



Report
of the
Tribunal of Inquiry
into
Payments to Politicians
and Related Matters

Part II

Volume 2

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INTRODUCTION

1.01 This initial introductory chapter to Volume 2 of Part II of the Tribunal's Report is principally directed to the Tribunal's lengthy inquiries into the circumstances surrounding the licensing of Esat Digifone by Mr. Michael Lowry, in May, 1996, as the second GSM operator, and should be read in conjunction with the initial chapter to Volume 1.

1.02 It was following the emergence of additional money trail information, suggesting financial connections and the possible conferral of financial benefits by Mr. Denis O'Brien on Mr. Michael Lowry, that it became evident, in 2001, that it would be necessary to revisit earlier preliminary inquiries undertaken by the Tribunal into the GSM process. When the Tribunal had first approached the GSM competition in that preliminary context, it had been assured by the Department of Public Enterprise (as successor to the Department of Transport, Energy & Communications), by the then Secretary General, Mr. John Loughrey, and by two of the senior Departmental officials who had been centrally involved, that the process which led to Esat Digifone being licensed had entailed an exemplary procedure, conducted by Departmental officials, assisted by external professional consultants. No significant infirmities or shortcomings had arisen in the course of the competitive evaluation, such as to undermine the objectivity and fairness of the outcome, or which indicated any political interference or influence. Having received such a positive commendation from the Department, the Tribunal accepted that no further preliminary investigations were necessary or justifiable.

1.03 It was accordingly not until May, 2001, that the Tribunal reactivated those inquiries, and in accordance with its established procedures, it commenced by undertaking a private confidential investigation to ascertain whether there was evidence which warranted proceeding to a full public inquiry into the circumstances surrounding the grant of the GSM licence, pursuant to paragraph (g) of its Terms of Reference. That paragraph, and its interpretation in the context of other paragraphs of the Tribunal's Terms of Reference, has already been addressed in Chapter 1 of Volume 1, but it is nonetheless instructive to refer afresh to its provisions. Paragraph (g) of its Terms of Reference mandated the Tribunal to inquire into:

“Whether Mr. Lowry did any act or made any decision in the course of any Ministerial office held by him to confer any benefit on any person making a payment referred to in paragraph (e) or any person who was the source of any money referred to in paragraph (f) or on any other

person in return for such payments being made or procured or directed any other person to do such act or make such decision.”

As already recorded in Chapter 1 of Volume 1, the Tribunal is satisfied that the correct interpretation of paragraph (g) is that, where Mr. Lowry is found by the Tribunal to have conferred a benefit on a person who is found to have made a payment to him, or to have been a source of money in certain bank accounts, there is no requirement in the Terms of Reference that the Tribunal should further find that such a benefit had been conferred specifically “*in return for*” those payments made or monies in those bank accounts.

1.04 Before proceeding to outline the course of its inquiries, it must be stated that, although widespread assertions and comments to the contrary have been made, it is not and has never been any part of the Tribunal’s functions or remit to review the fairness, objectivity or legality of the process whereby Esat Digifone was selected as the winner of the competitive process, and subsequently licensed as the second GSM operator. Nor has it been part of the Tribunal’s remit to determine whether Esat Digifone should or should not have been nominated as the winner. The Tribunal’s sole objective in inquiring into the process was to discharge its warrant under paragraph (g) of its Terms of Reference, by investigating whether, as a matter of fact, Mr. Michael Lowry intervened in the process or influenced its outcome, and thereby “*did any act or made any decision in the course of any Ministerial office held by him*” to confer a benefit on Mr. Denis O’Brien, as Chairman of Esat Digifone, and as a significant beneficiary of that company.

PRIVATE INVESTIGATIONS OF EVIDENCE AVAILABLE

1.05 In May, 2001, the Tribunal commenced its substantive investigations by requesting the Department of Public Enterprise, to produce all files held in relation to the GSM process. The Tribunal had expected that a systematic record of the process would have been kept by the Department, which would thus have facilitated its work. No such record was available, nor was such an account forthcoming at any stage, and what transpired is that over the ensuing months, in the order of 119 files in the possession of that Department, and of the Department of Finance, which played a subsidiary role in the process, were produced to the Tribunal without guidance or assistance as to their contents. The Tribunal estimates that approximately 30,000 pages of documentation had to be analysed by the Tribunal, and from that analysis the Tribunal had to endeavour to piece together what had occurred during the process, how the competition had been conducted, and how the licensing process had been progressed.

1.06 Whilst the Tribunal recognised from the volume of documentation, and the relative complexity of the subject matter under inquiry, that the task of forming a coherent chronological picture of what occurred would be challenging, the Tribunal had not anticipated that its efforts to progress its inquiries, and to structure those inquiries in a meaningful and thorough manner, would be met, with certain notable exceptions, with a degree of engagement on the part of Departmental personnel, which was significantly less than what should have been forthcoming. That stance was also in marked contrast with the Tribunal's experience of constructive engagement on the part of other Departments of State and State agencies, with which the Tribunal had dealings both privately and publicly in the course of other aspects of its inquiries.

1.07 The initial work of reviewing the documentation produced was undertaken by the Tribunal in conjunction with public sittings between May and November, 2001, when evidence was heard which related primarily to the relevant money trail inquiries pertaining to Mr. Michael Lowry as outlined in Volume 1. Having completed those sittings, the Tribunal's focus was redirected to the GSM process, and inquiries were progressed by means of requests for documentation and information, and the holding of private meetings with persons who the Tribunal had reason to believe could be of assistance in advancing those inquiries. A series of private meetings was held with Departmental personnel in the latter part of 2001 and the early months of 2002, and with Mr. Michael Andersen of Andersen Management International, AMI, the Danish consultants retained by the Department.

1.08 The Tribunal's dealings with Mr. Andersen are detailed in Chapter 50 of this Volume, and suffice to say at this juncture that Mr. Andersen substantially disengaged with the Tribunal in mid-2002, and ultimately declined to give evidence, save subject to the precondition that he be furnished with a comprehensive State indemnity, which the Government was not disposed to providing. In April, 2010, the Tribunal was informed by Messrs. Meagher & Co., then acting as solicitors for Mr. Denis O'Brien, that Mr. Andersen was disposed to give evidence, and after lengthy efforts to fix a date to hear his evidence, he ultimately attended on 26th October, 2010, approximately 7 years after the Tribunal would have heard his evidence, had he made himself available. By then it had emerged that Mr. Andersen's apparent belated change of heart had arisen, not from a determination that his evidence should be available to the Tribunal, irrespective of the availability of a State indemnity, but from the provision of an indemnity by Mr. Denis O'Brien, equivalent to that which the State had declined to provide. The Tribunal had in the meantime defended

proceedings instituted by Mr. O'Brien in late 2005 arising in part from Mr. Andersen's non-availability as a witness.

1.09 Returning to the Tribunal's private investigations, by the early months of 2002, the Tribunal had acquired some grasp of what the process entailed, which although rudimentary, was nonetheless sufficient to enable the Tribunal to identify and isolate specific areas of inquiry that it wished to pursue. In view of the number of Departmental officials involved, the Tribunal determined that the optimum and most expeditious means of proceeding was to furnish a set of formal written questions to be addressed by those officials, rather than by convening further lengthy and at times unproductive private meetings.

1.10 Those formal questions were forwarded to the Chief State Solicitor, acting on behalf of the Department, in the first two weeks of March, 2002, with a request that answers be furnished within 14 days. The Department's response to that request exemplified much of the Tribunal's experience of engagement with the Department over the years of its inquiries. In particular, as a result of successive piecemeal and delayed responses, and of requests for extensions of time, an inquiry which the Tribunal had expected to expedite its investigations, and to be concluded within two weeks, in fact took in the region of two months to bring to finality.

1.11 During this period the Tribunal had arranged, with considerable difficulty, a joint meeting to take place on 30th April, 2002, to be attended by Mr. Michael Andersen, and by Mr. Martin Brennan and Mr. Fintan Towey, the Departmental officials most centrally involved in the process, with a view to endeavouring to understand certain matters. These included how applications had been scored in the competitive process, and how that scoring evolved in the final stages of the process, as despite a close scrutiny of the draft and final Evaluation Reports, the contemporaneous Departmental documentation, the documentation available from AMI, and the information provided by Departmental personnel at private meetings, it had not proved possible for the Tribunal to divine how the final result had been arrived at. The Tribunal, having received assurances from the Chief State Solicitor that the responses of Departmental officials to the Tribunal's formal queries would be provided by 26th April, expected that those responses, which it regarded as necessary for the purposes of that meeting, would be available in advance of it. It was also the case that Mr. Andersen had already furnished written responses to relevant Tribunal inquiries. Having not received Departmental responses, the Tribunal wrote to the Chief State Solicitor on 30th April, requesting provision of them by 6pm that evening, the appointed time for that meeting. No reply was received to that letter by 6pm when the meeting was scheduled to commence.

1.12 At the appointed hour, Departmental legal representatives attended together with Mr. Towey. Mr. Brennan was not in attendance, as the Tribunal was informed that he had been taken ill earlier that day. Mr. Andersen also arrived, accompanied by his legal representatives, to attend what had been arranged, namely a three way meeting with Mr. Brennan and Mr. Towey.

1.13 That three way meeting could not proceed, and ultimately the commencement of the Tribunal's substantive meeting with Mr. Andersen was delayed. It is clear that Mr. Andersen took grave exception to that delay, as it was a matter which he instanced, in the course of his evidence in 2010, as an example of what he regarded as Tribunal hostility and discourtesy towards him. That delay was not of the Tribunal's making, but was due to efforts made from 6pm to 7.30pm that evening to endeavour to secure from the Department the responses which the Tribunal had requested from early March, 2002, and which had been promised by 26th April, 2002, and which had been the subject matter of a letter sent that day to the Chief State Solicitor. When it became apparent that those responses would not be provided that evening, and in the absence of Mr. Brennan, the Sole Member instructed his legal team that the proposed joint meeting should not proceed, as it could not be productive, and as it would be unfair to expose Mr. Andersen to such a process, when he had already furnished written responses to Tribunal queries.

1.14 It is the Tribunal's view that Mr. Andersen and his legal representatives were appraised of the reason for delay in the commencement of that meeting. It seems however that Mr. Andersen was not disposed to accept the Tribunal's explanation, or was certainly not disposed to accept it eight years later, when he gave evidence, although no such objection was registered by him or by his solicitors at the time of the meeting, or at any subsequent time.

1.15 Following receipt of those written responses from Departmental officials in May, 2002, and having considered the outcome of the entirety of its private investigations, including the contents of all available documentation, the Sole Member determined that there was sufficient evidence to warrant pursuing inquiries at public sittings, and so informed affected persons. At that point, it had been the Sole Member's intention that such public sittings would commence in October, 2002. Having received all outstanding responses from the Department, the Tribunal indicated by letter dated 28th June, 2002, that it wished to treat those responses, together with responses to a small number of supplemental queries raised, as Statements or Memoranda of Intended Evidence for the purposes of public sittings. In response, the Chief State Solicitor proposed, by letter dated 9th July, 2002, that the responses which had been furnished should be amalgamated on an official-by-official basis into

uninterrupted narratives, in place of the Tribunal's question and answer format, and agreed that such narratives could be notified to affected persons in advance of public sittings, in accordance with the Tribunal's usual practice. The Tribunal confirmed that it had no difficulty with that approach, provided the uninterrupted narratives embraced the entire of the responses received to all of the questions which had been posed by the Tribunal, and asked for an indication of when those narratives would be provided, bearing in mind the Sole Member's intention to commence public sittings in early October, 2002.

1.16 No response having been received, the Tribunal wrote in the same terms on 23rd August, 2002. Statements of eight Departmental officials were received in mid-September, 2002, whilst the balance, primarily in respect of former or seconded officials, were not made available until mid-October, 2002. The Statements were in the narrative form proposed by the Department, to which form the Tribunal had acceded, subject to the inclusion of all material recorded in earlier responses. The Statements furnished in mid-September were reviewed, and it was immediately apparent from the most superficial consideration that considerable material had been omitted, and that the Statements, in the form in which they had been recast, excluded information which had been provided earlier, and which the Tribunal regarded as significant to its inquiries at public sittings.

1.17 This necessitated the Tribunal undertaking the tedious, time consuming, costly and wholly unnecessary task of reconverting those narrative Statements into the question and answer format, reinstating earlier material which had been omitted, and adding additional or revised material which appeared for the first time in those narratives. The first set of eight reconstructed Statements, in question and answer format, were forwarded to the Chief State Solicitor on 3rd October, 2002, with the reinserted and new material highlighted for the benefit of officials, who were asked to confirm their agreement to those Statements as a matter of urgency. The Chief State Solicitor was also asked to ensure that the then outstanding Statements would be furnished promptly, in question and answer format.

1.18 It was not until 11th November, 2002, that all outstanding Statements were received, and the Tribunal was provided with confirmation that officials were agreeable to the manner in which the Tribunal had structured the material. By then, the Tribunal had been obliged to write to the Chief State Solicitor on behalf of the Department on 7th November, 2002, in the following terms:

“Dear Mr Shaw

I refer to my letter of 31st October last in which I requested that your client would provide the Tribunal with a written commitment as to when the voluntary statements of departmental officials would be provided.

I requested such commitment as a matter of the utmost urgency but to date I have received no response to my request. Notwithstanding repeated assurances, the statements continue to be outstanding over four months after the Tribunal’s initial request.

The Tribunal wishes to resume its public sittings in the week commencing Monday 18th November next. The Tribunal’s ability to make arrangements for the orderly resumption of its public sittings is now being undermined by the continuing delay on the part of your client in the furnishing of statements.

Your client has assured the Tribunal time and again of its desire to assist the Tribunal in its work. The Tribunal has given your client every reasonable latitude in the provision of statements. I am now instructed to inform you, on behalf of your client, that unless the Tribunal receives the outstanding statements by no later than close of business tomorrow Friday 8th November, 2002, the Tribunal will have to consider deferring its public sittings. This will inevitably involve the Tribunal incurring additional costs and any such deferral may require explanation at the ultimate commencement of public sittings.

Yours sincerely

John Davis
Solicitor to the Tribunal”

1.19 It had taken from 28th June, 2002, until 11th November, 2002, some four and a half months, for the Department to agree that what were substantially completed written responses provided in mid-May, 2002, could be treated by the Tribunal as Statements or Memoranda of Intended Evidence of Departmental officials for the purposes of their evidence at public sittings, which the Tribunal had intended to commence in early October, 2002. It is with regret that the Tribunal is compelled to record that this pattern of protestations of intended assistance, coupled with persistent failures to comply with requests for assistance within reasonable timeframes proposed by the Tribunal, and a series of broken commitments, was a feature of the Tribunal’s engagement with the

Department. Whilst the Tribunal appreciates that its work undoubtedly imposed an unwelcome burden on State resources, it was work mandated by unanimous resolution of the Oireachtas in pursuance of the democratic process. It is with even greater regret that it must further be recorded that the engagement between the Tribunal and the Department became not just protracted, but markedly antagonistic, in the wake of notification of Provisional Findings in November, 2008.

1.20 That protracted period of private investigations, which culminated in the commencement of public sittings on 3rd December, 2002, was not limited to dealings between the Tribunal and the Department. Extensive inquiries, entailing requests for and scrutiny of documentation, the making of Orders for Production in limited instances where necessary, the making of inquiries and receipt of responses, by means of both exchanges of correspondence and attendance at private meetings, were pursued with many other persons, who the Tribunal had reason to believe could or might be in possession of relevant evidence, or information which might lead to evidence.

1.21 All of the material and information which had been gathered was marshalled, and the relevant documentation, as it then appeared to the Tribunal, was identified. Voluntary Statements or Memoranda of Intended Evidence were requested, and where not forthcoming, Memoranda of Information Sought were prepared. Public sittings books were assembled and circulated confidentially to affected persons, prior to the commencement of sittings, in accordance with the Tribunal's usual practice, and in order to ensure that fair procedures were afforded to such persons. The initial set of public sittings books, distributed in the latter part of November, 2002, comprised eighteen lever arch files of documentation. During the currency of public sittings, as the Tribunal's inquiries evolved, and as further witnesses, potential witnesses, and material documentation were identified, additional public sittings books were generated. In all, upwards of forty such public sittings books were assembled and made available to affected persons.

PUBLIC HEARING OF EVIDENCE

1.22 In accordance with its established practice, the Tribunal's public sittings commenced with the delivery of an Opening Statement by counsel for the Tribunal, outlining the information which had been gathered by the Tribunal, and identifying the proposed lines of inquiries which would be pursued. Given the relative factual complexity of the material under consideration, the multiplicity of witnesses by whom Statements and Memoranda of Intended Evidence had been furnished, and the volume of documentary material which had been identified by

the Tribunal, that Opening Statement was performed of far lengthier duration than any previous or subsequent such statement. In all, it occupied some seven sitting days.

1.23 Thereafter, the evidence of witnesses commenced, and between December, 2002, and July, 2003, the Tribunal heard evidence from Departmental officials, including those most centrally and those more peripherally involved in the evaluation and licensing process. In the latter months of 2003, the Tribunal commenced the evidence of those witnesses associated on the participants' side, and that evidence, together with the evidence of a number of other witnesses, including a small number of current and former politicians, was largely concluded by April, 2004. The evidence of Mr. Michael Lowry had not yet been heard, as the Tribunal had determined that, as the person identified in paragraph (g) of the Terms of Reference, he should not be requested to attend as a witness until all other apparently available evidence had been heard. Mr. Lowry's evidence was deferred at that point, as it appeared as a result of further information which had initially come to the attention of the Tribunal in January, 2003, that money trail inquiries, largely concluded in 2001, pursuant to paragraphs (e) and (f) of the Terms of Reference, might have to be revisited in connection with the acquisition of Doncaster Rovers Football Club. As it was the Tribunal's view that it could potentially be oppressive and unfair to Mr. Lowry to impose more than a single further attendance on him, it was decided that Mr. Lowry's evidence on the GSM process should be postponed, and given in conjunction with any additional evidence requested in relation to those money trail inquiries.

1.24 Public sittings were accordingly adjourned in April, 2004, to enable private investigations to proceed into that additional aspect of money trail inquiries. The Sole Member having determined that inquiries into Doncaster Rovers should be pursued in public, the Tribunal resumed sittings on 15th September, 2004, and delivered an Opening Statement. As detailed in Chapter 9 of Volume 1, Mr. Denis O'Brien thereupon issued Judicial Review proceedings seeking to quash the Sole Member's determination to inquire into that matter. As those proceedings, which were successfully defended by the Tribunal in the High Court, and on appeal in the Supreme Court, were not disposed of until February, 2006, the Tribunal's initial intention of deferring Mr. Lowry's evidence on the GSM process, until such time as he was called to testify on Doncaster Rovers, was frustrated. Ultimately, that aspect of Tribunal inquiries did not proceed until the early months of 2007, following the publication in December, 2006, of Part I of the Report of the Tribunal. Public sittings into aspects of the Tribunal's inquiries pertaining to other paragraphs of its Terms of Reference proceeded in 2005 and 2006.

1.25 As of September, 2004, the outstanding aspects of the GSM inquiry related to some short further evidence to be heard from witnesses who had already attended, Mr. Michael Andersen's availability as a witness, which continued to remain unresolved, and the issue of whether expert testimony should be heard by the Tribunal from Mr. Peter Bacon, who had lent some early assistance to the Tribunal in the context of its understanding of technical concepts associated with the evaluation process. When the uncertainties surrounding Mr. Andersen's availability as a witness were resolved, and it became clear that he would not attend, the Government having not been disposed to provide him with a full State indemnity, and that his evidence could not be compelled by utilising Danish Court procedures, the Tribunal convened separate public sittings in September, 2005, to enable affected persons to make submissions to the Tribunal on the consequences, for the continuation of the Tribunal's inquiries into the GSM process, of Mr. Andersen's non-attendance. Mr. Denis O'Brien, through his then solicitors, Messrs. William Fry, had previously indicated his view, that in Mr. Andersen's absence, such inquiries could not proceed.

1.26 Having heard submissions from all affected persons, the Tribunal ruled on 29th September, 2005, that Mr. Andersen's absence did not impact on the Tribunal's ability to proceed with its inquiries and to make findings of fact, and a full copy of that Ruling is reproduced in the succeeding chapter of this Volume. Mr. O'Brien thereupon instituted further Judicial Review proceedings against the Tribunal arising from Mr. Andersen's non-availability and from the Tribunal's dealings with Mr. Peter Bacon. These proceedings were dismissed by the High Court in December, 2005, and likewise by the Supreme Court, on Mr. O'Brien's appeal, in May, 2006. In the meantime, the Tribunal, having been enjoined from proceeding to public hearings in relation to Doncaster Rovers, pending determination of Mr. O'Brien's earlier Judicial Review proceedings, decided that it could no longer defer hearing Mr. Lowry's evidence on the GSM process. His evidence was accordingly heard in December, 2005, following short hearings at which witnesses who had already testified were recalled.

1.27 The final aspect of public sittings, in advance of notification of Provisional Findings in November, 2008, arose in connection with Mr. Peter Bacon who, following Mr. O'Brien's latter proceedings, and a Ruling of the Tribunal, ultimately attended in March and May, 2008, for the purposes of examination, not by the Tribunal, but by affected persons. Mr. Bacon's involvement and assistance to the Tribunal is addressed in Chapter 51 of this Volume. For the purposes of these introductory comments, it is proposed merely to outline that interaction, how it culminated in his attendance, and the unusual manner in which that arose.

1.28 Towards the conclusion of its preliminary investigations into the GSM process, in late November, 2002, the Tribunal retained the services of Mr. Bacon. By then the Tribunal's understanding of the technical concepts associated with the process had reached a relatively advanced stage, but the Tribunal was anxious to ensure that the lines of inquiry which it had identified, and which it intended to pursue at public sittings, were not based on an erroneous appreciation of those technical concepts. It was in that context that Mr. Bacon was requested to furnish the Tribunal with a report addressed to specific matters identified by the Tribunal, which he did in March, 2003.

1.29 Whilst the Tribunal deferred consideration of whether Mr. Bacon should be called as an expert witness, in January, 2005, the Tribunal obtained a further report from him which it circulated to affected persons, and invited their submissions on whether Mr. Bacon's evidence should be heard. That matter was also alluded to in the Tribunal's Ruling of 29th September, 2005, when the Tribunal indicated that, subject to such submissions as might be made, it was the Tribunal's view that it would be of value to have the evidence of an expert.

1.30 Mr. Denis O'Brien's 2005 Judicial Review proceedings, issued immediately after that Ruling, also challenged the retention of Mr. Bacon and the Tribunal's provisional intention of hearing his evidence. Those proceedings were, as already recorded, dismissed by the High Court, and by the Supreme Court, on Mr. O'Brien's appeal, in May, 2006. The Court determined that:

- (i) the Tribunal was lawfully entitled to engage the services of Mr. Bacon; and
- (ii) the Tribunal had acted in accordance with fair procedures in relation to the assistance provided by Mr. Bacon.

1.31 In the meantime, as declared in its Ruling of 29th September, 2005, the Tribunal had invited submissions from affected persons on the question of the Tribunal hearing expert evidence from Mr. Bacon in relation to certain technical aspects of the GSM process. That facility was not availed of by affected persons until after the Supreme Court had disposed of Mr. O'Brien's proceedings in May, 2006. Certain of the submissions received proved to be of considerable assistance to the Tribunal, and prompted a detailed reappraisal of the proposal to adduce the evidence of Mr. Bacon, and of whether the taking of such evidence would advance the Tribunal's task of finding facts pursuant to its Terms of Reference. By Ruling of 17th July, 2007, also reproduced in the next succeeding chapter, the Tribunal determined that, whilst Mr. Bacon was an

expert in the field in question, his proposed evidence was not strictly speaking expert testimony, as the matters to which it was to be directed were not so complex or impenetrable that they were incapable of being understood by an intelligent lay person. It was on that narrow ground that the Tribunal, whilst fully acknowledging Mr. Bacon's expertise and the valuable assistance rendered by him, determined that it would not hear his evidence.

1.32 Although having so determined in July, 2007, the Tribunal respected the dictum of the High Court in its judgment in Mr. O'Brien's 2005 proceedings, that, even if Mr. Bacon was not called by the Tribunal, Mr. O'Brien would be entitled to cross-examine Mr. Bacon on information provided by him to the Tribunal. The Tribunal was not informed until 1st February, 2008, more than six months after its Ruling, that Mr. O'Brien wished to exercise that entitlement. As a matter of fair procedures, that right was also afforded to affected persons, and was availed of by the Department, Mr. Dermot Desmond and Mr. Michael Lowry, and whilst extended to Telenor, was not exercised.

1.33 Following an initial attendance in early March, 2008, when sittings were adjourned, Mr. Bacon made himself available for cross-examination over two lengthy days on 2nd and 7th May, 2008. Whilst the Tribunal had ruled, in accordance with the dictum of the High Court, that such cross-examination should be directed to information provided by Mr. Bacon to the Tribunal, the central thrust of the cross-examination on behalf of all affected persons, including to some extent on behalf of the Department, was that Mr. Bacon had been steered by the Tribunal legal team to make unwarranted criticisms of the GSM adjudication process, including of the methodology used, and of the independence and role of Mr. Michael Andersen, and further that he had been inappropriately requested to carry out, and did in fact carry out, a wholesale audit of that process, rather than a fair appraisal of its methodology and conclusions.

1.34 In his evidence, Mr. Bacon rejected the suggestion that his meetings and interaction with the Tribunal legal team had compromised his independence. He had, he testified, been around long enough to know if he was being led by the nose, and he did not regard himself as having been steered towards particular weaknesses perceived by Tribunal lawyers. Mr. Bacon also repeatedly countered suggestions that those dealings had tainted his advice or reports. He had provided assistance, as requested, on certain technical matters arising in the course of the GSM inquiry. Mr. Bacon rejected the suggestion that he or Tribunal lawyers with whom he had discussions were involved in a re-run of the entire competition. Further, he regarded the attacks on his qualifications, expertise and professionalism as "*derogatory*". In answer to repeated testing on the character

of his advices and expertise, Mr. Bacon affirmed that one did not need to be an expert to appraise certain deficiencies that occurred in the process.

1.35 Mr. Bacon's evidence, even though it was not evidence to which the Tribunal either intended to have, or has had, regard in making findings of fact, marked the determination, as far as the Tribunal was concerned, of the available evidence in relation to the GSM process.

NOTIFICATION OF PROVISIONAL FINDINGS

1.36 Reference was made in Part I of the Tribunal's Report to the fair procedure adopted, whereby letters notifying the substance of proposed findings critical of affected individuals or entities were circulated to their representatives, thereby enabling responses to be made by them and considered, in advance of the Sole Member proceeding to make findings of fact. This enabled submissions to be made on behalf of affected persons on the evidence heard by the Tribunal, with the benefit of the focus afforded by knowledge of the Sole Member's provisional views. This procedure was again followed for purposes of the balance of the Tribunal's investigations, as reported upon in this Part of the Tribunal's Report. In this latter instance, both the larger number of affected individuals and entities involved, and the greater complexity of the evidence required to be evaluated, were reflected in the amount and detail of correspondence conveying Provisional Findings, which were furnished in November, 2008.

1.37 Of submissions received by the Tribunal in response to these letters, some were prompt, constructive and addressed to provisional critical findings in a manner that, as had occurred in the case of the findings recorded in Part I of the Tribunal's Report, enabled the Sole Member to revisit his provisional views and, where considered appropriate, to vary, alter or revise those views. It was also the case that, as had been alluded to as a possibility in the course of the Tribunal's Ruling of 29th September, 2005, some witnesses were recalled, and some testimony received from witnesses not already heard, where such evidence was deemed necessary in justice to enable as full an appraisal of critical evidential matters as was practicable.

1.38 The three most substantial instances of the hearing of such evidence, after notification of Provisional Findings, are set out below.

- (i) The evidence of Mr Christopher Vaughan, the English solicitor retained by Mr. Michael Lowry and Mr. Denis O'Brien, or entities under his control, in respect of certain of the UK property transactions examined by the Tribunal. Although Mr. Vaughan had corresponded with the

Tribunal, and met with its legal team over the course of the period of investigation and evidence, he had declined to testify himself, notwithstanding several requests, until when, in January, 2009, the solicitor for Mr. O'Brien notified the Tribunal that Mr. Vaughan would some days hence be attending in Dublin to consult with him, thereby enabling an arrangement to be made whereby Mr. Vaughan attended at Dublin Castle by appointment, was duly served with a subpoena, and later attended to testify at public sittings. This matter is addressed in detail in Volume 1.

- (ii) The further evidence of Departmental officials who had previously attended, and the evidence of Mr. Richard Nesbitt SC, who testified for the first time, at the request of the State, in June and July, 2009, in relation to the provision of legal advice on the implications of Mr. Dermot Desmond's late introduction as a shareholder in Esat Digifone. This evidence was, again at the request of the State, supplemented by evidence of officials of the Office of the Attorney General, Mr. Denis McFadden and Mr. John Gormley, heard in March, 2010, to which reference has already been made in Chapter 1 of Volume 1.
- (iii) The evidence of Mr. Michael Andersen, which has already been alluded to earlier in this chapter, and is addressed in the course of the succeeding substantive chapters, and whose engagement with the Tribunal is the subject-matter of Chapter 50 of this Volume.

1.39 In general terms, the practice of circulating Provisional Findings, intended as it was to enable affected persons and entities to consider and respond constructively to relevant content, proved in practice appreciably less satisfactory than had been the case in regard to Part I. The incidence of "*leaking*" of portions of the content of Provisional Findings to the media proved significantly higher than had been the position in regard to Part I, notwithstanding the very explicit terms in which the confidentiality of the content was conveyed. What had earlier proved an irritant of relatively manageable proportions became in this latter instance a frequent and damaging feature. Its extent was such that, on a number of occasions, extensive work was required with a view to preparing injunction proceedings to restrain further breaches, met by undertakings from media organs to desist from publication or further publication of the confidential content. Although this averted the necessity of Court hearings, the required preparatory work not merely involved expense, but constituted a drain and delay on Tribunal resources that would preferably have been expended on more constructive aspects of Tribunal work. It was difficult to avoid a conclusion that the intent of much of the leaking was to destabilise and

damage the Tribunal process, an aspect already commented upon in general terms in Part I.

1.40 The Tribunal made inquiries with a view to identifying the source or sources of the leaks in question: responses in general terms were unsatisfactory, inconclusive and in some instances contradictory. As the Tribunal has indicated that its reporting on factual matters will, subject to limited and specific exceptions, be based solely upon evidence heard at public sittings, specific findings in this regard will not be set forth. It is nonetheless noteworthy that, whilst Mr. Denis O'Brien, through his former solicitors, Messrs. William Fry, initially applauded the Tribunal's endeavours in seeking to uphold the confidentiality of its Provisional Findings by preventing publication or media comment that might tend to identify the content or substance of those Provisional Findings, it appears that his view on the desirability of that approach had altered fundamentally by July, 2009, when, in a series of interviews provided to media outlets and subsequently published, he revealed what he described as substantive aspects of those Provisional Findings.

1.41 Apart from the matter of leaks, the legal representatives of some of the most centrally involved individuals or entities afforded levels of cooperation which fell below what might reasonably have been expected, in a context of furnishing appropriate responses to Provisional Findings relating to their clients, and facilitating the conclusion of this Part of the Report. Vexatiously repetitious correspondence, unwarranted delay in furnishing written submissions, and the making of hectoring stipulations regrettably represented a very substantial part of communications to the Tribunal. In the event, the final set of submissions addressed to the Provisional Findings notified in November, 2008, was not received by the Tribunal until February, 2010, some fourteen months after notification.

BRIEF SURVEY OF VOLUME 2

1.42 What now follows is not intended and should not be regarded as an Executive Summary of the contents of this Volume; such summary is comprised in the final chapter. It is intended as no more than an introduction to the material, and is included solely for the purposes of assisting readers.

1.43 Having regard to the duration of public sittings, the number of witnesses heard, and the breadth and significance of the documentary evidence adduced, this Volume of the Tribunal's Report is unavoidably detailed and lengthy. In order to facilitate accessibility by readers, the material has been presented chronologically in discrete chapters, some unavoidably lengthier than

others, and those chapters have been arranged in separate sections. The sections, which are self-contained, reflect a division of the events in respect of which evidence was heard, from the earliest stages of the process to its conclusion, and embrace what occurred within the Department, both administratively and politically, within the Esat Digifone consortium, and what otherwise occurred extraneously but was of significance to the Tribunal's inquiries. It is proposed to review the contents of this Volume by reference to those sections.

1.44 Before proceeding to do so, it is of assistance to record the principal milestones in the process. The policy of introducing competition in the market for cellular telecommunications was inherited by the Rainbow Coalition Government, led by Mr. John Bruton T.D., which succeeded the prior Fianna Fáil/Labour Government under Mr. Albert Reynolds, in December, 1994. Mr. Michael Lowry was appointed Minister for Transport, Energy & Communications and assumed office in December, 1994. On 2nd March, 1995, on foot of a Government decision to that effect, Mr. Lowry launched the competition to select a second GSM operator, as a single competitor to the incumbent Eircell, and a Request for Tenders document was issued by the Department, which set forth the rules of the competition, and the criteria by which applications would be evaluated.

1.45 At that point, the evaluation criteria, which were ranked in descending order of importance, included as the fourth-ranked such criterion, a provision whereby applicants were invited to submit a proposed licence fee without financial limitation. The closing date for receipt of applications was fixed for 23rd June, 1995, and interested parties were informed that the result would be announced by end-October, 1995.

1.46 In consequence of an intervention by the Competition Directorate of the European Commission, which objected to the provision for an open-ended licence fee in the competitive process, the fourth-ranked criterion was, with the agreement of the Commission, revised, and a cap of £15 million was placed on the level of licence fee which applicants were at liberty to nominate. The closing date of the competition was deferred to 4th August, 1995, and the date on which the result was to be announced was postponed to end- November, 1995.

1.47 On 4th August, 1995, six applications for the second GSM licence were received by the Department. These included an application by the Esat Digifone consortium, which comprised Communicorp Limited, a company substantially owned and controlled by Mr. Denis O'Brien, and Telenor, the Norwegian State telecommunications company.

1.48 Applications were evaluated by a Project Group which principally comprised officials drawn from the Telecommunications Divisions of the Department, who were assisted by Danish consultants, Andersen Management International. The result of the competition was announced by Mr. Michael Lowry on 25th October, 1995, some five weeks prior to the expected date, and the GSM licence was issued on 16th May, 1996, to Esat Digifone Limited, the shares of which were then held by Communicorp and Telenor as to 40% each, and by Mr. Dermot Desmond, through his company IIU, as to 20%.

Section A – Inception of policy and preparations for the introduction of competition in digital mobile telephony market

1.49 Section A, which comprises **Chapters 3 to 7**, covers events from 1993 to 2nd March, 1995, when the competition was formally announced by Mr. Michael Lowry. Chapters 3, 5 and 7 trace the evolution of the policy of introducing competition, the development and formulation of the competitive process whereby a single competitor to Eircell would be selected, the launch of that process by Mr. Lowry pursuant to a Government decision of 2nd March, 1995, and the formal Request for Tenders document issued by the Department, by which the competition was constituted.

1.50 **Chapter 3** outlines the history of mobile telecommunications as a monopoly operated by Eircell, a division of Telecom Éireann; the political and Departmental response to pressure from the European Union to liberalise the market; the initial exploratory work undertaken within the Department to formulate a process whereby a second GSM operator would be licensed; and culminates with details of proposals brought to and approved by the former Fianna Fáil/Labour Government in November, 1994.

1.51 **Chapter 5** addresses the formation of the new Rainbow Coalition Government in December, 1994, including Mr. Lowry's appointment as Minister for Transport, Energy & Communications; the proposals which he brought and which were approved by Government on 2nd March, 1995; and the launch of the process on that date. It records that, as between the proposals approved by the former Government, and those adopted on 2nd March, 1995, changes had been made to the manner in which it was intended that applications would be evaluated. Those changes related primarily to the terms governing the provision for the nomination of licence fees, and the manner in which the financial capability and technical capacity of applicants would be assessed. In November, 1994, those latter matters of capability and capacity had formed part of the evaluation criteria, but by 2nd March, 1995, they had become preconditions to be met independently of defined evaluation criteria. That Government decision,

which approved the launch of the competitive process, provided that it should be controlled and promoted by Mr. Lowry's Department, and that a recommendation should be made by Mr. Lowry to Government in time for a final decision by 31st October, 1995.

1.52 Chapter 7 then addresses in some depth the Request for Tenders, or RFP document, whereby the competitive process was formally constituted. It outlines the contents of the document, and focuses on specific significant paragraphs including paragraph 3 and paragraph 19. Paragraph 3 imposed a mandatory obligation on applicants to furnish details of the ownership of their intended licensee companies, and paragraph 19 set forth the framework whereby applicants would be evaluated, as approved by Government. In view of the centrality of that paragraph to the Tribunal's inquiries, it warrants reproduction, even in the context of this brief survey. It provided as follows:

"The Minister intends to compare the applications on an equitable basis, subject to being satisfied as to the financial and technical capability of the applicant, in accordance with the information required herein and specifically with regard to the list of evaluation criteria set out below in descending order of priority

- *Credibility of business plan and applicant's approach to market development;*
- *Quality and viability of technical approach proposed and its compliance with the requirements set out herein;*
- *The approach to tariffing proposed by the applicant which must be competitive;*
- *The amount the applicant is prepared to pay for the right to the licence;*
- *Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded;*
- *The extent of applicants' international roaming plan;*
- *The performance guarantee proposed by the applicant;*
- *Efficiency of proposed use of frequency spectrum resources."*

The chapter concludes with reference to Mr. Michael Andersen's criticisms of the competition design, as reflected in the RFP document, when he belatedly attended to give evidence.

1.53 Chapters 4 and 6 reflect the evidence heard regarding Mr. Denis O'Brien's early business operations in the telecommunications field, and the steps which he took in order to position himself to apply for the second GSM

licence. **Chapter 4** pertains to Mr. O'Brien's early telecommunications operations on foot of a Value Added Service, VAS, licence issued by the Department in December 1992; the restructuring and financing of his companies, including the injection of venture capital funds in October, 1994, by Advent International; the introduction of professional non-executive directors to his board; and the friction encountered between Mr. O'Brien, Telecom Éireann and the regulatory function of the Department in connection with the operation of that VAS licence. The chapter also outlines Mr. O'Brien's initial interest in the prospect of a second GSM licence, and his efforts to establish relations with potential partners to form a consortium to submit an application for the licence.

1.54 Chapter 6 takes up, from early 1995, the account of Mr. O'Brien's efforts to form a consortium, and the termination of negotiations with two potential partners in March, 1995, after the formal launch of the competitive process by Mr. Lowry. It also recounts Mr. O'Brien's engagement of political advisers, including the late Mr. Jim Mitchell T.D., and arrangements put in place by Mr. Mitchell, shortly after Mr. Lowry's appointment, to effect an introduction between Mr. O'Brien and Mr. Lowry; the commencement of Mr. O'Brien's efforts to increase his profile, and that of his companies, with Fine Gael, the senior party in Government, by making financial contributions, attending fundraising events, and meeting with senior Fine Gael Ministers.

Section B – Final preparations for and postponement of competition process

1.55 Section B, encompassing **Chapters 8 to 16**, covers events from 2nd March, 1995, to 4th August, 1995. Chapters, 8, 9, 10, 11, 13 and 15 report on intense activities within the Department in advance of the initial and ultimately deferred closing date of the process. Chapters 12, 14 and 16 deal with Mr. O'Brien's continuing preparations, including his introduction to Telenor as a prospective partner, the finalisation of negotiations between his company Communicorp and Telenor to establish the Esat Digifone consortium, financial arrangements put in place by Mr. O'Brien to bolster Communicorp's finances and to strengthen the Irish profile of Esat Digifone, and the emergence of tensions between Communicorp and Telenor in the days prior to the closing date of the process on 4th August, 1995.

1.56 Chapter 8 has as its focus the establishment of the fully constituted Project Group, drawn primarily from the Telecommunications Divisions of the Department, and of which Mr. Martin Brennan, then Principal Officer and head of the Development Division of the Department, and who had been instrumental in advancing the competition design, was Chairman. The manner in which it was

intended that the Project Group would operate as the agency by which the competitive process would be conducted and judged is addressed, including the practice which governed the generation of official reports of meetings of the Project Group. Reference is made to the Project Group meeting of 6th March, 1995, and an important protocol adopted at that meeting to regulate interactions and meetings with interested parties during the course of the process. The intention that the protocol should be respected by Mr. Michael Lowry, as Minister, is also discussed, as is the allied intention that the competitive process should be sealed, and should be conducted by the Project Group, independently of political or outside interference or input.

1.57 Chapter 9 reviews the separate tendering process by which Andersen Management International, AMI, the Danish consultants were selected, and whose appointment was announced on 11th April, 1995. Attention is directed to the tender document submitted by AMI, and the methodology proposed in that document, whereby the evaluation criteria would be disassembled into dimensions, and which, as reflected by associated indicators, would form the focus of the evaluation proper. A dual technique was recommended, entailing both quantitative and qualitative approaches, which according to the tender document would guard against the risk of an arbitrary result and would “*maximize the validity and reliability*” of the output of the evaluation. The terms of the formal contract of appointment between the Department and AMI of 9th June, 1995, are considered, including a cap of £297,450.00 placed on AMI’s professional fees.

1.58 In Chapter 10, consideration returns to the competition process proper, and two further formal documents issued by the Department for the assistance of interested parties: an information memorandum of 28th April, 1995, and a supplemental information memorandum of 12th May, 1995. The chapter summarises the contents of both memoranda, the first of which represented the Department’s response to substantive questions posed by interested parties, and largely reflected the work of the Project Group, and the second of which contained guidelines and stipulations for the presentation of applications. Those specifications, which were primarily devised by AMI, included a requirement that applicants complete a series of predefined numerical tables comprising data extracted from the body of their applications.

1.59 Chapter 11, an important chapter, has as its subject-matter the adoption of an Evaluation Model by the Project Group on 9th June, 1995, in advance of the then intended closing date of 23rd June, 1995. Apart from an early issue which arose between the Department and the Department of Finance regarding the adoption of a weighting matrix, the chapter commences with a

consideration of the draft Evaluation Model of 17th May, 1995, submitted by AMI, and considered and substantially revised by the Project Group at its meeting of 18th May, 1995.

1.60 The structure of the proposed methodology comprised in that draft Model is discussed in some detail, including the specifications, extending to some 15 of the 19 pages of the document, for the quantitative evaluation; the weighting matrix proposed for marking the quantitative indicators; and the manner whereby the qualitative evaluation was to be conducted and marked. By an analysis of the evidence of Project Group members, the official reports of the Project Group meetings of 18th May and 9th June, 1995, the contents of the draft Evaluation Model and the Model as adopted, and of contemporaneous notes of discussions of the Project Group, the chapter identifies the changes made by the Project Group to that draft Model as proposed by AMI, and the significant revisions made by the Project Group to the weighting matrix suggested by AMI. Alterations to the weightings of the three dimensions of the first-ranked criterion, that is, Market Development, Experience of Applicant and Financial Key Figures, are noted, as are revisions made by the Project Group to the weightings at criteria level.

1.61 **Chapter 13** continues to recount events within the Department, and has as its theme the ancillary, but nonetheless critical matter of the objection taken by the Competition Directorate of the European Commission to the competition design, as reflected by the evaluation criteria published in paragraph 19 of the RFP document. It was the fourth-ranked criterion, which invited applicants to nominate a licence fee without limitation on amount, to which that objection was primarily directed.

1.62 The chapter traces the Departmental response to that objection, and ultimate resolution of the issue by the revision of that criterion, to provide for a cap of £15 million on the level of licence fee that applicants were permitted to offer, together with the imposition of an equivalent reduced fee of £10 million on Eircell, as the incumbent operator. It was that intervention, and the necessity of resolving it, which resulted in a suspension of the competition process, and the deferral from 23rd June, 1995, of the closing date for submission of applications.

1.63 The chapter also relates the outcome of Tribunal inquiries into an extraneous matter, namely, how it was the case that an extract of a significant letter from Commission Karel Van Miert of the Competition Directorate, addressed to Mr. Michael Lowry, dated 14th July, 1995, confirming the Commission's acceptance of the Departmental proposal to resolve the issue, which contained highly sensitive information regarding an aspect of the

confidential weighting matrix which had been adopted by the Project Group under conditions of the strictest security, found its way into the hands of a lawyer in the employment of one of Mr. Denis O'Brien's companies, at some point prior to 24th July, 1995. The significance of the availability of that piece of confidential information, to which Esat Digifone had access, prior to the submission of its application, is noted.

1.64 The chapter concludes by recounting connected Tribunal inquiries into the source of information in a letter dated 20th June, 1995, from Mr. Owen O'Connell, of William Fry, then solicitors for Communicorp and Mr. Denis O'Brien, to Messrs. Baker McKenzie, London solicitors acting for Advent International, the venture capital company which had invested \$10 million in Communicorp the previous October, 1994, and which predicted, with some considerable degree of accuracy, the probable outcome of the Commission intervention.

1.65 Chapter 15, the concluding Departmental chapter of Section B, pertains to the reactivation of the competitive process, following the resolution of the Commission intervention, and to steps taken by the Project Group, consequent on the capping of the fourth-ranked Licence Fee criterion at a level of £15 million. Reference is made to notifications of 14th July, 1995, sent to interested parties, informing them of the deferred closing date of 4th August, 1995, of the revised completion date of end-November, 1995, and of modifications to the fourth-ranked criterion by the imposition of the £15 million limitation. The decision of the Project Group, by means of a formal written procedure, to alter, on the advice of AMI, the weighting matrix agreed on 9th June, 1995, by shifting a 3% point weighting from the fourth-ranked Licence Fee criterion to the third-ranked Tariffs criterion, accounts for the remainder of the chapter.

1.66 Chapter 12 takes up the account of Mr. O'Brien's efforts to form a bidding consortium, after lengthy negotiations with prospective partners had foundered in March, 1995, following the GSM process having been launched by Mr. Michael Lowry. It initially outlines certain abridged and unsuccessful dealings in April, 1995, between Communicorp and France Telecom, the French national provider. The significance of those dealings, for the purposes of the Tribunal's inquiries, arose from the manner in which they seemingly originated, namely, from a suggestion made by Mr. Lowry to Mr. O'Brien, and information provided by Mr. Lowry to Mr. O'Brien that France Telecom had not yet secured a partner to bid for the GSM licence, imparted on the occasion of a telecommunications conference attended by them on 4th April, 1995.

1.67 Having recounted the evidence heard in relation to that matter, and having addressed the nature and consequence of the apparent interaction

between Mr. O'Brien and Mr. Lowry, the chapter proceeds to deal with the introduction in late April, 1995, of Telenor as a prospective partner, by PA Consulting Group, an international telecommunications consulting firm, based in London, which had been engaged by Mr. O'Brien in March, 1995, to assist Communicorp in the preparation of its application. The terms of the formal joint venture agreement finalised and signed by Communicorp and Telenor on 3rd June, 1995, are outlined, including the requirement that Communicorp should provide Telenor with a financial guarantee, satisfactory to Telenor, for £5 million plus 50% of the licence fee. That requirement arose from Telenor's conclusion, following a review of Communicorp's finances, that its balance sheet could not support its equity commitment to the project, and that further capital injections would be required.

1.68 Chapter 14 focuses on Mr. Denis O'Brien's efforts to secure financial and institutional support for Esat Digifone, as the intended licensee company, and for the equity commitment associated with his own intended 40% shareholding, to be held through Communicorp. The former object, which was seemingly conceived in the course of meetings in early April, 1995, with France Telecom, and was secured through Davy Stockbrokers in June, 1995, occupies the initial part of the chapter. What was secured, were letters from Allied Irish Banks, Investment Bank of Ireland and Standard Life, recording their intention, subject to conditions, of investing in Esat Digifone. What was proposed was that such investment would secure a 5% interest in Esat Digifone for each of those institutions, although there was no binding entitlement in that regard on their part. Much was subsequently made in the course of the competitive process of the advantages of such institutional support, in contributing to the Irish identity of Esat Digifone, and in providing investment opportunities for Irish pension funds.

1.69 The balance of the chapter is devoted to Mr. O'Brien's efforts to meet both the immediate financial crisis in his business, the finances of which were by May, 1995, in a perilous state, having already absorbed Advent's \$10 million capital injection made in October, 1994, and the necessity of addressing the condition of demonstrable financial capability as provided by paragraph 19 of the RFP document. The immediate requirement was secured in June, 1995, by a one year bridging loan of \$5 million from Advent International, at an interest rate of 30%, after Advent had failed to deliver on earlier less onerous terms, which Mr. O'Brien and his associates regarded as having been agreed. These funds were required urgently, not only to finance working capital, and secure the survival of Mr. O'Brien's businesses, but to enable the repayment of a short term facility made available by Woodchester Bank. A second separate agreement negotiated with Advent between May and July, 1995, is explored in the chapter. What that agreement related to was the provision by Advent of two comfort

letters, dated 10th July, 1995, one addressed to Mr. Martin Brennan, as Chairman of the Project Group, and the second addressed to Telenor, confirming that Advent had “*offered*” £30 million to Communicorp to fund its equity commitment to Esat Digifone. The terms of the agreement concluded between Communicorp and Advent, to which Mr. O’Brien was himself a party, dated 12th July, 1995, whereby in consideration for providing those letters, Advent was entitled to a direct 5% interest in Esat Digifone, are examined closely, as is the evidence heard by the Tribunal of the true extent of the commitment assumed by Advent on foot of that agreement, and on foot of those comfort letters. The tendering of the Advent letter of 10th July, 1995, addressed to Mr. Brennan, with the Esat Digifone application as submitted to the Department on 4th August, 1995, together with a further letter dated 14th July, 1995, from Mr. O’Brien to Advent, purporting to “*accept*” Advent’s “*offer*”, are noted.

1.70 The provision of the Advent comfort letter to the Department, in order to satisfy the requirement of demonstrable financial capability, is also analysed in the context of the appointment in June, 1995, of Credit Suisse First Boston, a US equity house, as exclusive placement agents on behalf of Communicorp, in relation to a planned private placement on the US market. That placement ultimately proceeded in 1996, and was, as acknowledged, Mr. O’Brien’s intended source of funding should he secure the GSM licence.

1.71 The final chapter of Section B, **Chapter 16**, traces tensions which arose between Communicorp and Telenor in the final days, prior to the closing date for submission of applications on 4th August, 1995. The source of those tensions was Telenor’s view that Communicorp was in breach of its obligations under the joint venture agreement of 3rd June, 1995, by failing to furnish a financial guarantee for £5 million plus half of the nominated licence fee. Telenor did not regard the Advent comfort letter of 10th July, 1995, which confirmed Advent’s “*offer*” of £30 million, as satisfying that requirement. They considered that the letter was in substance no more than an indicative non-binding expression of interest.

1.72 The chapter recounts dealings between Telenor, Communicorp and Advent, the latter directly and through its London solicitors, Baker McKenzie, from 29th June, 1995, up to the morning of 4th August, 1995, and the unsuccessful efforts of Communicorp to secure some additional comfort from Advent in a form acceptable to Telenor. Reference is made to a significant telephone exchange of 3rd August, 1995, between Mr. Massimo Prelz of Advent, and Mr. Peter O’Donoghue, of Communicorp, noted by the latter, in the course of which Mr. Prelz accused Communicorp of misleading Telenor, and playing with words, and asserted that Advent had made no “*offer*” to Communicorp, as no

terms had been agreed. Ultimately, although no greater comfort was forthcoming from Advent, Telenor proceeded with the submission of the Esat Digifone application to the Department on 4th August, 1995.

Section C – Commencement of evaluation proper

1.73 Section C, which comprises **Chapters 17 to 21**, explores events from the commencement of the evaluation on 4th August, 1995, to the first meeting of the Project Group during the evaluation proper on 4th September, 1995, although certain chapters follow through on events which did not come to conclusion until after that date. As with earlier sections, three of the chapters, 17, 20 and 21, relate to events within the Department, whilst the intervening chapters, 18 and 19, deal respectively with developments within the Esat Digifone consortium, and with extraneous matters, including activities of Mr. Michael Lowry.

1.74 **Chapter 17**, a short chapter, addresses the receipt of applications by the Department from six consortia, and outlines the declared composition of the intended licensees, and principal features of the six applications. It records that the Esat Digifone application had stated that, whilst Communicorp and Telenor were currently equal 50% shareholders in the intended licensee company, prior to the issue of the licence their shareholding would be reduced to 40% each, and the resultant 20% allocation would be made available to third party investors, which shareholding, according to the Executive Summary, had been placed by Davy Stockbrokers with Allied Irish Banks, Investment Bank of Ireland, Standard Life and Advent International. The initial assessment of applications by AMI for compliance with formal presentational requirements, and the admission of all six applications to the competitive process is recorded, as is the absence of any substantive pre-qualifying consideration of financial capability or technical capacity.

1.75 **Chapter 20** is substantially devoted to the conduct of the quantitative evaluation undertaken by AMI in Copenhagen, and the presentation and consideration of the first set of results of that exercise, dated 30th August, 1995, at the Project Group meeting of 4th September, 1995. The shortcomings in those results adverted to by Mr. Michael Andersen, and recorded in the official report of the Project Group meeting, are referenced, as is the evidence of Project Group members as to their understanding of the checks and corrections to be undertaken by AMI in relation to those results. Noted also are incorrect weightings applied to that first set of results, which failed to reflect the 3% point shift in weighting from the fourth-ranked Licence Fee criterion, to the third-

ranked Tariffs criterion, as agreed by the Project Group prior to the closing date of the process.

1.76 A second set of quantitative results of 20th September, 1995, never considered by the Project Group, and a final set of 2nd October, 1995, of which no member of the Project Group had any knowledge, are also reviewed and analysed in that chapter, even though they were generated at later points in the process. As the material relating to the quantitative evaluation is unavoidably technical, it was considered helpful to consolidate consideration of it into a single chapter. It is noted that the corrections to the results which AMI agreed to undertake at the Project Group meeting of 4th September, 1995, were never carried through fully, and that the ranking of Esat Digifone in the quantitative results was never higher than third place.

1.77 The chapter notes the record in the official report of the Project Group and the evidence of members that:

“The consensus was that the quantitative analysis was not sufficient on its own and that it would be returned to after both the presentations and the qualitative assessment.”

Arrangements put in place for the attendance of Project Group members at qualitative sub-group meetings scheduled for the following week in Copenhagen, and for oral presentations by applicants to be made during the succeeding week, bring the chapter to conclusion.

1.78 The topic of **Chapter 21** is a dispute which arose between AMI and the Department a short time after the commencement of the competitive process. It was a dispute of which the Project Group was unaware, and was handled by Mr. Martin Brennan, the Chairman, with the assistance of his subordinate officials within the Development Division. The chapter outlines the commencement of the dispute in early August, 1995, with AMI asserting that they had been obliged to deploy greater resources than had been anticipated in the evaluation of applications, and that unless they were adequately remunerated outside the fixed limit of £297,450.00 as provided by their contract of appointment, they would have to consider scaling back the level of their intended participation.

1.79 The chapter then moves on to exchanges of correspondence between AMI and the Department, and to consideration of a side-meeting which commenced in Dublin, after the conclusion of the Project Group meeting of 4th September, 1995. It summarises the relative positions of AMI and the Department as seemingly articulated at that meeting, and concludes with an

account of the terms on which that dispute was resolved, as recorded in an exchange of correspondence between the Department and AMI. That correspondence included a detailed letter from Mr. Brennan to Mr. Andersen dated 14th September, 1995, proposing that the Department would lift the fee ceiling by £72,550.00, and stipulating precisely what was required from AMI in return. The terms of that letter are analysed closely in the chapter, as it was subsequently to assume a significant role in Tribunal inquiries.

1.80 Chapter 18, the first of the two chapters in Section C which recount events and activities extraneous to the evaluation process, pertains to evidence heard by the Tribunal in connection with initial dealings between Mr. Denis O'Brien and Mr. Dermot Desmond in relation to Esat Digifone, although it adverts to earlier interactions between the two, when Mr. O'Brien had endeavoured unsuccessfully to interest Mr. Desmond in investing in his existing fixed-line telecommunications and broadcasting businesses.

1.81 The chapter focuses on dealings between the two over Thursday 10th and Friday 11th August, 1995. It was on the return journey from a social outing to a football match between Glasgow Celtic and Liverpool, which Mr. O'Brien attended as a guest of Mr. Desmond, that a discussion ensued regarding the GSM competition, and the potential for an involvement in Esat Digifone on the part of Mr. Desmond. The differing recollections of Mr. O'Brien and Mr. Desmond as to what was conveyed by Mr. O'Brien, concerning the sources of financial weakness discussed, are set forth. The meeting between them on the following day, to advance their discussions, at which Mr. O'Brien produced a memorandum of his proposals, is recounted. Those proposals, which included the provision of a £3 million bank guarantee for Communicorp by Mr. Desmond, are considered, together with the evidence of both, including Mr. Desmond's view that what was being offered by Mr. O'Brien on that occasion was not an opportunity to invest in Esat Digifone, but rather an effort to use Mr. Desmond *"as a bank to lend him money for Communicorp"*. The chapter concludes by observing that the interaction between the two came to nothing, but that Mr. Desmond's interest in the GSM process had been stimulated, and his interest lay in participating in Esat Digifone on the same terms as Communicorp and Telenor.

1.82 Chapter 19 addresses distinct aspects of inquiries made by the Tribunal into material which related to another consortium, Persona Digital Telephony, of which Mr. Tony Boyle of Sigma Wireless, a member of that consortium, was Chairman. Those inquiries were directed, firstly, to a private meeting in Killiney Castle Hotel between Mr. Boyle and Mr. Michael Lowry on 16th August, 1995, during the currency of the evaluation process. The meeting, which had been arranged by a longstanding supporter of Fine Gael, who was a close

friend of Mr. Lowry, and a business connection of Mr. Boyle, was contrary to the terms of the protocol which had been adopted by the Project Group on 6th March, 1995, and which the Secretary General to the Department had brought to Mr. Lowry's attention.

1.83 The second matter which features in the chapter is the evidence heard by the Tribunal of an exchange between Mr. Boyle and Mr. Dermot Desmond on 8th April, 1995, when the two were guests in the private box of Mr. J.P. McManus at the Grand National race meeting at Aintree, which exchange seemingly hinted at a knowledge on the part of Mr. Desmond of the potential for an inappropriate relationship between Mr. Denis O'Brien and Mr. Michael Lowry in the context of the GSM licence.

1.84 The chapter concludes with a résumé of evidence heard in relation to complaints made by Mr. Desmond and Mr. O'Brien against the Tribunal, arising from the limited role undertaken by Mr. Jerry Healy SC in connection with the provision of a legal Opinion to Persona after the conclusion of the evaluation process, a role which was fully disclosed not only to the Sole Member, but to those immediately affected by the Tribunal's work.

Section D – The second phase of evaluation

1.85 Section D, consisting of **Chapter 22 to Chapter 29**, covers events following the Project Group meeting of 4th September, 1995, to the conclusion on 20th September, 1995, of sub-group meetings in Copenhagen which conducted the qualitative evaluation. Although reflecting developments on the Departmental side over just a few days in excess of two weeks, this was a period of intense activity for the evaluation proper. It was also an eventful period for Mr. Denis O'Brien and for Esat Digifone, and culminated on Sunday, 17th September, 1995, with agreement in principle being reached between Mr. O'Brien and Mr. Dermot Desmond, following the reopening of dealings between them some two days earlier, that Mr. Desmond would join the Esat Digifone consortium, would have a shareholding through his company, IIU, and would provide underwriting for Communicorp's equity participation. That agreement happened to be reached on the same day that Mr. O'Brien met on two occasions with Mr. Michael Lowry, initially at the All Ireland Football Final at Croke Park, and subsequently by arrangement at Houricans public house in Leeson Street, when the two left and repaired across Leeson Street to Hartigans public house, where they shared one or two drinks together. Chapter 28 tracks the finalisation of that agreement reached on 17th September, 1995, and the execution of formal contract documents on 29th September, 1995, including the securing by Mr. O'Brien of

Telenor's support for Mr. Desmond's introduction as a member of the consortium.

1.86 Chapter 22 relates to the two initial qualitative sub-group sessions held in Copenhagen in the second week of September, 1995. There were, according to the Evaluation Model, twelve dimensions to be assessed, but as all applicants had bid the ceiling £15 million for the licence, the Licence Fee dimension did not require evaluation. In consequence, the dimensions to be evaluated by sub-group meetings were reduced to eleven.

1.87 The qualitative assessment of six of those dimensions, Financial Key Figures, Performance Guarantees, Radio Network Architecture, Capacity of the Network, Coverage and Frequency Efficiency, is reported on in the chapter. The outcome of five of the six evaluations is discussed, together with, specifically in the case of the four latter dimensions, the difficulty of discerning from the tables of results which appeared in the draft and final Evaluation Reports, how those results had emerged. This difficulty was identified by the senior Project Group representative involved, Mr. John McQuaid, at a subsequent meeting of the Project Group on 9th October, 1995.

1.88 The chapter also records the inability of the sub-group scheduled to evaluate the Financial Key Figures dimension to proceed with the substantive evaluation, because of inconsistencies identified between the figures in applicants' business cases comprised in the body of their applications, and the figures in their mandatory tables, which latter figures were intended to be utilised in the evaluation. These inconsistencies were identified by Mr. Billy Riordan, a private sector chartered accountant who was on secondment from PricewaterhouseCooper to the Department of Finance, who had been delegated, together with Mr. Fintan Towey, a member of the Project Group and a Departmental official assigned to the Development Division, to conduct that evaluation. Rather than undertake a full comparison of the two sets of figures, it was decided instead to proceed by means of an analysis of the internal consistency of mandatory tables, and that task was to be undertaken by both Mr. Riordan and Mr. Jon Bruel, of AMI.

1.89 Chapter 20 then traces the further progress of the evaluation through the third week of September, 1995, when oral presentations were made by all six applicants. These were intended as a final opportunity for applicants to interact with the Project Group, and to clarify elements of their applications. The audio recordings of the presentations of the three top-ranked applicants having been played into the record of the Tribunal, and inquiry having been pursued in

relation to aspects of proceedings at those presentations, the chapter reviews the principal areas of inquiry made at public sittings.

1.90 As regards Esat Digifone, reference is made to the unequivocal statements of Mr. Denis O'Brien and Mr. Arve Johansen, the senior Telenor representative in attendance, as to the ownership structure of the intended licensee comprising the four financial institutions named in the application, that is, Allied Irish Banks, Investment Bank of Ireland, Standard Life and Advent International, and to those of Mr. Denis O'Brien regarding the financing of Communicorp's 40% shareholding, and the binding nature of the Advent commitment to funding £30 million, and to his affirmation, in response to inquiry, that an agreement was in existence between Communicorp and Advent in relation to that funding. The chapter also notes an exchange between Mr. Martin Brennan and Mr. Denis O'Brien at the conclusion of proceedings, when Mr. O'Brien confirmed that Esat Digifone would honour the Departmental direction that no further material should be submitted by applicants following oral presentations, unless requested in writing by the Department.

1.91 **Chapter 24**, which explores the views and activities of the Project Group immediately following the conclusion of the final oral presentation, initially recounts the evidence heard and adduced in relation to a Project Group meeting on the afternoon of Thursday, 14th September, 1995. The contents of the official report of that meeting are set forth, including the Group's relatively negative impression of the presentation made that morning by Irish Cellular, with which Mr. Anthony J.F. O'Reilly was associated. That matter is significant in the context of matters reported on in Chapter 25, to which reference will be made.

1.92 The kernel of discussion at the Project Group meeting, as noted in the chapter, was directed to the manner in which the evaluation process would be progressed. At the suggestion of Mr. Michael Andersen of AMI, it was proposed that greater resources should thereafter be deployed in the evaluation of the three applicants which were by then regarded as having submitted superior applications, that is, Irish Mobicall, Persona and Esat Digifone. The further tasks to be performed were identified as:

- (i) to finalise the qualitative scoring of dimensions;
- (ii) to perform initial scoring of Aspects (that is sub-totals of dimension marks);
- (iii) to perform supplemental analysis.

1.93 The official report, as referenced in the chapter, recorded that the scoring of the outstanding dimensions was to proceed in Copenhagen during the following week, and that AMI was to prepare a first draft Evaluation Report on 3rd October, 1995, to be discussed by the Project Group on 9th October, 1995. The three Departmental Divisions represented on the Project Group, that is the Development, Regulatory and Technical Divisions, were to supply written comments on the draft, prior to that meeting, and AMI was then to produce a second draft Report by 17th October, 1995.

1.94 The chapter notes that one of the tasks, as defined in the official report, namely the sub-totalling of technical dimensions, was to be undertaken by Mr. John McQuaid, and that Mr. Billy Riordan was to proceed with his analysis of the internal consistency of the mandatory tables. These steps, as undertaken by Mr. McQuaid and Mr. Riordan, are outlined, including the numerical approach adopted by Mr. McQuaid in the totalling of the marks for technical dimensions, and his evidence in that regard.

1.95 One unconnected entry in the official report of the Project Group meeting is considered, namely that:

“Mr. Brennan also stated, and the group agreed, that no further contact between the evaluation team and the applicants was possible, although access to the Minister could not be stopped.”

It is observed in that regard that Departmental officials may have known that Mr. Lowry was due to attend an official function on the following day, when he was likely to encounter Mr. A.J.F. O'Reilly.

1.96 The chapter closes with a consideration of the evidence regarding the Project Group's impression of the then emerging trends in the evaluation. The relevant evidence is analysed, and it is recorded that the view, amongst those that had been most centrally involved, was that Esat Digifone was emerging as lead applicant, with Persona a close second, and Irish Mobicall some distance behind.

1.97 **Chapter 29** concludes consideration of the evaluation proper in this section. It reviews the work of the final qualitative sub-groups which assembled in Copenhagen on 19th and 20th September, 1995, to evaluate the outstanding five dimensions, including the Financial Key Figures dimension, which evaluation had been abandoned during the first session. The evaluation of each dimension is considered by reference to the available evidence, and certain elements of the work of the sub-groups are highlighted. Mention is made of the further

abandonment of the evaluation of the Financial Key Figures dimension, arising from the failure of AMI to reformat applicants' mandatory tables in line with specifications furnished by Mr. Billy Riordan during the previous week, following his analysis of the internal consistency of those tables. The consequent absence of Project Group representation, and in particular that of Mr. Riordan, in the subsequent substantive evaluation and marking of the financial dimension, is noted.

1.98 Chapters 25, 26, 27 and 28 relate to matters extraneous to the evaluation process proper. Chapter 25 deals with Mr. Lowry's state of knowledge of the emerging trends as of mid-September, 1995. Despite the strict seal of confidentiality to which it was intended that the conduct of the evaluation by the Project Group should be subject, the chapter outlines the evidence heard and adduced regarding Mr. Lowry's appreciable curiosity concerning the substantive process, as it was proceeding, and the occasions on which he sought and was provided with information by members of the Project Group.

1.99 Attention is directed, firstly, to a telephone interaction between Mr. Lowry and Mr. Fintan Towey, with whom Mr. Lowry spoke in Mr. Martin Brennan's absence, at a time seemingly prior to the oral presentations, when the Tribunal is satisfied that Mr. Lowry learned the identity of the leading applicants. The chapter then proceeds to consider the evidence of further direct interaction between Mr. Lowry and Mr. Brennan, from which it is clear that prior to Friday, 15th September, 1995, Mr. Lowry acquired a more detailed account of the emerging trends in the evaluation, including the then perception of the relative position of the top applicants, and including concerns which had been recorded regarding the finances of the applicant perceived to be in pole position, namely, Esat Digifone.

1.100 Chapter 26 reviews the evidence of Mr. Lowry and Mr. Anthony J.F. O'Reilly of their meeting at the official launch of Galmoy Mine on Friday, 15th September, 1995, the day following the oral presentation by Irish Cellular, the consortium in which Mr. O'Reilly had an interest. According to Mr. O'Reilly, at the conclusion of formalities, Mr. Lowry observed to him:

"Your fellas didn't too well yesterday."

On inquiry by Mr. O'Reilly, Mr. Lowry clarified that what he was referring to were the oral presentations which had been made by applicants for the GSM licence. Mr. Lowry denied that he had said anything to Mr. O'Reilly along the lines attributed to him.

1.101 Evidence was also heard of contact between the two on another occasion, at a Derby Day meeting at the Curragh Racecourse, and in relation to dealings between Mr. O'Reilly and the then Taoiseach, Mr. John Bruton T.D., which led to a subsequent meeting between the Taoiseach's Programme Manager and representatives of Independent News and Media in relation to the activities of unlicensed MMDS operators. That evidence is also reviewed in Chapter 26.

1.102 **Chapter 27** pertains to the Tribunal's analysis of the evidence heard and adduced in connection with Mr. Denis O'Brien's meetings with Mr. Michael Lowry on Sunday, 17th September, 1995, and his separate dealings on that day with Mr. Dermot Desmond. All of the evidence available to the Tribunal, both direct and circumstantial, of what occurred at those meetings between Mr. O'Brien and Mr. Lowry is closely examined. That scrutiny includes consideration of Mr. O'Brien's actions in the days immediately preceding that Sunday, and the evidence of his perception of the Department's concerns surrounding the finances of Communicorp, arising from the inquiries made of him at the Esat Digifone oral presentation on the previous Tuesday. The chapter explores the circumstances in which dealings, having been reopened with Mr. Desmond on the previous Friday, came to rapid conclusion between Mr. O'Brien's initial interaction with Mr. Lowry at the half-time interval in Croke Park, and his subsequent meeting by arrangement later that evening, at 6:45pm, according to Mr. O'Brien's later diary entry.

1.103 The chapter notes Mr. O'Brien's instructions to his solicitor of longstanding, Mr. Owen O'Connell, of William Fry, conveyed on the following day, Monday, 18th September, 1995, that:

"Dermot Desmond going ahead with financing transaction.

Need 'underwriting' letter for Dept. because finances are seen as the weakness.

DD wants 30% of GSM."

This was notwithstanding Mr. O'Brien's clear knowledge of and commitment to the competition rule that no further information should be provided. Noted also is Mr. O'Brien's subsequent account to Mr. Per Simonsen, the Telenor GSM co-ordinator, furnished some time later, that he happened to meet Mr. Lowry in a public house, and that Mr. Lowry had suggested that IIU, Mr. Desmond's investment vehicle, should be involved in the consortium. Careful consideration

is directed to the weight and significance which should be attached to that evidence, having regard to denials on the part of Mr. O'Brien.

1.104 Mr. Michael Lowry's evidence of his actions on that day are also analysed closely, as is his account of what prompted his departure from the company of his friends and acquaintances in Houricans public house on Mr. Denis O'Brien's arrival, and their sequestered private half-hour interaction in Hartigans public house across the road. Mr. Lowry's evidence of a conversation between them about the match, and an effort by Mr. O'Brien, rejected by Mr. Lowry, to raise grievances relating to his fixed-line business, is considered. Account is taken of the undoubted possession of information by Mr. Lowry as of 17th September, 1995, of the promising standing of Esat Digifone in the evaluation process, but of doubts surrounding the adequacy of Communicorp's financing, and of the absence of inhibition on the part of Mr. Lowry surrounding the sharing of confidential information with interested parties, as apparent from his interaction with Mr. A.J.F. O'Reilly two days earlier.

1.105 Chapter 28, an unavoidably lengthy chapter, traces the intensive interaction between Mr. O'Brien and Mr. Desmond, and their respective representatives, commencing on Monday, 18th September, 1995, when Mr. O'Brien instructed his solicitors that a deal with Mr. Desmond had been struck, and that an underwriting letter was required for the Department. What Mr. Desmond was seeking at that point was an entitlement to subscribe for a 30% direct shareholding in Esat Digifone, for which he would provide underwriting for 60% of the equity, on the footing that Communicorp's shareholding would be diluted to 30%, but that Telenor's would remain at 40%. The chapter records that, following exchanges between their representatives regarding finer elements of the matters under negotiation, Mr. O'Brien and Mr. Desmond resolved the principal matter in issue in the course of a telephone conversation on Wednesday, 20th September, 1995, when it was agreed that Mr. Desmond would settle for a 25% interest in Esat Digifone, and would underwrite a further 40% of the shares.

1.106 The chapter then addresses relatively technical evidence of the development and refinement of contractual documents signed by the parties on 29th September, 1995, including two side-letters, one of which, between Esat Digifone and IIU, recorded that IIU had assigned its rights and obligations under the principal contracts to Bottin International, an off-shore company, incorporated and domiciled in Gibraltar, and the other of which, between Communicorp and IIU, provided for the payment of a fee by Communicorp to IIU for the provision of an underwriting letter addressed to the Department, and for a pro rata contribution to bid costs by Mr. Desmond.

1.107 The evolution of the terms of an underwriting letter ultimately dated 29th September, 1995, from IIU addressed to Mr. Martin Brennan of the Department, signed by Dr. Michael Walsh, Mr. Desmond's associate, and faxed on that afternoon to the Department's fax line dedicated to the GSM process, is then set forth. Observations are made relating to the terms of that letter as finalised, and the extent to which those terms, which were self-evidently carefully crafted and formulated, revealed the true extent of the actual alteration to the ownership of the intended licensee company.

1.108 The chapter then moves on to a review of Mr. O'Brien's efforts to secure Telenor's agreement to the introduction of Mr. Desmond as a partner in the consortium, and his initial position that the entire of the 5% dilution required to liberate a 25% shareholding for Mr. Desmond should be borne by Telenor. To that end, Mr. O'Brien travelled to Oslo for a meeting with Mr. Arve Johansen and another senior Telenor official on Friday, 22nd September, 1995, and conflicts in the evidence of Mr. O'Brien and Mr. Johansen regarding the reasons advanced by Mr. O'Brien for the replacement of the institutions by Mr. Desmond, and as to whether underwriting by Mr. Desmond of Communicorp's equity in Esat Digifone was mentioned on that occasion, are recorded and are examined in the light of the documentary evidence, and other circumstantial evidence. The outcome of that meeting and of further dealings during the following week, when Telenor continued to resist Mr. O'Brien's proposal that they dilute their shareholding to 35%, giving rise to an agreement that the dilution should be borne equally by Communicorp and Telenor, resulting in equivalent reductions to 37.5% in their respective shareholdings, is noted.

1.109 The final aspect of consideration in this chapter is of the steps taken by Mr. O'Brien to liberate the 20% shareholding intended for financial institutions. The 15% for which Davy Stockbrokers had recruited the Irish institutions posed little challenge, as those institutions had no binding entitlement. The chapter records how on that Friday, 29th September, 1995, when the contractual documents were put in place, Mr. John Callaghan, a director of Mr. O'Brien's company, met with Mr. Kyran McLaughlin of Davy, with whom he had a lengthy association, to inform him that Esat Digifone would not require the institutional support. The position in relation to Advent International was more challenging, as Advent did have a binding entitlement on foot of the formal agreement of 12th July, 1995, under which it furnished the comfort letters addressed to the Department and to Telenor. Mr. O'Brien's strategy for depriving Advent of that 5% entitlement, by a questionable reliance on Telenor dissatisfaction with the terms of the comfort letter provided, which ultimately led to a formal compromise of a number of matters in December, 1995, is recounted.

Section E – The third phase of evaluation

1.110 Section E, comprising **Chapters 30 to 37**, unlike earlier sections, relates exclusively to dealings within the Department. Apart from Chapter 35, which explores interactions between Mr. Martin Brennan and Mr. Michael Lowry, the chapters within the section have as their subject-matter critical developments in the process between 21st and 28th September, 1995, to which the Project Group was not party, and the subsequent manner in which those developments were presented to the Group. In this instance, therefore, it is proposed to review the contents of the chapters sequentially.

1.111 **Chapter 30** is directed to the content of a detailed memorandum forwarded by Mr. Michael Andersen of AMI on 21st September, 1995, to Mr. Martin Brennan, and his colleague Mr. Fintan Towey, both of whom had just returned from Copenhagen, following completion of the final sub-group evaluation session the previous day. Mr. Andersen's identification of the outstanding tasks to be undertaken, and his proposals for progressing the evaluation, as set forth in his memorandum, are referenced, and particular focus is directed to the matters set out below.

- (i) His proposal that the marking of the outstanding aspects, that is the sub-totals of related dimensions, together with a determination of a "*grand total*" in the evaluation, should be undertaken on 28th September, 1995, either by telephone, or by means of a meeting in Copenhagen.
- (ii) His request for instructions from the Department as to how the quantitative results should be integrated into the Evaluation Report, and his recorded preference that this question be left unanswered pending the availability of final results.
- (iii) His request for instructions on whether the Department wished to score an element of the evaluation described as Other Aspects, and which was intended to assess the sensitivities and risks associated with applicants, together with his proposal that, if a ranking could be agreed by reference to the dimensions already evaluated, that element should not be marked, but should be addressed narratively in the Evaluation Report.

1.112 The significance of these requests and proposals are considered in the light of what had been agreed at the Project Group meeting of the previous week,

in the light of the methodology prescribed by the Evaluation Model, as adopted by the Project Group on 9th June, 1995, and in the light of the centrality of the risks which had been identified in the case of the two leading consortia to the competition framework as prescribed in paragraph 19, which defined financial capability as a precondition to be satisfied by applicants. The absence of any written response to that faxed memorandum within the Departmental files produced to the Tribunal, and the absence of consultation with the Project Group, or even its most senior members, in relation to those requests, is also recorded.

1.113 Chapter 31 relates to the critical meeting attended by Mr. Martin Brennan and Mr. Fintan Towey in Copenhagen on 28th September, 1995, and which Mr. Michael Andersen, when he belatedly attended, initially challenged had taken place, and subsequently acknowledged must have occurred, but had no memory of.

1.114 The chapter opens with a review of what had transpired over the previous month in relation to the evaluation of the dimension Financial Key Figures, and the circumstances in which the substantive evaluation and the marking of that dimension was conducted without Mr. Billy Riordan's input, and was used by the Copenhagen meeting to rank applications. It then proceeds to a consideration of the evidence of what occurred in Copenhagen on that date, in which respect the constructive engagement of Mr. Fintan Towey with the Tribunal's inquiries is acknowledged. In the absence of any written record of what transpired, Mr. Towey endeavoured to explain how the results tables, which ultimately appeared in the Evaluation Reports, were generated. His evidence in that regard is set forth in some detail, as is the evidence of all concerned as to how and why weightings other than those provided for in the Evaluation Model were utilised, and in particular why equivalent weightings of 10/10/10 were applied to the three dimensions of the first-ranked criterion, when weightings of 15/10/7.5 were prescribed, which reflected a ranking of those dimensions in which Financial Key Figures was pre-eminent, followed by Experience of Applicant, followed in turn by Market Development.

1.115 The evidence of what seemingly emerged from that meeting, namely, a ranking which in principle was regarded as provisional and subject to approval and adoption by the Project Group, based on the totalling of marks awarded in sub-groups, arrived at by the application of weightings other than those provided for in the Evaluation Model, and predicated on decisions that the results of the separate quantitative evaluation should not impact on that ranking, and further that risks and sensitivities should not be scored, is recounted.

1.116 Chapter 32 relates to the Departmental response to the receipt on the afternoon of Friday, 29th September, 1995, the day following the Copenhagen meeting, of the IIU underwriting letter addressed to Mr. Martin Brennan, and signed by Mr. Dermot Desmond's associate, Dr. Michael Walsh. The form of that letter is noted, and in particular the identification of Mr. Desmond at its foot as the Chairman of IIU. The evidence of Mr. Towey and Mr. Brennan, initially in stark conflict, but on Mr. Brennan's subsequent attendance, resolved to some degree, is set forth.

1.117 The Departmental response, whereby the Project Group was not informed of the receipt or contents of the letter, and in respect of which Mr. Brennan and Mr. Towey testified that it was intended that the information it contained regarding the provision of underwriting, would be excluded from consideration in the evaluation of Esat Digifone, is considered. So too is the manner of return of the letter on the following Monday, 2nd October, 1995, by letter of that date, signed by Mr. Martin Brennan, and addressed not to Dr. Michael Walsh, but to Mr. Denis O'Brien, as Chairman of Esat Digifone. Finally, the consequences, in terms of the degree to which Mr. Brennan and Mr. Towey may have been compromised by knowledge of the contents of that letter, are alluded to.

1.118 The focus of Chapter 33, a short chapter, is developments within the Department during the first week of October, 1995, which was a relatively fallow time for the Department, in advance of the next scheduled meeting of the Project Group on the following Monday, 9th October, 1995. The material comprised in the chapter primarily relates to two matters. Firstly, an incidental but nonetheless significant reference to the GSM process in the personal notes kept by Mr. Sean McMahon, a member of the Project Group and head of the Regulatory Division, of a meeting of representatives of the three Telecommunications Divisions on Tuesday, 3rd October, 1995, at which a series of matters of mutual interest arose, and in the course of which Mr. McMahon had noted:

"4 GSM

- *Min wants to accelerate process*
- *legalities more complicated*
- *Draft report now imminent*
- *We need to discuss + digest.*

Agreed 1 copy we let it stay here (44) and discuss it in confidence."

1.119 The second aspect of the material relates to the return of Mr. John Loughrey, Secretary General of the Department, on Wednesday, 4th October, 1995, after a prolonged absence, due to a combination of sick leave and annual holidays. Mr. Loughrey's evidence of his state of knowledge of significant events in the process over the first three weeks of October, and of intentions and arrangements put in place to bring the result to Government weeks in advance of the projected completion date of end-November, 1995, is analysed in the light of evidence of widespread Departmental knowledge of those matters.

1.120 **Chapter 34** is a considerably lengthier chapter, which deals with the arrival in the Department of AMI's first draft Evaluation Report. Whilst the implementation of the decision that the Report should not be circulated to members of the Project Group, prior to the scheduled meeting on the following Monday, 9th October, 1995, with the consequence that the procedure agreed that written submissions should be made by each of the Divisions represented on the Project Group to AMI, is alluded to, the chapter is primarily directed to the content of the draft Report. The division of the material into five sections is outlined, and the subject matter of each section is summarised and analysed in terms of the evaluation which had been conducted.

1.121 The significance of section 4 of the draft Report, which explored narratively the risks identified, but not marked, in the case of the top-ranked applicants, is noted, and which in the case of Esat Digifone recorded that:

"The weakest point concerning A5 is not related to the application as such, but to the applicant, or more specifically to one of the consortium members, namely Communicorp, which has a negative equity. Should the consortium meet with temporary or permanent opposition, this could in a worst case situation turn out to be critical, in particular concerning matters related to solvency."

The import of those observations and their significance, in terms of the paragraph 19 precondition of financial capability, which belatedly emerged in the course of Mr. Andersen's evidence, is recorded.

1.122 Consideration in the chapter extends to the Appendices to the draft Report, and in particular the contents of Appendix 3, which reproduced the Evaluation Model adopted by the Project Group on 9th June, 1995, and Appendix 10, which contained the results of a financial risk analysis conducted in respect of the two top-ranked applicants, and which brought into stark focus the financial weakness of members of those two consortia.

1.123 The chapter concludes with consideration of relevant dealings on the part of two members of the Project Group. Firstly, Ms. Maev Nic Lochlainn, a Development Division official, and secondly, Mr. Ed O’Callaghan, a Regulatory Division official. Ms. Nic Lochlainn’s dealings related to queries forwarded by her to AMI on Friday, 6th October, 1995, arising from a close study made by her of the weightings applied to the twelve dimensions as shown in the results tables, and of those applied, at a lower indicator level, in the second set of quantitative results dated 20th September, 1995, both of which were available to her. Her query, directed to the consistency of those weightings, was one to which Mr. Andersen attached very considerable significance in his belated evidence. The second such aspect of dealings related to an interaction between Mr. Martin Brennan and Mr. Ed O’Callaghan, on the same day that Ms. Nic Lochlainn had open access to the first draft Report, when, on inquiry by Mr. O’Callaghan, Mr. Brennan declined to provide information on the ranking in the evaluation.

1.124 **Chapter 35** also covers events during the first week of October, 1995, but from a markedly different perspective, namely, from the viewpoint of Mr. Michael Lowry, and his dealings with Mr. Brennan during that week, material to the GSM process. Those dealings, although denied by Mr. Lowry himself, were evidenced by entries in documentary records, from which it was apparent to the Tribunal from an early point in its investigative work, that the seal of confidentiality by which it was intended that the fairness, integrity and independence of the process would be secured, had been breached.

1.125 The records which prompted the Tribunal’s inquiries were Mr. McMahon’s note of the inter-Divisional meeting of 3rd October, 1995, the official report of the Project Group meeting of 9th October, 1995, contemporaneous notes of that meeting, to which an initial claim to privilege was made by the Department, and a written chronology generated by Mr. Ed O’Callaghan in the aftermath of the conclusion of the process. The relevant contents of Mr. McMahon’s note have already been quoted, and the material portions of the latter documents, together with the Tribunal’s analysis of them, can be found within the chapter, as can a detailed résumé of the evidence heard, including the evidence of Mr. Brennan, all of which have led the Tribunal to find that substantial information was provided by Mr. Brennan to Mr. Lowry during that week, prior to any consideration by the Project Group of the ranking that had emerged in Copenhagen, or of sight of the draft Evaluation Report, and that Mr. Lowry’s intention of accelerating the announcement of the result, and his view that the concept of bankability should be imported as a solution to the financial weakness of Communicorp, as identified in the draft Report, and his further view as to how that aspect of the Report, including Appendix 10, should be presented, were conveyed by Mr. Lowry to Mr. Brennan.

1.126 Chapters 36 and 37, which bring the section to conclusion, both focus on events of Monday, 9th October, 1995. The subject of **Chapter 36** is a review of the evaluation and marking of the Financial Key Figures dimension, undertaken without the input of Mr. Billy Riordan. The chapter relates that on the morning of 9th October, Mr. Riordan, together with his colleague, Mr. Donal Buggy, also a chartered accountant, and likewise on secondment from PricewaterhouseCoopers, but who had not previously participated in the process, had an opportunity of reviewing those matters. Their evidence and the contents of the contemporaneous documents which they generated, in which they recorded their views at the time, are set forth. Noted are the changes that they wished to make, including changes to the marks of the two top-ranked applicants, their reasons for doing so, and Mr. Buggy's recognition that those changes, in particular that entailing a reduction in the overall dimension mark of Esat Digifone from B to C, could impact on the ranking which had emerged in the entire evaluation.

1.127 The elements of infirmity in their evidence, and that of other material witnesses, as to how their views had been conveyed and received, and as to why their changes, save in certain inconsequential respects, were not implemented, and not recorded in any deliberations of the Project Group, are noted, as are subsequent, equally incomplete dealings in that regard with AMI.

1.128 The final chapter of this section, **Chapter 37**, addresses in detail the evidence given and adduced in relation to the Project Group meeting of 9th October, 1995. In view of the significance of that meeting, and the availability of a uniquely detailed set of contemporaneous notes to which much of the evidence heard was directed, the chapter is the lengthiest of this section.

1.129 It opens by reviewing the momentum with which the process had proceeded from the last occasion on which the Project Group had met, on 14th September, when the Group had agreed only that the balance of dimensions to be evaluated should be marked, and that initial scoring of Aspects, that is, sub-totalling of related dimensions, should be undertaken. What had in fact occurred was that the process had been brought to effective finalisation by the Copenhagen meeting of 28th September, 1995, and the Project Group was presented with a ranking in the evaluation, predicated on decisions taken on that occasion. Initial consideration is also directed to the expectations of the membership of the Group, and conflicts in those expectations are examined.

1.130 The evidence of proceedings at the meeting is analysed by reference to the documentary records, and it is noted that Mr. Martin Brennan, as Chairman,

opened the meeting, the majority of the attendees of which had just had sight of the first draft Report, by stating that:

“the Minister had been informed of the progress of the evaluation procedure and of the ranking of the top 2 applicants. The Minister is disposed towards announcing the result of the competition quickly after the finalisation of the evaluation report.”

The import and impact of that statement on those in attendance is explored, as is the import of further statements of Mr. Michael Lowry’s views, including views on the concept of bankability as an answer to financial vulnerabilities. The extent to which both the ranking which had emerged, and the evaluation reflected by the draft Report, were presented as conditional for approval by the Project Group, or as a finalised result and completed evaluation, are examined.

1.131 Discussion at the meeting, as apparent from the contemporaneous records and the evidence of those in attendance, is analysed by reference to the structural issues which arose, and which embraced:

- (i) the quantitative evaluation, its exclusion as a separate limb of evaluation, and the intention that the results should not be published in the Report;
- (ii) whether the weightings applied in the results tables were correct;
- (iii) the reliability and accuracy of the financial data;
- (iv) the results tables and their relative importance.

1.132 Thereafter, the chapter records that a page-by-page review of the draft ensued, and that presentational issues were raised. In the course of that review, it is noted that there was considerable focus on section 4 of the draft Report, the narrative section in which AMI had identified the risks associated with the negative equity of the Communicorp element of Esat Digifone, and the recorded statements that *“no doubt that A5 will survive”*, that *“problem not unique to anyone”*, and that a *“more balanced statement”* was required. The chapter notes that the source of those recorded observations, most probably Mr. Brennan, together with Mr. Towey, were uniquely in possession of information regarding additional financial arrangements notified by the underwriting letter of 29th September, 1995.

1.133 The chapter concludes with an exposition of the material not apparently brought to the attention of the Project Group on that occasion, and a consideration of the extent to which the expectations for that meeting of particular members of the Project Group had been met.

Section F – The Interregnum

1.134 After a short introductory chapter, **Chapters 39 to 44** relate to the two weeks between the penultimate Project Group meeting of Monday, 9th October, 1995, and the final formal meeting of Monday, 23rd October, 1995. Save for Chapter 41, which has as its subject a Fine Gael Golf Classic held in the K Club on 16th October, 1995, and the circumstances surrounding confidential sponsorship of that event by Esat Digifone, the chapters focus on those weeks from the perspective of Departmental and political activity.

1.135 **Chapter 39** traces interactions between the Development Division officials, Mr. Martin Brennan and Mr. Fintan Towey, and AMI, regarding outstanding material, including appendices, not comprised within the first draft Evaluation Report. The material, which was furnished in the days following the Project Group meeting of Monday 9th October, 1995, primarily related to an additional draft section to the Report, and to Appendix 2 of the Report, both of which were intended to outline the methodology by which the evaluation had been conducted. Those drafts were neither circulated nor drawn to the attention of the Project Group, even though they were significant documents, and the importance of the manner of framing of Appendix 2, which in particular addressed the circumstances in which the results of the separate quantitative evaluation were not published in the Report, had been underlined at the Project Group meeting of 9th October, 1995. The Departmental response to those drafts, by fax dated Friday, 13th October, 1995, representing the views of Mr. Brennan and Mr. Towey, and proposing revisions and additions to the text, is set forth.

1.136 **Chapter 40** recounts the evidence heard and adduced of Mr. Michael Lowry's determination to implement his decision to accelerate the announcement of the result from end-November 1995, by bringing the result to Government on Tuesday, 24th October, 1995, the day following the next scheduled Project Group meeting, and preparations made in that regard within the Development Division. The documentary record of Mr. Lowry's intent is examined, as is the evidence of Departmental officials confirming that intent. The apparent absence of knowledge at the most senior Departmental level is noted, and the reasons for it are explored. Reference is also made to elements

of apparent awareness within Esat Digifone of Mr. Lowry's plan to accelerate the time of the scheduled announcement.

1.137 The latter portions of the chapter explore preparations made within the Development Division to facilitate the result proceeding to Government on Tuesday, 24th October, 1995, as planned by Mr. Lowry, including arrangements for a briefing session with him on the afternoon of Monday, 23rd October, 1995. The contents of briefing documents prepared by Ms. Maev Nic Lochlainn, on the directions of Mr. Brennan and Mr. Towey, which were intended to form annexes to a formal Aide Memoire to Government for circulation to members of Cabinet, are considered. Comment is directed to a degree of imbalance and want of accuracy in the central such document, in particular in relation to the account given of the relative performance of the two top-ranked applicants, and the absence of any reference to reservations surrounding financial capability as registered by AMI in the Evaluation Report.

1.138 **Chapters 42, 43 and 44** are a trio of chapters, related to the extent that each is directed to the second draft Evaluation Report, received by the Department from AMI on Thursday, 19th October, 1995. Chapter 42 covers the substantive revisions and amendments made to the earlier draft by AMI, as apparent from that second draft. Chapter 43 addresses evidence heard and adduced of a review of that draft made by Mr. Sean Fitzgerald, Assistant Secretary with overall responsibility for telecommunications within the Department, who had not been a member of the Project Group. Chapter 44 deals with annotations made on copies of the second draft Report by Mr. Ed O'Callaghan, Mr. Billy Riordan and Mr. Donal Buggy, and their evidence in relation to them, and comments on what those annotations and evidence reveal.

1.139 Amongst the substantive revisions apparent from the second draft Report, as noted and explored in **Chapter 42**, are the matters set out below.

- (i) The insertion of a new section in the body of the Report on the methodology which had been used, and a first draft of which had been seen by Mr. Brennan and Mr. Towey, and on which they had, by fax of 13th October, 1995, furnished their views and proposals. In that regard, it is noted that a statement in that section that

“unanimous support was given by the PT GSM to the results of the evaluation”

was one to which members of the Project Group took exception, and was ultimately deleted.

- (ii) The revision of the presentation of the results of the dimension Experience of Applicant, whereby the table which presented the scores registered in the quantitative evaluation was truncated to exclude those scores, and the effect of that truncation, is considered.
- (iii) A deepening of a narrative comparison of the performance of the two top-ranked applicants in the concluding section of the Report, which can be traced to a request by Mr. Brennan and Mr. Towey in their fax of 13th October, 1995, in a manner over which certain doubts are registered.
- (iv) The inclusion of Appendix 2 on the methodology applied, which advanced three distinct explanations for the abandonment of the separate quantitative evaluation.
- (v) Alterations made to Appendix 3, which purported to reproduce the Evaluation Model, and which consequent on those changes no longer accurately reflected the weightings recorded in the Model. Reference is made to changes in the weightings shown for the three dimensions of the first-ranked criterion, and the effect of those changes as rendering the weightings consistent with those applied in the results tables. The absence of any explanation for those alterations in Appendix 2, in which other such changes were explained, is noted.
- (vi) The manner in which Appendix 10, which set forth the results of the financial analysis, had been altered in the case of the computation for Esat Digifone, whereby the worst case equity exposure of its members had been reduced by the application of a multiplier of 1.5 rather than 2. The computation remained unchanged for Persona, on the basis of a double multiplier, yet it is noted that it emerged that the figures used in that sensitivity computation for Persona had been erroneously imported from those of another applicant, whose figures in that regard happened to be the worst of all six applicants.

1.140 Also explored in Chapter 42 is the absence of revisions where significant, and in particular the following.

- (i) The absence of modifications to the results of the Financial Key Figures dimension to reflect the changes made by the accountants to the marks for the top-ranked applicants.
- (ii) The absence of any substantive revision by AMI to the section on risks and sensitivities, in which they had registered financial reservations surrounding Esat Digifone, notwithstanding the views on bankability and presentation expounded at the Project Group meeting of 9th October, 1995.

1.141 Chapter 43 outlines the close scrutiny made of the second draft Report by Mr. Sean Fitzgerald, Assistant Secretary, when a copy of it was made available to him by Mr. Martin Brennan, and which scrutiny was apparent from annotations made by him on that copy, and which was confirmed by him in evidence. Noted is the observation “*very close*” made by him adjacent to the overall results tables in the draft, and his evidence in that regard that he considered the results for the two top-ranked applicants as shown in those tables as roughly the same. Noted also is the annotation “*this is more persuasive than the Tables*” made by Mr. Fitzgerald adjacent to the narrative comparison between the overall performance of those applicants, which had been deepened further in a questionable manner by AMI in that draft Report, at the request of Mr. Martin Brennan and Mr. Fintan Towey, and Mr. Fitzgerald’s evidence in that regard.

1.142 Reference is also made to Mr. Fitzgerald’s close study of the portions of the Report which addressed the finances of applicants, and in particular those of Esat Digifone, and the risks and sensitivities section in which AMI had noted deficiencies in the finances of the Communicorp element of Esat Digifone, and the possible adverse consequences of that deficiency. Mr. Fitzgerald’s evidence that, having reviewed the draft Report, he considered that “*a very strong rider*” surrounding finances had been placed on the nomination of Esat Digifone as the winner, and of his regret that that matter had not been drawn to the attention of the party leaders who ultimately approved Mr. Lowry’s recommendation on 25th October, 1995, is recorded.

1.143 The final element of Chapter 43 consists of a review of a document which Mr. Fitzgerald prepared, following his consideration of the second draft Report, in which he carefully identified and analysed the consequences of Esat Digifone being awarded the GSM licence for the Department’s existing and future regulatory function, having regard to his view of the Department’s prior experience of endeavouring to regulate the activities of Mr. Denis O’Brien’s existing fixed-line business. Mr. Fitzgerald’s concerns, and the actions which he proposed for both existing and future regulation, are examined, and it is noted

that those proposed actions, at least in part, were reflected in the formal Government decision of Thursday 26th October, 1995, which ratified the approval of the party leaders of the previous day. The chapter concludes with a brief account of Mr. Fitzgerald's evidence of a request made of him by Mr. Michael Lowry in December, 1995, following a meeting between Mr. Lowry and Mr. Denis O'Brien, when Mr. Lowry asked Mr. Fitzgerald to defer certain regulatory action which might have impacted adversely on Mr. O'Brien's fixed-line business.

1.144 Chapter 44, the final chapter of the trio relating to the second draft Report, is directed to the evidence of Mr. Ed O'Callaghan, Mr. Billy Riordan and Mr. Donal Buggy in connection with their reviews of that draft Report, and the annotations apparent from their copies. The significance of the matters noted in their copies, as distinct from those noted by Mr. Fitzgerald, is that they recorded matters of concern to members of the Project Group, who were intended to be decision makers in the recommendation ultimately made, and they reflected matters which were or might have been raised within the Project Group, if time had not ultimately been withdrawn by Mr. Michael Lowry.

1.145 The initial portion of the chapter relates to Mr. Ed O'Callaghan of the Regulatory Division who, in evidence, prior to the identification of his annotated copy of the draft, testified that his review related solely to matters of presentation. As noted in the chapter, and as later accepted by Mr. O'Callaghan, it was apparent from his copy that the matters he had highlighted were far more than presentational issues, but reflected his disagreement with, or uncertainty over, judgements made and marks awarded in the substantive evaluation. Those matters spanned the entire of the draft Report, and, as recorded in the chapter, included doubts surrounding the manner in which dimensions had been evaluated and marked, matters to which significance had and had not been attached, and the relative weightings applied in determining totals and sub-totals. His belief that the results of the separate quantitative evaluation were outstanding, and his evidence that he might have assumed that they were included within the final Report, which he had never seen until the Tribunal's inquiries, are noted.

1.146 The second portion of Chapter 44 deals with the evidence and annotations made on the copies of the second draft Report of the two accountants, Mr. Billy Riordan and Mr. Donal Buggy, who were also members of the Project Group. As noted in the chapter, those annotations displayed a reworking of many of the tables in the Report, and most significantly the three overall results tables. Remarkable upon are the series of complex re-computations of those results tables recorded in Mr. Riordan's copy, in which the weightings provided in the Evaluation Model for the three dimensions of the first-

ranked criterion were applied, and in respect of which it was explicitly noted that the weightings used in the results tables were

“not agreed by Project Group”

and

“no reason why the 10s should be split in this way.”

1.147 Amongst the many issues recorded and commented upon is the dense set of entries, apparent from Mr. Riordan’s draft, in the risks and sensitivities section, some of which it seems were made at a later point, but which included what appeared to be a retrenchment of the views recorded by the accountants on 9th October, 1995, when they separately reviewed the Financial Key Figures evaluation, and altered the mark awarded to Esat Digifone for Financial Strength from B to C.

1.148 **Chapter 41** is a stand alone chapter which reviews evidence heard by the Tribunal into the circumstances surrounding anonymous sponsorship by Esat Digifone of a Fine Gael Golf Classic, held on Monday, 16th October, 1995. What distinguished this support from other donations made to Fine Gael, addressed in Chapter 6 of this Volume, was that it was provided during a critical part of the closed phase of the GSM evaluation process, it was funded from the Esat Digifone joint venture bank account held by Communicorp and Telenor, and it gave rise to a degree of conflict in evidence which was virtually unique in the experience of public sittings. That conflict related to evidence of two meetings between Mr. Mark FitzGerald and Mr. Denis O'Brien, one in August, 1995, in the Shelbourne Hotel, and the other in October, 1995, following the Golf Classic, in a restaurant near Mr. FitzGerald’s office. That evidence, together with other material evidence, including evidence of an exchange between Mr. FitzGerald and Mr. Michael Lowry at the Golf Classic in relation to Esat Digifone’s prospect of securing the GSM licence, is explored. The degree of sensitivity surrounding that support on the part of Mr. O’Brien, and his desire for confidentiality, are noted.

1.149 One further matter to which attention is given in the course of the chapter, and which warrants mention, is an instance of a disclosure to the media of information furnished confidentially by the Tribunal to a person with whom it was dealing, in the course of its private investigations. The information in question related to contributions made by Mr. Denis O'Brien to political parties, and which, although never led in evidence at public sittings, appeared in The Sunday Tribune newspaper. That disclosure was made by Ms. Sarah Carey, a former employee of Mr. O'Brien, who, with the benefit of her Fine Gael

connections, had assisted Mr. O'Brien from early 1995, when she was recruited by him, in raising his profile with the party, and had been instrumental in the making of a number of donations, including the sponsorship in question. Having initially denied any responsibility for such disclosure, inquiry having been made of her by the Tribunal, Ms. Carey subsequently confirmed in evidence that she had been the source of it. As noted in Chapter 41, Ms. Carey furnished an explanation for her actions, namely, that she felt that there had been too much emphasis on support for Fine Gael, and her evidence in that regard, and the Tribunal's findings, are set forth.

Section G – The final days of the process

1.150 Section G, comprising **Chapters 45 to 49**, is the final section of the Report relating to the substantive evaluation process, and the chapters collectively track events within the Department, the Project Group, and politically, over the final four days of the process. **Chapter 45** contains an overview of events, and opens by recording the Tribunal's view that it was not furnished with a reliable account of what transpired over those days by any of the witnesses from whom evidence was heard, and that, if it had not been for the limited documentary sources available, it is unlikely that even the less than satisfactory accounts received by the Tribunal would have been forthcoming. A separate chapter is then devoted to each of those days.

1.151 **Chapter 46**, relating to developments on Monday, 23rd October, 1995, opens by reviewing the differing perspectives of elements with the Project Group, in the course of which consideration is directed to a formal typed document generated by Mr. Sean McMahon that morning, headed "*Views of the Regulatory Division – 23 October 1995*", in which he recorded the following:

- "(i) we agree with the finding that A3 and A5 are front runners;*
- (ii) we also agree that A3 and A5 are very close;*
- (iii) By reference to the report alone, we are unable to come to the conclusion as to which (A3 or A5) is, in fact, ahead;*
- ...*
- (v) we feel strongly that the qualitative assessment of the top two applicants should now be revisited."*

On the same document he had also handwritten:

"to be signed if PTGSM insists on finalisation of existing draft."

The import of, and the evidence heard in relation to, that document is recorded.

1.152 Proceedings at the Project Group meeting of that day, which commenced at 11:00am, are then traced by reference to the testimony of witnesses, and the documentary records available. It is noted, from the contemporaneous documents, and as was confirmed in evidence, that Mr. Martin Brennan, as Chairman, opened the meeting by stating that Mr. Michael Lowry wanted a result that day, but had not been promised one. The direction of discussion and debate in the course of the meeting, embracing the opaqueness of the tables contained in the draft Report, how weightings had been applied, and the proposition in the draft Report that four different methods of evaluation had been used, is referenced, as is the testimony of those in attendance that exchanges at the meeting were lively, and that debate was robust. In that regard, the contemporaneous notes made by Mr. Sean McMahon in his personal journal are quoted, including his note of his own contribution as follows:

“Me - We (T+RR) cant justify the conclusion by ref to the draft that we have seen (i.e. last one). Its too close and rept is not clear enough.”

1.153 The culmination of dissent within the Project Group, with the decision of the Principal Officer members that the unprecedented step of consulting Mr. John Loughrey, Secretary General, to adjudicate on the impasse which had been reached between those members who, in the light of Mr. Lowry’s request for a result that day to enable him to proceed to Government the following day, believed that further time was required to revisit the evaluation, and those who believed that the evaluation had concluded and that the result should be made available, is related. The evidence of a relatively lengthy meeting with Mr. Loughrey is outlined, as is the surprising absence of recollection of those who attended, with the exception of Mr. Sean McMahon, and to a lesser degree, Mr. John McQuaid. It is noted that there was no record of that meeting within the official report of the Project Group, or in any other document within Departmental files, and that the sole documentary evidence to be found was outside Departmental files, within the personal notes of Mr. McMahon, and within the personal chronology of Mr. Ed O’Callaghan. The outcome of that side-meeting and Mr. Loughrey’s adjudication that the Project Group should be granted a further week to conclude its work, are noted, as is Mr. Loughrey’s acceptance of that fact, but continued absence of recollection of that matter, or of any material later developments until the morning of Wednesday, 25th October, 1995.

1.154 The chapter concludes with a consideration of further discussion, on the resumption of the full meeting of the Project Group, following the return of the Principal Officers from their visitation to Mr. Loughrey, and the further discussion of the results tables and the weightings applied.

1.155 Chapter 47 pertains to the events of Tuesday, 24th October, 1995, which began as the first day of the additional week granted by Mr. Loughrey to the Project Group to conclude its work, but which at an early point became the final day of the Project Group's input, when that additional time was withdrawn, and members of the Project Group were informed that the result was required to enable Mr. Michael Lowry to announce it the following day. It is noted at the commencement of the chapter that the Tribunal's inquiries into the circumstances in which this guillotine was imposed on the work of the Project Group was met, with certain notable exceptions, including in particular Mr. Fintan Towey, with a wall of silence, based on frailty of recall and inadequacy of memory. In the course of the chapter, the testimony of all material witnesses is examined and analysed, and the Tribunal's findings, that the withdrawal of time resulted from Mr. Lowry's intervention, and his insistence that the result be made available to him for announcement the following day, are set forth.

1.156 The chapter then outlines proceedings at an undocumented late evening meeting of the Project Group, which commenced at 5:00pm, at which efforts were directed to presentation of the material comprised in the second draft Report, primarily by an analysis of a working document prepared by Mr. Towey and tabled at that meeting, copies of that document on which the accountants, Mr. Billy Riordan and Mr. Donal Buggy, had tracked changes, and the final version of the document faxed by Mr. Towey to AMI the following morning. The principal revisions and their import are noted, including the following:

- (i) A significant revision to the risks and sensitivities section in relation to Esat Digifone, in which AMI had recorded that Communicorp's negative equity was a potential risk to the success of the venture, and had recommended that a greater degree of self-financing should be required if Esat Digifone was to be licensed. The changes envisaged that this material would be deleted, and would be replaced with text which omitted a reference to that financial weakness, and imported the concept of bankability as justifying a view that, subject to at least one consortium member having sufficient funding, a weakness on the part of another should not impact negatively on the ranking.
- (ii) A substantial revision to the presentation of the overall results, whereby the principal table in the AMI drafts, Table 16, which was in the form stipulated for presentation of the qualitative results in the Evaluation Model, was relegated to the main body of the Report, and was treated as a summary table, and the two supplemental tables, Tables 17 and 18, devised in Copenhagen on 28th September, 1995, one of which, Table 18, AMI regarded as potentially distorting, were

elevated to a position of pre-eminence. This revision also included a significant recasting of the structure of the final section, and a new sub-division of the substantive material.

1.157 The chapter closes by noting the conflict in expectations at the conclusion of that drafting meeting regarding the status of the result, as between those members who considered that the result and revisions had been agreed, and those who believed that no such agreement had been reached, and that support for the result had been deferred until a final Report had been received incorporating those changes. The testimony of Mr. Sean McMahon in that regard, that it had been understood at the conclusion of that meeting, that if the final Report was not able to show, to his satisfaction, that sufficient qualitative analysis had been done to support the result, those present knew that he would not subscribe to it, is noted.

1.158 Chapter 48 addresses the events of Wednesday, 25th October, 1995, leading up to Mr. Michael Lowry's press conference at teatime that day, when he announced that the GSM competition had concluded, and that Esat Digifone was the winner. No Project Group meeting was convened that day, no final Report was made available to the Project Group, and the Project Group was not consulted further. As noted in the chapter, activities within the Department were directed to communications with AMI regarding the amendments discussed by the Project Group the previous evening, and dealings within the Department with a view to Mr. Lowry securing Government approval for the result, and its immediate announcement, and each of these aspects of activity is explored.

1.159 As regards the amendments to the Report, the chapter addresses the testimony and documentary evidence of interactions between Mr. Brennan and Mr. Towey on behalf of the Department, and Mr. Michael Andersen on behalf of AMI. It traces an exchange of faxes between the Department and AMI, whereby those amendments were sent to AMI, and returned with annotations at 1:00pm, followed by telephone communications. The outcome of that contact is recorded, including Mr. Andersen's insistence that the paragraphs in the risks and sensitivities section of the Report, identifying the risks associated with the negative equity of Communicorp, should remain, as Mr. Andersen regarded them as constituting a marker relating to the precondition of financial capability in paragraph 19, which had not been evaluated in the process. Reference is also made to Mr. Andersen's requirement, not in the event implemented, that the Report should record that:

"Andersen Management International has followed the instructions [of] PT GSM as to how the results should be presented..."

1.160 In relation to dealings between Departmental officials and Mr. Michael Lowry, the testimony of Mr. John Loughrey and Mr. Lowry, of advice having been given by Mr. Loughrey as to the positioning of the result that day, and the means of securing political clearance by seeking the approval of the party leaders, who were due to meet at 4:00pm, is outlined and considered in the light of all of the evidence heard and adduced.

1.161 The chapter then proceeds to deal with the manner in which political clearance was secured by Mr. Lowry. Addressed initially in this regard is an advance meeting between Mr. Lowry and the Taoiseach, Mr. John Bruton. The testimony of both, and the contents of Mr. Bruton's note of what was conveyed to him by Mr. Lowry, including remarks of an adverse political nature in relation to the second-ranked consortium, a suggestion of conflict on the part of the Minister for Finance, Mr. Ruairi Quinn, in relation to the third-ranked consortium, and an apparently mistaken prediction of the possible legal consequences of Government rejection of Mr. Lowry's recommendation, are each recorded and considered.

1.162 Thereafter, that part of the chapter moves to Mr. Lowry's meeting with the party leaders, Mr. Bruton, Mr. Dick Spring, T.D., and Mr. Proinsias De Rossa, T.D., also attended by Mr. Quinn. The evidence of the attendees in relation to proceedings at that meeting is recounted, including evidence of their shared impression, from what they were told by Mr. Lowry, that Esat Digifone was the clear winner, and their evidence that no reference was made to any financial shortcomings on the part of the recommended winner. The approval of the party leaders is noted, as is their sanction of an immediate announcement by Mr. Lowry, again on his recommendation, in order to avoid the risk of unauthorised disclosure. The chapter records that in securing de facto Government approval in that manner, certain procedural safeguards, which had been carefully put in place when the Rainbow Coalition came to power, had no application to the GSM decision.

1.163 This portion of the chapter concludes by reference to an interaction later that evening between Mr. Dick Spring and his Programme Manager, Mr. Greg Sparks, when Mr. Spring informed Mr. Sparks of the events which had occurred, and that Esat Digifone had won the GSM competition. Mr. Sparks' evidence of having then shared with Mr. Spring his surprise that it had seemingly been possible for Esat Digifone to meet the financial weakness attendant on the Denis O'Brien side of the consortium, and his concern, arising from a rumour that Mr. Dermot Desmond was a shareholder, that any such involvement should have been considered in the light of the Inspectors Report of Mr. John Glackin of 7th

July, 1993, in relation to the Johnson, Mooney & O'Brien site transaction, and Mr. Spring's response, are related.

1.164 The chapter closes by revisiting, in the light of the events of that day, the views of the members of the Project Group that had sought and been granted an additional week to conclude the evaluation, which had been withdrawn the following day as a result of Mr. Lowry's insistence that a result should be available to him on Wednesday, 25th October, 1995, and who had attended the drafting session of the previous evening. Reference is made to the evidence of Mr. Sean McMahon that, at the conclusion of that meeting, he had made it clear that he would not subscribe to the result unless satisfied from a review of the final Report that it was justified. The testimony of Mr. McMahon and of Mr. Ed O'Callaghan, that they had supported the result on 25th October, 1995, notwithstanding that they had no opportunity to review the Report on that date, and notwithstanding the entry made by Mr. O'Callaghan in his personal chronology in the following terms:

"Minister met Sean McMahon and Martin Brennan and Secretary and SF. He was to meet Party Leaders re. the winner. Heard at 4.45 that Minister was holding a press conference to announce winner. He did. No signing off on report – we had no final report. No consensus asked for. No vote – effectively no decision by Project Team,"

is analysed and weighed in the light of their earlier evidence, and all of the surrounding circumstances.

1.165 **Chapter 49** concludes the section with an account of the formal Government decision of Thursday, 26th October, 1995, whereby the decision of the party leaders of the previous day was noted and thereby formally ratified. The only additional matter of significance referred to is the incorporation in that formal decision of ancillary provisions, and in particular one which noted that it was intended that regulations concerning the provision of voice telephony and infrastructure services reserved to Telecom Éireann until January, 2000, would be strictly enforced. The provenance of those ancillary provisions is considered.

Section H – The experts

1.166 This section comprises just two chapters, **Chapters 50 and 51**. They respectively set forth an account of Tribunal dealings with Mr. Michael Andersen and Mr. Peter Bacon. The chapters recount the evidence of each, the distinguishing feature of which was that the Tribunal, in making findings of fact, has had regard to the evidence of Mr. Michael Andersen, but, in the light of the

Tribunal's Ruling of 17th July, 2007, has disregarded that of Mr. Peter Bacon, in response to cross-examination on behalf of affected persons.

Section I – Negotiation of the second GSM licence

1.167 The final substantive section of the Report, which comprises **Chapters 52 to 59**, relates to the post-evaluation period, when exclusive negotiations proceeded between the Department and Esat Digifone on the terms of the GSM licence, and which culminated with the grant of the licence on 16th May, 1996, some months after those negotiations were expected to conclude. Matters which arose in the second stage of the process, significant to the Tribunal's inquiries, are again considered from the standpoint of the Department and of Esat Digifone. Principal amongst those matters, as outlined in **Chapter 52**, which presents an overview of events, was the production of an appropriate licence, and technical regulations under which the licence was to be issued, for the Department, the negotiation of a shareholders agreement and the capitalisation of the company, for the members of Esat Digifone, and Mr. Desmond's entitlement to a 25% shareholding, for both.

1.168 **Chapter 53** traces the hesitancy on the part of Esat Digifone to disclose Mr Desmond's involvement to the Department, and the Department's corresponding reluctance to confront that matter from November, 1995, until mid-April, 1996. The evidence of Mr. Denis O'Brien and of his longstanding solicitor, Mr. Owen O'Connell, of William Fry, at that point acting solely for Esat Digifone, that, to an appreciable degree, Esat Digifone viewed the Department as being on notice of Mr. Desmond's involvement, consequent on the contents of the returned letter of 29th September, 1995, is set forth. Consideration of the matter by Esat Digifone in November, 1995, is related, including concerns on the part of senior personnel within Esat Digifone that Mr. Desmond's accession could give rise to problems concerning a material change of ownership, and including a carefully framed press statement made by Esat Digifone on Friday, 17th November, 1995, in response to media queries, in which the role of Mr. Desmond's intended ownership vehicle, IIU, was conveyed as that of financial adviser in relation to the placement of a 20% shareholding with investors. Reference is also made to evidence heard and adduced, indicative of contact between Mr. O'Brien and Mr. Martin Brennan on that day regarding that issue.

1.169 The continuing sensitivities surrounding that issue within Esat Digifone in the early months of 1996 are explored, when the altered shareholder configuration then intended, whereby Mr. Desmond was to hold 25% of the equity, with Telenor and Communicorp holding 37.5% each, featured most prominently. A formula devised by Mr. Owen O'Connell, in conjunction with Mr.

Pádraig O hUiginn, a director of Mr. O'Brien's company and a former Secretary to the Government, to explain that change in shareholder ownership and structure, in a manner appearing consistent with the ownership information furnished in the Esat Digifone application, is addressed.

1.170 The final portion of the chapter is devoted to an article which appeared in The Irish Times on 28th February, 1996, by its business correspondent, which revealed not only the full extent of Mr. Desmond's ownership entitlement, but also the steps then being taken by Mr. O'Brien to pursue his funding of Esat Digifone by a placement through Credit Suisse First Boston on the US market. Collective Departmental ignorance of the article and its contents, notwithstanding that it had incorporated an official Departmental comment, and had been retained on Departmental files, is recorded, as is the absence of Departmental inquiry in response to it.

1.171 Chapter 54 focuses on tensions between the Esat Digifone shareholders, which resurfaced in March, 1996, and which were not resolved until a matter of days before 16th May, 1996, when the GSM licence was issued. The source of these tensions, namely, Mr. Denis O'Brien's efforts to secure a majority shareholding in Esat Digifone, in order to underscore the prospects for a successful fundraising by him on the US market after the licence had issued, and their ultimate cause residing in the financial frailty of Communicorp, are analysed.

1.172 The chapter relates the adverse impact of those tensions on shareholder relations, and the various efforts during the initial weeks of May, 1996, to find a resolution, which at one point resulted in the delivery of a threat by Mr. O'Brien to his partners that he would seek an injunction to block the issue of the licence. The terms ultimately agreed on 12th May, 1996, including provision for a disposal by Mr. Desmond of a 5% shareholding equally between Communicorp and Telenor, in response to a Departmental requirement that the share configuration should be restored to that specified in the Esat Digifone application, and provision by Telenor and Mr. Desmond of loan facilities to Mr. O'Brien to cover his £6 million contribution to the £15 million licence fee, due to be paid on the issue of the licence, are outlined.

1.173 Chapter 55 traces developments over those months within the Department, and opens with a consideration of the initial post-competition meeting between the Department and Esat Digifone on 9th November, 1995, and proceeds to subsequent exchanges and meetings between the Department and Esat Digifone over succeeding months in relation to the licence, the drafting of which proved a complex and time-consuming task. Mention is also made of

persistent media and political controversy concerning the ownership and financing of the winning consortium.

1.174 The chapter then focuses on events which commenced in early April, 1996, by which time there was increasing disquiet on the part of Esat Digifone surrounding the slow pace of progress, and which were triggered by a robust letter of 3rd April, 1996, from Esat Digifone to the Department. In the course of Departmental dealings, subsequent to the receipt of that letter, a Departmental official who had recently joined the Regulatory Division, the division which was principally responsible for the drafting of the licence, in conjunction with the Office of the Attorney General, asked Mr. Owen O’Connell for details of the ownership of Esat Digifone, and requested that he confirm those details in writing. It is noted that it was that action which elicited a letter dated 17th April, 1996, from Mr. O’Connell, in which the Department was informed in writing for the first time that it was intended that Mr. Desmond’s vehicle, IIU, would hold 25% of the shares in Esat Digifone, and that the Communicorp and Telenor shareholdings would be reduced to 37.5% each.

1.175 The chapter concludes with consideration of a press conference convened by Departmental officials on 19th April, 1996, and the manner in which topics were then addressed by those officials. Noted also is that the ownership issue, over which controversy had raged, and in relation to which information had just been received, did not feature.

1.176 **Chapter 56** tracks the Departmental and political response to the notification, of 17th April, 1996, of ownership and funding changes. A series of unrecorded meetings and critical contacts between Esat Digifone representatives and Departmental representatives are addressed, as is the Department’s position, as advanced in evidence, that, pending consideration of the ownership information disclosed and the financial adequacy of Esat Digifone, the grant of the licence to Esat Digifone was uncertain. The extent of Departmental amnesia surrounding those extensive meetings and interactions, coupled with the absence of any record or reference to them within Departmental files, is the subject of comment.

1.177 Mr. Michael Lowry’s actions are also reviewed, and instances of official utterances made by him entailing affirmations of his intention to issue the licence to Esat Digifone, firstly, to his Cabinet colleagues, secondly, to the Dáil, and thirdly, to the public, during this time of critical consideration, are noted.

1.178 **Chapter 57** comprises a close consideration of the response received to a Departmental request made to officials of the Office of the Attorney General,

by letter dated 24th April, 1996, for a legal opinion on whether the ownership and capital configuration information furnished by Esat Digifone to the Department on 17th April, 1996, conformed with the specifications furnished in the Esat Digifone application. As this aspect of Tribunal inquiries gave rise to requests made by the State, following notification of Provisional Findings in November, 2008, that Departmental witnesses should be recalled, and that evidence of the author of an Opinion dated 9th May, 1996, should be heard, and following notification of revised Provisional Findings in January, 2010, a further request that two officials of the Attorney General's office who had dealt with the matter should then be heard, the course of Tribunal dealings with the State regarding this matter is recounted in some detail. That review is also dictated by a degree of controversy which surrounded the hearing of that latter evidence, and an acknowledgement by the Tribunal that, in interpreting a letter from the then Attorney General of 20th December, 2002, in response to a Tribunal inquiry, the Tribunal had overlooked the position conveyed at an earlier point, in the course of a private meeting, that the Opinion of 9th May, 1996, addressed that request.

1.179 The contents of that opinion, together with a full account of the evidence heard, albeit belated, of both prior and supplemental oral advice, and elements of infirmity and contradiction in that evidence, are set forth. Those matters are analysed, and followed by an expounding of the Tribunal's findings on whether the Department was in a position to regard a formal certification by the Attorney General of 13th May, 1996, as confirmation that there was no legal impediment to the granting of a licence to Esat Digifone, by reason of the altered ownership and share configuration of the company.

1.180 **Chapter 58** is directed to activities within the Department, and within Esat Digifone, including interactions between them, in the days immediately preceding the issue of the licence on 16th May, 1996. Continuing concerns and sensitivities in both camps over the ownership and financing of Esat Digifone, as evident from documentary records on the Esat Digifone side, and the manner in which those issues might best be presented to the public, are noted. Consideration commences with a significant meeting in the Department on Monday, 13th May, 1996, at which those matters featured prominently, and in which the importance of preparation for the press conference to announce the issue of the licence was to the fore.

1.181 A critical matter, yet to be assessed by the Department, was the ability of Esat Digifone to fund the roll-out of the network, even though, on the evidence heard by the Tribunal, it was a matter of priority for the Department, on receipt of notice of the ownership changes in mid-April, 1996. The analysis then undertaken by Mr. Donal Buggy, the seconded chartered accountant, is

considered, as is his approach, which was to treat Telenor as having sufficient assets to fund the entire venture, Communicorp as having no funds whatsoever, and to focus on the ability of Mr. Dermot Desmond to fund his by then 20% shareholding, and his contingent obligation to underwrite Communicorp's financing obligations pro rata with Telenor, in the event of default. The efforts of the Department to obtain information in relation to Mr. Desmond's finances, entailing a series of meetings with his representatives, and a degree of insistence on the part of Mr. Michael Lowry himself, is related, as are the outcome of and limitations to the desktop exercise undertaken by Mr. Buggy, which concluded on Wednesday, 15th May, 1996, the day before the licence was issued. Reference is also made to the evidence of reliance ultimately placed by the Department on a letter secured by Mr. Desmond from Anglo Irish Bank, on 15th May, 1996, concerning the availability of £10 million to him in respect of his contribution to Esat Digifone.

1.182 The chapter concludes with an account of the final intensive preparations, within the Department and within Esat Digifone, for the announcement and press conference on 16th May, 1996, and the ultimate finalisation of contractual arrangements between the shareholders, including arrangements made whereby Telenor and Mr. Desmond covered Communicorp's contribution to the licence fee of £15 million payable to the Department on 16th May, 1996.

1.183 Chapter 59, which concludes this section, pertains to connected events which occurred within the Department more than six months after the issue of the licence, by which time Mr. Lowry had resigned as Minister, and Mr. Alan Dukes T.D. had been appointed. The events in question relate to inquiries made by Mr. Dukes of his Departmental officials, and the contents of an official letter sent by Mr. Dukes to Mr. Bobby Molloy T.D., prepared for him by his officials, for the purposes of clarifying the situation in relation to the ownership of and investment in Esat Digifone, at the time of its application for the GSM licence, and at the time the licence was issued.

1.184 That letter, unbeknown to Mr. Dukes, omitted significant information regarding the evolution of Mr. Desmond's shareholding, and in particular the manner in which that shareholding was, just prior to the issue of the licence, diluted from 25% to 20%, as a result of a Departmental requirement. Other material omissions from the information disclosed in that letter, betraying a continuing Departmental sensitivity, are noted, as are the potentially far-reaching consequences of the manner in which Departmental officials drafted that letter for Mr. Dukes' relationship with his Dáil colleague.

1.185 Chapter 60 sets out concluding observations and findings pertinent to this Volume of the Report. Chapters 61 and 62, respectively containing an Executive Summary of the principal matters comprised in this Volume, and the Tribunal's recommendations, are then set forth. There then follow a number of Schedules. In view of the breadth of material comprised in this Volume, and the number of relevant appendices to which reference is made, those appendices, largely comprising significant documentation adduced in evidence, are contained in a separate Book of Appendices.

MATTERS OF RECORD

2.01 Having regard to the duration and complexity of the Tribunal, it is inevitable that a large number of informal or piecemeal Rulings were made on numerous occasions, governing a wide spectrum of evidential and procedural matters that arose from time to time. The content of what transpired in this regard can be ascertained from the daily transcripts of evidence, and such matters are not the concern of this chapter, which is rather concerned with Rulings which materially affected the nature of the evidence heard, the information that was conveyed to interested persons and their representatives for their assistance in dealings with the Tribunal, and the manner in which the Tribunal went about its business in preparing and finalising its Report. Rulings on specific issues which arose, or which were superseded by subsequent events, are not included, but the principal such Rulings can be found on the Tribunal website.

INTERPRETATION OF TERMS OF REFERENCE BY TRIBUNAL

2.02 Details relating to some of these matters have already been set forth in Part I of the Report, including the practice of furnishing Provisional Findings capable of impacting adversely upon affected persons to them or their representatives, to enable the making of submissions in response, and this aspect has also been considered in the preceding chapter of this Volume.

2.03 Foremost among the more formal deliberations on the part of the Tribunal were the occasions upon which it set forth its interpretation of its Terms of Reference. Such interpretation necessarily required to be reviewed on an evolving basis as the Tribunal carried out its private inquiries into wide-ranging information received; the outcome of each interpretation was obviously highly significant to persons potentially affected in an adverse manner if the matters investigated proceeded to public hearings, and opportunities to make representations as to the application of any relevant Terms of Reference were accordingly provided to such persons or their representatives. Following the expression of its substantive interpretation of its Terms of Reference, it was also the practice adopted by the Tribunal, in the course of its detailed Opening Statements, prior to the presentation of public evidence on a particular matter or matters, to set forth where such evidence stood in the context of the Terms of Reference.

2.04 A number of relatively detailed statements of interpretation of Terms of Reference were made at the outset of public sittings during the earlier years of the Tribunal's proceedings. It is of course the case that the Tribunal has already

in Part I reported on those Terms of Reference that relate to the late Mr. Charles J. Haughey, but because of the relative similarity between those Terms, and those referable to Mr. Michael Lowry, it is felt that the relevant portions, in which constructions referable to each were set forth on the same occasion, should be cited as delivered, rather than seeking to delete those portions referable to the late Mr. Haughey. Also, rather than setting forth those extracts in Appendices at the conclusion of this Part of the Report, it would seem preferable that they now be set forth.

2.05 The first such occasion was on 24th September, 1998, when what was stated was as follows.

“the tribunal's interpretation of its Terms of Reference, which may not be final, is as follows:

1.1: Term of Reference (a) embraces substantial payments made directly or indirectly to Mr. Charles Haughey in circumstances giving rise to a reasonable inference that the motive for making the payment was connected with any public office held by him or had the potential to influence the discharge of such office.

what substantial payment means in this context is having material significance either by reference to the value, i.e. the amount of any payment or by reference to other considerations, some of which are set out below.

1.2: The material significance of the amount of any payment will depend on the time at which the payment was made so that the size of a sum of money which now appears to be small should in fact be judged by reference to how large it may have seemed at the time it was paid.

1.3: Therefore, whilst a payment in the amount of 500 or 600 may not seem large now or so large as to be substantial, the same could not be said of a payment made in 1979. all the same, such a payment depending on the resources of the person by whom it is made and the motive with which it is made could be substantial.

1.4: Moreover, whilst a single payment in the amount of 500 or 600 might not be sufficiently large in today's terms to be regarded as "substantial", a number of payments of that amount from the one source over a short period of time or a number of related payments or concerted payments from a number of different sources might amount to such a substantial payment.

1.5. Overall, the factors which in the view of the Sole Member should be taken into account in ascertaining whether any particular payment is or is not substantial should include the following;

(1) The size of the amount;

(2) The time at which the payment was made;

(3) Whether the payment is related to other payments made at or about the same time from the same source;

(4) Whether the payment is related or can be viewed in conjunction with other payments from a number of different sources whether concerted or not;

(5) The resources of the person making the payment;

(6) The resources of the person receiving the payment.

1.6: Term of Reference (a) applies to any substantial payments made to Mr. Charles Haughey at any time within the period 1st January 1979 and 31st December 1996, inclusive.

1.7: There is no such similar time limit applicable to the bank accounts referred to in Term of Reference (b). This is not to say that the tribunal anticipates being able to examine or that it should take into account each and every bank account of Mr. Charles Haughey or any other person whose bank account may be relevant, in as much as it may be impossible to obtain accurate or reliable information or to adduce credible evidence in respect of any such material where it relates to a period which is too remote. This may arise, for instance, by reason of frailty of memory, absence of documents or otherwise in circumstances where the finding of facts based on available and information and evidence adduced would not be justified. Of course, this observation applies to any material that the tribunal may have to consider.

2.0: The tribunal envisages that having identified a payment, the circumstances in which the payment is made would be examined to see whether the inferences referred to in the Terms of Reference ought to be drawn.

3.0: Term of Reference (b) applies to monies held in the accounts known as "the Ansbacher accounts". The "Ansbacher accounts" are the accounts described as those consisting of money held on deposit in certain Irish banks by offshore banks in memorandum accounts for the benefit of Irish residents, including Mr. Charles Haughey, the history of

which is set out in chapter 6 of the Tribunal Report, colloquially referred to as "The McCracken Report".

4.1: *This Term of Reference applies to any money ever held in the accounts for the benefit or in the name of Mr. Charles Haughey and also applies to any other account discovered by the tribunal to be for the benefit of or in the name of Mr. Charles Haughey.*

4.2: *This term of reference also applies to any money ever held in the accounts for the benefit of or in the name of a person who now holds or ever held ministerial office.*

5.0: *Term of Reference (c) embraces payments from accounts held in the name of or for the benefit of Mr. Charles Haughey under Term of Reference (b) to any person who holds or has held public office. It applies to all payments to any such person regardless of size but it does not necessarily follow that every such payment is one which would merit being classified with the type of payment falling within Term of Reference (a).*

6.0: *Term of Reference (d) seems to speak for itself as has already been suggested by Mr. Justice Geoghegan in his judgment in the High Court in the proceedings entitled "Haughey and others -v- Moriarty and others", of the 28th April 1998. It applies only to acts or decisions of Mr. Haughey in the course of his ministerial offices.*

7.0: *Any reference to payments in the Terms of Reference includes payments in cash or in kind and payments consisting of the granting of any credit, discount or financial accommodation in circumstances amounting to the conferral of a monetary or other financial benefit.*

8.0: *The expression "public office" in relation to Mr. Charles Haughey in Term of Reference (a) applies to every ministerial office held by him and the period comprised in the said term includes all periods during which he held ministerial office, commencing on the 1st January 1979, and periods subsequent to the holding of such office, up to the 31st January 1996, both dates inclusive.*

9.0 *So far as "connected persons" are concerned, what Term of Reference (a) means is that a connected person within the meaning of the Terms of Reference may become involved with the tribunal in the context of the tribunal's obligation not to exclude from its consideration a payment which, although not made directly to Mr. Charles Haughey, may as an indirect payment to Mr. Charles Haughey, involve the discharge of monies or debts due by such a connected person. What*

this may involve, for instance, is the payment of a debt due by a connected person (as such) where the payment is made in a context that is discernibly referable to Mr. Charles Haughey.

10.0: Under Term of Reference (b), so far as "connected persons" are concerned, the tribunal is obliged to inquire into and report in connection with the source of funds in any accounts, other than the Ansbacher accounts discovered by the tribunal to be for the benefit of a connected person, with a view to establishing whether there is a context discernibly referable to Mr. Charles Haughey.

11.1: Term of Reference (e) embraces substantial payments made directly or indirectly to Mr. Michael Lowry in circumstances giving rise to a reasonable inference that the motive for making the payment was connected with any public office held by him or had the potential to influence the discharge of such office.

11.2: Term of Reference (e) applies to any substantial payments made to Mr. Lowry at any time when he held public office, meaning ministerial office.

12.0: Once again, there is no time limit applicable to the bank accounts referred to in Term of Reference (f). That is not to say that the tribunal anticipates being able to examine, or that it should take into account each and every bank account of Mr. Lowry or any other person whose bank account may be relevant in as much as it may be impossible to obtain accurate or reliable information or to adduce credible evidence in respect of any such material where it relates to a period which is too remote. This may arise, as already stated, by reason of frailty of memory, absence of documents or otherwise in circumstances where the finding of facts based on available information and evidence adduced would not be justified. As earlier stated, this observation applies to any material that the tribunal may have to consider.

13.0: The tribunal envisages that having identified a payment, the circumstances in which the payment is made would be examined to see whether the inference referred to in the terms of reference ought to be drawn.

14.0: Term of Reference (f) applies to monies held in the accounts in the Bank of Ireland Thurles Branch, Thurles, County Tipperary; The Allied Irish Bank in the Channel Islands; The Allied Irish Bank, Dame Street, Dublin; The Bank of Ireland (I.O.M.) Limited in the Isle of Man;

The Irish Permanent Building Society, Patrick Street Branch, Cork, or Rea Brothers, (Isle of Man) Limited.

15.1: This Term of Reference applies to any money ever held in the accounts for the benefit of or in the name of Mr. Lowry and also applies to any other accounts discovered by the tribunal to be for the benefit of or in the name of Mr. Lowry.

15.2: This Term of Reference also applies to any money ever held in accounts for the benefit of or in the name of any other person, who holds or has held ministerial office.

16.0: As with paragraph (d) of the Terms of Reference, paragraph (g) also seems to speak for itself as suggested by Mr. Justice Geoghegan in his judgment in the aforesaid High Court case, delivered on the 28th April 1998, when considering paragraph (d) of the Terms of Reference, which provision is identical to paragraph (g) in all material respects, with the exception of the party to whom it refers. It applies only to acts or decisions of Mr. Lowry in the course of his ministerial offices.

17.1: Term of Reference (h) embraces payments from accounts held in the name of or for the benefit of Mr. Michael Lowry under Term of Reference (f) to any person who holds or has held public office, meaning ministerial office. It applies to all payments to any such person regardless of size but it does not necessarily follow that every such payment is one which would merit being classified with the type of payment falling within Term of Reference (e).

18.0: Term of Reference (i) embraces payments from monies or accounts held in the name of or for the benefit of a person who holds or has held ministerial office under Terms of Reference (b) or (f) to any person who holds or has held public office meaning ministerial office. For the purposes of Term of Reference (b), these are confined to payments made from monies held in the Ansbacher accounts.

19.0: The expression "public office" in relation to Mr. Lowry in Term of Reference (e) applies to any ministerial office held by him.

20.0: So far as "connected persons" are concerned, what Term of Reference (e) means is that a connected person within the meaning of the Terms of Reference may become involved with the tribunal in the context of the tribunal's obligation not to exclude from its consideration a payment which, although not made directly to Mr. Lowry may, as an indirect payment to Mr. Lowry, involve the discharge of monies or debts due by such a connected person. What this may involve, for

instance, is the payment of a debt due by a connected person (as such), where the payment is made in a context that is discernibly referable to Mr. Lowry.

21.0: Under Term of Reference (f), so far as "connected persons" are concerned, the tribunal is obliged to inquire into and report in connection with the source of funds in any accounts other than the accounts, listed in Term of Reference (f), discovered by the tribunal to be for the benefit of a connected person, with a view to establishing whether there is a context discernibly referable to Mr. Lowry.

22.0: Paragraph (j) does not seem to require any explanation subject to any representation any person so authorized may wish to make.

23.0: This explanation of the Terms of Reference is not final and may be amplified or revised from time to time, either in the light of any representations made to the tribunal, or in the light of the manner in which the investigation develops, and indeed in the light of any evidence that may be given at public hearings.

24.0: Before passing on to outline some of the procedures the tribunal proposes to adopt, there is one further aspect of the interpretation of the Terms of Reference which should be mentioned. This concerns the investigative part of the tribunal's functions. In performing this part of its functions, the tribunal envisages that in most cases, it will proceed from an examination of payments, (if any), within the ambit of Term of Reference (a), or the source of funds (if any), within Term of Reference (b), before going on to investigate whether Mr. Haughey made any act or decision within Term of Reference (d). In other words, it anticipates that it will proceed in performing its investigative functions from examining what appear to be "payments" (or "sources of funds"), if any, to investigating what might appear to be potentially related acts or decisions. At the same time, if any "act or decision" appearing to come within the ambit of Term of Reference (d) is brought (or comes) to its attention, then the tribunal would not be precluded, as part of its investigative function, from examining any such act or decision to see whether it came within Term of Reference (d), i.e., whether evidence was available, which was relevant to be led in public, indicating that there was a relationship to a payment within Term of Reference (a) or a source of funds within Term of Reference (b).

25.0: However, while the tribunal could in its report make findings of fact in connection with payments within Term of Reference (a) or sources of funds within Term of Reference (b) while finding that there

were no related acts or decisions within Term of Reference (d), it would not be open to it to make a finding in relation to an act or decision except in the context of a prior finding of fact in relation to such a "payment" or such a "source of funds". This also applies to the investigative part of the tribunal's functions where Term of Reference (g) is concerned, i.e., "acts or decisions" of Mr. Lowry.

26.0: Dealing now with the tribunal's procedures, the Supreme Court has described the role of the tribunal as investigative and has referred to the various stages involved in a Tribunal of Inquiry of this nature. The first two stages involve a preliminary investigation of evidence available followed by the determination by the tribunal of what it considers to be evidence relevant to the matters into which it is obliged to inquire. In performing its investigative role, it is the preference of the tribunal that its dealings with people should be on a voluntary and cooperative basis.

27.0: Where the tribunal considers that it is necessary for its functions to examine documents in the course of its work, it will make an initial request to the person in possession of the documents to produce them voluntarily. If any other person is likely to be affected by the production of the documents or has confidential rights in the documents, the tribunal will, at the same time, notify that person of its request or seek a waiver of confidentiality where appropriate. When making these requests, it is the intention of the tribunal to explain the basis on which documents are being sought. While in the absence of a concrete set of circumstances it is difficult to be categorical as to the matters which may arise, the tribunal contemplates that the matters which might prompt the making of an order may be derived from the following classes of information or documents: -

- (1) The Terms of Reference;
- (2) The report of the McCracken tribunal;
- (3) The transcript of the evidence given at the public sittings of the McCracken tribunal;
- (4) Material or information furnished to, or material or information coming to the attention of, the tribunal.

28.0: If persons do not wish to produce documents on a voluntary basis, or if the actual production of the documents cannot be secured, the tribunal would then advise the person in possession of the documents, and all persons who are likely to be affected by their production, of the intention of the tribunal to make an Order, subject to

any representations or submissions that they may wish to make. It is the intention of the tribunal that this notice would again set out the basis on which the tribunal believes that the Order is necessary for its functions, and the material which has prompted the tribunal to seek access to the documents.

29.0: The tribunal would intend to give all such persons reasonable notice. The length of notice in any case would depend on the particular circumstances but as a general guideline, the tribunal would hope to give seven days notice to persons residing within the jurisdiction. Where persons are outside the jurisdiction, or are not represented by solicitors within the jurisdiction, the tribunal would consider a lengthier notice period. There may, of course, be circumstances where, due to particular facts, the tribunal believes that it is expedient and necessary for the purposes of its functions to provide a shorter notice period.

30.0: All persons to whom notice is given will have an opportunity to make representations or submissions to the tribunal regarding the making of the Order. If such persons wish to consent or otherwise do not wish to avail of their rights to make representations or submissions, they would be under no obligation to do so and could communicate with the tribunal in writing. Those who wish to make submissions would be entitled to make them in correspondence or orally to the Sole Member. If persons wish to make submissions in correspondence, they would be asked to do so prior to the expiry of the seven day period. If a person elects to make oral submissions, arrangements will be made for a private sitting of the tribunal. After giving due consideration to all submissions and representations made to him, the Sole Member would then and only then proceed to make an Order, if he considered it necessary for the purposes of his functions, and would state his reasons for so doing.

31.0: The next main stage of the inquiry, assuming that evidence relevant to the matters into which the tribunal is obliged to inquire exists, is the public hearing of witnesses in regard to such evidence. This stage, however, will require putting in place protections for people likely to be affected by the evidence. What the tribunal contemplates is serving notice on persons likely to be affected by any such evidence with an outline of the evidence, where possible. This will enable any such person to be in attendance when the evidence is being given. Where necessary, and subject to the matters set out at the tribunal's initial sitting, such persons will have an opportunity of cross-examining any relevant witness.

32.0: It cannot be guaranteed that the tribunal will always be in a position to serve notice of an outline or indeed give any indication of the nature of such evidence. It may transpire that in the course of the public hearings, evidence is given of which the tribunal has no prior notice or knowledge. In such circumstances, in order to afford a person likely to be affected by such evidence an opportunity of considering what course to take, it may be necessary to adjourn the public sittings, or to take whatever other practical steps appear to be necessary to afford such a person an opportunity of dealing with the evidence. A person whose interests may be affected or have been affected by evidence, may wish to bring to the notice of the tribunal other evidence and in that event, the tribunal will consider such evidence and if appropriate, such evidence will be led by the tribunal in public.

33.0: The findings or conclusions of the tribunal will be based only on appropriate evidence given at its public hearings.

34.0: It appears to me that the balance of today's sitting should be on the following lines. Firstly, any representations now sought to be made orally will be heard in relation to the interpretation of the Terms of Reference and the outline of procedures just mentioned.

this is not to say that in particular cases, if any Order is made or if the tribunal gives notice of intention to make an Order, representations on procedure in relation to any such intention may be appropriate, depending on the circumstances and will be received by the tribunal from any person likely to be affected. Any person who has already obtained authorisation to be represented at the tribunal will be at liberty to make any representations in relation to the interpretation and outline of procedures. Where a person has not obtained such authorisation, an application for authorisation will be entertained now after a very short adjournment, either limited to making representations in relation to the terms of reference or in relation to the procedures or generally as the case may be.”

2.06 The second such occasion upon which construction of Terms of Reference was set forth occurred at the start of the public sitting on 5th November, 1998. What was stated was as follows.

“Firstly, I will address the notion of an association between Mr. Charles J. Haughey and a company as referred to in Terms of Reference (a) and between Mr. Michael Lowry and a company in Term of Reference (e). For ease of reference, I will refer to Term of Reference (a). Term of Reference

(a) applies to payments satisfying a certain test of materiality. It applies to payments whether made directly or indirectly. Where a payment is made directly to Mr. Haughey, the fact that it is used to discharge a debt due by any company with which he was associated will not preclude the payment from otherwise coming within the ambit of the Terms of Reference.

Likewise, where a payment is made indirectly to Mr. Haughey, the fact that any such payment is used to discharge a debt due by any company with which he was associated will not preclude it from otherwise coming within the ambit of the Terms of Reference. It is in that context that the notion of an association with a company must be interpreted.

The Tribunal's view is that it connotes the widest range of potential connections including an involvement with the company as a promoter, a shareholder, an officer, an adviser, an employee, an agent or any other connection, but in every case, involving a dealing or dealings which are significant whether by reason of their frequency, their substance or otherwise. Of course these matters necessarily apply equally to Mr. Michael Lowry in relation to Term of Reference (e)

2: The expressions, act or decision, found in Term of Reference (d) in relation to Mr. Charles J Haughey and Term of Reference (g) in relation to Mr. Michael Lowry, may sometimes mean the same thing but in general, act means the taking of action or the doing of something or the behaving in a particular way which may include omitting to act in another or alternative way. A decision may be the action or act of deciding something and hence the overlap mentioned above. More specifically, it includes the reaching of a conclusion or the coming to a resolution with respect of some question or issue as to what action should be taken or what position should be adopted in any particular set of circumstances.

That concludes the amplification of the Terms of Reference on behalf of the Tribunal that arises at this juncture. I have already stated that our interpretation is not written in stone and we will of course either now or at any suitable future juncture permit submissions to be made and these will be fully considered and at this juncture, before passing onto the other aspect of today's sitting, I should invite any submissions that may sought to be made in the context of the Terms of Reference and/or any applications that may at this juncture arise in the context of representation, either complete or partial, before the Tribunal."

2.07 The third such occasion was on 15th October, 1999. On that occasion, the Tribunal, at the commencement of the sitting, heard oral submissions made by counsel on behalf of the Attorney General and the Public Interest, in relation

to a number of matters, but in particular to construction of “Public Office” as set forth in the Terms of Reference, having regard to evidence that had been heard at public sittings the previous week, in relation to the circumstances in which certain payments had been made to Mr. John Ellis T.D. With regard to the phrase “holder of public office”, it was then stated by the Sole Member as follows.

“I accept that in the course of dicta of Mr. Justice Geoghegan, in the High Court proceedings in the suit entitled ‘Haughey & Others against Moriarty & Others’ that Mr. Justice Geoghegan expressed a preliminary view to the effect that a holder of public office would appear to him to be equated with a holder of ministerial office. As Mr. Clarke correctly reminds me, the Supreme Court indicated that it was preferable that no view be expressed by either court on construction of the Terms of Reference and that the matter be left in the first instance to construction in accordance with fair procedures by the Sole Member.

But without necessarily taking on board all that Mr. Clarke has submitted, although I do of course attach obvious and deserved weight to his observations (in relation to the criteria of the degree of nexus with the public decision making process being the primary criterion upon which to view the potential involvement of a particular office holder), I feel that as regards what has transpired thus far in the context of Mr. Ellis, and the circumstances in which his evidence came to be given last week, that the Tribunal is justified as regards his involvement as a member of Dail Eireann, in proceeding with the reception of that evidence in relation to his involvement.

I accept, as submitted by Mr. Clarke, that other contingencies may arise down the road in the course of the Tribunal’s further sittings, and should they do so, in accordance with appropriate procedures, the parties or the persons who may be affected will dually be heard, and a ruling can be given in relation to each particular contingency that may arise.

It is clear to me, and I do so find, that it is appropriate that the Terms of Reference extend to the contingency affecting Mr. John Ellis as set forth in evidence last week.”

2.08 Further, on 27th January, 2000, the following was stated by the Sole Member at the commencement of the public sitting held on that day, an interpretation with which counsel for the Attorney General and the Public Interest thereafter expressly concurred.

“The first and most important matter that I want to mention relates to the Tribunal's Terms of Reference. It will be recalled that at a sitting of the Tribunal on the 24th September 1998, certain remarks were made by me for the purpose of indicating the Tribunal's interpretation of its Terms of Reference.

That interpretation was given pursuant to the then recent judgment of the Supreme Court affecting the Tribunal's procedures. I made it clear that this was the Tribunal's then current interpretation and that that interpretation might not be final. That interpretation was based on the information which had by that time become available to the Tribunal. It was also, to a significant degree, focused on the involvement on the part of the Tribunal with the two individuals named in its Terms of Reference, namely Mr. Charles Haughey and Mr. Michael Lowry.

Since that time, an enormous amount of additional information has been made available to the Tribunal in the course of its investigative activities and in the light of that additional information and the Tribunal's obligation, as I see it, to keep its interpretation of its Terms of Reference under review, I take the view that a further amplification of those Terms of Reference has become necessary. I had hoped to deal with these matters sometime ago but due to time taken up with the Tribunal sittings with other matters, this matter has had to be deferred.

In addition, before finalising views on the Terms of Reference, it was necessary to correspond with a number of individuals likely to be affected and also to bring the matter to the attention of counsel for the public interest.

In my interpretation of September 1998, I stated as follows: "Term of Reference (b) applies to monies held in the accounts known as the Ansbacher accounts. The Ansbacher accounts are the accounts described as those consisting of money held on deposit in certain Irish banks by offshore banks in memorandum accounts for the benefit of Irish residents including Mr. Charles Haughey, the history of which is set out at Chapter 6 of the Tribunal report, colloquially referred to as the McCracken Report."

I went on to say that this Term of Reference applied to any money ever held in the accounts for the benefit of or in the name of Mr. Charles Haughey and that it also applied to any money ever held in the accounts for the benefit of or in the name of a person who now holds or ever held ministerial office.

Passing on to Terms of Reference (c), I stated that this Term of Reference embraced payments from accounts held in the name of or for the benefit of Mr. Charles Haughey under Term of Reference (b) to any person who holds or has held public office. Although in those two Terms of Reference, the main focus of the interpretation so far as the Ansbacher accounts themselves were concerned, was on Mr. Charles Haughey, the ambit of the inquiry so far as the Ansbacher accounts is concerned, is wider than Mr. Haughey's involvement with those accounts. The wider ambit is clear from a close reading of Terms of Reference (b) and (c) and also from a reading of the Terms of Reference as a whole including the introductory paragraphs and the paragraphs dealing with the range of recommendations the Tribunal has been asked to make.

In the light of the further information which has become available to the Tribunal concerning individuals other than Mr. Haughey, I now want to mention specifically Term of Reference (c). This Term of Reference requires the Tribunal to inquire whether any payment was made from money held in any of the accounts referred to at (b), to any person who holds or has held public office.

The Tribunal takes the view that the expression 'public office' in the context of this Term of Reference is wider than the expression 'ministerial office' used elsewhere in the Terms of Reference. I have already alluded to the Tribunal's view of the meaning of this term in the context of evidence already given at the Tribunal's public sittings in connection with Mr. John Ellis, TD.

Term of Reference (c) applies to payments made from 'any of the accounts referred to at (b)'. The expression 'any of the accounts referred to at (b)' refers to two classes of accounts. Firstly, the Ansbacher accounts as a whole and secondly, any bank accounts discovered by the Tribunal to be for the benefit of or in the name of Mr. Haughey or for the benefit of or in the name of a connected person or for the benefit of or in the name of any company owned or controlled by Mr. Haughey.

The Ansbacher accounts are referred to generically and that expression comprehends a range of accounts kept in two offshore locations, on the one hand, in the Channel Islands, all of which appeared to have been closely related and under the control of the late Mr. Desmond Traynor and on the other hand, in the Cayman Islands under the control of the late Mr. Desmond Traynor and his associates from in or about 1969 onwards.

The reference in Term of Reference (i) to 'the accounts referred to at (b)' should be understood in the same way to refer to the two classes of accounts mentioned at (b), that is the Ansbacher accounts as a whole and any other bank accounts discovered by the Tribunal to be for the benefit or in the name of Mr. Charles Haughey and as otherwise set forth in that particular Term of Reference.

Under Term of Reference (i) the ambit of the Tribunal's inquiry embraces the source of money in, inter alia, the Ansbacher accounts for the purpose of ascertaining whether any public office holder for whose benefit money was so held in those accounts did anything in the course of his or her public office to confer any benefit on any person who was the source of that money or directed any person to do such an act.

Under Term of Reference (b), an inquiry into the source of money in the Ansbacher accounts may be warranted in the case of a ministerial office holder regardless of any connection between the activities of that ministerial office holder and the person who was the source of the money.

On the other hand, where Term of Reference (i) is concerned, it would not be appropriate to conduct an inquiry in public into the source of money into the Ansbacher accounts for the benefit of a non ministerial holder of public office regardless of any such connection. Under Term of Reference (i), the Tribunal envisages that evidence could not be led in public concerning the source of money held in the Ansbacher accounts for the benefit of a public office holder unless it was appropriate also to lead evidence in public as to whether that public office holder had done anything in the course of his or her public office to confer any benefit on that source of that money.

That is not to say, however, that a public office holder who becomes involved with the workings of the Tribunal may not wish, in giving a good account of himself or herself, to give evidence as to the source of any such monies."

CONSEQUENCES OF NON-ATTENDANCE OF MR. MICHAEL ANDERSEN AND OTHER MATTERS

2.09 The occasion of this Ruling followed a period in the Tribunal's inquiries and sittings in which it had become apparent that there was virtually no prospect of Mr. Michael Andersen, the principal of the firm of Danish consultants engaged in relation to the GSM process attending to testify at public sittings,

notwithstanding the expressed wishes of both the Tribunal and the persons and entities primarily involved in the relevant hearings that he should do so. Written submissions and other views were conveyed to the Tribunal on both that matter and other related concerns that had arisen in the course of the GSM evidence, including the involvement of the economist, Mr. Peter Bacon, in aid of the Tribunal, as well as the duration of the entire Tribunal process. In response to these matters, the Tribunal issued its Ruling of 29th September, 2005, which, while explicit that no final conclusions or findings of fact had been made, sought to address the concerns that had been expressed, to set forth a provisional statement of how the matters canvassed were then viewed by the Tribunal, and to draw to the attention of the persons and entities involved what then appeared to be the main matters of concern to the Tribunal in its evaluation of the GSM evidence at that juncture. The Ruling is reproduced below:

**“RULING OF MR. JUSTICE MICHAEL
MORIARTY
SOLE MEMBER OF THE TRIBUNAL
OF INQUIRY**

29th September, 2005

1. Caution:

1.1 *In any ruling or response to any submissions in any Tribunal, no more than in any Court, there is always a danger that no matter what care is taken in the use of language certain expressions may be open to being construed as suggesting that final conclusions have been reached or final findings made. I wish to make it clear that I have reached no final conclusions nor made any final findings of fact nor formed any fixed opinions and this ruling should be read accordingly.*

2. Preliminary

2.1 *In these remarks I intend to deal with the submissions invited by the Tribunal in response to a request from Counsel for Mr. Denis O'Brien that I should express a view on the probable non-availability of Mr. Michael Andersen. In response to this invitation, submissions were received from Counsel for the Public Interest, Counsel for Telenor, Counsel for Mr. Michael Lowry and Counsel for Mr. Denis O'Brien. Counsel for the Department, whilst reserving the position of the Department made a proposal concerning the procedure the Tribunal might adopt in its continuing sittings, a proposal to which I will return below. Mr. Denis O'Brien and Mr. Michael Lowry (in submissions with which Counsel for Mr. Dermot Desmond and IIU agreed, although not making substantive submissions and ultimately reserving their position) and to a lesser*

degree Telenor, raised other matters, primarily contentions of breach of fair procedures on the part of the Tribunal notably, inordinate and inexcusable delay. Additional matters were also raised with respect to the proposed evidence of Mr. Peter Bacon in resumed public sittings. Although not related to the question upon which the Tribunal invited submissions, I propose to address all of these additional matters in broad terms in the course of these remarks.

3. Duration of the Tribunal

3.1 Firstly, lest references in the course of these submissions to an indeterminate eight year duration of the Inquiry with no prospect of finality be ascribed weight certain factors should be borne in mind. These remarks were made in the context of submissions in connection with the portion of the Tribunal's inquiries dealing with the GSM process. As the Tribunal's inquiries into that process did not commence until in or about May, 2001 the references to that extensive period are of course inaccurate.

3.2 In addressing the complaint of delay, the extended duration of the Tribunal has to be considered, firstly, in the context of all of the work upon which it has been engaged since October of 1997 and, secondly, in the particular context of the inquiries relating to Mr. Michael Lowry, to which the GSM portion of the Tribunal's public sittings relates specifically. The Terms of Reference of this Tribunal are very extensive, and to date have involved a number of wide-ranging, although interdependent, inquiries, each of which in itself might have warranted a full-scale Tribunal of a more limited duration. The inquiries concerning Mr. Charles J. Haughey involved, firstly, the examination of his bank accounts and other sources of income; secondly, an inquiry into aspects of the operation of Ansbacher Bank within this jurisdiction and the role of the Central Bank in relation to those activities; thirdly, the examination of the conduct of the Leader's Allowance Account in connection with payments to Mr. Haughey; fourthly, the examination of Mr. Haughey's relations with the Revenue Commissioners. To this must be added those aspects of the Tribunal's inquiries concerned with Mr. Michael Lowry.

3.3 On three occasions since the commencement of its work the Tribunal has been obliged to respond to substantive legal challenges. These arose from Court proceedings instituted by Mr. Charles Haughey, Mr. Dermot Desmond and Mr. Denis O'Brien. While not suggesting that any of these individuals were not entitled to avail of their legal right of access to the Courts to challenge any of the Tribunal's procedures or proceedings, the litigation which ensued consumed a significant amount of the Tribunal's

time and resources. From shortly after the Tribunal's work commenced, Mr. Haughey's litigation, in the form of a constitutional challenge involving both the Tribunal and the State absorbed the preponderance of 1998 and precluded the commencement of public sittings proper until before the end of January of 1999. Thereafter the Tribunal's hearings, concerned with payments to Mr. Haughey, the operation of the Ansbacher accounts, the Leader's Allowance and Mr. Haughey's dealings with the Revenue Commissioners, were more or less concluded by the 30th May, 2001, retarded of course by the unavoidable health issues concerning Mr. Haughey.

3.4 The Inquiry's dealings with Mr. Lowry's affairs have undoubtedly been the longest and most extensive of those to date undertaken by the Tribunal. The evolution of those inquiries has been alluded to in litigation in which the Tribunal has been involved during the conduct of those inquiries and while it has also been referred to from time to time in the course of the Tribunal's public sittings, it is appropriate that it should be referred to extensively at this point in the context of what I propose to say below concerning the approach to be adopted to the conclusion of those hearings.

3.5 The Tribunal's first public sittings dealing substantively with the Terms of Reference applicable to Mr. Michael Lowry commenced on the 22nd of June, 1999. The duration of those sittings was a mere five days. Having regard to the evidence given it seemed reasonable to infer that the bulk of the Tribunal's work in relation to Mr. Michael Lowry had been concluded in those sessions. Of the matters outstanding at that time the most substantive, and the only one which at that stage it could definitively be predicted would involve public sittings was Term of Reference (j) relating to the collection of income tax by the Revenue Commissioners. In an Opening Statement delivered on the 22nd June, 1999 it was stated that in endeavouring to establish whether any substantive payments were made to Mr. Lowry and in endeavouring to establish the source of funds held in Mr. Lowry's bank accounts, the Tribunal had sought to assemble all of the available financial information concerning Mr. Lowry's affairs and that to that end, it had sought, and (as far the Tribunal understood) been given full access to all information regarding Mr. Lowry's accounts, both his accounts within the State and accounts he held off-shore. In the course of hearings on that day, evidence was given by Mr. Denis O'Connor, who agreed that he had been retained by Mr. Lowry in 1996 to carry out a full review of Mr. Lowry's financial affairs and to reconstruct and to prepare a record of his finances, and that, in carrying out his work, he had been given full access to all information regarding Mr. Lowry's

finances including all accounts held by him in banks within the State and off-shore. It should be noted, at this point, that of the matters listed by the Tribunal as warranting attention, the last itemised was the purchase of a property at Carysfort Avenue in Blackrock by Mr. Lowry. The relevant witnesses in connection with the Tribunal's inquiries relating to Mr. Lowry at that stage had concluded their testimony by 23rd June, 1999.

3.6 *On Monday the 18th of December, 2000, the Tribunal resumed public sittings to hear evidence connected, in the main, as it was put in the Opening Statement, with the Revenue Commissioners. Evidence dealing with Mr. Lowry's relationship with the Revenue Commissioners was not reached until the 23rd of March, 2001. The evidence thereafter given was considerably truncated due to a problem which arose concerning the extent to which it was either fair or appropriate to proceed with a public examination of Mr. Lowry's dealings with the Revenue Commissioners in circumstances where he was actively involved with the Revenue Commissioners in endeavouring to resolve a number of outstanding difficulties. It was also felt that apart from any question of appropriateness or fairness, the public intervention of the Tribunal at that stage might not be helpful to the expeditious conclusion of Mr. Lowry's personal income tax dealings.*

3.7 *By the time the Tribunal had resumed sittings in May of 2001, a significant amount of new information had become available concerning a number of financial and property transactions which appeared to involve Mr. Lowry and with which certain other individuals appeared to be connected in one way or another. These individuals were the late Mr. David Austin, Mr. Aidan Phelan, Mr. Kevin Phelan, Mr. Denis O'Brien and Mr. Christopher Vaughan. By that time, there had also come to the attention of the Tribunal, through media reports, the broad details regarding what has come to be known as the Telenor/ESAT \$50,000.00 payment intended for the Fine Gael Party.*

3.8 *As I have already indicated above, the Carysfort transaction had already been mentioned in the course of the Tribunal's proceedings, and it was effectively the last of the matters dealt with in the course of what the Tribunal believed to be its concluding hearings concerning Mr. Lowry's financial affairs. No mention had been made by Mr. Lowry, or Mr. O'Connor, of the fact of Mr. Lowry having received a loan of £147,000.00 to pay for repairs and renovations to that property. Nor had any reference been made by Mr. Lowry or Mr. O'Connor to the role of Mr. David Austin in connection with this sum of money. Nor was any information made available to the Tribunal concerning the circumstances*

surrounding the payment of £147,000.00 into an off-shore account of Mr. Lowry's in the Isle of Man, the payment having been transmitted from an off-shore account of Mr. David Austin in the Channel Islands.

3.9 The Cheadle and Mansfield transactions likewise had not been brought to the attention of the Tribunal in the course of the original examination of Mr. Lowry's financial affairs or at any relevant time thereafter until the Tribunal, by other means learned of the details of the transactions. Indeed, these transactions were in train both while the Tribunal was engaged in private investigations and while it continued to hear evidence concerning Mr. Lowry's financial affairs including in particular his dealings with the Revenue Commissioners.

3.10 A thread running through all of the Tribunal's inquiries in these matters and which will require special consideration, is not merely the need to review the earlier evidence, in the light of the later or newer evidence but in so reviewing it to consider the manner in which the additional or new evidence came to light and, also, to consider whether steps had been taken to prevent new evidence coming to light so as to conceal the true nature of the relationships of the individuals involved in these transactions.

3.11 The Tribunal's inquiries into the \$50,000.00 Telenor/ESAT payment involved not merely the payment itself but the apparently covert route by which the money was transferred from Telenor to an off-shore account of Mr. David Austin, the initial rejection by Fine Gael of this payment and subsequently the apparently secretive manner in which the payment, disguised as an altogether different donation, was transmitted to Fine Gael. In the course of the Tribunal's private investigatory work in relation to this payment, it came to light that an internal inquiry had been conducted by persons involved in the initial public offering (IPO) of shares in ESAT Telecom in 1997, a public offering the main attraction of which was the ESAT Telecom holding in ESAT Digifone. This inquiry involved not just directors of ESAT Telecom but also the representatives of the shareholders in ESAT Digifone namely, of Mr. Denis O'Brien's interests, the interests of Mr. Dermot Desmond and of Telenor. In the course of that private investigatory work, the Tribunal was informed by Mr. Barry Moloney (although not by anyone else) of remarks made to him by Mr. Denis O'Brien concerning two £100,000.00 payments one of which was referable (as has been confirmed both by Mr. Moloney and by Mr. O'Brien) to Mr. Michael Lowry.

3.12 *In a further Opening Statement on 14th June, 2001, it became necessary to refer to this additional material obtained from Mr. Moloney, and to the need to conduct a much more wide reaching inquiry into the events surrounding the 1997 IPO. By October of that year, the Tribunal had embarked on the examination of another payment which came to light in the course of public sittings connected with the IPO. This involved share transactions connected with Mr. David Austin and as was pointed out at page 19 of Day 41 of the transcript of the Tribunal's public sittings, the task for the Tribunal was to endeavour, so far as practicable, to establish the true nature of the transaction involving some 12,000 shares and to endeavour to establish whether in the light of an apparent conflict between Mr. O'Brien's evidence and Mr. Aidan Phelan's evidence, the purchase of these shares in Mr. Austin's name was in error; whether a transaction which on its face resulted in the benefit to Mr. Austin of some \$300,000.00 was not erroneous or whether in fact it was intended to confer a benefit on Mr. Austin, and whether there were any connections between such a transaction and other payments to Mr. Austin which appeared to have links to Mr. Lowry.*

3.13 *The Tribunal's sittings in 2001/2002 were concerned with the examination of the IPO, with the Carysfort loan and with the Cheadle and Mansfield transactions. In the course of examination of those matters, the file of Mr. Christopher Vaughan, Solicitor, was made available to the Tribunal. In 2002, certain correspondence was brought to the attention of the Tribunal, which warranted a certain focus on Mr. Vaughan's role in handling the Mansfield and Cheadle transactions and in particular, certain correspondence appearing to suggest, firstly, the involvement of Mr. Michael Lowry and, secondly, an attempt to conceal that involvement. This correspondence, described in the course of the evidence as the long form/short form letters was touched on in July, 2002. One of the features of the Tribunal's inquiries in connection with the Cheadle and Mansfield transactions was the mention on a number of occasions of what has now come to be known as the Doncaster transaction. This, according to information and evidence given to the Tribunal by both Mr. Lowry and Mr. O'Brien was exclusively an O'Brien interest.*

3.14 *It will be recalled that the Tribunal's inquiries into the transaction were prompted in the first instance by the publication in the Irish Times of the contents of a letter of September, 1998 from Mr. Christopher Vaughan to Michael Lowry suggesting an involvement by Mr. Michael Lowry in the Doncaster transaction. What the Tribunal has since learned is that this letter appears to have been produced in London in the course of*

mediation proceedings in 2002 connected with the purchase of the Doncaster Rovers Stadium property. It would appear therefore that from that date, whatever the position may have been prior to that date, the existence of this letter and the contents of it were known to Mr. O'Brien and those agents of his acting in connection with the mediation. From other information made available to the Tribunal, it would appear that in the course of preparations being made by English Lawyers for the mediation (and related litigation), there had been references to an involvement on the part of Mr. Michael Lowry in the Doncaster transaction. These references were attributed to Mr. Denis O'Connor. The letter of the 25th September, 1998 from Mr. Christopher Vaughan to Mr. Michael Lowry together with the other references to Mr. Lowry's involvement in the Doncaster transaction were referred to in an Opening Statement on 15th September, 2004. It will be recalled that, although this letter had at the very latest come to the knowledge of Mr. O'Brien and presumably a number of his advisers and assistants in 2002, at no point in the course of any evidence given in that year in connection with the not dissimilar long form/short form letters was any reference made either by Mr. O'Brien or Mr. Lowry or Mr. O'Connor to the letter of the 25th of September, 1998.

3.15 In the Opening Statement made in September, 2004, the Tribunal alluded to the fact that the examination of the evidence connected with the Doncaster transaction would involve a re-examination of all previous evidence concerning English property transactions. Public sittings concerning the Doncaster transaction must now await the High Court Order in proceedings instituted by Mr. O'Brien to restrain the Tribunal from examining the Doncaster transaction. Those proceedings have been unsuccessful but until an Order of the High Court is made and the question whether any such Order is to be appealed is disposed of, it would be preferable to limit references to the Doncaster transaction.

3.16 One of the questions which will ultimately fall to be determined is whether, regardless of any other conclusions I may reach, all of the additional material which has come to light since 1998 could have been - and if so ought to have been - brought to the attention of the Tribunal prior to that date, and if so, to what extent and by whom. What is clear is that, had that material been brought to the attention of the Tribunal, a considerable amount of time and effort might have been saved in dealing with the business of the Tribunal since that date in 2001.

3.17 One of the features of all of this material, from the information regarding the \$50,000.00 Telenor/ESAT payment, the Carysfort transaction and

the related £147,000.00 loan from Mr. Austin, the Doncaster, Cheadle and Mansfield transactions is, as has been pointed out in Opening Statements, the apparent connections between individuals, all of whom were involved or connected with the ESAT Digifone bid for the GSM II licence. A further dimension of this sequence of transactions, which is explored in the course of the inquiry and which will have to be addressed in any conclusions I may reach, concerns a statement attributed to Mr. O'Brien in the course of the internal inquisition at the time of the IPO that he had contemplated a payment to Mr. Lowry and that he had in his mind earmarked money for that purpose in Woodchester but that that money, to use the expression recorded at the time, "got stuck" with an "intermediary". It will be recalled that in the course of the IPO internal inquisition queries were raised concerning movements on Mr. O'Brien's account. Sometime shortly before the time of that inquisition, but not disclosed to the inquisition, there had been a transfer out of an account in Woodchester under the control of Mr. O'Brien, the RINV account, of a sum of £407,000. It appears that this money was transmitted, at the direction of Mr. Aidan Phelan, to an account opened for the purpose of receiving it in the Isle of Man. Amongst a number of allocations from this account the sum of £50,000 firstly and secondly the sum of £100,000 were transmitted to an account opened by Mr. David Austin in the Channel Islands, again, opened specifically for the purposes of receiving these monies. The Tribunal has been informed by Mr. Denis O'Brien that these monies were transmitted to Mr. David Austin in consideration of the sale by Mr. Austin of a townhouse he owned in Spain, to Mr. O'Brien. These monies paid to Mr. Austin by Mr. O'Brien were then transmitted (in fact £147,000 of the funds, not the entire £150,000) to an undisclosed off-shore account of Mr. Lowry in the Isle of Man, opened, at a time when he was still a Minister, and apparently expressly for the purpose of receiving these funds. According to Mr. Lowry these funds were to be used in the renovation of his Carysfort Avenue property. However, sometime shortly after a contract was entered into for the renovation of that property the entire transaction was reversed, in fact on the day of the establishment of the McCracken Tribunal by the re-transfer of those monies back to the Channel Island account in the name of Mr. Austin where they appear to have remained. One of the questions that arises in light of the remarks made by Mr. O'Brien in the course of the IPO inquisition, is whether the subsequent property transactions, namely, Doncaster, Cheadle and Mansfield (and the related financial transactions) were intended as a substitution for the payment that 'got stuck', i.e., for the £147,000 payment that was reversed (if that is an appropriate conclusion to reach in relation to that payment); and/or whether all of those transactions from the reversed Carysfort transaction

onwards were part of a train of transactions related to the conferral of a benefit on Mr. Michael Lowry.

4. The GSM II Process

4.1 While undoubtedly always recognised as a major decision involving Mr. Michael Lowry, and therefore as something potentially likely to be of interest to the Tribunal, the Tribunal's extensive inquiries into the GSM II process were prompted by the connections between the individuals apparently involved in the financial and property transactions mentioned above and the ESAT Digifone bid for the GSM licence.

4.2 From general knowledge of the process, gleaned from press reports and to some extent from parliamentary debates, the GSM process appeared to have been a seamless and technically irreproachable one, a process that was bound inexorably to reach an objective conclusion, one that had been described as being effectively hermetically sealed from outside interference. In order to understand the process, the Tribunal felt it was necessary to embark first upon an exhaustive preliminary investigation followed by lengthy public hearings with a view to elucidating the evolution of the scoring system, and of the evaluation structure proceeding to the actual conduct of the evaluation, followed by the negotiation of the licence. In examining the process, the Tribunal has set its face against endeavouring to substitute its view for the views of the evaluators as to the result of the competition. From the documents prepared by the PT GSM Team, from the information and documents provided by Mr. Michael Andersen, and from the evidence given by Officials connected with the process it appeared that the process may not have been as streamlined as at first it seemed. Moreover it appeared that the process did not proceed as seamlessly from the evolution of the evaluation structure to the ultimate result as may have appeared from public statements in the Dail and elsewhere concerning the conduct of the evaluation. It was clear from the Tribunal's preliminary examination, and from the evidence heard in the course of the Tribunal's sittings devoted to the GSM process, that the quantitative evaluation carried out, as initially envisaged by the evaluation model, resulted in a wholly different ranking to that ultimately adopted by the PT GSM. Apart from the fact that this suggested a less than streamlined process and a less than seamless evolution of the process from a substantive point of view, it warranted an extensive inquiry with a view to understanding the process.

4.3 The same goes for the alteration in the approach taken in the evaluation process to the measurement and scoring of the internal rate of return

(IRR). Without going into excessive detail, it would appear that the values submitted by the various applicants in respect of their IRRs were recalculated by the evaluator to reflect a ten year planning period, as opposed to a fifteen year period as was originally requested. While not entirely clear, it appears from the documentation available to the Tribunal that this was done because of inconsistencies in the manner in which one or more of the applicants had calculated IRR, although the applicant or applicants in question were never asked to correct the problem. One effect of this recalculation was to alter significantly the corresponding scores that each applicant was entitled to receive in respect of IRR. For the purposes of the Tribunal's inquiries, it was of particular interest that ESAT Digifone would only have been entitled to an E grade if scored on the IRR value submitted with their application, whereas, as a result of the recalculation, they were ultimately awarded an A. Once again, this underlined what appeared to me to be legitimately characterised as possible defects in the process.

4.4 What follows is an itemised, but not an exhaustive, list of the main aspects of the process covered in the course of the Tribunal's sittings:-

1. Development of a set of criteria;
2. Incorporation of the criteria in an RFP;
3. The retention of an expert;
4. The adoption of an evaluation model;
5. The adoption of a weighting system for the quantitative criteria;
6. The recasting of the competition in the light of the intervention of the European Commission;
7. The re-balancing of the weights;
8. The application of the evaluation model as adopted;
9. Difficulties encountered in the application of the model;
10. The course taken in response to these difficulties leading ultimately to what is described as the withering of the quantitative evaluation;
11. The re-balancing of the evaluation as a primarily qualitative evaluation;

12. *The application of weights to the qualitative evaluation;*
13. *The approach to scoring at various levels of the process and the different approaches to scoring adopted near the conclusion of the process;*
14. *The preparation of a final report;*

In addition the Tribunal also examined the following further matters, continuing the numbering above:-

15. *Contacts between the Minister and Civil Servants;*
16. *Contacts between the Minister, or his officials, with applicants or others;*
17. *The period of the negotiation of the Licence including also the issue that arose concerning the identification in the Dail and elsewhere of the proposed Licensee as defined in paragraph 3 of the RFP and the question concerning the difference between the persons so identified in the ESAT Digifone application and the make up of the proposed licensee at the time of the announcement of the result of the competition.*
18. *The composition and capital configuration of the Licensee at the time of the granting of the Licence.*

5. Submissions on Procedure to be followed in concluding examination of GSM II Process

- 5.1 *At this stage I should mention some of the remarks made by Counsel for the Department that the Tribunal should indicate how, regardless of Mr. Andersen, it intends to proceed to conclude the evidence in relation to the GSM II process. He has, as I understand it, effectively invited the Tribunal to indicate how it intends to proceed, along the lines of an Opening Statement given by the Tribunal on 1st April, 2003 in which the Tribunal refined the focus of its view of the process. I think at this time, also I should mention the submissions made by Mr. McGonigal on behalf of Mr. O'Brien to the effect that the Tribunal should set out the allegations it was making. He submitted that the Tribunal should now set forth what it believes to be any allegations which it says entitles it to continue with a public inquiry into the GSM licence. Mr. McGonigal also said that if that is done, then his client will be in a position where he can properly defend himself against any of those allegations by way of cross-examination, by calling witnesses or otherwise. He further submitted that the Tribunal has not indicated how it proposes to afford Mr. O'Brien the In re. Haughey*

rights to which he is entitled in the event that adverse findings are made against him.

5.2 In approaching these matters and in endeavouring to refine the focus of the Tribunal's inquiries I think it is important to emphasise that this Tribunal is not concerned with allegations, in the sense that it does not proceed from a set of allegations; it was not established to examine a set of allegations; and it was not established or mandated in its Terms of Reference to formulate a set of allegations to be examined in the course of its public sittings. It is in the purest sense an inquisitional or fact finding exercise. It is not involved in the administration of justice. As Denham J. explained in Lawlor v Flood [1999] 3 I.R 107 at 137:

"The difference between proceedings in Court (and being a party thereto) and a Tribunal of Inquiry to which a person is called to give evidence is important. The Tribunal hearing is not a criminal trial nor is it even a civil trial, nor is the person a party. The hearing is an inquiry to which the person is a witness."

In this connection, it is also useful to refer to the following passage in a recent ruling of the Blood Sunday Inquiry in which reliance was placed on the well known decision of the Supreme Court of Canada, in Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System) [1997] 3 S.C.R.440 as follows:-

"In this connection we have found assistance in the approach taken by the Supreme Court of Canada in Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System) 1997 3 S.C.R. 440, a case concerned with the Krever Inquiry into the blood system in Canada after many had contracted HIV and Hepatitis C from blood or blood products. Although the Act under which this Inquiry was being conducted differs in many respects from the Act under which we are operating, the observations of Cory J (who gave the judgment of the Court) at paragraphs 34-54 seem to us to have general application. As he pointed out, the findings of a commission of inquiry relating to an investigation are simply findings of fact and statements of opinion reached by the commission at the end of the day; and though they may affect public opinion, they are not and cannot be findings of criminal or civil responsibility".

5.3 While engaged in a fact-finding exercise, I recognise that the Tribunal is nevertheless bound by the principles enunciated in re: Haughey [1971] 1R 217. The procedures I have adopted to date have provided for

representation for persons affected by evidence given at this inquiry or likely to be given at this inquiry. I also wish to make it clear at this stage that, before reaching any conclusions on the evidence given at this inquiry, I intend to enunciate a procedure whereby persons likely to be affected by any adverse findings will be given notice of conclusions, which if reached, would be adverse to them, so as to enable them to make submissions in relation to those proposed conclusions. I would also envisage, so as to protect the interests of any such persons, that notice of any proposals to make any such adverse findings is given in writing, and not enunciated in public, thereby protecting persons in respect of whom such conclusions might ultimately not be reached from the risk of the promulgation of any such adverse findings. I would also envisage that submissions in relation to any such proposed adverse findings would be addressed to the Tribunal in writing so as once again to avoid unnecessary and potentially damaging publication. Depending on the circumstances, it may entail the recalling of certain witnesses for additional cross-examination as suggested by Mr. McGonigal.

5.4 Turning to the evidence given in connection with the conduct of the GSM Competition and the negotiation of the Licence, it may be reasonable to conclude that there were defects in the process. I recognise that no such process is or can be expected to be perfect. The presence of defects, even very serious defects is not necessarily evidence of improper intervention or interference in any such process. However, I have already alluded to the extent to which, in a number of respects, the evaluation model as originally envisaged may not have been followed. It is necessary to consider whether there were any significant deviations from the evaluation model which were prompted by outside interference or outside influence however slight. Drawing on some of the language used by Mr. Brennan in his evidence, interference or influence in this case may range from the stark or blunt type of interference to the mere massaging or nudging of a process. In this context my reference to outsiders embraces, (I do not think that this could be criticised by anyone affected by the inquiry), any individual outside of the GSM Project Group.

5.5 I now propose to list, though not perhaps at this stage in exhaustive detail, a number of matters which will ultimately require consideration and a finding of fact or an expression of opinion on my part as to whether they point to interference. The first such area concerns the strict cautions incorporated in the confidentiality protocol promulgated at the outset of the competition. It was detailed in a memo of Mr. Brennan dated 6th March, 1995, following a meeting of the GSM Project Group. The memo states:

“We agreed that as a matter of prudence, contacts with potential bidders should respect the following ground rules;

- 1. Always at least two people present on our side.*
- 2. Always stress that discussion is by way of informal clarification subject to formalisation in the written information round provided for in the competition.*
- 3. Always produce a brief record of attendance and discussion.*
- 4. As a general rule, contact to be “in the office” and thus avoiding social exchanges which, almost by definition, cannot be controlled.*

5.6 This protocol was designed to protect the process from interference. Obviously its effectiveness was dependent on strict adherence to its terms of the protocol. Notwithstanding the terms of the protocol it would appear that there may have been the following significant breaches, subject to any further submission and most importantly, the evidence of Mr. Lowry;

- 1. A meeting between Mr. Lowry and Mr. Tony Boyle on 16th August, 1995 at the Killiney Castle Hotel;*
- 2. A phone conversation between Mr. Lowry and Mr. Fintan Towey in or about September, 1995 in which Mr. Lowry conveyed to Mr. Towey certain apprehensions he had based on representations he had received from interests connected with the process. That conversation could be characterised as involving the conveying by Mr. Lowry of his state of mind regarding the outcome or potential outcome of the process;*
- 3. A meeting with Mr. Anthony JF O’Reilly at the opening of the Arcon Mine in or about 15th September, 1995 at which, if Mr. O’Reilly’s evidence is accepted, Mr. Lowry made reference to the process of the competition and the views of the evaluators concerning a presentation made by the Consortium with which Mr. O’Reilly was associated; suggesting, if Mr. O’Reilly’s evidence is accepted, that Mr. Lowry had access to information concerning the progress of the competition which went beyond mere pro forma accounts of the critical path of the process and may have included detailed information concerning either the evaluation of the Irish Cellular Telephones application or even other applications;*

4. *The evidence, of a meeting in Hartigans Public House on Sunday, 17th September, 1995 between Mr. Lowry and Mr. Denis O'Brien which, if certain descriptions of the meeting contained in evidence from and documents provided by Telenor were accepted, would suggest that Mr. Lowry had discussed the ESAT Digifone application and the views of the evaluators concerning the ESAT Digifone presentation, with Mr. O'Brien and furthermore that he may have made a suggestion as to how a perceived defect in the ESAT Digifone application could be rectified;*
 5. *If the evidence of Mr. Mark Fitzgerald is accepted concerning a meeting between himself and Mr. Lowry at the K Club on or about 16th October, 1995 and his evidence concerning a subsequent meeting with Mr. O'Brien, this would suggest that Mr. Lowry was in receipt of information concerning the views of the evaluators regarding the ESAT Digifone application;*
 6. *The evidence, if accepted, of Mr. Arthur Moran, Solicitor for Telenor, as evinced by his attendance note of 10th October, 1995, that Mr. Per Simonsen appears to have been aware not only of the intended or advertised date for the conclusion of the process, but the accelerated date, the actual date as agreed by the Minister and his officials;*
 7. *It would also appear that following the suspension of the original competition and prior to its being revamped on foot of the EU intervention, part of a document, a confidential letter from the relevant EU Commissioner, Commissioner Van Mert, to Mr. Michael Lowry, and containing what could be regarded as valuable information regarding the re-weighting of the evaluation criteria, was in the possession of Mr. Jarlath Burke, Chief Legal Counsel of ESAT Telecom, Mr. O'Brien's own company and an individual associated with aspects of the ESAT Telecom/Communicorp part of the ESAT Digifone Consortium. It has to be stated of course that this may have involved not so much the disclosure of confidential information from within the Department but the disclosure rather of such information from within the Commission.*
- 5.7 *Allied to these apparent deviations from the confidentiality protocol, or what might be termed indicators of the permeability of the process and of the extent to which the process was capable of being penetrated, in particular by the Minister, are the following further features of the competition which will in due course require special consideration:-*

- (i). *What was envisaged as a three stage process embracing a quantitative, qualitative and ultimately a combined quantitative and qualitative evaluation appears to have been abandoned in favour of a somewhat loosely contrived qualitative evaluation embracing some individual elements of the original quantitative measurements. While it would not be appropriate at this point to conclude even tentatively that this was a defect in the process it seems reasonable to suggest that it may have undermined the integrity of the process as originally envisaged. Whether it is indeed even appropriate to describe this as a deviation, without more, from the original process as yet awaits a conclusion and is something upon which ultimately there will no doubt be submissions. At the same time, it appeared to prompt an adaptation of the process to the new situation, resulting in an approach to the weighting of the qualitative evaluation or at least the subdivision of the weightings in the qualitative evaluation, in Copenhagen, in or about the 28th / 29th September, 1995, in a way which did not involve a consensus of all of the Project Team.*
- (ii). *At Copenhagen a tentative scoring or ranking was proposed. However, according to the evidence of Mr. Brennan and Mr. Towey they were unable to recognise a ranking. At that point two steps were taken with a view to clarifying the grading on the one hand, and secondly the ranking or scoring of the applications. The order in which these steps were taken is not clear, but from the evidence it would appear that it was at Copenhagen that the weighting of the three subdivisions of the primary criterion, in Tables 17 and 18 of the first draft of the Evaluation Report, was distributed equally. In numerical terms they each were accorded a weighting of ten. This appears to be the first time that an overall qualitative weighting had been applied, or at least the first time that a subdivision of the weights applicable to the various elements of the different criteria was applied in the context of the qualitative evaluation. It appears that this subdivision of the weights was inconsistent with the original evaluation model. If the subdivision of the weights applicable to the quantitative model were to be transposed to the qualitative model it appears that, whereas the subdivisions of the weightings applicable to the quantitative model had been agreed by the entire Project Team, there had been no similar consideration of any such subdivision by the entire Project Team in the context of the qualitative evaluation;*

nor of course any consensus as to the subdivision. A further concern is that it appears that the report may have been drafted so as to obscure such inconsistency and suggest such consensus.

- (iii). It would appear that prior to the communication of this tentative first draft result to the Project Team the ranking had been communicated to the Minister who, if the evidence of Mr. McMahon's notes is accepted, directed that the process thereafter be accelerated.*
- (iv). From this point onwards there appears to have been, on the one hand, both a certain acceleration of the process, and on the other, a degree of confusion on the part of a number of members of the Project Team concerning the course the process had taken, and the steps required to conclude the process, together with certain reservations concerning both the acceleration of the process and the manner in which the scoring and ranking had been concluded. In general I will be obliged to address myself, in reaching any conclusions concerning the latter part of the competition, to the question whether, by reason of the acceleration of the process or any other interventions by the Minister one of which will be referred to below, there was a reluctance or a certain disinterest on the part of officials to scrutinise certain aspects, and more specifically certain weaknesses in either of the leading two applications.*
- (v). One of the matters to which I will be obliged to address my attention is whether I should in considering this aspect of the process attach significance to the evidence, primarily from the notes of Ms. Margaret O'Keeffe, that the Minister may have intervened intimately in the deliberations of the Project Team by urging Mr. Brennan to ensure that the Report, as the note put it, did not argue against itself, suggesting an approach which may have disregarded the tenor of Appendix 10 proposed by Mr. Andersen, and further by proposing an alternative solution, characterised by the use of the expression "bankability" to dispose of the issues identified in Appendix 10.*
- (vi). In due course it will be necessary, subject, most critically to the evidence of Mr. Lowry, to consider whether the manner in which the result was brought to Government avoided scrutiny which a more orthodox approach to the adoption of the Report might*

have entailed. In this context it will be important to determine to what extent attention should be paid to the remarks of Mr. Greg Sparks.

- (vii). *I have already alluded to the evidence of a meeting between Mr. O'Brien and Mr. Lowry in Hartigans Public House on 17th September, 1995 and a question upon which I will be obliged to reach a conclusion is as to whether, and if so to what extent, the involvement of IIU or of Mr. Dermot Desmond was discussed at that meeting, and further the extent to which any such discussions were reflected in steps taken between 18th September, 1995 and 29th September, 1995 to substitute IIU/Mr. Dermot Desmond for the four financial institutions notified in the bid document.*
- (viii). *Particular attention will be paid to the period between the announcement of the winners of the competition and the actual formal granting of the Licence. While the competition was designed to identify a candidate for a Licence, to whom the State was prepared to grant an exclusive negotiation privilege, considerable controversy arose, in particular in late 1995 and early 1996 concerning the identity of the competition winners, and whether the exclusive negotiation privilege had been granted to an entity other than that which had been evaluated.*

5.8 *I think it appropriate that I should mention that a number of matters dealt with in the course of the evidence would not now appear to me, subject to what may transpire during the remainder of the Tribunal's work, to warrant further consideration as indicators of any interference or any intervention in the process by the Minister or any outside third party. This is not to say that the same conclusion could not be reached in relation to any of the matters mentioned above. However, in relation to these matters it is possible to be rather more definitive at this stage and I think it only right that they should be set out. They are as follows:-*

- a. *The extent to which the intervention of the EU and the consequent delay, which may have benefited some applicants, was in any way prompted by any improper intervention by any outside third party.*
- b. *The change in the manner of the measurement and scoring of IRR, which appear to have benefited certain applicants but which, so far as I can see, from the evidence to date, arose purely fortuitously.*

- c *The extent to which ESB was obliged by the Minister to facilitate the State's conclusion of licence negotiations with ESAT Digifone although ESB was itself a participant in another consortium, which was unknown to it ranked in second place.*

6. Proposal to introduce Evidence of Mr. Peter Bacon

6.1 *At this juncture I want to refer to the Tribunal's proposal to hear the evidence of Mr. Bacon. Before doing so I wish to deal with a submission that because I have been in receipt of reports or opinions from Mr. Bacon I have abdicated my responsibility, a responsibility that is mine alone, to reach conclusions on the evidence, to an outsider. It has also been submitted that the access to Mr. Bacon's expertise enjoyed by the Tribunal without witnesses having had similar access was an unfair procedure. These submissions are misconceived for the following reasons. The Tribunal is not engaged in an adversarial contest with persons affected or likely to be affected by evidence given at its public hearings. Nor is it engaged in an adversarial contest with witnesses testifying at those public hearings. The Tribunal is engaged in a fact finding exercise. The presentation of evidence directed to that end is a matter solely for me.*

6.2 *The private investigative phase of the Tribunal's work enables me to arrange and to configure material for presentation at the Tribunal's public hearings in a way which is best suited to achieving the ends set out in the Tribunal's Terms of Reference. The fact that in the course of the private investigative work I may have obtained some assistance in considering the material does not mean that I have substituted the views of experts or others for my own views. By reason of my training and experience as a Barrister and as a Judge I am keenly aware of the difference between evidence upon which my determinations must exclusively be based and any other information I may have obtained in the course of the private investigations I have carried out, or otherwise. As will appear below there was no question of Mr. Bacon's views being substituted for my views and further, as will appear, the line of questioning adopted by the Tribunal was devised exclusively under my supervision and without regard to Mr. Bacon's views. This is not to say that I did not regard the contact with Mr. Bacon as being of value. It is for me however to decide to what extent information obtained in the course of the private investigative phase should, if at all, be ventilated in public as part of the Tribunal's public sittings.*

6.3 *To this end I think that I should indicate in broad terms how Mr. Bacon became involved with the Tribunal. The Tribunal in the course of the*

preliminary private investigative stage in connection with the examination of the GSM process developed a number of lines of inquiry concerning aspects of the evaluation process. These were based on a common sense approach to the evaluation process and to the contents of documentation provided by the Department, including the draft evaluation reports and the final evaluation report. They were informed by a very close scrutiny of the draft reports and the final report and the computations upon which they were based.

- 6.4 During the Tribunal's private examination of this matter, the Tribunal's grasp of technical matters (i.e., technical aspects of the process as opposed to the technical aspects of cell phone technology) was informed by assistance and guidance provided by the officials involved in the PT GSM and by Mr. Michael Andersen and one of his colleagues. I was anxious to ensure that the approach being adopted was not based on a simplistic appreciation of the technical aspects of the evaluation. For this reason Mr. Bacon's services were retained. By that time, the Tribunal's appreciation of the technicalities of the evaluation was quite highly developed.
- 6.5 Mr. Peter Bacon's first report arose from information identified by the Tribunal. Once his Report was received in or about March of 2003, the question whether it would be necessary to introduce expert evidence was considered. A decision on that matter was deferred at that point. Having concluded the bulk of the technical evidence in relation to the GSM process, it was considered desirable to have the assistance of an expert. The Tribunal's request to Mr. Bacon for a report to be introduced at public hearings as expert evidence by him was based on the lines of inquiry developed by the Tribunal and on his Report of March, 2003.
- 6.6 It is my view, therefore, subject to any submission which may be made, that if conclusions are to be drawn having regard to the line of questioning pursued by the Tribunal in dealing with technical matters it would be of value to have the evidence of an expert.
- 6.7 I understand Mr. Bacon to be an expert in this area. Like Mr. Andersen, he is an Economist by training with, like Mr. Andersen also, a background in Government service. While he has not conducted a competition of the GSM II type, i.e., a competition to identify a first private enterprise competitor to a Semi-State organisation in a particular communications arena, he has experience of competition processes, including a number in the telecoms/IT area. He has not been asked to conduct an audit of the GSM II process. Nor has he been requested to examine the evaluation with a view to concluding whether the correct result was

reached by the evaluators. He has however examined aspects of the evaluation methodology and the way in which that methodology was applied. He has been directed to and has agreed to provide responses to a number of questions crafted along the lines of the questioning pursued with officials involved in the PTGSM. It is important that his evidence, if adduced, should be subject to scrutiny by Counsel for those persons likely to be affected by any conclusion which could be critical of the process and in particular, by Counsel for the Department.

7. Absence of Mr. Michael Andersen

- 7.1** Mr. Andersen assisted the Tribunal during its initial investigative work. He attended a series of private meetings with members of the Tribunal legal team; he provided an initial report for the assistance of the Tribunal outlining the evaluation process (the cost of which was met by the Department); and through his Solicitors he furnished written responses to various queries raised by the Tribunal. All of this assistance was provided over a twelve month period from June, 2001 to June, 2002. During that time the Tribunal understands that Mr. Andersen was also engaged in consultancy services on behalf of AMI with the Communications Regulator.
- 7.2** In June, 2002, AMI's Solicitors requested a meeting with the Tribunal legal team which was also attended by Ms. L. Bork of AMI. The Tribunal was informed that Mr. Andersen had sold his interest in AMI to a Norwegian company, Merkantildata, and that in providing assistance to the Tribunal over the previous twelve months he had been acting as a consultant to AMI and that his fees for such assistance had been discharged by AMI. Merkantildata had decided to dispose of its interest in AMI, and the Tribunal was informed that it did not intend to incur any further expense in connection with Mr. Andersen's assistance to the Tribunal, in the absence of a full Indemnity or guarantee from the Tribunal, in relation to its continuing costs, including Mr. Andersen's ongoing consultancy fees.
- 7.3** The Tribunal did not consider that it was in a position to provide such a wide ranging indemnity to AMI, and it proceeded to correspond directly with Mr. Andersen and with his Solicitors in Denmark, Bech Bruun Dragsted, with a view to securing Mr. Andersen's assistance in his personal capacity. Mr. Andersen's response to that request was that he was in dispute with Merkantildata in relation to their acquisition of his interest in AMI and that any assistance he might provide to the Tribunal personally would be treated by AMI/Merkantildata as an acknowledgement by him of a liability for the consultancy fees that he

had been paid in respect of the assistance provided to the Tribunal from June, 2001 to June, 2002.

- 7.4** *In an effort to meet Mr. Andersen's stated concerns, the Tribunal took the matter up with AMI/Merkantildata's Irish Solicitors and this resulted in confirmation from AMI/Merkantildata, by letter of 5th December, 2002, they did not wish in anyway to obstruct Mr. Andersen giving evidence; that they understood that the Tribunal was seeking assistance from Mr. Andersen in his personal capacity; that they had no objections; and that it was a personal matter for Mr. Andersen.*
- 7.5** *As the above confirmation appeared to the Tribunal to meet Mr. Andersen's apparent concerns, the Tribunal forwarded a copy of that letter to his Solicitors and asked them to confirm that in the light of its contents Mr. Andersen would be agreeable to attending to give evidence at public sittings. Mr. Andersen was not satisfied by that confirmation. The Tribunal was informed that his position had not altered but that he did not rule out the possibility of assisting the Tribunal once the financial and legal issues with AMI/Merkantildata, which had been referred to a commercial arbitrator in Denmark, had been resolved.*
- 7.6** *In July, 2003 the Tribunal renewed its efforts to secure Mr. Andersen's agreement to attend at public sittings and wrote to his Solicitors, on 29th July, 2003, clarifying the extent to which the Tribunal was agreeable to meeting Mr. Andersen's legal and incidental costs and again referring to the letter of 5th December, 2002 from AMI/Merkantildata, in which they had confirmed that they had no objection to Mr. Andersen assisting the Tribunal personally and that they accepted that it was a personal matter for Mr. Andersen. This approach did not advance matters as Mr. Andersen's Solicitors reiterated that he would not be in a position to assist the Tribunal until the disputes between himself and AMI/Merkantildata had been resolved, and that a decision from the Court of Arbitration was expected at the beginning of 2004 at the earliest.*
- 7.7** *The Tribunal persisted in its efforts to deal with Mr. Andersen's concerns as explained to the Tribunal, and to encourage his attendance and by letter of 3rd October, 2003 wrote to Mr. Andersen indicating that it proposed seeking a detailed assurance from AMI/Merkantildata that any assistance rendered to the Tribunal by Mr. Andersen would not be understood by AMI/Merkantildata as an acknowledgement by him of a liability for the cost of the assistance rendered to the Tribunal prior to June, 2002. This proposal was not acceptable to Mr. Andersen, who continued to insist that he could not consider any request from the Tribunal until the completion of the pending arbitration.*

- 7.8 *By that time, the Solicitors for Mr. Denis O'Brien had made known to the Tribunal their view that in the absence of Mr. Andersen's evidence the Tribunal might not be able to continue its inquiries into the second GSM Licence and the Tribunal brought that matter to Mr. Andersen's attention and informed him that in the light of Mr. O'Brien's view, the Tribunal was obliged to endeavour to clarify the situation regarding Mr. Andersen's intentions.*
- 7.9 *Following that approach, Mr. Andersen agreed to meet with members of the Tribunal legal team in Copenhagen, and this was arranged for Wednesday, 29th October, 2003. The purpose of the meeting was in part to discuss the terms that might govern Mr. Andersen's future assistance to the Tribunal. In the course of the meeting it became apparent that in addition to the earlier preconditions of Mr. Andersen's assistance, namely, an indemnity in relation to his costs, and the postponement of any assistance until the completion of the commercial arbitration, he was now seeking a much broader indemnity from the State in respect of any claims against him, whether direct or indirect, arising out of the evidence he might give, or arising from any proceedings connected with the process leading to the granting of the second GSM Licence (such an indemnity to extend to Merkantildata, the then owners of AMI).*
- 7.10 *What was apparent from the Tribunal's dealings with Mr. Andersen, dating from June, 2002 was that his stated reasons for non-attendance as a witness to the Tribunal and the matters which he was stipulating as conditions to his attendance altered as each such condition appeared, at least to the Tribunal, to have been met. His initial objection was that his assistance to the Tribunal would be interpreted by AMI/Merkantildata as an assumption by him of liability for the consultancy fees which he had been paid for the assistance provided under the aegis of AMI from June, 2001 to June, 2002. When it appeared to the Tribunal that that concern had been met by the confirmation received from AMI/Merkantildata, by letter from their Solicitor dated 5th December, 2003, Mr. Andersen was not prepared to accept that such confirmation met his concerns, and he stipulated that he could not consider providing any assistance until the commercial arbitration pending between himself and AMI/Merkantildata was complete. When the Tribunal then sought to clarify the terms on which he would attend as a witness after the completion of the arbitration, a further condition was introduced, namely the furnishing of a blanket indemnity from the State in respect of any liability that Mr. Andersen might have, arising from evidence he might give to the Tribunal, or arising from any other proceedings connected with the second GSM evaluation process.*

7.11 The Tribunal proceeded to relay Mr. Andersen's requirement for an indemnity from the State to the Government. Following receipt of an opinion from Mr. Oluf Engell, of Hjejle, Gersted & Mogensen, that a procedure might be available under Danish Law whereby Mr. Andersen on a request from the Irish Authorities might be compelled to attend before the Danish Courts for the purposes of giving evidence, the Government decided that it would defer a decision on Mr. Andersen's request for an indemnity pending the bringing of proceedings before the Danish Courts to seek to compel the provision of Mr. Andersen's evidence.

7.12 The Tribunal also retained Mr. Engell to advise on the compellability of Mr. Andersen and the prospects of securing evidence through Danish Court process in a form which would be of assistance to the Tribunal. The Tribunal received an initial opinion, from Mr. Engell in May of 2004. In that opinion Mr. Engell emphasised that while there was a procedure that might be available at the behest of the Tribunal, there was no guarantee that the Danish Courts would act upon such a request, and that a successful outcome would depend on a novel development of Danish Law. There were a number of substantive and technical issues of concern to the Tribunal in relation to the procedure potentially open to it, and following Mr. Engell's initial opinion, there were a number of exchanges between the Tribunal and Mr. Engell addressed to those matters. Ultimately, Mr. Engell attended a consultation with the Sole Member and members of the Tribunal legal team in Dublin, in March, 2005. In order to ensure that there was no misunderstanding or confusion regarding Mr. Engell's advice, and in order to ensure that the Tribunal had a full understanding of all the issues, both substantive and technical, the Tribunal wrote to Mr. Engell on 7th April, 2005 setting out the Tribunal's precise understanding of the matters which had been discussed and of Mr. Engell's advice on those matters, and asked Mr. Engell to confirm that the Tribunal was correct in its understanding of all of the advices he had furnished, dating from May, 2004. By letter of 15th April, 2005 Mr. Engell confirmed that the matters set forth in the Tribunal's letter constituted a correct understanding of his advices.

7.13 It was apparent from Mr. Engell's advices that there was no realistic prospect of the Tribunal securing Mr. Andersen's evidence through procedures before the Danish Courts. The Tribunal accepted Mr. Engell's advices and conveyed the position to the Government, and the Government then proceeded to a decision that it would not grant the indemnity sought by Mr. Andersen.

- 7.14 *The Tribunal duly informed Mr. Andersen of the position and inquired as to whether notwithstanding he would be prepared to make himself available as a witness. The Tribunal received no response to its initial letter, and wrote again, informing Mr. Andersen that in the absence of a response to its previous correspondence the Tribunal would proceed on the assumption that he would not be attending to give evidence or otherwise assisting the Tribunal. The Tribunal has received no response from Mr. Andersen and has accordingly proceeded on that assumption.*
- 7.15 *I accept the legal submissions made on behalf of the Attorney General representing the Public Interest as to how I should be guided in approaching the question of the consequences of the absence of Mr. Andersen. I am fortified in that view by the principle that in criminal and civil cases, the death, or the mere absence, of a witness does not, in general terms, even in the case of a person facing a murder charge, compel the abortion of the legal process. This principle, in the context of inquiries conducted by a Tribunal established under the 1921 Act is exemplified in the passage from the judgment of Geoghegan J. in Goodman International v. Hamilton (No. 2) [1993] 3 I.R. 307, to which I was referred by Counsel for the Public Interest.*
- 7.16 *From this vantage point the absence of Mr. Michael Andersen does not constitute a basis for terminating the inquiry. Obviously, his absence may have an impact in relation to the Tribunal's capacity to reach certain conclusions or in relation to the confidence with which certain conclusions can be reached but it would be impossible at this stage to predict with any precision what conclusions might be liable to be so affected. A distinction has to be made between Mr. Andersen's Reports, i.e., the Evaluation Reports and the draft Evaluation Reports together with Mr. Andersen's audit of the evaluation process and advice or information provided by him to the Tribunal either at meetings or otherwise, in the course of the investigative process. The latter class of information, standing alone, could not now be taken into account or regarded as evidence for the purposes of any findings I may be obliged to make. That is not to say that it could not be used to form the basis of questions for witnesses. In particular, I see no reason why, subject to any submissions that may be made, it would not be appropriate that any such information should be put to Mr. Bacon for comment, or used in challenging any views expressed by him in evidence.*
- 7.17 *So far as the ultimate conclusions that I may have to reach, are concerned I may in due course require submissions as to whether Mr. Andersen's absence as a witness and in particular the conditions subject*

to which he has indicated a willingness to give evidence, warrant any criticism that might tend to reflect on the evaluation process.

7.18 I have considered the proposal of Counsel for Telenor, Mr. Fitzsimons, that Mr. Bacon be asked to speak with or make contact with Mr. Andersen. In the event of Mr. Andersen agreeing to this course the question arises whether Mr. Bacon's views as tempered or qualified, or otherwise affected by his dealings with Mr. Andersen could be regarded as evidence to which I should have regard. I feel that I am correct in assuming that no person likely to be affected by such evidence would be prepared to consent to such a course until Mr. Bacon had given evidence of the results of or the impact of any such contact and this strikes me as a course unlikely to be of practical benefit.

8. Further approach to the Government

8.1 It has been submitted that the Tribunal write to the Government to request the Government to revisit the issues of the provision of an indemnity. Having regard to the formal Government decision on the matter I do not think that there have been any material changes in the relevant circumstances upon which I could reasonably base a request to the Government to reconsider the matter.

9. Telenor proposal that Insurance be put in place

9.1 I have given consideration to the proposals put forward on behalf of Telenor that the Tribunal explore the possibility that an insurance arrangement could be put in place to satisfy Mr. Andersen's requirement for an indemnity. I have taken this matter up with the Government and in due course will make known the results of my own and the Government's deliberations.

10. Delay and cross-examination

10.1 In submissions made to the Tribunal on behalf of Mr. Denis O'Brien, it was suggested that the Tribunal has delayed unreasonably in concluding its inquiries into the licensing process, and that no explanation for such delay has been provided. While there has undoubtedly been a lapse of time between the conclusion of the Tribunal's last public sittings and its intended resumption on 21st September last, that delay occurred for reasons outside the control of the Tribunal. As persons with whom the Tribunal is dealing will be aware, the Tribunal had intended to deal with the balance of its inquiries into the process in conjunction with separate inquiries in relation to Doncaster Rovers Football Club. As there are witnesses common to both inquiries, notably Mr. Denis O'Brien and Mr.

Michael Lowry, it seemed sensible to the Tribunal and fairer to those witnesses (who had already given evidence on previous occasions) to hear the entire of the balance of their evidence in relation to both matters at the one sitting. The Tribunal commenced sittings on 15th September of 2004 to deal initially with the Doncaster Rovers Football Club matter, and to move on to hear evidence in relation to the outstanding aspects of the GSM inquiry. The Tribunal was also mindful of the need to dispose of its sittings in relation to the Doncaster Rovers Football Club matter as it was concerned about the availability of witnesses who were outside the jurisdiction and whose attendance was not compellable by the Tribunal.

10.2 *Judicial Review proceedings were issued by Mr. O'Brien, which effectively prevented the Tribunal from continuing with those sittings. Mr. O'Brien was refused leave to seek Judicial Review in the High Court and the Tribunal expected to be in a position to proceed with its sittings and complete the GSM inquiry without further significant delay. Following the delivery of the High Court judgment on the 26th November, 2004, Mr. O'Brien appealed to the Supreme Court which delivered judgment on the 12th May, 2005. That judgment enjoined the Tribunal from proceeding with public sittings in connection with the Doncaster Rovers Football Club transaction until the completion of Mr. O'Brien's current application for Judicial Review. The Tribunal also considered that, insofar as was feasible, it was preferable not to hear evidence in connection with Mr. O'Brien's affairs during the currency of those proceedings.*

10.3 *In the interim, the Tribunal had proceeded with its private inquiries, which involved lengthy exchanges of correspondence and the close scrutiny of information and documentation. While inquiries continued in connection with the Doncaster Rovers Football Club transaction, the Tribunal also commenced private investigations in relation to a number of other matters pursuant to the paragraphs of its Terms of Reference which relate to Mr. Charles Haughey.*

10.4 *As of May, 2005, when the Supreme Court judgment was delivered and it was apparent that it would not be feasible for the Tribunal to postpone hearing the balance of the evidence in relation to the GSM inquiry pending the final disposal of Mr. O'Brien's proceedings, certain aspects of the Tribunal's inquiries in relation to matters pertaining to the affairs of Mr. Charles Haughey had reached an advanced stage and the Tribunal proceeded to hear evidence at public sittings in relation to those matters in June, 2005 which sittings were completed on 1st July, 2005. The Tribunal then envisaged the 21st of September last as the*

commencement date for the resumption of its sittings to hear the balance of the evidence in relation to the GSM inquiry.

- 10.5 *It has been submitted that this delay has deprived Mr. Lowry of his right to a meaningful cross-examination of Mr. Boyle and Mr. O'Brien. The same submission has been made on behalf of Mr. O'Brien in respect of his Counsel's continuing of his cross-examination of Mr. Boyle.*
- 10.6 *I have considered the evidence of Mr. Boyle. Primarily it concerns remarks allegedly made by Mr. Dermot Desmond and a meeting between Mr. Boyle and Mr. Lowry. The remarks allegedly made by Mr. Dermot Desmond refer to Mr. Denis O'Brien and Mr. Lowry. Mr. Dermot Desmond denied the making of any such remarks and has given evidence to that effect. In the examination of Mr. Boyle by Counsel for the Tribunal and in cross-examination by Counsel for Mr. Desmond it emerged that such remarks, assuming they were made, was capable of a non-pejorative interpretation at least in the judgement of the witness. In the event that I deem it necessary to make a finding in relation to the making and/or the meaning of these remarks, it will be for me to conclude whether, on the basis of an appropriate standard of proof, they could only bear a pejorative interpretation.*
- 10.7 *Nothing has been submitted to me to warrant my deciding at this stage that the rights of Mr. O'Brien or Mr. Lowry to cross-examine this witness have been nullified by reason of delay. Of course, in the event, that upon any examination of this witness it appears that in fact that those rights have been nullified or seriously diminished, I will of course be obliged to disregard the evidence of such witness in any conclusions I reach or any findings I am obliged to make, or any views I may be obliged to express in my report.*
- 10.8 *The other area where Mr. Boyle gave evidence concerning Mr. Lowry involved a meeting which he had with Mr. Lowry in the Fitzpatrick's Castle Hotel. Mr. Lowry has not given evidence in relation to this meeting. He has however furnished the Tribunal with a Memorandum of Intended Evidence in which he has informed the Tribunal that such a meeting did take place and of what transpired at that meeting and his account is not materially in conflict with the evidence given by Mr. Boyle. It is therefore difficult if not impossible to conceive how any cross-examination rights of Mr. Lowry could be affected by delay.*
- 10.9 *Mr. Lowry has also submitted that the deferral of the resumption of evidence in relation to the GSM process has deprived him of his right of cross-examination in respect of the evidence of Mr. O'Brien. Mr. O'Brien*

has not yet completed the balance of his evidence, he, having requested when last under Oath, an adjournment to enable him to consider certain documents. From a review of the evidence of Mr. O'Brien, it would appear that Mr. O'Brien made no remarks critical of or in any way reflecting on Mr. Lowry's reputation, and it is therefore difficult if not impossible to conceive how any cross-examination right of Mr. Lowry could have been affected by delay.

11. Four miscellaneous points

11.1 I want to mention four other points which seem to me to be of importance in the more general submissions made on 13th September.

11.2 Firstly, it has been submitted and I think correctly, that there is no general entitlement to investigate the GSM process. The Tribunal in a ruling on procedures on 29th September, 1998 indicated how it proposed to approach the sequencing of inquiries. It will be recalled that I indicated that the Tribunal would in general proceed from the money trail to examine decisions. Counsel for Mr. Lowry has in his submission drawn my attention to the fact that, in examination of a decision, the Tribunal should only proceed from a situation in which there were financial links with the beneficiaries of decisions. While I would not be prepared to accept that the Tribunal was bound to reach a conclusive view as to the nature of financial links with beneficiaries of decisions before proceeding to examine those decisions, I do think that this is nevertheless an attractively compendious way of describing the actual process whereby the Tribunal proceeded from an examination of property and financial transactions, ranging chronologically from the ESAT/Telenor payment of \$50,000.00 in October, 1995 through the Carysfort transaction, the David Austin share transaction, the Doncaster transaction, the Cheadle transaction and the Mansfield transaction to the subsequent examination of the decision with which most of the individuals involved in those financial transactions were linked. In this connection I think it is also important to draw attention to the fact that, however tempting, and I acknowledge understandably tempting, it may be to refer to the work of the Tribunal as involving an inquiry into malfeasance or corruption or untoward acts on the part of, in this case, Mr. Lowry, that formulation is inappropriate. It was used by Counsel for Mr. Desmond/IIU in the course of his submissions and, while for the reasons hinted at a moment ago, I appreciate how easy it is to fall into a somewhat causal approach to the Terms of Reference, the fact remains that in this context what the Tribunal is mandated to inquire into is, on the one hand, any substantial payments made to Mr. Lowry in circumstances giving rise to a reasonable

inference that the motive for making the payment was connected with any public office held by him, or had the potential to influence the discharge of such office, or the sources of any money held in certain bank accounts under Terms of Reference (e) and (f) and, on the other hand, any acts done or decisions made by him to confer any benefit on any person making such payment, or any person who was the source of any such money under Term of Reference (g). In reaching any conclusions on the evidence, I will be focusing on those provisions of the Terms of Reference.

11.3 *Secondly, it has been submitted that the Tribunal should apply to the Oireachtas for the provision of an indemnity. I have no standing to make any application to the Oireachtas to the effect that the Oireachtas should take any such step. It would be a usurpation of the role of the Oireachtas on my part to make any pretension to suggest to the Oireachtas how it should proceed other than within the strict confines of my Terms of Reference. This is quite apart from the fact that the introduction of any measure in the Oireachtas is a matter, in the first instance, and in practical terms, for the Government, and in any case theoretically only for any other member of the Oireachtas.*

11.4 *Thirdly, it has been submitted that the Tribunal should have issued or should now issue an Interim Report. I understand this submission to refer to a substantive Interim Report and not the type of Interim Report envisaged in the last substantive portion of the Terms of Reference which provides as follows:-*

“And that the Tribunal be requested to conduct its inquiries in the following manner, to the extent that it may do so consistent with the provisions of the Tribunals of Inquiry (Evidence) Acts, 1921 and 1979;

(iv). To report on an interim basis, not later than three months from the date of establishment of the Tribunal or the tenth day of any oral hearing, whichever shall first occur, to the Clerk of the Dail on the following matters:

The numbers of parties then represented before the Tribunal;

The progress which has been made in the hearing and work of the Tribunal;

The likely duration (so far as that may be capable of being estimated at that time) of the Tribunal proceedings;

Any other matters which the Tribunal believes should be drawn to the attention of the Clerk of the Dail at that stage (including any matter relating to the Terms of Reference);?

11.5 *This provision of the Terms of Reference has been complied with. I am satisfied from my reading of the Terms of Reference that there is no basis upon which the Tribunal can issue an Interim Report. I am also satisfied that my interpretation of the Terms of Reference gives effect to what I believe to have been the intention of the Oireachtas in drafting the Terms of Reference. The Terms of Reference regarding each of the two named individuals, the primary focus of the inquiry, together with the recommendatory provisions, are so interdependent that it would be inappropriate to distinguish between them and in addition could be unfair to those individuals.*

11.6 *Finally, both Mr. O'Brien and Mr. Lowry took exception to what was contended to be the unwarranted adverse consequences, of the length of Tribunal hearings particularly in the context of the former's on-going business activities and the latter's requirement to offer himself as a Dáil candidate in North Tipperary. In this respect, it may be noted that neither the conclusions of that constituency electorate, nor the preponderance of media reports, lend support to a view that the reputations of either have been unfairly damaged by dealings with the Tribunal. In the one case Mr. Lowry has been returned to the Dail, and I note from recent reports that Mr. O'Brien has been appointed to one of the most responsible positions in Irish business."*

STANDARD OF PROOF

2.10 In Chapter 1 of Part I of its Report at paragraph 1-60, the Tribunal addressed the standard of proof appropriate to justify conclusions or findings that could be adverse to the reputation of persons involved, as one of the matters which required careful consideration in the course of report preparation. In essence, it was the view of the Tribunal then expressed that the option of a criminal standard of proof beyond all reasonable doubt was neither warranted nor realistic, but that at the other extreme it seemed equally clear that findings which could impact seriously on persons affected could not be based upon evidence that was frail, untested or otherwise subject to real infirmity. A number of subsequent submissions were addressed to the Tribunal, and in response, two short Rulings were delivered in the latter part of 2007, dated respectively 8th November and 7th December. These were in the following terms.

2.11 Standard of Proof Ruling of 8th November, 2007

“In making findings pursuant to its Terms of Reference, the Tribunal is and has at all material times, been required to apply a standard of proof. That standard is not the criminal standard of proof beyond reasonable doubt, and it is noted that this is not contended for in submissions received. In the circumstances of the matters falling to be dealt with in the second part of its Report, the Tribunal sees no reason to depart from the approach adopted in the first Part, that is, the civil standard, a flexible approach, proportionate to the nature and gravity of the matters arising.

While the submissions recently received on this matter have generally been constructive and helpful to the Tribunal, it is well to allay some possible element of misinterpretation. It cannot be emphasised too often that Tribunal proceedings are not adversarial but inquisitorial. They are not a means of establishing criminal or civil liability. Adopting the language of the head note of a leading Canadian case, a “Commission of Inquiry is not a Court or Tribunal and has no authority to determine legal liability; it does not necessarily follow the same laws of evidence or procedures that a Court or Tribunal would observe. A Commissioner accordingly should endeavour to avoid setting out conclusions that are couched in the specific language of criminal culpability or civil liability for the public perception may be that specific findings of criminal or civil liability have been made”.¹ In the words of Hardiman J. in O’Callaghan v. Mahon², “The Tribunal in the end of the day merely reports its opinions and makes recommendations. It does not make binding findings of fact, though its report can, of course, have the effect of vindicating some persons and utterly destroying the reputations of others”. It is for this reason that the Courts and Parliaments in this jurisdiction, and elsewhere, have imposed strict limits on the extent to which the proceedings, including the findings, of Tribunals may be used in civil or criminal proceedings.

The Tribunal is mindful that apart from the Canadian case, other Inquiries in other jurisdictions have sought to avoid an excess of technical legal terminology and to that end this Tribunal stated as follows in Part I of its Report:-

“1.60 *One of the matters which required careful consideration in the course of Report preparation was the standard of proof appropriate to justify conclusions or findings that could be adverse to the reputation*

¹ Supreme Court of Canada [1997] 3 S.C.R. 440.

² [2006] 2 IR 32, at 74.

of persons involved, whether individuals or corporations. In its appraisal of this matter, it seemed to the Tribunal that the adoption of a criminal standard of proof was neither warranted nor realistic; as indicated earlier in this chapter, the conclusions in a report such as this are in no sense findings of either criminal or civil liability in law, and represent no more than what should be a reasoned and informed expression of opinion. Moreover, the Tribunal has on a number of occasions indicated that having regard to its inquisitorial, as opposed to its adversarial character, it would not be bound by rules of evidence or procedures designed for Court cases. In discharging its functions, rules, either for the admission of evidence or the burden of proof, evolved for the purpose of the administration of justice in criminal or civil proceedings, would inhibit and confine the functioning of the Tribunal, in particular if it could express findings or conclusions only if so convinced of them that no alternative view could be correct. At the other extreme, however, it seemed equally clear that findings, which could impact seriously on persons affected, could not be based upon evidence that was frail, untested or otherwise subject to real infirmity. It is noteworthy that a not dissimilar approach was adopted by Dame Janet Smith in the Inquiry she conducted relating to the multiple deaths caused by the conduct, as a medical practitioner, of Dr. Harold Shipman, and canvassed by Lord Saville in the Saville Inquiry established to enquire into and report upon the events of Bloody Sunday in 1972”.

Paragraph 1-60 made it clear that while on the one hand the Tribunal eschews a criminal standard of proof, equally it set its face against a casual or whimsical standard having regard to the seriousness of the matters under review. Whilst seeking to avoid characterising its approach in legal terms, having regard to some of the submissions made, it must nevertheless be stated, that the standard applied is that normally described as the civil standard or the standard of proof on the balance of probabilities, as defined by the Supreme Court in Georgopoulos v. Beaumont Hospital Board [1998] 3 IR 132.

The suggestion that because the conclusions in a report represent no more than a reasoned and informed expression of opinion this in some way reflects a new standard of proof is utterly mistaken. These words are not a description of the standard of proof but of the product of applying a standard of proof, a description of the basis upon which findings are made and/or conclusions are reached. In any event, lest some unwarranted pejorative element be attributed to the concept of “opinion” used appropriately in matters of arriving at decisions or conclusions generally, it is worth remembering that this is the very designation attached to binding determinations of both the US Supreme Court

and the House of Lords, and that regular usage in Ireland in both the Supreme and High Courts evinces reference to opinion on the part of individual Judges.

Lastly, questions of the manner in which the standard of proof is expressed were more recently canvassed at length in the case of R(N) v Mental Health Review Tribunal & Ors [2006] 2 WLR 850. In its judgment, the Court of Appeal, regardless of differences in wording of the description of the standard in many cases over the years, recognised the essentially flexible nature of the civil standard of proof, an approach which is consistent with the judgment of Hamilton CJ in Georgopoulos where, citing Sir. William Wade in the Sixth Edition of his work on Administrative Law, the then Chief Justice stated as follows:

“But the civil standard is flexible, so that the degree of probability required is proportionate to the nature and gravity of the issue. Where personal liberty is at stake, for example, the Court will require a high degree of probability before it will be satisfied as to the facts justifying detention; and the requirement will not be much lower in matters affecting livelihood and professional reputation, or where there is a charge of fraud or moral turpitude.”

Moreover, whilst mindful of the necessary legal distinction between judgments in adversarial Court proceedings, which inherently carry binding consequences in criminal or civil law and Tribunal findings, which do not, it is recognised that Tribunal findings may still very significantly affect the reputation or other interests of persons involved. It is also acknowledged that this should in no sense affect the quality of deliberation or care required to be observed in discharging the functions of a Tribunal and whatever procedural flexibility may be accorded to a Tribunal, it nonetheless is clearly required to apply the same care, diligence and vigilance in the evaluation of facts as those concerned with the adjudication of adversarial disputes.

Subject to the foregoing, it is clearly impracticable to seek to formulate an exact definition of the requisite standard that must be satisfied before making findings on matters of great seriousness within the Terms of Reference, but in addressing all individual instances, the Tribunal will have due regard to the submissions that have been made to it, along with authorities cited, as well as any such further submissions as may in further course be made. Having regard to the submissions made and this Ruling, it has not been deemed necessary to ventilate the matter in public hearings.”

2.12 Ruling on Evidence of 7th December, 2007

“It would be both impracticable, if not impossible, to provide an extensive Ruling, in the abstract, on the question of what constitutes evidence at this stage of the Tribunal’s proceedings. It seems preferable to indicate the Tribunal’s view of the matter in broad outline and by way of guidance which may be of some use to affected persons or entities when it becomes necessary to address the matter in more concrete terms once the Tribunal has notified its provisional findings.

*As has already been stated repeatedly the Tribunal is not bound by rules of evidence as applied by Courts in the determination of liability either in criminal or civil matters. This approach has been expressly approved by the High Court and Supreme Court, even in the case of adjudicative and adversarial Tribunal proceedings, in numerous cases since the decision in *Kiely v Minister for Social Welfare* [1977] I R 267 where Mr. Justice Henchy stated:*

“Tribunals exercising quasi judicial functions are frequently allowed to act informally – to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like – but they may not act in such a way as to imperil a fair hearing or fair result. I do not attempt an exposition of what they may not do for, to quote the frequently cited dictum of Tucker L.J. in Russell –v- Duke of Norfolk ‘there are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic Tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, the subject matter that is being dealt with, and so forth’”³

Accordingly rules of evidence will not be applied by the Tribunal with the same strictness as in either Civil or Criminal proceedings. At the same time, as has already been acknowledged in Part I of the Report of this Tribunal, findings should not be made or conclusions drawn which may have a significant impact on an individual or corporate or other entity where central elements of the relevant material have not, for example by reason of being hearsay, been subject to adequate scrutiny either by or on behalf of the Tribunal or by or on behalf of any affected person or entity.”

³ See page 281 of the Report.

2.13 Since the above two Rulings on the standard of proof in a Tribunal, this matter became the principal element considered by the High Court and Supreme Court in a case brought by Mrs. Hazel Lawlor, the widow of the late former T.D., Mr. Liam Lawlor, against the members of the Tribunal of Inquiry into Certain Planning Matters and Payments, otherwise the Mahon Tribunal. Following rejection of the reliefs sought by the High Court on 31st July, 2008, Mrs. Lawlor appealed that outcome, and the Supreme Court delivered judgment on 1st July, 2009. That decision is reported at [2009] 2 ILRM 400. As was also held in relation to the other ground of appeal brought by her, relating to a costs matter, the Supreme Court held that the ground of appeal relating to the standard of proof should fail.

2.14 In coming to its decision, the Supreme Court affirmed the prior decision in Goodman International v. Hamilton (No. 1) [1992] 2 IR 542 to the effect that a Tribunal of Inquiry was not involved in the administration of justice, insofar as it lacked jurisdiction or authority to impose any penalty or punishment on any person, and its findings could form no basis for either the conviction or acquittal of any person concerned on a criminal charge, if one was subsequently brought: its function was that of a fact-finding operation, reporting to the legislature.

2.15 The Court considered that a standard of proof beyond reasonable doubt, that is to say, a criminal standard of proof, had never been mandated in respect of any Tribunal of Inquiry, and had been specifically rejected by the Supreme Court in the case of *Goodman v. Hamilton*. Nonetheless, the Court stated that it would be wrong to infer that a Tribunal of Inquiry was at large in terms of the requirements of proof, or that the standard of proof was simply a matter of procedure, which it might regulate as it saw fit. It continued:

“Such an approach could lead to a situation where, for example, on the bare balance of probabilities, a finding of the utmost gravity could be made against a particular individual. In principle evidential requirements must vary depending upon the gravity of the particular allegation. This is not to adopt the ‘sliding scale’ of proof advocated by Counsel for the Applicant, but rather to simply recognise, as an integral part of fair procedures, that a finding in respect of a serious matter which may involve reputational damage must be proportionate to the evidence upon which it is based. For example, a finding that a particular meeting occurred on one day rather than another may be of such little significance that a Tribunal could make a finding in that respect on the bare balance of probabilities. A finding of criminal

behaviour, on the other hand, would require a greater degree of authority and weight derived from the evidence itself.”

2.16 Noting the historical requirement of proof beyond reasonable doubt in criminal trials, which dated back to the late eighteenth century, and which the Supreme Court considered undoubtedly developed because of the immense severity of punishments then applicable following conviction, the Court stated that no such punitive sanctions or consequences could attend the findings of a Tribunal of Inquiry, and it was this fundamental distinction which differentiated the criminal law from the law applicable to Tribunals. In citing the case of Banco Ambrosino SPA & Others v. Ansbacher & Company Limited & Others [1987] I.L.R.M. 669, it was noted that an allegation of fraud did not require to be proved to the criminal standard where the proceedings took place other than in a criminal court. In his judgment in that case, Henchy J. was firmly of the view that it would be an error to introduce some intermediate standard of proof between that of civil liability and criminal liability, when he stated.

“If, as has been suggested, the degree of proof of fraud in civil cases is higher than the balance of probabilities, but not as high as to be (as is required in criminal cases) beyond reasonable doubt, it is difficult to see how that higher degree of proof is to be gauged or expressed. To require some such intermediately high degree of probability would, in my opinion, introduce a vague and uncertain element, just as if, for example, negligence were required to be proved in certain cases to the level of gross negligence. Moreover, since in this jurisdiction many civil cases involving fraud are tried by juries it would be difficult for a trial judge to charge a jury as to this higher degree of proof without running the risk of confusing the jurors.”

2.17 The Supreme Court also noted that, apart from the practical difficulties that would arise from the creation of an intermediate standard of proof, Hamilton CJ. in Georgopoulos v. Beaumont Hospital Board [1998] 3 IR 132 had offered perhaps a more important rationale for maintaining the distinction, when he stated as follows.

“As already pointed out in this Judgment, the proceedings before the Defendant were in the nature of civil proceedings and did not involve any allegations of criminal offences. The standard of proving a case beyond reasonable doubt is confined to criminal trials, and has no application in proceedings of a civil nature. It is true that the complaints against the Plaintiff involved charges of great seriousness and with serious implications for the Plaintiff’s reputation. This does not, however, require that the facts upon which the allegations are

based should be established beyond all reasonable doubt. They can be dealt with on ‘the balance of probabilities’ bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated.”

2.18 Reverting to the judgment of Henchy J. in the said Banco Ambrosino case, the Supreme Court noted its conclusion as follows.

“Proof of fraud is frequently not so much a matter of establishing primary facts, as of raising an inference from the facts admitted or proved. The required inference must, of course, not be drawn lightly, or without due regard to all the relevant circumstances, including the consequences of a finding of fraud. But that finding should not be shirked because it is not a conclusion of absolute certainty. If the Court is satisfied, on balancing the possible inferences open on the facts, that fraud is the rational and cogent conclusion to be drawn, it should so find.”

2.19 In finding that the ground of appeal brought by Mrs. Lawlor failed, the Supreme Court stated that the foregoing judicial statements cited by it “aptly describe the requirement of due process, as regards the circumstances of the present case.” The Court concluded in the following terms.

“The findings made must clearly be proportionate to the evidence available. Any such findings of grave wrongdoing should in principle be grounded upon cogent evidence.”

2.20 It is also noteworthy that the matter of standard of proof in non-criminal cases was considered by the House of Lords in two 2008 cases: *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] 4 All ER 1, and *R (on the application of D) v The Life Sentence Review Commissioners (Northern Ireland)* [2008] 4 All ER 992. In the former case, which related to the standard of proof required to determine whether or not a child had been sexually abused by her father, Baroness Hale stated that she wished to “announce loud and clear” that when finding the facts the standard of proof applicable was as follows.

“...the simple balance of probabilities, neither more nor less. Neither the consequences of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.”

As an instance, she stated that murder was an event which was serious yet “sufficiently rare to be inherently improbable in most circumstances”. However, if one was confronted with a corpse with its throat cut, and no weapon to hand, then murder was “not at all improbable.”

2.21 Noting that the High Court in that case had felt itself unable to reach a finding about the alleged sexual abuse of the child by her father, Baroness Hale continued as follows.

“My Lords, if the judiciary in this country regularly found themselves in this state of mind, our Civil and Family Justice System would rapidly grind to a halt. In this country we do not require documentary proof. We rely heavily on oral evidence, especially from those who were present when the alleged events took place. Day after day, up and down the country, on issues large and small, Judges are making up their minds whom to believe. They are guided by many things, including the inherent probabilities, any contemporaneous documentation or records, any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses. The task is a difficult one. It must be performed without prejudice and preconceived ideas. But it is the task which we are paid to perform to the best of our ability.

In our legal system, if a Judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a Judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof.”

2.22 In the latter House of Lords case, a convicted murderer in Northern Ireland had been released on licence several years after being sentenced to imprisonment for life. Some months after his release, he was arrested following allegations of sexual offences against a young niece and nephew. His case was referred to the Life Sentence Review Commissioners to determine whether his continued imprisonment was necessary to protect the public from serious harm. It was decided that he should not be released, as there was a significant risk he would commit serious harm if he remained at liberty. D appealed successfully to

the Court of Appeal of Northern Ireland, and the Commissioners appealed to the House of Lords. In delivering the leading Opinion of the House, Lord Carswell observed that it was *“indisputable that only two standards are recognised by the Common Law, proof on the balance of probabilities, and proof beyond reasonable doubt.”* He noted that the latter standard was that required by the criminal law and in other limited areas, whilst the former was the general standard applicable to all other civil proceedings. He acknowledged the need to be aware of the context in which a finding of fact was to be made, but was clear that *“the standard itself is...finite and unvarying”*. It was simply a matter that *“in some contexts a Court or Tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard.”*

POTENTIAL EVIDENCE OF MR. PETER BACON

2.23 The final Ruling that will be set out in this chapter is that relating to the potential testimony of the consultant economist, Mr. Peter Bacon, made on 17th July, 2007. Chapter 1 of this Volume has already outlined, at 1.25 to 1.35 inclusive, the course of Mr. Bacon’s involvement with the Tribunal. It was on foot of the determination of unsuccessful related Judicial Review proceedings brought by Mr. Denis O’Brien, of the terms of that 2007 Ruling of the Tribunal, and of further provision made by the Tribunal in the interests of fair procedures, that Mr. Bacon attended at public sittings, initially in March and then for two days in May, 2008, for cross-examination on behalf of Mr. O’Brien and other affected persons or entities. The terms of that Ruling are set forth below.

2.24 Ruling of 17th July, 2007

1. *One of the matters referred to in the Tribunal’s Ruling of 29th September, 2005 was my view, subject to any submissions that might be made, that in dealing with certain technical aspects of the GSM Process it would be of value to have the evidence of an expert and that on that basis it was proposed to introduce evidence from Dr. Peter Bacon. Dr. Bacon is the principal of Messrs. Peter Bacon & Associates and has particular expertise and experience of competition processes and the application of scoring mechanisms in the conduct of such processes.*
2. *The evidence Dr. Bacon was in a position to give related to limited aspects of the mechanics of the GSM Process, focusing mainly on the approach adopted to the use of numerical indicators in the calculation of the scores of the individual applicants. It is important to state now, as has already been stated, that Dr. Bacon was not being asked to*

conduct an audit of the GSMII Process. Nor was he being asked to evaluate the applications of the various applicants with a view to expressing an opinion as to whether the correct result was reached by the evaluators.

3. *In the Ruling of 29th September, 2005 the Tribunal also dealt with the question of the absence of Mr. Michael Andersen and indicated that notwithstanding Mr. Andersen's apparent unwillingness to give evidence or otherwise to further assist the Tribunal, it nonetheless proposed to complete and report upon relevant matters pertaining to the second GSM Competition. Following the Ruling Mr. Denis O'Brien instituted High Court Judicial Review proceedings seeking various forms of relief primarily in regard to what had arisen relating to both Mr. Andersen and Mr. Bacon. In a written judgment of 21st December, 2005 Quirke J., refused each of the reliefs sought. Mr. O'Brien appealed that decision to the Supreme Court. That Appeal was heard and dismissed by the Supreme Court on 30th May, 2006, Denham J., stating in an ex tempore decision that "having considered the Applicant's submission and Respondent's written submissions, the decision of the High Court and the considered Ruling of the Respondent, the Court is of the view that there is no case to answer, for the reasons given by the High Court and is satisfied that the application should be dismissed and the judgment of the High Court affirmed." It was following this Ruling that written submissions (having already been invited by the Tribunal) were received regarding the prospect of the Tribunal calling Dr. Bacon as a witness. They have proved to be of considerable assistance. They have prompted a detailed reappraisal by the Tribunal of the proposal to adduce the evidence of Dr. Bacon and of the value of such evidence in advancing the Tribunal's task in finding facts pursuant to its Terms of Reference. All of the submissions were to the effect that Dr. Bacon's evidence should not be adduced. A variety of reasons were put forward in support of these submissions. Whilst not accepting all such submissions or the reasoning upon which they were based, because I have determined to accede to the thrust of what is being contended for, I need only briefly refer to them at this point.*
4. *On behalf of Telenor it was contended that the question was not whether the GSM2 Process was perfect, but whether any improper political influence or intervention in it was disclosed, that no expert could help the Tribunal in that exclusively conferred function, least of all one not involved at the time, and that in any event Mr. Bacon's expertise was as a macro economist without significant expertise in*

relation to GSM competitions or in evaluating competitive tenders generally. On behalf of Mr. O'Brien it was acknowledged that since the challenge in the High Court and the Supreme Court had been unsuccessful, the issue of whether or not to call Mr. Bacon was to be determined by the Tribunal, but that the Tribunal should not waste any further time or money in seeking to introduce, through Mr. Bacon, evidence that merely sought to second guess Mr. Michael Andersen; further that Mr. Bacon had had no actual involvement in the process, could only testify as an expert and had neither the requisite qualification nor independence to warrant giving such evidence. Mr. Dermot Desmond and International Investment & Underwriting objected to the introduction of any evidence from Mr. Bacon unless and until this could be shown to be connected to some wrongdoing on the part of Mr. Michael Lowry as Minister and submitted that since no evidence was to hand of any such wrongdoing on the part of Mr. Lowry, or of Andersen Management International, the evidence should not be introduced; that Mr. Bacon lacked the relevant experience, and that such evidence was irrelevant, unnecessary and likely to delay further the completion of the relevant part of the Tribunal Report.

5. In a short and cogent submission on behalf of BTI and O2, the successors of ESAT Digifone, it was indicated that whilst Mr. Bacon may have been of assistance to the Tribunal in equipping it with a certain insight into technical matters, this was to be distinguished from putting Mr. Bacon's views, as contained in his January, 2005 Report, into evidence as constituting expert evidence. Reference was made to the decision of the Supreme Court of South Australia in R. v. Bonython (1984) 15 ACR 364, a case which not merely remains binding in Australia, but which was stated in the most recent edition of Phipson on Evidence as having generally set forth the legal position accepted in the Courts of England and Wales. In particular reliance was placed on the following passage from the judgment of King CJ:

"Before admitting the opinion of a witness into evidence as expert testimony, the Judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subject upon which expert evidence is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of

the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which of the witness would render his opinion of assistance to the Court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the Court”.

Citing these tests, it was contended that Dr. Bacon’s Report did not constitute expert evidence in as much as (however skilled or experienced Dr. Bacon was) his views merely reflected the application of ordinary tests of rationality to the conduct of the process or reasons given by participants in the process for their having acted in one way or another. The view contended for is that the process, or at least the portion of it addressed in Dr. Bacon’s Report and in some of the Tribunal’s evidence, is not impenetrable to the intelligent layman; that it is the Tribunal’s view of the conduct of the process as evidenced by the witnesses involved that matters, not the views of a witness, notwithstanding that witnesses expertise or experience. In other words, the area of inquiry not being so impenetrable as to be incapable of being comprehended by an ordinary intelligent layman it would be wrong to accord a special status to Dr. Bacon’s views, the status normally accorded to the views of an expert. In this regard, the Tribunal has also had regard to some of the general principles applicable in this area as set out in the well known case of Davie v Edinburgh Magistrates, (1953) SC 34 and other more recent cases including Conley v Strain [1988] IR 628, DK v PH (otherwise TK) and JWH (otherwise W) v GW unreported, 1998, matrimonial cases referred to in McGrath on Evidence.

6. *The area to which Dr. Bacon addressed himself in his Report has in the main already been covered during the course of questioning pursued either by Tribunal Counsel or other Counsel. I accept the view that the area in question, the scoring process, although complex is not impenetrable. It has been submitted that Dr. Bacon is simply expressing a view as to what the Project Team responsible for the process should rationally or reasonably have done when confronted with different sets of circumstances that he infers they were confronted with; that he has merely expressed a view as to what the demands of rationality required of the Project Team from time to time. While I would reject any notion that Dr. Bacon was not a person of skill and experience in the areas to which he addresses his comments, I accept that the evidence proposed to be given is not expert evidence*

in the narrow sense canvassed in Bonython above. I now think it preferable that conclusions regarding the conduct of the process should be left to submissions, if any, in due course.

- 7. In conclusion, on this aspect, it would be wrong not to acknowledge the assistance of Dr. Bacon in affording the Tribunal a technical insight in relation to the line of questioning already being pursued by the Tribunal and in particular, in enabling the Tribunal to exclude from any consideration, as an indicator of possible interference or intervention in the process by the Minister or any outside party, the change in the manner of the measurement and scoring of IIR. It will be recalled that this appeared to have benefited certain applicants but on the basis of the evidence elicited, it has been possible for the Tribunal, with the benefit of the insights afforded by Dr. Bacon to dispel the notion that this resulted other than purely fortuitously.*
- 8. Apart from indicating a determination in regard to Dr. Bacon it is desirable to refer to an additional matter which arose in the course of the aforesaid Judicial Review proceedings. This relates to a number of associates of Mr Michael Andersen who had worked with him in the course of evaluating the various applications for the GSM 2 licence, in respect of whom it had been indicated to the High Court that the Tribunal was prepared to adduce evidence, provided this was reasonably practicable and that such evidence proved relevant. The Tribunal has corresponded with Mr Tage Iversen, Mr Jon Bruel, Mr Ole Federsen and Mr Michael Thrane to ascertain whether any of them would be prepared to assist the Tribunal and to attend to give evidence at its public sittings. The Tribunal offered to be responsible for their reasonable expenses, however none of the individuals mentioned above have so far been prepared to attend. All are reluctant to become involved and have indicated either an unwillingness or an inability to assist. At the same time, the Tribunal will continue with steps to endeavour to procure their assistance although it should be stated that the prospects of obtaining any or any relevant evidence from any of these individuals appear extremely remote. It should also be noted that Mr Marius Jacobsen is deceased and that the Tribunal has to date been unable to obtain any contact details for Mr Mikel Vinter, despite a request for assistance in this regard to Mr Michael Andersen to which no response was received.”*

SECTION A

INCEPTION OF THE POLICY AND PREPARATIONS FOR INTRODUCTION OF COMPETITION IN THE DIGITAL MOBILE TELEPHONY MARKET

DEVELOPMENT OF GOVERNMENT POLICY AND THINKING ON THE INTRODUCTION OF COMPETITION IN THE GSM MARKET

3.01 Mobile Cellular Radio Communication, when initially introduced in the State, was provided exclusively by Bord Telecom Éireann Limited, through its division, Eircell. The service was considered to be part of the telecommunications activities for which Telecom Éireann enjoyed an exclusive monopoly, by virtue of Section 87(1) of the Postal & Telecommunications Services Act, 1983. In 1985, Eircell launched an analogue mobile telecommunications system, using the 088 prefix, and this was the sole network available until the early 1990's. Analogue networks were gradually commissioned across Europe, and their growth was characterised by incompatible systems, with communication restricted to within national borders.

3.02 The Global Standard for Mobile Communications, GSM, a digital mobile radio telecommunications system, emerged in the early 1990's. The advantage of the GSM technology was that it enabled users to connect across national borders without technical difficulty. The GSM system was introduced by Eircell in 1993, using the 087 prefix, and for some years both GSM and analogue networks operated in conjunction. At that time, mobile telephony was in its infancy in the State: it was estimated that penetration levels were as low as 7%, and it was projected that the market would grow to penetration levels of no more than approximately 20% by the end of the last century.

3.03 All of this development took place against a backdrop of the adoption by the European Union of a policy of liberalisation of the market in telecommunications. In pursuance of that policy, the European Commission imposed an obligation on Member States to provide competition in the mobile telecommunications market. Competition was gradually introduced in Member States, in response to that policy, through the licensing of single competitors to incumbent providers.

3.04 The policy of the then Minister for Transport, Energy & Communications, Mr. Brian Cowen T.D., and the ethos of the Department, were in sympathy with the European objective of open market competition. This policy was regarded as having considerable economic advantages in upgrading the existing telecommunications infrastructure, and in securing more competitive tariffs, with ultimate benefits accruing to the consumer. Whilst some preparatory work was undertaken by the Department in early 1993 with a view to licensing a second GSM operator, the intensive work coincided with the appointment of Mr. Martin Brennan, then Principal Officer, to preside over the Development Division

of the Department's Telecommunications Section. Mr. Brennan's appointment followed a reorganisation of the Section, the work of which was allocated to three separate divisions: the Development Division, the Regulatory Division and the Technical Division. The Regulatory Division was presided over by Mr. Sean McMahon, Principal Officer, and the Technical Division by Mr. John McQuaid, also of Principal Officer rank. The Section was under the overall control of Mr. Sean Fitzgerald, Assistant Secretary, who in turn reported to Mr. John Loughrey, then Secretary General of the Department.

3.05 On Mr. Brennan's appointment, part of his brief was to progress the licensing of a second GSM operator, as a single competitor to Eircell. Some initial work had been undertaken, and Mr. Brennan, who had considerable experience in the telecommunications field, outlined in evidence that he had inherited a single file from his predecessor, comprising records of the Department's early consideration of the topic.

3.06 Mr. Brennan, who was then assisted by Mr. Conan McCarthy, set about identifying the optimum means of selecting a second GSM operator. He explained in his evidence that he commenced his work in October, 1993. His primary source of information was a report of Mr. Roger Pye, since deceased, of KPMG, London, which had been prepared for the European Commission, and had been presented by Mr. Pye at a Commission workshop. Mr. Brennan and his team also studied the experience in other Member States, they took soundings from the market, and they received representations from interested parties, and from Telecom Éireann. The process also involved input from the Department of Finance, which had a clear interest in the maximisation of the return to the Exchequer from the issue of the licence, and had a formal role arising from the provisions of Section 111 of the 1983 Act, whereby the issuing of a licence by the Minister for Transport, Energy & Communications was subject to the consent of the Minister for Finance.

3.07 Two possible strategies for the selection of a second operator were identified. Firstly, a pure auction process, whereby interested parties would be invited to bid a monetary sum for the licence, with the licence being awarded to the highest bidder. Secondly, a "*beauty contest*" process, as it was termed, whereby interested parties would be invited to lodge applications detailing their proposals for the provision of a mobile service, including a full business case, which applications would then be compared in accordance with fixed criteria, with the best application, according to those criteria, securing the licence. The Department, mindful of the objective of providing effective competition, and conscious of the policy of the European Commission, favoured the latter approach.

3.08 Mr. Brennan and his team went about designing a tendering process, and identifying potential criteria against which applications could be compared. In the course of that work, it was recognised that the Department did not possess sufficient expertise or experience in the field, and Mr. Brennan, in consultation with Mr. Fitzgerald and Mr. Loughrey, decided that the Department should retain the services of an expert consultant. Mr. Roger Pye of KPMG, London, was known to the Department, having previously advised on telecommunications policy and strategy. He had a track record in the field, as the author of the relevant Commission report on the licensing of second GSM operators issued in 1993, which Mr. Brennan had consulted for source information. Having selected Mr. Pye as an expert adviser, the competition materials, which had been worked up by Mr. Brennan and his team, were submitted to him. Following, and in the light of Mr. Pye's initial advices, those materials were revised and resubmitted, and with the benefit of Mr. Pye's further observations, the Department finalised its thinking on the process. All of this effort culminated in proposals brought by the then Minister, Mr. Brian Cowen, T.D., to Government in November, 1994, in the form of an Aide Memoire for Government. What was proposed was that the Department would initiate a written tender procedure to select a new entrant; that there would be a minimum initial price paid for the licence of £3 million; and that there would be further provision for the payment of continuing royalties, at a level to be nominated by applicants. The evaluation criteria proposed were listed in the document, in descending order of importance, as follows:

- “
- *Credibility of business plan and financial viability of applicant together with applicant's approach to market development;*
 - *Technical experience and capability of applicant;*
 - *Quality and viability of technical approach proposed and its compliance with the requirements set out herein;*
 - *The approach to tariffing proposed by the applicant;*
 - *The value of ongoing payments to the State for the licence over the licence period;*
 - *Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded;*
 - *The extent of applicant's international roaming plan;*
 - *The performance guarantee proposed by the applicant;*
 - *Efficiency of proposed use of frequency spectrum resources.”*

Whilst some revisions were subsequently made, the criteria as framed in that Aide Memoire of November, 1994, were substantially in their final form.

3.09 In the course of the work that led to the submission of that Aide Memoire to Government, there had been considerable interaction, and some tension, between the Department and the Department of Finance. With its pro-competition stance, the Department had from the outset favoured a beauty contest approach, and was opposed to the imposition of a large upfront licence fee. The thinking of the Department, which was in line with the policy of the Commission, was that such a large upfront payment would impose a financial burden on a new entrant, which could impact negatively on the capability of a new entrant to provide effective competition. This approach was at odds with the objective of the Department of Finance, which was directed to the maximisation of the return to the Exchequer from the issue of the licence. Following a lengthy interaction between the two Departments, by November, 1994, a consensus emerged that their respective priorities would be served by imposing a relatively low fixed upfront payment of £3 million, with provision for payment of ongoing royalties.

3.10 In the early draft competition documents, the Department's view was that the legal requirement for transparency in the selection process would be satisfied through the publication of the criteria by which applications would be judged. That approach was it seems consistent with the then standard for major public procurement contracts. It was Mr. Pye of KPMG who recommended that, in publishing the selection criteria, a descending order of priority should be incorporated. That proposal was adopted, and it was the Department that determined the order of priority, and it was that order which appeared in the Aide Memoire for Government of November, 1994.

3.11 All of this early work within the Department proceeded against a background of some urgency, in that the Commission, in pursuance of its policy of liberalisation in the market for digital telephony, had initiated formal infringement proceedings against a number of Member States that had failed to license second GSM operators. On 25th October, 1993, the Deputy Director General of DGIV, the Competition Directorate, had written to Mr. Sean Fitzgerald, Assistant Secretary, concerning the continuing monopoly in GSM mobile telephony in the State. The letter required the Department, within four weeks, to furnish information concerning the steps which had been taken by the State to license a second GSM operator, and it drew the Department's attention to the fact that the Commission had initiated infringement proceedings against two other Member States which had failed to authorise a second operator.

3.12 The Department viewed the receipt of that letter as an indication of the Commission's intention to commence formal infringement proceedings against

the State. As anticipated, that process was subsequently initiated by letter dated 4th May, 1994, from the Competition Commissioner, addressed to the then Minister for Foreign Affairs, Mr. Dick Spring T.D., which was in the form of what is known as a “*letter of formal notice*”. The letter set out the Commission’s view that the State had failed to fulfil its obligations under the then Article 90(1) of the EC Treaty, in extending the dominant position of Telecom Éireann, by failing to license a second GSM operator within a reasonable time, whilst Telecom Éireann had acquired significant competitive advantage in developing its GSM service. The Commission’s letter invited the Government, within two months, to submit either details of the measures which it intended to take to issue a second GSM licence, or to submit its observations on the content of the Commission’s letter of formal notice. Under the procedure which had been initiated by the issue of that letter, the Commission was entitled, within one year, to determine whether to open formal infringement proceedings against the State, by requiring the State to bring that infringement to an end within a set time period. Failure to comply with that requirement would then entitle the Commission to issue infringement proceedings against the State in the European Court of Justice, pursuant to the then Article 169 of the EC Treaty.

3.13 Throughout the preparatory period, there was interaction and consultation between the Department, Telecom Éireann, and Eircell, regarding the new regulatory regime which would be implemented following the licensing of a second GSM operator. Consideration was also given to the social, financial and political consequences of the impact of competition on Telecom Éireann and Eircell, in terms of their profitability and employee base. In particular, there was significant debate and discussion addressed to whether, as part of the licensing of a second operator, Eircell should be levied with equivalent financial obligations to those imposed on the new entrant.

3.14 Whilst the early preparatory work was led by Mr. Brennan, Mr. Loughrey and Mr. Fitzgerald were consulted as the work evolved, and had an input into the development of the Department’s thinking. Mr. McMahon, who presided over the Regulatory Division, also had a role, as did officials from the Technical Division. A Project Group comprising personnel drawn from each of the three Telecommunications Divisions was established, which it was intended would conduct the eventual evaluation. Whilst the Departmental files recorded that the first meeting of the Project Group took place on 29th April, 1994, the Project Group was then in an embryonic form, and the Group proper was not established, and did not meet in any systematic manner, until after the competition was launched in March, 1995. The Departmental documents included an agenda for the meeting of April, 1994, from which it seems that the topics then under discussion were a review of the project documentation, an update on interconnection between the existing and the new networks, and the

retention of specialist consultants to assist the Department in the evaluation process.

3.15 The Aide Memoire of November, 1994, to which reference has already been made, resulted in a Government decision of 11th November, 1994, which noted the Minister's proposal to hold a tender competition leading to the award of a GSM licence, and determined that the Minister should consult with the Cabinet Sub-Committee on Telecommunications, before a decision was made on the award of the licence. From the documentary evidence, as confirmed by Mr. Loughrey, it seems that the decision of 11th November, 1994, was made following earlier Cabinet discussion of the topic on 2nd November, 1994, when a decision was deferred. A memorandum from Mr. Loughrey to Mr. Fitzgerald, dated 3rd November, 1994, recorded both the Cabinet deferral and Mr. Loughrey's request that the then existing Aide Memoire should be expanded. It seems that it was that expansion which resulted in the document to which detailed reference has already been made. On 11th November, 1994, there was therefore a Government decision that a tender competition should be held, in accordance with the proposals which had been submitted by the then Minister, and that, following consultation with the Cabinet Sub-Committee, a decision on the awarding of a GSM licence should be made. No action was taken on foot of that decision by the then Government, which fell on 15th December, 1994.

THE FOUNDATION OF THE COMMUNICORP GROUP AND EARLY INTEREST IN THE MOBILE TELECOMMUNICATIONS SECTOR

MR. DENIS O'BRIEN'S EARLY BUSINESS INTERESTS

4.01 In the early 1990s, Mr. Denis O'Brien, who is now a businessman of international repute, was a young entrepreneur with business interests in the telecommunications and broadcasting sectors. He had founded Esat Telecommunications Limited in 1991, for the purpose of providing competitive telecommunications services both in Ireland and internationally. His broadcasting interests dated from the late 1980s, and in 1989 he had founded the Classic Hits 98FM Radio Station. He had also expanded his broadcasting activities abroad, and he had interests in radio stations in Prague, Stockholm and Budapest.

4.02 In 1994, Communicorp Group Limited was formed, and Mr. O'Brien's broadcasting and telecommunications businesses were amalgamated. Esat Telecom, which had recently entered the fixed-line telephone market, became a wholly owned subsidiary of Communicorp, as did Radio Investments NV, the company through which Mr. O'Brien operated his radio interests. That restructuring in 1994 was undertaken to facilitate third party equity investment by a US venture capitalist, Advent International. Whilst it was Communicorp Group Limited which was the vehicle through which Mr. O'Brien ultimately participated in what became the Esat Digifone consortium that applied for the GSM licence, the initial preparatory work was undertaken by Esat Telecom, and it is to Esat Telecom that reference will primarily be made in the course of the earlier chapters of this Report.

4.03 When Mr. O'Brien set up Esat Telecom, he had invited a number of people with experience of the private and public sectors in Ireland to join its board of directors. Over the following years, he constructed what he described in evidence as a strong and experienced board. Mr. Leslie Buckley, who then ran his own management consultancy business, and was initially involved with Mr. O'Brien on the radio side of his activities, was invited to join the Esat Telecom board, and went on to take up an executive role as acting Chief Operations Officer, with responsibility to ensure that the company was performing to budget. In February, 1994, Mr. Pádraig O hUiginn, former Secretary General of the Department of the Taoiseach, was invited by Mr. O'Brien to become a director of Esat Telecom. Mr. O hUiginn was available to the company to give advice as requested, and was also part of a small group that advised Mr. O'Brien from time

to time. Mr. Mike Kedar, the founder and former Chairman of Callnet in Toronto, Canada, with experience in regulatory matters, was also recruited to the board.

4.04 Mr. Massimo Prelz, Managing Director for Europe of Advent International Corporation, an international venture capital corporation that specialised in the telecommunications and media sector, became a director of Esat Telecom, and of Communicorp, in October, 1994, following Advent's investment of \$10 million. The Advent investment, in exchange for a 34% interest in Communicorp, was in large part made in anticipation of a possible bid for the GSM licence. Mr. John Callaghan, a prominent chartered accountant, became a director of Esat Telecom in December, 1994. Mr. PJ Mara, a consultant to Mr. O'Brien, and a significant figure in political circles, had advised him that the composition of the board needed strengthening, in view of Communicorp's interest in the GSM licence. It was Mr. Mara who had proposed Mr. Callaghan as a prospective board member. Other directors of Esat Telecom included Mr. Denis O'Brien Senior, father of Mr. O'Brien, Mr. Mark Roden, Mr. Paul Connolly and Mr. Brendan O'Kelly.

4.05 The first appointed Chief Executive of Esat Telecom was Mr. Doug Goldschmidt. He had previously served as head of regulatory affairs at PanAmSat, a US satellite company that had operated in direct competition with IntelSat, the US monopoly satellite communications systems provider. Mr. Goldschmidt had impressed Mr. O'Brien with his knowledge of European Community regulatory affairs, gained through spending time on behalf of PanAmSat securing permissions from European Union governments. Mr. O'Brien believed that Mr. Goldschmidt's experience would be helpful to Esat Telecom in its efforts to obtain a licence to operate long-distance fixed-line services, and also to press the Irish Government to introduce competition in mobile telephony, and specifically to hold a competition for the award of a GSM licence. In his dealings with the Competition Directorate of the European Commission, on behalf of Esat Telecom's fixed-line business, Mr. Goldschmidt it seems had learned, at a relatively early stage, of the Commission's intention to adopt a Directive to compel Member States to issue second mobile licences.

4.06 On the existing fixed-line side of its business, Esat Telecom had successfully applied to the Department for a Value Added Service, VAS, licence, which had been issued to it in December, 1992. VAS licence holders were entitled to provide limited telecommunications services, not deemed to be part of the public voice telephony service, which was reserved by law exclusively to Telecom Éireann. In essence, the VAS licence permitted Esat Telecom to provide telecommunications services, which included data, fax, voicemail, and any other "*added value*" service, in addition to a voice telephony service, provided that

voice service originated from, or was delivered over, a private line leased from Telecom Éireann. It was only Telecom Éireann that had the privilege of providing voice telephony services over the public network.

4.07 In his evidence to the Tribunal, Mr. O'Brien described the difficulties which had been encountered in operating the leased-line arrangements. Esat Telecom had signed up numerous large corporate customers to its services, but had, according to Mr. O'Brien, experienced delays in obtaining sufficient leased-line capacity from Telecom Éireann to meet that level of demand. Mr. O'Brien's position was never accepted by Telecom Éireann, and it was ultimately the view of Telecom Éireann that it had been vindicated in that regard, by reason of a formal decision issued by the European Commission in July, 2000.

4.08 In March of 1994, Mr. O'Brien was introduced by a Canadian company, which competed with Bell Canada, to the possibility of expanding Esat Telecom's fixed-line services, within the limitations of its VAS licence, through the use of devices known as auto-diallers and routers. Through the use of these devices, the Canadian enterprise had been able to route all long-distance calls over the public network to its nearest local switch. Esat Telecom proceeded to identify a supplier of auto-diallers and routers in the United Kingdom, and commenced installation at their customers' premises, thereby obviating the necessity for leased-lines, and overcoming the limitations imposed on its capacity to service its corporate customers, by the availability of leased-lines from Telecom Éireann. From Esat Telecom's point of view, the use of auto-diallers and routers was beneficial to its business, in that they reduced the backlog of customers awaiting service, and they permitted it to pursue smaller revenue-generating customers, who would have been unable to afford the high cost of leased-line installation.

4.09 From the Department's point of view, the use by Esat Telecom of this equipment to connect customers over the public network, rather than over leased-lines, fell outside the terms of its VAS licence. The Regulatory Division of the Department, and in particular Mr. Sean McMahon, who headed that Division, and Mr. Sean Fitzgerald, Assistant Secretary, with overall responsibility for the Telecommunications Section of the Department, believed that action should have been taken to restrict this activity, and that by reason of the failure to take such action, the law had not been upheld, and the regulatory process had been shown to be ineffective. Mr. Fitzgerald was concerned that the potential damage to Telecom Éireann, through Esat Telecom's operations outside the terms of its VAS licence, was significant. The legality of the usage of auto-diallers and routers was a vexed question, and there was considerable and genuine uncertainty surrounding the issue, and doubt as to whether legal action in respect of their usage would have succeeded.

4.10 Mr. O'Brien described the conflict between Esat Telecom and the Department on this issue as a major regulatory battle. The Department had threatened legal action against Esat Telecom, and in early 1995, Esat Telecom had referred the matter to the European Commission. Esat Telecom had, it seems, received a response from a senior Commission official, which, as far as Mr. O'Brien was concerned, supported the activities of Esat Telecom, and which set out the Commission's view that the use of auto-diallers for voice services should be regarded as permissible under the relevant EU Services Directive. It was Mr. O'Brien's evidence that, whilst he believed that the Department would never have taken legal action against him, there were concerns that this dispute could undermine Esat's prospects in the GSM process. As will be seen, close to the time of the announcement of the result of the GSM licence competition, Mr. Fitzgerald prepared a memorandum entitled "*The GSM Award and Regulation of Competition*", which highlighted what he regarded as the flouting of the terms of Esat Telecom's VAS licence in the fixed-line telecommunications sector.

4.11 By late 1993, Mr. O'Brien had commenced preparations for participation in the anticipated competition to licence a GSM operator. His first action was to put together a small project team. Interim work was undertaken to develop a business plan for the licence application, including a nationwide market research study, which was undertaken by an independent agency, to establish market needs and demand for mobile services. Work also commenced on the design of a national backbone and trunk network, to distribute and receive mobile telephone calls throughout the country.

4.12 Around this time, Mr. Brennan had been appointed to preside over the Department's Development Division, with a significant part of his brief to progress the licensing of a GSM operator. Mr. Brennan commenced research with a view to devising an approach to a selection process, and during this research period he operated an open-door policy to interested parties. It became known in the market that Mr. Brennan was engaged in this task, and various potentially interested parties came to meet with him. Mr. Brennan had discussions with representatives of many telecommunications companies from Europe and the United States, and some from further afield. During this phase, Mr. Brennan consciously used meetings as a two-way process, taking soundings to advance his evolving thinking about the approach to the competitive process, as well as taking the opportunity to listen to what interested parties wanted to say to him. He also received written submissions.

4.13 Esat Telecom, in common with other interested parties, took up the opportunity of making written submissions, and in June, 1994, Mr. Goldschmidt furnished Mr. Brennan and Mr. McMahon with a document, entitled "*Possible*

Criteria for Evaluating Competitive Tenders for a GSM Licence and for the Establishment of GSM Licensing Fees”, in which he outlined suggestions for evaluation of GSM licence applications, and for the level of fees which might be associated with the granting of a licence. In late October, 1994, Mr. Goldschmidt attended a meeting in the Department, when he was informed that the Department expected that the holding of a GSM competition process would be announced shortly. That projected timescale was of course delayed by unforeseen events, and in particular by a change of Government in December, 1994.

EXPLORATORY NEGOTIATIONS WITH POTENTIAL PARTNERS TO FORM A BIDDING CONSORTIUM

4.14 From 1994, Mr. O'Brien was active in attempts to establish relationships with potential partners to form a consortium to apply for the GSM licence. Preparatory meetings were held with various international telecommunications operators, some of which developed into serious negotiations. Further approaches were made to potential partners during the first months of 1995, but it was not until mid-1995 that a joint venture agreement was concluded with Telenor, the Norwegian State telecommunications company.

4.15 Initial approaches to potential partners included a single meeting with TeleDanmark, the Danish national telecoms provider. That meeting took place in early June, 1994, and was described by Mr. O'Brien in evidence as an exploratory discussion. It was Mr. O'Brien's view that TeleDanmark did not respond substantively to this approach. There was another single meeting with Sigma Wireless, described in evidence by Mr. Pádraig O hUiginn, director of Esat Telecom and an adviser to Mr. O'Brien. Mr. O hUiginn had accompanied Mr. O'Brien to that meeting with Sigma Wireless, whose personnel he knew, but again those discussions were fruitless. Sigma Wireless, which had been formed by Mr. Tony Boyle and Mr. Michael McGinley in 1991, subsequently went on to form the Persona consortium with Motorola, Unisource Mobile and the ESB.

4.16 A further single meeting was held between Esat Telecom and Bell South Corporation, one of the seven regional Bell operating companies in the United States. This meeting took place in Brussels in early 1995, and was also described by Mr. O'Brien as an exploratory meeting; matters did not proceed further, as it transpired that Bell South did not in the event wish to apply for the licence.

4.17 More serious negotiations were pursued with Southwestern Bell, another of the seven Bell companies in the US, and Detecon GmbH, which was a

subsidiary of Deutsche Telekom, the national telephone operator in Germany. These negotiations commenced, following an approach made in early 1994, by a Dublin solicitor, the late Mr. Jack Kirwan, of Beauchamps solicitors. The first step in the ensuing negotiations was a meeting between Mr. O'Brien and Mr. Denis Moran, senior Vice President of Southwestern Bell, and some of his colleagues. Soon after this initial meeting, Detecon was introduced as a potential participant in the prospective consortium. These negotiations were ongoing and inconclusive by the time the GSM competition was launched by Mr. Michael Lowry on 2nd March, 1995.

A NEW GOVERNMENT IS FORMED AND THE COMPETITION FOR EXCLUSIVE NEGOTIATION RIGHTS FOR THE GSM LICENCE IS LAUNCHED

5.01 Mr. Michael Lowry, T.D., was appointed Minister for Transport, Energy and Communications on 15th December, 1994, on the establishment of the Coalition Government, composed of Fine Gael, Labour and Democratic Left. Mr. John Bruton, T.D., was elected Taoiseach, Mr. Dick Spring, T.D., leader of the Labour Party, was appointed Tánaiste and Minister for Foreign Affairs, Mr. Proinsias De Rossa, T.D., leader of Democratic Left, was appointed Minister for Social Welfare, and Mr. Ruairi Quinn, T.D., was appointed Minister for Finance.

5.02 Mr. Loughrey explained that in anticipation of the appointment of a new Minister, the practice of the Department was to assemble what he described as a major compendium, setting out the new Minister's areas of responsibility. Separate briefing notes would also be prepared by senior officials, outlining the activities of the Department on current issues. The compendium and briefing notes prepared for and submitted to Mr. Michael Lowry were not within the Departmental documents available to the Tribunal. All of the senior officials from whom the Tribunal heard evidence agreed that Mr. Lowry would have been briefed on the GSM process, and the Department's view of the importance of progressing the process speedily would have been conveyed to him. Whilst Mr. Martin Brennan did not recall a face-to-face meeting with Mr. Lowry concerning the GSM process, he thought there was almost certainly a discussion at some point about the entire telecommunications sector. Mr. Sean Fitzgerald did recall a meeting between Mr. Michael Lowry and the Secretary General, attended by each Assistant Secretary, on Mr. Lowry's first day in the Department when, in the context of discussion of the GSM competition process, Mr. Lowry indicated that it was a political priority for him to license a second operator as soon as possible.

5.03 In the intervening period, since 11th November, 1994, when the previous Government had approved a process to license a GSM operator, the Department had an opportunity to revisit its views on the access fee and royalty elements of the process design. That re-appraisal seems, at least in part, to have been prompted by representations made by Telecom Éireann, addressed to the following:

- (i) the potential loss to the Exchequer from limiting the access fee to £3 million;

- (ii) the negative impact on the profitability of Telecom Éireann that would result from an obligation to make equivalent royalty payments to those nominated by a new entrant.

Mr. Brennan believed that these representations would have been the subject of discussions between himself, Mr. Loughrey, Mr. Fitzgerald and Mr. Fintan Towey, who was then an Assistant Principal Officer who had joined the Development Division in September, 1994, and who was working with and reporting to Mr. Brennan. The thinking of the Department on this aspect of the process was recorded in a memorandum prepared by Mr. Towey, dated 5th January, 1995, which analysed the efforts of the Department to arrive at a balance between the needs of the Exchequer, the objective of introducing effective competition, and the impact that the payment of an equivalent royalty might have on Telecom Éireann.

5.04 On the next day, 6th January, 1995, shortly following Mr. Lowry's appointment, a detailed memorandum was prepared for his consideration, and that of Mr. Loughrey. It recorded that Mr. Lowry, as the new Minister, had authority, by virtue of the earlier Cabinet Decision of 11th November, 1994, made by the previous Government, to proceed with a selection process, without resubmitting the matter to Government, unless he wished to do so for political reasons. The memorandum also referred to the representations which had been received from Telecom Éireann, and the then intention of the Department to apply the same licence conditions to Eircell in the interests of preserving fair competition. Mr. Loughrey confirmed that the contents of the memorandum reflected the advice he would have given to Mr. Lowry. He added however that he would have been conscious of the sensitivities surrounding the position of Mr. Lowry, as a newly appointed Minister in a coalition Government, and generally of the inadvisability of Mr. Lowry proceeding without informing his Cabinet colleagues, and without their authorisation.

5.05 In the latter part of January, 1995, the financial element of the process continued to feature in the Department's deliberations. Further representations, along the same lines, were made by Telecom Éireann, and on 25th January, 1995, Mr. Fitzgerald, Mr. Brennan and Mr. Towey met with representatives of Telecom Éireann. On 31st January, 1995, Mr. Alfie Kane, then Chief Executive Officer of Telecom Éireann, followed up that meeting with a letter addressed to Mr. Loughrey, in which he summarised the views of Telecom Éireann. The approach that was ultimately adopted by the Department to the financial element of the process, and the recommendation which was made by Mr. Lowry to Government, in fact arose, not from those representations, but from what was a pragmatic solution to entirely separate budgetary considerations.

5.06 In fixing public expenditure estimates for the year 1995, the Minister for Finance, Mr. Ruairi Quinn, had calculated that £25 million would be available from the telecommunications sector. It was proposed that this contribution would be in the form of a dividend payable by Telecom Éireann to the State, as shareholder. It was Mr. Lowry's view, which was shared by Departmental officials, that the payment of a dividend of that order at that time would impact adversely on the interests of Telecom Éireann, in terms of its profitability, and would ultimately undermine its ability to attract a strategic partner, which was then regarded as desirable. The solution that was finally brokered between the two Departments, through their respective Ministers, Mr. Lowry and Mr. Quinn, was an agreement that £25 million would be available from the telecommunications sector, and would not be generated by the payment of a dividend by Telecom Éireann, but rather would be derived from an open-ended access fee imposed on the new GSM entrant. It was estimated that this would raise the requisite £25 million, which would meet the budgetary requirement. Mr. Brennan agreed that this new approach represented a significant shift in Departmental thinking, but he observed that the Department had to reconcile conflicting objectives, and conflicting Departmental positions.

5.07 The outcome of these developments was that the financial element of the selection process was altered fundamentally. What had been approved by the previous Government was a fixed access fee of £3 million, together with an obligation to pay an open-ended royalty at a level to be nominated by applicants, and the imposition of an equivalent royalty on Telecom Éireann. Following the submissions by Telecom Éireann, and the inter-Departmental issues regarding budgetary provision, that element of the process was recast. The level of access fee, subject to a minimum of £5 million, became open-ended, and the obligation to make ongoing royalty payments was dropped. What was now contemplated, in terms of the overall selection process was in substance, a hybrid process between an auction and a beauty contest. It was the hope of senior Departmental officials that, as the level of licence fee offered was to be the fourth-ranked evaluation criterion, the highest financial bidder would not necessarily secure the licence, and that the process, despite the incorporation of an auction element, would nonetheless produce as winner the applicant with the best overall proposals. Mr. Brennan agreed that the Department had gone full circle in its approach to the financial element of the process, and had moved from a low entry fee plus a royalty payment, to an open-ended entry fee with no royalty payment, but he stressed that the Department was still determined to get the message out, as he put it, that they were more interested in low tariffs than the payment of high licence fees.

5.08 Mr. Lowry brought the licensing of a second GSM operator to Government on 7th February, 1995, when it was decided by Government that a Cabinet Committee comprising the Taoiseach, Mr. Bruton, the Tánaiste, Mr. Spring, the Minister for Finance, Mr. Quinn, the Minister for Social Welfare, Mr. De Rossa, the Minister for Enterprise and Employment, Mr. Richard Bruton, and Mr. Lowry should review the proposed financial terms, proposed tendering procedures and proposed advertisements for the second GSM licence. An Aide Memoire for the Cabinet Committee was then prepared by the Department. This was another detailed document, which replicated much of the material which had been contained in the Aide Memoire of November, 1994, and on which the decision of the then Government, was grounded.

5.09 The substantive portion of the February, 1995, Aide Memoire was contained in paragraph 11, which recited the eight evaluation criteria, in descending order of priority, by which applications would be compared. There was one change in the structure of the evaluation criteria from that which had been envisaged and approved in November, 1994. That change entailed the elevation of financial and technical capability from the status of evaluation criteria, by which applications would be judged comparatively, to matters of which the evaluators had to be satisfied. In contrast to the documentation within the Departmental files, relating to the considerations which prompted the alteration of the financial terms of the process, there was no documentation available relating to this structural alteration, nor, with the exception of Mr. Fitzgerald, were Departmental officials from whom the Tribunal heard evidence able to give an account of how it was envisaged that this alteration would impact on the evaluation process to be conducted by the Project Group. It was Mr. Fitzgerald's evidence that there was time between November, 1994, and February, 1995, to reflect on some of the things that were in the earlier proposals, and to do things differently. It was his view that financial capability was not an appropriate criterion by which to rank bidders in order of merit, but was an issue to be investigated, and satisfactorily resolved, prior to the determination of the winner and the issue of the licence. It was not a comparative matter, but one on which applicants either did or did not have the requisite capability: it was imperative that the Department select a project that would not fail. The issue of financial capability was one, as will be seen, which featured prominently in the evaluation process.

5.10 The Cabinet Committee met on 16th February, 1995, and agreed to proceed with the proposed GSM tender competition as outlined in the Aide Memoire. A formal Memorandum for Government, dated 17th February, 1995, was then prepared by the Department. That was a relatively abridged document which referred to the decision of the Cabinet Committee, and appended the Aide

Memoire on which that decision was based. Discussion of the matter proceeded at a Cabinet meeting of 2nd March, 1995, when the Cabinet approved the announcement of an open competition on the basis that the bidding process would be promoted and controlled by the Department, and that a recommendation would be put by Mr. Lowry to Government in time for a final decision by 31st October, 1995. The Departmental officials from whom the Tribunal heard evidence agreed that, having regard to the terms of the Government Decision, it was clear that, whilst the evaluation process was to be run under the aegis of the Department, and a recommendation was to be put by Mr. Lowry to Government, the ultimate decision on the awarding of exclusive negotiation rights for the GSM licence was to be one for Government. Mr. Brennan also agreed that the descending order of priority of the evaluation criteria, having been approved by Government, then represented Government policy. A copy of the Government Decision of [2nd March, 1995](#), can be found within the Book of Appendices to this Volume.

5.11 The competition was announced officially by the Department on 2nd March, 1995. The announcement informed interested parties that a formal invitation to tender, and an information memorandum for the guidance of licence applicants, could be purchased on payment of a non-refundable fee of £5,000.00, and only those that had purchased the documentation could participate in the competition. The closing date for the receipt of applications was fixed for 12 noon, on Friday, 23rd June, 1995.

MR. DENIS O'BRIEN'S CONTINUING EFFORTS TO FORM A CONSORTIUM AND TO ELEVATE HIS PROFILE WITH FINE GAEL

BREAKDOWN OF NEGOTIATIONS WITH SOUTHWESTERN BELL

6.01 The negotiations between Esat Telecom, Southwestern Bell, and Detecon extended over a full year from early 1994, but did not come to fruition. Mr. Denis O'Brien described in evidence how difficulties arose in those negotiations. Southwestern Bell and Detecon wanted to keep bid costs to a bare minimum until the official announcement of the GSM competition. In contrast, Mr. O'Brien was strongly of the view that they should immediately spend money on a radio plan, in order to determine the number and precise locations for the construction of masts to provide maximum coverage for the country. In addition, he wanted to approach suitable landowners to sign site option agreements, and further to submit detailed applications for planning permissions for every mast site to the relevant local authorities throughout the country.

6.02 Southwestern Bell and Detecon contributed to the radio plan initiative by sending personnel to Ireland with radio planning expertise. Mr. O'Brien outlined in his evidence that a dedicated site acquisition team commenced work in the second quarter of 1994, an expensive process, but which in his opinion would be one of the key distinguishing factors from other competitive bidders, as it would demonstrate a capacity to enter the market quickly. The cost of signing up site options and making planning applications was an issue for Southwestern Bell and Detecon, according to Mr. O'Brien, but he stated that Esat Telecom commenced the work anyway on its own account.

6.03 Disagreements also arose between Southwestern Bell, Detecon and Esat Telecom in late 1994, and continued into early 1995, regarding the level of Esat Telecom's equity participation in the prospective consortium. Mr. O'Brien testified that it appeared to him that Southwestern Bell and Detecon were seeking to relegate Esat Telecom to the status of a token Irish presence.

6.04 A related issue, which arose between the potential partners, was the ability of Esat Telecom to fund its equity investment in the intended GSM joint venture. At a meeting on 20th January, 1995, it seems that Southwestern Bell and Detecon requested the provision of written confirmation by Investment Bank of Ireland that the bank would raise the required financing to fund Esat Telecom's anticipated equity investment, as referred to in a letter from Mr. O'Brien dated 27th January, 1995. In that letter, Mr. O'Brien also referred to an earlier meeting in November, 1994, with Investment Bank of Ireland, at which

the bank had confirmed to Southwestern Bell, and to Detecon, that it could raise the necessary funds for Esat Telecom. Reference was further made by Mr. O'Brien to commitments by Advent to provide funding in respect of the GSM project, and to an indication by Advent of an interest in providing additional funding. In that regard, he stated that Advent would provide Esat Telecom with a letter during the following week, confirming its interest in providing the funds necessary for the GSM project, which Mr. O'Brien indicated he would furnish to Southwestern Bell and Detecon. Mr. O'Brien concluded by stating that, although Esat Telecom had no obligation to provide the assurances requested, he was anxious to lay to rest any residual doubts, however irrational, regarding its ability to fund the venture. When asked in the course of his evidence about the proposed Advent confirmation referred to in this letter of 27th January, 1995, Mr. O'Brien did not know whether that confirmation ever came into being.

6.05 It was Mr. O'Brien's evidence that, as time went by, he began to lose confidence in Southwestern Bell. He remarked that, when their representatives visited Dublin, they would have day-long sessions that achieved little or nothing. In early 1995, when he asked Southwestern Bell about the number of applications it had been involved in worldwide, and what its success rate had been, he learned that, whilst it had been involved in a total of fourteen licensing applications, it had achieved only one success, with an application in Taiwan, in which an 8% stake in the licence was held. He added that, during this time, Esat Telecom also lost confidence in Detecon because, in Mr. O'Brien's view, it was clear that it was being led by Southwestern Bell. Mr. O'Brien accordingly began to feel that he was with the wrong team, and made his board aware of his views.

6.06 Mr. Owen O'Connell, a partner in Messrs. William Fry, who had been Mr. O'Brien's longstanding solicitor, represented Esat Telecom in negotiations with Southwestern Bell and Detecon, which had also jointly instructed a solicitor to represent their interests. Negotiations had reached the stage that the solicitors had exchanged draft shareholders agreements. Mr. O'Connell testified that it was his view that the Southwestern Bell concern with Esat Telecom's financial strength arose from the belief that the licence competition would be conducted as a bare auction. He added that the other real problem, as he saw it, was one of control, or relative degrees of control, in that the parties could not agree on the scale and extent of the vetoes which each should have, or the degree of control that each should have over the prospective consortium. He expressed the opinion that Southwestern Bell and Detecon regarded Esat Telecom as a necessary local involvement, but did not regard it as having a significant say, and this contrasted with Mr. O'Brien's view of himself as the leader of the prospective consortium. It was Mr. O'Connell's assessment that it was these contrasting philosophies which were the cause of the breakdown of negotiations.

6.07 When the competition was announced on 2nd March, 1995, the auction element, as outlined in the formal Request for Tenders issued by the Department, was of grave concern to Southwestern Bell. They outlined their views on this matter in a letter dated 15th March, 1995, addressed to Mr. O'Brien. After expressing the hope that their respective lawyers could make good progress on the shareholders agreement, before their next scheduled meeting on 21st March, 1995, the Southwestern Bell letter continued as follows:

"I did however want to raise a major point related to the cellular bid. While we were led to believe the license fee would be fixed and that interconnect rates would be reasonable, the RFP now makes us realize the situation is very different. If we look at what has happened in an "auction" environment elsewhere in Europe, it is fairly safe to assume that the license fee could very well exceed an amount equal to 8, 9 or even 10 times as much as originally envisioned. Obviously, we are working diligently on the financials, but I think it is very safe to assume our view of the equity requirements is no longer applicable. We envision scenarios where it could easily double."

6.08 In Mr. O'Brien's view, this letter was part of a strategy by Southwestern Bell to downgrade the role of Esat Telecom to that of junior partner, and was an attempt to "spook" Esat Telecom about the actual cost of the project. When he was asked if Southwestern Bell's view of Esat Telecom's financial state, meaning their view of Esat Telecom's inability to meet the equity necessary for the project, resulted in the collapse of negotiations, Mr. O'Brien responded that the negotiations never reached that stage. It was Mr. O'Brien's view that the two fundamental reasons for the breakdown in negotiations were Esat Telecom's opinion that Southwestern Bell and Detecon were not the right people to be in business with, and that opinion was compounded by the fact that they wanted to offer Esat Telecom merely a small token equity holding of approximately 20%. In contrast, Esat Telecom was proceeding on the basis of being more or less equal partners. Mr. O'Brien described Esat Telecom's great strength as being in its development of a liberalised market in Ireland, an attribute which Southwestern Bell had never really recognised as one that could bring tremendous advantages to the prospective consortium. The negotiations were terminated by mutual consent in March or April, 1995. Southwestern Bell went on to participate in the Irish Mobicall consortium, together with Deutsche Telekom and TeleDanmark, whilst Mr. O'Brien and Esat Telecom continued in their quest for an international partner for the GSM licence bid.

APPOINTMENT OF POLITICAL ADVISERS

6.09 The services of external advisers, including political advisers, were retained by Esat Telecom as part of preparations for the GSM licence bid. Mr. O'Brien related in evidence that the external advisers, most of whom had been appointed in 1994, included Mr. PJ Mara, the late Mr. Jim Mitchell, Mr. Pádraig O hUiginn, and Mr. Dan Egan.

6.10 Mr. PJ Mara had extensive experience of Irish political life, having served as Press Secretary for Fianna Fáil whilst in opposition from 1983 to 1987, and having worked as Government Press Secretary and Press Adviser to the then Taoiseach, Mr. Charles Haughey, from 1987 to 1992. Mr. Mara outlined in evidence that he had been retained to provide public relations consultancy services to Communicorp, including Esat Telecom, from about 1994, extending to services in connection with the application ultimately made for the GSM licence. In view of its interest in the licence, Mr. Mara advised that the composition of the board of Esat Telecom should be strengthened, and it was he who had proposed Mr. John Callaghan as a board member. Mr. Mara described his input into matters as having generally been on a broad or macro basis. His expertise was in the area of public relations, particularly in financial public relations, and dealings with journalists writing in the business pages. Mr. Mara had no input into Mr. O'Brien's strategy of raising his profile with Fine Gael, and would not have been of any particular assistance to Mr. O'Brien in that regard. As to Fianna Fáil, it was Mr. Mara's evidence that he had been in internal exile within the party following the change of leadership in 1992. Mr. Mara agreed that his early role went beyond advising on relations with Fianna Fáil, in that his experience of Government gave him some insight into the way individuals in Government, whether senior politicians or administrators, would look at things, and he was in a position to advise accordingly.

6.11 Another person with substantial political and Government experience, who described himself in evidence as part of a small group that had advised Mr. O'Brien from time to time, was Mr. Pádraig O hUiginn. He was the former Secretary General of the Department of the Taoiseach, and was invited by Mr. O'Brien in February, 1994, to become a director of Esat Telecom. Mr. O hUiginn described how he brought the services of Esat Telecom to the notice of his business acquaintances. He knew the people in Sigma Wireless, and suggested a meeting with them, with a view to forming a consortium. Likewise, he knew Mr. Lochlann Quinn, and also sought to arrange a meeting with him about the possibility of forming a consortium, but was advised that Mr. Quinn was already committed to another consortium. Due to Mr. O hUiginn's position as Chairman of Bord Fáilte, he had tickets to the All-Ireland Football Final in September, 1995,

and invited Mr. O'Brien to accompany him. It was on this occasion, as will later be set forth, that Mr. O'Brien met Mr. Michael Lowry, and arranged to meet him again after the match. These meetings took place on 17th September, 1995, after applications for the GSM licence had been submitted on foot of a revised deadline of 4th August, 1995, and some days after oral presentations had been made by applicants to the Department.

6.12 A figure with a background in national politics, who was appointed as a consultant in 1994, was the late Mr. Jim Mitchell. Mr. Mitchell was a member of the Dáil for Fine Gael, and was a former Minister for Communications in the Fine Gael/Labour Government which held office between December, 1982, and March, 1987.

6.13 It seems that shortly after Mr. Lowry's appointment as Minister, Mr. O'Brien asked Mr. Mitchell if he could arrange for Mr. O'Brien to meet with Mr. Lowry, as they had never met before, and Mr. O'Brien needed an introduction. A note made by Mr. Mitchell, dated 5th January, 1995, which was provided to the Tribunal by his solicitors, recorded a meeting which he had with Mr. Lowry on that day. Mr. O'Brien and Mr. Lowry were questioned in evidence about the contents of this handwritten note, which recorded as follows:

"I saw M. Lowry at 3.30 today + informed him of my involvement with Esat.

Tenders to be sought by advertisement in next week or two.

(a) DOB not favoured by Dept.

(b) DOB FF!!

He is available to meet Principals of all contestants in Feb including DO'B - not for lunch.

Check in three weeks to see if this has happened."

6.14 As regards his interest in meeting Mr. Lowry, Mr. O'Brien testified that, as a player in a market dependent on the Government of the day for liberalisation to expand his business, the key person to meet was the Minister, because the Minister was driving the policy of the Government. He added that he wanted to meet Mr. Lowry to tell him of his experiences to date as an entrant into the market, to outline to him issues that needed to be addressed, such as auto-diallers and capacity from Telecom Éireann, and also to ask him whether it was his intention to proceed with the process of licensing a GSM operator.

6.15 As to Mr. O'Brien's knowledge of the meeting on 5th January, 1995, between Mr. Mitchell and Mr. Lowry, he thought that Mr. Mitchell would have telephoned him to tell him that Mr. Lowry would meet him, and he thought that a meeting was subsequently arranged. Mr. Mitchell did not, according to Mr. O'Brien, tell him that he was regarded as a person who was not favoured by the Department. Mr. O'Brien was emphatic that he did not recall any discussion with Mr. Mitchell about a view having been expressed by anybody, but particularly by Mr. Lowry, that there was a perception of Mr. O'Brien as being a Fianna Fáil supporter. Mr. O'Brien agreed that donations by him to Fine Gael in significant terms commenced in 1995, but added that he had probably bought tickets for a table at Mr. Mitchell's annual economic forum prior to that year, although he did not have any records for it.

6.16 Mr. Lowry had informed the Tribunal, in a Memorandum of Intended Evidence furnished by him prior to his attendance, that some time shortly after the Government announced its intention to commence the GSM licence competition, Mr. Mitchell had asked to see him. Mr. Mitchell had informed him that he wished Mr. Lowry to be aware of his interest in the matter as a consultant/adviser to Mr. O'Brien and to his associated companies, and Mr. Mitchell had not made any specific request of him, other than declaring his interest. During the course of the competitive process, Mr. Lowry would have met Mr. Mitchell on at least one occasion in Leinster House, when Mr. Mitchell inquired in general terms as to the ongoing status of the process, in response to which Mr. Lowry would have commented in general terms, and any discussion between them would not have been detailed. This Memorandum of Intended Evidence was furnished in response to a query raised by the Tribunal about any meetings Mr. Lowry may have had with, or approaches he may have received from, Mr. Mitchell.

6.17 Mr. Mitchell's note of his meeting with Mr. Lowry on 5th January, 1995, was raised with Mr. Lowry when he attended to give evidence. Mr. Lowry confirmed that he recalled the meeting and testified that it was his recollection that Mr. Mitchell had told him that he had been engaged by Esat Digifone as a consultant, and that Mr. Mitchell felt that he should put that on the record with Mr. Lowry, as Mr. Mitchell was a member of Fine Gael at the time. The portion of the note that recorded "*DOB not favoured by Dept*" was, in Mr. Lowry's view, a comment that Mr. Mitchell must have made to him, as Mr. Mitchell would have been very conscious of the fact that there had been tension between the Regulatory Division of the Department and Mr. O'Brien, relating to his fixed-line business, before Mr. Lowry was appointed Minister. As regards that part of Mr. Mitchell's note which recorded "*DOB FF.!!*", Mr. Lowry recalled Mr. Mitchell informing him that Mr. O'Brien's background was in Fianna Fáil, and that he was

a subscriber to that party, which Mr. Lowry described as a general comment made by Mr. Mitchell. He recalled that Mr. Mitchell had wanted him to meet Mr. O'Brien, with a view to Mr. O'Brien putting to him his point of view regarding the direction of the telecommunications industry. As regards Mr. Mitchell's record that Mr. Lowry had indicated that he would not be available to meet Mr. O'Brien for lunch, it was Mr. Lowry's evidence that that was in accordance with his general practice, as he considered lunch meetings were too time-consuming.

6.18 Mr. Lowry's diary for Tuesday, 7th February, 1995, recorded the following entry:

"18:30 Jim Mitchell FG H.Q.".

Mr. Lowry also recalled this meeting with Mr. Mitchell in Fine Gael Headquarters. He thought that their discussion related to the overall telecommunications market, but particularly the fixed-line side of the business. The location of the meeting in Fine Gael Headquarters was to convenience Mr. Lowry, who was then a trustee of Fine Gael, and presumably was scheduled to attend a meeting of the trustees at that location. Mr. Lowry had been appointed Chairman of the trustees of Fine Gael in 1993.

6.19 Following the initial contact between Mr. Mitchell and Mr. Lowry, as recorded in the note of 5th January, 1995, it was Mr. O'Brien's evidence that he believed that a meeting had been arranged by Mr. Mitchell on his behalf with Mr. Lowry in due course, within the first two or three months of 1995. He described it as a briefing meeting that took place one evening. He could not recall if it was in the Department, but did recall that Mr. Mitchell was present. The meeting was very short, and lasted for approximately fifteen minutes or less, and was primarily for the purpose of enabling Mr. O'Brien to introduce himself to Mr. Lowry as a matter of courtesy. He recalled that he did have an opportunity of outlining the business of the Esat companies, what they were trying to do, and the difficulties they were encountering, including in connection with leased-line capacity issues and auto-diallers. The entry in Mr. Lowry's diary for 7th February, 1995, was brought to Mr. O'Brien's attention during his evidence, and he agreed that Fine Gael Headquarters could have been the venue for this meeting, as the Esat offices were across the road from it.

6.20 Whether that first meeting between Mr. Lowry and Mr. O'Brien took place on 7th February, 1995, in Fine Gael Headquarters, or on another occasion in a different location, there appears to be no doubt that it was the late Mr. Jim Mitchell who arranged the first face-to-face meeting between them. Whilst nothing of any great significance turns on it, the Tribunal regards it as distinctly

improbable that the matters recorded by Mr. Mitchell as an aide memoire for himself, in his initial handwritten note of his meeting with Mr. Lowry on 5th January, 1995, would have included information that he had conveyed to Mr. Lowry. On the contrary, the Tribunal regards it as far more probable that Mr. Mitchell would have recorded information conveyed to him by Mr. Lowry, which he wished to remember. Whilst the Tribunal recognises that Mr. Mitchell may well have been conversant with the tensions which had arisen between Mr. O'Brien and the Regulatory Division of the Department over his fixed-line activities, and that it is possible that he may have also regarded Mr. O'Brien as then being a supporter of Fianna Fáil, the Tribunal considers it unlikely that Mr. Mitchell would have noted them, or in the case of the entry relating to Mr. O'Brien's political affiliations, that he would have followed that entry with double exclamation marks, if those were merely matters which were then within his own knowledge.

6.21 Mr. Mitchell introduced another political adviser to Mr. O'Brien, in the person of Mr. Dan Egan. Mr. Egan had then been associated with Fine Gael for the best part of two decades, and had been employed by the party for six years from 1978 to 1984. He had been appointed special advisor to Mr. John Bruton, then Minister for Finance, in 1986, and had worked in the Department of Finance. Shortly after his recruitment as an adviser to Mr. O'Brien, he was appointed Secretary to the Fine Gael group participating in the Peace and Reconciliation Forum, and he continued in that capacity until the work of the Forum concluded in 1996.

6.22 It was in January, 1995, that Mr. Egan was invited by Mr. Mitchell to become an adviser to Mr. O'Brien. It was Mr. Egan's understanding that Mr. O'Brien wished to raise his public profile and that of his companies. Following Mr. Mitchell's initial approach to Mr. Egan, Mr. Egan met with Mr. O'Brien. According to Mr. Egan's evidence, at their first meeting they discussed various matters, and Mr. Egan recalled in particular that their discussion focused on ways that Mr. O'Brien could promote both his name and that of Esat Digifone. By the time of their second meeting, which took place some short number of weeks later, Mr. Egan had agreed that he would act as adviser to Mr. O'Brien. Apart from attending political functions, Mr. Egan also recommended to Mr. O'Brien that he should meet with Ministers of commercial Departments. As to how this might assist Mr. O'Brien, Mr. Egan explained that, although it was not known how the GSM competitive process would be conducted, he thought it likely that it would be discussed at Cabinet level at some stage, and that accordingly it would be valuable for Mr. O'Brien to meet Ministers of such Departments, who would then have something to contribute to the debate.

6.23 In accordance with that advice, Mr. Egan arranged a meeting between Mr. O'Brien and Mr. Enda Kenny, T.D., who was then Minister for Tourism and Trade. That meeting, which took place in Mr. Kenny's Ministerial office in Leinster House, proceeded on 17th May, 1995. Mr. Egan had accompanied Mr. O'Brien to Leinster House, and it seems that, whilst they were waiting for that meeting to commence, Mr. Egan encountered Mr. Richard Bruton, then Minister for Enterprise and Employment, whom he also knew well. He introduced Mr. O'Brien to Mr. Bruton, and took that opportunity to ask Mr. Bruton if he would have time for a short meeting with Mr. O'Brien. Mr. Bruton acceded to that request, and there was a meeting between them later that evening. Each of these meetings sought and arranged by Mr. Egan appear to have been brief and perfunctory encounters and neither Minister in any event played any part in the decision taken by Government at the conclusion of the GSM process.

6.24 Although Mr. Egan testified that it was his advice to Mr. O'Brien that it was inadvisable to become identified with any one political party, it seems that that aspect of his advice was not followed. As will be seen, the political functions that were attended by, or sponsored by, Mr. O'Brien or his companies or associates, in 1995 and 1996, were all, bar one, events run by Fine Gael. Mr. O'Brien testified that greater focus was placed at that time on Fine Gael, as it was the major party in Government.

EFFORTS TO INCREASE PROFILE WITH FINE GAEL

6.25 From early in January, 1995, Mr. O'Brien actively courted Fine Gael with a view to increasing his profile and that of his telecommunications companies. Fine Gael was the main party in the new Rainbow Coalition formed with Labour and Democratic Left on 15th December, 1994, without the dissolution of the Dáil. Following the vote on the appointment of the new Taoiseach, and the nomination of members of the Government in the Dáil Chamber on 15th December, 1994, the Dáil then adjourned for the Christmas recess until 24th January, 1995.

6.26 The change of Government was a significant shift in political terms from the Fianna Fáil/Labour Coalition to the Fine Gael/Labour/Democratic Left Rainbow Coalition. Mr. Cowen of Fianna Fáil was no longer Minister for Transport, Energy and Communications, and this Department passed to Mr. Lowry. This was Mr. Lowry's first Ministerial portfolio. Shortly after the New Year, on the 5th January, 1995, and as has already been referred to in some detail, the late Mr. Jim Mitchell met with the new Minister, as recorded by him in his note. There can be no doubt from the contents of his note that Mr. O'Brien was discussed, and whatever the source of the comment "*DOB FF!!*", the fact remains that, as

the comment was noted, it would appear to show that there was a perception at large that Mr. O'Brien was closer to Fianna Fáil than to Fine Gael.

6.27 Following the recruitment of Mr. Egan, and the advice which he proffered, Mr. O'Brien, through his various companies commenced a campaign of contributions to Fine Gael, and attendances at functions. Information relating to these contributions and functions was provided to the Tribunal by Fine Gael, and by Mr. O'Brien. Detailed evidence of them was heard from Mr. Tom Curran, then General Secretary of Fine Gael, and his evidence was largely confirmed by Mr. O'Brien himself. The total recorded contributions, as detailed by Mr. Curran, allowing for uncertainty over one small donation of £260.00, amounted to £22,140.00, for the sixteen months from March, 1995, to June, 1996. Well over half of this total figure was paid in advance of the announcement on 25th October, 1995, of the result of the GSM licence competition. The figure was also net of certain other donations, which are dealt with separately. The information provided to the Tribunal by Fine Gael confirmed that no donations had ever been received by the party from Mr. O'Brien, or from any of his companies, prior to 9th March, 1995.

6.28 The following were the details of the recorded donations or subscriptions provided over that period:

- (i) £1,000.00 on 9th March, 1995, for the Carlow/Kilkenny constituency fundraising lunch;
- (ii) £2,000.00 in March, 1995, for the Dublin Central constituency fundraising lunch;
- (iii) £440.00 on 29th May, 1995, for the Meath constituency Golf Classic;
- (iv) £5,000.00 in June, 1995, for the Wicklow By-Election fundraising lunch;
- (v) £1,000.00 in June, 1995, for the Dublin West constituency lunch;
- (vi) £4,000.00 sponsorship on 16th October, 1995, for the Fine Gael National Golf Classic;
- (vii) £200.00 in October, 1995, for the Westmeath fundraising lunch;
- (viii) £600.00 in October, 1995, for the Dublin South East fundraising lunch;

- (ix) £900.00 in December, 1995, for the Dublin North Central lunch;
- (x) £1,000.00 in 1996, for the Dublin South West constituency;
- (xi) £1,000.00 in 1996, for the Limerick East constituency fundraiser;
- (xii) £1,000.00 in June, 1996, for the Dublin Central fundraising lunch;
- (xiii) £1,000.00 in June, 1996, for the Meath constituency lunch;
- (xiv) £3,000.00 in June, 1996, for the Fine Gael National Golf Classic.

The information provided by Mr. O'Brien in relation to these donations largely accorded with that provided by Mr. Curran. Mr. O'Brien himself, or various of his associates, attended these events.

6.29 Apart from the advice which Mr. O'Brien had from Mr. Egan, it seems that he also received advice in that regard from Ms. Sarah Carey, who joined Esat Telecom as Marketing Coordinator in January, 1995. Some weeks after her appointment, she informed Mr. O'Brien that she was a member of Fine Gael, and advised him that some members of the party had a negative perception of him, and that other members did not know anything about him, or anything about the liberalisation of the telecommunications industry. Ms. Carey it seems gave Mr. O'Brien the same advice as Mr. Egan, although her focus was on raising his profile, and that of his businesses, with Fine Gael.

6.30 Ms. Carey was instrumental in proposing the events which Mr. O'Brien sponsored and attended, and she herself attended probably as many as ten such Fine Gael events. It was Ms. Carey who suggested that Mr. O'Brien attend the first of the functions which he supported, the Carlow/Kilkenny lunch on 9th March, 1995, at which she expected that the Taoiseach and members of the Cabinet would be present. Mr. Michael Lowry also attended that event at the invitation of Mr. Phil Hogan, who was the Fine Gael T.D. for that constituency. By then, of course, Mr. Lowry had already met Mr. O'Brien on the introduction of the late Mr. Jim Mitchell, most probably at Fine Gael Headquarters on the evening of the previous 7th February, 1995.

6.31 The most sizeable contribution made at constituency level was the £5,000.00 donation to the Wicklow By-Election lunch in June, 1995. Mr. Hogan was also involved on this occasion as the Fine Gael Director of Elections for that By-Election. Ms. Carey testified that this donation was not made on her initiative,

and it was her understanding that Mr. O'Brien had himself spoken to Mr. Hogan, and had agreed to make that payment. The payment was made by bank draft, and Ms. Carey recalled that it was Mr. O'Brien who directed that it should be made in that manner, and she had a clear recollection of receiving those instructions from Mr. O'Brien. Ms. Carey further recalled obtaining an Esat Telecom cheque, and using that cheque to purchase the draft by which the donation was made. She did not consider it surprising that the donation was made in that manner, in view of the then prevailing climate, and the possibility that a donation by Mr. O'Brien to Fine Gael at that point might be misrepresented by other applicants for the GSM licence, or by the media.

6.32 Mr. Hogan's recollection of what had occurred was somewhat different. He had known Ms. Carey for many years, and it was his evidence that the donation arose as a result of an inquiry made to him by Ms. Carey as to whether Mr. O'Brien or Esat could be of any assistance to the party, and that it was in that context that he had mentioned the forthcoming fundraising Wicklow By-Election lunch. Mr. Hogan doubted that he had met Mr. O'Brien before that lunch in June, 1995, even though Mr. O'Brien had attended Mr. Hogan's own constituency event the previous March, 1995. Ms. Carey did not recall any discussion with Mr. Hogan along the lines described by him in evidence. She was clear in her testimony that it was her recollection that the initiative had come from Mr. O'Brien, and that he had informed her that he had discussed the donation with Mr. Hogan, and that it was Mr. O'Brien who had instructed her on how the payment should be made. Mr. O'Brien, whilst having no memory of the precise circumstances in which the donation arose, testified that he would not disagree with Ms. Carey's evidence.

6.33 Whether the donation arose as a result of contacts between Mr. O'Brien and Mr. Hogan, which seems to have been the position, or an inquiry made by Ms. Carey, the donation of £5,000.00 was made in the form of a bank draft, and Mr. O'Brien and Mr. Lowry attended that function, which was somewhat in excess of a month before the then closing date for receipt of applications for the GSM licence on 4th August, 1995. There was by then, as evident both from the manner in which the payment was made, and from Ms. Carey's own evidence, a clear sensitivity regarding other interested parties or the media learning of that donation, for fear of misrepresentation, as Ms. Carey put it. Although it would have been evident, from the attendance of Esat representatives at that function, that Esat was supporting Fine Gael, Ms. Carey indicated that the level of that donation at £5,000.00 would not have been known, and it was that which they wished to keep from public scrutiny. Ms. Carey testified that it was both legal and ethical to support Fine Gael in that manner, and that Esat simply wished to ensure that its profile with Fine Gael

would be higher than any other GSM applicant, and that the support given would not be misrepresented.

6.34 The second most sizeable payment was the donation of £4,000.00 made towards the Fine Gael Golf Classic, held on 16th October, 1995, and of which Mr. Hogan was Chairman of the organising committee. This donation was also made by means of a bank draft, and again the payment was arranged by Ms. Carey. It was Ms. Carey's evidence that it had been she who had selected this manner of payment, and she had followed the precedent of the Wicklow By-Election. The sensitivity surrounding public scrutiny was also apparent in the circumstances of this donation, and Ms. Carey testified that she recalled Mr. O'Brien specifically instructing her that there should be "*'no advertising' at the Golf Classic*". In that regard, Ms. Carey had to request that Fine Gael return Esat promotional material to her, although it seems that Esat was not the only sponsor that requested that there should be no identification or signage at the Golf Classic. A distinguishing feature of this donation was that the bank draft by which it was made was purchased with funds drawn from the joint account held by Communicorp and Telenor for the purposes of expenses connected with the Esat Digifone application for the GSM licence.

6.35 The donation to the Fine Gael Golf Classic of 1995, and evidence relating thereto, is outlined in greater detail in Chapter 41 of this Volume. This includes evidence relating to the mechanics of the donation from witnesses connected with Fine Gael, such as Mr. Mark FitzGerald, Mr. Hogan, Mr. Jim Miley, Ms. Deirdre Fennell and Ms. Rita O'Regan, and evidence from Mr. Hans Myhre of Telenor, regarding his signature on the cheque that funded the bank draft, as well as a detailed outline of Ms. Carey's and Mr. O'Brien's evidence in relation to this Golf Classic donation.

6.36 Apart from these fifteen recorded donations, there were two further payments made, one of which was greater than the aggregate amount of all recorded donations. That payment was made by Telenor, on behalf of Esat Digifone, at Mr. Denis O'Brien's request in unusual circumstances in December, 1995. At that time, the result of the competitive process had been announced, but protracted negotiations were proceeding between Esat Digifone and the Department, and the GSM licence would not issue until the following 16th May, 1996. This donation was made towards a fundraising dinner held by Fine Gael in New York City in November, 1995. The unusual circumstances in which the donation was made, and subsequently dealt with have already been addressed in Chapter 3 of Volume 1. By way of brief recapitulation, the payment of \$50,000.00 was made by Telenor into an off-shore account of the late Mr. David Austin, who was a member of the organising committee of the New York

fundraising event, and who was a close personal friend of Mr. Lowry. The donation, which was brought to the attention of the Taoiseach, Mr. John Bruton, by Mr. Austin, shortly after it was received, was declined by him. It was ultimately transmitted to Fine Gael on 6th May, 1997, when a cheque from Mr. Austin's account in Bank of Ireland for the amount of £33,000.00, the Irish pound equivalent of \$50,000.00, was made payable to Mr. Frank Conroy, a longstanding Fine Gael supporter, who endorsed that cheque and furnished it to the party. Mr. Curran testified that, when Fine Gael learned of the original source of the donation in February, 1998, it sought to return it, and the donation was returned, but not until 7th March, 2001.

6.37 One additional event should be mentioned, which was held in February, 1996, when Mr. Lowry, who was then Chairman of the trustees of the party, organised a fundraising function in the Burlington Hotel, to which Mr. O'Brien thought that he had contributed somewhere in the region of £1,000.00. It was on Mr. Lowry's initiative that this event was held, and he regarded it as an official Fine Gael function, the proceeds of which were shared between his own North Tipperary constituency and certain Dublin constituencies. The Tribunal was never able to obtain any records of the funds raised, which according to the evidence heard, were neither in the possession of Mr. Lowry, or Fine Gael. Mr. Curran, on behalf of Fine Gael, testified that, as the function was not an event run by Fine Gael Headquarters, the party did not hold any records relating to it. Mr. Lowry likewise disavowed responsibility for them; it was his view that all of the documentation generated should have been with Fine Gael. The Tribunal, despite pursuing lengthy inquiries in private, was never able to unearth these files, from any source.

6.38 In the course of Mr. O'Brien's evidence, he addressed the Sole Member of the Tribunal to explain what he called a wider point about the political donations made to Fine Gael. He said that there was a new Government in power and that nobody in Esat knew any of the Ministers. Going to these political functions, he stated, was an opportunity, firstly to introduce themselves, secondly to introduce Esat and what they were trying to achieve, and thirdly to promote a liberalisation agenda, and to persuade Fine Gael, as the senior party in the Rainbow Coalition, as to the merits of opening the market more quickly. He described how they were conscious that Democratic Left and Labour had a different view, in that they wanted to open the market more slowly. So far as Mr. O'Brien was concerned, he had never made a political donation for the purpose of achieving something, for example, like the licence. He stated that they were part of the political process and that they were supporting the political process. He described what they were doing as getting to meet people by going to events, talking to them at any opportunity, and promoting liberalisation and Esat, and the fact that they were worthy people to be considered for a mobile phone licence.

He added that, at most of the political lunches, dinners and golf outings, they met other bidders for the licence as well.

6.39 Mr. Lowry was asked about his knowledge of the donations and contributions made by Mr. O'Brien or his companies to Fine Gael, or to any constituency organisation or member of the party during those years. Mr. Lowry had no specific knowledge regarding the amounts of donations or contributions made, but added that, by virtue of Mr. O'Brien's attendance at Fine Gael functions, he would have assumed that he was a contributor. Mr. Lowry met Mr. O'Brien at the Wicklow By-Election lunch in June, 1995, and he would have accordingly assumed that he was a contributor, but would not have known the specifics. Mr. Lowry listed the other Fine Gael fundraising events that he had attended, which were the Carlow/Kilkenny constituency event on 9th March, 1995, the Dublin South East constituency fundraising lunch on 2nd October, 1995, and the Golf Classic at the K Club on 16th October, 1995.

6.40 In the light of the evidence heard, it can be concluded that, following the change of Government in December, 1994, Mr. O'Brien adopted a strategy of promoting himself and his companies with members of Fine Gael. The first step in pursuance of this strategy was Mr. Jim Mitchell's meeting with Mr. Lowry on 5th January, 1995, when he arranged to introduce Mr. O'Brien to Mr. Lowry. Mr. Mitchell also proposed Mr. Dan Egan, a person with established Fine Gael connections, as a consultant to Mr. O'Brien, who subsequently introduced Mr. O'Brien to Mr. Enda Kenny, then Minister for Tourism and Trade, and Mr. Richard Bruton, then Minister for Enterprise and Employment. Mr. Egan also advised Mr. O'Brien to develop relationships with members of the political establishment, and to that end, to attend and support fundraising events. Ms. Sarah Carey, another person with sterling Fine Gael associations, was recruited as Marketing Coordinator to Esat Telecom in January, 1995, and she too was instrumental in assisting Mr. O'Brien in elevating his and his company's profiles with Fine Gael.

6.41 A campaign of donations to Fine Gael fundraising events then commenced from early 1995, with the first to the Carlow/Kilkenny lunch on 9th March, 1995. According to Fine Gael records, a sum of £13,400.00 was donated by Esat to Fine Gael in advance of the 25th October, 1995, date on which Mr. Lowry announced that Esat Digifone was the winner of the GSM licence competition. The manner of payment of the more sizeable donations, being the Wicklow By-Election contribution of £5,000.00, and the Golf Classic support of £4,000.00, by bank drafts, was indicative of a desire for secrecy in relation to the quantum of those donations, and this was borne out by Ms. Carey's evidence concerning the necessity for discretion. As well as the non-transparent manner in which the Golf Classic donation was made, the hurried

request for the return of Esat's promotional material, so as to prevent any public display of the company's sponsorship, further underlines this desire for secrecy, even though it was the case that the payment was journalised as a donation to Fine Gael in the Esat Digifone cheque payments analysis for accounting purposes. As Ms. Carey agreed in evidence, their object was to raise Esat's profile, or to impress the higher echelons of Fine Gael, by supporting the Golf Classic.

6.42 By his conspicuous support of Fine Gael fundraising events from early 1995, there can be no doubt that Mr. O'Brien's and Esat's profiles with Fine Gael would have been elevated. Whilst both Mr. O'Brien and Ms. Carey observed that they met members of other bidding consortia at Fine Gael events, Mr. Curran's evidence of donations received from other bidding consortia, or individuals having connections with them, which is set out below, in fact revealed very little by way of donations of consequence from such consortia.

6.43 In addition to providing information relating to Fine Gael's records regarding donations from Mr. O'Brien or his companies, Fine Gael also carried out an exercise to attempt to establish the full extent of all donations received from applicants other than Esat, and Mr. Curran gave evidence as to the result of that search. To this end, Fine Gael wrote to every constituency organisation, as well as members of the Oireachtas, for the relevant period, from July, 1994, to May, 1996, in order to ascertain what donations, contributions, sponsorships or payments of whatsoever nature had been received by them from any of the applicant organisations for the GSM licence, other than Esat Digifone. All Fine Gael Oireachtas members during the relevant period were written to, and all such Oireachtas members indicated that they did not receive any donations or contributions from any of the unsuccessful applicants for the GSM licence. Contact with constituency organisations revealed a number of donations, as follows:

- (i) The Limerick East constituency received two donations from a member of one of the unsuccessful consortia, valued at £1,000.00, and £300.00 for a constituency fundraising dinner held in November, 1996.
- (ii) Dublin North Central constituency received two donations from an individual associated with a member company of a consortium, which two donations were valued at £400.00. A separate donation in the amount of £500.00 was received from another such individual. All of these donations were in respect of a constituency fundraising dinner held on 11th December, 1995.

- (iii) The Dublin Central constituency received three potentially relevant donations. There was a £100.00 donation towards a fundraising lunch, which Mr. Curran believed was made in January, 1994, a second £100.00 towards a fundraising lunch in March, 1995, and a further £100.00 towards a similar fundraising event in June, 1996. These three donations were from the same source as the one of £400.00 to the Dublin North Central constituency. Despite his diligent inquiries, Mr. Curran acknowledged some doubt in relation to these donations, which were in any event modest, and of course, if the first of them was correctly dated as January, 1994, this appreciably preceded the announcement of the GSM competition, or indeed the return of Fine Gael to Government.
- (iv) One further relevant donation of £100.00 was made in 1995, from a person associated with a company that was a member of a consortium.

6.44 Mr. Curran was not aware of any other contributions made by unsuccessful applicants to Fine Gael constituencies, but he did emphasise that the exercise demonstrated the need for constituencies to keep more accurate fundraising records, and it was his view that some constituency record-keeping was less than perfect. Mr. Curran excluded from this statement any donations or sponsorship received in relation to the 1995 Golf Classic, which is addressed separately in Chapter 41 of this Volume.

THE REQUEST FOR TENDERS DOCUMENT ISSUED BY THE DEPARTMENT

7.01 The [Request for Tenders](#) document, or as it was called, the Request for Proposals, the RFP, was issued by the Department on 2nd March, 1995, and was available to all interested parties on payment of a fee of £5,000.00. It represented the culmination of the work undertaken by Mr. Martin Brennan, his dealings with Mr. Roger Pye of KPMG, the collection of information from contacts with interested parties, and probing of the market place. The RFP also reflected the Government Decision approving the criteria that would be used in judging the competition, and the order of ranking of those criteria. The RFP was entitled “*Competition for a Licence to Provide Digital Mobile Cellular Communications (GSM) in Ireland*”, and a copy can be found within the Book of Appendices to this Volume.

7.02 The RFP opened by inviting applications for a single licence to provide and operate within Ireland a public pan-European cellular digital land-based mobile communications system, and it set out the EU and domestic legislative basis for the competition. In paragraph 3 it declared that:

“Applicants must give full ownership details for proposed licensee...”

It set a minimum initial fee for the licence of £5 million, but provided that applicants were free to offer a higher fee to win the right to the licence. Technical matters, such as the allocation of spectrum and minimum coverage were outlined, and it was stipulated that information as to initial tariffing, and the proposed regime for the future development of tariffs, would be required. Paragraph 9 stated that applicants were required to demonstrate their financial capacity and technical experience, and capability to implement the system if successful, and to provide a business plan for at least the first five years of operation and a complete technical proposal. The document provided a brief guide relating to both the business plan and technical proposals required, as well as requesting that performance guarantees should be addressed, and it concluded by setting out a list of required technical minimum standards relating to service and mobile radio equipment.

7.03 The RFP requested that details be provided as to applicants’ proposed approach to service provision and air time resale. It prescribed free access to emergency service numbers, a directory inquiry service, facilities for State-authorised security interception, itemised subscriber billing, and customer arbitration and dispute settlement. It further prescribed interconnection with the PSTN, that is, the Public Switched Telephone Network, and public mobile

telephony services, as well as the switching and delivery of international calls, via Telecom Éireann, and it listed the relevant charges. It stated that the technical features of interconnection, national roaming and other aspects of the commercial relationship between the new entrant and Telecom Éireann were to be negotiated. It requested proposals for the disposition of any net windfall gains, and proposals for the methods for transmission of traffic. The RFP allowed for the request of additional information by applicants during the evaluation process. It provided an outline of the licence conditions, and advised that the licence would not permit exemptions from planning legislation, any powers of compulsory acquisition, or from passage over property.

7.04 Paragraph 19 was the pivotal provision of the RFP, in that it set out the framework whereby applications would be evaluated, and thereby notified interested parties of the evaluation scheme and of the criteria which had been approved by Government. Paragraph 19 is reproduced below:

“The Minister intends to compare the applications on an equitable basis, subject to being satisfied as to the financial and technical capability of the applicant, in accordance with the information required herein and specifically with regard to the list of evaluation criteria set out below in descending order of priority

- *Credibility of business plan and applicant’s approach to market development;*
- *Quality and viability of technical approach proposed and its compliance with the requirements set out herein;*
- *The approach to tariffing proposed by the applicant which must be competitive;*
- *The amount the applicant is prepared to pay for the right to the licence;*
- *Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded;*
- *The extent of applicant’s international roaming plan;*
- *The performance guarantee proposed by the applicant;*
- *Efficiency of proposed use of frequency spectrum resources.”*

7.05 A trio of provisions in the RFP related to the Minister, including a statement that he could not be bound in advance to select any application or type of application, that he reserved the right to alter competition deadlines, and that he disclaimed any responsibility for costs incurred by applicants in preparing their applications. Lastly, the RFP informed interested parties that each application would be required to contain a statement that its contents would be

valid for a period of 180 days from the closing date for receipt of applications, it provided a deadline for the receipt of applicants' questions, and set a competition deadline of 12 noon on Friday, 23rd June, 1995.

7.06 In summary, the RFP was the formal document by which the competition process was constituted. It notified interested parties of the parameters of the intended GSM licence, it outlined the procedure for the competitive process, and it enshrined the rules of that process. It also served to meet the requirements of transparency, in that it laid out for all interested parties both what was required of them, and how applications would be evaluated.

7.07 The terms of the RFP were clear and unambiguous, and faithfully reflected Government policy, as recorded in the Government Decision of 2nd March, 1995. Whilst it seems that the Project Group never set about a collective analysis of the terms of the RFP at the outset of the evaluation process, the Tribunal is nonetheless satisfied that the membership of the Project Group fully understood its import, as did the most senior Departmental officials.

7.08 All were agreed that paragraph 3 of the RFP, which required applicants to furnish full ownership details of their proposed licensee, imposed a mandatory obligation on applicants. Mr. Sean Fitzgerald, Assistant Secretary with overall responsibility for the telecommunications sector of the Department, viewed this requirement as a continuing obligation on applicants to notify the Department as and when any changes in ownership of their proposed licensees might occur. Mr. Sean McMahon, of the Regulatory Division, understood the paragraph to mean that applicants were required to disclose all material facts regarding who was to own what within the body that was to hold the licence. Whatever shades of interpretation were put on that requirement by individual members of the Project Group, there was no dissent concerning the fundamental thrust of the paragraph, which was recognised by all as importing a mandatory obligation to declare the ownership of the entity proposed to be licensed.

7.09 Likewise, there was no want of certainty on the part of Departmental officials as to the meaning of paragraph 9 of the RFP document, which stipulated that applicants were required to demonstrate their financial capacity, and technical experience and capability to implement the system, if successful. Departmental witnesses in large part regarded the meaning of paragraph 9 as self-evident. Mr. John Loughrey, Secretary General, understood that the object of the paragraph was to ensure that applicants would be able to deliver on the plans outlined in their applications, whilst Mr. Fitzgerald interpreted it as

meaning that applicants had to demonstrate their financial and technical capability to implement their proposals.

7.10 The requirements of paragraph 9 were of course echoed in the provisions of paragraph 19, the pivotal paragraph, which outlined the criteria according to which applications would be evaluated. Mr. Brennan, who had been instrumental in the evolution of the thinking behind that framework, testified that the preambular passage of paragraph 19 which provided that

“The Minister intends to compare the applications on an equitable basis, subject to being satisfied as to the financial and technical capability of the applicant...”

constituted a prerequisite to admission to the comparative process. In other words, as Mr. Brennan put it, applicants had to demonstrate their financial and technical capability before they could qualify for entry to the competitive assessment. Having so qualified, applications would then be evaluated in accordance with the criteria in the order notified.

7.11 Whilst that was undoubtedly the theory behind paragraph 19, it was not, as will be seen, a scheme which was implemented, in that no separate consideration of the financial or technical capability of applicants was undertaken in advance of the evaluation proper; nor was any such step prescribed in the Evaluation Model adopted by the Project Group on the following 9th June, 1995. Instead, after a check to ensure that applications complied with certain formal presentational requirements, all applications were admitted to the comparative evaluation proper.

7.12 Mr. Michael Andersen was lead consultant and Managing Director of Andersen Management International, AMI, the Danish consultants appointed by the Department to assist in the comparative evaluation. Mr. Andersen attended to give evidence in the closing days of the Tribunal’s work. He testified that the terms of the RFP did not comply with what was then European best practice, although no reservation had been recorded by him, or by AMI, when they tendered for the consultancy contract in March, 1995, nor following their appointment as consultants in April, 1995, nor at any time during the currency of their retainer. Nor was such reservation expressed in a memorandum which they prepared in February, 1996, in which they undertook a retrospective evaluation of the process itself.

7.13 Mr. Andersen’s criticisms centred on two features of the RFP document: firstly, the absence of pre-qualifying specifications, in terms of

financial capability, which rendered it impossible to adopt a substantive pre-qualification assessment of applicants; secondly, the deficient manner in which the paragraph 19 evaluation criteria had been formulated. In that latter regard, Mr. Andersen pointed to the broad terms in which criteria had been framed, as in the case of those that adopted an “*approach*” terminology, and the combining of substantively distinct elements in single criteria, such as in the case of the first-ranked criterion. These features of the paragraph 19 scheme, according to Mr. Andersen, impacted on the capacity of AMI to develop and implement an optimum Evaluation Model, and in particular adversely affected the capacity of AMI to design specifications which would yield information from applicants in a form that was readily comparable. Whilst it is unnecessary for the Tribunal to draw any conclusion on the clarity of the RFP document, or comment further on that element of Mr. Andersen’s evidence, it must nonetheless be recorded that the Departmental officials who oversaw the development of the competition design cannot be faulted for their efforts over the previous years. They made a close study of the sources of material available to them, and engaged consultants of international repute to assist them in that part of their work.

7.14 The RFP as published by the Department was accompanied by a memorandum for the information of applicants. The memorandum was an explanatory document which expanded on the provisions of the RFP, but specifically provided that it did not form part of the formal invitation to apply. The memorandum largely restated the material contained in the RFP, albeit in a slightly more expansive and less formal manner.

SECTION B

FINAL PREPARATIONS FOR AND POSTPONEMENT OF COMPETITION PROCESS

THE PROJECT GROUP BEGINS ITS WORK

8.01 Following the launch of the competition process on 2nd March, 1995, a meeting of the Project Group was convened for 6th March, 1995. Whilst the official report of the meeting designated it the second meeting, a first meeting having taken place in April, 1994, it was in fact the inaugural meeting of the fully constituted Project Group. The Group was chaired by Mr. Martin Brennan, having been so appointed by Mr. Sean Fitzgerald, with the approval of Mr. John Loughrey. The Project Group membership was drawn from each of the three Telecommunications Divisions within the Department, and from the Department of Finance, in recognition of that Department's interest in the fees that would be generated from the issue of the licence, and the formal role of the Minister for Finance, whose consent to the issue of the licence was required under the relevant legislation.

8.02 The Project Group consisted of each of the heads of division, that is, Mr. Brennan, Mr. Sean McMahon and Mr. John McQuaid, each of whom in turn nominated at least one official from his respective division. It is not clear whether it was intended from the outset that those additional nominated officials would be full members of the Project Group, or whether, due to the proximity of the holiday season, it was determined that each head of division should have a deputy. In the event, all were agreed that such nominated officials *de facto* served, and were entitled to serve, as fully participating members. Mr. Brennan nominated Mr. Fintan Towey, Assistant Principal, who had joined the Development Division in September, 1994, and who had assisted him in the design of the process, and Ms. Maev Nic Lochlainn, who was then an Administrative Officer within the same division. The Development Division team was to act as secretariat to the Group. Mr. McMahon nominated Mr. Ed O'Callaghan, then Assistant Principal, but as Mr. O'Callaghan was not available to attend Project Group meetings until September, 1995, Mr. Eugene Dillon substituted for him at early meetings. Mr. McQuaid nominated Mr. Aidan Ryan, Assistant Staff Engineer, who had worked closely with Mr. Brennan's team in connection with the technical elements of the process design. Mr. Jimmy McMeel represented the Department of Finance, as did Mr. Billy Riordan, a private sector chartered accountant on secondment to the Department of Finance from PricewaterhouseCoopers. Accountancy expertise was also provided to the Project Group directly from within the Department, in the person of Mr. Donal Buggy, also a seconded chartered accountant, who joined the Department in June, 1995, and who attended later Project Group meetings. Mr. Denis O'Connor, who shared the same name as, but was not Mr. Lowry's accountant, attended earlier meetings, until replaced by Mr. Buggy.

8.03 The intention was that the evaluation process would be conducted by the Project Group in accordance with the competition rules as approved by Government. Each of the members of the Project Group was regarded as a full and equal participating member in terms of input into the evaluation process, although it was recognised that those with specialist expertise and experience would have an enhanced input into those parts of the process pertinent to their specialist areas.

8.04 There was no formal written record of the constitution of the Project Group, nor was there any formal record or protocol determining how it should function or conduct its business. It was subsequently stated on many occasions, both in the Dáil and elsewhere, that the evaluation had been conducted by an independent group of civil servants, without input from the Minister, and all Departmental witnesses agreed that the intention was that the Project Group would oversee and complete the evaluation process. No Standing Orders were adopted to govern the functions of individual members, the manner of decision making, or to define the matters reserved for decision by the Group as a whole. In evaluating the applications received by the Department, it was intended that expert consultancy services would be retained, as expressly provided for by the Aide Memoire on which the Government decision of 2nd March, 1995, was based.

8.05 During the course of the competition process, that is from March, 1995, to October, 1995, the Project Group met on twelve occasions. Formal reports of those meetings were generated, and were available to the Tribunal, save in respect of one meeting on 27th April, 1995, for which a formal report was not available. There was no protocol adopted for the preparation or circulation of minutes, but in practice, it was Ms. Nic Lochlainn who was responsible for the production of reports. These were drafted either by Ms. Nic Lochlainn herself, from contemporaneous notes of the meetings kept by her, or by one of two Executive Officers, Ms. Nuala Free and Ms. Margaret O’Keeffe, who reported to Ms. Nic Lochlainn, and who attended meetings as record keepers from time to time. Once a first draft was prepared, it was submitted to Mr. Brennan for approval, before it was circulated to other members of the Group in draft form for their comments. According to Ms. Nic Lochlainn, this step obviated the necessity of reading and formally adopting reports at subsequent meetings. That at least in theory was the procedure put in place for the production of reports, but as will be seen, it was not a procedure that was always strictly followed, as evident from what transpired in relation to the report of a crucial meeting of the Project Group on 9th October, 1995, which will be addressed in full.

8.06 The formal reports were not intended to be minutes of the meetings which recorded the deliberations of the Group. Rather, their purpose, according to Ms. Nic Lochlainn's evidence, was to keep an official record of agreements reached by the Group, and to formalise future work programmes. The reports did not record disagreement within the Project Group, where that disagreement had been resolved, or where it was anticipated that it would be resolved. In that event, the reports merely recorded the terms of the agreements ultimately reached, without reference to the deliberations which led to their conclusion. Mr. Brennan described the official reports as short summary reports of lengthy meetings.

8.07 The report of the second meeting of the Project Group, which extended over two pages, was dated [6th March, 1995](#), and was circulated to the attendees, and to Mr. Fitzgerald, and a copy can be found within the Book of Appendices to this Volume. Judging from the contents of the report, which recorded agreements concluded rather than the deliberations of the Group, the meeting must have been of fairly lengthy duration. There were a number of matters addressed, of which three were the most significant in terms of the process itself.

8.08 Firstly, there was it seems discussion and agreement on what was termed the critical path, which the Tribunal understands meant the detailed timeframe to which the Group intended to work. The report recorded that:

"...it was agreed that the consultants will be required to advise on a successful applicant by approx. mid-Sept in order to give ample time to put the matter to Government for decision. Tender document commits to announcement of successful applicant by 31 Oct 1995."

As evident from that agreement as recorded, and as confirmed by Departmental witnesses, a period of six weeks for consideration of the result by Government had been envisaged. As matters transpired, the critical path as defined was not and could not be adhered to. In one respect it was departed from substantially, in that no time at all was permitted for consideration by Government, prior to the announcement of the winner.

8.09 The second significant topic which arose, and which was also recorded in the official report, was a protocol adopted by the Project Group to govern contact between the Department and applicants, or potential applicants. What was recorded in the report, as having been agreed, was the following procedure:

- “
- *no one-to-one meetings*
 - *no social outings*
 - *a record to be kept of any meetings/conversations between D/TEC people and any of the bidders*
 - *D/TEC should stress at any such meeting that it is an informal, exploratory contact*
 - *where any issue of import does arise, the matter will be referred to the formal written procedures.”*

Mr. Brennan further formalised the adoption of that protocol by forwarding a memorandum of the same date to Mr. Loughrey, Mr. Fitzgerald, Mr. McMahon, Mr. McQuaid, and the staff of the Development Division, reiterating its terms.

8.10 The adoption of this protocol was entirely on the initiative of Mr. Brennan. He considered that it was important that there be a clear demarcation between the open access policy, that had obtained and had been promoted by the Department prior to the announcement of the process, and the policy which should be followed after the commencement of the competition proper. Mr. Brennan was also conscious that many members of the Project Group had unrelated dealings with parties that were likely to be members of bidding consortia, including a number of semi-State bodies. The significance and importance of the adoption of the protocol was recognised by all members of the Project Group and by the Secretary General and the Assistant Secretary.

8.11 Mr. Loughrey, to whom Mr. Brennan had addressed his memorandum recording the terms of the protocol, regarded its adoption as an entirely correct course to take. He was mindful that interested parties might seek to network with members of the Project Group, and he believed that it was essential to the perception of a fair and equitable process that the Department be seen to be above suspicion. In his view, the protocol ensured that, apart from there being no question of advantage to any applicant, no perception of any such advantage could arise.

8.12 According to Mr. Loughrey’s evidence, the protocol was discussed at a weekly management meeting of senior Departmental officials, which he chaired, and which was attended by Assistant Secretaries, and by Mr. Lowry’s Programme Manager, Mr. Colin McCrea. Whilst it would have been open to Mr. Lowry to attend those meetings, it seems that he was not in the habit of doing so. Mr. Loughrey testified that he separately brought the terms of the protocol to Mr. Lowry’s attention, and on several occasions advised Mr. Lowry to exercise caution around contacts with declared contestants, and with potential

participants. It was Mr. Loughrey's evidence that Mr. Lowry readily accepted his advice, including his advice that any meetings which Mr. Lowry might have with participants during the closed period of the competition, that is, between the receipt of applications and the completion date, should be on a courtesy footing only.

8.13 Mr. Colin McCrea, Mr. Lowry's Programme Manager, recalled Mr. Loughrey conveying that advice to Mr. Lowry. It was his recollection that the advice was given at a meeting between Mr. Loughrey and Mr. Lowry at which he was present, and which he believed was the only such meeting on the GSM process which he had attended. Mr. McCrea characterised Mr. Loughrey's advice on that occasion as his "*riding instructions*" to Mr. Lowry. It was Mr. McCrea's impression that Mr. Lowry had listened to and understood Mr. Loughrey's advice, and had agreed to the course proposed.

8.14 Mr. McCrea further recalled that at the same meeting, in the context of their discussion of the process, Mr. Lowry had volunteered that, if the GSM licence was awarded to a certain consortium, it was rumoured that it would become the "*nest egg*" of a politician, whom he also named. That politician, as recognised by Mr. McCrea at the time, was a member of Fianna Fáil, and had been a prominent member of the immediately preceding Government. Whilst Mr. McCrea may not then have known the composition of the consortium to which Mr. Lowry referred, he subsequently learnt that it was the Persona consortium, of which Motorola, Sigma Wireless, Unisource and the Electricity Supply Board were members. He characterised Mr. Lowry's contribution in that regard as political banter.

8.15 It was Mr. Lowry's evidence that he did not receive a copy of Mr. Brennan's memorandum of 6th March, 1995, relating to the protocol on meetings with applicants, and he had never seen it until it was brought to his attention in the context of the Tribunal's inquiries. He did nonetheless recall Mr. Loughrey outlining the elements of it to him in general terms. As far as Mr. Lowry was concerned, there was never any question of the protocol applying to him as Minister, although he accepted that Mr. Loughrey had advised him that it was preferable that he should not meet with applicants. He did not regard this as practicable, and it was in any event up to him to decide what course to take. In a small business community, it was inevitable that he would meet some of the persons involved, and as a politician, he felt that he should just meet them, thank them and wish them well. Mr. Lowry accepted that it was important not to give any impression of imparting information, or "*inside track*", as he put it. In the operation of that open door policy, he agreed to meet anyone who requested a meeting, either in the Department, or wherever was convenient.

8.16 If that was indeed Mr. Lowry's view at the time, it is not one that he ever conveyed to Mr. Loughrey, or to Mr. McCrea, either at that meeting or on any other occasion. Likewise, it is not a view that was known to Mr. Fitzgerald, or to any other of the Departmental witnesses engaged with the process. Both Mr. Loughrey and Mr. McCrea were clear in their evidence that it was their impression, at the meeting in early March, 1995, that Mr. Lowry had understood and accepted the precautions which Mr. Loughrey had recommended. Both were equally clear that Mr. Loughrey, in conveying that information, was not doing so simply to bring to Mr. Lowry's attention the measures which had been adopted by his civil servants, but was recommending to Mr. Lowry that they were precautions which he should adopt and take himself.

8.17 If it was Mr. Lowry's view at the time that he was not bound by those measures, and that on the contrary, as a politician he intended to operate an open door policy, and to meet interested persons who requested meetings with him privately outside the Department, in the absence of civil servants, that again was not an intention or a practice that he apparently ever shared with any of his Departmental officials. As will be seen, the Tribunal heard evidence of two occasions on which Mr. Lowry met with principals of consortia, privately, outside the Department, in the absence of officials, none of whom knew of such meetings until evidence of them was brought to their attention.

8.18 It is of course entirely understandable that Mr. Lowry could not hermetically seal himself from contact with interested persons, with whom it was inevitable that he would have contact, in both an official and an unofficial context. It is equally understandable that as a politician, he would not wish to behave in any manner that was less than courteous. What is not at all understandable is that Mr. Lowry, as the political head of the Department, would regard himself in principle as exempted from the terms of the protocol, or that it was either necessary for him as a politician, or appropriate for him as political head of a Department then conducting a competition, which it was vital should both be fair, and be seen to be so, should have regarded himself as at liberty to meet interested persons by private arrangement, outside the Department, during the most sensitive stages of the process.

8.19 As to Mr. McCrea's evidence that Mr. Lowry had volunteered the information regarding the Persona consortium, and the role of a member of the previous Government, Mr. Lowry testified that this was a rumour that was widely known, and that he may well have referred to it on that occasion. That rumour, which the Tribunal is satisfied was unsubstantiated, also arose in relation to

evidence which the Tribunal heard regarding events which occurred at a much later stage in the process.

8.20 Allied to the adoption of the protocol, was the principle that the selection process should be a sealed process conducted by the Project Group, independent of any political or outside interference or input. Whilst this principle was not recorded in a formal sense, it seems to have been regarded as a cornerstone of the process, and was referred to in public statements after the process had concluded. It is not however clear that all Departmental officials involved had precisely the same grasp of its scope and application in practice.

8.21 Mr. Loughrey, then Secretary General, was clear in his view that all information regarding the substantive process was strictly confidential to the Project Group. He did however observe that formal information, relating to the pace of the evaluation, and its progress along the critical path, would not have been regarded by him as confidential, and he would have thought it was permissible for officials outside the Project Group, such as himself, and for Mr. Lowry, as Minister, to have access to information of that type. Within the class of confidential information, he also distinguished, in terms of the consequences of a breach, between information which he would have regarded as critical, and that which he would have regarded as less critical. If there had been disclosure of critical information, such as the weightings fixed by the Project Group to be applied to the evaluation criteria, he would have been obliged, as accounting officer, to consider abandoning the process, whereas, had there been disclosure of less critical material, it might not have been necessary for him to consider such a course. It is clear that, in Mr. Loughrey's view, the seal of confidentiality was intended to attach to the entire of the substantive evaluation process which was to be conducted by the Project Group. Whilst his views regarding the actions he might have been obliged to take in consequence of a breach differed by reference to the sensitivity of the material that might have been disclosed, Mr. Loughrey was clear that the scope and application of the seal of confidentiality left no room for disclosure of any substantive information outside the membership of the Project Group.

8.22 Mr. Fintan Towey's understanding was very different to that of Mr. Loughrey. It was his evidence that the seal was not intended to bind members of the Project Group as regards disclosures to other Departmental officials, or to Mr. Lowry, and was intended to apply only to external interests. He accepted that it was Mr. Loughrey's view that nobody had any entitlement to information about the process, other than the critical path, until the Project Group had completed its work, but he indicated nonetheless that, if Mr. Loughrey had asked him for information, he would have felt that Mr. Loughrey was entitled to it, and

would have felt bound to provide it. In that context, he believed that Mr. Lowry was entitled to certain information that he sought from Mr. Towe in the course of the month of September, 1995, to which more detailed reference will be made. It seems that Mr. McMeel, of the Department of Finance, must have also shared Mr. Towe's perspective, as it was apparent that, on at least one occasion, which was documented, he kept his line superiors in the Department of Finance apprised of the substantive trends emerging in the process.

8.23 Whatever differing views there may have been amongst the membership of the Project Group, it is beyond doubt that the seal of confidentiality attaching to the process was intended to operate in the manner described by Mr. Loughrey. It is clear that the principle was not intended to be merely aspirational, or one that was to be limited in scope, and the Tribunal has no reason to doubt that Mr. Loughrey, as Secretary General and accounting officer, and as the Departmental official with ultimate responsibility for the process, did not correctly understand its scope or intended operation.

CONSULTANTS ARE APPOINTED

9.01 The separate task of selecting consultants to assist the Project Group in its work also commenced in early March, 1995. The selection was made by a sub-group of the Project Group, which comprised Mr. Martin Brennan, Mr. Fintan Towey, Mr. John McQuaid and Mr. Aidan Ryan. The selection also proceeded by means of a competitive tender process, which had been initiated by advertisement in the Official Journal of the European Commission in late 1994. Six tenders were submitted, including a tender from KPMG, London, which had already advised the Department on the design of the process, and from Andersen Management International, AMI, who were Danish consultants, and who were ultimately the successful candidates.

9.02 AMI, having qualified as one of six candidates from those that had submitted expressions of interest, and having been invited by the Department, submitted a detailed tender document outlining their proposals for a methodology by which a comparative evaluation of applications, received in accordance with the terms of the RFP document, would be conducted by them. A copy of the [tender document](#) can be found within the Book of Appendices to this Volume. They proposed in the first instance that each evaluation criterion should be disassembled into what they termed the dimensions of that criterion. Those dimensions would then be regrouped into four categories, which they termed Aspects, defined as marketing, technical, management and financial. Each of the individual dimensions of the criteria would in turn be divided into indicators, which in some instances would be further sub-divided into sub-indicators, and it was those indicators or sub-indicators which would form the focus of the assessment they proposed.

9.03 AMI recommended that two evaluation techniques should be used: firstly, a quantitative technique based on a system of points, whereby the dimensions, as represented by their constituent indicators or sub-indicators, would be scored numerically; secondly, a qualitative technique, whereby the same dimensions would be reassessed and graded comparatively on the basis of an award of marks. In their tender document, AMI highlighted the technical difficulty consequent on the descending ranking of the evaluation criteria, as published in paragraph 19 of the RFP document. This descending ranking would necessitate the application of a weighting matrix to the results, and the difficulty which this posed was that the aggregation of the weighted results would inevitably, according to AMI, entail some degree of arbitrariness. AMI therefore recommended that, in order to counteract that risk of arbitrariness, both techniques should be utilised, which would, as they put it, “*maximize the validity and reliability*” of the results.

9.04 AMI further explained in their tender that the advantage of adopting both techniques was that, in their experience, they frequently yielded the same result, and that outcome would support the reliability and the validity of the evaluation procedure, and the methodology by which the highest ranked application was nominated. In other words, if both the quantitative and qualitative evaluation techniques produced the same result, the Project Group could be confident that the result was the correct one. The quantitative evaluation would also generate a range of hard data which could serve as a basis for the qualitative evaluation.

9.05 The tender document proceeded to outline the main features of the quantitative and qualitative techniques, and in each instance included tables to illustrate how the results would be generated. These tables showed how the eight evaluation criteria listed in the RFP document would be disassembled into dimensions, which would be divided into constituent indicators, and how those dimensions would be regrouped into Aspects. These tables were very similar to tables which ultimately appeared in a draft Evaluation Model, submitted to the Project Group by AMI, on the following 18th May, 1995.

9.06 Having compared all of the tenders, the sub-group selected AMI as consultants. In their tender document, AMI had estimated that their fee for assisting the Project Group in the evaluation process would be in the region of £297,450.00, and ultimately, following negotiations, AMI agreed that their fees would not exceed that figure, exclusive of expenses, and that figure was sanctioned by the Department of Finance.

9.07 The Project Group was kept advised of developments in the appointment of consultants, and, as recorded in the report of the third meeting on 29th March, 1995, Mr. Brennan updated the Group, and informed the membership that the choice of consultants had been narrowed down to two candidates, AMI and KPMG, London. According to the report of the fourth meeting, on 10th April, 1995, the Group was informed that AMI had been selected as consultants, and that the Department of Finance had sanctioned that appointment. Mr. Michael Lowry, as Minister, formally announced AMI's appointment on the following day, 11th April, 1995. The decision of the sub-Group as between AMI and KPMG, had in part been determined by reference to the lower fee estimate furnished by AMI.

9.08 It appears from the official reports of those Project Group meetings that the general membership of the Group may not have been copied with AMI's tender document. Whilst the Group was not of course involved in the selection process itself, the tender document would have been of considerable assistance,

as it contained a detailed and informative account of the evaluation methodology proposed by AMI. Ultimately, an evaluation model based on that methodology was produced and approved by the entire Group, but those members who had not had sight of the tender document would have been at some disadvantage in understanding the dynamic and rationale of the model submitted.

9.09 The Department's press release, which announced the appointment of AMI, stated that the major task of AMI's consultancy was to carry out a detailed evaluation of competing bids, and to assist in all other aspects of the competition process. Within the membership of the Project Group, there was no common understanding as to the precise role that AMI assumed in the overall evaluation, or in the attendance of their consultants at Project Group meetings. Certain officials regarded AMI representatives as full members of the Project Group, whilst others regarded them merely as advisers to the Group. What is beyond doubt is that it was certainly not the intention of the Group that the substantive evaluation should in any sense be delegated to AMI. Mr. Loughrey's understanding, as Secretary General of the Department, was that AMI would provide independent expertise so as to assist the Project Group in the selection process from start to finish. It was always quite clear in his mind that the final recommendation had to rest with the Project Group itself.

9.10 Mr. Michael Andersen, when he attended to give evidence, testified that neither he nor his fellow consultants were members of the Project Group. Their practice when they were present was to deliver their advice, or agreed input, as Mr. Andersen put it, and then to leave the Project Group to their deliberations. They did not attend all Project Group meetings. It emerged that in the case of the two final critical Project Group meetings of 9th October, 1995, and 23rd October, 1995, Mr. Andersen's attendance, and that of his colleague, Mr. Jon Bruel, who accompanied him to the earlier of the two meetings, was abridged to approximately an hour and a half of what were lengthy meetings, due to unforeseen difficulties and travelling arrangements. The official reports of Project Group meetings did not support Mr. Andersen's recollection that the attendance of consultants at Project Group meetings was irregular. Apart from a Project Group meeting on 27th April, 1995, for which there was no official record available, all such reports for meetings after AMI's appointment recorded the presence of their representatives. It was Mr. Andersen's evidence that AMI were not routinely circulated with copies of the official reports or minutes of Project Group meetings, and that it was not part of their function to correct or to revise those reports.

9.11 Whatever differing views there were amongst those involved, as to the status of AMI consultants, the final Evaluation Report dated 25th October, 1995,

defined the Project Group as comprising members drawn from the three Telecommunications Divisions of the Department, and from the Department of Finance, together with “*affiliated consultants*” from AMI.

9.12 In his evidence to the Tribunal in June, 2003, when he returned to give evidence, after the Tribunal had completed hearing testimony from other Departmental officials, Mr. Brennan testified that, with the benefit of hindsight, it was his view that what AMI had proposed in their tender document did not reflect a dedicated technique developed by AMI to evaluate applications, by reference to the criteria selected by the Department, and prescribed in paragraph 19 of the RFP document, but instead represented the imposition of AMI’s proprietary standard technique for evaluating GSM competitions on the paragraph 19 criteria. In particular, he cited the AMI approach to the Performance Guarantees criterion as not having been consistent with the correct view of that concept in terms of the competition documentation. In the course of the process, Mr. Brennan thought that he had become conscious that AMI had in effect reversed their standard model into the paragraph 19 criteria, but that had only become entirely evident to him in the course of the Tribunal’s proceedings.

9.13 Mr. Andersen viewed matters very differently. The technique proposed by AMI was one which had been and was subsequently used in comparable processes, and it was his evidence that significant difficulties encountered in the application of that methodology in the course of the evaluation, and which will be returned to at later points of this Volume, were not due to any infirmity in the evaluation methodology proposed by AMI, but were due to the less than optimum manner in which the RFP document had been framed. The quantitative scoring of the Performance Guarantees criterion, to which Mr. Brennan had referred, which was not scored by reference to any assurance furnished or omitted by applicants, but by reference to the efficiency of their proposed network, was, according to Mr. Andersen, the best effort of the consultants to provide some form of comparable quantification in respect of that criterion.

9.14 Although AMI’s appointment was announced on 11th April, 1995, they were not formally engaged as consultants until 9th June, 1995, when a contract between the Minister and AMI was signed. That contract provided that AMI were obliged to provide the following services:

- (i) to develop an Evaluation Model based on the selection criteria of paragraph 19, in accordance with the principles outlined in the consultancy tender;

- (ii) to assist in preparing responses to questions submitted to the Department by prospective applicants;
- (iii) to elaborate guidelines and calculatory assumptions for the submission of licence applications;
- (iv) to undertake a detailed evaluation of the applications for the GSM licence, in accordance with the Evaluation Model;
- (v) to provide a comprehensive written report on the outcome of the evaluation carried out;
- (vi) to prepare the draft licence;
- (vii) to perform any other tasks related to the competition requested by the Department.

Payment for those services was to be based on work actually undertaken by AMI, subject to a ceiling of £297,450.00. No payment in excess of that sum was to be made without the express approval in writing of the Minister. In the event, and as will be seen, the fees which were actually paid to AMI were considerably in excess of that figure.

INFORMATION FOR APPLICANTS

10.01 Following the issue of the RFP document on 2nd March, 1995, two further formal constituent documents were issued by the Department for the assistance of potential applicants. The first, an information memorandum, was issued on 28th April, 1995, and contained substantive information regarding the intended competitive process, which was provided by the Department in response to queries raised by interested parties. The second, a supplemental memorandum, was issued by the Department on 12th May, 1995. It contained an indicative draft licence but was primarily directed to outlining the form in which the Department wished to receive applications for the GSM licence. The Project Group was advised on and assisted in the preparation of both of these memoranda by AMI, the newly appointed consultants.

INFORMATION MEMORANDUM OF 28TH APRIL, 1995.

10.02 Prior to the appointment of AMI, the Project Group had commenced some early work on the task of preparing an information memorandum for the assistance of interested parties. Under the terms of the RFP document, issued by the Department on 2nd March, 1995, interested parties, that had purchased the RFP document for a fee of £5,000.00, were entitled to pose written questions for answer by the Department. Such questions were to be submitted to the Department by Friday, 24th March, 1995.

10.03 Following receipt of a large number of written questions, Mr. Fintan Towey, of the Development Division, compiled a working document for the assistance of the Project Group, in which he grouped together related questions under a series of headings. He made that document available to the membership at the third meeting of the Project Group on 29th March, 1995. Having had an opportunity to consider the questions received, the Project Group discussed them one by one at the next formal meeting on 10th April, 1995, and members provided their initial views. There was further discussion at the following Project Group meeting on 19th April, 1995, which was the first such meeting attended by Mr. Michael Andersen and Mr. Marius Jacobsen of AMI. It was agreed that a complete version of the draft information memorandum would be circulated to all members on 26th April, 1995, in advance of the next scheduled meeting on the following day, at which the draft would be finalised, with a view to circulation to interested parties on 28th April, 1995.

10.04 The information memorandum as circulated was a sizeable document, which extended to some twenty-five pages. It opened with a narrative section which explained the structure of the memorandum itself, and provided some general guidelines about how the Department intended to handle the process. It

explained that, in order to simplify the process, the Department intended to develop a pro forma application, which would require a single bid per applicant. The template for that application was then under development by the Department, in conjunction with its consultants. The memorandum indicated that the Department might invite applicants to make a supplementary oral presentation, after the then scheduled closing date of 23rd June, 1995, in order to provide applicants with an opportunity to present their tender material in a more visual manner, and it notified applicants that no supplementary material would be accepted after the presentation stage. In all, there were eight categories of questions to which answers were provided, and in the case of each category the constituent questions were reproduced, together with the Department's response.

10.05 The responses to certain of the questions posed were of interest to the Tribunal, having regard to the stated purpose of the exercise, namely, as the last opportunity to clarify matters and provide information to interested parties, and further in the light of events as they unfolded. Under the heading “*Selection Process*”, the Department had been asked how financial capability, which, as will be recalled, was a condition precedent to eligibility for entry to the competition proper, would be assessed, and whether there were any specific financial criteria. The question was answered, as follows:

“Financial capability will be assessed by reference to the proposed financial structure of the company to which the licence would be awarded, if successful, the financial strength of consortia members and the robustness of the projected business plan for the second GSM operation. Further details of the criteria, which will be considered in the assessment of financial capability, will be elaborated in the supplementary memorandum to be issued by the Department, giving guidelines for submission of applications.”

10.06 Whilst AMI were involved in assisting the Department generally in drafting the entire of the memorandum, they had been consulted specifically on how the Department should frame a response to that question. On 25th April, 1995, AMI had proposed the following formulation, and suggested that the Department could pick and choose from its terms:

“The financial capability will both be assessed quantitatively and qualitatively. The evaluators will take a close look at the projected internal rate of return and a number of other financial key figures, cf. Annex 1 to the memorandum, in particular Table 15. As an example, the evaluators will consider e.g. the solvency, the liquidity and the degree of self-financing during the projected period. If the solvency, liquidity and

the degree of self-financing appear to be low compared to the exposure or the project seems to be risky, the evaluators will investigate whether “deep pockets” exist, should the business case meet temporary opposition.”

10.07 That formulation, as proposed by AMI, was not, as is clear, adopted by the Department. According to Mr. Brennan, the reason that it was decided that the AMI material should not be used was that it made reference to mandatory tables, which AMI intended to provide, and its terms presupposed that entrants would know what those mandatory tables consisted of, so that the approach suggested by AMI would not have made sense on a stand alone basis, in their absence. Mr. Brennan agreed that there was no reference whatsoever in the answer furnished to the concept of “deep pockets”, even though it was one that ultimately played a role in addressing the financial capability of both the first and second-ranked entrants.

10.08 The issue of performance guarantees, which was the seventh- ranked of the eight evaluation criteria, also featured in the information memorandum. The Department had been asked to clarify what was meant by that term, and to indicate whether applicants were required to provide a performance bond. Those questions were answered by a single response in the following terms:

“The reference to performance guarantee in the bid document is designed to elicit in a general way proposals from applicants which will increase the licensor’s confidence that they will deliver on their commitments and the applicants’ suggestions for milestones by which such delivery may be measured. A performance bond is not specifically required.”

10.09 In the ultimate ranking, the top-ranked applicant, Esat Digifone, which had provided for a monetary guarantee of performance in its application, was in consequence awarded the highest score for that criterion. In the course of the deliberations of the sub-group which conducted that element of the evaluation, and of later discussions within the Project Group, questions were raised, including by AMI, as to whether there was a want of fairness in the approach taken to the marking of that element of the evaluation, as applicants had been led to believe, by virtue of the contents of the information memorandum, that a performance bond would not be required. That issue will be returned to in some greater detail at a later point in this Volume.

10.10 On the same date, Telecom Éireann issued a Technical Memorandum for the Information of Prospective Applicants, which addressed matters that impacted on Telecom Éireann operations.

SUPPLEMENTAL INFORMATION MEMORANDUM OF 12TH MAY, 1995

10.11 On the following 12th May, 1995, the Department issued a supplemental information memorandum to interested parties entitled “*Guidelines for submission of applications to become the second operator of GSM Mobile Telephony within Ireland*”. The purpose of this supplemental memorandum was primarily to outline the Department’s template or preferred structure for the presentation of applications by interested parties for the GSM licence. The memorandum, which was also a sizeable document, had annexed to it a series of mandatory quantitative tables, and applicants were informed that they were required to complete and submit those tables with their applications, in the form of a separate annex, even if the selfsame information was contained in the body of their applications.

10.12 In advising the Department on the preferred form of presentation, it is evident that AMI’s objective was to ensure that applications were submitted in a form that would facilitate evaluation, in the manner envisaged in AMI’s tender document, and as ultimately prescribed in the Evaluation Model proposed by AMI, and adopted by the Project Group on the following 9th June, 1995. Mr. Andersen confirmed in evidence that, in the framing of these mandatory tables, the consultants had endeavoured to offset the want of clarity in the RFP document, and to ensure that information furnished by applicants was provided in a form that was directly comparable.

10.13 The supplemental memorandum addressed the Department’s preferred structure, and recommended that applications should be lodged in the form of six separate binders, the composition of which should be as follows:

- (i) an Executive Summary;
- (ii) the marketing aspects of applications, to include the approach to the development of the market, coverage, tariffs, roaming plans, and other marketing parameters;
- (iii) the technical aspects of applications, to include the quality and viability of the technical approach, frequency economy and performance guarantees;

- (iv) the management aspects of applications, to include the composition and legal structure of consortia, the provisions of joint venture agreements, rules adopted to govern the transferability of ownership, and the proposed management of the intended licencees;
- (v) the financial aspects of the applications, such as the amount applicants were prepared to pay for the right to the licence, some of what were described as classical key financial figures, together with indications of sensitivities in business cases;
- (vi) other aspects, such as comments on the anticipated licence conditions, effects of business cases on the Irish economy, and sensitivities in relation to new technologies.

10.14 By requesting the provision of applications in that form, AMI were clearly seeking to ensure that the information provided by applicants would correspond with the five Aspects into which AMI had classified the constituent features of the evaluation criteria, described by AMI as dimensions. The provision of information in that form was undoubtedly intended to promote the expeditious and orderly analysis of the material.

10.15 The supplemental memorandum, as already indicated, also provided that applicants would be required to complete, and attach to their applications, the twenty-two mandatory tables annexed to the supplemental memorandum. In order to facilitate the evaluation of applications, applicants were asked to provide those completed tables in both hard copy and electronic format, and in the event of discrepancies between them, the hard copy version would prevail. The twenty-two tables annexed to the supplementary memorandum in blank form, to be completed by applicants, were as follows:

Table 1:	Number of active SIM-cards ultimo (x £1,000) (for Tacs - 900: Subscriptions).
Table 2:	Churn in the applicant’s network.
Table 3:	Busy hour traffic per active SIM-card in milliErlangs.
Table 4:	Number of annual call minutes per active SIM-card (for Tacs - 900: Subscriptions).
Table 5:	Total yearly number of call minutes in the applicant’s network (x 1000).

Table 6:	Distribution of traffic types in percent of total network traffic.
Table 7:	Coverage (in % of Irish population).
Table 8:	GSM end - user - tariffs in IR£.
Table 9:	Blocking and drop-out rates on the radio path.
Table 10:	Turnover.
Table 11:	Operating costs.
Table 12:	Profit and Loss account.
Table 13:	Investments.
Table 14:	Balance sheet.
Table 15:	Financial key figures.
Table 16:	Technical key figures.
Table 17:	Cash flow analysis.
Table 18:	Sensitivity analysis. IRR for the planning period (year 15 only).
Table 19:	Sensitivity analysis. Accumulated operating and investing cash flow (Item 105).
Table 20:	Infrastructure components.
Table 21:	Total traffic capacity in the network in Erlang.
Table 22:	Required capacity in the network in Erlang. (Network Traffic).

10.16 The data to be provided by applicants in these mandatory tables would become the source data for AMI’s quantitative evaluation, and it was intended that the data would be inputted directly into AMI’s standard computer software to generate results for the quantitative evaluation. The obligation to furnish that information in the form of mandatory tables was also a sensible course, as it excluded the time-consuming and tedious process of reviewing applications to extract the relevant data.

10.17 Lastly, the supplemental memorandum contained some general obligatory guidelines to ensure that information furnished by applicants was consistent. These included a requirement that business cases should preferably be calculated and presented over fifteen years from 1995, through to 2009, that all financial figures should be furnished in Irish pounds net of VAT, that all financial figures should be presented in 1995 prices, assuming a 5% inflation rate per annum, that coverage quoted should, at a minimum, make a distinction between class IV and class II mobile stations, and similar matters.

AN EVALUATION MODEL IS ADOPTED

EARLY ISSUE ON ADOPTION OF WEIGHTING MATRIX

11.01 Prior to the appointment of AMI as consultants, on 11th April, 1995, an inter-Departmental issue had arisen between the Department and the Department of Finance, concerning the adoption of a numerical weighting matrix, in the evaluation of tenders, to reflect the descending order of priority of the eight evaluation criteria approved by Government. Mr. Martin Brennan explained that his Department had always been in favour of the application of such a weighting matrix in order to facilitate the objective assessment of applications, in accordance with the ranking of the evaluation criteria, and had further favoured the publication of that weighting matrix in the interests of the transparency of the process. Whilst he could not specifically recall it, he thought that the concept of adopting a weighting matrix might have initially been recommended by Mr. Roger Pye, in the early advices of KPMG, London. Although there was no mention of that topic in the official report of the third meeting of the Project Group, on 29th March, 1995, no agreement having been reached, subsequent inter-Departmental correspondence confirmed that the matter was discussed on that occasion.

11.02 Mr. Jimmy McMeel, who was a Department of Finance representative on the Project Group, wrote to Mr. Brennan on 31st March, 1995, the day after that Project Group meeting. The weightings issue had apparently been separately discussed and considered within the Department of Finance, and the consensus within that Department was that it would not be prudent to adopt a weighting matrix. The concerns of the Department of Finance, as evident from the contents of that letter, and as confirmed in evidence by Mr. McMeel, were twofold:

- (i) there was a danger that explicit attachment to a weighting formula would undermine the Government's legitimate freedom of action, and would convert the Government's input into a rubber-stamping exercise;
- (ii) the Government decision of 2nd March, 1995, approving the process, made it clear that the terms and conditions of the process, as sanctioned by Government, were those set out in the appendix to the Aide Memoire, provided to the Cabinet Sub-Committee on 16th February, 1995, and that appendix made no reference to a weighting formula.

Mr. McMeel in evidence explained that it was the objective of the Department of Finance to ensure that sufficient priority was allocated in the process to the level of licence fee nominated by applicants. Notwithstanding the terms of his letter,

he was conscious at the time that the Government Decision, which had approved the holding of the competition, had already sanctioned the order of priority of the eight evaluation criteria, and had fixed the Licence Fee criterion as the fourth-ranked. He accordingly recognised that in raising the issue at that stage, the Department of Finance was not on strong ground.

11.03 The contents of Mr. McMeel's letter were discussed at the fourth meeting of the Project Group on 10th April, 1995, which was the meeting at which the appointment of AMI was confirmed. The report of that meeting recorded that the views of the two Departments were aired, and that the Group decided that the debate should be reopened with AMI, whose formal appointment as consultants was imminent. The matter was accordingly deferred to the fifth meeting of the Project Group on 19th April, 1995, when Mr. Michael Andersen and Mr. Marius Jacobsen of AMI were in attendance for the first time.

11.04 The report of that fifth meeting recorded that AMI also favoured the adoption of a weighting mechanism on a number of grounds. These included their view that the process could be vulnerable to legal challenge by the European Commission, if some form of quantitative evaluation was not performed, and that in the absence of guidance to applicants on the application of weightings, there was a risk of receipt of non-comparable bids. Mr. McMeel kept a separate note of that meeting in which he had detailed the issues of interest to the Department of Finance, and in which he recorded his then impression that the Department had consistently moved back from its initial position, which was to publish a weighting formula with all of the emphasis to be placed on the tariffing criterion. The issue was apparently sufficiently significant for Mr. McMeel's superior, Mr. David Doyle, to brief the Minister for Finance, Mr. Ruairi Quinn, who asked to be kept informed of developments.

11.05 There were further discussions at the sixth meeting of the Project Group on 27th April, 1995. No official report of that meeting was within the files produced to the Tribunal, but Mr. McMeel's note from the Department of Finance file was available. It was evident from that note that, whilst the topic was returned to at that meeting, it was not resolved, and Mr. McMeel asked Mr. Brennan to respond formally to his letter of 31st March, 1995.

11.06 Mr. Brennan did respond formally by letter dated 3rd May, 1995, in which he largely reiterated the points which had already been made by him at Project Group meetings. The contents of that letter are of additional interest in that they provide an insight into Mr. Brennan's then thinking on how the evaluation proper should be approached. He stated:

“The proposed weighting of selection criteria is simply a tool to ensure that this recommendation is made on a fair, objective and transparent basis. The only alternative, is to make a recommendation based on intuitive analysis of the relative merits of the applications based on marks under each heading of the selection criteria. Such a process would however, in my view, introduce an element of subjectivity which does not meet the emerging EU requirements of objectivity and transparency and non-discrimination...

...The ultimate recommendation to Government will be supported by details of the weighting formula and the arguments in favour of the chosen formula. It will also include a short assessment of the conclusions reached on each of the applications for the GSM licence. I am satisfied that this approach fully accords with the normal practice in submitting recommendations to Government and does not exceptionally limit the Government’s discretion.”

Addressing Mr. McMeel’s concerns about the impact of the weighting mechanism on the priority accorded to the Licence Fee criterion, Mr. Brennan reminded Mr. McMeel that the order of priority had already been settled by Government, and that the priority of that criterion had been fixed by Government Decision. Mr. Brennan closed with a proposal that the Departments should agree that there be a reasonable balance between the weightings attached to the Tariff and Licence Fee criteria.

11.07 Neither Mr. Brennan nor Mr. McMeel could recall precisely how that issue was resolved, or whether further discussions proceeded, either in the context of Project Group meetings, or bilaterally; nor were they clear as to when a resolution was reached, although it was intimated in reports of Project Group meetings that the matter would be deferred until AMI had prepared and circulated their draft Evaluation Model. A numerical weighting matrix was ultimately adopted, and a decision made not to publish it, or release it to interested parties, which, according to Mr. Brennan, was made in deference to the views of the Department of Finance.

THE EVALUATION MODEL

11.08 AMI, having been appointed consultants on 11th April, 1995, set about producing an Evaluation Model for the consideration of the Project Group. A draft, dated [17th May, 1995](#), was distributed by AMI at the commencement of the Project Group meeting on the following day, 18th May, 1995, which was attended by Mr. Andersen, and at which the draft Evaluation Model was

discussed. A copy of the draft can be found within the Book of Appendices to this Volume. The draft Model was a sizeable document which extended to some nineteen pages. It was entitled “*Quantitative and qualitative evaluation of the GSM applications*”, and was divided into the following six sections:

- (i) Introduction;
- (ii) Procedure for the quantitative evaluation process;
- (iii) Dimensions assessed in the quantitative evaluation;
- (iv) Vote casting and weight matrix;
- (v) Procedure for the qualitative evaluation process;
- (vi) Guide to the award of marks.

By far the largest section of the document was Section (iii), which extended to some thirteen of the nineteen pages comprised in the document, and which was devoted exclusively to detail of the proposed quantitative evaluation methodology. Each of these sections will now be reviewed in turn.

Introduction

11.09 In accordance with what had been contained in the AMI tender document, the introduction stated that it had been decided to utilise both a quantitative and qualitative technique in evaluating applications. The section then outlined the layout and contents of the document itself. It explained that what would be evaluated were what AMI described as a manageable set of Aspects, defined as Marketing, Technical, Management and Financial Aspects, which would form a common denominator between the quantitative and qualitative approaches. Each Aspect would be reflected in dimensions, related to the evaluation criteria, and each dimension would be measured by an indicator, or in certain instances, a multiplicity of indicators.

Procedure for the quantitative evaluation process

11.10 This section, which introduced the quantitative technique, stated that it would entail scoring applications numerically on a series of indicators referable to each of the dimensions. The results of the quantitative evaluation would be considered “*with due respect to the significance of differences in the total sum of the points assigned*”. What this statement seems to have meant was that the results would be determined by reference to the scores which applicants received. A memorandum comprising the salient issues of the quantitative evaluation would be annexed to the Evaluation Report.

Dimensions assessed in the quantitative evaluation

11.11 The initial component of this lengthy section was a table which illustrated the relationship between the evaluation criteria, the dimensions with which they were associated, and the indicators by which each of those dimensions would be measured quantitatively. Apart from the first and second-ranked evaluation criteria, which were multi-dimensional, each evaluation criterion was represented by a single dimension. The table, as it appeared in the draft, is reproduced below:

Evaluation criteria from Paragraph 19 in the RFP document	Dimensions linked to each evaluation criteria	Indicators for the dimensions
Credibility of business plan and applicant’s approach to market development.	Market Development Experience of the applicant Financial key figures	Forecasted demand Number of network occurrences in the mobile field Solvency and IRR
Quality and viability of technical approach proposed and its compliance with the requirements set out herein	Radio network infrastructure Capacity of the network	Number of cells Reserve capacity
The approach to tariffing proposed by the applicant which must be competitive	Tariffs	Competitiveness of an OECD-like GSM2 basket
The amount the applicant is prepared to pay for the right to the licence	Licence payment	Up front licence fee payment
Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded	Coverage	Speed of demographical coverage of class IV (2W) handheld terminals
The extent of applicant’s international roaming plan	International roaming plan	Number of international roaming agreements
The performance guarantee proposed by the applicant	Performance guarantee	Blocking rate and dropout rate
Efficiency of proposed use of frequency spectrum resources	Frequency efficiency	Frequency economy figure

11.12 That table was followed by a short narrative, which was in turn followed by a detailed exposition, by reference to numerical formulae, of how it was proposed to measure each indicator quantitatively. This exposition, which extended to some ten pages of technical material, accounted for more than 50% of the content of the entire document, as circulated to the Project Group. The table reproduced above, which illustrated the relationship between the criteria,

dimensions and indicators, was a refined version of a table which had appeared at page 18 of AMI’s tender document, where it was described as representing a first draft template, showing how it was proposed that indicators in the quantitative evaluation would be identified, scored and weighted.

Vote casting and weight matrix

11.13 This section contained a numerical weighting matrix setting out AMI’s proposed weightings for each of the indicators intended to be measured in the quantitative evaluation, that is, each of the indicators identified in the preceding section of the draft Evaluation Model. There was no reference in the matrix, in the section, or anywhere else in the document, to weightings applicable at criteria level. The only means of discerning what weightings were proposed at criteria level was to identify the weightings proposed for the indicators, which measured the dimensions associated with each evaluation criterion. Where criteria were multi-dimensional, or where they were associated with multiple indicators, the individual weightings had to be aggregated to arrive at a total weighting for those criteria.

11.14 Five of the paragraph 19 criteria were associated with a single dimension for which there was a single indicator, and in those instances the weightings proposed at criteria level were clear enough, and are shown in the table below:

CRITERION	DIMENSION	INDICATOR	PROPOSED WEIGHTING
Approach to tariffing	Tariffs	Competitiveness of an OECD-like GSM 2 basket	15
Amount payable for licence	Licence payment	Up front licence fee payment	10
Timetable for achieving minimum coverage	Coverage	Speed of demographical coverage of class IV (2W) handheld terminals	10
Extent of international roaming plan	International roaming plan	Number of international roaming agreements	5
Efficiency of proposed use of frequency spectrum	Frequency efficiency	Frequency economy figure	5

11.15 There were two criteria, Credibility of Business Plan and Technical Approach, which were multidimensional, and one criterion, Performance Guarantees, which had multiple indicators. In those instances, it was necessary to aggregate the individual weightings in order to calculate the overall criterion weighting proposed, as shown in the further table below:

Criteria	Dimension	Indicator	Proposed Indicator Weight	Total Weight
Credibility of business plan	Market Development	Forecasted demand	10	30
	Experience of applicant	Number of network occurrences.	10	
	Financial key figures	Solvency	5	
		IRR	5	
Quality of technical approach	Radio network infrastructure	Number of cells	15	20
	Capacity of the network	Reserve capacity	5	
Performance guarantee proposed	Performance guarantee	Blocking rate	2.5	5
		Drop out rate	2.5	

11.16 From the above combined exercise, it is apparent that the weightings at criteria level, as proposed by AMI in their draft Evaluation Model, were as follows:

Evaluation Criteria	Proposed Weighting
Credibility of business plan	30
Quality and viability of technical approach	20
Approach to tariffing proposed	15
Licence fee	10
Timetable for achieving minimum coverage	10
International roaming	5
Performance guarantees	5
Efficiency of frequency spectrum	5

Procedure for the qualitative evaluation process

11.17 This fifth section of the draft Evaluation Model explained that, despite what was termed the “hard” data generated by the quantitative evaluation, it would be necessary to include what was described as “the broader holistic view of the qualitative analysis.” It further stated that “other aspects”, such as risks and the effect on the Irish economy, might also be addressed in the qualitative evaluation. This qualitative approach would, according to the section, enable a critical discussion of the reality behind the results of the quantitative analysis. It then elaborated on what were described as “some of the major steps in the

qualitative evaluation process”. In summary, it proposed that the applications should be read and analysed by the evaluators, and that they should then be compared and evaluated by means of discussion and analysis.

11.18 The section stipulated that, in assessing dimensions qualitatively, the evaluators should, as far as possible, use the same indicators as those which had been used in the quantitative evaluation, and that additional indicators should be considered only where the existing indicators were judged not to be sufficiently representative to enable a thorough evaluation. Although not explicitly stated, it follows from the contents of the section that, in analysing applications qualitatively, a “*Delphi*” technique, as it was termed by AMI in their tender document, rather than an “*Independence*” technique, again as so termed by AMI, should be adopted, that is, results in the qualitative evaluation should be arrived at by a number of persons consulting together to arrive at a consensus, rather than the obverse approach, of a number of persons assessing indicators independently of each other.

Guide to the award of marks

11.19 The final section of the document contained an outline of how the qualitative evaluation would be marked. It stated that the dimensions and indicators would not be weighted ex ante, that is, before the evaluation, and that the marks would be awarded according to “a ‘soft’ 5-point-scale”, of A, B, C, D and E, with A representing the best mark. The section also contained a table to illustrate how the marks would be awarded, dimension by dimension, and Aspect by Aspect, to arrive at a total mark. The table largely reproduced, with some minor refinements, a table that had appeared in AMI’s tender document, and was in the following form:

Aspects and dimensions	A1	A2	A3	A4	A5
Marketing aspects (subtotal)					
Market development Coverage Tariffs International roaming plan					
Technical aspects (subtotal)					
Radio network architecture Capacity of the network Performance guarantees Frequency efficiency					
Financial aspects (subtotal)					
Financial key figures Licence payment					
Management aspects (subtotal)					
Experience of the applicant					
Other aspects (subtotal)					
Risks (Effects on the Irish economy)					
Grand Total					

11.20 From the report of the Project Group meeting of 18th May, 1995, it is clear that the draft Evaluation Model, which was circulated by AMI, was treated as a highly confidential and sensitive document. It was agreed that only three copies would be retained in Dublin, one by Mr. Fintan Towey, one by Mr. Sean McMahon, and one by Mr. Jimmy McMeel, and that lock-and-key security would apply to those copies at all times. The report recorded that copies were distributed amongst the membership of the Group, that the Model was studied by those present, that it was scrutinised page-by-page, and that the Group had no major difficulty with the chosen format. The formulae, by which AMI proposed that each of the indicators should be measured quantitatively, were closely studied, and were discussed by the Group. Various modifications were considered, and in some instances those modifications were adopted, and it was agreed that AMI should alter the draft Model to reflect the agreed changes. A copy of the report of the Project Group meeting of [18th May, 1995](#), can be found within the Book of Appendices to this Volume.

11.21 In particular, the Project Group fundamentally revised the approach AMI had taken to the quantitative measurement of the indicator, Internal Rate of Return, IRR, which was one of the two indicators of the dimension Financial Key Figures. AMI had proposed that projected IRR should be measured on a continuum, with the highest rate being awarded the highest score, and lower rates being marked down. According to Mr. Brennan, the Group disagreed with that approach, as it considered there was a risk that a high IRR might lead to higher tariffs. Instead, the Group decided to select a median rate, which reflected its view of a reasonable rate of return for a telecommunications business, and to mark down deviations from that rate in both directions. Overall, the report recorded that the qualitative evaluation was to provide a common sense check on the quantitative model, and that the qualitative part of the Model would need to be clarified further before the commencement of the evaluation proper. It cautioned that, if a later challenge was to reveal that any two persons amongst the evaluators proceeded with a different understanding of the process, the entire evaluation could be open to question.

11.22 The report was silent as to discussions concerning the weightings issue. The topic of weightings was considered to be super sensitive, and the strictest precautions were taken to guarantee confidentiality. The only document generated to record the agreement of the Group on weightings was a one line note to file made by Ms. Maev Nic Lochlainn. The note was dated 31st May, 1995, and recorded

“Agreed at the meeting of 18 May 1995:- 30, 20, 15, 14, 7, 6, 5, 3.”

There was no circulation list for this note, and whilst copies of the report were circulated to the attendees, and a copy was placed on file, it was not circulated to Mr. Sean Fitzgerald, as it was thought to contain material in excess of that relating to critical path or other formal matters. Both the report and the note to file were prominently stamped with the word “*Confidential*”.

11.23 Very few of the witnesses from whom the Tribunal heard evidence had a detailed recollection of the meeting of 18th May, 1995, or of what had transpired in relation to the discussion of weightings. It was the recollection of Mr. Brennan and Mr. Towey that discussion was directed to weightings at criteria level, rather than at indicator level, as shown in the draft Evaluation Model. They each had a memory of Mr. Andersen using a flip-chart to illustrate points he made in the course of his presentation of the material. It is clear from the documentary evidence that, following the Project Group meeting, changes were made to AMI’s proposed weightings. In the first place of course, the Project Group could not have adopted the AMI weighting matrix, as it did not on its face respect the ranking that had been approved by Government, since the weightings did not reflect the descending order of priority of the criteria. It was furthermore apparent from the evidence of Mr. Aidan Ryan, of the Technical Division, that discussion had in fact been directed to indicator level weightings. His particular interest was in the dimensions and indicators of the second criterion, Quality and Viability of Technical Approach. The two dimensions which reflected that criterion were Radio Network Infrastructure, and Capacity of the Network, which were to be measured respectively by the indicators Number of Cells and Reserve Capacity. AMI in their draft Evaluation Model had proposed that these two indicators should be weighted at 15 and 5 respectively, and Mr. Ryan agreed in evidence that those weightings must have reflected AMI’s view of the relative significance of the two indicators, and the priority which they had accorded to the indicator, Number of Cells, over the indicator, Reserve Capacity. Mr. Ryan, from his work and experience within the Technical Division, was familiar with the operational quality of the Eircell network, and he had a view that Reserve Capacity, to which AMI had allocated a weighting of 5, was a central element in the design of any mobile network, and was just as critical to the operation of a network as its capacity. He believed that he would have raised those concerns with Mr. Andersen and his team, and with Mr. John McQuaid. It was Mr. Ryan’s view that the weightings proposed by AMI were not optimum, and it was his recollection that it was agreed that the weightings would be revised, and that the two indicators would be weighted equally at 10 each. Whilst Mr. Ryan could not recall exactly when those discussions had occurred, he assumed that they had proceeded at the meeting of 18th May, 1995, as he had no recollection of any separate meetings with the AMI team. Mr. Ryan had no memory of any similar discussion regarding the relative importance of the indicators or dimensions of other criteria.

11.24 Ms. Nic Lochlainn, who was the author of the official report of that Project Group meeting, kept contemporaneous notes in the course of the meeting, and also compiled some handwritten notes, immediately following its conclusion. Both sets of manuscript notes were available to the Tribunal. Whilst Ms. Nic Lochlainn had no recollection whatsoever of the 18th May, 1995, meeting, or what transpired at it, she was able to assist the Tribunal by explaining the contents of her notes. She agreed that her notes recorded that, in presenting the draft Evaluation Model, Mr. Andersen had referred the meeting to page 6 of the Model, where, under the heading “*Dimensions and indicators*”, a detailed analysis commenced of how each of the dimensions and their indicators would be deployed in the quantitative evaluation of the criteria set out in paragraph 19 of the RFP document. She further accepted that her handwritten notes recorded discussion directed to:

- (i) the quantitative evaluation of the indicator for Tariffs, in respect of which her notes recorded “*no ambition to cover each/all of tariffs aspects*”;
- (ii) the indicator for International Roaming, in respect of which she thought that her notes suggested that discussion centred on a difficulty with the indicator, and that it would be allocated a low weighting;
- (iii) the indicators for Performance Guarantees, in respect of which a suggestion had been made, attributed to Mr. McQuaid, which he himself did not recall making, that the matter was one that lent itself more naturally to qualitative, rather than quantitative, analysis.

11.25 This final point was taken up with Mr. Brennan, when he returned to give evidence some months after his initial attendance. He observed that the manner in which AMI had approached the criterion Performance Guarantees in the Evaluation Model, namely by scoring indicators for Blocking and Drop-out Rates, did not reflect the concept of Performance Guarantees as envisaged by the Department, and as explained in the information memorandum, which was in the nature of comfort to be provided by applicants that their networks would be launched within the timeframe projected in their applications. Mr. Brennan could not provide any explanation as to why no objection had been taken by the Project Group to AMI’s proposal, during the meeting of 18th May, 1995. When he attended to give evidence, Mr. Andersen explained that the efficiency indicators of Blocking and Drop-out Rates, proposed by him, for the quantitative evaluation of that criterion, reflected his efforts as a consultant to devise quantifiably measurable indicators by reference to that criterion, which was not otherwise susceptible to quantitative comparison.

11.26 At the next scheduled meeting of the Project Group, on 9th June, 1995, AMI produced a revised Evaluation Model, dated 8th June, 1995. The report of that meeting had again been prepared by Ms. Nic Lochlainn, and was dated 21st June, 1995. As regards the revised Evaluation Model, the report contained the following short entries:

“This was approved as presented, with correction of one minor typo on page 6/21.

Further comments, if any, to be forwarded to Maev Nic Lochlainn within a few days of the meeting.”

11.27 All members of the Project Group agreed in evidence that the revised Evaluation Model, dated [8th June, 1995](#), had been adopted subject to the correction of a minor typographical error on page 6. A copy of the Evaluation Model, as approved by the Project Group, can be found within the Book of Appendices to this Volume.

11.28 The Evaluation Model, as approved by the Project Group, had been modified by AMI to reflect the views and agreements of the Group as recorded in the report of the meeting of 18th May, 1995. These modifications included changes to the scheme for scoring the indicator IRR in the quantitative evaluation, to reflect the views of the Project Group that a median rate, rather than the highest rate, should secure top marks. Apart from technical modifications, there were two substantial revisions made, which warrant consideration.

11.29 Firstly, an additional section had been inserted into the Model, Section 7, which was entitled *“The Interplay between the quantitative and the qualitative evaluation”*. The new section consisted of three short paragraphs which stated:

“Initially, the quantitative evaluation is conducted in order to score the applications. This initial score will be given during the first three weeks after 23 June. This initial score – together with number crunching performed on the basis of Excell spreadsheets – will then form the basis for the presentation meetings and the qualitative evaluation.

When the bulk of the qualitative evaluation has been performed, however, this evaluation will conversely form the basis for a recalculation of scoring applied initially if mistakes, wrong information or similar incidentals can be documented.

The results of both the quantitative and the qualitative evaluation will be contained in the draft report with annexes to be prepared by the Andersen team.”

11.30 It seems that this additional section was incorporated to meet the Project Group’s requirement, as recorded in the report of the meeting of 18th May, 1995, that the concept, of the qualitative evaluation providing a common sense check on the quantitative evaluation, should be clarified, before the evaluation proper commenced. The members of the Project Group from whom the Tribunal heard evidence did not appear to have a clear view as to precisely how it was intended that this task of re-evaluating the quantitative results, based on the qualitative evaluation, would be undertaken. They did however agree that this step was an integral part of the Evaluation Model which they had adopted.

11.31 The second substantial change made to the Model related not to the methodology proposed, but to the weightings allocated to each of the fourteen indicators in the quantitative evaluation. The table in Section 4, headed “Vote casting and weight matrix”, was substantially amended, in large part to reflect the decision made by the Project Group that the overall criteria weightings should reflect the descending order of importance of the criteria as fixed by Government. There were however further changes made, which appear to have been unconnected with the overall recasting of the criteria weightings consequent on that determination. These related to the indicators associated with the two top-ranked criteria, Credibility of Business Plan and Applicants Approach to Market Development, and Quality and Viability of Technical Approach. The table below compares the collective weightings for these indicators, as initially proposed by AMI in the draft Evaluation Model, and those as contained in the final Evaluation Model as adopted.

DIMENSION	WEIGHTING IN DRAFT EVALUATION MODEL	WEIGHTING IN APPROVED EVALUATION MODEL
Market Development	10	7.5
Experience of applicant	10	10
Financial key figures	10	15
Number of cells	15	10
Reserve capacity	5	10

11.32 The alteration of the weightings for the two technical indicators, that is, Number of Cells and Reserve Capacity from 15 and 5 respectively, as proposed by AMI, to 10 and 10, as adopted by the Project Group, arose, as will be recalled, from the views of the Technical Division personnel that the indicators were of equal importance, and Mr. Ryan outlined in his evidence how that change had come about. There was no equivalent recollection amongst members of the Project Group of the considerations which prompted the alteration of the weightings for the indicators associated with the first-ranked criterion. As will be observed from the above table, whereas AMI initially proposed that the collective weighting of the indicators associated with the dimensions of the first-ranked criterion should be equal, at a weighting of 10 each, the revised Model, as adopted by the Project Group, stipulated unequal weightings of 7.5 for Market Development, 10 for Experience of Applicant, and 15 for Financial Key Figures. Members of the Project Group were unable to assist the Tribunal on the rationale underlying that modification. The weightings applied to these three dimensions ultimately had an impact on the overall outcome of the comparative process.

11.33 A complicating factor, that arose in consequence of this revision, was that the total weighting of the three indicators associated with the premier criterion, as revised, amounted to 32.5 rather than 30, its agreed weighting. This also had a distorting effect on the aggregation of the weightings of the indicators which, although shown in the revised table contained in Section 4 of the Model as amounting to 100, in fact amounted to 103. A half percentage point error had also been made in the weighting of the indicator for the criterion Coverage.

11.34 As with the meeting of 18th May, 1995, Ms. Nic Lochlainn kept contemporaneous notes of the meeting of 9th June, which were also available to the Tribunal. As with the earlier meeting, Ms. Nic Lochlainn likewise had no memory of what transpired, but was, as before, able to assist the Tribunal concerning the contents of her notes. She confirmed that her handwritten notes recorded that, in discussing the revised Evaluation Model, the Group focused on the major changes to the Model. Apart from references to changes in some of the technical formulae to be used for the purposes of the quantitative evaluation, there were two entries in her notes which featured significantly in her evidence.

11.35 Firstly, on the ninth page of her notes, having listed the dimensions and indicators of the quantitative evaluation, Ms. Nic Lochlainn had written “7½ *weighting*”, and had recorded on the right-hand side of the page “3.1 *approved*”. Ms. Nic Lochlainn agreed that those notes appeared to record that the weighting for Market Development, which was the focus of sub-section 3.1 of the Model,

had been reduced from 10 to 7.5 and that this was drawn to the attention of the Group, and was discussed and approved.

11.36 Secondly, on the final page of her notes, Ms. Nic Lochlainn, having recorded that the Group approved the Evaluation Model, had also noted:

“final table may need to be mod.”

She explained that the abbreviation “mod” was one that she used when speed writing for the word modified. Having regard to the content of that entry, she thought it quite possible that the issue of the indicator weightings amounting to 103, in the table on page 17/21 of the Evaluation Model, rather than 100, as shown in that table, had been raised, and that it was understood by the Group that the problem would be addressed and dealt with by AMI.

11.37 In assisting the Tribunal, Ms. Nic Lochlainn observed that the only alteration to the weightings recorded in her notes was the alteration to the weighting for the indicator Market Development. As she had not recorded any other weighting changes, she was unsure to what extent other changes to indicator weightings had, or had not, been discussed. All that was clear to her was that, as she had recorded, the alteration to the weighting of the dimension Market Development was the only change which she could confirm was definitely discussed.

11.38 Amongst the members of the Project Group from whom the Tribunal heard evidence, there was little recollection of discussion of weightings at indicator level. It was Mr. Brennan’s evidence that in agreeing the weightings, his mindset was very much directed to the paragraph 19 criteria. Whilst he accepted that indicators were the tools by which it was intended that applications would be evaluated, he thought that the specialist members within the Group were probably more focused on technical matters. He had no recollection of consulting the table of indicator weightings contained in the revised Evaluation Model.

11.39 It was likewise Mr. Towey’s recollection that discussion within the Project Group had been directed to weightings at criteria level. He did not know how the alterations to weightings at indicator level had occurred, and he did not believe that they had been made at the instigation of the Department. He did not recall there being any discussion of indicator weightings, and he suspected that the breakdown of the weightings, as between the constituent indicators, was fixed by AMI.

11.40 It is clear from the evidence that AMI were not the initiators of the revisions to the weighting matrix, as between the draft and final Evaluation Models. It is beyond doubt that the alterations made to the weightings for the two technical indicators arose from the views of the Technical Division personnel, as recounted by Mr. Ryan in evidence. There is no logical reason why AMI would have altered the weighting for the indicators associated with the first-ranked criterion, otherwise than as a result of the intervention of the Project Group. There was no necessity to alter the weightings, as the total for the indicators correctly reflected the weighting assigned to the first-ranked criterion in the descending order of priority. Moreover, it is clear from Ms. Nic Lochlainn's contemporaneous notes that the alteration to the weighting of at least one of those indicators was discussed and agreed at the meeting of 9th June, 1995.

11.41 Mr. Andersen's contribution to this aspect of the Tribunal's inquiries, when he attended to give evidence, was unimpressive. He testified that the weighting table in the approved Evaluation Model, insofar as the total weighting base was 103, was simply incorrect. The error did not merely reside in the indicator weightings for the first-ranked criterion aggregating to 32.5, and the weighting for the Coverage criterion amounting to 7.5, rather than weightings of 30 and 7 respectively. The error went further, in that, according to Mr. Andersen, the aggregate weightings of 7.5, 10 and 15, for the indicators of the first-ranked criterion, were also in error, and should have remained as proposed in the draft Model as equivalent weightings of 10 each. Mr. Andersen's evidence in that regard was in conflict with Ms. Nic Lochlainn's contemporaneous record, which established beyond question that the Project Group had, on 9th June, 1995, considered and approved a weighting of 7.5 for the first set of indicators of the first-ranked criterion. His evidence was likewise at odds with the documented views of the Project Group membership in the final phase of the process, and inconsistent with his own subsequent actions, and those of his fellow consultants.

11.42 All members of the Project Group from whom the Tribunal heard evidence agreed that the revised Evaluation Model, dated 8th June, 1995, was the Model adopted by the Group at its meeting of 9th June, 1995, for the purposes of the comparative evaluation of applications for the GSM licence. What that provided for were the following steps.

- (i) Firstly, a quantitative evaluation based on the inputting of hard data, extracted from applications, to mathematical formulae which defined the agreed indicators. Agreed weightings, reflecting the descending order of importance of the criteria, were to be applied to the results for

each indicator, and those weightings were fixed at the meeting of 9th June, 1995.

- (ii) Then, a qualitative evaluation, bringing into play a wider range of considerations based on subjective judgments, where applications were to be graded on a “soft” marking system of A to E. A total for each application was to be arrived at in accordance with the table contained on page 20 of the Evaluation Model.
- (iii) Finally, a revisiting of the quantitative results, after the qualitative evaluation had been completed, for the purposes of recalculating the quantitative scores, if the qualitative evaluation had established that there were mistakes, incorrect information or “*similar incidentals*” in the initial calculations.

11.43 The results of both the quantitative and qualitative evaluations were to be presented in an Evaluation Report, together with any supplemental analysis undertaken. The quantitative results were to form an appendix to the Report, and the qualitative results were to be presented in the main body of the Report.

11.44 As already alluded to, the Evaluation Model adopted by the Project Group did not record weightings at criteria level, nor did it make any reference whatsoever to the application of weightings at that level. What it appeared to contemplate was that the results would be presented by means of two tables, in the forms contained in the Evaluation Model. Firstly, by numerical totals in the case of the quantitative indicators, and secondly, by graded totals in the case of the qualitative assessment. There was certainly nothing in the Evaluation Model to suggest that any other product of the evaluation process, or form of presentation of the results, was contemplated in advance of its commencement.

11.45 The Evaluation Model was also entirely silent as to what course should be taken, if the quantitative and qualitative evaluations produced conflicting results, in other words, how the Project Group would then determine which applicant was the winner. Whilst, in the light of events as they unfolded, this omission could reasonably be regarded as a significant lacuna in the Model, it must, as it stated, be read in the light of the tender document which had been submitted by AMI. Section 5 of that document identified, as one of the advantages of adopting both a quantitative and qualitative technique, that they frequently produced the same overall result, and such outcome would be supportive of the reliability and validity of the methodology by which the highest-ranked applicant was nominated. Notwithstanding the contrary recollections of some witnesses, it seems that Mr. Andersen echoed that point in presenting the

initial draft Evaluation Model at the Project Group meeting of 18th May, 1995, as Mr. McMeel had recorded, in a note to file, which he prepared the following day:

“The consultants’ experience has been that both the quantitative and qualitative evaluations tend to produce the same leading candidates. The qualitative process narrows it down.”

THE ESAT DIGIFONE CONSORTIUM IS BORN

DEALINGS BETWEEN MR. MICHAEL LOWRY AND MR. DENIS O'BRIEN REGARDING FRANCE TELECOM

12.01 When the negotiations with Southwestern Bell and Detecon, with a view to forming a proposed consortium, terminated by mutual consent in March or April, 1995, Communicorp was solo, as Mr. O'Brien described it in evidence. He estimated that they could have been solo for a period of six weeks or two months, before they commenced discussions with Telenor. Mr. O'Brien emphasised that during this period they continued to obtain planning permissions, to do research, and to write up their bid, proceeding with their preparations as if they had secured a foreign partner. It was the perception of all of Communicorp's advisers that an international partner was essential to lend credibility to their application for the GSM licence.

12.02 When Mr. O'Brien first gave evidence to the Tribunal about negotiations to form a consortium to apply for the GSM licence, which included the above evidence, he referred to two meetings had with France Telecom, the French State provider, in Paris, in March or April, 1995. He described the meetings as exploratory discussions about the prospect of France Telecom joining Communicorp, to form a consortium, but stated that negotiations did not develop, because France Telecom was too slow, and could not make a decision. When Mr. O'Brien was asked to elaborate on discussions with France Telecom, he described their first meeting, which he thought was attended by himself, Mr. John Callaghan and Ms. Lucy Gaffney, another of his business associates, as a four hour meal during which they, in effect, tried to sell the idea that a partnership between Communicorp and France Telecom would be a strong one. France Telecom asked a lot of questions during this meeting, and requested a second meeting. Mr. O'Brien believed that Mr. Massimo Prelz, of Advent International, the venture capital company that had invested in Mr. O'Brien's businesses, and which was a shareholder in Communicorp, attended this second meeting, which Mr. O'Brien described as a long lunch, during which France Telecom asked virtually the same questions again. The only thing to emerge from these discussions, in Mr. O'Brien's view, was costs. Mr. Callaghan confirmed that he had attended a meeting along with Mr. O'Brien and Mr. Prelz. He described France Telecom's opposition to a 50/50 ownership structure, and that he and others had suggested that perhaps a 20% shareholding could be held by Irish institutional investors. Mr. Callaghan then rang Mr. Kyran McLaughlin of Messrs. Davy Stockbrokers from the France Telecom offices, and Mr. McLaughlin agreed that this could be achieved in the right circumstances.

12.03 Following the completion of Mr. O'Brien's principal evidence relating to the GSM licence heard by the Tribunal in November, 2003, his solicitors provided the Tribunal with some additional relevant documents, which had apparently come to light during a review by them of their client's documentation. These included a copy fax from Mr. O'Brien to Mr. Prelz, which referred to France Telecom, and which recorded that it was Mr. Michael Lowry who had suggested to Mr. O'Brien that he contact France Telecom relating to a GSM partnership. The relevant portions of the fax, which was dated 5th April, 1995, are reproduced below:

"Dear Massimo,

Here's the up-to-date position regarding GSM partners

1.
2. *France Telecom – The Minister spoke to me yesterday and suggested I contact France Telecom as they have no partner and I am meeting them tonight in Paris for dinner."*

12.04 Mr. O'Brien returned to the Tribunal to give further evidence in December, 2005, during which the contents of the fax of 5th April, 1995, were raised with him. He informed the Tribunal on that occasion that he believed, based upon the contents of this fax from him addressed to Mr. Prelz of Advent, and from a perusal of his diary, that he did have a conversation with Mr. Lowry at Comms 95, a telecommunications trade show, on 4th April, 1995. The entry in Mr. O'Brien's diary for that date, recorded as follows:

"10.30 Comm 95 Lowry"

12.05 Mr. O'Brien recalled attending Comms 95, and he stated that contemporaneous news reports confirmed that Mr. Lowry had made a speech at that event, relating to the liberalisation of the telecommunications industry in Ireland. Mr. O'Brien accepted, based on the contents of his fax to Mr. Prelz, that he must have had a conversation with Mr. Lowry, and that Mr. Lowry must have made some mention of France Telecom. Mr. O'Brien did not recall the conversation, and had no notes of the conversation other than the above quoted diary entry.

12.06 Mr. O'Brien explained that, following the termination of the relationship between Communicorp, Southwestern Bell and Detecon, in mid-March, 1995, he immediately took steps to identify a list of approximately ten potential

international telecom partners for the GSM project. France Telecom was included in this list. He described how he had made arrangements to meet the various potential partners at this time, and that these arrangements would have been made in mid to late March, and certainly prior to 4th April, 1995. Based again on the contents of his diary, he believed that the meeting with representatives of France Telecom for dinner in Paris took place on the evening of 5th April, 1995. He believed, but could not be certain given the lapse of time, that Ms. Gaffney and Mr. Callaghan could have been present for this dinner. There were two relevant entries for 5th April, 1995, in Mr. O'Brien's diary, as follows:

"4pm EI to Paris"

"8pm dinner"

Mr. O'Brien recalled that he travelled to Prague from Paris on the following morning. He had no notes of his dinner engagement. As to his subsequent lunch meeting with France Telecom, Mr. O'Brien believed that it must have occurred at a later date in April, 1995, and that Mr. Callaghan and Mr. Prelz may also have attended. He had no notes of this meeting, and there were no diary entries to assist his recollection.

12.07 The fax of 5th April, 1995, was also raised with Mr. Prelz, when he attended to give evidence at a late stage of the Tribunal's work. Whilst Mr. Prelz accepted, from the contents of the fax, that Mr. O'Brien had told him that he had met with Mr. Lowry, and that Mr. Lowry had suggested to Mr. O'Brien that he should contact France Telecom, he did not recall a conversation between them in that regard. He did recall the meeting with France Telecom, and his subsequent advice to Mr. O'Brien that France Telecom would not be suitable partners for Communicorp. Although Mr. Prelz did not recall it, it seems that he and Mr. O'Brien must at least have had a telephone conversation concerning Mr. O'Brien's interaction with Mr. Lowry the previous day, as it seems from a handwritten note on the top right-hand side of the copy fax produced to the Tribunal, which recorded, in what seems to have been Mr. O'Brien's handwriting, *"read the message out over the phone"*, that Mr. O'Brien may have relayed that information to Mr. Prelz over the telephone, rather than by transmitting the fax to him.

12.08 The fax from Mr. O'Brien to Mr. Prelz, produced by Mr. O'Brien's solicitors after his initial evidence, pointed towards an involvement by Mr. Lowry in recommending that Mr. O'Brien contact France Telecom. Mr. O'Brien had no difficulty accepting that he must have had a conversation with Mr. Lowry, and that France Telecom must have been mentioned in the course of that

conversation, which took place at the Comms 95 trade show. Mr. O'Brien agreed that this conversation was before any closing date in relation to the competition, and offered the view that the competition had not yet started. It will be recalled that the process was launched on 2nd March, 1995, and that the intended closing date for submission of applications was 23rd June, 1995. It is also worth noting that, shortly after the announcement of the competition on 2nd March, 1995, the Project Group had adopted a protocol to regulate contact with potential bidders. The Tribunal is satisfied that Mr. John Loughrey, Secretary General of the Department, brought that protocol to the attention of Mr. Lowry in early March, 1995, and had advised Mr. Lowry to exercise caution around contacts with declared contestants, and potential participants, and understood that Mr. Lowry had accepted that advice.

12.09 The Tribunal also made inquiries of Mr. Martin Brennan and Mr. Fintan Towey, with regard to any dealings had between the Department and France Telecom in relation to the process, and any dealings between Departmental officials and Mr. Lowry in connection with France Telecom's interest in the licence, including details of their knowledge of any contact between Mr. Lowry and Mr. O'Brien on 4th April, 1995. Mr. Brennan testified that the Departmental records showed that both he and the Secretary General, Mr. Loughrey, met with representatives of both France Telecom and of the French Embassy, in the Department offices on 30th March, 1995. Mr. Brennan had no recollection beyond what was contained in a record of the meeting, which was a file note addressed by him to Mr. Fintan Towey. There were no indications that he copied this note to anybody else, but he could not rule out that he had sent a copy to Mr. Loughrey, the other participant at the meeting. Mr. Brennan emphasised that the meeting took place after the launch of the competition, but well in advance of the originally anticipated closing date. His note of the meeting included a reference to France Telecom's purpose in coming to Ireland, stating that it was to outline the strengths of France Telecom in the context of their interest in the GSM licence. As to dealings between Mr. Brennan and Mr. Lowry in connection with France Telecom's expressed interest in the licence, Mr. Brennan had no recollection of any such dealings.

12.10 Mr. Brennan's handwritten note included a direction to Mr. Towey, "*FT for info*". Mr. Towey testified that the note was referred to him in the course of its way to a file, and that that was the extent of his knowledge or involvement. Mr. Towey had no knowledge or recollection of any dealings between Departmental officials and Mr. Lowry in connection with France Telecom's expressed interest in the licence. Neither Mr. Towey nor Mr. Brennan knew anything of Mr. Lowry's contact with Mr. O'Brien on 4th April, 1995.

12.11 Mr. Lowry, in common with so much of his evidence, testified that he had no recollection whatsoever of any contact with Mr. O'Brien relating to France Telecom at the Comms 95 trade show; nor had he any recollection of ever having met with Mr. O'Brien, and having suggested to him that he should make contact with France Telecom. He testified that he did not believe that he would have ever made any such suggestion to Mr. O'Brien.

12.12 Unless the reference to Mr. Lowry in Mr. O'Brien's fax to Mr. Prelz, and Mr. O'Brien's diary entries for 4th April, 1995, were figments of Mr. O'Brien's imagination, of which there was no such suggestion, there can be no doubt that Mr. O'Brien did meet Mr. Lowry on 4th April, 1995, and that Mr. Lowry did inform Mr. O'Brien that France Telecom had no partner for the GSM competition. That was information which, on the basis of the evidence heard by the Tribunal, could only have been learned by Mr. Lowry from within his own Department, which had received a delegation from France Telecom some five days earlier. By then of course Mr. Lowry and Mr. O'Brien were acquainted, apart altogether from interactions they may have had officially within the Department in connection with fixed-line matters, having been introduced by the late Mr. Jim Mitchell, on what seems to have been 7th February, 1995, at Fine Gael Headquarters. They also both attended at Mr. Phil Hogan's constituency lunch on 9th March, 1995.

12.13 Contacts of the type which occurred between Mr. O'Brien and Mr. Lowry on 4th April, 1995, were inevitable, and had been anticipated by Mr. Loughrey, when he had briefed Mr. Lowry on the importance of dealings with interested parties, in early March, 1995. Prior to receipt of applications by the Department in the licence competition, it is fair to say that the competition proper had not yet commenced. The competition had by then been formally launched on the previous 2nd March, 1995, the RFP document had been issued, and the work of the Project Group was advancing as of the date of that interaction between Mr. Lowry and Mr. O'Brien.

12.14 Whilst it was perhaps inadvisable, and possibly indiscreet, for Mr. Lowry to engage with Mr. O'Brien in relation to the GSM process, even at this juncture, and to disclose information to him which can only have emanated from within his own Department, Mr. Lowry no doubt recognised that the information was hardly confidential, it did not relate to any aspect of the Project Group's work, and that the exchange between them occurred well before the closing date of the competition process proper. What it does nonetheless suggest to the Tribunal is that there was a inclination on the part of Mr. Lowry to be less than discreet, and less cautious in his dealings with interested parties than might have been advisable, particularly bearing in mind that what the Department was embarking on was an adjudicative process, and one which the Department, in

the person of its Secretary General, Mr. Loughrey, recognised had not only to be fair in its execution, but had to be seen and perceived to be fair.

JOINT VENTURE WITH TELENOR

12.15 PA Consulting Group, an international telecommunications consultancy firm, based in London, were engaged in March, 1995, to assist Communicorp in the preparation of an application for the GSM licence. Mr. O'Brien was of the view that, in order to increase the professionalism of the team, and put together a compelling application, outside international consultants would have to be engaged to help structure and write the bid documentation, and to ensure its internal consistency. PA Consulting had worked on a number of successful GSM licence applications throughout Europe, and had experience of working as consultants, both to applicants for GSM licences, and to adjudicators for Governments. PA Consulting commenced work on the Communicorp application in March, 1995. One of their senior consultants, Mr. Nick French, and a team of seven moved to Dublin. Mr. French advised Mr. O'Brien that, in order for Communicorp to be successful in the competition, an international partner was a pre-requisite. It was Mr. French who proposed that Communicorp should make an approach to Telenor, the Norwegian national telecommunications provider, which had extensive experience as a provider of both fixed-line and mobile telecommunications services. Telenor Invest AS, the vehicle through which the Telenor Group participated in international telecommunications projects, had successfully implemented and launched GSM networks in Norway, Hungary and St. Petersburg.

12.16 In advance of Telenor's introduction to Communicorp, Telenor had independently already started evaluating the prospects of establishing a partnership to apply for the GSM licence in Ireland. Mr. Per Simonsen, a project manager with Telenor, who went on to head the Telenor contribution to the GSM project in Dublin, described in evidence early inquiries made by Telenor with a view to identifying joint venture partners. Telenor had initially approached TeleDanmark, which had not been receptive. They had also met with the Electricity Supply Board in late April, 1995, but nothing resulted from that contact. A special report had been commissioned by Telenor from the Norwegian Embassy in London to investigate the potential market for mobile telephony in Ireland, and reports had been obtained from industry sources. Mr. Simonsen related that the approach from PA Consulting, proposing a consortium with Communicorp, was the only such approach received by Telenor. PA Consulting was aware that Telenor was interested in participating in the Irish bid, and Mr. French had introduced Mr. Denis O'Brien and Communicorp as potential local partners in Ireland. This introduction took place in April, 1995.

12.17 On 27th April, 1995, Mr. Simonsen, and Mr. Sjur Malm, Telenor's project director, met with Mr. O'Brien and Mr. John Callaghan in Dublin. Following this first meeting, discussions between Telenor and Communicorp progressed at a rapid pace. Mr. O'Brien described in evidence how Telenor were very positive about joining Communicorp to form a consortium, and despite the fact that no formal agreement had yet been finalised, Telenor sent a technical and business planning team to Dublin to assist with bid preparation. Mr. O'Brien testified that Telenor had joined at an important stage of that work, and that, even though a substantial part of the application had already been written, Telenor brought extensive experience in important areas, such as network design, business planning, and information technology design.

12.18 The initial meeting between Communicorp and Telenor, in late April, 1995, had been constructive, and in a memorandum dated 4th May, 1995, from Mr. O'Brien to three board members of Esat Telecom, Mr. Mike Kedar, Mr. Callaghan and Mr. Massimo Prelz, he outlined the progress of negotiations with Telenor as follows:

"Per Simonsen spoke to me today and made the following points:

- Following their meeting here in Dublin last week they briefed their CEO and his reaction was very positive to their involvement in our GSM bid.*
- They require Board approval and this should be forthcoming in the week commencing 15th May.*
- In order to finalise a Board Paper they intend to do financial due diligence on our GSM business plan on Thursday and Friday of this week.*
- In the meantime they are going to provide some resources particularly in the technical area in order to write the bid document.*
- On Monday next they will send in their technical planner to define how many people we require to write the technical part of the bid. They will then be put in place by the middle of next week.*
- I am due to visit Norway next week to meet with their senior management....."*

12.19 Mr. O'Brien travelled to Norway on 9th May, 1995, and over the next number of weeks a joint venture agreement was negotiated and concluded. In the course of those negotiations, Mr. Knut Haga, who was another Telenor employee, with expertise on financial matters, was asked to evaluate the financial position of Communicorp on behalf of Telenor. He travelled to London

with Mr. O'Brien on 16th May, 1995, and met with Mr. Prelz of Advent. He testified that Mr. Prelz had informed him of the extent of Advent's financial resources, that Advent had already made a significant equity investment in Communicorp, and that Advent had a keen interest in the investment opportunity arising from the GSM licence. Mr. Prelz, according to Mr. Haga, had assured him that Advent was a committed long-term equity partner in Communicorp, and would support it in its efforts to win the licence.

12.20 Having analysed Communicorp's finances, it was Mr. Haga's view that Communicorp was not then in a position to provide sufficient funds for its expected contribution to the project on a standalone basis, and that further capital injections would be required. Based upon the information and assurances which he had received from Mr. Prelz, Mr. Haga nonetheless felt comfortable about Communicorp's future ability to fund its share of the project, with support from Advent, and it was his advice that Telenor should seek a formal confirmation of Advent's intended financial support. It was with this in mind that the joint venture agreement, ultimately concluded between Communicorp and Telenor, imposed an obligation on Communicorp to provide a financial guarantee, as it was termed in that agreement.

12.21 The agreement concluded between Communicorp and Telenor, whereby the parties established a joint venture for the purpose of submitting a bid for the GSM licence in Ireland, was drafted by Mr. Amund Bugge. Mr. Bugge was not a qualified lawyer at the time, and acted under the supervision of Mr. Rolf Busch, Senior Legal Counsel to the Telenor Group. The draft joint venture agreement was prepared by Telenor without the benefit of Irish legal advice. Mr. Bugge believed that the joint venture agreement was of a preliminary nature, and would be overtaken quickly by a more extensive and formal shareholders agreement. As events transpired, a shareholders agreement was not to be finally concluded until 16th May, 1996. Mr. Bugge explained that the imminent initial bid deadline, of 23rd June, 1995, placed considerable pressure on all concerned, not only to conclude the early signing of the joint venture agreement, but for Telenor to contribute its technical expertise to the preparation of the bid.

12.22 The joint venture agreement between Telenor and Communicorp was executed on 3rd June, 1995. Mr. O'Brien signed the agreement on behalf of Communicorp, and Mr. Sjur Malm signed it on behalf of Telenor. The purpose of the agreement, as recited by it, was for the parties to establish a joint venture to prepare and submit a bid for the Irish GSM licence. The agreement provided that the parties would incorporate a company, to be the recipient of the licence, and to establish and operate a GSM network, which would be owned by them on a

50/50 basis. The agreement was to remain in effect pending the incorporation of that company.

12.23 The second clause of the agreement imposed an obligation on Communicorp to provide Telenor with a financial guarantee, satisfactory to Telenor, in the amount of £5 million, plus 50% of the licence fee. Prior to the submission of the bid, Board approval was required by both parties, and Telenor's approval was conditional upon the acceptance by its Board that Communicorp's financial guarantee was satisfactory.

12.24 All liabilities arising from the agreement were to be distributed on a 50/50 basis between Communicorp and Telenor. All necessary costs and expenses pertinent to the bidding process, including historical costs set out in the appendix to the agreement, were to be borne by the parties equally; however, expenditure relating to the acquisition and development of base station sites was specifically excluded, and was to be borne solely by Communicorp. Any such costs and expenses, to be incurred by the joint venture, were to be mutually agreed and approved by both parties. The base station sites, which had been acquired by Communicorp, were to be transferred at cost price to the company to be incorporated by the parties, in the event that the licence was awarded to it. A bank account was to be opened on behalf of the venture, and was to be controlled by both parties. £200,000.00 was to be lodged by each of Telenor and Communicorp to the account, and a further lodgement in the same amount was to be made, following Board approval relating to the submission of the bid. The initial authorised signatories for this account were named as Mr. Peter O'Donoghue, for Communicorp, and Mr. Per Simonsen, for Telenor.

12.25 The joint venture agreement provided for an initial equity investment in the joint venture company in the sum of £10 million, plus an amount equivalent to the licence fee. It was recited that the total estimated funds which would be required to establish and operate a GSM network would be in excess of £120 million.

12.26 Having executed the joint venture agreement, and Communicorp and Telenor having thereby established a consortium between them, the joint venture company Esat Digifone was incorporated on 23rd June, 1995, and the Esat Digifone consortium was born.

THE COMMISSION INTERVENTION

EUROPEAN COMMISSION INTERVENTION AND DEFERRAL OF CLOSING DATE OF COMPETITION

13.01 In approaching the design of the competitive process, the Department, as already outlined, had been mindful of the EU policy regarding the potentially discriminatory effect, and consequent obstacle to competition, associated with the imposition of substantial licence fees on new entrants, particularly where no equivalent fee was levied on incumbent providers. This, in part, informed the Department's early thinking on the financial terms which should govern the licence, and its initial view that the upfront payment should be limited to £3 million, with periodic royalties payable by both the new entrant and by Eircell.

13.02 Following the recasting of the competition design, in the light of submissions made by Telecom Éireann, and in response to the realities of budgetary requirements, the financial terms were altered fundamentally. Insofar as paragraph 19 of the RFP provided for an open-ended licence fee, subject to a £5 million minimum fee, the competition, at least in part, was converted into an auction. Whilst officials were hopeful that the ranking of the Licence Fee element as the fourth evaluation criterion, together with other aspects of the terms governing the licence offered, might deflect objections on the part of the European Commission, there was nonetheless a realisation that there was a significant risk that the Commission would take issue with the design of the financial element of the process. That is precisely what came to pass.

13.03 The Department had forwarded courtesy copies of the competition documents to the Competition Directorate of the Commission on 8th March, 1995, and on the following 3rd May, 1995, the Department received a letter, dated 27th April, 1995, from Commissioner Karel Van Miert, the Competition Commissioner, objecting to certain features of the competition design. The three matters to which the Commission took exception were:

- (i) the provision for an open-ended licence fee;
- (ii) the absence of full transparency in the competition documentation, due to the non-disclosure of the weightings which would be applied to the evaluation criteria;
- (iii) the ranking of the Licence Fee criterion ahead of criteria relating to Coverage, Performance and Efficiency of proposed service.

13.04 The receipt of the Commission's letter was a matter of the utmost seriousness for the Department, as it potentially imperilled the progress of the process, and could ultimately have led to the Commission challenging the process in proceedings before the European Court of Justice. Whilst Mr. Martin Brennan and Mr. Fintan Towey appear to have taken the lead role, on behalf of the Department, in direct communications with the Commission on this issue, Mr. Sean Fitzgerald and Mr. John Loughrey were also closely involved, and Mr. Loughrey believed that he would have kept Mr. Michael Lowry briefed. In handling this intervention, the Department had the benefit of the experiences of other Member States that had endeavoured to hold auction-type competitions. Such competitions had been held or initiated in Spain, Greece, Italy and Belgium. In Greece, equivalent licence fees had been imposed on both GSM operators from the outset. In Belgium, equivalent licence fees were also levied on both operators, but this followed from a Commission intervention. Infringement proceedings had been opened by the Commission against Italy regarding the licence fee levied on its second GSM operator. No action had, as of that time, yet been taken by the Commission against Spain, where a unilateral fee payment had also been imposed on the new entrant.

13.05 The Department sought the advice of AMI, just recently appointed as consultants, and their advice, that it was probable that the Commission would pursue the licence fee issue, was another topic of discussion at the Project Group meeting of 18th May, 1995. The report of that meeting recorded that discussion focused on certain infrastructural freedoms that the new entrant would benefit from under the intended terms of the Irish licence, and the fact that the Commission had tacitly approved of the Belgian process, where equivalent licence fees had been imposed on the new and incumbent operators. It was considerations of this nature that were paramount in the discussions and deliberations of the Department at the time.

13.06 A delegation of Departmental officials, comprising Mr. Brennan, Mr. Sean McMahon, Mr. Eamonn Molloy, also of the Regulatory Division, and Mr. Jimmy McMeel, of the Department of Finance, accompanied by Mr. Michael Andersen, met with Mr. Herbert Ungerer of the Competition Directorate, DGIV, in Brussels on 2nd June, 1995. A summary note of the meeting was kept by Departmental officials, and recorded the exchange of views between the Departmental delegation and Mr. Ungerer. The note recorded that:

"The collective view of the delegation after the meeting was that, while the GSM fee issue would be followed-through on a formal basis by the Commission, it could be resolved by the provision of adequate assurances in writing to the Commission."

The Departmental officials involved confirmed in evidence that the above entry accurately reflected their views that it seemed probable that the issues raised by the Commission could be resolved by an agreed accommodation.

13.07 The Commission intervention also featured in the deliberations of the Project Group at its meeting on 9th June, 1995, which was the meeting at which the revised Evaluation Model was approved and adopted. The Group was fully briefed as to what had transpired in the meantime, and the report of the meeting recorded that four possible strategies were identified, to meet the Commission's objection, two of which were excluded on political grounds. The two options which were judged to be workable were:

- "A. *Proceed with the competition as is, with the attendant risks*
- ...
- C. *2 flat fees on both GSM operators or a fixed fee for Eircell in conjunction with a cap on bids [sic] to become the second operator."*

It was decided that it would be prudent to seek the advice of senior counsel before any decision was taken. In the event that such legal advice recommended against proceeding with the competition as it was then structured, that is option A, it was agreed that option C should be pursued, namely, the imposition of a fixed fee of £10 million on Eircell, together with a cap of £15 million on bids to become the second operator. A legal opinion was duly obtained which confirmed that there were considerable risks attendant on proceeding with the existing competition structure, in terms of the prospects of a successful challenge to it by the Commission.

13.08 On 15th June, 1995, there was a teleconference between Mr. Brennan and Mr. Towey, and Mr. Ungerer and Mr. Christian Hocepiet of the Competition Directorate. A note of the teleconference was kept by Mr. Towey, from which it seems that discussion was directed, firstly, to the legal basis on which the Commission might initiate infringement proceedings against the State, and secondly, to the steps which could be taken by the Department to enable the Competition Directorate to indicate definitively that infringement proceedings would not be taken. In effect, it seems that Mr. Brennan and Mr. Towey were seeking to sound out the Commission's reaction to the measures that the Department then had in mind of capping the licence fee at £15 million, and imposing a £10 million fee on Eircell. Mr. Brennan explained in evidence that the Department's view was that the £5 million differential between the Eircell fee and the cap on the second GSM fee could be justified by reference to the administrative cost to the State of running the GSM competition. The matter was

discussed at some length, and it appears that the Commission urged the Department to put its proposals in writing as soon as possible, including details of any possible changes in fee requirements.

13.09 As the closing date fixed for the receipt of applications for the licence was 23rd June, 1995, and as matters had not been resolved with the Commission by 15th June, 1995, it was recognised by the Department that it would be necessary to postpone the closing date of the competition. Accordingly, on 16th June, 1995, Mr. Lowry announced a deferral of the closing date for receipt of applications. The accompanying press release issued by the Department referred to further consultation with the European Commission concerning certain aspects of the terms of the competition, and acknowledged that the primary difficulty related to the role of licence fees in the selection process. On the same day, the Department also notified each party that had purchased tender documentation that discussions were progressing with the European Commission on “*certain aspects*” of the tender documentation, that it was necessary to extend the closing date, and that a further communication concerning the deferred closing date would issue as soon as possible.

13.10 It seems that from mid-June, 1995, the Department endeavoured to broker with the Commission what amounted to a settlement of the issue. This culminated on 20th June, 1995, with an exchange of faxes in the form of draft correspondence between Mr. Brennan and Mr. Hocepić, from which the Department was satisfied that its proposal to impose a cap, and an equivalent fee, would satisfy the Commission. Accordingly, on 22nd June, 1995, a formal confidential letter was sent by Mr. Lowry to the Commissioner, in response to the Commissioner’s letter of the previous 27th April, 1995. That letter set out precisely what was proposed by the Department, namely, that the licence fee would be capped at £15 million, and that a fee of £10 million would be imposed on Eircell. In the course of that letter, Mr. Lowry emphasised that the amount payable by the applicant for the licence was the fourth-ranked of eight evaluation criteria and that:

“A clear but confidential decision has also been taken that this element would get less than 15% of the overall marks in the quantitative assessment by our consultants.”

13.11 The fax which Mr. Brennan had received from Mr. Hocepić on the previous 20th June, 1995, had enclosed, on an unofficial footing, a draft closing letter which had been prepared for Commissioner Van Miert. That draft letter recited the various features of the competition process, as modified by the capped licence fee, and confirmed that the Commission considered that it had

no grounds for action in respect of the proposed licence fee to be imposed on the second operator. It was anticipated that the Commissioner would sign the final version of that letter within a short time of receiving Mr. Lowry's formal letter dated 22nd June, 1995. As matters transpired, the signing-off of the closing letter by Commissioner van Miert was delayed. There was speculation within the Department at the time that this delay may have been due to the Commission deliberately seeking to defer a formal resolution of the dispute, for the purpose of exerting continuing indirect pressure on other Member States contemplating auction-type processes.

13.12 On 29th June, 1995, Mr. Hocepić faxed to Mr. Towe what he described as an unsigned copy of the closing letter, which he expected Commissioner Van Miert to sign the following day. A copy of that [fax and its enclosure](#) can be found within the Book of Appendices to this Volume. It was not in fact until 14th July, 1995, following representations made by Mr. Joe Brosnan, then Chef de Cabinet to the Irish Commissioner, whose assistance was requested by Mr. Loughrey, that Mr. Hocepić faxed to Mr. Brennan and Mr. Towe what he described as an advance copy of the closing letter signed by Commissioner Van Miert. It was only on receipt of this signed letter that Mr. Brennan was confident that the issue had been resolved. The final version of the letter, dated 14th July, 1995, signed by Commissioner van Miert, was not ultimately received by the Department until 20th July, 1995.

APPEARANCE OF COMMISSIONER'S LETTER ON FILES OF ESAT TELECOM

13.13 In the months prior to the initial commencement of its public sittings to hear evidence in relation to the GSM process, the Tribunal had endeavoured to obtain a copy of the files of Mr. Jarleth Burke, who had, in 1995, represented Mr. O'Brien's interests in dealings with the Department, and with the European Commission. Mr. Burke was then a young lawyer, and had been retained by Esat Telecom, the subsidiary of Communicorp which operated Mr. O'Brien's fixed-line telecommunications business, initially as Legal Regulatory Counsel, and subsequently as Director of Legal Regulatory Affairs. The Tribunal understood from its investigations that Mr. Burke also had dealings with both agencies in relation to the GSM process, and it was in those circumstances that the Tribunal sought access to his files, which by November, 2002, were held by British Telecom, having taken over both Esat Digifone and Esat Telecom. By then, Mr. Burke had ceased his involvement with Esat Telecom.

13.14 It was not until Thursday, 27th November, 2002, some five days before public sittings were due to commence, that the Tribunal received those files, and discovered in them a copy fax dated [24th July, 1995](#), from Mr. Burke addressed

to Mr. Mike Kedar, who was then a director of Esat Telecom. By that fax, Mr. Burke had forwarded three documents to Mr. Kedar, which included a copy of the front page of Commissioner Van Miert's closing letter to Mr. Lowry. A copy of that fax, together with the relevant enclosure, can be found within the Book of Appendices to this Volume. That letter formed part of the confidential exchange between Mr. Lowry and Commissioner Van Miert, and it contained a highly sensitive piece of information regarding the weightings which had been adopted by the Project Group, which was never intended to be disclosed to any applicant or potential applicant, which was never in the public domain, and which Mr. Burke had no business having in his possession.

13.15 Mr. Loughrey, as Secretary General of the Department, and as the Departmental official with ultimate responsibility for the integrity of the GSM process, and the resolution of the issue which had arisen with the Commission, described the letter as emanating from the most sensitive area of the corral of confidentiality which surrounded the competition and the process. That closing letter from Commissioner Van Miert to Mr. Lowry recited certain information which had been provided by Mr. Lowry in his letter of 22nd June, 1995, and in particular that the Licence Fee criterion, which was the fourth-ranked criterion, would be allocated a weighting of “less than 15%” of the overall marks in the quantitative assessment. That determination was specifically described in Mr. Lowry's letter, which was itself headed confidential, as “a clear but confidential decision.” What Commissioner Van Miert's letter recited was that he had noted that:

“The Irish Government will give only a limited weighting to the auction element in the call for tender (less than 15%).”

13.16 That information was an important and valuable piece of information, as it provided a clear indication, not only of the weighting likely to be allocated to the Licence Fee criterion, but, as acknowledged by Mr. Loughrey, also provided a reliable starting point for the construction of a statistical model of the probable weighting matrix which had been adopted by the Project Group. Whether it was or was not used by Esat Digifone for that purpose, it was nonetheless a piece of highly sensitive and confidential information, which should not have been available to the consortium.

13.17 What was enclosed with Mr. Burke's fax to Mr. Kedar was not a complete copy of Commissioner Van Miert's closing letter, nor was any complete copy of that letter found on his file, or any other of the files available to the Tribunal. What the enclosure comprised was the front page of the Commissioner's letter, the page which contained that significant piece of

information on weightings. There was no other documentation on Mr. Burke's file indicative from whom he had received that extract, or to whom he may have transmitted it, other than Mr. Kedar. Moreover, there was no fax banner at the top of the enclosure recording the date on which, the time at which, and the fax number from which that front page of the letter had been transmitted, so that the source of it was not identifiable.

13.18 In endeavouring to further its inquiries into the source of the extract in Mr. Burke's possession, the Tribunal sought to identify to which of the various official, or semi-official, copies of that letter in circulation the extract corresponded. There were seven such versions in existence, and it was clear from a close study of them that the extract matched only a single version, which was the advance copy of the Commissioner's letter, faxed by Mr. Hocepić to Mr. Brennan and Mr. Towey on 14th July, 1995. There were two distinguishing features shared by that advance copy and the extract in Mr. Burke's possession: firstly, they were each undated, and, secondly, they each bore the legend "*F/ft*".

13.19 The Commission assisted the Tribunal in its private inquiries regarding its administrative procedures, and these distinguishing characteristics, and the information which had been provided by the Commission, was confirmed by Mr. Hocepić when the Tribunal heard his evidence. He testified that, when a final draft of a letter was generated for signature by a Commissioner, a reference "*F*" was placed on it, followed immediately by the initials of the secretary who typed the letter, and that reference remained on all subsequent signed versions of it. A letter was not date-stamped until after it was signed by a Commissioner, and until after it went through a further administrative procedure of formal registration. The version of the first page of Commissioner Van Miert's letter located on Mr. Burke's file, in common with the version sent by Mr. Hocepić to Mr. Brennan and Mr. Towey on 14th July, 1995, bore the legend "*F/ft*", and was undated. Those two features, as already alluded to, distinguished it from all other versions which had emanated from the Commission. It followed therefore that either the Commission or the Department was the ultimate source of the extract letter on Mr. Burke's file.

13.20 Neither Mr. Burke, Mr. Hocepić nor any Departmental official could assist the Tribunal as to the source of the extract in Mr. Burke's possession. Mr. Burke was unable to recollect from whom he had received it. He informed the Tribunal that he had nonetheless concluded that he almost certainly received the document from someone within the ranks of the then acting head of DGIV, Mr. Herbert Ungerer, and further, it most likely had been faxed to him by Mr. Hocepić. Whilst Mr. Burke had no recollection of requesting any document from Mr. Hocepić, he said that he could not rule out that he had asked to be

kept informed about the Commission's inquiry into the GSM process. He had no recollection of receiving the document, nor had he any recollection of discussing it with anybody in Esat.

13.21 Mr. Burke was known to Mr. Hocepić from his dealings with the Competition Directorate in relation to the fixed-line affairs of Esat Telecom. Mr. Hocepić had no recollection of having sent, or of having asked the secretary in his Department to send, a copy of the Commissioner's letter to Mr. Burke, or to Esat Telecom. He further observed that there appeared to be no concrete evidence that the document found on Mr. Burke's file had been transmitted directly from the Competition Directorate to Mr. Burke, or to Esat Telecom. However, as he had no recollection of matters, he could not testify categorically that such a fax had not been so transmitted, in the event that concrete evidence of such an origin subsequently came to light before the Tribunal.

13.22 It was Mr. Hocepić's evidence that, where he sent such a letter to a person who had requested it, it would have been his practice to send the entire letter, to avoid further queries. Moreover, he pointed out that he could see no reason why in this instance he would not have sent the entire letter, unless Mr. Burke had a specific question which could have been dealt with by sending an extract. Mr. Hocepić testified that the form of the copy extract of the letter, as it appeared on Mr. Burke's file, namely with the fax banner excised, led him to believe that he had not sent it to Mr. Burke. In that regard, he agreed that he would have had no reason to obscure the source from which the fax had been sent.

13.23 If Mr. Hocepić or the Competition Directorate was not the source of the extract letter on Mr. Burke's file, the only other source can have been the Department, which had received that version of the letter by fax from Mr. Hocepić, addressed to Mr. Brennan and Mr. Towey, on 14th July, 1995. Mr. Towey testified that Mr. Hocepić's fax would have been received on the dedicated fax machine which was used solely for GSM competition purposes, and which was located in an office where the staff of the Development Division was located. The fax would have been brought either to Mr. Brennan or Mr. Towey's attention, and they would have determined what the circulation arrangements should be. Mr. Brennan, although having no recollection, suspected that Mr. Loughrey would have been told that the letter had arrived, and that information would likewise have been conveyed to Mr. Lowry's office, although it was not possible to determine whether a copy of the letter went there or not.

13.24 This letter of course had been anxiously awaited by the Department. The Commission intervention had necessitated a deferral of the competitive process, and that process could not be reactivated until the settlement had been confirmed. Although the Department had received indications on the previous 20th June, 1995, that the proposals put to the Commission were acceptable, Commissioner Van Miert's closing letter had been delayed for upwards of three weeks, and this had necessitated Mr. Loughrey requesting the assistance of Mr. Brosnan in bringing matters to completion. There can be no doubt therefore that the receipt of Mr. Hocepić's fax on 14th July, 1995, which had been eagerly awaited, must have been regarded by the Department as a significant event.

13.25 As in so many other aspects of the Tribunal's inquiries, it was Mr. Towey who engaged constructively, and who acknowledged having a recollection of events. He recognised that the fax received by the Department on 14th July, 1995, was a sensitive document, and was one that the Department was anxious to secure. As to whether a copy of the fax would have been furnished to Mr. Loughrey, it was Mr. Towey's evidence that he believed that a copy had been faxed to Mr. Loughrey, in a hotel in Alicante, with a cover minute, as he described it. Whilst he did not believe that a copy of it would have been provided to Mr. Lowry's office, he thought that Mr. Lowry would have been told, and that it was possible that a copy could have been furnished to Mr. Colin McCrea, Mr. Lowry's Programme Manager.

13.26 It follows from Mr. Towey's evidence, which the Tribunal accepts, that Mr. Loughrey was not present in the Department on 14th July, 1995, and that a copy of the letter had to be faxed to him in Alicante in Spain, or in some other location where he happened to be. Mr. Loughrey was not therefore in a position to convey this important piece of information to Mr. Lowry, and in his absence, it seems that it was most probably Mr. Brennan who must have been the source of information to him. Mr. Lowry thought that his private office would have received at least a copy of the letter. He could be of little assistance to the Tribunal, but testified that he did not forward the letter to Mr. Burke.

13.27 In the absence of a fax banner on the extract on Mr. Burke's file, in the absence of any other documentary evidence, and in the absence of any witness, other than Mr. Towey, having a reliable recollection of events, the Tribunal is unable to conclude how that document came to be in the possession of Mr. Burke. It is of course possible, because of the less stringent approach to confidentiality adopted by the Commission, that Mr. Hocepić may have provided it directly to Mr. Burke, although it must be remembered that the absence of a fax banner led Mr. Hocepić to believe that he had not done so. It is equally possible that Mr. Burke received it from some other source, including an internal

Esat Telecom or Esat Digifone source, and it is also possible that the extract was a copy of the fax which had been received by the Department on 14th July, 1995.

13.28 Irrespective of whether the extract of Commissioner Van Miert’s letter emanated from the Commission, or from the Department, the fact remains that, in advance of the closing date of the GSM competition process, Mr. O’Brien’s consortium had available to it confidential information regarding the weighting matrix that had been adopted by the Project Group, which it was not entitled to have, and which might have conferred an advantage on the consortium. In that regard, Mr. Burke testified that it was likely, in the context of the GSM process, that he would have discussed the content of the letter with other executives and directors. He knew that he had faxed a copy to Mr. Kedar, a director of Esat Telecom on 24th July, 1995, from the copy fax on his file. As to why he would have done that, Mr. Burke testified that Mr. Kedar was an expert on regulatory affairs, and he had had extensive dealings with him in relation to such issues in the context of Mr. O’Brien’s fixed-line business. How that letter had any bearing on any aspect of the fixed-line regulatory issues is unclear to the Tribunal, as it related solely to the resolution of the issue which had arisen in the context of the design of the GSM competition process.

13.29 Mr. O’Brien had no recollection of matters. He acknowledged that Mr. Burke might have discussed the contents of the letter with other personnel, but he did not know. Likewise, Mr. O’Brien had no recollection of Mr. Burke bringing the letter to his attention; he might have, but Mr. O’Brien did not remember.

13.30 Mr. Loughrey, as Secretary General, recognised that the availability of this letter, and the information which it imparted to Esat Digifone, was a matter that amounted, at least potentially, to a breach of the rules of the competitive process. If he had learnt of it at the time, he would have had to consider very carefully the consequences of such information being available to one applicant, and not to the other five. Apart from the matter of State secrets, as Mr. Loughrey put it, he agreed that the issue also gave rise to a question of fairness. The GSM process was to be an adjudicative one, based on certain criteria; it was essential to ensure that no applicant gained an advantage, and it was equally important that there was no perception of any such advantage.

13.31 It was Mr. Loughrey’s evidence that, had he learnt of this matter at the time, he did not believe that he would have formed the view that the process had been “*holed below the water line*”, as he described it. It was his reasoning, as he explained it to the Tribunal, that one hint at one of the lesser weightings, as he characterised the information contained in the extract letter, would not have been sufficient to undermine the process. Mr. Loughrey did nonetheless

recognise that the issue was hypothetical, and he could not say precisely how he would have judged matters at the time.

13.32 The Tribunal recognises that there was considerable weight in Mr. Loughrey's reasoning, and that the Department and Mr. Lowry might well have taken the view that the information that had emerged would not have been sufficient to necessitate an abandonment of the process. Nonetheless, and as recognised by Mr. Loughrey, the Department would have had to ensure that the process continued to be seen to be a fair one, and, at a minimum, would have had to make provision for the sharing of the information which had emerged with all interested parties. The Department would also, it seems to the Tribunal, have been obliged to inquire into and ascertain the precise circumstances in which the confidentiality of its process had been breached, and whether those circumstances entailed a degree of culpability on the part of Esat Digifone, and to consider the appropriate course to be taken to regularise matters.

MR. OWEN O'CONNELL'S LETTER OF 20TH JUNE, 1995

13.33 At the time that the Department was considering how best to resolve the licence fee issue, and was endeavouring to negotiate with the Commission, Mr. Owen O'Connell of William Fry solicitors, who had been a longstanding legal adviser to Mr. O'Brien, and who was then acting on behalf of Mr. O'Brien and Communicorp, was in correspondence with Ms. Helen Stroud, of Baker McKenzie, the London solicitors acting for Advent International. Their correspondence was directed to finalising the terms of an agreement, ultimately concluded on 12th July, 1995, which will be explored in the following chapter.

13.34 In the course of that correspondence, Ms. Stroud sent a fax to Mr. O'Connell on 19th June, 1995, in which she asked him to let her know, in broad terms, the issues which had been raised by the Commission, and the effect that the Commission intervention might have on the competition timetable. The closing date had been fixed for 23rd June, 1995, but on 16th June, 1995, Mr. Lowry had announced the deferral of the process, and the Department had issued a press release, in which it was stated that "*certain aspects*" of the process required "*further consultation with the European Commission*", and that the primary difficulty which had arisen related to the role of licence fees in the selection process. It was further indicated in that press release that the consultation process with the Commission could take a further four weeks to complete, but that Mr. Lowry was confident that a winner of the competition would be selected that year, despite the procedural delay. All interested parties that had purchased the RFP document from the Department were separately notified by letter of the same date, 16th June, 1995. Those letters, which were signed by Mr. Brennan, were all in the same format, and contained much the

same material as the press release, save that they omitted any reference to the difficulty which had arisen as being one related to the role of licence fees in the selection process.

13.35 Before proceeding to relate Mr. O’Connell’s response to Ms. Stroud, it is helpful to refer to a meeting, which took place on the same day that Ms. Stroud sent her fax to Mr. O’Connell, that is, 19th June, 1995, in the Department between Mr. O’Brien and Mr. Ed Kelly, of Esat Digifone, and Mr. Brennan and Mr. Towey. That meeting complied strictly with the protocol which had been adopted by the Project Group, on Mr. Brennan’s initiative, on the previous 6th March, 1995, in that the meeting took place within the Department’s offices, it was attended by both Mr. Brennan and Mr. Towey, the latter prepared a formal typed note of what had transpired at the meeting, and that note was placed on the Departmental file.

13.36 The note recited that the meeting had been requested by Esat Digifone to discuss the postponement of the competition. As regards the deferral, and the reasons for it, the note recorded that:

“No indication could be given [by the Department] of any revision which might be put in place in relation to the licence fee. Potential applicants must, pending further clarification, draw their own conclusions from the Minister’s statements as reported in the media....

With regard to the revised timescale for submission of applications, Esat offered the opinion that a period of two weeks following notification would suffice.”

If that note, which was dated 20th June, 1995, was accurate, and there was no suggestion to the contrary, Mr. Brennan and Mr. Towey provided no additional information in the course of that meeting, and simply informed Mr. O’Brien and Mr. Kelly that they should draw their own conclusions from Mr. Lowry’s statements, as reported in the media. Mr. Brennan, in the course of his evidence, suggested that the press release, of 16th June, 1995, might not have represented the entirety of the information which had been made available by the Department to the media, and he thought, although he could not be specific on the point, that a further line, as he described it, was provided to the media in response to queries raised with the Department. This point will be returned to in the context of consideration of press coverage at the time.

13.37 By 20th June, 1995, the date of Mr. O’Connell’s response to Ms. Stroud, the Department had made considerable progress in its efforts to secure

a resolution of the Commission's concerns regarding the licence fee element of the competition structure. Since receipt of Commissioner Van Miert's letter of 3rd May, 1995, the advice of AMI had been taken, the issue had been considered at two meetings of the Project Group, legal advice had been received, a Departmental delegation had travelled to Brussels to meet with Commission officials on 2nd June, 1995, Mr. Brennan and Mr. Towe had had a teleconference with the same Commission officials on 15th June, 1995, in the course of which they had put the Department's proposal that the licence fee should be capped at £15 million, and that an equivalent fee of £10 million should be imposed on Eircell, and finally, on 20th June, 1995, the Department had exchanged faxes with the Commission, as a result of which the Department concluded that its proposals would be acceptable to the Commission. It was of some significance that, at the second of the Project Group meetings at which the matter arose, that is, the meeting of 9th June, 1995, four options available to the Department had been identified and considered. Two of them were regarded as politically expedient, and two were not so regarded. The two politically acceptable solutions have already been noted, but in the context of Mr. O'Connell's response, reference should be made to all four options, as referred to in the official report of that meeting, and which were as follows:

- "A. Proceed with the competition as is, with the attendant risks*
- B. No fee*
- C. 2 flat fees on both GSM operators or a fixed fee for Eircell in conjunction with a cap on binds [sic] to become the second operator.*
- D. Impose equivalent fee on Eircell after the competition is over."*

It was option A and C that were judged to be politically workable, and options B and D that were not.

13.38 What Mr. O'Connell said in his letter of 20th June, 1995, in response to Ms. Stroud's query was that:

"The Commission has objected primarily to the 'auction' concept inherent in the proposals for grant of the second GSM licence. Accordingly, the terms of application are to be revised with either no upfront payment required or a maximum cap placed thereon. It is expected that the timetable will be extended by about two months."

As that information conveyed by Mr. O'Connell to Ms. Stroud was not information which was comprised in the Departmental press release of 16th June, 1995, in

the letter to Esat Digifone of the same date, and was not, on the basis of Mr. Towey's note, provided in the course of the meeting in the Department on the previous day, but appeared to be a reasonably accurate reflection of the substance of the Department's then thinking and intentions, the Tribunal made inquiries of Mr. O'Connell as to the source of his instructions, and took up those inquiries with him in the course of his evidence.

13.39 Prior to his attending to give evidence, Mr. O'Connell had informed the Tribunal, in the first instance, that he had no direct recollection either of the person from whom, or the date upon which, he had received instructions, nor the source or sources of the information comprised in his instructions. He had, according to his response, undertaken a review of his files to ascertain whether they contained any correspondence or note which might throw some light on the matter. Having considered his files, Mr. O'Connell then informed the Tribunal that no written record had been located, either of his receipt of instructions in regard to the statements made in his letter to Ms. Stroud, or which assisted him in recalling the source of the information comprised in his instructions.

13.40 In a formal Memorandum of Intended Evidence furnished in advance of his attendance, Mr. O'Connell addressed this issue in some greater detail. He confirmed that a letter, such as his letter to Ms. Stroud of 20th June, 1995, would invariably have been written in compliance with instructions received from his clients, and would convey information received from them. He would not write, or have written, such a letter on his own initiative without receiving instructions to do so, and he would not have included in any such letter factual or speculative information of that type, unless it was given to him by his clients and/or confirmed by them. The client on whose behalf he wrote the letter was Communicorp, and at the time he was accustomed to receiving instructions from Mr. O'Brien, Mr. Peter O'Donoghue and Mr. Jarleth Burke, and it was likely that the instructions and information in question would have been given to him by one or more of them. In that Memorandum, Mr. O'Connell also referred to certain reports published at the time, which, he suggested, contained substantially the same information as had appeared in his letter. Mr. O'Connell proceeded to identify the likely sources of the information as being press reports, a possible unminuted comment made to Mr. O'Brien and Mr. Kelly by Mr. Brennan and Mr. Towey, during their meeting of 19th June, 1995, or comments made, or documents provided, to Mr. Burke by a contact or contacts in the European Commission.

13.41 When Mr. O'Connell attended to give evidence, he confirmed that the information he had provided to the Tribunal in advance was correct. The newspaper articles to which he referred were raised with him. There were four

articles in all. The first was an article which appeared in the Sunday Business Post on 26th March, 1995, shortly after the competition process had been announced. The article, which predated the triggering of the Commission intervention by some considerable number of weeks, was a general comment piece on the licence fee specifications of the competition, and the policy of the European Commission, and it no more than highlighted the possibility that an issue could arise. The second and third articles both appeared on 17th June, 1995, the day following Mr. Lowry's announcement, and the Department's press release, and were published by the Irish Independent and the Irish Times. The first of these, which appeared in the Irish Independent, reported Mr. Lowry's announcement of the previous day, and specifically referred to a comment made by Mr. Lowry that the Commission was asserting that, if a fee was to be charged to a new operator, a fee was also going to have to be imposed on Eircell. The Irish Times piece of the same date likewise reported on the deferral of the closing date of the competition, outlined that one approach that might be taken would be to set a maximum level for the fee payable by the new entrant, and speculated that the EU might suggest that a similar fee be levied on Eircell. The final article appeared in the Irish Times on 20th June, 1995, and included the additional information that the deadline for receipt of bids might be extended for two months. The factual content of those articles, published after Mr. Lowry's statement, and the Departmental press release, contained material in excess of what was in that release. In particular, the Irish Independent article of 17th June, 1995, attributed to Mr. Lowry the comment that a fee might also have to be levied on Eircell, and the Irish Times article, of the same date, speculated that a maximum fee payable by the new entrant might be fixed, with a similar fee payable by Eircell. Accordingly, Mr. Brennan's recollection of a further "*line*" having been provided to the media may well have been correct. Moreover, it seems that, in the statement which he made, or in questions which he answered, Mr. Lowry himself may have addressed those points.

13.42 The Tribunal is satisfied that Mr. O'Connell would not have conveyed that information to Ms. Stroud without clear instructions from his client, which at that point was Communicorp. Mr. O'Connell could not recall from whom he had received his instructions, and had no note or record to assist his recollection. Whilst the media reports were of assistance to the Tribunal, it is clear that Mr. O'Connell was not merely relaying to Ms. Stroud what was contained in those reports, as was evident from the definite terms of his response. Moreover, there was no suggestion in those reports of the alternative compromise conveyed by Mr. O'Connell to Ms. Stroud, namely that no fee might be imposed on the new entrant. Mr. Jarleth Burke, who also had dealings with the Commission in relation to the competition, and who had furnished the Competition Directorate with a submission on the competition specifications, testified that, from his knowledge of European law, and the Commission's adherence to the principles

of competition and the provision of non-discriminatory licence fees, he had anticipated that a cap could be placed on the licence fee, and that an equivalent fee could be imposed on Eircell, and he believed that he would have shared his views with Mr. O’Connell.

13.43 Whilst it is clear that Mr. O’Connell must have received that information from Communicorp, in the absence of any recollection on the part of those most centrally involved, the Tribunal cannot determine from whom his instructions emanated, or their ultimate source. There was undoubtedly information in the public domain, and there was considerable press speculation. In the light of what had been conveyed to Mr. O’Brien and Mr. Kelly on the previous day, that they should draw their own conclusions from Mr. Lowry’s statements, as reported in the media, it may be that this was, at least in some part, the source of Mr. O’Connell’s instructions. What none of these sources, or potential sources, can however account for is the alternative solution, referred to by Mr. O’Connell, namely, that no fee would be charged, and the only record of that solution ever having arisen, which the Tribunal has been able to access, is the official report of the meeting of the Project Group of 9th June, 1995. It was also of course a view to which the Department had itself adhered during the initial design stage of the process.

PUTTING ESAT DIGIFONE'S FINANCES IN ORDER

14.01 In the course of and in the aftermath of securing Telenor as a member of his consortium, Mr. Denis O'Brien had to turn his attention to the obtaining of institutional support. He also had to direct his energies to the fundamental issue of the deficiency in Communicorp's finances, if he was to have any prospect of competing for the licence. It is proposed to address each of these matters in turn.

SECURING SUPPORT FROM FINANCIAL INSTITUTIONS

14.02 It seems that it was during the exploratory meetings in Paris with France Telecom in early April, 1995, that the concept of including an element of institutional ownership in the consortium may have first been conceived. It will be recalled that Mr. O'Brien, Mr. John Callaghan, and Mr. Massimo Prelz of Advent, and possibly also Ms. Lucy Gaffney, travelled to Paris in early April, 1995, to meet representatives of France Telecom to discuss the possibility of forming a consortium to apply for the licence. It seems from the evidence heard by the Tribunal that France Telecom was opposed to the ownership structure then envisaged by Mr. O'Brien, namely a 50/50 joint partnership between the two principal members, and that, in response, the Communicorp team proposed that provision be made for an element of financial institution ownership.

14.03 Whilst the Tribunal does not doubt that this idea may have initially emerged in Paris, in view of the highly professional and systematic approach which had been adopted by Mr. O'Brien to all aspects of the preparation of the Esat Digifone application, it is probable that this prospect was given very careful and measured consideration, and that the views of PA Consulting, who had been retained by Mr. O'Brien in early March, 1995, and those of his other associates and consultants, would have been canvassed before the concept was adopted.

14.04 Mr. Callaghan testified that he had telephoned Mr. Kyran McLaughlin, then Joint Managing Director of Davy stockbrokers, from Paris to make an initial inquiry about the feasibility of securing support for the bid from Irish financial institutions. Mr. Callaghan and Mr. O'Brien then met with Mr. McLaughlin in mid-April, 1995, for a more detailed discussion. It was Mr. McLaughlin's evidence that it was his understanding that what was being sought by Mr. O'Brien was both financial support, and the credibility that would be lent to the bid by large institutional backing. As no business plan or financial projections were then available, and as the terms of the licence were as yet unknown, Mr. McLaughlin did not regard this as an easy undertaking.

14.05 Mr. Paul Connolly, who was an associate of Mr. O'Brien, and at various times a director of both Communicorp and of Esat Telecom, and whose expertise lay in the field of corporate finance, became involved at that point. He, in conjunction with Mr. Tom Byrne, then Managing Director of Davy Corporate Finance, set about drafting a document which could be furnished to prospective institutional investors. They prepared a memorandum for investors which contained outline information concerning the licence, the cellular telecommunications market, the competition process, the composition of the Esat Digifone consortium, a profile of its members, and the approach which the consortium intended to adopt in its application. The memorandum recited that, if the bid was successful, it was proposed to raise up to £12 million from new investors, in exchange for 20% of the total projected equity investment of £60 million. As regards the financial plan, the memorandum recorded that the balance of the £60 million equity investment would be contributed equally by Communicorp and Telenor, and that, as the total cost of establishing the GSM system, including the initial fee payable for the licence, which had not as of that time yet been capped at £15 million, was estimated to exceed £120 million, the balance of the finance required would be raised through borrowings.

14.06 The memorandum defined the commitment which was being sought from the institutions as *“an option to participate if the consortium is successful with its bid”*, and it further provided that, even though it was anticipated that £1 million would be spent on the licence application, *“no immediate contribution is sought from institutional shareholders”*. As is clear from the wording of those terms, what was sought was not a commitment from financial institutions, but an option to participate: nor were the financial institutions approached asked at that point to make any contribution to the bid costs.

14.07 It was Mr. McLaughlin's view that only a limited number of institutions would be interested in an untested venture that depended on the result of a competitive process, and was only at project finance stage. Of institutional clients known to him, it was Mr. McLaughlin who selected Allied Irish Banks (Capital Markets), Investment Bank of Ireland, and Standard Life, as potential candidates, and after initially explaining the proposal in each instance by telephone, he forwarded a copy of the memorandum to each of them. Positive responses, albeit of a contingent nature, were communicated by each of those institutions in the form of letters, dating from the first two weeks of June, 1995. By these, Allied Irish Banks, Investment Bank of Ireland, and Standard Life each indicated a preparedness to invest in Esat Digifone to the level of £3 million in the former cases, and £2.5 million in the latter case. Each of the letters confirmed the preparedness of the institutions to invest in Esat Digifone, subject primarily to the consortium succeeding in the competition, the terms of any

eventual licence awarded substantively conforming to what had been conveyed in the memorandum for investors, and the terms of the investment being approved by their respective investment committees or boards.

14.08 At various points in the course of the evidence heard by the Tribunal, Mr. O'Brien, and a number of other witnesses, including Mr. Dermot Desmond, called into question the value of these letters, in view of the conditions attaching to them, and in view of the fact that the institutions had not agreed to bear any share of the bid costs. It was suggested that they were letters of comfort, and were not sufficiently supportive for the purposes of the application. It was Mr. McLaughlin's evidence that it had never been envisaged in his discussions with Mr. Callaghan and Mr. O'Brien that actual hard cash would be sought from the institutions, until a licence was to hand, and that until then, what was offered to the institutions, as defined in the memorandum for investors, was an option to invest. He could not recall anyone asking him to seek anything stronger or different to that which he had obtained; nor was he ever informed that the conditions attaching to the letters rendered the support unacceptable. As all three letters were virtually identical in their terms, it must be taken that pro forma letters were provided by Davy to the three institutions when they were invited to take up the option. Mr. Callaghan, who was the principal contact with Mr. McLaughlin, had not been asked to review the letters, or to seek any stronger or different commitment from Mr. McLaughlin.

14.09 The three institutions, namely Allied Irish Banks, Investment Bank of Ireland and Standard Life, together with Advent International, which acquired an entitlement to a 5% shareholding on foot of a separate arrangement, which is addressed at a later point in this chapter, were named in the Esat Digifone application as collectively holding a 20% interest in the intended licensee. The executive summary to the application stated that this 20% allocation had been placed by Davy stockbrokers with the three financial institutions which Mr. McLaughlin had recruited, and with Advent International. Whilst a slightly different formulation was used in the body of the application, which will be referred to more fully in due course, there was nothing tentative or conditional in the manner of portrayal of the intended institutional element. The letters of early June, 1995, furnished by Allied Irish Banks, Investment Bank of Ireland and Standard Life, together with a letter from Advent, were appended to the application, and were described as "*written investment commitments*."

14.10 Likewise, considerable weight was placed on the advantages of the Irish institutional involvement by the Esat Digifone team, at the oral presentation made to the Department on the following 12th September, 1995, as part of the evaluation process. Not only was it emphasised that the financial institution

involvement was secured, but it was stated that their shareholding, coupled with that of Communicorp, meant that Esat Digifone was an Irish company. Moreover, Mr. O'Brien, when delivering his initial remarks to the Department, focused on the Irish institutional element as offering an opportunity to Irish pension funds, held by those institutions, for the first time to invest in a utility, thereby providing a home for those funds, which it was suggested would otherwise be destined for investment overseas. Ultimately, as will be seen, none of these institutions held any shareholding in Esat Digifone, and there was no institutional involvement in the licensed company, in the manner contemplated in the application, or suggested at the presentation.

14.11 The incorporation of the Irish institutional element in the intended composition of Esat Digifone, as disclosed in the application, was in the view of the Tribunal a carefully considered and crafted strategy. Mr. Connolly confirmed in his evidence that the rationale underlying the decision to bring in the institutions was that it was thought that the participation of pension funds would make a positive impression on the evaluators, and the involvement of Irish institutions would render the Irish element of ownership in the majority. The institutions in question, namely, Allied Irish Banks, Investment Bank of Ireland and Standard Life, undoubtedly lent credibility to the application. The terms of their involvement were very much to Esat Digifone's advantage, in that they enabled it to benefit from their support, and at the same time to retain control over the ultimate destination of that shareholding, there being no binding entitlement on their part to those shares, or obligation on the part of Esat Digifone to provide them. Not only did this strategy leave that shareholding available to enable the flexibility to bring in a third partner, ultimately in the form of Mr. Dermot Desmond, but it also meant that in the long run the possibility of Mr. O'Brien securing overall control, direct or indirect, of Esat Digifone remained in prospect, which, as will be seen, was it seems his overriding ambition.

SUPPORT OF ADVENT INTERNATIONAL

14.12 Amongst the many matters with which Mr. O'Brien had to deal, in the lead up to the closing date of the competition, was the particularly troublesome problem of Communicorp's finances. As well as facing a cash crisis in its existing fixed-line and radio businesses, he had to contend with the requirement in the RFP document of demonstrable financial capability which, according to Departmental witnesses, was a condition precedent to the eligibility of applicants. There was yet a further dimension to Mr. O'Brien's financial problems, arising from the provision of the joint venture agreement concluded with Telenor on 3rd June, 1995, whereby Communicorp was obliged to provide

Telenor with what was termed a “*financial guarantee*” in the sum of £5 million, plus 50% of the licence fee.

14.13 The business plan, which had been developed by Mr. O’Brien and his associates and advisers for Esat Digifone, projected a total capital requirement in the region of £120 million. It was intended that £60 million would be provided in the form of equity capital, of which £24 million each would be invested by Communicorp and Telenor, with the balance of £12 million invested by the financial institutions. It was an indubitable fact, which was acknowledged by all witnesses, that, notwithstanding Mr. O’Brien having been the initiator of the consortium, and the source of a large proportion of its preparations and strategy, the financial strength of Communicorp was one of considerable frailty. There was no question of Communicorp having available to it funds in the order of £24 million, nor did it have access to such funds. On the contrary, by May, 1995, Communicorp’s finances were in a perilous state, and it was in dire need of working capital to keep its existing businesses afloat.

14.14 Communicorp was Mr. O’Brien’s holding company, and it was through its subsidiaries, Esat Telecom and Radio Investments NV, that his fixed-line telecommunications and radio businesses were respectively operated. As of mid-1995, the entire business was valued, according to Mr. O’Brien, at or around the equivalent of €30 million. In October, 1994, as a first step in his strategy to expand his business and shareholder base, Mr. O’Brien had attracted an investment of \$10 million by a venture capital corporation, in the form of Advent International, which was a US corporation with interests throughout the world. It was with the London office of Advent International that Mr. O’Brien had his dealings, and it was with Mr. Massimo Prelz, who was then a senior executive experienced in the European media and telecommunications sector, that Mr. O’Brien had his principal relationship. Advent’s \$10 million investment in Communicorp gave it a 34% shareholding, with 25% voting rights in the company, together with two seats on the board of directors, which were held by Mr. Prelz, and by one of his Advent associates, Mr. Michael Garau. By May, 1995, Mr. Prelz was intimately involved in the business of Communicorp, and had been active in his support of Mr. O’Brien’s ambition of securing the GSM licence. It will be recalled that Mr. Prelz was part of the Communicorp delegation that had travelled to Paris for an exploratory meeting with France Telecom in April, 1995, and that he had also met Mr. Knut Haga of Telenor in London, on Mr. O’Brien’s introduction, in the context of negotiations between Communicorp and Telenor, and had assured Mr. Haga of Advent’s support of Communicorp’s efforts to secure the GSM licence.

14.15 Mr. O'Brien in the course of his evidence explained his then long-term strategy of building up his business, and expanding his shareholder base. He testified that the first step was that he had a private company, Communicorp, in which he and some fellow directors held the shares. The second step was to bring in a venture capitalist, secured in October, 1994, in the form of Advent, which had invested \$10 million. The third step was to bring in US institutional investors, which at that time was prospective, and was ultimately achieved by a private placement in June, 1996. The fourth step was a bond offering on the US market, and the final step was an Initial Public Offering, IPO, where shares were offered to the public, which IPO proceeded successfully in November, 1998. Those steps, according to Mr. O'Brien, were all planned by him very carefully in advance, to ensue in sequence.

14.16 It was Mr. O'Brien's evidence, which was confirmed by virtually all other witnesses, that once he had secured the GSM licence, the value of his business would increase significantly, and it would become an attractive investment opportunity. He testified that, as of early 1995, he had every confidence that he would raise the money to fund Communicorp's equity participation in Esat Digifone, and he would have those funds on the day. His intention was to raise the necessary funding by proceeding to the third stage of his plan, namely, by a private placement on the US market with a small number of financial institutions.

14.17 From as early as May, 1995, Mr. O'Brien was in negotiation with Credit Suisse First Boston, CSFB, a US equity house, in relation to such a private placement of shares on the US market, with a view to raising funds for both the GSM business, if the licence was secured, and for his existing fixed-line business. The relationship between Mr. O'Brien and CSFB dated back some years to the summer of 1991, when Mr. O'Brien was then seeking funding for an expansion of his radio interests to Eastern Europe. Mr. Paul Connolly was instrumental in that introduction, which was made by him to a former school friend, Mr. Peter Muldowney, who worked for CSFB on the stock broking side of its business, where he acted for and advised high net worth individuals. Mr. Muldowney in turn introduced Mr. O'Brien and Mr. Connolly to Mr. Tom Keaveney of CSFB, and by 1995, that relationship had extended to Mr. Scott Seaton, who was CSFB Head of Investment on the telecommunications side. Mr. Peter Muldowney also featured in elements of the evidence heard by the Tribunal on the money trail side of its inquiries, and in particular in relation to certain share transactions dating from 1998, which involved Mr. O'Brien and the late Mr. David Austin, and Mr. O'Brien's then accountant and financial adviser, Mr. Aidan Phelan. Mr. Muldowney, who being resident in the United States was not amenable to the jurisdiction of the Tribunal, declined the Tribunal's request that he attend to give evidence.

14.18 These negotiations with CSFB were largely undertaken by Mr. Connolly, who had built up a relationship with CSFB, and whose expertise was in the field of corporate finance. It was Mr. Connolly's evidence that final terms of engagement were concluded between Communicorp and CSFB towards the end of June, 1995, whereby CSFB was appointed as exclusive placement agent and financial adviser to Communicorp, in connection with its proposed placement on the US market.

14.19 Whilst Mr. O'Brien was confident that the necessary funds would be raised on the US market, it must nonetheless have been clear to him that the engagement of CSFB, and his future funding plan, was not going to meet the Departmental requirement of demonstrable financial capability. Mr. O'Brien sought to suggest in evidence that the reason that funds could not be raised by CSFB in advance of the closing date of the competition was one of timing, and would also have been ill-advised, as a placement at that point would have been hugely dilutive of his interest. His evidence in that regard was unconvincing. It is quite clear that any private placement at that juncture, based on Communicorp's then value of the equivalent of €30 million, would not have been feasible, and that the ultimate success of the placement in June, 1996, rested on the availability of the GSM licence.

14.20 As to his immediate financial requirements, it was to Mr. Prelz and Advent that Mr. O'Brien turned for assistance. It is understandable that he did so, as Advent's interests, following its \$10 million investment, and its acquisition of a 34% shareholding in Communicorp, were inextricably tied to those of Mr. O'Brien, and of Communicorp. Ultimately, Advent profited handsomely from its investment in Communicorp, netting a return of \$90 million. The Tribunal heard evidence of the dealings between Advent and Communicorp during the months of May, June and July, 1995, from Mr. O'Brien, Mr. Prelz, Mr. Callaghan and Mr. Peter O'Donoghue, who had joined Communicorp as Financial Director.

14.21 In mid-May, 1995, when Communicorp's finances were stretched, and it was in acute need of working capital, Mr. O'Brien approached Mr. Prelz for a further cash injection of \$5 million, then the equivalent of £3.25 million. This funding was unrelated to Mr. O'Brien's GSM ambitions, and was required to keep his existing businesses afloat. On 19th May, 1995, Mr. O'Brien and Mr. Prelz reached agreement on a second investment by Advent of \$5 million, in the form of redeemable preference loan stock, convertible after five years into a 20% shareholding in Mr. O'Brien's radio interests. That deal, had it proceeded, would have had significant advantages for Mr. O'Brien, as it would have solved his immediate financial needs, without imposing any short or even medium term

repayment or interest obligations on him, and it would have ring-fenced any future conversion rights of Advent to his radio businesses. However, it was not to be, and Mr. Prelz so informed Mr. O'Brien, when he telephoned him on 30th May, 1995, when Mr. O'Brien was in Norway at an advanced stage of negotiations with Telenor on the joint venture agreement, and indicated that he had not been able to secure board approval for that deal, and instead offered Mr. O'Brien a straight \$5 million loan for five years at an annual coupon, or interest rate, of 30%. On those terms, Mr. O'Brien would have been obliged to meet a 30% annual interest payment, and repay the loan in full after five years, or face the prospect of Advent securing an increased shareholding in all of his businesses, at a cost to his own shareholding. Ultimately, on 15th June, 1995, a one year straight bridging loan was agreed on the same annual coupon of 30%, and this was sanctioned by Mr. Prelz's board.

14.22 It is clear that Mr. O'Brien viewed Mr. Prelz's failure to deliver on the May agreement as disappointing and unhelpful, and Mr. Callaghan characterised the relationship between Communicorp and Advent arising from these events as not constructive. Likewise, Mr. O'Brien regarded the revised terms as harsh, but observed that his "*trousers were down*", signifying that he had no alternative but to accept them, having exhausted all other options available to him, including it seems an unfruitful approach to Mr. Dermot Desmond, which is addressed elsewhere.

14.23 Apart from the harsh terms of the bridging loan imposed by Advent, Mr. Prelz's failure to deliver on the May deal posed very considerable difficulties for Mr. O'Brien in terms of his relationship with his then principal banker, Woodchester Bank. In that regard, Mr. O'Donoghue testified that Mr. Prelz had attended a meeting with Woodchester after the May deal had been struck, and confirmed that a further investment of \$5 million would be made by Advent. In reliance on that further investment by Advent, as conveyed by Mr. Prelz, Woodchester had in turn agreed to advance a temporary loan to Communicorp, secured on Mr. O'Brien's personal guarantee, to be repaid when Advent's investment was made. It is understandable in those circumstances that Mr. O'Brien regarded himself as having no alternative but to accept the harsh terms imposed by Advent, that Advent's failure to deliver on that deal gave rise to tensions in the relationship between Mr. Prelz and Mr. O'Brien, and that Mr. O'Donoghue regarded Advent as having reneged on that deal.

14.24 The Tribunal heard evidence from Mr. Prelz at a late stage of its work. The Tribunal had dealings with Advent in the course of its inquiries, and in 2003 had sought access to Advent's files in relation to its 1995 funding arrangements with Communicorp. As a result of delays encountered in securing production,

these documents were not made available to the Tribunal until April, 2004, by which time the Tribunal had substantially completed its inquiries into the GSM licence. The Tribunal inspected these documents, and formed the view that there was nothing in them to suggest that further inquiries of Advent would add to the evidence which had already been heard. Even though the Tribunal had clearly earmarked its interest in aspects of the Advent funding in its Opening Statement delivered in December, 2002, and had signified its continuing interest in those arrangements in the course of the evidence of all principal witnesses on the Esat Digifone side, it was not until after the Tribunal had served notice of its Provisional Findings in November, 2008, that Mr. O'Brien informed the Tribunal that Mr. Prelz wished to give evidence, and requested the Tribunal to hear that evidence.

14.25 Overall, the Tribunal found Mr. Prelz's evidence in many respects unhelpful, if not deliberately misleading, and reference will be made to material aspects of his evidence as they arise. Suffice it to say at this juncture that Mr. Prelz testified that, notwithstanding that it was clear that he had informed Mr. O'Brien and Mr. Callaghan that he could not secure board approval for the \$5 million deal as initially concluded, and notwithstanding that Mr. O'Brien had recorded that fact in correspondence which he had forwarded to Mr. Prelz dated 29th June, 1995, which Mr. Prelz had not subsequently disputed, he had in fact received board approval for that deal, and he had simply changed his own mind about proceeding with it. Whether the failure of Advent to abide by the terms of the May agreement was due to the rejection of Mr. Prelz's recommendation by his US board, which was undoubtedly the explanation he gave at the time, or was due to Mr. Prelz's own change of mind, as testified by him when he gave evidence, the fact remains that the terms of the May agreement were not honoured by Advent. Either Mr. Prelz's recommendation, which it appears from the available documentation was supported by his local London board, did not carry weight with his US board, or Mr. Prelz was himself unreliable in his business dealings with Mr. O'Brien.

14.26 Apart from securing the survival of his business, Mr. O'Brien also needed something from Advent which was just as important as the bridging finance, namely, something to demonstrate that Communicorp, despite its then financial frailty, had sufficient financial capability to satisfy the condition precedent in the RFP document. As already adverted to, it would have been clear to Mr. O'Brien that his plan to raise funding on the US market, on the assumption that he secured the licence, would not suffice. All that would have shown was that Communicorp's ability to fund its £24 million investment in Esat Digifone was dependent on the uncertain outcome of a placement on the US market, which was itself predicated on the winning of the GSM licence, and the consequent enhancement of Communicorp's value. Mr. O'Brien was also of

course obliged, under the terms of his joint venture agreement with Telenor concluded on 3rd June, 1995, to provide Telenor with a financial guarantee for £5 million, plus half the licence fee payable. At that time, the licence fee had not yet been capped, so that the extent of the financial guarantee required was dependent on the level of licence fee which the consortium intended to nominate in its application. Neither Mr. O'Brien, nor for that matter any other witness on the Esat Digifone side, including the Telenor witnesses, could be drawn on the level of licence fee which the consortium might have intended to offer. According to the evidence heard, that decision had been left over to be determined by Mr. O'Brien and Mr. Arve Johansen, the Chairman of Telenor Invest, in the final run-up to the closing date of the competition, which had by then been postponed. In the context of the financial guarantee obligation, that evidence made little sense, as the extent of the guarantee required could only be determined once the level of licence fee was defined. If that was indeed the position, it suggests to the Tribunal a degree of casualness, not necessarily consistent with the guarantee having been regarded by either party as a priority.

14.27 In any event, on 15th June, 1995, when Mr. O'Brien and Mr. Prelz met in Dublin, and agreed the revised bridging finance facility, they also negotiated the terms of a second agreement. Mr. O'Donoghue and Mr. Callaghan attended that meeting, and Mr. Callaghan made a careful and detailed contemporaneous note of the principal terms of both agreements concluded on that occasion. As much evidence was heard from the protagonists as to the correct interpretation of the second agreement, it is useful at the outset to set out in full the terms which Mr. Callaghan recorded in relation to it, which were as follows:

"5% Equity in GSM Company

- *Advent to invest in 5% of the 20% Institutional Investment (at par)*
- *Advent to give letter to satisfy Telenor and requirements of GSM Bid (strong letter but cannot be a 'commitment' to invest)*
- *Advent to have opportunity to participate in any financing arrangements for Group and/or GSM company if money is raised directly for GSM Co.*
- *If GSM licence is secured, the contingent payment is deemed to be \$3.6 (originally \$4m for 50%)."*

A copy of [Mr. Callaghan's note](#) can be found within the Book of Appendices to this Volume.

14.28 Those terms were perfectly clear, were confirmed by Mr. Callaghan, and did not admit of any ambiguity. Advent was to be entitled to a 5% direct interest in Esat Digifone, the intended licensee company, in consideration for the provision of a letter to satisfy Telenor, and the requirements of the GSM bid; Advent was also entitled to participate in the future funding of the GSM company; and a contingent liability on the part of Advent under the original investment agreement of October, 1994, was to be reduced from \$4 million to \$3.6 million. Those latter terms, and in particular that which entitled Advent to participate in future funding, were it seems a restatement of rights which had already accrued to Advent under the terms of their October, 1994, investment agreement, under which their initial \$10 million cash injection had been made.

14.29 Equally clear were the terms of the written agreement dated [12th July, 1995](#), which formalised and gave effect to what had been agreed on 15th June, and which was finalised with the assistance of the parties' respective solicitors, Ms. Helen Stroud of Baker McKenzie, for Advent, and Mr. Owen O'Connell of William Fry, for Communicorp and Mr. O'Brien. That agreement, although containing complex provisions, defined the rights and obligations of the parties, and the recitals, which encapsulated its intention, were as follows:

- “(A) Each of Communicorp and Telenor Invest AS (“Telenor”) currently hold 50% of the issued share capital of E-Sat Digifone Limited (“Digifone”);*
- (B) Digifone proposes to make an application (the “Application”) to the Minister for Transport, Communications and Energy to be granted the licence to operate the second GSM cellular system throughout Ireland (the “GSM Licence”);*
- (C) In connection with the Application, AIC on behalf of the Advent Funds (as hereinafter defined), has written to the Minister and to Telenor confirming its offer to provide financing of up to IR£30 million to enable Communicorp to fund its equity participation in Digifone which will be required should the GSM Licence be granted to Digifone (the “Comfort Letters”, copies of which are attached at Schedule 1);*
- (D) In consideration of the issue of the Comfort Letters by AIC, Communicorp has agreed, subject to fulfilment of the conditions hereinafter set out, to procure that certain of the Advent Funds will be entitled to such number of shares in Digifone as is equal to 5% of its Fully Diluted Share Capital (as hereinafter defined) and to give the Advent Funds a right to participate in the funding*

of Digifone in connection with the GSM Licence as more specifically set out herein;

(E) *DOB is a party to this Agreement to record his consent to the amendment to the Investment Agreement referred to in Clause 6.”*

The agreement of 12th July, 1995, was executed by Ms. Janet Hennessey, Vice-President, on behalf of Advent International, by Mr. Paul Connolly on behalf of Communicorp, and by Mr. O’Brien on his own behalf. A copy of that agreement can be found within the Book of Appendices to this Volume.

14.30 The comfort letters, as they were defined in the agreement, were appended to it. They were each dated 10th July, and signed by Mr. Prelz. They were addressed to Mr. Martin Brennan of the Department, and to Mr. Knut Haga of Telenor, and were in all material respects identical. They commenced with details of the history and scale of Advent International. They then proceeded to recount its involvement as a substantial investor in Communicorp, having in 1994 invested approximately \$10 million in return for just over 25% of the voting share capital, and recorded that Advent was committed to investing an additional \$9.5 million to further develop the activities of Communicorp. Turning to the GSM licence application, the letters stated that Advent was committed to this and, having reviewed the Esat Digifone business plan and application, considered its operation of the second GSM in Ireland an attractive and viable project, and concluded in the following terms:

“The said application also shows Communicorp Group remaining as a 40% shareholder in Digifone and being required to provide up to 30 million Irish Punts to fund that 40% equity participation. We can confirm that we have offered that amount to Communicorp to enable it to fund its obligations.”

A copy of the [letter addressed to Mr. Brennan](#) of the Department can be found within the Book of Appendices to this Volume.

14.31 In passing, it should be observed that the statement that Advent was committed to investing a further \$9.5 million to develop the activities of Communicorp was not factually correct. That \$9.5 million seemingly comprised the \$5 million bridging facility, which was a simple straightforward loan, and could not properly be described as an investment. It also seemingly included a further \$4.5 million which Advent, although having an entitlement to invest, in the context of the prospective placement by CSFB, had no obligation to do.

14.32 The Tribunal has no doubt that the agreement reached on 15th June, 1995, as formalised in the written agreement of 12th July, 1995, governed nothing more or less than the issue of comfort letters by Advent, and Advent's entitlement to 5% of Esat Digifone in consideration for their issue. Notwithstanding the documentary record, and the evidence of other witnesses to which reference will be made, Mr. O'Brien and Mr. Prelz testified that there was in existence, as of 12th July, 1995, an enforceable obligation on the part of Advent to provide £30 million to Communicorp in consequence of that agreement, and of the letters of comfort.

14.33 It was Mr. O'Brien's evidence that, as far as he was concerned, there was such a binding enforceable commitment on the part of Advent in existence. He had received a verbal offer from Mr. Prelz, on terms that had yet to be agreed, as they were contingent on the valuation of Esat Digifone after the award of the GSM licence. That verbal offer was, according to Mr. O'Brien, confirmed in the letters of comfort, and in particular in the final paragraph, where it was stated "*we have offered that amount to Communicorp to enable it to fund its obligations*". As to whether that offer by Advent was enforceable by him or by Telenor, Mr. O'Brien responded that it was enforceable in his mind: the letter came from someone that he trusted, in Mr. Prelz, who had always delivered. It seems in that regard that Mr. O'Brien had overlooked Mr. Prelz's failure to deliver on the May agreement for a second investment of \$5 million secured by the issue of redeemable loan stock.

14.34 It was likewise Mr. Prelz's evidence that Advent, by reason of the comfort letters, had assumed a legally enforceable obligation to provide £30 million in financing to Esat Digifone. This arose from the terms of the comfort letters, which recited that Advent had offered that amount, and in that regard Mr. Prelz placed particular weight on the fact that the letters had been annexed to a formal agreement signed by a Vice-President of Advent International. This was his evidence to the Tribunal, notwithstanding that the terms of the agreement imposed absolutely no obligation of any sort on Advent to invest any funds, much less £30 million, in Esat Digifone, and further, notwithstanding that there was no documentary evidence of any consideration, either by his local London board, or the overall US board of Advent, much less approval of that or any prospective investment of £30 million.

14.35 The other witnesses who had a role in relation to the agreement were Mr. Callaghan and Mr. O'Donoghue, who had both attended the meeting in Dublin on 15th June, 1995, and who in Mr. O'Donoghue's case had subsequently been involved in dealings with Mr. Prelz in relation to it, and with Mr. Owen O'Connell, who had acted as solicitor to Communicorp and Mr. O'Brien in

connection with the finalisation of the formal agreement. They both recognised that the letters dated 10th July, 1995, issued by Advent to the Department and to Telenor on foot of that agreement, were precisely in conformity with their description, namely, letters of comfort, and both accepted that the agreement governed the issue of those letters and no more. Mr. Callaghan, having been a party to the negotiations on 15th June, 1995, and having noted that Mr. Prelz was prepared to provide a “*strong letter but cannot be a ‘commitment’ to invest*”, had not seen those letters until they were brought to his attention in the course of the Tribunal’s inquiries. He testified that their terms accorded precisely with what he had contemplated would be provided, when making his note on 15th June, 1995, insofar as they were strong letters, but did not constitute a commitment.

14.36 Mr. O’Donoghue, who was Financial Director of Communicorp, had, like Mr. Callaghan, attended the meeting of 15th June, 1995, but, unlike Mr. Callaghan, had seen copies of the letters of 10th July, 1995, at the time they were provided. Mr. O’Donoghue, as an executive director of Communicorp, was far more intimately involved in the financial affairs of the company, and naturally enough had a deeper knowledge of the surrounding events than Mr. Callaghan. Mr. O’Donoghue had also been active in negotiations around this time with CSFB, and had travelled on a number of occasions to the United States for that purpose. He agreed in his evidence that the Advent letters were comfort letters, which arose in consequence of the agreement made on 15th June, 1995, and recorded by Mr. Callaghan in his handwritten note. He further agreed that they were strong letters, but did not amount to a commitment. He recalled the formal agreement of 12th July, 1995, and he concurred with evidence given by Mr. O’Connell that he interpreted that agreement as providing that Advent would be entitled to a 5% shareholding in Esat Digifone, in consideration for issuing the letters of comfort, and that it did not cover provision for £30 million in funding. In the final days leading up to the submission of the Esat Digifone application on 4th August, 1995, and as will be seen, Mr. O’Donoghue was a party to exchanges with Mr. Prelz, in the context of a request made by Telenor for a clearer letter from Advent, which, if there was any uncertainty regarding the true nature of the Advent letters, and the Advent intention, put their status beyond question.

14.37 Returning to the agreements and letters, the Tribunal also had the benefit of the evidence of Mr. O’Connell of William Fry, who acted for Communicorp in advance of, and in the course of, the evaluation process, and acted for Esat Digifone thereafter. Mr. O’Connell’s evidence was primarily directed to attendances which he had kept, and correspondence which he had sent and received. His evidence was constructive and helpful, and was of assistance to the Tribunal’s overall understanding of those dealings.

14.38 Mr. O’Connell acted for and advised Communicorp and Mr. O’Brien in the finalisation of the Advent agreement of 12th July, 1995, which involved him in an exchange of correspondence with Ms. Helen Stroud of Baker McKenzie, who represented Advent. The draft agreement and draft comfort letters were prepared by Ms. Stroud and submitted to Mr. O’Connell for his approval, and after amendments and revisions which arose from their exchanges, an agreement acceptable to all parties was produced, and was executed. In the course of that exchange, Ms. Stroud had asked Mr. O’Connell whether the proposed draft letter of comfort addressed to Telenor was satisfactory, and, if not, she had invited him to submit an acceptable draft. That request arose in the context of a term of the agreement whereby Communicorp’s obligations were expressed to be conditional on Telenor having been satisfied with the comfort letter issued to it, and on the basis of having resolved to proceed with its participation in Esat Digifone, provided that Communicorp was itself obliged to use all reasonable endeavours to ensure fulfilment of that condition. The Tribunal had noted that it seemed that Mr. O’Connell had not responded to Ms. Stroud on that point, and in that regard Mr. O’Connell testified that this was not feasible, in view of Telenor’s entitlement to a financial guarantee. At that time, Mr. O’Connell described Mr. O’Brien as behaving like “*a typical entrepreneur...trying to keep all the balances in the air*”, hoping that a strong letter of comfort would suffice. That condition, and its interpretation, became central to a dispute between Communicorp and Advent, which subsequently arose as to the latter’s entitlement to its 5% shareholding in Esat Digifone, and will be returned to in a later chapter.

14.39 The Tribunal has no hesitation in concluding that there was no binding enforceable obligation on Advent to provide £30 million in finance to fund Communicorp’s equity participation in Esat Digifone, whether by reason of the letters of comfort, the agreement of 12th July, 1995, or any other offer or terms discussed by Mr. Prelz and Mr. O’Brien. Whatever “*offer*” may have been made by Mr. Prelz to Mr. O’Brien orally, or whatever provisional terms may have been discussed between them, they could not have imposed any obligation on Advent.

14.40 In advance of Mr. Prelz’s attendance as a witness, the Tribunal on 26th June, 2009, notified Advent International that it anticipated that references would be made in the course of his evidence to some of the documentation which had been produced to the Tribunal by Advent in July, 2004, and asked for Advent’s comments on the Memorandum of Intended Evidence which had been furnished by Mr. Prelz, and in particular, on an assertion made by him that it was understood by Advent that the letters of comfort of 10th July, 1995, represented a binding irrevocable commitment by Advent to provide up to £30 million to Communicorp to fund its share of equity in Esat Digifone. The Tribunal wrote to

Advent again on 8th July, 2009, notifying them of the date of Mr. Prelz's attendance, and indicating that, having reviewed the relevant files produced by Advent, it seemed to the Tribunal that there did not appear to be anything in the agreement of 12th July, 1995, or any other agreement between Communicorp, Mr. O'Brien and Advent, which could support Mr. Prelz's contention. The Tribunal accordingly asked Advent to indicate if they had identified any documentation which was inconsistent with the Tribunal's then view of the Advent documentation in its possession.

14.41 Whilst the Tribunal had throughout its inquiries been corresponding with Advent's London office, Advent's response to both of the Tribunal's letters was by means of a letter from Advent's head office in the United States, signed by Mr. Andrew Dodge, Vice-President. Whilst that letter was not part of the evidence heard by the Tribunal, its contents were referred to in the course of the examination and cross-examination of Mr. Prelz, and accordingly its contents should not be overlooked. It was clear to the Tribunal that the letter was very carefully framed, and in that regard Mr. Prelz confirmed that Mr. Jonathan Wood, to whom the letter was copied by Mr. Dodge, was a corporate partner with the firm of Weil, Gotshal & Manges LLP, Advent's principal US legal advisers. Mr. Wood had also participated in a conference telephone call with the Tribunal's solicitor on 13th July, 2009.

14.42 That letter from Mr. Dodge did not address the questions which had been posed by the Tribunal. Rather, it stated that Advent had not identified any other relevant documentation in its possession. With regard to the Tribunal's invitation to Advent to comment on Mr. Prelz's contention, Mr. Dodge qualified his comments by observing that Advent could not be of much assistance to the Tribunal, as the relevant events dated from some fourteen years earlier, and the persons most directly involved, and primarily Mr. Prelz, were no longer with Advent. It nonetheless seemed to Mr. Dodge that at the time Advent intended "*to stand behind*" what was referred to in his letter as the "*Commitment*", as had been described by Mr. Prelz in his Memorandum. Mr. Dodge further made clear that his comments were based solely on what he described as a "*plain reading*" of the documentation, and were not informed by any personal recollections or other ancillary information.

14.43 The Tribunal is satisfied that on a "*plain reading*" of the documentation produced by Advent, it is beyond doubt that no irrevocable, binding or enforceable agreement or commitment in any legal sense was imposed on Advent to fund Communicorp's equity participation in Esat Digifone, and that Mr. Dodge's assertion, although carefully framed and nuanced, is not one that is

sustainable by reference to Advent's own documentation, or the evidence heard by the Tribunal.

14.44 The Advent comfort letters were intended to serve two purposes. First and foremost, they sought to demonstrate to the Department that Communicorp had funding in place, and that Esat Digifone met the precondition of financial capability, notwithstanding Communicorp's financial vulnerability. Their secondary purpose was to endeavour to meet Communicorp's obligation to provide a financial guarantee to Telenor under the terms of the joint venture agreement, although in Mr. O'Connell's view, and as is clear, they were far from guarantees that Telenor could ever enforce.

14.45 The letter dated 10th July, 1995, from Mr. Prelz, addressed to Mr. Martin Brennan, was submitted to the Department with the Esat Digifone application, together with another letter dated 14th July, 1995, signed by Mr. O'Brien and addressed to Mr. Prelz, but which Mr. Prelz testified he had never seen, of which there was no copy within the Advent files, and which the Tribunal is satisfied was never sent to Advent. That letter, dated 14th July, 1995, was bizarre in its terms, and would have made no sense to any person who had knowledge of the true contents of the 12th July, 1995, agreement. The letter is reproduced in full below:

"Dear Masimo [sic]

I refer to our agreement dated the 12th July in regard to the GSM bid to be made by Esat Digifone Ltd.

As you are aware, you have written to the Minister of Transport, Energy and Communications and to Telenor Invest AS stating that you have offered Communicorp Group Ltd Ir£30 million in respect of their equity participation in the bid.

We would like to confirm acceptance of our agreement dated the 12th July.

Yours sincerely

Denis O'Brien

Chairman

Communicorp Group Ltd"

The content of that letter was meaningless, as what it purported to do was to accept an agreement to which Communicorp and Mr. O'Brien were already bound as parties.

14.46 If however a person, reading that letter of 14th July, 1995, knew nothing of the contents of the 12th July agreement, and only had before him or her the letter of comfort of 10th July, 1995, as was the position in the case of the Department, such person might well have concluded, from a reading of the two letters, that the agreement of 12th July, referred to in Mr. O'Brien's purported letter to Mr. Prelz dated 14th July, related to the terms of the supposed "*offer*" of £30 million referred to by Mr. Prelz, and that Mr. O'Brien's letter signified that Communicorp had accepted that "*offer*". Mr. O'Brien, as was his inclination throughout his evidence, sought to suggest that in writing that letter he was seeking to satisfy the demands of Telenor. That cannot have been the case, as it is clear from the documentary evidence that Telenor expressed no dissatisfaction with the Advent comfort letter until long after 14th July, 1995, the date of Mr. O'Brien's letter.

14.47 The Tribunal is satisfied that Mr. O'Brien's primary motive in generating that letter, which was never sent to Advent, and was a fictitious letter, was to include it with the Esat Digifone application. His intention can only have been to fortify the Advent comfort letter, by giving the impression to the Department, one that was wholly inaccurate and erroneous, that there was in existence an agreement between Communicorp and Advent, dated 12th July, 1995, for the provision of £30 million in funding to cover Communicorp's equity participation in Esat Digifone, in order to satisfy the RFP condition of demonstrable financial capability. The true position was that no such agreement existed, and that it was never Mr. O'Brien's intention, if he won the licence, to meet his equity participation through funds provided by Advent, but rather it was his intention to raise them by the wholly uncertain route of a private placement on the US market through CSFB, the success of which was dependent on Esat Digifone winning the GSM licence.

14.48 Following notification of the Tribunal's Provisional Findings, submissions were received from a number of affected persons, including from Mr. Prelz, and separately from an associate of Mr. O'Brien, who is a specialist in the field of corporate finance. Those submissions were in many respects both instructive and of considerable assistance to the Tribunal. What was however suggested was that the Tribunal had no grasp of the commercial world of corporate finance, and the Tribunal was urged to distinguish between a commitment that was legally binding, and one, such as represented by the Advent comfort letter, which, although not strictly legally binding, was in effect

commercially binding. It was suggested that the evidence of Mr. O'Brien and Mr. Prelz, in asserting that Advent had provided a binding irrevocable commitment, should be understood and regarded by the Tribunal in the latter, rather than in the former sense, although that was not a distinction which either Mr. O'Brien or Mr. Prelz drew in their evidence to the Tribunal.

14.49 It was further submitted that, in the world of corporate finance, the Advent comfort letter, according to custom and practice, meant that Communicorp was “*money good*” for £30 million, and that Advent could not have resiled from the funding of Communicorp, if called upon by the Irish Government, as its international reputation would have been harmed irreparably. That submission echoed the evidence of Mr. Owen O'Connell that the Advent comfort letter was not without value, as Advent, being a venture capital enterprise of international standing, would not have lightly deviated from the terms of a letter of that type sent to the Government of an EU Member State. The Tribunal accepts that there was merit in both that aspect of Mr. O'Connell's evidence, and such latter part of the submission received.

14.50 As regards the CSFB appointment, it was contended that this was no more than an alternative financing option which had been put in place by Mr. O'Brien. Such an alternative option was not in the least unusual in the context of raising funds on capital markets, and it was observed that corporate finance is by definition all about options, and that options are the very nature of that business. Moreover, any enterprise seeking to raise finance would keep options open, and would seek alternative terms. In other words, the fact that Mr. O'Brien and Communicorp intended to finance Communicorp's equity funding through a private placement by CSFB, but did not disclose that in the Esat Digifone application, did not at all detract from the reality and strength of the Advent option. They were not mutually exclusive options, but were alternative funding possibilities then open to Mr. O'Brien.

14.51 What all of these submissions overlooked was that Mr. O'Brien, Communicorp, his advisers, and Advent all knew that Mr. O'Brien never intended to fund Communicorp's equity investment in Esat Digifone through equity finance raised with Advent. Irrespective of Advent's willingness to provide that funding, the last thing Mr. O'Brien wished to do was to facilitate Advent in strengthening its existing shareholding in Communicorp. On the contrary, his plan, as he himself outlined it to the Tribunal, was to dilute Advent's shareholding, and proceed to the steps which he had carefully identified, resulting in the delivery of an IPO. Whilst Advent may have been an option, if that CSFB placement had foundered, it was never a realistic prospect, and it was certainly not the case that Mr. O'Brien, an astute and skilled businessman, would have ever left himself or

his business exposed to the prospect of Advent very possibly securing control of that business, by dictating the terms on which such funding would be provided.

14.52 What all of these submissions also entirely overlooked was that Mr. O'Brien and Communicorp were not involved in a business deal, in which case it would no doubt have been the most sensible and commercial course in the world for them to explore terms with a number of funding sources, and to leave their options in that regard open. On the contrary, what they were a party to was a competitive process, being conducted by a Government Departmental Project Group, for the deployment of a State privilege of momentous proportions. The rules of that competitive process required applicants to satisfy the Department of their financial capability to fund the GSM project, and the rules stipulated that applicants were obliged to furnish information which was true and valid. Insofar as the Esat Digifone application stated that Advent intended to fund Communicorp's equity participation, and proffered the Advent letter of comfort as proof of that intention, it was neither true nor valid. Nor was it ever intended that Advent, whatever about the value of its comfort letter, or any reputational imperative that might flow, should provide any binding or irrevocable commitment to fund that £30 million investment in Communicorp, in the sense represented to the Project Group. The actions of Mr. O'Brien, and those associated with him, in portraying the Advent support as constituting a definite commitment to provide £30 million in funding to Communicorp, fell far short of the standards of probity and fair play that the Department was entitled to expect from consortia submitting applications for the GSM licence.

THE COMPETITION IS REACTIVATED

15.01 The resolution of the Commission's intervention having been successfully secured by mid-July, 1995, the Department's focus shifted back to the competition proper. In the interim, and following the notification of deferral sent to parties that had purchased tender documents on 16th June, 1995, the Department met with representatives of two interested parties at their request. On 19th June, 1995, Mr. Martin Brennan and Mr. Fintan Towey met with Mr. Denis O'Brien and his associate, Mr. Ed Kelly, of Esat Digifone, and on the following day, 20th June, 1995, they met with a Mr. J. Condon, who was a consultant to the Persona consortium. Mr. John Loughrey also met Mr. Condon and Mr. Tony Boyle of Persona on 22nd June, 1995. In accordance with the protocol which had been adopted on the previous 6th March, 1995, these meetings took place within the Department's premises, were attended by two officials, and were formally noted in writing. From the contents of the records made, it is clear that the meetings were in the nature of courtesy visits during which no more than general information was imparted by the Department. There was no record of any discussion of how the licence fee issue was then being approached by the Department, or how it was anticipated that it might be resolved. These meetings, which were in any event outside the closed period of the competition proper, and which complied strictly with the Department's own protocol, were entirely legitimate, and did not imperil the fairness, or perception of fairness, of the process.

15.02 By letters dated 14th July, 1995, the Department formally reactivated the competition by notifying interested parties that the deferred closing date had been fixed for Friday, 4th August, 1995, and that applications should be received by 12 noon that day. By those letters, interested parties were also informed of the revision of the evaluation criteria, consequent on the conclusion of negotiations with the European Commission. Paragraph 4 of the RFP was amended as follows:

"The minimum initial licence fee for the licence will be IR£5,000,000 but applicants are free to offer a higher amount subject to a maximum of IR£15,000,000 to win the right to the licence."

This change was reflected in a revision to the Paragraph 19 Licence Fee criterion, the terms of which, as revised, provided as follows:

"The amount, in excess of the minimum initial licence fee which the applicant is prepared to pay for the right to the licence."

15.03 In consequence of the deferral of the date for receipt of applications from 23rd June, 1995, to 4th August, 1995, the projected completion date of the process was also revised. It had originally been contemplated that the result of the process, following Governmental consideration, would be announced by end-October, 1995. Following the delay of five weeks, that target completion date had been put back for one month, until end-November, 1995. This was expressly drawn to the attention of interested parties in the letters of 14th July, 1995, was confirmed by Departmental witnesses, and was apparent from a Gantt chart, which had been provided by AMI to the Department at this time. The chart was in the form of a flow diagram which traced the anticipated critical path of the process, from start to finish, by reference to each of its constituent stages. Copies of the letter to Esat Digifone of [14th July, 1995](#), and of the [Gantt chart](#) can be found within the Book of Appendices to this Volume.

15.04 Mr. Michael Andersen, when he attended to give evidence, did not accept that the provision in the AMI Gantt chart of approximately four weeks for what was described as “*wait for the political decision*”, signified that he or AMI were aware that provision of that order of duration had been made for Government consideration. Rather, he testified that this entry merely reflected an assumption or standard practice on the part of AMI, in the case of all European public procurement processes, to allocate time, following the projected finalisation of their Evaluation Report, for such political consideration. Whatever Mr Andersen’s understanding or that of his fellow consultants, there can be no doubt but that as of July, 1995, AMI had forecasted that the process would not be concluded until the final days of November, 1995, and this accorded precisely with Departmental projections. That position had also been confirmed by Mr. Brennan, in Mr. Andersen’s presence, to Mr. Denis O’Brien, at the end of the Esat Digifone oral presentation on the following 12th September, 1995, when, in response to a query by Mr. O’Brien, Mr. Brennan replied that Mr. Michael Lowry had made a political commitment to announce the result by end-November, 1995.

15.05 Arising from the capping of the licence fee, consideration was also given to modifying the weighting matrix which had been adopted by the Project Group on 9th June, 1995, for the purposes of the quantitative evaluation, at a time when the Licence Fee criterion was open-ended. Rather than convening a formal meeting of the Project Group, a revision of that matrix was agreed and fixed by means of a formal written procedure, and Ms. Maev Nic Lochlainn so notified all members of the Project Group on 17th July, 1995. AMI had been consulted earlier on whether a revision was necessary, and had advised that three percentage points should be deducted from the Licence Fee weighting, and should be added to the Tariffs weighting, which was the third-ranked criterion.

AMI's advice was confirmed in a fax dated 24th July, 1995. The contents of that fax are of significance, not merely in the context of the three percentage point shift in weighting recommended, but also because they contribute to an understanding of the intended function of the weighting matrix in the overall evaluation methodology.

15.06 Mr. Andersen framed his recommendation, not by reference to the evaluation criteria, but by reference to the indicators for those criteria in the quantitative evaluation. What he proposed was a three point percentage shift in weighting from:

“up front licence fee payment” to “competitiveness of an OECD-like basket”,

that is, from the Licence Fee indicator, to the Tariffs indicator in the quantitative evaluation. Whilst Mr. Andersen in that fax adverted to the conduct of a very thorough examination of tariffs in the course of the qualitative evaluation, he expressed his concern that, if the weighting matrix remained unaltered, there was a risk that different rankings could emerge from the quantitative and qualitative assessments. Mr. Andersen's concern that, in the absence of a shift in weightings, a different ranking could emerge from the two assessments, underscores the expectation, recorded in the AMI tender document, and recorded in Mr. McMeel's note of the Project Group meeting of 18th May, 1995, that the quantitative and qualitative assessments were likely to yield the same or similar rankings.

15.07 Having received written confirmation from all members of the Project Group that they were agreeable to the course recommended by AMI, Ms. Nic Lochlainn, on 27th July, 1995, forwarded a memorandum to Mr. Towey headed *“Revised Weightings”*. This memorandum informed Mr. Towey that, in line with the written procedure which had been agreed, the new agreed weightings for the criteria would be formally adopted once it was indicated that the Development Division approved the amendment. Mr. Towey made a handwritten note on Ms. Nic Lochlainn's memorandum, also dated 27th July, 1995, confirming the approval of the Development Division. On the same date Ms. Nic Lochlainn placed a note on the Development Division file to the effect that:

“The new revised weightings as agreed in recent telephone conversations with Project Group Members, and as later confirmed in written communications received from each interest represented on the Group, are as follows - 30, 20, 18, 11, 7, 6, 5, 3.”

15.08 Ms. Nic Lochlainn did not on that occasion, or on the earlier occasion when she had noted the criteria weightings for the purposes of the Departmental file, record the agreed breakdown of those weightings for the multi-dimensional criteria, primarily, the first and second-ranked criteria. Whilst it might have been preferable had she done so, in the interest of a clear audit trail, those constituent weightings were of course already recorded in the Evaluation Model of 8th June, 1995, the adoption of which had been formally evidenced in the official report of the Project Group meeting of 9th June, 1995. As the Evaluation Model did not contain a clear statement of the agreed overall criteria weightings, which could only be discerned by aggregating the constituent weightings noted in that document, there was every good reason for her to generate her file notes, which were the sole clear documentary record of those weightings, and their alteration consequent on the modification of the fourth-ranked Licence Fee criterion.

15.09 In the course of his attendance, Mr. Michael Andersen testified that the licence fee modification had a more far-reaching impact on the intended competitive process than a mere reallocation of quantitative weightings between the Licence Fee and Tariff criteria. According to Mr. Andersen, the capping of the licence fee resulted in a fundamental alteration to the competitive process, which was thereby converted from an auction process to a beauty contest. In consequence of the capping of the licence fee, the importance of the quantitative technique diminished, since it would no longer be necessary to satisfy the European Commission, on the basis of objective quantitative results, that the level of proposed licence fee had not been decisive in the selection of a winner. This also meant that the qualitative evaluation, which it had always been intended would be the principal focus of the evaluation, became even more central.

15.10 Whilst the Tribunal can of course appreciate that a set of quantitative results might well have been more readily persuasive for the purpose of demonstrating that the level of licence fee had not been the principal determinant in the process, had the licence fee continued to be open-ended, that consideration did not form any part of the rationale underlying AMI's recommendation of the combined quantitative and qualitative techniques, according to the contemporaneous documentary records. Although reference was subsequently made to that consideration in Appendix 2 of the Evaluation Report of 25th October, 1995, in the context of explaining why the Report did not contain a set of quantitative results, the contemporaneous records, in the form of AMI's tender document, the Evaluation Model, and AMI's advice, of 24th July, 1995, made no reference at all to this matter. Rather, the rationale underlying the consultants' proposal of the combined technique was stated in their tender

document to be the securing of a valid and reliable process, and in particular one which contained safeguards against the arbitrariness attendant on the aggregation of results by reference to a weighting mechanism. It is also the case that the Departmental officials who had adopted the Evaluation Model, and implemented the process, appeared to have no knowledge of this fundamental alteration in approach canvassed by Mr. Andersen in his evidence. Rather, it was the evidence of Departmental officials, including Mr. Martin Brennan and Mr. Fintan Towey, who had been instrumental in the evolution of the process, that they had always regarded it as a beauty contest evaluation, albeit one that included an auction element. Apart from the re-allocation of a weighting of 3 percentage points in the quantitative evaluation, they did not testify to any other substantive change in approach consequent on the removal of the open-ended licence fee element.

15.11 The Tribunal also regards it as significant that in the memorandum of January, 2002, submitted to the Tribunal by AMI, for which the Department paid AMI £20,000.00, and which Mr. Andersen confirmed he had co-authored, no reference was made to any such substantive methodological revision in consequence of the financial limiting of the fourth criterion. To the contrary, as regards the development of the Evaluation Model, the Tribunal was informed as follows:

“Accordingly, the work with the evaluation model was initiated in April 1995 and the definition of the model was settled prior to the original closing date of 23 June 1995. It was subsequently slightly amended prior to the postponed closing date of 4 August 1995 due to the requirement of the European Commission concerning the payment of licence fees.[foot note omitted]

The evaluation model applied the so-called best application method (i.e. a beauty contest) where the ‘best’ application should be nominated as the winner. [footnote omitted] ‘Best’ was to be measured against the evaluation criteria outlined in paragraph 19 of the RFP.”

TENSIONS EMERGE BETWEEN COMMUNICORP AND Telenor

16.01 Tensions arose between Communicorp and Telenor in the final days prior to the deadline for submission of applications on 4th August, 1995. The source of these tensions lay in the requirement of the joint venture agreement that Communicorp furnish Telenor with a financial guarantee for £5 million, plus 50% of the licence fee. Following the cap of £15 million placed on the level of licence fee that could be offered by applicants, the quantum of that guarantee had been fixed at £12.5 million, being £5 million plus 50% of £15 million. It was Telenor's view, one which was understandable, that the Advent letter of 10th July, 1995, was not a financial guarantee, and accordingly the tensions between Communicorp and Telenor resulted from the opposing efforts of Telenor to secure binding support from Advent, and of Communicorp and Advent to resist.

16.02 In the event, no further, stronger or binding commitment was forthcoming from Advent, but that did not prevent Telenor from permitting the submission of the Esat Digifone application to proceed on 4th August, 1995, and the Tribunal is satisfied that there was never any significant risk of such an eventuality coming to pass. Thereafter, the issue became largely academic, and it certainly did not pose an ongoing threat to Communicorp, as was suggested by Mr. Denis O'Brien in the course of his evidence. On the contrary, what it offered Mr. O'Brien was the prospect of depriving Advent of its 5% shareholding entitlement on foot of the agreement of 12th July, 1995, an opportunity which, as will be seen, Mr. O'Brien exploited in order to make room for a 25% shareholding in Esat Digifone to be taken by Mr. Dermot Desmond.

16.03 The interaction between Communicorp and Telenor on this issue, during the final days, primarily entailed telephone and fax communications between Mr. Knut Haga of Telenor, who was based in Oslo, and Mr. Peter O'Donoghue, who was based in Dublin, although interaction extended to contacts with Mr. Massimo Prelz of Advent, Ms. Helen Stroud of Baker MacKenzie, Advent's solicitors, Mr. O'Brien, Mr. Amund Bugge, a young lawyer then working with the Telenor legal division, who happened to be in Dublin over those days, Mr. Per Simonsen and Mr. Knut Digerud of Telenor, who were also in Dublin, and finally Mr. Owen O'Connell and Mr. Gerry Halpenny, both of William Fry, solicitors at various times to Communicorp and Mr. O'Brien.

16.04 Mr. Haga, whose experience lay in the field of debt funding and project finance, was a direct employee of Telenor International, the holding company for Telenor's various overseas activities. He was assigned on a part-time basis to advise Telenor Invest, the vehicle through which Telenor concluded the joint

venture agreement, in relation to that agreement. In the course of the joint venture negotiations, he had been responsible for evaluating the finances of Communicorp. It was Mr. Haga who had met Mr. Prelz of Advent, when Mr. O'Brien introduced them in London on 16th May, 1995, and when Mr. Prelz, according to Mr. Haga, had informed him that Advent was keenly interested in the investment opportunity offered by the GSM licence, and would support Communicorp in its efforts to win the licence.

16.05 Mr. Haga, in evaluating Communicorp's finances, formed the view that it did not have sufficient funds available to cover its expected contribution to the GSM project, and would require further injections of capital. After meeting Mr. Prelz, he felt confident about Communicorp's future ability, supported by Advent, to meet its capital requirements. He nonetheless believed that a written assurance should be obtained, and it was he who advised that Telenor should seek a formal financial commitment from an equity partner, such as Advent. In view of the direct assurances which he had received from Mr. Prelz, he had not envisaged any difficulty in obtaining such a commitment. It was a binding assurance of this type which Mr. Haga testified was intended by the financial guarantee provision of the joint venture agreement, and which he sought to secure on behalf of Telenor in the final days prior to 4th August, 1995.

16.06 Having initially had meetings with Mr. O'Brien, it seems that once the joint venture agreement was signed, Mr. Haga's continuing relationship was with Mr. O'Donoghue. In the latter part of June, 1995, after Mr. O'Brien and Mr. Prelz had reached agreement on the provision of comfort letters, and Advent's entitlement in exchange to a 5% direct shareholding in Esat Digifone, and when Ms. Stroud and Mr. O'Connell were in the course of finalising the terms of what became the 12th July agreement between Advent, Communicorp and Mr. O'Brien, Mr. Haga was informed by Mr. O'Donoghue that Communicorp was in negotiation with Advent on a financial support package. On 28th June, 1995, Mr. Haga forwarded a fax to Mr. O'Donoghue, which he also copied to his associate Mr. Per Simonsen, who was overall GSM co-ordinator, detailing the background information which he wished to receive about Advent, and specifying his formal requirements regarding the structure of that package. Mr. Haga confirmed in evidence that, as was clear from the terms of that communication, he was looking for information about Advent; for a statement from a lawyer and auditor confirming the validity of the Advent offer, and Advent's capability of fulfilling its commitment; for full information about the content of the offer; for material information about Communicorp, and about the acceptance and validity of the agreement, and for a legal opinion covering all relevant matters. On the following day, 29th June, 1995, Mr. O'Donoghue forwarded to Mr. Haga a copy of what became the Advent letter of 10th July, 1995, in draft form. Mr. Haga believed that he would have discussed the contents of the draft with his Telenor

colleagues, most probably with Mr. Simonsen, and possibly also with Mr. Knut Digerud, then Chief Executive Officer of Telenor Invest.

16.07 It was Mr. Haga's assessment that the draft Advent letter, with which he had been furnished, did not constitute a commitment, but was merely indicative of interest, and was non-binding. He regarded the letters, both to the Department and Telenor, in the form issued, as unsatisfactory, in the light of the assurances which had been given to him directly by Mr. Prelz in London on the previous 16th May, 1995, and of Communicorp's obligations under the joint venture agreement. Mr. Haga it seems had some understanding that Advent was entitled to a 5% direct shareholding in Esat Digifone, arising from the provision of the letters, but neither he, nor any other Telenor official, ever had sight of the 12th July agreement, nor for that matter did they have any knowledge of the separate bridging finance agreement for the provision of \$5 million, concluded between Advent and Communicorp at this time.

16.08 Mr. Haga, having received the draft Advent letter on 29th June, 1995, commenced his annual holidays at the beginning of July. Despite his reservations surrounding the draft, and even though he believed that he would have discussed and shared his views with his Telenor associates, it seems that the issue was neither pursued nor progressed by Telenor in his absence, and that the entire matter was left in abeyance until his return. The want of any progress on the issue in Mr. Haga's absence suggests to the Tribunal that the provision of a financial guarantee was not regarded as a priority by Telenor, as otherwise it would hardly have been left unattended pending Mr. Haga's expected return, some five days prior to the closing date for submission of applications. In the meantime of course, the formal agreement of 12th July, 1995, between Advent, Communicorp and Mr. O'Brien had been concluded.

16.09 On his return from holidays at the end of July, Mr. Haga learned that what was available, in terms of a financial commitment or a financial guarantee, was the Advent letter of 10th July, 1995. Mr. Haga noted that the letter was virtually identical to the draft which had been received on the previous 29th June, and testified that he interpreted it as merely a statement by Advent that it would be delighted to have an opportunity to invest in Esat Digifone, rather than as a commitment to invest. On a point of detail, it seems that Mr. Haga had never been sent, nor did he believe that he had ever received, a copy of the fictitious letter of 14th July, 1995, which had been signed by Mr. O'Brien, and appended to the Esat Digifone application, but which had never been sent to Advent, nor had ever been seen by Mr. Prelz.

16.10 On 31st July, 1995, Mr. Haga spoke to Mr. O'Donoghue and expressed his dissatisfaction with the Advent letter, following which Mr. O'Donoghue faxed a letter to him, in which he confirmed that Advent and Communicorp had formally entered into an agreement whereby *“Advent have committed up to IR £30 million to the Communicorp Group in the event that Esat Digifone is successful in its bid for the second GSM licence in Ireland”*; and that in consideration, Communicorp had agreed that Advent would be entitled to participate in up to 5% of the equity capital of Esat Digifone. Insofar as the content of that letter would seem to have been at variance with what was in fact provided for in the 12th July agreement, Mr. O'Donoghue agreed, in the course of his evidence, that there was then no *“agreement”* as stated in his letter, and that relevant dealings had proceeded only to an offer, which had not been accepted by Communicorp, and on foot of which the letter of 10th July, 1995, had been provided. Mr. O'Donoghue acknowledged that his faxed letter of [31st July, 1995](#), had been incorrect in that regard, and he testified that this had arisen as a result of a misunderstanding on his part.

16.11 Whilst Mr. O'Donoghue may well have been mistaken in his understanding of the provisions of the 12th July agreement, it is difficult to comprehend how that misunderstanding arose, bearing in mind that he had attended the meeting of 15th June, 1995, between Mr. O'Brien and Mr. Prelz, at which the terms of that agreement had been negotiated and carefully noted by Mr. Callaghan, and that he had further been directly involved in the negotiations with Credit Suisse First Boston, which had concluded at the end of June, in their engagement as exclusive placement agents. What is however clear is that there was no uncertainty on Mr. O'Donoghue's part on 31st July, 1995, when he either met with or spoke to Mr. O'Connell of William Fry solicitors, and when Mr. O'Connell recorded Mr. O'Donoghue as having informed him that Communicorp would not be providing a £5 million guarantee, and that it only had a letter of comfort from Advent.

16.12 Mr. Haga was not prepared to accept Mr. O'Donoghue's confirmation at face value, and he testified that, as recorded by manuscript entries made by him on the copy fax he had received, he wanted to obtain that confirmation directly from Advent, and he wanted to have sight of a copy of the 12th July agreement, so that he could verify the true position for himself. He promptly wrote to Ms. Stroud of Baker McKenzie, Advent's solicitor in London. In that regard, Mr. Haga stated in evidence that he would not have contacted Ms. Stroud directly, unless Communicorp and Advent had informed him that it was in order for him to do so. In that letter, which was dated [1st August, 1995](#), Mr. Haga specifically sought an assurance that an actual agreement had been entered into between Advent and Communicorp in the terms contended for in Mr. O'Donoghue's letter. Mr. Haga

had written the word “no” in the marginal space on his copy of that letter, and he testified that he had made that entry to record what Ms. Stroud had told him, when she telephoned him in response to his query. It was not Ms. Stroud of Baker McKenzie, but Mr. Prelz himself, who replied to Mr. Haga’s letter on [2nd August, 1995](#), and it is clear from that letter, and in particular from the terms of Mr. Prelz’s response to the assurance which Mr. Haga had sought, that he was not prepared to clarify, or expand upon, what had been stated in the comfort letter of 10th July, 1995, and he very carefully informed Mr. Haga that:

“As we wrote to you in our letter dated July 10th 1995, we confirm that we have offered to finance the amount required to fund Communicorp Group 40% partecipazione [sic] in Digifone.”

16.13 Mr. Prelz in his evidence to the Tribunal accepted that his statement to Mr. Haga was simply a repetition of the contents of the comfort letter of 10th July, 1995. According to Mr. Prelz, it did not occur to him to respond to Mr. Haga by indicating that there was then in existence a binding, enforceable, irrevocable agreement or commitment on the part of Advent to invest £30 million in Communicorp. His explanation for that omission was that he was not a lawyer, and “irrevocable” was not a term he would have used, even though it was a term which he had repeatedly used in his Memorandum of Intended Evidence, and in his evidence to the Tribunal. Furthermore, he did not feel that there was any necessity for him to so inform Mr. Haga, who he disparagingly described as a “bureaucrat in Oslo”.

16.14 Mr. Haga was far from satisfied with this response, and on receipt of it on [2nd August, 1995](#), two days before the Esat Digifone application was due to be lodged with the Department, he wrote directly to Mr. O’Brien. He expressed his concern on the financial guarantee issue; he stated that, based on Mr. O’Donoghue’s letter, he had required a similar statement through Baker McKenzie from Advent, but that Ms. Stroud had telephoned him that morning, and had informed him that there was no agreement between Advent and Communicorp in relation to the £30 million. He concluded by stating that, if this was correct, a serious problem had arisen which might jeopardise the whole project. Mr. Haga testified that, in so informing Mr. O’Brien, he was not seeking to suggest that, unless that matter was put right by 4th August, 1995, Telenor would not proceed with the application. Rather, what he had intended to convey was that the uncertainty on the financial side entailed a risk for all parties, and it was something on which Mr. O’Brien needed to focus. The meaning suggested by Mr. Haga was certainly consistent with the evidence available to the Tribunal, as there was no evidence of any expression or consideration of serious reservation by Telenor at a senior level to the submission of the application, notwithstanding the absence of a satisfactory financial guarantee or commitment.

16.15 Mr. O'Brien's evidence did not suggest that he was perturbed by Mr. Haga's letter, which he testified was wrong, and that it was "gaga". He was, as he described it, "*dealing with a guy who was a lieutenant*" for Telenor in Mr. Haga, and he felt that if he had been dealing with the top person in Telenor, this problem would not have arisen. He did not agree that Mr. O'Donoghue's letter of 31st July, 1995, in which he had confirmed that Advent and Communicorp had entered into a formal agreement, whereby Advent had committed up to £30 million to Communicorp, in consideration for which Communicorp had agreed that Advent would be entitled to a 5% shareholding in Esat Digifone, was incorrect; on the contrary, Mr. O'Brien broadly agreed with what Mr. O'Donoghue had stated. Insofar as his own solicitor, Mr. Owen O'Connell, who had represented him in the negotiations which led to the finalisation of the 12th July agreement, had testified that Mr. O'Donoghue's letter could not have been based on that agreement, it was Mr. O'Brien's evidence that that may have been the position in Mr. O'Connell's eyes, but what he had obtained was better, and his commercial opinion differed to that of Mr. O'Connell. As to Ms. Stroud, Advent's solicitor, who had represented Advent in the negotiations which led to that agreement, having apparently taken a similar view to Mr. O'Connell, that was in Mr. O'Brien's view third-hand or fourth-hand evidence; she was wrong, and maybe Mr. Haga had picked it up wrong.

16.16 Despite Mr. O'Brien's dismissive views regarding Mr. Haga's concerns, the letter of 2nd August, 1995, did it seems prompt some activity over the final two days, Thursday, 3rd August, and Friday, 4th August, 1995. This entailed meetings with Telenor officials who were then in Dublin, and efforts on the part of Mr. O'Donoghue to obtain from Mr. Prelz a letter in a form agreeable to Telenor. Whilst those efforts yielded no positive results, Mr. Prelz's response to Mr. O'Donoghue's requests confirmed, had there been doubt, the absence of any binding or enforceable commitment on the part of Advent to provide £30 million to fund Communicorp's equity participation in Esat Digifone.

16.17 Before proceeding to consider the exchange between Mr. O'Donoghue and Mr. Prelz, reference should be made to Mr. Amund Bugge, who was the young apprentice lawyer who had joined Telenor's legal division the previous January. He reported to Mr. Rolf Busch, who was Telenor's most senior commercial lawyer. Although Mr. Bugge did not attain his professional qualifications until 1997, he had assisted Mr. Busch in advising Telenor in the context of the joint venture agreement. He travelled to Dublin on 2nd August, 1995, and over Thursday, 3rd August, and the morning of Friday, 4th August, he attended meetings with Mr. O'Donoghue, Mr. O'Brien, Mr. O'Connell, and Mr. Gerry Halpenny, who was also then a partner in William Fry solicitors.

16.18 Whilst some of these meetings were protracted, it seems that they were primarily directed, not to the financial guarantee requirement, but rather to negotiations with a view to endeavouring to finalise a shareholders agreement between Communicorp and Telenor, in advance of the bid deadline of 12 noon on Friday, 4th August, 1995. Mr. Halpenny's involvement arose as it had been decided that, following the submission of Esat Digifone's application, Mr. O'Connell would act for Esat Digifone, rather than Communicorp, and that Mr. Halpenny would replace Mr. O'Connell as adviser to Communicorp in its shareholder negotiations with Telenor. Mr. Halpenny testified that Mr. Bugge arrived at a meeting on 3rd August, 1995, with a draft shareholders agreement, with a view to finalising it by the following day. Mr. Halpenny regarded that prospect as wholly unrealistic, and although negotiations proceeded through the night of 3rd August, until 5am on the morning of 4th August, no progress was made either legally or commercially. As matters transpired, an Esat Digifone shareholders agreement was not to be executed until 16th May of the following year, which was the day on which the licence was ultimately issued, and by then it was a tripartite agreement between Communicorp, Telenor and Mr. Dermot Desmond's company, IIU Limited.

16.19 In the course of these meetings on 3rd August and 4th August, 1995, the issue of Telenor's dissatisfaction with the Advent comfort letter also arose. As a result of those discussions, Mr. O'Donoghue forwarded drafts of letters, acceptable to Telenor, to Mr. Prelz, and requested that they be provided by Advent. In that regard, Mr. O'Connell observed, in the course of his evidence, that Mr. O'Donoghue had the difficult task of endeavouring to get an assurance from Advent, in a form which would satisfy Telenor, which at the same time would not impose an obligation on Communicorp to accept it. In that regard, Mr. O'Connell complimented Mr. O'Donoghue on the subtlety of the draft revised letters which he had forwarded to Mr. Prelz.

16.20 The first of these letters, which was sent to Mr. Prelz at 3.45pm on Thursday, [3rd August, 1995](#), was in the following terms:

"Advent International Plc hereby guarantee Telenor AS that it will offer IR£30,000,000 (Thirty Million Irish Pounds) to Communicorp Group Limited for the necessary equity increase in Esat Digifone Limited to establish and operate a GSM network in Ireland.

This offer is true and valid until 60 days after the Ministry of Transport, Energy and Communications has awarded the license to Esat Digifone Limited. Telenor AS can call this guarantee."

Mr. Prelz's response to this first draft was immediate and trenchant, as recorded in a memorandum made by Mr. O'Donoghue of a telephone call which he received from Mr. Prelz on [3rd August, 1995](#), and which was confirmed by Mr. O'Donoghue in evidence. In the course of this conversation, Mr. Prelz accused Mr. O'Brien and Mr. O'Donoghue of misleading Telenor, stated that they, meaning Mr. O'Brien and Mr. O'Donoghue, had been playing with words, that the word "*committed*" was misleading, that there was no offer as no terms had been agreed, and that Advent would not sign the proposed or any new letter, which in any event would have required the approval of its investment committee.

16.21 It seems that Mr. Prelz's response did not deter Mr. O'Donoghue from making a further effort, on the morning of [4th August, 1995](#), to obtain a stronger assurance to satisfy Telenor, when he forwarded a second revised draft to Mr. Prelz, in the following terms:

"Advent International Plc., on behalf of its funds under management, confirms that it has offered IR £30,000,000 (thirty million Irish pounds) to Communicorp Group Limited for the necessary equity increase in Communicorp Group Limited to establish and operate a GSM network in Ireland.

This offer is true and valid until 60 days after the Ministry of Transport, Energy and Communication [sic] has awarded the licence to Esat Digifone Limited."

That request was also to no avail, and even though the only addition which it contained over and above the text of the letter of 10th July, 1995, was the confirmation that the Advent offer was true and valid for 60 days after the award of the licence, Mr. Prelz was not prepared to strengthen the earlier letter. It seems that the text of this draft, and of the draft of 3rd August, 1995, had been prepared by Mr. O'Donoghue in consultation with both Mr. Simonsen, the Telenor GSM co-ordinator, and Mr. Bugge, and reflected the progressively diminishing level of their requirement.

16.22 With regard to the serious charges made by Mr. Prelz to Mr. O'Donoghue on 3rd August, 1995, that he and Mr. O'Brien had misled Telenor, that they had played with words, that the word "*committed*" was misleading, and that there was no offer by Advent as no terms had been agreed, it was Mr. O'Brien's evidence that everyone was "*cheesed off*" at that stage, having spent weeks negotiating the 12th July agreement. He viewed what was stated by Mr. Prelz as "*a rant*", which may have reflected language difficulties, as Mr. Prelz was Italian. The requests made to Mr. Prelz to furnish revised letters were made

because it was felt that Telenor was dissatisfied, and because Communicorp should be seen to make a further effort. The requests were, as Mr. O'Brien put it, *"tongue in cheek"*, since Mr. Prelz did not want to hear more, and was frustrated, and Mr. O'Brien knew that he would not sign the draft letters. It seems from Mr. O'Brien's evidence that he regarded Mr. O'Donoghue as simply going through the motions, in seeking stronger assurances from Advent in recognition of Telenor's dissatisfaction, without any realistic expectation that such letters would be forthcoming.

16.23 Mr. Prelz in his evidence accepted that he had had a conversation with Mr. O'Donoghue on 3rd August, 1995, and confirmed that he remembered it. He regarded that exchange as being part of what he described as *"shadow boxing"* between himself and Mr. O'Brien, and he testified that he thought he had been upset at the time, as the conversation had taken place in the context of Mr. O'Brien informing him about the introduction of Mr. Dermot Desmond, and the consequent loss of Advent's 5% direct shareholding in Esat Digifone. That of course was not so, as it is clear from all of the evidence available to the Tribunal that the conversation between Mr. Prelz and Mr. O'Donoghue predated even the initial exploratory dealings between Mr. O'Brien and Mr. Desmond, on their return flight from a football match in Glasgow, on or around 10th August, 1995, as will be fully explored in Chapter 18 of this Volume.

16.24 It is clear from Mr. O'Donoghue's record of what Mr. Prelz said to him, on 3rd August, 1995, which Mr. Prelz did not dispute, that Mr. Prelz made statements which were entirely at odds and inconsistent with his evidence that there then existed a funding commitment, and an agreement on the part of Advent. The Tribunal is in no doubt that what Mr. Prelz said to Mr. O'Donoghue was not an hysterical outburst, or some kind of tactical manoeuvre on the part of Mr. Prelz, but rather was a statement of the true position. This is borne out by the terms of the agreement made on 15th June, 1995, as carefully recorded and confirmed by Mr. Callaghan, by the terms of the formal 12th July agreement, and by Mr. Prelz's trenchant refusal to provide any clarification of the comfort letter of 10th July, 1995, for the benefit of Telenor. The final draft letter forwarded by Mr. O'Donoghue to Mr. Prelz, on 4th August, 1995, contained nothing in addition to what had been stated by Mr. Prelz in the comfort letter of 10th July, 1995, save for confirmation that:

"This offer is true and valid until 60 days after the Ministry of Transport, Energy and Communication [sic] has awarded the licence to Esat Digifone Limited."

Even that confirmation was not forthcoming from Mr. Prelz, who could not explain in evidence why he did not provide it, and which further confirms the Tribunal's

view of what the true state of affairs then was. There was no commitment, there was no agreement, and there was no continuing offer then in existence. A copy of the correspondence to which reference has been made in the preceding paragraphs, together with a copy of Mr. O'Donoghue's note of Mr. Prelz's telephone call of 3rd August, 1995, can be found within the Book of Appendices to this Volume.

16.25 Returning to events in Dublin, having attended a meeting through the night of 3rd August, 1995, which did not conclude until the early hours of the morning of Friday, 4th August, Mr. Bugge met with Mr. O'Donoghue, Mr. O'Connell and Mr. Halpenny at 10am that morning. At some point Mr. O'Brien also joined them. In attending that meeting, unaccompanied by any other Telenor official, Mr. Bugge testified that he had been instructed to seek a financial guarantee of as high a quality as was possible. In other words, and as was agreed by Mr. Bugge, he was told to do the best he could. What he was offered was a letter from Mr. O'Brien confirming that Communicorp had received an offer from Advent, but wished to seek alternative sources of funds, because the terms of the Advent offer were unfavourable, and further confirming that, if Communicorp failed to raise sufficient third party funds in time to provide Esat Digifone with funds, it would accept and conclude Advent's offer of funding.

16.26 That letter added nothing in terms of security to Telenor's position, nor did it bind Communicorp to any funding arrangement with Advent, there being no such arrangement in existence. In the course of that meeting, Mr. Bugge requested that a legal opinion be furnished by Mr. O'Connell in relation to the enforceability of the "offer" which Mr. O'Brien believed he had received, and which Advent, in its letter of 10th July, 1995, stated it had made. This request was recorded by Mr. O'Connell in a short attendance which he made of that meeting. In that attendance, he had also recorded that Mr. Bugge had asked him to request Mr. O'Brien to provide him with a copy of the agreement with Advent, or of the Advent offer that was binding, and that Mr. O'Connell had made it clear to Mr. Bugge that he had not seen that offer. Mr. Bugge received no commitment that such an opinion on enforceability would be provided, and, at the conclusion of that meeting, he thought that there was no more than a possibility that such an opinion would be forthcoming.

16.27 Mr. O'Brien made much of the eleventh hour conflict over the financial guarantee, and the ongoing threat to Communicorp's position which it posed. The Tribunal is however satisfied that this conflict was, to a very appreciable degree, more apparent than real. Telenor, notwithstanding the absence of a financial guarantee, proceeded with the submission of the bid. There was no evidence whatsoever of any consideration by Telenor of withdrawing from the

joint venture on this or any other ground. On the contrary, Mr. Haga testified that in international projects, such as the Esat Digifone application, it had been Telenor's experience that it was not unusual for the local partner to be less soundly asset based than the non-local partner. He explained that, although the Advent letter of 10th July, 1995, was completely unsatisfactory, Telenor nonetheless felt comfortable about the bid, and about the project's capability of raising funds, if it succeeded. He confirmed that the decision to proceed would have been taken at a very high level in Telenor.

16.28 Moreover, the manner in which this issue arose, and was handled by Telenor, was hardly consistent with Telenor having accorded it a high degree of priority. In Mr. Haga's absence, the matter was not pursued by Mr. Simonsen or Mr. Digerud, or any other Telenor official. Neither Mr. Haga, nor any other senior official, travelled to Dublin to deal with the issue over the final days, and instead the matter was delegated to Mr. Bugge, who was then an apprentice lawyer, and who was ultimately instructed to do the best he could, on the morning of 4th August, to secure some additional assurance over and above the Advent letter of 10th July, 1995. That meeting concluded some ten or fifteen minutes before the deadline for submission of applications, and Mr. Bugge had no opportunity to convey the outcome to any Telenor official. None of this suggests that Telenor was ever seriously contemplating taking any precipitous action, arising from Communicorp's failure to provide a financial guarantee, much less withdrawing from the joint venture.

16.29 Once Telenor had agreed to the submission of the Esat Digifone application, its capacity to seek any further assurance or comfort was very significantly curtailed, as the joint venture agreement of 3rd June, 1995, expressly provided that Telenor's approval to the submission of the application was conditional upon the acceptance by its board that the financial guarantee provided for, under the terms of that agreement, was satisfactory. In those circumstances, having proceeded with the submission, the issue of the financial guarantee, in terms of Telenor's ability to invoke its entitlement, was largely moot.

16.30 The conflict over these last days surrounding the financial guarantee was in reality no more than a phoney war. The real significance of the evidence heard by the Tribunal resided in the decisive and trenchant response of Mr. Prelz to Mr. O'Donoghue's request of 3rd August, 1995, for a revised letter of comfort for Telenor, as recorded by Mr. O'Donoghue, and as confirmed by him in evidence. What Mr. Prelz said was that Communicorp was misleading Telenor; that Mr. O'Brien and Mr. O'Donoghue had "*a way with playing with words*"; that the word "*committed*" was misleading; and that the fact was that there was no

offer, as no terms had been agreed. The Advent letters of 10th July, 1995, never exceeded the status of letters of comfort: there was no binding enforceable commitment, agreement or offer on the part of Advent to provide £30 million in funding. Mr. O'Brien had no intention of financing his participation in Esat Digifone through Advent, but rather intended to do so by a placement on the US market, and which was itself entirely dependent on the success of the Esat Digifone application, and the securing of the GSM licence. Credit Suisse First Boston had already been formally engaged by Communicorp to that end. This was not a matter that was disclosed in the Esat Digifone application, notwithstanding the requirement of the RFP that its contents should be true and valid, nor was the Department told of it at the Esat Digifone oral presentation. It seems reasonable to observe that such an uncertain funding arrangement, dependent as it was on the availability of the GSM licence, could scarcely have met the RFP condition of demonstrable financial capability. This was indeed evident from analysis of Esat Digifone's finances conducted by Mr. Donal Buggy, the Department seconded accountant, in May, 1996, just prior to the issue of the licence. By then, Mr. O'Brien's fundraising arrangements through Credit Suisse First Boston were known, and Mr. Buggy, in determining whether Esat Digifone had sufficient funds to meet the roll-out costs of a GSM network, treated the Communicorp element of the company as having zero available funds.

SECTION C

COMMENCEMENT OF THE EVALUATION PROPER

THE COMMENCEMENT OF THE COMPETITIVE PROCESS

RECEIPT OF SIX APPLICATIONS

17.01 The closing date fixed by the Department for receipt of tenders was 4th August, 1995. In consequence of the postponement of the original closing date, which was of approximately six weeks duration, the projected completion date, from receipt of tenders to the announcement of a winner, was likewise deferred. The Government decision of 2nd March, 1995, had fixed 31st October, 1995, for a final decision by Government on the outcome of the competitive process, and Departmental witnesses agreed that the deferral had impacted on that anticipated completion date, which in consequence had been put back until the end-November, 1995, as had been notified to interested parties on 14th July, 1995.

17.02 Applications were received from six consortia, one more than the maximum number which had been envisaged by AMI in their tender document. For the purposes of the evaluation exercise, the applicants were designated A1, A2, A3, A4, A5 and A6. These designations were used as a convenient means of identifying applicants in the course of the evaluation, and were in no sense intended as a device to secure their anonymity. On the contrary, the evaluation did not and could not proceed anonymously, as many of the matters scrutinised in the course of the process were dependent on the composition of consortia, and factors pertaining to individual consortia members.

17.03 On 31st July, 1995, prior to the closing date of the competition, the Department wrote to each of the parties that had purchased tender documents, asking them to confirm in writing, when submitting a tender, that they had no objection to the Department releasing the name of their consortium, the names of the participating members, and the fact that a tender for the GSM competition had been received from them. On the submission of the Esat Digifone tender, its designated GSM coordinator, Mr. Seamus Lynch, replied to the Department, confirming that Esat Digifone had no objection to the release of its name, or that it comprised Communicorp Group Limited, Telenor and institutional investors, or that it had submitted a tender, but that it did *“not wish the names of the institutional investors to be released at any stage.”*

17.04 The reservation of anonymity in the case of the financial institutions, that is, Allied Irish Banks, Investment Bank of Ireland, Standard Life and Advent International, enabled Esat Digifone to benefit from that institutional support, in terms of the credibility which it lent to the application, whilst protecting the option of allocating that shareholding elsewhere. Had the identity of those institutions been declared publicly in August, 1995, it would have been

exceedingly difficult to have announced in May, 1996, when the licence was issued to Esat Digifone, that Mr. Dermot Desmond was replacing those institutions.

17.05 Applications were received from six consortia: Irish Mobicall, Cellstar Group, Persona, Irish Cellular Telephones, Esat Digifone, and Eurofone. As indicated above, the consortia were respectively designated A1, A2, A3, A4, A5, and A6. It is proposed at this juncture to outline briefly both the composition of each of those consortia, as disclosed in their applications, and the salient features of their respective applications.

THE COMPOSITION AND FEATURES OF THE SIX APPLICATIONS

Irish Mobicall – A1

17.06 The Irish Mobicall consortium, designated A1 in the evaluation process, consisted of three institutional partners, SBC Communications Inc., formerly South-Western Bell, an international communications company, Deutsche Telekom A.G., the German privatised national telephone operator, and Tele Danmark A/S, the 51% State-owned Danish operator. Each of these international partners held a 25% interest in Irish Mobicall. The remaining 25% interest was held by three Irish businessmen, Mr. Martin Naughton, Mr. Lochlann Quinn and Mr. Kieran Corrigan.

17.07 The structure of the Irish Mobicall application followed the Departmental guidelines, and was presented in the form of seven separate ring-binders of documents, which were entitled as follows: Executive Summary; Marketing Aspects; Technical Aspects; Management Aspects; Financial Aspects; Other Aspects; and Appendix and Supporting Material. The final book contained the mandatory quantitative tables, which had been completed in full, for each of the years from year 1 through to year 15 of the business case. The application, at 338 pages, was within the Departmental limit of 350 pages. The Executive Summary extended to some 16 pages.

Cellstar Group – A2

17.08 The Cellstar Group consisted of Comcast International Holdings Inc., a United States corporation, together with two Irish semi-State companies, Raidió Teilifís Éireann and Bord na Móna, and a newly formed Irish company, GCI Limited. A letter of intent, which formed the basis of the relationship between the consortium members, recorded that Comcast would own 60% to 64% of the joint venture, Raidió Teilifís Éireann would own 15%, Bord Na Móna would own 6 to 10%, and GCI would own 15%. In the Executive Summary, Cellstar stated that

it would be willing, if desired by the Government, to offer up to 30% of its equity to the public, in the form of ordinary shares, and proposed that such a flotation could proceed between year 3 and year 5 of operation.

17.09 Cellstar's application followed the Departmental guidelines, and was presented in the form of six separate folders entitled as follows: Executive Summary; Marketing; Technical; Management; Financial; and Others. The application extended to some 319 pages, and was within the Department's limit.

Persona – A3

17.10 Three of the principals in the Persona consortium, Motorola, Sigma Wireless and Unisource Mobile, held ownership percentages of 26.7% each, and the Electricity Supply Board held the remaining 20% interest. Motorola was described in the Executive Summary as a major player in the global communications business, as an equipment supplier, a service provider, and an investor and operator in mobile telecommunications networks. Sigma Wireless was an Irish company which was the product of a management buy-out of Motorola's Irish distribution network. Unisource was described as a joint venture between four European telecommunications companies, Telia AB, the Swedish national operator, PTT Telecom BV, a subsidiary of KPN, the Dutch postal and telecoms group, Swiss Telecom, a subsidiary of Swiss PTT, and Telefónica, the Spanish operator.

17.11 The presentation of the Persona application followed the Departmental guidelines in that the consortium produced a series of folders of documents, which were entitled Executive Summary, Marketing Plan, Technical Plan, Management Plan, Financial Plan, Other Aspects and Quantitative Tables. All twenty-two of the mandatory quantitative tables had been completed, for each of the years from year 1 through to year 15. The Persona application at 349 pages did not exceed the Departmental ceiling page count of 350 pages. The Executive Summary extended to some 20 pages.

Irish Cellular Telephones – A4

17.12 The Irish Cellular consortium had incorporated an Irish limited company of which AT&T, a leading telecommunications company, held a 26% interest, Princes Holdings Limited, an Irish communications company providing multi-channel television retransmission services, held a 48% shareholding, United and Philips Communications B.V., UPC, a joint venture between subsidiaries of Philips Electronics N.V. and United International Holdings Inc., held a 16.4% interest, Independent Newspapers plc held a 2% interest, and Riordan Communications

Limited held a 2.6% interest. The consortium intended to realign the capital configuration of the company on the grant of a licence, so that the capital composition of the intended licensee was AT&T, UPC, and Independent Newspapers, each holding a 26% interest, Riordan Communications holding a 5% interest, Telecommunications Inc, a shareholder in Princes Holdings, with a 12% interest, and a semi-State company holding a 5% interest. Whilst the semi-State company was not identified in the ownership details, it was apparent from the supporting documentation submitted with the bid that Shannon Development Limited was the intended such shareholder.

17.13 The Irish Cellular application followed Departmental guidelines. Separate booklets of documentation were provided and were entitled: Executive Summary; Marketing Plan; Technical Plan; Management Plan; Financial Plan; Other Considerations; Tables and Appendices; and Supporting Documentation. Excluding the supporting documentation, the Irish Cellular application page count came to approximately 245 pages, which was well within the Departmental limit of 350 pages. The Executive Summary extended to some 19 pages. The mandatory quantitative tables, which were contained in the booklet of Tables and Appendices, had been fully completed for each of the years of the business case from year 1 through to year 15.

Esat Digifone – A5

17.14 The Esat Digifone consortium had also incorporated an Irish limited company, of which Telenor Invest AS, described as a wholly owned subsidiary of Telenor International AS, a company in the Telenor Group, held 50% of the shares. The remaining 50% of the shares were held by Communicorp Group Limited. As with Irish Mobicall, the application stated that the shareholding of the company was to be reconfigured on the award of a licence, and the composition of the intended licensee was to be Telenor and Communicorp, each holding a 40% shareholding, with a 20% shareholding being made available to third party investors. The Executive Summary stated that the 20% allocation had been placed by Davy Stockbrokers with Allied Irish Banks, Investment Bank of Ireland, Standard Life and Advent International. A slightly different formulation was used to describe the ownership of the intended licensee in the body of the application, in which it was stated that, in the period leading up to the award of the licence, 20% of the equity would be formally placed by Davy Stockbrokers. It was added that, as of the submission of the application, Davy Stockbrokers had received “*written investment commitments*” from the same four named financial institutions, and reference was made to the letters furnished by those institutions, which were described in the application as “*letters of commitment*”, and copies of which were included within the appendices to the application.

These were the same letters to which detailed reference has already been made in previous chapters of this Volume.

17.15 Information regarding the ownership profile of Communicorp Group Limited was also provided. It was stated that in 1994, Advent International, a US-based private equity house, had acquired a 34% interest in Communicorp, and had committed a total of \$19.5 million to the company. Reference was made to Advent's agreement to take a 5% direct equity stake in Esat Digifone, and to its commitment, as it was described, to provide £30 million in funding to Communicorp's Irish GSM bid.

17.16 The format of the Esat Digifone application followed the Departmental guidelines. Separate books were provided for the Executive Summary; Marketing Aspects; Technical Aspects; Management Aspects; Financial Aspects; Other Aspects. Separate appendices were submitted, and in the case of the marketing and technical appendices, these were comprised within two further boxes of documentation. In all, the page count of the body of the Esat Digifone application was 344 pages, and the Executive Summary extended to some 22 pages. The mandatory quantitative tables had been completed for each of the years from year 1 through to year 15, although it seems that, in the course of the evaluation, it became apparent that projected internal rate of return had not been computed for the precise years specified in the Departmental guidelines.

Eurofone – A6

17.17 The Eurofone consortium was a joint venture between Investment AB Kinnevik, a wholly owned subsidiary of Industriförvaltnings AB Kinnevik of Sweden, and Millicom International Cellular SA of Luxembourg. Detailed information regarding the telecommunications experience and credentials of the parent companies of the joint venture partners was provided. The ownership structure of the proposed licensee was Kinnevik with a 20% shareholding, Millicom with a 40% shareholding, and an independently administered trust holding the balance of 40% of the shares. Córas Iompair Éireann, the Irish semi-State company, had been given an option over 10% of those shares, and the balance of 30% was to be offered by means of a public share issue on the Dublin Stock Exchange, as soon as practicably possible following receipt of a licence.

17.18 As with all other applications, the form of the application submitted by Eurofone substantively complied with Departmental guidelines, and separate booklets of documents were provided entitled: Executive Summary; Marketing Plan; Technical Plan; Management Plan; Financial Plan; Other Information. In addition, supplementary material in the form of the mandatory quantitative

tables, the joint venture agreement and annual reports were also furnished. The mandatory tables had been completed in full for each of the years from year 1 through to year 15. The number of the pages in the Eurofone application was estimated by AMI at 357 pages, which was marginally in excess of the Departmental page limit, whilst the Executive Summary ran to some 36 pages.

ADMISSION OF ALL SIX CONSORTIA TO EVALUATION PROCESS

17.19 As Mr. Martin Brennan was on annual leave during the first half of August, 1995, it was Mr. Fintan Towey who was responsible for the receipt of applications, and their transmission to AMI in Copenhagen. One full set of tenders was retained as a master copy in the Development Division of the Department, two further full sets were retained as working copies by the Division, two sets were provided to the Technical Division as working copies, and one set each was provided to the Regulatory Division and the Department of Finance. Mr. Donal Buggy, the accountant on secondment to the Department, was to have access, as required, to working copies held by the Development Division. During the month of August, there were no meetings of the Project Group, nor does it appear that AMI attended in Dublin. Insofar as AMI progressed the evaluation proper, that work was undertaken exclusively in Copenhagen.

17.20 The first task to be undertaken in the process was the assessment of each application to determine whether it should be admitted to the competition proper. Although not specifically provided for in the RFP document, it will be recalled that the subsequent information memorandum, issued to applicants on 12th May, 1995, had prescribed the form in which applications were required to be submitted, in terms of the length of tender documents, completion of mandatory tables and so forth. AMI conducted an initial assessment of the applications to ascertain whether they met those formal requirements, and Mr. Towey, in his evidence, recalled that he had received confirmation from AMI that all six applications complied with the formal requirements, and should be admitted to the process. Whilst Mr. Brennan was under the impression that this initial assessment extended to determining whether applicants had fulfilled what he regarded as conditions precedent, namely, the demonstration of sufficient financial and technical capability, that was not a view shared by Mr. Towey, who had no recollection of any financial or technical assessment in advance of the evaluation proper. Likewise, Ms. Maev Nic Lochlainn had no memory of the conduct of any substantive threshold evaluation, although she did recall a discussion concerning the number of pages comprised in one of the applications received.

17.21 It is clear from the documents that were available to the Tribunal that the initial assessment undertaken by AMI was directed solely to the minimum prescribed requirements, four of which concerned the form in which tenders were presented, and only one of which related to their content. A fax dated 8th August, 1995, from Mr. Andersen to Mr. Towey, comprised a memorandum detailing the outcome of conformance tests that AMI had undertaken. It is clear from the contents of that memorandum that the five minimum requirements tested were as follows:

- (i) applications, excluding appendices, were not to exceed 350 pages;
- (ii) executive summaries were not to exceed 25 pages;
- (iii) applications were to include a statement quantifying the licence fee payment offered;
- (iv) applications were to provide for 90% coverage of the population within four years of the issue of the licence;
- (v) applications were to include a statement that they would be valid as to their contents for a period of 180 days from the closing date for receipt of applications.

On a copy of the fax cover sheet of 8th August, 1995, Mr. Towey had noted in manuscript that *“following examination of applications, decision taken that all are valid. Tender requirement is that applications ‘should not’ exceed 350 pages.”*

17.22 Lest there be any doubt concerning the scope of the initial tests, in a document which AMI provided to the Department in February, 1996, entitled *“Memorandum on the evaluation of the evaluation of the GSM2 tender in Ireland”*, which was intended to be an ex post facto analysis of the effectiveness of the overall conduct of the process, AMI recorded that *“[a]ll the GSM2 applications received were admitted to the evaluation, as none of the applications had such substantial deviations from the minimum requirements of the RFP document that they were to be rejected.”* No further reference was made in that document to any distinct assessment of the financial capability or technical capability of applicants, as preconditions to entry to the evaluation process proper. It is clear that no separate threshold assessment of those matters was in fact undertaken in advance of the substantive evaluation.

17.23 During his recent attendance, Mr. Michael Andersen confirmed that the initial assessment of tenders entailed no substantive eligibility test. This, he testified, was consequent on the absence of pre-defined admittance specifications in the RFP document, on which to base a rejection procedure, in accordance with international best practice. Had the RFP document prescribed minimum substantive specifications, such as a degree of solvency of not less than 20% throughout the years of the business case, a two-stage process could have been implemented, and applicants that did not meet such specifications could have been eliminated at the outset. Financial and technical capability, having not been defined in the RFP document, could not, according to Mr. Andersen, be assessed substantively at the outset as conditions to eligibility. These issues of capability, which Mr. Andersen accepted were central to the competition design approved by Government, could only be addressed after the conclusion of the comparative evaluation. In that regard, Mr. Andersen referred to certain passages of the Evaluation Report in which AMI had registered reservations or markers, as Mr. Andersen described them, surrounding the finances of the two top-ranked applicants.

17.24 It appears therefore from Mr. Andersen's evidence that, in the absence of clear definitions of what constituted financial and technical capability, those requirements could not be implemented as envisaged, that is, as pre-conditions to eligibility for admittance to the comparative process. Instead, they were requirements to which regard could only be had after the conclusion of the comparative evaluation, and in this instance, as matters transpired, after a ranking had been established.

17.25 Whilst the focus of the process in the month of August, 1995, was almost exclusively directed to the quantitative evaluation, in preparation for the qualitative evaluation, on 9th August, 1995, AMI provided the Department with a document entitled "*Reader's Guide*", which was intended to assist members of the Project Group, in reviewing applications, to identify significant matters that could or should be addressed later, in the course of the qualitative evaluation.

THE CELTIC MATCH AND ENCOUNTER BETWEEN MR. DENIS O'BRIEN AND MR. DERMOT DESMOND

18.01 On 4th August, 1995, when the Esat Digifone consortium submitted its application to the Department, the consortium was a joint venture between Communicorp and Telenor, each of which held a 50% interest. The composition of the intended licensee, as notified to the Department, was Communicorp with a 40% shareholding, Telenor with a 40% shareholding, and financial institutions, holding between them a 20% shareholding. It was that consortium, and that intended licensee, which was evaluated. By the time the result of the process was announced on 25th October, 1995, that was no longer the composition of the consortium, or of the intended licensee. By then, the consortium had become a venture between three partners, Communicorp, Telenor, and Mr. Dermot Desmond, respectively holding interests of 37.5%, 37.5% and 25%, and that was also by then the composition of the intended licensee.

18.02 In 1995, Mr. Desmond was, and remains, a very successful and well-known business figure both in Ireland and abroad. In the period leading up to his involvement in Esat Digifone, Mr. Desmond had been a party to a number of high profile international commercial transactions. In December, 1994, he sold his interest in the company for which he was at that time perhaps best known and which he founded, the stockbroking firm, National City Brokers, NCB, to Ulster Bank. In the early months of 1995, he became a major investor in Glasgow Celtic Football Club, and in the course of the same year, he also finalised his purchase of London City Airport. These were only some of the large number of commercial projects in which he had been involved during his career, and which had earned him a wide reputation as a skilled and shrewd financier.

18.03 Mr. Desmond was at the same time a controversial figure. He had been the subject of adverse comment in the then relatively recent Report of 7th July, 1993, of Mr. John Glackin, the Inspector appointed under the Companies Acts to inquire into transactions relating to the Johnston, Mooney and O'Brien site in Dublin. That Report had been received by Mr. Ruairi Quinn T.D., who had been Minister for Industry and Commerce in the previous Fianna Fáil/Labour Coalition Government, and who was in 1995 Minister for Finance.

18.04 Mr. Desmond incorporated International Investment and Underwriting Limited, IIU, a financial advisory company, in December, 1994, and the company commenced trading from the International Financial Services Centre in July, 1995. IIU was one of the vehicles used by Mr. Desmond to make investments, after he became non-resident in Ireland for taxation purposes in 1994, and was one of two vehicles ultimately used by him to invest in Esat Digifone, the other

being Bottin International, a trust company incorporated and domiciled in Gibraltar.

18.05 Initially, however, when the GSM competition was announced, Mr. Desmond decided that he did not wish to pursue an involvement in a consortium to compete for the licence. This decision appears to have been the subject of a conversation between Mr. Desmond and Mr. Tony Boyle, then Chairman of the Persona consortium, at a race meeting at Aintree in April, 1995. There was significant disagreement between Mr. Desmond and Mr. Boyle about that occurrence, and the content of their conversation, and this will be returned to in more detail in the following chapter.

18.06 The first business dealings between Mr. O'Brien and Mr. Desmond occurred some time in either 1993, or more probably, in 1994, when Mr. O'Brien invited Mr. Desmond to invest in his newly established fixed-line business, which was operated by Esat Telecom, a subsidiary of Communicorp. To that end, Mr. O'Brien had a meeting with Dr. Michael Walsh, who was Mr. Desmond's long-standing business associate and adviser. Following that meeting, and on the advice of Dr. Walsh, Mr. Desmond decided against proceeding with an investment in Mr. O'Brien's fixed-line business. That interaction occurred at a time long before the announcement by the Government of the GSM competition.

18.07 Mr. O'Brien made a second approach to Mr. Desmond for assistance in the funding of his then existing businesses, in the context of the cash crisis which he encountered in May, 1995. It will be recalled, from Chapter 14 of this Volume, that it was that crisis which resulted in Mr. O'Brien ultimately being forced to conclude a bridging finance agreement with Advent International in July, 1995, for the provision of \$5 million, the then equivalent of £3.25 million, on terms which he, and his associates, regarded as harsh. This followed from Advent's failure to deliver on an earlier agreement, on terms more favourable to Mr. O'Brien, which had been reached between Mr. O'Brien and Mr. Prelz in May, 1995.

18.08 That second approach to Mr. Desmond arose in the context of Mr. O'Brien seeking an alternative source of finance to Advent. It seems from Mr. O'Brien's evidence that what he sought from Mr. Desmond in May or June, 1995, was the provision of a guarantee to Anglo Irish Bank, as security for a facility which Anglo Irish Bank was prepared to provide to Mr. O'Brien, subject to the availability of such security. Mr. O'Brien testified that at that stage, he had been in and out of Anglo Irish Bank "*loads of times*", and had approached them in relation to both the funding of Communicorp's non-GSM business, and also in connection with the guarantee required under the joint venture agreement with

Telenor. He had also approached IIU in relation to the non-GSM funding only. As Mr. O'Brien put it in his evidence, *"there were only two games in town and that was Dermot or Anglo"*.

18.09 Whilst some discussions took place with a view to Mr. Desmond making a loan or equity investment at that time, those discussions did not proceed to fruition, and Mr. Desmond declined to furnish the guarantee sought by Mr. O'Brien. It seems that Mr. Desmond, who then had a close relationship with Anglo Irish Bank, nonetheless informally encouraged the bank to continue its support of Mr. O'Brien in his business activities.

18.10 On Thursday, 10th August, 1995, some six days after the closing date of the competitive process, Mr. Desmond invited Mr. O'Brien to join a party of guests on an outing to Glasgow, to attend a pre-season friendly match between Glasgow Celtic and Liverpool Football Clubs. Mr. O'Brien and Mr. Desmond did not have a particularly close personal relationship, although they were acquainted, and had had the limited business dealings to which reference has been made. Mr. Desmond had invited Mr. O'Brien on that occasion as a gesture of thanks for a favour done by Mr. O'Brien on an unrelated matter.

18.11 The outing to Glasgow was a social occasion, and no business was discussed on the outbound flight, at the match itself, or at the post-match dinner. It was on the return flight to Dublin that night that a conversation took place between the two men regarding the GSM competition process, the Esat Digifone application, and the potential for an involvement on the part of Mr. Desmond, when they repaired to the back of the airplane to have a private discussion. There were significant differences in their respective evidence of their recollections of what had then transpired between them, although they agreed that their discussions related to the Esat Digifone application, and a possible role for Mr. Desmond in the consortium. They further agreed that their discussion extended to the positive aspects of the application, as well as to certain weaker features of it, and that the latter aspect of their discussion focused on the issue of finances. It was their respective recollections of the sources of financial weakness, as identified and described by Mr. O'Brien, which diverged.

18.12 Mr. O'Brien testified that it was the consequences of Telenor's dissatisfaction with the Advent letter of comfort of 10th July, 1995, which continued to trouble him. In particular, he feared that Communicorp's failure to provide a financial guarantee, in accordance with its obligations under the joint venture agreement with Telenor of 3rd June, 1995, might be used by Telenor to its advantage to wrest control of Esat Digifone. It was Mr. O'Brien's evidence that it was this issue, and the possibility that Mr. Desmond might provide him

with a financial guarantee of the type required by the joint venture agreement, which was the central theme of their discussion, although he recalled that he had also expressed concerns regarding Communicorp's ability to meet the requirement of financial capability stipulated in the Department's RFP document.

18.13 That was not Mr. Desmond's recollection. Contrary to Mr. O'Brien's testimony, it was Mr. Desmond's evidence that he did not recall Mr. O'Brien making any reference whatsoever to Telenor, or to his need for a financial guarantee to satisfy Telenor, or to his concern that Telenor might use the absence of such guarantee to its advantage to seek to take control of Esat Digifone. Rather, it was Mr. Desmond's evidence that Mr. O'Brien's focus was the insufficiency of the support which he had received from the financial institutions in the form of the letters of early June, 1995, which had been arranged by Mr. McLaughlin of Davy, and of his need for additional assistance in relation to the existing finances of Communicorp. As regards the former, Mr. Desmond also recalled that Mr. O'Brien had mentioned that the financial institutions had not agreed to contribute to the bid costs.

18.14 Mr. Desmond and Mr. O'Brien met the following day, Friday, 11th August, 1995, in Mr. Desmond's office in Dublin, to continue their discussions, and that meeting and its location were recorded in Mr. O'Brien's diary. In advance of that meeting, Mr. O'Brien had generated a memorandum which he entitled "*RE: Outline Agreement on IR£3m. Guarantee for Communicorp Group Ltd.*", which was intended to summarise his proposals for an agreement arising from the general discussions had the previous night, at the rear of the airplane on the return journey from Glasgow. The contents of that document are instructive as to the matters then under discussion, and also reflect on the direction that the discussions of the previous night must have taken. The contents of Mr. O'Brien's memorandum are reproduced in full below:

"1. Esat Digifone Ltd.

Communicorp Group Ltd. ('CGL') will arrange for Dermot Desmond ('DD') to have the right to take up at par 15% of the ordinary shares in Esat Digifone Ltd. replacing IBI, AIB and Standard Chartered [sic].

2. GSM Bid Costs

A total of £1.3m. - £1.5m. will have been expended on the bid by award of licence. It is agreed that DD will pay his portion of the costs – win or loose [sic].

3. Bank Guarantee

DD will provide a Bank Guarantee of IR£3m. in order for CGL to drawdown a £3m bank facility which will remain in place up to March 31, 1996.

In exchange for this guarantee DD will be paid a fee of £300,000 no later than March 31, 1996. Should CGL complete its placing of equity through CS First Boston before March 31, 1996, the fee will be paid within 10 days after completion of the placing.

Security

If the £3m. facility including interest is not repaid by March 31, 1996, DD will have the right to purchase 33.3% of Radio 2000 Ltd. (Classic Hits 98FM) for £1 (One pound). CGL currently holds 76% of Radio 2000 Ltd.

Negative Pledge

We understand that you will seek a negative pledge of the assets of CGL."

18.15 It is perfectly clear from the contents of that memorandum that what was proposed by Mr. O'Brien on that occasion was two-fold, and related both to Mr. O'Brien's existing businesses, and to an involvement by Mr. Desmond in Esat Digifone. Firstly, it entailed Mr. Desmond taking over the 15% shareholding, which, according to the Esat Digifone application, was to be subscribed for by Allied Irish Banks, Investment Bank of Ireland, and Standard Life, but which, as already observed in an earlier chapter, by reason of the non-binding nature of the arrangements put in place, continued to be available to and at Mr. O'Brien's disposal. In exchange for the 15% shareholding, Mr. Desmond was to bear a commensurate share of the bid costs, whether the consortium won or lost the GSM licence competition. Secondly, it entailed the provision by Mr. Desmond of a £3 million guarantee for Communicorp, in order to enable Communicorp to draw down a banking facility, for which Mr. Desmond would be paid a fee of £300,000.00 out of the proceeds of the prospective Credit Suisse First Boston placement. In default of repayment by 31st March, 1996, Mr. Desmond would be entitled to convert that liability into a 33.3% shareholding of Radio 2000 Limited, one of Communicorp's subsidiaries that operated the 98FM Classic Hits radio station, for the nominal payment of £1.

18.16 What is equally clear is that there was absolutely no provision in that memorandum for any financial guarantee directed to meeting Communicorp's obligations to Telenor under the joint venture agreement. What was required of

Mr. Desmond was a guarantee to enable Communicorp “to drawdown a £3m bank facility”, and what was offered to Mr. Desmond was a fee of £300,000.00 and an option on a 15% shareholding in Esat Digifone. Apart from that guarantee for £3 million, no further support for Communicorp was sought from Mr. Desmond, much less a financial guarantee for £12.5 million in favour of Telenor, or any underwriting for Communicorp’s £24 million projected equity participation in Esat Digifone.

18.17 Mr. O’Brien in his evidence to the Tribunal professed some puzzlement surrounding the guarantee of £3 million which he had sought from Mr. Desmond, and could not understand to what it related. He speculated that he might have intended to add that guarantee, or part of it, to the existing Advent letter of 10th July, 1995, to create some new guarantee. That proposition was nonsensical. The entitlements of Telenor had quite clearly absolutely no bearing on the guarantee sought from Mr. Desmond on 11th August, 1995, which as plainly stated by Mr. O’Brien in his own words, in his own memorandum, was for the purposes of enabling Communicorp “to drawdown a £3m bank facility”.

18.18 The £3 million facility referred to in Mr. O’Brien’s memorandum can only have been the selfsame facility as that for which Mr. O’Brien had unsuccessfully sought a guarantee from Mr. Desmond, no more than two or three months earlier. Although decried by Mr. O’Brien when suggested to him, the Tribunal is satisfied, as indeed was speculated by Mr. Peter O’Donoghue in evidence, that Mr. O’Brien’s intention, subject to securing Mr. Desmond’s guarantee, was to draw down that £3 million facility, and to use it to repay Advent’s bridging loan, thereby protecting his own shareholding in Communicorp from the prospect of dilution by Advent, in the event of a default under the bridging financing agreement.

18.19 The true nature of the terms proposed by Mr. O’Brien were not lost on Mr. Desmond, who testified that he recalled the memorandum of 11th August, 1995, and the terms then offered. He further recalled that his response to Mr. O’Brien had been consistent with his previous responses to advances to assist Mr. O’Brien’s existing businesses. He informed Mr. O’Brien, according to his evidence, that he was not interested in those terms, and had never been interested in Mr. O’Brien’s fixed-line business. It was Mr. Desmond’s evidence that it was apparent to him, from the terms of Mr. O’Brien’s memorandum, that what Mr. O’Brien was in fact looking for was money for Communicorp, and as Mr. Desmond put it in evidence:

“he was using me as a bank to lend him money for Communicorp.”

Mr. Desmond, as he had on the two previous occasions, rejected Mr. O'Brien's proposals, as confirmed in evidence by Dr. Michael Walsh, his associate and adviser, even though on this occasion Mr. O'Brien had sought to entice Mr. Desmond with an option on a 15% shareholding in Esat Digifone.

18.20 Mr. O'Brien's portrayal of his discussions with Mr. Desmond in early August, 1995, as entailing some fresh departure from the advances made by him some two to three months earlier, was not borne out by Mr. Desmond's evidence, or by the documentary evidence. Whatever Mr. O'Brien may have regarded as the thrust of their conversation on the return flight from Glasgow on the night of Thursday, 10th August, 1995, it was evident to Mr. Desmond, and was apparent from the contents of the memorandum generated by Mr. O'Brien himself, that what Mr. O'Brien was again seeking was a £3 million guarantee to fund his radio and fixed-line businesses, and the only new feature of these proposals was that Mr. Desmond was being offered minority membership of the Esat Digifone consortium. Not even that prospect was it seems sufficient to attract Mr. Desmond to act as banker to Communicorp, as he put it, and he firmly rejected those proposals.

18.21 Mr. Desmond was however by then interested in Esat Digifone, and in the GSM licence. His interest lay in an involvement in Esat Digifone on the same terms as the existing shareholders, Communicorp and Telenor. Mr. Desmond had noted that a lot of people, who appeared to him to know what they were doing, were anxious to go after the GSM licence, and that, as he put it, was good enough for him. Dr. Walsh in his evidence characterised Mr. Desmond's approach to participation in Esat Digifone as being a pragmatic one: if it was a good deal for Telenor, which he regarded as a highly professional organisation, it should be a good deal for him. The critical factor, as explained by Dr. Walsh, was that Mr. Desmond would participate on the same footing as Communicorp and Telenor.

18.22 Although Mr. O'Brien, Mr. Desmond and Dr. Walsh all testified that they believed that there had been continuing contacts between them after 11th August, 1995, following Mr. Desmond's rejection of the terms proposed by Mr. O'Brien, none of them could point to when those contacts had occurred; nor was there a record of any further contact between them until after 12th September, 1995, save for a fax from Mr. Peter O'Donoghue to Dr. Walsh dated 7th September, 1995, which, as observed by Mr. O'Donoghue, related solely to the cash requirements for Communicorp to 31st March, 1996, in relation to its existing businesses. Mr. O'Donoghue confirmed that the figure of £5 million mentioned in that fax related to projections for the radio and fixed-line businesses, and excluded any projected commitments to Esat Digifone. Mr.

O'Donoghue believed the provision of this figure related back to the earlier negotiations which he had had with Dr. Walsh, dating from May, 1995, and indeed may also have related to the August discussions, in the context of which that date, 31st March, 1996, had also been significant.

18.23 Whatever contacts and discussions may have proceeded after 11th August, 1995, of which there was no documentary evidence, or record in Mr. O'Brien's diary, it is clear that no meaningful negotiations took place after Mr. Desmond had rejected the terms put to him by Mr. O'Brien on that date. As will be seen, contact between Mr. O'Brien, Mr. Desmond and Dr. Walsh was not re-established until after the Esat Digifone oral presentation to the Department on 12th September, 1995, and then proceeded very rapidly, when a very different agreement was concluded between Mr. O'Brien and Mr. Desmond, which did not entail any support for Communicorp's existing business, which did not entail the provision of any guarantee for £3 million by Mr. Desmond to enable the draw down of a bank facility, but which conferred an entitlement on Mr. Desmond to a 25% shareholding in Esat Digifone, and imposed an obligation on him to provide underwriting for Communicorp's £24 million equity participation. As will also be seen in later chapters, those terms were agreed between Mr. O'Brien and Mr. Desmond on the selfsame day that Mr. O'Brien had contacts with Mr. Michael Lowry.

PERSONA MATTERS

19.01 Persona Digital Telephony, Persona, receives mention at different points in this Volume of this Report on a considerable number of occasions. Having at least anecdotally been viewed as the probable favourite to win the GSM licence competition, it ultimately was found to be the second-placed consortium, an outcome which, after long and assiduous preparations, its participants found deeply disappointing. Feeling that this outcome was unwarranted and unsubstantiated, it sought to pursue all possible forms of redress, writing to political leaders, meeting somewhat acrimoniously with some Project Group personnel to demand concrete reasons for their apparent failure, having questions asked in the Dáil, and exploring and instituting legal proceedings complaining of the outcome. In these circumstances, it was predictable that Persona should have taken a keen interest in the Tribunal's inquiries in regard to the GSM licence competition. The Chairman, Mr. Tony Boyle, a senior and highly experienced businessman, gave evidence, as did his co-director and associate, Mr. Michael McGinley.

19.02 Whilst portion of the content of that evidence related to the disgruntlement of those involved in Persona, at what was perceived by them as an unfair outcome to the competition, the most pertinent portion of the evidence heard related to three separate matters:

- (i) A meeting held in the Fitzpatrick Castle hotel in Killiney, Co. Dublin, on 16th August, 1995, between Mr. Michael Lowry and Mr. Tony Boyle, described by the latter as an opportunity to make “a sales pitch” to the Minister, in relation to the merits of the Persona consortium. This was during the closed period of the competition, and was examined in evidence by the Tribunal as an encounter that in its timing, circumstances and content was inappropriate or potentially compromising, and which appeared to disregard the agreed Project Group protocol in regard to contacts with consortia personnel which, whether or not binding upon the Minister, was known to him.
- (ii) Some brief and informal verbal exchanges between Mr. Tony Boyle and Mr. Dermot Desmond, whilst guests of Mr. J.P. McManus in his hospitality box at the Grand National race meeting at Aintree, Liverpool, on 8th April, 1995. Regarding some remarks relating to the GSM competition attributed to Mr. Desmond by Mr. Boyle, Mr. Desmond disputed the alleged content, in particular the making of a response in that context that he knew exactly who Mr. Denis O'Brien would use to get to Mr. Lowry. This conversation was examined by the Tribunal in

public sittings as a potential indication of some inappropriate association between Mr. Lowry and Mr. O'Brien, which could have borne upon the competition outcome, particularly when allegedly voiced by an individual who ultimately became a partner in Esat Digifone.

- (iii) In the course of Mr. Gerard Moloney's communications with the Tribunal as solicitor and company secretary to Persona, he conveyed a considerable amount of information to it, and proposed possible lines of inquiry. A portion of these communications was addressed by Mr. Moloney to Mr. Jerry Healy, one of the senior counsel retained by the Tribunal, who was known to him from prior legal practice. It was also the case that at an early stage of considering their possible legal options, consequent upon failure to win the GSM competition, and long before this Tribunal's establishment, Mr. Moloney had briefly retained Mr. Healy, together with Mr. Gerard Hogan, then junior counsel, to advise upon the feasibility of instituting judicial review proceedings for the failure to give reasons for their ranking in the process. No such proceedings were instituted. At both Tribunal public hearings, and in the course of extensive correspondence, exception was taken by and on behalf of both Mr. Dermot Desmond and Mr. Denis O'Brien to Mr. Healy's ongoing involvement as Tribunal senior counsel, on account of what was contended by them to be a conflict of interest, arising from his earlier retention on behalf of Persona. The matter was alluded to on a number of occasions in the course of evidence, in particular during the testimony of Mr. Boyle, and that of Dr. Michael Walsh, Mr. Desmond's associate and adviser. The Sole Member expressed the view in the course of public sittings on 3rd March, 2004, that Mr. Healy had acted neither improperly nor incorrectly, but rather with the utmost integrity, and that his position was not compromised. This matter, important in the context of the actual and perceived independence and fairness on the part of the Tribunal and its personnel, has in addition been addressed in Volume 1 of this Part of the Report.

THE KILLINEY CASTLE MEETING

19.03 Taking the initial matter referred to above which, although later in time was brought to Tribunal attention at an earlier stage, Mr. Tony Boyle testified that he had written to his insurance broker, Mr. Colm Maloney, an individual with Fine Gael connections, seeking a meeting with Mr. Lowry, but stating that he would understand if Mr. Colm Maloney felt unable to assist, by reason of any perceived conflict. In the event, Mr. Colm Maloney arranged an introduction for Mr. Boyle

with the late Mr. Frank Conroy, a senior figure in the financial affairs of the Fine Gael party, and a person whose unwitting role in the transmission of the \$50,000.00 Esat/Telenor donation to Fine Gael is noted in Volume 1 of this Part of the Report. Mr. Conroy offered to ask Mr. Lowry to meet Mr. Boyle for a presentation. This was arranged for 6pm on 16th August, 1995, in the Fitzpatrick Castle Hotel in Killiney, Co. Dublin, a time subsequent to bids having been submitted for the GSM competition. Mr. Boyle duly attended, and met with Mr. Lowry and Mr. Conroy, in the public bar of the hotel. Mr. Conroy effected an introduction, following which Mr. Boyle and Mr. Lowry had their meeting at a table, for approximately 30 minutes, whilst Mr. Conroy remained sitting at the bar some 10 to 15 feet away.

19.04 Mr. Boyle recalled that, at the outset of the meeting, he had explained that his purpose was for the Minister to hear directly of the interest of Persona in the bid, and the strength of their team. He stated that Mr. Lowry listened intently, whilst Mr. Boyle developed those matters, and then said that he was aware that Persona was a very strong contender. Mr. Boyle afterwards reported accordingly to his board, and his colleague, Mr. McGinley, recalled being informed by Mr. Boyle that the meeting had gone well. Mr. Boyle acknowledged that the bid had been delivered on 4th August, 1995, and that the process was accordingly sealed by the time of his meeting, but he stated that what he had sought was the opportunity to make a sales pitch, so that Mr. Lowry would understand the strength of Persona's credentials. He stood over his meeting with the Minister, stating that he conveyed no more than Persona had already conveyed in writing to all members of the Oireachtas. At an earlier meeting with Mr. Martin Brennan, of the Department, Mr. Boyle had intimated his anxiety to meet with the Minister, and Mr. Brennan did not appear to demur in this regard. Mr. Boyle stated that his main skill was as a salesman. Asked by Tribunal counsel whether or not the meeting was an attempt to influence Mr. Lowry, Mr. Boyle stated that it certainly was an attempt to make a sales presentation to Mr. Lowry, and let him know of the strengths of Persona, and acknowledged that in this regard it was an attempt to influence him.

19.05 In Mr. Lowry's evidence, he had referred in general terms to the protocol enjoining caution in dealings with applicants, that had been passed by the Project Group. Mr. Lowry stated that this was not circulated to him as Minister, and he never saw it until it was brought to his attention by the Tribunal. It was the case that Mr. Loughrey had gone through the elements contained in it in very general terms, but Mr. Lowry said that there was never any question of them applying to him. Although Mr. Loughrey had told him it was preferable that he, as Minister, would not meet applicants, Mr. Lowry did not see this as practical, feeling that it was up to him to decide, once he was advised, in particular instances. It seemed to him that in a small business community, it

was inevitable that he would have occasion to meet some persons involved in the competition, and, as a politician, he thought it appropriate that he should meet some of these individuals, thank them for their interest in the competition, and wish them well. He accepted that it was important not to give any impression of him imparting information, but he was not the person who was making the winning recommendation. Accordingly, he gave meetings to any person who requested them on this basis, either in the Department, or in whatever venue was convenient. Apart from meeting Mr. Boyle, and his later meeting with Mr. O'Brien, examined in following chapters, Mr. Lowry recalled meeting Mr. Pat Dineen, a businessman concerned in a different consortium, and many others involved. These meetings were usually short, and he did not have any information to impart. It was correct that the meeting with Mr. Boyle was arranged by Mr. Frank Conroy, and the Killiney hotel venue had been fixed because Mr. Lowry had been staying with Mr. Conroy in his adjacent apartment. He and Mr. Boyle had sat in the hotel bar over coffee, and all that had been involved was a courtesy meeting, in which he was obliging Mr. Boyle. It seemed to Mr. Lowry that Mr. Boyle wanted to be able to say to his partners that he had access to the Minister, and was a big player. Mr. Lowry stated that he could not recall details of what was stated by Mr. Boyle at the meeting, but there was no need for caution, due to Mr. Conroy being a friend, supporter and a substantial figure in Irish business; in any event Mr. Lowry reiterated that he was outside the process, and not giving information. What took place was merely a meeting such as politicians have every other day. Mr. Lowry thought the meeting occupied about 15 to 20 minutes, and he intended only to be courteous and approachable, bearing in mind that Motorola, involved in the Persona consortium, was a large Irish employer, and that this was a public relations opportunity for Mr. Boyle within his own consortium. As to Mr. Lowry not having informed his Private Secretary in the Department of this meeting, Mr. Lowry stated that the meeting did not merit this; as a politician he had no difficulty with such a meeting, at which nothing untoward occurred, and in relation to which he made no apologies.

19.06 Notwithstanding the absence of evidence of any explicitly improper requests or proposals in the discussions between Mr. Lowry and Mr. Boyle, the mere holding of the Killiney meeting, in the circumstances described, must be viewed as seriously misconceived and inappropriate. Taking only the most obvious frailties: firstly, it was held in what was very much the closed period of the competition, after bids were in; secondly, it was arranged by, and held effectively in the presence of, Mr. Frank Conroy, a senior figure in the financial affairs of the Fine Gael party, the principal party in Government, and the party represented by Mr. Lowry as Minister and T.D.; thirdly, it was held without any notification or representation from the Department; lastly, as was acknowledged by Mr. Boyle in evidence, he attended the meeting in the belief that Mr. Lowry as

Minister had a role in determining the outcome of the competition, and it was his intention and wish to influence him in that regard. Accordingly, having regard to the timing, surrounding circumstances and intent of the meeting, from the standpoint of Persona and Mr. Boyle, it should not have been sought, held or conducted in the manner that transpired. Whilst Mr. Lowry in his evidence expressed the view that the protocol passed by the Project Group in relation to contacts with consortia personnel did not apply to him, the contents of that protocol had undoubtedly been explained to him, and his participation in the meeting in the circumstances described flagrantly infringed its terms and intent.

GRAND NATIONAL INTERACTION

19.07 Turning to the events of the Grand National race meeting at Aintree on 8th April, 1995, Mr. Boyle testified that he attended the meeting on that day with his colleague, Mr. Michael McGinley, and his father, Mr. James Boyle, since deceased. They were guests in the box of Mr. J.P. McManus, at the invitation of Mr. Colm Maloney, the insurance broker who subsequently facilitated the meeting with Mr. Lowry. Mr. Dermot Desmond was also then present, and was introduced to Mr. Boyle by Mr. McGinley, who knew Mr. Desmond through his son, the noted golfer, Mr. Paul McGinley. It transpired that Mr. Desmond was familiar with the business of Mr. Boyle and Mr. McGinley, and conversation turned to the topic of the second GSM competition. Mr. Boyle mentioned that he had assembled a consortium to bid for it, whereupon Mr. Desmond stated that he had been approached by Mr. Denis O'Brien to act as Chairman of his consortium, but said that he had declined to do so, saying with some vehemence that he had had enough of telecoms. Mr. Desmond then asked what the process involved, and who the decision maker was. Mr. Boyle explained that it would be a public competition run by the Department of Communications, and that the decision would be made by them and their Minister, Mr. Michael Lowry. Mr. Desmond then responded by saying that he knew exactly who Mr. O'Brien would use to get to Mr. Lowry. No further conversation of significance ensued.

19.08 Replying to counsel for Mr. Desmond, Mr. Boyle stated that he made only two statements to the Tribunal, and had attended on three or four meetings. He accepted that his statement relating to Mr. Desmond was made several years after the event, and was some fifteen months after his first statement to the Tribunal. He could not remember who actually won the Grand National, but his father had backed the winner at long odds. This was the only occasion upon which Mr. Boyle had ever been at Aintree. Approximately two dozen people were coming in and out of the McManus box. He had casually met Mr. Desmond on one previous occasion, at Leopardstown, having then been introduced by Mr. Colm Maloney, the insurance broker referred to earlier. Mr. Desmond's

reference to getting to Mr. Lowry seemed very significant to Mr. Boyle, but he was even more concerned with learning that Mr. Desmond would not be involved. Mr. Boyle had checked that no written record of the conversation existed, and that the matter had not been raised at earlier potential opportunities. The Persona consortium had spent over £5 million on the GSM application, and in relation to the Tribunal much less than £1 million had been expended, perhaps less than £500,000. As to whether or not Mr. Boyle's evidence might help in regard to legal proceedings then in being, it was the position that Persona intended to pursue those regardless. Mr. Boyle stated that he had been a senior businessman for 30 years, and had a photographic memory.

19.09 Evidence was also given by Mr. Michael McGinley. In the course of the Opening Statement made by the Tribunal in relation to the GSM competition, he became aware that reference had been made to Mr. Boyle's account of his conversation with Mr. Desmond at Aintree, and also that Mr. Desmond had informed the Tribunal that he had no recollection of Mr. Boyle being present, or having a conversation with him then, or at any other time, of the nature described. In this context, Mr. McGinley stated that he was a long standing business partner of Mr. Boyle, and a co-director of Persona, since its incorporation in 1995. He recalled attending the Aintree race meeting, and was a guest in the box of Mr. McManus along with Mr. Boyle and his late father. Mr. Desmond was also present, and there were approximately 20 to 25 people in the box during the time that he was present, which was approximately 5 to 6 hours. Mr. Desmond was present throughout much of that time. Mr. McGinley witnessed Mr. Boyle having a conversation with Mr. Desmond, which he thought lasted in the vicinity of 10 minutes. He did not overhear its content, but later that day Mr. Boyle reported to him in general terms in relation to what had been stated. In particular, Mr. Boyle informed him that Mr. Desmond had indicated that he had been approached by Mr. O'Brien to become Chairman of the Esat Digifone consortium; he also informed Mr. McGinley that Mr. Desmond had said that he was not going to become involved, because he had had enough of telecoms, which at that time was the aspect that was of greatest interest to Mr. Boyle and himself.

19.10 Mr. McGinley had not on that day heard from Mr. Boyle any reference to Mr. Desmond having stated that he knew who Mr. O'Brien would use to get to Mr. Lowry; he heard that from Mr. Boyle either in late 1995, or 1996. Their two offices were adjacent, and Mr. Boyle would generally come into his office in the morning to discuss matters relating to Persona, in which context it seemed that what happened was that the reference to Mr. Desmond's name as an investor in Esat Digifone highlighted in the mind of Mr. Boyle that further matter. Mr. McGinley recalled that he had introduced Mr. Boyle casually to Mr. Desmond on that particular occasion, having known Mr. Desmond for about 10 or 12 years

previously. He stated that he liked Mr. Desmond, and had nothing against him, indicating that their previous contact had only been of a sporting nature, and had never involved business discussions. Mr. McGinley stated that he had never been to Aintree previously, and consumed no alcohol on the occasion that he attended. His first conversation with Mr. Boyle later that day was approximately 1½ to 2 hours later, as they were walking down the terraces. It was the information that there was one important player less that seemed most material to them.

19.11 In response to further questions from other counsel, Mr. McGinley stated that his first involvement with the Tribunal came about through their solicitor, Mr. Gerard Moloney, informing him of the denial on the part of Mr. Desmond of the conversation, and advising him to make a statement on the basis of having been there, and informed of the conversation by Mr. Boyle. He could not recall telling Mr. Gerard Moloney of the conversation between himself and Mr. Boyle at the time of becoming aware of Mr. Desmond's investment in the successful consortium. December, 2002, was the first time that he committed the matter to writing, after Mr. Gerard Moloney had contacted him. Mr. McGinley further stated that his first record of Mr. Desmond stating that he knew who Mr. O'Brien would use to get to Mr. Lowry was his evidence then given. He did not insert the matter in his statement, as so much had taken place since. Mr. McGinley also remarked that Mr. Desmond may have just said this as a bit of bluster.

19.12 Some reference was also made by Mr. McGinley to the period following the announcement of the result of the competition, and to the steps taken by him and his colleagues on foot of what they perceived as an unjust outcome, including the seeking of reasons and related information at a meeting of consortium representatives with members of the Project Group, when he felt that not much relevant information had been forthcoming. In this regard, he also referred to correspondence he had addressed to the Taoiseach, Mr. John Bruton, in particular a letter of 28th February, 1996, which he stated had been spurred by having on the same day read a newspaper article, referring, amongst other matters, to the involvement of Mr. Dermot Desmond as an investor in the winning consortium. This, he confirmed to Tribunal counsel, was an Irish Times article written on that date by Mr. John McManus, setting forth in some detail matters relating to the composition of Esat Digifone, including Mr. Desmond's involvement.

19.13 In the course of Mr. Dermot Desmond's evidence, he addressed the matters that Mr. Boyle had referred to. In accordance with one of his statements furnished to the Tribunal, he confirmed that he had attended the Aintree race

meeting on the occasion in question, and was a guest in the box of Mr. J.P. McManus. He agreed that he had been acquainted with Mr. Boyle, whom he had met on a number of occasions, but stated that he had absolutely no recollection of Mr. Boyle being present in the box, or at the race meeting in April, 1995. In any event, Mr. Desmond stated that he did not speak with Mr. Boyle, and the conversation alleged by Mr. Boyle never took place, either at Aintree, or any other time. This applied to all of the remarks which Mr. Boyle had attributed to him. Returning to the matter of the Aintree meeting near the conclusion of his evidence, Mr. Desmond confirmed that the position as regards Mr. Boyle and Mr. McGinley had been absolutely as he had already stated, but took a more trenchant view, stating that Mr. Boyle had been a failed bidder who was bitter, and eaten up with envy. He had met Mr. Boyle socially on a number of occasions, and had no fallings out with him, and had never at any time discussed the GSM competition with him.

19.14 The Tribunal has considered the conflicting evidence of Mr. Boyle, as to the alleged content of the conversation in the hospitality box of Mr. J.P. McManus at Aintree, and Mr. Desmond as to no such conversation having then or at any time occurred. If, as suggested by Mr. Desmond, evidence of the conversation was no more than a concerted fabrication to damnify him on the part of a failed and embittered consortium, it might reasonably seem that somewhat more explicit and unequivocal statements might have been attributed to him; it might similarly on that basis seem that Mr. McGinley would have purported to have overheard any conversation, or at least to have heard the remark as to knowing who Mr. O'Brien would use to get to Mr. Lowry, conveyed to him when Mr. Boyle reported on the matter to Mr. McGinley later that day, rather than several months later. On balance, it appears to the Tribunal a probability that some conversation relating to the forthcoming GSM competition did take place on the occasion between Mr. Boyle and Mr. Desmond, and that, apart from indicating an unlikelihood that he would be involved, Mr. Desmond also made some remark referring to Mr. O'Brien and Mr. Lowry in terms broadly equating with Mr. Boyle's testimony.

19.15 Regard must also be had to the testimony of Mr. McGinley, who, whilst acknowledging that he was probably more incensed and upset by the competition outcome than any of his colleagues, nevertheless impressed the Tribunal as a careful and balanced witness on matters of fact. After stating that he liked Mr. Desmond and bore him no ill-will, he expressed the view that the remark relating to Mr. O'Brien and Mr. Lowry may have just been said by Mr. Desmond as a bit of bluster. In a matter of such potential magnitude as inferring knowledge on the part of Mr. Desmond of some possible improper association between Mr. O'Brien and Mr. Lowry in the context of the GSM competition, it is essential to assess available evidence carefully and warily. Given the context and

circumstances of any conversation had between Mr. Boyle and Mr. Desmond on the particular occasion, the relatively clear possibility that any such remark was made in terms that were less than fully clear or considered, and the ordinary principles to be applied in balancing the potential prejudicial as against probative effect of aspects of evidence, the Tribunal is satisfied that it should not draw adverse inferences in relation to any of the persons mentioned, arising out of this portion of the evidence.

COMPLAINTS AGAINST THE TRIBUNAL

19.16 Regarding the final matter referred to in the opening section of this chapter, which generated both some relatively heated exchanges in the course of public sittings, and a measure of protracted correspondence, the substantive facts are as follows:

- (i) Some fairly short time prior to the issue of the GSM licence to Esat Digifone in 1996, Mr. Gerard Moloney as solicitor to Persona engaged and instructed Mr. Jerry Healy SC, and Mr. Gerard Hogan, then a junior counsel and latterly one of the senior counsel retained by Mr. Desmond/IIU as legal representatives for purposes of the Tribunal. What Mr. Moloney sought from the barristers was advice on the feasibility of instituting judicial review proceedings, to compel the furnishing of reasons as to why Persona was not awarded the GSM licence. In the course of Mr. Boyle's evidence, he stated that the concerns of Persona at that time primarily related to what was seen as a lack of openness and transparency.
- (ii) Mr. Hogan prepared written advices in the matter, which were settled or approved by Mr. Healy, and furnished to Mr. Moloney. No judicial review proceedings were brought, but at a later stage substantive legal proceedings were instituted, for which purpose entirely different barristers were retained by Mr. Moloney. During Mr. Boyle's evidence, he stated that for the purposes of seeking the earlier advice, he only had a very limited discussion with Mr. Healy and Mr. Hogan, and that it was absolutely not the case that Mr. Healy gained any confidential information in regard to Persona's involvement in the process during those brief dealings.
- (iii) Having made full disclosure to the Tribunal Chairman when initially retained, of the nature and extent of his earlier retention by Persona, in March, 2001, Mr. Healy contacted counsel for Mr. Denis O'Brien, notified him in similar terms, and asked that he seek instructions as to

whether Mr. O'Brien, in these circumstances, had any objection to Mr. Healy's continuing role as Tribunal counsel, in the context of inquiries which it was then anticipated would be made into the grant of the GSM licence. Mr. Healy was subsequently informed by counsel for Mr. O'Brien that his client had no objections whatsoever, and this was further confirmed by a letter from Mr. O'Brien's solicitors, William Fry, of 28th May, 2001, in the following terms:

"Mr Healy S.C. of the Tribunal Counsel contacted our Mr McGonigal SC and indicated that at one stage he had been requested to act on behalf of Sigma/Motorola in connection with judicial review proceedings which were being considered following the granting of the Licence in October 1995. Mr. McGonigal quite rightly indicated, and our client fully accepts, that he would not in any way seek to identify a conflict of interest such that would exclude Mr. Healy S.C. from continuing with the Tribunal on this issue."

Other persons materially involved in the Tribunal's inquiries, namely Telenor, Mr. Michael Lowry, and the State, were at a later stage also notified of this matter, and likewise conveyed no objection to Mr. Healy continuing to act for the Tribunal. Such notification was not then conveyed to Mr. Dermot Desmond and IIU, as their involvement in the course of the GSM process was not viewed by the Tribunal as central, as indeed was reflected by the infrequent and sporadic attendance of their legal advisers at related public sittings.

- (iv) Further, by letter of 26th March, 2001, from the Tribunal to Mr. Moloney, it was sought on behalf of Mr. Healy that Persona would waive any duty of confidentiality which Mr. Healy owed to Persona in connection with his earlier retention, in particular with regard to any information he might have obtained in the course of carrying out that work. A letter of the same date from Mr. Moloney to the Tribunal confirmed that Persona was agreeable to releasing Mr. Healy from any obligation of confidentiality that he might have owed in that regard. Mr. Boyle, in the course of his evidence, recalled having been contacted by Mr. Moloney on the day in question, and confirming instructions to accede to the request, whilst, as already stated, having been of the view that no confidential information had been imparted, in the course of his brief dealings with Mr. Healy and Mr. Hogan. That waiver was not sought to enable Mr. Healy to make disclosure of confidential information to the Tribunal, he having received no such information from Persona, but as a prudent safeguarding of the

Tribunal's interests, in the event of a subsequent objection by Persona to Mr. Healy's role.

- (v) In the course of the Tribunal's confidential inquiries into the GSM licence award, a considerable amount of information and correspondence was conveyed to the Tribunal by Mr. Moloney on behalf of Persona. As was acknowledged in correspondence by the solicitors to Mr. O'Brien, most of this was unsolicited by the Tribunal. It was acknowledged by Mr. Boyle in his evidence that the majority of matters raised by Persona was not pursued by the Tribunal in the course of its public sittings.

19.17 Given the events that occurred, Mr. Healy as Tribunal counsel acted correctly and properly in relation to disclosure and notification of his earlier limited retention as counsel to advise Persona, and no conflict of interest such as precluded his continued retention by the Tribunal arose. Whilst the amount of contact between Persona and the Tribunal through their respective legal advisers was not insubstantial, and in the main, emanated from Persona and was unsought by the Tribunal, the Tribunal at all times determined the lines of inquiry it would pursue, and any view that it was improperly influenced, manipulated or directed by Persona in this regard is unwarranted and without foundation. Likewise the Tribunal was at all times aware of Persona's vested interest in investigations into the GSM process and, as with any information emanating from such a source, treated all such information received with care, circumspection and independence.

FURTHER ASPECTS OF EVIDENCE RELATING TO PERSONA

19.18 The balance of the evidence of Mr. Boyle and Mr. McGinley, heard in November, 2005, was comprised of relatively lengthy cross-examination, mainly on the part of counsel for the Department, and for Mr. O'Brien, relating primarily to interaction between Persona and the Tribunal, and to the steps taken within Persona to obtain explanations and redress for what was viewed by them as an unfair and unwarranted result. In the latter context, Mr. McGinley wrote letters of complaint, both to Mr. Lowry, and to the Taoiseach, Mr. Bruton, in 1996, but received in reply only responses that he viewed as being merely of a formal nature. Following lobbying from Persona and the other unsuccessful consortia, meetings were arranged between consortia representatives and the Department. The meeting held in respect of Persona was on 15th May, 1996, and appears to have been an argumentative affair which resolved nothing, with Persona complaining of being provided only with misleading and simplistic information as to how their bid was unsuccessful, and the Department's note of the meeting

referring to repeated interruptions on the part of the Persona representatives, and proceeding on the footing that the level of information that could be imparted to Persona was limited, by reason of confidentiality constraints. When it was put by Department counsel to Mr. Boyle that Persona had a vested interest in the Tribunal, and was trying to steer the Tribunal against the Department under the guise of being helpful, he responded that he had a desire for the truth, and that they had information which they provided to the Tribunal. Mr. Boyle stated that he was not disposed to regard as incorrect a view earlier expressed by him, that “*strings were pulled by Loughrey, Lowry and Brennan*”: it seemed to him that they controlled the rules, and had the Andersen Management International emblem stamp. But he said that it was absolutely not the case that he was a disgruntled loser, motivated by annoyance or malice. Like Mr. McGinley, he acknowledged that he was not in a position to provide specific evidence of impropriety against individual civil servants.

19.19 Whilst noting the evidence and conflicting positions adopted by Persona and the Department in relation to events subsequent to the announcement of the GSM competition result, the Tribunal finds it unnecessary to make findings or express views in this regard, and, in the context of its Terms of Reference, considers its primary obligation in regard to that period as assessing and reporting upon the post-result negotiations which culminated in the formal award of the licence to Esat Digifone.

THE QUANTITATIVE EVALUATION AND FURTHER CONSIDERATIONS AT PROJECT GROUP MEETING OF 4TH SEPTEMBER, 1995

20.01 The quantitative evaluation, which entailed the extraction of data from the mandatory tables submitted by applicants, and the inputting of that data to the AMI proprietary software package, was a mechanical exercise conducted by AMI in Copenhagen. When Mr. Andersen recently attended to give evidence, the Tribunal learned that it was Mr. Mikkel Vinter of AMI who was responsible for this exercise. The outcome of the exercise will be referred to in due course, but at this point it should be observed that, in the course of Mr. Vinter's work, it became apparent that some of the information provided by applicants in their mandatory tables had not been provided precisely in the form sought, or anticipated by AMI, or had not been provided in forms that were easily comparable. In the case of one indicator, Internal Rate of Return, IRR, which was to be measured over 15 years, information had not been provided by one applicant, Esat Digifone, for the years 1996 to 2010, as requested in the supplemental memorandum issued by the Department on 12th May, 1995, but instead had been provided for the years 1995 to 2009. On 21st August, 1995, AMI proposed that, in light of the receipt of incomparable data, IRR should be recalculated by reference to the first ten years of the business cases, and sought the Department's approval for that approach. As Mr. Martin Brennan was on annual leave around that time, AMI raised the matter with Ms. Maev Nic Lochlainn. Whilst she could not recall the issue, or how the Department responded to that proposal, as AMI proceeded to recalculate IRR on a base of 10, rather than 15 years, that course was presumably approved.

20.02 In order to meet the difficulty which had arisen from the provision of incomparable information, AMI also framed what they termed "*applicant specific questions*" to be addressed by the Department to each applicant. This was a step in the process provided for by virtue of paragraph 16 of the RFP document. These questions, as formulated by AMI, were duly forwarded to applicants, who were requested to provide written responses by 12 noon, on Monday, 4th September, 1995. It seems from Mr. Andersen's evidence that the responses to these questions did not resolve inconsistencies which had been identified by AMI in the figures for Blocking and Drop-out Rates, which were the quantitative indicators for the Performance Guarantee criterion.

PROJECT GROUP MEETING OF 4TH SEPTEMBER, 1995

20.03 The first meeting of the Project Group after the closing date of the process was on [4th September, 1995](#). There was a full attendance at the meeting, save for Mr. Donal Buggy, who was on leave, and Mr. Jimmy McMeel, of the Department of Finance, who was unavailable. The official report of the meeting, which was compiled by Ms. Nuala Free, was dated 6th September, 1995, and a copy can be found within the Book of Appendices to this Volume.

Results of quantitative evaluation

First set of results and consideration by Project Group

20.04 From the contents of the official report, the contemporaneous notes that were available, and the recollections of those present, it is evident that the principal focus of the meeting was AMI's presentation of the results of the quantitative evaluation. AMI were represented at the meeting by Mr. Michael Andersen, Mr. Marius Jacobsen and Mr. Mikkel Vinter. It appears that Mr. Andersen both delivered a verbal presentation to the meeting, and distributed a set of draft quantitative results of [30th August, 1995](#). The seven page document contained the computer generated results of the exercise whereby the raw data, extracted from mandatory tables, had been applied to the formulae that had been agreed and adopted by the Project Group, to score the thirteen indicators of the quantitative evaluation. In order to facilitate an understanding of the results of that exercise, and how they related to the task of adjudicating between applications, by reference to the evaluation criteria, it is useful at this point to replicate the table already set out in Chapter 11 of this Volume, which shows the relationship between the evaluation criteria, and AMI's dimensions and indicators for the quantitative evaluation.

Evaluation criteria from Paragraph 19 in the RFP document	Dimensions linked to each evaluation criteria	Indicators for the dimensions.
Credibility of business plan and applicant’s approach to market development.	Market Development Experience of the applicant Financial key figures	Forecasted demand Number of network occurrences in the mobile field Solvency and IRR
Quality and viability of technical approach proposed and its compliance with the requirements set out herein	Radio network architecture Capacity of the network	Number of cells Reserve capacity
The approach to tariffing proposed by the applicant which must be competitive	Tariffs	Competitiveness of an OECD-like GSM2 basket
The amount the applicant is prepared to pay for the right to the licence	Licence payment	Up front licence fee payment
Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded	Coverage	Speed and extend [sic] of demographical coverage of class IV (2W) handheld terminals
The extent of applicant’s international roaming plan	International roaming plan	Number of international roaming agreements
The performance guarantee proposed by the applicant	Quality of service performance	Blocking rate and dropout rate
Efficiency of proposed use of frequency spectrum resources	Frequency efficiency	Frequency economy figure

20.05 The document presented to the Project Group on 4th September, 1995, dated 30th August, 1995, contained the numerical results for each of those thirteen indicators, that is:

- (i) Forecasted demand;
- (ii) Number of network occurrences in the mobile field;
- (iii) Solvency;
- (iv) IRR;
- (v) Number of cells;
- (vi) Reserve capacity;
- (vii) Competitiveness of an OECD-like GSM 2 basket;
- (viii) Upfront licence fee payment;

- (ix) Speed of demographical coverage of class IV (2W) handheld terminals;
- (x) Number of international roaming agreements;
- (xi) Blocking rate;
- (xii) Drop-out rate;
- (xiii) Frequency economy figure.

20.06 Following the presentation of the results for each individual indicator, page 6 of the document contained a composite table which showed the scores, on a scale of 1 to 5, for each of those thirteen indicators. The final page contained two further tables. The first listed the weightings applied to each indicator, the total weighted score for each applicant, and the highest weighted score. The second contained statistical information, including the average score for each indicator. The overall results of the quantitative evaluation, as shown on the final page of the document, were as follows:

A1	A2	A3	A4	A5	A6
3.05	2.91	3.48	2.96	3.13	3.19

A3, Persona, was recorded as the highest scoring applicant, with A6, Eurofone, in second place, and A5, Esat Digifone, in third place.

20.07 The official report of the Project Group meeting recorded that before presenting the results, Mr. Andersen “*acknowledged certain shortcomings in the results gleaned so far from the quantitative scoring.*” The report then identified the matters that “*had highlighted some incomparable elements*”.

20.08 The first was the indicator OECD Basket, which was the sole indicator measured for the third dimension, Tariffs, which reflected the third evaluation criterion. The indicator accounted for 18% of the total weightings, following the recasting of the weighting matrix consequent on the capping of the licence fee. This indicator was to be measured by a comparison between projected tariffs in year 4 of the business case, and a standard set of tariffs known as “TACS 900”. The output of the measurement was expressed as a percentage price reduction compared to “TACS 900”, and these price reductions were then accorded points on a scale from 1 to 5. When compiling the mandatory tables, from which the data was extracted, it was noted that some applicants had not translated the relevant material, from their business cases to their mandatory tables, to their own best advantage. In other words, the data in the mandatory tables did not always fairly reflect what applicants intended to do according to their applications. Departmental witnesses agreed that this shortcoming was

unconnected with the Evaluation Model, and specifically the method by which the indicator was to be measured, but was due entirely to the manner in which applicants had themselves completed their mandatory tables. This difficulty was subsequently remedied, by extracting the correct figures from the business cases of the two applicants in question, namely, A4, Irish Cellular, and A6, Eurofone, and their results were recalculated.

20.09 The second element of inconsistency identified arose in the context of the indicator Internal Rate of Return, IRR, being the percentage return on money invested in the business, one of the two indicators for the dimension Financial Key Figures. That dimension was one of three dimensions of the first evaluation criterion, Credibility of Business Plan and Applicant's Approach to Market Development. Financial Key Figures carried a weighting of 15, and this was split equally between Solvency and IRR, so that IRR carried a weighting of 7.5. The method whereby IRR was to be scored had been subject to a fundamental revision by the Project Group. It will be recalled that AMI had proposed that the highest projected IRR should be awarded the highest score, but that the Project Group had disagreed with that approach, and had fixed a median IRR of 11%, as being the optimal level, with differences on each side of 11% being scored down.

20.10 According to the Evaluation Model, IRR was to be calculated for the entire fifteen year business plan. The problem which had arisen was, as already stated, that one applicant, A5, Esat Digifone, had provided figures for 15 years from 1995, rather than from 1996, as requested in the supplemental memorandum of 12th May, 1995. AMI had identified this inconsistency at an earlier stage, and, as previously mentioned, had written to Ms. Nic Lochlainn on 21st August, 1995, drawing the Department's attention to the matter, and requesting approval for their proposal that they recalculate IRR by reference to the first 10 rather than 15 years of operation. It seems that this matter had been clarified in advance of generating the results of 30th August, 1995, as the IRR computation was made on that base.

20.11 The third element of inconsistency related to the indicator Number of Roaming Agreements, the sole indicator for the dimension International Roaming Plan, which was in turn the only dimension associated with the sixth evaluation criterion, Extent of Applicant's International Roaming Plan. In the Evaluation Model, the indicator was weighted at 6, and was to be measured by the number of international roaming agreements planned by the end of the second year of operation. The Evaluation Model had recognised that such information might not be provided, and had stipulated that, in that event, the indicator would not be scored quantitatively. That is precisely the eventuality which came to pass, and the quantitative results recorded that, as insufficient information had been

provided, the indicator was not scored. Instead, each applicant was notionally awarded full marks of 5 for the indicator.

20.12 The fourth problematic element, to which reference was made in the official report of the Project Group meeting, was a time sensitivity detected in the case of some of the indicators measured quantitatively, so that, to take the example instanced in the report, if scored in year four, they gave one ranking, and if scored in year fifteen, they gave another ranking. The Evaluation Model had of course already selected and fixed the year or years for which indicators were to be scored, so that the temporal issue, although recognised and highlighted by Mr. Andersen, could not have undermined the reliability of the scoring, or the fairness of the comparison.

20.13 The official report of the Project Group meeting merely recorded the fact of the difficulties referred to above. None of the discussion of the Project Group surrounding the issues was detailed. In that regard, the Tribunal however had the benefit of Ms. Nic Lochlainn's contemporaneous notes, in which she had recorded some flavour of exchanges surrounding those issues, and her notes substantially confirmed the content of the official report. They also contained a record of discussion directed to further elements of the quantitative results, that were not reflected in that report.

20.14 In connection with the Performance Guarantee indicators, that is, Blocking and Drop-out Rates, Ms. Nic Lochlainn had noted that further information would be sought from applicants, and that, in light of that further information, the computations would be reworked. Ms. Nic Lochlainn had no recollection of the meeting, or of any of the discussion which she had noted, but confirmed that the Tribunal had correctly interpreted her notes. She also agreed, as was the case, that the Department, at AMI's suggestion, had, prior to 4th September, 1995, already written to applicants seeking further information on those matters, and that it was intended and agreed at the Project Group meeting that, on receipt of such further information, AMI would rerun the computations for those indicators.

20.15 Ms. Nic Lochlainn's notes also contained entries which she confirmed related to discussion of the Project Group surrounding the results of the evaluation of the financial indicators, that is, Solvency and IRR. She had made the entries reproduced below.

“ A2/A5 - high level of external financing.
equity. is ↓ (Op. deficit)”
eaten away

At the top of the following page, she had recorded

“During 1st inv – heavy years”.

She had also separately noted

“needs to be examined further in qual.

A2/A5 - Look bankrupt acc to this.”

Again Ms. Nic Lochlainn had no recollection of the discussion reflected by those entries, but she agreed that those were the notes which she had made at the time, and that they were based on the exchanges that had taken place between those in attendance.

20.16 Those exchanges recorded by Ms. Nic Lochlainn must have related to the results for the indicator Solvency, measured by reference to average solvency over years two, three, four and five of applicants’ business plans. The quantitative results recorded that A2, Cellstar, had a zero solvency, and that A5, Esat Digifone, had a negative solvency of 13% over the second to fifth years of operation. The solvency results for A2 and A5, as they appeared in the first and all subsequent quantitative results generated by AMI, are contained in the table below, which is an extract of the full table on page 5 of that first generated set of results.

	A2.	A5.
Solvency year 2	61%	5%
Solvency year 3	58%	-17%
Solvency year 4	- 55%	-24%
Solvency year 5	- 62%	-15%
Average solvency over years 2, 3, 4 & 5	0%	-13%
Points	1.00	1.00

This issue of solvency and indeed negative solvency, which at a later point in the evaluation took on considerable significance, appears to have been focused on, at least as regards A2 and A5, as early as the first meeting of the Project Group after the substantive process had commenced. It is clear from Ms. Nic Lochlainn’s notes that there was a concern surrounding the solvency scores of A2 and A5, and that it was decided by the Project Group that solvency would need to be scrutinised in the course of the qualitative evaluation.

20.17 In weighting the quantitative results for each indicator to arrive at total scores and a ranking, AMI had applied the weightings approved at the meeting of 9th June, 1995, that is, those weightings recorded in the Evaluation Model. Adjustments had not been made to reflect the 3% shift in weighting from the Licence Fee criterion to the Tariffs criterion, approved on 27th July, 1995, following the European Commission intervention. In this regard, the official report of the meeting recorded as follows that:

“The need to reflect a change in the weighting for the licence fee was highlighted. AMI committed to correct the model in this respect.”

In addition to that change, the results were also to be revised, following the exclusion of the indicator for International Roaming, which could not be scored due to provision of insufficient information, and following the recalculation of the results for Blocking and Drop-out Rates, when further information sought from applicants was received.

20.18 When Mr. Andersen attended to give evidence, it was his testimony that the errors in the weightings applied in the first set of quantitative results, dated 30th August, 1995, were not confined to AMI's failure to reallocate the 3% weighting between the indicators for Licence Fee and Tariffs. He quite correctly observed that the errors extended to the weighting base, which came to 103 rather than 100. This arose from the errors made in the total weightings of the three indicators of the first-ranked criterion, Credibility of Business Plan and Applicants' Approach to Market Development, which came to 32.5, rather than 30, the agreed criterion weighting. Additionally, the weighting for the Coverage indicator was shown at 7.5 in the Evaluation Model, rather than 7, the agreed criterion weighting in that case. Mr. Andersen accepted that the renormalisation of those weightings was a straightforward arithmetic operation, involving the application of the fraction 32.5 over 30 to the three indicator weightings of the first-ranked criterion, together with the simple deduction of 0.5 from the Coverage indicator to bring it back to 7. The Departmental documents included a document whereby a renormalisation exercise was conducted, but this recorded an operation whereby all the criteria weightings were renormalised by the application of a multiplier of 103 over 100, and whereby each of the resultant weightings were rounded to a single decimal point.

20.19 Apart from the three indicators highlighted in the official report, all other indicators had been correctly measured and scored in the quantitative evaluation. The official report recited that:

“The consensus was that the quantitative analysis was not sufficient on its own and that it would be returned to after both the presentations and the qualitative assessment.”

In this regard, Ms. Nic Lochlainn also referred to an entry in her contemporaneous notes “do not over exag. NBness of quantitative”, which is self-explanatory and which she attributed to Mr. Andersen. The Departmental officials all agreed that the consensus as recorded, namely, that the quantitative analysis was not sufficient on its own, and that it would be returned to after the presentations and the qualitative assessment, accorded precisely with the Evaluation Model, namely, that the quantitative evaluation would be followed by a qualitative evaluation, which would in turn be followed by a revisiting of the quantitative results. The official report also recorded that the figures that had been used by applicants could not be taken at face value, and needed to be scrutinised.

20.20 The final entry in the official report on this point was:

“Mr. Andersen concluded that the scoring at this stage was relatively close and that no conclusions could yet be drawn.”

Departmental officials agreed that the conclusion attributed to Mr. Andersen also accorded with the approach provided for in the Evaluation Model, which did not contemplate a result based solely on the outcome of a quantitative evaluation, albeit that the Project Group had been informed, and AMI had stated in their tender document, that the quantitative and the qualitative evaluations frequently yielded the same result.

20.21 It appears further from Mr. Andersen’s concluding remarks that he regarded the results of the quantitative analysis as “*relatively close*”. Those present at the meeting agreed that the entry accurately reflected the view expressed by Mr. Andersen at the time. The Tribunal has computed that the percentage difference in the scores of the first and second-ranked applicants, A3 and A6, was 5.8%, and the percentage difference in the scores of the second and third-ranked applicants, A6 and A5, was 1.2%.

20.22 From the contents of the official report, from Ms. Nic Lochlainn’s handwritten notes, and from the evidence heard by the Tribunal, it seems that, following consideration of the quantitative results by the Project Group, AMI was to prepare a revised set of results to reflect the following:

- (i) the exclusion of the indicator for International Roaming which, as had been anticipated, could not be measured quantitatively, due to the insufficiency of information contained in applications;
- (ii) the correction of the Tariffs computations for A4, Irish Cellular, and A6, Eurofone, by reference to the figures in their business cases;
- (iii) the application of the correct weightings for Tariffs and Licence Fee, that is, the addition of 3 to the weighting for Tariffs, and the deduction of 3 from the weighting for Licence Fee;
- (iv) the computation of Blocking and Drop-out Rates, on receipt of additional information which had been sought from applicants.

20.23 A fully corrected set of quantitative results was never generated by AMI, and Mr. Andersen himself acknowledged that the final set of quantitative results, apparently generated on 2nd October, 1995, and according to his evidence brought by him to a Project Group meeting of 9th October, 1995, but not seemingly circulated, not referred to in the contemporaneous notes of that meeting, and not appearing on the Departmental files, continued to exhibit errors, and those results were described by Mr. Andersen as academic.

20.24 Mr. Andersen testified, when he belatedly attended after notification of Provisional Findings, that it was clear to him from 4th September, 1995, that due to incomparable elements of the applications received, the quantitative analysis was so bereft of statistical reliability that it could not be performed as a separate analysis, or generate a valid quantitative ranking. If this be so, it is clear that he did not share that view with the Project Group, as none of the Departmental witnesses testified that the shortcomings identified by Mr. Andersen at that juncture had led them to the view that the quantitative analysis, as a self-contained output of the evaluation, had become redundant. Whatever Mr. Andersen's own views, his consultants in AMI, including Mr. Mikkel Vinter, who was responsible for the quantitative analysis, returned to Copenhagen and continued in their efforts to correct the errors apparent in the first set of results.

Second set of results

20.25 A second set of quantitative results was generated by AMI in the same format as the results of 30th August, 1995, and was dated [20th September, 1995](#). This version was identical to the earlier version, save that the indicator for International Roaming was excluded, in accordance with what was agreed at the Project Group meeting of 4th September, 1995, and for some reason the results for IRR were altered. It seems that there had been no progress made in the

scoring of Blocking or Drop-out Rates, following the receipt of additional information from applicants, and the results for this indicator remained unchanged. Slightly different weightings were applied in the second set of results to the remaining twelve indicators. It is not entirely clear what AMI had intended, or what they sought to achieve, in applying those different weightings. Whilst the Licence Fee weighting had certainly been reduced, the Tariff weighting had not been increased to 18. The total of the weightings applied was 100.01. These changes suggest that AMI may have been endeavouring to recast the weightings to reflect three operations: firstly, an incomplete reallocation of the weighting of 3 from Licence Fee to Tariffs; secondly, the redistribution of the weighting of 6 from International Roaming, which had been excluded; and thirdly, a form of renormalising exercise to bring the weighting base back to 100 from 103. There was a reduction in the total weighted score for each of the applicants, and the total scores were as follows:

A1	A2	A3	A4	A5	A6
2.77	2.62	3.22	2.67	2.85	2.91

The highest ranking score was 3.22, and the order of ranking remained unchanged, that is, A3, Persona, followed by A6, Eurofone, followed by A5, Esat Digifone.

20.26 A copy of these results was within the Departmental files made available to the Tribunal, so that there can be no doubt that they were received by the Department. None of the Departmental witnesses could be of assistance as to whether they had ever seen a copy of them. Ms. Nic Lochlainn, who had no memory of the results at all, suggested that they might have been generated by AMI merely to enable correct inputs to be made into the qualitative evaluation which was then underway. Mr. Martin Brennan had been in Copenhagen on 20th September, 1995, for the final phase of qualitative sub-groups, and although having no memory of these results, thought it probable that AMI had furnished them to him in Copenhagen, and that he had brought them back with him to the Department. What is clear is that this second set of results was not circulated to the full membership of the Project Group, nor does it appear to have been the subject of discussion at any meeting of the Group.

20.27 A copy of the second version of the results had, it seems, been provided to Mr. Billy Riordan, who was in Copenhagen on 19th and 20th September, 1995, for a scheduled meeting of the Financial Key Figures sub-group, which in the event could not proceed, as AMI had failed to complete a reformatting of applicants’ mandatory tables, in accordance with specifications furnished by Mr. Riordan the previous week. Mr. Riordan had marked his copy

of these results “*Final Version*”. His focus was on the results of the two financial indicators, Solvency, which had remained unchanged from the first set of results of 30th August, 1995, and IRR, which had been altered. As regards the latter results, Mr. Riordan had recorded:

“These could not be correct.”

20.28 Mr. Andersen’s evidence, when he recently attended, was less than illuminating on the circumstances surrounding either the generation or consideration of the second set of results. He had no understanding as to why the weightings were adjusted, and he had no idea as to why Mr. Mikkel Vinter produced a table of different weightings. He struggled, as he described it, to understand those weightings, but it was clear to him that they were wrong.

20.29 Mr. Andersen was partly correct, in that the weightings applied to the second set of quantitative results were wrong. The 3% weighting shift was not correctly reflected, and, whilst the 6% weighting loss arising from the exclusion of the International Roaming indicator had been reallocated, the renormalisation of the 32.5 and 7.5 weightings for the indicators of the first and fifth-ranked criteria had not been carried out. It must be recorded that, whatever about any unreliability in the results for the Tariffs and Blocking and Drop-out Rates indicators, due to the receipt of incomparable information, and whether or not that was ultimately due to deficiencies in the RFP document, as so consistently repeated by Mr. Andersen, AMI, as expert consultants, who had designed the quantitative evaluation and the weighting matrix, displayed a surprising ineptitude in what was no more than a relatively straightforward arithmetic exercise.

Third set of results

20.30 A final version of the quantitative results was also available to the Tribunal, which the Tribunal was informed had been generated by AMI on 2nd October, 1995. This version contained no changes in the results for individual indicators, save that the initial results for IRR were reinstated, and the Tariffs computation for A4 and A6 had been revised. The weightings applied to the results reverted to those used in the first set, that is, the weightings agreed at the meeting of 9th June and recorded in the Evaluation Model, save that the weightings matrix did reflect the 3% reallocation between Tariffs and Licence Fee. However, in this version, there was no redistribution of the 6% weighting for International Roaming, and instead that 6% had simply been deducted, so that the weighting base had been reduced from 103 to 97. This version recorded overall results as follows:

A1	A2	A3	A4	A5	A6
2.73	2.90	3.19	3.09	3.01	3.41

20.31 As is apparent, there was a change in the order of ranking, in that the positions of A3, Persona, and A6, Eurofone, were reversed, so that A6, Eurofone, was ranked first, followed by A3, Persona. A5, Esat Digifone, slipped from third to fourth position. A copy of these results was not within the Departmental files available to the Tribunal, and no Departmental witness was aware or had any knowledge of them. They were provided to the Tribunal on 20th June, 2002, by solicitors acting for Merkantildata, a Norwegian company which had then recently acquired Mr. Andersen’s interest in AMI, and had taken over the entire business. The Tribunal was informed that it appeared from AMI’s computer records that the document had originally been generated on [2nd October, 1995](#), and that the date which it bore, 17th June, 2002, merely recorded that it had been printed from AMI’s computer on that date. There was no reference to the third set of results, or indeed the second set, in any record, official or otherwise, of meetings of the Project Group.

20.32 Mr. Andersen testified that he had seen a copy of the third set of results within AMI’s files. It was his recollection that he brought a copy of those results with him to the Project Group meeting of 9th October, 1995, at which the output of the process and AMI’s first draft Evaluation Report were due to be considered for the first time by the Project Group as a whole. He did not believe that he had circulated copies of them in advance of the meeting, but had brought them to the table, as he put it. He believed he had just one copy with him, and brought it back when he returned to Copenhagen. He thought he had shown the results to the Project Group, but it was, according to Mr. Andersen, already the sentiment of the Group that the results of the quantitative analysis should not be presented as a separate output of the process in the Evaluation Report. This matter will be returned to at a later point, but it must be recorded that, having regard to other significant lapses in Mr. Andersen’s recollection, it does seem unusual that he alone, amongst all those assembled from whom the Tribunal heard evidence, had such recollection of this issue, particularly as the contemporaneous record of the meeting noted detailed discussion of the topic, but made no reference at all to any further set of quantitative results.

20.33 In his Statement of 13th April, 2010, provided to the Tribunal by solicitors acting for Mr. Denis O’Brien, Mr. Andersen made a number of allegations about the manner in which the Tribunal had conducted its inquiries. Amongst those was an accusation that the Tribunal had consistently omitted to refer to or raise with witnesses the third set of quantitative results. In his Statement, Mr. Andersen had described this set of results as the “correct”

results, although in his evidence he resiled from that position, and testified that they, along with the earlier sets of results, were erroneous, and were academic, even though they were the final set of quantitative results generated. In the course of his evidence, Mr. Andersen accepted that he had been incorrect in accusing the Tribunal, as he did, of having failed to direct Departmental witnesses to, or ask them about, those results. It should be recorded that, although there was no trace of this third set of results within Departmental files, they were addressed at length in the Tribunal's Opening Statement in December, 2002, as was a memorandum concerning them, dated 20th June, 2002, furnished by AMI's Danish lawyer, and in addition they were raised with Departmental witnesses on a number of occasions long before Mr. Andersen's attendance.

20.34 It seems that the steps agreed, following the initial presentation by AMI of the quantitative analysis on 4th September, 1995, were never implemented. What was never generated was a document showing the results of the quantitative analysis, inputting the additional information that had been sought from applicants. Nor were renormalised weightings on a base of 100 ever applied. In the event, the quantitative results were never returned to, or revised following the completion of the qualitative analysis, as had been prescribed by the Evaluation Model, and those results played no distinct part in the adjudication of the six applications, or in the determination of the outcome of the process. The quantitative results, as a separate limb of analysis, were not published in the Evaluation Report which was ultimately produced, and accordingly the Report contained no explanation of how A5, Esat Digifone, which had never ranked higher than third place in the quantitative evaluation, was nonetheless nominated as the best applicant. This turn of events is considered in detail in later chapters of this Volume. Copies of all three sets of quantitative results can be found in the Book of Appendices to this Volume.

Further topics addressed at the Project Group meeting

20.35 Consideration was also given by the Project Group, at the meeting of 4th September, to procedures for the then forthcoming oral presentations which had been scheduled for the week commencing Monday, 11th September, 1995. The information memorandum circulated to interested parties on 28th April, 1995, had advised that the Department might invite applicants to make a presentation in the course of the process. AMI had prepared and proposed some general lines of inquiry to be pursued at presentations, and, in the course of the Project Group meeting, those proposals were discussed, and in some instances refined. The official report recorded that, in addition to those general areas of inquiry, AMI were to develop applicant-specific questions to be put at

the presentations, and they were also to brief the Project Group, in advance of the presentations, concerning any areas of weakness detected in applications, and on what was termed the underlying philosophies of the applicants, as identified by AMI. Other security measures were agreed, and a decision was taken that each presentation should be taped.

20.36 The final topic addressed in the course of the meeting was the future framework of the evaluation. It seems that AMI had proposed that ten separate sessions of sub-groups should be held for the purposes of the qualitative evaluation. It appears from the official report, and was confirmed in evidence, that AMI informed the Project Group at the meeting of 4th September, 1995, that five of those sessions had already been convened by them in Copenhagen, had been attended solely by AMI personnel, and had proceeded without representation from the Project Group. In the absence of any Departmental representation on the sub-groups, that development had, at least to some degree, undermined the role of the Project Group as evaluators. That departure, and the reasons for it, featured more prominently in a separate meeting between the Department and AMI on the same day, which forms the subject matter of the next chapter. The official report of the meeting recorded that AMI had made a commitment to provide the Project Group with documentation on the earlier sub-group meetings, and that members would be welcome to contribute to, or to suggest amendments to, the markings already awarded by AMI. As matters transpired, those sub-groups were all formally reconvened in Copenhagen in the latter part of September, 1995, with representatives of the Project Group in attendance, and the evaluations which had been conducted by AMI in late August were revisited. That part of the qualitative evaluation is returned to in a later chapter.

20.37 There was also consideration of a timetable for the other five qualitative sessions, which had not already proceeded, and of the personnel from the Project Group who should attend them. Mr. John McQuaid and Mr. Aidan Ryan were nominated to attend the Radio Network, Capacity of the Network, and Frequency Efficiency sessions, that is, the dimensions associated with the two technical criteria. These dimensions had been regrouped as Technical Aspects, and in view of their technical backgrounds, these officials were the natural choice to attend those sub-groups. Mr. Towey and Mr. Billy Riordan were nominated to attend the sub-groups on Financial Key Figures and Performance Guarantees, which were respectively associated with the first and seventh evaluation criteria. Mr. Riordan, as a qualified and experienced accountant, was likewise the natural choice to attend the Financial Key Figures sub-group, and Mr. Towey was presumably nominated because Mr. Donal Buggy was unavailable.

20.38 In terms of progressing the qualitative evaluation towards a ranking, AMI proposed that the qualitative marking for each of the dimensions, that is the accumulation of the markings for indicators, would be made within sub-groups, although the official report recorded that Mr. Brennan wished to have an opportunity to revisit those markings in the light of the oral presentations. The marking of Aspects would then proceed after the presentations.

20.39 It will be recalled that the Evaluation Model contained a marking matrix for the qualitative evaluation, which had regrouped the dimensions for each evaluation criterion, one for each criterion, except for Market Development which had three dimensions, and Technical Approach, which had two, into four Aspects, that is, Marketing, Technical, Financial and Management. The marking matrix, which is reproduced in Chapter 11, showed that a sub-total would be computed for each of these four Aspects, together with a sub-total for what was termed “*Other Aspects*”, defined as risks and the impact on the Irish economy. The grand total of the sub-totals for those five Aspects would then produce an overall ranking in the qualitative evaluation.

20.40 The decisions of the Project Group regarding the marking of applications in the qualitative evaluation were clearly directed and defined by that marking matrix. In that context, it was agreed that the Project Group would have an initial discussion of the qualitative evaluation markings on the afternoon of Thursday, 14th September, 1995, when, according to the official report, gaps in the evaluation would be highlighted, and when the extent of the necessity for supplemental analysis would be determined. It seems reasonable to observe that this agreement suggests that what AMI and the Project Group had in mind was that, on 14th September, 1995, the views of the membership of the Project Group on the qualitative markings would be canvassed, and that the membership would have an input into determining the extent of supplemental analysis necessary. A date of 3rd October, 1995, was suggested by AMI for the delivery of a draft qualitative report.

THE ANDERSEN FEE DISPUTE

21.01 What was not recorded in the report of the Project Group meeting of 4th September, 1995, or in any other report of the Project Group, was that a serious dispute had arisen between the Department and AMI in relation to AMI's fees. From the terms of the contract signed on 8th June, 1995, which placed a monetary ceiling on the fees payable to AMI, and which was the product of a formal tendering process, it would have seemed unlikely that there was scope for such a dispute. It seems that the genesis of the dispute lay in the receipt by the Department of six applications. In tendering for the consultancy work, and in setting out the approach to methodology that they would adopt if awarded the contract, AMI had proceeded on the footing that five applications would be received, although there was certainly no caveat in their tender regarding the maximum number that could be evaluated for the fee proposed, nor for that matter was there any such qualification in the contract signed between the parties in June, 1995. The first intimation in the documentation of disquiet on the part of AMI in relation to fees was within four days of the closing date of the competition. It will be recalled that on 8th August, 1995, Mr. Michael Andersen had forwarded to Mr. Fintan Towey a memorandum on conformance with the defined minimum formal requirements of the competition. In that fax he stated as follows:

"We have used more time on this part of the work than expected, as also an additional consultant was necessary. In addition, I already now foresee that we are understaffed re in particular tariffs, in which area I foresee that it will more difficult [sic] to compare the applications than expected. Thus, I have requested Michael Thrane to also have a closer look on the applications with a focus on marketing."

There then followed an exchange of correspondence between Mr. Andersen and Mr. Martin Brennan.

21.02 On 22nd August, 1995, Mr. Andersen wrote to Mr. Brennan, indicating that the evaluation was proving more demanding than had been anticipated, and detailing the additional unforeseen work that had arisen. Apart from the receipt of an extra application, Mr. Andersen pointed to the deployment of additional resources in the admittance procedure, the necessity of posing questions to applicants, and the requirement for a deeper evaluation of tariffs, consequent on the capping of the licence fee. Further, he highlighted the recomputation of IRR on a base of 10 rather than 15 years, due to the use of a different planning period by A5, Esat Digifone, further analysis consequent on certain applicants having failed to reinvest funds after 10 years of operation, as required in the

supplementary memorandum of May, 1995, and the need to carry out more supplementary analysis than had been foreseen. Mr. Andersen closed by informing Mr. Brennan that AMI intended to invoice for these items as ancillary work, under a separate contractual arrangement concluded between the Department and AMI, after the fixed price contract of 9th June, 1995, to provide for the payment of fees to cover AMI's assistance to the Department in connection with the EU intervention.

21.03 Mr. Brennan responded at some length on 29th August, 1995. Having set forth the history of contractual arrangements between the Department and AMI, he addressed each of the instances of additional work identified in the letter of 22nd August, 1995. He pointed out that those items were provided for in AMI's tender document, and asserted that they therefore formed part of the contractual obligations assumed by AMI under the fixed price contract. Mr. Brennan observed that as international consultants, he would have expected AMI to have anticipated the necessity for supplementary analysis, and to have foreseen that applications received might not be immediately comparable. Mr. Brennan concluded by stating that he trusted that AMI would review their invoicing procedure.

21.04 Mr. Andersen replied by an equally lengthy letter of 1st September, 1995, in which he joined issue with Mr. Brennan on the extent of services provided for by the fixed price contract. He complained that Departmental personnel had not made themselves available to participate in sub-groups in connection with the qualitative evaluation, and he contended that Departmental officials had instructed applicants, prior to the closing date, that they could deviate from the tender specifications, and further that they had from early August, 1995, sought additional consultancy services. Mr. Andersen indicated that, in recognition of the Department's budgetary constraints, AMI intended to scale down their input, by replacing senior with more junior personnel, by reducing their attendance at the forthcoming oral presentations, and by deferring the preparation of spreadsheets and graphics. In conclusion, Mr. Andersen proposed a meeting after the Project Group meeting scheduled for 4th September, 1995, to endeavour to resolve the differences that had arisen.

21.05 The meeting as proposed by Mr. Andersen proceeded after the Project Group meeting of 4th September, 1995, and was attended by a subset of the Project Group, comprising Mr. Brennan and the two other representatives of the Development Division, Mr. Towey and Ms. Maev Nic Lochlainn. None of the other members of the Project Group were informed of the meeting, or of the fact that a dispute had arisen with AMI, or of the resolution of that dispute. Mr. Sean McMahon, who was in overall charge of the Regulatory Division, had never

previously been aware of the dispute or the issues that arose, and only learnt of them for the first time in the course of the Tribunal's inquiries.

21.06 A report of the side meeting of 4th September, 1995, was prepared by Ms. Nic Lochlainn, and all three Departmental officials who had attended that meeting confirmed that its contents correctly reflected what had transpired. Mr. Andersen, when he attended recently to give evidence, did not agree that the note was accurate. Although his recollection of many aspects of the process was, as will become apparent, less than reliable, he was confident that he could not recall a number of the matters recorded by Ms. Nic Lochlainn as having been said at the meeting. He regarded elements of her note as overstating matters, overall he characterised it as an insurance policy for the Departmental officials involved, and thought that the terms in which the note had been drafted had been deliberately intended to justify increasing his consultancy fees.

21.07 Ms. Nic Lochlainn's report was illuminating, both as to the background to the dispute, and the course of exchanges at the meeting itself. It recorded that initially AMI and the Department put their respective positions on record. AMI's position was that there was considerable extra work required of which the Department was unaware, and that the nature of that work meant that it was difficult to establish the likely cost of a full analysis. AMI further contended that Mr. Towey and Ms. Nic Lochlainn had already approved, in large part, the additional tasks undertaken. The Department's position, in a nutshell, was that AMI had concluded a fixed price contract, subject to the payment of a maximum fee, and were now seeking to disregard its terms. Certain ancillary tasks, some associated with the services provided in the context of the Commission intervention, and others arising from matters that the Department accepted were unforeseen, had been subject to a separate agreement, but AMI were seeking to invoice under that separate agreement tasks which the Department considered properly formed part of the main fixed price contract. Those matters reflected what was contained in the exchange of correspondence which had already passed between Mr. Brennan and Mr. Andersen.

21.08 The report recorded that Mr. Andersen responded by indicating that it had not been possible for AMI to determine in the previous June, when the contract had been signed, whether the consultancy work on the evaluation could or could not be completed within the maximum fee stipulated, as they had not then had sight of the tenders. Mr. Brennan, understandably, pointed out that what Mr. Andersen was saying made a farce of the agreement concluded and signed by both parties. As the meeting progressed, Mr. Andersen proposed that AMI would complete the evaluation strictly within their tender document, and would work within the fee limit, but that they might not be able to stand over the

evaluation. He confirmed, on clarification having been sought by Mr. Brennan, that what he meant by this was that AMI would submit a report with reservations, and that there would be no quantification of the difference between the first and second-ranked candidates. What Mr. Andersen was suggesting was that the tender document submitted by AMI, and the consultancy agreement concluded with the Department, did not oblige AMI to produce a ranking, but merely to conduct an evaluation. Mr. Andersen accepted that he had indicated that, if adequate or sufficient resources were not made available, AMI would stick to their tender, and he observed that their tender document did not say very much about ranking the applicants. The report recorded that the meeting concluded on the footing that AMI would revert to the Department with an estimate of the additional work envisaged, and that the Department would revisit the items for which AMI were seeking payment as ancillary tasks, in addition to those governed by the main contract.

21.09 There can be no doubt that, as observed by Mr. Brennan in evidence, this dispute placed the Department in an invidious position. The Department had invited tenders for the consultancy, it had furnished all of the competition documentation, and had received tenders from a number of suitably qualified consultants. KPMG, London, which had assisted in the early design work on the competition, and in the finalisation of the RFP document, had been excluded in favour of AMI, in part by reference to cost considerations. AMI had lodged a tender document, proposing a fee which was without qualification, and had concluded an agreement with the Department subject to the payment of a maximum fee.

21.10 It appears that, apart from the assistance of AMI in connection with the European Commission intervention, which was clearly a separate and unforeseen event, what occurred was that following receipt of tenders, and when the Department had commenced a process that it had planned to complete by the end of the following November, AMI raised for the first time this issue of work which was not foreseeable on the conclusion of the fixed price agreement. Whilst it forms no part of the Tribunal's mandate to determine the rights or wrongs of the issue, the Tribunal can fully understand that the Department's response was to seek to reach an accommodation with AMI. The prospect of terminating AMI's consultancy, and appointing an alternative consultant to complete the work within the timescale envisaged, was considered, but was rejected as unfeasible. Such a change could certainly have had an adverse impact on the confidence of applicants in the Department's ability to carry out a fair or efficient evaluation. No doubt such a course could also have exposed the Department to an even greater cost overrun, as the Department might have been obliged to pay AMI for the work completed by early September, and would additionally have had to meet the costs of replacement consultants selected and

appointed at short notice. In these circumstances, the Department endeavoured to reach an accommodation with AMI. To that end, Mr. Brennan consulted with Mr. Jimmy McMeel of the Department of Finance, to obtain clearance for the payment of additional fees to AMI, and he separately consulted with the Attorney General's office, as there was a concern that the cost overrun could expose the Department to sanctions under EU procurement Regulations, which governed contracts involving a consideration in excess of a certain monetary value.

21.11 Ultimately, the dispute was resolved and the Department agreed to pay AMI additional fees. In concluding negotiations between the Department and AMI, Mr. Brennan wrote to Mr. Andersen on 14th September, 1995, and put proposals to him to compromise the dispute. At the Department's request, Mr. Andersen had furnished on 5th September, 1995, an estimate of AMI's additional fees at £97,613.00. What the Department proposed was that AMI would be paid an increased fee of £370,000.00, subject to them agreeing to the following conditions:

“

- *Complete all the steps outlined in the AMI tender submitted on 16th March, 1995,*
- *Carry out such supplementary analysis as are considered necessary by AMI along the lines identified in the minute from AMI dated 5th, September 1995,*
- *Submit, by a target date of 3rd October, 1995, unless an alternative date is expressly approved by the Department prior to the said date, a first draft of the evaluation report, along the lines set out at step 18 of the tender submitted on 16th March, 1995. The evaluation report shall contain a quantitative and a qualitative evaluation of all the applications and the results of any supplementary analyses undertaken. The report shall rank the top three applications for the GSM licence in order of merit according to the criteria prescribed by the Department, while detailing the differences between the applications which form the basis of this ranking. The evaluation report shall also nominate a winner and shall explain why the three applications not ranked do not qualify for ranking.*
- *The final evaluation report shall take account of comments provided by member[s] of the GSM Project Group. It is anticipated that comments from the GSM Project Group on the draft evaluation report shall be provided to AMI by 10, October 1995. Following consideration of such comments, AMI shall produce a further draft evaluation report*

in the format described above for the draft evaluation report by 17 October, 1995. This further draft evaluation report shall be discussed at a meeting of the GSM Project Group within six days. The final evaluation report taking into account the views of the GSM Project Group shall be submitted to the Department by AMI by 25 October, 1995, unless an alternative date is expressly approved by the Department prior to the said date.

- *carry out such further work which is not expressly specified at this time but would generally be considered reasonable to ensure a fair and objective evaluation on the applications for the GSM licence.*
- *participate in the preparation of a draft licence and in the licence negotiation process as outlined in the tender of 16 March, 1995.”*

21.12 In the light of what had occurred, it was undoubtedly a sensible course for the Department to define precisely what was required of AMI to complete their input into the evaluation. The confidence of the personnel involved in the reliability of AMI must inevitably have been dented by this dispute, and by the manner in which AMI placed the Department in a position where it felt obliged to accede to their demands. In that regard, Ms. Nic Lochlainn’s report of the side meeting of 4th September, 1995, recorded some serious criticisms of the quality of AMI’s work, to which further reference will be made below, although it should be noted that Mr. Andersen disputed Ms. Nic Lochlainn’s record in that regard.

21.13 The target date of 3rd October, 1995, for the provision of a first draft Evaluation Report, had of course already been fixed at the Project Group meeting earlier that day, 4th September, 1995, and was recorded in the official report of that meeting. In order to meet the deadline for the announcement of the result of the competition by end-November, 1995, it was sensible for the Department to seek a final report by at least 25th October, 1995, as it had been anticipated at the outset that four weeks would be required for Government consideration.

21.14 There was nothing new in the timeframe stipulated by Mr. Brennan in his letter of 14th September, 1995, or in the agreement of the Project Group that the first draft Evaluation Report should be provided by 3rd October, 1995. That timing roughly accorded with AMI’s own projections, prior to the closing date of the competition process. In that regard, AMI had provided the Department with the Gantt chart, already referred to, tracing the anticipated critical path of the process from start to finish, by reference to each of its constituent elements. It is apparent from that chart that the time limits prescribed by Mr. Brennan on 14th September, 1995, accorded with AMI’s own projections.

21.15 Apart from Mr. Jimmy McMeel, whose assistance was sought in securing Department of Finance clearance, no other member of the Project Group was informed of the fact of the fee dispute, or the terms on which it was resolved; nor apparently was the membership circulated with any of the relevant correspondence, including the letter of 14th September, 1995. More significantly, it appears that the Project Group was not informed of any of the criticisms of AMI's work recorded in Ms. Nic Lochlainn's report of the side meeting of 4th September, 1995, as follows:

“[Note:– The lesser quality of recent AMI work had become apparent in the meantime

- 1. graphical comparisons of applicants/spreadsheets had not been distributed to Project Group on 4 Sept as earlier promised by AMI;*
- 2. on 4 Sept, Jon Bruel had been replaced by Mikkel Vinter, a more junior colleague;*
- 3. sub-Groups [qualitative evaluation] had already taken place, although the AMI tender says that the evaluation would proceed as follows: - quantitative evaln, presentations, qualitative evaln.*
- 4. Very poor notes of the sub-group meetings, which AMI had conducted without DTEC participation, were handed to MNL for distribution to Project Group;*
- 5. the initial phase of review/re-evaluation after the presentations would take place on Thursday 14 Sept, when all evaluators would be exhausted after 4 days solid of meetings.*
- 6. No other evaluation meeting has been suggested by AMI]”*

21.16 There can be no doubt, as was acknowledged by Mr. Brennan, that what Ms. Nic Lochlainn had recorded reflected serious criticisms of the quality of AMI's work. Whilst Mr. Towey and Ms. Nic Lochlainn suggested that the deficiencies recorded may not in fact have represented the views of the Development Division personnel, but may have originated in a document circulated at the meeting by Mr. Andersen himself, those criticisms were nonetheless noted in the Departmental report, and clearly represented divergences from what the Department had expected of AMI. Mr. Andersen testified that none of those criticisms were levelled during his attendance at the meeting. If he had no recollection of them, as he testified, it is doubtful that they could have originated in a document that he had circulated.

21.17 Irrespective of the provenance of the criticisms, it was accepted by the Departmental officials who attended the meeting that they accurately reflected what had in fact occurred. Members of the Project Group were kept in ignorance of all these developments. They knew nothing of the fact of the dispute, how it arose, how it was approached by AMI, the involvement of the Department of Finance, the consultation with the Attorney General's office, or of the deviations which had been made, apparently unilaterally, by AMI from the Evaluation Model. These facts were all kept off the official reports of the Project Group, which constituted the only contemporaneous record of the evaluation process itself.

21.18 Having resolved the fee dispute, and having stipulated on 14th September, 1995, precisely what was expected of AMI, it appears that the Departmental officials involved, Mr. Brennan, Mr. Towey and Ms. Nic Lochlainn, were satisfied that AMI would complete their input into the evaluation in a professional manner, and could be relied upon to produce a quality Evaluation Report. Despite her professed confidence in AMI's professionalism and commitment to the project, Ms. Nic Lochlainn testified that it was her understanding that AMI's budgetary problems had arisen due to the use of an incorrect exchange rate in their tender document, and it was her impression that they had resource problems and that they wanted to finish the evaluation as quickly as possible. It is not clear to the Tribunal that the settlement of this dispute by the Department's agreement to pay AMI an additional £72,550.00, fully resolved AMI's budgetary issues. In that regard, the Tribunal has observed that in the memorandum of January, 2002, submitted by AMI to the Tribunal, for which AMI were paid a fee of £20,000.00 by the Department, and which Mr. Andersen confirmed had been co-authored by him, the Tribunal was informed that the budgetary constraints with regard to AMI's work meant that some supplementary analysis, that usually would have been part of a "best practice" evaluation, was not carried out.

21.19 Mr. Brennan's approach to the fee dispute with AMI was decisive and resolute, and was effective in securing a timely resolution. It was the Tribunal's overall impression that Mr. Brennan was a highly experienced civil servant of considerable ability, and that he was to a significant degree the driving force behind the work of the Project Group. What was evident in his handling of this first obstacle that arose in the process was an overriding desire to achieve an outcome: a desire which was understandable, and indeed in many respects commendable. However, in keeping both the fact of this dispute from his fellow members of the Project Group, and by excluding them from input into the decisions made as to how it should be resolved, Mr. Brennan may have lost sight of the fundamental nature of the exercise in which he was involved, namely, an

adjudicative process which was to be conducted by the Project Group as a whole. As the process evolved, and as further obstacles inevitably arose, this pattern of information and decision-making being kept outside the Project Group became increasingly pronounced, and ultimately was a pattern which exposed the process to a risk of outside interference and outside influence.

SECTION D

THE SECOND PHASE OF EVALUATION

THE INITIAL QUALITATIVE SESSIONS IN COPENHAGEN

22.01 The qualitative evaluation was the second limb of the process as prescribed by the Evaluation Model adopted by the Project Group at the meeting of 9th June, 1995. It was intended to entail a wider assessment, based on the subjective judgements of sub-groups of the Project Group which, through discussion, would reach a consensus on the grading of applications, on a scale from grade A to grade E. The markings which were to be the product of the qualitative evaluation were characterised as “*soft scale*”, in contrast to the hard scores that emerged from the quantitative assessment. It was intended that the sub-groups would consist of representatives of the Project Group, and of at least one member of AMI’s consulting team.

22.02 The Model stipulated that the qualitative evaluation would commence after the completion of the quantitative evaluation and the oral presentations. The logic of that structure was self-evident, in that it was envisaged that the quantitative results would form part of, or, as described by Departmental witnesses, would be an input into the qualitative evaluation, so that, by definition, the quantitative results had to be available before the qualitative evaluation could commence. The oral presentations were also intended to arm the evaluators with further information and impressions that they could bring to bear on their deliberations in the course of the qualitative analysis. In the event, that was not how matters transpired. In late August, 1995, AMI had proceeded with the qualitative evaluation, without representation from the Project Group. This was reported to the Project Group in Dublin on 4th September, 1995. Ultimately, it appears that the August sub-groups were reconvened with representation from the Project Group, and the approach taken by AMI, and the grades awarded, were reviewed. At least in one instance, in the case of the dimension Coverage, it appears that grades were altered following the input of Departmental personnel.

22.03 It will be recalled that in developing the methodology for the overall evaluation, the eight evaluation criteria had been recast as dimensions, and it was by reference to those dimensions that applications were to be compared and assessed. The dimensions for each of the evaluation criteria are shown in the table below:

Evaluation Criteria from Paragraph 19 of the RFP Document	Dimensions linked to each Evaluation Criteria
Credibility of business plan and applicant's approach to market development	Market Development Experience of the Applicant Financial Key Figures
Quality and viability of technical approach proposed and its compliance with the requirements set out herein	Radio Network Architecture Capacity of the Network
The approach to tariffing proposed by the applicant which must be competitive	Tariffs
The amount the applicant is prepared to pay for the right to the licence	Licence Payment
Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded	Coverage
The extent of applicant's international roaming plan	International Roaming Plan
The performance guarantee proposed by the applicant	Performance Guarantee
Efficiency of proposed use of frequency spectrum resources	Frequency Efficiency

22.04 There were therefore eleven dimensions to be assessed, and these eleven dimensions were common to both the quantitative and the qualitative approaches. The Evaluation Model had defined in advance how they were to be measured for the purposes of the quantitative evaluation, that is, by indicators, the formulae for which had been discussed at the Project Group Meetings of 18th May, 1995, and 9th June, 1995, and had been approved and fixed in advance. The Model provided that the same indicators were to be used in the qualitative evaluation, together with additional indicators to be agreed by the sub-groups, in advance of their deliberations.

22.05 These eleven dimensions were regrouped into four categories which AMI designated Aspects, and which were termed Technical Aspects, Financial Aspects, Management Aspects and Marketing Aspects. What the Tribunal, and no doubt the Departmental assessors, found slightly confusing was that the three dimensions of the first-ranked criterion, Credibility of Business Plan and Approach to Market Development, were not comprised within one single Aspect,

but rather spanned three Aspects. Market Development was categorised as a Marketing Aspect, Experience of Applicant was categorised as a Management Aspect, and Financial Key Figures was categorised as a Financial Aspect. The division of the eleven dimensions between AMI’s four Aspects is reflected in the table below, which was the marking matrix for the qualitative evaluation as contained in the Evaluation Model.

Aspects and dimensions	A1	A2	A3	A4	A5
Marketing aspects (subtotal)					
Market development Coverage Tariffs International roaming plan					
Technical aspects (subtotal)					
Radio network architecture Capacity of the network Performance guarantees Frequency efficiency					
Financial aspects (subtotal)					
Financial key figures Licence payment					
Management aspects (subtotal)					
Experience of the applicant					
Other aspects (subtotal)					
Risks (Effects on the Irish economy)					
Grand Total					

22.06 There were three qualitative evaluation sessions attended by Departmental officials in Copenhagen. The dates of those sessions, and the dimensions which were assessed in the course of them, are shown in the table below:

Date of Session	Dimensions Assessed
6 and 7 September, 1995	Financial Key Figures Performance Guarantees
7 to 9 September, 1995	Radio Network Architecture Capacity of Network Coverage Frequency Efficiency
19 and 20 September, 1995	Market Development Tariffs International Roaming Financial Key Figures Experience of Applicant

It was unnecessary to convene a sub-group to undertake a qualitative assessment of the dimension Licence Fee, as all applicants had bid the maximum of £15 million for the licence, and all were awarded an A grade in the qualitative evaluation for that dimension.

22.07 At the Project Group meeting of 4th September, 1995, when arrangements were made, Departmental representatives were nominated to attend the sub-group sessions. The intention was that members of the Project Group would be selected to assess the dimensions to which their specialist skills and experience most directly related. Mr. Billy Riordan, a chartered accountant on secondment to the Department of Finance, together with Mr. Fintan Towey, were nominated to attend the first session. Mr. John McQuaid and Mr. Aidan Ryan, the two representatives of the Technical Division, were nominated to attend the second session to evaluate the dimensions categorised as Technical Aspects. Mr. Riordan, who was to participate solely in the Financial Key Figures assessment, Mr. Martin Brennan, Mr. Fintan Towey and Ms. Maev Nic Lochlainn were nominated to attend the third session. Mr. Towey and Ms. Nic Lochlainn were to represent the Department on the Market Development and International Roaming sub-groups, and Mr. Towey, this time accompanied by Mr. Brennan, was to attend the Tariffs and Experience of Applicant sub-groups. It seems therefore that the sub-groups for six of the eleven dimensions were manned, on the Departmental side, exclusively by representatives of the Development Division, and that Mr. Towey attended all sub-group meetings other than those which assessed technical dimensions.

22.08 Conspicuous by their absence were Mr. Sean McMahon and Mr. Ed O’Callaghan of the Regulatory Division. In evidence, they both explained that they had discussed the possibility of one or other of them travelling to Copenhagen to participate in sub-groups, but due to work commitments within their Division, they were not free to do so. Mr. Jimmy McMeel of the Department of Finance played no role in the sub-groups, nor did Mr. Donal Buggy, also a

chartered accountant on secondment to the Department: the former was heavily committed in other areas of responsibility, and the latter was on annual leave until the end of the month of September. As matters unfolded, the representatives of the Development Division, and in particular Mr. Brennan and Mr. Towey, assumed a dominant role in the sub-groups and ultimately, by any reckoning, assumed a dominant role in the entire evaluation as it proceeded towards its conclusion.

22.09 In endeavouring to trace the progress of the qualitative evaluation, the Tribunal's task was significantly hampered by the absence of a systematic documentary record of deliberations of the sub-groups, of how a consensus was achieved within the sub-groups, of how agreement was arrived at on the markings for each dimension, and what implicit or explicit weightings were attributed to indicators in order to arrive at an overall grade for each dimension. It seems that Departmental representatives relied on AMI to keep records, although Mr. Andersen testified that AMI were not responsible for record keeping or other audit trail matters in connection with the evaluation of applications, and that this function was solely the responsibility of the Department. According to Mr. Andersen, before their appointment as consultants, AMI had offered to perform this function, but that offer had been declined by the Department. Whilst some of AMI's working documents were available to the Tribunal, they primarily related to the sub-groups conducted without Departmental participation, prior to 4th September, 1995, and which were subsequently reviewed. What the Tribunal primarily considered were the following matters:

- (i) The recollections of those who attended, and principally those of Mr. Towey and Mr. McQuaid, both of whom provided the Tribunal with valuable assistance.
- (ii) The limited number of AMI working documents available, together with reports of Project Group meetings, and copies of fax communications between AMI and the Department, and principally with Mr. Brennan and Mr. Towey.
- (iii) AMI's first draft Evaluation Report dated 3rd October, 1995, which presented the outcome of the qualitative evaluation, dimension by dimension. The results for each dimension were presented in tabular form, accompanied by narrative commentary. In that regard, it seems from the evidence of Mr. Towey, who attended all sub-groups, with the exception of those relating to Technical Aspects, that AMI came to each sub-group, and circulated participants with documents containing an outline of the indicators which they proposed should be assessed, their views of each application, by reference to those indicators, and their

suggested grading of those indicators, together with an overall marking of the dimension to which the sub-group related. It appears that discussions at sub-groups were directed by reference to the contents of those documents, and that the documents, subject of course in many instances to amendment, formed a foundation for the material which ultimately appeared in the first draft Evaluation Report of 3rd October, 1995.

22.10 The Tribunal's understanding of how sub-groups operated was largely derived from the helpful evidence of Mr. Towey, who participated in all of the non-technical sub-groups, and of Mr. McQuaid, who was involved solely in those technical sub-groups. Their accounts, whilst differing in relation to one significant element, were largely in conformity.

22.11 According to Mr. Towey, AMI proposed the indicators to be used in assessing the dimension under consideration. In all cases, these included the indicators already measured in the quantitative evaluation. They also proposed additional indicators that they judged to be necessary to ensure a fair and equitable comparison. The issue of whether the proposed additional indicators were the correct indicators was discussed, and this discussion led in some instances to the adoption of AMI's additional indicators, or the substitution of others. Having reached a consensus on the indicators to be evaluated, AMI proposed a marking for each application by reference to each agreed indicator. In so doing, AMI explained the rationale underlying their thinking, and this, according to Mr. Towey, formed the basis for an interaction within the sub-group until a consensus was achieved. In some instances, AMI's provisional markings were adopted, and in other instances they were altered.

22.12 Mr. Towey recalled that, for the purposes of leading the sub-groups through their proposals, AMI circulated participants with summary documents setting out the suggested indicators, their assessment of the applications by reference to those indicators, and their provisional markings. It was Mr. Towey's view, and from the documents led in evidence the Tribunal believes that he was correct, that these documents which AMI circulated were initial drafts of the constituent parts of the draft Evaluation Report ultimately furnished by AMI.

22.13 This process resulted in a series of grades on a scale from A to E for each application, referable to each of the indicators assessed. It was in the method of aggregating these grades, to arrive at a total for the dimension evaluated, that there was a divergence between the procedure followed in sub-groups attended by Mr. Towey, and that followed in sub-groups attended by Mr. McQuaid and Mr. Ryan.

22.14 At the sub-groups attended by Mr. Towey, indicators were aggregated by way of discussion and consensus as to their relative importance. Having completed marking each indicator, discussion was directed to their relative significance, and the most important indicators were identified. The next step was to appraise the markings for each application, and to reach agreement on the overall dimension grade to reflect fairly the indicator markings, and the relative importance attributed to those indicators. Mr. Towey accepted that this approach amounted to the application of implied weightings, and that the overall marks for each dimension represented the application of the subjective judgements of sub-group participants, both as to the grades awarded for each indicator, and as to the aggregation of those grades to arrive at overall totals for the dimension under assessment.

22.15 The four sub-groups which Mr. McQuaid and Mr. Ryan attended used a different method to aggregate indicator grades to arrive at totals. Mr. McQuaid explained that the very last step taken in his sub-groups was to decide on the relative importance of each indicator. They then proceeded to fix numerical weightings on a base of 100 to reflect that relative importance. This left a set of numerical weightings to be applied to lettered grades, which was a mathematical operation of inherent difficulty. According to Mr. McQuaid, they converted the lettered grades to numbers, that is, A to 5, B to 4, C to 3, D to 2 and E to 1, and having done so, they then applied the numerical weightings to what had become numerical scores. The product of that calculation was a set of numerical scores which they then converted back to lettered grades, which then represented the result for the evaluation of the dimension. It was the view of both Mr. McQuaid and Mr. Ryan that this was the only reliable method which could be used to both weight and aggregate a series of lettered grades.

22.16 The difficulty which the Tribunal faced, in seeking to clarify how the qualitative evaluation proceeded to grades for each dimension, and to an overall ranking, was that no record was kept of the exercise performed in the sub-groups of weighting the indicators, whether implicitly, as happened in those attended by Mr. Towey, or explicitly, as happened in those attended by Mr. McQuaid and Mr. Ryan, or of how those weighted indicators were aggregated. Nor did the Evaluation Report, in either its draft forms or final form, explain or address these matters. This meant that the product of the qualitative evaluation was presented in a series of tables which Departmental witnesses agreed were relatively impenetrable, were not amenable to verification, and ultimately had to be taken at face value.

22.17 The prospect of verifying these results was further complicated by a factor which did not emerge until Mr. Andersen attended to give evidence. He

testified that in aggregating lettered grades to arrive at total grades, regard would also have to be had to what he termed the confidence factor surrounding the constituent grade, so that the consensus grade arrived at would reflect the strength of the constituent grades. This meant that even though two applicants might have identical marks, their total marks could be different, depending on whether their As, Bs, Cs etc., were perceived as strong or weak. This was not an element of the collective process which featured in the accounts of Departmental officials, nor of course could it have had any application to the aggregation of grades in the technical sub-groups, in which Mr. McQuaid and Mr. Ryan had participated, as they had used a strictly numerical technique.

22.18 Before proceeding to consider the two initial qualitative sessions in some detail, it is important to keep in mind what had been agreed at the meeting of the Project Group on 4th September, 1995, and, arising from those agreements, what the understanding of the Project Group must have been as to how the qualitative evaluation would proceed. Firstly, it was agreed and recorded that the quantitative evaluation results would be returned to after the presentations. Secondly, it was agreed and recorded that the qualitative scoring of dimensions would take place in sub-groups, and the scoring of Aspects would take place after the presentations. Thirdly, it was agreed and recorded that the Group would have an initial discussion on the qualitative evaluation scoring on the afternoon of 14th September, 1995, when gaps would be highlighted, and the extent of the necessity for supplemental analysis would be determined. In other words, what the Project Group had agreed was that those nominated to attend sub-groups were to proceed with the qualitative scoring of dimensions; that an initial discussion of the entire membership of the Project Group would take place at the meeting scheduled for 14th September, 1995; that the entire membership of the Project Group would then decide on such supplemental analysis as was necessary; and the marking of Aspects would then proceed. Accordingly, what was envisaged, and must have been understood, was that the entire membership of the Project Group would have an input into the qualitative evaluation, as it moved forward towards an overall ranking.

FIRST QUALITATIVE SESSION

22.19 The first session of sub-groups was held on 7th and 8th September, 1995, in Copenhagen, and was attended by Mr. Billy Riordan and Mr. Fintan Towey. The sub-groups scheduled for the session were to assess the dimensions Financial Key Figures and Performance Guarantees, and each of these will now be considered.

Financial Key Figures

22.20 The dimension Financial Key Figures, which was one of the three dimensions of the first-ranked criterion, had been measured in the quantitative assessment by two indicators, Solvency and IRR. It will be recalled that there was a difficulty in measuring IRR which, according to the Evaluation Model, was to be measured over fifteen years of applicants' business plans. As one applicant had not provided data for the terminal fifteenth year, AMI had proposed measuring IRR over ten rather than fifteen years. The scoring of the Solvency indicator had proceeded without difficulty, but due to concerns surrounding the solvency of two applicants, including A5, Esat Digifone, which had a negative solvency, it had been agreed that this would be closely scrutinised in the qualitative evaluation.

22.21 Mr. Riordan recalled that he and Mr. Towey travelled to Copenhagen on 5th September, 1995, and that the sub-group meeting on Financial Key Figures was convened on the morning of 6th September, 1995, which was the first day of the session. It is clear however from Mr. Riordan's evidence that no substantive evaluation actually proceeded on that day. Discussions of the sub-group, which included Mr. Michael Thrane and Mr. Michael Andersen of AMI, focused firstly, on the selection of indicators to assess Financial Key Figures qualitatively, and secondly, on a troublesome series of errors in the completion of the mandatory tables, which had been identified by Mr. Riordan, and which he drew to the attention of the sub-group. Mr. Riordan testified that he regarded this latter issue as a serious state of affairs. He explained that the problem, as he saw it, arose from the fact that each application contained two sets of financial projections: one set in mandatory tables, and the other in the business cases contained in the applications proper. What had to be examined was the consistency between the figures in the mandatory tables and those in the business cases.

22.22 Mr. Riordan in his note recording his meeting with AMI personnel in Copenhagen, on 6th September, 1995, made the following day, noted that it was agreed by the sub-group that, in order to establish the scale of the problem, they would have to verify the consistency of the financial projections in the mandatory tables with those in the business cases. Mr. Riordan noted his observation that this would be a mammoth task, and further recorded a suggestion, attributed to Mr. Towey, that in the first instance they should conduct what was termed a "*quick and dirty*" check on the mandatory tables themselves, to ensure that they were at least internally consistent. It was agreed that they would proceed as proposed by Mr. Towey, and that both AMI and Mr. Riordan would check the mandatory tables submitted by each of the six consortia for internal consistency.

For the purpose of the sub-group, it was agreed that they would take mandatory tables as submitted at face value, and that the issue of credibility would be considered at a later point.

22.23 Both Mr. Riordan's note, and a summary report of the sub-group evaluation prepared by Mr. Towey, dated 13th September, 1995, recorded that AMI had proposed four categories of indicators for the purposes of the qualitative evaluation, namely, solvency, financing, profitability and sensitivity. Mr. Riordan was recorded as having suggested the use of efficiency indicators, and as having also mooted the advisability of expanding the earlier analysis of IRR performed quantitatively. The report recorded that the sub-group accepted that progress had been made in identifying appropriate indicators, but that the Departmental representatives had emphasised that they wished to reserve the right to review the indicators at a future point.

22.24 Both documents, that is, Mr. Riordan's note and Mr. Towey's report, recorded initial results for three of the indicators as proposed by AMI. Mr. Riordan's note was subject to the caveat that several of the sub-indicators discussed had not been scored, and that one of the indicators scored had to be revisited by AMI. Mr. Towey's summary described the grades as:

"The outcome on a provisional basis...(to the extent possible with the information that was readily available)."

In the final paragraph of his report, Mr. Towey had also noted as follows:

"F. Towey and B. Riordan pointed out that it would be necessary to reflect more fully on the overall adequacy of this evaluation approach and in particular on whether the chosen indicators were the most appropriate and sufficiently extensive to rank applications. AMI accepted that the evaluation would be an iterative process."

22.25 The Tribunal is satisfied that Mr. Riordan's evidence represented a reliable account of what transpired at the Financial Key Figures sub-group meeting on 6th September, 1995. Mr. Riordan was clear in his recollection of what occurred: given that his principal focus in the evaluation was on Financial Key Figures, it was to be expected that his recollection would be distinct. It seems to the Tribunal, having regard to AMI's practice of initially submitting their own assessment of the applications to sub-groups, and having regard also to the terms in which Mr. Towey described the table in his report as showing the "provisional" outcome, that these grades represented AMI's initial views, rather than the product of deliberations within the sub-group.

22.26 Financial Key Figures was a highly significant dimension within the overall evaluation. Not only was it one of the three dimensions of the first-ranked evaluation criterion, but within those three dimensions, its significance was reflected in the weighting allocated to it in the quantitative evaluation of 15, as against 10 and 7.5 for the other two dimensions. Apart from its position within the hierarchy of the eight evaluation criteria, it will be recalled that “*financial capability*” had been elevated to the “*chapeau*” of the evaluation. In terms of paragraph 19, which reflected Government policy, it was a matter on which evaluators, over and above any consideration of relative ranking, had to be satisfied. The Evaluation Model contained no mechanism or test for determining whether applicants had satisfied that condition of financial capability, as confirmed by Mr. Andersen when he attended to give evidence. Whilst the financial evaluation was undoubtedly highly significant, Mr. Andersen testified that, in the absence of a clearly defined threshold test in the RFP document, consideration of whether the condition had been met had to be deferred until the conclusion of the comparative evaluation.

Performance Guarantees

22.27 The dimension Performance Guarantee was the single dimension for, and therefore the sole determinant of, the seventh-ranked evaluation criterion, the Performance Guarantee Proposed by Applicant. The dimension had been measured in the quantitative analysis by two indicators, Blocking Rates and Drop-out Rates, and had been allocated a weighting of 5. Its relative position in the ranking of the evaluation criteria belied the significant role which the dimension ultimately played in the overall evaluation. It will be recalled that Mr. Brennan had misgivings about the technical approach to the measurement of performance guarantees in the quantitative analysis, even though he accepted that both he and the Project Group had subscribed to that approach. He did not consider that the measurement truly reflected Departmental thinking on performance guarantees, which was that applicants would provide something in the nature of comfort to the Department, that they would roll out their networks, and provide a GSM service in accordance with their proposals. It will further be recalled that the subject of performance guarantees had featured in the information round, when the Department’s concept had been elaborated for the assistance of applicants, who had been informed that a performance bond was not specifically required. Mr. Andersen testified that the concept of performance guarantees did not lend itself to quantitative assessment, and it was for that reason that he had proposed that efficiency indicators should be used in the quantitative evaluation. The information furnished by applicants in their mandatory tables had been incomparable, and the Department, at AMI’s

suggestion, had posed additional questions to applicants, which it was hoped would generate responses that would facilitate the quantitative measurement of those indicators.

22.28 Mr. Towey and Mr. Riordan, the two Departmental representatives in Copenhagen, participated in the sub-group, and AMI were represented by Mr. Marius Jacobsen and Mr. Ole Feddersen. Mr. Riordan’s note of 7th September, 1995, also covered the Performance Guarantees sub-group, and the Tribunal had the further assistance of a written summary report prepared by Mr. Towey, dated 13th September, 1995. It appears from these documents that at the outset of proceedings at the sub-group meeting, there was a protracted discussion concerning the approach to be taken to evaluating the dimension. Mr. Riordan’s, but not Mr. Towey’s, document recorded that AMI had expressed some concerns that, by reason of what had been stated by the Department in the information memorandum, applicants might have disregarded the provision of a bid bond. It appears that AMI’s concerns centred on whether it might be unfair to reward or penalise applicants, by reference to the provision or absence of a performance bond, when it had been represented to them by the Department that such a bond was not specifically required.

22.29 It appears from Mr. Towey’s report that, despite AMI’s reservations, the six applications were ranked by reference to three determinants as follows:

- (i) those that had undertaken to provide a performance bond;
- (ii) those that had recognised the concept of a performance guarantee, and made some proposal to ensure that performance objectives would be achieved;
- (iii) those that had generally speaking failed to deal with the concept.

Both documents recorded that the following grades were awarded:

CONSORTIUM	MARK
A1	D
A2	E
A3	C
A4	B
A5	A
A6	C

22.30 Only two applicants, A5, Esat Digifone, and A4, Irish Cellular, had made provision in their applications for the furnishing of monetary guarantees. Whilst Mr. Towey’s summary had noted that the above grades were provisional, and that they would need to be reviewed after further reflection, the Tribunal found no evidence of any further assessment of the dimension, and despite AMI’s concerns as to the fairness of the assessment, the grades awarded on 6th September, 1995, remained unchanged. These were the grades for the dimension contained in the final Evaluation Report.

SECOND QUALITATIVE SESSION

22.31 The second session of qualitative sub-groups was held in Copenhagen between 7th and 9th September, 1995. The dimensions which were evaluated in the course of the session were:

- (i) Radio Network Architecture;
- (ii) Capacity of the Network;
- (iii) Frequency Efficiency;
- (iv) Coverage.

Each dimension was evaluated over a half day meeting, with meetings scheduled on both days, one in the morning and one in the afternoon. The Departmental representatives nominated to attend the session were Mr. John McQuaid and Mr. Aidan Ryan, both of whom had the requisite skill and experience to participate meaningfully in the assessment of these dimensions, which involved an appreciation of technical and engineering matters. The table below illustrates the evaluation criteria with which these four dimensions were associated.

EVALUATION CRITERIA	RANKING OF CRITERIA	DIMENSIONS
Quality and viability of technical approach proposed	Second	Radio Network Architecture Capacity of the Network
Timetable for achieving minimum coverage requirements and extent to which they may be exceeded	Fifth	Coverage
Efficiency of proposed use of frequency spectrum resources	Eight	Frequency efficiency

22.32 The first three of these dimensions were categorised in AMI’s framework table as Technical Aspects. The final dimension, Coverage, although

requiring an understanding and appreciation of technical issues, was not classified as a Technical Aspect, but as a Marketing Aspect. Mr. McQuaid and Mr. Ryan explained in their evidence that four separate sub-groups were convened, one each morning and each afternoon of the session. The AMI consultants who attended were Mr. Marius Jacobsen and Mr. Ole Feddersen. There were no summaries or reports available to the Tribunal for those four sub-groups, so that the Tribunal's principal documentary source was the relevant contents of the draft and final Evaluation Reports. In the case of Coverage, there was also a copy of a report of a sub-group meeting held on 30th August, 1995, which was one of the sub-groups that AMI had proceeded with in the absence of Departmental representation, and which was reconvened in the course of the second session. It is now proposed to review the assessment conducted by each of the four sub-groups.

Radio Network Architecture

22.33 In the quantitative evaluation, the indicator for Radio Network Architecture was defined as the number of cells in the applicant's proposed network at the end of the fourth year of operation. It appears from the draft and final Evaluation Reports that five further indicators were identified and assessed in the course of the qualitative evaluation. Mr. McQuaid confirmed that the additional indicators would have been proposed by AMI, and that following the agreement of participants to those indicators, each application would have been analysed by reference to them, and would have been graded on a scale from A to E for each indicator. The additional indicators evaluated by the sub-group were as follows:

- (i) Number of Antenna Sites in Proposed Network;
- (ii) Cell Planning;
- (iii) Points of Interconnect with the Fixed-line Network;
- (iv) Redundancy;
- (v) Dublin Area.

The indicator Cell Planning related to the professionalism with which the applicants had planned their cell structure, the indicator Redundancy related to the provision of alternative routing in the network design, and the indicator Dublin Area focused specifically on the network deployed in the area of the capital, where it was assumed that there would be greatest demand on services.

22.34 The results for the dimension, as recorded in Table 7 of the Evaluation Report, were as follows:

Dimension Radio Network Architecture	A1	A2	A3	A4	A5	A6
1. Number of antenna sites	C	B	C	A	B	C
2. Number of cells	E	D	C	B	A	D
3. Cell planning	A	A	A	A	A	B
4. POI	B	A	A	A	A	B
5. Redundancy	A	C	A	B	A	D
6. Dublin area	A	D	A	D	B	E
Radio network architecture (subtotal)	C	C	B	B	A	D

22.35 In his evidence, Mr. McQuaid explained that, having marked each individual indicator, the sub-group agreed on a set of numerical weightings to reflect its view of the relative importance of each. The group would then have converted each of the grades awarded for the indicators to numbers, applied the numerical weightings, and arrived at numerical totals for the six applicants. Those numerical scores would then have been re-converted back to letters, to arrive at grade C for A1, grade C for A2, grade B for both A3 and A4, grade A for A5, and grade D for A6. The difficulty which the Tribunal had, and which it appears was shared by members of the Project Group, and was acknowledged by Mr. McQuaid in evidence, was that no reference whatsoever was made to this operation in the draft or final Evaluation Reports, and there was no record either in those Reports, or in any other documentation, of the weightings applied, or even of the relative importance attributed by the sub-group to the constituent indicators.

Capacity of the Network

22.36 In the quantitative evaluation, the sole determinant of the dimension Capacity of the Network was the indicator Reserve Capacity. It will be recalled that, in the context of the weightings agreed for the quantitative evaluation, Mr. Ryan had expressed the view that Network Capacity was as important as Network Architecture, and had insisted that both indicators should be weighted equally at a weighting of 10 each, rather than weightings of 15 and 5 respectively, as had been proposed by AMI. Reserve Capacity had been scored in the quantitative evaluation by reference to the percentage of reserve capacity in applicants’ proposed networks in years 2, 3, 4, and 5 of operation.

22.37 In the qualitative evaluation, the assessment was expanded to four indicators. The three additional indicators which were evaluated were:

- (i) capacity of applicants’ own infrastructure;
- (ii) capacity of applicants’ proposed interconnect regimes to the PSTN;
- (iii) capacity of applicants’ proposed central components.

The grades for each application under each indicator were arrived at by the same process of discussion and consensus, and the same method of weighting, conversion to numbers, and reconversion to grades, would have been used to aggregate the grades to arrive at sub-totals for the dimension. The results for the dimension, as recorded in Table 8 of the Evaluation Report, were as follows:

Dimension Network Capacity	A1	A2	A3	A4	A5	A6
1. Capacity of the (radio) network	C	C	C	A	A	A
2. Capacity of own infrastructure	A	C	A	C	B	E
3. Capacity of interconnect	B	D	B	A	A	C
4. Capacity of central components	A	B	A	B	A	C
Network capacity (subtotal)	C	D	C	B	A	C

22.38 A similar lack of transparency was evident in the case of this dimension, as neither the weightings, nor the relative importance of the indicators, was adverted to in either the draft or final Evaluation Reports, or in any other documentation available to the Tribunal. The difficulty which the Tribunal faced, and which those members of the Project Group who ultimately reviewed Table 8 also faced, was particularly marked in this instance, and is apparent from a simple comparison between the indicator grades, and dimension grades, awarded to A1, Irish Mobicall, and A2, Cellstar Group. The indicator grades for A1 were C, A, B and A, giving a total grade for the dimension of C. As A1 had only one C grade, which was for the first indicator, and as all of its other grades were higher than C, this logically suggests that the first indicator had been allocated by far the greatest relative weighting. However, this theory does not hold true for A2, which was awarded grades of C, C, D and B, but was not awarded C, as might be expected, if the greatest weighting was attributed to the first indicator, but instead was awarded D, even though all of its indicator grades, other than one, was in excess of D. An analysis of those markings would suggest that the third indicator was in fact decisive. It was this type of inconsistency that troubled the Tribunal in the course of its investigations, and certainly raised very serious questions in the course of review by the Project Group in October, 1995. Lest it be thought that the matter has been overlooked, it should be recorded that Mr. Andersen’s confidence factor, as he described it, as an ingredient in the aggregation of grades, could have played no part in the inconsistencies apparent in the case of the technical sub-groups, where a numerically weighted technique to the aggregation of grades was employed.

Frequency Efficiency

22.39 In the quantitative evaluation, the dimension Frequency Efficiency was measured by the indicator Frequency Economy Figures. This involved the inputting of information extracted from applications into an agreed formula, and it produced clear results on a scale from 1 to 5. In the qualitative evaluation, four indicators were assessed, which were described as Peak/Mean Traffic Ratio, Number of 200kHz Channels, Frequency Economy Factor, and Cells per Site. Table 10 in the draft and final Evaluation Reports recorded the results of the qualitative evaluation of the dimension as follows:

Dimension Frequency Efficiency	A1	A2	A3	A4	A5	A6
1. Peak/mean traffic ratio	C	C	A	A	B	B
2. Number of 200 kHz channels	A	B	B	B	B	A
3. Frequency economy factor	A	C	C	B	B	B
4. Cells per site	C	C	B	C	A	C
Frequency efficiency (subtotal)	A	C	A	A	A	A

22.40 According to Mr. McQuaid, the same approach was adopted in the case of the evaluation of this dimension, namely the identification of indicators to be assessed, a discussion of each application in terms of each indicator, leading to a consensus on the grades to be awarded to each application for each indicator, a numerical weighting of indicators according to the sub-group’s views of their relative importance, a conversion of the grades to numbers, the application of those numerical weightings, the computation of a numerical sub-total, and finally a reconversion to grades, to give totals for the dimension.

22.41 In the course of evidence, the Tribunal was informed by all of the witnesses who had participated in the qualitative evaluation that the indicators measured in the quantitative evaluation had been used as indicators in the qualitative evaluation. It will be recalled that this principle was a cornerstone of the Evaluation Model, which prescribed that the starting point of the qualitative evaluation should be the indicators used in the quantitative assessment. This was also stated to have been the position in the Evaluation Report itself. It is striking therefore that, whilst the Frequency Economy Figures measured in the quantitative assessment may have been an input into the third indicator, Frequency Economy Factor, it is evident from the grades recorded for that indicator, and from the narrative commentary in the Evaluation Report, that the third indicator was measured not as at year 5, as had been done in the quantitative assessment, but over 14 years, so that, at best, the results of the

quantitative assessment represented no more than an infinitesimal part of the qualitative results for that indicator.

22.42 The difficulty in verifying the aggregation of the indicator grades to arrive at overall grades for the dimension was also evident in this case. It will be seen that A1, which had scored grades of C, A, A, and C for the four indicators, was awarded an overall grade A. This logically suggests that the dominant indicators were the second and third indicators, for both of which A1 was awarded A grades. However, this does not hold true for A3 which, with indicator grades of A, B, C and B, was also awarded an A, which instead suggests that the dominant indicator was the first of the four indicators, rather than the second or third. Similar difficulties and inconsistencies arise in the aggregation of the grades for A4 and A5, and to a lesser degree for A6.

Coverage

22.43 The dimension Coverage was the sole dimension of the fifth-ranked evaluation criterion, and in the quantitative assessment was measured by the indicator Speed and Extent of Demographic Coverage. The percentage coverage in each of the first four years of operation of the proposed network was extracted from applicants’ figures, and the indicator was scored without difficulty.

22.44 AMI had commenced the qualitative evaluation of Coverage on 29th August, 1995, in Copenhagen without Departmental representation, and had proceeded to mark each indicator, and to aggregate those marks to give total marks for the dimension. Mr. McQuaid in his evidence confirmed that the sub-group was reconvened during the session which he attended in Copenhagen, and that the evaluation undertaken by AMI was reviewed by reference to notes which AMI circulated, and which recorded the approach taken at the earlier meeting. It was apparent from a comparison between the grades recorded in AMI’s notes, and the grades recorded in the Evaluation Reports, that the deliberations of the sub-group attended by Mr. McQuaid and Mr. Ryan resulted in some revision of the earlier assessment undertaken by AMI in their absence. The table below is extracted from the Evaluation Report, and where different grades had initially been awarded by AMI, those grades are shown in brackets.

Dimension Coverage	A1	A2	A3	A4	A5	A6
1. Roll-out plan	A	C	B	C	A	C
2. Radio link budget	A	A	A	B	A (B)	B
3. Site acquisition	C	B	A	B	A	D
4. Special coverage	B (A)	D (C)	A (B)	D (C)	A	E (D)
Coverage (subtotal)	B (A)	C	A (B)	C	A	D

22.45 AMI’s notes of their initial meeting of 29th August, 1995, were available to the Tribunal, and were of assistance in that they included, at least to some degree, an analysis of the considerations which led to the grading of the indicators, although they threw little or no light on the discussions that took place, the method of aggregation, or the relative importance attributed to the four indicators assessed. In the course of his evidence, the Tribunal reviewed the contents of this document with Mr. McQuaid.

22.46 There were four indicators evaluated in the qualitative assessment, which were:

- (i) Roll-out Plan;
- (ii) Radio Link Budget;
- (iii) Site Acquisition;
- (iv) Special Coverage.

AMI’s notes recorded the sub-indicators which they had used for each of these four indicators. Mr. McQuaid’s evidence focused on the sub-indicators for Roll-out Plan, the first of the four indicators assessed, as this seemed to relate most closely to the indicators scored in the quantitative assessment. The sub-indicators for Roll-out Plan, as defined in those notes, were:

- 1.1 Early launch commitment;
- 1.2 Coverage at launch (geographic and population);
- 1.3 Time to cover 90% of population.

The relevant information concerning the sub-indicators was extracted from applications, and presented in AMI’s notes in tabular form. What follows is an extract from that table.

	A1	A2	A3	A4	A5	A6
1	A	C	B	C	A	C
1.1	1/7-96	1/10-96	1/7-96	1/7-96	1/10-96	1/12-96
1.2	56%	56%/78%	40%	55%	80%	75%
1.3	3-6/97	12/97	6/97	6/98	6/97	12/97

22.47 Mr. McQuaid explained that the entries across the top row of the table, numbered 1.1, reflected the date on which each applicant had committed to launching a mobile service. The entries across row 1.2 recorded projected percentage coverage as at launch date, in both geographic and population terms. Row 1.3 represented the date on which applicants had committed to covering 90% of the population. Mr. McQuaid explained that the entries across row 1 were the grades that each applicant was awarded for the indicator, and were the result of a consensus achieved after dialogue within the sub-group, and reflected the application of the collective judgement of participants.

22.48 A5, Esat Digifone, which was awarded an A, intended to launch its network in October, 1996, with coverage of 80%, and to reach 90% coverage by June, 1997, some nine months later. This was judged to be superior to A3, which had committed to roll-out three months earlier in July, 1996, with coverage of 40%, and to reach full 90% coverage at the same time. Mr. McQuaid agreed that it was clear that the consensus of the group was that it was more advantageous to roll out with 80% coverage, rather than with 40% coverage three months earlier, even though that would retard the availability of service for three months. In other words, greater significance was attached to the extent of coverage at roll-out, than to the date of roll-out. It seems that it was considerations and value judgements of this type that were integral to the qualitative approach.

22.49 It is unclear precisely how the quantitative results were inputted or integrated into the qualitative evaluation of Coverage. As with all other dimensions, the relative weighting attached to the four indicators, and the means whereby indicator grades were aggregated to give overall grades for the dimension, could not be discerned from the Evaluation Report, or any of the documentation within Departmental files.

THE OUTPUT OF THE EVALUATION FOLLOWING THE INITIAL QUALITATIVE SESSIONS

22.50 As of Friday, 9th September, 1995, following the completion of the two qualitative sessions held in Copenhagen during that week, the evaluation of the six applications had reached the point that the quantitative results, subject to

the modifications and corrections which AMI had agreed to make at the Project Group meeting of 4th September, 1995, were available, together with the marks for five of the eleven dimensions in the qualitative evaluation, subject to the caveat that they could be reviewed following the oral presentations, which were due to proceed the following week. No progress had been made in the qualitative evaluation of the pivotal Financial Key Figures dimension, which had been delayed as a result of inconsistencies identified by Mr. Riordan between the figures in mandatory tables and those in applicants’ business cases.

22.51 In terms of actual results, what was available was firstly, the results of the quantitative evaluation, as contained in the first set of results dated 30th August, 1995, which were as follows:

A1	A2	A3	A4	A5	A6
3.05	2.91	3.48	2.96	3.13	3.19

What was also available were the results of the qualitative evaluation of the dimensions assessed over the two sessions in Copenhagen, and these are shown below, entered into the overall marking matrix for that evaluation as it appeared in the Evaluation Model.

Aspects and dimensions	A1	A2	A3	A4	A5	A6
Marketing aspects (subtotal)						
Market development Coverage Tariffs International roaming plan	B	C	A	C	A	D
Technical aspects (subtotal)						
Radio network architecture Capacity of the network Performance guarantees Frequency efficiency	C C D A	C D E C	B C C A	B B B A	A A A A	D C C A
Financial aspects (subtotal)						
Financial key figures Licence payment						
Management aspects (subtotal)						
Experience of the applicant						
Other aspects (subtotal)						
Risks (Effects on the Irish economy)						
Grand Total						

22.52 On the basis of the information then available, it would have been apparent that A3, Persona, was in first-ranked position on the quantitative

evaluation, and that A5, Esat Digifone, was ahead on the portion of the qualitative evaluation that had by then been completed. There was of course the matter of Esat Digifone's finances, which, based on the quantitative evaluation results for the indicator Solvency, had been a focus of concern at the Project Group meeting of 4th September, 1995, when its negative solvency had been noted, when it was observed that Esat Digifone, on the basis of the Solvency results looked "*bankrupt*", and when it had been determined that it was a matter that would have to be examined closely in the course of the qualitative evaluation. It is unclear to what extent these emerging trends were brought to the attention of the Project Group at this point, but as will be seen, it was certainly the view of AMI by the following Thursday, 14th September, 1995, when the Project Group met, after the conclusion of the oral presentations, that the field had broken into two distinct divisions, and it was Mr. Andersen's evidence that, by that time, there was a clear sentiment amongst some civil servants that A5, Esat Digifone, and to some extent A3, Persona, had done a very good job, and also that A1, Irish Mobicall, would be qualified for the licence.

THE ORAL PRESENTATIONS

23.01 Consideration of arrangements for oral presentations by applicants and of the matters to be covered in the course of them had, as will be recalled, been discussed at the Project Group meeting of 4th September, 1995. This element of the process had in fact been formally initiated by the Department prior to that Project Group meeting, when by letter dated 28th August, 1995, Mr. Martin Brennan had written to each of the applicants enclosing a series of questions arising from their applications, and requesting responses by 4th September, 1995. By those same letters, the time and date of oral presentations was confirmed, and applicants were notified of the protocols to which the presentations would be subject. The object of the presentations was defined in that letter as *“an opportunity to meet the proposed management team”*, and accordingly applicants were informed that professional consultants would not be permitted to attend.

23.02 Following discussions at the Project Group meeting of 4th September, 1995, Mr. Brennan again wrote to applicants, reconfirming the time and date fixed for their presentations, and setting out in some further detail the procedures which would be followed at them. The letter dated 5th September, 1995, indicated that the presentations were being held *“in order to allow the evaluation team better to understand the applications submitted on 4 August 1995”*. Applicants were informed that an audio recording would be made for the benefit of the evaluation team, and that copies would not be made available to applicants; nor would applicants be permitted to record presentations themselves. The names of the members of the evaluation team who would attend were furnished, as was an agenda, and a list of general topics that would be discussed. Applicants were notified that additional matters, over and above those listed, might be raised in the course of presentations.

23.03 The presentation meetings were scheduled for the second week of September, commencing on Monday, 11th September, 1995, and each applicant was assigned a specific day and time between then and Thursday, 14th September, 1995. The Project Group met in advance on 11th September, 1995, for what was to be its tenth meeting. The sole topic under discussion at that meeting was the strategy for the presentations. As recorded in the official report, it was decided that as well as taping the presentations, a general written résumé should be kept by Ms. Maev Nic Lochlainn and Ms. Margaret O’Keeffe, and that individual Project Group members with technical and financial expertise should minute the information that pertained to their specialist areas. Mr. Michael Andersen was recorded as having observed that the early questions posed should be straightforward, to allow consortia teams an opportunity to warm up. The representatives of the Technical Division, Mr. John McQuaid and Mr. Aidan

Ryan, who had just completed the qualitative evaluation of technical dimensions, indicated that they had a number of technical questions for each applicant, but that their particular focus would be on applicants' backbone networks. It was also agreed that questions would be raised on apparent discrepancies between the figures in applicants' mandatory tables, and those in their business plans. Finally, the report recorded that:

“As a general rule, it was decided that applicants would be given a last opportunity to provide clarification orally at these meetings; further contact would be avoided. If it became apparent, that clarification was essential after the meetings, contact would be initiated in writing by the Department. The applicants were to be informed in this regard.”

Applicants had already been informed by the information memorandum circulated on 28th April, 1995, that they would not be permitted to provide any further information after the oral presentations, so that the decision of the Project Group that this should be reiterated at presentations was presumably for the purposes of reinforcing that rule. A copy of the official report of the Project Group meeting of [11th September, 1995](#), can be found in the Book of Appendices to this Volume.

23.04 Further to the discussions of the Project Group at the previous meeting of 4th September, 1995, AMI in the interim had prepared applicant-specific questions to be posed during presentations. These questions had not been notified to applicants in advance, and were to be raised at the end of the presentation meetings, unless they had already arisen, and had been covered in the course of earlier exchanges. AMI also advised, as recorded in the document which they had prepared, that additional questions might arise, as a result of discussion in the course of presentations, and these, together with follow-up questions, could be posed during the final phase of the sessions.

23.05 The document prepared by AMI set out specific questions for each applicant in the order in which the presentations had been scheduled, that is, A3, Persona, A2, Cellstar, A5, Esat Digifone, A6, Eurofone, A1, Irish Mobicall and A4, Irish Cellular. It is noteworthy that for each applicant, the questions were grouped around the following topics: General Business Case; Marketing Aspects; Technical Aspects; Management Aspects; Financial Aspects; and Other Aspects. These topic headings reflected the grouping of dimensions in terms of Aspects for the purposes of the qualitative evaluation, as set out in the Evaluation Model.

23.06 Whilst a number of the AMI questions were applicant-specific, and were based on issues identified from applications, some questions were common to all applicants, including those relating to the advantages and

disadvantages of a second operator in the Irish market, the importance of the quality of service, particularly in the Dublin area, and possible problems concerning frequency co-ordination with the United Kingdom.

23.07 In addition to the questions prepared by AMI, a list of questions had also been prepared by the Technical Division, and were recorded in a document entitled “*Technical Dimension – Questions List*”. This document contained a list of ten general questions which were not applicant-specific. It appears that a corresponding set of questions may have been prepared by Department of Finance personnel, as it seems from the recordings of the presentations that some additional financial questions had been formulated in advance, and were posed by Mr. Billy Riordan, the accountant on secondment to the Department of Finance, who had been nominated as a member of the Project Group, and who had attended the abortive financial sub-group meeting in Copenhagen the previous week.

23.08 The Tribunal was aware from an early stage of its inquiries that presentations had been made by applicants, and had been taped, as there were references to them, and to the fact that they had been taped, in the draft and final Evaluation Reports, in official reports of meetings of the Project Group, and in some limited notes which had been made by those in attendance. As the Departmental files which had been produced to the Tribunal did not include copies of the tapes, transcripts of the tapes, or any comprehensive documentary record of what had transpired at presentations, the Tribunal, by letter dated 26th September, 2001, requested the Department to furnish it with copies of those tapes. It took approximately fourteen months, until 15th November, 2002, some two weeks prior to the commencement of public sittings, for the tapes to be located, and provided to the Tribunal.

23.09 In the course of lengthy exchanges of correspondence between the Tribunal and the Department over that time, the Tribunal was informed that the tapes could not be found; that no copies of them had been made; that no official had ever made transcripts of them; and that Departmental officials were quite certain that they had never used, relied upon, or listened to them for the purposes of the selection process. The only use to which the tapes were put, according to the evidence heard by the Tribunal, was after the licence was issued, when Mr. Eanna O’Conghaile, together with another Departmental official, Ms Orla Corrigan, listened to the tape of the Esat Digifone presentation to check the commitments which had been made regarding network roll-out, in the context of a £1 million fine levied against Esat Digifone for its failure to launch a GSM service with 80% coverage by February, 1997.

23.10 It was in response to notification by the Tribunal on 8th October, 2002, that it wished to hear evidence from Mr. O’Conghaile and Ms Corrigan regarding their limited use of the tapes, and their knowledge of their whereabouts, and from the senior Departmental official with overall responsibility for safekeeping of the tapes, which was Mr. Martin Brennan, that on 15th November, 2002, the Tribunal was informed that, following a search of a storage facility in Finglas, in the context of endeavouring to locate original copies of the bids provided in the GSM competition, it was noticed that there were additional filing cabinets in the storage facility, over and above those that had been there on a previous inspection, and that upon opening one of those filing cabinets, a number of additional documents were discovered, together with the tapes of the presentations. Those interactions between the Tribunal and the Department over fourteen months, which involved lengthy exchanges of correspondence, and meetings with Departmental officials, added an entirely unnecessary strand of inquiry to the Tribunal’s work, and naturally contributed to delay in its proceedings.

23.11 The audio recordings of the presentations of A1, Irish Mobicall, A3, Persona and A5, Esat Digifone, were played into the Tribunal’s formal record in full, as ultimately these were the consortia that were ranked in the top three positions at the end of the evaluation process. The presentations were chaired by Mr. Brennan, who delivered a relatively standard introduction in each case, setting out the ground rules to which the presentations would be subject. Each presentation was kept as strictly as possible to a limit of three hours, the first hour of which was made available to applicants to make uninterrupted statements. It was not intended that any new material would be submitted, but rather that applicants would be extended an opportunity to expand upon, explain or highlight areas of their applications as submitted to the Department. The second hour was allotted to the questions which had been notified to applicants in advance. The final hour was available for additional questions, of which applicants had no prior notice, and which were in the main based on the applicant-specific questions prepared by AMI, and the general technical questions formulated by the Technical Division. It was explained by Mr. Brennan in his introduction that members of the presentation team were at liberty to confer with each other, or to take time to consider their answers when responding to the questions of which they had no prior notice.

23.12 In the course of his introduction, Mr. Brennan reiterated the rule which had already been notified to applicants in the information memorandum circulated on 28th April, 1995, namely, that on completion of the presentations, no further material should be submitted to the Department. If additional material was required by the Department, which Mr. Brennan stated he hoped would not

be the case, such material would be requested in writing. As Mr. Brennan did not present his introduction from a prepared script, there were slight differences between the introductions delivered at the commencement of each presentation, but in the main, those differences were insignificant.

23.13 Having regard to the duration of each presentation, it is not intended to summarise in full the proceedings at each session. Whilst it was of interest to note differences in the manner in which questions were dealt with by consortia, and whilst it was clear to the Tribunal that a very significant amount of preparatory work had been undertaken, both on the part of applicants, and on the part of the Project Group, there were only relatively limited portions of each of the three presentations which were of significance to the Tribunal's inquiries.

23.14 In general, the Project Group team assigned to the presentations comprised Mr. Michael Andersen, Mr. Marius Jacobsen, Mr. Ole Feddersen and Mr. Jon Bruel of AMI, together with Mr. Brennan, Mr. Fintan Towey, Ms. Maev Nic Lochlainn, Ms. Margaret O'Keeffe and Ms. Nuala Free from the Development Division; Mr. Billy Riordan and Mr. Jimmy McMeel from the Department of Finance; Mr. Sean McMahon and Mr. Ed O'Callaghan from the Regulatory Division; and Mr. John McQuaid, Mr. Aidan Ryan and Mr. John Breen from the Technical Division. Whilst some of those persons were not present at all presentations, or had to absent themselves from part of some, in general they were the persons who were in attendance. In that regard, Mr. Brennan observed in his introductions that, whilst all of the persons present on the Department side would not necessarily be involved in forming a final view on the evaluation, it was intended to err on the side of caution, so that each relevant Division would be over-represented, rather than not represented at all.

PRESENTATION BY A3, THE PERSONA CONSORTIUM

23.15 The presentation by the Persona consortium was the first of the presentations, and proceeded at 2.30pm on 11th September, 1995. The Persona consortium team comprised Mr. Tony Boyle, Mr. Tomas Jarne, Mr. John McSweeney, Mr. Hans Kuropatwa, Mr. Martin Keogh, Mr. Phil Dowson, Mr. Robert Källman, Mr. Paul Kearney and Mr. Åsa Ericson. The presentation followed the predetermined structure, and in the course of proceedings, two matters arose which ultimately became relevant at a later point in the evaluation process.

23.16 The first of these related to the financial capability of the Sigma Wireless component of the Persona consortium. It will be recalled that the composition of the intended licensee proposed by Persona was Motorola 26.7%,

Unisource 26.7%, Sigma Wireless 26.7% and ESBI Telecoms, as an investment vehicle for ESB, 20%. As Sigma's equity capital was only £1 million, and as the Persona application had not disclosed how Sigma intended to fund its equity commitment, Mr. Boyle, who was Chairman of the consortium, and Managing Director of Sigma Wireless, was asked how Sigma intended to meet its equity requirement. In response, Mr. Boyle referred in the first instance to a letter from KPMG Corporate Finance, lead advisers to Persona in relation to its application, who had been mandated by Sigma to arrange its share of the Persona equity financing, confirming their opinion that financing would be available in the timeframe required. Mr. Boyle added that, since the submission of the Persona application, an indicative or strategic offer of finance had been received, and that a further letter of support could be provided by KPMG in that regard, if it would be of assistance to the Project Group.

23.17 When Mr. Boyle was asked by Mr. Jon Bruel of AMI to elaborate on the strategic offer to which he had referred, Mr. Boyle, on a confidential footing, disclosed that Allied Irish Banks had provided an indicative letter, under the terms of which they would invest in the Sigma investment vehicle sufficient funds to meet Sigma's equity requirement, on terms which would see them taking a 45% shareholding in that investment vehicle. He further stated that KPMG had received approaches from other parties regarding the provision of equity funding, and it was on that basis that KPMG had furnished the letter submitted with the Persona application. Mr. Boyle then repeated that if the Department required any further clarification, either then or over the next several weeks, there would be no difficulty in providing it. Mr. Brennan replied by stating that:

"we are trying as much as possible to avoid further communication from applicants to us as a result of this week's presentation, so unless we specifically ask for something we'd prefer not to receive it."

Mr. Boyle confirmed that he accepted that position, but added that, if there were any continuing concerns on the part of the Department, Persona would expect that the Department would request the provision of further information.

23.18 In the event, no further clarification or information was sought by the Department from Persona in connection with the funding offers to which reference was made in the course of the presentation. However, as will become apparent, it seems that what had been stated by Mr. Boyle did not alleviate the concerns of AMI or of the Department, and the relatively modest equity capital of Sigma Wireless continued to be regarded as constituting a financial risk to the Persona consortium, which necessitated supplementary analysis on the risks attendant by virtue of Sigma's finances, and the results of which were ultimately recorded in Appendix 10 of the Evaluation Report.

23.19 The second matter which arose in the course of the Persona presentation, which warrants comment, related to what the Department perceived as strong reservations recorded by the consortium in its application to the terms of the indicative licence, which had been furnished by the Department. In the course of the presentation, the Department queried whether these reservations amounted to an indication that Persona, if it won exclusive negotiation rights, would not accept a licence on the terms of the indicative draft. The Persona representatives clarified that it had not been their intention to give that impression, and that they believed that any difficulties regarding the ultimate terms of a licence could be resolved in the course of negotiations. They added that confusion may have arisen, regarding the strength of their reservation, due to the manner in which that element of their application had been framed by the Swedish component of the consortium.

23.20 Despite the clarification provided, it seems that AMI, at least, continued to regard the observations on the indicative licence made by Persona in its application as constituting a strong reservation. At a much later point in the process, when Mr. Ed O’Callaghan of the Regulatory Division was reviewing a draft of the Evaluation Report, he sought to correct a passage of the draft, in which AMI had stated as follows concerning Persona:

“Furthermore, A3 has expressed so strong reservations concerning the draft licence, which was circulated as part of the tender documents, that the Minister will formally have an unfavourable starting point.”

In the event, it seemed that, despite Mr. O’Callaghan’s efforts, that passage of the text remained, and was replicated in the same form in the final Evaluation Report. Furthermore, it seems that Persona’s clarification of the issue did not make an impact on Mr. Michael Andersen, who referred to that objection in the course of his recent evidence to the Tribunal, in the context of the sensitivity analysis contained in the Evaluation Report.

PRESENTATION BY A1, IRISH MOBICALL

23.21 The presentation by Irish Mobicall was the fifth of the scheduled presentations, and proceeded at 2.30pm on 13th September, 1995. The consortium team in attendance at the presentation comprised Mr. Gerry Scanlan, Mr. Lochlann Quinn, Mr. Martin Naughton, Mr. Kieran Corrigan, Mr. Dennis Whiteside, Mr. Wolfgang Stark, Mr. Bent Svanholmer and Mr. Eric Groves. The presentation followed the pre-determined structure, and in the course of the final question and answer session, an issue arose concerning the financing of the consortium which warrants comment, as it reflects the thinking of AMI on the

extent and certainty of the assurances which they were seeking from applicants, surrounding the availability of equity capital.

23.22 The composition of the Irish Mobicall intended licensee, as already outlined, was made up of three subsidiaries of substantial telecommunications operators, that is, Southwestern Bell, TeleDanmark, and Deutsche Telekom, each of which entities would hold 25% of the issued shares. The balance of 25% of the equity capital was to be held individually by three Irish businessmen.

23.23 The matter of concern raised by Mr. Andersen related to the terms of the letter of support provided by Deutsche Telekom to its subsidiary Detecon, which had been included with the application, and the terms of which were as follows:

“The management board of Deutsche Telekom AG will endeavour to provide Irish MobiCall with all the necessary resources from throughout the concern at its best possibilities and capabilities to fulfil the requirements and obligations placed upon its subsidiary, DETECON.”

It seems that Mr. Andersen did not regard the terms of that letter as constituting sufficiently clear support, and in posing his questions he stated:

“Generally speaking, we are looking for commitments, as I said before, when we read such an application and we are not particularly happy with words like ‘will endeavour to’ or ‘its best possibilities’....”

23.24 In responding to Mr. Andersen, Mr. Dennis Whiteside, the then acting Chief Executive of Irish Mobicall, indicated that he could state unequivocally that he knew the people in Deutsche Telekom, and had worked with them throughout the project, and that they were probably as committed as anyone could ever be to provide whatever the project needed. He believed that any note of uncertainty in the terms of the letter was merely a matter of language. Another member of the Mobicall team added that a lot of the board members in Detecon were bankers, and they had a tendency to express themselves in terms that could be slightly doubtful, but that he had no doubt that the letter was definitely intended as a commitment. The history of Detecon for the past eighteen years was that it had always received full support from Deutsche Telekom on different projects all over the world.

23.25 Mr. Andersen continued his questioning by proceeding to a different, albeit related topic, namely the share structure of Detecon, and whether that had

been accurately presented in the Irish Mobicall application. He pointed to the description of Deutsche Telekom in the application as a “*partner*” in the project, whereas it seemed to him, from the share structure of Detecon, that Deutsche Telekom held only 30% of the shares in Detecon, with the balance being held by financial institutions. In that regard, his concern was directed to the extent to which Deutsche Telekom could exert influence on Detecon under that ownership régime. In response, it was stated that the experience and history of Detecon showed that the interest of the majority bank shareholders was only in the receipt of dividends, and that all management decisions, and all decisions on telecommunications projects, were fully the responsibility of Deutsche Telekom.

23.26 Mr. Andersen repeated that the assessors would still have preferred to have received binding financial commitments, and in view of the fact that Deutsche Telekom controlled only 30% of Detecon, there was still in his mind a question as to the binding nature of the commitment of Deutsche Telekom, particularly if the banking shareholders wished to withdraw from the business, and in that context came into conflict with Deutsche Telekom. In that event, Mr. Andersen queried the value of the letter of support provided by Deutsche Telekom, in terms of the licence and of the Department. Mr. Stark responded by stating that it was his understanding that there were historical reasons which rendered it impossible for Deutsche Telekom to operate in competing areas, and that this was one of the reasons that Detecon had been set up, but that in order for the evaluators to understand the operation and structure of Detecon fully, they would need to be provided with additional information in relation to management agreements and shareholder agreements.

23.27 Mr. Scanlan then joined the debate, by indicating that, if there were gaps in the application which were of concern to the assessors, Irish Mobicall would wish to address them and close them out. Mr. Andersen answered that he thought it was in the nature of things that there would be gaps that could not be bridged or closed, and that the evaluators should confine themselves to what was in applications. The Irish Mobicall application left them with the fact that Deutsche Telekom had not signed what AMI regarded as a commitment to Detecon, and that further, Detecon was only partially owned by Deutsche Telekom, and in those circumstances there remained some degree of uncertainty. Mr. Scanlan suggested that if Irish Mobicall was the successful candidate, appropriate terms could be incorporated into the licence to meet any perceived uncertainty, but he added that, if the assessors wished to write to Irish Mobicall, they would certainly address those issues and provide a written response, which was their preference. At that point, Mr. Brennan interjected by stating that:

“The trouble is, if I may speak as Chairman, there are different gaps in different applications and some are more easily filled than others. We have a duty to be objective in relation to all applications.”

23.28 This exchange is also of significance, in that it was this issue, namely the extent of the Deutsche Telekom support for the Detecon limb of the Irish Mobicall consortium, which was identified in Appendix 10 to the Evaluation Report as being a potential weakness in the application, and was in some respects treated as being comparable to a weakness identified in relation to Esat Digifone and Persona, consequent on the financial frailty of Communicorp and Sigma Wireless respectively.

23.29 One further matter to which reference should be made is an exchange which occurred at the very end of the presentation, when the questioning returned to an issue that had been raised earlier by Mr. Riordan in relation to the mandatory tables, and to a discrepancy which he had identified between the figures for accumulated depreciation, and those for accumulated investments. Having spent some time examining the tables whilst other matters were being explored, Mr. Eric Groves of Irish Mobicall indicated that he believed that a double accounting error had been made in the accumulation calculation. He proposed that he would check the calculations, and re-input the information, to ensure that it was correct, and then revert to the Department. It will be recalled in this regard that Mr. Riordan had deep concerns regarding both the internal consistency of the mandatory tables provided by all applicants, and the consistency between those mandatory tables and applicants’ business cases comprised in the body of their applications. Following an exchange between Mr. Brennan and Mr. Andersen, as to whether the Department would accept a set of revised calculations from Irish Mobicall, in the course of which Mr. Brennan acknowledged that Mr. Andersen was *“the ultimate referee”*, it was agreed that Irish Mobicall should be permitted to provide a set of corrected calculations, and when asked where the figures should be sent, it was Mr. Brennan rather than Mr. Andersen who replied:

“To the Department, addressed to me, within 24 hours. This is an exceptional arrangement because it’s a technical recalculation that we don’t feel able to do ourselves.”

23.30 Whilst the Department was prepared to accept those revised calculations from Irish Mobicall, it did not at any point request or extend to Irish Mobicall the facility of clarifying either the ownership issue, or the financial support issue which had arisen in the case of Detecon.

PRESENTATION BY A5, ESAT DIGIFONE

23.31 The Esat Digifone presentation was the third of the six scheduled presentations, and proceeded at 2.30pm on 12th September, 1995. As with all other presentations, it followed the same format, and after a short introduction by Mr. Brennan, members of the consortium team had an opportunity of outlining features of the Esat Digifone application, after which the questions of which notice had been given were raised, and finally, additional questions of which notice had not been given were pursued. The representatives of the Esat Digifone consortium who attended the presentation were Mr. Denis O'Brien, Mr. Arve Johansen, Mr. Jan-Edvard Thygesen, Mr. Barry Maloney, Mr. John Hennessy, Mr. Peter O'Donoghue, Mr. Hans Myhre and Mr. Per Simonsen.

23.32 It was Mr. O'Brien's evidence that the Esat Digifone management team had prepared for the presentation from 4th August, 1995, when its application had been submitted. They practised intensively over the three days prior to the presentation, and a final dress rehearsal was held at the Mont Clare Hotel, on the evening of Monday, 11th September, 1995, with all participants in attendance. That dress rehearsal was also attended by Mr. Pádraig O hUiginn, a director of Communicorp and former Secretary General to the Department of the Taoiseach. Mr. O hUiginn provided input on matters which he believed should be highlighted in the course of the presentation. It was his advice that the strengths of Esat Digifone over other applicants should be emphasised, including the extent of the Irish shareholder component, the absence of any semi-State body or handset supplier from the composition of the intended licensee, and the experience of the Communicorp limb of the consortium as a competitor to Telecom Éireann in the Irish fixed-line market. As references were made by Esat Digifone speakers to these themes, particularly in the course of their initial uninterrupted statements, it seems that Mr. O hUiginn's advice in that regard was accepted and followed.

23.33 There were two elements of proceedings at the Esat Digifone presentation which featured most prominently in the evidence heard by the Tribunal, and which related firstly, to the ownership of the Esat Digifone intended licensee, and specifically the involvement of the financial institutions named in the application, and secondly, to the financial capability of the consortium. That second issue had two distinct strands, in that it entailed consideration of both the projected negative solvency of the licensed company over the initial years of operation, as identified in the quantitative evaluation, and separately, the ability of Communicorp to fund its equity commitment.

23.34 Before proceeding to recount what was stated by Mr. Johansen and Mr. O'Brien regarding the ownership structure of the Esat Digifone proposed licensee company, it is helpful to recap briefly on what had been stated in that regard in the application. In both the application proper and the executive summary, it was stated that Esat Digifone Limited was currently owned as to 50% each by Communicorp and Telenor, and that prior to the award of the licence, 20% of the equity in the company, 10% each from Communicorp and Telenor, would be made available to third party investors. In the application proper, it was stated that Davy stockbrokers had received what were described as "*written investment commitments*" from Allied Irish Banks, Investment Bank of Ireland, Standard Life, and Advent International. A slightly different and more emphatic formulation was used in the executive summary, where it was stated that the allocation had been placed by Davy stockbrokers with the same named financial institutions. What were described as "*letters of financial support*" from those institutions were included within the application. As will be recalled, those letters, with the exception of the Advent letter, which was in different terms, were to the effect that the institutions confirmed their preparedness to invest by way of equity or loan stock in the consortium, subject to the licence being granted, and subject to approval by their investment committees or boards.

23.35 The ownership structure of the proposed licensee company was not in fact a matter into which the Departmental representatives delved, but rather arose in the course of opening remarks made by Mr. Johansen and Mr. O'Brien during the initial phase of proceedings. Mr. Johansen, in delivering what seems to have been a prepared script, stated:

"Esat Digifone is an Irish company. It's evidenced first of all by the Communicorp Group holding 40 percent as we get going and we have institutional investors holding 20 percent and they are: the Allied Irish Bank, the Investment Bank of Ireland, Standard Life Ireland and Advent International....

We already have the funding in place. The total funding requirements seen from the business plan is £124 million. We base the capitalisation on 40 percent equity and 60 percent debt and therefore we are certain we can achieve that in the project in Ireland on GSM.

The available funding exceeds those requirements considerably. Telenor has a firm commitment. It's even already approved by the board of directors at the top level of the corporation, £30 million and even that would not be a hard limit even if you think later we would benefit from having more equity. The Communicorp group has committed £30 million and the institutions have committed £11

million. Meaning that we have available £71.1 million in equity and we have the banks like NatWest Markets and ABN AMRO who has submitted £90 million meaning that we have available funds of £161 million, which is £37 million above the current requirements of the Business Plan.”

23.36 Mr. O'Brien, at a later point, returned to the same theme when he observed:

“So Esat Digifone is ready to go. We have an experienced management team in place. You have heard from them here this afternoon. It's done. We have a network already there and a site acquisition plan in place. And planning applications made. It's done. We have recruitment in progress....It's done. The Business Plan is sound. No blue skies, no dreaming. It's a Business Plan that makes sense. And as Arve has mentioned, both Communicorp and the financial institutions are going to share in this investment and I think this is important, because its the first time a utility will make available shares to financial institutions. There is a hell of a lot of money, pension money leaving this country and this is a way of tapping that vast resource. So we have two operating partners and financial institutions. So that's done.”

In the course of the final question and answer session, Mr. O'Brien further elaborated on the involvement of the financial institutions, when he stated that:

“It's also likely that the Irish institutions will probably go into a vehicle together just for simplicity that there would be that 20 percent block so the Irish institutions again would control that block effectively in terms of equity terms.”

23.37 Mr. Johansen testified that the bidding process was conducted and directed in Ireland. He had limited time to prepare for his role at the presentation. He had been furnished with advance copies of slides and manuscript notes in bullet point form, prior to travelling to Dublin on Monday, 11th September, 1995. He believed that he had studied that material on the plane journey from Oslo to Dublin. He attended the dress rehearsal that evening at the Mont Clare Hotel, and was provided with a full written script to deliver, and it was from that script that he made the contribution quoted above. He did not think that he had studied the entire application, and the only portion that he thought he would have been familiar with was the executive summary. What he had stated regarding the extent of the involvement of the financial institutions was of course consistent with the content of the executive summary, in which it

was recorded that the allocation had been placed by Davy Stockbrokers with the named financial institutions.

23.38 Mr. O'Brien in evidence disagreed with Mr. Johansen's description of his knowledge of the Esat Digifone application as limited. It was Mr. O'Brien's view that Mr. Johansen would have been briefed in full by Telenor personnel, and that it was always the position that he was to play a significant role in the presentation. As regards his own clear statement that the financial institutions intended to form a 20% block shareholding, Mr. O'Brien accepted that there had been no discussions on that point with the financial institutions concerned, but he testified that it would have been a usual practice for minority shareholders. Although it was Mr. O'Brien's evidence that he was at that time in negotiations with Mr. Dermot Desmond, for Mr. Desmond to take an interest in Esat Digifone in place of those financial institutions, he did not consider that there was any obligation on him to disclose that fact to the presentation meeting. It was his view that he had informed the evaluators frankly of where Esat Digifone stood at that time. Mr. O'Brien was at least in one respect correct in that observation, in that arrangements had not then been concluded with Mr. Desmond. However, neither Mr. O'Brien nor Mr. Johansen were accurate in their characterisations of the involvement of the named financial institutions as having already been agreed and determined.

23.39 It is unquestionably the case that both Mr. Johansen and Mr. O'Brien stated in the clearest possible terms, in the course of the presentation, that the four named financial institutions, that is, Allied Irish Banks, Investment Bank of Ireland, Standard Life and Advent International, had committed themselves to taking a 5% interest each in the proposed licensee company. In that regard, it is noteworthy that neither Mr. Johansen nor Mr. O'Brien were challenged or queried on what they had stated by any member of the Departmental team. Nor for that matter were they asked about the terms of the letters of support which had been furnished by those institutions with the Esat Digifone application. On the contrary, there is no record of any inquiry having been directed to the extent of the commitments provided by those financial institutions, at least other than Advent International, which arose separately, or as to whether the letters of support were consistent with what was stated by Mr. Johansen and Mr. O'Brien regarding their intended involvement.

23.40 Whilst Mr. Johansen's statement regarding the definitive involvement of the financial institutions was undoubtedly part of the representations made to the Department in the course of the presentation, it must be recognised that he had not been a party to the strategy of seeking and securing support from those financial institutions, and his state of knowledge was very much subordinate to

that of Mr. O'Brien. Neither Mr. Johansen, nor any other Telenor official, had any role in the process of recruiting institutional support through Mr. Kyran McLaughlin of Davy stockbrokers. They were equally unaware that Mr. O'Brien regarded the 15% shareholding allocated in the application to Allied Irish Banks, Investment Bank of Ireland, and Standard Life as freely at his disposal, or that as of 10th August, 1995, after the application had been lodged, Mr. O'Brien had offered that 15% shareholding in exchange for funding by Mr. Dermot Desmond for the fixed-line side of his business. Insofar as Mr. Johansen and Mr. O'Brien misstated the true extent of the commitment of those financial institutions, the responsibility must rest primarily with Mr. O'Brien.

23.41 It was during the final phase of the presentation that inquiries were pursued with the Esat Digifone representatives regarding the finances of the consortium. These topics had not been notified in advance. The first of the two such matters was raised by Mr. Andersen, and related to the projected negative solvency of Esat Digifone during the first three years of operation, which had been identified from the results of the quantitative evaluation. Mr. Peter O'Donoghue, the financial director designate of the company, responded. He indicated that Esat Digifone was confident that its business would carry the debt equity ratio of 60:40 on which its business plan was based. In consequence of this ratio, there would be negative solvency in the early years of the plan. As it was recognised that it was legally impermissible for an insolvent company to trade, it was intended that guarantees would be provided to Esat Digifone by its parent companies, Telenor and Communicorp, whereby liabilities of Esat Digifone would be underwritten. This would ensure that Esat Digifone did not operate otherwise than in compliance with Irish company law.

23.42 Of much greater significance was the line of inquiry pursued by Mr. Billy Riordan, regarding the financial capability of Communicorp to meet its equity commitment. It will be recalled that Mr. Riordan, together with Mr. Towey, had travelled to Copenhagen the previous week to participate in a qualitative sub-group to assess the dimension Financial Key Figures. That evaluation had not proceeded, due to inconsistencies both within the mandatory tables, and between the mandatory tables and the business cases submitted by applicants, on which that evaluation would be based.

23.43 It was apparent to the evaluators from the Esat Digifone application that Communicorp, with negative equity, did not have the resources to fund its intended 40% shareholding in Esat Digifone. On the basis of the business case submitted, that level of shareholding would have required an investment by Communicorp of in the order of £20 million. According to the information provided, Communicorp intended to meet that capital requirement with funds

provided by Advent International, the private equity house, which already held a 34% shareholding in Communicorp. That shareholding had arisen from an investment by Advent of \$10 million in Communicorp, in October, 1994, which had been utilised in the radio and fixed-lined businesses of Communicorp's subsidiaries. In the weeks leading up to the submission of the bid, Advent had provided a further \$5 million to Communicorp, by way of bridging finance, although that matter was not disclosed in the application.

23.44 The application, as submitted to the Department, included the letter dated 10th July, 1995, from Advent International, signed by Mr. Massimo Prelz, addressed to Mr. Brennan. Detailed reference has already been made to the content of this letter, and to the extent of the financial support which it reflected. It will be recalled that in the operative portion of the letter, Mr. Prelz had stated:

“The said application also shows Communicorp Group remaining as a 40% shareholder in Digifone and being required to provide up to 30 million Irish Punts to fund that 40% equity participation. We can confirm that we have offered that amount to Communicorp to enable it to fund its obligations.”

23.45 There was also submitted with the bid the letter from Mr. O'Brien to Mr. Prelz, dated 14th July, 1995, which has also been commented on in some depth, and which, as will be recalled, was in the following terms:

“I refer to our agreement dated the 12th July in regard to the GSM bid to be made by Esat Digifone Ltd.

As you are aware, you have written to the Minister of Transport, Energy and Communications and to Telenor Invest AS stating that you have offered Communicorp Group Ltd Ir£30 million in respect of their equity participation in the bid.

We would like to confirm acceptance of our agreement dated 12th July.”

Neither that letter nor a copy of it was within the documents produced to the Tribunal by Advent International, and when Mr. Prelz attended to give evidence, he confirmed that he had never previously had sight of it. For these and other reasons the Tribunal has already characterised this letter as a fictitious letter.

23.46 The application was silent as to the terms of the offer referred to in the letter of 10th July, 1995, as to how the contemplated funding would be structured, as to whether, and if so, the extent to which there would be an increase in the level of Advent's then shareholding of 34%, and how such increased shareholding might impact on the control of Communicorp.

23.47 These matters were taken up by Mr. Billy Riordan, of the Department of Finance, in the course of the final phase of the presentation. The documentation which was available to the Tribunal included a document which was on the Department of Finance files, and which was headed "*Esat*". The document contained eight typewritten bullet points, a number of which appeared to relate closely to the questions ultimately posed by Mr. Riordan during the presentation. The copy of the document on the Department of Finance files also contained some handwritten notes. Whilst Mr. Riordan accepted that those handwritten notes had been made by him, he did not believe that he was the author of the typed document, but was unable at that time to identify its provenance. He speculated that the document might have been prepared by AMI, or by AMI and himself jointly, or even by Mr. Sean McMahon or Mr. Fintan Towey.

23.48 It was Mr. Riordan's recollection that the Department team met in advance of each presentation to discuss matters on which the consortium team should be questioned. He thought it probable that he would have spoken with Mr. Bruel and Mr. Towey, regarding the questions on financial issues. He recalled that he had been asked to pose the financial questions at the Esat Digifone presentation, and he referred to handwritten notes which he had made, which were on the same Department of Finance file, and which contained at the top of the first page what were clearly drafts of the questions he ultimately raised at the presentation. The remainder of the document contained notes made by him during the course of the presentation, regarding the ownership structure of the Esat Digifone proposed licensee, and of Communicorp. Whatever the provenance of the typed document, it is clear from both Mr. Brennan's evidence, and the documentary trail, that the line of questioning pursued by Mr. Riordan had not been proposed by AMI, and that it was the Project Group, most probably in the person of Mr. Riordan himself, which was the source of the inquiry.

23.49 As Mr. Riordan's inquiries proceeded, contributions were also made by Mr. Andersen and Mr. McMahon. It was Mr. O'Brien, rather than Mr. O'Donoghue, who responded, and as the exchanges were lengthy, and covered a series of issues, it is helpful to quote the relevant extract from the transcript in full, which is as follows:

“Mr. Michael Andersen: So, okay, you have assurances that you will not go bankrupt. Thank you for that. We will now move on to the next question, which is a combined financial and management question and it will be posed by Billy Riordan from the Department of Finance.

Mr. Billy Riordan: Sorry, this question relates really to the letters of financial support, and particularly the ones from Advent. Advent, in that letter, say that they have invested 10 million for 25 percent of the company, and then at some stage in the proposal, it says that they have 19.5 million invested for 34 percent. I just want to clarify, have they, in the interim, invested an extra 9.5 million for the extra 9 percent equity?

Mr. Denis O’Brien: They have invested a total of 19,500,000 since last October which is completely apart from this new investment which will come and is guaranteed if we receive this licence.

Mr. Billy Riordan: Okay. The reason that was throwing me off was the letter said something different. This was a letter that was addressed to Martin on the 10th July. And it says that certainly the funds managed by Advent International invested a total of approximately 10 million in Communicorp, and it leaves it at that. They are committed to investing an extra 9.5 million.

Mr. Denis O’Brien: They have actually done it.

Mr. Billy Riordan: That’s the clarification I was looking for, really. Then really a follow-on from that was that Advent have said they are providing up to 30 million to Communicorp.

Mr. Denis O’Brien: 30 million, I think it’s pounds.

Mr. Billy Riordan: Sorry, you are right, IR£30 million. I am wondering, in what form will that funding be put into Communicorp? Will it be loans or will it be equity?

Mr. Denis O’Brien: It will be equity. That’s what we have negotiated on. So in other words, at the moment, Advent will probably go up to about 47/48 percent if we win this licence. So the business will be, remain Irish-controlled.

There is also a second thing, and that is that there is a three-to-one voting ratio to the Irish investors.

Mr. Billy Riordan: So every one of their shares is worth three of yours - -

Mr. Denis O'Brien: No. In fact the Irish content, we have three times their votes. It's a three-to-one so, and that really protects the Irish content, and that has been there from the very, very beginning of the relationship with Advent.

Mr. Martin Brennan: I'd just like to ask, in the sense of Advent having 47 percent of Communicorp, and if I remember correctly also one of the institutional investors for the 20 percent. That still doesn't give them anything like leverage.

Mr. Denis O'Brien: No, absolutely not. Because that's one of the things that we have raised the finance on. In other words, like as in Irish indigenous companies, you cannot raise that kind of capital in this country. It's extremely difficult unless you go to the public markets. So we have raised it privately, and indeed all of the money has come from European pension funds. So what we have tried to do all along, and it's been our goal, is that the company would remain Irish. And that's the reason why, you know, we have insisted on these voting requirements for the Irish investors, that they have three times the number of votes Advent have. It's also likely that the Irish institutions will probably go into a vehicle together, just for simplicity, that there would be that 20 percent block so the Irish institutions again would control that block effectively in terms of equity terms.

I don't know whether we mentioned this in the presentation, but it is our aim to drop down to 32 percent, in other words, to share the ownership through a capital market entry here in the country now. We are not saying that we are going to do that immediately, because it's totally unfeasible to believe we'd do it immediately, but we have an agreement with the institutions whereby they would assist in marketing, taking in the shares in Dublin, and I think that's a tremendous advantage to our proposal.

Mr. Billy Riordan: When you say "dropping to 32 percent", who is dropping?

Mr. Denis O'Brien: In other words, Telenor AS would be dropping down to 32, so they would lose 8 percent. Communicorp would lose 8 percent as well. That would mean that the Irish investors, institutional investors and the public, would go up to, I think its 31. So, you know, you have even a greater Irish content going forward. Sorry, it's 6 percent.

Mr. Billy Riordan: You will drop each of your interests by 6 percent to 34 percent? Very magnanimous of you. So basically Advent essentially ends up with roughly 20 percent of the licence if you take the 5 ballpark percent that they have through their -

Mr. Denis O'Brien: Yeah, 20 percent will be right.

Mr. Billy Riordan: Plus the 47 percent.

Mr. Denis O'Brien: As I stress, the main thing from our point of view is that the company maintains -- is an Irish company. Okay.

Mr. Michael Andersen: I'd just like you to repeat for me the Advent's interest in Communicorp. You say that it's going to be up to, was it 47 percent voting power wise or --

Mr. Denis O'Brien: Equity. It's going to be up to 47 percent equity, but in terms of voting, the other 53 percent has three times the votes of Advent. So we, you know, the Irish shareholders in Communicorp will always have control of Communicorp.

Mr. Michael Andersen: Okay. But that also means that if you have what they have right now up to 46 and that escalates up to £30 million, then you have to have some other capital in from some other side so far as I can see.

Mr. Denis O'Brien: No, no, because the capital full requirement for the investment is initially 21.6, I think it is, plus a line up to 30, so they have said day one, they are guaranteeing £30 million.

Mr. Billy Riordan: So you have a little bit of fat in that. You have, in fact, from the point of view, you have about £8.5 million of fat in that particular commitment.

Mr. Denis O'Brien: Yes, but it's an irrevocable commitment of fat, if you know what I mean.

Mr. Billy Riordan: I used the term first.

Mr. Sean McMahon: Sorry, just one question on that, Denis, do I understand there is already an agreement in place between Communicorp and Advent on that?

Mr. Denis O'Brien: Yes.

Mr. Sean McMahon: *That is not the same as the letter of commitment we have seen in the application?*

Mr. Denis O'Brien: *Well, we thought that you'd want to hear that directly from Advent, hence they wrote you a letter to say that.*

Mr. Michael Andersen: *Okay. I think that that's all for the financial part, okay.*

23.50 As is apparent from that exchange, there were two matters on which Mr. Riordan sought clarification. The first of these was the extent of the investment which had already been made by Advent, and its then current shareholding, and the second was how the intended funding of £30 million by Advent would be structured. Mr. Riordan was confused on the former matter, as the application stated that Advent held a 34% shareholding in Communicorp, whereas Mr. Prelz' letter quantified that shareholding at 25%, and likewise the application referred to Advent having made an investment of \$19.5 million, with a commitment to invest an additional \$9.5 million, whilst the letter referred to the investment as having been one of \$10 million.

23.51 On that first point, Mr. O'Brien informed the Department that Advent had invested "*a total of 19,500,000 since last October*", and when queried again on the point, he replied that "*they have actually done it*". Those statements were incorrect. Advent had neither invested £19.5 million, nor \$19.5 million. The true position was that Advent had invested \$10 million in October, 1994, for a 34% stake in Communicorp, and the only additional funding provided by Advent as of 12th September, 1995, was on foot of the separate bridging finance agreement concluded the previous July, whereby Advent advanced \$5 million to Communicorp, by way of a bridging loan subject to a coupon of 30% per year. That information was not disclosed to the Department.

23.52 As regards the "*offer*", as recorded in Mr. Prelz' letter of 10th July, 1995, Mr. O'Brien informed the Department that it was intended that the £30 million would be provided in the form of an additional equity investment, whereby Advent's shareholding would increase to 47% or 48%. Furthermore, as there would be a 3:1 voting ratio in favour of the 53% shares held in Irish ownership, control would remain with the Irish shareholders. Since Mr. O'Brien had digressed to discuss the possibility of a future placement of shares on the Irish market, which would have the effect of diluting the shareholdings of both Telenor and Communicorp, it was Mr. Andersen who brought discussion back to the

funding issue, when he asked Mr. O'Brien to repeat the information he had provided to Mr. Riordan, regarding the Advent funding. It was at that point that Mr. Andersen voiced a concern regarding the impact on the level of Irish ownership in the event of an additional capital requirement. Mr. O'Brien responded that under the Esat Digifone business plan, Communicorp's capital requirement was £26 million, whereas the Advent offer was for funding of £30 million, which meant that additional funding was available if required, without any further dilution in the Irish ownership component. In that regard, Mr. O'Brien stated:

"...they have said day one, they are guaranteeing £30 million... it's an irrevocable commitment of fat, if you know what I mean."

23.53 It was at that juncture that Mr. Sean McMahon, who had direct knowledge of the state of Communicorp's finances from his dealings with its subsidiary, Esat Telecom, on the fixed-line side of the telecommunications sector, interjected, when he asked Mr. O'Brien directly whether:

"there is already an agreement in place between Communicorp and Advent on that?",

to which Mr. O'Brien replied

"Yes."

Mr. McMahon further queried whether:

"That is not the same as the letter of commitment we have seen in the application?"

and Mr. O'Brien responded:

"Well, we thought that you'd want to hear that directly from Advent, hence they wrote you a letter to say that."

23.54 What is beyond doubt from these exchanges is that Mr. O'Brien informed the Department that there was a "commitment" and a "guarantee" from Advent to provide £30 million in funding, by means of an equity injection, and that the terms of that investment would entail an increase in Advent's shareholding to 47% or 48%, subject to a 3:1 voting ratio in favour of the existing Irish ownership. Detailed reference has already been made to the evidence of Mr. O'Brien, Mr. Prelz, Mr. O'Donoghue, Mr. John Callaghan and Mr. Owen

O'Connell regarding the extent, if any, of the existence of such agreement or commitment on the part of Advent.

23.55 What is further beyond doubt is that there was no concluded agreement in existence between Advent and Communicorp for the provision of £30 million in equity investment on the terms outlined by Mr. O'Brien to the Department in the course of the presentation. Nor was there any legally binding commitment or guarantee of the type suggested by Mr. O'Brien. What there was in existence was a carefully worded letter of support, which did no more than record an historic fact, namely, that "*an offer had been made*". Whilst the Tribunal recognises of course that Advent, as a private equity house of international repute, would not have lightly withheld financial support from Communicorp, as observed by Mr. O'Connell in the course of his evidence, the fact remains that the support which was actually available was no more than that which had been furnished by Deutsche Telekom to Detecon, and over which such strong reservations had been registered by Mr. Andersen.

23.56 The factual position, unknown to the Department and to its consultants, was that Advent was not prepared to provide a binding commitment or a guarantee, as evidenced by their refusal to furnish any additional comfort to Telenor in the days immediately preceding the submission of the bid. Moreover, and again entirely unknown to the Department, it was never Mr. O'Brien's intention, in the event of Esat Digifone securing the licence, to fund Communicorp's capital requirement by means of a further equity injection by Advent. Rather, it was his intention, as he freely acknowledged in evidence, to raise such funds through a private equity placement, on the US market, through Credit Suisse First Boston, and, by that time, negotiations to that end had been proceeding with Credit Suisse First Boston, who had been appointed exclusive placement agents, from the previous June, 1995.

23.57 It was Mr. McMahon's evidence that it was his anxiety concerning Communicorp's financial capability, of which he had prior knowledge, that had prompted his intervention. As far as he was concerned, he was told by Mr. O'Brien that there was a separate agreement in place between Communicorp and Advent. He had recorded his understanding of the financial information provided by Mr. O'Brien at the presentation, in the following terms:

"

- *Advent has \$19.5 m in Communicorp*
- *Irish investors always to have 3 times the votes*

- Advent will fund ↑ £30 million for Communicorp's involvement in Esat D;
- There is an agreement in place."

It is evident from the content of Mr. McMahon's note that he was left in no doubt as to the import of what had been conveyed by Mr. O'Brien, and in view of the emphasis which he had added below the word "is" in the final bullet point of his note, it seems that he was clear in his understanding of what Mr. O'Brien had said, that is, that there was then in existence an agreement between Communicorp and Advent for funding of £30 million.

23.58 As regards Mr. O'Brien's statement that Advent had already invested \$19.5 million in Communicorp, it was Mr. O'Brien's evidence that the \$9.5 million to which he had referred, in addition to the \$10 million provided in October, 1994, comprised the \$5 million bridging finance advanced by Advent the previous July, and a further \$4.5 million which, under the terms of the original investment agreement of October, 1994, it was obliged, according to Mr. O'Brien, to invest in the event of Communicorp securing the GSM licence. Whilst Mr. O'Brien may well have believed at the time that he was justified in stating that Advent had invested \$19.5 million, by reference to those additional components, it seems to the Tribunal that the emphatic statement which he made could not be substantiated by reference to them. The \$5 million provided in July, 1995, as bridging finance, was not advanced in the form of equity, and was a simple contract debt due by Communicorp to Advent. Furthermore, the additional \$4.5 million had most certainly not been invested as of 12th September, 1995, and was at best a contingent obligation.

23.59 As regards Mr. O'Brien's responses to the final queries posed by Mr. McMahon, it was his view that there was an agreement in being between Advent and Communicorp, arising from the letter of 10th July, 1995, from the formal agreement of 12th July, 1995, which governed the issue of the letter of support, and from a verbal understanding or agreement between Mr. O'Brien on behalf of Communicorp, and Mr. Prelz on behalf of Advent. It was Mr. O'Brien's evidence that he regarded these arrangements from a commercial, rather than a legal viewpoint, and whilst he acknowledged that he had not informed the evaluators that the intended structure of the funding arose from a verbal agreement, he believed that he had been full and frank with them. The Tribunal has already addressed these matters in some considerable detail, and it is sufficient at this point to record that the Tribunal is satisfied that there was no such binding enforceable agreement, guarantee or commitment on the part of Advent then in existence.

23.60 Mr. O'Brien testified that his response to Mr. McMahon's final query was in error. Mr. McMahon had asked whether the agreement between Advent and Communicorp for £30 million funding, which Mr. O'Brien had confirmed to him was in place, was not the same as the letter of comfort from Advent, that is, the letter dated 10th July, 1995, from Mr. Prelz to Mr. Brennan, to which Mr. O'Brien had responded:

"Well, we thought you'd want to hear that directly from Advent, hence they wrote you a letter to say that."

It was Mr. O'Brien's evidence that he had misunderstood the question which had been asked by Mr. McMahon, and that he believed, in retrospect, that he had not answered the question which had been posed. Mr. O'Brien testified that:

"...I thought he was talking about the Letter of Commitment and I probably at that stage - I mean, I was chairing on our side, so it was fairly fast and furious, the questions were coming and I was passing them off to people, and then it came to the financial sector which Peter answered, then I asked [sic] as well in relation to Communicorp. So maybe I didn't listen to the question properly. But the reply that I gave him probably didn't answer his question, definitely not on purpose though."

Whether Mr. O'Brien was or was not confused, he did not directly answer the question put, but nonetheless conveyed the impression that the letter of 10th July, 1995, was something separate to the agreement which he had confirmed was then in existence.

23.61 Whilst it had been agreed that Mr. Riordan would pursue inquiries into the finances of Communicorp, it was Mr. Andersen who brought the questioning to conclusion. It is perhaps surprising that neither Mr. Andersen nor Mr. Brennan suggested that there was a gap in the Esat Digifone application, as they had in the case of Irish Mobicall, even though there was absolutely no information, much less proof, in the Esat Digifone application of the terms of the supposed Advent funding agreement.

23.62 One final matter, which should be mentioned, is an exchange which took place between Mr. O'Brien and Mr. Brennan at the conclusion of proceedings. At the end of the meeting, Mr. Brennan, having thanked the Esat Digifone representatives for their attendance, reiterated the rule which he had outlined at the commencement of the meeting, that any further communications between the Department and Esat Digifone should be on the Department's

initiative, and that any such request by the Department would be made in writing. There was then the following exchange between Mr. O'Brien and Mr. Brennan:

“MR. DENIS O'BRIEN: *Do you think that the process, I mean, what is the process between now and when you make your decision? I know we are not communicating with you. So - well - sorry, we are not going to send in any further material for you to review. So...*

MR. MARTIN BRENNAN: *Simply we will complete the evaluation and the Minister has a political commitment to produce a result by the end of November and I can't say any more.*

MR. DENIS O'BRIEN: *Okay. All right. Thank you.”*

23.63 As apparent from that exchange, Mr. O'Brien expressly confirmed his understanding of the rules governing communications in the final stage of the process, as outlined by Mr. Brennan, and his then intention to comply with them. Mr. Brennan, in response to Mr. O'Brien's query, indicated that, following the oral presentations, the evaluation of the applications would be completed, and that a result would be produced by end-November, 1995.

THE OUTPUT OF THE PRESENTATIONS

23.64 In the absence of any documentary record of how information and clarifications provided in the course of the presentations were utilised in the comparative evaluation, it is difficult to understand what substantive purpose they served, or how they advanced the process. As already alluded to, no transcripts of the presentations were generated, and no written record was created by the Department. No use whatsoever was made of the tapes until after the completion of the evaluation. Although the Project Group had contemplated that further inquiries could be made of applicants after the presentations, that course was not taken, and no such post-presentation inquiries were made.

23.65 The presentations undoubtedly provided the evaluators with an opportunity to meet and engage with the people behind the consortia, and to form an impression of them which might have impacted on judgements made in the course of the qualitative evaluation. That was certainly, it seems, the rationale behind the convening of presentations. However, as the qualitative evaluation had already proceeded as regards five dimensions, that purpose was at least partially frustrated. Although the Project Group had reserved the right to revisit the qualitative evaluation of the dimensions which had been completed, in the light of the presentations, there was no evidence to suggest any such

revisiting, and on the contrary, all of the evidence suggests that those marks were never revised, or never reconsidered in any formal sense.

DEPARTMENTAL ACTIVITIES AND INTERACTIONS IN THE IMMEDIATE AFTERMATH OF THE PRESENTATIONS

24.01 The completion of the final oral presentation on the morning of Thursday, 14th September, 1995, which was made by A4, Irish Cellular, marked the commencement of a time of intense activity on the part of the members of the Project Group who had been most centrally involved in substantive and administrative elements of the process. It was also a delicate time in the life of the Project Group, as it is apparent from the evidence heard by the Tribunal that members were by then forming impressions on emerging trends, and were therefore in possession of information which would have been of interest to persons outside the Group. Each of the elements of the events of Thursday and Friday, 14th and 15th September, 1995, of which the Tribunal heard evidence, will now be considered.

THE POST-PRESENTATION PROJECT GROUP MEETING

24.02 Following the conclusion of the final oral presentation, the Project Group met on the afternoon of Thursday, 14th September, 1995, for what was to be its eleventh meeting. By then, the evaluation had proceeded to the extent that the first quantitative evaluation results were available, the dimensions Performance Guarantees, Radio Network Architecture, Capacity of the Network, Frequency Efficiency and Coverage had been evaluated qualitatively, subject to Mr. Brennan's reservation that the Project Group would have an opportunity to revisit the evaluation of those dimensions in the light of the presentations, and the presentations themselves had concluded. Some initial work had been undertaken by AMI without Project Group participation in late August, in connection with the qualitative evaluation of five of the outstanding dimensions, but that was as yet to be considered and revisited by Project Group members. The financial evaluation was stalled, pending an analysis of the internal consistency of mandatory tables completed by applicants.

24.03 It will be recalled that the work programme which had been planned at the earlier Project Group meeting of 4th September, 1995, and which must have represented the understanding of the Group, was that the quantitative evaluation would be returned to, following the completion of the presentations; that the Project Group would have an initial discussion of the qualitative scoring, when the extent of the necessity for supplemental analysis would be determined; and that the marking of Aspects would then proceed.

24.04 The official report of the eleventh meeting of [14th September, 1995](#), was dated 29th September, 1995, and was signed by Ms. Nuala Free. The report

would have been vetted by Ms. Nic Lochlainn, and possibly also by Mr. Brennan or Mr. Towey, and the Tribunal has no reason to doubt that it was otherwise than an accurate account of what was agreed on that occasion. With the exception of Mr. Donal Buggy, who was on annual leave, there was a full complement of the Project Group in attendance. AMI were also very fully represented, with Mr. Michael Andersen, Mr. Marius Jacobsen, Mr. Ole Feddersen and Mr. Jon Bruel all recorded as present: the AMI personnel were of course already in Dublin for the oral presentations.

24.05 The report recorded that the agenda proposed for the meeting was:

- “1. Discussion of the morning’s presentation by A4.
2. Review of current position.
3. Decide how to progress the evaluations further. ”

The report was divided into separate sections addressed to each of those topics, and a copy of it can be found within the Book of Appendices to this Volume.

24.06 The first topic, which related to the presentation made that morning by Irish Cellular, appears from the layout of the report to have taken up the initial portion of the meeting. It seems that discussion was opened by Mr. Andersen as the report recorded at the outset that:

“Mr Andersen spoke about the success of the presentations generally. He felt that because AMI were well prepared from the earlier quantitative assessment, they had attained the required information from all the applicants. The presentations had served to highlight considerable variation between the applicants.”

It seems therefore, although the qualitative evaluation had proceeded in part, that AMI, in preparing for the presentations, had done so by reference to the quantitative assessment and results, which had of course been available from the previous 4th September, 1995.

24.07 Irish Cellular was the consortium with which Mr. A.J.F. O’Reilly was associated, primarily through the membership of Princes Holdings Limited, which was the principal member of the consortium with a 48% interest. AT&T, with a 26% interest, and UPC with a 16.4% interest, were also members. The report of the meeting recorded the Project Group’s impression of that presentation in the following terms:

“The A4 presentation was good. But AMI felt that the lack of familiarity with the Irish scene was poor. It was generally evident that:

- A4 spent too much time on matters that were not relevant to the tender requirements,*
- was unfamiliar with the ETSI standards.”*

As the Irish Cellular presentation was the only presentation discussed at that meeting, no equivalent record of the Project Group’s shared assessment of the presentations of the other five consortia was available, although Mr. Towe confirmed that the Project Group and the AMI consultants discussed their impressions of each presentation after its conclusion.

24.08 The second section of the report, which was headed “*Review of Current Position*”, related to the second topic listed in the agenda for the meeting. The report noted that the Project Group had agreed that the presentations had served as a useful exercise, and in that regard detailed five respects in which they had been of assistance which, as recorded in the report, were:

- “
- the ability of each applicant to work as a team had been highlighted,*
 - all applicants had been treated equally,*
 - the presentations had served to consolidate the initial views on the applications arising from the quantitative assessment,*
 - the importance both of a foreign applicant having a good knowledge of the Irish scene, and an Irish applicant having an understanding of the global picture was noted.*
 - Some companies showed that they could take a proactive role in developing the market where required. ”*

The Departmental witnesses agreed that the reference to the presentations, having served to consolidate initial views, arising from the quantitative assessment, suggested that the presentations had reinforced the ranking that had emerged from that analysis.

24.09 That section of the report also noted that:

“AMI said that while all applications would be scored, greater resources would from now on be expended on the leading applications. Two distinct groups had emerged – those with a good score to date and - those whose ranking was such that further intensive evaluation was deemed unnecessary.”

Departmental witnesses confirmed that the above entry signified that, as of 14th September, 1995, it was AMI’s view that, as the evaluation had proceeded, two distinct groups had emerged. The first group, which comprised A1, Irish Mobicall, A3, Persona and A5, Esat Digifone, were regarded by AMI as having submitted applications that were superior to those which had been submitted by A2, Cellstar, A4, Irish Cellular, and A6, Eurofone. It seems that it was AMI that nominated the composition of the two divisions, and proposed that, whilst all six applications would be scored, disproportionately greater resources should be focused on the three leading contenders.

24.10 When Mr. Andersen attended to give evidence, he confirmed the position as recorded in the official report. He testified that, in the light of his view that the Department had altered the contractual obligations of AMI following the settlement of their additional fee claim, whereby the focus of their work was to identify and rank the three top applicants, AMI regarded it as a natural course to concentrate resources on the first division of applicants. As of 14th September, 1995, two different leagues of applicants were clearly identifiable. Mr. Andersen nonetheless testified that at the meeting of 14th September, 1995, he had endeavoured to convey to the Project Group that *“everything was open”*. In that regard Mr. Andersen stated that he was quoting from a record of the meeting, but no such quote was to be found in any record available to the Tribunal. Those views were, according to Mr. Andersen’s evidence, voiced by him in response to a sentiment within the Project Group that A5, Esat Digifone, and to some extent A3, Persona, had done a very good job, and that A1, Irish Mobicall, was also a qualifying applicant.

24.11 It was on that very day that Mr. Brennan wrote to Mr. Andersen offering to resolve the fee dispute by increasing the fee limit in the contract of 9th June, 1995, to £370,000.00. Mr. Brennan considered it sensible to spell out in that letter precisely what the Department expected of AMI, in bringing the process to conclusion, particularly in light of Mr. Andersen’s stance at the contract meeting of 4th September, 1995, that AMI were not bound in assisting the Department in evaluating the applications, to assist in their ranking. It was not however the Tribunal’s impression that Mr. Brennan ever regarded the resolution of that

dispute as having altered AMI's contractual obligations. It is certainly possible that this curtailment of the process was part of the compromise brokered with AMI, but if that was the case, it was a matter which was entirely unknown to the greater part of the Project Group, who had no knowledge of that dispute. In that regard, the evidence of Ms. Maev Nic Lochlainn, who had been involved in the contractual negotiation with AMI, is of some significance. As already alluded to, she testified that it was her impression that AMI had resource problems, and that they wished to complete the evaluation as quickly as possible. There can be no doubt that this strategy, of focusing resources on three of the six applications, which was at least to some degree a departure from the Evaluation Model, would have led to a conservation of resources.

24.12 There was an entry in the middle of this second section of the report which recorded a contribution made by Mr. Brennan, which did not relate to the evaluation proper, but to procedural matters pertaining to future contact between the Project Group and applicants. Apart from its content, the entry also struck a discordant note, in that it represented the first instance of reference to Mr. Michael Lowry in reports of the Project Group. Mr. Brennan's contribution was recorded as follows:

"Mr. Brennan also stated, and the group agreed, that no further contact between the evaluation team and the applicants was possible, although access to the Minister could not be stopped."

When Mr. Brennan was asked about this entry in the course of his evidence, he could not assist the Tribunal as to what might have prompted him to make that observation. He thought that it might have been a casual or "throwaway" remark on his part. He did not know, and could not say, whether that entry reflected the existence of an awareness on the part of Departmental officials of access by interested persons to Mr. Lowry.

24.13 Whilst the Tribunal appreciates that casual remarks of little import can be made in the course of meetings at which serious business is conducted, it cannot accept that such a remark would be recorded in an official approved report of such a meeting. It is important to emphasise that the Tribunal is satisfied that neither Mr. Brennan, nor any other Departmental official, knew anything of actual contacts between Mr. Lowry and interested persons, of which the Tribunal learnt in the course of its inquiries, and of which it heard evidence. It is however clear that Departmental officials were aware in general that Mr. Lowry, in his official capacity, could not be isolated, and would inevitably have contact with interested persons during the course of the process. They would have known, in particular, that he was due to attend a function the following day, at which he was likely to have, and as will be seen did have, contact with Mr.

A.J.F. O'Reilly, who had an involvement in A4, Irish Cellular, which had just completed its presentation that morning. Apart from such corporate awareness, it is clear from the evidence of Mr. Fintan Towey, who the Tribunal found to be a constructive and helpful witness, that the Department had anticipated that interested persons would communicate with Mr. Lowry, and that, by 14th September, 1995, Mr. Towey also knew that such communications had occurred, and had prompted Mr. Lowry to seek information from him concerning the substantive process, and Mr. Towey had so informed Mr. Brennan. That interaction is returned to, and considered in full, in the next chapter of this Volume. It is the Tribunal's view that it was more probable that specific knowledge, rather than some general apprehension, in fact prompted Mr. Brennan to make the observations attributed to him in the official report of the Project Group meeting.

24.14 The third section of the report was headed "*How to progress the Evaluations*". It initially noted that the assessment of technical dimensions had been completed, that the Technical Division members had attended all but one of the sub-groups, and were happy with the conclusions, and that the Technical Division and AMI were to proceed to score Technical Aspects by close of business that day. Technical Aspects comprised the dimensions Radio Network Architecture, Capacity of the Network, Frequency Efficiency and Performance Guarantees. Mr. John McQuaid and Mr. Aidan Ryan had been involved in the assessment of three of those dimensions, but had not had input into the assessment of the fourth dimension, Performance Guarantees, which had been evaluated by Mr. Towey and Mr. Billy Riordan. As it was agreed that the aggregation of those scores should proceed immediately, it must be assumed that the caveat entered by Mr. Towey in his summary report on the Performance Guarantees sub-group, dated the previous day, 13th September, 1995, in which he had reserved the right to review the markings following further consideration, must have been lifted.

24.15 The section of the report then continued by identifying in some detail the steps which had yet to be taken to progress the evaluation as follows:

"AMI listed the next steps as:

- 1. finalise the qualitative scoring and award marks on the dimensions,*
- 2. perform initial scoring of the aspects, and*
- 3. perform supplementary analyses in:*
 - blocking/drop out*
 - financial analysis concerning SIGMA/ADVENT*

- adherence to EU procurement rules
- tariffs
- interconnection (since assumptions vary widely between applicants)

The scoring of the marketing, financial and management dimensions would take place in Copenhagen next week; DTEC to appoint the appropriate personnel to attend. AMI would provide the first draft evaluation report on the 3rd October. This would be discussed by the Group on Monday 9 October. The three DTEC Divisions would supply any written comments prior to that meeting. Following that, AMI would produce a second draft report by 17 October.”

24.16 The three steps identified by AMI undoubtedly represented a logical and systematic approach to the continuing management of the progress of the evaluation. What was recorded as planned was firstly, the finalisation of the qualitative scoring and award of marks for the dimensions. Six of the eleven dimensions remained to be evaluated, of which five, Market Development, Experience of Applicant, Financial Key Figures, Tariffs and International Roaming Plan, required to be analysed in sub-groups. It was intended that sub-groups for those remaining dimensions would assemble in Copenhagen during the following week. The term used to describe what was required was “to finalise” the qualitative scoring, and this confirms, as was the case, that at least some of the outstanding dimensions were amongst those that AMI had commenced evaluating qualitatively at the end of August, without Departmental involvement.

24.17 The second step to be taken in progressing the evaluation was to perform “initial scoring” of Aspects. Apart from noting that Technical Aspects would be sub-totalled by close of business that day, the report was silent as to how, when, or by whom the remaining Aspects would be scored. This was going to be a significant step in the evaluation, since the Aspects sub-totals were important components in the completion of the marking matrix, which was intended to produce a grand total of markings, and a ranking in the qualitative evaluation. Although not recorded in the official report, Ms. Nic Lochlainn’s contemporaneous handwritten notes of the meeting recorded that this step was to be undertaken by those scoring the dimensions. It follows therefore that the Departmental personnel who were due to evaluate the outstanding dimensions were to be responsible for the “initial” scoring of the Aspects sub-totals. The official report recorded that AMI were to produce a draft Evaluation Report on 3rd October, 1995; that the Evaluation Report was to be discussed at the meeting of 9th October, 1995; that the three Divisions represented on the Project Group were to supply written comments prior to that meeting; and that a second draft Evaluation Report was then to be provided by 17th October, 1995. It was

therefore intended that the three remaining Aspects would be aggregated on an “initial” or provisional basis by the Departmental personnel due to evaluate the outstanding dimensions, and that those totals would be reviewed by the Project Group, following receipt of AMI’s first draft Report.

24.18 The third step identified by AMI in their breakdown of the future work to be undertaken was supplemental analysis of the five matters recorded in the report of the meeting, namely:

- (i) Blocking and Drop-out Rates;
- (ii) Financial analysis concerning Sigma and Advent;
- (iii) Adherence to EU procurement rules;
- (iv) Tariffs;
- (v) Interconnection.

24.19 The first of these was Blocking and Drop-out Rates which, it will be recalled, were the two indicators for Performance Guarantees in the quantitative evaluation. Whilst there had been some unease on the part of the Project Group, and in particular Mr. Martin Brennan, regarding the adoption of these mechanical indicators to define Performance Guarantees in the quantitative evaluation, which he regarded as inconsistent with the Departmental concept, it is clear that this element of the supplemental analysis proposed by AMI on 14th September, 1995, can only have been directed to the quantitative evaluation. It cannot have related to the qualitative evaluation of Performance Guarantees, as Blocking and Drop-out Rates formed no part of that evaluation, which had in any event been completed the previous week. Moreover, the Technical Division had been instructed to proceed to aggregate the results of that evaluation as part of the marks for Technical Aspects.

24.20 Supplemental analysis was also to be performed in relation to the finances of Sigma and Advent. Sigma was one of the members of the Persona consortium, and Advent, according to the Esat Digifone application and presentation, was intended to be both a 5% shareholder in the licensee company, and the provider of funding to Communicorp to meet its capital commitment to the project. The results of the quantitative evaluation for the indicator Solvency had raised serious questions surrounding the finances of Esat Digifone, and it appears that it was those results, coupled with continuing unease surrounding the funding available to Sigma and Communicorp to meet their respective equity commitments, as evident from the inquiries pursued at their oral presentations, that prompted AMI to recommend that supplemental analysis should be performed.

24.21 Although not recorded in the report, it seems that the Project Group also agreed at the meeting of 14th September, 1995, that inquiries should be made concerning the credentials of Advent, and that Mr. Billy Riordan, through his private sector contacts, should pursue those inquiries. What was not however raised, in the context of either Persona or Esat Digifone, was the possibility of requesting the provision of any additional documentation relating to, or proof of, the availability of funding to cover their equity obligations, even though those issues were regarded as issues of concern, which had prompted inquiries pursued in the course of their respective presentations. This element of the supplemental analysis proposed by AMI had also been recorded by Mr. McMahon in his notes of the meeting, made in his personal journal, in which he had recorded that the capital funding of some applicants was to be re-assessed.

24.22 Supplemental analysis was also recommended by AMI, and agreed, in relation to EU procurement rules, tariffs and interconnection. It appears that the further analysis of tariffs and interconnection was related to, and arose because of, the fact that a final interconnection regime had not been agreed with Telecom Éireann prior to the launch of the competition. Pending agreement, applicants had been provided with what was described as an interim regime. It appears that in preparing applications, and in particular in prescribing tariff levels, applicants had been obliged to make assumptions about the final interconnection rates that would be charged by Telecom Éireann, and these assumptions had varied widely between applicants.

24.23 The future work programme as outlined by AMI, and as recorded as having been agreed by the Project Group, did not extend beyond the “*initial*” scoring of Aspects in the qualitative evaluation, and the performance of supplemental analysis in connection with the matters proposed by AMI. No reference was made to proceeding to a grand total in the qualitative evaluation, or to a ranking, provisional or otherwise, in the overall evaluation.

24.24 The official report closed with a final short section headed “*Other Issues*”, in which reference was made to dealings between Mr. Towey and the Office of the Attorney General regarding the draft licence, and also to the work which had yet to be undertaken by Mr. Riordan on the financial indicators, and which he was to forward to AMI, who would then amend the mandatory tables. This latter reference it seems was to the analysis that Mr. Riordan had agreed to undertake following the first abortive Financial Key Figures sub-group in Copenhagen the previous week.

THE TECHNICAL ASPECTS ARE SUB-TOTALLED

24.25 The first of the tasks identified at the Project Group meeting of 14th September, 1995, as requiring critical attention on the Departmental side, was the aggregation of the marks for technical dimensions to arrive at a Technical Aspects sub-total. This task was undertaken by Mr. McQuaid and Mr. Ryan, in conjunction with AMI, and resulted in the following sub-totals:

A1	A2	A3	A4	A5	A6
C	D	B	B	A	C

Mr. McQuaid recalled the exercise, which he undertook in conjunction with Mr. Jacobsen, but could not pinpoint in time precisely when he went about it. What was of considerable assistance, in understanding how Mr. McQuaid and Mr. Jacobsen approached that task, was a working document which Mr. McQuaid had generated in the course of it. The document had not been retained within the Technical Division files, but a copy of it had been annexed to a fax sent by Ms. Nic Lochlainn to Mr. Andersen on the following 6th October, 1995, and that copy had been retained, and was available to the Tribunal.

24.26 The document consisted of a copy of page 20 of the Evaluation Model, which contained the qualitative marking matrix. Mr. McQuaid had made handwritten entries on that copy of the matrix, recording the marks received by each applicant for technical dimensions, and the sub-totals which they had arrived at for Technical Aspects. The handwritten entries included numerical weightings seemingly applied to each dimension, and the sub-totals for each applicant were expressed both numerically and in lettered grades. The document had been headed by Mr. McQuaid “*Technical Aspects as noted by J. McQ at mtg w M. Jacobsen*”, and the table is reproduced below, with Mr. McQuaid’s handwritten entries shown in bold:

Aspects and dimensions	A1	A2	A3	A4	A5	A6
Technical aspects (subtotal)	C 3.00	D 2.25	B 3.55	B 4.10	A 5	C
Radio network architecture ++35	C	C	B	B	A	D
Capacity of the network ++35	C	D	C	B	A	C
Performance guarantees +20	D	C	C	B	A	C
Frequency efficiency 10	A	C	A	A	A	A

24.27 Mr. McQuaid confirmed in evidence that, in order to aggregate the dimension marks, he and Mr. Jacobsen had used the same technique which they had employed in the technical sub-groups: the grades awarded to each applicant for each of the four dimensions were converted from letters to numbers, so that every A became 5, every B became 4, every C became 3, every D became 2, and every E became 1. The numerical weightings recorded beside each of the dimensions, that is, 35, 35, 20 and 10, were then applied to the numerical scores, to arrive at a numerical sub-total for each applicant, and those sub-totals were then reconverted into lettered grades. The numerical totals for each of the applicants, with the exception of A6, were shown in Mr. McQuaid's working document, and it will be seen that these were 3.00 for A1, which was reconverted to grade C, 2.25 for A2, reconverted to grade D, 3.55 for A3, reconverted to grade B, 4.10 for A4, also reconverted to grade B, and 5 for A5, reconverted to grade A.

24.28 Mr. McQuaid could not recall the discussions which led to the selection of those numerical weightings for the four technical dimensions which, on a base of 100, were:

- (i) 35 for Radio Network Architecture;
- (ii) 35 for Capacity of the Network;
- (iii) 20 for Performance Guarantees;
- (iv) 10 for Frequency Efficiency.

Whilst not recalling their thinking, he surmised that, as the numerical weightings were reasonably consistent with the relative weightings of the dimensions in the quantitative evaluation, it was likely that they had chosen those weightings, by reference to the quantitative weightings agreed prior to the closing date of the competition. Although Mr. McQuaid accepted that such an approach had not been provided for in the Evaluation Model, he considered that it was a fair and appropriate way to proceed.

24.29 Whilst Mr. McQuaid could not pinpoint in time precisely when he, Mr. Ryan, and Mr. Jacobsen had met to undertake this exercise, in view of the mandatory and urgent terms in which this task was framed in the report of the Project Group meeting of 14th September, 1995, which stipulated that the Technical Division and AMI were to score Technical Aspects by close of business that day, it is probable that Mr. McQuaid and Mr. Jacobsen proceeded to do so on 14th September, 1995, immediately following the conclusion of the Project Group meeting.

MR. RIORDAN GRAPPLES WITH THE FINANCIAL FIGURES

24.30 The second task to be undertaken on the Departmental side was the finalisation of work on the mandatory tables by Mr. Riordan. This matter was also attended to promptly, and on the following day, 15th September, 1995, Mr. Riordan forwarded a memorandum to Mr. Bruel, outlining the results of his analysis. It will be recalled that Mr. Riordan's task was to examine applicants' mandatory tables to test them for internal consistency. This followed from Mr. Towey's proposal that, rather than undertaking what had been described as the mammoth task of checking for consistency between the mandatory tables and the business cases, they should confine the exercise to a "*quick and dirty*" check of the tables themselves.

24.31 In his memorandum of 15th September, 1995, Mr. Riordan confirmed that he had examined the tables, and thought that he had resolved the deficiencies. He initially proposed that amendments be made to the structure of the tables submitted by all applicants, to ensure that they were at least visually consistent. Having made those changes, he proposed a series of what he described as bidder-specific amendments. These amendments were necessary for all candidates, with the exception of A6, Eurofone, which Mr. Riordan noted had made no mistakes. Mr. Riordan concluded his memorandum with the following observation:

"I believe that the level and extent of errors in the tables should result in our considering including a financial competency criterion in our evaluation of the bidders' credibility. Some of the mistakes discovered are far from understandable."

There was no evidence available to the Tribunal that this suggestion was considered within any financial sub-group, or that the matter was ever brought to the attention of the full Project Group. It was never adopted or implemented.

24.32 Mr. Riordan's memorandum closed with an instruction to AMI that it was crucial that the mandatory tables should be amended before the financial sub-group met to complete the qualitative evaluation. That sub-group was scheduled to reconvene in Copenhagen towards the end of the following week, and Mr. Riordan asked AMI to notify him, before the following Tuesday or Wednesday, if it was not possible for them to reformat the tables in advance of the scheduled meeting.

THE PROJECT GROUP'S IMPRESSION OF EMERGING TRENDS IN THE EVALUATION

24.33 As has already been explored, on 14th September, 1995, applicants had been divided into two divisions, in terms of the further focus of the evaluation, and A1, Irish Mobicall, A3, Persona, and A5, Esat Digifone, had been identified as the top three contenders for the GSM licence. That division primarily arose from the results of the quantitative evaluation, and of the qualitative evaluation of the five dimensions which had proceeded in Copenhagen during the previous week.

24.34 Within that first division, there was a further sub-division of the three applicants. It seems that A3, Persona, and A5, Esat Digifone, were regarded as front runners, with A1, Irish Mobicall, in third position. Mr. Towey, who had been so centrally involved in the process, confirmed that he would have formed that view of the emerging trends from a relatively early stage of the substantive evaluation. He further testified that once Mr. Ryan of the Technical Division, who together with Mr. McQuaid and Mr. Jacobsen had been instrumental in the evaluation of technical dimensions, had informed him of the ranking arising from that evaluation, he deduced that A5, Esat Digifone, would be the winning consortium.

24.35 The emergence of these two groups, and the perception of the evaluators regarding them, was supported by the contents of a memorandum which was within the files of the Department of Finance. The [memorandum](#) was from Mr. Jimmy McMeel, of the Department of Finance, a member of the Project Group who had attended the meeting of 14th September, 1995, to his superiors in that Department, Mr. Doyle, Mr. Furlong and Mr. Curran, and it related to what had transpired at that meeting. A copy of Mr. McMeel's memorandum can be found within the Book of Appendices to this Volume. There were a number of annexes to the memorandum of which annex 1 was a significant piece of evidence. That annex comprised a list of the names and composition of the six consortia, on which Mr. McMeel had made handwritten annotations, reflecting the then state of mind of the Project Group on the merits of the six applications. At the top of the page, Mr. McMeel had written "*meeting 14/9/95*", and he testified that this signified that the Project Group meeting of that day was the source of the information he had recorded. On the right-hand side of the annex, he had made three separate entries as follows:

- (i) he had written "*3rd PLACE*" with an arrow pointing towards A1, Irish Mobicall;

- (ii) he had written “*DOING WELL*”, with an arrow pointing towards A3, Persona;
- (iii) he had also written “*DOING WELL*” with an arrow pointing towards A5, Esat Digifone.

24.36 As Mr. McMeel had been absent from the meeting of 4th September, 1995, he testified that he would have gleaned the information which he had recorded from his attendance at the Project Group meeting of 14th September, 1995, and possibly from a member of the consultancy team. From the annotations he had made on annex 1, it is clear that it was his understanding, from what had been conveyed to him at the Project Group meeting, that Persona and Esat Digifone were both regarded as “*doing well*”, and that Irish Mobicall was regarded as behind them in third place.

24.37 The views of some members of the Project Group as of 14th September, 1995, were it seems even more advanced than as recorded by Mr. McMeel. As already referred to, Mr. Andersen, when he recently attended to give evidence, testified that at that meeting there was a clear sentiment amongst Departmental officials that A5, Esat Digifone, and to some extent A3, Persona, had done a very good job, and that A1, Irish Mobicall would qualify for the licence. It seems therefore, that if Mr. Andersen was correct, that as of 14th September, 1995, there was a view that as between A5 and A3, A5 was the front runner, and that view conformed with the evidence of Mr. Towey as to his impressions.

Mr. MICHAEL LOWRY'S KNOWLEDGE OF THE EMERGING TRENDS AS OF MID-SEPTEMBER, 1995

25.01 It was a fundamental principle of the competitive “*beauty contest*” approach to the selection of a GSM competitor for Eircell, and which represented Government policy, that the process would consist of a fair, impartial and independent adjudication of applications, in accordance with the rules of the competition. It was intended that the selection would be made by a Project Group comprised of Departmental officials possessing the relevant skills and expertise, who would be assisted by specialist consultants, free of political or any other external influence.

25.02 In order to guarantee the fairness of the process, it was intended that it should be sealed, and that information regarding the substantive evaluation should be kept confidential, and should not pass outside the membership of the Project Group. This subject has already been addressed in Chapter 8 of this Volume. Mr. Loughrey, Secretary General of the Department, recognised that the confidentiality of the process was central to the proper operation of the Project Group. The only information which he countenanced could have been made available legitimately to persons outside the Project Group, such as himself, or Mr. Michael Lowry, as Minister, was information relating to issues such as timing and critical path. The Tribunal is satisfied, as already found, that the principle was not intended to be merely aspirational, and that the scope and application of the seal of confidentiality left no room for disclosure of substantive information outside the confines of the immediate membership of the Project Group.

25.03 Whilst it was undoubtedly the case that a strict seal of confidentiality was intended to bind the process, that seal was in practice breached on a series of occasions of which the Tribunal heard evidence: specifically, Mr. McMeel’s report to his superordinate officials in the Department of Finance on the outcome of the Project Group meeting of 14th September, 1995; and discussions between Mr. Martin Brennan and Mr. Sean Fitzgerald, his immediate superior, to which reference will be made. It is not at all suggested that isolated communications, such as those recounted, with fellow senior civil servants in either of the involved Departments, being persons of long professional standing and in any event bound by Official Secrets legislation, were likely to compromise the process. Nevertheless, the justified emphasis on strict confidentiality within the Project Group was surely such as necessitated that any such disclosure was an exceptional course, requiring agreed clearance within the Project Group, rather than a discretionary initiative undertaken at the behest of any individual member.

25.04 It is however clear that substantive information was also made available to Mr. Lowry, who, contrary to his testimony to the Tribunal, was far from being a disinterested Minister whose sole anxiety was to secure a competitor for Eircell, but rather, on a consideration of all of the evidence heard by the Tribunal, in fact exhibited an appreciable curiosity about the substantive process, as it was proceeding, and on a number of occasions sought, and was provided with, information by members of the Project Group.

A PHONE CALL TO MR. FINTAN TOWEY

25.05 On a date which it has not been possible to establish with precision, but which was undoubtedly during the early part of September, 1995, a telephone call was made by Mr. Lowry to Mr. Fintan Towey in the latter's Departmental office. As significant differences emerged in the testimony of Mr. Towey and Mr. Lowry, when each gave evidence as to the content of the conversation which ensued, their respective accounts of it given in evidence will be set forth in a summarised form, along with references to other related or additional testimony.

25.06 It is noteworthy at the outset to observe that the Tribunal acquired knowledge of this conversation only by reason of information provided by Mr. Towey to the Tribunal, during the course of the private investigative phase of its work, and confirmed by him in his Memorandum of Intended Evidence furnished in advance of the Tribunal commencing public sittings in December, 2002, in response to a detailed questionnaire issued to him by the Tribunal. No written memorandum or reference to the conversation of any sort was within the Departmental documentation made available to the Tribunal, or otherwise came to the attention of the Tribunal.

25.07 The evidence of Mr. Towey was heard first in May, 2003. As already stated, this portion arose from his response to his lengthy evidence questionnaire, in the course of which he had been asked whether or not he had kept Mr. Fitzgerald, Mr. Loughrey and Mr. Lowry or any other person informed of the emerging trends or ranking in the GSM competition. His response was to the effect that he had had no such contact with Mr. Fitzgerald or Mr. Loughrey, but that at some point during August or September, 1995, which he later narrowed to the early part of September, in advance of the oral presentations, Mr. Lowry telephoned him, in Mr. Brennan's absence, in relation to the progress of the competition. The main concern expressed by Mr. Lowry was to ascertain that the process had not concluded, and that the winning consortium had not yet been decided. Mr. Towey made it clear to him that the evaluation had not been completed, and may have mentioned the names of the front runners, although

he could not be absolutely certain on that point. He believed that Mr. Lowry had indicated that he was under some pressure, because he had been subject to representations by parties who were concerned that the decision had already been made, to ensure that a genuine evaluation process was underway, and that the result was not a foregone conclusion.

25.08 Mr. Towey could not say how the call came through to him, thinking it was most likely that Mr. Lowry had initially reached Mr. Brennan's secretary, and had then been transferred to Mr. Towey, in the absence of Mr. Brennan. Mr. Towey stated that he got the impression that Mr. Lowry was in an open, crowded area, with background noise audible, and speculated that he had been at a race meeting. The conversation had been very short, with Mr. Lowry stating that he was under a lot of pressure regarding the competition, and wanted to know how it was going. He gave Mr. Towey the clear impression that the pressure on him was in the sense that one of the consortia, no name was given, had the view that the competition was sewn-up, that the favourite or media favourite had the licence "*in the bag*", and Mr. Lowry was accordingly anxious to ascertain the position, and preferably learn that this was not the case. Mr. Towey made it clear in response that no finality had been reached, and that there were a number of players still in the game. Whilst Mr. Towey did not have an absolute recollection, he believed that he had indicated to Mr. Lowry who the front runners were at the time. Mr. Lowry seemed satisfied with this response, and Mr. Towey thought that Mr. Lowry had said to him that he would talk subsequently to Mr. Brennan. Mr. Towey confirmed in evidence that the favourite in media and bookmaker's circles at the time had been A3, Persona.

25.09 Returning to the matter at a later stage in his testimony, Mr. Towey stated that the impression he got was that Mr. Lowry was being subjected to a view that Motorola jobs would disappear, and because of that the Government would ensure that the licence went to Persona. He confirmed having heard a rumour within the Department to the effect that Persona had been given some degree of comfort from the previous Government with regard to its prospects for the licence, and he drew the inference that some other consortium member had suggested this to Mr. Lowry. Mr. Lowry, it will be recalled, had been aware of that rumour for some time, and had himself canvassed it with Mr. Loughrey, and his Programme Manager, Mr. Colin McCrea, some six months earlier, in early March, 1995, when, according to Mr. McCrea's evidence, Mr. Loughrey was advising Mr. Lowry on the appropriate course he should take in dealings with interested parties in the course of the process.

25.10 Mr. Towey confirmed that it was the case that Mr. Lowry had approached him, that it was not a casual encounter such as meeting in a

corridor, and that Mr. Lowry had sought specific information from Mr. Towey and had received it. This was Mr. Towey's only direct one-to-one contact with Mr. Lowry in relation to the GSM competition. He passed word of the conversation on to Mr. Brennan, as his immediate superior, but not to anybody else in the Project Group. He did not believe that the telephone call from Mr. Lowry had in fact been mentioned to the rest of the Group, but it was followed, he believed, by a discussion between Mr. Lowry and Mr. Brennan which would have been a substantial discussion, which he presumed was reported to the Group. Even though this was during the closed period of the competition, Mr. Towey stated that he was not particularly concerned at the approach: he said that they were always clear in the Department that it was likely that Mr. Lowry would come in contact with people having interests in the competition, and this was such an instance; he did not interpret the call as a concern on the part of Mr. Lowry that Persona should not win, but merely as seeking a rebuttal of the notion that the outcome was "*in the bag*", and providing a basis for getting the consortium in question off his back.

25.11 As to the time in September of the call, Mr. Towey suspected that it was previous to the oral presentations, but it could have been after them. Trying to focus further, he recalled that he had had a telephone conversation with his Project Group colleague, Mr. Aidan Ryan, following the completion of the technical evaluation, which he thought would have been between 21st and 26th September, 1995, and it would have been clear to him at that point that Esat Digifone was likely to be the winner. The call from Mr. Lowry was at a time when he knew the first three, but before he knew that Esat Digifone was the probable winner. Accordingly, it was likely to have been any time from early to mid-September, and most likely not at the time of the oral presentations, when he would have been absent from his desk. He suspected that it was before the oral presentations. On a point of detail, it should be observed that Mr. Towey was incorrect in his estimation that the technical evaluation had been completed some time between 21st and 26th September, 1995. That evaluation had in fact been completed during the week prior to the presentations, and Technical Aspects had been sub-totalled by Mr. McQuaid and Mr. Ryan, in conjunction with Mr. Jacobsen of AMI, immediately following the post-presentation Project Group meeting of 14th September, 1995.

25.12 Mr. Towey agreed that this was the first example in evidence of Mr. Lowry approaching a Project Group member on foot of some applicant's representations; however, by the rules of the competition, he felt that there was no question of Mr. Lowry being denied information if he sought it in relation to the process. He remarked that it was the feeling of civil servants that overall, if Mr. Lowry was approached, ignorance was the best defence. Mr. Towey accepted that the reference in the official report of the Project Group meeting of

14th September, 1995, where it was stated “*access to the Minister could not be stopped*”, may have had some relevance to this telephone call.

25.13 When Mr. Martin Brennan attended on a second occasion to give further evidence to the Tribunal in June, 2003, he was questioned in relation to the Ministerial telephone call, and in relation to Mr. Towey’s evidence that he subsequently discussed the matter with Mr. Brennan, as his immediate superior. Mr. Brennan testified that he was familiar with that evidence, had no recollection of Mr. Towey discussing the matter with him but, insofar as Mr. Towey had stated this, he was prepared to take his word for it. The Tribunal has no doubt that Mr. Towey’s evidence in that regard was entirely reliable, and that, as testified by Mr. Towey, he did inform Mr. Brennan of that telephone conversation, and that as already indicated, it was that knowledge which very probably informed the observation attributed to Mr. Brennan in the official report of the Project Group meeting of 14th September, 1995, to the effect that the Project Group could not prevent access to the Minister by consortia or interested persons.

25.14 Prior to the commencement of its public sittings, the Tribunal requested Mr. Lowry to provide a voluntary Memorandum of Intended Evidence in response to a questionnaire with which he was then furnished. In that questionnaire, Mr. Lowry was asked for details of all of his knowledge, direct or indirect, of the trends and/or ranking emerging from the evaluation process during the month of September, 1995, and the source or sources of such knowledge. Mr. Lowry provided the Tribunal with a voluntary Memorandum on 1st December, 2002, but did not do so in the form requested by the Tribunal, that is, in the form of responses to specific questions which had been posed by the Tribunal. In that Memorandum, Mr. Lowry made no reference whatsoever to the information which had been provided by Mr. Towey concerning that telephone call, even though that information had been conveyed to him by the Tribunal: rather, he merely informed the Tribunal that he did not have any meetings or discussions with the Project Team, as he described it. It should also be observed that, whilst Mr. Lowry was represented throughout the Tribunal’s public sittings, save in respect of Mr. Andersen’s belated testimony, no questions were put on Mr. Lowry’s behalf to Mr. Towey when he gave his evidence in May, 2003, nor was any alternative version of the telephone call outlined to him for his comment.

25.15 When Mr. Lowry came to testify in relation to this matter, in the course of his substantive examination regarding the GSM competition in December, 2005, his evidence, in contrast to the contents of his Memorandum of Intended Evidence, in relation to the conversation, was detailed and specific, and he indicated that he had in the interim recalled matters. He testified that during a

review in the Department, he recalled his Programme Manager, Mr. Colin McCrea, telling him that he had heard rumours that there was already a winner, and that the competition was nearly over. Mr. Lowry's response had been that this was improbable. Later that afternoon or early evening, he visited the shop Tricot Marine in the Grafton Street area, and then rang his Department, seeking to speak with Mr. Brennan, but was instead transferred to Mr. Towey, whereupon he indicated to Mr. Towey that, in conversation with his Programme Manager, the latter had told him that the matter was done and dusted. Mr. Towey's response, according to Mr. Lowry, had been in terms of "*No Minister, it's very, very much alive, we have at least three very active contenders*".

25.16 As to Mr. Towey's mention of hearing background noise during the call, Mr. Lowry felt this was because it was in the immediate area of Grafton Street. He stated that he wanted to know whether there was something that he had not been informed of; insofar as Mr. Towey had referred to his seeming to be under pressure, Mr. Lowry felt that Mr. Towey had misrepresented the position: he knew of pressure in the Department, had had bad days, and wanted a good news story on the GSM competition. He acknowledged that there was then a strong rumour doing the rounds that Motorola had it "*in the bag*", having been given the "*nod*" from the previous Government, and he testified that this was what Mr. McCrea had been informing him about. He was not under any pressure from the competition entrants, as he was outside the process. As to any feeling that Motorola was not the "*flavour of the month*" with him as Minister, and that this was known to civil servants, that intimation never came to him from any civil servant. Mr. Lowry thought that the conversation with Mr. Towey was at the end of August, or early September. He was almost sure that he telephoned whilst coming back from the shop to his car in Leinster House. This had been quite a normal course for him, and he had looked for Mr. Brennan, but got Mr. Towey. What he had stated was his best recall, and the details had recently come back to him. It was not unusual for him to have followed the matter up himself, rather than have Mr. McCrea do so.

25.17 It appears to the Tribunal that a significant difference exists between a query posed by a Minister of a Departmental official, arising from a conversation with his Programme Manager, and one perceived by the official as reflecting pressure applied to the Minister by some consortium associate. If Mr. Lowry had indeed prefaced his query to Mr. Towey as resulting from a conversation with Mr. McCrea earlier the same day, it is extremely difficult to see how Mr. Towey could reasonably have divined the context and interpretation he placed upon the inquiry. Overall, the Tribunal found the account furnished by Mr. Towey appreciably more cogent and persuasive than that furnished by Mr. Lowry.

25.18 The Tribunal finds it singularly improbable that Mr. Lowry happened to recall events shortly before giving evidence, when they had seemingly escaped him over the previous three years, in the absence of a reasonable explanation, which was not forthcoming. The Tribunal further regards Mr. Lowry's account of the Motorola rumour having been conveyed to him by Mr. McCrea that day as improbable, given that the self-same rumour was the one which Mr. Lowry had himself canvassed with Mr. McCrea and Mr. Loughrey, some six months earlier. Mr. Lowry's account that it was this information which prompted him to make the inquiry of Mr. Towey was wholly unconvincing.

25.19 The Tribunal is satisfied that Mr. Towey's testimony represented a reliable account of what in fact occurred. The Tribunal found Mr. Towey to be a responsible civil servant, and having observed him giving evidence over a number of days found him to be a careful witness. The Tribunal has no doubt that the impression which Mr. Towey formed, that Mr. Lowry was under pressure as a result of representations made to him by interested parties, was not a fanciful one, but resulted from what Mr. Lowry conveyed to him. The Tribunal is further satisfied that Mr. Towey, in responding to Mr. Lowry, did disclose to him the names of the leading contenders which, as of that time, were A1, Irish Mobicall, A3, Persona and A5, Esat Digifone, and that in doing so, he was responding to a specific inquiry made of him by Mr. Lowry.

25.20 Mr. Towey cannot be faulted either personally or professionally for his actions in this matter. As has already been outlined in Chapter 8, it was Mr. Towey's evidence that it was his view that the seal of confidentiality to which the process was subject was not intended to bind members of the Project Group as regards disclosures to other Departmental officials or to Mr. Lowry, and was intended to apply only to external interests. Whilst the Tribunal does not accept that Mr. Towey's understanding represented a correct statement of the intended operation of that seal of confidentiality, it must also have regard to the fact that Mr. Towey was then a relatively junior civil servant, to whom questions had been put by Mr. Lowry, as Minister. They were self-evidently not on equal terms, and the Tribunal recognises that Mr. Towey had no realistic alternative but to respond to Mr. Lowry. The fault rests solely with Mr. Lowry, and with a system which enabled Mr. Lowry, as Minister, to make such an inquiry of a relatively junior civil servant. Mr. Towey's response was entirely understandable, and was very properly followed up by what the Tribunal is satisfied was a full report to his superior official, Mr. Brennan.

25.21 Arising from the evidence heard by the Tribunal, it appears beyond doubt that, at a highly sensitive stage of the closed period of the GSM competition, when Mr. Loughrey as Departmental Secretary General believed

that information relating to the process of selection should, save for its critical path, have been confined within the Project Group itself, such information was sought and obtained by Mr. Lowry from Mr. Towey.

EARLY INTERACTIONS BETWEEN MR. BRENNAN AND MR. LOWRY

25.22 A point which was common to both the evidence of Mr. Towey and Mr. Lowry relating to the telephone conversation, was that Mr. Lowry had telephoned the Department seeking Mr. Brennan, and only spoke to Mr. Towey in his absence. This was not the first time that Mr. Lowry had approached Mr. Brennan for information, and, during the course of the process, Mr. Brennan and Mr. Lowry had a number of interactions when Mr. Lowry was briefed by Mr. Brennan on how the evaluation was proceeding. Mr. Loughrey, as Secretary General of the Department, would in the ordinary course have been the point of contact between Mr. Lowry and Departmental officials, but as he was absent from the Department for seven weeks, through a combination of sick leave and annual holidays, and as his absence coincided with the greater part of the evaluation process, he was not then available, and was not in a position to oversee contact between Mr. Lowry and Departmental officials. Mr. Loughrey seemingly knew nothing of any of this contact.

25.23 Mr. Brennan informed the Tribunal in his Memorandum of Intended Evidence, and confirmed when he attended to give evidence, that he recalled having three interactions with Mr. Lowry during the process. Mr. Brennan had himself been on annual leave on 4th August, 1995, the closing date for receipt of applications, and the first of these contacts occurred a couple of weeks after his return, when Mr. Lowry asked him if he was satisfied that a good GSM operator would emerge from the applications which had been received, to which Mr. Brennan responded that he had read all of the applications, and was confident that the better of them would produce a very good operator. At a later point, which Mr. Brennan could not date, he told Mr. Lowry that he could see either a 3/3, or a 2/2/2 split in the applications, but did not think that he had named names at that point. Closer to the conclusion of the process, as recorded in the official report of the Project Group meeting of 9th October, 1995, Mr. Brennan thought that he had told Mr. Lowry that two applications stood out from the rest, but that they were still working on separating them.

25.24 In his Memorandum of Intended Evidence, dated 1st December, 2002, as already referred to in this chapter, Mr. Lowry made no reference whatsoever to the information which had been provided by Mr. Brennan, or to these interactions, of which he then had notice. He merely informed the Tribunal that he had not had any meetings or discussions with the Project Group. When Mr. Lowry attended to give evidence in December, 2005, he testified that his only

recollection of an earlier conversation with Mr. Brennan was in terms of whether there was a competition and a worthwhile one. The only other contact between them, which he recalled, was when Mr. Brennan came to his office and informed him that they were down to two applicants, but that there was still much work to be done before they had a winner.

25.25 There is no doubt that Mr. Brennan did have at least three substantive interactions with Mr. Lowry in the course of the process. It is also clear that the contacts between them at the concluding stage were far more comprehensive than a single exchange of the type outlined by Mr. Brennan, and that interaction will be returned to at a later point in this Volume of the Report. At this juncture, it is the first and second interactions described by Mr. Brennan which are of significance, and more particularly the second of them.

25.26 The Tribunal has already found that Mr. Lowry telephoned Mr. Brennan, but spoke to Mr. Towey, in the week prior to the presentations, and on making inquiry was informed by Mr. Towey that the competition had not concluded, that there were a number of applicants still in the running, and that Mr. Towey had identified those applicants. Mr. Towey reported that conversation to Mr. Brennan, and it was Mr. Towey's understanding that there followed a discussion between Mr. Lowry and Mr. Brennan which would have been a substantial one. There was certainly an interaction between Mr. Brennan and Mr. Lowry around this time, in the course of which, according to Mr. Brennan, he disclosed to Mr. Lowry the divisions in the field which had emerged, although he thought that he had not identified the relevant consortia at that point.

25.27 As no other person was present when Mr. Lowry and Mr. Brennan spoke, only they can know the precise extent of the information which passed, and the consequent knowledge acquired by Mr. Lowry. There was however other evidence heard by the Tribunal which was of assistance, and which points to there having been quite detailed information made available to Mr. Lowry at this time. That evidence comprises firstly, what Mr. Brennan informed his immediate superior officer that he had told Mr. Lowry, and secondly, the evidence of an interested party concerning comments made to him by Mr. Lowry, concerning the performance of the consortium with which he was associated. That latter evidence will be outlined in the next chapter, and at this point it is the evidence of Mr. Sean Fitzgerald, who was Assistant Secretary of the Department, and the official with overall responsibility for the Telecommunications Division, to which focus will be directed.

25.28 It will be recalled from the circulation lists of reports of early Project Group meetings, that Mr. Fitzgerald was furnished with copies of those reports,

but that, once the Project Group commenced work on the substantive evaluation, that practice ceased. Mr. Fitzgerald had been involved in the resolution of the EU intervention, and had been kept informed of matters relating to the critical path or progress of the process. It seems however that on an occasion in the month of September, 1995, Mr. Brennan had a conversation with Mr. Fitzgerald, when he furnished him with significant information pertaining to the emerging trends in the substantive evaluation.

25.29 In his Memorandum of Intended Evidence, furnished in advance of the commencement of public sittings, Mr. Fitzgerald had informed the Tribunal that he had been told by Mr. Brennan in early September, 1995, that the initial evaluation of the Project Group had identified three bids which would qualify for the licence, and three over which there were reservations; that there was “clear water”, as he described it, between the third-placed applicant and the first and second-placed applicants; that the first and second-placed applicants were close; and that Esat Digifone was the likely front runner, although more work was needed.

25.30 When he attended to give evidence in February, 2003, the Tribunal had delivered its Opening Statement, and had circulated material from which it would have been apparent that the Tribunal had learned about, and would be hearing evidence relating to, meetings between Mr. Lowry and interested persons. Mr. Fitzgerald confirmed his conversation with Mr. Brennan, as outlined in his Memorandum, but testified that he believed that the discussion had not, as he had initially thought, taken place in early September, 1995, as it seemed to him, from a consideration of the documentation with which he had been provided by the Tribunal, that the result was not known with sufficient clarity at that stage, such as to have enabled a view to be taken as to the likely outcome, and that the exchange between himself and Mr. Brennan must therefore have taken place in late September. Again, from a consideration of the material which had been brought to his attention by the Tribunal, it seemed to him that their discussion must have occurred after 28th September, 1995. Mr. Fitzgerald further observed that, although he had indicated in his Memorandum that he had conveyed that information to Mr. Loughrey, he believed that he could not have done so, as Mr. Loughrey was on annual leave, and did not return to the Department until 4th October, 1995, which he thought was some time after his discussion with Mr. Brennan. The documentation, which had been provided to Mr. Fitzgerald by the Tribunal, was circulated in November, 2002, and was extracted by the Tribunal from files produced by the Department, and which would have been available to Mr. Fitzgerald when he furnished his Memorandum.

25.31 Mr. Brennan could not specifically recall having a conversation with Mr. Fitzgerald along the lines described by Mr. Fitzgerald in his evidence, although he did not rule out that such a conversation took place, as Mr. Fitzgerald was his immediate superordinate officer, and they occupied offices along the same corridor. Whilst Mr. Brennan could not recall what information he might have conveyed to Mr. Fitzgerald, he did have a clear recollection of Mr. Fitzgerald's response, and in particular Mr. Fitzgerald's expression of concern over Esat Digifone's finances, on learning that it was emerging as the front runner. Mr. Fitzgerald testified that, on being so informed by Mr. Brennan, he commented that such a result, if upheld, would be controversial, and that the final decision of the Group should be well-founded, as it would be open to attack. Mr. Fitzgerald recalled that he informed Mr. Brennan of his concerns regarding the financial capability of Esat Digifone to implement the project, and his anxiety that such capability should be clearly established before a recommendation was made by the Project Group.

25.32 Mr. Fitzgerald's misgivings related to the intended 40% shareholding of Communicorp, which was then heavily committed in developing a fixed-line service in competition with Telecom Éireann. That service, to Mr. Fitzgerald's knowledge, was still unprofitable, and was requiring ever-increasing capital support, resulting in increasing investment in Esat Telecom by venture capital funds, matched by a dilution of Mr. Denis O'Brien's shareholding. Even though Mr. Fitzgerald recognised that the award of the licence would result in a bankable project for establishing the mobile service, the telecoms business would put a strain on Communicorp's ability to fund its large stake. Mr. Fitzgerald understood from Mr. Brennan that the Project Group was aware of the financial weaknesses of Communicorp, and of participants in some other bids, and had required all bidding group members to cross-guarantee all other bid partners. This would ensure that Telenor's financial strength would, if necessary, guarantee the viability of the mobile business. It would not however, in Mr. Fitzgerald's view, necessarily stabilise the shareholding within Esat Digifone, but neither would any other financial underpinning. The nub of Mr. Fitzgerald's concern was that the Project Group should examine the problem before reaching a final conclusion. He recognised that the recommendation was one for the Project Group to make, and that he was not part of that process: all he wished to ensure was that the issue was addressed by the Project Group, and that the Group should then decide what weight to attach to it, and how it might be addressed before a final recommendation was made.

25.33 As to the timing of Mr. Fitzgerald's conversation with Mr. Brennan, which Mr. Fitzgerald had initially placed in early September, but which he departed from when he attended to give evidence, and testified that it must have

occurred later in that month, and possibly as late as after 28th September, 1995, there were a number of elements of the evidence heard by the Tribunal which are of assistance. It is apparent that, with the exception of one matter, namely that Esat Digifone was the likely front runner, all of the information conveyed by Mr. Brennan to Mr. Fitzgerald was identical in all respects to the information relayed by Mr. Jimmy McMeel to his superior officers in the Department of Finance. That information, it will be recalled, was contained in his memorandum about the Project Group meeting of 14th September, 1995, to which he had appended an annex which contained information regarding the ranking of the applicants, gleaned by him from his colleagues at that meeting. It is however apparent both from the evidence of Mr. Fintan Towey and the recent evidence of Mr. Michael Andersen that, as of that time, the sentiment of Departmental officials was more developed than Mr. McMeel had recorded, and that there was a view that A5, Esat Digifone, was ahead. Whilst Mr. Fitzgerald, although having no clear recollection as to precisely when the conversation occurred, testified that it was probably after 28th September, 1995, he accepted that he had arrived at that dating by a process of deduction, from his knowledge of the timing of a final meeting in Copenhagen on that date. That dating is not however consistent with Mr. Fitzgerald's recollection that Mr. Loughrey's return to the Department on 4th October, 1995, was some time after his discussion with Mr. Brennan. If Mr. Brennan's discussion with Mr. Fitzgerald was after the meeting of 28th September, 1995, it could not have been before Monday 2nd October, 1995, as Mr. Brennan was not back in the Department from abroad until 2nd October, 1995. Mr. Fitzgerald's recollection that Mr. Loughrey did not return until some time after the conversation had occurred, would hardly be consistent with a time lag of just one or possibly two days.

25.34 Having regard to the above considerations, and in particular the evident availability of the information relayed by Mr. Brennan to Mr. Fitzgerald from at least 14th September, 1995, and having regard also to Mr. Brennan's acceptance that it was reasonable to suggest that their conversation would have occurred around the time of, before or after, the oral presentations, it seems to the Tribunal more probable that their exchange occurred earlier than 28th September, 1995, and more probably in or around the time of the presentations.

25.35 The significance of Mr. Fitzgerald's evidence for present purposes is that he further testified that he had inquired of Mr. Brennan whether Mr. Michael Lowry was aware of the emerging trends, and had been informed by Mr. Brennan that Mr. Lowry was so aware, and had not expressed a view. Mr. Brennan, although recalling Mr. Fitzgerald recommending that caution should be exercised around the finances of Communicorp, testified that he could not recall his conversation with Mr. Fitzgerald with sufficient clarity to confirm whether he did

or did not tell Mr. Fitzgerald that he had conveyed that same information to Mr. Lowry.

25.36 The Tribunal has no reason to doubt the reliability of that aspect of Mr. Fitzgerald's evidence. Apart from the single issue of the timing of the exchange, it seems that Mr. Fitzgerald had a detailed recall of the discussion, and his recall of what he was told by Mr. Brennan reflected, according to Mr. Andersen, views conveyed at the Project Group meeting of 14th September, 1995. Whilst Mr. Brennan could not himself recollect the discussion in detail, he did remember Mr. Fitzgerald's observations surrounding the finances of Esat Digifone, and he did not dispute that such a conversation occurred, nor did he suggest that Mr. Fitzgerald's recollection was flawed. The Tribunal is therefore satisfied that Mr. Brennan did inform Mr. Fitzgerald that he had relayed the same information to Mr. Lowry, and if that be the case, it would appear that from in or about the middle of September, 1995, Mr. Lowry was aware that Esat Digifone was the likely front runner.

25.37 As of mid-September, 1995, Mr. Lowry had a relatively detailed knowledge of the emerging trends in the evaluation. This resulted both from his request to Mr. Towe for information, and from his discussion with Mr. Brennan. The Tribunal is satisfied that the first of these contacts, by telephone call to Mr. Towe, occurred prior to the week of the presentations, and that the second, involving Mr. Lowry's discussion with Mr. Brennan, took place shortly thereafter. In that regard, it will be recalled that Mr. Towe, having reported his telephone conversation with Mr. Lowry to Mr. Brennan, understood that a discussion took place between them, as the following extracts from his evidence show:

"Q. Now, I know you didn't inform the rest of the group about it. Do you remember if Mr. Brennan ever mentioned it to the rest of the group, that the Minister had been – made contact with you?"

A. Well, I don't believe it was mentioned to the rest of the group, and it was followed, I believe, by a discussion between the Minister and Mr. Brennan, which would have been the substantive discussion, I presume, which was reported to the group

...

Q. Did Martin Brennan tell you about his conversation with the Minister?"

A. At some point, yes, and again I can't put a precise date on it, but he told me that he had discussed it with the Minister; he had told the Minister who the top contenders were, and the Minister had said he

had no difficulty with any of them – with either of them; I believe it was two that he mentioned.”

Mr. Brennan also accepted that his conversation with Mr. Fitzgerald, when he had informed Mr. Fitzgerald that he had already told Mr. Lowry about the emerging trends in the evaluation, occurred around the time of the presentations.

25.38 As of this time, mid-September, 1995, the evidence heard by the Tribunal all points to the fact, of which the Tribunal is satisfied, that Mr. Lowry knew that:

- (i) A1, Irish Mobicall, A3, Persona, and A5, Esat Digifone were regarded as having submitted the top three applications;
- (ii) there was a division between A1, Irish Mobicall, on the one hand, and A3, Persona, and A5, Esat Digifone, on the other hand, the latter being regarded as having submitted the top two applications;
- (iii) A5, Esat Digifone, was regarded as the front runner;
- (iv) there were concerns surrounding the finances of A3, Persona, and A5, Esat Digifone.

It will also become apparent that Mr. Lowry was in possession of further information regarding the Project Group’s perception of the performance of at least one of the applicants in the oral presentations.

25.39 The fact that Mr. Lowry was in possession of this knowledge was contrary to the confidentiality which was intended to seal the process, to guard against external or political influence, and thereby to guarantee its fairness, independence and impartiality. It was information which should not have been provided to Mr. Lowry, and it is surprising that Mr. Brennan, conscious of the likelihood of access to Mr. Lowry by persons connected with competing consortia, should have shared that information with him. What Mr. Brennan undoubtedly did not, and could not have known or foreseen, was Mr. Lowry’s propensity to interact with and to disseminate information to interested parties.

MR. MICHAEL LOWRY MEETS MR. ANTHONY O'REILLY ON 15TH SEPTEMBER, 1995

THE OPENING OF GALMOY MINE

26.01 On Friday, 15th September, 1995, the day following the final oral presentation, and the post-presentation Project Group meeting, Mr. Lowry, in his official capacity, attended an event to mark the opening of a zinc mine by Arcon International Resources in Galmoy, County Kilkenny. Mr. Anthony J.F. O'Reilly was a shareholder in Arcon, and he also attended that function. A mining licence to open and operate the mine had been issued to Arcon by Mr. Lowry's predecessor, Mr. Brian Cowen, in a protracted process which had commenced in 1992, and which had been subject to legal challenge. Following the establishment of the Rainbow Coalition Government in December, 1994, Mr. O'Reilly had been impressed by the manner in which Mr. Lowry and his Department had dealt with matters which were then outstanding, and which had enabled the commissioning of the mine to proceed in September, 1995.

26.02 Mr. O'Reilly was also interested in the GSM licence, as he was then non-executive Chairman of, and a significant shareholder in, Independent News & Media, IN&M, which was in turn a 50% shareholder in Princes Holdings Limited, an investment vehicle which had a 48% interest in the Irish Cellular Telephones consortium. Apart from its shareholding in Princes Holdings, IN&M also held a small direct interest in the consortium. The consortium had made its oral presentation the previous morning, and the views of the Project Group regarding the performance of the consortium team had been discussed at the post-presentation Project Group meeting the previous afternoon.

26.03 Mr. O'Reilly testified that he had no hands-on role in relation to the Irish Cellular application for the GSM licence, and that he had virtually no knowledge of the process. He regarded the application as no more than a prospective investment by IN&M, and one that was being handled primarily by Mr. Brendan Hopkins, an executive director of the company, and by Mr. Liam Healy, who was then Chief Executive Officer. Mr. O'Reilly was unaware that the process involved a competitive evaluation, and that the successful applicant was to be selected by a set of Departmental officials. He was further unaware that the selection process was intended to be sealed from outside involvement and outside knowledge, including that of Mr. Michael Lowry as Minister. Mr. O'Reilly testified, in furnishing the Tribunal with a Statement on 24th September, 2001, following inquiries made of him by the Tribunal, that he was unaware of the sealed nature of the competition process. It should incidentally be noted that, as to any titles or distinction conferred upon him, the usage of Mr. O'Reilly in this

chapter reflects a prior request made to the Tribunal by his legal advisers that he be described and addressed in that manner.

26.04 The contact between Mr. Lowry and Mr. O'Reilly at the formal opening on Friday, 15th September, 1995, was within the category of contacts, arising as it did from other aspects of Departmental business, that Mr. John Loughrey, Secretary General of the Department, had foreseen would be likely to occur in the course of the sealed phase of the evaluation process. Mr. Loughrey had testified, as will be recalled, and as was confirmed by Mr. Colin McCrea, Mr. Lowry's Programme Manager, who was in attendance on the occasion in question, that in briefing Mr. Lowry in early March of that year on the confidentiality protocol which had been adopted by the Project Group, he had advised Mr. Lowry that in the case of such official interaction with persons interested in the GSM process, he should be cautious, and should limit his conversation to pleasantries, and that Mr. Lowry had signified his understanding and acceptance of that advice.

26.05 It is also noteworthy that it was only on the previous day, at the post-presentation meeting, that the Project Group had discussed its impression of the performance of Irish Cellular at its presentation that morning. The official report, as will be recalled, had recorded as follows:

"The A4 presentation was good. But AMI felt that the lack of familiarity with the Irish scene was poor. It was generally evident that:

- *A4 spent too much time on matters that were not relevant to the tender requirements,*
- *was unfamiliar with the ETSI standards."*

The report also recorded the agreement of the Project Group, at the suggestion of Mr. Andersen, that the consortium should be placed in the second division of applications, in terms of the further evaluation work, so that, whilst it would be evaluated, greater resources would be directed to the evaluation of the three applications placed in the first division.

26.06 In his Statement to the Tribunal made on 24th September, 2001, in response to inquiries raised with him by the Tribunal, arising from information which had been provided by Mr. Lowry, to which reference will be made, Mr. O'Reilly informed the Tribunal that the Galmoy opening ceremony on 15th September, 1995, was the first occasion on which he had met Mr. Lowry. He recalled that after the conclusion of formalities, he was proceeding with a

number of guests, including Mr. Lowry, towards the refreshments tent, when Mr. Lowry made a comment to him along the lines of:

“Your fellas didn’t do too well today.”

Mr. O’Reilly informed the Tribunal that he had told Mr. Lowry that he did not know to what Mr. Lowry was referring, and that Mr. Lowry indicated to him that what he was referring to was the oral presentations which had been made by applicants for the GSM licence. Mr. Lowry had further explained that the “*your fellas*” to which he had adverted, were the AT&T representatives who had made a presentation on behalf of Irish Cellular to the Departmental panel in charge of selecting the successful applicant. Mr. O’Reilly was unaware of any such presentation by AT&T, the US-based worldwide telephone service provider, and informed the Tribunal that further discussion about the matter was somewhat brief, and that the remainder of their conversation related to the Galmoy Mine, and its future.

26.07 Mr. O’Reilly, who attended to give evidence on 31st March, 2004, confirmed the contents of his Statement, save that he testified that, subsequent to furnishing it, he had learnt that the Irish Cellular presentation had not been made on Friday, 15th September, 1995, but had in fact been made the previous day, Thursday, 14th September, 1995, and he therefore presumed that his recollection was not one hundred percent, and that Mr. Lowry must have said to him:

“Your fellas didn’t do too well yesterday.”

Mr. O’Reilly had in fact clarified that matter some considerable time prior to attending to give evidence when, in early December, 2002, he had furnished the Tribunal with a supplemental Statement. Mr. O’Reilly testified that he had no doubt whatsoever that Mr. Lowry had spoken to him in the terms which he had described to the Tribunal. In that regard, Mr. O’Reilly explained that, as Mr. Lowry had used such a strange turn of phrase, in referring to “*your fellas*”, his comment had stuck in Mr. O’Reilly’s mind.

26.08 It was Mr. Lowry’s evidence that he definitely never said anything to Mr. O’Reilly along the lines attributed to him. He did not even know that the oral presentations had been held by the Project Group during that week. Nobody had indicated to him that Irish Cellular had not performed well in their oral presentation. Mr. Lowry suggested that there might have been some confusion, or some mix-up, in connection with his interaction with Mr. O’Reilly on that occasion, but he was clear that he had not made the comment attributed to him by Mr. O’Reilly. Mr. Lowry recalled that he had arrived at Galmoy in advance of

Mr. O'Reilly, and that when Mr. O'Reilly did arrive, he had been very welcoming, and had been complimentary about the manner in which the Department had completed outstanding formalities required to enable the mine to open. Mr. Lowry thought that they had also discussed another issue, to which further reference will be made, concerning the Government's approach to unlicensed MMDS operators, in the field of television retransmission, and it was his recollection that Mr. O'Reilly had stated that if he had been as decisive and efficient in relation to MMDS, as he had been in relation to the mining licence, Mr. O'Reilly would have been happy. Mr. Lowry, according to his evidence, had responded by explaining that the Government had political difficulties in taking action against unauthorised operators.

26.09 If Mr. O'Reilly was not confused, and if his evidence regarding Mr. Lowry's observation is accepted, it follows that Mr. Lowry, as of 15th September, 1995, was in possession of specific information regarding the substantive evaluation during the sealed phase of the process. There can be no gainsaying that the comment attributed to Mr. Lowry accurately, if somewhat colloquially, reflected both the Project Group's impression of the performance of Irish Cellular at the presentation on the previous day, and its overall assessment of the consortium's application, as recorded in the official report of the Project Group meeting of 14th September, 1995, matters of which Mr. O'Reilly could never have known. If Mr. Lowry was in possession of that information, that can only have been as a result of information having been provided to him the previous day, or on the morning of 15th September, 1995, either by a member of the Project Group, or by some other person to whom that information had been conveyed by a member of the Project Group.

26.10 It is clear from the evidence heard by the Tribunal that information regarding the substantive process, including the performance of consortia at oral presentations, was at or around that time available to persons outside the Project Group, notwithstanding the intended seal of confidentiality. Mr. Brennan told Mr. Fitzgerald, in mid-September, that the initial evaluation of the Project Group had identified three bids which could qualify for the licence, and three over which there were reservations; that there was "*clear water*", as he described it, between the third-placed applicant, and the first and second-placed applicants; that the first and second-placed applicants were close; and that Esat Digifone was the likely front runner, although more work was needed. On further inquiry by Mr. Fitzgerald, Mr. Brennan informed him that Mr. Lowry was also aware of the emerging trends. Mr. McMeel informed his superordinate officers in the Department of Finance of the indicative order of merit of applicants, immediately following the Project Group meeting of 14th September, 1995. Mr. Colin McCrea, Mr. Lowry's Programme Manager, was aware that the presentations were proceeding in the Department that week, and was in

possession of quite detailed information regarding the arrangements which had been put in place, and in particular the monitoring and security arrangements. He thought that it was Mr. Brennan who had explained these matters to him. He also recalled it being said that some applicants had not performed well. He did not recall from whom he had received that information, but he assumed that the comment would have been made to him by Mr. Brennan. Whilst he initially placed that exchange during the time that the presentations were proceeding, or immediately after them, or perhaps during the following week, as his evidence proceeded he suggested that it may not have been until some time later that he formed that impression. His general recollection was that he had been told one of the applicants had not done well. He did not know the name of the applicant, but he thought it was the consortium with which Bord Na Móna had an involvement. Mr. McCrea did not believe that he would have relayed that information to Mr. Lowry.

26.11 The Departmental policy, as outlined to the Tribunal by Mr. Loughrey, the Secretary General, was that neither Mr. Lowry nor any Departmental official outside the Project Group had any business being in possession of any information regarding the substantive process. Mr. Loughrey, as already indicated, distinguished between information of that type, and information relating to non-substantive matters, such as the critical path of the process, over which no such restriction applied. Mr. Brennan testified that in the course of the evaluation, he had three conversations with Mr. Lowry relating to the evaluation. He recalled that the first of these occurred some few weeks after he returned from holidays in the latter part of August, when Mr. Lowry inquired if he was satisfied that he would secure a good operator out of the applications received, to which Mr. Brennan responded that he had read all six applications, and he was confident that the better of the applicants would make very good licensees. At a later stage, which he could not date, Mr. Brennan testified that he told Mr. Lowry that he could see either a 3/3 or a 2/2/2 split in the applications, but did not think that he had identified the applicants that fell into those divisions at that stage. Closer to the end of the process, as recorded in the minutes and report of the Project Group meeting of 9th October, he thought that he had told Mr. Lowry that two applicants stood out from the rest, but that they were still working on separating them. This latter contact, which from the available evidence was far more extensive than initially described by Mr. Brennan, will be returned to in some detail in a later chapter. What does seem significant to the Tribunal at this juncture is the second of the three contacts to which Mr. Brennan referred in his evidence, when he indicated to Mr. Lowry the existence of two or three divisions based on the Project Group's then views of the merits of the applications. From the documentary evidence available to the Tribunal, it seems probable that this information must have arisen from what had occurred at the Project Group meeting on 14th September, 1995, and that, if Mr. Lowry was in possession of

the information which would have enabled him to make the comment attributed to him by Mr. O'Reilly, it is again probable that this arose from the exchange which Mr. Brennan described in his evidence.

26.12 Mr. Brennan testified that he could not rule out that he could have made a chance remark to Mr. Lowry, or to somebody else, regarding the performance of applicants at presentations. He did not know whether he could say that he did not inform Mr. Lowry of those matters. He observed that a Minister attending the opening of a mine, knowing that he was going to meet people involved with one of the applicants, could have made an inquiry of him, and he could not rule out that he would have responded, but he would have been surprised, as he thought it was the kind of thing he would have remembered. He also referred in his evidence to a possibility that Mr. Lowry could have obtained the information from a consortium member, but this appears to the Tribunal an improbable conjecture. What is clear, as already found, is that Mr. Brennan, on the basis of his own recollection, did convey information regarding the substantive evaluation to Mr. Lowry at some point around this time, and that he also conveyed information of that type to Mr. Fitzgerald, when he identified the emerging front runners.

DERBY DAY MEETING

26.13 As observed earlier, it was information provided by Mr. Lowry, regarding contacts which he had with Mr. O'Reilly, which prompted the Tribunal to make inquiries of Mr. O'Reilly, in response to which he informed the Tribunal of his conversation with Mr. Lowry on 15th September, 1995. Mr. Lowry had not told the Tribunal of the Galmoy meeting, but rather had referred to exchanges between himself and Mr. O'Reilly at the Curragh Racecourse on Derby Day, which Mr. Lowry had dated as having occurred in July, 1995. The evidence that was ultimately heard by the Tribunal, arising from the Derby Day matter, was peripheral to the Tribunal's substantive inquiries. Its materiality related solely to the credibility of the evidence of Mr. Lowry and Mr. O'Reilly, regarding the events at Galmoy mine, in the light of the wider context of the relationship between them, and the relationship between Mr. O'Reilly and the then Rainbow Coalition Government, arising from the regulation of the market in MMDS, in which Mr. O'Reilly and his partners had invested £75 million, on foot of an exclusive licence issued by the Department. What had to be investigated by the Tribunal, was whether Mr. O'Reilly's dissatisfaction with the then Government, and with Mr. Lowry, as the responsible Minister in relation to the MMDS issue, and his dissatisfaction in relation to other issues, including the outcome of the GSM process, could have motivated him to give false evidence regarding the Galmoy exchange. It is however important to note that Mr. Lowry, whilst giving evidence

on this matter, did not suggest that Mr. O'Reilly was so motivated, but rather attributed the apparent conflict of recollection between them to no more than confusion on Mr. O'Reilly's part.

26.14 Before addressing the evidence heard on this matter, it is necessary to outline briefly the course which the Tribunal's private inquiries took. The Tribunal wrote to Mr. Lowry on 17th May, 2001, when evidence was being heard in connection with the money trail aspect of the Tribunal's inquiries, and requested that Mr. Lowry provide the Tribunal with a narrative statement addressing such approaches, direct or indirect, as were made to him as Minister, in connection with the granting of the GSM licence, whether by lobbyists, T.D.s, Ministers or other persons with or without political connection, or otherwise from competitors, or persons associated with competitors. Mr. Lowry responded on 30th May, 2001, indicating that he had received approaches from a number of persons whom he identified, and which included Mr. O'Reilly. The Tribunal responded on 6th June, 2001, requesting details of those approaches, including the approach made by Mr. O'Reilly, and on 27th June, 2001, Mr. Lowry provided the Tribunal with his Statement setting out those matters. In that Statement, Mr. Lowry informed the Tribunal that he attended the Curragh on the Derby weekend of July, 1995, and, having had an invitation conveyed to him to visit Mr. O'Reilly in his executive box, he proceeded there in the afternoon. According to Mr. Lowry, Mr. O'Reilly discussed his consortium's GSM application, and sought to impress on Mr. Lowry his commitment to and investment in Ireland, along with recognition of his standing as an international business leader. He stated that he expected his consortium to succeed in the competition, and also demanded that Mr. Lowry forthwith as Minister shut down the pirate deflector systems. The remainder of the relevant portion of his Statement was largely uncontentious and was scarcely relevant, referring as it did to extreme displeasure being expressed to the then Government by Mr. O'Reilly, leading to a meeting between Mr. O'Reilly and the Taoiseach, Mr. John Bruton, at the former's Cork residence at Glandore on 25th August, 1996, which in turn led to Mr. Bruton's Programme Manager, Mr. Sean Donlon, being asked to attend a meeting with Mr. O'Reilly's representatives, in an attempt to mediate the difficulties which had arisen.

26.15 The Tribunal furnished a copy of the relevant portions of that Statement to Mr. O'Reilly, and asked for his comments, and it was at that point that Mr. O'Reilly provided the Tribunal with his Statement in which he referred to the Galmoy meeting, which he believed was in fact the first occasion on which he had met Mr. Lowry. As to the Derby weekend interaction, Mr. O'Reilly believed that it had not occurred in 1995, but in the following year, 1996. He asserted that the information provided to the Tribunal by Mr. Lowry regarding that Derby Day interaction was absolutely untrue, and that he had never had any discussion about his consortium's GSM application, and had never told Mr. Lowry that he

expected that his consortium would win the selection process. He accepted that he probably complained to Mr. Lowry about the Government's failure to take any action against pirate MMDS operators, and in that context he may have emphasised his commitment to Ireland. His Statement then proceeded to a considerable level of detail in relation to meetings between Mr. O'Reilly and Mr. Bruton, and between representatives of IN&M and Mr. Sean Donlon, over the summer and early autumn of 1996. In that regard, the Tribunal also heard evidence from Mr. Bruton and Mr. Donlon.

26.16 Mr. O'Reilly and Mr. Lowry both gave evidence to the Tribunal in accordance with their Statements. Mr. O'Reilly reiterated in his testimony that it was his belief that the Derby weekend meeting had occurred in 1996, rather than 1995. He readily accepted that at that meeting he had conveyed to Mr. Lowry his dissatisfaction surrounding what he regarded as the Government's inaction in the face of pirate MMDS operators, and its failure to enforce the law. He believed that the exchange between them must have taken place in 1996, rather than 1995, as during the previous year there were proceedings pending before the Courts in which the State had been prevented by injunction from restraining the operation of an unlicensed provider. That litigation had not concluded until November, 1995, and it was in his view highly unlikely therefore that he would have pressed the Government to take action, when he knew that no such action could be taken.

26.17 Mr. Lowry was equally clear in his recollection that the exchange occurred at the Derby meeting of 1995. He testified that he recalled the race meeting very clearly, as it was the first occasion on which he had attended the Derby: he was a national hunt enthusiast, almost to the exclusion of flat racing. He had been invited to a function, and having attended that function, he was then asked to Mr. O'Reilly's box. He recalled that they had a lengthy discussion about politics, and the circumstances in which Fine Gael had come to power, by forming a new coalition Government, rather than as a result of a general election. He observed that the conversation over the formation of the Government, which he recalled, could not have taken place a year later, as presumably by then it would not have been a topic of interest.

26.18 Whilst it seemed from the exchange of Statements that there was a significant area of conflict between Mr. O'Reilly and Mr. Lowry surrounding what was or was not stated by Mr. O'Reilly about the GSM licence, that conflict did not in fact arise in such stark terms in the evidence heard by the Tribunal. Mr. Lowry, having furnished a supplemental Statement in that regard, testified that in stating that Mr. O'Reilly had informed him at the Derby meeting that he had expected his consortium would be successful in the GSM evaluation, he did not

wish to convey a wrong impression. It was Mr. Lowry's evidence that Mr. O'Reilly, in making that observation, was simply expressing his opinion on his consortium's prospects in the evaluation process, rather than making a specific demand of Mr. Lowry in relation to that matter.

GLANDORE MEETING BETWEEN MR. O'REILLY AND THE TAOISEACH

26.19 There was no doubt surrounding the timing of Mr. O'Reilly's meeting with the then Taoiseach, Mr. John Bruton, or the subsequent meeting arranged between representatives of IN&M and Mr. Sean Donlon. By mid-summer, 1996, the concern of Mr. O'Reilly and his partners surrounding pirate operators had reached the point that extensive representations had been made to Government. It was against this background that Mr. Bruton accepted an invitation extended to him by Mr. O'Reilly, who had known Mr. Bruton for many years, to attend a meeting at the latter's holiday home in Cork on 28th July, 1996. Mr. O'Reilly took that opportunity to outline to Mr. Bruton his concerns regarding Government inaction in relation to unlicensed MMDS operators, and in relation to a number of other matters, although it is clear that the MMDS issue was the principal matter under discussion. It had been suggested by Mr. Lowry in his earlier Statement of 27th June, 2001, that in the course of this meeting in Cork, Mr. O'Reilly had also expressed to Mr. Bruton his extreme displeasure at his consortium's failure to secure the GSM licence. That matter, according to Mr. Lowry, had been reported by Mr. Bruton to a subsequent Fine Gael Ministers meeting, which he attended.

26.20 Mr. O'Reilly was assisted in his recollection of that meeting by a copy of a handwritten letter that he had sent to Mr. Bruton, on 30th July, 1996, following their meeting, and which set out the matters of concern in some detail. Mr. Bruton had no such record, as on that occasion he had diverged from his usual practice, and had not kept a note of their exchanges.

26.21 It was Mr. O'Reilly's evidence that he made no reference whatsoever on that occasion to the outcome of the GSM process. At the time of his meeting with Mr. Bruton, the competition was a dead issue, and it would have been pointless for him to raise it. Whilst Mr. Bruton thought that Mr. O'Reilly might have expressed some unhappiness in regard to the outcome of the competition in the course of their discussion, if such statement was made, Mr. Bruton thought it might only have been a passing matter, and that the MMDS issue probably occupied half of the duration of the meeting. Mr. O'Reilly's handwritten letter, which alluded to a number of points of concern, made no reference to any dissatisfaction surrounding the GSM process, nor indeed did any other correspondence which passed at that time. Mr. Bruton testified that the letter

did not look familiar to him, and that it might have arrived in his office in his absence, and been dealt with by someone else.

26.22 In advance of their meeting, Mr. Bruton had requested his Programme Manager, Mr. Sean Donlon, to brief him in relation to matters that were likely to arise. Although Mr. Donlon was generally aware of the MMDS issue, he obtained a more detailed oral briefing from Mr. John Loughrey, the main content of which he then imparted to Mr. Bruton. Following the Cork meeting, Mr. Bruton had forwarded to Mr. Donlon a handwritten note in which he referred to the various grievances which Mr. O'Reilly had raised. This note had been mislaid, but it was Mr. Donlon's recollection that the instances of grievance noted by Mr. Bruton had included some reference to the outcome of the GSM process. Mr. Bruton could not assist the Tribunal as to the contents of his note.

26.23 Mr. Donlon, at Mr. Bruton's request, attended a luncheon meeting on 4th September, 1996 at the offices of IN&M in an endeavour to resolve matters, but no resolution proved possible. Whilst Mr. Donlon testified that the tone of the meeting had been cordial and relaxed, he was left in no doubt at its conclusion that, unless the MMDS grievances were seriously addressed, the Government was likely to experience much wrath and hostility from IN&M.

26.24 There seems to be no doubt that the meeting ended with the sides as far apart as ever. A memorandum of the meeting prepared by IN&M recorded that, at the close of the meeting, the disappointment of IN&M was conveyed, and Mr. Donlon was informed that the shareholders' inclination would be to take action against the Government for its failure to police the exclusivity of the MMDS licence. The memorandum closed as follows:

"We said that large numbers might be at stake and that this surely would not be good for the Government in an election year.

Donlon said any case would not come to Court before the Election (next November likely) and this would at least solve their Cork problem and ensure the 4 seats were safe.

We said they would lose INP as friends and would mean any future administration would have a large bill to pay."

26.25 On 6th September, 1996, Mr. O'Reilly wrote to Mr. Bruton enclosing a copy of the note of the meeting attended by Mr. Donlon. The letter concluded by inquiring of Mr. Bruton whether or not it was Government policy to encourage pirates to flout the law of the land to the detriment of Irish and international

investors, and stating that an answer, which was awaited with some urgency, would be of great importance in assessing future plans. There was no reference in that letter of 6th September, 1996, or indeed in the note of the meeting of 4th September, 1996, to any dissatisfaction having been expressed in relation to the GSM process.

26.26 It seems that soon after this meeting, Mr. Donlon conveyed the strength of feeling over the MMDS issue to Mr. Lowry, and informed him that the focus of hostility was upon him as the responsible Minister; Mr. Donlon recalled that Mr. Lowry had responded by referring to a hostile encounter with Mr. O'Reilly at a race meeting previously. Accordingly, it appeared that Mr. Lowry was not surprised to hear from Mr. Donlon of the anger felt towards him by IN&M.

26.27 Proceedings were ultimately issued against the State by IN&M for losses incurred by reason of the State's alleged failure to secure the exclusivity of the MMDS licence. An editorial also appeared on the front page of The Irish Independent on election day 1997, headed "*Payback Time*", urging readers to vote against the current Government. Mr. O'Reilly acknowledged that this was an unusual departure, if not a unique occurrence in the long history of The Irish Independent, which he described as a non-interventionist newspaper. He testified that neither he as Chairman, nor any member of the board of the newspaper, had any role whatsoever in directing the content of the editorial, or had any prior knowledge of its content. Mr. O'Reilly explained that in the then organisation of The Irish Independent, there was a complete separation between editorial policy and business policy, and the former would not have even been discussed by board members.

26.28 The internal management processes and deliberation that preceded this singular and distinctive editorial do not fall within the Tribunal's remit, or require the expression of a view. Whilst in no sense suggesting that this was directed by Mr. O'Reilly, it would nonetheless seem surprising if so unprecedented a course was adopted, without some degree of perceived assent or imprimatur on the part of a Chairman and major shareholder who, however diverse his overseas commitments, had invested significantly in terms of both finance and hands-on involvement in matters in dispute with the Government.

26.29 Mr. O'Reilly rejected the proposition put to him that the events of which the Tribunal heard evidence might suggest that he was maliciously disposed towards the then Government or towards Mr. Lowry. He testified that he bore no hostility towards either the Government or Mr. Lowry, arising from the MMDS issue, or any other issue, including the GSM process. He accepted that he was at that time aggrieved at the conduct of the Government in failing to regulate the

MMDS market, and in particular in failing to take steps to restrain the activities of pirate operators. The reference in the concluding passage of the note of the meeting between representatives of IN&M and Mr. Donlon of 4th September, 1996, to the effect that the Government would lose IN&M as “*friends*”, was a reference to prospective litigation which was in fact subsequently commenced.

26.30 Mr. O'Reilly testified that it was an overstatement to describe Mr. Lowry as being a focus of his hostility, as Mr. Donlon had conveyed in relaying to Mr. Lowry his impressions following that meeting with IN&M representatives. What arose was commercial frustration over large sums of money which had been expended on the MMDS investment. He bore no resentment to Mr. Lowry, by reference to the outcome of the GSM process, and his feelings in that regard were evident from the terms of a letter which he sent to Mr. Denis O'Brien, following the announcement of the result of the GSM process, which letter was dated 30th October, 1995, and was in the following terms:

“My dear Denis,

Many years ago at Blackrock Baths I watched your father diving in the national Championships, I think against a certain Eddie Heron. The multitude of the Kavanagh Brothers were there flexing their pectorals, and I was sure your father would win an Olympic Gold.

In fact he didn't and you did, and I think your achievement in securing the second digital Network is its equivalent. I wish you and your colleagues every success.

Please convey my best wishes to your father.”

26.31 In the context of conclusions, as already stated, a number of matters in relation to which evidence was not agreed are no more than peripheral to the Tribunal's Terms of Reference, and do not require the expression of conclusions. The principal contentious matter of most relevance is the divergent testimony of Mr. Lowry and Mr. O'Reilly in relation to the conversation had between them at the opening of the Galmoy Mine.

26.32 Given that the Tribunal had sought the assistance of Mr. O'Reilly in the context of Mr. Lowry's account of the Derby Day encounter between the two, it was the position that Mr. O'Reilly separately volunteered his account of their meeting at Galmoy. The Tribunal accepts Mr. O'Reilly's evidence that he was not conversant with details of the GSM selection process, and could not have been in a position to make an assessment of the context or import of observations

made in regard to it. Further, the remark attributed to Mr. Lowry accurately conveyed the broad thrust of the views of the Project Group of the previous day's oral presentation made by the Irish Cellular consortium. It is also the position that, if Mr. O'Reilly was falsely attributing to Mr. Lowry the words used, it is highly improbable that he would have incorrectly stated the day in question, thereby occasioning himself the mild embarrassment of furnishing a supplemental Statement, to the effect that the reference must have been in relation to "yesterday", rather than "today".

26.33 The nature of the remark and its circumstances have certain affinities with the entirely separate evidence of Mr. Mark FitzGerald, regarding Mr. Lowry's remarks to him at a Fine Gael Golf Classic on 16th October, 1995, about Esat Digifone, which Mr. FitzGerald characterised as showing a disposition on the part of Mr. Lowry to like being at the centre of events, which features in a later chapter.

26.34 In all the circumstances, the Tribunal finds that a remark, consistent only with knowledge on the part of Mr. Lowry, of unfavourable assessment of the performance of Irish Cellular within the previous twenty-four hours, was made by him to Mr. O'Reilly, and that this in turn must have resulted from disclosure to Mr. Lowry from within the Project Group, almost certainly from Mr. Martin Brennan, and clearly in breach of the intended seal of confidence.

26.35 As to the year of the Derby Day encounter, various points were made by both Mr. Lowry and Mr. O'Reilly in support of their recollections, in relation to neither of which any oral or documentary corroboration, by way of diaries, guest-lists, or otherwise, was offered. The comparative force with which Mr. O'Reilly recounted that the Galmoy encounter was the first occasion that he had met Mr. Lowry, obviously thereby excluding 1995 if correct, and the considerably more fraught relations between Mr. O'Reilly and the Government by the time of Derby Day, 1996, seem to incline the probabilities in favour of the occasion having taken place in 1996. Whilst it is unnecessary that a specific finding be made in that regard, it is however clear that, whatever passing remark was made by Mr. O'Reilly in relation to the GSM outcome, the overwhelming weight of his grievance, as apparent from the evidence of subsequent dealings described, related to the MMDS issue.

MR. MICHAEL LOWRY MEETS MR. DENIS O'BRIEN AT CROKE PARK AND IN HARTIGANS PUBLIC HOUSE ON 17TH SEPTEMBER, 1995

INTRODUCTION

27.01 In what became an important part of Tribunal inquiries into the GSM competition, namely a meeting between Mr. Michael Lowry and Mr. Denis O'Brien, in a Dublin public house on the evening of the 1995 All-Ireland Football Final, it is instructive at the outset to set forth the essential account of its circumstances and content, as conveyed by its participants. On 17th September, 1995, which was the Sunday following the conclusion of oral presentations, and two days after the Galmoy function, Mr. Lowry and Mr. O'Brien both happened to attend the All-Ireland Football Final at Croke Park. They happened to be seated in the same area; they happened to encounter each other during the half time interval; and they happened to arrange to meet later at Houricans licensed premises in Leeson Street, where Mr. Lowry had a prior engagement to meet friends for an after match drink. Houricans licensed premises happened to be very busy, so that on Mr. O'Brien's arrival, Mr. Lowry left the company with which he had been socialising, and he and Mr. O'Brien repaired across the road together to Hartigans licensed premises, where they remained alone for some half hour and talked of nothing other than the match, and Mr. O'Brien's fixed-line business. Mr. Lowry then returned to Houricans, and Mr. O'Brien departed.

27.02 The meeting, whatever transpired at it, was not, as in the case of the Galmoy interaction, of the type which Mr. John Loughrey, Secretary General, had anticipated was likely to occur during the closed phase of the evaluation process, as it did not arise from interaction with Mr. Lowry in connection with official Government business. On the contrary, on the evidence heard by the Tribunal, it was an entirely private meeting, which arose from an arrangement made directly between Mr. Lowry and Mr. O'Brien, when they met at Croke Park earlier that day.

27.03 Mr. Loughrey was of course on annual leave at that time, and did not return to his desk in the Department until early October. Neither he, nor any other Departmental official, knew anything of the encounter until it was brought to their attention by the Tribunal. Mr. Loughrey testified that, in advising Mr. Lowry to exercise care in his dealings with interested persons during the closed phase of the evaluation, he had been as concerned by considerations of perception, as much as substance. He believed that he had explained this carefully to Mr. Lowry, who he thought had understood its importance. Whilst Mr. Loughrey judged that it would have been less than ideal for Mr. Lowry to have

met a member of a bidding consortium after a sporting event, within a large group of persons, he testified that he would have had to caution Mr. Lowry to consider perceptions, before proceeding to another venue with such a person alone.

27.04 Mr. Lowry, as already alluded to, had been requested in the course of the Tribunal's investigative work, to furnish it with a narrative statement addressing such approaches, direct or indirect, as had been made to him as Minister, in connection with the granting of the GSM licence, whether by lobbyists, T.D.s, Ministers or other persons, with or without political connections, or otherwise by competitors, or persons associated with competitors. Mr. Lowry responded by furnishing a list of named individuals, which included Mr. O'Brien, and the late Mr. Jim Mitchell, who it will be recalled had been engaged as a consultant by Mr. O'Brien. The Tribunal, having requested details of the approaches made to Mr. Lowry by Mr. O'Brien, was furnished with a Statement by Mr. Lowry, dated 27th June, 2001. This was the Statement in which, as regards Mr. A.J.F. O'Reilly, Mr. Lowry had recounted the Derby Day meeting. As regards Mr. O'Brien, Mr. Lowry, in addition to detailing his official contacts with Mr. O'Brien and his associates in Esat Telecom, in connection with its fixed-line business, and a meeting between them at a Fine Gael fundraising lunch in advance of the Wicklow By-Election of June, 1995, also informed the Tribunal that he recalled:

"meeting with Mr. O'Brien in September 1995 after the All Ireland Football Final."

No further details were furnished by Mr. Lowry in the context of that statement.

27.05 The Tribunal subsequently obtained a copy of Mr. O'Brien's diary for the year 1995, and noted two entries for [17th September, 1995](#), in the following terms:

"6pm D. Desmond

6.45 ML. Harto's"

A copy of that extract from Mr. O'Brien's diary can be found within the Book of Appendices to this Volume. It seemed to the Tribunal that the second of those entries possibly reflected a meeting between Mr. O'Brien and Mr. Lowry at Hartigans licensed premises in Leeson Street. The Tribunal pursued the matter further with Mr. Lowry, and was informed that he thought that he had bumped into Mr. O'Brien in the hospitality area at Croke Park, and, when asked specifically whether he had met Mr. O'Brien in a pub that night, and in particular

in Hartigans licensed premises in Dublin, he informed the Tribunal that he might have. By letter dated 2nd October, 2002, Mr. Lowry subsequently furnished the Tribunal, again at its request, with a fuller account of his recollection of the events of 17th September, 1995. He informed the Tribunal that he recalled that he had met Mr. O'Brien in the hospitality area in Croke Park; that Mr. O'Brien inquired where he was going after the match; that Mr. Lowry advised him that he was meeting friends in Houricans, in Leeson Street; that Mr. O'Brien indicated that he would see him there; that Mr. Lowry subsequently went to Houricans; that Mr. O'Brien arrived, and that, as the premises was extremely crowded, they agreed to go across the road to Hartigans; that in the course of a drink in Hartigans, some general chat took place; that Mr. O'Brien engaged in some conversation in relation to Telecom Éireann, and the availability of leased-lines; that Mr. O'Brien expressed his unhappiness and dissatisfaction at what was happening in that regard; that after some further general conversation, Mr. O'Brien left; and that Mr. Lowry then returned to join his friends in Houricans.

27.06 The Tribunal had in the meantime raised similar queries with Mr. O'Brien, who on 15th October, 2002, furnished the Tribunal with information which was largely in conformity with that which had been provided earlier by Mr. Lowry.

MR. O'BRIEN TELLS HIS ASSOCIATES

27.07 Mr. O'Brien, unlike Mr. Lowry, who it seems never mentioned the encounter to any of his officials, or to anyone else, told a number of his associates about it. He mentioned the arrangement in advance to Mr. Pádraig O hUiginn, who he had accompanied to the All-Ireland Final at the latter's invitation, although it seems that Mr. O hUiginn never inquired of Mr. O'Brien what had then transpired between him and Mr. Lowry. Mr. O'Brien also told Mr. Leslie Buckley, a fellow director of Esat Telecom, the following day, when they were both en route to a meeting with Mr. Owen O'Connell, of William Fry solicitors, at which Mr. O'Brien instructed Mr. O'Connell that Mr. Dermot Desmond was proceeding to join the Esat Digifone consortium, and that he needed a letter of underwriting for the Department. Mr. O'Brien recalled that he might also have mentioned it directly to Mr. Arve Johansen of Telenor, although Mr. Johansen had no recollection of that.

27.08 It was the evidence of Mr. Per Simonsen of Telenor, who was the Telenor GSM coordinator, and the Telenor representative most closely connected with the application, that at some time during the last two weeks of September, 1995, Mr. O'Brien had informed him that he had happened to meet Mr. Lowry in a public house, and that Mr. Lowry had suggested that IUU, Mr. Desmond's

investment vehicle, should be involved in the consortium. The conversation between them, on Mr. Simonsen's evidence, took place at a time when Mr. O'Brien was proposing that Mr. Desmond should become a member of the consortium with an entitlement to a 25% shareholding in the intended licensee company, which would entail Telenor agreeing to dilution of its intended 40% shareholding to 37.5%. Whilst it was Mr. Simonsen's evidence that he did not believe Mr. O'Brien, who he thought was exaggerating matters in order to persuade Telenor to accept that dilution, it seems that he nonetheless considered that information sufficiently significant to convey it to a number of his colleagues in Telenor, including Mr. Arve Johansen. Moreover, at a much later date, in October, 1997, in the context of the delicate and sensitive inquiries being made within Esat Telecom and Esat Digifone in advance of the Esat Telecom IPO, concerning a statement made by Mr. O'Brien to Mr. Barry Maloney that he had paid a sum of money to Mr. Lowry, which inquiries are addressed fully in Volume 1 of this Part of the Report, Mr. Johansen asked his fellow board members whether they knew anything of a meeting between Mr. Lowry and Mr. O'Brien in a public house.

27.09 The Tribunal was first informed of Mr. Simonsen's recollection by Mr. Arve Johansen, and by Telenor's legal representatives, at a meeting held in the course of its private investigative work. Telenor was then entirely unaware of the entry in Mr. O'Brien's diary, or of the information available to the Tribunal regarding the meetings of 17th September, 1995.

27.10 Mr. O'Brien testified that he had never at any time said any such thing to Mr. Simonsen. He regarded the information which Mr. Simonsen had provided to the Tribunal, Mr. Simonsen having not at the time of Mr. O'Brien's attendance yet given evidence, as "*nonsense*" and "*absolute nonsense*". Mr. O'Brien did not suggest that Mr. Simonsen had provided the Tribunal with false information, but considered that he must have been confused. He recalled that Mr. Simonsen was present for at least part of a meeting between Mr. O'Brien and Mr. Johansen, on the following 22nd September, 1995, in Oslo, which was a significant meeting, and will be returned to in some detail, and he imagined that, in the course of that meeting, Mr. Simonsen must have heard something about underwriting that he had misunderstood. Whilst the possibility of a misunderstanding on the part of Mr. Simonsen cannot be discounted, it was his evidence that he did not attend that meeting, and it was Mr. Johansen's evidence that Mr. O'Brien had made no reference whatsoever to underwriting by Mr. Desmond in the course of it.

27.11 There can be no question but that, as was confirmed by each of them in evidence, Mr. O'Brien and Mr. Lowry did meet in a public house in mid-

September, 1995. There was no suggestion that Mr. Simonsen could have learned of that fact from any person to whom Mr. O'Brien had conveyed it. Nor was Telenor aware of the information which the Tribunal had gathered concerning that meeting when Telenor first apprised the Tribunal of Mr. Simonsen's recollection of what he had been told by Mr. O'Brien. In those circumstances, it was only Mr. O'Brien who could have been the source of the information available to Mr. Simonsen, and it follows that Mr. O'Brien must have told Mr. Simonsen of that meeting, and that a conversation concerning it must have taken place between them. That being so, the Tribunal is satisfied that Mr. O'Brien did inform Mr. Simonsen that Mr. Lowry had suggested that IIU should be involved in the consortium. In making that finding, the Tribunal has had regard to the fact that Mr. Simonsen made a contemporaneous report to his associates in Telenor of what Mr. O'Brien had said to him, and that under no circumstances could Mr. Simonsen's evidence in that regard be considered as serving any purpose, either of Mr. Simonsen or of Telenor. On the contrary, it is the Tribunal's view that it should properly be regarded as evidence against interest.

27.12 Whilst the Tribunal accepts Mr. Simonsen's evidence, and is satisfied that Mr. O'Brien did inform him that he had happened to meet Mr. Lowry in a public house, and that Mr. Lowry had suggested that IIU should be involved in the consortium, that does not of course mean that Mr. Lowry ever made any suggestion of that type. What it does mean, however, is that Mr. O'Brien said it to Mr. Simonsen, and it must follow that Mr. O'Brien did not at that time feel it either inappropriate or improper to make that statement.

27.13 It is now intended to set out in some detail the evidence that was available to the Tribunal regarding the meetings between Mr. Lowry and Mr. O'Brien, and the circumstances surrounding them, before addressing the Tribunal's findings of what in all likelihood occurred between them on that day.

EVIDENCE OF INTERACTIONS ON 17TH SEPTEMBER, 1995

27.14 The possibility of Mr. O'Brien attending the All-Ireland Final on 17th September, 1995, did not seemingly arise until the previous Thursday, 14th September, two days after the Esat Digifone oral presentation to the Department. Mr. Pádraig O hUiginn, who was a director of Esat Telecom, and who had a considerable input into the final preparations for the presentation, testified that he recalled attending a meeting with Mr. O'Brien after the presentation, which, from an entry in his diary, he believed to have been on Thursday, 14th September, 1995. It was his recollection that Mr. PJ Mara, a fellow director, was also present, although Mr. Mara had no memory whatsoever of that meeting.

27.15 Mr. O hUiginn testified that it was at that meeting that Mr. O'Brien shared with him his assessment of how Esat Digifone had performed at its presentation. Mr. O'Brien had been overall positive in his assessment. Whilst he thought that the adjudicators had felt that the Esat Digifone application was excellent, he conveyed to Mr. O hUiginn his concerns that, having regard to the questions posed, the adjudicators had reservations concerning the financial strength of the consortium. It was the strength of the Advent commitment that was the focus of their discussion. Mr. O hUiginn's recollection was that it was at that meeting that Mr. O'Brien informed him, for the first time, of the possibility of Mr. Dermot Desmond becoming involved in the consortium, and providing a guarantee. Mr. O hUiginn endorsed and encouraged that course, as he thought that a guarantee from Mr. Desmond would be preferable to Advent's letter of comfort. Mr. O hUiginn did not, it seems, at that time address his mind to whether Mr. Desmond's involvement would be notified to the Department; rather he thought that once that involvement had been finalised, there would be some point at which it could be discussed, or notified to Mr. Lowry or his staff. Mr. O hUiginn must therefore have been unaware of the prohibition on the submission of additional material after the conclusion of oral presentations.

27.16 Mr. O hUiginn was not a regular attendee at Croke Park, but on this occasion he happened to have two complimentary tickets available to him, by reason of his chairmanship of Bord Fáilte. He invited Mr. O'Brien, because he knew of his interest in sport, and had since attended rugby matches with him. Mr. O hUiginn had not previously invited Mr. O'Brien to an All-Ireland Final in Croke Park, nor did he do so subsequently.

27.17 Mr. Lowry, unlike Mr. O hUiginn, had for many years been a GAA supporter, and had been an active participant in the affairs of the Association at County level. There could be no doubt of Mr. Lowry's attendance at the Final on Sunday 17th September, 1995, whether in his personal or official capacity. Mr. Lowry's plans had been made well in advance, as had his post-match arrangements. The Tribunal heard evidence from Mr. Denis O'Connor, Mr. Lowry's accountant, who had separately attended the match with his wife, having obtained tickets either from Mr. Lowry or from Mr. O'Connor's father, and more probably the latter, that at Mr. Lowry's invitation, they had agreed to meet him for drinks after the match at Houricans, in Leeson Street.

27.18 On Sunday 17th September, 1995, Mr. O hUiginn collected Mr. O'Brien from his home, and they travelled together by car to Croke Park. Mr. O'Brien and Mr. O hUiginn were seated a few rows behind Mr. Lowry. At half time, they proceeded to the hospitality area to the rear of the corporate boxes, where it seems they parted company. Mr. O hUiginn recalled that he spoke to Mr. John

Bruton, and Mr. Jim Higgins, and he did not see Mr. O'Brien again until they reassembled for the second half of the match, when Mr. O'Brien told him that he had met Mr. Lowry, and that they had made an arrangement to meet for drinks after the match.

27.19 It was Mr. O'Brien's evidence that he bumped into Mr. Lowry in the hospitality area, and that they had a few words. Mr. O'Brien could not recall if there was anyone else in their company during their exchange, although he observed that half of the Cabinet was in the vicinity. It was Mr. Lowry's recollection that Mr. O'Brien was with Mr. O hUiginn, when he encountered him, but that was not confirmed by Mr. O hUiginn. Both Mr. O'Brien and Mr. Lowry testified that Mr. O'Brien asked Mr. Lowry if he was going for a post-match drink, and that, Mr. Lowry having informed Mr. O'Brien of his plans, they agreed to meet up in Houricans. Whatever may or may not have transpired in the course of this exchange, it seems that by 17th September, 1995, there was at least a sufficient level of personal acquaintance between Mr. O'Brien and Mr. Lowry that Mr. O'Brien felt entirely at liberty to suggest that they meet again after the match. Mr. O'Brien had first been introduced to Mr. Lowry the previous February, by Mr. Jim Mitchell, who had been retained as a consultant by Mr. O'Brien. It was Mr. O'Brien's evidence that he and Mr. Lowry had since then bumped into each other quite a few times at various events and on various occasions. He described Mr. Lowry as chatty and friendly: sport was a common denominator between them, and Mr. O'Brien perceived Mr. Lowry as a Minister who wished to pursue a liberalisation agenda. He would have freely raised with Mr. Lowry the difficulties which he was then encountering in his fixed-line business, and in particular his view on the restrictions on availability of leased-lines from Telecom Éireann.

27.20 It will be recalled that on one of the occasions on which Mr. O'Brien and Mr. Lowry had met, prior to September, 1995, namely, at the telecommunications conference which they had both attended on 4th April, 1995, they had not just spoken of sport, or of Mr. O'Brien's problems on the fixed-line side of his business, but had discussed his interest in the GSM licence. Mr. Lowry had disclosed to Mr. O'Brien that France Telecom was interested in the GSM licence, but had not yet formed a consortium. That disclosure was followed by negotiations between Communicorp and France Telecom when, as already alluded to, Mr. O'Brien, Mr. John Callaghan, and Mr. Massimo Prelz of Advent travelled to Paris to meet with representatives of France Telecom.

27.21 After the match had finished, Mr. O hUiginn drove Mr. O'Brien back to his home in Ballsbridge where they parted ways. Mr. O'Brien never mentioned to Mr. O hUiginn that he had any arrangement to meet with Mr. Desmond, in advance of his meeting with Mr. Lowry. He had of course told Mr. O hUiginn of

his plans to meet with Mr. Lowry, and it was Mr. O hUiginn's evidence that he was not surprised on learning of that arrangement. On the contrary, he was pleased: it was in his view quite legitimate for Mr. O'Brien to take such an opportunity to speak to Mr. Lowry, and he believed that he probably exhorted Mr. O'Brien to take up the chance to speak to him about fixed-lines. As already noted, it seems that, notwithstanding Mr. O hUiginn's interest and encouragement, it never occurred to him to ask Mr. O'Brien afterwards how he had fared in his meeting with Mr. Lowry, and what progress he had made with Mr. Lowry on fixed-lines.

27.22 After spending some time after the match in Croke Park, Mr. Lowry was dropped by his State car at Houricans. Mr. Denis O'Connor and his wife had arrived in Houricans in advance of Mr. Lowry, and they awaited his arrival close to the front entrance of the premises. When Mr. Lowry arrived, he joined Mr. O'Connor and his wife for a drink, and Mr. O'Connor recalled that Mr. Lowry had introduced him to Mr. Sean Barrett T.D., then Minister for the Marine. Neither Mr. O'Connor nor Mr. Barrett, from whom the Tribunal also heard evidence, had any memory of seeing Mr. O'Brien in Houricans. Whilst Mr. O'Connor was uncertain whether he would have recognised Mr. O'Brien at the time, Mr. Barrett would have known him, but would not have been aware that he was involved with a consortium which had applied for the GSM licence. Mr. O'Connor had no memory of Mr. Lowry leaving Houricans, although he did recall that Mr. Lowry had left their company, and had circulated amongst other persons present.

27.23 It was Mr. O'Brien's evidence that, having met with Mr. Desmond in the interim, which meeting will be returned to, he proceeded to Houricans in Leeson Street. He met Mr. Lowry on his way into Houricans: Mr. Lowry was just inside the door in the company of a number of people, one of whom Mr. O'Brien recognised as the late Mr. Sean Murray, who he knew to have an involvement with a competing consortium. According to both Mr. O'Brien and Mr. Lowry, Houricans was crowded, or "*jammers*", as Mr. O'Brien described it, so they decided to leave Houricans, and proceed across the road to Hartigans. Mr. O'Brien explained that Hartigans, unlike Houricans, was a pub that was frequented by a rugby and college fraternity, and as it was usually empty on a Sunday evening, he expected that they would be served there easily.

27.24 They had one or two drinks together in Hartigans, and chatted about the match. Mr. O'Brien testified that he also took the opportunity to raise the problems which Esat Telecom was then encountering in its fixed-line business, due to inadequate capacity resulting from limitations on the availability of leased-lines. According to Mr. O'Brien, the problem was becoming critical, as existing corporate customers were experiencing blocks in service at peak hours. That

was a very serious issue, and was the key thing that Mr. O'Brien wished to talk about with Mr. Lowry. Likewise, it was Mr. Lowry's evidence that he and Mr. O'Brien discussed the match, and that Mr. O'Brien raised the matter of fixed-lines. Mr. Lowry testified that he did not want to hear about fixed-lines after the match, and he asked Mr. O'Brien to "*park*" the subject. Having finished their drinks, Mr. O'Brien and Mr. Lowry left Hartigans. Mr. O'Brien departed, and Mr. Lowry returned to join his friends in Houricans. Mr. Lowry had not, it seems, left Houricans, when Mr. O'Connor and his wife took their leave of him, at what Mr. O'Connor believed was between 7.30 and 8pm that evening.

27.25 Both Mr. Lowry and Mr. O'Brien were clear in their evidence that no reference whatsoever was made by them at any time, during the course of their encounters on 17th September, 1995, to the GSM process. Mr. O'Brien testified that he would have regarded it as a taboo subject. It would have been wrong and inappropriate for him to raise it. They did not converse about the process at all, nor did they discuss the possibility of Mr. Desmond joining the Esat Digifone consortium. It was Mr. Lowry's evidence that no reference whatsoever was made to Mr. Desmond or IU, and he presumed that he became aware of Mr. Desmond's involvement at the same time as his officials in the Department. In weighing this aspect of the evidence of Mr. Lowry and Mr. O'Brien, the Tribunal must have regard to all of the relevant evidence which was available to it, and the context of the interactions on 17th September, 1995.

ANALYSIS OF EVIDENCE AND CONTEXT

27.26 The Esat Digifone presentation had proceeded the previous Tuesday, 12th September, 1995. The Esat Digifone team had prepared intensively for the presentation, from as early as the beginning of August. Mr. O'Brien had been concerned from the outset as to how the evaluators would assess the financial capability of Esat Digifone, and in particular the ability of Communicorp to fund its equity requirement. On the advice of his principal consultants, PA Consulting, he had raised with Mr. Massimo Prelz of Advent that it was anticipated that some additional documentation regarding the Advent commitment would be sought by the Department at the presentation, although no such further documentation was it seems forthcoming from Advent. Mr. O'Brien's concerns had not been allayed by the questioning at the presentation, and he testified that, at the conclusion of it, he regarded the bringing in of Mr. Desmond as a much more serious prospect. He had shared his concerns with Mr. O hUiginn, and possibly also Mr. Mara, on Thursday, 14th September, 1995, and had informed Mr. O hUiginn of the possibility of bringing in Mr. Desmond as a member of the consortium, and of obtaining from him a guarantee for Communicorp's equity requirement, and was encouraged by Mr. O hUiginn to take that course. Having

had no direct contact with Mr. Desmond since 11th August, 1995, some five weeks earlier, Mr. O'Brien met with or contacted Dr. Michael Walsh, Mr. Desmond's business associate, on the following day, Friday, 15th September, 1995. That meeting was not prompted, as suggested by Mr. O'Brien, by a letter from Telenor of the same date, and was entirely unrelated to it. The letter in question is discussed in the next chapter.

27.27 Between Mr. O hUiginn dropping Mr. O'Brien to his home after the match on Sunday, 17th September, 1995, and Mr. O'Brien's meeting with Mr. Lowry, which he subsequently entered into his diary for 6.45pm on that day, Mr. O'Brien either met, or had contact with Mr. Desmond. That meeting or contact was also subsequently entered into Mr. O'Brien's diary for 6pm that day. Mr. Desmond had no memory of any such meeting, although he confirmed that he was then in Dublin, and had attended the match. He would have returned to his home after the match, at or around 6pm, to collect his luggage, and would have left his home for the airport at or around 6.45pm. It was therefore possible that he might have met with Mr. O'Brien, but he reiterated that he had no recall of any such meeting, and he observed that Mr. O'Brien's diary entry had not assisted his recollection.

27.28 Mr. O'Brien testified that he could not recall the venue of his meeting with Mr. Desmond: it could have been at Mr. Desmond's office in town, or at his home. According to Mr. O'Brien, although again having no memory of it, the meeting would have been arranged the previous week, and the appointment would have been made in advance, probably on the telephone directly between him and Mr. Desmond. If arranged in advance, it seems strange that the meeting had not then been entered by Mr. O'Brien into his appointment diary, but rather was entered after the fact, at the same time as the entry of Mr. O'Brien's meeting with Mr. Lowry. The purpose of the meeting, according to Mr. O'Brien, was to finalise directly with Mr. Desmond some outstanding issues relating to Mr. Desmond's pending involvement in the consortium. Whilst again Mr. O'Brien could not recollect what those issues were, he thought that they probably related to the fundamentals of the underwriting to be provided, and possibly the level of Mr. Desmond's entitlement to participate as a shareholder in the licensed company. Whatever was or was not discussed between Mr. O'Brien and Mr. Desmond, it is clear that their interaction was decisive as to the principle of Mr. Desmond joining the consortium and underwriting Communicorp's financial obligations as, on the following day, Monday, [18th September, 1995](#), Mr. O'Brien, together with Mr. Leslie Buckley, attended a meeting with Mr. Owen O'Connell of William Fry solicitors, and, according to Mr. O'Connell's contemporaneous attendance, Mr. O'Brien instructed him that:

"Dermot Desmond going ahead with financing transaction.

Need 'underwriting' letter for Dept. because finances are seen as the weakness.

DD wants 30% of GSM..."

In the light of the terms of that attendance, Mr. Desmond accepted that it was possible that he did have a related discussion with Mr. O'Brien on the previous day. A copy of Mr. O'Connell's attendance can be found within the Book of Appendices to this Volume.

27.29 Mr. Lowry, as the Tribunal has already found, was as of 17th September, 1995, undoubtedly in possession of information concerning the Project Group's then assessment of the relative performance of the six applicants. As has already been outlined in some detail, Mr. Brennan himself testified that he had informed Mr. Lowry at some point in the course of the process that he could see either a 3/3 or a 2/2/2 split in the applications. That information of course mirrored the assessment of Mr. Michael Andersen made to the Project Group at the post-presentation meeting of the previous Thursday, 14th September. However, as already observed, the Tribunal is satisfied that Mr. Lowry was in receipt of information of a far more detailed nature, and had by then been informed by Mr. Brennan that Esat Digifone was emerging as a front runner, but that there were reservations concerning its finances. In that regard, it will be remembered that when Mr. Brennan conveyed information along these lines to Mr. Fitzgerald around this time, he told Mr. Fitzgerald that he had also so informed Mr. Lowry.

27.30 The Tribunal is satisfied that not only was Mr. Lowry in possession of that information, but that it is clear from his interaction with Mr. O'Reilly at the opening of the Galmoy mine two days earlier, that he had no inhibition about sharing information concerning the evaluation with interested persons. Whilst Mr. Lowry denied that he had ever spoken to Mr. O'Reilly in the terms outlined by Mr. O'Reilly in evidence, or that he had discussed the GSM process with Mr. O'Brien on 17th September, 1995, his overall thinking on the issues of confidentiality, perception and disclosure, as apparent from his evidence, was illuminating. Mr. Lowry testified that he did not regard himself as bound by the protocol governing interaction with members or persons interested in consortia, as adopted by the Project Group, which he accepted was outlined to him by Mr. Loughrey. Further, he did not consider that Mr. Loughrey's advice to him to refrain from meeting interested persons was practicable in a small business community. In any event, it was for him, as Minister, to decide what course to take. He considered that it was inevitable that he would meet persons involved, and as a politician he felt that he should meet them, thank them and wish them

well. Whilst he accepted that it was important not to give any impression of imparting information, or “*inside track*”, as he put it, it was not he who would make a recommendation on the outcome of the process, which was a matter exclusively for the Project Group.

27.31 It is difficult to accept that the encounter between Mr. O’Brien and Mr. Lowry at half-time in Croke Park was entirely serendipitous and fortuitous. Rather, it seems to the Tribunal that Mr. O’Brien, in attending the match, at Mr. O hUiginn’s invitation, did so in the expectation and intent that, in view of the location of the tickets available to Mr. O hUiginn as Chairman of Bord Failte, there was every possibility that he would have an opportunity to engage with Mr. Lowry, who he would expect to be in attendance. This was the first and last time that Mr. O hUiginn ever asked Mr. O’Brien to an All-Ireland Final, and the invitation was issued in the context of Mr. O’Brien’s deliberations on the Project Group’s assessment of his finances, and the prospect of involving Mr. Desmond, and the Tribunal considers it unlikely that Mr. O hUiginn’s invitation was otherwise than part of a carefully considered strategy to place Mr. O’Brien and Mr. Lowry in proximity to each other. Moreover, Mr. O’Brien had already profited from such an encounter with Mr. Lowry when, in the previous April, Mr. Lowry had informed him, when they met at the telecommunications conference, that France Telecom was interested in applying for the licence, and had not yet formed a consortium.

27.32 What happened was that Mr. O’Brien and Mr. Lowry met in the hospitality area at half-time. Far from his fixed-line business then being a key consideration for him, as he testified, it is clear that what was then consuming Mr. O’Brien’s time, his thoughts, and his actions was his perception of the Project Group’s reservations concerning the finances of Communicorp, and whether he should bring in Mr. Desmond, who would guarantee Communicorp’s finances, but at the cost of a dilution of its shareholding in Esat Digifone. It is also clear that when Mr. Lowry, the Minister who was demonstrably inclined to share information with interested persons, met Mr. O’Brien, he knew that Esat Digifone was doing very well in the evaluation, but that the Project Group had reservations surrounding its finances.

27.33 In these circumstances, the Tribunal finds it wholly incredible and inconceivable that either Mr. O’Brien or Mr. Lowry could have restrained themselves from raising and discussing the process, and the Esat Digifone application. The Tribunal rejects the evidence of Mr. O’Brien and Mr. Lowry in this regard, and considers the only realistic inference to be drawn from all of the circumstances is that Mr. Lowry, as he had done when he had met Mr. O’Reilly two days earlier, volunteered the Project Group’s then assessment of the Esat

Digifone application. It likewise appears to the Tribunal that Mr. Lowry must have imparted some outline information to Mr. O'Brien, when he met him during the half-time interval at Croke Park, and it was this information which prompted Mr. O'Brien to make contact with Mr. Desmond, before proceeding to meet further with Mr. Lowry in Houricans.

27.34 In view of Mr. Desmond's clear evidence that he had no recollection of meeting Mr. O'Brien that evening, but that it seemed from the unequivocal instructions furnished by Mr. O'Brien to Mr. O'Connell the following day, that they probably did have contact, it seems likely that such contact was by telephone. There was certainly no prearranged meeting, as testified by Mr. O'Brien, as otherwise it would have been entered by Mr. O'Brien into his appointment diary, when the arrangement was made. Instead, the entry, as in the case of Mr. O'Brien's meeting with Mr. Lowry, was made after the fact, but without the identification of any location, even in an abridged form. If the Tribunal is correct in this analysis, and it believes that it is, it was what Mr. Lowry said to Mr. O'Brien that confirmed his view that it was vital for his prospects in the evaluation to obtain Mr. Desmond's guarantee. Otherwise, Mr. O'Brien's instructions to his solicitor, Mr. O'Connell, the following day, that underwriting was required for the Department, when only six days earlier Mr. O'Brien had expressly confirmed, at the conclusion of the Esat Digifone oral presentation, both his understanding of, and his intention to abide by, the bar on communications to the Department, other than on the initiative and written request of the Department, were inexplicable.

27.35 With regard to the subsequent meeting in Houricans and the departure to Hartigans, the Tribunal rejects the evidence that the reason for the abandonment of Houricans was because it was "*jammers*", as Mr. O'Brien put it, and it was difficult to secure service. Mr. Lowry was then by any measure an important personage, and it is difficult to believe that he would have encountered any delay in securing service in Houricans. It is also hard to credit that Mr. Lowry would have left the company that he was then in, which included friends who he had personally invited to meet him, and depart for an empty public house across the road, to chat to Mr. O'Brien, somebody he did not know well, about nothing more than the match, as testified by Mr. Lowry.

27.36 The only plausible inference that can be drawn is that the flight from Houricans was motivated by a mutual desire to discuss the evaluation process, and Mr. O'Brien's prospects, in privacy. Mr. O'Brien subsequently told Mr. Simonsen that Mr. Lowry had suggested that Mr. Desmond should be involved in the consortium, when they had met in a public house. Whilst there is no evidence at all to suggest that Mr. Lowry was ever the initiator of Mr. Desmond's

involvement, the Tribunal has no doubt that, in the course of their half-hour discussion in private in Hartigans, Mr. O'Brien must have shared with Mr. Lowry the single matter that was preoccupying his thoughts, namely, his strategy of strengthening the Department's perception of his side of the finances of Esat Digifone, by means of a guarantee from Mr. Desmond. The Tribunal likewise considers it unworthy of belief that Mr. Lowry did not give some comfort to Mr. O'Brien on the consequences of notifying that information to the Department, notwithstanding the competition rules which prohibited the submission of further information after the conclusion of oral presentations. Not only had that rule been reiterated by Mr. Martin Brennan, in the clearest possible terms, at the Esat Digifone presentation the previous week, but Mr. O'Brien had himself furnished a commitment that Esat Digifone would abide by it.

27.37 In rejecting as bereft of credibility the evidence of Mr. O'Brien and Mr. Lowry that the sole focus of conversation between them, other than the match, was on fixed-line Esat grievances, the Tribunal also considers that it is significant that no correspondence or other record of renewed dialogue on these grievances, of an even approximately contemporaneous date, existed in all of the documentation made available to the Tribunal by the Department. In addition, Mr. O'Connell's attendance of his meeting the following day with Mr. O'Brien and Mr. Buckley was confined to the involvement of Mr. Desmond, and the necessity of providing underwriting to the Department. Mr. O'Connell accepted that, had he been furnished with instructions on fixed-lines, he would probably have noted them. Nor is the Tribunal impressed by, or disposed to regard as plausible, the testimony of Mr. O hUiginn that he exhorted Mr. O'Brien to avail of his Croke Park access to Mr. Lowry to seek comfort on fixed-lines.

TOWARDS AGREEMENT WITH MR. DERMOT DESMOND

REACTIVATING AND CONCLUDING NEGOTIATIONS WITH MR. DESMOND

28.01 Following the reopening of negotiations between Mr. Denis O'Brien and Mr. Dermot Desmond, and the events of Sunday 17th September, 1995, matters moved speedily to conclusion. Agreements were finalised and executed on Friday, 29th September, 1995, and a letter was sent by IIU Limited, Mr. Desmond's company, to the Department, for the attention of Mr. Martin Brennan. The Department's understanding of the contents of that letter, and the Department's response to its receipt, are the subject-matter of Chapter 32. The focus of this chapter is the negotiations between the members of the Esat Digifone consortium, and the strategies and manoeuvrings undertaken by Mr. O'Brien in relation to Telenor and Advent, in order to liberate a 25% shareholding for Mr. Desmond.

28.02 It will be recalled from Chapter 18 that Mr. O'Brien and Mr. Desmond, at the back of the airplane on the return journey from an outing to a Glasgow Celtic match, on 10th August, 1995, had for the first time a discussion about Esat Digifone. They agreed to meet to continue their discussion the following day, and they did meet in Mr. Desmond's office in the International Financial Services Centre. In preparation for that meeting, Mr. O'Brien had generated a memorandum in which he outlined his proposals, and it was evident from that memorandum, and recognised by Mr. Desmond, that what Mr. O'Brien was seeking was a £3 million guarantee for Communicorp, to support its existing fixed-line business, something he had unsuccessfully sought from Mr. Desmond on two previous occasions, and what he was offering in return was a right to acquire a 15% shareholding in Esat Digifone. Mr. Desmond had no interest in those terms, and rejected Mr. O'Brien's proposals. His interest in Esat Digifone and the GSM licence had nonetheless been stimulated, and, as his close associate and adviser Dr. Michael Walsh put it, he was interested in participating in Esat Digifone, but only on the same footing as Communicorp and Telenor. Those negotiations of early August, 1995, foundered, and apart from the furnishing of some financial information regarding Communicorp's radio and fixed-line businesses, there was no evidence of any further contact between Mr. O'Brien and Mr. Desmond, or their associates or representatives, until 15th September, 1995, the Friday following the Esat Digifone presentation, when Mr. O'Brien met or had contact with Dr. Walsh.

28.03 Matters then moved very speedily, and following further contact between Mr. O'Brien and Mr. Desmond, most probably by telephone, at 6:00pm on Sunday, 17th September, 1995, the fundamentals of a very different

agreement to that proposed by Mr. O’Brien in early August, 1995, were agreed. There was no longer any provision for a guarantee or other support for Mr. O’Brien’s fixed-line business, Mr. Desmond was to receive a far more substantial shareholding in Esat Digifone, and there was a new component: underwriting by Mr. Desmond for Communicorp’s £24 million projected capital investment in Esat Digifone.

28.04 On the following day, Monday, [18th September, 1995](#), as already outlined in a previous chapter, Mr. O’Brien, together with Mr. Leslie Buckley, went to see Mr. Owen O’Connell of William Fry, solicitors, and furnished him with what were self-evidently urgent and decisive instructions. Mr. O’Connell’s contemporaneous handwritten attendance of that meeting is again reproduced below, and a copy of it can be found within the Book of Appendices to this Volume. Mr. O’Connell’s attendance recorded as follows:

“Denis O’Brien + Leslie Buckley.

Dermot Desmond going ahead with financing transaction.

Need ‘underwriting’ letter for Dept. because finances are seen as the weakness.

DD wants 30% of GSM. AIB Standard + IBI to be excluded.

30	<i>DD</i>
5	<i>Advent</i>
32.5	<i>Esat</i>
32.5	<i>Telenor”.</i>

28.05 As is clear from that attendance, and as was confirmed by Mr. O’Connell in evidence, there were three elements to the instructions which he received from Mr. O’Brien on 18th September, 1995, which were:

- (i) Mr. Desmond was proceeding with the financing transaction;
- (ii) an underwriting letter was required for the Department, as finances were seen as the weakness;
- (iii) Mr. Desmond wanted a 30% shareholding in Esat Digifone, and what was then contemplated was that this would be achieved by excluding the three Davy financial investors, which would liberate a 15% shareholding, and by Telenor and Communicorp diluting their

shareholdings by 7.5% each, from 40% to 32.5%, which would liberate a further 15% shareholding.

It was Mr. O'Connell's evidence that, although final agreement was not reached until 29th September, 1995, it seemed to him that there was a commercial deal in place at that point.

28.06 Mr. Buckley, who accompanied Mr. O'Brien to that meeting, was then Chief Operations Officer of Esat Telecom, and although he subsequently became a director of Esat Digifone, he described his then involvement in the affairs of Esat Digifone as peripheral. As to why he was therefore in attendance at that meeting, as it was clear that the only matter discussed related to Esat Digifone, Mr. Buckley replied that that was an interesting question. He thought what had happened was that he had been on his way to a meeting in William Fry, and happened to meet Mr. O'Brien, who had asked him to jump into the car with him. It was accordingly almost by accident that he had ended up at the meeting between Mr. O'Brien and Mr. O'Connell, and he was sure that he had been going to William Fry to discuss fixed-line capacity, and other issues regarding Esat Telecom. According to Mr. Buckley, during the car journey to William Fry, Mr. O'Brien had informed him that he had met Mr. Lowry the previous evening, following the All-Ireland Final, and had told him that they had discussed fixed-line matters, and particularly Esat Telecom's shortage of capacity from Telecom Éireann.

28.07 Mr. Buckley initially provided a statement to the Tribunal in early October, 2002, in which, in response to a query from the Tribunal about his knowledge of any meetings, discussions, dealings or contacts of whatsoever nature between Mr. Denis O'Brien and Mr. Michael Lowry, Mr. Buckley made no reference to having knowledge of Mr. O'Brien's meeting with Mr. Lowry on the evening of 17th September, 1995. In early November, 2002, after the Tribunal had received Mr. Per Simonsen's Statement, in which he referred to Mr. O'Brien having informed him of having met Mr. Lowry in a public house, the Tribunal specifically asked Mr. Buckley whether he had any knowledge of that meeting. In his supplemental statement in response, of late November, 2002, Mr. Buckley informed the Tribunal, and subsequently confirmed in evidence, that he did have knowledge of that meeting. He testified that he had always been aware of it, and that he remembered it particularly because it was tied into a meeting between Mr. O'Brien and Mr. Dermot Desmond, although, on the basis of Mr. Buckley's other evidence, there was no connection in subject-matter between the two meetings. Mr. Buckley was asked why he had not brought his knowledge of the meeting to the Tribunal's attention in his initial statement, to which he replied:

"I'm quite surprised at that, actually."

Whatever Mr. O'Brien may have informed Mr. Buckley in the course of that short car journey along the canal to the offices of William Fry, the Tribunal has already found that the discussions between Mr. O'Brien and Mr. Lowry related not to fixed-line issues, but to the far more pressing matter of the Esat Digifone application for the GSM licence.

28.08 After 18th September, 1995, there followed a period of intense discussions and negotiations between various parties, with a view to finalising Mr. Desmond's involvement, and providing an underwriting letter to the Department. These involved primarily Dr. Walsh, on behalf of Mr. Desmond, Mr. O'Connell, as solicitor for Esat Digifone, Mr. Gerry Halpenny, another solicitor with William Fry, who was deputed to act for Communicorp and Mr. O'Brien, with both Mr. O'Connell and Mr. Halpenny receiving instructions from Mr. O'Brien. Concurrent with those negotiations, Mr. O'Brien also had to endeavour to convince Telenor that it was necessary to bring Mr. Desmond in as a partner in Esat Digifone, and secure agreement to the consequent dilution of its shareholding. Further, Mr. O'Brien had to endeavour to convince Advent to relinquish its 5% shareholding in favour of Mr. Desmond, or, as happened, put in place a strategy where he could, at least arguably, contend that Advent had forfeited its entitlement to that 5% shareholding under the terms of the agreement of 12th July, 1995. Lastly, although he had no commitment to the Davy financial investors, namely Allied Irish Banks, Investment Bank of Ireland and Standard Life, he had to ensure that their exclusion was effected in an appropriate manner. As will be seen, all of this required a significant degree of tactical manoeuvring on the part of Mr. O'Brien, and his various advisers, and led to varying degrees of dispute with the replaced participants.

28.09 The central negotiations, from which all other dealings flowed, concerned the basis upon which Mr. Desmond was to become a partner in the consortium, and primarily the extent of the shareholding in Esat Digifone to which he would become entitled. Although Mr. Desmond, as of 17th September, 1995, was seeking a 30% shareholding, and although Mr. O'Brien, Mr. Buckley and Mr. O'Connell had directed their minds to how that level of shareholding might be achieved, it seems that Mr. O'Brien was hopeful that Mr. Desmond might be satisfied by some lesser degree of participation. There were three stages in progressing negotiations from Mr. O'Brien and Mr. Desmond's commercial deal of 17th September, 1995, as it was described by Mr. O'Connell, to the execution of a formal arrangement agreement, and side-letters, on 29th September, 1995, and the furnishing of an underwriting letter to the Department on the same date, each of which will now be considered.

Initial exchange of proposed terms in correspondence

28.10 On that Monday, 18th September, 1995, when Mr. O'Brien and Mr. Buckley went to Mr. O'Connell, with the news of the commercial deal struck with Mr. Desmond, information concerning the structure and projected financing of Esat Digifone was provided to Dr. Walsh. This was the first time that Mr. Desmond or Dr. Walsh had been furnished with any such documentary information concerning Esat Digifone. That information was supplied in the form of a copy of the memorandum for investors which had been prepared by Mr. Paul Connolly, in conjunction with Mr. Tom Byrne, of Davy, and circulated by Mr. Kyrán McLaughlin to the institutional investors, whose support had been sought and secured by Davy in June, 1995. It will be recalled from Chapter 14 that the memorandum indicated that the total projected equity investment in Esat Digifone would be £60 million, and that, as the estimated cost of establishing a GSM network was £120 million, the balance would be raised through bank borrowings. It was Mr. Paul Connolly who forwarded a copy of that memorandum to Dr. Walsh, who appears to have used the information contained in it to prepare initial proposed outline terms.

28.11 On the following day, Tuesday, 19th September, 1995, Dr. Walsh wrote to Mr. O'Brien, confirming what he described as the terms which had been agreed in consideration of Mr. Desmond providing an underwriting letter to the Department. IIU Limited, Mr. Desmond's company, which had been incorporated by him in December, 1994, and which had commenced trading from the International Financial Services Centre two months earlier, in July, 1995, was the vehicle intended to be used by Mr. Desmond at this point, and indeed was the vehicle used for the agreements executed on 29th September, 1995, and to furnish an underwriting letter to the Department. The rights and obligations of IIU were on the same date, that is 29th September, 1995, assigned to another of Mr. Desmond's companies, Bottin International, a company incorporated and domiciled in Gibraltar, but as observed by Dr. Walsh in his evidence, it was in practice always Mr. Desmond himself who was investing in Esat Digifone.

28.12 The terms confirmed by Dr. Walsh in his letter of 19th September, 1995, were as follows:

- "1. The total maximum commitment under the underwriting and placing will be £32 million ('the Commitment') and will be for the 60% of the equity, not held by Telenor in the Consortium.*
- 2. The Consortium will pay a fee of 1% of the Commitment to IIU Limited.*

3. *All shares will be subscribed for on the same basis by all members of the Consortium.*
4. *IIU Limited or its nominees will retain 30% of the equity of the Consortium.*
5. *IIU Limited will have security over the 30% intended to be placed with Communicorp Group Limited. In the event that Communicorp Group Limited does not subscribe for this 30% then IIU Limited will be entitled to place these shares with any other party.”*

At this point it seems therefore that, apart from seeking an entitlement to 30% of shares allotted in Esat Digifone, it was the understanding of Mr. Desmond, and Dr. Walsh, that Telenor’s shareholding would remain at 40%, and that it was only Communicorp’s shareholding that would be diluted, and that Communicorp and Mr. Desmond would each have a 30% shareholding.

28.13 Dr. Walsh also enclosed two draft letters. The first of these was a letter to be sent by Mr. O’Brien to Mr. Kyran McLaughlin of Davy, to inform him that Esat Digifone would not be taking up the support of the three institutions which Davy had secured in June, 1995. No such letter was in fact ever sent by Mr. O’Brien to Mr. McLaughlin, and as will be seen, the uncomfortable task of advising Mr. McLaughlin that those institutions would not be required was dealt with in a much more delicate and diplomatic fashion by Mr. John Callaghan, who went to see Mr. McLaughlin on 29th September, 1995, the day on which the agreements which governed Mr. Desmond’s entry to the consortium were finalised. The second draft letter was a draft of the critical underwriting letter to the Department. That initial draft, prepared by Dr. Walsh, was subject to significant refinement, and will be returned to at a later point in this chapter, in the context of the letter sent to the Department on 29th September, 1995.

28.14 Mr. O’Brien, having consulted with Mr. O’Connell, replied to Dr. Walsh on the same day, and enclosed his counter proposals, which had been prepared by Mr. O’Connell. He summarised the areas where there were differences between them. Firstly, there was no agreement for any underwriting fee. Rather, Mr. Desmond’s “reward” for providing underwriting was to be his participation in Esat Digifone. Secondly, Mr. Desmond’s shareholding in Esat Digifone would have to be limited to 20%, as it was impossible to commit to more, by reason of third party constraints. However, in that regard Mr. O’Brien indicated that Mr. O’Connell’s advice was to the effect that Advent’s entitlement to 5% of the equity in Esat Digifone was doubtful, and Mr. O’Brien was prepared to endeavour to secure that 5% for Mr. Desmond, provided Mr. Desmond took responsibility for any costs involved in any dispute that might arise with Advent. Thirdly, Mr.

O'Brien reminded Dr. Walsh that Mr. Desmond had agreed to meet a pro rata proportion of the bid costs, whether Esat Digifone won or lost the competition. The enclosed document, which had been drafted by Mr. O'Connell, incorporated these proposals, and it also included a provision that Mr. Desmond's total maximum commitment, pursuant to the underwriting arrangement, would be £35 million, a figure which was slightly higher than the £32 million envisaged by Dr. Walsh. Mr. O'Connell's draft took the form of an underwriting letter to be sent by IIU to Esat Digifone.

28.15 It is clear from this exchange of correspondence that, whilst a commercial deal had been struck between Mr. Desmond and Mr. O'Brien on 17th September, 1995, there were still certain key matters which had not been agreed, most notably the percentage shareholding in Esat Digifone which would be made available to Mr. Desmond. As reflected in Mr. O'Connell's attendance of 18th September, 1995, and Dr. Walsh's letter of the following day, it is clear that Mr. Desmond was seeking a 30% shareholding for himself. Mr. O'Brien, on the other hand, was endeavouring to limit Mr. Desmond's equity share to 20%, although he had indicated that it might be possible to increase that shareholding to 25%, if Advent could be persuaded to relinquish its 5% entitlement.

Differences are resolved

28.16 The critical difference between Mr. O'Brien and Mr. Desmond at that point was the level of shareholding to which Mr. Desmond would be entitled as a reward for providing underwriting for Communicorp. As of 19th September, 1995, there was a 10% differential between their respective positions. This issue it seems reached a resolution at 7:00pm on Wednesday, 20th September, 1995, in the course of a telephone conversation between Mr. O'Brien and Mr. Desmond. Mr. O'Brien was in his office in Dublin, in the company of his father, Mr. Denis O'Brien Senior, and Mr. Desmond was in Barbados, when, as Mr. O'Brien described it, they "*shook hands on the phone*". What they agreed was to split the difference between them. Mr. Desmond would be entitled to a 25% shareholding in Esat Digifone, which was an unconditional entitlement, and was not dependent on the outcome of Mr. O'Brien's efforts to disentitle Advent.

28.17 Mr. O'Brien relayed the agreed terms to Mr. O'Connell later that evening, and early the following morning, Thursday, 21st September, 1995, Mr. O'Brien, Dr. Walsh and Mr. O'Connell had a teleconference, and Mr. O'Connell noted the matters discussed as follows:

"25% to IIU or nominees

Underwrite 40% (covenant)

*No placing of shares with telecom company (competitor of Telenor); otherwise no restriction. Wording re. behave reasonably in placing shares. Will consult company on all material places.
Fee: Side letter. DOB”.*

28.18 As is evident from the contents of Mr. O’Connell’s note, what was envisaged was that Mr. Desmond, or his nominee, would be entitled to 25% of the shares in Esat Digifone, and would provide underwriting for a further 40% of the shares. What seems to have been proposed, or touched on in the course of their teleconference, was that the underwriting would be provided in the form of a deed of covenant, which was the structure used by Mr. O’Connell when he prepared an initial draft immediately following that teleconference. Dr. Walsh testified that he was puzzled at the reference in Mr. O’Connell’s note to underwriting of 40%, as that would have brought Mr. Desmond’s potential exposure to 65% of the total capital subscribed in Esat Digifone, which, as Dr. Walsh observed, was never intended. Had that figure been correct, it would have meant that Telenor’s shareholding, that is the shareholding in Esat Digifone which Mr. Desmond was not acquiring or underwriting, would have been reduced to 35%. What Dr. Walsh may not have fully appreciated at that point, or may not have known, was that it was Mr. O’Brien’s plan, and one which, as will be seen, he sought unsuccessfully to execute, that Telenor would be persuaded to absorb the entire of the dilution necessary to make room for Mr. Desmond’s shareholding, leaving Communicorp’s 40% shareholding undiminished.

28.19 The balance of discussion between them on that day related to restrictions on Mr. Desmond’s entitlement, through IIU, to place his 25% shareholding with other parties, if he wished. Whilst that was an entitlement which was provided for in the agreements ultimately concluded, there was nothing in the documentary evidence, or in any other evidence heard by the Tribunal, to suggest that this was ever in truth a realistic prospect. Barring some unforeseen financial constraint, which Mr. Desmond was of course sensible to protect himself against, the Tribunal is satisfied that it was always Mr. Desmond’s intention to hold those shares on his own account, albeit through his nominee companies. Lastly, it seems that Mr. Desmond was to receive a fee for providing underwriting for Communicorp, which it was agreed should be offset against his share of the bid costs, and it was recorded by Mr. O’Connell that Mr. Desmond’s fee was not to form part of any formal agreement concluded, but instead was to be provided for in a side-letter, that is, a private letter between parties to a formal agreement making provision for ancillary contractual terms and obligations.

28.20 Mr. O’Connell moved speedily, and just after 1:00pm on that day, Thursday, 21st September, 1995, he produced a draft deed of covenant which encapsulated the agreement concluded between Mr. O’Brien and Mr. Desmond, as further refined in the course of the teleconference that day with Dr. Walsh, whereby IIU covenanted to Esat Digifone that, in consideration for the obligations undertaken by IIU, namely the provision of underwriting for Communicorp, Esat Digifone would procure that 25% of its shares would be allotted to IIU.

28.21 It was at this point, when he was satisfied that he had finalised the terms of Mr. Desmond’s role in Esat Digifone, both as an underwriter and a shareholder, that Mr. O’Brien turned his attention to Telenor and Advent. Mr. O’Brien travelled to Oslo the following day, Friday 22nd September, 1995, to meet with senior Telenor officials, to introduce them to the concept of Mr. Desmond as a new partner, and to seek to persuade them to dilute the Telenor shareholding in Esat Digifone. He also brought with him a draft letter that he wished to receive from Telenor, to seek to strengthen his case against Advent’s entitlement to a 5% shareholding. Both these matters will be returned to in later sections of this chapter, but for the moment it is sufficient to note that Telenor accepted Mr. Desmond’s role, and agreed to reduce its shareholding, not by 5% as Mr. O’Brien had hoped, but by 2.5%, to match an equivalent dilution by Communicorp. What this meant was that, subject to ousting Advent’s 5%, Mr. O’Brien had available 25% of Esat Digifone for Mr. Desmond, at a cost of a 2.5% dilution in Communicorp’s own shareholding, and of course Mr. Desmond’s fee.

The formal agreement and side-letters are finalised

28.22 Following Mr. O’Connell’s drafting of the deed of covenant, negotiations proceeded over the following week. By then, two further participants had joined the negotiations, Mr. Gerry Halpenny, another partner with William Fry, who represented Communicorp and Mr. O’Brien, and Telenor, who had by then been informed of, and agreed to, Mr. Desmond’s role. There was various toing and froing over finer points of agreement, such as the number of persons with whom Mr. Desmond could place shares if he decided against taking them on his own account. This and other related points were largely academic as, whilst the Tribunal recognises that Mr. Desmond may have wished to retain for himself some degree of flexibility, he was never called upon to underwrite any shares in Esat Digifone, and he took the entire 25% shareholding on his own account. There were also meetings and dealings in Dublin, to which Telenor was not a party, and in particular relating to the framing of the underwriting letter, ultimately forwarded to the Department, and the framing of a side letter between Communicorp and IIU.

28.23 By Friday 29th September, 1995, the deed of covenant, as drafted by Mr. O’Connell, had been rechristened an arrangement agreement. The parties to that agreement continued to be Esat Digifone and IIU, and apart from the finer points of pre-emption and placement rights, which had been teased out in the final days prior to 29th September, there was no substantive difference in the provisions which governed the obligation to underwrite Communicorp’s shareholding, save that the term “*subscription*” was used in place of the term “*underwriting*”.

28.24 What had changed significantly was the manner in which Mr. Desmond’s entitlement to 25% of the shares issued in Esat Digifone was framed. That right was provided for by clause 3 of both Mr. O’Connell’s deed of covenant, and the final arrangement agreement, and in each case had a marginal heading entitled “*Consideration*”. In Mr. O’Connell’s draft deed of covenant, in which IIU was defined as the Covenantor, and Esat Digifone was defined as the Company, that clause was in the following terms:

“In consideration for the obligations undertaken by the Covenantor in this Deed and in particular pursuant to this paragraph 3 and to paragraph 5 the Company shall procure that not less than 25% of the Ordinary Shares comprised in every tranche of the Issue shall be allotted to the Covenantor and the Covenantor undertakes to accept such allotments and to make payment therefor in full in accordance with the terms of each tranche.”

That provision was absolutely clear: every time additional shares were issued by Esat Digifone, 25% of such shares was to be made available to IIU, and IIU was to accept and make payment for them in full.

28.25 In the arrangement agreement, in which IIU Limited was defined as the Arranger, and Esat Digifone continued to be defined as the Company, the formulation of clause 3 was significantly different in that it provided as follows:

“In consideration for the obligations undertaken by the Arranger in this Agreement and in particular pursuant to this Clause 3 and to Clause 5 the Company shall procure that not less than 25% of the Ordinary Shares comprised in every tranche of the Issue shall be allotted to subscribers procured by the Arranger and the Arranger undertakes to procure that such subscribers accept such allotments and make payment therefor in full in accordance with the terms of each tranche. The total number of subscribers so procured by the Covenantor [sic] under all tranches of the Issue shall not exceed four.”

Although Mr. Desmond's rights to 25% of all issued shares in Esat Digifone had not altered one iota, the thrust of the consideration clause, as it appeared in the arrangement agreement, had shifted from Mr. Desmond's right to 25% of all issued shares, to an obligation on him to procure subscribers for those shares. Had anybody had sight of that arrangement agreement, who did not have knowledge of how that clause had evolved, or of the contents of certain side letters to which reference will be made, they might well have regarded clause 3 as substantially consistent with the continuing involvement of the financial institutions which had been named in the Esat Digifone application.

28.26 Matters came to finality at a meeting between Dr. Walsh, Mr. O'Brien and Mr. Halpenny on Friday, 29th September, in Mr. Desmond's offices in the International Financial Services Centre, which Mr. Halpenny believed began at or around noon that day. Mr. Halpenny had a vivid memory of the meeting, and recalled that the offices were practically empty, as the Smurfit European Golf Open Championship was taking place over that weekend at the K Club. The focus of the meeting was the finalisation of the additional contract documents, as it seems that the arrangement agreement, which was the formal contract document, had been executed earlier that day. What remained to be addressed were two side-letters, and the underwriting letter to the Department. That letter to the Department will be addressed separately, and for the moment what falls to be considered are the two side-letters.

28.27 Side-letters are commonly used in commercial contractual transactions. Their purpose is twofold: firstly, to clarify the intention of parties to a formal agreement, and secondly, to provide for additional matters of contract not covered by such formal agreement. They are useful devices, as they provide both a safeguard against uncertainty, and a means whereby ancillary terms can be provided, which parties may not, for one reason or another, wish to appear in their formal agreement. That dual purpose is well illustrated by the two side-letters which were signed by Dr. Walsh and Mr. O'Brien on 29th September, 1995. It is proposed to review those letters in turn.

Esat Digifone and IIU side-letter of 29th September, 1995

28.28 The side-letter between Esat Digifone and IIU commenced by reciting that its purpose was to confirm the basis of agreement between IIU and Esat Digifone, in consideration for the issue of the underwriting letter to the Department. It expressly stated that the arrangement agreement was subject to its terms. It then set out a series of provisions, many of which merely governed the mechanics of the underwriting provided for by the arrangement agreement. There were however two terms which warrant consideration, and these were the first and second terms of the side-letter itself.

28.29 The first term provided that:

“In the event that the Consortium is awarded the second GSM licence then the Consortium undertakes to place 25% of the equity in the Consortium with IIU Ltd. or its nominees (together “the Placees”). IIU Ltd. (“the Arranger”) will arrange underwriting for the 37.5% of the equity which Communicorp Group Ltd. (“Communicorp”) has committed to subscribe for. The maximum combined commitment under the placing and underwriting will be £36.5 million (“the Commitment”).”

That provision was to a significant degree a repetition of the principal terms of the arrangement agreement. It did however distinguish very clearly between IIU’s entitlement to 25% of all shares issued in Esat Digifone, and its obligation to provide underwriting for Communicorp’s 37.5% of the equity. It further confirmed that the full extent of the IIU commitment was to be £36.5 million.

28.30 The second term of the letter provided that:

“The Arranger has assigned the Agreement in it’s [sic] entirety – both benefits and obligations to Bottin (International) Investments Ltd.”

What this meant was that IIU no longer had any obligations or rights under the arrangement agreement, and those rights and obligations had been passed on to Bottin International, Mr. Desmond’s Gibraltar-based vehicle, and any rights or remedies that Esat Digifone might have had under the terms of the arrangement agreement were against Bottin, and not against IIU. Mr. Desmond, with whom Dr. Walsh and Mr. O’Brien agreed, testified that, regardless of which vehicle was used by him, or named in any agreement or side-letter, whether IIU or Bottin, it was Mr. Desmond personally who was behind the transaction, and as far as he was concerned, there was absolutely no confusion in that regard.

28.31 The effect of that assignment was that for all intents and purposes, it was Bottin and not IIU which was bound by the arrangement agreement. Had IIU not been named as the underwriting party to the arrangement agreement, it could not of course have written an underwriting letter to the Department, and that could only have been provided by Bottin. Although IIU was in reality no more than another of Mr. Desmond’s personal investment vehicles, it had been incorporated in Ireland, its business, at least according to the formal documents by which it was incorporated, was that of a financial advisory company, it had commenced trading in the International Financial Services Centre, albeit only two months earlier in July, 1995, and it had it seems applied to the Central Bank for

a licence under the Investments Intermediaries Act, 1995, to carry on an investment business, and to provide investment advice, including the business of underwriting, and did subsequently receive such a licence on 8th February, 1996. In these circumstances, whatever the reality, IIU as a vehicle would have been a far more suitable signatory to an underwriting letter to the Department than Bottin, an off-shore company, incorporated and domiciled in Gibraltar.

28.32 Mr. O’Connell, in his evidence to the Tribunal, certainly speculated, as he put it, that the transaction was structured in the way it was, namely with IIU as party to the arrangement agreement, and with those rights immediately assigned to Bottin, because IIU was regarded as a more suitable provider of an underwriting letter to the Department. He also observed that, even though IIU ceased to have any legal obligation to Esat Digifone or to Communicorp by reason of the assignment, it was his view that the Department, having no notice of such assignment, would have been entitled to call on IIU to remedy any breach. Mr. O’Connell may well have been correct in that regard, but with the greatest of respect to him, that was not a consideration that was then in the mind of any of the parties, for whom the underwriting was primarily regarded as a means of enhancing Communicorp’s financial standing in the eyes of the Departmental evaluators.

28.33 Whilst Dr. Walsh testified that, in the execution of that side-letter, he took it, not unreasonably, that Mr. O’Brien was duly authorised to sign it on behalf of Esat Digifone, it seems that Telenor may not have had any knowledge of, and certainly had no input into, the drafting of that term. Telenor subsequently sought, but never in fact received any information from Mr. Desmond about Bottin.

Communicorp and IIU side-letter of 29th September, 1995

28.34 The second side-letter, which was between Communicorp and IIU, was likewise signed by Mr. O’Brien and Dr. Walsh. The letter also recited that its purpose was to confirm the basis of the agreement between Communicorp and IIU, in consideration for the issue of the underwriting letter to the Department. This was shorter than the side-letter between Esat Digifone and IIU, and in essence it addressed two matters. Firstly, it provided for the payment of a fee of £219,000.00 by Communicorp to IIU, in consideration for the provision of the underwriting letter to the Department. That fee, which was considerably less than the 1% which Mr. Desmond had initially sought, had been agreed between Mr. Desmond and Mr. O’Brien in the course of their transatlantic telephone call on Wednesday, 20th September, 1995. It had also it seems been discussed the following day by Mr. O’Brien, Dr. Walsh, and Mr. O’Connell, and had been recorded in the latter’s note of that discussion as a matter that would be dealt

with by side-letter. What this provision meant was that, irrespective of the outcome of the GSM competition, Mr. Desmond was going to receive payment of £219,000.00.

28.35 The second matter for which the side-letter made provision was a pro rata contribution by Mr. Desmond to the bid costs, up to a maximum of £1.6 million, and that contribution was to be paid by him after deduction of the £219,000.00 fee to which he was entitled. One final matter of significance was the concluding term, which provided that:

“This letter, together with the attached letter addressed to the Consortium and the Agreement represents the full understanding between the parties and no other commitments exists between the Arranger or the Placees on the one hand and the Consortium or it’s [sic] shareholders on the other hand.”

In other words, that final side-letter confirmed, had there been doubt, that the entirety of the contractual arrangements between the parties was to be found, not in the formal arrangement agreement, but in that agreement augmented by the side-letters.

28.36 These side-letters formed the main focus of negotiations on 29th September, 1995, and once they were finalised and signed, the underwriting letter to the Department, which was the *raison d’être* of all of the negotiations between the parties over the previous two weeks, and the agreements concluded between them, could be dispatched by fax to the GSM dedicated fax number maintained by the Department, connected to a fax machine located within the Development Division offices of the Department.

28.37 Before proceeding to examine the underwriting letter of 29th September, 1995, it is necessary at this stage to address one general aspect of evidence heard by the Tribunal. In the course of testimony given by, amongst others, Mr. O’Brien, Mr. Desmond, Dr. Walsh and Mr. Leslie Buckley, it was suggested that the agreements reached on 29th September, 1995, were the product of the evolution of a continuous negotiation relating to Mr. Desmond’s involvement in Esat Digifone, which commenced with the discussions between Mr. O’Brien and Mr. Desmond on the return flight from the Celtic football match in early August. This is not a contention that is borne out by the information and documentation available to the Tribunal. Rather, what is clearly discernable are two entirely separate courses of negotiation, directed to two distinguishable agreements, the first of which, in early August, 1995, had as its object the securing of a guarantee for Mr. O’Brien’s existing businesses, and the second of

which, commencing on 15th September, 1995, with outline agreement reached on the evening of 17th September, 1995, the day of the All-Ireland Final, had as its object the provision of underwriting for Communicorp's intended equity in Esat Digifone. In this regard, the Tribunal heard evidence from Mr. John Callaghan, who, whilst not involved centrally in any of those negotiations, was asked, on the basis of his wide commercial experience, whether he agreed that there was a significant difference between what was contemplated in early August, 1995, namely, the provision of a bank guarantee for Communicorp's existing businesses, and what was then contemplated in mid-September, 1995, namely, the underwriting of Communicorp's equity in Esat Digifone. It was his testimony that what was being discussed in early August was *"a different proposition entirely to what was there at the end"*, and he continued in the following terms:

"So it's not that this is metamorphised into the last bit. It is just two deals. This is a different deal entirely to the last one. They are not the same transaction, I would have said."

28.38 The Tribunal cannot fault Mr. Callaghan's analysis, and is satisfied from all of the evidence heard and adduced that the underwriting of Communicorp's equity in Esat Digifone by Mr. Desmond was an entirely new proposition which emerged at the earliest on 15th September, 1995, many weeks after the early August negotiations had terminated, and had never previously been contemplated or discussed.

THE UNDERWRITING LETTER OF 29TH SEPTEMBER, 1995

28.39 The focus and urgency of activities between 18th September, 1995, and 29th September, 1995, was to ensure that the Departmental evaluators were notified that Communicorp, apart from the Advent comfort letter, had an additional source of funding to cover its equity investment in Esat Digifone, so as to dispel the perception of financial weakness. When Mr. O'Brien and Mr. Buckley first came to see Mr. O'Connell with the news on Monday, 18th September, 1995, what he recorded was:

"Need 'underwriting' letter for Dept. because finances are seen as the weakness."

28.40 By then Mr. O'Brien had evidently made a decision that he would ignore the rules of the competition, notified to all interested parties in the Department's information memorandum, and restated by Mr. Martin Brennan as recently as the previous Tuesday, 12th September, 1995, at the commencement

of the Esat Digifone presentation to the Department. There can be no doubt that Mr. O'Brien was fully aware that any further communications between Esat Digifone and the Department after that date, should be on the Department's initiative, and that any such request by the Department was to be made in writing. He also confirmed to Mr. Brennan at the completion of the oral presentation that he intended to abide by that rule when he indicated unequivocally that:

"we are not going to send in any further material for you to review."

28.41 Dr. Walsh, who signed the letter which was sent to Mr. Brennan on 29th September, 1995, testified that he knew nothing of any restriction on the furnishing of new material to the Department. As far as he was concerned, it was Mr. O'Brien who was driving matters, and if Mr. O'Brien felt that information should not be sent to the Department, or that it might "*damage*" Esat Digifone's prospects, it would have been nonsensical, as Dr. Walsh put it, to do so. Dr. Walsh's view is one with which the Tribunal cannot disagree.

28.42 The initial draft of the letter, which was ultimately faxed to Mr. Brennan, was prepared by Dr. Walsh, and was one of the three documents which he sent over to Mr. O'Connell in William Fry on Tuesday, 19th September, 1995. Dr. Walsh testified that he suspected that he had prepared that first draft in "*typed form*". He was very anxious throughout these negotiations to ensure that the contract documents accurately reflected his understanding of the commitments being undertaken by Mr. Desmond, and he had probably insisted on preparing the draft letter himself. That first draft letter is reproduced below:

"Dear Sirs,

We refer to our recent discussions with Mr. Denis O'Brien on behalf of the Consortium in relation to their proposal for the second cellular mobile telephone licence ('the licence').

We have reviewed the Information Memorandum ('the Memorandum') prepared by the Consortium. We confirm that we have agreed with Mr. O'Brien on behalf of the Consortium to place the 60% of the equity in the Consortium not held by Telenor with Irish investors. Our commitment under this facility will be for £31 million of equity finance, giving the Consortium total committed equity finance in excess of £50 million.

We do not foresee any additional need for equity, however, we are confident that if such equity is required we will not have a difficulty in arranging it.

*Yours faithfully,
Prof. Michael Walsh
Director"*

28.43 Whilst this initial draft was very substantially altered, and bore little relation to the terms of the final letter as transmitted to the Department, it is nonetheless of some significance that, even in this very early draft, no distinction was made between Mr. Desmond's commitments, as regards the 25% shareholding which he was entitled to as principal, as Mr. Desmond put it himself, and the Communicorp shareholding which he was liable to underwrite. A letter in those terms could well have caused consternation in the Department, as the confirmation that IIU had agreed with Mr. O'Brien

"...to place the 60% of the equity in the Consortium not held by Telenor with Irish investors"

could well have suggested to the Departmental evaluators that Communicorp was itself stepping out of the consortium, and that its intended shareholding would be allotted to unknown Irish investors.

28.44 Once Mr. O'Brien and Mr. Desmond had finalised the critical issue of the shareholding to which Mr. Desmond would be entitled, once Mr. O'Brien had secured Telenor's agreement, and once Mr. Halpenny had been introduced to the transaction to represent Communicorp and Mr. O'Brien, efforts were redoubled to finalise all contractual documents, and the underwriting letter. On the evening of Sunday, 24th September, 1995, there was a meeting at the offices of William Fry, solicitors, attended by Mr. O'Brien and Dr. Walsh, at which it seems, from an attendance kept by Mr. Halpenny, that consideration was directed to notification to the Departmental evaluators. Mr. Halpenny's attendance recorded:

"IIU doc – not lodge with the Dept."

28.45 Whilst neither Mr. Halpenny nor Dr. Walsh had any specific recollection of the discussion at that meeting, both agreed that the note most likely reflected that there had been a debate over what should be sent to the Department, and that a view had been taken that the contractual documentation would not be supplied, and that an underwriting letter from IIU would be sufficient. Mr. Halpenny testified that it was his belief that it was not regarded as necessary or appropriate to lodge all of the contractual documents with the Department, and in that regard he thought that he and Dr. Walsh would have been guided by Mr. O'Brien, who was the only one at the meeting who had had contact with the Department.

28.46 By the following day, Monday, 25th September, 1995, a much refined version of that underwriting letter had been prepared, which, as Mr. Halpenny

agreed, had been very carefully drafted. That letter was virtually in final form, and differed to the final letter in only one minor, but highly significant, respect. The letter, as redrafted, consolidated a series of annotations which had been noted in manuscript by Dr. Walsh on a copy of his initial draft. The underwriting letter in final form, as faxed to Mr. Brennan on Friday, [29th September, 1995](#), is reproduced below, and a copy of it can be found in the Book of Appendices to this Volume.

*“Department of Transport, Energy & Communications,
44 Kildare Street,
DUBLIN 2.*

*IFSC House
Custom House Quay
Dublin 1*

*Att: Mr. Martin J. Brennan
Telecommunications and Radio (Development) Division*

*Tel +353-1-6054444
Fax+353-1-6054455*

29th September, 1995

Re:
ESAT Digifone Ltd. (“the Consortium”)
South Block, The Malt House, Grand Canal Quay, Dublin 2.

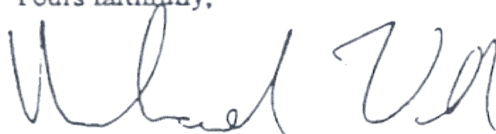
Dear Sirs.

We refer to the recent oral presentation made by the Consortium to the Department in relation to their proposal for the second GSM cellular mobile telephone licence. During the course of the presentation there was a detailed discussion in relation to the availability of equity finance, to the Consortium, from Communicorp and a number of institutions.

We confirm that we have arranged underwriting on behalf of the Consortium for all of the equity (i.e. circa 60%) not intended to be subscribed for by Telenor. In aggregate the Consortium now has available equity finance in excess of £58 million.

We do not foresee any additional need for equity, however, we are confident that if such equity is required we will not have a difficulty in arranging it.

Yours faithfully,



*Professor Michael Walsh
Managing Director*

International Investment & Underwriting Limited
Registered in Ireland No: 225660

Directors/Partners: D.F. Desmond (Chairman), N. McDermott, C. McHugh, M. Walsh

The only addition to this letter made after 25th September, 1995, consisted of the insertion of the bracketed reference in the second paragraph to:

“(i.e. circa 60%)”.

28.47 In common with Dr. Walsh's first draft, no distinction was drawn in the information contained in the final letter between Mr. Desmond's rights and obligations, as regards the 25% shareholding to which he was entitled as principal, and as regards the by then 37.5% Communicorp shareholding, which he had agreed to underwrite. Instead, what was conveyed in that letter was that IIU had:

"arranged underwriting on behalf of the Consortium for all of the equity (i.e. circa 60%) not intended to be subscribed for by Telenor."

28.48 That was the full extent of the information which, after what was careful and close consideration, it was decided should be given to the Departmental evaluators. What that letter did not disclose, and it seems left deliberately undefined, was that:

- (i) the Esat Digifone consortium now comprised a partnership between Communicorp, Telenor and Mr. Desmond;
- (ii) that the ownership details of the intended licensee, as notified in the Esat Digifone application, were no longer true and valid as required by the RFP document;
- (iii) that the ownership of the intended licensee had changed, and it was now envisaged that the ownership would be Communicorp 37.5%, Telenor 37.5% and Mr. Desmond 25%;
- (iv) that Mr. Desmond, through his Gibraltar registered vehicle, Bottin International, had agreed to underwrite Communicorp's equity participation in Esat Digifone.

28.49 It was the evidence of Dr. Walsh, Mr. Desmond and Mr. O'Brien that there had been no intention or attempt to obscure or conceal either the fact of Mr. Desmond's involvement, or the true nature and extent of it. The letter was sent on IIU's distinctive letterhead, and was signed by Dr. Walsh, using his title of Professor. He testified that he had deliberately used that title, so as to alert the Departmental evaluators, to whom he was well known, of his identity. Whilst Dr. Walsh recognised that the letter had not notified the Department of the terms of the commercial arrangements which had been concluded, it was his view that it was up to the Departmental evaluators to revert if they wished to raise queries, and at that point further details would have been provided. As to why that information was not furnished, it was Dr. Walsh's evidence that they were living

in the real world, the letter was a straightforward commitment, and there was nothing to prohibit the Department from seeking further information.

28.50 There was however nothing straightforward about the contents of this letter, or the commitment which had been made by Mr. Desmond. What the letter plainly stated was that IIU had “*arranged*” underwriting for all of the shares in Esat Digifone not to be subscribed for by Telenor. Even Dr. Walsh accepted that the use of that term suggested some third party involvement. The truth was that neither Mr. Desmond, nor any of his vehicles, whether IIU or Bottin, had “*arranged*” any underwriting for Communicorp’s shareholding, or any other shareholding in Esat Digifone, from any third party. Mr. Desmond who, through IIU, had assigned his entitlement to his Gibraltar company, Bottin, had himself agreed to underwrite Communicorp’s shareholding, and the consideration for that undertaking, as patent from the side-letters, was his entitlement, as principal, to 25% of the shares in Esat Digifone.

28.51 The true intention underlying the formulation of the letter was apparent from Dr. Walsh’s explanation for the decision taken to adopt the estimated terminology of “*circa 60%*” to quantify the extent of the shareholding affected by the arrangements then notified to the Department. It was Dr. Walsh’s evidence that a clear decision was taken to insert that approximate figure, so as to indicate that there was some deviation from the configuration of 40:40:20 as notified in the Esat Digifone application. In other words, the inclusion of that figure was intended to alert the Department to the fact that a change had occurred. Although Dr. Walsh did not recall discussions concerning that insertion, he imagined that the objective was to portray the arrangement as being as similar as possible to what had previously been proposed, whilst at the same time indicating that it was not identical.

28.52 The Tribunal is satisfied that it was this approach which informed the careful and considered preparation of the entire letter. The intention was to inform the Departmental evaluators of sufficient to enable them to conclude that Communicorp’s equity contribution was covered, but insufficient to lead them necessarily to believe that there had been a departure from the ownership and shareholding specifications provided in the application. The determination, apparent from the earliest drafts of this letter, to make no distinction between Mr. Desmond’s entitlement as principal to 25% of the shares, and his underwriting obligations in respect of Communicorp, can have been for no other purpose than to obfuscate, and to conceal from the Departmental evaluators that a fundamental alteration in the composition of the intended licensee had been effected, and that instead of Esat Digifone consisting of Communicorp and Telenor as partners, with a minority shareholding being held by disinterested

financial institutions, it had become a partnership of three, consisting of Communicorp, Telenor and Mr. Desmond. Whilst Mr. Desmond's role was not entirely concealed, his involvement was relegated to that of a footnote, in small print, at the bottom of the letter, whereby he was identified as "D.F. Desmond", and designated as Chairman of IIU, a company that had commenced trading only two months earlier, and for which a search of the Companies Office would reveal that its business was that of the provision of financial services. Insofar as the letter announced Mr. Desmond as having a role, as he put it, that announcement was at best tentative, and was in a very minor key.

28.53 Mr. O'Brien and Mr. Desmond went even further in their evidence than Dr. Walsh. They both insisted that it was perfectly clear from the terms of the letter that Mr. Desmond or IIU was to replace the institutional element of Esat Digifone, as notified to the Department. Mr. O'Brien testified that there was nothing in the least misleading about the letter. The only interpretation that anybody could put on the statement that IIU:

"arranged underwriting on behalf of the Consortium for all of the equity (i.e. circa 60%) not intended to be subscribed for by Telenor"

was that Esat Digifone had brought someone in to underwrite the 20%, and that the Department would have understood that the institutions were gone. It was Mr. O'Brien's view that the Tribunal's line of inquiry regarding the terms of this letter resulted from an absence of financial expertise on its part, and that any financial person would immediately conclude from that passage that IIU was:

*"in for the 20% if they are underwriting the 20%.
It is as clear as daylight".*

28.54 On Mr. O'Brien's reasoning, it should have followed therefore that a financial person reading that passage would also have concluded that it was equally clear as daylight that IIU was going to replace Communicorp. That proposition was not however at all clear to Mr. O'Brien. He observed that the letter had to be read very carefully and he continued:

"The letter, they are saying they are underwriting Communicorp, so there is no swap. And they are taking over the 20%. That is really what the letter, the essence of this letter, is. ...If you are a financial person reading it, not a lawyer".

28.55 Whilst it may have been clear as daylight to Mr. O'Brien that the letter did not mean that Communicorp was being replaced by IIU or Mr. Desmond, even

though the confirmation made not one shade of distinction between the Communicorp and non-Communicorp element of that obligation, he accepted that the letter did not convey that the non-Communicorp Irish shareholding had increased from 20% to 25%. He regarded that omission as academic, because it was always his belief that the Department would insist on a 40/40/20 share configuration. As to the estimate of “*circa 60%*” being imprecise, it was Mr. O’Brien’s view that this meant plus or minus 10% either side of 60%. In other words therefore, the expression encompassed a shareholding of 62.5%.

28.56 Mr. Desmond’s contribution to the evidence, in common with that of Mr. O’Brien, was that any misconception as to what was conveyed by the letter, did not arise from what had been written by Dr. Walsh, but stemmed from the Tribunal’s financial inexpertise, and in particular its misunderstanding of the concept of underwriting. He explained, for the benefit of the Tribunal, that underwriting was similar to “*allay insurance*”, and that it was “*contingent on something that may or may not happen in the future*”. Whilst the Tribunal was as always grateful for any assistance which it received in conducting its inquiries, it must nonetheless record that Mr. Desmond’s definition accorded entirely with what had at all times been the Tribunal’s understanding and experience of that concept. Underwriting is neither a complex, nor a particularly technical concept. It is akin to a guarantee, whereby a third party agrees to be responsible for a monetary obligation. In banking, the guarantee obligation is the repayment of a loan, in commercial transactions the underwriting obligation is the payment of capital on the allotment of shares. The only distinction is that, if capital is paid by an underwriter, the underwriter then becomes the holder of the shares in question.

28.57 Mr. Desmond’s definition of underwriting, as being a contingent obligation, applied with ease to the Communicorp element of his obligation, but could not it seems, without considerable difficulty, apply to the 25% shareholding which he was entitled to as principal. The contingency in the case of the Communicorp shareholding was clear: if Communicorp was unable to fund its subscription for shares issued to it, those subscriptions would be covered by Mr. Desmond, either personally, or through one of his companies. That contingency did not arise in the case of the 25% shareholding, but that did not mean that no contingency existed, as it was Mr. Desmond’s evidence that the contingency in that case was the winning of the licence. In putting forward that analysis, Mr. Desmond it seems overlooked the fact that all of his obligations, commitments and entitlements under the arrangement agreement and side-letters signed on 29th September, 1995, were expressly subject to the winning of the licence, and that if the licence was not won, his only entitlement was to a deduction of £219,000.00 from his obligation to contribute to the bid costs.

28.58 The evidence of Mr. O'Brien and Mr. Desmond that the letter accurately conveyed the reorganisation of the shareholding in Esat Digifone, and of the finances of Communicorp, was evidence which on no reasonable or objective consideration could be accepted. Mr. O'Brien's characterisation of the two distinct elements of Mr. Desmond's commitment, as being clear as daylight from the contents of the letter, was risible, dependent as it was on an acceptance, which Mr. O'Brien was not prepared to make, that the letter also meant that Communicorp had ceased to have a role in Esat Digifone. Mr. Desmond's testimony that his entitlement to 25% of the shares in Esat Digifone could be described as underwriting, as it was contingent on the winning of the licence, was unstateable. Their suggestion that the Tribunal was interpreting the contents of the letter from a legalistic or technical standpoint, and was unversed and therefore ill-qualified to understand financial shorthand, was merely an effort to deflect attention from the clear language of that letter, which required nothing more than the application of common sense to understand it.

28.59 The Tribunal is satisfied that the letter, which was carefully framed, and was the culmination of consideration over the previous ten days, was deliberately couched in vague and ambiguous terms. The object of the exercise was to enhance the Esat Digifone application, specifically by endeavouring to dispel the perception of Departmental evaluators that Communicorp's finances were weak. In doing so, in breach of the rules of the process, the letter skilfully sought to reveal only as much as was necessary to achieve that purpose. As Mr. Desmond put it, the letter was "*firmly planted in mid-air*". There can be no doubt that the letter was left deliberately vague, so as to minimise the perception of deviation from the ownership specifications conveyed in Esat Digifone's application.

GETTING TELENOR ONSIDE

28.60 On Friday, 22nd September, 1995, Mr. O'Brien, having reached a resolution with Mr. Desmond on the percentage shareholding to which he would be entitled, flew post haste to Oslo to meet with senior Telenor executives, to brief them on the introduction of Mr. Desmond to the Esat Digifone consortium, and to persuade them to accept the structural change to the consortium, as well as to the intended shareholding of Esat Digifone, which Mr. Desmond's accession would entail. In particular, as it had been agreed that Mr. Desmond would be entitled to a 25% shareholding in Esat Digifone, Mr. O'Brien had to endeavour to convince the Telenor executives to accept a dilution of Telenor's intended 40% interest. It was Mr. O'Brien's ambition to secure the extra 5% which he needed for Mr. Desmond from Telenor, so that Communicorp's

shareholding would be unaffected, and Communicorp would be left as the largest single shareholder in Esat Digifone, with a 40% interest.

28.61 Apart from using his ample powers of persuasion on Telenor, Mr. O'Brien, it seems from the evidence, also brought with him to Oslo on 22nd September a draft letter, which he wished to receive from Telenor. That letter, which had been under preparation for some days, related to Telenor's dissatisfaction with Advent's letter of comfort, and was intended to strengthen Mr. O'Brien's case that Advent had forfeited its entitlement to a direct 5% shareholding in Esat Digifone, under the agreement of 12th July, 1995. Subject to defeating Advent's right to call for that shareholding, Mr. O'Brien would have at his disposal 25% of the intended shares in Esat Digifone, which were needed, for Mr. Desmond.

Telenor objects to Advent 5% shareholding

28.62 Before proceeding to recount the evidence heard by the Tribunal in relation to that Oslo meeting on 22nd September, 1995, it is necessary to digress briefly and return to early August, 1995, and trace what had occurred in the interim between Communicorp and Telenor, as partners in the consortium. As detailed in Chapter 16, in the days immediately preceding the lodgement of the Esat Digifone application on 4th August, 1995, tensions had emerged between Telenor, in the person of Mr. Knut Haga, and Communicorp, in the persons of Mr. Peter O'Donoghue and Mr. O'Brien, over the adequacy of the Advent letter of comfort. Dealings on that occasion extended to Ms. Helen Stroud, of Baker McKenzie, Advent's London solicitors, and to Mr. Massimo Prelz of Advent. Despite fairly frenetic activity over those last four days, nothing stronger or more definite than the letter of comfort emerged from Advent, and although Telenor was dissatisfied with that letter, and did not regard it as sufficient to discharge Communicorp's obligations to provide a financial guarantee under the joint venture agreement, Telenor nonetheless approved of and proceeded with the submission of the application. The Tribunal has already found that, once Telenor had agreed to that course, its capacity to seek any further assurance or comfort from Communicorp, or from Advent, was very significantly diminished as the joint venture agreement had expressly provided that Telenor's approval of the submission of the application was conditional on the acceptance by its board that the financial guarantee provided under the terms of that agreement was satisfactory. In those circumstances, the issue of the financial guarantee, in terms of Telenor's ability to invoke its entitlement, was largely moot.

28.63 On 4th August, 1995, the day the application was lodged with the Department, Mr. Amund Bugge, the young apprentice lawyer who had then

recently joined the Telenor Legal Division, and who was in Dublin over those final days, attended an early morning meeting at the offices of William Fry, and met with Mr. O'Connell and Mr. Halpenny. During the course of that meeting, Mr. O'Brien furnished a letter confirming that Advent had made an offer to Communicorp to fund its equity participation in Esat Digifone, which Communicorp did not wish to accept, but would do so if no other source of funding could be secured. Mr. Bugge then requested that Mr. O'Connell furnish Telenor with a legal opinion on the enforceability of the offer, as referred to in Advent's letter of comfort, and in Mr. O'Brien's letter of that same date. Mr. Bugge received no commitment that such an opinion on enforceability would be provided, and he testified that, at the conclusion of that meeting, he thought that the provision of such an opinion was no more than a possibility.

28.64 No such opinion on the enforceability of any offer by Advent was ever furnished to Telenor, either by Mr. O'Connell, or by any other lawyer. Nor, for that matter, was there any evidence that Telenor, at a senior executive level, had ever seriously pressed for the provision of such an opinion. Mr. Bugge it seems did make contact with Mr. O'Brien during the following week, on 11th August, 1995, and inquired about it, and seems to have been left with the impression that Mr. O'Connell was in the process of preparing an opinion on the point. Mr. Bugge and Mr. O'Connell subsequently spoke on the telephone, and that conversation prompted Mr. O'Connell to send a fax to Mr. O'Brien, recounting his conversation with Mr. Bugge, and informing Mr. O'Brien that, as he had been told by Mr. O'Brien that the Advent offer was verbal, it would not be possible for Mr. O'Connell to provide any such opinion.

28.65 Mr. O'Connell did write a skilful and self-evidently carefully considered letter to Mr. Bugge on 17th August, 1995, in which he informed Mr. Bugge that he was not in a position to provide the opinion sought, but nonetheless proceeded to outline why, in his view, Telenor's position was fully protected. He confirmed that Communicorp did not wish to take up the Advent offer, because it was on disadvantageous terms, and indicated that Communicorp was in the process of pursuing a number of other funding avenues, in particular a US equity and debt placing through Credit Suisse First Boston, which was at an advanced stage. Mr. O'Connell highlighted the extent of Communicorp's financial commitment to the application, and observed that Telenor would not be disadvantaged in the event that the licence was won and Communicorp was unable to meet its funding obligations, as Telenor could either withdraw, or could seek a replacement joint venture partner. He urged Telenor to accept Communicorp's existing financial assurances, and offered to meet with representatives of Telenor either in Oslo, or in Dublin, if Telenor was not prepared to accept them.

28.66 Mr. O'Connell's invitation to Telenor was not taken up, and no such meeting was ever sought with him. Whilst it seems that, on receipt of Mr. O'Connell's letter, Mr. Bugge applied himself enthusiastically to dispatching inter-company memoranda to various of the senior Telenor executives involved, including Mr. Knut Digerud and Mr. Per Simonsen, there was no evidence of any serious contemplation or consideration by Telenor of taking any steps against Communicorp to enforce the financial guarantee provision of the joint venture agreement. In truth, and as already found by the Tribunal, that issue had ceased to have force on the submission of the application, with the approval of Telenor, and even if Telenor had wished to take steps against Communicorp, there were few options then available. Nothing emerged from Telenor in response to Mr. O'Connell's letter for the best part of a month, until 11th September, 1995, when, on the day before the Esat Digifone oral presentation to the Department was scheduled to proceed, Mr. Knut Haga resumed his involvement, and wrote to Mr. O'Brien. His concerns on this occasion were not directed to the adequacy of the Advent letter of comfort, which at that point had become an historic issue, but rather were directed to the prospect of an Advent entitlement to a direct shareholding in Esat Digifone.

28.67 In his letter of 11th September, 1995, Mr. Haga reiterated his view that there was no formal or binding commitment by Advent to provide £30 million to enable Communicorp to fund its projected investment in Esat Digifone, and his assessment that Advent merely regarded itself as having an option to participate, together with an entitlement to a 5% interest in Esat Digifone, without any premium or obligation. He expressed the opinion that the Advent letter of comfort of 10th July, 1995, which had been furnished with the application, had not added any value to the consortium. He concluded by advising Mr. O'Brien that Esat Digifone should not, in those circumstances, assume any obligation to allot an equity shareholding to Advent, and that in any event the terms and conditions of any such obligation would have to be determined jointly by Communicorp and Telenor.

28.68 When writing that letter, Mr. Haga had not had sight of, nor had he knowledge of, the agreement of 12th July, 1995, under the terms of which Advent already had a subsisting entitlement to a 5% shareholding. Mr. Bugge, at the final meeting on the morning of 4th August, 1995, had requested a copy of that agreement, but, as with the opinion on enforceability of the Advent offer, which he had sought from Mr. O'Connell, it had not been forthcoming. It was Mr. Haga's evidence that it was only at that point, in mid-September, 1995, that he had focused on the Advent participation in Esat Digifone, which he knew of only from the institutional ownership details furnished in the application. All of the arrangements for support from the institution had, as will be recalled, been

attended to in Dublin by Mr. O'Brien and his associates, without Telenor involvement. Mr. Haga had assumed, incorrectly, that the agreement concluded with Advent was in consideration for Advent committing itself to fund Communicorp's equity investment. Neither he nor Telenor suspected that the true position was that Advent's 5% equity entitlement had nothing whatsoever to do with any funding of Communicorp, but was conferred on Advent solely in consideration for the provision of the letters of comfort, which Mr. Haga regarded as worthless. As it was Mr. Haga's analysis that no commitment had been provided by Advent, he wanted to ensure that Advent, having in his view made no contribution to the effort to secure the GSM licence, would not qualify for a direct shareholding in Esat Digifone.

28.69 It seems doubtful that Mr. Haga or any other Telenor executive could have known that by then Mr. O'Brien shared that view, and had arrived at the same determination, although for different reasons. Nor could Mr. Haga have guessed how fortuitous the arrival of his letter would be for Mr. O'Brien. What neither Mr. Haga, nor anyone else in Telenor, was aware of was that Mr. Haga's view dovetailed with advice which Mr. O'Connell had given on the day the application was lodged, as confirmed in a letter of the same date from Mr. Halpenny to Mr. O'Donoghue, who had taken a lead role in efforts to secure a stronger letter from Advent. In that letter, Mr. Halpenny had informed Mr. O'Donoghue as follows:

"As you will recall, Owen O'Connell is strongly of the view that the condition in Clause 4.2 of the Agreement dated 12 July, 1995 has not in fact been satisfied and that you should very strongly consider sending a letter along these lines to Advent stating as that Agreement was not satisfied, the Agreement of 12 July, 1995 is of no further effect."

28.70 Nor did Telenor, or Mr. Haga, know that Mr. O'Brien had acted on that advice, when he met Mr. Massimo Prelz in Dublin on 11th August, 1995, and had himself created a note of that meeting, in which he had recorded that he had told Mr. Prelz that the agreement of 12th July, 1995, had been breached by Advent, as Telenor had not been satisfied by their letter. The timing of the arrival of Mr. Haga's letter was thus particularly fortuitous, as it coincidentally tallied with Mr. O'Brien's determination that he needed an underwriting letter for the Department, and that he would need to have at his disposal an additional shareholding in Esat Digifone for Mr. Desmond.

28.71 It seems that on Monday, 18th September, 1995, the day that Mr. O'Brien and Mr. Buckley went to Mr. O'Connell to instruct him on the commercial

deal which Mr. O'Brien had struck with Mr. Desmond, consideration was also directed by Mr. O'Connell to Mr. Haga's letter of 11th September, 1995. Having considered the letter, Mr. O'Connell wrote to Mr. O'Brien, and as was apparent from the contents of his letter, the principal matter under consideration was whether Mr. Haga's letter would facilitate Mr. O'Brien's strategy of depriving Advent of its 5% shareholding entitlement. In his letter, Mr. O'Connell recorded his view that Mr. Haga's letter might be of assistance in denying Advent participation in Esat Digifone.

28.72 Mr. O'Connell was also concerned that Mr. Haga's letter suggested that Telenor might not appreciate that Advent already had a subsisting entitlement to that 5% shareholding, and, as a careful solicitor, he advised Mr. O'Brien that he should write to Telenor, informing it that Esat Digifone had already entered into a position whereby it might be obliged to provide that shareholding to Advent. Mr. O'Connell concluded by offering to draft letters for Mr. O'Brien to send to Advent, and to Telenor. As will be seen, Mr. O'Connell did subsequently assist Mr. O'Brien in the drafting of a letter relating to this issue, but not of the type contemplated by him on that Monday, 18th September, 1995.

28.73 It should be stated at this juncture that Mr. O'Brien's evidence, supported by Mr. O'Connell, albeit on the footing of a rationalisation, that it was Telenor's dissatisfaction with the Advent letter of comfort, and Mr. O'Brien's fears that Telenor would use Communicorp's inability to furnish it with a financial guarantee to seek to strengthen its interest in Esat Digifone, to the detriment of Communicorp and Mr. O'Brien, which propelled Mr. O'Brien into association with Mr. Desmond, was evidence which the Tribunal wholly rejects. That account of Mr. O'Brien's motivations is inconsistent with the clear documentary trail, which established beyond doubt that, once the Esat Digifone application had been submitted, Telenor's entitlement to call for a financial guarantee had dissipated; that by 11th September, 1995, Telenor's sole concern was to endeavour to ensure that Advent, having in their view added nothing to the efforts of the consortium, should not qualify for an equity interest in Esat Digifone; and that the underwriting letter sought from Mr. Desmond, which was the *raison d'être* for his involvement, was to satisfy the Departmental evaluators, and not Telenor, that Communicorp's finances were sound. In brief, far from Mr. O'Brien having been driven to seeking Mr. Desmond's financial support through Telenor's misgivings over Advent, plus his own fear that Telenor would exploit such lack of commitment to advance its position, it is demonstrably clear that, in proceeding with the submission of the Esat Digifone application, Telenor had effectively abandoned those misgivings. It is a measure of the artificiality of Mr. O'Brien's account that he invoked support for it by reference to a letter from Telenor, which, as will be seen, was a letter which Mr. O'Brien had himself requested from Telenor, to strengthen his grounds for resisting Advent's entitlement to a 5%

shareholding, and one which he, with the assistance of Mr. O'Connell, had initially drafted, and provided to Telenor.

Meeting in Oslo on 22nd September, 1995

28.74 Proceeding then to Friday, 22nd September, 1995, Mr. O'Brien flew to Oslo on that day to meet with Mr. Arve Johansen, who was Chief Executive Officer of Telenor International, and Chairman of its subsidiary Telenor Invest, and Mr. Sjur Malm, Director of New Projects, who was one of the first Telenor executives met by Mr. O'Brien, back in May, 1995. The purpose of that meeting was for Mr. O'Brien to introduce Telenor to the concept of Mr. Desmond's involvement, and to endeavour to persuade Telenor that it should absorb the full 5% dilution necessary to make room for Mr. Desmond's 25% interest. In advance of that meeting, it seems that the draft deed of covenant, which had been prepared by Mr. O'Connell, had been faxed to Telenor the previous day, and a copy of that document was within the Telenor Legal Division files which were produced to the Tribunal. The deed of covenant provided for Mr. Desmond's entitlement to a 25% shareholding in Esat Digifone, and for his obligation to underwrite Communicorp's equity interest. It did not however make any reference to any underwriting letter for the Department.

28.75 That meeting, which it seems from Mr. Johansen's evidence was arranged at short notice, and for which he had little time to prepare, was attended by Mr. O'Brien, who was unaccompanied, by Mr. Johansen himself, and by Mr. Malm, and Mr. Per Simonsen may have joined the meeting in its closing stages, although neither he nor Mr. Johansen had any recollection of his doing so. No contemporaneous record was kept either by Mr. O'Brien, or the Telenor executives, although some months later, on 4th May, 1996, shortly before the issue of the licence, Mr. Johansen, in the context of highly charged inter-shareholder negotiations, and following a meeting with the Department at which he was informed for the first time that the Department regarded Mr. Desmond as a controversial figure, had recorded his then recollection of what had occurred at his meeting with Mr. O'Brien on 22nd September, 1995, and reference will be made in due course to the relevant portions of that memorandum.

28.76 Both Mr. O'Brien and Mr. Johansen agreed that Mr. O'Brien had outlined his proposal that Mr. Desmond should join the consortium in place of the institutional element. They were also agreed that Mr. O'Brien indicated that Mr. Desmond had been seeking a 30% equity interest in Esat Digifone, but that Mr. O'Brien had managed to persuade him to reduce that shareholding to 25%. They were further agreed that Mr. O'Brien sought to persuade Mr. Johansen that

the necessary dilution to provide that 25% shareholding should be absorbed solely by Telenor.

28.77 Where Mr. O'Brien's and Mr. Johansen's evidence diverged was in relation to their respective accounts of the reasons that Mr. O'Brien had advanced in recommending Mr. Desmond's accession. Mr. Johansen testified that it was his recollection that Mr. O'Brien's recommendation rested on information, which he said he had received from "*very important sources*", that the Irish element of the intended Esat Digifone ownership structure needed to be strengthened, and that Mr. Desmond, through IIU, would be a much stronger presence than the "*neutral banks*", which would be anxious to maintain good relations with all consortia. That was not Mr. O'Brien's recollection of what he had told Mr. Johansen: it was Mr. O'Brien's evidence that he had explained to Mr. Johansen that the institutional shareholding needed to be replaced, because the commitments which the institutions had given in their letters of support were insufficient.

28.78 There was one further element of disagreement between them, which related to the provision of underwriting by Mr. Desmond for Communicorp's equity commitment to Esat Digifone. Mr. Johansen testified that the issue of underwriting had not arisen at the meeting of 22nd September, whilst it was Mr. O'Brien's evidence that not only had it arisen, but that he had indicated that the reason underwriting was required was to satisfy Telenor's requirement for a financial guarantee. Whether underwriting was or was not mentioned, it was certainly clear to Telenor, if not at the meeting of 22nd September, then at latest during the following week, from the draft deed of covenant, and from the draft documents, including the draft underwriting letter to the Department received by them during that week, that underwriting of Communicorp was an integral element of the agreement concluded with Mr. Desmond. The Tribunal is satisfied beyond doubt, and has already found, that the dominant purpose of securing underwriting was to satisfy the Departmental evaluators of the soundness of Communicorp's finances.

28.79 Before considering this issue further, in the context of the documentary evidence, reference must also be made to a related aspect of discussions on that date, namely, Mr. O'Brien's efforts to persuade Telenor to assume the entire dilution required to liberate a sufficient shareholding for Mr. Desmond. Mr. O'Brien agreed that he had argued strongly that all of the dilution should be borne by Telenor: it was his perspective that Communicorp had contributed all of the effort to the project, much of the funding, and that it should not have to surrender any of its shareholding. Mr. Johansen did not accept Mr. O'Brien's reasoning, and it was his view, to which he adhered determinedly, that the

principle of equal and joint participation in the project was fundamental for Telenor.

28.80 It seems that during the following week, when efforts were being made to finalise the agreements concluded with Mr. Desmond, that Mr. O'Brien persisted in his efforts, and telephoned Mr. Johansen on a number of occasions to press the point. Relations between Mr. O'Brien and Mr. Johansen evidently became strained, and at least one of these telephone conversations between them ended with Mr. O'Brien terminating the call abruptly because of Mr. Johansen's refusal to budge from his position. Mr. O'Brien also recruited the good offices of Mr. John Callaghan in his campaign, and at Mr. O'Brien's request, Mr. Callaghan somewhat reluctantly telephoned Mr. Johansen, but when Mr. Johansen made known to him the strength of his views on the issue, Mr. Callaghan did not pursue matters. Mr. Johansen testified that relations steadily deteriorated over these days, to such a degree that he began to have concerns that the consortium might collapse.

28.81 Mr. Johansen wrote to Mr. O'Brien on 2nd October, 1995, the Monday after the agreements with Mr. Desmond had been concluded, in what seems to have been an effort to rekindle good relations, and stabilise the consortium. He confirmed in that letter that Telenor would accept a pro rata dilution to 37.5%, and no more, as any further dilution would be contrary to the principles of Telenor's participation. He asserted his belief in the consortium's continuing compatibility, and he thanked Mr. O'Brien for his efforts on behalf of the consortium. In the course of that letter, Mr. Johansen recited his understanding of the purpose of Mr. Desmond's accession to the consortium as follows:

"In order to reassure the Ministry and give an even stronger signal to the Irish community in general, we are pleased with the plan to have another solid, Irish underwriter."

That statement was certainly consistent with Mr. Johansen's evidence as to what Mr. O'Brien had told him at the meeting of 22nd September, 1995.

28.82 Mr. Johansen's memorandum of [4th May, 1996](#), to which reference has already been made, was also instructive on this issue. The relevant paragraphs are reproduced below, and a full copy of the document can be found within the Book of Appendices to this Volume.

“Re: Memo on shareholding in Esat Digifone

I have below summarised a few points that has [sic] become clear to me over the last twenty four hours as a consequence of the information acquired regarding Communicorp’s attempt to buy back 12.5% of the IIU-shares.

1. *Denis O'Brian [sic] came personally over to see me in Oslo probably some time during September last year. He informed me that, based on information from various very important sources, it was necessary to strengthen the Irish profile of the bid, and get onboard people who would take a much more active role in fighting for Digifone than the 'neutral' banks who basically would like to keep a good relation to all consortia.*

I accepted Denis' word for the necessity for this new move.

Note: Underwriting was never used as an explanation.

2. *IIU should apparently be the ideal choice for this function; the only string attached being that they had demanded a 30% equity-participation "for the job". Denis had managed to reduce this to 25%, but it was absolutely impossible to move them further down. This was a disappointment to us, since everything we had said and done up to then had been focused on at least 40% ownership for the principal shareholders at the time of the issuing of the license. But not only that: Denis then pushed very hard for Telenor to swallow 15% of this and Communicorp only 10% - to which I never agreed - but I accepted the principle of "sharing the pain" and maintaining equal partnership (37.5%/37.5%). It was also said that a too high Telenor ownership-stake would be seen as aggressive and could be inhibiting the award of a license.*

This was the first time I experienced real hard, and very unpleasant, push from Denis.

3. *Some days later the nature of the agreement with IIU comes clearer into the light, as an underwriting agreement to **guarantee for Communicorp's timely payment** of its share of the capital into Digifone, and including the right to place the shares with up to four nominees. This was unwillingly accepted by Telenor (since we understood it to be the right steps to be taken from an “official Irish standpoint” to secure the license).*

*The agreement was drafted by Fry's/OOC and signed in a hurry (basically in draft's form) by Denis O'Brian [sic] alone on behalf Communicorp **and Digifone** (even though we in the JV-agreement have made it clear that two authorised signatures are required - one from each party).*

4. *The agreement was never signed by Telenor, neither as authorised Digifone signature **nor as a shareholder and a party to the agreement**. Sometime shortly after this, the Advent commitment to invest USD 30 mill. into Communicorp disappears, as it was essentially not necessary any more, since the Communicorp liability to pay capital to Digifone was anyway underwritten by IIU.*
5. *In hindsight it is quite clear who benefitted [sic] from this arrangement.*

*I have good reasons to believe that the terms put forward by Advent for investing into Communicorp did not suit Denis O'Brian [sic]. With the above arrangement, that he orchestrated for all other sorts of reasons, he has actually achieved to bolster his/Communicorp's balance sheet and **paid for it with Digifone-shares at the cost of Telenor**. He has done this in an atmosphere of trust, where Telenor even has agreed to bridge finance Communicorp while he raises funds through a private placement in the US."*

28.83 Mr. Johansen testified that he had prepared that memorandum in May, 1996, for his own use; he was then upset, angry and emotional about matters that had transpired at that late stage, felt that Telenor had been heavily disadvantaged, and wanted to document matters for his own sake more than anything else. He wrote the memorandum in English. He believed that it was a fair record of what had taken place. As far as he could remember, and as recorded by him, underwriting had never been mentioned on 22nd September, 1995, and he speculated that Mr. O'Brien, who he judged to be a very proud person, may have had a difficulty in mentioning a weakness of that type. It was Mr. Johansen's understanding that the "very important sources" referred to by Mr. O'Brien on that occasion were the consultants which he had engaged to advise him in relation to the application.

28.84 Mr. O'Brien described Mr. Johansen's memorandum as "the conspiracy memorandum", and referred to the pressured and tense context in which it had been prepared. Mr. Johansen, according to Mr. O'Brien, was wrong

in saying that he had conveyed to him that it was necessary to strengthen the profile of the bid, as a result of information which he had received from “very important sources”: Mr. O’Brien had not stated this, having only his advisers and consultants, some of whom Mr. Johansen might have met. Much of the memorandum was wrong, including the assertion that underwriting was never discussed at the meeting. Whilst the second paragraph was largely correct, the third paragraph was described by Mr. O’Brien as

“gobbledegook”,

and Mr. O’Brien observed that he did not know what Mr. Johansen could have meant by it: he had had no involvement with Departmental officials, and believed he had said nothing to Mr. Johansen that could have given rise to what he had recorded. It was also wrong for Mr. Johansen to have suggested that the arrangement agreement was solely prepared by Mr. Owen O’Connell of William Fry, since Mr. Simonsen had been shown an advance draft, and there was no question of it having been done unilaterally.

28.85 The only documentary reference ever made by Mr. O’Brien to the meeting of 22nd September, 1995, or the reasons which he had advanced to Mr. Johansen for the admission of Mr. Desmond, was a letter that Mr. O’Brien had also written many months later, on 12th May, 1996, shortly after Mr. Johansen had generated his personal memorandum, and also in the context of acute shareholder tensions. That letter had been written by Mr. O’Brien in response to correspondence received from Mr. Johansen, in which Mr. Johansen had asserted that the arrangement agreement with IIU of 29th September, 1995, had been concluded only because of Communicorp’s lack of financial strength. In responding to Mr. Johansen, Mr. O’Brien, having referred to the meeting of 22nd September, 1995, and to the persons who were present, including reference to Mr. Simonsen having joined the meeting at a later point, stated as follows:

“I had received a letter dated 15 September (copy attached) from Knut Haga stating that Advent’s letter of financial support was not acceptable. I.I.U. participation for 25% of the equity in Esat Digifone was brought about for two reasons. Firstly, it was viewed that the consortium needed more firmly committed Irish Investment content as the other institutional letters from I.B.I., A.I.B., Standard Life were Letters of Intent and not legally binding. The other reason being that Telenor had rejected Advent’s letter of financial support.”

28.86 The letter to which Mr. O’Brien referred in the above quoted extract, dated 15th September, 1995, and described as having been received from Telenor, has yet to be addressed fully. That letter had in fact been requested by

Mr. O'Brien, it had been substantially drafted by him and Mr. O'Connell, it had not been signed on behalf of Telenor until on or after 22nd September, 1995, and it had been backdated, at Mr. O'Brien's direction, to 15th September, 1995. The purpose of that letter had been to strengthen Communicorp's efforts to force Advent to forfeit its entitlement to a direct 5% shareholding in Esat Digifone, as was acknowledged by Mr. O'Brien in his evidence to the Tribunal. As it seems that Mr. O'Brien had deliberately misrepresented the provenance of that correspondence in his letter to Mr. Johansen of 12th May, 1996, and had sought to suggest that it was the receipt of that backdated letter, which had prompted him to have recourse to Mr. Desmond, none of which was true, it is difficult for the Tribunal to place reliance on the other matters stated by Mr. O'Brien as supportive of his account of what he had related to Mr. Johansen on 22nd September, 1995.

28.87 Mr. Johansen's memorandum, as distinct from Mr. O'Brien's letter, was prepared for his own use, and there is no reason to believe that the contents of it were a figment of his imagination. Moreover, in weighing the evidence of Mr. Johansen and Mr. O'Brien as to the reasons advanced by Mr. O'Brien on 22nd September, 1995, for the introduction of Mr. Desmond, the Tribunal must also have regard to its overall impression of the truthfulness of their testimony, and their relative reliability as witnesses. Although the Tribunal does have reservations over certain aspects of Mr. Johansen's evidence, those reservations are insignificant in comparison to its views of much of Mr. O'Brien's evidence, which overall the Tribunal found unsatisfactory, unreliable, and in many respects in direct conflict with the clear documentary record.

28.88 The Tribunal is satisfied that on 22nd September, 1995, the reason advanced by Mr. O'Brien to Mr. Johansen for Mr. Desmond's accession to the consortium was information, which he said he had received from "*very important sources*", that it was necessary to strengthen the Irish profile of the application. The Tribunal is fortified in this view by the evidence of Mr. Simonsen, which the Tribunal accepts, that around this same time Mr. O'Brien told him that he had met Mr. Lowry in a public house, which he had, and that Mr. Lowry had told him that IIU should be brought into the consortium. What that evidence demonstrates, if nothing else, is a propensity on the part of Mr. O'Brien to invoke, not just sources of information which should not have been available to him, but a source no less than the political head of the Department then conducting what was intended to be a confidential and fair competitive process. The Tribunal is left in no doubt that Mr. O'Brien was capable of informing, and did inform, Mr. Johansen on 22nd September, 1995, that he had that information from such important sources, and the Tribunal is also left in no doubt that Mr. O'Brien's account of the reasons given by him on that occasion is one which should be rejected.

28.89 There is one further aspect of Mr. Johansen's interaction with Mr. O'Brien, and Telenor's agreement to the course which Mr. O'Brien proposed, which must now be explored. It follows from Mr. Johansen acceding to Mr. Desmond's joining of the consortium, that Telenor accepted, for whatever reason, that this was the correct course to take. It further follows that Telenor must be taken to have agreed to the Department being informed of this development. During the following week, Telenor received draft copies of the arrangement agreement, the Esat Digifone side-letter, and the underwriting letter for the Department, and Telenor proposed drafting changes to at least some of those documents. There can be no doubt that Telenor knew that the Department was to be notified, and there can be no doubt that Telenor knew that in doing so, Esat Digifone would be breaching the rules of the competition, as prescribed in the Department's information memorandum, and as reiterated in the clearest possible terms by Mr. Brennan, in opening proceedings at the presentation the previous week, which had been attended by Mr. Johansen, Mr. Simonsen, Mr. Jan-Edvard Thygesen, and Mr. Hans Myhre of Telenor.

28.90 It follows therefore that the arguments put forward by Mr. O'Brien must have been sufficiently compelling to persuade Mr. Johansen and Telenor that the competition rules, which Mr. O'Brien had committed to keeping in his closing contribution to the oral presentation, should be ignored, and that Telenor should agree, as it did, to foregoing part of its shareholder entitlement in Esat Digifone. In his memorandum of 4th May, 1996, in his Memorandum of Intended Evidence furnished in advance of his attendance, and in his evidence to the Tribunal, Mr. Johansen was consistent in his description of the font of the information which Mr. O'Brien had brought to him as being "*various very important sources*". It was Mr. Johansen's evidence that Mr. O'Brien had not named those sources, and had been vague as to their identities: it was his understanding that Mr. O'Brien had good information, and he testified that he took it that the sources of that information were the consultants who had been engaged to advise the consortium, although Mr. O'Brien had not mentioned any of them.

28.91 In that regard, Mr. Johansen testified that Mr. O'Brien would, from time to time, have referred to having had important and useful sources of information, which he always assumed were those consultants. In the running of the GSM project, Mr. Johansen had put his trust entirely in Mr. O'Brien on Irish matters. Mr. O'Brien always had strong views on how matters should be approached, and it was Mr. Johansen's impression that Mr. O'Brien endeavoured to portray himself as an influential person.

28.92 Mr. Johansen's evidence was that, in advancing his case, Mr. O'Brien had indicated that the presentation had been regarded as highly impressive, but

that financial aspects needed to be reinforced. He thought in that regard that Mr. O'Brien was relying on collective feedback which he had received, including from his consultants, although Mr. Johansen recognised that those consultants had not attended the presentation. He denied that his reference to "*various very important sources*" suggested that Mr. O'Brien had told him that he had information from within the Departmental evaluators, or from an official source, or from somebody who had access to an official source. It is however evident from the terms of his personal memorandum of 4th May, 1996, that at that point Mr. Johansen recorded that Telenor had agreed to Mr. Desmond's accession, and the consequent loss of shareholding as:

"...we understood it to be the right steps to be taken from an 'official Irish standpoint' to secure the license."

28.93 Around this same time, Mr. O'Brien had told Mr. Per Simonsen that he had met Mr. Lowry in a public house, which he had, and that Mr. Lowry had told him that IIU should be brought in as a member of Esat Digifone. Mr. Simonsen had relayed that information to Mr. Johansen and other Telenor executives, including Mr. Haga, also around the same time. Whilst they all testified that they regarded Mr. O'Brien as exaggerating, there can be no doubt that they knew, whether they believed it or not, that Mr. O'Brien had identified Mr. Lowry to Mr. Simonsen as a source of information relevant to Mr. Desmond's involvement.

28.94 Neither the documentary record created by Mr. Johansen, nor the course which Telenor took, in agreeing to be a party to the provision of additional information to the Department, in breach of what they knew to be the rules of the competition, and in relinquishing a small but valuable part of its shareholding entitlement, suggest to the Tribunal that Telenor relied only on the views of hired consultants who had not attended the presentation.

28.95 To have acquiesced in furnishing that information to the Department, without some solid assurance that, in so doing, Esat Digifone would not suffer adverse consequences, or even possible disqualification, would have been foolhardy in the extreme, or as Dr. Michael Walsh, Mr. Desmond's associate, put it, nonsensical. There was nothing foolhardy or irrational in the manner in which Telenor approached the GSM project. It had expended considerable time, resources and energy in the Esat Digifone application, and it is inconceivable that the Telenor executives, including Mr. Johansen, would have countenanced such a course otherwise than on the basis of the most reliable assurance. Whilst they may well have thought that Mr. O'Brien was exaggerating, the Tribunal has no doubt that Mr. O'Brien intended Telenor to believe that Mr. Lowry was a source of information to him, and Telenor, by its actions, must have believed that

there was at least some basis for Mr. O'Brien's claim. The Tribunal has no doubt that Mr. Johansen, in taking the significant decision that Telenor should participate in a breach of the competition rules, and should forego part of its shareholding, must have proceeded in the belief that Mr. O'Brien had a reliable source of information which emanated from within or close to the circle of the Departmental evaluators.

The backdated letter of 15th September, 1995

28.96 The final matter to which reference must now be made is the letter dated 15th September, 1995, signed by Mr. Haga of Telenor, and addressed to Mr. O'Brien. The letter was in the following terms:

"We refer to the Letter of Comfort written by Advent International Corporation in respect of the funding by you of your proposed equity participation in ESAT Digifone Limited.

We regret to inform you that we are not satisfied with the above mentioned letter. Our concern was further strengthened by our meeting with the Department this week. On this basis we consider the letter of having no significant value to Telenor or ESAT Digifone.

It is vital to our further co-operation that Communicorp Group immediately can provide another letter or agreement giving appropriate financial assurance in a form more acceptable to Telenor."

28.97 This letter was in no sense a genuine communication from Mr. Haga to Mr. O'Brien, and the Tribunal is satisfied that it was not signed by Mr. Haga until after 21st September, 1995, and most probably not until Monday, 25th September, 1995. A copy of it was dispatched by Mr. O'Brien to Mr. Massimo Prelz of Advent on 26th September, 1995, as the initial salvo in his campaign to deprive Advent of its 5% shareholding entitlement.

28.98 As already referred to, on 11th September, 1995, after a silence of approximately six weeks, Mr. Haga had written to Mr. O'Brien, reiterating his view that the Advent letter of comfort did not constitute a commitment on the part of Advent to provide funding to Communicorp, and consequently had added no value to the Esat Digifone application, and indicated that in those circumstances no binding agreement should be concluded entitling Advent to a 5% shareholding. As already observed, the arrival of that letter was fortuitous, and Mr. O'Brien promptly sought Mr. O'Connell's view of it, and on 19th September,

1995, he received Mr. O’Connell’s advice that the letter might be of assistance in denying Advent participation in Esat Digifone.

28.99 Two days later, on 21st September, 1995, the day before Mr. O’Brien’s departure for Oslo to meet with Mr. Johansen, he forwarded a draft letter to Mr. O’Connell, which was a draft of the letter ultimately signed by Mr. Haga, and backdated to 15th September, 1995. It seems that this draft had most probably been received by Mr. O’Brien from Mr. Simonsen that day, and was described by Mr. Simonsen as “*DRAFT LETTER AS AGREED*”. Mr. O’Connell then applied his mind to the draft, and substantially revised it, and returned that revised draft to Mr. O’Brien later that day. Mr. O’Connell included a direction at the top of his draft that it should be prepared on the notepaper of Telenor Invest AS, and left provision for the letter to be dated.

28.100 It is probable that Mr. O’Brien brought that revised draft with him to Oslo on 22nd September, 1995, as there was no record of any fax transmission of it to Telenor, although it is clear that it was received, as a copy of Mr. O’Connell’s draft was found within the files of Telenor’s Legal Division. That copy had been substantially annotated with handwritten entries, and below Mr. O’Connell’s typed reference to the insertion of a date, a handwritten note had been made in Norwegian ‘*Notert tidligere?*’. Mr. Haga testified that the literal translation of that term was “*noted earlier*”, which he agreed was consistent with a decision to backdate the letter.

28.101 The letter in final form included substantial portions of Mr. O’Connell’s draft, although it had been amended, most probably by personnel from within Telenor’s Legal Division. It was Mr. Haga’s evidence that he had no role in drafting the letter, although he was aware that the letter might be used by Mr. O’Brien in his dealings with Advent. It was his understanding that the letter was the product of a collective process between Mr. O’Brien, William Fry, solicitors, and Telenor, with a view to the provision of a letter by Telenor to be used in preventing Advent from claiming a 5% interest in Esat Digifone. Mr. Haga was out of his office on Friday, 22nd September, 1995, and he thought it probable that he did not sign the letter until he returned on the following Monday, 25th September, 1995.

28.102 It is quite clear that the backdating of the letter can only have been for the purpose of enabling it to be claimed that the letter had been received before Mr. O’Brien reached agreement with Mr. Desmond. In the context of the subsequent anticipated dispute with Advent, it might not have been helpful had it appeared that Mr. O’Brien had concluded negotiations with Mr. Desmond, before receipt from Telenor of the letter which Mr. O’Brien used as proof of Telenor’s

demand that an alternative letter or agreement should be procured in a form more acceptable to Telenor.

28.103 In the context of the Tribunal's inquiries, this letter was of some significance, in that it was the letter which Mr. O'Connell pointed to as having crystallised Telenor's insistence that an alternative arrangement be put in place, and which, on Mr. O'Connell's rationalisation, necessitated Mr. O'Brien's approach to Mr. Desmond. Nothing could have been further from the truth. This letter was not a genuine letter, but one requested by Mr. O'Brien, which Mr. O'Connell had assisted in drafting, which was backdated to suit Mr. O'Brien's purposes, and most probably not signed until 25th September, 1995. Whilst the Tribunal is satisfied that it was on Mr. O'Brien's initiative that the letter was generated and backdated, there is no doubt that Telenor was at least an equal participant in that scheme.

PUTTING FINANCIAL INSTITUTIONS OFFSIDE

28.104 A second consequence of Mr. Desmond's accession to Esat Digifone as a 25% shareholder, to which Mr. O'Brien also had to direct his efforts, was the necessity of both repudiating Advent's 5% shareholding, and of notifying the Irish financial institutions that had lent support to the Esat Digifone application that their support would no longer be required. These two matters, the first of which was problematic, also occupied Mr. O'Brien's time and energies during August and September, 1995, and took perhaps longer than had been anticipated to bring to final closure.

Moves to exclude Advent's 5% shareholding

28.105 Telenor's dissatisfaction with the Advent letter of 10th July, 1995, Mr. O'Connell's advice to Mr. O'Brien of 4th August, 1995, and the dealings between Mr. Bugge and Mr. O'Connell, have already been traced in detail in the previous section of this chapter. Although Mr. O'Brien did not formally notify Advent of Communicorp's intention to terminate the 12th July, 1995, agreement until Tuesday, 3rd October, 1995, after Mr. Desmond's involvement had been legally secured, it is evident that he had commenced laying the foundations for that termination from early August, 1995.

28.106 When Mr. O'Brien met Mr. Prelz in Dublin on 11th August, 1995, he informed him, according to the contemporaneous note that he made, that Telenor was not happy with Advent's letter of comfort. That hardly came as a surprise to Mr. Prelz, as Telenor's dissatisfaction would have been evident to him from his dealings with Mr. Haga of Telenor, and Mr. Peter O'Donoghue of Communicorp, over the final days prior to 4th August, 1995, which dealings

became increasingly acrimonious, and culminated in Mr. Prelz's accusation that Mr. O'Brien and Mr. Peter O'Donoghue had misled Telenor about the nature of Advent's support. Mr. O'Brien also informed Mr. Prelz on that occasion that, in consequence of Advent's dissatisfaction, the agreement of 12th July, 1995, under which Advent was entitled to its 5% interest, had been breached. The day of their meeting in Dublin, 11th August, 1995, was a busy day for Mr. O'Brien. He had flown to Glasgow the previous day with Mr. Desmond, and they had had their back of the airplane conversation about the possibility of Mr. Desmond joining Esat Digifone. Apart from meeting Mr. Prelz, Mr. O'Brien also met Mr. Desmond to progress their discussions, although Mr. Desmond rejected Mr. O'Brien's proposals, which included provision for a £3 million guarantee to support Communicorp's existing businesses. No doubt, in informing Mr. Prelz that Advent was in breach of that agreement, Mr. O'Brien had in mind the 15% shareholding in Esat Digifone which he was then intending to offer to Mr. Desmond.

28.107 There then followed a fallow period in Mr. O'Brien's dealings with both Mr. Desmond and Mr. Prelz, and it was not until after the Esat Digifone presentation, after Mr. O'Brien's meeting with Mr. Lowry on 17th September, 1995, and after his decision that an underwriting letter for the Department was so critical that an increased shareholding would be needed for Mr. Desmond, that Mr. O'Brien again focused on Advent's 5% entitlement. He had in the meantime fortuitously received Mr. Haga's letter of 11th September, 1995, in which Mr. Haga had conveyed Telenor's objection to Advent receiving any shareholding in Esat Digifone. However, in order to strengthen his case for depriving Advent of that 5% shareholding, a further letter was required from Telenor, demanding an alternative financial guarantee, which would enable Mr. O'Brien to justify to Advent his decision to bring in Mr. Desmond, and strengthen his case that Advent had forfeited its rights under the 12th July agreement. That letter was signed by Mr. Haga, most probably on 25th September, 1995, and was backdated to 15th September, 1995, to give the impression that it was that letter which precipitated Mr. O'Brien's renewed move on Mr. Desmond.

28.108 A copy of that backdated letter was promptly dispatched by Mr. O'Brien to Mr. Prelz on 26th September, 1995. In his covering letter, Mr. O'Brien informed Mr. Prelz that it was clear that Esat Digifone would not be awarded the GSM licence with its existing financial arrangements, and that something much stronger would be required if it was to have any chance of success. He indicated that he was working on another avenue which would provide the answer, and at the same time significantly strengthen the application. He concluded by informing Mr. Prelz that he would explain matters in further detail when they met. They met shortly afterwards, on Monday, 2nd October, 1995, which was another eventful day for Mr. O'Brien, who also attended a Fine Gael Dublin South-East constituency lunch that day, at which Mr. Lowry was coincidentally present. As

will be seen, that was an equally significant day for the Chairman of the Project Group, Mr. Martin Brennan, who, having determined that the Esat Digifone underwriting letter should not be considered, and should not be brought to the attention of the Project Group, returned it, under cover of a letter of that date, addressed to Mr. O'Brien.

28.109 It seemed from the terms of Mr. O'Brien's letter of 26th September, 1995, to Mr. Prelz that he had some significant news that he wished to share with him relating to the matters referred to, that is, that it was clear that the licence would not be won with the existing financial arrangements, and that he was working on another avenue. Neither Mr. O'Brien nor Mr. Prelz could assist the Tribunal as to what transpired between them on 2nd October, 1995, in that regard. According to Mr. O'Brien, what he really meant in his letter of 26th September, was that neither of Advent's letters of 10th July, 1995, had satisfied Telenor, and he had simply explained that to Mr. Prelz.

28.110 Mr. Prelz had no memory of what Mr. O'Brien had told him when they met, and he certainly had no recollection of Mr. O'Brien telling him, as he had Mr. Simonsen, that he had met Mr. Lowry in a public house, and that Mr. Lowry had told him that IIU should be brought in to join the consortium. Mr. Prelz, at that point in his evidence, took the opportunity to explain to the Tribunal that legislation had then recently been passed in the United States which imposed stringent penalties on US corporations found to have participated in foreign corrupt activities. Advent in Europe had received directions from its head office in the US, following the passage of that legislation, that great care should be taken by Advent personnel in any dealings which involved a public or political element. Mr. Prelz further testified that he had specifically brought that legislation to Mr. O'Brien's attention and Mr. Prelz was no doubt careful in that regard. He did acknowledge that Mr. O'Brien had mentioned meetings with Government Ministers to him on many occasions, and he had of course been told back at the beginning of April, 1995, of Mr. O'Brien's meeting with Mr. Lowry at the telecommunications conference, at which Mr. Lowry had informed Mr. O'Brien that France Telecom was interested in applying for the GSM licence, and had no local partner.

28.111 On the following day, Tuesday, 3rd October, 1995, Mr. O'Brien sent two relevant letters, the first to Mr. Prelz, and the second addressed to Advent International at its head office in Boston, Massachusetts. In his letter to Mr. Prelz, he referred to their meeting of the previous day, and confirmed that the Advent letters to Telenor, and to the Irish authorities, had not satisfied them. He reiterated that it had been critical to make alternative arrangements. The second letter was a formal notification to Advent at its head office asserting that, by

reason of Telenor's dissatisfaction, a condition precedent to Advent's entitlement under the 12th July agreement to a 5% shareholding in Esat Digifone had not been satisfied, and that accordingly that entitlement had not arisen. Mr. O'Brien concluded by asking Advent to treat his letter as formal termination of that agreement. Attached to that formal letter of termination was another copy of the Telenor backdated letter of 15th September, 1995.

28.112 A course of correspondence then commenced between Ms Helen Stroud of Baker Mackenzie, Advent's London solicitors, and Mr. O'Connell, of William Fry, both of whom had respectively represented Advent and Communicorp/Mr. O'Brien in the drafting and finalisation of the agreement which was now in dispute. Despite Mr. O'Brien carefully preparing the ground in terms of the Telenor backdated letter, and in terms of his efforts to convince Mr. Prelz that the course he had taken was necessary for the success of the GSM application, Advent was not agreeable to conceding its 5% direct shareholding in Esat Digifone. The issue on which the correspondence turned was the construction of the 12th July agreement, and in particular whether Telenor's satisfaction with the Advent comfort letter was a condition precedent to Advent's 5% entitlement. That issue was very fully ventilated in correspondence, but Ms Stroud, and Advent, were not prepared to cede Advent's interest. The issue became even more critical after Mr. Lowry's announcement on 25th October, 1995, that Esat Digifone had won the competition process, as Advent's 5% entitlement was thereby converted into a valuable tangible asset, which, based on subsequent dealings between the shareholders prior to the issue of the licence, was worth in the region of £2.5 million.

28.113 By December, 1995, it was apparent that the matters in contention would not be resolved by correspondence between the two solicitors. It was in the interests of both Mr. O'Brien and Advent, as fellow shareholders in Communicorp, and through that shareholding as partners in Esat Digifone, that the dispute should not escalate further. By then Mr. O'Brien was also planning a restructuring of Communicorp, to separate its telecommunications and radio businesses in order to facilitate the fundraising efforts planned through Credit Suisse First Boston, so that it had become both urgent and critical that a resolution be found.

28.114 Mr. O'Brien asked Mr. John Callaghan, Mr. Paul Connolly, and another of his associates, Mr. Richard O'Toole, to endeavour to find a compromise which would also facilitate that envisaged restructuring. All three were financial advisers to Mr. O'Brien, and Mr. Callaghan and Mr. Prelz were known to each other as fellow directors of Esat Telecom. Ultimately a resolution was achieved, as encapsulated in a formal memorandum of understanding dated 24th

December, 1995. Mr. O'Toole, when he attended to give evidence, helpfully summarised the principal provisions of that memorandum for the Tribunal as follows:

- (i) Advent was to receive an additional 3.5% share in the restructured company formed to hold all of Communicorp's telecommunications interests;
- (ii) Advent agreed to waive its contested claim to a 5% direct shareholding in Esat Digifone;
- (iii) Advent waived Communicorp's obligation to repay the balance then outstanding on its loan from Advent on foot of the bridging finance agreement of July, 1995;
- (iv) Advent released its interest in Communicorp's broadcasting businesses.

A final resolution was therefore achieved by end-December, 1995, which not only compromised the contested claim, but which superseded all other existing agreements between Communicorp and Advent.

Notifying the Irish institutions

28.115 Although the Irish institutions, Allied Irish Banks, Investment Bank of Ireland and Standard Life, had no legal entitlement to 15% of the shares in Esat Digifone, it was recognised that it would be necessary for steps to be taken to inform Mr. Kyrán McLaughlin of Davy that their support would no longer be required. Dr. Michael Walsh, Mr. Desmond's associate, had taken it upon himself as soon as a commercial deal had been effected between Mr. O'Brien and Mr. Desmond, to draft a letter for Communicorp to send to Mr. McLaughlin. Neither that draft letter, nor a later draft prepared by Mr. O'Connell, were used and it was considered preferable that the matter should be broached directly with Mr. McLaughlin by Mr. John Callaghan, who was well known to Mr. McLaughlin, and who had made the initial approach to him back in April, 1995.

28.116 Mr. O'Brien, following Mr. O'Connell's advice, did not act precipitously, and no steps were taken to notify Mr. McLaughlin until 29th September, 1995. Mr. Callaghan, who had arranged to meet Mr. McLaughlin in the latter's office, recalled that, whilst he had been waiting for his meeting with Mr. McLaughlin to commence, he had received a telephone call confirming that the contract documents between Communicorp and IIU had been executed. Both Mr.

Callaghan and Mr. McLaughlin had a good recollection of their meeting, and confirmed that Mr. Callaghan had requested that Davy's three institutional clients would step aside, as the consortium had been advised that its finances were not sufficiently strong, and was presently in negotiations with a party that would provide stronger backing. Mr. Callaghan did not, it seems, indicate from whom such advice had been received, nor identify Mr. Desmond as the party with whom the consortium was then in negotiation. Although reverting to his clients with this changed situation would obviously entail some degree of professional embarrassment on his part, Mr. McLaughlin agreed to do so.

28.117 Since this was the first time in Mr. McLaughlin's professional experience that his clients had been asked to withdraw in this fashion, and since the whole circumstances appeared unusual to him, he did nonetheless, after learning in November, 1995, of the involvement of Mr. Desmond, and of his company, IIU, write a considered letter on the matter to Mr. O'Brien. That letter was dated 22nd November, 1995, and in it Mr. McLaughlin related the history of the approach which had been made to Davy, the efforts which Davy had made to secure the support of the three Irish institutions, and Mr. Callaghan's request subsequently made that they should step aside. Mr. McLaughlin then recited that it had emerged that the investor with which the consortium was then in negotiation was IIU, which Mr. McLaughlin then understood had been appointed to handle the sale of a 20% stake in Esat Digifone. He indicated that a number of questions were likely to arise from the institutions that had provided letters in June, 1995, which he defined as follows:

- “
- (a) *why were the original investing group not asked to make a stronger financial commitment along the lines of that offered by IIU if that was necessary given that by 29th September a maximum price of £15 million had been established for the licence and discussions on the application had clearly taken place with the Department and possibly the Assessors.*
 - (b) *Was information available to IIU that was not available to the original investing group at the time that they were asked to step aside?*
 - (c) *At what stage were the Dept. of Communications and the Assessors told of changes in the institutions providing finance to the consortium?”*

Mr. McLaughlin concluded by indicating that he believed it was important to reassure the institutions in question that they had been treated fairly, and that it

would be helpful for him to receive responses to the issues he had raised so that he could provide them with that reassurance.

28.118 Regarding references in that letter to the involvement of IIU, Mr. McLaughlin could not recall if Mr. O'Brien had mentioned that to him in the course of a telephone call, which they had had some days prior to his letter, but thought that his information was probably based on newspaper articles that addressed the matter. The evidence of such witnesses as Mr. O'Brien, Mr. Desmond, and Dr. Walsh was in general terms less than sympathetic to any discomfort occasioned to Mr. McLaughlin by his belated exclusion, but Mr. O'Connell, the solicitor most centrally involved on behalf of Esat Digifone and Communcorp, testified that he accepted that the matters raised in Mr. McLaughlin's letter were important and pertinent.

28.119 Those questions were indeed pertinent, and despite Mr. O'Brien's dismissive attitude to them in evidence, they must have caused him and his advisers some unease and discomfort. Mr. McLaughlin's third query would have been regarded as particularly troublesome at that time, as the Department had not yet been formally notified of any alteration in the ownership of the intended licensee, and it was, as will be seen, a matter to which careful consideration was then being given by Mr. O'Brien and his associates. Mr. McLaughlin received no response to his letter. When he happened to meet Mr. O'Brien over the course of Christmas, 1995, Mr. O'Brien had told him that he and Mr. Callaghan would call to see him to explain matters further. It was only after Mr. McLaughlin forwarded a further letter to Mr. O'Brien on 4th July, 1996, after the licence had been issued, that the two did call to him. On that occasion, which was noted by Mr. McLaughlin, it was stated that the consortium had needed a firm financial commitment, guaranteed by a bank, both for the 20% shareholding, which at that time it had been intended would be taken by financial institutions, and for Communicorp's own 40% shareholding, which no bank was prepared to give, but which IIU did provide. Mr. McLaughlin was also informed that no inside information had been imparted, and that it was likely that IIU would sell its existing shareholding within the market. There still was then no information forthcoming as to by whom the consortium had been informed that stronger financial support was required.

28.120 Obviously any discussion in evidence as to the likelihood of the three institutions recruited by Mr. McLaughlin having proceeded with their investment, if they had not been replaced, was hypothetical. Mr. McLaughlin, whilst acknowledging that he was speculating, and that his clients' letters had been contingent, felt that they would have adhered to what, for institutions of their scale, at that time, were modest proposed investments, and that they would not

have responded to his proposals unless they had been serious. As to the observations made by Mr. Desmond in the course of his evidence that what those institutions had proffered, was “*not...bankable...lotto...a waste of paper...a waste of time*”, Mr. McLaughlin testified that he did not agree, but did not otherwise wish to comment.

THE FINAL QUALITATIVE SESSION IN COPENHAGEN

29.01 As with the earlier qualitative sessions in Copenhagen, at what transpired to be the final such session, there were no documents generated, or retained by the Department, or retained by those who participated, recording what occurred at the sub-group meetings, or how decisions on the evaluation were made or progressed. Whilst Mr. Towey had prepared summary reports on 13th September, 1995, on the Financial Key Figures and Performance Guarantees sub-groups, attended by him as part of the first session, no such summary reports were prepared by him, or by any other participants for the sub-groups that proceeded during the final session. As before, the Tribunal had to endeavour to piece together what occurred from other documents, and from the relatively sparse recollections of those who attended.

29.02 On Sunday, 17th September, 1995, in advance of the third session, Mr. Andersen forwarded a fax to the Department, addressed to Mr. Martin Brennan, Mr. Fintan Towey, Mr. Billy Riordan and Ms. Maev Nic Lochlainn, who comprised the Departmental team due to travel to Copenhagen that week. In his fax, he set out a work programme for their two day trip to Copenhagen. Mr. Andersen referred mistakenly to the work plan for Monday and Tuesday, 18th and 19th September, but Mr. Brennan clarified that the session in fact proceeded on Tuesday and Wednesday, 19th and 20th September, 1995. From the contents of that fax, it appears that AMI had arranged to convene sub-groups to evaluate the five remaining dimensions, that is:

- (i) Financial Key Figures;
- (ii) International Roaming;
- (iii) Market Development;
- (iv) Tariffs;
- (v) Experience of Applicant, referred to in the fax as the management dimension.

The work plan was in the form of a fairly detailed timetable for the two day session. The anticipated duration of the sub-groups varied as between the dimensions to be evaluated: for Market Development and International Roaming, no more than one hour was allocated on the first day, whereas for Tariffs and for Experience of Applicant, additional time was set aside.

29.03 Mr. Andersen's timetable also suggests that AMI expected that the marking of the three outstanding Aspects, that is, Management, Marketing and Financial, would proceed on the second day of the session. It will be recalled that, whilst the report of the Project Group meeting on 14th September, 1995, made reference to the progression of the evaluation by the "*initial*" marking of Aspects, it was Ms. Nic Lochlainn's handwritten notes of that meeting which confirmed that the exercise was to be undertaken by the personnel who were due to evaluate the dimensions, that is, Mr. Brennan, Mr. Towey, Ms. Nic Lochlainn and Mr. Riordan. In the event, it is clear from further communications, which post-dated the third session, that the anticipated marking of those Aspects did not proceed at that time.

29.04 Mr. Towey confirmed that the same approach to the process of evaluating dimensions was adopted by all sub-groups meetings which he attended, including those that were held during the third session. The Tribunal's understanding of the dynamics of the sub-group procedure was expanded upon in the evidence of Ms. Nic Lochlainn, for whom the third session was her initiation to the process, and who had a relatively detailed recall of events. It was Ms. Nic Lochlainn's evidence that in advance of each sub-group, AMI produced what she described as a "*first draft cut*" of what they considered should be the outcome of the qualitative evaluation of the dimension in question. She had a hazy recollection of reviewing the documents which they circulated in advance of the sub-groups that she was due to attend, namely, Market Development and International Roaming, before she travelled to Copenhagen. This was confirmed by the existence of a copy of AMI's analysis of Market Development, to which further reference will be made, on which Ms. Nic Lochlainn had made handwritten annotations. Ms. Nic Lochlainn testified that the discussion at sub-groups proceeded by reference to those AMI documents, and that participants were at liberty to agree or disagree with AMI's analysis, and that through dialogue between participants, a consensus was reached on the appropriate marks for each application.

29.05 Apart from the financial dimension, the other four dimensions were evaluated by Development Division personnel, that is, Mr. Brennan, Mr. Towey and Ms. Nic Lochlainn, in consultation with AMI consultants. By 19th September, 1995, they had formed a view of the relative performance of the six applicants in the evaluation by then completed. They had agreed at the Project Group meeting of 14th September, 1995, that the applicants fell into two divisions, and that A1, Irish Mobicall, A3, Persona, and A5, Esat Digifone, had submitted the better applications, and that in progressing the evaluation, a greater proportion of resources should be directed to them. They had also, as the Tribunal has found, formed a view on the relative positions of the three applicants within that first

division: A1, Irish Mobicall, was regarded as being in third place, with A3, Persona, and A5, Esat Digifone, both ahead, and it was the view of the Development Division personnel, as conveyed to Mr. Fitzgerald, that A5, Esat Digifone, was the front runner.

29.06 It was with that perception that Mr. Brennan, Mr. Towey and Ms. Nic Lochlainn came to the evaluation of these four dimensions, one of which, Tariffs, at a weighting of 18, was the most significant dimension in the evaluation. The four dimensions which they were due to evaluate collectively represented over 40% of the agreed weighting. Whilst it forms no part of the Tribunal's mandate to review the judgements made in the course of the evaluation of those dimensions, unless those judgements may have been influenced by Mr. Michael Lowry, there had in this instance been separate contact between Mr. Lowry and each of Mr. Brennan and Mr. Towey in advance of this session. In the case of the latter contact, Mr. Lowry, in response to what Mr. Towey perceived as pressure from interested parties, had asked Mr. Towey whether the evaluation process had already concluded, and had been won by Persona. Mr. Towey had conveyed that matter to Mr. Brennan, and thereafter the Tribunal is satisfied that Mr. Brennan and Mr. Lowry had a much more detailed interaction in relation to the process. Whilst the Tribunal does not believe that Mr. Brennan or Mr. Towey ever consciously intended to approach the evaluation otherwise than fairly and with open minds, there were some decisions taken by them in the evaluation of these dimensions which were unusual, and are worthy of comment.

Financial Key Figures

29.07 Mr. Riordan and Mr. Towey were both in attendance in Copenhagen to revisit the evaluation of the Financial Key Figures dimension, following the verification work undertaken by Mr. Riordan in the meantime, as detailed by him in his fax to AMI of the previous Friday, 15th September, 1995. Mr. Riordan had taken the trouble of asking AMI to inform him if they were unable to reformat the mandatory tables, in the manner he had suggested, in advance of the scheduled sub-group meeting, as it was clear to him that the capacity of the sub-group to progress the evaluation was dependent on the availability of those reformatted tables.

29.08 It seems that when Mr. Riordan travelled to Copenhagen, for the sole purpose of attending the Financial Key Figures sub-group, it was his expectation that the reformatting work would be completed. In the event, Mr. Riordan's trip was largely a wasted exercise, as AMI had not concluded that recasting exercise. It was clear from Mr. Riordan's evidence that he found the entire episode both frustrating and pointless, and he described how most of the time over the two

day trip was spent by him waiting around AMI's offices for the work to be concluded. As matters transpired, the task was not completed, and the evaluation proper could not proceed. Mr. Donal Buggy, the accountant seconded to the Department, who was on annual leave at the time, recounted in his evidence that, on his return to work in late September or early October, 1995, Mr. Riordan had briefed him as to what had transpired in Copenhagen, and had expressed his annoyance that, having taken time out from his work commitments in the Department of Finance to travel to Copenhagen, his time was largely wasted.

29.09 It appears that the only matter advanced by the financial sub-group meeting was agreement on the indicators to be used in the qualitative assessment. Again, no documentation was generated concerning this matter, but from a comparison between the indicators which AMI had initially proposed during the first session in Copenhagen, as recorded by Mr. Towey in his summary document of 13th September, 1995, and those that were ultimately evaluated, as evident from the Evaluation Reports, the agreement reached in Copenhagen on 19th and 20th September can be discerned. There were eight separate indicators identified for evaluation, as follows:

- (i) Solvency;
- (ii) Financial strength of consortia members;
- (iii) Liquidity;
- (iv) IRR (internal rate of return);
- (v) Profit/interest expenditure;
- (vi) Accumulated operating costs/accumulated turnover;
- (vii) Accumulated operating costs/SIM-card years;
- (viii) Accumulated turnover/accumulated investments.

The last three of the indicators were directed towards assessing the overall efficiency of the business cases, and it appears that, to the extent that these efficiency indicators were incorporated into the evaluation framework, the suggestion made by Mr. Riordan at the earlier sub-group meeting, and recorded by him in his note to file of 7th September, 1995, may have been adopted. What was not seemingly adopted, however, was the strong recommendation made by Mr. Riordan in his fax of 15th September, 1995, that, having regard to the level

and extent of errors identified by him in the mandatory tables, the sub-group should consider incorporating a financial competency criterion.

29.10 Mr. Riordan testified that, after he returned from Copenhagen, following the final session, he had no further role in the financial evaluation until 9th October, 1995. He did not participate in the award of marks to the agreed financial indicators, nor in the aggregation of those marks to arrive at a total for the dimension as shown in Table 14 of the draft Evaluation Report of 3rd October, 1995. It was not until the morning of Monday, 9th October, 1995, in advance of the scheduled Project Group meeting, that he, together with Mr. Donal Buggy, his accountancy colleague on secondment to the Department, had an opportunity to review those marks.

International Roaming

29.11 The dimension International Roaming was the sole dimension associated with the sixth-ranked evaluation criterion, Extent of Applicants' International Roaming Plans. In the quantitative evaluation, the criterion had been assigned a weighting of 6, and the Evaluation Model provided that it would be measured quantitatively by reference to the number of roaming agreements planned by applicants by the end of their second year of operation. It will be recalled that the Model itself had anticipated that sufficient information might not be provided by applicants to enable the indicator to be scored in that manner, and it had stipulated that, should that be the case, the indicator would not be measured quantitatively. That eventually did come to pass, and in the first set of quantitative results, of 30th August, 1995, the indicator was not scored, and instead the dimension was dealt with by awarding each applicant notional full marks of 5. In the second set of quantitative results, of 20th September, 1995, the indicator was excluded from the assessment. Consideration of the dimension was confined to the qualitative evaluation, and this was subsequently noted in the Evaluation Reports.

29.12 Ms. Nic Lochlainn and Mr. Towey were nominated to participate in the sub-group, although it seems from Mr. Brennan's evidence that, whilst not attending as a contributing member, he nonetheless sat in on the meeting. Ms. Nic Lochlainn had a clear enough recollection of the sub-group meeting. She testified that she recalled that the meeting was convened on the morning of the first day of the session, Tuesday, 19th September, 1995, with Mr. Brennan, Mr. Towey and Mr. Andersen in attendance. It was her recollection that at some point during discussions, it was decided that a more detailed study of certain elements of applicants' roaming proposals was required, and that she was requested to conduct that analysis. She did so, with the assistance of a junior member of the

AMI consulting team, and following completion of that further analysis, Ms. Nic Lochlainn recalled that the sub-group reconvened on the second day of the session, reviewed the work she had undertaken, and proceeded to mark each application.

29.13 International Roaming was another of the dimensions which AMI had proceeded to evaluate, without Departmental representation, in late August, 1995, and what occurred on 19th and 20th September was a reconvening of the sub-group to enable the Departmental representatives to review the work that had already been undertaken. The AMI report of the initial assessment of 31st August, 1995, was available to the Tribunal, as was a copy of a faxed document sent by AMI to the Department on 27th September, 1995, which was self-evidently a draft of the material which ultimately appeared in the Evaluation Reports in relation to this dimension. That second document contained no information about the further analysis that Ms. Nic Lochlainn undertook, nor any record of the discussions which gave rise to the marks awarded for the constituent indicators, which led to the overall marks awarded for the dimension.

29.14 It appears from these documents that AMI had initially proposed that the dimension should be measured qualitatively by six indicators as follows:

- (i) Number of countries at launch;
- (ii) Number of networks at launch;
- (iii) Expressed knowledge about roaming;
- (iv) Commitment to increase roaming possibilities after launch;
- (v) Roaming to non-GSM networks;
- (vi) Extent of roaming services.

When the sub-group reconvened in Copenhagen, or possibly as a result of deliberations in the course of the meeting, these six indicators were consolidated into three indicators, and marks for the three indicators and the overall marks for the dimension were contained in a table which appeared in AMI’s document dated 27th September, 1995, and which was reproduced as Table 5 in AMI’s first draft Evaluation Report in the form shown below.

Dimension International Roaming	A1	A2	A3	A4	A5	A6
1. Understanding of GSM roaming issues	A	E	C	E	B	D
2. Commitment to European GSM roaming	A	D	A	B	B	A
3. Additional roaming features	A	D	D	B	D	D
International roaming (sub-total)	A	D	C	C	C	C

29.15 In the absence of a record of the deliberations at the meetings of 19th and 20th September, and in the absence of any further recollection by Departmental witnesses, the Tribunal has no means of knowing what factors prompted AMI to suggest, or the meeting to determine, that the six indicators initially proposed should be consolidated into the three indicators shown in the table above.

29.16 Although Ms. Nic Lochlainn had no recollection of any implicit or explicit weightings having been used in aggregating the constituent indicator marks, to arrive at a sub-total for the dimension, and thought that it was accepted that all indicators ranked equally, Mr. Towey was clear that in all sub-groups which he had attended, the marks were aggregated by the application of implicit weightings by the sub-group participants, in applying their collective judgement, to arrive at a sub-total. As with all other dimensions, save for Experience of Applicant, which will be returned to later in this chapter, no reference was made, either in the AMI initial draft constituent parts of the Evaluation Report, or in the draft or final Reports, to such weightings, or to the relative significance attached to each of the indicators. Insofar as it is possible to discern what relative importance might have been accorded to the three indicators, it seems from an inspection of the table that it is possible that, in the case of this dimension, the judgement of the sub-group may have been that the three indicators were of roughly equivalent importance. To that extent, the recollections of Mr. Towey and Ms. Nic Lochlainn may not be inconsistent.

Market Development

29.17 Market Development was one of the three dimensions of the first-ranked evaluation criterion, Credibility of Business Plan and Applicant’s Approach to Market Development. A weighting of 30 was assigned by the Project Group to that criterion for the purposes of the quantitative evaluation. The breakdown of that weighting as between the three dimensions, as recorded by reference to the indicator weightings in the Evaluation Model, was:

- (i) 15 for Financial Key Figures;
- (ii) 10 for Experience of Applicant;
- (iii) 7.5 for Market Development.

Due to an error on the part of AMI, the aggregate of the weightings for the constituent dimensions came to 32.5, 2.5 in excess of the agreed criterion weighting. Mr. Andersen’s evidence in relation to the weightings of these three dimensions, and the errors made by AMI in the weightings table of the Evaluation Model, will be reviewed in due course. What is clear is that the renormalisation of the dimension weightings, to bring them into conformity with the criterion weighting of 30, would have been a straightforward arithmetic exercise, simply entailing the application of the fraction 30 over 32.5 to the weightings 15, 10 and 7.5.

29.18 In the quantitative evaluation, the dimension was measured by the indicator Forecasted Demand, which was in turn scored by two sub-indicators, defined as Market Penetration Score I, and Market Penetration Score II. These sub-indicators respectively measured the projected total annual traffic minutes, and the projected total number of SIM-cards at the end of the fourth year of applicants’ business plans. The sub-indicators were weighted equally at 3.75. The quantitative evaluation proceeded uneventfully, and no caveats were entered by AMI to the scoring on the quantitative side. The results of the quantitative assessment of the dimension were as follows:

	A1	A2	A3	A4	A5	A6
Market Penetration Score I	2.60	2.01	2.66	5.00	3.50	2.22
Market Penetration Score II	4.0	3.0	5.4	2.9	3.7	4.2
Total for Indicator	4.02	3.00	5.00	2.92	3.67	4.24

29.19 Market Development was another of the dimensions that AMI had proceeded to assess qualitatively, before the finalisation of the quantitative evaluation, and without representation from the Department. The Departmental files contained two documents, one dated 29th August, 1995, and the other dated 27th September, 1995, the latter of which was a draft of the material relating to this dimension which ultimately appeared in the Evaluation Reports, and which was expressed to replace “Version of 29.8.95”. There were handwritten annotations made on the earlier version of the document, apparently made by Ms. Nic Lochlainn, and which confirm her evidence that she had received and reviewed what she described as a “first draft cut” from AMI, before she travelled to Copenhagen.

29.20 In all, ten indicators for the dimension Market Development were evaluated in the qualitative process. Whilst the description of some of these indicators appears to have changed as between the documents of 29th August, 1995, and 27th September, 1995, there do not appear to have been any substantive changes made to the indicators initially assessed, or any additional indicators added, as a result of the sub-group meeting. What is apparent, however, from the annotations made by Ms. Nic Lochlainn, and from a comparison of the two versions of the document, is that whilst the marks awarded for some of the indicators were revised, these revisions did not impact on the overall grades that had been proposed by AMI for the dimension.

29.21 The results of the qualitative evaluation were presented in both the draft document of 27th September, 1995, and in the Evaluation Reports, in the following table, which was Table 2 in the Reports:

Dimension Marketing	A1	A2	A3	A4	A5	A6
1. Market penetration (projected number of GSM2 subscribers in own network)	C	D	C	C	B	A
2. GSM market share (including traffic)	B	C	C	A	B	B
3. Consumer penetration	E	A	B	D	B	B
4. Market research	C	C	B	A	A	E
5. Distribution strength	C	D	B	C	A	E
6. Segmentation	D	E	A	C	B	B
7. Dealer commission handset prices	C	A	A	C	A	A
8. Marketing budget	A	C	D	E	A	A
9. Communications planning	D	E	B	C	A	D
10. Customer care and churn	C	C	B	E	A	B
Marketing (sub-total)	C	C	B	C	A	C

It will be observed that there was a significant difference in ranking between the quantitative and the qualitative evaluations for this dimension.

29.22 As already related, it was the evidence of all Departmental witnesses who had participated in qualitative sub-groups that the quantitative results had been inputted into the qualitative evaluation. It will also be recalled that the Evaluation Model stipulated that the indicators which had been scored quantitatively should be the starting point of the qualitative evaluation. As is apparent from the above table, there was it seems no indicator evaluated

qualitatively which was equivalent to the indicators or sub-indicators used in the quantitative analysis. Whilst the first three indicators undoubtedly related to applicants' projected market shares, none of the marks for them appear to equate, even approximately, to the scores in the quantitative evaluation which assessed market penetration at the end of year 4 of applicants' business plans. Nor, for that matter, do either of the draft documents, or the narrative in the Evaluation Reports, explain what the grades for the first three indicators actually represented.

29.23 As with all other dimensions, there was no indication in any of the documentation of the implicit weightings adopted, in aggregating the indicator marks to arrive at sub-totals for the dimension. From nothing more than a visual inspection of the table, it appears possible that, as with the dimension International Roaming, all ten indicators may have been ranked equally in this case.

Tariffs

29.24 The dimension Tariffs was the single most important dimension within the overall evaluation, as the sole determinant of the third-ranked criterion, Approach to Tariffing Proposed by Applicant. It carried a weighting of 18 in the quantitative evaluation, following the realignment of the weightings, consequent on the EU intervention, and the capping of the licence fee. Its significance was also reflected in the time allocated in AMI's timetable for the third session. The sub-group meeting to evaluate Tariffs was scheduled to run from 11.00am to 12.30pm on the first day of the session, and to resume after lunch at 2.00pm, and continue until 4.00pm that afternoon.

29.25 In the quantitative evaluation, the dimension Tariffs had been assessed by the indicator Competitiveness of an OECD-like GSM 2 Basket. The Evaluation Model recorded that this was the standard means whereby the OECD measured competitive tariffs, and it was agreed that applicants' tariff proposals for year 4 of their business cases should be measured against a standard tariff, as of 1st January, 1995, for mobile telephony, known as TACS 900. The output of the quantitative evaluation was the percentage price reduction offered by applicants as against TACS 900, and that percentage reduction was then marked on a scale from 1 to 5. The results of the quantitative evaluation were as follows:

	A1	A2	A3	A4	A5	A6
Percentage Price reduction compared to TACS 900	11%	11%	25%	16%	7%	44%
Points	2.00	2.00	3.00	2.00	1.00	5.00

29.26 It will be recalled that, when presenting the results of the quantitative evaluation to the Project Group meeting on the previous 4th September, 1995, Mr. Andersen had observed, in the context of this dimension, that when completing the mandatory tables, from which the data to measure the indicator had been extracted by AMI, A4, Irish Cellular, and A6, Eurofone, had not translated the relevant material from their business cases to their own best advantage. As recorded in the Evaluation Reports, and as confirmed by Mr. Andersen when he attended to give evidence, AMI had recalculated the tariff basket figures for A4 and A6, and had recomputed the quantitative results.

29.27 Mr. Brennan and Mr. Towey were nominated to attend the Tariff sub-group meeting in Copenhagen on 19th September, 1995. Initial evaluations had already been undertaken by AMI on 30th August, 1995, and at a further post-evaluation meeting held on 7th September, 1995. Neither of these meetings had included Departmental representation. Nine indicators were marked, and the results for the dimension, as comprised in the Evaluation Reports submitted by AMI, were presented in Table 4, reproduced below:

Dimension Tariffs	A1	A2	A3	A4	A5	A6
1. Initial charges	B	B	A	B	C	B
2. Consumer graph	E	E	B	C	C	A
3. Business graph	C	E	B	C	D	A
4. Peak period	B	C	A	C	A	A
5. Metering and billing principles	A	C	C	C	B	A
6. Special offering	B	C	A	C	A	B
7. International roaming surcharges	B	D	B	B	B	B
8. International call charges	C	E	A	C	A	C
9. OECD- like basket	D	D	B	C	D	A
Tariffs (sub-total)	C	D	B	C	C	A

The qualitative results for the final indicator evaluated, OECD-like basket, warrant reference. These appear to reflect the quantitative results, and an exercise whereby the numerical scores were converted into lettered grades, with 5 becoming A, and so forth down the scale. It seems however that an exception was made for Esat Digfione, which, having scored 1.00 in the quantitative evaluation, was awarded a D grade in the qualitative evaluation, the same grade

as A1, Irish Mobicall, and A2, Cellstar, both of which had scored 2.00 in the quantitative evaluation.

29.28 In the absence of documents recording sub-group deliberations, the Tribunal has no means of knowing how discussions at the meeting on 19th September, 1995, developed, however it does appear that both the indicators measured, and the grades awarded by AMI, were revised at that meeting. This was apparent from a comparison of the indicators and results as recorded, firstly, in draft documents produced by AMI, dated 13th September, 1995, in advance of the sub-group meeting, secondly, in further draft documents produced by AMI on 25th September, 1995, after the meeting, and thirdly, in the AMI Evaluation Reports. It appears, from this comparison, that indicators 2 and 3 in the above table, termed Consumer Graph and Business Graph, were adopted at the sub-group meeting in substitution for indicators which had been selected by AMI in advance of it.

29.29 It further seems, from this three-way documentary comparison, that marks were revised after 25th September, 1995, that is, after the sub-group had concluded its deliberations. This may have occurred at a later meeting in Copenhagen on 28th September, 1995, to which detailed reference will be made. As with the qualitative results of all other dimensions, there was no reference in the documentation or in the Evaluation Reports to the implicit weightings, which, according to Mr. Towey’s evidence, were applied in aggregating marks to arrive at a sub-total for the dimension.

Experience of Applicant

29.30 Experience of Applicant was the second-ranked dimension of the first criterion, Credibility of Business Plan and Applicant’s Approach to Market Development. In the quantitative evaluation, the Project Group had allocated the dimension a weighting of 10. In that evaluation, the dimension had been determined by indicators that were scored by reference to the number of instances of applicants’ experience in GSM2 networks, in GSM1 networks, and in other cellular networks. The quantitative evaluation proceeded uneventfully, and produced results which were unqualified by AMI. The results of the quantitative evaluation were reproduced in full in the first draft Evaluation Report submitted by AMI, as Table 12, reproduced below:

	A1	A2	A3	A4	A5	A6
GSM2 experience occurrences	1	0	0	0	0	2
GSM1 experience occurrences	2	0	4	0	1	0
Other cellular network	3	1	5	2	1	1
GSM2 experience points	2	0	0	0	0	3
GSM1 experience points	3	0	4	0	2	0
Other cellular experience points	4	2	4	3	2	2
GSM2 ownership weight	0.20	0.00	0.00	0.00	0.00	0.80
GSM1 ownership weight	0.50	0.00	1.07	0.50	0.45	0.00
Other cellular experience, ownership weight	1.50	0.62	1.33	0.50	0.45	0.20
Temporary score	10.200	1.240	13.868	1.500	2.700	7.600
Renormalisation factor	0.36	0.36	0.36	0.36	0.36	0.36
Points (quantitative)	3.68	0.45	5.00	0.54	0.97	2.74

29.31 That table, showing the quantitative results in detail, and the points awarded to each applicant, did not appear in the same form in the second draft Report. What appeared in that draft Report was a truncated version of the table, which excluded all of the rows below the first six rows. In other words, all of the entries relating to and showing the scores received by applicants were excluded. The table was deleted in its entirety from the final Report.

29.32 The qualitative evaluation of the dimension was scheduled by AMI for two hours on the afternoon of the second day of the session. It was Mr. Brennan and Mr. Towey who were nominated to represent the Departmental side. In the absence of any working papers, or even any initial analysis documents prepared by AMI, it is unclear to what extent AMI had proceeded with the evaluation, prior to the convening of that sub-group meeting. Four indicators for the dimension were assessed, and the results of the exercise were presented in Table 13 of the Evaluation Reports, reproduced below:

Dimension Management aspects	A1	A2	A3	A4	A5	A6
1. Proposed management team	C	E	B	C	A	D
2. Experience of Irish Market	C	C	A	B	B	E
3. Experience of European Market	A	D	A	C	A	A
4. Experience as cellular operator	B	E	A	D	C	B
Management aspects (sub-total)	C	D	A	C	B	C

29.33 The fourth indicator listed in the table above, Experience as Cellular Operator, was stated in the Evaluation Reports to represent the output of the

quantitative evaluation, that is, the results of the quantitative analysis. With regard to that fourth indicator, the Tribunal had noted in the course of its inquiries that, in an early draft of the material, which was ultimately incorporated into the first draft Report submitted by AMI, the fourth indicator was described in the following terms:

“The indicator is a measure of the abundance of relevant experience within the cellular sector – with emphasis on GSM and GSM-2 experience. The quantitative scoring is used and translated into the A-E scoring model according to the quantitative ranking.

In the final score this indicator is weighted 3 times less than the other indicators.”

29.34 A slightly different formulation appeared in the first draft Report itself, which was maintained throughout all versions of the Report, and was as follows:

*“The quantitative experience of the application as a cellular **operator in OECD member countries** has also been defined as an indicator. The quantitative scoring, which appears in table 12 has been translated into the award of marks, A3 getting the highest mark and A2 the lowest. This indicator has been weighted 3 times less the other indicators during the scoring of the experience dimension.”*

This was the sole instance of reference in the Evaluation Reports to the application of specific weightings in the aggregation of indicator marks.

29.35 What the narrative in both versions meant was that the quantitative scores, on a scale up to a maximum of 5, had been translated into an award of lettered marks, and that exercise is illustrated in the table below:

	A1	A2	A3	A4	A5	A6
Points	3.68	0.45	5.00	0.54	0.97	2.74
Marks	B	E	A	D	C	B

In the course of his evidence, Mr. Towey, who had participated in the sub-group, was questioned on both this conversion exercise, and the weighting attributed to the indicator. He agreed that, in the qualitative evaluation, the sub-group had converted the hard data from the quantitative evaluation, expressed in points, into qualitative grades. He could not explain how the score of 0.97 for A5, Esat Digifone, had been converted to C, when a score of 3.68 for A1, Irish Mobicall, had been converted to B, as had a score of 2.74 for A6, Eurofone. Nor could Mr. Towey explain why it was considered appropriate that this indicator, Experience

as Cellular Operator, which would seem to have been the most relevant experience to the task at hand, should have been weighted at a level three times less than the other indicators.

29.36 Having concluded this third sub-group session in Copenhagen on 20th September, 1995, Departmental personnel returned to Dublin. All dimensions had by then been evaluated qualitatively, save for Financial Key Figures, the evaluation of which could not be progressed until AMI completed the task of reformatting applicants' mandatory tables in compliance with Mr. Riordan's specifications. Mr. Riordan took no further part in that evaluation. The overall progression of the evaluation at that point is reviewed at the commencement of the next succeeding chapter.

SECTION E

THE THIRD PHASE OF THE EVALUATION

Mr. MICHAEL ANDERSEN’S MEMORANDUM OF
21ST SEPTEMBER, 1995

30.01 It is of assistance at this juncture to recap briefly on what had been achieved in evaluating applications over the seven weeks from receipt on 4th August, 1995, to the completion of the final qualitative evaluation session in Copenhagen on 20th September, 1995.

30.02 The first set of quantitative results, dated 30th August, 1995, based on the quantitative measurement of fourteen indicators, was presented to the Project Group meeting on 4th September, 1995. The total scores for the six applicants were as follows:

A1	A2	A3	A4	A5	A6
3.05	2.91	3.48	2.96	3.13	3.19

It was agreed by the Project Group at that meeting that, in accordance with the Evaluation Model, the quantitative results would be returned to after the completion of the presentations, and the qualitative assessment. A number of steps were to be taken by AMI in the meantime to remedy certain deficiencies in the quantitative results, some of which were due to errors on AMI’s part, and some of which were due to errors by applicants in the submission of information in the form of mandatory tables.

30.03 A second set of quantitative results dated 20th September, 1995, was produced by AMI, based on thirteen indicators: the indicator for International Roaming having been excluded in consequence of what had been agreed at the Project Group meeting of 4th September, 1995. The scores for the six applicants as shown in the second set of results were as set out in the table below.

A1	A2	A3	A4	A5	A6
2.77	2.62	3.22	2.67	2.85	2.91

Mr. Martin Brennan testified that it was probable that copies of those results were provided to him and to other members of the Project Group who were in Copenhagen on 20th September, 1995. In compiling those results, AMI had only partially addressed the modifications agreed by the Project Group at the earlier meeting of 4th September, 1995.

30.04 In the qualitative evaluation, nine of the eleven dimensions had been assessed, and the Technical Aspects, comprising four dimensions, had been sub-totalled by Mr. John McQuaid, Mr. Aidan Ryan and Mr. Marius Jacobsen of AMI, immediately following the post-presentation Project Group meeting of 14th

September, 1995, as had been agreed at that meeting. No progress had been made in the appraisal of the important dimension Financial Key Figures, which remained outstanding. By inserting the results for each of the dimensions which had been evaluated by 20th September, 1995, into the qualitative marking matrix, as contained in the Evaluation Model, a clearer picture emerges as to where the evaluation then stood.

Aspects and dimensions	A1	A2	A3	A4	A5	A6
Marketing aspects (subtotal)						
Market development	C	C	B	C	A	C
Coverage	B	C	A	C	A	D
Tariffs	C	D	B	C	C	A
International roaming plan	A	D	C	C	C	C
Technical aspects (subtotal)	C	D	B	B	A	C
Radio network architecture	C	C	B	B	A	D
Capacity of the network	C	D	C	B	A	C
Performance guarantee	D	E	C	B	A	C
Frequency efficiency	A	C	A	A	A	A
Financial aspects (subtotal)						
Financial key figures						
Licence payment	A	A	A	A	A	A
Management aspects (subtotal)						
Experience of the applicant	C	D	A	C	B	C
Other aspects (subtotal)						
Risks (Effects on the Irish economy)						
Grand total						

30.05 Immediately after the completion of the third qualitative evaluation session on 20th September, 1995, Mr. Andersen on the next day, Thursday, [21st September](#), faxed a document to the Department addressed to Mr. Martin Brennan and Mr. Fintan ToweY regarding the work programme for the following ten days. This was a detailed document, and from its contents it seems that its purpose was threefold:

- (i) it was intended as an analysis of, and timetable for, the work that would be completed by AMI personnel in Copenhagen;
- (ii) it was also intended to identify the tasks required to be undertaken by Departmental personnel, and to fix a time by which those tasks would to be completed;
- (iii) it was further intended to identify matters on which decisions relating to certain substantive issues would be required to be taken.

As Mr. Brennan and Mr. Towey were the only members of the Project Group who had access to this document, they were the only witnesses who could assist the Tribunal as to their understanding of what was then proposed by Mr. Andersen, which in certain respects was less than clear from a reading of it. A copy of Mr. Andersen's fax of 21st September, 1995, can be found in the Book of Appendices to this Volume.

30.06 The contents of the document, which extended over four typed pages, were divided into six sections, which were lettered A to F, and were entitled as follows.

- A. The remaining award of marks to the 10 dimensions.
- B. Scoring of the marketing aspect, financial aspect and other aspects.
- C. The grand total.
- D. Supplementary analyses.
- E. The first draft report.
- F. Questions to the Department.

The contents of each of these sections will now be outlined.

30.07 Section A detailed the work which was outstanding in the preparation of draft documents relating to the qualitative evaluation of the dimensions for inclusion in the draft Evaluation Report. As regards the Financial Key Figures evaluation, the marking of which had not yet commenced, it stated:

“Concerning the dimension financial key figures, the existing calculatory work needs to be checked and reviewed by as well MT/JB as BR. MT is – together with BR – to suggest a revised award of marks on the basis of reviewed figures. Deadline: Wednesday the 27th.”

It appears therefore that, as of 21st September, 1995, the reformatting of the mandatory tables, consequent on Mr. Billy Riordan's analysis of the previous 15th September, 1995, had not yet been finalised by AML, much less reviewed by Mr. Riordan. Whilst it seems that an initial written proposal for the marking of the dimension was available on 27th September, 1995, to which more detailed reference will be made in due course, it was neither reviewed nor approved by Mr. Riordan on that date, and it was not until much later, on 9th October, 1995, that Mr. Riordan had an opportunity to consider it.

30.08 In section B of the document, headed Scoring of the Marketing Aspect, Financial Aspect and Other Aspects, Mr. Andersen suggested that the outstanding Aspects should be marked at a meeting on the following Thursday, 28th September, 1995, either by means of a conference telephone call, or face-to-face in Copenhagen. Mr. Andersen observed that the marking of Financial Aspects would be “self-explanatory”, whereas they would “need to consult each other concerning the scoring of the marketing aspect”. As to what Mr. Andersen meant by this observation, Mr. Towey thought that the sub-totalling of Financial Aspects, which comprised the dimensions Financial Key Figures and Licence Fee, simply involved the inputting of hard data, whereas the sub-totalling of Marketing Aspects, which entailed consideration of four dimensions, required the application of the subjective judgments of those involved.

30.09 The section also focused on the so-called Other Aspects in the Evaluation Model. It will be recalled that the marking matrix for the qualitative evaluation contained a fifth set of Aspects termed Other Aspects, of which Risks and The Effect on the Irish Economy were the defined dimensions. Mr. Andersen proposed that specific risk investigations should initially be made for all six applicants. As regards the three top candidates, A1, Irish Mobicall, A3, Persona, and A5, Esat Digifone, he made the following specific recommendations.

“A1: No major risks are identified yet, except for the DETECON issue and the potential conflicts in decision making among three operators.

...

A3: The equity of Sigma (and ESB) to be documented by JB and FT, and the potential abuse of dominant positions or lack of competition due to the relationships between on the one hand Motorola and Sigma and on the other hand Telecom Eireann have been identified as risks (TI).

...

A5: Three years of negative solvency combined with a comparatively weak financial strength of Communicorp Group is identified as a risk (JB/BR/-MT). In addition it might be a risk factor that A5 is to establish [its] own radio (backbone) network (OCF), but A5 seems to have a comparatively high degree of preparedness.”

30.10 The section then concluded with the following passage.

“If there is a clear understanding between the Department and AMI of the classification of the two best applications, it is suggested not to

score ‘other aspects’, the risk dimensions and other dimensions, such as the effect on the Irish economy. In this case, the risk factor will be addressed verbally in the report.

If there is no immediate unanimity, it is suggested to score the other aspects and the dimensions under this heading.

A decision has to be taken at the meeting 28 September.”

This passage was explored in some depth in the course of evidence, and in particular in the course of examination of Departmental witnesses, as its meaning was not immediately apparent to the Tribunal. Mr. Brennan testified that his understanding of what was proposed was that they would refrain from marking Other Aspects, unless there was no clear winner, even though it was evident from the Evaluation Model that Other Aspects were part of the marking matrix for the qualitative evaluation. In other words, it appears that what was proposed by Mr. Andersen was that, if there was a clear ranking and separation between the two best applicants, by reference to the first four of the five Aspects that formed the substance of the qualitative evaluation, the fifth Aspect should be excluded, and the evaluation should be confined to those four Aspects.

30.11 Section C, which was headed grand total, proposed that this element of the marking matrix should be scored at a meeting on 28th September, 1995. As the term “*grand total*” was how the aggregation of all of the marks in the qualitative evaluation was described in the matrix, it seems that what Mr. Andersen had in mind was that, having inserted the marks for the dimension Financial Key Figures, and having sub-totalled the Marketing and Financial Aspects, the proposed meeting of 28th September should proceed to an aggregation of the marks for all of the dimensions in the qualitative evaluation, thereby arriving at a “*grand total*” for that limb of the evaluation.

30.12 Section D of the document, headed supplementary analysis, contained an update on the progress of the analysis agreed at the Project Group meeting of 14th September, 1995, and recorded that, as far as possible, the results of that analysis would be annexed to the first draft Evaluation Report, to be provided by AMI.

30.13 Section E of the document headed first draft report, contained a brief outline of the intended structure of that Report.

30.14 The final Section F, headed Questions to the Department, recited five matters on which AMI required decisions to be taken by the Department, which were defined as follows.

- “ - *Should the identified meeting September 28 be conducted [sic] means of a conference call or a meeting in Copenhagen?*
- *Does the Department wish to score ‘other aspects’?*
- *Given the time frame and the fact that we are not yet ready to begin the drafting of the report, will it be acceptable for the Department that AMI produces a non-edited report to be received by the Department by fax late October 3rd?*
- *How do we integrate the quantitative evaluation in the report (we prefer to leave this question unanswered, until we have the final results)?*
- *How do we proceed we [sic] acronyms/names concerning the applicants (we prefer to continue with acronym, but at least in chapter two we need to mention the names of the consortia and the consortia members)?”*

30.15 There was no record within Departmental files of any written response by Mr. Brennan or Mr. Towey to Mr. Andersen’s fax of 21st September, 1995. By any reasonable standard, the fax constituted a highly significant document. Not only did it set out and apprise the Department of how AMI intended to progress the evaluation which they were conducting in the name of the Project Group, but more importantly it sought direct input from the Departmental side on what were self-evidently decisions of fundamental importance concerning the structure of the process itself. Both Mr. Brennan and Mr. Towey recognised, and confirmed in evidence, that the questions on which Mr. Andersen had sought Departmental responses, and in particular the first, second and fourth questions, were significant.

30.16 In these circumstances, it is difficult to understand why Mr. Brennan, in his capacity as Chairman of the Project Group, did not bring the document or its contents, including the questions posed by AMI, to the attention of the other members of the Project Group, or even to the attention of Mr. Sean McMahon and Mr. John McQuaid, who were the two other members of the Project Group of Principal Officer rank, and were the senior representatives of the Regulatory and Technical Divisions. Neither Mr. McMahon, Mr. McQuaid, nor any other member

of the Project Group, had ever seen the document, or had been aware of its contents during the course of the process, and their first introduction to the document, or to its contents, was when it was brought to their attention by the Tribunal. Mr. Brennan testified that he did not consider convening any meeting of the Project Group in response to receipt of Mr. Andersen's communication, even though all members, with the exception of Mr. Donal Buggy, who was still on annual leave, were available.

30.17 It seems to the Tribunal undeniably the case that the contents of the document would have warranted consideration by the Project Group, whether in the context of a formal meeting, or a written procedure, akin to that adopted by Ms. Nic Lochlainn in July, 1995, in connection with the approval of the reassignment of the 3% weighting, consequent on the capping of the licence fee. According to the evidence of Mr. Brennan and Mr. Towey, what in fact happened was that Mr. Brennan consulted with Mr. Towey, and they decided between themselves that the seriousness of the work required to be undertaken warranted a face-to-face meeting in Copenhagen, and they proceeded to make arrangements in that regard. They did not consider involving any other member of the Project Group, or consulting with any of them, in connection with any element of what was contained in the document.

30.18 Whilst there is no doubt that Mr. Brennan and Mr. Towey were nominated to represent Departmental interests at the sub-groups convened in Copenhagen on 19th and 20th September, there was nothing in the official report of the Project Group meeting of 14th September, 1995, to suggest that the Project Group had agreed to delegate additional functions to them. Their actions, and in particular those of Mr. Brennan, must be viewed in the context of the agenda which had been set by AMI for the meeting on 28th September, 1995. That agenda contemplated:

- (i) that the Marketing and Financial Aspects sub-totals in the qualitative evaluation would be determined, even though the central dimension of the latter Aspect, Financial Key Figures, had not yet been evaluated;
- (ii) that the exercise of aggregating the markings in the entire qualitative evaluation would proceed, in order to arrive at a grand total for that evaluation;
- (iii) that the Department would decide whether Other Aspects should or should not be scored;
- (iv) that the Department would instruct AMI as to the course which should be taken regarding the quantitative evaluation results.

30.19 The core of the evaluation technique which had been promoted by AMI in their tender document, on foot of which they were appointed consultants to the Project Group, and which was the central construct of the Evaluation Model, was that a quantitative evaluation should be performed, that it should be followed by a qualitative evaluation, and that the quantitative evaluation results should then be reviewed. The objective of this dual technique was to guard against the emergence of an unreliable result, and the assurance against that outcome was the prospect that both evaluations would yield the same result. The request therefore made in the fax of 21st September, 1995, that the Department should instruct AMI on the course to be taken regarding the quantitative evaluation, was by any reasonable standards an extraordinary turn of events, and in common with the proposal that the qualitative evaluation should be confined, by the exclusion of Other Aspects, must have been so regarded.

30.20 Whilst the determination of the Aspects sub-totals, and of a grand total, would have been integral elements of the evaluation, had it proceeded in accordance with the protocols agreed by the Project Group, and as comprised in the Evaluation Model, as matters evolved these steps became nothing short of decisive as to the ultimate outcome of the process. For reasons which were entirely undocumented, and which Mr. Brennan could not explain, he resolved to exclude the Project Group from these considerations, and effectively to constitute himself and Mr. Towey as sole arbiters of these matters on the Departmental side for the purposes of the meeting of 28th September, 1995.

30.21 When he recently attended to give evidence, Mr. Andersen testified that he authored that memorandum primarily as a logistical exercise to facilitate the progress of the evaluation, to enable AMI to complete a draft Evaluation Report by 3rd October, 1995, and to ensure that they were not working in the “dark”, as he put it. What he was endeavouring to achieve, as lead consultant, was the necessary Departmental input to enable AMI to proceed with and complete their work.

30.22 Mr. Andersen’s evidence of his expectations surrounding the meeting which he had proposed for 28th September, 1995, in Copenhagen, was in a number of respects unclear and inconsistent. When asked about the meeting he had requested, towards the conclusion of his evidence on Friday, 29th October, 2010, a meeting of which he had no recollection, and which he initially denied had ever taken place, he testified that he had envisaged that the proposed meeting would be one of the entire Project Group. When he resumed his evidence on the following Monday morning, 1st November, 2010, his evidence changed. He was then equivocal about his expectations, and testified that

maybe he had, or maybe he had not, envisaged that the meeting would be one of the entire Project Group. He thought at that point that perhaps it had been unrealistic of him to expect that the Project Group would travel en masse to Copenhagen, as obviously a Project Group meeting had not transpired.

30.23 Mr. Andersen protested that he was not indifferent to whether the meeting he proposed was a meeting of the Project Group, or was a meeting with two members of the Project Group. It was not his starting point that there would be a meeting in Copenhagen involving four people, at which the grand total would be scored. If it were the end point that the grand total was scored in that manner, he would have had no other option but to accept that eventuality, as he wanted to progress his work and finalise a draft Report by 3rd October, 1995. He nonetheless accepted that he did not envisage, when he formulated his memorandum, that the grand total would be scored by four people. What is abundantly clear and undoubtedly the case, despite Mr. Andersen's impaired recollection, is that this is precisely what occurred when Mr. Brennan and Mr. Towey, without reference to the Project Group, attended their meeting in Copenhagen with Mr. Andersen and Mr. Jon Brüel. At that meeting the attendees proceeded to arrive at a grand total, and in so doing generated three tables by reference to the output of the evaluation conducted by the sub-groups over the three sessions in Copenhagen, two of which tables were never envisaged by the Evaluation Model. It was Mr. Andersen's view that the importance of that step was overstated, as much of the scoring used had already been finalised in the sub-groups.

30.24 As to the question which Mr. Andersen had posed to the Department in the final section of his memorandum, in relation to the quantitative evaluation, namely:

"How do we integrate the quantitative evaluation in the report (we prefer to leave this question unanswered, until we have the final results)?"

Mr. Andersen could not explain why he had put matters in those terms. He recognised that the manner in which he had framed that question was inconsistent with the "*withering*" of the separate quantitative evaluation, as explained in his evidence, and in the Evaluation Reports, a matter which will be returned to in later chapters. In that regard Mr. Andersen accused the Tribunal of looking for inconsistencies. It is perhaps trite, but should not nonetheless be overlooked, that the inconsistency was not of the Tribunal's making, but was one which emanated from the contemporaneous records, and from Mr. Andersen himself.

30.25 It will be recalled that Mr. Andersen testified that as and from 4th September, 1995, when he presented the first set of quantitative results to the Project Group, it had been his personal view, due to shortcomings in the results, including the receipt of incompatible information arising from deficiencies in the RFP document, that it was not going to be possible to generate a set of statistically reliable quantitative results. Although there was no record of him ever having conveyed that view to the Project Group, or ever having suggested that there was a question mark over the use of the quantitative results, until his memorandum of 21st September, 1995, and although the official report of the Project Group meeting of 4th September, 1995, had recorded that the quantitative evaluation:

“would be returned to after both the presentations and the qualitative assessment”,

Mr. Andersen believed that it was clear from 4th September, 1995, that the quantitative evaluation was unworkable. The efforts of his colleague, Mr. Mikkel Vinter, after 4th September, 1995, to generate a set of quantitative results, incorporating the further information sought from applicants regarding their efficiency figures, incorporating the correct tariff basket figures for A4 and A6, and applying a correct set of weightings on a base of 100, were, according to Mr. Andersen, academic and, he stated, were undertaken solely for the purpose of generating quantitative results for input into the evaluation conducted by the sub-groups in Copenhagen in September, 1995.

30.26 Mr. Andersen further testified that the evaluation conducted by the sub-groups in the course of the three Copenhagen sessions was substantively different to the qualitative evaluation envisaged by the Evaluation Model. It became an *“holistic”* evaluation, entailing a consideration of both quantitative and qualitative material. The Tribunal has already reviewed the work of the sub-groups, and whilst there is no doubt that quantitative results were incorporated in one form or another in the case of a number of the evaluations, albeit at times in a less than entirely clear manner, the Tribunal is not convinced that what was thereby being performed was anything substantively different from the qualitative evaluation envisaged in the AMI tender document, or the Evaluation Model of 8th June, 1995. The inclusion of quantitative results in the qualitative evaluation was nothing new or different to the qualitative methodology prescribed in the Evaluation Model, which provided that the quantitative indicators were to be the starting point of the qualitative evaluation. The *“holistic”* approach was defined, in Step 17 of the AMI tender document, as the integration of the quantitative and the qualitative evaluations.

30.27 Mr. Andersen's query as to how the quantitative evaluation was to be integrated into the report, and his proposal that the question be left unanswered until the "*final results*" were available, is inconsistent with any decision having been made at an earlier point that the quantitative results were statistically unreliable. It is also inconsistent with Mr. Andersen's evidence that some form of combined or holistic quantitative and qualitative evaluation had been conducted by the sub-groups which was substantively different to the qualitative evaluation contemplated by the Evaluation Model. It is further at odds with the logic and rationale underlying Mr. Andersen's explanation that the quantitative results were excluded as a separate set of results due to their unreliability. If that was the true position, there could have been no reason to postpone that decision until the "*final results*" had emerged. Mr. Andersen's preference to defer that decision can only mean that his views and advice on the appropriate course to take would be dependent on those results.

30.28 As regards Mr. Andersen's proposal that Other Aspects should not be scored if the ranking of the top two applicants could be agreed, he testified that his proposal was justifiable, as the scoring of Other Aspects was optional, rather than mandatory, under the terms of the Evaluation Model. Sensitivities and Risks, which were the dimensions of Other Aspects, were not dimensions of the evaluation criteria established by paragraph 19 of the RFP, and had already been considered in the course of the sub-group evaluations, according to Mr. Andersen. Moreover, they were addressed in the Evaluation Report, and were subject to supplemental analysis, including supplemental financial analysis, which was ultimately comprised in Appendix 10 of the Report.

30.29 It is unnecessary for the Tribunal to express a view as to whether the course proposed by Mr. Andersen was or was not justifiable or legitimate. It does not however strike the Tribunal as optimal, that, the issue of whether Sensitivities and Risks ought or ought not to have been scored, should have turned on whether four people in Copenhagen decided that they could agree a ranking between the two top applicants by reference to the four substantive Aspects. It also appears to the Tribunal that the matter of financial risk, which impacted directly on the condition of demonstrable financial capability, was one that merited very close scrutiny since, on Mr. Andersen's evidence, it did not form part of the comparative evaluation, but fell for separate consideration following the conclusion of the evaluation.

THE COPENHAGEN MEETING OF 28TH SEPTEMBER, 1995

PREPARATORY WORK ON THE OUTSTANDING FINANCIAL KEY FIGURES DIMENSION

31.01 Until the Financial Key Figures dimension was marked, the meeting arranged for 28th September, 1995, in Copenhagen could not proceed, as no grand total for the qualitative evaluation could be reached, without the completion of the constituent marks for each dimension, and possibly also the constituent marks for each Aspect. Mr. Billy Riordan was the sole representative on the Departmental side with financial expertise, and having travelled on two separate occasions to Copenhagen for the purpose of conducting the qualitative financial analysis, his efforts had been frustrated. It is clear from the documentation and the evidence of other witnesses, and in particular that of Mr. Donal Buggy, that Mr. Riordan was far from satisfied with the financial information provided by applicants, or the approach of AMI to this element of the evaluation. On his first trip to Copenhagen, in early September, 1995, Mr. Riordan had highlighted apparent inconsistencies between figures in the mandatory tables and those in the business cases comprised in the body of applications, and had characterised this as a serious problem. Rather than analysing and resolving the apparent inconsistencies, a much lesser exercise had been proposed by Mr. Towey, and had been accepted by AMI, which merely entailed an analysis of the internal consistency of the mandatory tables. Whilst it was intended that both Mr. Riordan and AMI would review the tables, it seems that this task largely fell to Mr. Riordan who, on 15th September, 1995, furnished AMI with a detailed analysis and an outline of the modifications he required to be made. These were not concluded by the time Mr. Riordan arrived in Copenhagen for the meeting on 19th September, 1995, or by the time he departed two days later. It must be said in passing, that whilst Mr. Riordan's misgivings concerning these matters were clearly apparent from the contemporaneous documentation which he had generated, in his testimony to the Tribunal he evinced far less than a clear or full recollection of these matters. Similarly, the unreliability of Mr. Michael Andersen's memory of events was apparent from his evidence that the Financial Key Figures evaluation had completed on 19th September, 1995, even though his own memorandum of 21st September, 1995, subsequent to that date, recorded that the financial dimension had yet to be scored.

31.02 On Tuesday, 26th September, 1995, the day before Mr. Brennan and Mr. Towey were due to travel to Copenhagen, Mr. Jon Brüel of AMI forwarded a set of revised mandatory tables to Mr. Riordan, and indicated that he had checked the figures and felt *“rather confident that the figures are correct”*. Having made that statement, he then drew Mr. Riordan's attention to certain

adjustments he had made to Table 32, which contained figures for IRR sensitivity. Mr. Bruel had made certain adjustments to the year 10 figures, and observed that *“this adjustment does not give an entirely correct assessment of the terminal value, but it represents a ‘qualified guess’”*. It is doubtful that this observation added much to Mr. Riordan’s confidence in AMI’s competence, and, as will become apparent, Mr. Riordan’s misgivings surrounding the financial element of the evaluation became more marked as the overall evaluation proceeded towards conclusion.

31.03 Apart from receiving copies of those revised mandatory tables on Tuesday, 26th September, 1995, Mr. Riordan testified that he had no involvement at all in marking the Financial Key Figures indicators, or in aggregating those indicator marks to arrive at an overall mark for the dimension. Nor, it seems, did he have any opportunity of reviewing the marks awarded by AMI on the basis of the revised mandatory tables, in advance of the Copenhagen meeting on 28th September, 1995, when AMI, in conjunction with Mr. Brennan and Mr. Towey, proceeded to use those marks in order to arrive at a qualitative grand total. It will be seen that, when Mr. Riordan did have an opportunity of examining the marks, in conjunction with Mr. Buggy, some time later, he and Mr. Buggy appear to have shared some fundamental doubts over certain critical elements of the marks awarded.

THE COPENHAGEN MEETING

31.04 There was a dearth of documentary material available to the Tribunal regarding the meeting in Copenhagen on Thursday, 28th September, 1995. Apart from the proposals contained in Mr. Andersen’s faxed communication to the Department of 21st September, 1995, there was no reference in any other document within the Departmental files to that meeting. There was no copy of an agenda for the meeting. There was no contemporaneous note recording what transpired at the meeting. There was no summary prepared, by Mr. Brennan, or by Mr. Towey, or apparently by Mr. Andersen.

31.05 Neither Mr. Brennan nor Mr. Towey had a distinct recollection of how the business of the meeting was conducted. As regards the most critical element of the business transacted, namely, the aggregation of the qualitative marks to arrive at a grand total for that qualitative evaluation, it was Mr. Towey who had the more extensive recollection. Their recollections were however of a different order to those of Mr. Andersen, who had been the initiator of the meeting, having proposed it in his memorandum of 21st September, 1995.

31.06 Mr. Andersen had been asked about the meeting, many years before he attended to give evidence, when the Tribunal had requested that he provide responses to a series of queries in May, 2002. The queries remained unanswered until receipt of his second statement on 20th October, 2010. In the meantime, the Tribunal had notified Mr. Andersen, in common with all affected persons, of Provisional Findings in November, 2008, and in a joint response by Mr. Andersen, and his colleague, Mr. Jon Brüel, the Tribunal was informed as follows:

“According to our recollections supported by available documents, the Tribunal is factually wrong regarding a series of statements related to a meeting in Copenhagen on 28th September. It is correct that a meeting took place, however at another date (18/19 September) than listed by the Tribunal. Minutes were taken with regard to the meeting on 18/19 September, but no minutes were taken concerning any meeting on 28th September. Mr. Andersen and Mr. Brüel were in Sweden on that particular day and not in Copenhagen, and we have no records showing that other. AMI staff members attended a meeting on that day. We know from our records that Mr. Martin Brennan, personally, had an opportunity to meet us that particular day because he was to attend another meeting in Copenhagen not related to the PT GSM. However, we did not meet with him.”

In his second statement to the Tribunal of 20th October, 2010, the contents of which he confirmed in evidence, Mr. Andersen stated the following.

“Michael Andersen does not recall any further meeting with Martin Brennan and Fintan Towey in Copenhagen other than meetings on 18 and 19 September 1995. According to Michael Andersen’s diary, he and Jon Brüel were in Sweden on 28 September 1995. Neither Martin Brennan nor Fintan Towey were present with them in Sweden. Michael Andersen and Jon Brüel were in Sweden on other business. Michael Andersen recalls a conference call around that time but a formal PT GSM meeting, did not, to the best of Mr. Andersen’s recollection, transpire.”

Lest confusion could arise as to the meetings of 18th and 19th September, 1995, adverted to by Mr. Andersen in the above quoted extracts, it should be recorded that he was also in error as to those dates, as the meetings in question were the sub-group meetings which were held in Copenhagen on 19th and 20th September, 1995.

31.07 In the course of his evidence, Mr. Andersen testified that he struggled with his recollection. He thought there had been a number of conference telephone calls in response to his memorandum of 21st September, 1995, when the matters raised by him were discussed and progressed. In responding to Tribunal counsel, his position was somewhat different to that taken in his responses to Provisional Findings and in his statement of October, 2010, in that he stated that, whilst he had no recollection of the meeting on 28th September in Copenhagen, that did not mean that such a meeting did not take place, even though his diary recorded that he and Mr. Brüel were in Sweden that day. What he recollected was a telephone conversation, but he did not reject the possibility that a meeting had taken place.

31.08 By the time Mr. Andersen had been cross-examined on behalf of the Department, and the details of AML's billings for 27th and 28th September, 1995, had been drawn to his attention, including billings for meetings in Copenhagen with Mr. Martin Brennan and Mr. Fintan Towey, on re-examination by Tribunal counsel, Mr. Andersen fully accepted that there had been a meeting in Copenhagen on 28th September, 1995, and that it had been an important meeting, at which the matters raised in his memorandum of 21st September, 1995, were addressed.

31.09 Whilst it was surprising that Mr. Andersen, as lead consultant, and initiator of that meeting, testified to having no memory of it, the Tribunal is in no doubt at all that a critical meeting, convened by Mr. Andersen, proceeded on that day, attended only by Mr. Brennan and Mr. Towey on behalf of the Department. As Mr. Andersen's memory of that meeting was so impaired, his ability to assist the Tribunal as to what transpired on that occasion was constrained, and added little to the evidence which the Tribunal had already heard.

31.10 From Mr. Andersen's memorandum faxed to the Department on 21st September, 1995, it is clear that there were three principal tasks to be undertaken at the meeting:

- (i) the sub-totalling of the Marketing and Financial Aspects;
- (ii) the taking of a decision concerning the evaluation and scoring, or otherwise, of the dimensions of Other Aspects;
- (iii) the aggregation of the marks in the qualitative evaluation to arrive at a grand total for that limb of the evaluation for each of the six applicants, based on the marking matrix contained in the Evaluation Model.

As will become apparent as this chapter unfolds, the Copenhagen meeting in fact went far further than had even been contemplated in Mr. Andersen's fax of 21st September, 1995, in that the product of the meeting was not just regarded as a totalling of the qualitative results, but was treated as something even more far-reaching, namely, a provisional ranking in the entire comparative process.

31.11 In the absence of any contemporaneous written record, the sole documentary source to which reference could be made, in order to assist Mr. Brennan and Mr. Towey in their recollections of events, was the section of the AMI first draft Evaluation Report of 3rd October, 1995, which contained the results of the qualitative evaluation, and which both Mr. Brennan and Mr. Towey agreed represented the product of their endeavours in Copenhagen.

31.12 Mr. Brennan and Mr. Towey travelled to Copenhagen on Wednesday, 27th September, 1995. They were unsure whether their meeting commenced on that day, or on the following day. The meeting was attended by Mr. Brennan, Mr. Towey, Mr. Andersen and Mr. Jon Brüel. In the course of that meeting, whether it spanned one or two days, decisions were taken on the marking of the Financial Key Figures dimension, on the sub-totalling of the Marketing Aspects and Financial Aspects, on the exclusion of Other Aspects, and on the grand total for each applicant in the qualitative evaluation. Most critically, a decision was also made that the outcome of the qualitative evaluation should be the sole determinant of the ranking in the comparative process. Neither Mr. Brennan nor Mr. Towey was able to provide the Tribunal with a comprehensive account of how the business of the meeting was approached, although Mr. Towey was able to furnish the Tribunal with an explanation in relation to certain elements of the work undertaken, which the Tribunal found helpful. As already adverted to, the evidence of Mr. Brennan and Mr. Towey was largely directed to the contents of Section 5 of the first draft Evaluation Report prepared by AMI and dated 3rd October, 1995.

31.13 Before proceeding to deal with the evidence of the deliberations at the meeting, it is helpful to digress briefly to refer to the relevant material contained in that draft Report. Section 5, which was entitled "*Summary, concluding remarks and the recommendation*", comprised five sub-sections. Three of the sub-sections contained tables, each of which were stated to contain the results of the qualitative evaluation, and which were numbered Table 16, Table 17, and Table 18. Mr. Brennan and Mr. Towey confirmed that these tables were the product of their deliberations in Copenhagen on 28th September, 1995. In the draft Report, the tables were accompanied by short narrative passages. Each of the tables will now be reviewed, by reference to the evidence of Mr. Brennan and Mr. Towey on how they were constructed at the Copenhagen meeting.

Table 16

31.14 Table 16, which was contained in Section 5.1 of the draft Report, was described as comprising “the results on the basis of the evaluation of the marketing, technical, management and financial aspects (qualitative award of marks)”. The table as shown in the draft report is reproduced below.

Aspects and dimensions	A1	A2	A3	A4	A5	A6
Market development	C	C	B	C	A	C
Coverage	B	C	A	C	A	D
Tariffs	C	D	B	C	C	A
International roaming plan	A	D	C	C	C	C
Marketing aspects (subtotal)	B	C	B	C	A/B	C
Radio network architecture	C	C	B	B	A	D
Capacity of the network	C	D	C	B	A	C
Performance guarantee	D	E	C	B	A	C
Frequency efficiency	A	C	A	A	A	A
Technical aspects (subtotal)	B	C	B	C	A/B	C
Financial key figures	A	C	B	C	B	C
Licence payment	(A)	(A)	(A)	(A)	(A)	(A)
Financial aspects (subtotal)	A	C	B	C	B	C
Experience of the applicant	C	D	A	C	B	C
Management aspects (subtotal)	C	D	A	C	B	C
GRAND TOTAL	B	D	B	B/C	A/B	C
RANKING	3	6	2	4	1	5

31.15 The following text appeared immediately below the table:

“The marks awarded under each aspect and each dimension are outlined in table 16, whereas the award of marks to the indicators and sub-indicators appears in chapter 3.

As seen from table 16, the evaluation has produced the following results concerning the 3 best applications:

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

with the indicated ranking. The difference between A5 and A3 is approximately the same as the difference between A3 an [sic] A1.”

31.16 Table 16 was in the form of the marking matrix for the qualitative evaluation, as contained in the Evaluation Model, save for the omission of marks

for Other Aspects. It contained the marks for each of the eleven dimensions, together with an aggregation of the marks to produce sub-totals for each of the four Aspects. In the draft report of 3rd October, 1995, there was a transcription error in the marks shown for the Technical Aspects sub-total, which was subsequently corrected, and the table as shown above is in its corrected form.

31.17 What was not shown in Table 16, or referred to anywhere in the narrative, were the weightings applied to each of the dimensions, in order to arrive at the Aspects sub-totals, or the grand totals. Before proceeding to construct Table 16, or any other table, the meeting had to aggregate the Marketing Aspects dimensions and the Financial Aspects dimensions, in order to arrive at sub-totals for each. The determination of a sub-total for Financial Aspects was straightforward. There were only two financial dimensions, that is, Financial Key Figures and Licence Fee. As all six applicants provided for payment of the ceiling level licence fee of £15 million, all six had been awarded an A grade for that dimension. Accordingly, the marks awarded for the Financial Key Figures dimension were the sole determinant of the Financial Aspects sub-totals. The marks for that dimension and its constituent indicators had been awarded by AMI without the input of Mr. Riordan. Although he had no opportunity to review and alter or approve those marks, the Copenhagen meeting proceeded to use them in constructing the tables which ultimately appeared in the draft Report of 3rd October, 1995, and in arriving at a provisional ranking. The results of the Financial Aspects are shown in the table below, which is an extract from Table 16.

Aspects and dimensions	A1	A2	A3	A4	A5	A6
Financial key figures	A	C	B	C	B	C
Licence payment	(A)	(A)	(A)	(A)	(A)	(A)
Financial aspects (subtotal)	A	C	B	C	B	C

31.18 The aggregation of the four Marketing Aspect dimensions, Market Development, Coverage, Tariffs, and International Roaming Plan, was a more demanding exercise, entailing the use of judgement by the participants. The results of that exercise are shown in the table below, which is also an extract from Table 16, and was also presented in the Evaluation Reports as Table 1.

Aspects and dimensions	A1	A2	A3	A4	A5	A6
Market development	C	C	B	C	A	C
Coverage	B	C	A	C	A	D
Tariffs	C	D	B	C	C	A
International roaming plan	A	D	C	C	C	C
Marketing aspects (subtotal)	B	C	B	C	A/B	C

31.19 In common with the Tribunal’s consideration of the aggregation of indicator results to produce totals for the dimensions by sub-groups, there was no consistency in the apparent weightings used in the aggregation of the four Marketing Aspects dimensions. A consideration of the sub-totals for A2 and A5, which, with respective constituent marks of C, C, D, D, and A, A, C, C, earned marks of C for A2, and A/B for A5, suggests that the first two dimensions, that is, Market Development and Coverage, were allocated a higher weighting than the third and fourth dimensions. The adoption of such weightings would have been very surprising, as they would not have respected or reflected the relative importance attached to those dimensions, prior to the closing date of the process. The weighting of those four dimensions, as provided for in the Evaluation Model, and their consequent comparative ranking, is as shown in the table below.

DIMENSION	RANKING	WEIGHTING
Tariffs	1	18
Market Development	2=	7.5
Coverage	2=	7.5
International Roaming	4	6

Had those weightings and ranking been respected, it would not have been possible for A2, with a D grade for Tariffs, and A5 with a C grade for Tariffs, to have been awarded overall grades of C and A/B respectively. What is equally surprising is that that apparent weighting does not hold true for the aggregation of the marks awarded to A3, which, with constituent marks of B, A, B and C, was awarded an overall sub-total of B for Marketing Aspects.

31.20 Had these four dimensions been aggregated in the manner used by Mr. John McQuaid, Mr. Aidan Ryan and Mr. Marius Jacobsen in arriving at a sub-total for Technical Aspects, whereby they sought to respect the relative ranking and weighting of the constituent dimensions, as agreed prior to the closing date of the competition, by means of a numerical operation, a very different set of results would have emerged. The equivalent exercise for the four Marketing Aspects dimensions is illustrated in the table below. The starting point of the exercise reflected in that table is the recasting of the weightings for the four dimensions, Tariffs, Market Development, Coverage and International Roaming, on a base of 100, which yields weightings of 46.2, 19.2, 19.2 and 15.4 respectively.

DIMENSION	WEIGHTING	A1	A2	A3	A4	A5	A6
Tariffs	46.2	C(3)	D(2)	B(4)	C(3)	C(3)	A(5)
Market Development	19.2	C(3)	C(3)	B(4)	C(3)	A(5)	C(3)
Coverage	19.2	B(4)	C(3)	A(5)	C(3)	A(5)	D(2)
International Roaming	15.4	A(5)	D(2)	C(3)	C(3)	C(3)	C(3)
Total weighted score on base of 500		350	238.4	403.8	300	376.8	373.2
Total weighted score on base of 100		70	47.68	80.76	60	75.36	74.64
Re-conversion to grades		B/C	C/D	B	C	B/C	B/C
Copenhagen Meeting Grades		B	C	B	C	A/B	C

31.21 As is clear, the results would have been very different if the Copenhagen meeting had applied implicit weightings which even approximated to those agreed prior to the closing date, or which respected the relative ranking of the four dimensions. Those differences are particularly marked in the case of A5, Esat Digifone, and A6, Eurofone. It is anomalies and inconsistencies of this type, which repeatedly arose in the Tribunal’s consideration of the evaluation, that the Tribunal has found exceedingly difficult to understand or reconcile. The Tribunal is conscious that it is no part of its function or remit to review the evaluation process independently of its Terms of Reference. It is however the case that striking and inexplicable deviations of this type cannot but contribute to a view that the process, as it was implemented, departed significantly from the Evaluation Model, and fell far short of the standard of professionalism and reliability that might have been expected. In making these observations, it must of course be borne in mind that AMI, the independent consultants engaged by the Department, had a central role in the actions taken, and decisions made, in the implementation of the process. Mr. Michael Andersen was unable to elucidate these matters when he attended to give evidence, although, as already alluded to in Chapter 22 of this Volume, he referred the Tribunal to the role of confidence factors in the aggregation of marks, that is, the evaluators’ perception of the relative strength or weakness of apparently equivalent marks, as an element in that process. Whilst that may undoubtedly account for some part of the apparent anomalies, it will be seen that discrepancies and divergences of this type continued to perturb members of the Project Group in the closing days of the process.

31.22 Returning to Table 16 itself, there was nothing in the short narrative which appeared in the first draft Report, and is quoted above, to explain how the dimensions were weighted, or how the marks were accumulated, to arrive at a grand total. Nor was there any indication of whether, in arriving at a grand total, it was the sub-totals which were aggregated, and if so, whether those sub-totals were themselves weighted. It is also striking that the final statement in the narrative quoted above that *“The difference between A5 and A3 is approximately the same as the difference between A3 and an [sic] A1”* is self-evidently at odds with the grand total marks as shown in the table.

31.23 Neither Mr. Brennan nor Mr. Towey could be of any assistance as to how they went about constructing the Aspects sub-totals, or the grand totals shown in Table 16. What is apparent is that, at some stage over the one or two day meeting, the Marketing Aspects were sub-totalled, and the provisional marks for the dimension Financial Key Figures, which had not yet been reviewed or approved by Mr. Riordan, were inserted into the table, and were used for the purpose of arriving at a grand total and a ranking. Mr. Brennan’s sole concrete recollection of Table 16 related, not to how the table was constructed, but to his dissatisfaction with the manner of presentation of the results, which he found to be unclear and unconvincing. Mr. Andersen testified that Table 16 represented the product of the qualitative evaluations undertaken by sub-groups over the previous weeks, and that the table was constructed from the bottom up. In other words, the constituent dimension marks had emerged in the course of the sub-group evaluations, and it was only the task of aggregation that was undertaken in response to his memorandum of 21st September, 1995.

Table 17

31.24 Table 17 was contained in Section 5.3 of the draft Report, and was described as *“The results based on a re-grouping of the criteria”*. In the draft Report, the following text appeared immediately above Table 17.

“In order to investigate whether the conclusions of the evaluators are consolidated on the basis of [paragraph] 19 of the RFP document, the evaluators have carried out a separate conformance testing.

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

The draft Report then presented Table 17 which is reproduced below:

Dimension	Weight	A1	A2	A3	A4	A5	A6
Market development	10	C	C	B	C	A	C
Financial key figures	10	A	C	B	C	B	C
Experience of applicant	10	C	D	A	C	B	C
Radio network architecture	10	C	C	B	B	A	D
Capacity of the network	10	C	D	C	B	A	C
Tariffs	18	C	D	B	C	C	A
Licence payment	11	A	A	A	A	A	A
Coverage	7	B	C	A	C	A	D
Roaming	6	A	D	C	C	C	C
Performance guarantees	5	D	E	C	B	A	C
Frequency efficiency	3	A	C	A	A	A	A
GRAND TOTAL		B↓	C↓	B	B↓	B↑	C↑
RANKING		3	6	2	4	1	5

The following text followed it:

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

From this, it can be concluded that the 3 best applications are the following:

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

with the indicated ranking.”

The weighting as shown in Table 17 was described in the next sub-section of the draft Report as the weighting mechanism “agreed prior to the closing date.”

31.25 As is apparent from an inspection of Table 17, and as confirmed by Mr. Brennan and Mr. Towey, the table contained exactly the same constituent marks as Table 16, namely, the marks given for each of the eleven dimensions in the qualitative evaluation. All that was omitted from Table 17 were the sub-totals for each of the four Aspects into which those dimensions had been grouped. The Aspects framework was removed, and the dimensions were reordered, to reflect the ranking of the evaluation criteria to which they related. The significant additional element of Table 17 was the inclusion of numerical weightings,

described in the draft Report as the weightings that had been agreed for the quantitative evaluation prior to the closing date. As with Table 16, the narrative was silent as to how these numerical weightings were applied to the marks for each of the eleven dimensions, to arrive at a grand total for each applicant.

31.26 Table 17 was described in the draft Report as the product of “*separate conformance testing*”, to investigate “*whether the conclusions of the evaluators are consolidated on the basis of [paragraph] 19 of the RFP document*”. It was agreed by all Departmental witnesses that what this statement meant was that Table 17 was subsidiary to Table 16, and that its purpose was to verify the reliability of the results which had emerged from the qualitative evaluation.

31.27 The evidence of both Mr. Brennan and Mr. Towey focused on two related features of Table 17: firstly, the manner of its construction, and secondly, the weightings applied. The relevant evidence will now be reviewed.

The construction of the table

31.28 Whilst Mr. Towey testified that his recollection of the construction of Table 17 was not clear, his evidence of how he thought the meeting went about the task of generating the table was, in the view of the Tribunal, a lucid and logical account, and in all probability represented a fair summary of what in fact occurred in Copenhagen. Mr. Towey explained that, in marking Table 17, they had proceeded in the first instance by focusing on the grades for A3 and A5, the lead candidates, with the paramount intention of seeking to separate them, and to determine their respective rankings. He thought that they analysed the grades of A3 and A5 for each of the eleven dimensions as follows:

- (i) on the first evaluation criterion, as represented by the dimensions Market Development, Financial Key Figures and Experience of Applicant, Mr. Towey observed that as both A3 and A5 had each been awarded one A and two Bs, they were treated as equal, so that the marks for that criterion could not assist in separating them;
- (ii) on the second criterion of Technical Ability, represented by the dimensions Radio Network Architecture and Capacity of the Network, A5 was clearly superior;
- (iii) on the third criterion, Tariffs, A3 was superior to A5;
- (iv) on the fourth, fifth and sixth criteria, Licence Fee, Coverage and International Roaming, A3 and A5 had been awarded equal marks;

- (v) on the seventh criterion, Performance Guarantees, A5 was superior to A3;
- (vi) and on the final criterion, Frequency Efficiency, A3 and A5 had also been awarded equal marks.

31.29 It was Mr. Towey's evidence that it was by means of the analysis which he had described that the meeting had divided A3 and A5, and arrived at their relative ranking. Their reasoning was that, as A5 was a grade and a half ahead on the Technical Ability criterion, and was also ahead on the Performance Guarantees criterion, as against A3's superiority on Tariffs, which was ranked behind Technical Ability in the order of ranking of the evaluation criteria, they reached the conclusion that A5 was the better applicant. They accordingly awarded a B⁺ for A5, Esat Digifone, and a B for A3, Persona, and they then proceeded to rank and mark the other four applicants relative to A3 and A5.

31.30 Whilst Mr. Towey could not recall the precise sequence of the construction of the tables in Copenhagen, he thought it quite possible that, in generating the tables which were the output of their work, Table 17 may well have been their starting point, and that, having concluded the exercise that he described, they may then have proceeded to mark Table 16. Mr. Towey accepted that the explanation, which he had given to the Tribunal, did not accord with what was stated in the draft Report. He also accepted that there was no reference to workings of the type he had described in the text accompanying Table 17. He recognised that, to that extent, the text may have been inaccurate.

Weightings

31.31 Whilst it appears from the evidence of Mr. Towey that the weightings as shown on Table 17 were not applied by means of any numerical or precise exercise in arriving at a grand total for each applicant, they were nonetheless shown in the table, and were applied in an approximate manner, in that in seeking to separate A3 and A5, the ranking of the evaluation criteria had been respected.

31.32 The weightings which were shown for each of the eleven dimensions were defined in the draft Report as the weightings agreed for the quantitative evaluation prior to the closing date of the process. That definition holds true for the weightings shown for eight of the eleven dimensions, but is not correct for the weightings shown for the first three dimensions in the table, being the dimensions of the premier evaluation criterion, Credibility of Business Plan and Applicants' Approach to Market Development. It will be recalled that the weightings proposed for these dimensions by AMI in the initial draft Evaluation

Model of 18th May, 1995, were 10, 10, and 10, but that, following discussion by the Project Group, these were revised and fixed at 15 for Financial Key Figures, 10 for Experience of Applicant, and 7.5 for Market Development. It was these latter weightings which were the weightings allocated to the dimensions in the Evaluation Model, and it was these weightings that were the weightings agreed for the quantitative evaluation prior to the closing date.

31.33 The application of the 10/10/10 split weighting, rather than the 7.5/15/10 split which had been agreed, was, as will be seen, a matter of considerable significance, and in evidence the Tribunal sought to ascertain why there had been a departure from the agreed quantitative weightings for these three dimensions only. Mr. Brennan could not assist the Tribunal: he did not know what caused them to settle on weightings of 10/10/10 in Copenhagen. Mr. Towey had what he described as a general recollection of those weightings being agreed in Copenhagen, and he presumed they were agreed on the basis that the three dimensions were judged to be of more or less equal importance, and that an appropriate way to reach an overview of the criterion was to weight each of them equally. That of course was an entirely different view to the one taken by the Project Group when fixing the weightings for the quantitative evaluation, and revising AMI's initial proposal of an equal split. There was no record anywhere of the decision of which Mr. Towey gave evidence, nor was there evidence that the decision had ever been relayed to or adopted by the Project Group, and Mr. Towey could not say that a record had been made at the time.

31.34 The Tribunal had expected that Mr. Andersen, as lead consultant, would be able to clarify this matter when he attended to give evidence. However, his evidence with regard to the application of equivalent weightings to the three dimensions of the first-ranked criterion, as shown in Table 17, far from clarifying matters, added to the confusion and uncertainty surrounding the issue. There were three strands to his evidence. Firstly, he testified that the 10/10/10 split weightings, as applied in Table 17, were the correct weightings, even though they did not accord with the quantitative weightings recorded in the Evaluation Model as adopted by the Project Group. This was because the quantitative weightings, as shown on page 17 of the Evaluation Model, were incorrect, as they aggregated to 32.5, rather than 30, and were inconsistent with the criteria weightings recorded by Ms. Maev Nic Lochlainn in her notes to file of 31st May, 1995, and 27th July, 1995. Those non-equivalent quantitative weightings were incorrect, even though they were the weightings applied by Mr. Mikkel Vinter when he generated the three sets of quantitative results on 30th August, 1995, 20th September, 1995, and 2nd October, 1995, when in each case non-equivalent weightings which respected the internal ranking of the three dimensions, as reflected by the 7.5/15/10 split, were applied. Mr. Andersen's evidence was also inconsistent with the documentary records, which although

noting, on 4th September, 1995, that weighting corrections were to be made to the quantitative results, to reflect the 3% shift in weightings, made no reference whatsoever to any alteration to the relative weighting applied to those three dimensions. Lastly, Mr. Andersen's evidence in that regard was at odds with the clear record made by Ms. Nic Lochlainn on 9th June, 1995, when the Project Group met and approved the Model, that the weighting of 7.5 for the dimension Market Development had been agreed.

31.35 The second strand to Mr. Andersen's evidence was that at some point prior to the closing date for receipt of applications on 4th August, 1995, a decision had been made that the quantitative weightings for those three dimensions should revert to the equivalent weightings of 10/10/10, as proposed by him in the draft Evaluation Model of 18th May, 1995. He regretted that there was no audit trail which he could find which documented that decision. If any such decision was made, it seems that Ms. Nic Lochlainn, who had so carefully and painstakingly implemented a written procedure to record the 3% weighting shift from the Licence Fee criterion to the Tariffs criterion, overlooked the decision on the split weightings of the dimensions of the first criterion. If the decision was made otherwise than by way of written procedure, it is unclear when or by whom it was made, as there was no Project Group meeting from 9th June, 1995, when the Evaluation Model was adopted, to 4th September, 1995, when the Project Group met to consider the first set of quantitative results.

31.36 The third strand to Mr. Andersen's evidence on this issue was that equivalent weightings were applied by the Copenhagen meeting, as appeared in Table 17 of the draft Evaluation Report of 3rd October, 1995, and as those weightings remained unchanged as between that draft, the second draft of 18th October, 1995, and the final Evaluation Report of 25th October, 1995, those weightings must have been approved by the Project Group as a whole, which met on 9th October, 1995 and 23rd October, 1995. In other words, if the weightings were altered in Copenhagen, that alteration was adopted and approved by the Project Group as a whole. As to whether it would be a serious step to change the weightings after the closing date of the process, Mr. Andersen was equivocal: he answered both yes and no, as he did not think that there was any more specific mandate than that the evaluators respect the descending order of priority of the evaluation criteria. His reasoning in that regard did not accord with the agreement of the Project Group that a weighting matrix should be adopted prior to the completion date, nor did it accord with the weightings scheme of the Evaluation Model proposed by him, and adopted by the Project Group, subject to amendment, which specified weightings at indicator level, which was the means by which applications were to be compared and evaluated quantitatively. To suggest that those weightings were not intended to be settled prior to the closing date of the process was contrary to every statement and assurance furnished

after the process had concluded. It should be added for completeness that no reference whatsoever was made to this weightings issue in the Evaluation Report, or in the AMI memorandum submitted to the Tribunal in January, 2002.

31.37 The Tribunal finds it exceedingly difficult to understand what could have prompted such a departure from the prescribed weightings in the case of these three dimensions. It is clear that, as regards all other dimensions, the correct quantitative weightings as provided in the Evaluation Model were used. Mr. Brennan and Mr. Towey testified that the weightings they had in mind at the time were the weightings at criterion level, rather than at dimension or indicator level. However, this explanation does not stand up to scrutiny, as it is clear that the reference in the text to the quantitative weightings was a reference to the weightings as shown in Table 17, namely the weightings at dimension level. It is also evident that in the case of the second multidimensional criterion, namely Quality and Viability of Technical Approach, the weightings stipulated in the Evaluation Model for each of the two dimensions, that is, 10 and 10, were correctly applied, rather than the weightings initially proposed at dimension level by AMI of 15 and 5. It is a matter of grave concern to the Tribunal that, as will become apparent in the context of a consideration of the totality of the draft Reports, at a later stage in the process the quantitative weightings recorded in the Evaluation Model, as reproduced in an Appendix to the final Report, were altered to conform with the 10/10/10 split weighting, applied by the Copenhagen meeting, and shown in Table 17.

31.38 The consequence of the application of the equivalent split weighting had a significant impact on the reasoning used in separating A3 and A5, as advanced by Mr. Towey. In seeking to separate the ranking of A3 and A5, the application of that split meant that A3 and A5, with one A and two Bs each, were treated as having equivalent marks for the first-ranked criterion. With A5’s superiority on the second and seventh criterion, as against A3’s superiority on the third criterion, the Copenhagen meeting concluded that overall A5 had submitted the better application. If, however, the Evaluation Model quantitative split weightings had been applied to those three dimensions, the results for the first-ranked criterion would have been as illustrated in the table below.

DIMENSION	WEIGHTING	A3	A5
Market Development	7.5	B	A
Dimension financial key figures	15	B	B
Experience of applicant	10	A	B

31.39 As is apparent, A3’s A, for Experience of Applicant, would have been worth more than A5’s A for Market Development, and consequently A3 would have to have been deemed superior to A5, on the premier criterion. Mr. Towey accepted that that would have been the effect of the use of the correct weightings, and he also accepted that, in that event, A3 would have been superior on the first-ranked, as well as on the third-ranked, criterion. He also accepted that it would have been very difficult for the meeting to have separated A3 and A5 in the manner which he had described. Mr. Towey however testified that it was not the case that they had initially endeavoured to separate A3 and A5 in Copenhagen, by applying the 7.5/10/15 quantitative weightings, and that having failed to do so, they then proceeded to alter the weightings in order to obtain a result. Whilst Mr. Andersen’s concept of the confidence interval surrounding the As and Bs of A3 and A5 might have had an impact, it was not a consideration which featured at any point in the evidence of Mr. Towey.

31.40 Had the 7.5/15/10 weightings for the first three dimensions been adopted, the consequences could have been more far-reaching than those contemplated by Mr. Towey. It might not simply have been the case that the Copenhagen meeting would have found it difficult to separate A3 and A5, rather it is far from evident how that meeting could have concluded, by means of the analysis described by Mr. Towey, that A5, Esat Digifone, with an advantage on the second and seventh criteria, should be ranked ahead of A3, Persona, with an advantage on the first and third criteria.

Table 18

31.41 Table 18, as contained in Section 5.4 of the draft Report, was described as the “*results on the basis of the application of a quantitative scoring model (conversion of marks to points)*”. The following narrative appeared in the draft Report immediately above Table 18:

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

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

31.42 Table 18 was then presented and is reproduced below:

Dimensions	Weight	A1	A2	A3	A4	A5	A6
Market development	10	C	C	B	C	A	C
Financial key figures	10	A	C	B	C	B	C
Experience of applicant	10	C	D	A	C	B	C
Radio network architecture	10	C	C	B	B	A	D
Capacity of the network	10	C	D	C	B	A	C
Tariffs	18	C	D	B	C	C	A
Licence payment	11	A	A	A	A	A	A
Coverage	7	B	C	A	C	A	D
Roaming	6	A	D	C	C	C	C
Performance guarantees	5	D	E	C	B	A	C
Frequency efficiency	3	A	C	A	A	A	A
SCORING (POINTS)		362	268	410	353	432	347
RANKING		3	6	2	4	1	5

The following further text appeared below the table:

“As illuminated by table 18, the quantitative scoring of the applications generates the same ranking of the applications. Thus, also this method lead to the following nomination of the 3 best applications:

- 1. A5*
- 2. A3*
- 3. A1*

with the indicated ranking.”

31.43 As is apparent from an inspection of the table, and as was confirmed by Mr. Brennan and Mr. Towey in evidence, Table 18 represented no more than a recasting of Table 17, with the results converted from graded marks to numerical scores. It was generated by converting each of the lettered grades to numerical scores, by multiplying each of those scores by the numerical weightings shown, and by combining the numerical scores to arrive at total scores in points. The same weightings were applied as in Table 17, including the 10/10/10 split weightings for the first three dimensions, and these weightings were also defined as the quantitative weightings agreed prior to the closing date of the competition.

31.44 It was this table which featured most prominently in Mr. Brennan’s memory, and in his evidence. He testified that he could not see a clear ranking based on the results as presented in the form of lettered grades. What he wanted was a table which demonstrated that the descending order of the evaluation criteria had been respected, and which presented the results in

numerical form. Mr. Brennan recalled that it was he who had suggested the conversion of grades to marks, the application of the numerical weightings to those numerical scores, and the aggregation of those scores to give total scores in points.

31.45 Both Mr. Brennan and Mr. Towey testified that, at the outset, Mr. Andersen resisted their proposal, and was against the presentation of what was a qualitative ranking in a quantitative form. It was Mr. Towey's evidence that Mr. Andersen had some difficulty with the conversion of grades to numbers, and opposed that approach. Whilst Mr. Towey could not recall what arguments Mr. Andersen had advanced at the time, he did not consider them convincing, and he testified that he and Mr. Brennan were at a loss to understand Mr. Andersen's reluctance. Whilst it appears from the inclusion of Table 18 in the draft Report of 3rd October, 1995, that Mr. Andersen was prepared to go along with Mr. Brennan's view, it seems to the Tribunal that, by inserting the passage in the text that "*such a calculation distorts the idea of a qualitative evaluation*", a significant reservation, Mr. Andersen placed a serious caveat over the reliability of Table 18.

31.46 Mr. Brennan and Mr. Towey testified that they placed great store on the numerical results as shown in Table 18, which they regarded as clear and convincing, and a form of presentation in which they could place confidence. They did nonetheless accept in evidence that the results, as shown in Table 18, were also based on the application of the even split weightings of 10/10/10 to the first three dimensions, and that, even with the application of that split, which accrued to the benefit of A5, Esat Digifone, the separation of 22 points, on a base of 500, between A5 and A3, amounted to less than a 5% differential on the qualitative assessment. They also accepted that, had the uneven split weightings of 7.5/15/10 been applied to the first three dimensions, the numerical differential would have been even narrower. They did not dispute that, had the numerical marks been reconverted to grades, as had been done by Mr. John McQuaid, when aggregating the marks for indicators to arrive at totals for the four technical dimensions, and further when totalling the four technical dimensions to arrive at marks for Technical Aspects, the result would have been B for A3, and B for A5.

31.47 Mr. Andersen did not recall Mr. Brennan telling him that the presentation of the results in Table 16 left him in the dark as to the ranking. It was his recollection, even though he had no memory of the Copenhagen meeting, that it was easier for Mr. Brennan to comprehend the result when shown in figures, rather than letters. He confirmed that the idea of working with figures rather than letters came from some of the civil servants, and that it was

proposed by Mr. Brennan. He agreed that he was reluctant to switch from letters to numbers, as the evaluation of the sub-groups had been conducted by reference to lettered grades. His recollection was that he had used the phrase that he “*was not particularly fond of that exercise.*”

31.48 Mr. Andersen agreed that the difference between A3 and A5, as shown numerically in Table 18, was probably less than 5%. He also agreed that, in describing the differential of 5.7% between the first and second-ranked applicants in the first set of quantitative results, he had used the appellation “*close*”, but he stressed that in that instance there was a statistical uncertainty surrounding those results. In this instance, it seems to the Tribunal that, as a matter of common sense, there was a series of factors equivalent to the statistical uncertainty attached by Mr. Andersen to the quantitative results, including the subjectivity of the exercise, the representation of what were soft scale grades as hard scores, and the risk of arbitrariness attendant on the accumulation of weighted scores, as cautioned by AMI in their tender document.

The output of the meeting

31.49 What there was no reference to at all in Section 5 of the AMI first draft Report were the results of the quantitative evaluation. What would have been available to the Copenhagen meeting on 28th September, 1995, was the second set of quantitative results of 20th September, 1995, copies of which had been provided to Mr. Brennan, Mr. Towey, and Mr. Riordan when they were in Copenhagen during the previous week for the third qualitative evaluation session. The scores according to those results of 20th September, 1995, were as follows:

A1	A2	A3	A4	A5	A6
2.77	2.62	3.22	2.67	2.85	2.91

31.50 In his 21st September, 1995, memorandum, which had been faxed to Mr. Brennan and Mr. Towey, Mr. Andersen had indicated that a decision had to be made by the Department as to the course which should be taken regarding the quantitative evaluation. At this juncture, it is of assistance to refer briefly back to what had been proposed by AMI in their tender document, to what had been provided in the Evaluation Model adopted by the Project Group, and to what had been agreed with regard to the quantitative evaluation at the Project Group meeting of 4th September, 1995, at which the first set of quantitative results had been considered.

31.51 In their tender document, AMI had recommended a dual quantitative and qualitative approach to the evaluation. They had highlighted the difficulties of totalling results consequent on the application of weightings, and had cautioned that the aggregation of results would inevitably introduce an element of arbitrariness. They had therefore proposed that both quantitative and qualitative approaches should be used, in order to maximise “*the validity and reliability*” of the results. They had also stressed that a further advantage of adopting a dual approach was that each technique frequently produced the same end result, thereby supporting the methodology used.

31.52 The Evaluation Model, which itself stipulated that it should be read in conjunction with the tender document, provided for both a quantitative and qualitative approach. The final version of the Model, dated 8th June, 1995, contained an additional Section 7 which addressed “*The interplay between the quantitative and qualitative evaluation*” and which provided as follows.

“When the bulk of the qualitative evaluation has been performed, however, this evaluation will conversely form the basis for a recalculation of scoring applied initially if mistakes, wrong information or similar incidentals can be documented.

The results of both the quantitative and the qualitative evaluation will be contained in the draft report with annexes to be prepared by the Andersen team.”

The Evaluation Model itself was, as will be recalled, primarily devoted to the mechanics of the quantitative evaluation, and the mathematical formulae by which indicators would be scored quantitatively.

31.53 The official report of the Project Group meeting of 4th September, 1995, recorded that the Project Group had considered the first set of quantitative results, and had agreed that the quantitative analysis “*would be returned to after both the presentations and the qualitative assessment*”. There was nothing in the official report of the post-presentation Project Group meeting of 14th September, 1995, or in any other document, that recorded any qualification to, or departure from, that agreement.

31.54 It is unclear how an issue arose on 21st September, 1995, as to the course to be taken in relation to the quantitative evaluation, as it is evident that the matter had already been settled by the Project Group on the previous 4th September, 1995. In the light of what transpired, it is surprising that neither Mr. Brennan nor Mr. Towey could recall any discussion of the quantitative evaluation,

or the decision that must have been taken at the Copenhagen meeting that the results of the quantitative evaluation should be excluded, that the overall ranking of applicants should be confined to the qualitative evaluation results, that the grand total should be arrived at by reference to Table 17, which appears to have been generated by the process described by Mr. Towey, and that the resultant outcome should be treated as a provisional ranking in the entire evaluation. In treating the results of the qualitative evaluation as a provisional ranking, it follows that a decision must have been taken at the Copenhagen meeting that there should be no revisiting of the quantitative evaluation, notwithstanding that AMI's own tender document recognised that in the absence of a dual approach, there could be adverse repercussions for the reliability of the result.

31.55 This was indeed the net effect of what occurred at the Copenhagen meeting. Mr. Brennan and Mr. Towey regarded the product of their endeavours as a provisional result, subject to supplemental analysis to be completed by AMI, which result had yet to be approved by the Project Group. They accepted that, as matters unfolded, after the Project Group meeting of 14th September, 1995, decisions of fundamental significance to the process had been made by them, albeit in conjunction with AMI, without the authority of the Project Group. It is yet again of some assistance to bear in mind the distance which Mr. Brennan, Mr. Towey and AMI had progressed the evaluation beyond what had been contemplated or agreed by the Project Group, at its meeting of 14th September, 1995, the official report of which recorded under the subheading *"How to progress the Evaluations"* as follows.

"AMI listed the next steps as:

- 1. finalise the qualitative scoring and award marks on the dimensions,*
- 2. perform initial scoring of the aspects, and*
- 3. perform supplementary analysis in:*
 - blocking/drop-out*
 - financial analysis concerning SIGMA/ADVENT*
 - adherence to EU procurement rules*
 - tariffs*
 - interconnection (since assumptions vary widely between applicants)."*

31.56 No reference of whatsoever nature was made in that report to bringing the qualitative evaluation or the overall evaluation to a conclusion. Rather, what

was authorised was the finalisation of the qualitative marking of dimensions, the performance of “initial scoring” of Aspects, and the conduct of supplemental analysis. Not only had Mr. Brennan and Mr. Towey, together with AMI, decided on much more than an “initial scoring” of Aspects, they had determined how an overall ranking in the qualitative evaluation should be arrived at, how it should be presented, without reference to the Project Group they had determined that ranking, and recast the structure of the evaluation process to produce a provisional result.

31.57 In taking this course, the Copenhagen meeting seemingly cast to one side the fundamental structure of the intended methodology, and ignored the concerns and cautions which had been expressed by AMI, and separately by Mr. Brennan, in advance of, and during the course of the process, up to 28th September, 1995. Apart altogether from the contents of the tender document, and the Evaluation Model, it will be recalled that, as recorded in the official report, Mr. Andersen at the Project Group meeting of 19th April, 1995, advised that, without some form of quantification, the process would be open to challenge by the European Commission. Mr. Brennan, in responding officially to the concerns of the Department of Finance surrounding the adoption of a weighting matrix, by letter dated 3rd May, 1995, cautioned that, in the absence of a weighting matrix:

“The only alternative, is to make a recommendation based on intuitive analysis of the relative merits of the applications based on marks under each heading of the selection criteria.”

and further warned that:

“such a process would however, in my view, introduce an element of subjectivity which does not meet the emerging EU requirements of objectivity and transparency and non-discrimination.”

31.58 Further, in the course of Mr. Andersen’s evidence, he was asked whether it was unusual or exceptional in his extensive experience that a quantitative evaluation should have “withered”, as he put it, to the extent that it could not be relied upon as a separate or self-contained unit of the evaluation, given that, from the third Irish GSM competition and some other continental competitions involving Mr. Andersen, it appeared the norm that both quantitative and qualitative evaluations proceeded. His response was as follows.

“...it was rather exceptional because, in most cases, we would be able to finalise a robust quantification if we had a quantification included, but due to the problems we have encountered during this particular

evaluation, I could not defend, on purely scientific statistical grounds, to arrive at a final report or a final result, and I think mainly, if that is of assistance to the Tribunal, that it points back to the less-than-perfect RFP document.”

31.59 In excluding the quantitative results as a separate output of the evaluation, and in adopting the technique described by Mr. Towey in his evidence, the participants at the Copenhagen meeting fell into the very trap which had been identified by Mr. Brennan in his letter of 3rd May, 1995. They arrived at a ranking by an intuitive comparison of the performance of applicants, on a qualitative judgmental assessment of the eight evaluation criteria, by reference to their descending order of priority. The weighting mechanism, although shown in Table 17, played little part in the deliberations which led to the ranking of the applicants, as shown in that table, and its apparent use in Table 18 was both a questionable exercise, as recorded by AMI, and was of very little functional value. In proceeding as they did, and by separating the two top-ranked applicants by means of that intuitive process, they treated the three dimensions of the first-ranked criterion as being of equal importance, even though that was contrary to the recorded determination of the Project Group prior to the commencement of the process. They ignored the output of the separate quantitative evaluation, they failed to revisit it in the light of the results of the qualitative evaluation, and they proceeded to produce a provisional ranking, which, according to the AMI tender document, was based on a methodology, the reliability and validity of which must be regarded as suspect.

ARRIVAL AND RETURN OF THE ESAT DIGIFONE UNDERWRITING LETTER

32.01 Mr. Martin Brennan and Mr. Fintan Toweey completed their Copenhagen meeting on Thursday, 28th September, 1995. Mr. Toweey flew back to Dublin directly, and was in attendance in the Department on the following day, Friday, 29th September, although he was unsure whether he travelled back from Brussels on the evening of Thursday 28th, or on the morning of Friday, 29th, September. Mr. Brennan flew from Copenhagen to Brussels for a meeting, in connection with an unrelated matter on Friday, 29th September, and did not return to his office in the Department until the following Monday, 2nd October, 1995.

32.02 On Friday, 29th September, 1995, a letter was faxed to the Department's dedicated GSM competition fax number, marked for the attention of Mr. Brennan. This was Mr. Dermot Desmond's underwriting letter in respect of the intended shareholding of Communicorp in Esat Digifone, already addressed in depth in Chapter 28. It represented the culmination of an intensive period of negotiations between Mr. O'Brien's representatives and those of Mr. Desmond, which had commenced twelve days earlier, on Monday 18th September, 1995, when Mr. O'Brien, accompanied by Mr. Leslie Buckley, attended a meeting with Mr. Owen O'Connell, in the offices of William Fry, solicitors, and informed Mr. O'Connell that Mr. Desmond was *"going ahead with financing transaction"*, and that an underwriting letter was needed for the Department *"because finances are seen as the weakness."* Mr. O'Brien had spoken to Mr. Desmond on the previous day, Sunday, 17th September, 1995, after he had met and spoken with Mr. Michael Lowry at the All-Ireland Final in Croke Park, and before he met Mr. Lowry again that evening by arrangement at Hourican's licensed premises in Leeson Street, when he and Mr. Lowry repaired together alone to Hartigan's public house.

32.03 On that day, Friday 29th September, 1995, a series of agreements were concluded between Mr. O'Brien and Mr. Desmond, the net effect of which was that Mr. Desmond joined the Esat Digifone consortium, as a 25% shareholder in the intended licensee company. He agreed to underwrite the equity participation of Communicorp in the intended licensee, and he agreed to bear a portion of the consortium's bid costs, whether or not the bid was successful. These agreements were formally concluded on behalf of Mr. Desmond by IIU, which was Mr. Desmond's private investment vehicle, and which had been incorporated on the previous 1st December, 1994. Consequent on these agreements, the respective shareholdings of Mr. O'Brien's Communicorp and of Telenor in the intended licensee company had been diluted from 40% to 37.5%, and the financial institutions named in the Esat Digifone application, namely, Allied Irish Banks,

Investment Bank of Ireland, Standard Life and Advent International, were no longer to hold any interest in the intended licensee company.

32.04 The short [underwriting letter](#) is reproduced in full below, and a copy of it can be found within the Books of Appendices to this Volume.

*“Department of Transport, Energy & Communications,
44 Kildare Street,
DUBLIN 2.*

*IFSC House
Custom House Quay
Dublin 1*

Att: *Mr. Martin J. Brennan
Telecommunications and Radio (Development) Division*

*Tel +353-1-6054444
Fax+353-1-6054455*

29th September, 1995

**Re: *ESAT Digifone Ltd. (“the Consortium”)
South Block, The Malt House, Grand Canal Quay, Dublin 2.***

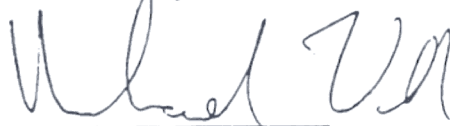
Dear Sirs,

We refer to the recent oral presentation made by the Consortium to the Department in relation to their proposal for the second GSM cellular mobile telephone licence. During the course of the presentation there was a detailed discussion in relation to the availability of equity finance, to the Consortium, from Communicorp and a number of institutions.

We confirm that we have arranged underwriting on behalf of the Consortium for all of the equity (i.e. circa 60%) not intended to be subscribed for by Telenor. In aggregate the Consortium now has available equity finance in excess of £58 million.

We do not foresee any additional need for equity, however, we are confident that if such equity is required we will not have a difficulty in arranging it.

Yours faithfully,



*Professor Michael Walsh
Managing Director*

International Investment & Underwriting Limited
Registered in Ireland No: 225660

Directors/Partners: D.F. Desmond (Chairman), N. McDermott, C. McHugh, M. Walsh

Neither the original nor a copy of the letter was within the Departmental files produced to the Tribunal: a copy of it was traced on files produced to the Tribunal voluntarily by Mr. Desmond.

32.05 Mr. Brennan did not reply to the letter, but rather on the following Monday, [2nd October, 1995](#), he wrote to Mr. O’Brien. That letter is also

reproduced below, and a copy of it can be found within the Books of Appendices to this Volume.

*An Roinn Iompair,
Fuinnimh agus Cumarsáide
44 Sráid Chill Dara,
Baile Átha Cliath 2.*

2 October 1995

*Mr. Denis O'Brien,
Chairman,
ESAT Digifone Ltd.,
South-Block,
The Malt House,
Grand Canal Quay,
Dublin 2.*

*Department of Transport,
Energy and Communications,
44 Kildare Street,
Dublin 2.*

Telephone: (01) 6707444

Fax: (01) 6709633

Re: Additional Correspondence Received

Dear Mr. O'Brien,

I refer to the ground-rules of the competition as outlined at our recent meeting with you on Tuesday 12th September. The Department has already made it clear, that applicants shall not be permitted to provide any further material to supplement their applications, except where expressly requested to do so by the Department.

Accordingly, the additional material received from you on Friday last is enclosed herewith. It shall not be taken into consideration in the evaluation process.

Yours sincerely,



*Martin Brennan
Principal Officer
Telecommunications & Radio(Development)*

32.06 As considerable attention was focused on these two letters in the course of the evidence of Mr. Brennan and Mr. Towey, who, on all of the evidence heard by the Tribunal, were the only two Departmental officials who knew of them, and as their accounts of matters diverged in significant respects, it is necessary to recount their evidence in some detail.

32.07 Mr. Towey testified that he received the letter on Friday, 29th September, 1995, following his return from Copenhagen, and having read it, he formed the view that its contents constituted an attempt by the Esat Digifone consortium to address what was perceived by the consortium as a financial weakness in its application. He would have been very conscious that the Department had repeatedly stated that no additional material would be admitted for consideration after the closing date of the competition, and he accordingly formed the view that the Department had no option but to return it. He believed that he consulted with Mr. Brennan, and that they would have agreed on the

course that should be taken, and that in that context, he would have discussed the contents of the letter with Mr. Brennan, or passed the letter to him to read.

32.08 Mr. Towey regarded the arrival of the letter as an unwelcome development. It was his understanding from its contents that a further institution, as he described IIU, was willing to provide financial backing for both Communicorp and for the 20% equity to be subscribed by institutional investors. He did not interpret the contents as suggesting that IIU intended to underwrite the 20% equity to be allocated to the financial institutions named in the bid, and also named at the Esat Digifone presentation. His understanding of what was envisaged was that IIU intended to underwrite Communicorp's equity obligation, and to take up the financial institutions' allocation directly. Consequently, Mr. Towey agreed that, having read the letter, he recognised that it was possible that the financial institutions were out of the equation. That possibility did not cause him sufficient concern to prompt him to query what had happened: his overwhelming response to the letter was that Esat Digifone was simply seeking to redress a perceived financial weakness in its application, centred on the financing of Communicorp.

32.09 Mr. Towey did not interpret the contents of the letter as meaning that what had been stated in the bid, and repeated at the presentation, might not be the true position, in terms of the composition of the intended licensee. He accepted however that, if the letter was interpreted as confirming that there was a binding agreement that excluded Advent from the funding of Communicorp, and excluded the financial institutions from taking up the 20% equity set aside for that purpose, it might be the case that what had been stated in the bid and at the presentation was not true.

32.10 Mr. Towey testified that he had not noticed that Mr. Dermot Desmond was identified at the foot of the letter as Chairman of IIU. In that regard, he observed that he had read the letter in the context of excluding the material which it contained from consideration. He was not aware that Mr. Desmond had an involvement with IIU, nor was he aware of any business relationship between Mr. Desmond and the signatory of the letter, who described himself as "*Professor Michael Walsh*".

32.11 Mr. Brennan's evidence, on the first occasion that he attended public sittings of the Tribunal, was that he had never had sight of the letter of 29th September, 1995. He believed that Mr. Towey had telephoned him, had told him about the letter, and had recommended that it should be returned, without being brought to the attention of the Project Group. He added that he felt it appropriate that the contents of the letter should not have been brought to his attention, as a

decision had been made that it should be excluded. Mr. Brennan noted that the letter had been returned to Mr. Denis O'Brien by letter of 2nd October, 1995, which he had signed, but as he had never had sight of the IIU letter, he assumed that he must have signed the letter of 2nd October, in the absence of its attachment. Mr. Brennan accepted that it was curious that his letter of 2nd October was sent to Mr. O'Brien, rather than to Dr. Walsh, from whom the letter then being returned had been received. Nor could he be of assistance as to why his letter of 2nd October was addressed to Mr. O'Brien, rather than to Mr. Seamus Lynch, who had been designated by the Esat Digifone consortium as the person to whom correspondence should be forwarded in the course of the evaluation process.

32.12 As to whether the furnishing of the letter might have constituted a breach by Esat Digifone of the rules of the competition, Mr. Brennan in the course of his evidence propounded a theory which he termed "*plausible deniability*". His reasoning was that, since the letter had not been sent by Esat Digifone, or any member of that consortium, but rather by an unconnected third party, Esat Digifone could have denied that there was any breach of the competition rules. Mr. Brennan did however accept that, as his letter of 2nd October, 1995, was addressed to Mr. O'Brien, and as he had testified that he had not had sight of the letter of 29th September, 1995, he must have assumed that the letter had originated with Esat Digifone, and specifically with Mr. O'Brien, and consequently he could not have given any consideration to the concept of "*plausible deniability*" at the time.

32.13 Mr. Brennan agreed that, had he had sight of the contents of the letter at the time, he would have wondered whether there had been a change in the intended financing of Esat Digifone, and that issues surrounding the financing of the consortium raised in the letter might have put him on his guard. He further agreed that, if those conducting the evaluation had had sight of the letter, they would have had to form a judgement about it.

32.14 When Mr. Brennan returned to give further evidence, after the Tribunal had completed hearing the evidence of all other Departmental officials, he recognised that Mr. Towey's recollection of the consideration of the letter of 29th September, 1995, was different to his own. Whilst he acknowledged that it was certainly possible that Mr. Towey might have read the contents of the letter to him, particularly in the context of their main contact which, according to Mr. Brennan, was by telephone, on 29th September, 1995, he did not believe that he had seen the letter, and did not believe that the conversation he had with Mr. Towey was detailed. Mr. Brennan's most constant recollection was of Mr. Towey's strong recommendation that the letter should be sent back, and of his agreement

to that course. He did not have any recollection of Mr. Towey informing him that he had formed a view, based on the contents of the letter, that the financial institutions named in the bid, and identified in the course of the presentation by Esat Digifone as being involved, were out of the equation. Having read the letter, he was uncertain as to whether his view as to the meaning of its contents, in terms of the involvement of the financial institutions, would have been as definitive as that of Mr. Towey, as what was referred to in the letter was “*underwriting*”. He did not believe that he gave any thought to asking AMI whether the letter should be ruled in, or ruled out, but he accepted that, with the benefit of hindsight, it might be reasonable to suggest that it would have been sensible to consult AMI, although that had not occurred to him at the time.

32.15 Mr. Brennan confirmed that he knew Dr. Michael Walsh, who had previously been seconded to the Department by NCB Stockbrokers, which at that time was controlled by Mr. Desmond. He did not believe that he knew that Dr. Walsh had a continuing association with Mr. Desmond. He did not know whether Mr. Towey had mentioned Dr. Walsh’s name to him, but if he had, it was likely that he would have wondered why Dr. Walsh was writing to him in the context of the GSM process. Mr. Brennan reiterated that he did not recall his conversation with Mr. Towey, and furthermore he did not know if he would agree that it was hard to credit that he would not have asked Mr. Towey from whom the letter had been received. Mr. Brennan asserted that, whether he did or did not see the letter, he did not appreciate that Mr. Desmond was identified as Chairman of IIU at the foot of it. As to whether, following receipt of the letter, it would have seemed improbable to Mr. Desmond that the Department would not have been aware that he was asserting some sort of interest in the Esat Digifone consortium, it was Mr. Brennan’s view that, at the end of the day, it was for the Tribunal to judge the significance to be attached to Mr. Desmond’s intervention.

32.16 There were many aspects of the circumstances surrounding the receipt of the letter of 29th September, 1995, and the forwarding of it on 2nd October, 1995, to Mr. O’Brien, which were not satisfactorily explained in evidence. The Tribunal has no doubt that Mr. Brennan and Mr. Towey discussed and agreed on the action that was taken. It was of course Mr. Brennan, as Chairman of the Project Group, and the addressee of the letter, rather than Mr. Towey as his subordinate, who was responsible for that decision. There were many elements of the evidence concerning this matter which the Tribunal is compelled to conclude were less than entirely satisfactory.

32.17 As Mr. Towey put it, the receipt of this letter was an unwelcome development. He and Mr. Brennan had just completed their provisional ranking of applicants in Copenhagen, and had concluded that Esat Digifone had

submitted the best application, and it is understandable that the receipt of the letter could have been viewed by them as a complication. The Tribunal finds it improbable that Mr. Towey, who impressed the Tribunal as an able, responsible and diligent assistant to Mr. Brennan, would not have discussed every aspect of the short, but highly significant, letter very carefully with Mr. Brennan, particularly in view of the provisional ranking of Esat Digifone, and in view of the subject matter of the letter, which related to the issue of financing, over which there were continuing misgivings, and which, according to Mr. Michael Andersen's evidence, had yet to be considered in terms of the condition of financial capability prescribed in paragraph 19 of the RFP document. The Tribunal also finds it improbable that Mr. Brennan, to whom the letter was addressed, would not have insisted on having sight of it, whether in the context of signing his letter of 2nd October, to which the earlier letter was an attachment, or otherwise.

32.18 From the terms of Mr. Brennan's letter of 2nd October, 1995, it is clear to the Tribunal that there was nothing ill-considered or haphazard about the manner in which the underwriting letter of 29th September, 1995, was handled by him. Rather than taking the obvious and natural course, namely to return the letter to IIU, addressed to Dr. Walsh, being the person from whom it was received, the letter was transmitted, not just to Esat Digifone, but to Mr. O'Brien as Chairman. The terms of that letter of 2nd October, which stated that "*the additional material received from you on Friday last*" was enclosed, demonstrates beyond question that Mr. Brennan regarded that letter of 29th September as having originated with Mr. O'Brien, although both he and Mr. Towey testified that there had been no contact by them with Esat Digifone, or with any associated person in connection with it.

32.19 Whilst the Tribunal cannot determine exactly what transpired between Mr. Brennan and Mr. Towey, or indeed any other person concerning this matter, it can conclude that the letter of 29th September, 1995, was not dealt with in any casual, ill-considered or abridged fashion. What is abundantly clear is that the following occurred, consequent on decisions made by Mr. Brennan.

- (i) The letter was not brought to the attention of the Project Group as a whole, or to any one or more of its members. No other member of the Project Group was aware of either the fact of receipt of the letter, or of its contents, until furnished with copies by the Tribunal.
- (ii) The letter was not brought to the attention of AMI, as confirmed by Mr. Andersen, even though, according to Mr. Brennan, the Project Group relied on AMI's expertise in the course of the evaluation.

- (iii) Although it is evident from the terms of Mr. Brennan's letter of 2nd October, 1995, that he and Mr. Towey recognised that the provision of the letter was contrary to the rules of the competition, no consideration was given to the consequences of that infraction, nor was the Project Group permitted to have any view on that matter. The sole response of Mr. Brennan and Mr. Towey to receipt of the letter was to determine that it should not be considered, and should be sent to Mr. O'Brien. Both Mr. Brennan and Mr. Towey testified that they regarded this course to have been the correct one to take, so that the Project Group would not be contaminated or burdened by material which should not have been provided.
- (iv) No consideration was given to making any inquiries of Esat Digifone as to whether what was conveyed in the letter regarding underwriting altered information which had been provided in the application submitted to the Department on 4th August, 1995, as confirmed at the presentation on 12th September, 1995, and which had been and continued to be subject to evaluation. This is all the more troubling in view of the continuing uncertainties surrounding the finances of Esat Digifone, which were, at that very time, subject to supplemental analysis then being conducted by AMI, and when the entire financial evaluation, as represented by the dimension Financial Key Figures, was yet to be reviewed by Mr. Riordan and Mr. Buggy.

32.20 Had inquiries been made, or had the Department sought details of the arrangements between Mr. Desmond and Esat Digifone, it would have become evident:

- (i) that Mr. Towey's understanding of the contents of the letter, as suggesting that it was no longer intended that the financial institutions would be shareholders in the intended licensee, was correct, and;
- (ii) that the proposed capital configuration and ownership of the intended licensee company had altered, from a structure comprising Communicorp with a 40% shareholding, Telenor with a 40% shareholding, and Allied Irish Banks, Investment Bank of Ireland, Standard Life, and Advent International with a combined 20% shareholding, to a structure comprising Communicorp with a 37.5% shareholding, Telenor with a 37.5% shareholding, and Mr. Desmond with a 25% shareholding.

Whether this information might ultimately have impacted on the outcome of the process is uncertain, but must at least be considered as a possibility.

32.21 The Tribunal nonetheless recognises that the receipt of the letter of 29th September, 1995, placed Mr. Brennan and Mr. Towey in an invidious position. They cannot be faulted for their assessment of the letter as an effort by Esat Digifone to mend perceived weakness in its application, a perception which the Tribunal is satisfied must have been confirmed by Mr. Michael Lowry in his interactions with Mr. O'Brien on 17th September, 1995. They were also, as they testified, acutely conscious of the clear direction that had been given in the formal competition documents, and reiterated by Mr. Brennan at the conclusion of the Esat Digifone presentation as recently as the previous 12th September, 1995, that no further material would be accepted by the Department unless requested in writing. They were no doubt mindful that the process could have been exposed to a risk of invalidity had the letter not been returned. Their actions and instincts in this matter were therefore understandable.

32.22 Whilst Mr. Brennan and Mr. Towey had insulated the Project Group from awareness of the additional impermissible information contained in that letter, they were themselves burdened with it as the process moved forward, and when issues surrounding the finances of the two top-ranked applicants remained to be resolved.

32.23 According to Mr. O'Brien, the return of the letter to him by Mr. Brennan, whilst disappointing, was something to which he was resigned. It was Mr. O'Brien's evidence that they had endeavoured to notify the Department, and could do no more. It might be thought that the rejection of the letter, coupled with Mr. Brennan's statement that its contents would be disregarded, would have been a matter of concern to Mr. O'Brien. He had ceded a 25% stake in Esat Digifone to Mr. Desmond, at the cost of dilution to his own shareholding, in order to secure underwriting for Communicorp's equity. The purpose of seeking that underwriting was to strengthen Communicorp's finances which Mr. O'Brien believed, and the Tribunal is satisfied Mr. Lowry confirmed, was perceived by the Department as the weak point of the Esat Digifone application. Despite this, the Department's rejection was, according to Mr. O'Brien, a matter which he accepted. Mr. Owen O'Connell, Mr. O'Brien's solicitor, in his evidence to the Tribunal, offered a somewhat different analysis. It was his evidence that although the letter was returned, Esat Digifone was satisfied that the underwriting commitment was known to Mr. Brennan, and however much the Department tried to exclude it, it would be at the very least have had the effect of the Department not dwelling unduly on Communicorp's weakness. It appears to the Tribunal far more probable that it was those considerations, as described by Mr. O'Connell, that led to the return of the letter not being regarded as a significant retrograde event.

DEPARTMENTAL DEVELOPMENTS IN THE FIRST WEEK OF OCTOBER, 1995

33.01 The first working week of October, 1995, which commenced on Monday, 2nd October, 1995, was to be a significant week in the lifetime of the evaluation process. The developments in the process over that week are addressed both in this and in the next chapter of this Volume.

33.02 As recorded in the official report of the post-presentation Project Group meeting of 14th September, 1995, the last occasion on which the Project Group had met, AMI's first draft Evaluation Report was expected on Tuesday, 3rd October, 1995, and was to be discussed at the next scheduled Project Group meeting on the following Monday, 9th October, 1995. The three Telecommunications Divisions were to supply written comments on the draft Report prior to that date, and AMI were then to provide a second draft Report by Tuesday, 17th October, 1995. What was therefore envisaged was that the three Divisions should have access to the first draft Report, to enable them to study and digest its contents, in order to permit them to furnish written comments by the meeting fixed for the following Monday, 9th October, 1995.

33.03 Monday, 2nd October, 1995, was Mr. Brennan's first working day back in the Department following his return from the Copenhagen meeting of the previous Thursday, 28th September. It was on this Monday that the Esat Digifone underwriting letter of 29th September, 1995, was returned to Mr. O'Brien, under cover of Mr. Brennan's letter of that date.

THE INTER-DIVISIONAL MEETING OF 3RD OCTOBER, 1995

33.04 On the following day, Tuesday, 3rd October, 1995, there was an inter-Divisional meeting of the three Departmental Divisions. There was no report of that meeting available to the Tribunal, and the sole record was a handwritten note that had been kept by Mr. Sean McMahon in his personal journal, in which he had made brief notes of the topics discussed, and in some instances had attributed what he had recorded amongst those present.

33.05 Mr. Sean Fitzgerald, Assistant Secretary with overall responsibility for the three Divisions, explained that inter-Divisional meetings, which were relatively infrequent, were held for the purpose of ensuring that all three Divisions were kept abreast of developments in matters in which they had a joint interest. If he was present, he would chair the meetings, but he did not believe that he had attended the meeting of 3rd October, 1995. Mr. McMahon, who was the author of the note available to the Tribunal, observed that, as he had not attributed to Mr.

Fitzgerald any information recorded by him, he thought it unlikely that Mr. Fitzgerald was present as, if he had been, it was probable that he would have had a contribution to make on the topics under discussion. Mr. McMahon also confirmed that there were occasions on which Mr. Fitzgerald would be absent from these inter-Divisional meetings, and on such occasions he, and his fellow Principal Officers, would proceed in Mr. Fitzgerald's absence. The attributions made by Mr. McMahon in his note established that, apart from Mr. McMahon himself, Mr. Martin Brennan, Mr. John McQuaid and Mr. Fintan Towey were in attendance.

33.06 Mr. McMahon's note recorded discussion of six topics in the course of the meeting, the fourth of which was the GSM evaluation process. The relevant extract from his note is reproduced below:

"4 GSM

- *Min wants to accelerate process*
- *legalities more complicated*
- *Draft report now imminent*
- *We need to discuss + digest.*

Agreed 1 copy we let it stay here (44) and discuss it in confidence."

33.07 That information was not attributed to any of those present, but Mr. McMahon testified that it was inconceivable that it could have emanated from anybody other than officials of the Development Division, namely, Mr. Brennan or Mr. Towey. Mr. McQuaid, who had also been in attendance, whilst accepting that he had been present at the meeting, had no recollection of it, but agreed that it made sense that the information conveyed to the meeting in relation to the GSM process had, in all probability, come from Mr. Brennan or Mr. Towey. Mr. Brennan testified that he could not recall what contribution he had made to the meeting. Whilst he agreed that the note signified that the person who had conveyed the information that Mr. Lowry wished to accelerate the process must have spoken to Mr. Lowry, he suggested that it could have been Mr. Fitzgerald or Mr. McMahon who had spoken to Mr. Lowry, and in that regard, he observed that the relevant portion of Mr. McMahon's note was unattributed. Mr. Brennan nonetheless accepted that he could have been the source of that information, but asserted that he might have received it through Mr. Fitzgerald, or Mr. John Loughrey. Despite Mr. Brennan's reluctance, when he first attended to give evidence, to acknowledge that he was the probable source of the material recorded by Mr. McMahon, on his resumed evidence some months later, he recognised that, in all

probability, it was he who had conveyed that information to the meeting, and that it was he who must have spoken in advance of the meeting to Mr. Lowry.

33.08 As to the substance of what was contained in his note, it was Mr. McMahon's understanding that either Mr. Brennan or Mr. Towey had informed the meeting that Mr. Lowry wished to accelerate the process, and he believed that the passage in his note, which recorded "*legalities more complicated*", represented his own response to that information. By that observation, he had meant that there was a necessity for proper scrutiny, which might not be compatible with a speeding up of the process. Mr. McMahon testified that he believed that the balance of his note recorded that, having been informed that the draft Report was imminent, it was he who had commented on the necessity "*to discuss + digest*" it. It appears from his final entry that it was at this meeting of Tuesday, 3rd October, 1995, that it was first proposed that, contrary to what had been planned and agreed at the Project Group meeting of 14th September, 1995, copies of the draft Report would not in fact be circulated, but instead would be retained in the Development Division offices at 44 Kildare Street, to be discussed in confidence. This is exactly what transpired, and in consequence of this revised arrangement, members of the Project Group, other than Mr. Brennan, Mr. Towey, and Ms. Nic Lochlainn, did not have sight of the first draft Report until the commencement of the Project Group meeting on Monday, 9th October, 1995. The only limited exception was that the two seconded accountants were given sight of it in the early morning, prior to the Project Group meeting.

33.09 Further and more detailed consideration will be given to Mr. McMahon's note of the inter-Divisional meeting, and in particular the interaction between Mr. Brennan and Mr. Lowry evidenced by it, in Chapter 35 of this Volume.

MR. JOHN LOUGHREY'S RETURN FROM ANNUAL LEAVE

33.10 On Wednesday, 4th October, 1995, Mr. Loughrey returned to the Department from his annual leave. He had been unwell for some time before the commencement of his leave in early September, with the result that he had been absent from the Department for the latter part of August, as well as throughout the entire of the month of September. As Secretary General, he had overall responsibility for all activities of the Department, and it was also his function to liaise between Mr. Lowry, as Minister, and the civil servants who served within the Department in relation to all Departmental business.

33.11 Mr. Loughrey outlined in evidence that his relationship with Mr. Lowry as Minister entailed daily meetings between them, usually held in Mr. Lowry's

Ministerial office. As Mr. Lowry represented a rural constituency, they would typically have met on four out of five working days. In that regard, it was Mr. Lowry's practice to travel from his constituency, in Co. Tipperary, to Dublin on Monday evenings, and to leave to return to his constituency on the following Friday at lunchtime, or in the early afternoon. During the evaluation process, Mr. Loughrey testified that he, or Mr. Brennan, would have kept Mr. Lowry briefed as to the overall progress of the process, but without reference to individual applicants. At the weekly Departmental management meetings, which were chaired by Mr. Loughrey, and attended by all Assistant Secretaries, Mr. Fitzgerald would have noted significant milestones reached in the process. Mr. Lowry was not a regular attendee at those meetings, although his Programme Manager, Mr. Colin McCrea, was usually present.

33.12 It was Mr. Loughrey's recollection that, during the three weeks following his return to the Department on Wednesday, 4th October, 1995, to a day or two prior to 25th October, 1995, when the result of the process was announced, nobody had indicated anything to him concerning the outcome, or likely outcome. He thought that, on his return, he would have been briefed on developments in all Divisions, either at the weekly Department management meeting, or, if his return was after that meeting, in the course of informal meetings with each of his Assistant Secretaries. He thought that in the weeks from 4th October, to 25th October, 1995, he would have picked up from Mr. Fitzgerald, or perhaps from Mr. Brennan, that the tempo of work on the process was increasing, and that the Project Group was approaching a decision, but he was not conscious of having been in possession of any additional information.

33.13 Mr. Loughrey testified that he was unaware that a first draft Report was received by the Department on the day he returned, or that a further draft Report was received on Thursday, 19th October, 1995, and he was certain that he had not had sight of either of those draft Reports. Mr. Loughrey further testified that he absolutely did not know of any desire on the part of Mr. Lowry to accelerate any aspect of the process, and nobody had informed him of that, or of any arrangements proposed or made to implement that objective.

33.14 In this regard, it will be recalled that as of 4th October, 1995, being the date of Mr. Loughrey's return, Mr. Fitzgerald had known for some time that the evaluation process had identified three top applicants, that there was a clear difference between the third ranked and the two leading applicants, that these two applicants were close, and that Esat Digifone was the likely front runner. Whilst Mr. Fitzgerald could not recollect the precise circumstances surrounding his dealings with Mr. Loughrey, following his return from annual leave, he testified

that he would have found it very surprising if he had not mentioned to Mr. Loughrey how matters were shaping up.

33.15 On the basis of Mr. Loughrey's evidence, it would appear that he was kept in ignorance of many significant developments that occurred during the month of October, over the three weeks from his return to the Department on 4th October, 1995, and leading to the announcement of the result on 25th October, 1995. He did not know that initial or revised draft Reports had been received from AMI, even though, and as will become apparent, copies or extract copies of one or other of those draft Reports were provided by Mr. Brennan to Mr. Fitzgerald, and to Mr. Lowry's Programme Manager, Mr. McCrea, and that both Mr. Fitzgerald and Mr. McCrea had an opportunity to review those drafts, and to make their views on them known to Mr. Brennan. In that regard it should also be borne in mind that Mr. McCrea, apart altogether from his position as Mr. Lowry's Programme Manager, was a personal friend of Mr. Loughrey, who had proposed him for his engagement as Programme Manager.

33.16 Likewise, it would appear from his evidence that Mr. Loughrey was unaware of Mr. Lowry's desire to accelerate the process, a matter which was widely known within the Department, Mr. Brennan having so informed the inter-Divisional meeting of 3rd October, and, as will be seen, having reiterated that matter at the Project Group meeting of 9th October, 1995, to which further reference will be made. Together with each member of the Project Group, Mr. McCrea also had knowledge of Mr. Lowry's intentions. It seems further that in the week prior to 25th October, 1995, Mr. Lowry had crystallised his desire to accelerate the process into an intention to bring the matter to Government on Tuesday, 24th October, 1995, and, on Mr. Loughrey's evidence, it would seem that this was also a development which was entirely unknown to him, or unrecalled by him, notwithstanding his daily meetings with Mr. Lowry.

33.17 Despite the magnitude of the GSM process, in terms of the work of the Department, and despite Mr. Loughrey's presence within the Department, it seems that all of these highly significant developments, which were widely known within the Department, and beyond, escaped Mr. Loughrey's attention. The Tribunal is left with the impression that either Mr. Loughrey had a very poor recollection of events, or that these matters were not imparted to him by his subordinate officials, or by Mr. Lowry himself.

ARRIVAL OF THE FIRST DRAFT EVALUATION REPORT AND CERTAIN RELATED DEALINGS

34.01 Andersen Management International's (AMI's) first draft Evaluation Report was dated 3rd October, 1995. It was received by the Department on Wednesday, 4th October, 1995, and Mr. Martin Brennan made a manuscript endorsement on the letter under cover of which it was sent, recording receipt at 2.30pm on that day. AMI's covering letter, addressed to Mr. Brennan and Mr. Towey, recited that two hard copies of the draft were attached, and had been personalised for each of Mr. Brennan and Mr. Fintan Towey, by shadow texting of their names on each page. It also recommended that members of the Project Group, who wished to read the draft, should do so in the Development Division, as it was a sensitive document.

34.02 Mr. Andersen's proposal that the two copies of the draft should be retained in the Development Division cannot have been the first time that this issue arose, unless he and Mr. Brennan happened coincidentally to have reached the same view at the same time. Mr. Andersen's letter was not received until Wednesday, 4th October, 1995, but these arrangements had already been proposed by Mr. Brennan at the inter-Divisional meeting of the previous day. Presumably therefore the matter had already been discussed between them, either in Copenhagen at the meeting of 28th September, 1995, or subsequently by telephone. What there was no record of within the Departmental files was notification to members of the Project Group of receipt of the draft Report, or of any steps having been taken to facilitate access to it by members, including representatives of the Department of Finance. As matters transpired, no members of the Project Group, other than the representatives of the Development Division, had sight of the full draft Report in advance of the Project Group meeting of the following Monday, 9th October, 1995. Nor does it appear that any consideration was given as to how other members of the Project Group, who were located at a distance from the Development Division offices in Kildare Street, were to inform themselves sufficiently to enable them to make written observations on the draft, in accordance with the procedure agreed at the last post-presentation Project Group meeting of 14th September, 1995. In the event, that procedure was not followed, and no such written observations were made, or were made available to AMI.

34.03 The only exception was in the case of Mr. Billy Riordan and Mr. Donal Buggy, who were furnished either with copies of the draft, or extract copies, in advance of the commencement of the meeting of the 9th October, 1995, as they did have an opportunity on that morning, in advance of the Project Group

meeting, to review the Financial Key Figures evaluation, and further reference will be made to that review at a later point.

CONTENT OF THE FIRST DRAFT REPORT

34.04 In his 21st September, 1995, memorandum, Mr. Andersen had outlined the intended structure of the draft Report agreed to be provided, and the draft of [3rd October, 1995](#), conformed with that structure. It contained five sections as follows:

- (i) Section 1, entitled *“Introduction”*;
- (ii) Section 2, entitled *“Key characteristic of the applications”*;
- (iii) Section 3, entitled *“The comparative evaluation of the application”*;
- (iv) Section 4, entitled *“Sensitivities, risks and credibility factors”*;
- (v) Section 5, entitled *“Summary, concluding remarks and the recommendation”*.

The draft extended in all to some 49 pages, and these included graphs, diagrams and tables. It is now intended to review the contents of the draft in some detail, section by section. A copy of the first draft Evaluation Report can be found in the Book of Appendices to this Volume.

Section 1 - Introduction

34.05 Section One was a short two-page introduction to the Report, which contained a resumé of the evaluation criteria, a summary of the methodology which had been adopted in the evaluation, and an outline of the structure of the report itself. The contents of the introduction were largely unremarkable. The section did however contain one passage relating to the evaluation methodology, and which, when echoed in other parts of the draft, was subject to comment within the Project Group, and inquiry by the Tribunal. The passage was in the following terms:

“The evaluation comprises both a quantitative and a qualitative evaluation, and it was decided prior to the closing date that the qualitative evaluation should be the nucleus of the evaluation. As outlined in appendix 2, a heuristic methodology has been applied with an award of marks to each application based on a scale from A to E, A being the best.”

Section 2 – Key characteristics of the applications

34.06 Section 2 of the draft was divided into two separate sub-sections: the first sub-section, designated 2.1, was entitled “*The applicants*”; the second, designated 2.2, was entitled “*The basic philosophy behind each application*”. Each of the six applicants was analysed in sub-section 2.1, and in each instance the structure of the trading company, through which the applicant proposed to operate the licence, if awarded to it, was outlined, as was the composition of each consortium, which composition was also represented diagrammatically. All of the information contained in this sub-section was stated to have been extracted from the applications received.

34.07 In the case of Esat Digifone, the participants in the consortium, as illustrated diagrammatically, were shown as Communicorp Group, having a shareholding of 50%, and Telenor Invest AS, also having a shareholding of 50%. The narrative which accompanied the diagram is quoted in full below:

“A5 will operate as an Irish limited liability company, which has been incorporated in Ireland under the name of Esat Digifone. The participants are two operators, namely Esat who operates in Ireland on the basis of a VAS licence and the Norwegian carrier Telenor. However, Communicorp Group is the shareholding company behind Esat, and 34% of these shares are held by Advent International plc. It is the intention of the applicant to make 20% of the equity available to institutional investors during the period prior to the commercial launch, including a 5% equity stake to Advent International plc. Furthermore, the application states an intention to make 12% available for flotation within three years. It is difficult to state the exact Irish ownership share. Before the flotation, it could as a maximum become 55% and after the flotation it could increase to a maximum of 67%. In practice, the Irish share could turn out to be significantly lower.”

34.08 The second sub-section, designated 2.2, was entitled “*The basic philosophy behind each application*”. This sub-section contained AMI’s analysis of what was termed “*the underlying philosophies and strategies*” of each applicant. Although not stated in the sub-section, it must be presumed that the analysis undertaken by AMI, and set out in the sub-section, and which was described as a “*comparative assessment*”, was also based on information extracted from the six applications. The content of this sub-section also featured in later discussions of the Project Group, and in evidence heard by the Tribunal, so that it is of assistance at this point to refer to the observations made in it, in

relation to each of the three top-ranked applicants, that is, A1, Irish Mobicall, A3, Persona, and A5, Esat Digifone.

34.09 With regard to A1, Irish Mobicall, the following analysis was presented:

“A1, backed up by three well-know [sic] mobile operators, intends to launch quickly with a proprietary roll out, leaving the option of national roaming open for further negotiations with Telecom Éireann. The applicant will use its own sales forces and has in addition set up agreements with a number of dealers/outlets, leaving the service provision path open. A1 does not opt for market leadership, as the applicant foresees itself as taking up less than 50% of the market.

*Consequently, A1 views itself as pursuing a **differentiator type of strategy**, which is consistently reflected in the application for example by a focus on the variety of service and packages, and, not least, customer care aspects. This focus is also substantiated by the fact that A1 quotes the highest operating costs per subscriber during the initial years. This implicit wish to compete with Eircell on services and quality as opposed to fierce competition on tariffs, also seems to be consistently reflected by the fact that A1 expects to have a comparatively low degree of private consumer penetration.”*

34.10 As to A3, Persona, the following comments were made:

*“A3, backed up on Motorola and Unisource as the major operating player, pursues a strategy with considerable similarities to **cost leadership**. A3 intends to build a network with a rather low capacity and to run the company in such a way that the operating costs are comparatively low. In general, the tariffs are projected to be low as well.*

Subsequently, A3 ultimately aims at the mass market, with an expected private consumer penetration representing about 50% of A3’s subscriber base at the end of the 14 year planning period. The penetration is substantiated by an advanced segmentation, based on the identification of specific Irish types of customers. Furthermore, A3 intends to play a major role among the distribution channels with the establishment of a wholly-owned service provider under the brand ‘person-to-person’. A3 does not opt for market leadership measured by the long range market penetration ambitions, as A3 only projects to obtain a modest 45% share of the GSM market.”

34.11 As to A5, Esat Digifone, the following appeared:

*“A5, with Esat as the Irish fixed provider and Telenor as the mobile operator, intends to provide good and quick coverage. In addition, A5 has a high degree of preparedness. A5 intends to differentiate itself by a number of innovative marketing initiatives, for example by advanced customer service, broad distribution channels, lower tariffs and branding. In general, A5 opts for **market leadership**.*

The ambitions are supported by the technical plans, and the level of experience of the consortium partners is reflected in the initial set-up of the organization, including, but not limited to, the top level management. The financial plans, however, indicate some weaknesses against the background of market leader ambitions, in particular with a degree of solvency below 0% during some of the decisive initial years.”

Section 3 – The comparative evaluation of the applications

34.12 Section 3 presented what was termed “*the results of the comparative evaluation*”, and what it contained were the outputs of the qualitative sub-groups that had met in Copenhagen over the three sessions held during the month of September, 1995, and which have already been very fully explored. The section was divided into four sub-sections, directed to each of the four Aspects into which AMI had re-grouped the dimensions of the evaluation criteria. Each sub-section opened with a presentation, in tabular form, of the overall marks for the dimensions and Aspects assessed, and each was then supplemented by short narrative passages. Each of these Aspects tables was an extract of Table 16, which it will be recalled was generated at the Copenhagen meeting of 28th September, 1995. Whilst it is not intended at this juncture to reproduce all of the tables to which reference has already been made, in the context of the qualitative evaluation sub-groups, it is of assistance to refer in an abridged way to each of the four sub-sections within Section 3.

Sub-section 3.1 – Marketing Aspects

34.13 The sub-section opened with a presentation of the results in the form of a table which was designated “*Table 1: Marketing aspects: Award of marks*”, reproduced below:

Marketing	A1	A2	A3	A4	A5	A6
1. Market development	C	C	B	C	A	C
2. Coverage	B	C	A	C	A	D
3. Tariffs	C	D	B	C	C	A
4. International roaming plan	A	D	C	C	C	C
Marketing aspects (subtotal)	B	C	B	C	A/B	C

34.14 It will be observed that the above table was an extract of Table 16, and comprised the first five rows of that table. Following a short narrative, the results for each of the four constituent dimensions were presented, in four further distinct sub-sub-sections. For each of the dimensions, the tables generated within the sub-groups were reproduced, as were the commentaries that had been prepared or approved by AMI, and to which reference has already been made. In some instances, the outcome of the qualitative evaluation at indicator level was also illustrated graphically. All of the dimensions categorised within the rubric of Marketing Aspects, with the exception of the dimension Coverage, had been evaluated in the course of the final evaluation session in Copenhagen on 19th and 20th September, 1995. Mr. Towey was involved in all of the three sub-groups, as was Mr. Brennan, although it appears that Mr. Brennan may not have attended the International Roaming session as an active participant, as it was Ms. Nic Lochlainn who had been designated to represent the Project Group. The tables showing the output of the evaluation of the dimensions Market Development, Tariffs and International Roaming, can be found in Chapter 29 of this Volume. The dimension Coverage had been evaluated during the second qualitative session between 7th and 9th September, 1995, and it was Mr. John McQuaid and Mr. Aidan Ryan who had represented the Department. The table which appeared in the draft Report for this dimension can be found at Chapter 22 of this Volume. The Tribunal has already commented on apparent anomalies surrounding the aggregation of the constituent dimension marks to arrive at the Aspects sub-totals as shown in the table reproduced above.

Sub-section 3.2 – Technical Aspects

34.15 The structure of this sub-section followed the same format as the previous Marketing Aspects sub-section. It opened with a table, designated “Table 6: Technical aspects: Award of marks”, showing the output of the qualitative evaluation of the four dimensions classified as Technical Aspects, which was also extracted from Table 16, and comprised the next five rows of that table. That extract table, as it appeared in the draft Report, is reproduced below.

Technical Aspects	A1	A2	A3	A4	A5	A6
1. Radio network architecture	C	C	B	B	A	D
2. Capacity of the network	C	D	C	B	A	C
3. Performance guarantees	D	E	C	B	A	C
4. Frequency efficiency	A	C	A	A	A	A
Technical aspects (subtotal)	C	D	B	B	A	C

34.16 It will be recalled that the Technical Aspects sub-total had been calculated by Mr. McQuaid and Mr. Ryan, with the assistance of Mr. Marius Jacobsen, following the post-presentation Project Group meeting on 14th September, 1995, when they had computed the sub-total by converting the grades for each dimension to numerical scores, by then applying numerical weightings to arrive at a weighted numerical total, and finally by reconverting that numerical total back to a lettered grade.

34.17 With the exception of Performance Guarantees, all of the dimensions had been evaluated during the second qualitative session in Copenhagen, attended by Mr. McQuaid and Mr. Ryan. The dimension Performance Guarantees had been evaluated in the course of the first session on 6th and 7th September, by Mr. Towey and Mr. Riordan. Each of the technical dimensions were also addressed in distinct sub-sections, which reproduced the tables generated in the course of the qualitative evaluation, and the commentaries that had been prepared by AMI. Those tables can be found in Chapter 22 of this Volume.

34.18 Apart from the marking of the Performance Guarantees dimension, over which AMI had some evident misgivings surrounding the fairness of treating the provision of a performance bond as a benchmark for the evaluation of applicants, the qualitative evaluation of the other three technical dimensions had been unremarkable. It had been carried out by Mr. McQuaid and Mr. Ryan, of the Technical Division, each of whom had the relevant expertise, and the outcome had broadly accorded with the results of the quantitative evaluation.

Subsection 3.3 - Management Aspects

34.19 This was a short sub-section, as Management Aspects comprised only a single dimension, Experience of Applicant. Following the same format as before, the sub-section opened with a table extracted from Table 16, showing the output of the qualitative evaluation, which was designated “*Table 11. Award of marks: The management aspects*”, reproduced below.

Management	A1	A2	A3	A4	A5	A6
1. Experience of the applicant	C	D	A	C	B	C
Management aspects (subtotal)	C	D	A	C	B	C

The dimension Experience of Applicant had been evaluated during the final session by Mr. Brennan and Mr. Towey. The two tables, already reproduced in Chapter 29 of this Report, one showing the results of the quantitative evaluation, and the other showing the results of the qualitative evaluation, were included in the AMI draft. It will be recalled that there was a significant anomaly between the results of the quantitative evaluation for this dimension, and the manner in

which those results had been translated into marks in the qualitative evaluation, and that anomaly was glaringly obvious from a simple comparison of the results as shown in the two tables. As between this and the second draft Report, the quantitative results table was amended by the deletion of the material which highlighted that anomaly, and in the final Evaluation Report, the resultant abridged table was excluded in its entirety.

Sub-section 3.4 – Financial Aspects

34.20 The final sub-section, Financial Aspects, presented the results for the two dimensions, Financial Key Figures and Licence Fee. As with all earlier sub-sections, it opened with a table extracted from Table 16, which was designated, “Table 14. Financial aspects: Award of marks”, and is also reproduced below.

Finance	A1	A2	A3	A4	A5	A6
1. Financial key figures	A	C	B	C	B	C
2. Licence payment	(A)	(A)	(A)	(A)	(A)	(A)
Financial aspects (subtotal)	A	C	B	C	B	C

The commentary in the sub-section, which included a full table showing the qualitative marks for each indicator of the dimension Financial Key Figures, explained that, as all applicants had bid the ceiling level of £15 million for the dimension Licence Fee, they were all awarded full marks for that dimension. This meant that the Licence Fee dimension was a neutral component in the results for Financial Aspects, which rested solely on the evaluation of the Financial Key Figures dimension.

34.21 It must be borne in mind that, as of 3rd October, 1995, being the date of the draft document, the Financial Key Figures marks had to be regarded as no more than provisional, as they had yet to be reviewed by Mr. Riordan and Mr. Buggy, and as will be seen from their subsequent working papers, they appear to have had some serious and significant misgivings surrounding the marks which had been awarded, and which were presented in the first draft Report.

Section 4 – Sensitivities, risks and credibility factors

34.22 Section 4 was a short narrative section which opened with the following statement:

“Various analyses and investigations have been conducted in order to deal with the sensitivities, risks and credibility of the applications and the business cases behind the applications”.

It appears from this passage, and from the further contents of the section, and as was confirmed by Departmental witnesses, and recently by Mr. Michael Andersen, that the purpose of this section was to address Other Aspects as defined in the AMI tender document, and in the Evaluation Model adopted by the Project Group. Risks and Effects on the Irish Economy were the features of these so-called Other Aspects.

34.23 It will be recalled that in his memorandum of 21st September, 1995, forwarded to Mr. Brennan and Mr. Towey, and which is the subject-matter of Chapter 30 of this Volume, Mr. Andersen, having outlined what he considered to be the significant risks associated with each applicant, proposed that:

“If there is a clear understanding between the Department and AMI of the classification of the two best applications, it is suggested not to score ‘other aspects’, the risk dimensions and other dimensions, such as the effect on the Irish economy. In this case the risk factor will be addressed verbally in the report.”

In the final section of that fax, Mr. Andersen had listed five matters on which decisions had to be made by the Department, and these included a decision on whether the Department wished to score Other Aspects. As Section 4 represented AMI’s efforts to address the topic “*verbally*”, it seems that a decision must have been taken by the Department, and conveyed to Mr. Andersen, that Other Aspects should not be scored, and this seems to be confirmed by the closing paragraphs of the section, which are referred to below.

34.24 As regards A5, Esat Digifone, the draft stated as follows:

“In general, the credibility of A5 has been assessed as extremely high as A5 is the applicant with the highest degree of documentation behind the business case and with much information evidenced. In addition, it can be stated that A5 does not have abnormal sensitivities in its business case. Taking all the sensitivities defined in the tender specifications into account, A5 still earns a positive IRR. The weakest point concerning A5 is not related to the application as such, but to the applicant, or more specifically to one of the consortium members, namely Communicorp, which has a negative equity. Should the consortium meet with temporary or permanent opposition, this could in a worst case situation turn out to be critical, in particular concerning matters related to solvency.

Although being assessed as the most credible application, it is suggested to demand an increased degree of liability and self-

financing from the backers, if the Minister intends to enter licence negotiations with A5.”

34.25 The following observations were made regarding A3, Persona:

“The A3 application has also been found highly credible as well, although not reaching the degree of documentation and evidencing as A5. In addition, the supplementary investigations concerning tariffs indicates that there might be a lack of consistency between the marketing and the financial plans, as the projected usage revenue per call minute exceeds the normal call tariffs by far and no [sic] substantiated by [sic] solely by the non-time true metering principles suggested by A3. For this reason, the difference in the level of tariff between A3 and A5 is not substantiated by the projected revenues steams [sic], where A5 projects a lower revenue per call minute than A3.

In addition, A3 had a similar type of problem as A5, namely the extremely small equity of Sigma Wireless. It is questionable, whether Sigma Wireless can bridge the gap between the weak degree of solvency and the general liability as a comparatively big shareholder in a business that requires ‘patient money’ and a high exposure.

Furthermore, A3 has expressed so strong reservations concerning the draft licence, which was circulated as part of the tender documents, that the Minister will formally have a weak favourable starting point. However, should the Minister wish to enter into licence negotiations with A3, both these reservations and the Sigma Wireless issues should be solved satisfactorily as necessary, but not sufficient, conditions in order to conclude the licence negotiations.

Finally, it has not been taken into consideration at all during the award of marks in the evaluation that Motorola and Sigma have interests with and links to the incumbent operator, whereby it could, in theory, be questioned, whether some of the consortium members of A3 could be exposed to conflicts of interests, thereby weakening the competitive edge of the GSM2 operator (or the incumbent). This risk should be dealt with at the political level, as has been the case in other European mobile tenders, most recently during the DCS1800 tender in France, where the French Government abstained from the nomination of a consortium with conflicts of interest between the incumbent and the potential status as a second mobile licensee.”

34.26 When preparing their comments on Esat Digifone, and when assessing the credibility of its application as “*extremely high*”, AMI, as confirmed by Mr. Andersen, knew nothing of the IIU underwriting letter of 29th September, 1995, or of its contents. It should also be observed that, whilst AMI characterised Persona as having expressed “*strong reservations*” concerning the draft licence, that matter had been explored in the course of the Persona oral presentation, and had been clarified to a significant degree, although no reference to that clarification appears to have been included in the narrative text. As will be seen, that omission was subsequently noted and raised in the context of consideration of the text by the Project Group, but notwithstanding, the passage remained unaltered in the final Report. It was also a clarification that seemingly made little impact on Mr. Andersen himself, as in his recent evidence to the Tribunal, he referred to Persona’s reservations on the draft licence as an attendant risk associated with that consortium.

34.27 Having reviewed each of the six applications, AMI concluded as follows:

“In total, the evaluators have arrived at the conclusion that the other aspects investigated under the dimensions credibility, sensitivities and risks widens the gaps between the applicants and thus confirm the results of the award of marks presented in chapter 4, in particular concerning the difference between on the one hand A1, A3 and A5 and on the other hand A2, A4 and A6.

The evaluators have also concluded that it has not been necessary to score the so-called ‘other aspect’ contained as an option in the agreed evaluation model, since the mandatory part of the evaluation generates results that discriminate among the application, and since it has been concluded that the general credibility of the applications is equal to the ranking of the applications. As such, it has been assumed that the risks identified can be handled satisfactorily during the licence negotiations.”

34.28 The above passage must be taken as confirmation that a decision had been made in Copenhagen on 28th September, 1995, that Other Aspects would not be scored, as presumably there was a sufficient consensus on the part of AMI, Mr. Brennan and Mr. Towey that they were in a position to rank the applicants, by reference to the results generated from the existing qualitative evaluation of the four substantive Aspects. What is not at all clear to the Tribunal is how AMI could have concluded that the credibility of the applications was “*equal to the ranking of the applications*”, without measuring or evaluating the applications in a considered or systematic way, by reference to those

dimensions, although Mr. Andersen testified that, as regards the financial risks identified, supplemental analysis had been conducted by AMI, as set out in Appendix 10 of the draft Report.

34.29 It was only as a result of Mr. Andersen's evidence that the Tribunal learned that this section on risks and sensitivities, far from being an adjunct to the comparative evaluation, was of central significance to the paragraph 19 scheme, as it implemented Government policy. What the Tribunal had not appreciated from the evidence of Departmental witnesses, who had made no mention of it in their testimony, is that it was this section which was intended by AMI to represent consideration of the condition of financial capability, as stipulated in paragraph 19. As there had been no pre-qualification substantive specifications included in the RFP, Mr. Andersen testified that it was not possible to evaluate financial and technical capability as pre-qualifying conditions, and instead these matters fell to be addressed following the conclusion of the comparative evaluation. It was in various passages of this section, according to Mr. Andersen, that AMI, as consultants, had registered reservations surrounding the financial capability of Esat Digifone, and of Persona. It was the following passage, according to Mr. Andersen, which represented the financial marker in respect of Esat Digifone:

"The weakest point concerning A5 is not related to the application as such, but to the applicant, or more specifically to one of the consortium members, namely Communicorp, which has a negative equity. Should the consortium meet with temporary or permanent opposition, this could in a worst case situation turn out to be critical, in particular concerning matters related to solvency."

It was this observation, together with a further reference in the following paragraph that

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

which was intended to alert those responsible for determining the outcome of the process that there were problems surrounding the financial capability condition.

Section 5 – Summary, concluding remarks, and the recommendation

34.30 Section 5, the final section of the draft, was divided into five sub-sections. In the preamble to the sub-sections, the draft recited that the Report aimed to rank the three best applications on the basis of the results of the evaluation, and stated that the evaluation had been conducted by means of “four different models”, which were then set forth in five numbered points, as follows:

- “1. The results on the basis of the evaluation of the marketing, technical, management and financial aspects (qualitative award of marks).
- 2. The results on the basis of business case sensitivities, risks and credibility issues (qualitative assessment).
- 3. The results on the basis of a re-grouping of the criteria (qualitative award of marks).
- 4. The results on the basis of the application of a quantitative scoring model (conversion of marks to points).
- 5. A last comparison of the best applications.”

The results were then presented in five separate sub-sections, by reference to those “models”. It is noteworthy that the results, as contained in Table 16 and Table 17, were described in both instances as “qualitative award of marks”, and not as representing the product of a combined or holistic quantitative and qualitative process, as suggested by Mr. Andersen in his evidence.

34.31 Much of the material in this section has already been explored in considerable detail in the context of the output of the Copenhagen meeting of 28th September, 1995. It will be recalled that three tables were generated at that meeting, and they appeared in the draft Report as Tables 16, 17 and 18. Although these tables have already been reproduced earlier in this Volume, it seems to the Tribunal that, in order to convey, even in summary form, the salient features of what was contained in the draft of 3rd October, 1995, it is necessary to replicate the tables in recounting the content of the sub-sections of Section 5.

Sub-section 5.1 – “The results based on the aspects, dimensions and indicators”

34.32 This first sub-section contained Table 16 which was in the following form, save for an acknowledged error in relation to the Technical Aspects sub-total, which has been corrected in the following table:

Aspects and dimensions	A1	A2	A3	A4	A5	A6
Market development	C	C	B	C	A	C
Coverage	B	C	A	C	A	D
Tariffs	C	D	B	C	C	A
International roaming plan	A	D	C	C	C	C
Marketing aspects (subtotal)	B	C	B	C	A/B	C
Radio network architecture	C	C	B	B	A	D
Capacity of the network	C	D	C	B	A	C
Performance guarantee	D	E	C	B	A	C
Frequency efficiency	A	C	A	A	A	A
Technical aspects (subtotal)	C	D	B	B	A	C
Financial key figures	A	C	B	C	B	C
Licence payment	(A)	(A)	(A)	(A)	(A)	(A)
Financial aspects (subtotal)	A	C	B	C	B	C
Experience of the applicant	C	D	A	C	B	C
Management aspects (subtotal)	C	D	A	C	B	C
GRAND TOTAL	B	D	B	B/C	A/B	C
RANKING	3	6	2	4	1	5

It was these results which were described in the draft as the qualitative award of marks, and by reference to these marks, the sub-section nominated the three best applicants as A5, A3 and A1, ranked in order of merit. It was further observed that the difference between A5 and A3 was approximately equivalent to the difference between A3 and A1, a proposition that was demonstrably incorrect.

Sub-section 5.2 – “The results based on business case sensitivities, risks and credibility.”

34.33 This short sub-section revisited the material presented in Section 4 on Other Aspects. The text of the sub-section is quoted in full below:

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

As the attention [sic] has been to nominate the 3 best applications, the following has been concluded:-

- 1. A5
- 2. A3

3. A1

with the indicated ranking. The risks identified among the 3 best applications might turn out to be general business type risks, whereas some of the risks identified for A4, A6 and, in particular, A2 with the indicated ranking are more serious.

Some of the risks have been subject to supplementary analyses, which are summarised in appendices 9 -13.”

Sub-section 5.3 – “The results based on a re-grouping of the criteria”

34.34 The third sub-section contained Table 17, in the following form:

Dimension	Weight	A1	A2	A3	A4	A5	A6
Market development	10	C	C	B	C	A	C
Financial key figures	10	A	C	B	C	B	C
Experience of applicant	10	C	D	A	C	B	C
Radio network architecture	10	C	C	B	B	A	D
Capacity of the network	10	C	D	C	B	A	C
Tariffs	18	C	D	B	C	C	A
Licence payment	11	A	A	A	A	A	A
Coverage	7	B	C	A	C	A	D
Roaming	6	A	D	C	C	C	C
Performance guarantees	5	D	E	C	B	A	C
Frequency efficiency	3	A	C	A	A	A	A
GRAND TOTAL		B↓	C↓	B	B↓	B↑	C↑
RANKING		3	6	2	4	1	5

The results, as contained in Table 17, had also been described in the preamble of the sub-sections as a qualitative award of marks. Notwithstanding the detailed evidence of Mr. Towey as to what had transpired in Copenhagen on 28th September, 1995, the exercise which generated the results comprised in the table was characterised as “a separate conformance testing”. The sub-section concluded with the same ranking of the three best applicants.

Sub-section 5.4 – “ The results based on a conversion of marks to points”.

34.35 The fourth sub-section contained Table 18, also reproduced below:

Dimensions	Weight	A1	A2	A3	A4	A5	A6
Market development	10	C	C	B	C	A	C
Financial key figures	10	A	C	B	C	B	C
Experience of the applicant	10	C	D	A	C	B	C
Radio network architecture	10	C	C	B	B	A	D
Capacity of the network	10	C	D	C	B	A	C
Tariffs	18	C	D	B	C	C	A
Licence payment	11	A	A	A	A	A	A
Coverage	7	B	C	A	C	A	D
Roaming	6	A	D	C	C	C	C
Performance guarantees	5	D	E	C	B	A	C
Frequency efficiency	3	A	C	A	A	A	A
SCORING (POINTS)		362	268	410	353	432	347
RANKING		3	6	2	4	1	5

34.36 The exercise reflected in the table, whereby the alphabetical grades, A, B, C, D and E, were converted to numerical points, 5, 4, 3, 2, and 1, and the weightings fixed for the quantitative evaluation were applied, was described as a mechanism “to check the results”. The weightings applied to the results, as shown in this table, and in Table 17, were defined as those which had been “agreed prior to the closing date for quantitative purposes”. The commentary included a statement that “such a calculation distorts the idea of a qualitative evaluation”. It will be recalled from the earlier discussion of the Copenhagen meeting of 28th September, 1995, that it was on Mr. Brennan’s initiative that the exercise illustrated by Table 18 was undertaken. Although that proposal was resisted by Mr. Andersen, it seems that, by incorporating this table in the draft Report, albeit subject to qualification, that resistance was not sustained. The sub-section concluded by ranking the three best applicants in the same order as in the previous sub-sections.

Sub-section 5.5 – “A last comparison of the best applications”

34.37 This sub-section comprised a comparative exposition of the results of the sub-group evaluation, and the ranking of the three top applicants in purely narrative form. Much of the material contained in the sub-section appears to echo the discussions which Mr. Towey related in the course of his evidence regarding the exercise of separating A3, Persona, and A5, Esat Digifone, and the generation of Table 17 at the Copenhagen meeting of 28th September, 1995.

34.38 The sub-section opened with a consideration of the application that had been submitted by A1, Irish Mobicall, ranked in third position. It focused on A1’s relatively weaker results in the areas of marketing and tariffs, and on the absence of provision for performance guarantees, as factors which led to that ranking.

34.39 By far the greater part of the sub-section focused on differences between the applications submitted by A3, Persona, and by A5, Esat Digifone, which it was stated warranted ranking A5 ahead of A3. The following were the principal differences highlighted.

- (i) The text reiterated the philosophical differences, as identified by AMI, between the overall approaches of Esat Digifone and Persona, respectively defined by AMI as “*market leadership*” and “*cost leadership*”. The latter arose from Persona’s objective of bringing about a considerable reduction in tariffs. As against that, the text noted that supplemental analysis established that, because Esat Digifone had “*a number of unique selling propositions*”, and “*a sound link to the revenue streams evidenced in the financial part of the business case*”, it was just “*a fraction*” behind Persona on tariffs. In passing, it may be observed that the text omitted to explain how, or why, Persona was then a full grade ahead on the Tariffs dimension, which according to the weightings agreed was, at a weighting of 18, by far the single most important dimension evaluated.
- (ii) The “*market leadership*” philosophy of Esat Digifone was discussed, and it was noted that Esat Digifone opted for “*market leadership*”, both at operator level and at distribution level, and it was concluded therefore that its entire approach would boost market development.
- (iii) Whilst noting that both Persona and Esat Digifone had been awarded full marks on the dimension Coverage, it was observed that Esat Digifone’s proposals, notwithstanding the marks awarded in the evaluation, should be viewed more favourably than those of Persona, primarily because of Esat Digifone’s intention to launch its mobile service with approximately 80% coverage. There was no mention of the fact that Esat Digifone’s targeted launch date was some months behind that planned by Persona.
- (iv) It noted that Esat Digifone was clearly superior on the technical dimensions of Radio Network Architecture and Network Capacity. In that context, it stated that it had not been possible “*just to rely on the quoted figures concerning blocking and drop out rates*”, and that accordingly all that could be concluded was that “*customers of an A5 network will, with a high probability, meet a better network quality of service than the customers of an A3 network*”.

- (v) The sub-section then focused on the differences between Esat Digifone and Persona in terms of Performance Guarantees, and contrasted Esat Digifone's provision for a penalty clause for non-compliance, with the absence of any equivalent provision in the Persona application. It will be recalled in passing that this question of performance guarantees, and the provision of a performance bond had been somewhat controversial. In the information round, the Department had informed applicants that the provision of a performance bond, was not compulsory, and that being so, AMI, in the course of the Performance Guarantees sub-group, had voiced concerns as to whether it was appropriate to reward or penalise applicants by reference to the provision or omission of a performance bond, where it had been stated by the Department that such a bond was not specifically required.
- (vi) As to the dimension Experience of Applicant, it was noted that Persona, with its constituent membership of Unisource, which had more cellular experience than Telenor, and with its Irish-based experience through Motorola, Sigma Wireless, and the ESB, was superior to Esat Digifone. The latter's superior preparedness and experience at top management level was adverted to, although it was recorded that this did not outweigh the overall strengths of Persona.
- (vii) As regards all remaining dimensions, the sub-section recorded that the respective applications of Esat Digifone and Persona had been ranked equally, that is, on the dimensions of Financial Key Figures, Licence Fee, International Roaming and Frequency Efficiency.

34.40 The sub-section concluded in the following terms:

"The total assessment demonstrates that A1 is a qualified candidate and that both A3 and A5 are highly qualified candidates, each presenting applications comprising strong business plans.

Marginally, A3 is stronger than A5 concerning tariffs and experience. A5, however, is significantly stronger than A3 concerning market development, radio network architecture, capacity of the network and performance guarantees. The dimensions, where A5 is stronger than A3, have a more heavy weight in § 19 and in the weighting concluding [sic] prior to the closing date, as well as the difference between A3 and A5 is smaller, where A3 is the strongest and bigger, where A5 has the strongest points. Additionally, A5 has lower tariffs than the existing GSM1 tariff as well as it has been assessed that A5 does indeed have the necessary and sufficient experience to operate successfully.

Summarising, it can be concluded that A5 is the best application based on the approved methods and the criteria outlined in § 19, whereas A3 and A1 are the second best and third best applications, respectively.”

34.41 Whilst the Tribunal does not wish to engage in an exercise of parsing and analysing the sub-section to an undue extent, it is undoubtedly unsettling that the overall tone of the sub-section appears to have been one of advocating the strength of the Esat Digifone application, and that certain aspects of the narrative, both in terms of what was stated, and what was omitted, were misleading. It is particularly striking that AMI, in the penultimate paragraph of the sub-section, stated that *“the dimensions where A5 is stronger than A3 have a more heavy weight in paragraph 19”*, when it was patently clear, from both Table 17 and Table 18, that the dimension Tariffs, on which Persona had been awarded a higher grade, was, on the weightings shown, some 80% more significant than any other single dimension evaluated.

Sub-section 5.6 - “The recommendation”

34.42 The text of the final short sub-section is quoted in full below:

“The results of the evaluation mean that the evaluators have arrived at the following ranking of the 3 best applications:

1. A5
2. A3
3. A1

It is therefore proposed to advise the Minister to enter into licence negotiations with the consortium behind the A5 application, with the prior consent of the applicant that if the negotiations is [sic] assessed by the Minister to fail or to be impossible to conclude successfully, then licence negotiations will be commenced with the next nominated candidate. If the consortium behind A5 cannot satisfactorily cover the risks identified (but not scored), it is recommended to consider entering into licence negotiations with A3. Similarly, if the consortium behind A3 cannot satisfactorily cover the risk identified (but not scored) and abandon the strong reservations concerning the draft licence, it is recommended to consider entering into licence negotiations with A1.

Prior to the licence negotiations, it is recommended to redraft the licence in order to transform the favourable offerings in the application into binding licence requirements and to cover the risks identified simultaneously.”

In his evidence, Mr. Andersen directed the Tribunal’s attention to the following passage of the recommendation:

“If the negotiations is [sic] assessed by the Minister to fail or to be impossible to conclude successfully..”

He testified that this passage, when read in conjunction with the passage in the risks and sensitivities section, referring to Communicorp’s negative equity and risk in a worst case situation that such weakness could lead to critical difficulties, in particular concerning solvency, constituted AMI’s marker surrounding the financial capability of Esat Digifone, for the purposes of the paragraph 19 precondition.

Appendices to first draft Report

34.43 In addition to the body of the draft Report, a series of draft appendices were also received by the Department on 4th October, 1995. Mr. Andersen had referred in his memorandum of 21st September, 1995, to the provision of appendices with that draft Report, and had stated that they would, as far as possible, be provided in full. A copy of the [appendices](#) to the first draft Evaluation Report can be found in the Book of Appendices to the Volume.

34.44 It seems that AMI were not in the event in a position to finalise the entire of the draft appendices by that time, as a number were omitted from the material forwarded to the Department on 4th October, 1995. It is clear from the table of appendices that thirteen appendices were intended to be attached to the Report. Of the thirteen, ten were to address supplemental analysis undertaken by AMI. Of the other three, Appendix 1 was to consist of a table of contents, Appendix 2 was to cover the methodology used in the evaluation, and Appendix 3 was to contain the Evaluation Model. It is evident from the table of contents comprised in Appendix 1 of the first draft that no provision was made for an appendix containing the results of the quantitative evaluation, which confirms that, as of 3rd October, 1995, it was not contemplated by AMI that the results of the quantitative evaluation would be published in the final Report. Nor was there any provision, either within the body of the draft, or in any appendix, for an analysis of the *“interplay between the quantitative and qualitative evaluation”*, as had been stipulated by the Evaluation Model.

34.45 Of the thirteen appendices recited in Appendix 1, the following were included within the draft of 3rd October:

- (i) **Appendix 1** – Table of Appendices;
- (ii) **Appendix 3** – The Evaluation Model;
- (iii) **Appendix 4** – Supplementary analysis on financial conformance check;
- (iv) **Appendix 5** – Supplementary analysis on blocking and drop-out rates;
- (v) **Appendix 9** – Supplementary analysis on consortia composition and selected risks;
- (vi) **Appendix 10** – Supplementary analysis on financial risks;
- (vii) **Appendix 11** – Supplementary analysis on procurement and infrastructure etc;
- (viii) **Appendix 12** – Supplementary analysis on the substitution of mobile terminals;
- (ix) **Appendix 13** – Supplementary analysis on legal aspects and matters related to the licence.

34.46 The following appendices had not it seems been completed by that date, as they were not included with the draft received:

- (i) **Appendix 2** – The methodology applied;
- (ii) **Appendix 6** – Supplementary analysis on tariffs;
- (iii) **Appendix 7** – Supplementary analysis on interconnection;
- (iv) **Appendix 8** – Supplementary analysis on the effects on the Irish economy.

34.47 Two of these appendices featured significantly in evidence heard by the Tribunal in relation to the later deliberations of the Project Group, in relation to the subsequent draft Report of 18th October, 1995, and in relation to the final

Report. These were Appendix 3 and Appendix 10, and it is proposed to refer to their contents in some detail at this point.

Appendix 3

34.48 Appendix 3 reproduced the Evaluation Model as approved at the Project Group meeting of 9th June, 1995, which included the weightings agreed at indicator level on that date for the quantitative evaluation. The weightings as contained in the Model were the pre-European Commission intervention weightings for the dimensions Tariffs and Licence Fee. They also included the weightings at indicator level for the multi-dimensional evaluation criteria, that is, the first and second criteria, Credibility of Business Plan and Applicants’ Approach to Market Development, and Quality and Viability of Technical Approach Proposed. The following table is an extract of the table which appeared at page 11 of the appendix, which was a direct reproduction from the Evaluation Model, and showed the numerical weightings for the indicators in question.

INDICATOR	WEIGHT
Market penetration score 1	3.75
Market penetration score 2	3.75
Number of network occurrences in the mobile field	10
Solvency	7.5
IRR	7.5
Number of cells	10
Reserve capacity	10

34.49 The following text appeared immediately below that table on page 11 of the appendix:

“Credibility of business plan and the applicant’s approach to market development will be covered in the following indicators: experience of the applicant, market development, solvency and IRR. Quality and viability of technical approach will be covered by the number of cells and the reserve capacity.”

This appendix will be revisited in some detail in the context of discussion of the second draft and final Evaluation Reports, when it will be seen that significant alterations were made to the table of agreed quantitative weightings.

Appendix 10

34.50 Appendix 10 was entitled “*Supplementary analysis on financial risks*”. According to the narrative, the purpose of the appendix was to “*discuss the risks*

due to lack of funding”, and the necessity for that discussion, as defined in the opening remarks, was:

“As stated in the main evaluation report, the two top ranked consortia have members, who presently do not have the capital required to finance the GSM-2 network.”

The risks associated with the financial vulnerabilities identified in relation to Sigma Wireless, in the case of the Persona, Communicorp, and Esat Digifone, were then reviewed in two separate sub-appendices.

Sub-appendix 10.2 - The Persona consortium

34.51 The first sub-appendix numbered 10.2 related to Persona. It opened by identifying the percentage ownership of the consortium members as follows:

*“26.7% Motorola International Ventures Inc.
26.7% Unisource NV (NL, S, CH, E, telecom joint venture)
26.7% Sigma Wireless Networks Ltd. (Irish mobile communications group)
20% EBSI [sic] Telecoms Ltd. (100% State owned).”*

The analysis assumed that Motorola, Unisource and ESBI had, or should be deemed to have, ample capital to fund their respective equity participation in the proposed venture, and it was Sigma, the financially vulnerable member, with a 26.7% shareholding, which was the focus of the exercise.

34.52 It was noted that the financial plans submitted by Persona projected a total equity subscription of £39.9 million, and debt financing of £42.4 million. By reference to the ownership ratios, it was estimated that Sigma’s equity requirement would be in the range of £10.649 million, on the projections submitted, to a possible £21.298 million, in a worst case scenario. Sigma’s equity capital was only £1 million, and it was recorded that the Persona application did not disclose how Sigma intended to fund its equity commitment, although the presentation had revealed that Sigma had received a facility letter from Allied Irish Banks. It was noted that the “price” of such funding, in terms of the ownership and control of Sigma, was unknown. There was however a shareholder’s agreement which had already been executed, and which contained underwriting provisions which would underpin Sigma’s obligations, although the activation of those provisions would have consequences in terms of control being vested in non-Irish partners.

34.53 The sub-section concluded as follows:

“To conclude, the weak financial position of Sigma will not lead to financial problems for Persona, but may lead to a different ownership structure of Persona, either directly through the division of it’s [sic] shares or indirectly through the ownership of Sigma.

This uncertainty can be limited by a proper set of licence conditions. As examples, the following types of conditions are suggested:

- Requirements for minimum equity capital of Sigma*
- Requirements regarding the voting power in Persona*
- Requirements regarding the loans to Sigma and their conditions.”*

Sub-appendix 10.3 - The Esat Digifone Consortium

34.54 The results of the supplemental analysis of the risks associated with Esat Digifone were outlined in sub-appendix 10.3. The members of the consortium, and their respective shareholdings, were stated to be:

*“50% Telenor Invest AS
50% Communicorp Group (34% held by Advent Int. plc)”*

34.55 As with the Persona exercise, it was recognised at the outset that no issue surrounded Telenor’s capacity to fund its equity participation, and the focus of the analysis was on Communicorp, which was described in the following terms:

“Communicorp is a new company which has invested heavily in telecommunications infrastructure and has a very weak balance sheet which needs capital injection before it can support the shareholders’ equity commitments stated in the shareholders’ agreement.”

34.56 Communicorp’s shareholding, after licence award, was defined as being within a range of 40% to 50%, and as there was a possibility that its shareholding could be diluted to 34% at a later stage, Communicorp’s equity requirement was estimated at three different levels of equity, as shown in the table below, which is extracted from page 4 of the appendix.

OWNERSHIP	EQUITY BASE	ESTIMATED WORST CASE EQUITY
Commitment at minimum equity 34%	17.68 million	35.36 million
Commitment at medium equity 40%	20.8 million	41.6 million
Commitment at minimum [sic] equity 50%	26 million	52 million

34.57 It was stated that “*this equity commitment cannot be met by Communicorp today*”. Reference was made to what was described as a letter of commitment, dated 10th July, 1995, from Advent International, which had been submitted with the Esat Digifone application, whereby Advent had “*committed to fund up to IR£30,000,000 in support for Communicorp’s 40% shareholding*”, but it was observed that the letter did not disclose the “*price*” of the commitment, if it was triggered. Reference was also made to information provided, in the course of the oral presentation, that the price of this capital injection would be close to a “*75% stake*” in Communicorp, but that control would nevertheless remain with the Irish minority shareholder, through the creation of shares with different voting rights, and the allocation of shares bearing greater voting rights to the Irish ownership. A rider was added to the effect that the “*legal basis*” for the commitment had not been included as part of the application.

34.58 The sub-appendix cautioned that the risk of a dispute between Advent and Communicorp seemed “*evident*”, and that this could result in instability, a transfer of control from Communicorp to Advent, or a situation where the Advent commitment would not be fulfilled. It concluded in the following terms:

“The size of commitment by Advent does not cover our worst case estimate of the equity requirements for Communicorp. In a worst case scenario, the requirement for further funding is expected to arise 2-3 years into the project. At this stage Advent will already have invested the committed figure, and it is judged to be very unlikely that Advent will retreat as this could lead to a 100% loss of the invested funds. Therefore, it can be concluded that the major risk is related to possible instability of Communicorp or to the transfer of power to a non telecommunications investor.

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

- Requirements regarding the share of ownership and voting power in Communicorp*
- Requirements regarding the equity of Communicorp.”*

34.59 Whilst the Tribunal does not intend to analyse the wording of Appendix 10, it is nonetheless instructive to note that no distinction was drawn, in terms of overall risks to the project, between the significantly lesser shareholding of Sigma in the Persona consortium, with 26.67% of the shares, as against the shareholding of Communicorp in the Esat Digifone consortium, with 34%, 40% or 50% of the shares. Nor was it disclosed that, whilst the members of the Persona consortium had already executed a binding shareholders agreement, no more than an unexecuted proposed shareholders agreement had been submitted with the Esat Digifone application.

34.60 The Sigma worst case scenario requirement of £21.298 million was estimated, as recorded in Appendix 10, by reference to cash flow sensitivity figures extracted from the mandatory tables. There was no reference in the case of the Communicorp analysis to the multiplier of 2, applied in estimating the worst case capital requirement, having arisen from equivalent cash flow sensitivity figures. All that was stated in that regard was:

*“If IR£ 52,000,000 are used as the base case requirement, and if 2*IR£52,000,000 is used as the worst case equity requirement, the individual equity commitment for Telenor, Communicorp amounts to:”*

34.61 According to the Persona analysis, the consortium’s negative cash flow figures increased from minus £102 million to minus £255 million, in the event of a two year delay in subscriber uptake. It was stated that, by reference to those figures, the worst case assumption of twice the capital requirement of the base case had been made. It appears however that a significant error was made by AMI in conducting the sensitivity analysis in the case of Persona, in that the cash flow sensitivity figures used were not the figures submitted by Persona, but those submitted by A4, Irish Cellular, whose figures in that regard represented the worst figures submitted by any of the six applicants.

34.62 That error, which only came to light from a further inspection of the figures made by the Tribunal, as a result of cross-examination of Mr. Andersen, was brought to Mr. Andersen’s attention in the course of his re-examination. Whilst Mr. Andersen accepted that there was an error, he was not certain that the error lay in the use of A4’s figures for A3; the error might have been that A3’s figures had been transposed incorrectly into A4’s tables. Mr. Andersen agreed that, if A4’s figures had been used in conducting the Persona sensitivity analysis, the supplementary analysis was wrong and that it would reflect a mistake. He testified that he would be disappointed, but he resisted the proposition that it would constitute a serious mistake.

34.63 In regard to this matter, which arose in the final hour of Mr. Andersen's attendance, he was invited by the Sole Member to avail of a facility that had been implemented in connection with Part I of the Tribunal's Report, whereby witnesses were permitted, after the conclusion of their evidence, to submit further information to the Tribunal, to which the Tribunal would have regard, provided such information did not impact adversely on any other affected person. By letter dated 17th November, 2010, from the Tribunal to Maples & Calder, Mr. Andersen's Irish solicitors, the Tribunal confirmed that it would have regard to any further comments that Mr. Andersen wished to make, having considered this matter more fully. Mr. Andersen's solicitors responded by letter dated 23rd November, 2010, in which they informed the Tribunal as follows:

"As the Tribunal is aware, Mr. Andersen does not have access to the working files in relation to this matter.

In those circumstances it is not possible for him to check the point being put to him by Mr McDowell SC at question 377 and the suggestion that some of the figures might have been interchanged between A3 and A4 cannot be confirmed.

However we have taken out client's further instructions and he is able to assist the Tribunal in stating that given that this issue related to a supplementary analysis on financial risks as dealt with in section 5 of the final evaluation report, the figures contained in the document put to him did not in any way affect the scorings which are recorded in section 4 of the evaluation report and could not therefore have affected the result in any way whatsoever.

This is furthermore substantiated by the fact that the only reference to Appendix 10 in the evaluation report appears in section 5 (page 43) is as follows: 'It is important, nevertheless, to draw attention to the need to deal with this factor where relevant in the context licence negotiations. These aspects are the subject of further elaboration in appendices 9 and 10'. Therefore, the figures discussed are only relevant in the context of the licence negotiations and not in the context of the evaluation and the scorings. Mr McDowell's suggestion that some of the figures of A3 and A4 might have been interchanged was not relevant in the context of the licence negotiations, since neither A3 nor A4 were invited to licence negotiations."

34.64 Whilst Mr Andersen is of course correct in his observations that the workings to which the matter related did not impact on the substantive scorings in the evaluation process, he appears to have overlooked the significance

attached to Appendix 10 by Mr. Martin Brennan at the Project Group meeting of 9th October, 1995, which will be returned to in Chapter 37 of this Volume. He also appears to have lost sight of his own evidence on the significance of the risk analysis section of the Report, to which Appendix 10 related, and which, according to Mr. Andersen, addressed financial risks in the context of the paragraph 19 precondition of demonstrable financial capability, which did not otherwise form any part of the substantive evaluation conducted. As will become apparent it was on Mr. Andersen's insistence that passages of that section, relevant to the financial vulnerability of the Communicorp element of Esat Digifone were retained in the text of the final Evaluation Report, in the face of Departmental efforts to delete them, a matter of hours before Mr. Lowry announced the result on 25th October, 1995. Those passages, according to Mr. Andersen, were intended by him to be a “*marker*” to those giving consideration to whether the precondition of financial capability had been satisfied.

34.65 The Tribunal has no reason to believe that the relevant parts of the mandatory tables of A4 and A3 had been transposed, particularly in the light of Mr. Billy Riordan's close scrutiny of them, and the terms of the confirmation which he insisted upon receiving from Mr. Jon Brüel of AMI at the Project Group meeting of 9th October, 1995, and which he required to be recorded formally in a corrigendum to the official report of the final Project Group meeting of 23rd October, 1995, in the following terms:

“Mr. Billy Riordan noted, for the record, that Mr. Jon Bruel of AMI had stated at the previous meeting that he was sufficiently satisfied that the financial tables, as evaluated, were adequate and true. Reference to this statement had been omitted from the minutes of the previous meeting in error”.

It should be added that it was Mr. Jon Brüel, according to Mr. Andersen, who was responsible for the workings reflected in, and the contents of, Appendix 10.

34.66 The Tribunal must conclude that the supplemental analysis comprised in Appendix 10 was in the case of Persona wrong, and that the figures used in computing its worst case capital requirement were not the figures submitted by Persona, but those submitted by A4, Irish Cellular. The correct figures, as shown in Persona's mandatory tables, were approximately minus £75 million to minus £103 million, which could not have justified a multiplier of 2, and could have warranted a multiplier of no more than one in the region of 1.4. The evaluation was of course a complex process, and it is inevitable that errors, including significant errors of the type identified, could occur. Such errors might of course have been identified and remedied if time had been available for a thorough appraisal of the evaluation which had been conducted, and of the draft Reports.

34.67 Appendix 10 was revisited, following consideration of the first draft Report by the Project Group, at what appears to have been the instance of Mr. Michael Lowry. Certain significant amendments were made to it, to which reference will be made, but the error in the case of the Persona computation was never corrected. Further reference will also be made to this appendix, and certain significant amendments to it, in the context of the second draft and final versions of the Evaluation Report.

MS. NIC LOCHLAINN'S REVIEW OF THE FIRST DRAFT REPORT AND CONCERNS OVER WEIGHTINGS USED BY AMI

34.68 The two copies of the first draft Report received by the Development Division were not copied and distributed to the body of the Project Group, and the preponderance of the membership did not have sight of the draft, until it was circulated at the commencement of the Project Group meeting on the following Monday, 9th October, 1995. This, as already alluded to, precluded the procedure which had been adopted by the Project Group on 14th September, 1995, for the provision of written observations. Neither Mr. Brennan nor Mr. Towey could recall what steps they took on receipt of the draft, although Mr. Towey thought that he certainly read the draft, and expected that Mr. Brennan did so as well. He did not recall discussion of the draft in advance of the Project Group meeting on the following Monday, but considered that it was probable that such discussions took place.

34.69 What is clear from the documentation on the Departmental files is that a copy of the draft was available to Ms. Nic Lochlainn of the Development Division, and that she had an opportunity of making a close study of its contents prior to the 9th October meeting. What is evident from that documentation is that, far from regarding the results of the quantitative evaluation as no longer material, Ms. Nic Lochlainn continued to consider them sufficiently important to warrant a close scrutiny of the weightings applied to those results by AMI. On 6th October, 1995, the Friday following receipt of the draft, Ms. Nic Lochlainn sent a fax to Mr. Andersen, to which she appended four annexes, identified and marked by her as Annex A, B, C and D, and in the body of which she raised two queries, which she numbered 1 and 2, and which arose from the analysis which she had undertaken.

34.70 Her first query was:

“(1). Please see qualitative scoring for technical aspect as recorded by John McQuaid, which follows [Annex A]. This does not correspond with the Technical Aspect subtotal detail on Page 44 of the draft evaln

report – I believe it is a typo, marketing aspect scores having been duplicated by mistake on page 44.”

The final three words “on page 44”, as quoted in the above extract, had been added by Ms. Nic Lochlainn in manuscript.

34.71 Annex A was a document which has already been alluded to in the context of Mr. McQuaid’s task of aggregating the marks for the Technical Aspects dimensions, to arrive at an Aspects sub-total. It will be recalled that he and Mr. Aidan Ryan set about that task immediately following the post-presentation Project Group meeting of 14th September, with the assistance of Mr. Marius Jacobsen of AMI. The document in question was a copy of page 20 of the Evaluation Model, containing the qualitative marking matrix, on which Mr. McQuaid had made handwritten entries recording both his workings, and the numerical weightings which he had applied, in computing the Technical Aspects sub-totals for each of the six applicants.

34.72 As is evident from the content of point 1 of her fax, Ms. Nic Lochlainn, having read page 44 of the draft Report, had noted that the Technical Aspects sub-totals, as shown on that page, did not correspond with the sub-totals as recorded by Mr. McQuaid, and she brought that to the attention of Mr. Andersen. In doing so, she commented that the error probably arose from a duplication of the sub-totals for Marketing Aspects.

34.73 Point 2 in her letter, the more substantial point, was in the following terms:

“Please see attached list of criteria and weighting as agreed by the Project Group prior to 4 August 1995 [Annex B].

Could you please clarify how these related to the weights as detailed on page 17/21 of the document of 08.06.95, which were to be the weights underlying the quantitative evaluation? [Page 17 is also attached at Annex C] and to page 7 of the draft quantitative report [see section on Weights at Annex D] e.g. OECD – basket is weighted 15.96%, does this correspond to 18% for competitive tariffing, as agreed by the Group?”

34.74 The document marked Annex B by Ms. Nic Lochlainn contained the following table showing the weightings agreed for each of the evaluation criteria. A manuscript note had been made on it recording that it contained “weighting agreed by the Group prior to 4/8/95”.

List of the Evaluation Criteria	List of Weightings
credibility of business plan/approach to Mkt Development	30
Quality of technical approach	20
competitive tariffing	18
Licence Fee	11
Coverage	7
Intl Roaming Plan	6
Perf Guarantees	5
Frequency efficiency	3
	100

The numerical weightings in the table, and the total figure, had been entered in manuscript, and beside the figure 30, the weighting for the first-ranked criterion, Credibility of Business Plan, there was another somewhat fainter manuscript entry of “32.5”. It was to this annex, which recorded the criteria weightings, that Ms. Nic Lochlainn initially drew Mr. Andersen’s attention.

34.75 The document marked Annex C by Ms. Nic Lochlainn was a copy of page 17 of the Evaluation Model, dated 8th June, 1995, which had been adopted by the Project Group on 9th June, 1995, and which contained the table of agreed weightings at indicator level for the purposes of the quantitative evaluation. Certain corrections had been made to the table by hand, to reflect the adjustments made to the weightings by means of the written procedure administered by Ms. Nic Lochlainn at the end of July, 1995, consequent on the capping of the licence fee, whereby the weighting for the Licence Fee indicator had been reduced from 14 to 11, and the weighting for the indicator Competitiveness of an OECD-like GSM 2 Basket, the sole indicator for the dimension Tariffs, had been correspondingly increased from 15 to 18. The total weighting shown at 100 in the printed table was also corrected by hand to 103, and a bracket had been placed around four of the indicator weightings, and their total of “25” had been written outside the bracket.

34.76 The document marked Annex D by Ms. Nic Lochlainn was a copy of page 7 of the quantitative results of 20th September, 1995, which it will be recalled was the second set of results generated by AMI. The page contained a table showing the weighting applied by AMI to each of the indicators, to arrive at a total weighted score for each of the six applicants. The table is reproduced below:

“Weights

1.	a.	Total annual traffic minutes	3.99%
	b.	Number of SIM-cards	3.99%
2.		Demographical coverage	7.98%
3.		OECD-basket	15.96%

4.	Number of cells	10.64%
5.	Reserve capacity	10.64%
6. a.	Blocking rate	2.66%
6. b.	Dropout rate	2.66%
7.	Frequency economy	3.19%
8.	Number of network occurrences	10.64%
9.	Licence fee payment	11.70%
10. a.	Solvency	7.98%
10. b.	IRR	7.98%

Total weighted score

A1	A2	A3	A4	A5	A6
2.77	2.62	3.22	2.67	2.85	2.91

”

34.77 In essence, what Ms. Nic Lochlainn was asking Mr. Andersen at point 2 of her fax, was how the indicator weightings, as shown in the quantitative results of 20th September, 1995, related to the indicator weightings agreed by the Project Group on 9th June, 1995, subject to the adjustment following the capping of the licence fee, and to the weightings that had been agreed at criterion level prior to 4th August, 1995. To illustrate the matter that was causing her concern, she drew attention to the weighting applied to the Tariffs indicator, that is, OECD Basket, which in the quantitative results of 20th September, 1995, was shown at 15.96, but which had been agreed at both indicator and criterion level by the Project Group at 18.

34.78 It is not surprising in the least that Ms. Nic Lochlainn experienced some confusion around the weighting applied by AMI. It will be recalled that, following what was agreed at the Project Group meeting of 4th September, 1995, AMI had produced revised quantitative results of 20th September, 1995, which excluded the indicator for International Roaming, so that the weighting for that indicator was omitted. It seems that in re-casting the weightings, AMI may have endeavoured to reflect two operations, firstly, the reallocation of the 3 percentage point weighting from Licence Fee to Tariffs, and secondly, the redistribution of the 6 percentage point weighting for International Roaming. It is understandable that she found it difficult to reconcile the weightings that had been applied to the second set of quantitative results, with those that had been agreed by the Project Group.

34.79 Both of the queries raised by Ms. Nic Lochlainn related to points of relatively fine detail. They certainly demonstrate that Ms. Nic Lochlainn had made a close study of the draft Report of 3rd October, 1995. They also suggest that she had combined that with a scrutiny of the then most recent quantitative results on the Departmental files, and in particular of the consistency of the weightings applied to those results with those that she had carefully recorded as having been approved by the Project Group prior to the closing date of the competition. It further suggests that, as far as Ms. Nic Lochlainn was concerned, both the quantitative and qualitative results warranted her attention, and this

must have reflected her understanding, as of 6th October, 1995, that the quantitative results continued to be an integral part of the evaluation process. In her evidence, Ms. Nic Lochlainn accepted that the quantitative results were still a live issue for her as of that date, and whilst she questioned their significance, she agreed that they were sufficiently significant to warrant her raising those queries with Mr. Andersen.

34.80 The manuscript addition made to Annex A, whereby the number “32.5” had been written beside the weighting of 30, shown as the agreed weighting for the first evaluation criterion, also suggested that Ms. Nic Lochlainn was conscious that the agreed weightings at dimension level for that criterion, that is, 10 for Market Development, 15 for Financial Key Figures and 7.5 for Experience of Applicant, amounted to a figure of 32.5, which was in excess of the agreed criterion weighting of 30. Whilst the contents of her fax suggested that considerable care had been taken by her in the preparation of her queries, there was no record of any written response from AMI, although the Technical Aspects sub-totals were corrected in the later draft Report submitted by them, and in the final Report.

34.81 Ms. Nic Lochlainn had no memory of this document, or of the exercise which it reflected, and it was her evidence that she had not noticed that the split weightings agreed for the dimensions of the first criterion came to 32.5, until March, 2002, when she was reviewing documentation in the context of inquiries made by the Tribunal. She did not accept that the manuscript figure of “32.5” on Annex B to her fax, together with the correction made to the total of the weightings from 100 to 103 in Annex C, suggested that she must have been conscious of that matter as of 6th October, 1995. Her explanation was that she had not written the number “32.5” beside the weighting, which she observed had been written in pencil, whereas the entries which she had made had been written in blue biro.

34.82 She testified that it was clear to her that the figure “32.5” had been written by Ms. Margaret O’Keefe, and that, although Ms. Nic Lochlainn herself was not aware of the 32.5 issue, Ms. O’Keefe must at some stage have become aware of it, and must have marked the document in pencil, although it was not clear to Ms. Nic Lochlainn when Ms. O’Keefe might have done so. Ms. Nic Lochlainn suggested that this might have occurred during a cross-check at a subsequent date, and that it was possible that the fax had been issued and sent by her to AMI, without that entry on Annex B. As to the alterations that had been made by hand on Annex C, clearly made by Ms. Nic Lochlainn, whereby the weightings had been changed for Tariffs and Licence Fee, and the total of the weightings had been altered from 100 to 103, Ms. Nic Lochlainn did not believe

that she had made those alterations at the time she sent the fax to AMI, rather she thought that she had probably just taken a copy of the document from the general file, and faxed that copy. She did however accept that those manuscript changes were in her handwriting, and had been made by her.

34.83 Mr. Andersen, unlike Ms. Nic Lochlainn, had a very clear memory of receiving her fax, although his recall did not extend to whether he had responded to it. He noted that there was no record of a response from him on the files, and he had a reasonable expectation that he would have discussed the matters she raised at the Project Group meeting on the following Monday, 9th October, 1995.

34.84 Mr. Andersen regarded Ms. Nic Lochlainn's fax as a highly significant document, which, according to his evidence, justified a subsequent alteration made by AMI to the weightings table in the Evaluation Report, as comprised in Appendix 3 to the draft Report, to record that the weightings for the three dimensions of the first-ranked criterion, that is, Market Development, Experience of Applicant, and Financial Key Figures, were 10 each, rather than 7.5, 10 and 15, as recorded in the Evaluation Model approved by the Project Group on 9th June, 1995, and as applied to all versions of the quantitative results generated by AMI. That alteration meant that the quantitative weightings in the Evaluation Model annexed to the Evaluation Report were consistent with the equal 10/10/10 weightings used for those dimensions by the Copenhagen meeting of 28th September, 1995, in ranking the applicants, as shown in Table 17 and 18 of the Evaluation Reports. As far as Mr. Andersen was concerned, Ms. Nic Lochlainn had brought to his attention that the weightings in the Evaluation Model of 8th June, 1995, were incorrect, and that was how he perceived her fax. Although he recognised that she did not say that explicitly, he thought that she was minded to say that the 10/10/10 were the correct weightings, and that the weightings in the Evaluation Model, as adopted, were not the correct ones, at least for what he termed "*the holistic*" evaluation. Mr. Andersen regarded as quite obvious from his review of the file that the weightings for the quantitative indicators were wrong, as they totalled 103, and the weighting split for the dimensions of the first criterion was wrong, as those weightings of 7.5, 10, and 15, totalled 32.5, rather than 30. These were both inconsistent with Ms. Nic Lochlainn's note of the agreed criteria weightings, a copy of which she had appended as Annex B to her fax.

34.85 The Tribunal has already observed that, as regards all of Mr. Andersen's evidence on the application of equivalent weightings to these dimensions, he overlooked the fact that the Evaluation Model of 8th June, 1995, was adopted by the Project Group at its meeting of 9th June, 1995, and the evidence showed that, in so doing, the Project Group had specifically approved a

weighting of 7.5 for the dimension Market Development. Whilst there were significant errors in the work conducted by AMI, some of which were understandable, it is abundantly clear that there was no error in the weightings recorded in the table at page 17 of the Evaluation Model of 8th June, 1995, insofar as those weightings reflected that the Project Group had agreed that the dimensions of the first-ranked criterion should not be weighted at 10 equally. It is undoubtedly the case that those weightings totalled more than 30, an error which, as Mr. Andersen acknowledged, could easily have been remedied by the application of a simple renormalisation factor, and it was quite frankly trite for Mr. Andersen to suggest that rectification of this error extended, or necessitated, the alteration of the agreed relative weightings of those three constituent dimensions.

34.86 Mr. Andersen's interpretation of Ms. Nic Lochlainn's fax was one that did not accord with her intention in raising those queries, according to her own evidence. As already related, it was her testimony that the manuscript addition of "32.5" to Annex B of her fax had not been made by her, and she denied that that entry, together with the manuscript entry to Annex C, in which she had recorded the figure "103", signified that she was conscious at the time that the dimension weightings of 7.5, 10 and 15 totalled 32.5, rather than 30, the agreed criterion weighting. It was her evidence that she was not aware of that disparity until she had reviewed the documentation in the course of the Tribunal's inquiries. Although it seems that Mr. Andersen was familiar with certain portions of Ms. Nic Lochlainn's evidence, it seems that he overlooked this centrally relevant passage.

34.87 Whatever ultimately prompted AMI to alter the weighting table on page 17 of the Evaluation Model, the Tribunal finds it very hard to accept that it was Ms. Nic Lochlainn's query, addressed to how the weightings deployed in the second set of quantitative results related to the criteria weightings agreed by the Project Group, which was at the source of the actions subsequently taken by AMI. It is clear from a reading of those queries that they pertained to a different weightings issue, and the author herself professed to have had no knowledge of the disparity in question.

MR. O'CALLAGHAN IS NOT TOLD

34.88 Whilst the draft Report of 3rd October, 1995, was not circulated to the membership of the Project Group, it seems that at some point during the first week of October, and possibly in the context of the inter-Divisional meeting of 3rd October, Mr. Brennan or Mr. Towey informed Mr. Sean McMahon of the outcome of the Copenhagen meeting of the previous week, and of the provisional ranking that had emerged. It seems that Mr. Brennan was otherwise guarded about that

information, and was not inclined at that time to share it, at least with the wider membership of the Project Group.

34.89 Mr. O’Callaghan who, as will be recalled, together with Mr. McMahon, represented the Regulatory Division on the Project Group, testified that he had met Mr. Brennan on Friday, 6th October, and inquired about the ranking, but that Mr. Brennan had declined to tell him what had emerged. Mr. O’Callaghan’s recollection was that he had met Mr. Brennan in the staff canteen in the Department’s offices in Kildare Street. Mr. O’Callaghan was aware, from the previous Project Group meeting, that the draft Report was expected, and he was curious about the outcome, as he wished to have an input into the meeting scheduled for the following Monday. He had probably also inquired from Mr. McMahon whether the Regulatory Division had received a copy of the draft Report, as had been agreed at the previous Project Group meeting, and had been told that it had not. Mr. O’Callaghan’s memory of what occurred was that he and Mr. Brennan were at a table alone, and that, as it was his recall that their exchange had taken place at around 2.30pm, most members of staff had already finished their lunch break, and had returned to their offices. Mr. O’Callaghan made his inquiry of Mr. Brennan, and he testified that he thought that Mr. Brennan had responded by stating that it was not proper to provide him with that information in a public place, even though Mr. O’Callaghan considered that he had approached the topic discreetly.

34.90 Mr. O’Callaghan reported that exchange to Mr. McMahon, who testified that he recalled that Mr. O’Callaghan had told him that he had asked Mr. Brennan about the ranking, but had been refused that information. Mr. McMahon further recalled that Mr. O’Callaghan had then asked him about it, and that he had told him. Mr. McMahon observed that they were being highly secretive at the time, and he presumed that Mr. Brennan’s hesitancy was perhaps due to some misguided apprehension, or adherence to the principle of secrecy. Mr. McMahon had no reservations whatsoever about furnishing that information to Mr. O’Callaghan, and confirmed that he regarded Mr. O’Callaghan as a full member of the Project Group, and that Mr. O’Callaghan was as much a member of the Project Group as anyone else. This latter element of Mr. McMahon’s testimony was addressed to a matter that had earlier been raised by Mr. Brennan in the course of his evidence, and to which reference is made below.

34.91 Mr. Brennan testified that he did not recall, and did not know, whether he had refused to provide that information to Mr. O’Callaghan. He assumed that the conversation between them had been casual, and may have taken place in a corridor or in the canteen, and that, in that context, he had perhaps been

guarded. He also suggested that his reluctance to disclose matters to Mr. O'Callaghan may have stemmed from a view that Mr. O'Callaghan's status on the Project Group was one of deputy to Mr. McMahon, and not one of full membership, and that, in those circumstances, the proper course would have been for Mr. O'Callaghan to have sought the information from his superior, Mr. McMahon.

34.92 In the absence of Mr. Brennan having any recollection of his exchange with Mr. O'Callaghan it is difficult to determine what may have actuated or contributed to his reticence. It may of course have been matters of confidentiality and discretion that informed Mr. Brennan's actions, but it must be borne in mind that at this time the information was well-known within the Department, and that, apart from Mr. Brennan and Mr. Towey, it was known to Ms. Nic Lochlainn, who had had access to the draft Report, it was known to Mr. Fitzgerald, it was known to Mr. McMahon, and it was known to Mr. Michael Lowry. It seems unlikely, when the information was so widely known, even extending to persons outside the Project Group, and when it was due to be discussed by the Project Group on the following Monday, that considerations of discretion, secrecy, or confidentiality alone could have been at the root of Mr. Brennan's actions. Irrespective of what did or did not motivate Mr. Brennan, the fact remains that not only was the draft Report kept strictly within the Development Division, but that Mr. Brennan had denied information on the provisional ranking to Mr. O'Callaghan. It is perhaps a measure of the extent to which the wider membership of the Project Group had been kept in the dark as to developments in the process at this time that Mr. O'Callaghan never knew that Mr. Brennan and Mr. Towey had been to Copenhagen on the 28th September, 1995, independently of their attendance at qualitative sub-groups, and that he had only learned of that meeting when reviewing documentation with which he had been furnished by the Tribunal.

34.93 The Tribunal would have known nothing of the interaction between Mr. O'Callaghan and Mr. Brennan on Friday, 6th October, 1995, or indeed of a number of other significant events, had it not been for a handwritten chronology which Mr. O'Callaghan generated, immediately following Mr. Lowry's announcement of the result of the evaluation process, on 25th October, 1995. A copy of that document can be found within the Book of Appendices to this Volume. The contents of the [chronology](#), as confirmed and corrected by Mr. O'Callaghan in the course of his evidence, were as follows:

“Chronology

1. *I learned that AMI had forwarded a first draft of final report in week ending 6.10.95. I asked MB who had they recommended + he refused to tell me on 6.10. The report was not circulated that wk. SMacM told me the order of pref later that day.*

2. *Did not see copy of first draft final report until 9.10.95. I raised ? of what happens if there is disagreement + MB said that most of the PT had been involved in the assessment which led to the ranking. MB said that Minister already knew the winner.*
3. *Remainder of week taken up entirely with Consultants on the Strat Alliance.*
4. *17.10.95 informed by FT that Minister wanted to ~~announce winner by end of October~~ go to Government the following Tuesday with the winner. Mtg of PT for 23.10 at 11.30.*
5. *Went to Brussels 18.10. – returned 19.10. Read 2nd draft Report on 20.10. but not appendix.*
6. *Informed at mtg of 23.10 that Min wanted to go to Govt 24.10 + get clearance for winner. SMacM + I said that we couldn't sign off on it as the report was deficient + had not been fully read. MB, SMacM and JMcQ met Sec and a further week was agreed to consider report. Mtg went on until 7.30pm.*
7. *23.10 [sic] informed that Taoiseach had requested Sec to expedite the position with a view to clearance at Govt the following day. I went through drafting changes with MB 4-5. Mtg at 5pm, left at 7.15 – drafting changes still being discussed to be faxed to MA.*
8. *Min met SeanMacM + MB + Sec + SF. He was to meet party leaders re. the winner. Heard at 4.45 that Min was hosting a Press conf to announce winner. He did. No signing off on report – we had no final report; No consensus asked for. No vote – effectively no decision by PT.”*

34.94 The contents of the document, the purpose for which, and the circumstances in which Mr. O’Callaghan generated it, will be returned to and referred to more fully at subsequent points in this Volume. Whilst many of the events to which Mr. O’Callaghan made reference occurred at a later stage of the process, it is nonetheless appropriate at this juncture to comment on the circumstances surrounding the disclosure of the document to the Tribunal.

34.95 The Tribunal sought access to all documents pertaining to the GSM process held by the Department, and by the Department of Finance, in early May, 2001. In view of the very considerable volume of documents involved, the Tribunal recognised that it would have been unduly onerous to expect the

Departments to produce all of the relevant material within a very short span of time, and accepted the provision of documents as and when assembled by the Departments. The greater part of the documents was provided during the month of June, 2001, and thereafter schedules identifying the documents were supplied in August, 2001. Mr. O'Callaghan's document was not within any of the documents furnished in June, 2001, nor was it within a small number of supplemental documents made available in August, 2001, and nor was it identified in the schedules with which the Tribunal was provided. It was not until 6th September, 2001, that a copy of the document was transmitted to the Tribunal, and in that regard the Tribunal was informed as follows:

“The delay in transmitting this document to you before now is regretted. Mr. O'Callaghan raised issues as to the possibility that the document might not fall within the scope of the discovery directed by the Tribunal and/or that it might be subject to some form of privilege. This necessitated further correspondence with Mr. O'Callaghan and the Chief State Solicitor.”

34.96 It appears that when Mr. O'Callaghan was contacted regarding the Tribunal's request for access to documents, he queried whether his chronology fell within the terms of the Tribunal's request, firstly, on the ground that it was a personal rather than a Departmental document, and secondly, on the ground that it might attract privilege. He initially spoke to the then Assistant Secretary, and it seems that on the 28th May, 2001, he furnished a copy of it to Mr. Aidan Hodson, the Departmental official who was then coordinating dealings between the Tribunal and the Department, querying whether the document was discoverable. It seems that the Department took advice from the Chief State Solicitor's office, and having notified Mr. O'Callaghan on 15th August, 2001, that the document was discoverable, it seems that Mr. O'Callaghan then queried whether it might be possible to claim privilege over it, having regard to what he considered to be the personal nature of the document. It was only following further advice from the Chief State Solicitor's office on this point, that the document was provided to the Tribunal. Mr. O'Callaghan confirmed in evidence that he also took advice in that regard from his own personal solicitor, as he thought there was some doubt within the Department as to whether or not he could obtain separate advice from the Chief State Solicitor.

34.97 Mr. O'Callaghan was of course entirely at liberty to seek legal advice on these matters, and he should not be faulted for exercising that right. It does however seem to the Tribunal that his actions displayed, at the very least, a sensitivity regarding the contents of the document, and an unease surrounding the disclosure of it to the Tribunal.

34.98 Mr. O’Callaghan’s interaction with Mr. Brennan on Friday, 6th October, 1995, might seem relatively inconsequential in its effect, in that Mr. O’Callaghan was able to secure the information, which Mr. Brennan had denied him, from Mr. McMahon later that day. The interaction was however sufficiently significant in Mr. O’Callaghan’s mind for him to record it as the very first entry in the chronology, which he prepared for his own use, immediately following Mr. Lowry’s announcement of the result of the process on 25th October, 1995. Moreover, it is difficult to reconcile Mr. Brennan’s response to Mr. O’Callaghan, whatever his motivation, with his preparedness to share that same information with officials outside the Project Group, and with Mr. Lowry who, as will be seen from the next chapter, was at this time provided with information of considerable detail by Mr. Brennan.

MR. LOWRY AND MR. BRENNAN INTERACT IN EARLY OCTOBER, 1995

35.01 It was apparent to the Tribunal from a very early stage of its private investigative work, notwithstanding that it had been the clear intention that the fairness, integrity and independence of the evaluation process should be safeguarded by a strict seal of confidentiality, which was intended to bind the membership of the Project Group, that, as the process proceeded, confidentiality had not been maintained. This was evident from an inspection of the documentation then available to the Tribunal, and primarily from records relating to the inter-Divisional meeting of 3rd October, 1995, to which reference has already been made in Chapter 33, and further from both the official report, and contemporaneous notes made, of the Project Group meeting held on Monday, 9th October, 1995. All of these records disclosed that information regarding the substantive process had been conveyed in early October, 1995, to Mr. Michael Lowry, and they further disclosed that Mr. Lowry had expressed his views on the process, and that those views had in turn been relayed to the Project Group, or to its members.

35.02 The Tribunal has already found that Mr. Lowry, in mid-September, 1995, had sought and had obtained detailed information regarding trends emerging in the substantive evaluation, and having done so, had disclosed information to persons connected with competing consortia. That finding is borne out by the evidence that was available to the Tribunal regarding Mr. Lowry's continuing involvement in the process in the first week of October, 1995. What is even more significant about the early October interactions, is the clear evidence that Mr. Lowry directly endeavoured to influence both the Project Group and the Departmental handling of the process.

35.03 Before proceeding to a closer review of the relevant material, it is appropriate to refer again to the information provided by Mr. Martin Brennan, and by Mr. Lowry, prior to the commencement of the Tribunal's public sittings, regarding interaction between them concerning the evaluation, and to their evidence to the Tribunal in that regard.

35.04 Mr. Brennan had informed the Tribunal, in the course of its private investigative work, and confirmed when he attended to give evidence, that, during the currency of the process, he had spoken to Mr. Lowry about it on three occasions. Reference has already been made to the information which he provided on the first two occasions. As regards the third such occasion, Mr. Brennan had informed the Tribunal that, closer to the conclusion of the process, he thought that he had told Mr. Lowry that two applicants stood out from the

rest, but that they were still working on separating them. When he attended to give evidence, Mr. Brennan testified that, although he had no recollection whatsoever of his interaction with Mr. Lowry, he accepted from the Departmental records that he did have such an interaction, which he thought probably occurred shortly after his return to the Department from the Copenhagen meeting of 28th September, 1995.

35.05 In his Memorandum of Intended Evidence, dated 1st December, 2002, Mr. Lowry did not respond to the questions which had been posed to him by the Tribunal, arising from the Departmental records of contact between him and Mr. Brennan in early October, 1995, which records were specifically drawn to his attention. He merely informed the Tribunal that he had not had any meetings or discussions with the Project Group. When he attended to give evidence in December, 2005, he testified that, apart from an early conversation with Mr. Brennan in the terms of whether the applications received indicated that “*there was sufficient interest... to make it a worthwhile competition*”, the only other contact between them, which he recalled, was when Mr. Brennan came to his office, and informed him that they were down to two applications, but there was still much work to be done before they had a winner. Whilst Mr. Brennan identified the two consortia to him, he did not, according to Mr. Lowry, tell him their order of ranking.

35.06 The three documents which alerted the Tribunal to evident contact between Mr. Brennan and Mr. Lowry in the first week of October, 1995, and which prompted the inquiries pursued by the Tribunal at public sittings, were Mr. Sean McMahon’s note of the Departmental inter-Divisional meeting of 3rd October, 1995, the official report of the Project Group meeting of 9th October, 1995, and a set of contemporaneous notes of that meeting, made by Ms. Margaret O’Keeffe, who had attended the meeting as a note-taker. It is now intended to proceed to review the contents of each of those documents, and the relevant evidence heard by the Tribunal.

MR. MCMAHON’S NOTE OF THE INTER-DIVISIONAL MEETING OF 3RD OCTOBER, 1995

35.07 This document, which has already featured in Chapter 33, consisted of a note made by Mr. McMahon, in his personal journal, of discussions at an inter-Divisional meeting of that date. As already outlined, the note recorded discussion of six topics in the course of the meeting, the fourth of which was the GSM evaluation process. The relevant extract from that note is again reproduced below:

“4 GSM

- *Min wants to accelerate process*
- *legalities more complicated*
- *Draft report now imminent*
- *We need to discuss + digest.*

Agreed 1 copy we let it stay here (44) and discuss it in confidence.”

35.08 Although Mr. Brennan was initially resistant to the proposition that he or Mr. Fintan Towey, who were both present at the meeting, were the source of the information recorded regarding Mr. Lowry, when he returned to resume his evidence in June, 2003, he acknowledged that he was the probable source of the material which had been recorded by Mr. McMahon, that it was he who had conveyed that information to the meeting, and that it was he who must have spoken in advance of the meeting to Mr. Lowry. Mr. McMahon’s evidence in relation to his note has already been recounted in Chapter 33, and suffice it to say at this juncture that Mr. McMahon testified that it was his understanding that the material recorded at the first bullet point of his note, “*Min wants to accelerate process*,” reflected information provided to the meeting by Mr. Brennan or Mr. Towey, and that the material at the second bullet point, “*legalities more complicated*”, reflected his own response to it. By that response, he had meant that there was a necessity for proper scrutiny, which might not be compatible with a speeding up of the process.

35.09 The Tribunal is satisfied that there is no reason to doubt the accuracy of Mr. McMahon’s note, or that the Development Division, in the person of Mr. Brennan, either solely or with the assistance of Mr. Towey, was the protagonist in the provision of information regarding the evaluation process to the inter-Divisional meeting. At one point in his evidence, Mr. Brennan suggested that Mr. Lowry’s views might have been conveyed to him second-hand, either by Mr. Sean Fitzgerald, or by Mr. John Loughrey, but this seemed singularly improbable to the Tribunal, as there was no evidence that Mr. Fitzgerald had any direct dealings with Mr. Lowry regarding the process, and, as Mr. Loughrey was still on annual leave as of 3rd October, 1995, and did not return to the Department until the following day, he could not have been the agency of contact with Mr. Lowry. Mr. Brennan did ultimately accept that the information regarding Mr. Lowry’s views had been conveyed to the meeting by him, and arose from direct contact between them.

35.10 Mr. Brennan testified that anything he may have conveyed to Mr. Lowry, arising from the Copenhagen meeting of 28th September, 1995, would

have been surrounded with what he described as “*health warnings*” because of the “*various things that were still going on*”. Whatever qualifications may have been expressed by him, the fact remains that Mr. Brennan informed Mr. Lowry of the outcome of the Copenhagen meeting, before the draft Evaluation Report was available, before the Project Group, which had been charged with the function of making a recommendation, had been informed, and before the Project Group had any opportunity to consider the provisional ranking, much less approve it. Furthermore, that provisional ranking was based solely on the outcome of the qualitative evaluation, and was disclosed at a time when AMI were in the process of conducting supplemental analysis, and before either Mr. Riordan or Mr. Buggy had reviewed the important Financial Key Figures evaluation.

35.11 As already alluded to, the content of this document was specifically drawn to Mr. Lowry’s attention on 16th October, 2002, when the Tribunal, in advance of commencing public sittings, asked Mr. Lowry to furnish it with a Statement or Memorandum of Intended Evidence, but in his Statement of 1st December, 2002, Mr. Lowry did not address the point, and merely informed the Tribunal that he did not have any meetings or discussions with the Project Group. When he attended to give evidence, Mr. Lowry’s testimony was somewhat different, in that he testified that Mr. Brennan had in fact informed him, in the course of an exchange in his office, that the Project Group had reduced the field to two named candidates, but had further work to do, and had not disclosed to him the ranking of those two candidates. He testified that Mr. McMahon’s note had nothing to do with him, and that he had nothing to do with any acceleration of the process. It was Mr. Lowry’s evidence that the contents of the contractual letter from Mr. Brennan to Mr. Andersen made nonsense of what Mr. McMahon had recorded.

35.12 The letter to which Mr. Lowry referred was the letter dated 14th September, 1995, from Mr. Brennan to Mr. Andersen, which marked the closure of the AMI fee dispute. That letter has already been analysed closely in Chapter 21. It will be recalled that in that letter Mr. Brennan had confirmed to Mr. Andersen that the Department would pay an increased fee to AMI, over and above the maximum fee stipulated in the formal agreement concluded between the Department and AMI on 9th June, 1995. Mr. Brennan had additionally taken the precaution of stipulating, in precise terms, what was required of AMI in order to assist the Project Group in bringing the process to conclusion. Those terms incorporated a timetable for the production of draft Evaluation Reports, and of a final Evaluation Report by AMI, and specifically the production of a first draft Report by 3rd October, 1995, a second draft Report by 17th October, 1995, and a final Report by 25th October, 1995.

35.13 Those target dates were met by AMI, and Mr. Lowry was entirely correct in his observation that he played no part, at least as regards the two draft Reports, in the fixing of that timetable, or its implementation. That does not however hold true for the final Report, or the manner in which the process was then handled, and as will be seen, the Tribunal is satisfied that it was Mr. Lowry who determined that the result should be made available on 25th October, 1995, notwithstanding the reservations of certain members of the Project Group, and further that it was Mr. Lowry who put in place a strategy which enabled the result to be announced on that day, without full Governmental consideration, even though it was not due to be announced until the end of the following month. Far from being nonsensical, Mr. McMahon's note was entirely consistent with events as they unfolded.

35.14 None of the Departmental witnesses could assist the Tribunal as to why Mr. Lowry might have wished to accelerate the process. All were agreed that the process had proceeded in accordance with the critical path, and that the evaluation was on target for an announcement at end-November. Mr. Brennan speculated that Mr. Lowry might have been motivated by some external factor, or by political considerations associated with a desire to announce positive news. Mr. Brennan was not the only person with whom Mr. Lowry shared his objective of expediting the announcement. The Tribunal also heard evidence from Mr. Lowry's Programme Manager, Mr. Colin McCrea, that he too was conversant with Mr. Lowry's intentions. Whilst he could not point to the source of his knowledge, he thought that it was something he had probably learned directly from Mr. Lowry himself. In line with Mr. Brennan's speculation, Mr. McCrea, although not recollecting any discussion with Mr. Lowry, also surmised that political pressures might have been at the root of Mr. Lowry's desire.

THE RECORDS OF THE PROJECT GROUP MEETING OF 9TH OCTOBER, 1995

35.15 Both the official report of the Project Group meeting of [9th October, 1995](#), and the contemporaneous notes of that meeting made by Ms. Margaret O'Keeffe, who attended as a note-taker, contained entries which also suggested that there had been contact between Mr. Brennan and Mr. Lowry. They further revealed that additional information, over and above the provisional ranking, had been provided by Mr. Brennan to Mr. Lowry prior to that meeting. What was relayed by Mr. Brennan to the Project Group on 9th October, 1995, as apparent from those records, and as confirmed by those in attendance, was not confined to Mr. Lowry's state of knowledge, but critically extended, firstly, to a reiteration of Mr. Lowry's intention to accelerate the process, and secondly, to a recounting of Mr. Lowry's views on how the Project Group should approach the presentation

of the provisional ranking in the Evaluation Report, and should in particular approach the issue of financial vulnerability.

35.16 Both of those documents were available to the Tribunal from within the Departmental files produced to the Tribunal voluntarily. The latter document, namely Ms. O’Keeffe’s contemporaneous note, was at one stage subject to a claim of privilege by the Department, and it was only when this claim was challenged by the Tribunal that it was withdrawn. Ms. O’Keeffe’s contemporaneous notes were considerably more compendious than the official report, and comprised a far fuller account of what had transpired at the meeting. A copy of both the official report and Ms. O’Keeffe’s [handwritten notes](#) of the Project Group meeting of 9th October, 1995, can be found in the Book of Appendices to this Volume.

35.17 The official report opened with the following text:

“The chairman opened the meeting by stressing the confidentiality of the evaluation report and the discussions re same. He also informed the group that the Minister had been informed of the progress of the evaluation procedure and of the ranking of the top 2 applicants. The Minister is disposed towards announcing the result of the competition quickly after the finalisation of the evaluation report.”

That passage appears to represent, in narrative form, a distillation of the initial entries made by Ms. O’Keeffe in her contemporaneous notes, which were as follows:

“Confidentiality

*Minister knows,
Shape of evaluation and order of top two.
Minister of State does not know.
Quick announcement.”*

35.18 It is apparent from the official record that Mr. Brennan took the lead role in opening the Project Group meeting, and that, having highlighted the importance of confidentiality, the very first piece of information that he relayed to the meeting was that Mr. Lowry knew the “*shape*” of the evaluation, and that he knew the order of ranking of the two top-ranked applicants. He then, it seems, immediately informed the meeting that Mr. Lowry was disposed to announce the result quickly. This of course echoed, at least in part, the information which Mr.

Brennan had conveyed to the inter-Divisional meeting on the previous Tuesday, 3rd October, 1995, concerning Mr. Lowry's desire to accelerate the process.

35.19 In this instance, there were two additional features to the news that Mr. Brennan delivered: firstly, that Mr. Lowry knew the order of ranking of the top two applicants; and secondly, that Mr. Lowry knew what Mr. Brennan described as the “*shape*” of the evaluation, although there was nothing in the official report of the meeting reflecting that latter element of Ms. O’Keeffe’s contemporaneous note. It follows from her notes, and the Tribunal has no reason to doubt their accuracy, nor was their accuracy challenged by any witness, that at some point during the first week of October, Mr. Lowry had not just been informed of the ranking which had emerged from the Copenhagen meeting of 28th October, 1995, but had also been briefed by Mr. Brennan on the “*shape*” of the evaluation, which means that he must have been furnished with details over and above the bare ranking of the candidates. It seems to the Tribunal that the only reasonable interpretation which can be put on that term is that Mr. Lowry must have been in receipt of outline information regarding the main features of the evaluation. Mr. Brennan accepted that this was a reasonable interpretation of the record, as did other Departmental witnesses. It should be added that such an interpretation is supported by further references to Mr. Lowry’s views at a later point in discussions of the Project Group, as recorded in Ms. O’Keeffe’s note, and which are referred to below.

35.20 Having recorded Mr. Brennan’s opening observations, Ms. O’Keeffe’s contemporaneous notes then went on to record that Mr. Brennan had addressed the meeting on the draft Report which had just been circulated to the membership of the Project Group. As the Development Division had received that Report on the previous Wednesday, 4th October, 1995, Mr. Brennan and Mr. Towey had of course had ample opportunity to study its contents, and to form a view of the draft. In the course of that address, which will be referred to in full in Chapter 37 in the context of consideration proper of the meeting, Mr. Brennan proceeded to focus on the appendices to the draft Report. Having referred to additional appendices, which AMI had brought with them to the meeting, and to an appendix on methodology which was outstanding, it seems from the record that Mr. Brennan referred to Appendix 10, and observed that a “*full discussion needed*”. In that context, according to Ms. O’Keeffe’s notes, he advised the meeting that:

“Minister does not want the report to undermine itself e.g. either a project is bankable.

Should be balanced arguments”

35.21 Mr. Brennan and Mr. Towey, although probably no other member of the Project Group, would have known that Appendix 10 contained an exposition of the supplemental analysis that had been conducted by AMI into the risks attendant on the financial shortcomings of both A5, Esat Digifone, and A3, Persona, consequent on the finances of Communicorp and Sigma respectively. Appendix 10 opened with the statement that:

“As stated in the main evaluation report, the two top ranked consortia have members who presently do not have the capital required to finance the GSM-2 network.”

35.22 The risks that followed from the capital deficiencies of Sigma and Communicorp were then analysed in turn. As regards Esat Digifone, the draft text of Appendix 10 was unequivocal, and having projected the capital requirement, stated that:

“This equity commitment cannot be met by Communicorp today.”

Having adverted to the risk of internal instability, the appendix recommended that the uncertainty could be limited by an appropriate set of licence conditions. The members of the Project Group were fully conversant with the financing problems surrounding both Communicorp and Sigma, from their overall review of the applications, from their attendance at the oral presentations where those issues were probed, and, in the case of Communicorp, from the results of the quantitative evaluation and their anecdotal knowledge of the financial challenges facing Communicorp on the fixed-line side of its activities, which were regulated by the Department. Mr. Fitzgerald, it will also be recalled, had already cautioned Mr. Brennan concerning Communicorp’s finances, on being informed some time earlier that Esat Digifone was emerging as the front runner in the process.

35.23 Discussion of Appendix 10 was taken up at a later point in the meeting, and further reference will be made to it. The particular significance of Mr. Brennan’s contribution in the opening stages is that he appears to have raised that appendix, and drawn the Project Group’s attention to the necessity of discussing it in full, in the context of Mr. Lowry’s reported views on the style of the draft Report, and in particular the presentation of the financial risks analysis. Moreover, it would seem from Ms. O’Keeffe’s record that Mr. Brennan proceeded to introduce the concept of bankability to the meeting as representing Mr. Lowry’s views, and as a solution to the content of the financial analysis contained in that appendix, and as a means of balancing that material. As will become apparent, it was this very approach, namely, that banks would regard the GSM

venture as an attractive opportunity, which was ultimately adopted, and seemingly informed amendments made at the instance of the Department to the second draft Report, on the day Mr. Lowry announced the result of the process.

35.24 The terms of that entry in Ms. O’Keeffe’s note suggest to the Tribunal that Mr. Brennan’s discussion with Mr. Lowry, prior to the meeting of 9th October, must have been more extensive than one directed solely to the ranking and “*shape*” of the evaluation, and must have embraced a detailed briefing on the contents of the draft Report, which culminated in a proposal by Mr. Lowry as to how the financial problems of Esat Digifone, as identified in the evaluation and the draft Report, might be solved.

35.25 All of Mr. Brennan’s evidence surrounding his contact with Mr. Lowry in early October was subject to the proviso that he had no recollection of their exchanges. He had at all times accepted that, during the currency of the process, he had spoken with Mr. Lowry about the process on three occasions, and whilst he could not pinpoint those occasions accurately, he thought that the third occasion had probably been after his return to the Department on 2nd October, following the Copenhagen meeting of 28th September, 1995. Insofar as he had any recollection of that exchange, his memory was of a single encounter. He did nonetheless recognise that the information that he had conveyed to the Project Group meeting on 9th October, as evident from Ms. O’Keefe’s note, was more expansive than that which he had conveyed to the inter-Divisional meeting on 3rd October, and he therefore accepted that it was possible that he had spoken to Mr. Lowry on more than one occasion during that week. As the draft Report, including Appendix 10, had not arrived in the Department until the afternoon of 4th October, the day following the inter-Divisional meeting, discussion between Mr. Brennan and Mr. Lowry directed to Appendix 10 could only have been after such receipt of the draft Report. The timing of receipt of the Report, and the evident content of Mr. Brennan’s contributions conveying Mr. Lowry’s views, all point to there having been at least two contacts between them, one prior to the inter-Divisional meeting of 3rd of October, and one on or after 4th October, following receipt of the draft Report and appendices.

35.26 Mr. Brennan accepted that the record of what he had informed the Project Group on 9th October, 1995, reflected Mr. Lowry’s views on how the matter of the financial frailty of consortia members should be addressed in the Report, as well as Mr. Lowry’s proposal of the notion of bankability as a solution to those frailties. What he did not accept, at least during his initial evidence, was that his report of Mr. Lowry’s views to the meeting was necessarily the result of a direct interaction between them. As in the case of the earlier record, he again speculated that Mr. Lowry’s views might have come to him indirectly, through Mr.

Fitzgerald, Mr. Loughrey, or even this time from Mr. McMahon. Furthermore, recalling his own exchange with Mr. Fitzgerald, he postulated a circuitous theory, that the “*bankability solution*” might have originated with Mr. Fitzgerald, who might have shared his view with Mr. Lowry, who might have adopted those views, and who might in turn have relayed them back to Mr. Brennan. However, when he returned to resume his evidence, in June, 2003, Mr. Brennan agreed that Mr. Lowry had indicated to him:

- (i) that he did not want the report to undermine itself, and
- (ii) that the project was bankable,

although he rejected the suggestion put to him that the draft Report was made available to Mr. Lowry.

35.27 Whilst there was no evidence that a copy of the first draft Report had been provided by Mr. Brennan to Mr. Lowry, there was evidence that some part of that Report was made available to Mr. Lowry’s Programme Manager, Mr. Colin McCrea, and that this may have happened prior to the meeting of 9th October, 1995. Mr. McCrea testified that he recalled reading what he described as an executive summary of the evaluation process in his office. Although he could not recall receiving the document from Mr. Brennan, he did not believe that anyone else could have been the source of its provision. Having read the document in his office, he testified that he returned it to Mr. Brennan, as he recognised that it was both a sensitive and confidential document. Although having no recollection of discussing it with anyone else, he thought that had he done so, it would have been with Mr. Loughrey.

35.28 It was Mr. McCrea’s recollection that these events occurred some time prior to the announcement of the result on 25th October, 1995, and he thought that what he had reviewed was a copy of part of the first draft Report of 3rd October, 1995. He testified that, in furnishing him with that document, Mr. Brennan was transmitting it to him in his capacity as Mr. Lowry’s Programme Manager, for what he described as “*information*”, and for no other purpose.

35.29 Irrespective of how or from whom Mr. McCrea received what seems to have been an extract of the first draft Report, the Tribunal is satisfied from his clear evidence that he did have access to it, and that such access occurred some time prior to 25th October, 1995, and may have been during the first week of October, 1995. Mr. McCrea was Mr. Lowry’s Programme Manager, and had been appointed by Mr. Lowry. He was self-evidently not a member of the Project Group, he had no function within the Department independent of Mr. Lowry, and

he had no role in the evaluation process. His sole responsibility was to advise and represent Mr. Lowry as Minister, and to assist him in the delivery of the Government's programme. He had no interest in the GSM process, or in any Departmental business, save as Mr. Lowry's representative, and his interest was co-extensive with that of Mr. Lowry. Insofar as an extract of the first draft Report was made available to him for information, it can only have been for Mr. Lowry's information, and that must have been the intention of whosoever it was that provided it to Mr. McCrea.

35.30 It is indisputably the case that Mr. Lowry and Mr. McCrea had discussions surrounding the GSM process, as evident from Mr. McCrea's knowledge of Mr. Lowry's objective of accelerating the conclusion of the process, and there is no reason to believe that their discussions would have been confined to that single issue. Whilst there can be no doubt that, in the first week of October, Mr. Lowry was aware of the provisional ranking, and of some of the principal features of the evaluation, as evident from the first draft Report, it is unclear whether his knowledge was or was not connected with the transmission of the extract in question to Mr. McCrea.

35.31 Mr. Lowry's evidence in this regard was very simple. He testified that he had no role or involvement whatsoever. He received the information which Mr. Brennan brought to him, namely, that the field had been narrowed to two candidates, but that further work was required, and he then awaited and ultimately received the Project Group's recommendation. He testified that he absolutely did not have a conversation with Mr. Brennan, at which the question of accelerating the process was discussed. He knew nothing of the concept of bankability, which he did not understand, and insofar as that concept was ultimately imported into the framework of the Report as a solution to the financial vulnerability of the top-ranked applicant, that was a matter for which those responsible had to answer. As regards the records of the meeting of 9th October, 1995, it was Mr. Lowry's evidence that he could not be responsible for comments that might have been attributed to him, accurately or otherwise.

35.32 With regard to Mr. Lowry's professed unfamiliarity with the concept of bankability, it is noteworthy that the first witness to invoke or canvass the term, in evidence heard by the Tribunal, was Mr. Lowry himself, some four years before his evidence in relation to the GSM process, when he testified in relation to his involvement in the UK property transactions in Mansfield and Cheadle. During that earlier evidence, given on 6th and 7th November, 2001, Mr. Lowry made some eleven references to bankability. These primarily related to the Cheadle project, but Mr. Lowry also testified that he considered that the Mansfield project was bankable. The references to bankability extended over his own appraisal,

the advice that had been given to him generally, and what was indicated to him in his discussions with Mr. Aidan Phelan in regard to Cheadle. From these references made by Mr. Lowry in his evidence to the Tribunal, in November, 2001, it is beyond doubt that he had an appreciation of, and familiarity with, the concept of bankability.

35.33 When this aspect of his earlier evidence was drawn to his attention by the Sole Member of the Tribunal on 12th December, 2005, Mr. Lowry contradicted the evidence that he had just given, and responded that he obviously understood the meaning of the term. He sought to deflect attention from this reversal, by suggesting that the concept was related to advice given to him by Mr. Loughrey, to the effect, as summarised by Mr. Lowry, that when the licence was granted, the:

“blue chip industry would be tripping over themselves at that stage to offer to get in on the act.”

35.34 Overall, and as already observed, the Tribunal found Mr. Lowry’s evidence formulaic, evasive and unhelpful. He did not engage with the Tribunal’s inquiries in a meaningful manner, or take the opportunity, presented to him in examination, to explain why it was the case that the Tribunal should disregard and discount the contemporaneous documentation which recorded his views and his involvement. His evidence, of having had no role other than as a recipient of outline information brought to him by Mr. Brennan, was wholly inconsistent and irreconcilable with the documentary evidence and the evidence of Departmental witnesses, and in particular that of Mr. Brennan, and the Tribunal has no hesitation in rejecting it.

35.35 The Tribunal is satisfied that there were intensive and detailed interactions in relation to the evaluation process outside the Project Group during the first week of October, 1995, and that these interactions extended to Mr. Brennan, Mr. Lowry, and very probably Mr. Lowry’s Programme Manager, Mr. McCrea. Following his return to the Department from Copenhagen on Monday 2nd October, 1995, Mr. Brennan, either on that day, or on the following morning, reported the outcome of the meeting to Mr. Lowry, and informed him of the provisional ranking that had emerged. The Tribunal has no doubt that Mr. Lowry was made aware by Mr. Brennan that A5, Esat Digifone, A3, Persona and A1, Irish Mobicall, were provisionally ranked in first, second and third position. It was at this point that Mr. Lowry first made known to Mr. Brennan his objective of accelerating the announcement of the result, and making that announcement immediately following the finalisation of the Evaluation Report, and it was this

information which Mr. Brennan then relayed to the inter-Divisional meeting on the morning of 3rd October, 1995.

35.36 At one point in his evidence, Mr. Brennan testified that he had been advised by Mr. Andersen that it was preferable that the overall result of the process should be announced as soon as it was available, in order to avoid the risk of unauthorised disclosure. Mr. Brennan suggested that it was this advice of Mr. Andersen, as an independent consultant, at the source of the determination that the announcement should be brought forward. However, it is significant in that regard that there was no documentary record of that advice anywhere within the Departmental files, nor, according to any of the official reports, did Mr. Andersen ever share that advice with the Project Group at the meetings which he attended. Moreover, Mr. Brennan's suggestion was at odds with the documentary evidence, all of which recorded that on each and every occasion that Mr. Brennan referred to the acceleration of the announcement, he identified Mr. Lowry as the source of that intention, and, according to the record, made no reference whatsoever to any such advice having emanated from Mr. Andersen.

35.37 The sole documentary record, apparently pertaining to the views of AMI in this regard, was an oblique reference to be found, not within contemporaneous documents, but in a subsequent document, namely, a press statement issued by Departmental officials in April, 1996, some six months after the fact. That press statement, produced at a time of intense political and media controversy surrounding the competition, including the timing of the result, did not state that the result had been announced early on the advice of AMI. Instead, in a self-evidently carefully framed press statement, it was stated:

“There has been speculation about the timing of the result. The Department was aware from the Consultants that in other countries there was intense political pressure coming up to decision time. There was a clear advantage to the process in avoiding that but in fact the final report was presented to the Minister in exactly the week foreseen in planning documentation from an earlier stage.”

Little weight can be attached to this ex post facto account, formulated at a time when the degree of sensitivity felt by Departmental officials prompted them to take the unusual course of convening a press conference and issuing a press statement, a course which Mr. John Loughrey subsequently regretted. This press statement is considered in some depth in Chapter 55 of this Volume.

35.38 The Tribunal is satisfied that there were at least two interactions between Mr. Brennan and Mr. Lowry, one of which followed receipt by Mr.

Brennan of the first draft Evaluation Report at 2.30pm on Wednesday, 4th October, 1995. That interaction occurred at some time between 2:30pm, on Wednesday, 4th October, and 11:00am on Monday, 9th October, when the Project Group meeting commenced. It may well have also embraced the provision of an extract of the first draft Report to Mr. Lowry's Programme Manager for his consideration. This second interaction had as its focus the detail of the evaluation as presented in the first draft Report, and in particular the presentation of the financial weakness of A5, Esat Digifone, as exposed in stark terms in Appendix 10 of the draft. It is ironic that Appendix 10 was a matter of such central consideration at this time, bearing in mind that Mr. Brennan and Mr. Towey, although no other member of the Project Group, knew from the Communicorp underwriting letter of 29th September, 1995, that additional financial arrangements and safeguards had apparently by then been put in place. As was ultimately confirmed by Mr. Brennan when he resumed his evidence in June, 2003, it was Mr. Lowry who had informed him that he did not want the report to undermine itself, and that the project was bankable. When Mr. Andersen attended as a witness, he also gave evidence in relation to the deployment of the bankability principle, and this aspect of his evidence will be addressed in Chapter 37 of this Volume.

35.39 These interactions between Mr. Brennan, Mr. Lowry, and possibly Mr. McCrea, in the first week of October, 1995, occurred before the membership of the Project Group knew of the provisional ranking, before the membership of the Project Group had sight of the first draft Report, and before the membership of the Project Group had an opportunity to consider, much less approve, what had been done in its name in Copenhagen, on 28th September, 1995. Mr. Brennan's dealings with Mr. Lowry in the first week of October, 1995, were in breach of every principle which governed the process, and contrary to every safeguard that was intended to secure its integrity, fairness and independence. Their interactions in regard to the substantive process, which from the evidence available to the Tribunal appeared to commence in mid-September, 1995, effectively opened a second strand of influence on, and direction to, the evaluation, which was outside and separate to the Project Group.

MR. ANDERSEN CLAIMS TO HAVE GIVEN ADVICE ON ACCELERATION

35.40 When Mr. Andersen recently attended to give evidence, he testified that he had strongly advised Mr. Brennan, on a number of occasions, that once the Department was in possession of the final result, via the final Evaluation Report, it should announce that result as soon as possible. This advice was based on AMI's extensive previous experience in such matters. It was Mr. Andersen's firm advice to Mr. Brennan that the result ought to be announced

straight away. He understood that his advice had been taken, and that the result was announced by Mr. Lowry on the evening of 25th October, 1995. He wholly endorsed that approach, reflecting as it did his clear advice to the Department. That advice was given in the course of telephone calls and meetings with Mr. Brennan, with whom he had virtually daily contact. He gave that advice several times, but could not recall specific dates, as he did not have notes available to him. He did not think that advice had been taken up at Project Group meetings.

35.41 The first occasion on which the Tribunal learned that Mr. Andersen would say that he had given advice on the timing of the announcement of the result was on receipt of his Statement of 13th April, 2010, from Messrs. Meaghers & Co., solicitors for Mr. Denis O'Brien. No intimation of a recommendation of that type featured in Mr. Andersen's joint submission furnished in December, 2008, in response to the Tribunal's Provisional Findings. That is perhaps unsurprising, as Mr. Andersen was not notified of any Provisional Finding pertaining to the acceleration of the process, the withdrawal of time from the Project Group, or the timing of Mr. Lowry's announcement, as those Findings did not impact on AMI or Mr. Andersen. Nor had Mr. Andersen been requested to address any queries regarding those matters in May, 2002, when the Tribunal furnished a series of queries to Messrs. Landwell, the Irish solicitors who the Tribunal understood were then acting for him. There is no reason that Mr. Andersen should not have taken the initiative in furnishing the Tribunal with that information in April, 2010, but it is nonetheless noteworthy that it was not a matter that the Tribunal had drawn to his attention previously, and it was not a matter that Mr. Andersen regarded as warranting reference in December, 2008, or at any other time.

35.42 Mr. Andersen had however furnished the Tribunal with information relating to Mr. Lowry's announcement of the result on 25th October, 1995, many years earlier, in January, 2002, when he co-authored an AMI memorandum provided to the Tribunal for its assistance, for which AMI was paid £20,000.00 by the Department. What the Tribunal was told on that occasion was as follows:

"The evaluation report's finalisation on 25 October 1995 led to the announcement of the winner by the Minister the same evening⁷⁵. The decision of the winner of the GSM2 licence was made ahead of schedule. However, the Minister chose to make the decision public immediately upon making the decision. AMI does not know the reason for the swift announcement prior to the estimated time of 'end of November⁷⁶' Based upon AMI's experience it is, however, in general best to quickly announce the decision of who the winner is once the Minister has made the decision, in order unintended leakage and

speculation, cf. that the decision is often crucial to the involved applicants of which many are publicly listed companies.”

35.43 Footnote 75 to that memorandum was in the following terms:

“Cf. section 3 of the Information Memorandum attached to the original RFP according to which the original deadline for a decision to be made public was 31 October 1995. However, due to the postponement of the closing date until 4 August 1995, the deadline for making a public decision as to the winner of the tender was in July 1995 set to be around the end of November 1995 (cf. the letter of 14 July 1995 from the Department to the interested parties (exact reference in footnote 23)).”

35.44 That letter of 14th July, 1995, referred to in the AMI memorandum, has already been considered in Chapter 15 of this Volume. It was a letter forwarded to all interested parties notifying them of the alteration to the Licence Fee criterion, and informing them, in the light of the deferral of the process, of consequent amendments in the RFP document. Those amendments included, at the final indent of the letter, the following:

“The fourth bullet point of section 3 of the same document (RFP) is revised by the substitution of ‘4 August to end November, 1995’ for ‘23rd June to 31st October, 1995’.” [Emphasis added]

35.45 That passage of the January 2002 memorandum, together with its footnote, was brought to Mr. Andersen’s attention, and he was examined closely on apparent inconsistencies between his statement of April, 2010, as confirmed in evidence in October, 2010, and the content of the earlier memorandum which he had co-authored. As his evidence on that matter was of importance, it is proposed to set forth a relatively detailed account of it.

35.46 It was suggested to Mr. Andersen that his evidence that Mr. Lowry, in announcing the result on 25th October, 1995, had followed his strong advice to Mr. Brennan, was inconsistent with his previous position, as conveyed to the Tribunal in January, 2002, that AMI did not “*know the reason for the swift announcement prior to the estimated time of ‘end of November’*”. Mr. Andersen was equivocal in his response, and asserted that the matter had to be approached from a neutral stance. It was his testimony that the reference to AMI not knowing the reason for the “*swift announcement*” was to an announcement on the evening of 25th October, 1995, rather than one on the next or the following day. In furnishing that explanation, Mr. Andersen was asked whether

he was inviting the Tribunal to ignore the manner in which that announcement had been described in the memorandum, namely, as one made “*prior to the estimated time of end of November*”. Mr. Andersen stated that his understanding of the English language might not be the same as the Tribunal. As to what that phrase then meant, Mr. Andersen did not attach particular importance to the last part of the sentence. The word “*estimated*” was just a reference to some time in November.

35.47 As to the reference to the announcement having been made in advance of “*the estimated time of ‘end of November’*” being inconsistent with his evidence of the previous day to the Tribunal, that he and AMI were unaware that the timetable for the process had made provision for four weeks for Government consideration, Mr. Andersen testified that when he had been questioned about that in the context of the AMI Gantt chart of 14th July, 1995, he had answered by reference to AMI’s work on the internal project schedule. He accepted that, having regard to the clear contents of the notification of 14th July, 1995, to interested parties, as cited in the AMI January 2002 memorandum, he did know that the process was not due to conclude until the end of November, 1995, and he accepted that the phrase “*end of November*” in that passage of the memorandum was a direct quotation from the letter of 14th July, 1995.

35.48 Mr. Andersen’s explanation for the conflict between his statement of April, 2010, as confirmed in evidence in October, 2010, of having given firm advice to Mr. Brennan that the result ought to be announced straight away, and the information furnished in January, 2002, that AMI did not know the reason for “*the swift announcement*”, turned on Mr. Andersen’s interpretation of the term “*swift*” as a reference to an immediate announcement, rather than one expected a day or two later. That explanation must also be viewed in the light of the circumstances surrounding the provenance of Mr. Andersen’s later account. That account first arose in his statement of 13th April, 2010, following interaction between Mr. Andersen and Mr. Tom Reynolds, an associate of Mr. Denis O’Brien. It related to a matter that had never been raised with, or notified to Mr. Andersen, by the Tribunal. Mr. Andersen’s rationalisation of the conflict between the two accounts was tortured, forced, and palpably at odds with the clear meaning of the words used in his co-authored January 2002 memorandum. Nothing could be simpler or more unequivocal than the statement that:

“*AMI does not know the reason for the swift announcement prior to the estimated time of ‘end of November’.*”

35.49 Mr. Andersen’s assertions that the term “*swift announcement*”, and the phrase, immediately following, “*prior to the estimated time of ‘end of*

November’’, should be read disjunctively, and that the latter phrase was one to which he did not attach particular importance, as the co-author of the memorandum, were ludicrous propositions. Mr. Andersen’s efforts to suggest that he was disadvantaged in his use of the English language was one which required only a cursory consideration of the transcript of his evidence to reject, and was as unmeritorious as his imputation of a want of neutrality on the part of the Tribunal in questioning him about this stark inconsistency. It should be added that, in regard to the line of questioning pursued with Mr. Andersen, senior counsel instructed to represent him confirmed that he had no difficulty with the Tribunal testing Mr. Andersen’s credibility.

35.50 The Tribunal regards it as inconceivable that, had such strong or any advice been given by Mr. Andersen to Mr. Brennan, the Tribunal would have been informed in January, 2002, that AMI did not know the reason for the swift announcement. It is equally improbable, having then recounted in that context:

“Based upon AMI’s experience it is, however, in general best to quickly announce the decision of who the winner is once the Minister has made the decision, in order to avoid unintended leakage and speculation...”,

that it would not then have been added that advice of that type had been conveyed to the Department, if any such advice had in fact been given.

35.51 Likewise, Mr. Andersen’s effort to rationalise his denial in earlier evidence of personal or corporate knowledge on the part of AMI of the provision of four weeks for Governmental decision in the timetable for the process, as a matter of a misunderstanding on his part, to the effect that the questions put to him had been directed solely to AMI’s input, was one which cannot be accepted by the Tribunal.

35.52 At the conclusion of this aspect of his evidence, it was put to Mr. Andersen, in the clearest terms, that the position that he had adopted, that the announcement of the result on 25th October, 1995, was done on his strong advice, was at variance with the account he had given earlier to the Tribunal, and that he had changed his version of events to give cover to the premature or accelerated announcement of events by claiming that it was his responsibility, when in 2002 he had disclaimed knowledge of why it had been done. Whilst there is no necessity for the Tribunal to make a finding in those terms, it must be recorded that the Tribunal has grave misgivings surrounding this aspect of Mr. Andersen’s evidence, and what could have prompted him to embark on a course that was so manifestly irreconcilable with his earlier account. Those doubts do

not arise solely from the inconsistencies in his evidence, or the diametrically opposed accounts furnished as between January 2002 and April 2010, on a matter which did not impact directly on Mr. Andersen, but also arise from the absence of any record of his supposed advice, or any reference to it by Mr. Brennan in his reporting of Mr. Lowry's intentions to his fellow Departmental officials, and to the Project Group.

THE ACCOUNTANTS' RESERVATIONS SURROUNDING THE FINANCIAL EVALUATION

36.01 On Monday, 9th October, 1995, in advance of the Project Group meeting scheduled to commence at 11.00am that day, Mr. Billy Riordan and Mr. Donal Buggy had an opportunity to review the results of the qualitative evaluation of the dimension Financial Key Figures. Before proceeding to recount their deliberations, it is desirable to review briefly how that evaluation had proceeded.

36.02 Financial Key Figures was one of the three dimensions associated with the first evaluation criterion. In the Evaluation Model, as adopted by the Project Group on 9th June, 1995, it had been allocated a weighting of 15, the highest weighting of the three dimensions associated with that criterion. The weighting of 15 had been divided equally between the two quantitative indicators, Internal Rate of Return, and Solvency. In the quantitative evaluation, the marking of the indicator Solvency had proceeded uneventfully. A slight complication had been encountered in the measurement of IRR which, in the Evaluation Model, was to be assessed over the full fifteen years of the business plans submitted. This could not be done as one of the entrants, A5, Esat Digifone, had calculated IRR for fifteen years from 1995, rather than from 1996, as had been specified in the competition documentation, so that no data was available for Esat Digifone to input into the agreed formula for the terminal year. IRR was recalculated over a 10 year base following a recommendation made by AMI.

36.03 The qualitative limb of the financial evaluation had not proceeded as envisaged, and a number of obstacles had been encountered. In consequence, Mr. Riordan, who was the sole Departmental representative with accountancy skills nominated by the Project Group to conduct the evaluation, did not participate in marking the agreed indicators. It will be recalled that Mr. Riordan, together with Mr. Fintan Towey, had been nominated to represent the Department, and that the sub-group that they attended had been scheduled for the first qualitative session in Copenhagen on 6th and 7th September, 1995. The work of the sub-group could not proceed on that date, as it had become apparent to Mr. Riordan, from an initial review of the applications, that there were inconsistencies between the financial figures contained in the mandatory tables completed by applicants, and the business cases contained in the body of their applications. Mr. Riordan regarded this as a serious problem.

36.04 Rather than undertaking a full comparative analysis of all six applications, it seems that Mr. Towey proposed that the exercise should be confined, in the first instance, to an analysis of the internal consistency of the figures contained in the mandatory tables themselves, in order to establish the

scale of the problem. Mr. Riordan ultimately undertook that analysis, and provided AMI with specifications for amendments to the mandatory tables. These amendments were to be made by AMI in advance of Mr. Riordan travelling to Copenhagen to resume the financial evaluation on 19th and 20th September, 1995. As matters transpired, the re-formatting of the tables, in accordance with Mr. Riordan's specifications, was not completed by that time, and Mr. Riordan's trip to Copenhagen was largely pointless, as the evaluation proper could not proceed, although the selection of indicators for that assessment was finalised.

36.05 In his memorandum of 21st September, 1995, sent by fax following the abortive sub-group meeting, Mr. Andersen made the following proposal to progress the qualitative financial evaluation:

“Concerning the dimension financial key figures, the existing calculatory work needs to be checked and reviewed by as well MT/JB as BR. MT is – together with BR – to suggest a revised award of marks on the basis of reviewed figures. Deadline: Wednesday the 27th.”

Mr. Andersen also suggested in his memorandum that the Financial Aspects sub-total, that is, the total of the marks for the dimensions Financial Key Figures and Licence Fee, should be dealt with at the Copenhagen meeting of 28th September, 1995.

36.06 Whilst Mr. Jon Brüel forwarded copies of the revised mandatory tables to Mr. Riordan on 26th September, 1995, it is clear that Mr. Riordan, as he testified, had no input into the marking of the Financial Key Figures indicators, or the allocation of overall marks for that dimension, and he did not know how the dimension marks had been determined. It is equally clear that somebody set about and completed the marking of the indicators, the aggregation of those marks to arrive at grades for the dimension, and the translation of those grades into overall grades for Financial Aspects, all applicants having been awarded full marks for the Licence Fee dimension. Neither Mr. Brennan nor Mr. Towe could recall any discussion of those matters at the Copenhagen meeting of 28th September, 1995, although it is clear that those marks were used at that meeting to arrive at a grand total for the qualitative evaluation, and a provisional ranking.

36.07 It was not until Monday, 9th October, 1995, before the commencement of the Project Group meeting, that Mr. Riordan and Mr. Buggy had an opportunity to review the marks that had been awarded. It is clear from the evidence heard, as already outlined, that Mr. Riordan was less than comfortable with the reliability of the work that AMI had undertaken, including their work in the re-

formatting of the mandatory tables. In that regard, and as will become apparent, in subsequent contributions made by Mr. Riordan to Project Group meetings, he was insistent that AMI should take full responsibility for the accuracy of the financial figures on which the evaluation had proceeded. This suggests to the Tribunal that his concerns on this front were never satisfactorily met.

THE ACCOUNTANTS’ NOTES OF THEIR REVIEW

36.08 It appears from Mr. Riordan’s diary entries for 9th October, 1995, to which he drew the Tribunal’s attention, that he and Mr. Buggy met at 8.00am that morning. Neither of them had a distinct recollection of their interaction, but as they had each generated notes, which were available to the Tribunal, there was a record of their deliberations, and of their shared views on the evaluation conducted in Mr. Riordan’s absence. Mr. Riordan and Mr. Buggy were uncertain whether they generated those documents as contemporaneous notes of their meeting, or whether the documents represented a written consolidation of the product of the review that they had conducted at that meeting. Whilst it seems to the Tribunal that little turns on this distinction, it does appear from the heading of Mr. Riordan’s documents, “NOTES FOR MEETING ON 9/10”, that his document was probably intended to be a synthesis of his discussions with Mr. Buggy, for the purposes of presentation of their joint views to the Project Group meeting. Copies of both [Mr. Buggy’s notes](#) and [Mr. Riordan’s notes](#) can be found in the Book of Appendices to this Volume.

36.09 It is clear from the material recorded in both documents that the focus of their review was primarily sub-section 3.4 of the draft Report, headed “Financial aspects”, and which was comprised in pages 34 to 39 of the first draft Report, as they had each recorded points in their notes by reference to the page numbers of the draft Report. It is evident from the contents of their notes that they had directed their review to both stylistic and substantive considerations. As regards the former, a number of typographical corrections had been noted, and some presentational matters had been recorded, such as the desirability of expanding certain passages of the draft narrative, and the less than clear usage of language in certain instances.

36.10 The main focus of their substantive review was on the marks which had been awarded for each of the eight indicators in the qualitative evaluation, and the overall dimension grades. These marks were presented in Table 15, which was on page 38 of the draft Report. Both Mr. Riordan and Mr. Buggy had replicated Table 15 in their notes, and, in the case of some of the marks, recorded revisions that they wished to make. The table contained in Mr. Buggy’s

note is reproduced below. The table in Mr. Riordan’s note contained exactly the same entries, although he had adopted a slightly different form of notation.

	A1	A2	A3	A4	A5	A6
Solvency	A	E	B	C	D	C
Financial strength	A	E	A	A	B -C	B
Liquidity	B	C	D C	E	A	A D
IRR	D	A	D	A	A	D
PRDIT/ Interest	A	B C	A	C	B	C
Acc oper costs/Acc turnover	A	B	B	D	C	D
Acc oper costs/SIM	A	A	A	D	B	A
Acc Turnover/Acc Invest	D	A	D	B	D	E
	A	C	B	C D	B C	C D

36.11 As is apparent from the above table, and as was confirmed by each of them in evidence, Mr. Riordan and Mr. Buggy had modified the markings for three of the eight indicators, that is, Financial Strength, Liquidity and Profit/Interest Expenditure, and had revised the overall grades for the dimension for three of the six applicants, A4, Irish Cellular, A5, Esat Digifone and A6, Eurofone. Their notes also contained an abstract of their reasoning in making those changes. Those changes are more clearly apparent from the table below, which is an extract from Mr. Buggy’s table.

	A1	A2	A3	A4	A5	A6
Financial strength	A	E	A	A	B -C	B
Liquidity	B	C	D C	E	A	A D
PRDIT/Interest	A	B C	A	C	B	C
	A	C	B	C D	B C	C D

Financial Strength Indicator

36.12 In the case of the Financial Strength indicator, the accountants had reduced the grade for A5, Esat Digifone, from B to C. Before proceeding to address their thinking in doing so, it is helpful to refer to the narrative contained in the second paragraph on page 38 of the draft Report, which outlined the approach that had been adopted in evaluating this indicator and determining the grades awarded. The relevant passage is quoted below:

“The financial strength of the consortia members is a matter of ‘deep pockets’ under the assumption that the liability is not effectively limited. When looking at the equity of the mother companies of the backers exceeding IR£1 billion, A1 (Southwestern Bell, Tele Danmark and, through Detecon, Deutsche Telecom/3 big German banks), A3 (Motorola, Unisource and ESB) and A4 (AT&T and Philips) all have

sufficiently ‘deep pockets’ to be awarded As... A5 is backed by Telenor with an equity in excess of IR£1 billion and Communicorp with a negative equity, which have been transformed to a B”.

36.13 Returning to the accountants’ notes, with regard to the reduction in the Esat Digifone grade from B to C, Mr. Buggy had recorded:

“Telenor and Communicorp C from B as Communicorp doesn’t have sufficient strength for 50% share”,

whilst Mr. Riordan had noted:

“A5 – Communicorp has - ive equity as does A2’s partner. This should constitute a C for A5 surely.”

It is clear therefore, as they confirmed, that it was the financial frailty and negative equity of Communicorp which were central to their thinking, and it was these factors which caused them to downgrade Esat Digifone’s mark from B to C.

The Liquidity Indicator

36.14 In the case of the second altered indicator, Liquidity, the mark awarded to A3, Persona, was increased by the accountants from D to C, whereas that for A6, Eurofone, was reduced from A to D. The final paragraph on page 38 of the draft Report explained that AMI had calculated Liquidity by reference to the percentage ratio between current assets and current liabilities, and that marks had been given by reference to the number of years for which there was liquidity within three bands, firstly, less than 100, secondly, between 100 and 200, and thirdly, in excess of 200. The text then analysed the performance of the candidates on the application of that approach, as follows:

“In the mandatory tables, A4 has not stated any current liabilities, which means that the liquidity cannot be calculated, and A4 [has] thus been awarded an E. A5 and A6 have the best liquidity performance with many years above 200, and they have both been awarded As. A1 comes close to this performance, but 3 years below 100 only warrant a B. A2’s business plan shows a liquidity below 100 for 3 years and a liquidity between 100 and 200 for 11 years, which deserve a C. A3 is slightly worse than A2 with 6 years below 100, and consequently A3 has been awarded a D.”

36.15 As regards the changes made to the marks for A3 and A6, Mr. Buggy had noted:

*“A6 – all years < 100 ==> D
A3 – more or less the same as 2 yrs > 200 ==> C.”*

Mr. Riordan had put it as follows in his document:

“Liquidity – A6 is given an A even though < 100 over all 15 years.”

The Profit/Interest Expenditure Indicator

36.16 In the case of the third altered indicator, Profit/Interest Expenditure, Mr. Riordan and Mr. Buggy had downgraded A2, Cellstar Group, from B to C, which, as explained by the narrative on page 39 of the draft Report, had been evaluated by reference to the number of years for which the value of the ratio was two or less. Whilst the narrative reported that the ratio was two or less for A1 for three years, and was two or less for A4 and A6 for five years, it was silent as to the results for A2, A3 and A5. It appears from Mr. Buggy’s document that he and Mr. Riordan had verified AMI’s calculations, and he had made the following entry:

*“A1 & A3 = 3 yrs
A4 = 4 yrs

A2, A4 & A6 = 5 yrs.”*

It was clearly this finding, that A2’s ratio was less than two for five years, which explained the downgrading of the marks for A2 from B to C.

The total marks for the dimension

36.17 Having revised the indicator marks, it seems that Mr. Riordan and Mr. Buggy considered that those changes should be translated into revisions to the overall marks for the Financial Key Figures dimension. They had accordingly downgraded the marks for A4, Irish Cellular, from C to D, for A5, Esat Digifone, from B to C, and for A6, Eurofone, from C to D. It seems, from Mr. Buggy’s document, that he and Mr. Riordan were also conscious of the possibility that the revisions they had made could have an impact on the overall ranking of the applicants, as evidenced by the terms of the following entry in Mr. Buggy’s document:

“Page 44 Table 16 may change as a result of changes to Table 15.”

Table 16 on page 44 was the Aspects results table in the form of the AMI marking matrix. There can be no doubt therefore that, as far as Mr. Buggy was concerned, the product of their review could have impacted critically on the outcome of the evaluation process.

36.18 The accountants’ documents also recorded two incidental matters which prompted them to make changes, or over which they had concerns, and which were as follows:

- (i) as regards the indicator IRR, they wished to clarify whether the marks given were consistent with the quantitative results, and they wanted the narrative to quantify the actual IRR figure for each applicant;
- (ii) as regards the use of the term “*deep pockets*”, it is evident that they each had misgivings, and as will be seen from a memorandum faxed by Mr. Buggy to AMI, they were anxious that the term “*deep pockets*” should be replaced throughout the draft by some alternative phraseology.

36.19 Whilst it is undoubtedly the case that Mr. Riordan and Mr. Buggy covered significant ground in their analysis of the financial evaluation, Mr. Buggy recorded in his note that their work was incomplete, as they had not had time to check the calculations for the three final indicators, and his annotations also included the following observation:

“Annex – not read yet - no time.”

36.20 The Tribunal is satisfied that the documents generated on the morning of 9th October, 1995, by the two accountants represented the outcome of their review. But for these documents, it is probable that the Tribunal would never have discovered the constituent elements and features of their analysis, nor the changes which they had made, as neither of them had any recollection whatsoever of any aspect of their work, even though they agreed that their substantive input to the entire process was directed primarily to the financial portion of the evaluation. The frailty of their recollection did not end with their early morning meeting of 9th October, 1995, but extended to their subsequent interaction with the Project Group, and with AMI, consequent on their review. They had no recall of any discussions of the changes which they had made, nor of what reception those changes received, nor why those changes were not

accepted and incorporated into the Evaluation Report and, most critically, into the determination of the ranking in the evaluation.

36.21 Whilst having no recollection whatsoever, they each believed that they must have raised their review at the meeting of the Project Group, which followed immediately after their bilateral meeting, and they reasoned that, as their changes had not been adopted and incorporated into the second draft Report, or into the final Report, they must have received explanations that satisfied them that the indicator marks awarded, without their input, were the correct marks, and that their changes were not warranted. The Tribunal has considerable difficulty in accepting the reasoning that was advanced by Mr. Riordan and by Mr. Buggy in that regard. As will become apparent, a very detailed contemporaneous note was kept by Ms. Margaret O’Keeffe of the Project Group meeting of 9th October, 1995, and there is no reference at all in that contemporaneous note of any of those matters having been raised either by Mr. Riordan, or by Mr. Buggy, or by anyone else, or of any discussion directed to them. Nor did any member of the Project Group recall such a discussion.

36.22 In view of the significance of the modifications made by the accountants, and, critically, the impact that those modifications might have had on Table 16, and on the overall ranking, as recognised by Mr. Buggy, the Tribunal found it perturbing that neither the accountants, nor Mr. Brennan, nor Mr. Towey, who were both conscious that the marking of the Financial Key Figures dimension was to be checked, could explain why their changes had not been incorporated, and whether this was because they were deemed to be unwarranted, or because they were not accepted. Mr. Buggy and Mr. Riordan both agreed, in testifying that they must have received explanations which satisfied them that their changes were unnecessary, that their evidence was not based on their recollection of events, but on a rationalisation by them of the documentary evidence.

THE ACCOUNTANTS’ DEALINGS WITH AMI AND THEIR SUBSEQUENT FAX OF 9TH OCTOBER, 1995

36.23 What is clear from the available documentation is that at some point during the afternoon of 9th October, 1995, Mr. Buggy and Mr. Riordan had some discussions on the financial evaluation with Mr. Michael Andersen and Mr. Jon Brüel. As with their earlier review, the evidence available to the Tribunal regarding this discussion was not derived from the testimony of Mr. Riordan or Mr. Buggy, but from a documentary source, which in this instance was a fax dated [9th October, 1995](#), from the two accountants to AMI. Although dated 9th October, it was not it seems transmitted until 9:15am on Tuesday, 10th October, 1995, as was apparent from a manuscript annotation made by Mr. Buggy on the

fax cover sheet. A copy of the fax had also been forwarded by Mr. Buggy to Mr. Riordan for his files, and a copy can be found in the Book of Appendices to this Volume. The fax opened in the following terms:

“Further to our discussions this afternoon, as promised, we set out below our particular queries on the financial section of the Report.”

36.24 Mr. Buggy testified that from memory, he did not recall having had a separate discussion with Mr. Andersen or Mr. Brüel, and he interpreted the reference to a “discussion”, in the opening sentence of his fax, as a reference to exchanges between them in the context of the Project Group meeting, although he acknowledged that they may have had a separate meeting, which he did not recall. As there was absolutely no trace of any reference to any of the large number of matters referred to in that fax, which were the output of the financial review, in Ms. O’Keeffe’s contemporaneous notes of the Project Group meeting, it seems to the Tribunal that the discussions referred to in that fax cannot have proceeded at the Project Group meeting, and that there must have been a separate meeting or contact after its conclusion.

36.25 The fax then proceeded to list six points, all of which reflected the output of the accountants’ review. The most striking feature of this fax is not what it contained, but rather what it omitted, as it made no reference whatsoever to any of the changes which the accountants had made to the marks awarded to the two top-ranked candidates, A5, Esat Digifone, and A3, Persona, nor did it make reference to the changes which they had made to the overall marks for the dimension consequent on those revisions. There was no reference at all to the accountants’ downgrading of A5, Esat Digifone’s mark for the Financial Strength indicator from B to C, nor to their elevation of A3, Persona’s mark for the Liquidity indicator from D to C. Although also silent on the revision of A1, Irish Mobicall’s mark for the Liquidity indicator, it is surprising to note that there was reference to that indicator recorded in the fax, but that reference was confined to the downgrading of the mark awarded to A6, Eurofone, from A to D, and in that regard, the accountants’ direction was as follows:

“Recheck liquidity on A6 with reference to the number of years the ratio falls below 100 (see page 38, paragraph 3). If this changes the grading then please consider the consistency of the revised grade with those attributed to the other applicants.”

36.26 The review of the third indicator, Profit/Interest Expenditure, where the change made impacted solely on A2, Cellstar Group, was taken up in the fax, and the following query was raised:

“Page 39, paragraph 3 doesn’t refer to A2, A3, and A5 when A3 is given a different grade than A2 and A5. Also please recheck A2 as it would appear that it has a ratio of 2 or less for 5 years and therefore merits a grade C.”

36.27 On the copy fax available to the Tribunal, handwritten entries had been made beside each of the points in what seemed to the Tribunal to have been Mr. Buggy’s handwriting. Mr. Buggy confirmed in evidence that the annotations had been made by him, and he thought he had made them when he had received a telephone call from AMI in response to his fax, or when he had received the second draft Report. As regards the queries pertaining to the indicators Liquidity and Profit/Interest Expenditure, Mr. Buggy had noted that the first was “O/S”, signifying that it was outstanding, and as regards the second, the downgrading of A2’s mark from B to C, he had noted “NO on rounding it appears as 2 but it is actually > 2”, reflecting the explanation he had received for leaving the mark unchanged. There was of course no equivalent written record of such explanations as may have been forthcoming, regarding the critical modifications made to the Esat Digifone mark for Financial Strength, and the Persona mark for Liquidity, as neither of these changes had featured at all in the fax of 9th October, 1995.

36.28 There are many aspects of what occurred in relation to the financial review which the Tribunal finds strange, and for which no satisfactory explanation was given in evidence. The frailty of recollection exhibited by both Mr. Riordan and Mr. Buggy, regarding every aspect of the exercise which they undertook, was striking, and significantly contrasted, in the case of Mr. Riordan, with the clarity of his recall of the qualitative sessions he attended in Copenhagen, and of the complications he had identified and subsequently sought to resolve in the base figures contained in the mandatory tables.

36.29 It might have been expected that Mr. Michael Andersen, as lead consultant, would have been able to resolve, or at least advance, the Tribunal’s understanding of how the accountants’ review was conveyed, how it was received, and why their changes to the marks for A5, Esat Digifone, and A3, Persona, were not adopted. However, in common with the accountants, Mr. Andersen’s memory of events was poor, and he was unable to provide any material assistance. He testified that he had never seen the records of the accountants’ deliberations of 9th October, 1995, so that he was unfamiliar with them. He did not recall Mr. Buggy’s fax of 9th October, 1995 (sent on 10th October, 1995), but as his colleague, Mr. Brüel, was responsible for that part of the evaluation, it would have been attended to by him.

36.30 In his evidence, in response to Tribunal counsel, Mr. Andersen testified that he did not recall that any of the matters detailed in the accountants' notes were raised by them at the Project Group meeting of 9th October, 1995, which he believed he would have remembered, as he had attended the initial meeting of the sub-group in Copenhagen on 6th September, 1995. As will become apparent, the attendance of Mr. Andersen and his AML colleagues in Dublin on 9th October, 1995, was, it seems, foreshortened, as they were late for the Project Group meeting due to confusion surrounding its venue. Likewise, Mr. Andersen's attendance at the final Project Group meeting of 23rd October, 1995, was abridged, as his inward flight was delayed due to headwinds, so that in the case of both of these critical meetings he was under a disability as to what had transpired, and as regards the second meeting, he was only present for approximately an hour and a half of a meeting which commenced in the morning and did not conclude until late that evening.

36.31 Mr. Andersen gave somewhat different evidence regarding the matters noted by the accountants in response to his own counsel, in that he testified that the accountants' reservations must have been discussed at the Project Group meeting of 9th October, 1995, and they must have been satisfied that their problems were resolved. When it was drawn to his attention, in the course of re-examination by Tribunal counsel, that his positions appeared to be inconsistent, he both accused the Tribunal of looking for inconsistencies, and denied the existence of any inconsistency.

36.32 In that regard, Mr. Andersen explained that although he had no recollection of the accountants' views being raised on 9th October, 1995, it seemed to him from Mr. Buggy's fax sent on 10th October, 1995, which referred to discussions with Mr. Andersen and Mr. Brüel, that matters had been raised, and it was in the light of that reference, as drawn to his attention by his own counsel, that he had stated that there must have been discussions, and those discussions must have satisfied the accountants. Mr. Andersen's evidence was unconvincing, and added nothing of value to the Tribunal's inquiry into the serious reservations recorded by the accountants. In the result, there remains an absence of any evidence of any consideration having been accorded to their shared view that certain of the marks for A5, Esat Digifone, and A3, Persona, were incorrect, and required adjustment, and that in the case of Esat Digifone, this would have resulted in a reduction of the overall score for the dimension. Neither was there any evidence of consideration having been given to their critical view that these changes could impact on the overall evaluation ranking.

36.33 What the Tribunal is satisfied of, both from the contemporaneous documentation and the evidence heard, is as follows.

- (i) The marking of the Financial Key Figures dimension was conducted without accountancy input from the Project Group, although it was intended that the marks should be reviewed by Mr. Riordan and Mr. Buggy.
- (ii) The provisional marks awarded, without input from the accountants, were used at the Copenhagen meeting of 28th September, 1995, to arrive at a Financial Aspects sub-total, and to arrive at a provisional ranking.
- (iii) Mr. Riordan and Mr. Buggy conducted a review on the morning of Monday, 9th October, 1995, prior to the commencement of the Project Group meeting, and in doing so made changes to the marks for the two top-ranked applicants, A5, Esat Digifone, and A3, Persona.
- (iv) A5, Esat Digifone's mark for the indicator Financial Strength was reduced from B to C, and A3, Persona's mark for the indicator Liquidity was elevated from D to C.
- (v) The accountants translated their changes to the indicator marks into revisions of the overall marks awarded for the dimension Financial Key Figures, and critically they downgraded the mark for Esat Digifone from B to C.
- (vi) The accountants recognised, as is apparent from Mr. Buggy's note, that the changes which they had made might have impacted on the overall ranking in the evaluation.
- (vii) Neither of the accountants had any recollection of what had then occurred. They each testified that they would have raised these matters in the course of the Project Group meeting of 9th October, 1995, and they reasoned that they must have received explanations which satisfied them that their changes were not warranted, although neither could recall, or could suggest, what those explanations might have been.
- (viii) The changes made by the accountants were not raised or discussed at the Project Group meeting, but at some time in the course of the afternoon of Monday, 9th October, 1995, Mr. Riordan and Mr. Buggy had discussions with Mr. Andersen and Mr. Brüel.

- (ix) That interaction resulted in a joint fax from Mr. Buggy and Mr. Riordan confirming their queries, but in which no reference at all was made to the most significant changes they had made, that is, the changes which impacted on A5, Esat Digifone, and on A3, Persona, or to their changes to the overall grades.

36.34 What is clear and what the Tribunal is satisfied of, is that at some point between the conclusion of the Project Group meeting on 9th October, 1995, and the generation of the joint fax dated 9th October, 1995, but not transmitted until early the following morning, something occurred which caused Mr. Riordan and Mr. Buggy to omit reference in that fax to the changes made by them to the Esat Digifone and Persona grades. There may of course have been some entirely satisfactory explanation given to the accountants which caused them to reconsider their views, but it must be borne in mind that there is no record of such explanations, although a careful note was made by Mr. Buggy of the explanations received by him in relation to their other modifications. Nor were they in a position to recall or otherwise indicate to the Tribunal, even on the footing of a rationalisation, what those explanations might have been. Alternatively, it may be that their views were not accepted, and it was for that reason that they did not pursue those changes further. In that regard, Mr. Riordan's perception of his role, as an external accountant on secondment, as primarily that of a resource to the civil servants, whereby he would apprise the Department of technical matters, but leave policy decisions to be taken by the civil servants, may have been material to what occurred.

36.35 What is beyond question is that it was the view of the only two members of the Project Group who had accountancy and financial skills, that the mark awarded to A5, Esat Digifone, for the financial evaluation was wrong, and that instead of receiving an overall B grade, Esat Digifone only warranted a C grade. What is also beyond question is that there was no direct evidence that their views were ever brought to the attention of the Project Group, and it is equally clear that, for some reason, their revisions were not accepted, and that the Esat Digifone grade for the financial limb of the evaluation remained at B, and the overall provisional ranking in the evaluation was not revisited.

THE PROJECT GROUP MEETING OF 9TH OCTOBER, 1995

37.01 The meeting of 9th October, 1995, was the penultimate formal Project Group meeting of the evaluation process. It commenced at 11am that morning, and both Mr. Michael Andersen and Mr. Jon Brüel of AMI had travelled from Copenhagen to attend it. According to Mr. Andersen, he and Mr. Brüel were late for the meeting, as there was confusion about the venue as between the Departmental offices in Kildare Street and Clare Street, and they were not it seems in attendance during the early stages of proceedings. With the exception of Ms. Maev Nic Lochlainn of the Development Division, and Mr. Jimmy McMeel of the Department of Finance, who were otherwise engaged, there was a full compliment of the membership present.

37.02 This was the first occasion on which the Project Group had met since 14th September, 1995, a period in excess of three weeks. In order to contextualise what occurred at the meeting, it is helpful to contrast what had been agreed at that Project Group meeting of 14th September, in terms of progressing the process, with what actually happened.

37.03 It will be recalled that the official report of the 14th September, 1995, meeting recorded the following below the heading “*How to progress the evaluations*”:

“AMI listed the next steps as:

- 1. finalise the qualitative scoring and award marks on the dimensions,*
- 2. perform initial scoring of the aspects, and*
- 3. perform supplementary analyses in:*
 - blocking/drop out*
 - financial analysis concerning SIGMA/ADVENT*
 - adherence to EU procurement rules*
 - tariffs*
 - interconnection (since assumptions vary widely between applicants)*

The scoring of the marketing, financial and management dimensions would take place in Copenhagen next week; DTEC to appoint the appropriate personnel to attend. AMI would provide the first draft evaluation report on the 3 October. This would be discussed by the Group on Monday 9 October. The three DTEC Divisions would supply

any written comments prior to that meeting. Following that, AMI would produce a second draft report by 17 October.”

37.04 The above passage has already been commented on in some detail, as has the progression of the process from that date. What is clear is that the evaluation had proceeded far beyond what had been agreed, and what could have been anticipated or contemplated by the majority of members of the Project Group, and in particular those members drawn from outside the Development Division. In accordance with the agreements of 14th September, 1995, all dimensions had been evaluated and marked qualitatively, although the marks for the Financial Key Figures dimension had yet to be confirmed. By any objective assessment, the scoring of the four Aspects had proceeded far beyond the “initial” stage, and had, following Mr. Andersen’s memorandum of 21st September, 1995, progressed to the determination of a ranking in the qualitative evaluation, regarded as the ranking in the entire evaluation, albeit subject to further supplemental analysis to be conducted by AMI.

37.05 That ranking was predicated on decisions that:

- (i) Other Aspects should not be scored;
- (ii) the marks allocated for the Financial Key Figures dimension were correct;
- (iii) the results of the quantitative evaluation should be disregarded and excluded as a separate limb of the process;
- (iv) the results of the qualitative evaluation should be deemed conclusive.

These developments all arose from decisions and judgements made, not by the Project Group, but by Mr. Martin Brennan and Mr. Fintan Towey, in conjunction with AMI, at the Copenhagen meeting of 28th September, 1995, none of which was known to the wider membership of the Project Group.

37.06 Apart from the Development Division, which had received the first draft Report on the previous Wednesday, 4th October, 1995, no other members of the Project Group, with the possible exception of Mr. Billy Riordan and Mr. Donal Buggy, had had sight of the draft Report in advance of the commencement of the meeting, so that the opportunity to provide written comments on the draft, as had been agreed on 14th September, 1995, could not and did not arise. In view of the apparent disparity between what had been agreed by the Project Group,

and what had in fact occurred, it is not surprising that there were such contrasting expectations amongst those in attendance surrounding the business to be conducted at the meeting of 9th October, 1995.

37.07 Apart from the AMI representatives, it seems to the Tribunal that the membership of the Project Group fell into three fairly distinct categories. Firstly, there were those who were special interest members, consisting on the one hand of Mr. Riordan and Mr. Buggy, as accountants, and on the other hand of Mr. John McQuaid and Mr. Aidan Ryan, as engineers and representatives of the Technical Division. The focus of the former was the financial elements of the evaluation, whilst the focus of the latter was the technical elements. Mr. Riordan and Mr. Buggy each confirmed that, as accountants on secondment from the private sector, they perceived themselves as providing a resource to civil servants, and it was evident from all of the records available to the Tribunal that their engagement with the process was almost exclusively directed to financial elements of the evaluation. In a not dissimilar vein, Mr. McQuaid testified that his primary concern in attending the meeting of 9th October, 1995, was with the portions of the draft Report which related to the dimensions which he had had a role in evaluating, and his principal objective was to ensure that the draft text correctly reflected points discussed during the evaluation sessions attended by him, and the marks that had been awarded. Whilst the Tribunal does not suggest that Mr. Riordan, Mr. Buggy, Mr. McQuaid or Mr. Ryan were in any sense in abdication of their responsibilities as full members of the Project Group, it does seem that they understandably directed their more specialised backgrounds to the elements of the evaluation to which their skills related.

37.08 The second category of membership was drawn from the Regulatory Division, in the persons of Mr. Sean McMahon and Mr. Ed O’Callaghan. Neither of them had specialist areas of interest in the evaluation, such as the accountants and engineers, nor had they participated in the qualitative sub-groups. Their involvement and knowledge of the process arose solely from their attendance at Project Group meetings. Whilst, due to indisposition, Mr. O’Callaghan did not join the Project Group until the ninth meeting on 4th September, 1995, Mr. McMahon had been a faithful attendee at Project Group meetings. Each of them had also participated on the Department side in all six oral presentations which had proceeded in mid-September. Their expectations surrounding the progress of the process, the stage which it had reached as of 9th October, 1995, and the business to be conducted at the meeting of that day, matched what had been agreed by the members of the Project Group collectively on 14th September, 1995.

37.09 In that regard, Mr. McMahon testified that, as of 9th October, 1995, he thought that the Project Group would convene in what he termed “*plenary session*”, and would take and review the two top-ranked applicants in the qualitative evaluation almost from first principles. He anticipated that there would be an exposition by AMI, and that the Project Group would be brought through the evaluation step-by-step, and that all those who had participated would make contributions as necessary. He envisaged that they would backtrack, and revisit collectively everything that had been done to establish where they had reached in the evaluation, and how the qualitative treatment of the dimensions and indicators had been reintegrated into the quantitative assessment. Ultimately he thought that they would look and see whether the gap between the top-ranked applicants was large enough, or whether it needed to be closely examined further from a qualitative viewpoint, and if the gap was still very close, that they would then proceed until such time as they had exhausted every means of separating them. Somewhat similarly, Mr. O’Callaghan envisaged that Mr. Andersen would provide a résumé or overview of the draft Report, and that in turn the Project Group participants would make their contributions, would ask questions and seek clarifications. He would then have expected that the process would have resulted in a final document, that the entire Project Group collectively would have received, and would have signed off on.

37.10 The third category of membership was drawn from the Development Division in the persons of Mr. Brennan and Mr. Towey. Having been instrumental in progressing the evaluation to the stage it had reached, their expectations surrounding the Project Group meeting of 9th October, 1995, were very different to those of Mr. McMahon and Mr. O’Callaghan. Mr. Brennan considered that, following the Copenhagen meeting of 28th September, 1995, they had a result, subject to some further analysis to be undertaken by AMI, and which result had to be explained to the Project Group. It is not entirely clear what role Mr. Brennan envisaged for the Project Group, although he acknowledged that the Group could have disagreed, and if the Group had found serious flaws in the methodology, they would have had to revisit the provisional ranking. In a somewhat similar vein, Mr. Towey considered that as of 9th October the evaluation was substantially complete, and all that remained was for the Project Group to sign off on the nature and extent of the evaluation, and the outcome, and to ensure that the Evaluation Report fully documented the process, and the marking.

37.11 AMI, according to Mr. Andersen, regarded the meeting as a step in the discharge of their contractual obligations as consultants to the Department. The first draft Report had been generated by them, following the Copenhagen meeting of 28th September, 1995, which Mr. Andersen ultimately accepted had

taken place, but of which he had no recollection. A second draft Report was to be produced by 18th October, 1995, and AMI needed feedback and instructions to enable them to generate that Report, and that was their objective in attending the meeting.

37.12 It seems to the Tribunal that it was these opposing expectations and perspectives, whereby Mr. McMahon and Mr. O’Callaghan envisaged that the entire Group would participate collectively in a substantive review of the evaluation, on the one hand, and Mr. Brennan and Mr. Towey, who considered that the evaluation was effectively complete, subject to signing off by the Project Group, on the other hand, that set the scene for what occurred at the Project Group meeting of 9th October, 1995, and for much of the subsequent evident tension within the Group.

37.13 The recollections of those who attended the meeting were less than vivid, and as was the case with so much of the evidence heard by the Tribunal, the testimony of witnesses was, to a significant degree, directed towards the records of the meeting available to the Tribunal. Those records consisted of the following documents.

- (i) The [official report of the meeting](#), a relatively short typed document dated 17th October, 1995. Ms. Margaret O’Keeffe, who was one of two job-sharing Executive Officers within the Development Division, prepared the report in accordance with the protocol which had been described in evidence by Ms. Nic Lochlainn. As the latter was absent from the meeting of 9th October, Ms. O’Keeffe testified that she would have submitted her draft report to Mr. Towey for approval.
- (ii) Ms. O’Keeffe’s [contemporaneous notes](#) of the meeting, which she had attended in the capacity of a note-taker, and the contents of which she confirmed in evidence.
- (iii) A short manuscript contemporaneous [note made by Mr. McMahon](#) in his personal journal.
- (iv) A short manuscript [note made by Mr. Riordan](#) in the course of the meeting.
- (v) The [Regulatory Division copy](#) of the official report of the meeting, dated 17th October, 1995, on which Mr. McMahon had endorsed the views of the Regulatory Division, as expressed at the meeting.

- (vi) Mr. O’Callaghan’s [chronology](#), to which reference has already been made in Chapter 34.
- (vii) A [corrigendum to the official report](#) of the subsequent Project Group meeting of 23rd October, 1995, which had been inserted at the instance of Mr. Riordan, regarding inquiries which he had made of Mr. Bruel in the course of the meeting of 9th October, 1995, and assurances received from Mr. Bruel in response.

Copies of all of the above documents can be found in the Book of Appendices to this Volume.

37.14 All of these documents were made available to the Tribunal in the course of its investigative work. Ms. O’Keefe’s contemporaneous notes were, as already observed, at one stage subject to a claim of privilege by the Department, which was withdrawn when challenged by the Tribunal. Ms. O’Keefe’s notes were a contemporaneous record of discussion at the meeting: they were accordingly considerably more compendious than the official report, and gave a far fuller flavour of the content of discussions, and of the exchanges between those present.

37.15 As already indicated, apart from Mr. Brennan and Mr. Towey, the members of the Project Group had not had sight of the draft Report in advance of the meeting, although Mr. Riordan and Mr. Buggy may have had a full copy, or an extract comprising the financial evaluation section, for the purposes of their review earlier on the same day. The draft, which has already been described in some detail in Chapter 34, extending as it did to 49 pages, apart from its appendices, and containing numerous tables and figures, was by any standards a dense document written in a relatively inaccessible style, and would undoubtedly have posed a challenge to any reader approaching it for the first time, even under optimum conditions. There can be no gainsaying that the majority of the Project Group was at a considerable disadvantage in endeavouring to read and absorb the draft Report, and in seeking to understand its contents, whilst at the same time trying to participate in a meaningful way in discussion at the meeting. In the short manuscript note made by Mr. McMahon in his journal, he had made reference to that difficulty as follows:

“We have draft (No. 1) Rept of AMI which recommends A5, A3, A1 in that order.

(They are not easy to read).

[only limited no. of copies we've (T&RR) not had a chance to read in full]"

Mr. Andersen, having arrived at the meeting after it had commenced, was not it seems aware at the time that Mr. McMahon had not seen the draft Report until that morning.

37.16 In that regard, Mr. O'Callaghan testified that, even if the draft Report had been properly written, it would have been impossible for him to read and digest it at the meeting. He agreed that the understanding he would have gleaned at the meeting was based on information and explanations given to him by Mr. Brennan and Mr. Andersen. Likewise, Mr. McMahon observed that at the meeting of 9th October, he and Mr. O'Callaghan were trying to read the draft, as well as trying to make a meaningful contribution. The difficulties posed to the membership of the Project Group by the decision not to circulate the draft Report in advance of the meeting were undoubtedly most acute in the case of Mr. McMahon and Mr. O'Callaghan, as they had not participated in the evaluations conducted by the sub-groups. It is unfortunate that members of the Project Group were deprived of access to the draft Report, and of a meaningful opportunity to prepare for the meeting of 9th October, 1995, when it seems that at the very same time, a copy, or an extract copy, may have been made available to Mr. McCrea, Mr. Lowry's Programme Manager.

37.17 The content of the official report of the meeting is a useful starting point in reviewing the substantive business that was conducted. The report was structured around three sub-headings, and it is proposed initially to refer to the material by reference to those sub-headings.

OPENING

37.18 The official report, as will be recalled from Chapter 35, opened with the following text, below the above sub-heading:

"The chairman opened the meeting by stressing the confidentiality of the evaluation report and the discussions re same. He also informed the group that the Minister had been informed of the progress of the evaluation procedure and of the ranking of the top 2 applicants. The Minister is disposed towards announcing the result of the competition quickly after the finalisation of the evaluation report."

That paragraph, as already detailed, appears to have represented, in narrative form, a distillation of the initial entries in Ms. O’Keeffe’s contemporaneous notes which were:

“Confidentiality

Minister knows.

Shape of evaluation and order of top two.

Minister of State does not know.

Quick announcement.”

37.19 Having distributed the draft Report to the membership of the Project Group, it seems therefore that Mr. Brennan’s approach was to open the meeting by informing the Group, without further ado, that Mr. Lowry knew the “*shape*” of the evaluation, and the order of the two top-ranked applicants, and that it was Mr. Lowry’s intention to accelerate the announcement of the result. Many of those in attendance must have been confounded by what Mr. Brennan had to say. They understood that they were attending a meeting of the Project Group to progress the process whereby the top-ranked applicant would be selected by the Project Group, so as to enable the Project Group to make a recommendation to Mr. Lowry. Yet, at the outset of the meeting, what they were told by Mr. Brennan was that the recommendation had effectively already been made by him, and that the Minister intended to accelerate the announcement of the result. Mr. McMahon testified that he was both surprised and concerned by this development. Mr. O’Callaghan considered the news to be highly significant as, from his experience as a civil servant, it meant that for all practical purposes the process was at an end, as he could not conceive of circumstances in which, irrespective of the views of the Project Group, any different recommendation could be made, or in which Mr. Lowry could be advised that the Project Group had reversed that provisional ranking. As will become apparent from the contents of the documentary evidence adduced, and in particular the contemporaneous notes of Ms. O’Keeffe, the Tribunal is satisfied that the meeting effectively proceeded on the footing that the provisional ranking, which had emerged from the Copenhagen meeting of 28th September, 1995, represented the result of the evaluation, and that what was required was for the draft Evaluation Report to be finalised.

DISCUSSION OF THE EVALUATION REPORT

37.20 Under this second sub-heading, the official report recorded:

“The draft evaluation report put forward by AMI was examined in detail. A range of suggestions in relation the manner of presentation of the results were put forward by the Group and AMI undertook to incorporate these in the second draft. The agreed amendments included:

- inclusion in the body of the main report of the proposed appendix in relation to the evaluation methodology.*
- an expansion generally of the justification for the award of marks to the various indicators*
- revision of the financial conformance appendix to a more explanatory format*
- inclusion of an executive summary and an annex explaining some of the terminology*
- elaboration of the reasons as to why the quantitative analysis could not be presented as an output of the evaluation process*

AMI also indicated that the supplementary analysis in relation to interconnection and tariffs which had yet to be provided did not suggest that it would be necessary to revise the award of marks.”

37.21 That short passage represented lengthy discussions of the Project Group, and it is to Ms. O’Keeffe’s contemporaneous notes that resort must be had for a full account of what actually transpired. From those notes, it is apparent that, following a general exposition delivered by Mr. Brennan, discussion at the meeting was directed firstly, to structural issues connected with the methodology of the process, and secondly, to a page-by-page review of the draft Report. It would however be incorrect to conclude from the foregoing that discussion of the structural issues was entirely separate to the page-by-page review, as in the course of the latter exercise, it seems from the content of Ms. O’Keeffe’s notes that, in some instances, the review led to further discussion of issues already aired, and in others prompted discussion of additional issues of that type. However, for the purposes of the orderly presentation of the material, the four principal structural issues which arose will be addressed separately to the page-by-page review. It is now proposed to relate, in some depth, the evidence which was available to the Tribunal regarding what actually transpired at the meeting, and this will be done primarily by reference to Ms. O’Keeffe’s notes, and the evidence directed to those notes.

37.22 After the initial passage, already quoted at paragraph 18 above, Ms. O’Keefe’s notes continued as follows under the heading “Agenda”:

“Draft Report

Future Work Programme: A. Producing draft number two.

Good working draft produced on time.

Annex should be part of the main report.

Object to get feedback on context style of report, content accuracy.

Report too brisk. Critically needs more elaboration and reasoning more significantly. Few lay readers but they will be critical – terminology needs to be explained.

MA brought appendix on supply on tariffs and interconnections.

Description of methodology still missing.

Different groups examined dealing with commissions etc.

Relevance of annex dealing with conflict.

Full discussion needed on Annex 10.

Minister does not want the report to undermine itself e.g. either a project is bankable.

Should be balanced arguments”

37.23 From the structure and layout of that passage, it appears that these initial remarks were made by Mr. Brennan, who set the agenda for the meeting as the “Draft Report” and the “Future Work Programme”, which he defined as “Producing draft number two”. He described the first draft as a “good working draft”, and the object of the meeting as being “to get feedback on context style of report, content accuracy”. He then proceeded to refer to the appendices to the Report, and in particular to Appendix 10, as already discussed in Chapter 34.

37.24 There seems accordingly to have been two elements to these opening observations made by Mr. Brennan. Firstly, he set the agenda for the meeting as involving a consideration of the draft Report, and of the future work programme. In that context he elaborated on the task of the Project Group meeting in terms of the draft Report, and suggested that the object was “to get feedback on context style of report, content accuracy”. There is certainly nothing in these opening remarks, as recorded by Ms. O’Keefe, to suggest that the outcome of the Copenhagen meeting, or what was contained in the draft Report, was

presented in any provisional sense, or that it was intended that there would a substantive review by the Project Group.

37.25 In that regard, Mr. O’Callaghan testified that his impression from what he was informed of at the meeting was that the evaluation process was effectively over. He had queried what would happen if there was disagreement within the Group, and recalled that Mr. Brennan had replied that the evaluations had been conducted by teams comprised of most of the membership of the Project Group. Mr. O’Callaghan’s evidence was consistent with the second paragraph of the chronology which he had generated immediately after the public announcement of the result, in which he had written:

“2. Did not see copy of the first draft final report until 09.10.95. I raised question of what happens if there is disagreement and MB said that most of the Project Team had been involved in the assessment which led to the ranking. MB said that the Minister already knew the winner.”

37.26 The impression with which the Tribunal is left from the available records, and from the evidence heard, is that the draft Report, to which the Project Group had just been given access, and the ranking which had emerged from the meeting of 28th September, 1995, in Copenhagen, were presented by Mr. Brennan at the outset of the meeting as representing the results of a concluded evaluation. It seems that what Mr. Brennan was in reality inviting the Project Group to participate in was a discussion of the presentation of those results as contained in the draft Report, and not a substantive review of what had been done in order to enable the Project Group to approve those results or otherwise.

37.27 The second aspect of Mr. Brennan’s initial remarks related to the appendices to the draft Report. Having referred to additional appendices which AMI had brought with them to the meeting, and to an appendix on methodology which was outstanding, Mr. Brennan focused on Appendix 10, and observed that a “full discussion [was] needed”. In that context, according to Ms. O’Keeffe’s note, he advised the meeting that:

“Minister does not want the report to undermine itself e.g. either a project is bankable. Should be balanced arguments.”

37.28 This passage, and its import, in terms of Mr. Lowry’s views on how the financial frailty of Esat Digifone should be presented, and handled in the Evaluation Report, has already been explored in Chapter 35. Suffice to say that

the Tribunal is satisfied that Mr. Lowry had been briefed quite extensively in the first week of October, 1995, on the main features of the evaluation, and had been apprised of the financial problem associated with Esat Digifone, and in particular as exposed and elaborated upon in Appendix 10, and had proposed the concept of bankability, namely, that banks would regard the GSM project as an attractive investment, as a solution to it, and as a means of balancing the material contained in that appendix. As will be seen, this very approach was ultimately adopted, and informed certain eleventh hour amendments made to the Evaluation Report at the instance of the Department.

37.29 It is unclear whether Mr. Andersen and Mr. Bruel had joined the meeting by the time Mr. Brennan, having referred to Appendix 10, introduced Mr. Lowry's views on the draft Report, his desire that the Report should not undermine itself, and the concept of bankability. Mr. Andersen had no recollection of these matters being aired. He did however have much to volunteer about them.

37.30 He was not surprised that Mr. Brennan had already informed Mr. Lowry of the ranking before it had been approved by the Project Group. It was to Mr. Andersen's mind understandable that Mr. Lowry, as Minister, would be interested in how the process was progressing, as Mr. Lowry had an important decision to make. It seems in that regard that Mr. Andersen was labouring under a fundamental misconception, and that, as lead consultant to the Department, his knowledge of responsibility for decision making in the process was strangely inadequate. It is clear that he must have been wholly misinformed as to the respective functions of the Project Group, Mr. Lowry, as Minister, and the Government, as he appears not to have understood that Mr. Lowry was not the intended decision maker, and that that function was reserved exclusively to Government.

37.31 Mr. Andersen also had much to say regarding the concept of bankability, and its adoption as a solution to the financial weaknesses of consortia. Again, he had no recollection of the matter being adverted to by Mr. Brennan, in terms of outlining Mr. Lowry's views at that meeting. However, he thought that the concept had been introduced at an early stage in the workings of the financial sub-groups by AMI consultants and representatives of the Department of Finance. It was not introduced by Mr. Andersen himself, but by other members of AMI. He did not recall whether there was any record of AMI proposing the concept; there may have been or there may not have been. Bankability was, according to Mr. Andersen, a general term in wide use in the context of the licensing of second GSM operators during the mid-1990s, to

describe corporate finance business associated with the introduction of second operators.

37.32 Mr. Andersen's position therefore was that he had no recollection of the concept being raised by Mr. Brennan at the Project Group meeting. He had no personal involvement, but he believed that it would have been introduced by one of his AMI associates, in conjunction with Department of Finance personnel, at an early stage in the financial evaluation. He was equivocal as to whether there was any record of AMI consultants suggesting the concept.

37.33 The actual position was that there was no record of the concept, or of any consideration of it ever having arisen at any stage in the context of the financial sub-group meetings. It was not an indicator that was evaluated, it did not feature in either Mr. Riordan's or Mr. Towey's summaries of the initial sub-group meeting in Copenhagen on 6th September, 1995, it did not feature in any of the correspondence which passed between Mr. Bruel and Mr. Riordan during the course of the process, and it did not form any part of the considerations recorded by Mr. Riordan and Mr. Buggy during their review of the financial evaluation on the morning of 9th October, 1995.

37.34 The first occasion on which the concept was documented as arising in the GSM evaluation process was in Ms. O'Keeffe's contemporaneous notes of the Project Group meeting, when it was clearly attributed by Mr. Brennan to Mr. Lowry. Mr. Brennan himself, when he resumed his evidence in June, 2003, accepted that the concept had originated with Mr. Lowry.

37.35 It is of course possible that Mr. Andersen was confused in his evidence between the concept of bankability and that of "*deep pockets*", which was also ultimately invoked in the credibility, risks and sensitivities section of the final Report as an answer to the financial frailty of the Communicorp element of Esat Digifone. This was identified by AMI as a material consideration to the paragraph 19 precondition of financial capability. The latter concept, which related to the presence of financially strong members within consortia, had certainly originated with AMI, and was ultimately imported, in conjunction with the concept of bankability, to meet the uncertainties noted in the finances of A5, Esat Digifone.

The structural issues

37.36 During the course of the meeting, there was consideration of at least four structural issues pertaining to the methodology of the evaluation which had been conducted. To what extent the broad membership of the Project Group could have followed the discussion of these issues, or contributed to it in any

meaningful way, is doubtful. Apart from Mr. Brennan and Mr. Towey, the members were entirely unaware of the extent to which the evaluation had progressed beyond what had been envisaged at the Project Group meeting of 14th September, 1995. They knew nothing of the significant matters raised by Mr. Andersen in his memorandum of 21st September, 1995, and they were coming to the draft Report for the very first time. It is not surprising therefore, as was acknowledged by a number of the Departmental witnesses, that there was a degree of confusion at the meeting surrounding these discussions.

The Quantitative Evaluation

37.37 There were four passages in Ms. O’Keeffe’s notes which recorded consideration of the issue of the quantitative evaluation. The first of these passages arose at an early stage of the meeting, shortly following Mr. Brennan’s reference to Appendix 10. It also followed an interjection by Mr. Andersen, when he adverted to corrections to the scores for Technical Aspects to which he had been alerted, by Ms. Nic Lochlainn’s fax of 6th October, 1995, and to certain elements of the supplemental analysis. The following passage then appeared:

“Quantitative Evaluation

View is QE should not be performed separately but are taken into account in main report.

Already agreed that international roaming should not be used.

Hard to score the block out and drop-out rates.

Tariffs – Well defined basket of tariffs.

Metering – Billing should be a score indication.

Data not reliable for comparison purposes.

To be left over for discussion.

If included it will give a false confidence in some figures.

M. Brennan

Would proceed in the way Andersen suggests and would strengthen report, the annex on methodology should cover this and become main report.”

37.38 There then followed a general observation, attributed to Mr. McMahon, regarding the overall presentation of the draft Report, after which Mr. McQuaid appears to have steered discussion back to the quantitative evaluation.

“John McQuaid

*Page 44- Correct, ok evaluation model appendix. quantitative analysis
↑ report based on qualitative analysis. Concluding remarks (Page
44)...”*

37.39 Following some further discussion of the final tables in the draft Report, Mr. Towey returned to the topic, and the following passage appeared in Ms. O’Keeffe’s note:

“F Towey

*Should we not include quantitative analysis up-front.
Quantitative analysis too simplistic to give results.*

1. *The scoring.*
2. *Would like to stick to the evaluation model.*

*Should quantitative analysis be shown. Would have to open
discussion again. Quantitative evaluation unfair and impossible.
Figure impossible to compare.*

F Towey

*Change of events, evaluation model 80% deals with quantitative
evaluation.*

Results of quantitative evaluation not reliable.

Quantitative analysis became less and less.

Should be explained in methodology report and wording is important.”

37.40 The fourth passage, which was preceded only by an unrelated observation attributed to Mr. Riordan, was as follows:

“Because of uncertainty cannot trust quantitative.

Quantitative

Ranking is probably different now (Annex D).

*50% of the weighting is lost due to scoring that cannot be used and
quantitative analysis has been undermined.*

It is not necessary to publish, the original.”

37.41 Departmental witnesses who had attended the meeting agreed that, as reflected in the passages quoted above, there had been a debate at the meeting concerning the quantitative evaluation, and how the results should be handled in the Evaluation Report. Before proceeding to consider that debate, it is helpful to revisit briefly what had happened in relation to the quantitative evaluation, and what had been agreed by the Project Group. The quantitative evaluation had not featured in discussions of the Project Group since 4th September, 1995, when Mr. Andersen presented the first set of quantitative results. The attention of the Group having been drawn to certain shortcomings in the results, it had been decided at that meeting and the official report so recorded that:

“The consensus was that the quantitative analysis was not sufficient on its own and that it would be returned to after both the presentations and the qualitative assessment.”

37.42 It will be recalled that a second set of quantitative results had been prepared by AMI, dated 20th September, 1995. Mr. Brennan, Mr. Towey, Ms. Nic Lochlainn and Mr. Riordan were in Copenhagen on that date, and Mr. Brennan agreed that it was probable that they had been given a copy of the results in Copenhagen, and had brought the copy back with them to the Department. Mr. Riordan had also received a copy of the results, on which he had recorded in manuscript “*final version*”, and in the body of which he had noted his misgivings surrounding the correctness of the IRR scores which had for some reason been altered by AMI. There was nothing in the records however to suggest that the second set of results had ever been circulated, and none of the other members of the Project Group were aware of its existence. It is equally clear that there was nothing in all of the documentation available to the Tribunal to suggest that those results had ever been subject to consideration or discussion by the Project Group.

37.43 The Tribunal was also furnished with what appeared to be a third set of quantitative results. That set was not produced to the Tribunal by the Department, a copy of it was not within the Departmental files, and no Departmental witness was aware of it. It was provided to the Tribunal on 20th June, 2002, by solicitors acting for Merkantildata, a Norwegian company which had some years earlier acquired Mr. Andersen’s interest in AMI, and had taken over the entire business. The Tribunal was informed that it appeared from AMI’s log that the document had been generated on 2nd October, 1995, and that the date which it bore, 17th June, 2002, merely reflected that the document had been printed from AMI’s computer records on that date. As none of the Departmental witnesses had ever seen the document, the Tribunal had no evidence whatsoever concerning it, what it represented, what its purpose was,

and on what date it was in fact generated, until Mr. Andersen's recent attendance.

37.44 As already alluded to, it was Mr. Andersen's evidence that he had brought a copy of the third set of results with him to the Project Group meeting on 9th October, 1995. He did not believe that he had circulated copies in advance of the meeting, but had brought the results to the table, as he put it. He believed that he had just one copy with him at the meeting, and that he had brought it back with him that evening when he returned to Copenhagen. He thought that he had shown the results to the Project Group, but that it was in any event already the sentiment of the Group that the results of the quantitative analysis should not be presented in the Report as a separate output of the process.

37.45 The ranking which emerged from the first two sets of quantitative results was of course very different to that which emerged from the Copenhagen meeting, as reflected in the first draft Report then under consideration by the Project Group. The rankings which emerged from those first two sets of results were identical, namely, A3, Persona in first position, A6, Eurofone in second position, and A5, Esat Digifone in third position. A different order of ranking emerged from the third set of results, in that the positions of A3, Persona, and A6, Eurofone, were reversed, and A5, Esat Digifone, had slipped from third position to fourth position. The ranking from that set of results was therefore A6, Eurofone, in first place, A3, Persona, in second place, A4, Irish Cellular, in third place, and A5, Esat Digifone, in fourth place. In all three versions of the quantitative results, it was notable, and accepted by Mr. Andersen, that A5, Esat Digifone's ranking always remained two places behind that of A3, Persona.

37.46 Returning to the discussion of the quantitative evaluation as recorded in Ms. O'Keeffe's contemporaneous notes, it is striking that there was no reference whatsoever to Mr. Andersen's memorandum of 21st September, 1995, in which he had asked the Department for a decision on how to integrate the quantitative results into the Evaluation Report, whilst indicating his preference that the question be left unanswered until the final results had become available. Although Mr. Brennan and Mr. Towey had no recollection of any discussion of the quantitative evaluation in Copenhagen on 28th September, 1995, the fact remains that they had proceeded to arrive at what they regarded as a provisional ranking, without reference to the quantitative results. The ranking was therefore predicated on a decision, or at least on a working assumption or hypothesis, that the results of the separate quantitative evaluation, which in all forms had, contrary to expectations, yielded a ranking

very different to the provisional ranking, should not form a component in determining the overall ranking in the evaluation process.

37.47 Reverting to the relevant extracts from Ms. O’Keeffe’s notes, it appears that the first passage represented the view articulated by Mr. Andersen that the results of the quantitative evaluation should not be presented separately in the Evaluation Report, but should be:

“taken into account in main report.”

In that regard, it appears that he cited the difficulties which had been encountered in the quantitative measurement of three of the thirteen indicators, including International Roaming, which had been identified at the outset in the Evaluation Model as an indicator that might not be susceptible to quantitative evaluation at all. It appears also from this first passage that Mr. Andersen proposed that the matter *“be left over for discussion”*, and voiced his concern that, if the quantitative results were included, they would *“give a false confidence in some figures”*. Mr. Brennan then seems to have interjected, by stating that they *“would proceed in the way Andersen suggests”*, which seems to be a reference back to Mr. Andersen’s proposal that the quantitative evaluation should not be presented separately. Mr. Brennan also appears to have referred at that point to the appendix on methodology, which was then outstanding, and proposed that the contents of that appendix should address the quantitative evaluation.

37.48 Mr. Brennan’s views on how the matter should be approached did not bring discussion of the topic to a conclusion, as, following a short general observation made by Mr. McMahon, Mr. McQuaid brought discussion back to it. From Ms. O’Keeffe’s notes, it seems that, having noted that the Evaluation Model was to be contained in an appendix to the Evaluation Report, he had observed that the Report was:

“based on qualitative analysis.”

In evidence, Mr. McQuaid commented that his remarks, as recorded in Ms. O’Keeffe’s notes, seemed to him to be cryptic, although he agreed that they might suggest that he had been proposing that references to the quantitative results should be incorporated in the concluding remarks in the main Report. Whilst there is no doubt that the precise meaning of his contribution is somewhat unclear, the note nonetheless seems to suggest that Mr. McQuaid was highlighting, presumably in the context of what was proposed regarding the quantitative results, that the draft Report was based solely on a qualitative analysis.

37.49 The third and fourth passages of Ms. O’Keeffe’s notes followed what appears to have been a lengthy discussion of another topic, and it seems from the record that it was Mr. Fintan Towey who returned to the issue. The third passage recorded, in fairly stark relief, the issues debated within the Group, and the opposing viewpoints articulated. It appears that it was Mr. Towey who was the protagonist for the view that the quantitative results should feature separately in the Report, and his view was seemingly founded on a belief that the Report should abide by the Evaluation Model. In that regard, he appears to have bolstered his argument by reference to the extent to which the Evaluation Model had provided for a quantitative evaluation, and it will be recalled that the Model was largely devoted to the methodology for that evaluation. The passage also recorded the opposing viewpoint, namely, that the quantitative results were “*unfair and impossible*”, that the scores were “*impossible to compare*”, and that the results of the quantitative evaluation were “*not reliable*”. The passage closed with an entry which echoed Mr. Brennan’s earlier contribution that:

“should be explained in methodology report and wording is important.”

37.50 Mr. Towey’s evidence with regard to this issue was that, whilst he had no respect, as he put it, for the quantitative evaluation, it was nonetheless his view that the quantitative results were part of what he described as “*the paper trail*”, and ought to have been presented in the Evaluation Report in the form provided for in the Evaluation Model, together with an explanation as to why the qualitative evaluation had produced a different ranking. He agreed that the other entries in the passage from Ms. O’Keeffe’s notes represented the response of others to his view, and he suspected that they represented the views of Mr. Andersen.

37.51 The final relevant passage of Ms. O’Keeffe’s notes on this topic did not contain attributions, but from the content of the remarks recorded it seems probable that the contributions came from those within the Group who supported Mr. Andersen’s view, to the effect that the results and ranking derived from the quantitative evaluation should not be presented as a distinct output of the process in the Evaluation Report. In the course of that element of the discussion, it seems that reference was made to a loss of 50% of the weighting in the quantitative evaluation, due to “*scoring that cannot be used*”, and analysis which had been “*undermined*”. It is unclear how that figure of 50% arose, because there was certainly nothing in the records, or in the sets of quantitative evaluation results available to the Tribunal, that could have supported a figure of anything approaching that magnitude.

37.52 Mr. Andersen suggested that this 50% loss of weighting figure arose from the losses associated with the International Roaming dimension at 6%, the Licence Fee dimension at 11%, the Performance Guarantee dimension represented by Blocking and Drop-out Rates at 5%, the Tariffs dimension at 18%, and a further separate weighting loss of 10% to reflect the time sensitivity which, according to Mr. Andersen, became apparent in the measurement of constituent indicators. It is striking that, apart from Blocking and Drop-out Rates, which were AMI's efforts to measure quantitatively the Performance Guarantee criterion, and which accounted for a mere 5% weighting, his reasoning as applied to the other factors, which he had identified as contributing to this supposed 50% loss of weighting, was far from compelling. The Evaluation Model, in both its draft form of 18th May, 1995, and its approved form of 8th June, 1995, had anticipated that sufficient information might not be provided to enable applicants' International Roaming Plans for year 2 of operation to be measured quantitatively. The Licence Fee dimension, in respect of which all applicants, having nominated the maximum fee of £15 million, were awarded full marks, was neutral in its impact, had been anticipated prior to the closing date, and continued to be marked and used in the qualitative evaluation. Likewise, the quantitative results for the Tariffs dimension, which compared applicants' tariffs to a defined OECD-like basket in year 4 of operation, had been recalculated in the case of A4, Irish Cellular, and A6, Eurofone, and had been used without reservation in the qualitative evaluation. Those results were also ultimately used, again without reservation, in Appendix 6, which set out supplemental analysis on tariffs. Whether the time sensitivity detected in the case of some indicators, as between the chosen year for measurement and other years, justified a further notional 10% loss of weighting, must be open to question, particularly when the time sensitivity related primarily to the Tariffs dimension, the weighting for which had already, on Mr. Andersen's evidence, been discounted.

37.53 It requires no specialist expertise, and nothing more than the deployment of common sense, to identify the deficiencies in the logic of Mr. Andersen's evidence.

37.54 Whilst it forms no part of the Tribunal's mandate to assess whether the view, that the separate set of quantitative results was statistically unreliable, was justified, as advocated by Mr. Andersen at the Project Group meeting, and advanced by him in his evidence, it is difficult to overlook the fact that in Mr. Andersen's first recorded views on this issue, his memorandum of 21st September, 1995, he stated that it was his preference that a decision on how the quantitative results should be incorporated into the Evaluation Report should be postponed until the results were known. Either the quantitative results were

or were not statistically reliable, and if they were not, Mr. Andersen's views on their incorporation should not have turned on the outcome of any results.

37.55 It is also of note that during this closing portion of the discussion, a reference appears to have been made to what must have been Ms. Nic Lochlainn's fax to Mr. Andersen of 6th October, 1995, and in particular Annex D of that fax which, it will be recalled from Chapter 34, consisted of an extract from the set of quantitative results of 20th September, 1995, and in that context it appears that someone observed that the ranking was "*probably different now*". The final entry in that passage recorded the view that it was:

"not necessary to publish, the original."

37.56 As is apparent from the passages of Ms. O'Keeffe's notes recording discussion of the quantitative evaluation, there was no record of reference by Mr. Andersen to his third set of quantitative results in the course of any of the exchanges directed to the quantitative evaluation. There was reference to the ranking "*probably*" being different to that recorded in Annex D to Ms. Nic Lochlainn's fax of 6th October, 1995, which comprised a copy of the second set of results of 20th September, 1995, and, had Mr. Andersen brought his third set of results with him to the meeting, it might be expected that he would, at that point, have drawn the meeting's attention to them, but judging from the record, he did not, and nobody in attendance had any recollection of them.

37.57 The most striking and disappointing feature of Mr. Andersen's evidence, regarding the determination that the quantitative results should not be published in the Evaluation Report, was the extent to which he sought to distance himself from that determination, and to portray himself as a disinterested bystander, receiving instructions from the Project Group. It was Mr. Andersen's evidence that AMI was told by the Project Group that a final separate quantitative Evaluation Report should not be produced, and should not be appended to the Evaluation Report. As a consultant, it was his evidence that he presented matters to the Project Group, that matters were discussed, and the Project Group made a decision, with which he fully agreed. The reality was that, whatever about the statistical reliability of the results, which must remain an open question, AMI, as expert consultants, who recommended and endorsed the dual quantitative and qualitative approach for good reason, never managed to produce a fully corrected set of quantitative results. Moreover, it was Mr. Andersen, in his 21st September, 1995 memorandum addressed to Mr. Brennan and Mr. Towey, who first raised the spectre of how the quantitative results should be integrated into the Evaluation Report. It was Mr. Andersen who then observed that it was his preference that a decision should await the final results. He could

not account for that observation, and suggested that he was simply approaching matters from the point of view of a consultant who wished to bring his work to completion. What is however abundantly clear from a review of Ms. O’Keeffe’s detailed notes is that it was Mr. Andersen who recommended that the separate quantitative results should not be published, and that it was Mr. Andersen who participated actively in resisting Mr. Towey’s contention that the results should be published, and that it was Mr. Brennan who stated that:

“Would proceed in the way Andersen suggests and would strengthen report, the annex on methodology should cover this and become main report.”

37.58 Again in this instance, the extent to which those in attendance at the meeting could have followed the debate regarding the quantitative evaluation must be open to considerable doubt. Apart from Mr. Brennan, and possibly Mr. Towey and Mr. Riordan, none of them knew anything of the second set of quantitative results of 20th September, 1995, nor does it appear that reference was made in the course of the exchange to the fact that the ranking in the first such set of 30th August, 1995, was at odds with the ranking which had emerged from the qualitative analysis. Had the membership of the Group had an appreciation of the substance of that debate, it might be expected that at least some of the more obvious queries would have been raised, including:

- (i) whether Mr. Andersen had taken the steps which had been agreed at the meeting of 4th September, 1995, to remedy the shortcomings in the results for the indicators which had been highlighted at that meeting;
- (ii) what changes had been made in the qualitative analysis to incorporate the quantitative results;
- (iii) how AMI could justify a methodology confined to a qualitative evaluation, having regard to the terms of the Evaluation Model, and having regard to their own recommendation in their tender document, that it was advisable to adopt a methodology which combined both forms of analysis;
- (iv) whether the ranking that had emerged from the qualitative analysis could be regarded as reliable in the absence of a quantitative analysis.

37.59 What is abundantly clear from Ms. O’Keeffe’s notes, and from all other records of the meeting which were available to the Tribunal, is that there was no discussion of any of these matters, and this suggests to the Tribunal that the

substance of the debate may have largely eluded the majority of the Group, who were no doubt grappling to understand the document which had just been circulated.

The Weightings

37.60 From the contents of Ms. O’Keeffe’s notes, it appears that the issue of weightings also arose in the course of the meeting, and the entries suggest that two features of their use were considered: firstly, the actual weightings applied, as shown in the first draft Report; and secondly, the manner in which the application of weightings was dealt with in the draft Report.

37.61 In all, there were three passages of Ms. O’Keeffe’s notes which recorded discussion of the issue of weightings. The first of these was a short entry, which followed immediately after the record of initial discussion of the quantitative evaluation, and which recorded:

“Weighting

Table 17 different from agreed weighting.”

After an interjection regarding the structure of the Report, there was a further short passage which appears relevant, and which recorded:

“Michael Andersen

16, 17, 18 tables reflect discussions in Copenhagen. If different weighting used to prove you get the same result with different approach.”

At what seems to have been a much later stage in proceedings, in the context of the page-by-page review, the following remarks were attributed to Mr. McQuaid:

“John McQuaid

*Without visibility of weighting it looks unreasonable
It should be explained.
Stress that main focus was on capacity of network and infrastructure.
More attention given to the point that weightings were used.”*

37.62 From the first of these extracts, it seems that a member of the Project Group observed that the weightings shown in Table 17 of the first draft Report

were not the weightings which had been agreed. That observation was of course correct: the departure from the agreed weightings, as stipulated in the Evaluation Model of 8th June, 1995, was in respect of those weightings applied to the three dimensions, Market Development, Financial Key Figures and Experience of Applicant, which reflected the first-ranked evaluation criterion. What had been provided in the Evaluation Model were unequal weightings of 7.5, 15 and 10 respectively, whereas what had been applied in Copenhagen, and used to rank the applicants, were equal weightings of 10, 10 and 10. Whilst that difference was clearly identified, and highlighted by someone at the meeting, there was nothing in Ms. O’Keeffe’s notes to suggest that discussion developed, or that Mr. Andersen, Mr. Brennan or Mr. Towey explained to the Group that the weightings for those three dimensions in the Evaluation Model of 8th June, 1995, were incorrect. Nor was there any indication that a decision had been taken by them in Copenhagen, in the context of the judgements they had applied in generating Table 17, that it was appropriate, for qualitative purposes, to depart from the agreed weightings, and to apply equivalent weightings to those three dimensions. Although Mr. Towey’s testimony was that all of this had been explained to the Project Group, there is no evidence from the contemporaneous records to suggest that such an explanation was forthcoming, nor did any member of the Project Group have any recollection of it, or familiarity with it. Moreover, whatever discussion took place, as reflected in the second passage quoted above, it seems that this could not have extended to an explanation directed to the different weightings applied, as it will be seen that the very same issue, surrounding the weightings applied to those three dimensions, arose once again at a later date in the context of consideration of the second draft Evaluation Report. Mr. Andersen, when he attended, was of little assistance on this matter, as he could not recollect any discussion of weightings, or recollect any member of the Project Group taking issue with the weightings that had been applied.

37.63 The third passage of Ms. O’Keeffe’s note recorded remarks made by Mr. John McQuaid. These related, not to the substantive weightings applied, but rather to the lack of visibility of weightings in the constituent dimension and Aspects tables. None of these tables displayed the weightings used, and in the main the accompanying narratives omitted reference to weightings, or even implicit weightings, by virtue of greater importance having been attached to certain indicators or dimensions. Mr. McQuaid’s observation was self-evidently made in the context of the Technical Aspects table, and appears to have reflected his anxiety, which he confirmed in evidence, that without reference to the weightings, the aggregation of the grades shown in the table appeared to be “unreasonable”, as he put it. His concern was that the accompanying texts should have explained that implicit weightings had been applied, and specifically, in the case of the Technical Aspects table, should have stated that the

dimensions, Capacity of the Proposed Network and Network Infrastructure, had been treated as the more significant of the four dimensions evaluated.

The Financial Information Data

37.64 Ms. O’Keeffe’s notes recorded contributions made by Mr. Riordan concerning the accuracy and validity of the data used in the evaluation process. This concern arose from the difficulties which he had encountered in the Financial Key Figures evaluation, and in particular the inconsistencies which he had identified between the data contained in mandatory tables, and the figures and projections contained in applications proper. Mr. Riordan judged this to be a serious problem, and it will be recalled that when he had raised it at the first evaluation session in Copenhagen, on 6th September, 1995, Mr. Towe had proposed that, instead of undertaking what would have been an exceedingly time-consuming task of comparison, the problem should be addressed, in the first instance, by an analysis of the internal consistency of the mandatory tables themselves. It was Mr. Riordan to whom that task fell, and having completed his analysis, he travelled to Copenhagen on 19th September, 1995, to find that the reformatting of the mandatory tables consequent on the modifications he had directed had not been completed by AMI, and the sub-group could not proceed. On 26th September, 1995, the day before Mr. Brennan and Mr. Towe were due to travel to Copenhagen for their decisive meeting, Mr. Bruel of AMI forwarded a set of revised mandatory tables to Mr. Riordan, and indicated that he had checked the figures and felt “*rather confident that the figures are correct*”. In the same letter, in the context of adjustments made to certain of the data in the mandatory tables, he had observed that “*This adjustment does not give an entirely correct assessment of the terminal value, but it represents a ‘qualified guess’*”. Mr. Riordan had no further input whatsoever into the marking of the applications by reference to the Financial Key Figures dimension, which was undertaken and completed in his absence, and was used in generating a provisional ranking in Copenhagen on 28th September, 1995, until he, in conjunction with Mr. Buggy, undertook a review of those grades on the morning of 9th October, in advance of the commencement of the Project Group meeting.

37.65 The entries in Ms. O’Keeffe’s notes which recorded Mr. Riordan’s interventions were as follows:

“B Riordan

Are Andersen happy to go forward with the position as it is now.

They are sufficiently happy.

Aim is to conduct the evaluation in such a way that 10 people would come up with the same results.

...

Billy Riordan

Do we carry out any further assessment of the validity of the information presented?

Martin Brennan

Some validation has been done.

A3 and A5 have much evident [?] information and are satisfied with what they have. Michael Andersen advises not to carry out extra analysis without risk to the process.”

37.66 The manuscript note of the meeting of 9th October, 1995, kept by Mr. Riordan himself reflected more fully both his concerns, and the terms of the response he received. He had recorded as follows:

“Note

Andersens are sufficiently satisfied ‘that the figures as finally stated are a reasonable and fair basis on which to proceed. They stated that any further amendments which might arise would not make any difference to the evaluation.

Further analysis is not considered necessary. MB Believe that this has been done effectively.”

37.67 The official report of the meeting was silent as to the assurances provided by AMI, but the significance which Mr. Riordan attached to them is evident from his insistence that a corrigendum should be inserted in the official report of the next meeting of the Project Group on 23rd October, 1995, in the following terms:

“Corrigendum

Mr. Billy Riordan noted, for the record, that Mr. Jon Bruel of AMI had stated at the previous meeting that he was sufficiently satisfied that the financial tables, as evaluated, were adequate and true. Reference to this statement had been omitted from the minutes of the previous meeting in error.”

37.68 This was one of the very few matters raised with Mr. Riordan in his examination of which he had a clear recollection. His evidence was that he had raised this matter at the meeting of 9th October, 1995, as he wished to ensure that AMI were satisfied with every aspect of the mandatory tables, and he agreed that he was anxious that they should affirm their satisfaction with them. In light of Mr. Riordan’s dealings with AMI on the financial evaluation, which by any standards would have to be regarded as less than entirely satisfactory, it is understandable that he took the course that he did, as he clearly had doubts about both the adequacy of the analysis which had been undertaken, and the accuracy and validity of the figures on which that analysis was based. What is of course strikingly absent from Ms. O’Keeffe’s notes, and from Mr. Riordan’s own record, is any reference to the outcome of the joint review undertaken by Mr. Riordan and Mr. Buggy, earlier that morning, including the changes they had made to the marks for A3, Persona, and A5, Esat Digifone, and the potential impact these changes might have had on the ranking in the evaluation.

The Results Tables

37.69 Ms. O’Keeffe’s notes recorded some discussion of the results tables contained in Section 5 of the draft Report. It will be recalled that there were three such tables, Table 16, Table 17 and Table 18. Table 16 presented the output of the qualitative analysis in the form of the qualitative marking matrix in the Evaluation Model, and was described in the draft Report as comprising “*the results on the basis of the evaluation of the marketing, technical, management and financial aspects (qualitative award of marks)*”. Table 17 contained precisely the same graded results, this time ordered by reference to the evaluation criteria, and additionally displayed numerical weightings. That table was described in the draft Report as comprising “*the results on the basis of a re-grouping of the criteria (qualitative award of marks)*”. Table 18 was identical to Table 17, save that the output of the qualitative evaluation was converted from graded letters to numerical scores, and the table was described in the draft Report as comprising “*the results on the basis of the application of a quantitative scoring model (conversion of marks to points)*”. It will also be recalled that, as regards the weightings displayed in Table 17 and Table 18, the draft defined those weightings as “*a weighting mechanism...agreed prior to the closing date for quantitative purposes*”. In the course of his evidence, Mr. Towey had helpfully explained his recollection of how those tables, and in particular Table 17, had been generated in Copenhagen, on 28th September, 1995, by the application of judgement to the lettered grades, in endeavouring to separate the two top-ranked applicants, and, in doing so, to arrive at an aggregated total grade for each of the six applicants.

37.70 The first passage of Ms. O’Keeffe’s notes that recorded references to the tables was as follows:

“John McQuaid

...

Are tables 16, 17 and 18 of equal importance.

...

Michael Andersen

16, 17, 18 tables reflect discussions in Copenhagen. If different weighting used to prove you get the same result with different approach.

Paragraph 19 was regrouped to reflect that.

Have to apply a numerative approach.

If 3 tables gave a different answer MB said further analysis would be required and seek to re-examine.”

The second passage, which seems to relate merely to matters of presentation, appeared towards the end of Ms. O’Keeffe’s notes, and was as follows:

“Table 17 and 18 should mention selection criteria and subheading (as RFP document may not be to hand).”

37.71 It seems that it was Mr. McQuaid who initiated discussion of the tables, with his question relating to their respective importance, although he did not seemingly receive a direct answer to that question. It seems that it was Mr. Andersen who responded, and who, having informed the Group that the tables reflected discussions in Copenhagen, referred to the use of weightings, and to proving “*the same result with different approach*”. Thereafter, it seems that Mr. Andersen focused on the regrouping of the paragraph 19 criteria, presumably around the four Aspects that he had promoted in the Evaluation Model. There then followed reference to the necessity of adopting a “*numerative approach*”, and although the passage seems to suggest that this contribution may have been made by Mr. Andersen, it seems to the Tribunal unlikely that Mr. Andersen would have taken a lead in endorsing that approach. It is clear from the evidence of both Mr. Brennan and Mr. Towey that Mr. Andersen had opposed Mr. Brennan’s proposal that the results should be presented numerically, and judging from the qualification he had inserted in the draft Report, namely, that the exercise “*distorts the idea of a qualitative evaluation*”, it would seem that he was far from convinced about the value of Table 18, or the exercise which it represented. When Mr. Andersen testified, he indicated that he had “*concerns*”

about that approach, being “*not particularly fond of that exercise*”, although he “*didn’t resist it*”. In consequence, it seems far more probable that the commendation of the numerical approach was made by someone other than Mr. Andersen.

37.72 The final entry in the passage was specifically attributed to Mr. Brennan, who was recorded as having informed the meeting that:

“if 3 tables gave a different answer...further analysis would be required and seek to re-examine.”

From that record, it seems that the sense of what Mr. Brennan was conveying to the meeting was that, if the three tables had yielded different results, it would have been necessary to conduct further analysis, and to re-examine the applications. If that be so, the evident deficiencies in the logic of that statement do not seem to have been challenged at the meeting, although the flaws in it would have been patent to anybody who had critically appraised the tables. Of course, nobody at the meeting, other than the Development Division personnel, had had an opportunity to study the Report in advance, so it is not surprising that it was not until the next meeting of the Project Group that the issue was explored in greater depth. What is entirely clear is that the entries in all three tables were substantively identical, and that the tables differed only in form, and that there was therefore no possibility of them yielding divergent results. What is also patently clear is that there was nothing in Ms. O’Keeffe’s record, or any other record of that meeting, which recorded that Mr. Andersen, Mr. Brennan or Mr. Towey made a presentation to the meeting, or otherwise explained in any detail what had occurred between them in Copenhagen, on 28th September, 1995.

The page-by-page review

37.73 The latter part of the meeting appears to have revolved around a page-by-page review of the draft Report. From Ms. O’Keeffe’s notes, this review seems to have been primarily directed to matters of style and presentation. In his evidence, Mr. Brennan testified that, in reviewing the draft Report, there were three strands to the work of the Project Group: one was correcting typographical errors; another was addressing what he termed the “*Danish English*”; and a third was consideration of how to articulate the result, and improve the way the Report was presented. Ms. O’Keeffe’s notes certainly reflected contributions addressed to each of those three matters. Those notes do not however suggest that the review entailed a full reading of the draft Report, and the impression that the Tribunal is left with is that it consisted of the taking of proposals for amendments and changes.

37.74 Apart from Mr. Brennan and Mr. Towey, who had received the draft Report on the previous Wednesday, and had had every opportunity to make a detailed study of its contents, it seems unlikely that any other member present would have been in a position to contribute meaningfully to that discussion. This is borne out by the attributions, such as they were, in the final section of the notes, which were predominantly to Mr. Brennan, and to Mr. Towey.

37.75 In the course of that exercise, and in the context of Section 4 of the draft Report, discussion it seems gravitated back to the topic of financial risks. It will be recalled that Section 4, which was entitled “*Sensitivities, risks and credibility factors*”, was addressed to Other Aspects. This was the fifth of the Aspects that AMI had proposed should be evaluated, but from which Mr. Andersen departed in his memorandum of 21st September, 1995, when he recommended that, if a ranking could be agreed based on the marks for the four Aspects that had by then been evaluated, Other Aspects should not be scored, but should be addressed in the narrative of the Report. It was that course that was taken, and as regards Esat Digifone the narrative in the draft stated:

“In general, the credibility of A5 has been assessed as extremely high as A5 is the applicant with the highest degree of documentation behind the business case and with much information evidenced. In addition, it can be stated that A5 does not have abnormal sensitivities in its business case. Taking all the sensitivities defined in the tender specifications into account, A5 still earns a positive IRR. The weakest point concerning A5 is not related to the application as such, but to the applicant, or more specifically to one of the consortium members, namely Communicorp, which has a negative equity. Should the consortium meet with temporary or permanent opposition, this could in a worse case situation turn out to be critical, in particular concerning matters related to solvency.

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

Mr. Andersen regarded this passage as reflecting AMI’s reservations surrounding the finances of A5, Esat Digifone, and as constituting material relevant to a consideration of the paragraph 19 precondition of financial capability which, as he testified, had formed no part of the comparative evaluation which had been conducted.

37.76 The discussion of Section 4, and in particular of the above passages, was recorded in Ms. O’Keeffe’s notes as follows:

“Page 40

Should be presented in a more balanced way.

Financial Risks

No doubt that A5 will survive.

A3 have agreement that if one shareholder does not come up the others will pay.

Put in requirements in licence conditions.

If things don’t go as planned a lot more expenditure may be required.

Problem not unique to anyone.

More balanced statement. The project will survive, no one consortium is weak in itself. Each member of the consortium brings different elements.”

37.77 Although not attributed, it is unlikely that those contributions were made by Mr. Andersen, as it seems improbable that Mr. Andersen would have advocated a position at odds with his own draft. It seems to the Tribunal that the remarks are a logical extension of Mr. Brennan’s earlier comments on Appendix 10, and of Mr. Michael Lowry’s desire, as conveyed by Mr. Brennan to the Project Group, that the Report should be balanced, and should not “*undermine itself*”, and therefore Mr. Brennan must have been their source.

37.78 The contributions recorded by Ms. O’Keeffe seem to reflect the view that the reference to Communicorp’s negative equity, and the critical impact that it might have, in terms of the future solvency of the consortium, were unduly negative, and that the material should be presented in a more “*balanced way*”. In that regard, it seems that a view was advanced that there was “*no doubt that A5 will survive*”, and that the consortia should be judged in the round, rather than by reference to their participants, and that no individual consortium was weak in itself. It also seems to have been suggested that the “*problem was not unique to anyone*”, and that the problem, such as it was, could be met by a licence condition requiring mutual underwriting, as had been provided in the

shareholders agreement which had been executed by the members of the Persona consortium. The only discordant note in the entire passage was that which recorded the comment that:

“If things don’t go as planned a lot more expenditure may be required.”

As that entry is unattributed, it is unclear by whom the contribution was made, but what is evident from Ms. O’Keefe’s notes is that it did not prompt a wider discussion, but instead was met by a retrenchment of the position that had already been advocated.

37.79 In the context of this discussion, there was of course a very significant piece of financial information which was known to Mr. Brennan and Mr. Towey alone, and was unknown to the Project Group. That was the information, conveyed by the underwriting letter of 29th September, 1995, that a secondary source of funding for Communicorp’s equity participation had been secured, in the form of underwriting by Mr. Dermot Desmond, through his company, IIU.

CONCLUSION OF MEETING

37.80 The official report closed with the following short section:

“Future Work Programme

It was agreed that AMI would provide the first draft of parts of the report which had not been included in the first draft of the overall report for comments before submission of a complete second draft the following week.”

That text reflected the final entries in Ms. O’Keefe’s contemporaneous notes, which recorded:

“Fax copy with grammatical errors

First draft of chapters on methodology along with 2nd draft of report.

24-36 hours

2nd report to be of quality to be shown to Secretary.”

Both of these passages noted that, as the meeting concluded, arrangements were made for the provision of outstanding portions of the first draft Report by AMI, and the submission of a second draft Report during the following week.

37.81 From an overall consideration of the records of what transpired at the meeting, it is unclear what purpose the meeting served, in terms of the substantive evaluation, other than to provide a forum for those members of the Project Group who had a familiarity with the draft Report, or portions of it, to make their views known regarding the style and presentation of the material, and to enable AMI to proceed to a second draft Report. There appears to have been no presentation to the Project Group of the evaluation conducted, or the ranking which emerged, as recorded in the draft Report, in any provisional sense. Moreover, there was nothing to show that the Project Group was briefed with information that would have enabled the Group to give any meaningful consideration to what had been done in its name, particularly bearing in mind that the majority had come to the Report for the first time. The Group was not, it seems, told any of the following:

- (i) how the sub-groups had arrived at their assessments of the applications for each of the dimensions, including what implicit weighting they had attached to indicators, or how the sub-groups had aggregated the indicator grades to arrive at dimension level grades;
- (ii) that a decision had been made not to score Other Aspects, and the reason for that decision;
- (iii) how the Copenhagen meeting had generated Tables 16, 17, and 18, and how the task of separating the two top-ranked applicants had been approached;
- (iv) that in generating Table 17, and applying judgements for that purpose, it had been decided that equivalent weightings of 10/10/10 should be applied to the three dimensions of the premier criterion, even though those weightings were at variance with the weightings stipulated in the Evaluation Model, and did not reflect the relative importance of those dimensions as determined by the Project Group;
- (v) that it was Mr. Brennan, rather than AMI, who had proposed that the results of the qualitative evaluation should be presented numerically in the form of Table 18, and that Mr. Andersen had initially opposed a presentation of the results in that form;
- (vi) that the qualitative marking of the dimension Financial Key Figures had proceeded without the involvement of the accountants within the Group, and that the grades for that dimension were subject to review by them, which had been conducted just prior to the Project Group meeting, and the outcome of that review.

37.82 There was nothing approximating to the “*plenary session*” that had been envisaged by Mr. Sean McMahon, or, for that matter, even the explanation of the evaluation and ranking that, according to his evidence, had been contemplated by Mr. Brennan. Rather, the very first piece of information imparted to the meeting by Mr. Brennan, as Chairman of the Group, was that the Minister already knew the ranking, and the “*shape*” of the Evaluation, and that the Minister was disposed to announcing the result of the competition quickly, after the finalisation of the Evaluation Report. Mr. Brennan then proceeded to set the agenda for the meeting as “*Draft Report – Future Work Programme: A. Producing draft number two*”. There was no scope within that agenda, as defined by Mr. Brennan, for consideration by the Project Group of the merits of the evaluation that had been conducted, or of the ranking that had emerged from the Copenhagen meeting.

37.83 Whilst many of the non-Development Division Departmental witnesses, with certain notable exceptions, were reticent in their evidence concerning what had occurred at the meeting, the documentary trail which existed showed irrefutably that no agreement was reached by the Group on that date approving the ranking, as reflected in the first draft Evaluation Report. In that regard, it will be seen that, when the Project Group reconvened on 23rd October, 1995, to consider the second draft Report dated 18th October, 1995, a passage inserted by AMI, which suggested that “*unanimous support*” had been given by the Project Group to the results of the evaluation as presented at the meeting of 9th October, 1995, was objected to and deleted by collective decision of the Group.

37.84 Mr. McMahon, who had expected a “*plenary session*” on 9th October, 1995, surrounding the merits of the evaluation, was, it seems, far from satisfied when he was informed that the qualitative evaluation was complete: nor was he convinced that the provisional ranking was the correct one. He testified that he felt that the qualitative assessment should have been revisited at that time, and that a further round table discussion was required. His view was based on his perception that the result, as detailed in the draft Report, was very close, and he could not say from reading the draft Report which of the two top-ranked applicants was in fact ahead. It was his impression, at the completion of the meeting of 9th October, 1995, that further work on the evaluation would be done, and he expected something in that regard to occur following the meeting. Moreover, it was his evidence that the collective view of the Group was that more work was required to be done: he did not believe that anyone had formed a final view on the merits, although they might have done so individually.

37.85 Mr. McMahon agreed that the action he took some three weeks later on 1st November, 1995, after Mr. Lowry had announced the result of the process, when he recorded his views on the Regulatory Division copy of the official report of the meeting of 9th of October, 1995, which he directed Mr. O'Callaghan to place on the Division's files, was a measure of the strength of his feelings at the time. It seems to the Tribunal that the note he made very probably also reflected his level of concern, and his dissatisfaction with how events unfolded between the meeting of 9th October, 1995, and the announcement of the result by Mr. Lowry on 25th October, 1995. He recorded his views as follows:

"Mr O'Callaghan

It's prob too late to change this record, but our intervention at subsequent meetings made clear that:

- 1. We did not subscribe to unanimity at this meeting.*
- 2. We expected the qual. assessment to continue from that time.*
- 3. The report while it had probably highlighted the best 2 candidates had a long way to go."*

37.86 Mr. O'Callaghan agreed with Mr. McMahon's note, insofar as it recorded that he and Mr. McMahon had not subscribed to unanimity at the meeting of 9th October, 1995, and that whilst the draft Report had probably highlighted the best two candidates, it had a long way to go. He did not however share Mr. McMahon's belief that the qualitative evaluation would continue after that meeting. It was his evidence that Mr. Brennan had quite clearly put to him that the qualitative assessment had been completed, and as Mr. Brennan had also informed the meeting that the Minister had already been advised of the ranking, Mr. O'Callaghan, as an experienced civil servant, considered that there was little scope for reopening the evaluation, or varying that ranking.

37.87 With the benefit of an overview of all of the available evidence, the Tribunal can well understand how Mr. O'Callaghan concluded on 9th October, 1995, that the evaluation was over, and that there was no prospect of the Project Group reviewing or varying the result reflected in the first draft Report. In concluding this unavoidably detailed chapter, the Tribunal is compelled to observe that events had, by 9th October, 1995, overtaken the Project Group as the instrument of evaluation and decision-making in the GSM process. The recommendation, reserved to the Project Group, had effectively already been made by Mr. Brennan, when he reported the outcome of the Copenhagen meeting to Mr. Lowry, at the beginning of October, and when he further briefed

Mr. Lowry on the features of the evaluation. The Project Group meeting of 9th October, 1995, was in truth nothing more than a forum for discussion of the first draft Report by those who had been fortunate enough to study it in advance of the meeting, that is, by Mr. Brennan and Mr. Towey. The determination that the ranking which had emerged should not be reviewed, challenged or disturbed by the Project Group continued to be the principal objective of activities as events unfolded after 9th October, 1995, and, as will be seen, led to a complete breakdown of consensus within the Project Group, in the days immediately prior to the announcement of the result.

SECTION F

THE INTERREGNUM

OVERVIEW

THE INTERREGNUM

38.01 Between Monday 9th October, and Monday 23rd October, 1995, the date of the final formal Project Group meeting, and which was just two days prior to the press conference convened by Mr. Michael Lowry to announce the result of the process, there was no meeting of the Project Group. The balance of the week of 9th October was relatively uneventful, and it was during the following week commencing on Monday 16th October, that the pace of activity accelerated, particularly when AMI's second draft report was received on Thursday, 19th October, 1995. The second draft, unlike the first, was distributed promptly, and at least some members of the Project Group had an opportunity to study its contents in advance of the final Project Group meeting. The annotations made by those officials on their copies of the second draft report were available to the Tribunal, and were of assistance in illuminating their views on certain elements of the evaluation, on the ranking of the applicants, and on the presentation of the draft Report.

38.02 During this interregnum, it seems that Mr. Lowry's desire to accelerate the process, and to make a quick announcement of the result, solidified into an intention on his part to bring the result of the process to Cabinet for Government approval on Tuesday 24th October, 1995, the day after the next scheduled Project Group meeting. Although the most senior Departmental officials had apparently no knowledge of his plans, preparatory steps were taken within the Development Division to give effect to that intention, including the preparation of the formal documents which would be required for that purpose. A briefing session with Mr. Lowry was also arranged for the afternoon of Monday, 23rd October, 1995, and was entered into his diary.

38.03 All of this activity, which will be addressed in some detail, took place against a background in which the Project Group had not yet approved the ranking recorded in the first draft Report, Mr. Sean McMahon and Mr. Ed O'Callaghan were satisfied that the first draft Report had done no more than identify the two top-ranked applicants, Mr. McMahon had expected that further substantive work on the evaluation would proceed with a view to separating the two top-ranked applicants, and Mr. Billy Riordan and Mr. Donal Buggy, the two accountants, had made changes to the marks for the dimension Financial Key Figures which had not, it seems, been brought to the attention of the Project Group as a whole.

38.04 What is clear is that during this interregnum, no further substantive evaluation work, as envisaged by Mr. McMahon, was undertaken, and activity within the Development Division, which was the Division steering the process, was all directed to the production of a satisfactory report based on the provisional ranking determined at the Copenhagen meeting of 28th September, 1995, and of which Mr. Lowry had been informed immediately thereafter.

INTERACTION BETWEEN DEVELOPMENT DIVISION AND AMI

39.01 The official report of the Project Group meeting of 9th October, 1995, concluded by recording that AMI would provide:

“parts of the report which had not been included in the first draft of the overall report for comments before submission of a complete second draft the following week.”

What was then outstanding were those parts of the draft Report in which the methodology used in the evaluation would be explained. This was also confirmed by the closing passage of Ms. O’Keeffe’s contemporaneous notes of that meeting of 9th October, in which she had referred to *“first draft of chapters on methodology”*, and it seems from her note that AMI had undertaken to provide those drafts within twenty-four to thirty-six hours of the conclusion of the meeting.

39.02 First drafts of the methodology sections were duly received by the Development Division from AMI during that week. Whilst those drafts were not put into general circulation, it seems that copies were provided to Mr. Riordan and Mr. Buggy, albeit during the following week, and their input will be returned to more fully in due course. The Departmental files included a document entitled *“[Comments on the Presentation of the Results by AMI](#) of the Evaluation of the GSM Applications”*. From the content of that document, it is clear that it primarily represented the Development Division’s response to the first draft of the methodology sections, and from manuscript entries made on the face of the document it seems that it was sent to AMI on Friday, 13th October, 1995, and as already mentioned, was copied to Mr. Buggy and Mr. Riordan on the following Monday, 17th October. The document was structured around four sub-headings which defined the subject matter of the material it contained. After an *“Introduction”* which made it clear that the observations in the document were addressed to *“the further material now provided by AMI”*, the text was arranged under those sub-headings. The second of those sub-sections, entitled *“Comments on Appendix 2”*, contained a considerable amount of material relating to how the methodology actually used in the process should be presented in the Report, and included passages of text to be incorporated. A copy of that document can be found in the Book of Appendices to this Volume.

39.03 It will be recalled that this appendix on methodology had featured in the proceedings of the Project Group meeting of 9th October, 1995 and that in the context of the discussion at that meeting between Mr. Andersen, Mr.

Brennan and Mr. Towey regarding the handling of the quantitative evaluation results in the Report, a decision had been made that the quantitative results, which as a set of results had played no part at all in determining the ranking which emerged from the Copenhagen meeting, would not be presented as an output of the process in the Evaluation Report. It was further decided that the exclusion of those results, and that limb of the evaluation, would be explained in the section on methodology, and in that regard, it was observed, as recorded by Ms. O’Keeffe, that the wording of the appendix was a matter of importance. The relevant entry in her contemporaneous notes recorded as follows:

“Should be explained in methodology report and wording is important.”

As previously noted, the drafting of these sections was inevitably going to be a difficult and delicate task, as what had to be addressed was the exclusion of the quantitative results as an output of the evaluation, which undoubtedly entailed a departure from the Evaluation Model, which was largely directed to the quantitative evaluation, and was itself reproduced in Appendix 3 to the Report.

39.04 Returning to the Development Division document of 13th October, 1995, the final sub-section, headed *“Other remarks”*, did not in fact relate to any material in the supplemental first draft documents received from AMI after the meeting of 9th October, but rather to Section 5 of the first draft Report, which contained the presentation of the results of the process, and in particular sub-section 5.5, entitled *“A last comparison of the best applications”*. This sub-section, as will be recalled, contained a comparative exposition of the results and ranking of the three top-ranked applicants in the qualitative evaluation in purely narrative form. The sub-section, in the form in which it appeared in the first draft Report, has been reviewed in some depth in Chapter 34, and it has already been noted that the representation of the results of the qualitative evaluation in that sub-section appeared to be less than an entirely balanced and accurate account of the relative performance of the two top-ranked applicants. As observed in that chapter, certain elements of the material contained in that sub-section were inaccurate and misleading.

39.05 In their comments to AMI of 13th October, 1995, the Development Division recorded what was described as the Departmental view, that it was desirable

“that the explanation of the difference between A3 and A5 be deepened”,

and that it was unnecessary for reference to be made in that sub-section to the third-ranked applicant, A1, Irish Mobicall, as the A1 application was regarded as

being clearly inferior to the two top-ranked applications. There was no discussion at all of sub-section 5.5 of the first draft Report recorded in Ms. O'Keeffe's contemporaneous notes of the Project Group meeting, and as there was no evidence of any further meeting, formal or informal, of the Project Group during that week, it must be concluded that the views expressed in that communication were those of the Development Division. By then, Mr. Brennan had discussed matters in depth with Mr. Lowry, Mr. McCrea appeared to have been furnished with an extract of the first draft Report, and Mr. Lowry's views on the presentation of the Report had been made known to the Project Group.

39.06 Mr. Towey, whose attention was drawn to this document in the course of his evidence, thought it had probably been prepared by Ms. Nic Lochlainn, and that it confirmed comments which had arisen from discussions at the Project Group meeting on 9th October, 1995. It is clear from the contents of the document that the comments did not and could not have represented the collective view of the Project Group as expressed at the meeting of 9th October, as the draft chapter and appendix on methodology had not been provided by AMI until after the conclusion of that meeting, and, as already noted, there was nothing in the available evidence to suggest that a formal, or even an informal, meeting of the Project Group was convened to consider these supplemental drafts between 9th October and 13th October, 1995. The Tribunal is satisfied that the comments contained in the fax of 13th October, 1995, were those of the Development Division, formed without input from the Project Group.

MR. LOWRY'S DETERMINATION TO ANNOUNCE THE RESULT ON TUESDAY, 24TH OCTOBER, 1995

TUESDAY, 24TH OCTOBER, 1995, BECOMES MR. LOWRY'S TARGET DATE

40.01 It will be recalled that under the terms of the Government decision of 2nd March, 1995, approving the selection process, a recommendation was to be made by Mr. Michael Lowry to Cabinet in sufficient time to enable a decision to be taken by Government by 31st October, 1995. It was envisaged at that time that the recommendation would be made six weeks before that date to enable sufficient time for Cabinet consideration. That timeframe was modified following the intervention by the European Commission, and the postponement of the closing date for submission of applications from 23rd June to 4th August, 1995. That delay necessarily impacted on the overall timescale of the process, and all Departmental witnesses were agreed that, in consequence of that delay, the projected date for announcement of the Government decision had been deferred to end-November, 1995, as notified to all interested parties by letter dated 14th July, 1995.

40.02 On Tuesday, 17th October, 1995, Mr. Fintan Towey informed Mr. Ed O'Callaghan that Mr. Lowry wanted to bring a recommendation to Cabinet on Tuesday, 24th October, 1995. Mr. O'Callaghan considered that event to be of sufficient import to record it in the chronology which he generated immediately following the announcement of the result on Wednesday, 25th October, 1995, and which document he had retained over the intervening years within his personal papers. The relevant paragraph of his chronology read as follows:

"17.10.95 informed by FT that Min wanted to ~~announce winner by end of October~~ go to Govt the following Tues with the winner. Mtg of PT for 23.10 at 11.30."

Mr. O'Callaghan confirmed in evidence that he had received that information from Mr. Towey. Whilst having no recollection of their conversation, Mr. Towey did not doubt that Mr. O'Callaghan's record, and his evidence in that regard, were correct, and he testified that, in all probability, it was Mr. Martin Brennan who had been the source of the information which he had conveyed to Mr. O'Callaghan on 17th October, 1995. Mr. Towey further recognised that, at that time, he also knew of Mr. Lowry's enthusiasm for bringing the process to a speedy resolution.

40.03 Mr. Brennan had no specific recollection of having known, during the week commencing Monday, 16th October, 1995, of Mr. Lowry's target date of

24th October, 1995, and he thought that, if he had known of it, he would have regarded that timescale as impossible, or very difficult to achieve. He accepted that by Monday, 23rd October, 1995, he knew of Mr. Lowry's mindset, as he had conveyed to the Project Group meeting of that day, as recorded in the official record of the meeting, that Mr. Lowry wanted a result that day. Mr. Brennan accepted that he must have learned of Mr. Lowry's plans either directly, from a further conversation or contact between them, or indirectly through Mr. John Loughrey, or Mr. Sean Fitzgerald.

40.04 Mr. Loughrey, although he had daily meetings with Mr. Lowry, and was at his desk in the Department throughout this period, testified that he knew nothing about the outcome of the process until he was made aware of the result some short time before 25th October, 1995, possibly by Mr. Fitzgerald. He had no recollection whatsoever of knowing, during the previous week, that Mr. Lowry was minded to bring a recommendation to Government on Tuesday, 24th October, 1995.

40.05 As already recounted in Chapter 35, it was Mr. Lowry's evidence that he had absolutely nothing whatsoever to do with the acceleration of the process. It was his view that the issues of timing had been determined as of 14th September, 1995, when Mr. Brennan wrote to Mr. Andersen, at the conclusion of the AMI fee dispute, and stipulated a timeframe for the provision of draft Reports, and a final Report by AMI. As regards the Departmental records recording Mr. Lowry's desire to bring the process to an early conclusion, it was his evidence that he could not be responsible for comments that might have been attributed to him, accurately or otherwise.

40.06 The Tribunal found Mr. Lowry's evidence in this regard wholly unconvincing, and has no difficulty in rejecting it. It is undoubtedly the case, on the basis of the multiplicity of documentary records, and the evidence of Mr. Brennan, Mr. Towey and Mr. Colin McCrea, that Mr. Lowry's design of accelerating the process and announcing the result, which, as far as can be seen from the available documentation, can be traced back to 2nd or 3rd October, 1995, when he was informed by Mr. Brennan of the ranking which had emerged from the Copenhagen meeting of 28th September, had, by Tuesday, 17th October, been converted into a definite plan to proceed to Government on 24th October, 1995. Mr. Towey and Mr. O'Callaghan were recorded as having knowledge of that intention, and Mr. Brennan certainly knew of it by the following Monday, 23rd October, and the Tribunal is satisfied must have known about it during the preceding week, as he was the probable source of that information to Mr. Towey. During the latter part of that week, as will be seen, steps were taken by the Development Division personnel to prepare documents to be used in briefing Mr.

Lowry about the result, together with formal documents required to bring that recommendation to Government. Moreover, it seems from Mr. Lowry's official diary that a briefing session for that purpose was arranged for 4.30pm on Monday, 23rd October, presumably to follow the Project Group meeting scheduled for 11.30am that morning.

40.07 Mr. Towey in the course of his evidence testified that he thought it highly surprising and very unusual that it appeared, from the evidence heard by the Tribunal, that apart from Mr. Towey himself, and Mr. Brennan, no other official within the Department seemed to be cognisant of Mr. Lowry's aspiration of concluding matters by Tuesday, 24th October, 1995. The Tribunal shares Mr. Towey's misgivings concerning this matter. In particular, it is difficult to understand how or why Mr. John Loughrey, the most senior official in the Department, the official with direct responsibility for liaison between Mr. Lowry, as Minister, and officials of the Department, and the official ultimately bearing Departmental responsibility for all matters brought by Mr. Lowry to Cabinet, was kept in ignorance of Mr. Lowry's objective. This seems all the more inexplicable in the light of Mr. Loughrey's proximity and daily access to Mr. Lowry. Mr. Loughrey himself accepted that, if he was in fact unaware of these matters, and of the preparations afoot within the Development Division, he was effectively bypassed both by his own Minister, and by his subordinate officials.

40.08 Whilst there can be no question surrounding Departmental awareness of Mr. Lowry's plans, it is perhaps no more than a mere coincidence, but is nonetheless noteworthy, that persons outside the Department, and specifically those with an interest in Esat Digifone, were, as of 10th October, 1995, the day following the penultimate Project Group meeting, also it seems in possession of the selfsame information. It was on [10th October, 1995](#), that Mr. Per Simonsen, the Telenor GSM co-ordinator, attended a meeting with Mr. Arthur Moran, of Matheson Ormsby Prentice, solicitors, who had just been instructed by Telenor to represent their interests in shareholder negotiations. This was the first occasion on which Mr. Simonsen met Mr. Moran, and Mr. Simonsen agreed that the purpose of the meeting was to brief Mr. Moran, and to explain the stage which had been reached in the GSM selection process. Mr. Moran kept an attendance of that meeting, and in that attendance, which he confirmed in evidence, he had recorded a number of matters, including the following:

"Decision – end November 1995 – in fact decision 2/3 weeks".

A copy of this document can be found in the Book of Appendices to this Volume.

40.09 As the information imparted by Mr. Simonsen to Mr. Moran appeared to correspond precisely with Mr. Lowry's then intentions, Mr. Simonsen was asked about his knowledge of that timing issue when he attended to give evidence. He testified that he had no specific knowledge of when the decision would be announced. He accepted that it was he who had informed Mr. Moran of that matter, but he thought that he might have been referring to media speculation. Furthermore, having reflected on that entry before giving evidence, in the knowledge that it was likely that it would be raised with him, he thought that he might have said that in order to put pressure on Mr. Moran to complete work on the shareholders agreement within that timeframe. Whilst it is always possible that Mr. Simonsen may simply have been seeking to impress on Mr. Moran the urgency of the task at hand, there was nothing in that note, or in any subsequent correspondence or document, or generally in the conduct of Telenor, suggestive of any such degree of urgency. The shareholders agreement in fact remained unresolved until 16th May of the following year, the date on which the licence was ultimately issued.

40.10 Mr. Simonsen's positive statement concerning the timing of the decision was in complete contradiction to the official information then available to Telenor, arising from the Departmental notification of 14th July, 1995, and from Mr. O'Brien's questions at the conclusion of the Esat Digifone presentation, when, in response to Mr. O'Brien, Mr. Brennan had informed the Esat Digifone team that Mr. Lowry had made a political commitment to produce a result by end-November. It will be recalled that it was Mr. Simonsen that Mr. O'Brien had informed, in the last two weeks of September, that he had happened to meet Mr. Lowry in a public house, and that Mr. Lowry had suggested that IIU should be involved in the Esat Digifone consortium. Whilst all of this may point to nothing more than the existence of coincidence, it is undoubtedly curious that Mr. Simonsen, when instructing Matheson Ormsby Prentice for the first time on a serious matter, should have happened to refer to the very timeframe for the announcement of the result that Mr. Lowry himself then had in mind.

BRIEFING DOCUMENTS ARE PREPARED

40.11 As already adverted to, during the latter part of that week, and most probably on Friday, 20th October, 1995, following receipt of AMI's second draft Report, Ms. Maev Nic Lochlainn set about preparing a series of documents. Mr. Towey seems to have reviewed her initial work, and, following his input, she revised and refined her drafts. Ms. Nic Lochlainn testified that she was instructed either by Mr. Brennan, or by Mr. Towey, or by both of them, to prepare a series of briefing documents, and in that regard she made what she described

as a “to-do list”, in which she noted the tasks to which she had been directed to attend. She recorded as follows:

- “1. Eval Process
2. Result citing para 19
3. Approp extract from Andersen’s report.”

Below those items she had written:

“briefing session – Monday.”

Ms. Nic Lochlainn agreed that, as was apparent from her final entry, the documents she had been instructed to draft were part of preparations then underway within the Development Division, for a briefing session with Mr. Lowry, scheduled for 4.30pm on the following Monday, 23rd October, 1995.

40.12 Ms. Nic Lochlainn proceeded to prepare three documents entitled as follows:

1. “Briefing note for the Minister – [Evaluation Process for the GSM Competition](#).”
2. “Briefing note for the Minister – GSM Competition - [Advancing the Process further](#).”
3. “Briefing note for the Minister – [Recommendation regarding the Best Application](#) in the GSM Competition.”

Copies of these documents can be found in the Book of Appendices to this Volume, and it is necessary to refer in some detail to their contents, which will now be reviewed.

First briefing document - evaluation process for the GSM competition

40.13 The first of the briefing notes contained a chronological overview of the process. The text was structured around a series of sub-headings, corresponding to the significant stages of the process. The document covered five topics: evaluation methodology, GSM Project Group, information phase, evaluation model, and evaluation process. The last topic was further sub-divided by reference to initial examination, qualitative evaluation by sub-groups, presentations, and AMI evaluation report. The document closed with a short paragraph headed “*Imprimatur*”, the text of which will be referred to below.

Whilst the briefing note was clearly intended to summarise both the methodology used, and how the evaluation had been progressed, there was undoubtedly a degree of economy brought to bear on the framing of the document. By referring to the Evaluation Model adopted by the Project Group in June, 1995, but by omitting any details of that Model, and in particular the envisaged use of both quantitative and qualitative techniques, and by then referring solely to the qualitative evaluation by sub-groups, the impression was given that the evaluation process had proceeded uneventfully and seamlessly, in accordance with the Evaluation Model as adopted.

40.14 In the final passages of the document, under the sub-headings “AMI Evaluation Report” and “Imprimatur”, a series of statements was made which, as of Friday, 20th October, 1995, being the date on which Ms. Nic Lochlainn and Mr. Towey were working on the document, were inaccurate. These passages are quoted below:

“AMI Evaluation Report

Following further analysis of the risks associated with each application, the overall evaluation, incorporating inputs from the sub-groups’ deliberations, was completed and a final ranking of the applications proposed. A draft evaluation report was submitted by AMI and discussed at a Project Group meeting on 9 October. Unanimous support was given by the Project Group to the results of the evaluation. Having incorporated comments from the Project Team in relation to the format of the report, AMI submitted a final draft evaluation report to the Department on 20 October. The Project Group is unanimous in its support of the conclusions of that report.

Imprimatur

The Project Group is in full agreement with the view expressed by AMI in its final draft report, that the competition has been conducted throughout in a transparent, objective and non-discriminatory manner. There is consensus in the Group that the evaluation process treated each of the six applications in a fair and equitable manner.”

40.15 As of Friday, 20th October, 1995, it was not the position that “unanimous support [had been] given by the Project Group to the results of the evaluation”, and as AMI’s second draft Report had not then even been reviewed by the Project Group, it was at a minimum premature to state that “the Project Group [was] unanimous in its support of the conclusions of that report”. Likewise, the entire of the endorsement below the sub-heading “Imprimatur” was

precipitous, as that proposition had not yet even been put to, much less considered by the Project Group. In passing, it is also noteworthy that the language used by Ms. Nic Lochlainn in that passage of the document appears to have been lifted directly from fresh material inserted by AMI in the second draft Report, apparently in response to the observation made by the Development Division in the document of 13th October, 1995, that:

“A final comment in this chapter is desirable on the professional view of AMI on the extent to which interested parties initially and applicants for the licence subsequently were dealt with on a transparent, objective and non-discriminatory basis through the process.”

In fairness to Ms. Nic Lochlainn, she had not been in attendance at the Project Group meeting of the previous 9th October, and in preparing that document she was it seems relying on the content of the second draft Report as source material, and in doing so she was presumably anticipating that the conclusions of the Report would be approved by the Project Group.

40.16 There were four manuscript annotations on the front page of the document which, with one exception, were identified by Mr. Towey as having been made by him, and which he testified would have been made when he reviewed and discussed the draft with Ms. Nic Lochlainn. Firstly, at the top of the document, above the title, he had written “*Bullet Pts*”; secondly, in the middle of the title page, he had inserted an additional heading “*licence fee – small para*”; and finally, after a reference in the document to the composition of the Project Group, and the inclusion of the planning unit and Department of Finance representatives, he had inserted the following text:

“(Planning Unit + Dept of Finance representatives include 2 accountants on secondment from private sector accountancy houses)”.

40.17 The fourth annotation, at the top left-hand corner of the title page of the document, which had been made by Ms. Nic Lochlainn, was:

“Aide Memoire - Annex I.”

This entry suggested, as was confirmed by Mr. Towey, that it was envisaged that the briefing note would form an annex to an Aide Memoire for Government. In other words, it was intended that the document under preparation would be included within the set of formal documents submitted to Cabinet for the purposes of Cabinet consideration of Mr. Lowry’s anticipated recommendation.

40.18 In passing, it may be observed that it is somewhat ironic that Mr. Towey, in amending the document, wished to emphasise that the composition of the Project Group included two private sector accountants. Those accountants had no input into the substantive evaluation, or into the judgements exercised in arriving at a ranking, and they had noted serious reservations concerning the reliability of the data in the mandatory tables on which the financial analysis had been based, and in addition their views on the marks awarded for the Financial Key Figures dimension had seemingly not, for whatever reason, been accepted.

Second briefing document - advancing the process further

40.19 The second of the three documents comprised a single page and was the shortest of the three briefing notes prepared by Ms. Nic Lochlainn. It set out, under a series of sub-headings, the steps that it was envisaged would be necessary, following the announcement of the result, and the issues it was anticipated would arise. The topics touched on were: announcement, licence negotiations, legal issues, licence award, jobs created, service launch, and complete competition in mobile services in Ireland. The copy of the document available to the Tribunal also contained two manuscript entries. The first comprised a similar entry, in the top left-hand corner of the document, to that which appeared on the first briefing document, namely,

“Aide Memoire Annex II”,

likewise designating the document then under preparation as one that was intended to be submitted to Cabinet. The second entry consisted of some additional text inserted by Mr. Towey under the sub-heading “Service Launch.”

Third briefing document - recommendation regarding the best application in the GSM competition

40.20 The third, and it seems to the Tribunal the most significant of the documents prepared by Ms. Nic Lochlainn, opened as follows:

“Evaluation of all six applications quickly led to agreement among Project Group members that two applications, namely A5 and A3, stood head-and-shoulders above the rest. Detailed examination has shown, however, that the A5 application is clearly superior to that of A3. This conclusion is substantiated below by a comparison of the top two applications on the basis of the evaluation criteria listed in para 19 of the tender document.”

40.21 The document then proceeded to summarise the results by reference to each of the eight evaluation criteria contained in paragraph 19, and it concluded by stating:

“Conclusion

A5 is judged to be superior to A3 in the two most important evaluation criteria i.e. market development/credibility of business plan and technical approach. While A3 scores marginally better than A5 with respect to the third criterion, tariffing, A5 proves superior in respect of coverage, performance guarantees and spectrum efficiency, the fifth, seventh and eighth criteria respectively. Licence fee and roaming have become irrelevant in the final analysis, since both applications score the same in respect of these.

Disregarding the criteria where both A3 and A5 score the same, A5 is seen to be superior in five out of six cases, including in respect of the two most important criteria [market development/business plan and technical approach]. Where A3 is judged to be better than A3 [sic] as regards tariffing, it is noted that A5 scores a very close second. Hence it is clear that, evaluating in accordance with the criteria set out in paragraph 19 of the tender document, A5 has the best application.”

40.22 Finally, as initially drafted by Ms. Nic Lochlainn, the document made a recommendation in the following terms:

“Recommendation

The GSM Project Group is therefore unanimous in its recommendation, that the Minister should enter into licence negotiations with the consortium which submitted the A5 application. Furthermore, the Project Group and is also in agreement that, should negotiations with the A5 applicant fail, the Minister should enter licence negotiations with the candidate behind the application ranked second, namely A3.”

40.23 This document had also been reviewed by Mr. Towey, who made a small number of changes reflected by manuscript annotations on the copy available to the Tribunal. As with the other briefing documents, the words “Aide Memoire” had been written by Ms. Nic Lochlainn in the top left-hand corner of the first page, and the annotation “bullet pt.”, had been written by Mr. Towey, respectively signifying the purpose of the document and a suggestion regarding its layout. Amongst a small number of additional changes, made by Mr. Towey to

the text, was the deletion of the final sentence in the recommendation paragraph, where Ms. Nic Lochlainn, having recited the principal recommendation, namely that negotiations should be opened with A5, Esat Digifone, had added the secondary conditional recommendation that, if those negotiations failed, negotiations should then be opened with A3, Persona. Following Mr. Towey's input, Ms. Nic Lochlainn revised the lay-out of the material contained in the document, and whilst preserving the same sub-headings, she converted the document from one containing a continuous narrative text, to one containing bullet points in the form of single sentence statements.

40.24 It will be apparent from the extracts already quoted that the contents of the document did not, by any objective standard, contain a balanced or factually correct account of the results of the qualitative evaluation as contained in the draft Evaluation Report. What the document stated was:

- (i) *"A5 is judged to be superior to A3 in the two most important evaluation criteria i.e. market development/credibility of business plan and technical approach."*

That statement was incorrect. Esat Digifone was ahead only on the second-ranked criterion, Technical Approach. On the first-ranked criterion, Esat Digifone and Persona had each been awarded an A and two B grades. Those equivalent grades were themselves open to question, as regards both the weightings applied and the mark awarded for the dimension Financial Key Figures, which, in the view of the accountants, was incorrect. As will be seen, there was clear evidence of continuing unease on the part of members of the Project Group surrounding the grades awarded for that criterion.

- (ii) *"...A3 scores marginally better than A5 with respect to the third criterion, tariffing."*

That statement was incorrect. Persona received a B grade for Tariffs, whilst Esat Digifone received a C grade, so that the differential between them was not marginal, but was, on the marks awarded, a full grade.

- (iii) *"...A5 proves superior in respect of coverage, performance guarantees and spectrum efficiency, the fifth, seventh and eighth criteria respectively."*

That statement was incorrect. Esat Digifone and Persona had each been awarded an A grade for the criteria Coverage and Frequency Efficiency.

- (iv) *“Disregarding the criteria where both A3 and A5 score the same, A5 is seen to be superior in five out of six cases, including in respect of the two most important criteria [market development/business plan and technical approach].”*

That statement was incorrect. A5 was in fact superior on two criteria only, namely Technical Approach and Performance Guarantees, and A3 was superior on one criterion, Tariffs, although there were continuing doubts concerning the equal grading of A3 and A5 on the first-ranked criterion.

40.25 Ms. Nic Lochlainn testified that she had received instructions to prepare this and the other two documents from Mr. Towey or Mr. Brennan, and it was her understanding that the third document was intended to be a briefing note for Mr. Lowry, to give him a flavour of what had happened in the evaluation process, as the draft Report was both technical and inaccessible. She characterised the document as being analogous to a *“ladybird guide”*. According to Ms. Nic Lochlainn, the document was not intended to contain a comprehensive summary of the evaluation result, but rather to present the performance of A5, Esat Digifone, in the most positive light. It was her understanding that the document was prepared on the assumption that a decision on the result of the process would be made in accordance with what was contained in the second draft Report, and the contents of the document were not therefore intended to influence the making of a decision on the process.

40.26 Ms. Nic Lochlainn agreed that the contents of the document did not describe the process accurately. She however drew a distinction between a document intended for use prior to the making of a decision, and one intended for use after a decision had been made, where the sole purpose of the document was to describe a process. She considered that, insofar as there was any misrepresentation in the content of the document, it was simply a misrepresentation of the gap between the two top-ranked applicants.

40.27 Ms. Nic Lochlainn explained that in preparing the document, and in endeavouring to fulfil her remit to present A5, Esat Digifone’s comparative performance in the most positive light, she had not confined herself to the overall grades for each of the eight criteria. Instead, she had consulted the results at dimension and at indicator level, and it was on the basis of those results that she had framed the document. To illustrate her point, she referred to the criterion Coverage. Although A5, Esat Digifone, and A3, Persona, had each been awarded an A for that criterion, she had stated that Esat Digifone was superior to Persona. She explained that, in preparing the document, she had

bypassed the results tables, Tables 16, 17 and 18, and had instead referred to the body of the Report. Having noted that Esat Digifone had been awarded A for all four indicators of that dimension, and that Persona had been awarded A for only three, and B for the fourth indicator, she reached what she considered to be the reasonable conclusion, that Esat Digifone was in fact superior to Persona. In doing so, Ms. Nic Lochlainn ignored the implicit weightings applied by the participants of the sub-group that had evaluated that dimension, and the judgements they had made. As to how the logic which she described might have applied in the case of other criteria, where there was no disparity in indicator grades, is unclear.

40.28 Ms. Nic Lochlainn, although having no clear memory of events surrounding the generation of these documents, was confident in her recollection that she was engaged in that process on Friday, 20th October, 1995, as she was able to relate it to a personal event in her life that she recalled. Whilst she had not recorded her interactions with Mr. Towey, it was clear to her that, in the course of her work, she had consulted with him and, as was evident from the annotations made in his handwriting, he had reviewed her drafts and had made changes to them.

40.29 Mr. Towey accepted that it was clear from the manuscript changes to the document in his handwriting that he had reviewed its contents, and suggested certain amendments. He agreed that the contents of the document argued very strongly for a position which did not fully accord with the judgements made by those who had evaluated the applications. He further agreed that the document was intended for Mr. Michael Lowry, but could not say whether it was for the purposes of briefing Mr. Lowry, or for the purposes of enabling Mr. Lowry to brief members of the Cabinet. Mr. Towey also recognised that the legend “*Aide Memoire*” in the top left-hand corner of each of the three documents, in Ms. Nic Lochlainn’s handwriting, signified that, at some point in their evolution, it was envisaged that they would become more than briefing documents, and would become constituent parts of an Aide Memoire for Cabinet. Mr. Towey therefore acknowledged that the documents were of a serious nature.

40.30 Mr. Brennan could not assist the Tribunal on any aspect of the drawing up or intended use of these documents. Whilst appearing to accept that the content of the principal document, which outlined the result and recommendation, was erroneous, he had some reservations over whether the inference that the document was unbalanced was warranted. Mr. Brennan testified that he did not know who prepared the documents, for what purpose they had been prepared, or under what time constraints the work might have been undertaken.

40.31 The Tribunal is satisfied from the evidence of Ms. Nic Lochlainn that these documents were drafted by her on Friday, 20th October, 1995, on the directions of her superordinate officers. It is equally clear from her “*to-do list*” that her initial instructions were to produce documents for the purpose of briefing Mr. Lowry, most probably at the session which had been arranged for 4.30pm on the following Monday, 23rd October, 1995. It is further evident that, in the course of that exercise, Ms. Nic Lochlainn was informed that it was envisaged that the documents on which she was then working would be converted into, or would become constituent parts of, a formal Aide Memoire for Government. In other words, the material in those documents would be used to inform the Cabinet of the result and of the recommendation of the Project Group, so as to enable the Cabinet to exercise the function reserved to it by the Government Decision of 2nd March, 1995, of determining to whom exclusive negotiation rights should be awarded. As, in the event, the matter never proceeded to Government, otherwise than to ratify a decision of the party leaders made informally, and announced publicly in advance of any Cabinet consideration, it never proceeded to Cabinet for a decision in the sense contemplated by the earlier Government Decision of 2nd March, 1995.

40.32 The results of the evaluation process, as framed in the principal briefing document, were erroneous, and constituted, by any objective standard, a distorted presentation of the comparative performance of the two top-ranked applicants. The results of the qualitative evaluation, as conveyed in the document, were inaccurate, and the document would have conveyed to Mr. Lowry, or to any person relying on its contents, a false impression of the result and the relative performance of the top-ranked applicants. That impression would have arisen not only from what was stated in the document, but from what was omitted from it, and most significantly, the omission of reference to the financial frailty of both top-ranked applicants, and to the reservations recorded by AMI in the draft Report, which Mr. Andersen ultimately insisted on retaining in the final Report. Likewise, the document addressed to the evaluation process methodology had left out all trace of the intended quantitative evaluation.

40.33 The Tribunal had considerable sympathy for the position in which Ms. Nic Lochlainn found herself in relation to these documents, as she was left with the unenviable task of endeavouring to justify their contents. Ms. Nic Lochlainn was the most junior official on the Project Group, and the most junior official in the Development Division involved in the GSM process, and in casting these documents she was undoubtedly acting on instructions, and on directions received from her superordinate officers. The documents, whilst drafted by her, were in no sense her own creation. Mr. Towey accepted that he had reviewed

the documents, and he fairly acknowledged that he had not corrected them, or expressed any dissent or reservation in relation to their contents, although he did observe that, had they been converted into an Aide Memoire, they would have been subject to repeated review and refinement both by Mr. Towey himself, and by his superordinate officers. Ultimately, it was Mr. Brennan who was directing the process within the Development Division, and who was responsible for Ms. Nic Lochlainn's instructions.

40.34 These documents, whether in the form of briefing documents, or of component parts of an Aide Memoire, were intended to convey information about the process, and the outcome of the process, so that a decision could be made as to the applicant with whom exclusive negotiations should be opened. If their immediate purpose was, as seems probable, to apprise Mr. Lowry at the briefing session arranged for the following Monday, there can be no gainsaying that the object of that exercise was to arm him with sufficient information to enable him in turn to inform his Cabinet colleagues, who were seised with authority to make that determination. Although the briefing session on the afternoon of Monday, 23rd October, 1995, almost certainly did not proceed on that date, that does not mean that the documents were not put to use, and, as will become apparent, it would seem that both Mr. Loughrey and Mr. Lowry had a recollection of briefing documents having been made available to them at the final stage of the process.

40.35 It is unclear what prompted the Development Division officials to construct such an inaccurate account of the results. This exercise was undertaken in the name of the Project Group, but without the knowledge of the Project Group, and at a time when it was accepted that the Group had not approved the ranking, and had not yet even met to consider the second draft Report. What is undeniable, however, is that the ethos underlying the construction of the documents, as propounded by Ms. Nic Lochlainn, namely that the result should be presented in a positive vein, accorded entirely with Mr. Michael Lowry's recorded desire that the Report should not undermine the result.

40.36 As there was no suggestion that Mr. Michael Andersen or any of his AMI colleagues were in Dublin on Friday, 20th October, 1995, or had otherwise been consulted by the Development Division in relation to the generation of these documents, the Tribunal did not anticipate that he would be in possession of any useful information to add to the evidence that it had heard on this matter. However, in the course of cross-examination on behalf of Mr. Denis O'Brien, his attention was drawn to the contents of the third briefing document, and in particular the conclusion to that document already quoted at paragraph 21 of this chapter. It is a measure of the disappointing absence of balance, objectivity

and consistency that was apparent in so much of his evidence, that even though the authors of that document accepted its shortcomings, and even though that conclusion omitted the AMI financial reservation that Mr. Andersen personally insisted should be retained in the final Report, presumably with a view to informing the decision made, Mr. Andersen was prepared to testify that he agreed with the contents of that paragraph.

THE FINE GAEL GOLF CLASSIC AND OTHER DEALINGS BETWEEN ESAT DIGIFONE AND FINE GAEL

INTRODUCTION

41.01 It will be recalled that, in Volume 1, reference was made to the involvement in the inquiries of the Tribunal of Mr. Mark FitzGerald, the auctioneer and principal founder of the firm of Sherry FitzGerald. In the course of preliminary investigations by the Tribunal into political contributions and donations of potential relevance to the award of the second GSM licence, various documents were furnished by the solicitor to Fine Gael, including some referable to a fundraising function entitled “*The Fine Gael Golf Classic*”. Among these was a list of the sponsors of the eighteen holes, in which the seventeenth was assigned to Esat Telecom “*via M.F.*”. Further inquiries elicited a Statement from Mr. Mark FitzGerald, in the course of which he told of two meetings referable to the GSM competition held with Mr. Denis O’Brien, in August and October, 1995, at Mr. O’Brien’s request. As Mr. Colin McCrea, Programme Manager to Mr. Michael Lowry whilst Minister, had referred to Mr. FitzGerald having attended a number of meetings with Mr. Lowry in his Department, Mr. FitzGerald was further requested through his solicitors to furnish relevant details. These additional inquiries gave rise to the public hearings held in relation to the circumstances surrounding the rent arbitration in connection with Marlborough House, Dublin, details of which have already been set forth in Volume 1.

41.02 It is now to the initial object of those inquiries, namely the matter of political contributions and donations made by Mr. Denis O’Brien and his associated companies to Fine Gael, as the principal party in Government during the period of the GSM licence competition, that this chapter returns, along with some related dealings stated by Mr. FitzGerald to have been had by him with Mr. O’Brien, and also with Mr. Michael Lowry. Chapter 6 of this Volume has already recounted the amounts and occasions of such contributions and donations, in particular with regard to the Fine Gael Golf Classic held at the K Club, in Co. Kildare, on 16th October, 1995. What distinguished this donation from others outlined in Chapter 6, was its proximity in time to the conclusion of the evaluation process, its source, the joint bank account controlled by Communicorp and Telenor used for the purposes of the Esat Digifone application, and its apparent association with interactions relating to Esat Digifone’s prospects in the competitive process. It is these distinguishing features which necessitated a deeper inquiry into the circumstances surrounding it. The evidence that emerged at public sittings also included a stark and tendentious conflict of evidence between Mr. O’Brien and Mr. FitzGerald in

regard to the content, and indeed very occurrence, of two meetings in August and October, 1995, stated by Mr. FitzGerald to have taken place between them.

41.03 Since an appreciable amount of the relevant evidence in this regard related to that Fine Gael Golf Classic, it is helpful to refer at the outset to a number of documents made available by Fine Gael to the Tribunal. As already stated, it was a list of the sponsors of the eighteen holes, in which the seventeenth was assigned to Esat Telecom “*via M.F.*,” that induced the Tribunal to pursue further inquiries as to possible connections between Mr. O’Brien and Mr. FitzGerald around the latter stages of the GSM competition. The following were among the documentation produced by Fine Gael:

- (i) Minutes of the Golf Classic committee meeting of 21st July, 1995, containing a list of suggested sponsors delegated to individual committee members. A number of individuals and companies were listed in the documents as being referable to committee members, including Mr. FitzGerald, and in this regard Mr. O’Brien, Esat Telecom, was noted as being referable to Mr. P. Hogan, T.D.
- (ii) Letter on Dáil Éireann notepaper of Mr. Phil Hogan T.D. to Mr. O’Brien, of 30th August, 1995, in the following terms:

“Dear Denis,

I am delighted to hear of your response in becoming a sponsor of the Fine Gael Golf Classic. I gather this arose through discussions with Mark FitzGerald. Your very generous sponsorship of £4,000 will be used two-fold, with £1,000 sponsoring a hole and the remaining balance sponsoring the wine for the Gala Dinner. As I am sure Mark already discussed with you, appropriate advertising will be utilised.

I look forward to your attending the dinner on the night which I think will be an excellent evening.

Again many thanks for your kind support.

Yours sincerely,

PHIL HOGAN T.D.”

- (iii) Further letter on notepaper of Fine Gael National Headquarters from Mr. Hogan to Mr. O’Brien, of 8th September, 1995, in the following terms:

“Dear Denis,

Following my earlier correspondence last week, regarding our upcoming Golf Classic, I would be very grateful if you could forward to Fine Gael Headquarters (by Friday 16th September) for the attention of Ms. Eileen Kelly, a disk with your company’s logo etc. Or alternatively a bromide listing the colours used in your logo. This would greatly enhance the advertisement at each hole which is being made available to our sponsors.

I look forward to seeing you at the Gala dinner that evening.

With kind regards,

Yours sincerely,

PHIL HOGAN T.D.”

Certain manuscript additions had been added to the copy letter that was made available to the Tribunal: under the date, there appeared the words “17th Hole No Signage”, and, marked by an asterisk referable to the mention of company promotional material in the letter, there appeared the words “Received 13/9/95”, and underneath “Returned 15/9/95 to Sarah Carey.”

- (iv) A letter on Esat Telecom notepaper of Ms. Sarah Carey to Mr. Hogan, dated 9th October, 1995, in the following terms:

“Dear Phil

Please find enclosed a draft for the Golf on the 16th.

I understand Denis has requested that there are no references made to his contribution at the event.

Best of Luck on the day!

I’ll give you a call soon

Yours sincerely

Sarah Carey

Marketing Co-ordinator”

SUMMARY OF EVIDENCE

Evidence of Mr. Mark FitzGerald

41.04 In evidence, Mr. Mark FitzGerald stated that in addition to his position as a trustee of the party, he had been a member of the organising committee responsible for the Fine Gael Golf Classic, held at the K Club in Co. Kildare, on 16th October, 1995. He and Mr. Denis O'Brien had known each other for some time, although not particularly friendly, and had had a number of business contacts. Mr. FitzGerald stated that, sometime in August, 1995, Mr. O'Brien telephoned him at work, and asked him to meet for coffee in the Shelbourne Hotel. Mr. FitzGerald proceeded to the hotel as requested, assuming that the meeting related to property business. On meeting there, Mr. O'Brien said that he was applying for the second mobile phone licence, that he was facing an uphill struggle against Motorola, and that it was rumoured that a senior politician and member of the previous Government, whom he named, was in line for a pay-off if Motorola was granted the licence. He also said that he wanted to keep up his profile with Fine Gael, and that he had heard of an impending golf outing being run by the party. Mr. FitzGerald responded that, in his view, it might be unwise for Mr. O'Brien to be involved in the golf outing, in the circumstances of being an applicant for the GSM licence, but that, if he really so wanted, Mr. David Austin was running the event. Mr. FitzGerald said that he tried to dampen Mr. O'Brien's enthusiasm, although in fact the amount that would be involved as a sponsor of the Golf Classic was not huge. He recalled that when he mentioned Mr. Austin, Mr. O'Brien referred a relative of Mr. Austin, who was known to both of them.

41.05 Mr. FitzGerald continued that, soon after this meeting, he spoke to Mr. Jim Miley, the recently appointed Secretary of Fine Gael, recounting the approach by Mr. O'Brien, and saying that in the circumstances he did not think that Fine Gael should accept a corporate donation from him. Mr. Fitzgerald said that he had then been aware of prior support given by Mr. O'Brien to previous Fine Gael functions.

41.06 At a later meeting of the organising committee, Mr. Austin thanked Mr. FitzGerald for the introduction of Mr. O'Brien, whose company was going to assist in the sponsorship. Although uncomfortable about the matter, Mr. FitzGerald did not feel it necessary, having spoken to Mr. Miley, to involve the committee further. Either then or at a later meeting, Mr. FitzGerald became aware that no signage or other attribution of the sponsorship was to be associated with Esat Telecom at the event. A similar wish to avoid publicity had been shown by a number of other sponsors, so this came as no great surprise.

41.07 On a date in mid-October, 1995, subsequent to the Golf Classic, Mr. FitzGerald recalled receiving a further telephone call from Mr. O'Brien. This was probably at the end of that week, as Mr. FitzGerald recalled having been out of Ireland for most of the following week. On this occasion, Mr. O'Brien requested a meeting at Lloyds Brasserie, a restaurant close to Mr. FitzGerald's office. Mr. FitzGerald assumed that the purpose of the meeting was likely to relate to a business deal that they had recently discussed, and was surprised on arrival at the venue to find Mr. O'Brien sitting with Mr. Jim Mitchell, since deceased, and Mr. Phil Hogan at a table. Both Mr. Mitchell and Mr. Hogan were then serving Fine Gael members of Dáil Éireann, and Mr. Mitchell was then also a consultant retained by Mr. O'Brien in respect of the GSM competition, and had effected the initial introduction between Mr. O'Brien and Mr. Lowry in February, 1995. Mr. O'Brien asked Mr. FitzGerald had he heard any news on the licence, and Mr. FitzGerald informed him, as was the case, that he had bumped into Mr. Lowry at the K Club Golf Classic, and that Mr. Lowry had then told him that Mr. O'Brien had made a good impression on the Department, and that he had good sites and good marketing. He may also then have imparted to Mr. O'Brien and his companions a further observation that had been made by Mr. Lowry, to the effect that there would be a third licence anyway. Otherwise, Mr. FitzGerald recalled the meeting as consisting mainly of general banter, primarily between Mr. O'Brien and himself, with Mr. O'Brien sounding upbeat about the competition, and stating "*we'll give it a good shot*".

41.08 As to the conversation with Mr. Lowry at the K Club on 16th October, 1995, this was at a late stage of the function, as Mr. FitzGerald had only attended at the end of the dinner. It seemed to Mr. FitzGerald that Mr. Lowry liked being at the centre of events, and his remarks puzzled Mr. FitzGerald. Feeling also uncomfortable about those remarks, and annoyed with himself for passing them on in the restaurant, since he had understood that the consultants AMI were responsible for evaluating the bids of applicants, Mr. FitzGerald stated that he later checked with both Mr. Colin McCrea and Mr. Sean Donlon, respectively Programme Managers to Mr. Lowry and Mr. Bruton, the Taoiseach, each of whom confirmed that the decision in regard to the licence would be one of Government, rather than of Mr. Lowry alone. In making the inquiries, he had indicated to both Programme Managers that he was not holding a candle for Mr. O'Brien. Mr. FitzGerald stated that, by this stage, his concerns in regard to Mr. Lowry had increased, and he felt somewhat sceptical of him.

41.09 Prior to these brief meetings at Mr. O'Brien's request, Mr. FitzGerald said that his dealings with Mr. O'Brien had been limited to business contacts, and he had never been asked by him to meet for coffee in any similar circumstances. As to the late Mr. Jim Mitchell, it may have been the case that he

had informed Mr. FitzGerald of his interest in the competition as a consultant on behalf of Mr. O'Brien's consortium, and inquired as to the position in general terms.

41.10 Tribunal counsel then put to Mr. FitzGerald some extracts from Statements of witnesses who had yet to testify: as to Mr. Lowry's statement to the effect that it was Mr. FitzGerald who raised with him the issue of the GSM competition and the prospects of Esat Digifone, at the K Club, this was not at all Mr. FitzGerald's recollection, and it was Mr. Lowry who had raised the issue; as to the Statement of Mr. Phil Hogan T.D. that he had no memory of any meeting with Mr. FitzGerald together with Mr. O'Brien and Mr. Mitchell in Lloyds Brasserie, Mr. FitzGerald responded that he stood by his evidence, in relation to which he had a clear and certain recall. He remarked that one did not lightly make statements to Tribunals such as this.

41.11 Mr. FitzGerald was then cross-examined by counsel for Mr. O'Brien. It was put to him that, with regard to both the Shelbourne Hotel and Lloyds Brasserie meetings, *"Mr. O'Brien is saying, in effect,...that insofar as your recollection is concerned, it is untrue, made up and lies."* In response to this, and the absence of any recollection of the second meeting on the part of Mr. Hogan, Mr. FitzGerald replied that he received correspondence from the Tribunal containing certain questions, and he answered these truthfully. As to any diaries from the period that might have enabled exact ascertainment of meeting dates, Mr. FitzGerald said that he had not retained any.

41.12 Asked did he query the role of Mr. O'Brien as a sponsor at the subsequent Golf Classic committee meeting, Mr. FitzGerald replied that he did not recall Mr. O'Brien being mentioned on that occasion, but that in any event that was not an appropriate forum for raising the matter, and he had told Mr. Miley of his concerns. It was then put by counsel that Mr. O'Brien would say that it was Mr. FitzGerald who contacted him in relation to the Golf Classic, that a discussion on costs took place, and that Mr. O'Brien agreed to become a sponsor. Mr. FitzGerald stated that that was not the case, and that he had given Mr. O'Brien the information at the Shelbourne Hotel meeting as described. Asked what was wrong with Mr. O'Brien sponsoring the event through his company, Mr. FitzGerald said that it was because of being an applicant for the licence, and quoted the former Fine Gael leader and Taoiseach, Mr. Liam Cosgrave, *"if in doubt...send it back"*. When counsel responded that others involved in the competition appeared to have contributed, mentioning Cellstar and Mr. Pat Dineen, the late Mr. Sean Murray and Mr. Pat Heneghan, Mr. FitzGerald stated that some of these were only advisers.

41.13 After adjourning overnight, the cross-examination resumed the following morning, and dealt initially with previous contacts between Mr. FitzGerald and Mr. O'Brien and his various enterprises in relation to properties, including some instances where Mr. FitzGerald had acted on the other side. The two had also shared some social encounters, going back to childhood. Questioned as to his role in fundraising on behalf of Fine Gael, Mr. FitzGerald stated that he had not been involved in a significant amount of this, given his young family and expanding business, and had never been a member of the Fine Gael Capital Branch. He also said that he had always felt that there was a need for State funding of political parties; there was a necessary relationship between business and politics, and each could learn from the other, but caution was needed. People like to associate with success. Through his father, Dr Garret FitzGerald, he had been involved in Fine Gael since his childhood, but since 1997, he had concentrated on his family and business. At the time of the events in question, he would have known the Fine Gael Ministers in the Government, but would not have been close to them.

41.14 Replying further to counsel for Mr. Lowry, Mr. FitzGerald reiterated that it was Mr. O'Brien who raised the matter of the GSM competition at both meetings. Similarly, it was Mr. Lowry who volunteered the information related at the K Club, and Mr. FitzGerald had not made any inquiry in that regard. Put that it appeared that Mr. Phil Hogan, in the records relating to the Golf Classic, was giving Mr. FitzGerald credit for obtaining Mr. O'Brien as a sponsor, Mr. FitzGerald replied that Mr. David Austin was really running the show, and Mr. FitzGerald's understanding was that Mr. O'Brien had contacted Mr. Hogan. As stated in regard to Mr. Lowry in his earlier evidence, Mr. FitzGerald concluded his evidence by stating that he had had no personal or business dispute or falling out with Mr. O'Brien.

Evidence of other persons within Fine Gael

41.15 Mr. Phil Hogan, Fine Gael T.D. for the Carlow/Kilkenny constituency, also testified. He stated that the meeting described by Mr. FitzGerald as having occurred in Lloyds Brasserie on or about 17th October, 1995, did not take place or, if it did, he had no recollection whatsoever of being present. He did not remember anything associated with it, he thought he would have remembered meeting Mr. O'Brien, and was not in the habit of having coffee with Mr. Jim Mitchell.

41.16 He stated that he was Chairman of the committee which organised the Golf Classic of 16th October, 1995. The obtaining of sponsorship for the function was delegated to committee members, and Mr. Hogan understood that it was

Mr. FitzGerald who obtained sponsorship from Mr. O'Brien and Esat Telecom. As Chairman, Mr. Hogan would have written to sponsors, but in doing this he merely signed letters prepared by the Fine Gael secretariat. In this regard, he would have written to Mr. O'Brien on a couple of occasions in the context of his willingness to be a sponsor, but was not particularly aware of the wish on Mr. O'Brien's part that his support should not be publicised. Apart from writing to Mr. O'Brien on this basis, Mr. Hogan stated that he would have had no other dealings with him.

41.17 Regarding any association with Mr. O'Brien other than in connection with the Golf Classic, the first time that Mr. Hogan recalled meeting Mr. O'Brien was at a fundraising event for the Wicklow by-election in June, 1995, an occasion also already referred to in Chapter 6 of this Volume. Contact was made between Mr. Hogan, as Director of Elections, and Ms. Sarah Carey, on behalf of Mr. O'Brien. Mr. Hogan had known Ms. Carey for some years, by reason of her father having been a Fine Gael Councillor. Mr. O'Brien had attended the fundraising event, a lunch at the Glenview Hotel in Co. Wicklow, and had given him a contribution of £5,000.00, which Mr. Hogan handed on to the local constituency association. As to an earlier fundraising lunch in his own Carlow/Kilkenny constituency, in March, 1995, Mr. Hogan recalled receipt of a £1,000.00 contribution, although he could not remember if Mr. O'Brien attended in person, and on balance thought not.

41.18 With regard to the GSM competition, Mr. Hogan stated that he never made any representation to any Minister, civil servant or otherwise, and he never discussed the award of the licence with Mr. O'Brien. He was not involved in the process, and knew little of it, beyond what was reported in the media.

41.19 Mr. Hogan then gave some further detail in regard to the practice whereby he would have merely signed fundraising letters for the Golf Classic as committee Chairman. He stated that Mr. David Austin was the main driving force behind the Golf Classic, and that Mr. Austin would have prepared most letters, had them typed by Ms. Deirdre Fennell in Fine Gael Headquarters, and only then given them to Mr. Hogan for signature. This procedure would have applied to both of Mr. Hogan's letters to Mr. O'Brien, of 30th August and 8th September, 1995.

41.20 Mr. Hogan was questioned briefly by counsel for Mr. O'Brien in regard to minutes of the Golf Classic committee meeting of 21st July, 1995, in which Mr. Hogan's name appeared under those of Mr. O'Brien and Esat Telecom. Mr. Hogan stated that this reflected the practice of individuals or companies being

assigned to particular committee members; he would not have known Mr. O'Brien, and doubted that he was contacting him "*cold*" for assistance.

41.21 Asked by counsel for Mr. Lowry whether he had been aware that Mr. FitzGerald had reservations about sponsorship being accepted from Mr. O'Brien and Esat Telecom, Mr. Hogan replied that he had not been so aware, and this would not have been mentioned to him. He reiterated that in August, 1995, he had had very little contact with Mr. O'Brien, and had only met him once. He believed that the terms of the letter, crediting Mr. FitzGerald with obtaining this sponsorship, were accurate, although this appeared at variance with Mr. FitzGerald's memory of events.

41.22 Of a number of Fine Gael staff members from 1995 who testified, the most senior was Mr. Jim Miley, General Secretary between July, 1995, and April, 1999, who had already given evidence in relation to the \$50,000.00 Esat/Telenor donation, the subject matter of Chapter 3 of Volume 1. Mr. Miley stated that he attended the 1995 Golf Classic committee meetings on 21st July, 6th September and 9th October, 1995. However, being newly appointed to his position, he took somewhat of a back seat in relation to a process that was already in train. Insofar as it appeared from the minutes of the meeting of 21st July, that Mr. O'Brien and Esat Telecom were identified as potential sponsors, and were assigned to Mr. Phil Hogan for further action, Mr. Miley's general recollection would accord with that record, but he had no specific recall of the matter. Individuals would volunteer at meetings to follow up in regard to intended sponsors, and the norm was that a person with some connection with the intended sponsor would be given this responsibility. The aggregate sum paid to Fine Gael by Esat Telecom for sponsoring both the seventeenth hole and the wine reception at the function was £4,000.00. Mr. Miley had been aware of the request that the contribution should not be publicised, but there was nothing particularly unusual about this, and three other sponsors had made similar requests.

41.23 As to conversations at the time with Mr. FitzGerald, Mr. Miley recalled that Mr. FitzGerald had been involved in the process of interviewing him for the position of General Secretary, and he had met with Mr. FitzGerald regularly over the period. In particular, Mr. Miley remembered one lengthy meeting over lunch with Mr. FitzGerald, in late August, 1995. Whilst he could not recall precisely the full extent of the conversation, or topics discussed, he did not recall Mr. FitzGerald then or close to that time raising the issue of proposed sponsorship by Mr. O'Brien and Esat Telecom, or its appropriateness. He did however recall Mr. FitzGerald at that meeting being a strong advocate of the necessity for the highest possible standards of ethics in regard to fundraising. Other than what

emerged from the documents that were to hand, he stated that he had no specific recollection of whatever dealings may have taken place between Fine Gael and Mr. O'Brien in regard to the Golf Classic. He recalled having had a brief and unremarkable conversation with Mr. O'Brien, during a fundraising lunch that he had attended for the Dublin South-East constituency of Fine Gael.

41.24 Whilst Mr. Miley had no recollection of Mr. FitzGerald expressing concern over acceptance of donations from Mr. O'Brien and Esat Telecom in regard to the Golf Classic, he did recall Mr. FitzGerald expressing those concerns at a later stage, either in 1996 or 1997. As to the Golf Classic itself, Mr. Miley confirmed that, whilst Mr. Hogan was the committee Chairman, the main driving force behind the function was Mr. Austin. In reply to counsel for Mr. Lowry, Mr. Miley agreed that Mr. Lowry was not involved in the funding or organising of the Golf Classic, and would not have been briefed in regard to its funding or contributors.

41.25 Ms. Deirdre Fennell, a member of Fine Gael head office staff since 1988, confirmed the enthusiastic commitment and driving force provided by Mr. Austin in making the Golf Classic a function of a high standard. She confirmed that both the letters of 30th August and 8th September, 1995, were probably dictated to her over the telephone by Mr. Austin, generated in Fine Gael Head Office, and then merely signed by Mr. Hogan. As to some manuscript entries on the letter of 8th September, 1995, Ms. Fennell understood that these had been made by a colleague, Ms. Rita O'Regan, whilst Ms. Fennell was away on holiday. Ms. Fennell stated that it could be taken that, in dictating the letter in question, Mr. Austin knew that the Esat Telecom donation arose through some contact between Mr. FitzGerald and Mr. O'Brien. Prior to the Golf Classic, Mr. Austin did not to her knowledge have a significant Fine Gael fundraising profile nationally.

41.26 She confirmed, in response to counsel for Mr. O'Brien, that the entry relating to Mr. O'Brien and Esat Telecom in the minutes of the committee meeting of 21st July, 1995, would seem to have reflected some discussion in that context and, in response to counsel for Fine Gael, she confirmed that she would not have considered it particularly unusual that a sponsor should not have sought attribution.

41.27 Ms. Rita O'Regan confirmed what Ms. Fennell had stated, to the effect that, whilst a relief worker in Fine Gael Headquarters in September and October, 1995, she had made the handwritten notes, already referred to, on the copy letter of 8th September, 1995, from Mr. Phil Hogan to Mr. Denis O'Brien, in effect noting that there was to be no signage for the seventeenth hole at the Golf Classic, and that an Esat Telecom promotional logo already provided for that

purpose had been returned to Ms. Sarah Carey. Ms. O'Regan recalled receiving a telephone call from a representative of Esat Telecom, whom she thought was Ms. Carey, explaining that there had been a change of mind in relation to publicity since forwarding a promotional disk, and requesting that this be returned.

Evidence of Ms. Sarah Carey

41.28 The evidence of Ms. Sarah Carey did not exclusively relate to contemporaneous involvement in matters considered in this chapter, but regrettably she also acknowledged responsibility for related media “leaking”, an aspect that will be returned to at the end of this chapter. Insofar as that evidence related to her knowledge of and involvement in Esat Telecom contributions and donations to Fine Gael during 1995, and the relevant background, matters already touched upon in Chapter 6 of this Volume, it may now be summarised.

41.29 Soon after completing her university studies, Ms. Carey joined Esat Telecom as marketing coordinator, in January, 1995. Whilst reporting to other company executives in regard to general marketing issues, she reported directly to Mr. O'Brien on some other matters, including media and publicity aspects of the licence bid. Ms. Carey had then been and still remained an active member of Fine Gael. Some weeks after taking up her employment, she mentioned this association to Mr. O'Brien, who had previously been unaware of it. She told him that she was aware that significant elements within Fine Gael either had a negative perception of Mr. O'Brien, or were largely unaware of him, and were unaware of the need for liberalisation in the telecommunications industry. With a view to raising his profile within Fine Gael, she suggested that it would be a good idea for him to attend a forthcoming Fine Gael lunch in the Carlow/Kilkenny constituency, at which the Taoiseach, Mr. Bruton, and other members of the Cabinet would be present. Following upon that attendance, various further invitations were received from Fine Gael, some of which were accepted, and some declined, with the decisions in this regard being made by Mr. O'Brien. Ms. Carey recalled attending as many as ten such lunches, one being at Blackhall Place, in aid of the constituency of Mr. Jim Mitchell. Ms. Carey recalled that, after she and Mr. O'Brien had agreed to attend the Carlow/Kilkenny lunch, he later approached her and stated that the two of them should also attend the Blackhall Place lunch, as Mr. Mitchell had contacted him in that regard. This was the first time she had become aware that Mr. O'Brien and Mr. Mitchell were separately friendly, and she soon also became aware that Mr. Mitchell had been retained by Mr. O'Brien as an adviser. The standard subscription for these lunches was generally £1,000.00.

41.30 It was against this background of attendance at a number of Fine Gael functions that an offer of financial assistance was made to Mr. Phil Hogan in relation to the Wicklow by-election. Ms. Carey recalled Mr. O'Brien telling her that he had spoken to Mr. Hogan in this regard, and on foot of this had decided to make a contribution of £5,000.00 to the Fine Gael campaign. Whilst it was a possibility that a contact between Mr. Hogan and herself had led to this, she thought this unlikely, having no more than a vague recollection that she may have spoken to Mr. Hogan in this regard, but did recall Mr. O'Brien raising the matter in conversation with him. She presumed that the proposal arose out of Mr. Hogan and Mr. O'Brien chatting after one of the lunches that they attended.

41.31 Ms. Carey stated that she gave effect to Mr. O'Brien's instructions by obtaining a company cheque, on foot of which she purchased a bank draft used to make the £5,000.00 payment to Fine Gael. She did not regard the amount as particularly large, although it was put to her by Tribunal counsel that it was one of the largest, if not the largest, donations received by Fine Gael in regard to that by-election. As to the precise mechanics relating to the cheque and bank draft, she was unable to recall the details, and it was in addition the position that no documentation had been produced to the Tribunal by either the bank, Fine Gael or Esat sources. However, she was positive that she recalled being instructed by Mr. O'Brien to use a bank draft to make the donation. This did not surprise her as, given the high degree of secrecy attaching to many aspects of the licence competition, she felt that a payment to Fine Gael at that stage might have been deliberately misrepresented by other bidders, or by the media.

41.32 As to the Golf Classic, Ms. Carey said that she was reasonably certain that it was her decision to duplicate the earlier procedure by obtaining a cheque, in this instance from the joint venture account of Esat Digifone, and using it to purchase a £4,000.00 bank draft that was given to Fine Gael. Where she did recall an intervention on the part of Mr. O'Brien was in regard to a specific instruction from him, to the effect that there should be no publicity or advertising of the Esat sponsorship at the Golf Classic. She recalled receiving this instruction from him after she told him that, at Fine Gael's request, she had furnished the Esat Telecom logo to the party. This explained the manuscript note made by Ms. Rita O'Regan, on foot of their subsequent conversation. Insofar as a measure of discord had subsequently arisen between Mr. O'Brien and Mr. Hans Myhre, of Telenor, as to all the circumstances whereby the cheque used to purchase the bank draft was signed by each of them, Ms. Carey was unable to throw definite light on that: if she had been the person who obtained Mr. Myhre's signature on the cheque, she would have explained to him what was entailed in the payment, but she could not recall dealing with him in that regard. She agreed with Tribunal counsel that the Golf Classic donation was made right in the middle of the

licence competition, and stated that it was necessary to be somewhat discreet in the making of the payment, so that the media would not then become aware of it, or opportunities be provided whereby opponents or journalists might have misconstrued it. With respect to the wording of her own letter of 9th October, 1995, in which she stated “*I understand Denis has requested that there are no references made to his contribution at the event*”, Ms. Carey agreed that this seemed to indicate that she had been made aware of some dialogue between Mr. O’Brien and Mr. Hogan in this regard, although she did not have a specific recollection.

41.33 Copies of relevant documentation had in this instance been recovered, and produced to the Tribunal, material details of which will be summarised when addressing the evidence of Mr. O’Brien and Mr. Myhre. It seems beyond doubt that Ms. Carey personally obtained a cheque from the joint venture account of Esat Digifone for the amount of the Golf Classic donation plus the small bank charge levied for the issue of the bank draft, and that she then attended at a Bank of Ireland branch to purchase the draft used for the donation. Although the cheque and bank draft were drawn on different bank branches, and the cheque was made payable to cash, it is nonetheless noteworthy that the payment was journalised in the company accounts as a payment to Fine Gael.

Additional brief evidence

41.34 A number of other witnesses referred briefly to matters raised in this chapter, even though their main evidence was outside its scope. Both Mr. Sean Donlon and Mr. Colin McCrea, respectively Programme Managers to the Taoiseach, Mr. Bruton, and to Mr. Lowry, in 1995, stated that they had no recollection of Mr. FitzGerald querying the respective roles of Mr. Lowry and the Cabinet in deciding the outcome of the GSM competition, although Mr. McCrea acknowledged that the response attributed to him by Mr. FitzGerald, already referred to, sounded correct and consistent with his understanding at the time. Mr. Tom Curran, General Secretary of Fine Gael in succession to Mr. Miley, referred to documentation in relation to both the Wicklow by-election donation and the Golf Classic sponsorship, as well as other donations received at the relevant time by Fine Gael from Esat companies, or from Mr. O’Brien. Following a detailed examination of these, undertaken by Fine Gael at the request of the Tribunal, it appeared that, excluding the \$50,000.00 that is dealt with elsewhere, and allowing for uncertainty in regard to a £260.00 contribution, a total of £22,140.00 was paid by Mr. O’Brien or Esat companies to Fine Gael between the months of January, 1995, and June, 1996.

Evidence of Mr. Denis O'Brien

41.35 As part of reasonably lengthy evidence, directed primarily to his knowledge of and involvement in the GSM competition, Mr. Denis O'Brien also testified on this aspect of Tribunal inquiries. Of those portions of his evidence relevant to this chapter, the first consisted of confirming the content of a short Statement made by him in response to what had been stated by Mr. FitzGerald. In this, Mr. O'Brien acknowledged that Mr. FitzGerald was an acquaintance, and that, as Chief Executive of the Sherry FitzGerald Group, he would have acted for Esat companies and for Mr. O'Brien on a number of occasions in connection with property transactions. However, although Mr. O'Brien might have spoken to Mr. FitzGerald on a number of occasions during 1995, his recollection differed significantly from that of Mr. FitzGerald. In particular, he had no recollection of ever speaking to Mr. FitzGerald with reference to a senior politician in the previous Government, or with reference to the Motorola consortium. Similarly, he also had no recollection of ever meeting Mr. FitzGerald in the company of Mr. Jim Mitchell or Mr. Phil Hogan. Having reviewed his diaries for the period, he found nothing to dispute this, and in any event he was at a loss as to why any such meetings should have taken place. He did recall having been approached on a number of occasions by various members of the Oireachtas, seeking jobs for constituents, or making similar requests.

41.36 Dealing further with the matters raised by Mr. FitzGerald at a later stage in his evidence, Mr. O'Brien observed that Mr. FitzGerald had done quite substantial business for him in the sphere of property transactions. As to the meeting in the Shelbourne Hotel described by Mr. FitzGerald, Mr. O'Brien said that he never met Mr. FitzGerald on any such occasion, and he never made any of the remarks then attributed to him. Neither did Mr. FitzGerald advise him that it would be unwise to sponsor the Fine Gael Golf Classic, in the light of Mr. O'Brien's involvement in the GSM competition: if this had indeed been the case, Mr. FitzGerald should have advised his colleagues on the Golf Classic committee accordingly.

41.37 Similarly, the later meeting described by Mr. FitzGerald in Lloyd's Brasserie with Mr. O'Brien, Mr. Mitchell and Mr. Hogan did not occur, and Mr. O'Brien said that when he received Mr. FitzGerald's Statement in this regard, he viewed it as *"coming left field and totally untrue"*. It seemed to Mr. O'Brien that, for some reason, Mr. FitzGerald was seeking to be a player in the licence situation, by conveying information from the Minister and the like, when that was not the case. Mr. FitzGerald was correct in stating that he attended the Esat Digifone celebration party on the night the result was announced: all service

providers had been invited, and Mr. O'Brien recalled Mr. FitzGerald being in attendance, along with a colleague from Sherry FitzGerald.

41.38 Asked had there been any business falling out between himself and Mr. FitzGerald, Mr. O'Brien could not recall any, beyond speculating that Mr. FitzGerald may have been unhappy that some business deals proposed by Mr. FitzGerald were not proceeded with, but he stated that he would not do business with Mr. FitzGerald now, or recommend him, after this. Otherwise, it occurred to Mr. O'Brien that Mr. FitzGerald may possibly have been jealous over the Esat companies using other auctioneers, or that, through a body known as the Young Presidents Association, Mr. FitzGerald may have known of Mr. O'Brien's difficulties regarding this Tribunal on a very personal basis. Mr. O'Brien said that the content of Mr. FitzGerald's Statement was one out of a few strange things that had arisen in the course of his involvement with this Tribunal, and it had occasioned him great disappointment.

41.39 Tribunal counsel reminded Mr. O'Brien that his counsel had questioned Mr. FitzGerald on a basis that his credibility was in issue, and that his testimony in relation to the two meetings was "*untrue, made up and lies*": Mr. O'Brien responded that that was indeed his position, that what was involved was not a mere difference of recollection, and that Mr. FitzGerald had lied in giving this evidence. Accordingly, he was totally putting Mr. FitzGerald's credibility in issue. As to how his initial Statement to the Tribunal came to be expressed on a basis of having no recollection of either meeting, Mr. O'Brien stated that he had initially been going to give his evidence first, and that what probably had occurred was that the Statement was prepared by his solicitors, following a telephone call or brief meeting, in which he had stated it "*didn't happen*".

41.40 Whilst denying both meetings, Mr. O'Brien said that he obviously did speak to Mr. FitzGerald at some stage during 1995. He did not however think that he had spoken to Mr. FitzGerald, or met him, in relation to the Fine Gael Golf Classic. Asked whether the reference in Mr. FitzGerald's Statement and evidence, to Motorola and a senior politician, had come to him as a surprise, Mr. O'Brien said he had never said anything similar to what had been attributed to him: many vicious rumours had arisen in relation to him and the GSM licence, and it was in response to years of such false media allegations that he had attended to testify.

41.41 At a later stage in Mr. O'Brien's evidence, he was questioned by Tribunal counsel on the more general topic of political donations made to Fine Gael during the period of the licence competition. After referring to initial donations of £1,000.00 each, made on successive days in March, 1995, at

functions in the constituencies of Mr. Phil Hogan and Mr. Jim Mitchell, followed by similar donations in other constituencies, reference was made to the £5,000.00 donation made on 22nd June, 1995, at the Glenview Hotel in respect of the Wicklow by-election. Asked was it correct that Mr. Hogan made this request, Mr. O'Brien replied that it may have been Mr. Hogan, but he could not be one hundred percent sure. After referring to subsequent payments, including that in respect of the Golf Classic, Tribunal counsel refreshed Mr. O'Brien's memory by reading to him the main portions of the Statement of evidence of Ms. Sarah Carey. Mr. O'Brien stated that he would not necessarily disagree with what she had said.

41.42 In relation to the mode of payment of the Wicklow by-election donation, which Fine Gael's bank in Wicklow had been unable to retrieve, but which Ms. Carey had stated involved a bank draft, Mr. O'Brien replied that he was unable to help, beyond confirming that the donation had been made, and that it had not been paid in cash. Regarding the Golf Classic, Mr. O'Brien confirmed that the £4,000.00 sponsorship had been made by way of a bank draft drawn on the Pembroke branch of Bank of Ireland, purchased using a cheque drawn upon the Esat Digifone joint venture account at Bank of Ireland, Lower Baggot Street. Again, Mr. O'Brien did not take issue with what was stated by Ms. Carey, and he agreed that there had been a deliberate decision to request anonymity from Fine Gael. As to how his involvement with the Golf Classic came about, Mr. O'Brien said he thought it was through a letter from Mr. Hogan, who had credited Mr. FitzGerald. Asked did he remember having a conversation with Mr. FitzGerald about the Golf Classic, Mr. O'Brien said that he believed that Mr. FitzGerald was the person who initiated the sponsorship. He was unable to say how, beyond saying that he remembered receiving the letter, and that the letter referred to Mr. FitzGerald. It might well be that what was stated in the letter was true, and this indeed was more likely. Asked whether that indicated that there had been some discussion between himself and Mr. FitzGerald, Mr. O'Brien said that that was one interpretation, or else Mr. Hogan had been told by Mr. FitzGerald to write to Mr. O'Brien, in the knowledge that sponsorship would be forthcoming. Put that the letter was specific as regards details of the donation, and appeared to envisage Mr. FitzGerald and Mr. O'Brien having spoken, Mr. O'Brien stated that he was asked to become a sponsor, and he did. Put that he had earlier described Mr. FitzGerald's account in this regard as lies, Mr. O'Brien was asked what other contact with Mr. FitzGerald could have given rise to the letter. Mr. O'Brien replied that someone had contacted him, but he had not realised that he was going to be asked by the Tribunal to deal again with matters relating to Mr. FitzGerald. It was accordingly agreed that any remaining questions in this regard would be deferred.

41.43 Regarding the cheque used to purchase the bank draft that was paid in respect of the Golf Classic, Mr. O'Brien was unable to recall its circumstances, but he agreed that the cheque appeared to have been signed by himself and Mr. Hans Myhre of Telenor, and that this accorded with the practice in relation to cheques drawn on the joint venture account, whereby a signature from either himself or Mr. Peter O'Donoghue had to be accompanied by a further signature from either Mr. Myhre or Mr. Per Simonsen.

41.44 As to a Statement made available on behalf of Mr. Myhre, that he only contemplated signing cheques that related to the consortium's business venture, and would not have signed if aware that the payment was a political donation, Mr. O'Brien stated that six cheques were drawn on the joint venture account on that day, and the procedure that obtained in relation to the account was that requests for payments would be backed by appropriate vouching invoices or correspondence. In the present instance, Mr. O'Brien thought that the relevant vouching documentation would have been Mr. Hogan's letter of 30th August, 1995.

41.45 As already stated in Chapter 6, Mr. O'Brien then proceeded to testify that, in the context of a new Government led by Fine Gael being in power, a course of seeking to meet the new Ministers, support their political functions, and promote the liberalisation agenda of Esat companies, was justified and proper. Insofar as the payments in respect of the Wicklow by-election and the Golf Classic were made in a confidential fashion, this was because Esat Digifone was in the middle of a bidding process, and did not want the donations to be misinterpreted in any way.

41.46 Asked how, in the context of his evidence relating to the \$50,000.00 donation that payment from either Esat company was inappropriate, it was nonetheless in order to make these smaller donations to Fine Gael, Mr. O'Brien said what was involved in attending these political functions was only an opportunity "*to press the flesh and to meet people who are in power*". As to the \$50,000.00 donation, Mr. O'Brien said that this related to detailed evidence that he had given some two years previously, and he requested and was granted an opportunity to consider what had then transpired more fully. Subject to this, he stressed that the limited payments made to Fine Gael should not be viewed as political interference in the licence process: all that was obtained at the various functions attended was a chance to introduce his company to a Minister, and all that had been done was in accordance with advice given by Esat's lobbyists, in circumstances in which his companies were unacquainted with members of the new Government, and other bidders were acting similarly.

41.47 When Mr. O'Brien returned to give further evidence on 5th December, 2005, he had little to add in relation to the matters on which he had sought more time for consideration. Regarding the letter sent to him under Mr. Phil Hogan's name, inviting a contribution in relation to the Fine Gael Golf Classic, and indicating an introduction having been made through Mr. Mark FitzGerald, he believed this did come to him. Notwithstanding that reference, he remained of the view that he had never had any meeting in this context with Mr. FitzGerald. He remembered getting the letter, agreeing to sponsor the event, and had no real further comment to make. Regarding his view that it would have been inappropriate for any of the companies with which he was associated to have made the \$50,000.00 payment to Fine Gael in late 1995, in respect of the New York fundraising event, although a matter for Telenor whether or not they paid, as opposed to the smaller sums that had been paid to Fine Gael, he still held the view that these were two different situations. The latter related to political events that he had attended before winning the licence, in accordance with a practice that had subsequently been continued, and was part of the political process, in the way business interacted with politicians. However, in regard to the \$50,000.00 payment, it was the situation that, when his consortium won the licence, initial congratulations were promptly followed by excessive whingeing, particularly from TDs on behalf of losers, and outrageous things were said, despite the licence having been won on merit. It was in the context of that hysteria that, when asked to contribute to the New York Fine Gael fundraising function, he promptly refused, and indeed felt he should never have been asked.

Evidence of Mr. Hans Myhre

41.48 Mr. Hans Myhre of Telenor also testified. He confirmed the arrangements mentioned by Mr. O'Brien, whereby, in the early transitional phase of Esat Digifone, a joint venture bank account was established at Bank of Ireland, at its Baggot Street branch, in order to pay its business expenses. Two signatories were required to sign any cheque drawn on the account, one of either Mr. O'Brien or Mr. Peter O'Donoghue on the Communicorp side, and one of either Mr. Per Simonsen or Mr. Myhre on the Telenor side. On the vast majority of occasions, the Telenor signatory was Mr. Simonsen, but in a limited number of instances, Mr. Myhre, whose primary expertise was that of an engineer, did sign on behalf of Telenor. It appeared that one of those occasions was 6th October, 1995, when Mr. Myhre was in Dublin and signed a number of cheques. One of those cheques, signed by Mr. O'Brien and Mr. Myhre, was made payable to Bank of Ireland in the sum of £4,001.75, and that cheque had been used to purchase a bank draft in another Bank of Ireland branch which was used to pay the donation to Fine Gael in respect of its Golf Classic at the K Club. Mr. Myhre stated that he had no direct recollection whatsoever of this transaction, but on a

basis of principle would have objected to making a political donation, particularly at that sensitive period shortly prior to the outcome of the licence competition, when it might have been viewed as seeking to exercise political influence. When he belatedly learned the actual nature of the payment, he was shocked and upset. He accepted that the payment was openly journalised as a donation to Fine Gael in the Esat Digifone cheque payments analysis, in addition to having been set forth in the working papers used to prepare the accounts by its accountants, but stated that in practice the cheque payments analysis documentation had never crossed his desk, or been in his audit working line. Although the making out of the cheque to the bank in the first instance may have been somewhat unusual, and would hardly have been required for a trade creditor, Mr. Myhre felt that situations could have arisen in which this course would have been adopted, such as someone in Norway requiring cash.

41.49 Having no recollection of the circumstances of signing the cheque, Mr. Myhre could not say if Ms. Sarah Carey may have spoken to him about it, or if any documentation had been presented to him. However, he acknowledged that it could arise from time to time that documentation would not be readily available, and if a satisfactory explanation was provided by someone such as Mr. O'Donoghue or Ms. Carey, he would have been disposed to sign a cheque on request. Had it solely been conveyed to him that the matter related to a Golf Classic, without reference to the actual recipient, he would not have known of a political connection, and may have been disposed to sign. In brief evidence at the conclusion of longer testimony relating to other matters, Mr. Peter O'Donoghue recalled the manner in which this joint venture account was dealt with, in terms broadly similar to Mr. Myhre, but stated that he himself had had no involvement in, or knowledge of, the particular payment in question.

Evidence of Mr. Michael Lowry

41.50 As to the limited matters relevant to the GSM competition addressed in this chapter, the principal matters contained in the testimony of Mr. Michael Lowry may now be summarised. Further to the specific queries addressed by the Tribunal in the first instance, he stated that he had no knowledge of any contributions made by Mr. O'Brien or any of his companies to Fine Gael, or any constituency organisation. He recalled attending the Wicklow by-election lunch in June, 1995, meeting Mr. O'Brien there, and assuming by his presence that he had contributed, but had no knowledge of specifics. He also attended the dinner after the Fine Gael Golf Classic at the K Club in October, 1995, in addition to a Dublin South-East constituency fundraising lunch, and a similar function in relation to the Carlow/Kilkenny constituency. The last of these was at the

invitation of Mr. Phil Hogan, but Mr. Lowry stated that he had no knowledge of any association between Mr. Hogan and Mr. O'Brien.

41.51 Whilst the Golf Classic had certainly been a major fundraising function, Mr. Lowry had not been involved in its organisation, and had no knowledge of the sponsors or contributors. It was again at Mr. Hogan's request that he had attended this function. As to any discussion with Mr. FitzGerald at the K Club, in relation to the Esat Digifone application for the licence competition, Mr. Lowry stated that what happened was that Mr. FitzGerald had raised in a general way the issue of the competition, and the prospects of Esat Digifone. In response Mr. Lowry provided him with a minimal amount of non-committal information, which was effectively already in the public domain. This included reference to the Department having been impressed with the commitment of Esat Digifone to the process, underlined in their declaration that they had already identified numerous sites for masts and equipment. Mr. Lowry had also then suggested that, if Esat Digifone was unsuccessful, there would be a subsequent opportunity to apply for a third licence. Mr. Lowry stated that he had no knowledge of any relationship or association between Mr. O'Brien and Mr. FitzGerald. The conversation with Mr. FitzGerald at the K Club was his only such dealing. The late Mr. Jim Mitchell had long previously informed him of his role as a consultant to Esat Digifone, which Mr. Mitchell had felt was a matter of which Mr. Lowry should be aware.

41.52 When Tribunal counsel put to Mr. Lowry the account given by Mr. FitzGerald of their encounter at the K Club, Mr. Lowry confirmed that he did differ from Mr. FitzGerald, and had no doubt that Mr. FitzGerald approached him and made inquiry of him. He thought Mr. FitzGerald may have confused the matter with an earlier encounter at Luttrellstown Golf Club. At the K Club, he had approached Mr. Lowry at the bar, and inquired how Denis O'Brien was doing in regard to the GSM. Mr. Lowry had shrugged it off, but did say that a good impression had been made, and there would be a third licence. He had said the things attributed to him by Mr. FitzGerald, but the main difference was that Mr. FitzGerald had approached him. The matter was then fresh in his mind, as Esat Digifone had indeed made a big impression, including their public relations campaign, in the course of which Mr. Lowry had declined an invitation to accept the Esat Digifone licence application from persons dressed as Vikings, lest this might be seen as favouritism. Mr. Lowry stated that he would not have associated Mr. FitzGerald with Esat Digifone, feeling that his family connections would, if anything, have inclined him towards the consortium with which Mr. Anthony J.F. O'Reilly was associated, but it was the position that Mr. FitzGerald made the request in regard to Mr. O'Brien's consortium.

41.53 In response to his own counsel, Mr. Lowry confirmed that it was only innocuous information that he imparted to Mr. FitzGerald at the K Club, and that he would not have bothered doing that unless the information had been sought by Mr. FitzGerald.

OBSERVATIONS ON EVIDENCE

41.54 The conflict between Mr. FitzGerald and Mr. O'Brien, as to not merely the content, but the very occurrence, of two meetings between them, in 1995, was as polarised as any evidential controversy heard by the Tribunal. That this was so is perhaps surprising, since the content of what was attributed to Mr. O'Brien at those meetings by Mr. FitzGerald hardly diverged significantly from Mr. O'Brien's professed intention to attend Fine Gael fundraising functions, with a view to making himself and his consortium known to Ministers in the new Government. Nevertheless, it is a conflict that the Tribunal must address.

41.55 Mr. O'Brien's evidence as to any relevant dealings had with Mr. FitzGerald contained clear elements of inconsistency, fluctuations and uncertainty. He variously asserted, that he had no recollection of meeting Mr. FitzGerald in either the Shelbourne hotel or Lloyds Brasserie, then, that neither meeting had even occurred, hence Mr. FitzGerald had lied, then, that contact seeking sponsorship had been made with him by Mr. FitzGerald, then, that any communications had by him with Mr. FitzGerald had not related to the Golf Classic, and lastly, that it was likely that a conversation on the matter, initiated by Mr. FitzGerald, had in fact taken place between the two. Even allowing for the amount of material to be addressed by Mr. O'Brien, over several days' evidence, and some possible degree of misunderstanding in his communications with his legal advisers, these elements of uncertainty and irresolution did not enhance the cogency or conviction of Mr. O'Brien's testimony on the matters in question.

41.56 Whilst care is always required in assessing the demeanour of witnesses, the evidence of Mr. FitzGerald in relation to the two meetings was on general appraisal composed, coherent, dispassionate and moderate, not least in the face of a robust cross-examination by counsel for Mr. O'Brien. Even having regard for the much more extensive range of matters required to be addressed in evidence by Mr. O'Brien than Mr. FitzGerald, these attributes were significantly less apparent in the relevant testimony of Mr. O'Brien.

41.57 Such limited documentation as was to hand, being the list of sponsors for the Golf Classic, and Mr. Hogan's letter to Mr. O'Brien of 30th August, 1995, tends to confirm some basis of communication in this regard between Mr.

O'Brien and Mr. FitzGerald, and this would seem to accord more closely with Mr. FitzGerald's account of events.

41.58 As to any motive for giving false evidence in this regard, on the part of Mr. FitzGerald, no serious or substantial basis was advanced by or on behalf of Mr. O'Brien, and it is difficult in the extreme to conceive of any realistic reason that might have impelled Mr. FitzGerald to act in such a manner. On the other hand, at the time of the alleged meetings, Mr. O'Brien and his companies had for several months been embarked upon a concerted campaign of raising their profile within Fine Gael, with the assistance of consultants, Mr. Jim Mitchell T.D., and Mr. Dan Egan, and of their employee, Ms. Sarah Carey. That Mr. O'Brien may in these circumstances have sought to elicit some possible degree of support or information from a business acquaintance of some prominence and standing within Fine Gael, in Mr. FitzGerald, would in contrast appear appreciably less improbable, than that Mr. FitzGerald should have maliciously fabricated an entirely untrue account in relation to each meeting.

41.59 Some reliance in subsequent written submissions was placed on the absence of direct corroboration of matters alluded to by Mr. FitzGerald in his dealings with Mr. Miley, Mr. McCrea and Mr. Donlon, although regard must be had to the full context of the related testimony of Mr. Miley and Mr. McCrea. It is understandable that Mr. Fitzgerald would have felt a degree of unease following his interaction with Mr. Lowry. What had occurred only some months previously, in connection with the Marlborough House rent review, when Mr. Lowry had revealed himself to Mr. FitzGerald as willing to exercise influence to benefit a contributor to Fine Gael, would surely have put Mr. FitzGerald on his guard. It is not surprising that Mr. FitzGerald sought reassurance that Mr. Lowry was not intended to have a role in selecting the winner of the GSM licence, and these absences of limited potential confirmation, on a collateral aspect, are not viewed by the Tribunal as being of sufficient consequence to undermine materially Mr. FitzGerald's evidence, which the Tribunal accepts.

41.60 With further regard to what transpired between Mr. FitzGerald and Mr. Lowry, the matters related in this chapter provide further evidence of two matters. Firstly, it follows from what was conveyed by Mr. Lowry to Mr. O'Brien, over which there was little disparity in the respective accounts furnished, that Mr. Lowry was, as of 16th October, 1995, in possession of information of some degree of detail concerning not just the Esat Digifone application, but the impression it had made on the Project Group. According to the protocols put in place by the Department, he should not have had access to that information. By then, the Tribunal is satisfied that Mr. Lowry knew far more than he seemingly disclosed to Mr. FitzGerald, and on this occasion he was perhaps cautious in

disclosing matters to Mr. FitzGerald, in the light of their previous encounter in connection with the Marlborough House rent review, when Mr. FitzGerald had refused Mr. Lowry's request that he seek to influence the outcome of that review. Secondly, what emerges again is that, despite that earlier encounter between them, and the relatively limited level of information imparted by Mr. Lowry to Mr. FitzGerald, Mr. Lowry again exhibited a propensity to disseminate information inappropriately to third parties. Whether this information was volunteered by Mr. Lowry to Mr. FitzGerald, or furnished in response to an inquiry made by the latter, is immaterial.

MEDIA "LEAKING" OF CONFIDENTIAL INFORMATION

41.61 As recounted earlier in this chapter, significant "*leaking*" of confidential information in relation to political contributions by Mr. O'Brien's companies, some of it relating to parties other than Fine Gael, occurred, and, in the course of her evidence, Ms. Sarah Carey acknowledged that she was the person responsible.

41.62 In the latter portion of her evidence, Ms. Carey stated that she had been aware that all Tribunal discussions with witnesses in advance of their giving evidence were conducted on a confidential basis. Apart from meetings and correspondence, dealings were likely to involve the passing of documents to individuals from whom the Tribunal was seeking assistance. She had also been aware that the correspondence expressly stated that such documents were confidential. In the course of the Tribunal's correspondence with her solicitors, an amount of documentation was passed to her, some of which was never used in public sittings, concerning political payments by Esat Digifone, Esat Telecom and Mr. O'Brien. These found their way into a Sunday Tribune article. Ms. Carey had become aware that, as a result, the Tribunal received considerable criticism from individuals affected by the documents, suggesting that the material had been disclosed by the Tribunal in advance of its hearings. The Tribunal then tracked the documents with all of the persons to whom they had been given, with a view to ascertaining by whom the material had been disclosed to the newspaper. When the Tribunal wrote to Ms. Carey, her solicitor responded to the effect that she had not made the disclosure. This was not the case, and it transpired that she was the person who had done so.

41.63 Ms. Carey testified that she now understood that this had created a lot of difficulties for the Tribunal, and she was sorry. She did not at the time realise that, in addition to the Sole Member and lawyers, the civil servants working for the Tribunal had effectively to swear that they were not involved in disclosing the material. As to her motivation for doing this, she had felt there was excessive

emphasis on Mr. O'Brien's donations to Fine Gael, whilst the documentation provided to her made it clear that he had also made donations to Fianna Fáil and the Progressive Democrats. At the time she had felt that there was some public entitlement to know that. She accepted that Mr. O'Brien had not anticipated that material getting into the public domain, and like the political parties involved, he was doubtless annoyed over this.

41.64 In further response to her own counsel, Ms. Carey stated that, at the time she passed the documents to the media, she had no legal experience, and had no sense of the implications, or of the trouble that she would be occasioning to several persons. When confronted with what she had done, she stated that her initial instinct, having dug a hole for herself, was to dig deeper in panic. She had revised her instructions to her solicitor within a matter of days, but unfortunately he had already passed on her denial to the Tribunal. Nor had she been aware that what she had done occasioned the Tribunal a considerable amount of needless work by way of internal inquiries to deal with these matters, including the receipt of abrasive correspondence from the Progressive Democrats.

41.65 The Tribunal has already in Part I of its Report deplored the incidence of "leaking" as one of the insidious and baleful devices used to delay and distract its proper workings, and to seek to erode public confidence in its overall function. Ms. Carey is entitled to some limited measure of credit for being among the tiny minority of persons to admit and acknowledge her conduct in this regard, and for her apology in public session, notwithstanding that these came late in the day. However, what she did was irresponsible, in flagrant breach of the course of dealings that had been clearly conveyed to her, and was not remotely justified by the proffered explanation that she provided. It also predictably occasioned a considerable measure of distress, inconvenience and annoyance to a large number of persons.

ARRIVAL OF THE SECOND DRAFT REPORT AND ITS CHANGES

42.01 AMI's second draft Report dated 18th October, 1995, arrived in the Department on Thursday, 19th October, 1995. It represented AMI's response to the observations made on their first draft Report at the Project Group meeting of 9th October, 1995, and to separate instructions received from the Department. It was distributed promptly to at least some members of the Project Group, who were then able to make a study of it, in advance of Project Group discussions on the following Monday, 23rd October. As already indicated, some of the copies of the second draft Report, on which annotations had been made by members of the Project Group, had been retained within Departmental files, and were available to the Tribunal, and were of assistance in stimulating the recollections of those witnesses, and in reflecting their views and thinking at the time. Before proceeding to deal with that element of the evidence, it is necessary to address the significant changes which had been made, and which were apparent from the second draft Report.

NEW SECTION ON METHODOLOGY

42.02 The first draft Evaluation Report provided by AMI had contained five sections. These were augmented in the second draft by the addition of a new section, outlining how applications had been evaluated, and the methodology which had been employed. This new section, which was inserted as Section 2, was entitled "[Outline of the conduct of the competition process](#)". A draft of the section, as will be recalled from Chapter 39, had been sent by AMI to the Development Division shortly after the Project Group meeting of 9th October, and on Friday, 13th October, 1995, the Development Division had furnished AMI with its comments and suggestions on the material which it contained. The wider membership of the Project Group had not been consulted.

42.03 The new section contained four sub-sections, respectively headed "*The organisation*", "*Selected milestones of the competition process*", "*The framing of the evaluation*", and "*The marking and the nomination of the best application*". The material comprised in each of those sub-sections will now be considered. A copy of this new section can be found in the Book of Appendices to this Volume.

Section 2.1 – The organisation

42.04 This sub-section, which contained just two paragraphs, was an introduction to the respective roles of the Department, AMI and the Project Group in the evaluation, and its contents are reproduced below:

“The Department of Transport, Energy & Communications has had the overall responsibility for the conduct of the competition. The drafting of this report as well as the provision of advice during the tender has been the responsibility of Andersen Management International.

The Project Team on GSM (PT GSM) has been the nucleus of the competition process. The PT GSM comprises members from the 3 telecom divisions of the Department of Transport, Energy and Communications, the Department of Finance, and affiliated consultants from Andersen Management International.”

Section 2.2 – Selected milestones of the competition process

42.05 The second sub-section contained an outline of the significant steps taken in advance of the commencement of the evaluation proper, and focused on the formal announcement of the process on 2nd March, 1995, the initial scheduled closing date on 23rd June, 1995, and the information round, whereby interested parties posed questions to the Department, which were responded to by means of the circulation of information memoranda.

Section 2.3 – The framing of the evaluation

42.06 The third sub-section related to the steps taken in advance of the closing date of the competition, including the adoption of what was described as *“An evaluation model...as to how a combined quantitative and qualitative evaluation should be performed, see appendix 2.”*

42.07 The sub-section referred to the EU intervention, the manner of its resolution, the consequent postponement of the closing date to 4th August, 1995, the receipt of six applications, their admission to the process, the posing of written questions to applicants, and the provision of written answers by 4th September, 1995.

42.08 It closed with a statement that:

“A large part of the quantifiable side of the applications was then compiled and put into graphics in order to serve as a background for the evaluation.”

This statement, which can have related only to the quantitative evaluation, suggests that the quantitative material was used to form “graphics” which were then utilised as background information in the evaluation proper. No reference

was made to the principal object of the quantitative exercise, namely the generation of a set of quantitative results for the indicators, as defined in the Evaluation Model.

Section 2.4 – The marking and nomination of the best application

42.09 The final sub-section, as is clear from its heading, was intended to explain, in broad terms, how applications were evaluated. It opened with a statement that:

“The nucleus of the evaluation was then commenced by the establishment of 10 sub-groups each dealing with one of the dimensions...”

Having then adverted to the composition of the sub-groups, reference was made to the oral presentations as the next step in the process. Thereafter, according to the sub-section, the remaining part of the evaluation was conducted *“in particular on credibility, risks and sensitivities”*, and the overall evaluation and the final marking of applications was completed.

42.10 The text of the sub-section closed with the following two paragraphs:

“A draft report discussed on 9 October has, following the incorporation of comments from the PT GSM, culminated in this final report. As unanimous support was given by the PT GSM to the results of the evaluation, Andersen Management International was requested to submit this final report. It was also decided to present the quantitative and the qualitative parts of the evaluation in an integrated fashion in accordance with the agreed procedures, see appendices 2 and 3.

It is the view of Andersen Management International that the competition process has been conducted in such a way that a comparatively high degree of transparency, objectivity and non-discrimination has been achieved.”

42.11 For different reasons, both of these closing paragraphs warrant comment. The first paragraph, which included the statement that at the meeting of 9th October:

“unanimous support was given by the PT GSM to the results of the evaluation”

was, as will emerge in due course, a statement to which a number of members of the Project Group took exception. It was ultimately deleted from the final Report. It was a matter on which Mr. Ed O’Callaghan, Mr. Donal Buggy and Mr. Billy Riordan registered dissent on their copies of the second draft Report, and more detailed reference will be made to their evidence, and the evidence of other members of the Project Group in that regard.

42.12 The final paragraph, an endorsement by AMI of the fairness of the process, was not in fact something that AMI had themselves volunteered, but had originated in the proposals made to them by the Development Division on the previous Friday, 13th October, 1995, in the document to which reference has already been made in Chapter 39. In that document, the Development Division had articulated the matter as follows:

“A final comment in this chapter is desirable on the professional view of AMI on the extent to which interested parties initially and applicants for the licence subsequently were dealt with on a transparent, objective and non-discriminatory basis throughout the process.”

42.13 The inclusion of this new section in the second draft was clearly intended to provide a brief resumé of how the competitive process had been conducted, so that a reader would be armed with sufficient information to follow and contextualise the succeeding sections on the substantive evaluation. It is understandable that considerable detail had to be excluded in the interests of brevity and accessibility, and that the necessary exclusion of such detail would inevitably detract from the completeness of the account given. There were however elements of what was stated, and what was omitted, which gave a less than fully accurate representation of the process, and in particular:

- (i) the absence of any reference to an intended separate quantitative evaluation and the results of that evaluation;
- (ii) the intimation that an evaluation was conducted on credibility, risks and sensitivities;
- (iii) the statement that unanimous support was given to the result on 9th October, 1995.

Some of these deficiencies were, at least in part, met following scrutiny by members of the Project Group.

REVISION OF PRESENTATION OF
EXPERIENCE OF APPLICANT DIMENSION

42.14 Experience of Applicant was one of the three dimensions of the first-ranked evaluation criterion, of which Approach to Marketing and Financial Key Figures were the other two dimensions. The quantitative assessment of the dimension had proceeded smoothly, and the results of the quantitative evaluation were incorporated into the qualitative evaluation to the extent that the sole quantitative indicator, Experience as a Cellular Operator, was one of the four indicators assessed qualitatively. The relevant section of the first draft Report, as already detailed in Chapter 29, contained two tables. The first presented the results of the quantitative evaluation, including the total scores awarded on a scale of 1 to 5 for each of the applicants, whilst the second showed the qualitative indicator marks and the total for the qualitative evaluation of the dimension. The narrative stated that the quantitative results, expressed in points on a scale from 1 to 5, had been translated into qualitative grades on a scale from A to E.

42.15 It will be recalled from Chapter 29 that a comparison of those two tables showed quite clearly a disparity between the quantitative points, and the qualitative grades into which they had been converted. For ease of reference, that exercise is illustrated in the following table:

	A1	A2	A3	A4	A5	A6
Points	3.68	0.45	5.00	0.54	0.97	2.74
Marks	B	E	A	D	C	B

42.16 In the second draft Report, the table containing the quantitative results had been truncated, and reduced to half of its original size. All of the entries relating to and showing the points awarded had been erased, with the result that the disparity, between the points scored and the marks into which they had been translated, was not apparent. Mr. Towey’s evidence on this matter, including on the loss of relativity, and on related issues pertaining to this element of the evaluation, has already been explored. A copy of the sub-section of the second draft Report relating to this dimension can be found within the Book of Appendices to this Volume.

REVISION OF PRESENTATION OF FINANCIAL KEY
FIGURES DIMENSION

42.17 The presentation of the results of the Financial Key Figures analysis in the second draft Report is of significance, in the light of the review undertaken by the accountants on 9th October, 1995, and the changes they had made to the marks awarded to the two top-ranked applicants, which at the time, it was

recognised could have impacted on the overall ranking in the evaluation. As will be recalled from Chapter 36, there was no evidence that these changes were ever in fact brought to the attention of the Project Group. The accountants, having had discussions with Mr. Andersen and Mr. Brüel at some point during the afternoon of 9th October, in all probability following the completion of the Project Group meeting on that date, forwarded a fax to AMI setting out some of their concerns, and it will be recalled that Mr. Buggy testified that the handwritten notes, on the copy of the fax available to the Tribunal, had been made by him, either on receipt of the second draft Report, or following telephone contact with AMI.

42.18 It is evident from the second draft that some revisions were made to the Financial Key Figures section to reflect the accountants’ views. As requested by them, additional explanatory text had been inserted to accompany the graphs contained in the section, and the term “*deep pockets*”, which had been used by AMI to signify the financial strength of constituent members of consortia, and to which the accountants had taken exception, had been replaced by an alternative form of wording.

42.19 One set of indicator marks had been changed, the marks for the final indicator, ratio of Accumulated Turnover/Accumulated Investment. The table below shows those changes:

Marks as shown in First Draft	Marks as shown in Second Draft
D	A
A	E
D	C
B	A
D	B
E	E

It appears from the available documentation that the alterations in the marks for this final indicator very probably arose from a recalculation of the ratio undertaken by AMI, prompted by the accountants’ request, in their fax of 9th October, 1995, that AMI supply their workings for the calculation of that ratio. Whilst the importance or implicit weighting attached to that indicator cannot be discerned from the text of the section, and indeed the accountants could be of no assistance as to what weightings had been applied, as the alterations to the grades for that indicator were not reflected in any change to the overall marks for the dimension, it would seem to follow that the weighting attached to it was relatively slight.

42.20 What is of greater significance is that it was apparent from the second draft Report that no changes had been made to the marks shown for the Financial Key Figures dimension to reflect the other revisions made by the accountants on the morning of 9th October, 1995. The following marks remained unchanged, despite those revisions:

- (i) A2, Cellstar Group's grade B for the indicator Profit/Interest, reduced by the accountants to grade C;
- (ii) A3, Persona's grade D for the indicator Liquidity, elevated by the accountants to grade C;
- (iii) A5, Esat Digifone's grade B for the Financial Strength indicator, reduced by the accountants to grade C;
- (iv) A6, Eurofone's grade A for liquidity, reduced by the accountants to grade D.

Likewise, the overall marks for the dimension remained unchanged, despite the consequent revisions made by the accountants, so that the following marks continued to be shown in the second draft:

- (i) A4, Irish Cellular's grade C, reduced by the accountants to grade D;
- (ii) A5, Esat Digifone's grade B, reduced by the accountants to grade C;
- (iii) A6, Eurofone's grade C, also reduced by the accountants to grade D.

REVISION TO SECTION ON SENSITIVITIES, RISKS AND CREDIBILITY FACTORS

42.21 This was the short section which, as already explained, addressed in narrative form the “*other aspects*” of the comparative evaluation, which had not been marked. Although the risks and sensitivities had not been measured quantitatively or qualitatively, the section had concluded with the statement that:

“the general credibility of the applications is equal to the ranking of the applications.”

The section commented on the risks and sensitivities identified in relation to all six applications, but focused primarily on the two top-ranked applicants, A5, Esat Digifone, and A3, Persona.

42.22 Several minor amendments and additions were made to the section, most of which do not warrant comment. One seemingly minor change was however made to an early passage of the text, which focused on the risks associated with A5, Esat Digifone, consequent on the financial frailty of Communicorp, and is noteworthy, particularly when viewed in conjunction with how that financial frailty ultimately came to be addressed. What had been stated in the first draft Report was as follows:

“The weakest point concerning A5 is not related to the application as such, but to the applicant, or more specifically to one of the consortium members, namely Communicorp, which has a negative equity.”

In the second draft Report, an element of uncertainty and conditionality was introduced by the addition of the qualification “*maybe*” before the reference to A5, Esat Digifone’s weakest point, thereby diluting, at least to some degree, the proviso concerning finances. As will be seen, by the time the Report reached finalisation, that note of caution, registered by AMI, was further offset by a positive, but questionable, endorsement of the ability of the project to secure ample funding.

42.23 What the Tribunal had not fully appreciated until Mr. Michael Andersen attended, as it did not feature in the evidence or explanations of Departmental witnesses, is that Mr. Andersen, at least, regarded this section and the proviso entered in relation to the finances of Esat Digifone, and of Persona, as representing the sole consideration of the paragraph 19 precondition of Financial Capability. This passage, coupled with the Appendix 10 analysis, was intended as a marker to the decision maker that deficiencies had been identified. Although there was considerable discussion of this section at the Project Group meeting of 9th October, 1995, that discussion did not seemingly prompt AMI to make any more substantial change to the text of the first draft than the addition of the qualifying word “*maybe*”.

REVISION OF RESULTS SECTION

42.24 In the written comments directed by the Development Division to AMI on 13th October, 1995, which principally arose from the additional first draft material not available until after the meeting of 9th October, 1995, it will be recalled that the Development Division had also asked AMI to deepen the explanation of the differences between A5, Esat Digifone, and A3, Persona, in the sub-section entitled “*last Comparison of Applications*”. That sub-section contained a comparative exposition of the results and ranking of the top three

applicants in narrative form, and the Tribunal has already registered its misgivings surrounding the tenor and accuracy of the text, as it appeared in first draft Report, and in particular, the extent to which the text appeared to overstate the relative performance of A5, Esat Digifone.

42.25 In response to the Development Division's request, AMI had inserted two fairly lengthy passages of text into this last sub-section. The first passage of inserted text related to the dimension Tariffs, for which A3, Persona, was superior to A5, Esat Digifone, by a full grade, even though in the first draft Report, A5 had been described as "*a fraction behind A3*" for the dimension. The Development Division had specifically asked in its comment document of 13th October, why A3 was "*considered superior to A5 in relation to tariffs (Mention the specific tariffs)*". In the second draft, the following additional material had been inserted:

"Appendix 6 furthermore documents that A5 does have a more favourable tariff scheme for international calls than has A3. Concerning domestic tariff, A3 is clearly better than A5, when taking the figures at their face value. A5, however, has more favourable metering and billing principles and has furthermore made stronger provisions for discounts, thereby improving its comparative price/performance ratio considerably. The actual bills to be paid by the A5 customers might, therefore, not be bigger than for the A3 services, or are at any rate only a fraction above."

42.26 The second passage of inserted text related to the four dimensions for which A5, Esat Digifone, and A3, Persona, had been ranked equally. In the first draft, the text had stated:

"Finally, A3 and A5 are equal on the remaining dimensions relevant to the definition of the comparative evaluation, i.e. the financial key figures, the licence fee payment, the international roaming plans and the frequency efficiency."

42.27 In their document of 13th October, the Development Division had asked "*Why are the applications considered equal in relation to coverage, financial key figures, roaming and frequency efficiency*". What this query, made in the context of the Development Division's request for a deepening of the explanation, seems to have elicited was an expansion of the above quoted paragraph as follows:

“A5 is, however, also when marked equally with A3, slightly better than A5. Concerning coverage, A5 does have a more attractive rollout plan. Concerning frequency, for example, both applicants have been awarded the same marks because they demand the same amount of frequency spectrum, namely the initial 37 200 MHz channels. As was shown in Figure 17, A5 has a much better frequency economy than A3 throughout the planning period. This means that A5, all other things being equal, is in a better position to demand more spectrum from the Regulator than is A3, and this will potentially increase the comparative price/performance ratio of A5.”

42.28 It is strange that AMI, having been appointed as independent consultants, and having proposed an Evaluation Model which was adopted by the Project Group, intended to generate results that were valid and reliable, were seemingly amenable to revisiting those results, arrived at by consensus of the sub-group participants. The amendments to the text of this sub-section, over which the Tribunal has misgivings even in the form in which it appeared in the first draft, added significantly to what was by any reasonable standards a partial presentation of the outcome of the process, and the performance of the two top-ranked applicants. It is equally unsettling that it was the Development Division that had instigated an even more emphatic casting of the material, in what was intended to be an accurate and reliable Report on which a decision was to be made.

APPENDIX 2 – THE METHODOLOGY APPLIED

42.29 Revisions had also been made to the appendices to the first draft Report. The most significant change was the inclusion of Appendix 2, containing an outline of the evaluation process, and the evaluation methodology. A copy of [Appendix 2](#) to the second draft Report can be found in the Book of Appendices to this Volume. Appendix 2 had not been completed by 9th October, 1995, when the Project Group had met, and at which the first draft Report had been tabled. It will be recalled that the appendix nonetheless featured in discussion in the course of that meeting of 9th October, and in particular in the context of the debate between Mr. Towey on the one hand, and Mr. Andersen and Mr. Brennan on the other hand, concerning the treatment of the results of the quantitative evaluation in the Report. It was in the context of the view advanced by Mr. Andersen, apparently supported by Mr. Brennan, that the results of the quantitative evaluation were unreliable, and should not be presented separately in the Report, as an output of the evaluation process, that reference was made to the framing of this methodology appendix. The following was the relevant extract from Ms. O’Keeffe’s contemporaneous notes:

“Results of quantitative evaluation not reliable.

Quantitative analysis became less and less.

Should be explained in methodology report and wording is important.”

42.30 It was Appendix 2 which contained the “*methodology report*”, and as had been articulated at the meeting of 9th October, its framing was considered to be “*important*”. It is not surprising that this task was viewed in those terms. What the appendix had to endeavour to explain was why a significant departure had been made from the Evaluation Model agreed in advance of receipt of applications, and which Model was reproduced, for all readers to see, in Appendix 3 to the Report.

42.31 It is clear from the documentary trail that the Development Division had a significant input into the wording of Appendix 2. Having received AMI’s first draft, shortly after the meeting of 9th October, the Development Division furnished its comments to AMI on Friday, 13th October, and as will become apparent, it seems from that document that the Development Division was the source of lengthy tracts of the text which appeared in Appendix 2.

42.32 The appendix extended to some eight printed pages. The narrative was divided into sub-sections, and the material in the early sub-sections was a repetition of the contents of the newly incorporated Section 2 of the main Report. The substantive material which addressed the absence of a separate set of quantitative evaluation results was comprised in sub-section 2.4 entitled “*The evaluation model and techniques*”. The material in the sub-section, presented in the form of a continuous narrative, set forth three thematically distinct explanations for the abandonment of the separate quantitative evaluation, each of which now will be addressed.

The first explanation

42.33 Having stated that the overall approach adopted was to nominate the best application by reference to the criteria contained in paragraph 19 of the RFP document, the sub-section recited that AMI had been asked to propose an evaluation model. It then stated that:

“At that time, there was no limitation on the amount to be offered to the right to the GSM2 licence. Thus, the evaluation model should include some degree of quantitative evaluation in order to avoid a situation where the Irish Government could easily be accused of having prioritised the fee aspect higher than the ranking as the fourth

criteria stated in [paragraph] 19 of the RFP document. The resulting document is basically appendix 3.”

In other words, what was stated was that the rationale underlying the adoption of a quantitative technique at the outset was to enable the Government to demonstrate clearly that the quantum of licence fee offered had not been a critical determinant in the selection process.

42.34 Having then referred to the change in weightings, following the settlement of the EU intervention by the capping of the licence fee, the text proceeded to state:

“Essentially, the evaluators decided that all the results of the evaluation should be presented in one comprehensive report, as is the case with the main report such that the results of the evaluation (both quantitative and qualitative techniques) should be presented in an integrated fashion. No changes were made in the memorandum, but it was decided that the qualitative evaluation should be the decisive and prioritised part of the evaluation.”

What this text suggested was that, as the licence fee had been capped, it was no longer imperative to present the quantitative results separately, and it was for this reason that a decision had been made that all of the results should be presented in one comprehensive report. There was nothing in AMI’s tender document, or in the Evaluation Model, or in any other record available to the Tribunal, nor was it ever suggested by any Departmental witness, that the licence fee or the capping of the licence fee played a part in the adoption of a quantitative technique, or the decision that the results of the quantitative evaluation should not be shown as a separate output of the process. On the contrary, the rationale for the adoption of the two techniques was defined in AMI’s tender document as being to maximise “*the validity and the reliability*” of the results, and to obviate the risk of arbitrariness associated with the aggregation of weighted scores or marks.

42.35 Mr. Andersen’s evidence was that, consequent on the capping of the licence fee and the revision to the fourth-ranked evaluation criterion, as notified to interested parties by letter dated 14th July, 1995, the evaluation process was fundamentally recast, and was converted from an auction process to a beauty contest. This aspect of Mr. Andersen’s evidence has already been analysed in Chapter 15 of this Volume, and suffice it to observe at this juncture that the Tribunal found Mr. Andersen’s evidence in this regard unimpressive, contrary to AMI’s written advice to the Department, and inconsistent with the evidence of Departmental officials. Whilst the availability of quantitative results would no

doubt have assisted in satisfying the European Commission that the quantum of licence fee offered, had the criterion remained open-ended, had not determined the outcome, the Tribunal is satisfied that, to a considerable extent, this explanation bordered on a rationalisation for a course taken in the presentation of the results of the evaluation which, as acknowledged by Mr. Andersen, was “exceptional” in his wide experience of evaluation processes.

The second explanation

42.36 The second ground advanced for omitting the results of the quantitative evaluation was that:

“it become clear during the evaluation that a number of indicators in the quantitative evaluation were either impossible or difficult to score”.

The indicators, International Roaming, Blocking and Drop-out Rates, Tariffs and Licence Fee Payment, were instanced as examples. As a result of this realisation, the appendix stated that it was “*decided that the foundation for a separate quantitative evaluation had withered away*”. According to the text, the Evaluation Model “*was checked*”, and the course taken was found to be consistent with its contents. It was stated that, in consequence of that decision, the quantitative results were used “*as valuable input in the integrated, holistic evaluation*”. Reference was then made to the use of the quantitative indicators in the qualitative evaluation.

42.37 The Tribunal has already reviewed Mr. Andersen’s analysis of the shortcomings in the quantitative results. Of the eleven dimensions, there was just one, the Performance Guarantees dimension, that could not be scored due to deficiencies in comparable information. This dimension was to be measured quantitatively by reference to Blocking and Drop-out Rates, which represented AMI’s effort to assess Performance Guarantees quantitatively, and which accounted for a weighting of 5%. The only other dimension that could not be scored was International Roaming, which the Evaluation Model had anticipated might not be susceptible to quantitative assessment. The Licence Fee dimension was neutral in its impact, as all applicants had nominated the maximum permitted Licence Fee of £15 million. The Tariffs dimension had been properly scored in the case of A4, Irish Cellular, and A6, Eurofone, the correct figures having been extracted from their respective business cases, and the results for all six applicants had been utilised without reservation in the qualitative evaluation.

42.38 Whilst these issues were of course highlighted on 4th September, 1995, when AMI presented the first set of quantitative evaluation results to the Project Group, no decision was taken or recorded either on that date, or on any other date, that “*the foundation for a separate quantitative evaluation had withered away*”. On the contrary, the decision documented in the official report of that meeting was that the quantitative evaluation would be returned to on completion of the qualitative evaluation, and all Departmental witnesses agreed that that course accorded precisely with the Evaluation Model. Nor was any recorded decision made, in advance of, or in the course of the qualitative evaluation, that a different “*holistic*” approach should be taken involving the use of the quantitative results in a manner different to that prescribed in the Evaluation Model. In that regard, it will be recalled that the methodology for the qualitative evaluation, as prescribed in the Evaluation Model, specifically provided that, when the dimensions were being assessed qualitatively, the evaluators should, as far as possible, use the same indicators as had been used during the quantitative evaluation, and that supplemental indicators should be defined only if the existing indicators were judged not to be sufficiently representative for dimensions to be fully evaluated.

42.39 No issue whatsoever arose regarding the use of the quantitative evaluation results until the qualitative evaluations by sub-groups had concluded in Copenhagen on 20th September, 1995, when Mr. Andersen, on the following day, forwarded his memorandum to Mr. Brennan and Mr. Towey, with whom he had been in continual contact over the previous two days in Copenhagen. In the memorandum, he posed five questions for the Department to answer, including how the quantitative evaluation should be integrated into the Evaluation Report, recording his preference that the question should be left unanswered until the final results were available.

42.40 Whilst, according to this explanation, some form of expanded qualitative or hybrid evaluation was conducted, there was nothing in the evidence heard by the Tribunal, or the contemporaneous documents generated at the time, to support that proposition. Had some hybrid form of evaluation been conducted by the sub-groups, in which the quantitative results were utilised or inputted in a manner different to that provided by the Evaluation Model, no issue could have arisen on 21st September, 1995, after the conclusion of those sub-groups, as to how the quantitative results should be incorporated into the Report. The evaluation conducted was, at least in part, precisely in accordance with the Evaluation Model, namely, a quantitative evaluation, followed by a qualitative evaluation. What was omitted was the final step provided for in the Model, of revisiting the quantitative results in light of the qualitative results, and what was also omitted from the Report were the results of the quantitative

evaluation, or any reference to, or mention of, the fact that the quantitative evaluation results, no matter how statistically unreliable, had produced a ranking different to that recommended.

42.41 As regards the steps taken to check whether the decision to exclude the results of the quantitative evaluation from the Report was consistent with the Evaluation Model of 8th June, 1995, referred to in the text of the appendix, but not elaborated upon, Mr. Andersen referred the Tribunal to point 4 on page 2 of the Evaluation Model which stated that:

“Uncertainties regarding the scoring of points may be dealt with in the qualitative evaluation.”

Mr. Andersen testified that this provision assured AMI that the manner in which they intended to proceed was in accordance with the Model.

42.42 That point was one of six points in section 2 of the Evaluation Model, which comprised an overview of the procedure for the quantitative evaluation. It undoubtedly envisaged that uncertainties regarding *“the scoring of points”* in the quantitative evaluation could *“be dealt with”* in the qualitative evaluation. That in any event was to be part of the *“interplay”* between the quantitative and qualitative, intended to be the concluding stage of the evaluation, in which regard the Model provided in section 7, on page 22, that:

“When the bulk of the qualitative evaluation has been performed, however, this evaluation would conversely form the basis for a recalculation of scoring applied initially if mistakes, wrong information or similar incidentals can be documented.

The results of both the quantitative and the qualitative evaluation will be contained in the draft report with annexes to be prepared by the Andersen team.”

42.43 That provision at point 4 of section 2 cannot be read in isolation, and must be interpreted in the context in which it appeared, as one of six points to describe the quantitative procedure, which included at the final point the following provision:

“A memorandum comprising the salient issues of the quantitative evaluation will be annexed to the evaluation report.”

Mr. Andersen's proposition that point 4 of that section, which envisaged that uncertainties that arose in scoring could be clarified in the course of the qualitative evaluation, somehow contemplated that the overall results of the quantitative evaluation would be omitted from the Report, can only be viewed with considerable scepticism, when there was no evidence of any independent consideration of that issue, when it was never seemingly brought to the attention of the Project Group, and where Mr. Andersen himself accepted that the course taken in this instance was in his experience exceptional.

42.44 It was also Mr. Andersen's view that there was a degree of discretion or flexibility in the Evaluation Model as adopted by the Project Group on 9th June, 1995. In that regard, Mr. Andersen pointed to the terms of the formal contract of the same date, between AMI and the Department, and in particular to paragraph 1(a), whereby AMI were obliged to assist the Department in:

"the development of an evaluation model for applications for the GSM licence based on the selection criteria at paragraph 19 of the GSM tender document in accordance with the principles outlined in paragraphs 3.2.1 and 4.2.1 and Section 5 of the consultancy tender. This advice shall be provided before 23 June, 1995 by a document providing an outline evaluation model which might be further developed during the evaluation."

Although the Tribunal is not convinced that the contractual arrangements between AMI and the Department have any relevance to the issue of the exclusion of the overall results of the quantitative evaluation, it does not seem to the Tribunal that what was adopted by the Project Group on 9th June, 1995, was "an outline evaluation model", capable of being developed further during the evaluation, but rather a final Evaluation Model, which, subject to the written procedure adopted prior to the closing date of the evaluation process, was intended to be fixed and binding, and indeed was so characterised after the conclusion of the process.

The third explanation

42.45 The third limb of the explanation, which can be traced directly to the comments of the Development Division faxed to AMI on the previous Friday, 13th October, 1995, amounted to a restatement of the differences between the quantitative and the qualitative techniques. The text had been inserted by AMI word for word, in the form drafted by the Development Division. The differences were stated as follows:

“Thus, the quantitative analysis is based on extracting from the applications the ‘hard’ quantitative commitments in relation to critical indicators associated with the selection criteria prescribed in the tender document. It is thus limited to clearly identifiable figures as expressed by applicants and does not have the capacity to take account of considerations such as market research, planning, management preparedness, credibility etc. In the event following receipt of the applications, it became clear that a number of 14 indicators in the qualitative model [sic] were either impossible or difficult to score.

The qualitative model differs from the quantitative in that it allows a more holistic comparison of the critical elements of the applicants. In accordance with the evaluation document agreed prior to the close of the competition, the indicators for the model under the 10 dimensions were expanded to a total of 56, taking account of critical but non-quantifiable aspects of applications such as performance guarantees [sic], cell planning, market research, understanding of roaming, special tariff provisions, customer care, etc.”

42.46 The sub-section closed with an exposition of the techniques used in the “holistic” evaluation which, according to the text, reflected a “heuristic” methodology, involving assessments by consensus, award of marks, and averaging of marks by consensus. In other words, it detailed the techniques used in the qualitative evaluation. It is of interest that portions of the literature on the topic define the main characteristics of a “heuristic” approach as rapidity, non-scientific, trial-and-error, and rule of thumb.

42.47 What was absent from the appendix, and indeed from the entire Evaluation Report, was any reference whatsoever to AMI’s tender document, in which the actual rationale underlying their recommendation, that both quantitative and qualitative approaches should be adopted, was outlined, as was the contingency which that dual methodology was intended to meet. As evident from what was stated by AMI in that document, the purpose of the dual approach was to minimise the unreliability inherent in the two separate techniques, and to confirm the reliability of a ranking which emerged independently from both of them.

42.48 The penultimate sub-section of the appendix, sub-section 2.5, entitled “The marking of the applications and the nomination of the best application”, set forth an overview of the marking of the qualitative evaluation, and the manner of presentation of the results. Apart from some minor passages, it seems that the

entire wording was taken by AMI from the Development Division proposals, which were part of the comments faxed to AMI on Friday, 13th October, 1995. In the course of the final paragraph, reference was made to the exercise of “*Validation and finalisation of the results*” by, inter alia, the “*Regrouping of the criteria*” to reflect more directly the selection criteria outlined in paragraph 19. This was clearly a reference to Table 17 in the results section. Reference was also made in that passage to the application of weightings in the following terms:

“Application to the qualitative marks to the weightings agreed prior to the close of the competition for the quantitative model.”

APPENDIX 3 – THE EVALUATION MODEL

42.49 Appendix 3 of the first draft Report, as will be remembered, reproduced the Evaluation Model of 8th June, 1995, as adopted by the Project Group on 9th June, 1995. The purpose of incorporating the Evaluation Model into the draft Report was no doubt to enable persons reading the Report to satisfy themselves that the comparative evaluation had been conducted fairly, and in accordance with that Model, subject of course to what had already been stated in Appendix 2 concerning the quantitative evaluation.

42.50 The Evaluation Model as reproduced in the first and second draft Reports, and for that matter in the final Report, was in broad terms identical to the Evaluation Model of 8th June, 1995, which had been tabled and agreed at the Project Group meeting of 9th June, 1995. Some corrections had been made, as between the first and second drafts, of what were self-evidently errors in the printing process. There was however one set of significant changes made in the second draft Report which impacted on the presentation of the results tables, and in particular Tables 17 and 18, which illustrated what was described in the text of the draft Report as the application of the “*weighting mechanism...agreed prior to the closing date for quantitative purposes*”. Reference has already been made to the equal weightings of 10/10/10 applied to the three dimensions, Market Development, Experience of Applicant and Financial Key Figures, the dimensions associated with the first-ranked evaluation criterion, even though the quantitative weightings in the Evaluation Model as adopted had provided for unequal weightings of 7.5/15/10. A copy of [Appendix 3](#) of the second draft Report can be found in the Book of Appendices to this Volume.

42.51 The Evaluation Model, as contained in Appendix 3 of the first draft Report, faithfully replicated the weightings table for the marking of indicators in the quantitative evaluation, as printed on page 17 of the Model. The table, as it appeared in the second draft Report, was not in that form, as different figures

were shown for the weightings of seven of the fourteen indicators. The table below is a composite of the tables comprised in both drafts.

Indicator	Weighting First Draft	Weighting Second Draft
Market penetration score 1	3.75	5
Market penetration score 2	3.75	5
Speed and extend [sic] of demographical coverage for class IV (2W) handheld terminals	7.5	7
Competitiveness of an OECD-like GSM2 basket	15	18
Number of international roaming agreements	6	6
Number of cells	10	10
Reserve capacity	10	10
Blocking rate	2.5	2.5
Dropout rate	2.5	2.5
Frequency economy figure	3	3
Number of network occurrences in the mobile field	10	10
Up front licence payment from the applicant	14	11
Solvency	7.5	5
IRR	7.5	5
Grand Total	100	100

Both drafts reproduced the note appearing below the weightings table in the Model:

“Note:

Credibility of business plan and the applicant’s approach to market development will be covered by the following indicators: experience of the applicant, market development, solvency and IRR. Quality and viability of technical approach will be covered by the number of cells and the reserve capacity.”

42.52 As apparent from the composite table, different weightings were shown, to those agreed, in the second draft Report for the following seven indicators or sub-indicators:

- (i) Up-front Licence Payment;
- (ii) Competitiveness of an OECD-like GSM 2 Basket;
- (iii) Speed of demographical coverage;
- (iv) Market Penetration Score 1;
- (v) Market Penetration Score 2;

(vi) Solvency;

(vii) IRR.

In commenting on these changes, it is helpful to distinguish between the first two indicators on the one hand, and the last five on the other hand.

42.53 Up-front Licence Fee, was the indicator for the dimension Licence Payment, the sole dimension associated with the fourth-ranked evaluation criterion. Competitiveness of an OECD-like GSM 2 Basket was the sole indicator for the dimension Tariffs, which was associated with the third-ranked evaluation criterion. The weightings of 14 and 15 contained in the weightings table, as comprised in the first draft Report, were the weightings adopted by the Project Group on 9th June, but were varied by agreement following the capping of the licence fee payment at £15 million, in consequence of the compromise agreed with the European Commission. As has already been referred to in some detail in Chapter 15, Ms. Nic Lochlainn had very carefully documented, by means of a written procedure, the agreement of all members of the Project Group to an adjustment to those weightings, by a three point reduction to the Licence Fee weighting, and a corresponding three point increment to the Tariffs weighting, in advance of the deferred closing date of 4th August, 1995. In consequence, the revised weightings for those indicators were 11 for Licence Payment, and 18 for Tariffs, and it was that express and documented variation which necessitated those two corrections to the weightings table as between the first and second draft Reports. Although it might have been preferable to address the variation of those two weightings in the context of Appendix 3 by means of an addendum to the Evaluation Model, rather than an unexplained alteration to the historical record, that is a matter of approach and presentation, rather than one of substance. Moreover, the methodology appendix, Appendix 2, had recorded the agreement of the Project Group to the revision of the quantitative weightings for the Licence Fee and Tariff dimensions, by the 3% weighting shift from the former to the latter.

42.54 The third of the weightings altered in the table comprised in Appendix 3 was the weighting for the indicator Speed and Extent of Demographical Coverage of Class IV (2W) Handheld Terminals, the sole indicator for the dimension Coverage in the quantitative evaluation. In both the Evaluation Model of 8th June, 1995, and in Appendix 3 to the first draft Report, this was shown as having a weighting of 7.5. In Appendix 3 to the second draft Report, this was altered to 7. It will be recalled that Ms. Nic Lochlainn's note to file of 31st May, 1995, recorded that the Project Group had agreed a weighting of 7 for the paragraph 19 criterion relating to coverage, of which this was the sole indicator. By reason of what was clearly no more than a mistake on the part of AMI, a

weighting of 7.5 was inserted into the Evaluation Model, and this was corrected in the weightings table.

42.55 The last four weightings altered in the table in the second draft were those for the sub-indicators which defined two of the dimensions of the first-ranked evaluation criterion. As illustrated in the composite table, the quantitative weightings contained in the Evaluation Model were 7.5 for Market Development, comprising 3.75 each for the two Market Penetration Scores, 15 for Financial Key Figures, comprising 7.5 each for Solvency and for IRR, and 10 for Experience of Applicant. The weightings of the sub-indicators for two of these indicators were altered in Appendix 3 of the second draft Report to show equal weightings for the three dimensions. Market Development was increased to 10, comprising 5 each for the Market Penetration scores; Financial Key Figures was reduced to 10, also comprising 5 each for Solvency and IRR; and Experience of Applicant remained at 10.

42.56 As has already been detailed, Tables 17 and 18, the results tables, presented the output of the qualitative process by reference to the evaluation criteria, and also sought to demonstrate the application of the quantitative weightings to the grades in Table 17, and to the grades converted to numerical scores in Table 18. What was shown in Table 17 and 18 were equal weightings of 10/10/10 for the three dimensions of the first-ranked criterion, rather than the unequal weightings of 7.5/15/10 prescribed by the Evaluation Model. Mr. Towey explained in his evidence, outlined in some considerable detail in Chapter 31, that in Copenhagen on the 28th September, 1995, when he, Mr. Brennan and the AMI representatives went about applying their collective judgment in constructing Table 17, they decided that the dimensions should be treated equally for qualitative purposes, and for that reason they should have equivalent weightings. This is not what was stated in the draft Report: on the contrary, what was stated was that Table 17 and 18 represented the application of the quantitative weightings, and it was emphasised that those weightings had been agreed prior to the closing date. Had the weightings table in Appendix 3 not been altered, the incongruity between that statement in the body of the Report, and the weightings in the Evaluation Model, as contained in Appendix 3, would have been apparent to anybody making a reasonably close study of the Report, and could well have undermined confidence in both the fairness of the process and the reliability of the result. However, in consequence of the alteration and reconstruction of the weightings table in the Evaluation Model, as presented in Appendix 3, anybody who checked the table would believe that the weightings applied in Table 17 and 18 were verifiably those selected by the Project Group, in advance of the closing date of the competition.

42.57 Departmental witnesses expressed their shock at this alteration of the weightings in the Evaluation Model, testified that they had no knowledge of it, and that they were unaware of it until brought to their attention by the Tribunal. In the case of at least some members of the Project Group, this is understandable, as it seems that the distribution of the second draft Report following its receipt may not, initially, have included copies of appendices. Mr. Towey testified that, although he had no recall of reviewing Appendix 3, he believed that he would have read it but, as he understood that it reproduced the Evaluation Model, he may not have considered it that deeply. There is nothing in the documentary evidence to suggest that the Development Division officials, who were the officials liaising with AMI in connection with the second draft Report, were the source of or proposed this alteration.

42.58 Mr. Andersen, when he attended to give evidence, accepted that the alteration, as between the first and second draft Reports, had been made by AMI. His evidence as to his view that the weightings of 7.5, 15 and 10 as recorded in the Evaluation Model of 8th June, 1995, were incorrect, as they did not sum up to 30, the agreed criterion weighting, and that it had somehow at some point been agreed that the weightings should revert to equivalent weightings of 10 each, even though there was no trace of any advice to that effect from AMI, no record of any written procedure varying those weightings either prior or subsequent to the closing date, and there was no Project Group meeting after 9th June, 1995, at which that decision could have been taken, has already been outlined. Mr. Andersen's regret that there was no audit trail, and his "*struggle*" with his recollection, has also been reviewed. His further evidence, that these weightings were not the agreed weightings for the "*holistic*" evaluation, was inconsistent with his own account, set forth in AMI's first draft Report, that the weightings applied in Table 17 and 18 to the qualitative results were the quantitative weightings agreed prior to the closing date of the competition. Mr. Andersen's evidence on the alteration of the weightings table was unsatisfactory, as was his evidence that Ms. Nic Lochlainn's fax of 6th October, 1995, which made no reference whatsoever to these weightings, was to his mind tantamount to an instruction to AMI that the table of agreed quantitative weightings in the Evaluation Model should be altered.

42.59 What Mr. Andersen found himself entirely unable to account for was why Appendix 2, which had explained carefully the written procedure whereby the Project Group, consequent on the capping of the Licence Fee, had agreed to a 3% shift in weighting from the Licence Fee dimension to the Tariffs dimension, omitted any reference to or explanation for the alteration in the weightings for the other dimensions, as shown in the weightings table. When put to him that the effect of the alteration was to misrepresent the weightings for these dimensions

as shown in Table 17 and 18, as the weightings agreed for quantitative purposes, Mr. Andersen's response was that he could see the "*challenge*" being put to him, but he also regarded himself as equally challenged, as no separate quantitative results were ever produced, and according to his recollection, the weightings issue had never been queried, and he was unaware of the issues recorded in contemporaneous documents.

42.60 Mr. Andersen provided no cogent explanation for the alteration of the weightings table in the Evaluation Model, as purportedly reproduced in Appendix 3. His evidence was no more satisfactory than his evidence on the application of equivalent weightings to those dimensions in Copenhagen on 28th September, 1995, a meeting of which he had no recollection. His account of Ms. Nic Lochlainn's fax of 6th October, 1995, as having to his mind constituted an instruction to AMI to alter the quantitative weightings table in the Evaluation Model, was one which does not withstand even the most superficial scrutiny.

42.61 The result of the alteration to the weightings table in the Evaluation Model, as reproduced in Appendix 3, was the falsification of the historical record, and the consequence of that falsification was to represent the weightings for the dimensions of the first-ranked criterion, as shown in Table 17 and 18, and as explained in the accompanying text, as being consistent with the weightings prescribed for quantitative purposes in the Evaluation Model. If the necessity to alter these weightings had arisen from some error or oversight, that could easily have been explained in Appendix 2.

42.62 It is important in this regard not to lose sight of the impact that the use of equal 10/10/10 weightings might have had on the overall ranking which emerged. It will be remembered that Mr. Towey in his evidence explained how he believed that the Copenhagen meeting went about the task of separating A5, Esat Digifone and A3, Persona, in the course of constructing Table 17. A cornerstone of that exercise was the assumption that Esat Digifone and Persona ranked equally for the first, and by far the most important, criterion. That assumption rested on the utilisation of equal weightings for the three constituent dimensions, and that assumption could not have been made, had the relative weightings contained in the Evaluation Model been utilised. Mr. Towey accepted that, if those weightings had been applied in Copenhagen, it would have been exceedingly difficult to separate A5, Esat Digifone, and A3, Persona, by the process which he had described in his evidence. Lest it be thought that the matter has been overlooked, it should be observed that Mr. Andersen's notion of the impact of confidence factors in the aggregation of marks was not seemingly a consideration with which Mr. Towey had any familiarity. As will become apparent in due course, this issue of the relative weighting of these three

dimensions continued to trouble members of the Project Group in the closing days of the process.

APPENDIX 10 – SUPPLEMENTAL ANALYSIS ON FINANCIAL RISKS

42.63 Significant revisions were also made to Appendix 10 of the second draft Report which, as will be recalled, contained an exposition of the supplemental analysis conducted by AMI into the risks attendant on the financial shortcomings of both A5, Esat Digifone, and A3, Persona, consequent on the finances of Communicorp and Sigma respectively, and which were necessitated by virtue of the fact that they did:

“not have the capital required to finance the GSM-2 network.”

A copy of [Appendix 10](#) to the second draft Report can be found in the Book of Appendices to this Volume.

42.64 Both the appendix and its contents had featured prominently in discussions of the Project Group at the meeting of 9th October, 1995. Ms. O’Keeffe’s contemporaneous notes recorded that Mr. Brennan had informed the Group, in the course of his introductory remarks on that occasion, that *“full discussion needed”* of Appendix 10, and in that context he had informed the meeting further that:

“Minister does not want the report to undermine itself e.g. either a project is bankable.

Should be balanced arguments.”

42.65 At a much later stage of proceedings at that meeting, discussion of the topic of financial risk had been returned to, and Ms. O’Keeffe recorded the following exchange:

“No doubt that A5 will survive.

A3 have agreement that if one shareholder does not come up the others will pay.

Put in requirements in licence conditions.

If things don’t go as planned a lot more expenditure may be required.

Problem not unique to anyone.

More balanced statement. The project will survive, no one consortium is weak in itself. Each member of consortium brings different elements.”

This extract has already been quoted and commented upon in Chapter 37 in connection with the 9th October, 1995 meeting, and it is sufficient at this juncture to observe that what was seemingly called for, in terms of the treatment of financial risks, was a more balanced approach to the material, and a recognition that financial problems were not unique to any one consortium. What Mr. Andersen's evidence brought into focus was that the comments recorded were directed to consideration of financial capability in the context of the paragraph 19 precondition.

42.66 It was Mr. Jon Brüel of AMI who had conducted the supplemental financial analysis, and who had been responsible for drafting Appendix 10. Mr. Michael Andersen, although lead AMI consultant, had little familiarity with its contents. The attendance of Mr. Andersen and Mr. Brüel at the meeting of 9th October, 1995, was delayed, and whilst they may not have been present for the earlier discussion, of which Mr. Andersen had no recollection, they were undoubtedly present for the latter discussion, as Appendix 10 was substantially revised, and those revisions were self-evidently made in response to the observations recorded by Ms. O'Keeffe. Whilst Mr. Andersen did not recall being informed of the IIU underwriting letter, Mr. Brennan, who the Tribunal is satisfied must have been the source of the statement

"No doubt that A5 will survive",

did know that Communicorp's equity funding was also underwritten by IIU.

42.67 It is apparent from the second draft Report that the approach outlined in the extracts quoted above was implemented, and resulted in material changes to both the scope and content of Appendix 10. With regard to scope, the first draft Report had detailed the analysis conducted in relation to the two top-ranked consortia, A3, Persona, and A5, Esat Digifone, and in particular in respect of their financially vulnerable shareholders, Communicorp and Sigma. The introductory section of the first draft stated that A1, A2, A4 and A6 had been excluded from the risk analysis, as A1 had been awarded the highest marks for Financial Aspects and was *"not seen as a risk"*, and the remaining three consortia were the lowest-ranked applicants, and were not considered to be in contention.

42.68 In the second draft, the scope of the analysis had been broadened to include those four consortia earlier excluded. Two additional sub-sections were inserted, one headed *"Brief assessment of A2, A4 and A6"*, and the other *"Assessment of A1"*. Whilst some risks were identified in the case of A2, it was stated that financial risks were not envisaged in the cases of either A4 or A6.

The second new sub-section contained a much fuller analysis of the finances of A1, Irish Mobicall, which, according to the first draft, had not been judged to carry any financial risks whatsoever. In the second draft, it was postulated that in certain “*unrealistic*” circumstances, there could be a 40% increase in the capital requirement over that projected in A1’s business case. Although acknowledged that Detecon, a 20% shareholder in the consortium, had equity capital of £77 million, which was 50% of the worst case total equity commitment, it was stated that the burden on Detecon might be “*too big*”, even though it was recorded that Detecon had not been assessed as an investor that might not be able to cover its commitments.

42.69 With regard to content, whilst a number of minor changes had been made to the presentation of the material contained in the appendix, a significant substantive revision had been made to the financial risk analysis of A5, Esat Digifone. In order to explain that revision, and its impact on the material, it is necessary to recap briefly on the methodology of the analysis presented by AMI in the first draft Report. It will be recalled that in assessing the ability of Sigma and Communicorp to meet their respective capital commitments, AMI had not confined their calculations of capital requirements to the equity projections contained in the applicants’ business cases, but had extended that analysis to an estimated worst case scenario. For Persona, where Sigma’s shareholding was fixed at 26.7%, AMI had estimated that Sigma’s equity commitment based on the business case projections was £10.649 million, and on a worst case estimate was £21.298 million. In arriving at the worst case commitment, AMI had applied a multiplier of 2, on the assumption that the need for finance could be doubled.

42.70 That assumption, according to the first draft, was based on cash flow sensitivity figures extracted from A3, Persona’s mandatory tables, which were stated to increase from minus £102 million to minus £255 million, in the event of a two year delay in subscriber uptake. Due to an error on the part of AMI, that analysis was flawed. The Tribunal is satisfied that the negative cash flow figures used in the calculation were incorrect, having been extracted from the mandatory tables submitted by A4, Irish Cellular, whose figures represented the worst such figures submitted by any of the six applicants, rather than from the figures submitted by A3, Persona. If the correct figures had been used, the multiplier for A3, Persona, would have been in the region of 1.4, and their worst case exposure would have been approximately £14.9 million, as opposed to £21.298 million. Although it is clear that considerable further work was undertaken on the financial risk analysis by AMI between the Project Group meeting of 9th October, 1995, and the finalisation of the second draft Report on 18th October, 1995, that error was not seemingly identified, and was at all events not corrected.

42.71 In the first draft Appendix 10, the same multiplier of 2 had been used by Mr. Brüel in estimating the worst case equity requirement for A5, Esat Digifone, although there was nothing in that draft to suggest that the multiplier had arisen from a cash flow sensitivity analysis, equivalent to that used for A3, Persona. The first draft had merely proceeded on the assumption that a factor of 2 should be utilised.

42.72 On the basis of the workings as shown in the first draft, Communicorp’s maximum exposure, as a 50% shareholder, in a base case scenario was £26 million, and in a worst case scenario, applying a multiplier of 2, was £52 million. This analysis was significantly revised in the second draft, as on this occasion Mr. Brüel had grounded his workings on Esat Digifone’s cash flow sensitivity figures. Having noted that the minimum accumulated cash flow increased from minus £108 million to minus £156 million in the event of a two year delay in subscriber uptake, it was stated that the need for finance could be 50% higher, and a multiplier of 1.5, rather than 2, was used.

42.73 By reducing the multiplier from 2 to 1.5 in the second draft, Communicorp’s figure for the worst case equity exposure had been reduced from £52 million to £39 million. The table below contains the estimated worst case equity figures for Communicorp, as shown in Appendix 10 of the first and second draft Reports:

COMMUNICORP SHAREHOLDINGS	ESTIMATED WORST CASE EQUITY FIRST DRAFT REPORT	ESTIMATED WORST CASE EQUITY SECOND DRAFT REPORT
34%	£35.360 million	£26.520 million
40%	£41.6 million	£31.2 million
50%	£52 million	£39 million

42.74 Appendix 10, according to Mr. Andersen, reflected supplemental analysis undertaken at the instance of AMI, arising from their misgivings surrounding the finances of Communicorp and Sigma as financially frail members of the two leading consortia. The necessity for this analysis had been identified by AMI at the post-presentation Project Group meeting of 14th September, 1995, and its purpose was directed, not to the evaluation of Financial Key Figures as a dimension, but to the paragraph 19 precondition of financial capability.

42.75 What is clear is that, as regards A3, Persona, the analysis was flawed, as incorrect figures had been used in assuming that there could be a need for twice the base case capital requirement. That error had been made prior to the generation of the first draft Appendix 10 of 3rd October, 1995. Although the risk

analysis of A5, Esat Digifone, had been revisited, and the scope and presentation of the appendix had been revised, in response to discussion at the Project Group meeting of 9th October, 1995, the significant error made by AMI in relation to the A3, Persona, analysis was not seemingly identified, was not corrected, and was carried through to the final version of the Evaluation Report.

42.76 The risk analysis for A5, Esat Digifone, was the object of fundamental revision. Whether that revision was or was not warranted is unclear, as there was nothing in the first draft version of the appendix to indicate that Mr. Brüel's initial workings, and his assumption that twice the base case capital requirement might be needed, had arisen from cash flow sensitivity figures. What is clear however, is that if the revision of the analysis for A5, Esat Digifone, as between the first and second draft Reports was correct, it was, in common with the analysis of A3, Persona, incorrect in the first draft, as no new information, as far as the Tribunal is aware, was brought to the attention of AMI between 3rd October, 1995, the date of the first draft, and 18th October, 1995, the date of the second draft.

42.77 It seems incontrovertible from the documentary trail that the expansion of Appendix 10 to embrace A1, A2, A4 and A6, excluded for good reason from the first draft, was made in response to the proposition advanced at the Project Group meeting of 9th October, 1995, that financial problems were "*not unique to anyone*". Likewise, it seems unlikely that AMI's reworking of the figures for the worst case equity exposure of Communicorp, whether these were warranted or not, was unconnected with Mr. Michael Lowry's view that the Report should not "*undermine itself*", in the context of Appendix 10, as recorded in Ms. O'Keeffe's contemporaneous note, and that there was "*no doubt that A5 will survive.*"

MR SEAN FITZGERALD'S REVIEW OF THE SECOND DRAFT AND HIS OTHER THOUGHTS

43.01 Both Mr. Martin Brennan and Mr. Sean Fitzgerald, Assistant Secretary, testified that Mr. Brennan made a copy of the second draft Report available to Mr. Fitzgerald for what was described as an outside view. From the volume of paperwork generated by Mr. Fitzgerald, it is clear that he devoted considerable time and energy to that exercise. In addition to a close reading of the draft Report and appendices, Mr. Fitzgerald also sought to verify the results tables by his own set of workings. He further prepared a lengthy handwritten document, which he headed “NOTE”, characterised by him in evidence as an aide memoire, for his personal use. All of these documents were available to the Tribunal, and were of assistance both as a contemporaneous record of Mr. Fitzgerald's thinking, and as a stimulus to his memory of events.

43.02 Mr. Fitzgerald did not come to the draft Report without prior knowledge of the provisional ranking as recorded in it. As will be recalled, Mr. Brennan had a much earlier interaction with Mr. Fitzgerald when he informed Mr. Fitzgerald that Esat Digifone was emerging as a likely front runner in the process. On receipt of that news, Mr. Fitzgerald had conveyed to Mr. Brennan his concerns surrounding the financial frailty of Communicorp, of which he had anecdotal evidence, through his dealings with Communicorp's subsidiary, Esat Telecom, on the fixed-line side of the Telecommunications Divisions. He had cautioned Mr. Brennan at the time of their earlier discussion that, if Esat Digifone was to be the winning applicant, the result of the Project Group would have to be well-founded, as he anticipated that such a result would be controversial. Mr. Fitzgerald also testified that he was aware that Mr. Sean McMahon had also shared his misgivings surrounding the finances of Communicorp.

43.03 Whilst the evidence suggested that Mr. Fitzgerald's involvement at this point was a matter of course, and was prompted by nothing more significant than Mr. Brennan's desire for the views of an outside observer, with the benefit of a review of the entire of the documentation in evidence, and the entire of the testimony of all witnesses, it seems to the Tribunal that Mr. Fitzgerald's role may have also arisen in response to tensions between the Development Division and the Regulatory Division, evident from the meeting of 9th October, 1995, and which no doubt became more pronounced as the meeting of 23rd October, 1995, approached. By the time the second draft Report was received on 19th October, 1995, Mr. McMahon and Mr. Ed O'Callaghan must have realised that no further evaluation work had been undertaken. They were also aware that the final Project Group meeting had been scheduled for Monday, 23rd October, and likewise that Mr. Michael Lowry planned to bring a recommendation to

Government on the following Tuesday, 24th October, 1995. Mr. O’Callaghan had been so informed by Mr. Towey on 17th October, and had so noted in his chronology. Both Mr. Fitzgerald and Mr. McMahon agreed that they were each aware that the other shared their concerns over Communicorp, and it seems to the Tribunal unlikely that Mr. Fitzgerald’s work was undertaken otherwise than in the context of the conflicting views within the Project Group, and in particular between his two principal officers, Mr. Brennan and Mr. McMahon.

THE MARGINAL NOTES AND VERIFICATIONS MADE BY MR. FITZGERALD ON HIS COPY OF THE SECOND DRAFT REPORT

43.04 Whilst it was evident from Mr. Fitzgerald’s annotations, and was confirmed by him in evidence, that he read through the entire body of the draft Report and appendices, he reserved his closest scrutiny for the final sections, and in particular the results tables, and narrative passages contained in the latter sections. The following are details of the principal observations recorded in Mr. Fitzgerald’s marginal notes, and confirmed by him in evidence.

Results as shown in Table 16

43.05 Table 16, which was the Aspects table, recorded the following totals:

	A1	A2	A3	A4	A5	A6
GRAND TOTAL	B	D	B	B/C	A/B	C

In his copy of the second draft, Mr. Fitzgerald had placed a bracket around the ranking of A5 and A3 in first and second position respectively, and had written the words “very close”. He had also placed a question mark beside the statement in the narrative passage appearing immediately below, which recorded that “*The difference between A5 and A3 is approximately the same as the difference between A3 and A1*”. He testified that these notes signified that he had concluded that there was very little separating the two top-ranked applicants, and that he disagreed with the statement that the difference between A5 and A3 was approximately the same as the difference between A3 and A1, as it was apparent to him from the results shown in Table 16 that, whilst A5 and A3 were “very close”, the separation between A3 and A1 was clear enough.

43.06 Mr. Fitzgerald had also made jottings below the totals in Table 16 for A1, A3 and A5. In the case of A1, he had written “A, B, 2C”, reflecting the sub-totals for the four Aspects; in the case of A3, he had written “1A, 3B”; and in the case of A5, he had written “1.½ A, 2.½ B”. In collating the grades in this manner, Mr. Fitzgerald testified that he thought he had been endeavouring to

understand how the total grades had been achieved, as the draft Report contained no such explanation.

Results based on Sensitivities, Risks and Credibility

43.07 As regards the second sub-section, which contained a narrative description of the results based on business case sensitivities, risks and credibility, and which, although stating that they had not been scored, nonetheless nominated a ranking of A5, A3 and A1, Mr. Fitzgerald had written “Where is back up”. He testified that it was the absence of any information in the sub-section as to how that ranking had been achieved that prompted him to make that note, and he thought that he would have asked Mr. Brennan for information to justify the ranking.

Results as shown in Table 17

43.08 Table 17, presented the same results as Table 16, but with the dimensions regrouped to reflect the evaluation criteria, and with the addition of numerical weightings, including the equal 10/10/10 weightings for the three dimensions of the first evaluation criterion, and which gave the following grand totals:

	A1	A2	A3	A4	A5	A6
GRAND TOTAL	B↓	C↓	B	B↓	B↑	C↑

Mr. Fitzgerald had again written “very close” beside the ranking of A5 and A3 in first and second position respectively. He agreed in evidence that this signified that he had continued to hold the view that the difference between them was slight.

43.09 In the course of his consideration of Table 17, Mr. Fitzgerald undertook an exercise of verifying the grand totals as shown above, and he recorded that exercise by jottings on Table 17 in the draft copy with which he had been provided. What he did was to convert the lettered grades to numbers, so that each A became 5, each B became 4, each C became 3, each D became 2, and each E became 1. He wrote the numerical equivalents beside each of the individual dimension grades in Table 17 for A3 and A5, and he then totalled those individual scores to arrive at a numerical grand score of 87 for A5, and 83 for A3. Whilst he seemingly commenced the same exercise for A1, he did not proceed with it to completion. Mr. Fitzgerald agreed that in that exercise, he had to some extent anticipated Table 18, and he also agreed that, if his total numerical scores of 87 for A5, and 83 for A3, were converted back to letters, each would result in a B grade.

Results as shown in Table 18

43.10 Table 18 was the same as Table 17 save that it showed the results in the form of numerical scores rather than lettered grades, and gave the following grand totals:

	A1	A2	A3	A4	A5	A6
SCORING (POINTS)	362	268	410	353	432	347

Mr. Fitzgerald had also conducted a verifying exercise for A1, A3 and A5, and in this instance had recorded his computations in separate working papers. In that exercise he had applied the weightings as shown in Table 17 and 18 to the numerical scores, and he had verified that the total scores, as shown in Table 18, were correct. Mr. Fitzgerald testified that he had no knowledge of the numerical weightings selected by the Project Group until he had sight of the second draft Report, and he would not have known that the equal 10/10/10 weightings for the three dimensions of the first evaluation criterion were not the weightings which had been approved by the Project Group at the outset.

Results as explained in final narrative

43.11 As regards the final sub-section entitled “A last comparison of the best applications”, which contained the narrative presentation of the results, Mr. Fitzgerald had noted his view that:

“This is more persuasive than the Tables.”

He had also highlighted the passages of the text which explained the distinction in the underlying philosophies of A5 and A3, and which described the philosophy of A5 as market leadership, and that of A3 as cost leadership, and he had focused on and emphasised the passage which suggested that A5 was only “a fraction” behind A3 on the Tariffs criterion, even though there was a full grade in the difference between their marks.

43.12 Mr. Fitzgerald testified that it was the narrative presentation of the results, rather than the actual results as shown in Table 16, Table 17 and Table 18, which he had found persuasive. He agreed that in noting beside the tables that A5 and A3 were “very close”, what he had meant was that they were roughly the same. Moreover, he testified that it was his view that, had the result been based solely on Table 18, which presented the grades numerically, the result might not have been “as well-founded as it should be”, in view of AMI’s caution regarding the distorting effect of presenting the result of a qualitative evaluation

in the form of a quantitative numerical score. It was the narrative presentation of the material that he found persuasive, and which, according to his evidence, satisfied him that the result was correct. What he did not know, nor could he have known, was that the manner in which the material was presented in that sub-section was less than entirely balanced, and that certain portions of the text, both in terms of what was included, and what was omitted, had elements of inaccuracy. Furthermore, Mr. Fitzgerald, having not had sight of the first draft Report, or the comments on the first draft forwarded by the Development Division to AMI on the previous Friday, 13th October, 1995, would not have been aware that revisions had been made to that sub-section which suggested that, where A3 and A5 had been ranked equally in the evaluation, A5 was in a superior position. Nor was Mr. Fitzgerald aware that there was any doubt over the equal ranking of A3 and A5 on the first and by far the most significant criterion of the evaluation, whether by reason of the weightings applied, or the accountants' views that A5's mark for one of the three dimensions of that criterion should be reduced from B to C.

The finances of Esat Digifone

43.13 Mr. Fitzgerald had also made a close study of the portions of the draft Report relating to the financial elements of the evaluation. It was apparent from the manuscript entries made by him that he had noted that the Communicorp element of A5, Esat Digifone, had negative equity, and that the consortium had three years of projected negative solvency. In that regard, he had also focused on the section of the draft Report which addressed sensitivities, risks and credibility factors, and he had highlighted the passage which stated:

“Although being assessed as the most credible application, it is suggested to demand an increased degree of liability and self-financing from the backers, if the Minister intends to enter licence negotiations with A5”.

Mr. Fitzgerald confirmed in evidence that it came as no surprise to him that Communicorp did not have the capital required to finance the second GSM network. The finances of Esat Digifone, and in particular the Communicorp element of the consortium, had been a matter of serious concern to him from when he first learned that Esat Digifone was emerging as a front runner in the process.

43.14 Having scrutinised the draft Report, it was his view that in recommending A5, Esat Digifone, as the first ranked applicant, there was “a very strong rider” that the financial problems of Esat Digifone remained, and would

need to be addressed in the course of licence negotiations. He also recognised that the financial strength of Telenor, whilst it might ensure the financial viability of Esat Digifone and of the second GSM network, would not and could not secure the stability of the shareholding in Esat Digifone, which was inherently unstable as a result of Communicorp's financial frailty. Nor, in his view, could that end be achieved by any other underpinning of a financial nature.

43.15 Mr. Fitzgerald very much regretted that, when a recommendation that Esat Digifone should be nominated as winner of the competitive process was ultimately made to the party leaders and to Government, the rider surrounding the finances of Esat Digifone had not been highlighted, and that the Cabinet Sub-Committee and Government had not been made aware of the “*health warning*” surrounding the finances of the consortium as registered in the draft Report by AMI.

MR. FITZGERALD'S NOTE

43.16 The Departmental files available to the Tribunal included a lengthy manuscript document in Mr. Fitzgerald's handwriting entitled “[*The GSM Award and Regulation of Competition*](#)”, a copy of which can be found in the Book of Appendices to this Volume. Before recounting the contents of that document, and Mr. Fitzgerald's evidence to the Tribunal in that regard, it is necessary to digress briefly, to outline Esat Telecom's activities in the fixed-line telecommunications sector, and how those activities had impacted on the regulation of competition.

43.17 In 1995, at the time of the evaluation process, Esat Telecom, a subsidiary of Communicorp, held what was known as a VAS licence, issued by the Department. The licence permitted Esat Telecom to provide non-voice telecommunications services to the public through its use of private lines leased from Telecom Éireann. The provision of these VAS licences was part of a move towards liberalisation of the telecommunications sector, which had formerly, by law, been reserved exclusively to Telecom Éireann. A derogation from full liberalisation had been secured by the Government from the European Commission until January, 2000, in respect of voice telephony and infrastructure.

43.18 The purpose of that derogation was to provide for an orderly transition to full competition by Telecom Éireann in the market for voice telephony, and in particular in what was then the highly profitable international calls market. As of October, 1995, the derogation had slightly more than four years to run, and the Department was in the process of seeking to secure a strategic partner for Telecom Éireann to take a 35% shareholding in the company. In these

circumstances, the Telecommunications Section of the Department, as agent of the Minister, had dual functions and objectives. As ultimate shareholder in Telecom Éireann, as representative of the State, the Department had, on behalf of the Minister, a clear interest in protecting Telecom Éireann's privileged position, whilst as de facto regulator, through the Regulatory Division, it had to provide for and regulate competition to Telecom Éireann in the emerging market in a fair and even-handed manner.

43.19 The problem which had arisen, and which taxed Mr. Fitzgerald and the Regulatory Division, was that Esat Telecom, by using devices known as auto-diallers and routers were, in the Department's view, operating illegally by connecting customers, not over their private leased-lines, but over the public network, the exclusive privilege of Telecom Éireann, and which activity was regarded as a breach by Esat Telecom of its VAS licence. Although recognising that there were obstacles to enforcement, it was the view of Mr. Fitzgerald and the Regulatory Division that the law was not being upheld, that the regulatory process was being shown to be ineffective, and that significant damage, through lost revenue, was being caused to Telecom Éireann.

43.20 It was in this context that Mr. Fitzgerald prepared his document, which contained what was self-evidently a carefully constructed and considered analysis of the consequences of Esat Digifone being awarded the GSM licence, and the imperatives which to his mind would flow from that decision. Mr. Fitzgerald testified that his intention in preparing the document was to outline the implications and repercussions of an award of the licence to Esat Digifone, in terms of the regulation of Esat Telecom's use of its VAS licence.

43.21 The document contained two sections, the first of which was entitled "*Present Position*", and which was divided into six numbered paragraphs. In the initial three paragraphs, Mr. Fitzgerald described the activities of Esat Telecom, the Division's views as to the illegality of those activities, and the Division's concerns surrounding the absence of enforcement, and the consequential impact on Telecom Éireann. In the final three paragraphs, Mr. Fitzgerald listed the implications, as he saw them, of the GSM licence being awarded to Esat Digifone. His concerns, as apparent from the contents of his document, and as confirmed by him in evidence, were three-fold.

43.22 Firstly, he considered that, if the winning consortium included Esat Telecom, which was "*perceived to be immune from any regulatory action up to now, it will strain credibility in the process*", this would increase the potential for non-licensed activity. Mr. Fitzgerald's difficulty, as apparent from the contents of his document, related to the fact that Esat Digifone would be entitled, under the

terms of the GSM licence, to construct its own telecommunications infrastructural network, which, until 1st January, 2000, would be limited to use for mobile services. He regarded it as doubtful that its use would be so restricted, and he addressed the matter by posing a rhetorical question in the following terms:

“Is it credible that without strong regulatory enforcement that licence restrictions would be complied with?”

43.23 His second concern was that an award of the licence to a consortium including Communicorp would:

“...without concurrent action on leased lines & regulatory enforcement will be seen by the Company Management & Unions as consolidating ESAT’s position as a formidable competitor in a privileged position with apparent Ministerial and Government backing...”

In evidence, Mr. Fitzgerald testified that what he had stated was not necessarily his own view, but it was certainly the perception of Telecom Éireann management and unions that Esat Telecom was favoured by Mr. Michael Lowry, and by Government, and to his mind it was vital that a statement of intention should be made that the regulatory process would be implemented.

43.24 The final matter of concern identified by Mr. Fitzgerald was the detrimental impact that a failure to enforce licence conditions strictly, thereby protecting Telecom Éireann’s exclusive privilege, might have on the value of Telecom Éireann, and its prospects of securing a strategic partner.

43.25 The second portion of Mr. Fitzgerald’s document was headed “Action Needed”, and having recited that “*The outcome of GSM competitive process must be respected*”, he prescribed the course of action which, in his view, was required to be taken. He formulated a two-pronged approach, involving in the first instance a public announcement by the Department that the regulatory system would be enforced, and secondly, a procedure whereby Esat would be asked to indicate how it intended to comply with licence conditions regarding existing and future customers, and in the event of Esat failing to provide a satisfactory response, he recommended that two further steps should be taken, namely:

- (i) legal or operational action to enforce compliance;

- (ii) a review of the desirability of concluding GSM licence negotiations with a consortium, a member of which was not in compliance with existing licence conditions.

In that latter regard, Mr. Fitzgerald noted that the draft Evaluation Report contemplated circumstances in which a failure to reach agreement on licence conditions with the first recommended bidder, A5, Esat Digifone, would allow for opening negotiations with the second recommended bidder, A3, Persona.

43.26 Mr. Fitzgerald was unclear as to when he had prepared this document, although he recognised that it must have been after his review of the second draft Report on Thursday, 19th October, 1995, or possibly on Friday, 20th October, 1995. He did not recall whether he had circulated the document, but he thought it probable that he would have at least spoken about its contents to Mr. Brennan and to Mr. McMahon.

43.27 It is evident from the documentary trail that, at some point prior to the Government Decision of the following Thursday, 26th October, 1995, retrospectively noting a decision made the previous day with the approval of the party leaders, and announced later that day, much of Mr. Fitzgerald's thinking and recommendations, as recorded in his document, were incorporated into the Government Decision, and into the Aide Memoire to Government of the same date.

43.28 The Government Decision of 26th October, 1995, apart from noting the decision already made on the GSM licence, was in the following terms:

“

- (2) *noted that, in the event of failure of the licence negotiation process, the Minister proposed to seek agreement of licence terms with the second and subsequently, if necessary, the third ranked applications;*
- (3) *agreed to the proposal to approve, under Section 90 of the Postal and Telecommunications Services Act, 1983, a range of tariff increases by Telecom Éireann for leased lines, subject to consultation with the Minister for Enterprise and Employment in regard to the future adjustments in these tariffs; and*
- (4) *noted the proposal to enforce strictly the law and regulations concerning the provision of telecommunications services, particularly as they relate to the voice telephony and infrastructure services reserved to Telecom Éireann until January, 2000.”*

43.29 It is unclear when or how Mr. Fitzgerald's views on these matters were conveyed to Mr. Lowry, or when they became an integral part of the announcement of Esat Digifone as the winner of the competitive process. Apart from a meeting on Monday, 23rd October, 1995, when a delegation comprising senior members of the Project Group met with Mr. John Loughrey, in the context of a request by Mr. Sean McMahon that further time be made available to the Project Group to consider the result, in the face of Mr. Lowry's desire to bring a recommendation to Government the following day, at which Mr. Fitzgerald was recorded as having been in attendance, there was no record of any further meetings at which these matters might have been raised. As will become apparent, the available record of that meeting of 23rd October noted references to aspects of the Department's regulatory functions in the fixed-line sector, and it is possible that there was a lengthier discussion at that time. There can be no doubting, and Mr. Fitzgerald accepted, that it was on his initiative that the regulatory issues became part of the Government Decision on the GSM process. Whether further meetings or discussions between Mr. Fitzgerald and Mr. Lowry may have taken place on 24th October, 1995, or indeed on the morning of 25th October, 1995, is unclear, but must be a very real possibility, particularly having regard to the further contents of Mr. O'Callaghan's chronology, to which reference will be made at a later point.

43.30 What is abundantly clear from Mr. Fitzgerald's document, is that his support for the nomination of Esat Digifone as the winning consortium was conditional on the Department being satisfied that Esat Telecom would comply with the conditions attaching to its VAS licence, and that Esat Digifone would comply with the conditions attaching to its prospective GSM licence. Paragraph 2 of the Government Decision of 26th October, 1995, which recorded that, in the event of failure of licence negotiations with Esat Digifone, the Minister proposed to enter negotiations with the second-ranked, and if necessary, the third-ranked applicants, may signify that, in addition to the issue of increased tariffs on leased-lines, and the announcement that there would be strict enforcement of the law and regulations, Mr. Fitzgerald's further views in that regard may also have been accepted. There was however nothing in the evidence heard by the Tribunal, or in the documents to which it had access, which suggested that any requests were ever made of Esat Digifone, as proposed by Mr. Fitzgerald, to satisfy the Department that the infrastructural network they were entitled to construct pursuant to the terms of the GSM licence would be used by them solely for mobile telephony until January, 2000.

43.31 In the course of his Memorandum of Intended Evidence, and of his testimony to the Tribunal, Mr. Fitzgerald described an exchange between himself and Mr. Lowry that took place some time after these events. Although that exchange was not immediately material to the Tribunal's consideration of the

circumstances surrounding the final days of the evaluation process, it was nonetheless of relevance, as it related to the steps taken by the Department to enforce regulation of Mr. O'Brien's fixed-line business, pursuant to the supplemental terms of the Government Decision of 26th October, 1995, which had been initiated by Mr. Fitzgerald.

43.32 Mr. Fitzgerald explained that, on foot of that Government Decision, Mr. Lowry authorised the monitoring of traffic over lines leased to private providers, including Esat Telecom. That monitoring, together with limitation on the provision of additional leased-lines, had been approved by Mr. Lowry as measures to curb suspected unauthorised voice telephony on independent networks.

43.33 Mr. Fitzgerald recalled that on the occasion in question he had gone to Mr. Lowry's office at his request. Mr. O'Brien and his associate, Mr. Leslie Buckley, were with Mr. Lowry discussing regulatory problems concerning Esat Telecom. No official of the Department was present; nor had Mr. Fitzgerald been informed of the meeting in advance. Strong concerns were voiced by Mr. O'Brien, and by Mr. Buckley, that substantial damage would be caused to the business of Esat Telecom if the Department implemented its proposal to limit the availability of further leased-lines, unless monitoring of the nature and volume of traffic on existing lines objectively justified a need for additional capacity. Mr. Fitzgerald testified that, after the meeting concluded, and Mr. O'Brien and Mr. Buckley had left Mr. Lowry's office, Mr. Lowry asked Mr. Fitzgerald *"to go easy on the monitoring"*, as Mr. Fitzgerald put it, of Esat Telecom, and if possible to defer it *"until after Christmas"*.

43.34 At the time, Mr. Fitzgerald had surmised that Mr. Lowry's request was connected with Mr. O'Brien's then prospective fundraising operations. He had thought that Mr. O'Brien's need for additional capacity, through the provision of further leased-lines, was to expand the size of Esat Telecom's private network, and thereby to bolster Mr. O'Brien's prospectus, and enhance his prospects of securing sufficient funding to meet his equity commitments to Esat Digifone. Whilst Mr. Fitzgerald dated that exchange to late-1996, it is clear that he was mistaken, as by then Mr. Lowry was no longer Minister. Mr. Fitzgerald was clear that the exchange had taken place shortly before Christmas, as Mr. Lowry's request to him was to defer the implementation of monitoring until after Christmas. He was equally clear in his then understanding that the purpose of the deferral was to facilitate Mr. O'Brien's fundraising efforts. As Mr. O'Brien's fundraising was completed in June, 1996, it appears to the Tribunal that the exchange in question must have taken place in late-1995, some short time after the announcement of the result of the evaluation process, and in advance of Mr. O'Brien's fundraising activities in the US market.

THE ANNOTATED COPIES OF THE SECOND DRAFT REPORT AND WHAT THEY REVEAL

MR. ED O'CALLAGHAN'S REVIEW

44.01 Mr. Ed O'Callaghan of the Regulatory Division received his copy of the second draft Report on Friday, 20th October, 1995. He had endorsed receipt of it on that date, on the front title page of his copy, and he had also noted the event in his chronology, the relevant extract of which recorded as follows:

“Went to Brussels 18.10. – returned 19.10. Read 2nd draft Report on 20.10. but not appendix...”

It was Mr. O'Callaghan's recollection that he had worked on the draft Report on Friday, 20th October, 1995, but may not have completed his review until early on the following Monday, 23rd October, 1995, in advance of the Project Group meeting scheduled for that day. At the time, he had regarded the draft as another interim Report, and had expected that a further interim Report would follow after it. He was confident that he had met with Mr. Sean McMahon, either during the afternoon of Friday, 20th October, or during the early morning of Monday, 23rd October, 1995, to discuss the document with him.

44.02 It was evident from the manuscript annotations made by Mr. O'Callaghan that he undertook a close study of the contents of the second draft, to which he must have devoted considerable time, particularly as he was unfamiliar with how the process had evolved. It was equally evident that, in addition to a large number of linguistic and grammatical corrections made by him, the passages of the text which he had highlighted, and the notes which he had made, signified he had identified a series of queries regarding the substantive evaluation which had been conducted.

44.03 When Mr. O'Callaghan initially attended to give evidence, it was his testimony that the entire of the work of review undertaken by him was directed exclusively to the presentation of the material comprised in the draft Report. Shortly following the conclusion of his evidence, the Tribunal identified a copy of his working Report within the files of the Regulatory Division, in the possession of the Tribunal, and made that copy available to him, to enable him to consider its contents, and to refresh his memory. When he returned to give further evidence, on a second occasion, with the benefit of his working copy, he recognised that many of the matters he had highlighted did not merely relate to presentation, but rather, reflected his disagreement with, or uncertainty over, judgments made and marks awarded in the evaluation proper. These substantive matters, which

spanned the entire of the draft Report, were raised with Mr. O’Callaghan when he returned to give evidence, and are detailed below, together with a summary of his evidence on that occasion.

Introductory sections

44.04 In a short executive summary at the beginning of the Report proper, Mr. O’Callaghan had drawn a line through the entire of the final paragraph at the foot of the first page, which contained the following text:

“By means of 4 different scoring methods, which all generate the same result, the evaluators have therefore arrived at the conclusion to advise the Minister to enter into licence negotiations with A5. A5 has been nominated by the evaluators as the best application measured against the background of the approved evaluation model, techniques and criteria. If the licence negotiations with A5 cannot be concluded successfully, then licence negotiations should continue with the other ranked applications in descending order.”

Whilst he could not recall his precise reason for wishing to exclude this paragraph in its entirety, he thought it was probable that he was not entirely convinced that four different scoring methods had been used. It was his view that only a single method had been used, and that the further expositions of the results were merely variations on that same theme.

44.05 Mr. O’Callaghan had marked the statement in sub-section 2.4, that:

“A draft report discussed on 9 October has, following the incorporation of comments from the PT GSM, culminated in this final report. As unanimous support was given by the PT GSM to the results of the evaluation, Andersen Management International was requested to submit this final report.”

He had made the following note in the right-hand marginal space beside it:

“Not true for me. I don’t rec the ? being asked.”

Mr. O’Callaghan confirmed in evidence that these annotations reflected his view that the issue of support for the ranking, as reflected in the first draft Report, had not arisen at the Project Group meeting of 9th October, 1995. The purpose of that meeting, as far as he was concerned, had been to offer a first opportunity to members of the Project Group to look at the AMI draft Report. He did not think

that anybody at that meeting had given support to the result on that date, and he certainly had not done so. He explained that what he was also endeavouring to signify was that he did not recall that the question of support had been raised at the meeting of 9th October, 1995.

44.06 Mr. O’Callaghan had also marked passages in Section 3, which was entitled “*Key characteristics of the applications*”, and which described the composition of the six consortia, and outlined AML’s perception of “*the philosophy behind each application*”. In describing the composition of Esat Digifone, including the capital structure of Communicorp, it was stated in that sub-section that:

“A5 will operate as an Irish limited liability company, which has been incorporated in Ireland under the name of Esat Digifone. The participants are two operators, namely Esat who operates in Ireland on the basis of a VAS licence and the Norwegian carrier Telenor. However, Communicorp Group is the shareholding company behind Esat, and 34% of these shares are held by Advent International plc. It is the intention of the applicant to make 20% of the equity available to institutional investors during the period prior to the commercial launch, including a 5% equity stake to Advent International plc. Furthermore, the application states an intention to make 12% available for flotation within three years. It is difficult to state the exact Irish ownership share. Before the flotation, it could as a maximum become 55% and after the flotation it could increase to a maximum of 67%. In practice, the Irish share could turn out to become significantly lower.”

Mr. O’Callaghan had recorded the following comment in the marginal space on the right-hand side of that text:

“What about cash injection of £30m by Advent for equity to bring it to 47% of Communicorp.”

Mr. O’Callaghan testified that what had prompted him to record that observation was his recollection that it had been stated at the Esat Digifone presentation that Advent had made an irrevocable commitment to provide £30 million towards the funding of Esat Digifone, in return for an increase in its shareholding to 47%. In Mr. O’Callaghan’s view, it was self-evident that the envisaged increase in the Advent shareholding would impact on both the share configuration of Communicorp, and on the “*Irish share*” of the consortium.

44.07 At a later point in Section 3, where the “*basic philosophy*” behind the applications was discussed, Mr. O’Callaghan had marked three portions of the text as follows:

- (i) He had placed a squiggle, and an exclamation mark below the word “*modest*” in the following passage:

“A3 does not opt for market leadership measured by the long range market penetration ambitions, as A3 only projects to obtain a modest 45% share of the GSM market.”

- (ii) He had placed a question mark over the word “*fixed*” in the description of Esat Digifone as:

“...the Irish fixed provider...”

- (iii) And, he had placed a bracket and an asterisk beside the statement concerning A5 that:

“The financial plans, however, indicate some weaknesses against the background of market leader ambitions, in particular with a degree of solvency below 0% during some of the decisive initial years.”

44.08 Mr. O’Callaghan testified that he recalled that in making the annotations below the description of A3, Persona’s, projected market penetration, as “*modest*”, he was signifying that he did not concur with that description. He did not consider that a projected market share of 45% for a new entrant, competing against an established incumbent, warranted that description. Whilst he had no recollection of the data then available, he did recall that it was his view that, in those circumstances, a 45% market share would be sizeable. With regard to the description of Esat Telecom as “*the Irish fixed provider*”, Mr. O’Callaghan testified that by placing a question mark above those words, he was signifying that he did not agree that Esat Telecom, which operated solely on foot of a VAS licence, warranted the designation “*fixed provider*” within the full meaning of that term. As regards his marking of the reference to A5, Esat Digifone’s financial weakness, he testified that, in so highlighting that portion of the text, he was signalling his concern regarding Esat Digifone’s finances, in particular in the light of its projected market share. Whilst Mr. O’Callaghan freely acknowledged that he had no more than a layman’s understanding of the principles of accountancy, he nonetheless believed that all members of the Project Group were familiar with terms such as “*solvent*” and “*negative*”

solvency”, and he personally had concerns surrounding the finances of Esat Digifone that he wished to raise.

The comparative evaluation section

44.09 In the course of his review, Mr. O’Callaghan had marked elements of all four elements of the comparative evaluation section.

The Marketing Aspects sub-section

44.10 The very first sentence of this sub-section, which contained the results of the qualitative evaluation of Marketing Aspects, stated that:

“The dimensions of the marketing aspects are identified as market development, coverage, tariffs and international roaming plans.”

This was a source of uncertainty for Mr. O’Callaghan, and prompted him to make the following annotation:

“Were these ranked in S.19 on the basis of importance.”

Connected to that annotation was an insertion made by Mr. O’Callaghan to the text, which followed, and which recorded:

“Clearly, A3 and A5 are the strongest applications on marketing aspects. A5 has the most elaborate approach to market development, the dimension with the highest priority and the highest weight, cf. [paragraph] 19 of the RFP document”.

What Mr. O’Callaghan had inserted were the words “part of” before the words “the dimension”.

44.11 It was also apparent that Mr. O’Callaghan had endeavoured to verify or to ascertain how the sub-totals in Table 1, the Marketing Aspects Table, had been arrived at. That table, including his manuscript entry, is reproduced below.

Marketing Aspects	A1	A2	A3	A4	A5	A6
1. Market development	C	C	B	C	A	C
2. Coverage	B	C	A	C	A	D
3. Tariffs	C	D	B	C	C	A
4. International roaming plan	A	D	C	C	C	C
Marketing aspects (subtotal)	B	C	B	C	A/B	C

C

44.12 Mr. O’Callaghan explained in his evidence that he had doubts about the order in which the four dimensions were presented in that table. It was his

understanding, which was correct, that Tariffs, the sole dimension of the third-ranked criterion was the most significant of the four dimensions comprised in the table. He had noted that the dimensions, as presented in the Report and in the table, were not in the order of importance provided for in paragraph 19, and it was his view that their order in the Report should have correctly reflected their paragraph 19 ranking. Likewise, by inserting the words “*part of*” before the reference to the dimension Market Development, Mr. O’Callaghan testified that he was seeking to correct what he considered to be an error, in that it was clear to him that Market Development was not the sole dimension of the first-ranked criterion, which to his mind was the impression created by the text.

44.13 In entering grade C below the sub-total for A1, Irish Mobicall, Mr. O’Callaghan testified that he assumed that what he was suggesting was that the sub-total grade for A1 could just as well have been C, rather than B. In carrying out that cross-check, Mr. O’Callaghan had assumed that the table had been weighted, but he had no knowledge of what those weightings were, or at what point they had been applied. As regards the total grades, Mr. O’Callaghan agreed that it seemed to him that the A/B sub-total shown for A5, Esat Digifone, for Marketing Aspects could equally have been B.

44.14 It was apparent that in reviewing Section 4.1.1 of the draft, which focused on the evaluation of the Market Development dimension, Mr. O’Callaghan had noted in particular the passages directed to the evaluation of the first indicator, Market Penetration. The draft explained that this indicator had been assessed by reference to the projected number of GSM subscribers in applicants’ own networks over the fourteen years of the business case. The draft stated that:

“Clearly, A5 has the highest long-range market penetration ambitions, whereas A3 quotes more modest projections with less than 70% of the projected subscriber base projected by A5 in year 2009.”

44.15 Mr. O’Callaghan had inserted the phrase “*so what*” in the right-hand marginal space beside the above text. He explained in his evidence that, in doing so, he was again signifying his view that A3, Persona’s Market Penetration projection at 45% was, to his mind, far from “*modest*” for a new entrant against a single incumbent operator. This echoed his earlier concerns over the characterisation of A3’s market ambitions in the context of AMI’s analysis of the philosophies behind the applications. Mr. O’Callaghan was further of the view that the approach which had been used in evaluating this indicator was deficient. Rather than comparing the projections of each applicant against those of other applicants, it seemed to him that it would have been more useful to carry out a comparative evaluation of projections against a benchmark European norm,

which would have measured each applicant's projection against an objective standard.

44.16 Queries had also been recorded by Mr. O'Callaghan in the final sub-section, which presented the results of the qualitative analysis of the dimension International Roaming. The dimension had been evaluated, as will be remembered, by three indicators, the first of which was Understanding of GSM Roaming Issues, for which A3, Persona, had received grade C, and for which A5, Esat Digifone, had received grade B. Overall A3 and A5 had been assessed equally for the dimension, both having received C grades. Mr. O'Callaghan had placed a question mark over Persona's C grade for the indicator, Understanding of GSM Roaming Issues, and had written

"What about arrangements with Telia"

in the right-hand marginal space, beside the text appearing below the table, which stated:

"A5 displays a good level of understanding gained from relevant experience and allows for a time-frame for concluding roaming agreements which has demonstrably turned out to be realistic. A3 also displays good understanding but seems to rely on an extremely tight timeframe in order to conclude roaming agreements."

44.17 Mr. O'Callaghan in his testimony explained that in his view, the evaluation had failed to give sufficient weight to, or had overlooked, the benefit which accrued to A3 from the involvement of Telia, which, through its subsidiary Unisource, was a member of the Persona consortium. Unisource was part of a Europe-wide mobile network with established European roaming agreements, and it seemed to Mr. O'Callaghan that those existing roaming arrangements would have been accessible to A3, and that factor ought to have been taken into account in evaluating the indicator.

The Technical Aspects sub-section

44.18 Whilst a number of annotations had been made by Mr. O'Callaghan to the Technical Aspects sub-section, which presented the results of the assessment of the four dimensions associated with those Aspects, with the exception of one of those annotations, he was uncertain, and could not discern from his workings, what points had caused him concern. It was clear to him, however, that the markings which he had made adjacent to the statement that Esat Digifone's intention to construct new infrastructure was *"slightly less favourable"*, reflected his view that the Report should have stated explicitly that this would delay the roll-out of the A5 network. It was also evident, from his

markings, that he had endeavoured to ascertain how the results tables within the Technical Aspects sub-section had been constructed.

The Management Aspects sub-section

44.19 It was clear from Mr. O’Callaghan’s draft that he had made a close study of the sub-section containing the results of the qualitative evaluation of Management Aspects. It will be recalled that Management Aspects were represented by a single dimension, Experience of Applicant, one of the three dimensions of the first-ranked evaluation criterion. A3, Persona, had been awarded grade A for Management Aspects, reflecting its grade for that dimension, whilst A5, Esat Digifone, had been awarded grade B, likewise reflecting its equivalent grade for that dimension. It was the presentation of the quantitative information on GSM1 and GSM2 experience, representing the results of the quantitative evaluation, which seemed to have taxed Mr. O’Callaghan’s understanding. It will be recalled that, in the first draft, the relevant table showed the conversion from scores in the quantitative evaluation to grades in the qualitative evaluation. A3, Persona’s score of 5.00 was translated to grade A, and A5, Esat Digifone’s score of 0.97 was translated to grade C. As between the first and second drafts, the table comprising the quantitative results had been reduced, and the scores, and all of the entries relating to them, had been deleted.

44.20 As was clear from his markings, it was the contents of that much reduced table which prompted question marks in Mr. O’Callaghan’s mind regarding the quantitative data. He placed a question mark beside the table, and circled the entries for A3 and A5 for two of the indicators. What appears below is an extract from the table showing those entries which Mr. O’Callaghan had circled.

	A3	A5
GSM2 experience occurrences	0	0
GSM1 experience occurrences	4	1
Other cellular network occurrences	5	1
GSM2 experience points	0	0
GSM1 experience points	4	2
Other cellular experience points	4	2

It seems that Mr. O’Callaghan’s query was directed to how such different scores were given for what must have seemed to him to be identical determinants, that is, other cellular network occurrences, and other cellular experience points.

The Financial Aspects sub-section

44.21 The final subsection of Mr. O’Callaghan’s draft, which addressed the results of the evaluation of Financial Aspects, also exhibited a series of annotations, and from their concentration, it seems that it was the results for the evaluation of the Solvency indicator to which his review was primarily directed. He had circled the grade D received by A5 for that indicator, and had underlined and placed an asterisk beside the explanatory text below, stating that:

“A5 has projected 3 years of negative solvency.”

44.22 Mr. O’Callaghan testified that the issue of solvency was one that concerned him, and which he had already noted from the introductory sections of the draft. He believed that he had highlighted this element of the evaluation in order to remind himself to raise it with AML. As will emerge in due course, it seems that this was the single matter which Mr. O’Callaghan believed he had managed to raise with AML, and for which he had received an explanation, and whilst he could not recall precisely what that explanation was, he surmised that he was told that the solvency issue would be attended to in the drawing up of the licence.

The Sensitivities, Risks and Credibility analysis

44.23 Leaving aside corrections made by Mr. O’Callaghan to the text, there were two passages of this narrative section registered as problematic by him, in his copy of the draft Report.

44.24 It will be recalled that the initial passage of this section addressed the financial weakness of A5, Esat Digifone, consequent on the negative equity of Communicorp, and that this portion of the text had been revised as between the first and second drafts, by the insertion of the word “*maybe*”, signalling some tentativeness or uncertainty attaching to the statement. Mr. O’Callaghan had highlighted this portion of the text, and made what appears to have been a connected note three paragraphs below, where it was stated that A3, Persona, had “*a similar type of problem as A5, namely the extremely small equity of Sigma Wireless*”, above which, Mr. O’Callaghan had written:

“but it doesn’t have negative equity.”

44.25 Mr. O’Callaghan explained that these annotations reflected his view that the financial weaknesses of A5 and A3, consequent on the equity of Communicorp and Sigma respectively, were not equivalent. Whilst he recognised that Sigma had an “*extremely small equity*”, what was paramount in his mind was that it did not have the “*negative equity*” of Communicorp. He did not therefore consider that the consequences, in terms of the finances of A3 and A5, were comparable, and he took issue with the use of the terminology “*similar*” in the draft Report.

44.26 Mr. O’Callaghan had also registered his disagreement with the substance of the contents of the following paragraph concerning A3, Persona:

“Furthermore, A3 has expressed so strong reservations concerning the draft licence, which was circulated as part of the tender documents, that the Minister will formally have an unfavourable starting point.”

In the right-hand marginal space beside this text, Mr. O’Callaghan had written:

“this was cleared up at the oral presentation.”

44.27 He testified that in making this note, he was recording his recollection that the issue had been raised and clarified in the course of the Persona oral presentation, and had been resolved to his satisfaction. In making that annotation, he was signalling that he was not at one with the printed text.

The results and recommendation section

44.28 The markings evident in the final section of Mr. O’Callaghan’s copy of the draft Report demonstrated that, in common with Mr. Sean Fitzgerald, he had undertaken a detailed analysis of the results tables. This section of the second draft Report contained the same three tables as the first draft. Table 16, the Aspects table, presented the results of the qualitative evaluation in the form prescribed in the Evaluation Model. Table 17 contained exactly the same results, but with the dimensions regrouped to reflect the descending priority of the paragraph 19 criteria, and also showed what were described as weightings agreed for the quantitative evaluation. Table 18 was identical to Table 17, save that the results had been converted from lettered grades to numerical scores.

44.29 There were annotations to all three tables in Mr. O’Callaghan’s copy of the draft Report, indicating that his analysis entailed a separate scrutiny of each table. In the case of Table 16, the Aspects table, which showed a grand total for A3 of B, and for A5 of A/B, Mr. O’Callaghan had written the quantitative

weightings beside each of the dimensions, in what seems to have been an effort to understand how the table had been constructed, and which reflected his assumption that, in arriving at the grand totals, the quantitative weightings had been applied.

44.30 In the case of Table 17, in which the dimensions were regrouped around the paragraph 19 criteria, and reflecting the descending order of priority of those criteria, and in which A3, Persona, had received a grand total of B, and A5, Esat Digifone, had received a B⁺, it was evident from the separate workings made by Mr. O’Callaghan that he had endeavoured both to understand and to verify those grand totals. A series of annotations had been made by him to the table itself, and a separate set of workings had been recorded by him in a space below that table. In those workings, Mr. O’Callaghan had grouped together the A grades, B grades and C grades received by A3, and by A5, and had combined those grades to arrive at a total. In the case of A3, his workings showed that he had combined four As, four Bs, and three Cs to produce a B total, whilst in the case of A5, he had combined seven As, two Bs, and two Cs to produce a B⁺ total.

44.31 In Table 17 itself, Mr. O’Callaghan had circled and placed an asterisk beside A3, Persona’s B grade, for the dimension Market Development, and C grade for the dimension International Roaming. He testified that by marking those grades, in that manner, he was signifying that he wished to question them, arising from his views on the merits of Persona’s projected market penetration, and on the membership of Unisource in the Persona consortium as it bore on the dimension International Roaming. Mr. O’Callaghan had also placed brackets around the equal weightings of 10 each, shown in Table 17 for the first five dimensions, that is, the three dimensions of the first criterion, and the two dimensions of the second criterion, but was unsure why he had done so, and overall had no recollection of any discussion of the topic of weightings.

44.32 In the case of Table 18, which was in the same form as Table 17, save that the results had been converted from lettered grades to numerical scores, and in which A3, Persona, had received a score of 410, and A5, Esat Digifone, a score of 432, Mr. O’Callaghan’s workings below the table signified that he had computed the differential between the scores for A3 and A5. Having recorded that there was a 22 point difference between their scores, he noted that there was a “5% variation bet A3 + A5”.

44.33 As regards the sub-section entitled “A last comparison of the best applications”, containing the narrative exposition of the comparative results, and which Mr. Fitzgerald had found more persuasive than the tables, Mr. O’Callaghan

had made a single annotation. In relation to the opening passage of the second paragraph, which stated:

“Both A3 and A5 are assessed favourably on marketing aspects, although some differences are clearly identifiable. A3 does not opt for market leadership, but seems inclined towards a cost leadership in order to bring the tariffs considerably down.”

Mr. O’Callaghan had highlighted the text, and had written the words “so what”. In his testimony, he explained that that annotation reflected his view concerning the relevance of the concept of “market leadership”, as used by AMI in describing the philosophies behind the applications. Whilst he could not be categorical about his precise reasoning at the time, he thought that his difficulty with the use of the concept, as a means of distinguishing between A3 and A5, arose either from the fact that it had not been identified as an evaluation criterion in paragraph 19, or from his view that A3, Persona’s projected market share at 45% did not warrant the label “modest”. In other words, his objection was either one of principle, or one of application, or both.

The appendices

44.34 At some point after receipt of the main body of the draft Report, on Friday, 20th October, 1995, which as will be recalled from Mr. O’Callaghan’s chronology did not include the appendices, he must have received copies of them, as his annotated copy of the draft Report, retained on the Regulatory Division files, included marked copies of the appendices. It is not clear when these appendices were made available to Mr. O’Callaghan, or to what time constraints he was subject in scrutinising them. He had made a series of corrections to Appendix 2, the new appendix outlining the methodology applied, the contents of which have been discussed fully in Chapter 42, and included a number of question marks, signalling his lack of understanding. When the earlier statement, which had appeared in the Executive Summary, that unanimous support had been given to the result by the Project Group, was repeated in this appendix, Mr. O’Callaghan had written the word “NO”, confirming again that he disagreed with the statement. It is perhaps a measure of the strength of his objection to that proposition that the word “NO” had been written by him emphatically in bold capitals.

44.35 Appendix 3, as will be recalled, contained what was intended to be a reproduction of the Evaluation Model adopted by the Project Group on 9th June, 1995. As between the first and second drafts, the appendix had been revised, and the weightings table in the Evaluation Model, containing the agreed

quantitative weightings at indicator and sub-indicator level, had been altered in a number of respects, including the alteration of the weightings for the three dimensions of the first evaluation criterion, to correspond with the equal weightings of 10/10/10 applied in Copenhagen, and shown in Tables 17 and 18. Mr. O’Callaghan had not picked up that detail in his study of the contents of the appendix. What he had however taken the opportunity of noting was the final statement that:

“The results of both the quantitative and qualitative evaluation will be contained in the draft report with appendices to be prepared by the Andersen team.”

Mr. O’Callaghan had underlined the words “quantitative”, and “draft report”, and in a box adjacent to the text had written:

“Is it here.”

44.36 Mr. O’Callaghan testified that, in making that note, he thought he was posing a rhetorical question to himself, inquiring as to the whereabouts of the quantitative results. It was quite clear from Mr. O’Callaghan’s evidence in this regard that the discussion of the quantitative evaluation at the Project Group meeting of 9th October, 1995, and the explanation contained in Appendix 2, that the quantitative evaluation had “withered away”, had made no impression on him, and largely, and perhaps understandably, had passed over his head. It was Mr. O’Callaghan’s understanding at that time that the evaluation process was intended to be a dual quantitative and qualitative process, and he had anticipated that the separate quantitative results would be brought to bear on the overall result. He was still expecting to see the results of the quantitative evaluation, and he was surprised that they were not in the draft. As events unfolded, and as will emerge, Mr. O’Callaghan never saw a copy of the final Report, until it came to his attention in the course of the Tribunal’s inquiries, and he testified that he might have assumed at the time that the quantitative evaluation results had appeared in the final Report.

44.37 The extent of the disparity in understanding between Mr. O’Callaghan, as a member of the Project Group, and Mr. Martin Brennan and Mr. Fintan Towe, who were effectively steering the process, as to how the process had evolved, and as to the import of the substantive decisions taken in its closing stages, was brought into stark relief by this aspect of Mr. O’Callaghan’s evidence. Mr. O’Callaghan had no knowledge of the second set of quantitative results of 20th September, 1995, which had produced a ranking of A3, A6, A5, even though the results were on the Departmental files. Nor was he aware of the third set of quantitative results of 2nd October, 1995, which had produced a different

ranking of A6, A3, A4, and A5. He had no appreciation of the discussion at the Project Group meeting of 9th October, 1995, regarding the quantitative evaluation, or how it should be presented as an output of the evaluation. He was unaware that any decision had been made to produce an integrated Report, nor had he any familiarity with the notion that the quantitative evaluation had “withered”. Mr. O’Callaghan’s understanding of the quantitative evaluation was that a set of results, dated 30th August, 1995, had been produced on 4th September, 1995, and that, whilst Mr. Andersen had identified some shortcomings surrounding three of the indicators evaluated, it had been decided that the quantitative evaluation would be returned to after the qualitative evaluation had been completed. It seems that this continued to be his understanding, as evidenced by his expectation that the quantitative results would be included in the second draft Report, and his assumption that they might have been produced in the final Report.

44.38 Mr. O’Callaghan’s evident confusion is not surprising. Indeed, it would have been surprising were it otherwise, given that he had not received the first draft Report until the meeting of 9th October, 1995, and, as already noted, he had found it a challenge at that meeting to absorb the contents of the draft Report, whilst at the same time endeavouring to make a meaningful contribution to discussions. It would seem that Mr. O’Callaghan’s confusion was even greater than he had himself realised, as it is clear from his evidence that the import of much of what had been discussed at that meeting made no impression on him at all.

44.39 It was clear from Mr. O’Callaghan’s evidence, and from the annotations he had made in his copy of the second draft Report, that he had identified a series of queries and reservations which went to the kernel of the substantive evaluation conducted, and the marks awarded. Had his views been aired and discussed by the Project Group, they could have impacted on what then continued to be, at least theoretically, a provisional ranking. As events unfolded, Mr. O’Callaghan had no opportunity to raise his concerns. Apart from the issue of the negative equity of Communicorp, which he recalled discussing with Mr. Andersen at the meeting on the following Monday, 23rd October, 1995, Mr. O’Callaghan testified that he might not have had a chance of raising the matters he had noted, or on which he had wished to obtain explanations or clarifications. He explained that, at the end of the meeting of 23rd October, it was his clear understanding that there was a further week available to the Project Group to complete its work, and to deal with the type of questions that he had noted on his copy of the draft Report. That time was withdrawn on the following day, Tuesday, 24th October, 1995, and all that it was possible for him to address were textual changes, which he discussed with Mr. Brennan at a meeting between them at 5pm that evening. Detailed reference will be made to all these events

as they occurred, and at this point it is sufficient to observe that, in consequence of the withdrawal of that further week, on 24th October, 1995, there was insufficient time available to enable Mr. O'Callaghan to pursue the matters he had noted. It is certainly evident, from the contents of the final Report, that the substantive matters over which he had registered doubts and reservations remained unchanged.

THE ACCOUNTANTS' REVIEW

44.40 Copies of the second draft Report, annotated by Mr. Donal Buggy and Mr. Billy Riordan, were also within the Departmental files. Neither had a clear recollection of when they had received those drafts, nor when they had made annotations on them. Whilst it is clear that the draft was distributed by Ms. O'Keeffe on Thursday, 19th October, 1995, and either received on that day or on the following day, it is not entirely clear that all of the entries recorded by Mr. Buggy and Mr. Riordan were made by them in advance of the Project Group meeting of 23rd October, 1995, or for that matter reflected their own views.

44.41 Although Mr. Buggy testified that it was probable that he did have a copy of the draft Report to scrutinise and mark up in advance of the meeting of 23rd October, Mr. Riordan thought this was unlikely, and that what he had written on his draft probably reflected discussions at the Project Group meeting of 23rd October, and might equally have reflected either his own views or those of others, and in most instances he thought on balance that the latter was more probably the case.

44.42 The notes on Mr. Riordan's copy of the draft Report were considerably more extensive than those on Mr. Buggy's copy, and as acknowledged by him, were made on separate occasions, as reflected by the different appearance of the script in which his entries had been recorded. Mr. Riordan testified that the entries recorded in fainter script had, it seemed to him, been made by him at an earlier point than those recorded in denser script. This also seemed to be borne out by the content of some of the entries, which seemed to record queries in fainter script, and answers in denser script. The issue was complicated by the fact that it seems that Mr. Riordan also used his copy of the draft to record developments as they unfolded and occurred, over the final days of the process, as evident from some of the entries which he had dated 24th October, 1995, the eve of the day on which Mr. Michael Lowry announced the result.

44.43 Whilst Mr. Riordan, having no memory of events, was reluctant to accept that any of the matters reflected by his entries recorded his own views, rather than the views articulated by other members of the Project Group, it is

undoubtedly the position that at least some of the entries must have represented his views, or those which he shared with other members. It cannot be gainsaid that Mr. Riordan had, quite understandably in the light of his dealings regarding the financial element of the evaluation, formed a determination that AMI should accept full responsibility for that portion of the evaluation, and generally for the content of the Report. Reference has already been made to his insistence that a corrigendum be inserted in the formal report of the final meeting of the Project Group on 23rd October, 1995, to record assurances received by him at the penultimate meeting on 9th October, 1995, regarding the accuracy of the financial tables. Mr. Jimmy McMeel, of the Department of Finance, to whom it seems Mr. Riordan reported what had transpired at that meeting, confirmed in his evidence that, arising from his dealings with Mr. Riordan following the meeting of 9th October, he was conscious of Mr. Riordan's concerns that AMI should take "ownership" of the Report.

44.44 It further appears beyond doubt that Mr. Riordan shared Mr. O'Callaghan's objection to the statement in the draft relating to unanimous support, prefigured in the initial drafts of Chapter 2, forwarded by AMI to Mr. Towey after the meeting of 9th October, and received by Mr. Riordan on the following Monday, 16th October, and that Mr. Riordan's objection was formed entirely independently of Mr. O'Callaghan, and well in advance of the meeting of 23rd October, 1995. On that document received by Mr. Riordan on Monday, 16th October, beside the reference to "*unanimous support*" having been received for the result on 9th October, Mr. Riordan had written:

"Don't agree that this took place."

Having regard to that entry, Mr. Riordan accepted that at some time prior to the meeting of 23rd October, he had considered that portion of the draft Report, and that what he had written must have represented his own views.

44.45 It would seem from annotations made on copies of documents retained on the Department of Finance files that on that Monday, 16th October, Mr. Riordan had received two documents from the Development Division, first, a copy of AMI's first draft of section 2 of the Report, containing an outline of the evaluation process, which had been faxed by AMI to Mr. Towey on 11th October, 1995, and which contained the offending statement, and second, a copy of the initial draft of Appendix 2, the evaluation methodology appendix, together with a draft of a single page Executive Summary. According to Mr. Riordan's note, made on the front cover page of these documents, they were seen by Mr. McMeel on Monday, 16th October. On the following day, Tuesday, 17th October, Mr. Riordan had received a fax from Ms. Nic Lochlainn, containing a copy of the document entitled "*Comments on the presentation of the results by AMI of the evaluation*

of the GSM applications”, prepared by the Development Division, and already forwarded to AMI on the previous Friday, 13th October, 1995. On the front page of that document, Mr. Riordan had written:

“Awaiting next draft of report, which will encompass these changes, before commenting on items received on 16/10 (which are amended by the attached).”

44.46 It follows from the contents of Mr. Riordan’s note, which he had dated Tuesday, 17th October, that he was “awaiting” the second draft before commenting on the additional material received by him the previous day, as he expected that the second draft would encompass the amendments proposed by the Development Division. Presumably, Mr. Riordan was seeking to postpone making comments that might be superfluous in view of the expected revisions. It follows therefore that Mr. Riordan’s expectations, as reflected by that note, were that he would comment on the material on receipt of the second draft Report. Having formed that intention, it is unlikely that Mr. Riordan, having received the draft on either Thursday, 19th or Friday, 20th October, did not proceed to review its contents, and in particular to scrutinise the new material in advance of the meeting of 23rd October.

44.47 Whilst there is no doubt that many aspects of the items marked in both of the accountants’ copies of the draft Report may have been raised at the meeting of 23rd October, it nonetheless seems unlikely that the careful and detailed notes, and recalculations of many of the tables contained in the drafts, did not represent the product of reviews undertaken by them in advance of that meeting. Had these recalculations merely reflected the work of others at the Project Group meeting on 23rd October, 1995, they should have been identical, at least in approach, which they were not. It is unnecessary for the Tribunal to decide what did or did not represent their original work, as it does seem that many of these matters were the subject of discussion at the Project Group meeting on 23rd October, and it is intended at this juncture to refer briefly to what were the significant matters of concern, as evidenced by the markings on their copies of the draft Report.

Workings to tables

The Marketing Aspects Table

44.48 In common with Mr. O’Callaghan’s copy of the draft Report, both of the accountants’ copies contained reworkings of Table 1, which presented the grades for each of the four dimensions of Marketing Aspects, and the aggregate

grade for those Aspects. For ease of reference, the table, as it appeared in the second draft Report, is again reproduced below.

Marketing aspects	A1	A2	A3	A4	A5	A6
1. Market Development	C	C	B	C	A	C
2. Coverage	B	C	A	C	A	D
3. Tariffs	C	D	B	C	C	A
4. International roaming plan	A	D	C	C	C	C
Marketing aspects (subtotal)	B	C	B	C	A/B	C

44.49 The annotations on Mr. Buggy’s draft showed that he had also recorded doubts regarding the construction of the table and the narrative accompanying it, which suggested that Market Development, as a dimension of the first criterion, was the predominant dimension within that table. He noted that:

“implied weighting favours mkt dev but tariffs are greater on RFP.”

Mr. Buggy then applied the following numerical weightings to the table, namely, 10 for Market Development, 7 for Coverage, 18 for Tariffs and 6 for International Roaming. He arrived at numerical totals for A3, Persona, of 80.47%, and for A5, Esat Digifone, of 76.54%, and below the table had written grade B for each of A3 and A5.

44.50 The markings on Mr. Riordan’s copy of the draft Report evidenced a different, and indeed a more complex set of workings, than those on the drafts of either Mr. Buggy or Mr. O’Callaghan. In the first place, Mr. Riordan had not applied the numerical weightings used by Mr. Buggy, and which presumably had been transposed by him directly from Table 17 and Table 18, and which were 10 for Market Development, 7 for Coverage, 18 for Tariffs and 6 for International Roaming. Instead, he had used the numerical weightings contained in the Evaluation Model of 8th June, 1995. The weightings which he had applied to the four dimensions were Market Development, 7.5, Coverage, 7.5, Tariffs, 18 and International Roaming, 7.5. In selecting those weightings, rather than those shown in Table 17 and Table 18, it seems clear that Mr. Riordan must have realised that the equal weightings of 10/10/10 for the three dimensions of the first evaluation criterion, applied throughout the Report, were not the relative weightings prescribed in the Evaluation Model. In that regard, he had recorded, above the text immediately preceding the table, the following breakdown of the weightings of those three dimensions:

*“Mkt dev 7.5%
Experience 10%
Financial Key 15%.”*

Moreover, and as will become apparent, he had repeatedly used these weightings at many points in markings, and reworkings, recorded throughout his copy of the draft Report.

44.51 From the entries on his copy of Table 1, it seems that Mr. Riordan then translated these weightings to percentages on a base of 100, and applied percentage weightings to the grades awarded to A3 and A5, to arrive at a total for A3, Persona, of 1.77 and for A5, Esat Digifone, of 1.565. It seems to the Tribunal unlikely that in recording those workings in his draft, which represented in excess of thirty separate numerical computations, Mr. Riordan was merely transcribing or noting the work of another member of the Project Group. It seems to the Tribunal singularly improbable that the entries represented anything other than the product of Mr. Riordan’s own work, and the Tribunal is satisfied that, when he placed “B?” beside the total for A5, Esat Digifone, in Table 16, the principal results table, he was recording his own query consequent on the exercise he had undertaken himself. In his evidence, Mr. Riordan agreed that the tot reflected on his copy of the draft had arrived at a result that was different to that shown in Table 1, in that in his tot A3, Persona, had received the highest mark, whereas in Table 1 the highest mark had been awarded to A5, Esat Digifone.

The Technical Aspects Table

44.52 Both of the accountants’ copies of the draft Report contained annotations querying the construction of, and weightings applied in, the tables comprised in the Technical Aspects sub-section. The import of the entries suggest that they had doubts concerning the weightings applied at both indicator and dimension level. It would seem from entries made by Mr. Riordan that those doubts were resolved by Mr. McQuaid on the following Tuesday, 24th October, 1995, when Mr. Riordan recorded that Mr. McQuaid had confirmed that the tables were correct.

Financial Aspects Table

44.53 As will be recalled, Table 15 of the draft Report contained the marks awarded in the qualitative evaluation for the dimension Financial Key Figures. The results for that dimension were the sole determinant of the Financial Aspects grade, as the only other dimension associated with Financial Aspects was Licence Payment, for which all applicants, having bid the ceiling limit of £15 million, had been awarded an A grade, and the marks for that dimension were accordingly neutral. It was this Table 15 which was the focus of the review undertaken by the two accountants in advance of the meeting of 9th October, 1995, and, it will be recalled, they had made two significant revisions to Table

15, as it appeared in the first draft Report. In the first place, they had reduced the Financial Strength grade for A5, Esat Digifone, from grade B to grade C, which they had then translated into a downgrading of A5’s total for the dimension, from grade B to grade C. Their rationale, as evidenced by their notes, and as confirmed by them in evidence, was that Communicorp, with a negative equity, did not have sufficient financial strength to fund its 50% share. Secondly, they had elevated A3’s grade D for the indicator Liquidity to grade C, as it was their shared view that A3’s liquidity figures approximated to the predefined threshold for grade C on that indicator.

44.54 As has already been recounted, there was no evidence to suggest that these significant changes had been raised in the course of the Project Group meeting of 9th October, nor had reference been made to them in a subsequent fax from the accountants to AMI, dated 9th October, but not transmitted until the following day, 10th October, in which a number of the lesser issues which they had identified, in the course of their review, had been raised. Neither of the accountants could recall how those two significant issues had been disposed of. They each testified that they would have raised them, and that they must have received explanations which satisfied them that the changes they had made were not warranted, although neither of them could recall or suggest what those explanations could have been.

44.55 Whatever explanation may have been advanced for the grade received by A3, Persona, for the indicator Liquidity, it would seem, from the annotations made by the accountants on their copies of the second draft Report, that either that issue was not addressed prior to 19th October, or that they were far from satisfied by the explanation they had received, as it is clear that, in reviewing the second draft Report, they once again elevated A3’s grade from grade D to grade C, and reduced A6’s grade for the same indicator from grade A to grade D. It follows therefore that as of 19th October, that issue had not been resolved, or had certainly not been resolved to the satisfaction of the accountants. What is also apparent from their annotations is that, at some subsequent date, they cancelled their revisions to the marks for that dimension for both A3 and A6, and they recorded the direction “*stet*” beside the grades in the printed table, thereby signifying that the initial grades remained unchanged.

44.56 Their markings also included two sequences of numbers in the left marginal space along the vertical axis of the table. These numbers seemed to represent their efforts to discern the weightings which had been applied to the eight indicators in the construction of Table 15. Whilst Mr. Buggy testified that the numbers and workings on his Table 15 reflected an exercise that he had conducted himself, Mr. Riordan thought that his annotations and queries could

have arisen from discussions at the Project Group meeting on the following Monday, 23rd October, 1995. Mr. Buggy's markings included the product of what seems to have been at least three sets of numerical computations, absent from Mr. Riordan's copy, whereby Mr. Buggy sought to verify the total grades shown in the table by numerical calculations.

44.57 Irrespective of whether the markings had been made by the accountants before, or in the course of, discussions at the meeting of 23rd October, to the Tribunal's view the single most significant matter to emerge is that neither of the accountants, being the only persons on the Project Group with the requisite financial expertise, and the persons charged with reviewing the financial element of the evaluation, knew how Table 15 had been constructed, or how the total grades for the financial analysis had been arrived at. Mr. Riordan confirmed in his evidence that he was unable to reconstruct the table, as it was dependent on the exercise of judgement: he had not been a party to that process, and did not know how those judgements had been deployed.

The Results Tables

44.58 Whilst there were significant markings on all three of the results tables in both of the accountants' copies of the draft Report, particular attention seems to have been directed by them to Table 17 and Table 18. It was Mr. Riordan's copy which was more densely annotated, and which exhibited more detailed workings, particularly to Table 18, in which the results of the qualitative evaluation had been converted from grades to scores. As with other markings on his copy of the Report, Mr. Riordan was unsure whether they represented his own workings and his own thoughts, formed in advance of or in the course of the Project Group meeting of 23rd October, or reflected the workings and views of others present at that meeting. What all of the annotations undoubtedly show, and what was agreed by Mr. Riordan and by Mr. Buggy, is that doubts were registered regarding the relative positions of A3, Persona, and A5, Esat Digifone, as derived from the results tables, and in particular there was concern surrounding:

- (i) the relative weightings applied to the three dimensions of the first-ranked criterion; and
- (ii) whether there was a margin of significance between A3 and A5.

The annotations to the results tables, and the evidence of the accountants in that regard, are most helpfully reviewed by reference to each of the three tables.

Table 16

44.59 Table 16, the Aspects table, which presented the results of the qualitative evaluation in the form of the matrix contained in the Evaluation Model, had been marked by both accountants. Mr. Riordan had made the annotation “B?” beside the A/B total for A5, Esat Digifone, and he agreed in evidence that this reflected the earlier queries recorded by him in connection with the Marketing Aspects table. At what was evidently a later stage, he had written “Gone” in a circle beside the table, signifying a decision that was ultimately made by the Project Group, which will be referred to in due course, that Table 16 should not be presented prominently as the principal table within the results section of the Report, but should be repositioned to the comparative evaluation section. Whatever views were expressed about the grade awarded to A5, Esat Digifone, for Marketing Aspects, those views were not sustained, as the grade remained unaltered.

44.60 Table 16 in Mr. Buggy’s copy of the draft Report contained a series of numerical entries suggesting that he had sought to verify the totals shown in the table by converting the grades to scores, and by calculating a simple numerical total without the application of any weightings. There were no equivalent entries on Mr. Riordan’s copy of the draft Report, which suggests, as was accepted by Mr. Buggy, that he in all probability conducted that exercise independently of Mr. Riordan.

Table 17

44.61 Table 17, it will be recalled, contained the same grades as Table 16 but with the dimensions regrouped in accordance with the ranking of the evaluation criteria they reflected, and showed the numerical weightings for each dimension. The markings made by the two accountants on Table 17, in common with those made by Mr. O’Callaghan, centred around the equal weightings of 10/10/10 applied to the three dimensions of the first-ranked criterion, and to the two dimensions of the second-ranked criterion. In the same vein as Mr. O’Callaghan, Mr. Buggy had bracketed the first three dimensions which reflected the first criterion, and had written the figure 30 beside the bracket. He had similarly bracketed the two dimensions of the second criterion, and had written the figure 20 beside that bracket. He had additionally blacked out and cancelled the individual weightings of ten for each of those five dimensions. Mr. Buggy testified that, in making those markings, he thought he was noting that the agreed weighting for the first-ranked criterion was 30, and he thought that there was an issue over whether the weighting of 30 should be split into weightings of 10 for each of the three constituent dimensions of that criterion.

44.62 Mr. Riordan was more explicit in the annotations he had made on his copy of the second draft Report. Not only had he written the total of the weightings for the first two criteria, that is, 30 and 20, but he had additionally made two separate notes, positioned immediately above the table. In the first note, which for emphasis he had placed inside a double square frame, with an arrow pointing to the weightings column of the table, he had recorded:

“Not agreed by Project Group.”

To the right of that entry, with another arrow also pointing in the direction of the weightings column, he had written:

“No reason why the 10s should be split in this way.”

When questioned about these entries, Mr. Riordan testified that he thought that they recorded observations made at the Project Group meeting of 23rd October, and he could not recall whether he was noting his own observations, or contributions made by some other member of the Project Group. Whether the notes reflected Mr. Riordan’s views, recorded in advance of or in the course of the Project Group meeting, or the views of another member of the Project Group, it seems beyond doubt that there was a clear recognition that the 10/10/10 split, shown in Table 17, was not the weighting which had been agreed by the Project Group, even though the text recorded that the weightings shown in Tables 17 and 18 were “*agreed prior to the closing date for quantitative purposes.*”

Table 18

44.63 Table 18, which was in the same form as Table 17, save that the grades had been converted into numerical scores, contained a dense set of annotations in Mr. Riordan’s copy of the draft Report. In the main, they were in the fainter hand which Mr. Riordan had associated with his earlier markings, although it seems that at a later point, he may have retraced some of the markings in a heavier hand. There were four sets of markings made on the table in Mr. Riordan’s copy.

44.64 In the first set of markings, Mr. Riordan had written an alternative set of weightings beside the weightings column. The table below comprises an extract of Table 18 as it appeared in Mr. Riordan’s copy of the draft Report. The column on the left contains the alternative weightings which Mr. Riordan had written in hand, and the column on the right contains the printed weightings as shown in the table.

	MR. RIORDAN’S WEIGHTINGS	WEIGHTINGS IN TABLE 18
Market development	7.5	10
Financial key figures	15	10
Experience of the applicant	10	10
Radio network architecture	10	10
Network capacity	10	10
Tariffs	18	18
Licence payment	11	11
Coverage	7.5	7
International roaming plan	6	6
Performance guarantees	5	5
Frequency efficiency	3	3

44.65 As evident from the above extract table, Mr. Riordan’s weightings and the printed weightings diverged in the case of the first two dimensions, and in the case of the dimension Coverage, for which dimensions he had written the weightings as contained in the approved Evaluation Model of 8th June, 1995, subject to the variation of 3% agreed by formal written procedure, following the resolution of the Commission intervention and the capping of the licence payment at £15 million.

44.66 From a separate document comprised in Mr. Riordan’s files, it seems that at some point Mr. Riordan had made a close study of the agreed weightings. His documents included a copy of the first set of quantitative evaluation results, dated 30th August, 1995, circulated and discussed at the Project Group meeting of 4th September, 1995. It will be remembered that the final page of these results contained a table showing the weightings for each of the eleven indicators in the quantitative evaluation. It will further be remembered that there were errors in the weightings contained in that table, as AMI had overlooked the 3% weighting movement from Licence Payment to Tariffs. Mr. Riordan had made a number of manuscript notes on that table, as follows:

- (i) He had written the figure “7.5” beside the two weightings of 3.75 each for Market Penetration Score 1 and Score 2, the two indicators for the dimension Market Development in the quantitative evaluation.
- (ii) He had written the figure “15” beside the two weightings of 7.5 each for the indicators Solvency and IRR, the two indicators for the dimension Financial Key Figures in the quantitative evaluation.
- (iii) He had written “3%” beside the weighting for OECD Basket, the sole indicator for the dimension Tariffs, shown at the old weighting of 15 in the table, and beside which he had also written the figure “18”.

- (iv) He had also written “3%” beside the weighting for the indicator Licence Fee Payment, shown at the old weighting of 14 in the table, and beside which he had written the figure “11”.
- (v) He had totalled the weightings and written the figure of 103.

44.67 What these entries show is that Mr. Riordan had corrected the table to reflect the 3% movement in weighting from Licence Fee to Tariffs, and that, at some point, he had carefully studied the quantitative weightings agreed at the lowest indicator level for the dimensions Market Development and Financial Key Figures, and had transposed these indicator weightings to verify the weightings at dimension level. It was these transposed weightings, at dimension level, which he then wrote into Table 18 of his draft.

44.68 The second series of entries made by Mr. Riordan to Table 18 in his copy of the second draft Report were in the marginal space to the right hand side of the table, where he had written the numerical equivalent of an A grade for each dimension by reference to the printed weightings, that is, by reference to the 10/10/10 split, and had added these to arrive at a total of 500 available points, thereby verifying that the total scores as shown at the foot of the table were calculated on a base of 500.

44.69 The third series of entries were made across the foot of Table 18, and showed the total scores expressed as percentages. Having satisfied himself that the scores as shown in the table were calculated on a base of 500, the conversion to percentages would have involved a simple operation of dividing the scores by 5. The final set of entries then made by Mr. Riordan appeared below the percentage calculations, and reflected a conversion back from the percentage scores to lettered grades. The relevant extract from the table, as contained in Mr. Riordan’s draft, is reproduced below. The first row of entries contains the scores as shown in Table 18, the second row shows the percentages written in hand by Mr. Riordan, and the third row shows the lettered grades into which those percentage scores had been converted by Mr. Riordan.

	A1	A2	A3	A4	A5	A6
Scoring as shown in Table 18	362	268	410	363	432	347
Percentages written by Mr. Riordan	72.4	53.6	82	70.6	86.4	69.4
Mr. Riordan’s re-conversion to grades	B-	C-	B↑	B-	B↑	C↑

44.70 Mr. Riordan agreed in evidence that the entries made by him reflected the same weighting issue recorded in his notes to Table 17. He accepted that, on the re-conversion from percentage scores to grades, as shown in his annotations, the percentage scores of 82% for A3, and 86.4% for A5, had both

resulted in “B↑” grades and, subject to a reservation that he subsequently made when he resumed his evidence the following day, that the A5 arrow was to his mind marginally larger than the A3 arrow, Mr. Riordan recognised that his markings suggested that on that re-conversion, A3 and A5 were in equal position. Mr. Riordan further acknowledged that, in the context of a qualitative evaluation which by definition was subjective, and relatively imprecise, it was necessary to allow for a margin of error.

44.71 Mr. Riordan testified that he was uncertain whether the exercise of converting the grades to numerical scores was valid, and he had a recollection of Mr. Andersen at some point advising that the qualitative evaluation which had been conducted was more judgemental than a numerical analysis, seemingly echoing the caution which had been registered in the text of both the first and second draft Report that the calculation reflected in Table 18 “*distorts the idea of a qualitative evaluation*”. As has already been indicated, that statement was ultimately removed from the text, and did not appear in the final Report.

44.72 As with all other entries recorded in his copy of the draft Report, Mr. Riordan had no recollection of when, or in what circumstances, he had annotated Table 18. He had no memory of making the annotations, nor had he any memory of any other person suggesting them. Whilst the Tribunal has no doubt that the issue of the correct weightings, and in particular the relative weightings for the three dimensions of the first evaluation criterion, together with the margin of difference between A3 and A5, were discussed at the Project Group meeting on the following Monday, 23rd October, 1995, it seems improbable that the series of entries recorded on Table 18 of Mr. Riordan’s draft reflected anything other than his own original analysis. There were no equivalent markings on Mr. O’Callaghan’s copy of the draft Report, and only very limited entries on Mr. Buggy’s copy, so that it seems unlikely that Mr. Riordan was merely recording figures and computations dictated by some other person in attendance at that meeting. Moreover, it was evident that Mr. Riordan had made a close study of the quantitative weightings, and it seems likely that this was done by him for the purposes of verifying the weightings shown for the first three dimensions in Table 17 and Table 18, which he had noted were “*Not agreed by Project Group.*”

Section 5 of the Report

44.73 Apart from grammatical and presentational corrections, and various general queries, at least one of which will be returned to in due course, there was one further set of annotations, on Mr. Riordan’s copy of the draft, which warrants comment at this juncture. This set of annotations was made to Section 5 of the Report which, as will be recalled, was entitled “*Sensitivities, risks and*

credibility factors”, and addressed in narrative form the Other Aspects identified in the Evaluation Model, which had not in the event been marked in the course of the evaluation, following a decision taken at the Copenhagen meeting of 28th September, 1995. It was the passage in this section directed to the risks associated with A5, Esat Digifone, consequent on the financial frailty of Communicorp, that had been altered between the first and second draft Reports, by the insertion of the word “*maybe*” to introduce some degree of conditionality to the caution entered by AMI, on which Mr. Riordan focused. It was not that amendment which seems to have troubled him, but rather the discordant note struck between what was stated in that section concerning Esat Digifone’s financial weakness, and the grade B which it had been awarded in the Financial Key Figures analysis for the indicator Financial Strength.

44.74 What was stated in the draft was as follows:

“A5’s maybe weakest point is not related to the application as such, but to the applicant behind the application, or more specifically to one of the consortium members, namely Communicorp, which has a negative equity. Should the consortium meet with temporary or permanent opposition, this could in a worst case situation turn out to be critical, in particular concerning matters related to solvency.

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

44.75 Mr. Riordan had underlined the first sentence of the passage quoted above, and in the right-hand marginal space had written in a faint hand:

“How does this stack up against a B for financial strength?”

Mr. Riordan of course had not agreed with the grades awarded to Esat Digifone in the financial evaluation, and when he and Mr. Buggy had reviewed those grades before the meeting of 9th October, 1995, they had reduced Esat Digifone’s grade for the indicator Financial Strength from grade B to grade C, and had translated that into a downgrading of its grade for the overall Financial Key Figures dimension from grade B to grade C.

44.76 In evidence, Mr. Riordan was equivocal concerning the import of that annotation. He testified that he thought that, in making that note, he could have been querying how Esat Digifone had been awarded grade B for Financial

Strength, if it had the weakness stated in that passage of the narrative, or he could equally have been highlighting that the language used in the passage was inconsistent with the grade awarded for that indicator in the comparative evaluation. In other words, he was unsure whether that note reflected doubts regarding the substance of what was stated, or the form in which it was expressed. It seems to the Tribunal unlikely that his concerns related solely to matters of presentation as, in that event, Mr. Riordan would have simply corrected the wording, as he had done in the case of other portions of the text. It seems far more probable that the entry evidences that Mr. Riordan's doubts surrounding the financial analysis, and in particular the grade awarded to Esat Digifone for Financial Strength, continued to subsist, and that whatever explanation he may have received at an earlier date, which he could not recall, did not then convince him that the analysis was correct.

44.77 Two further entries had been made by Mr. Riordan immediately below that annotation. Firstly, he had written the word "*Change*", which he had double underlined, and placed in a box, and secondly, below that again he had written the word "*Bankability*". These additional markings, which, from their content, from the denser hand in which they had been made, and from subsequent events, appear to have been written at a later point, will be returned to in the context of the final version of the Evaluation Report, and particularly a lengthy amendment made to this section, reflecting the concept of "*Bankability*". That concept, it will be recalled, was first recorded as having been raised by Mr. Martin Brennan at the Project Group meeting of 9th October, and was a concept which he had attributed to Mr. Michael Lowry.

SECTION G

THE FINAL DAYS OF THE PROCESS

OVERVIEW

THE FINAL DAYS OF THE PROCESS

45.01 The Tribunal's review of the evidence heard by it, relating to the closing days of the evaluation process, must be prefaced with the observation that it is the Tribunal's view that, to a greater or lesser degree, it was not furnished with a fully reliable account of what transpired over those days by any of the witnesses from whom evidence was heard. Were it not for the limited documentary sources available, it is unlikely that even the less than satisfactory accounts received by the Tribunal would have been forthcoming. Many of the Departmental witnesses showed a marked reluctance to engage with, or respond to, the Tribunal's inquiries, and instead relied on the relative remove of those events to justify an absence of recollection, which in many instances the Tribunal found to be less than convincing.

45.02 The greater part of the relevant evidence was heard by the Tribunal in early 2003, which was admittedly some years after the events, and might well ordinarily have occasioned difficulties in detailed recollection for witnesses. However, it must be borne in mind that the events in question were far from ordinary; on the contrary, they were unique and singular in character. Moreover, the selection process for the GSM licence was very probably the most significant matter which the Departmental witnesses had encountered during their professional careers, and by any standard it was also concluded in what were highly turbulent circumstances. Furthermore, it seems to the Tribunal that, in September, 1997, when the Tribunal was appointed, which was at a time proximate to those events, it would have been apparent from Mr. Michael Lowry's prominence in the Tribunal's Terms of Reference that there was a real possibility that the Tribunal's inquiries could encompass the GSM licence, and in those circumstances, it would not have been unreasonable to expect that the Departmental officials involved in the process would have directed their minds at that time to those events, to refresh their memories of them.

45.03 It is also useful at the outset, before reviewing and commenting in detail on the available evidence, to indicate in outline form what seems to have occurred during the closing days of the process. On Monday, 23rd October, 1995, the scheduled Project Group meeting proceeded with a full complement of the membership in attendance. As with the previous Project Group meeting of 9th October, 1995, Mr. Michael Andersen distanced himself from what occurred on 23rd October, 1995. On this occasion, it was adverse headwinds encountered by his inward flight from Copenhagen to Dublin that kept him late for the meeting, and it was his evidence that his attendance spanned no more than an hour and a half of the meeting.

45.04 The meeting commenced at 11.00am, and Mr. Brennan opened proceedings by informing those in attendance that Mr. Lowry wanted a result that day, but had not been promised one. The meeting continued into the afternoon, and at 3.30pm, consequent on the Group's failure to reach agreement, a delegation comprising the three Principal Officer members, namely, Mr. Martin Brennan, Mr. Sean McMahon and Mr. John McQuaid, who were probably accompanied by Mr. Sean Fitzgerald, met with Mr. John Loughrey, Secretary General. The result of that meeting was that additional time was made available, and what seems to have been contemplated was that the Project Group should have a further week to complete its work.

45.05 That further time ceased to be available on the following day, Tuesday, 24th October, 1995. The Project Group assembled in the late afternoon, to focus on final amendments to the draft Report. That meeting proceeded late into the evening of Tuesday, 24th, and concluded at approximately 11.00pm. There was conflicting evidence surrounding all of these events, including the terms on which the meeting of 24th October, broke up.

45.06 On Wednesday, 25th October, Mr. Brennan and Mr. Towey liaised with AMI concerning amendments to the second draft Report. Whilst it is unclear whether a copy of the final Report, or of a draft encompassing those amendments, was available on that day, it was undoubtedly the position that the Project Group did not have sight of any such copy of the Report on 25th October, 1995, and never had an opportunity to review or approve its contents. It is clear that Mr. Lowry proceeded on the footing that he had a final result, and having secured political clearance during the course of that afternoon from the leaders of the parties in Government, Mr. Lowry called a press conference for 5.00pm, and announced that Esat Digifone was the winner of the competitive process, and was the consortium with which the Government intended to enter into exclusive negotiations for the grant of the second GSM licence. The matter was not considered by Government until 26th October, 1995, the day following the public announcement, when it proceeded to Cabinet, merely to note the result which had already had been announced by Mr. Lowry.

45.07 Had it not been for the availability of Mr. O'Callaghan's chronology, it is doubtful that the Tribunal would have been able to reconstruct anything even approximating to the above outline of what actually occurred over those days. Reference has already been made to the contents of that document, but it is helpful at this point to refer again to its relevant paragraphs. What was recorded in the final three paragraphs of the document, as confirmed by Mr. O'Callaghan in evidence, was as follows:

“

6. *Informed at mtg of 23.10 that Min wanted to go to Govt 24.10 + get clearance for winner. SMacM + I said that we couldn't sign off on it as the report was deficient + had not been fully read. MB, SMacM and JMcQ met Sec and a further week was agreed to consider report. Mtg went on until 7.30pm.*
7. *23.10. [sic] informed that Taoiseach had requested Sec to expedite the position with a view to clearance at Govt the following day. I went through drafting changes with MB 4-5. Mtg at 5pm, left at 7.15 – drafting changes still being discussed to be faxed to MA.*
8. *Min met SeanMacM + MB + Sec + SF. He was to meet party leaders re. the winner. Heard at 4.45 that Min was hosting a Press conf to announce winner. He did. No signing off on report – we had no final report; No consensus asked for. No vote – effectively no decision by PT.”*

45.08 As has already been alluded to, Mr. O’Callaghan’s chronology was not provided to the Tribunal until some months after the greater part of the documents in relation to the GSM licence had been furnished by the Department. The Tribunal was unaware of the existence of the document, and was further unaware that it had been withheld to allow for consideration of whether a claim to privilege from disclosure could be sustained. It seems that on learning of the Tribunal’s formal request for production, Mr. O’Callaghan, having recollected the existence of the document, and having identified it within his personal papers, discussed with two senior officials of the Department whether the document, which Mr. O’Callaghan regarded as a private rather than an official one, attracted privilege. Advice on the issue was sought from the Chief State Solicitor’s Office by the Department, and Mr. O’Callaghan himself sought separate independent legal advice from his own personal solicitor. The consensus of advice from both sources being that the document did not attract privilege, it was then produced to the Tribunal. Mr. O’Callaghan and the Department were of course entirely at liberty, and within their rights, to seek advice on this matter. However, it does seem to the Tribunal that the duplication of advice, and Mr. O’Callaghan’s retention of his own solicitor, were indicative of a considerable sensitivity on his part surrounding its disclosure to the Tribunal.

45.09 As to the circumstances in which he generated the document, Mr. O’Callaghan testified that he had prepared it spontaneously, shortly after the announcement by Mr. Michael Lowry of the winner of the competitive process on Wednesday, 25th October, 1995. He had been very busy during the time leading

up to 25th October, and he was conscious that there had been a flurry of activity during the closing weeks of the evaluation process, and, according to his evidence, he wished to put events into chronological order for his own benefit. The document was not in his view an official document, but rather had been created by him for his own personal use, and had been retained by him within his personal papers. When the matter initially arose in Mr. O’Callaghan’s mind, some months prior to the Tribunal’s formal request for production of documentation, as a result of the contents of a newspaper article which he had read, he had wondered whether he might have discarded the document, as he had moved offices a number of times in the interim. Despite these moves, he discovered that he had in fact retained it. He also confirmed that he did not recall that he had ever, on any other occasion, created a document such as his chronology, in respect of any other aspect of his work.

45.10 Mr. O’Callaghan testified that his purpose in creating the document was twofold: firstly, he wished to clarify the sequence of events in his own mind, so that if he was asked in the future, it would be available to him as an aide memoire, and secondly, he also wished to create a record. At that time, he had dual concerns surrounding what had occurred in the final stages of the process. His first concern related to the fact that he had been assured on Monday, 23rd October, 1995, that a further week would be available to the Project Group to complete its work. His second concern related to his impression, when he left the late evening meeting on Tuesday, 24th October, 1995, that there would be a final meeting the following day, when he expected that a Report, containing the amendments discussed at that meeting, would have been received from AMI, and would have been available to the Project Group. Whilst detailed comment on the substantive contents of each of the final paragraphs of Mr. O’Callaghan’s chronology will be deferred until consideration of the relevant events, it should be noted at this juncture that Mr. O’Callaghan confirmed in his evidence that he had been mistaken in the date to which he attributed the events recited in the penultimate paragraph of his chronology, and he testified that those events had in fact occurred on Tuesday, 24th October, 1995.

EVENTS OF MONDAY, 23RD OCTOBER, 1995

46.01 Before proceeding to address the events of Monday, 23rd October, 1995, it is of assistance to recap briefly on what had occurred since the Project Group had last assembled on 9th October, 1995, and on how matters had progressed since then from the viewpoint of the Divisions represented on the Project Group.

46.02 The Development Division had proceeded with its work on the assumption that the evaluation was complete, and that a ranking had been achieved. The thrust of the Division's work was directed to the production of an acceptable Report. From at latest Tuesday, 17th October, 1995, when Mr. Fintan Towe so informed Mr. O'Callaghan, the Development Division knew that it was Mr. Michael Lowry's plan to bring the result to Government on Tuesday, 24th October, 1995. Having received the second draft Report on Thursday, 19th October, the Development Division commenced preparations with a view to enabling the matter to proceed to Government on Tuesday, 24th October, and in particular Ms. Nic Lochlainn, in conjunction with Mr. Towe, worked on Friday, 20th October, on draft briefing documents for Mr. Lowry, and on formal documents intended for submission to Government. Arrangements were also made for an oral briefing of Mr. Lowry at 4.00pm on Monday, 23rd October, 1995.

46.03 The Regulatory Division which, in the person of Mr. Sean McMahon, had expected the qualitative evaluation to continue after the meeting of 9th October, 1995, had a very different perspective. It was Mr. McMahon's view that the evaluation was far from complete, and that a satisfactory ranking had not been reached. Mr. O'Callaghan, although somewhat diffident as to the reality of the ranking being altered, given the Minister's then state of knowledge, nonetheless held to the view that unanimity within the Group had not been achieved at the meeting of 9th October, 1995. The Division also knew from Tuesday, 17th October, of Mr. Lowry's plan to proceed to Government on 24th October. Mr. O'Callaghan had undertaken a painstaking review of the second draft Report on the previous Friday, 20th October, and as was apparent from the annotations made by him on his copy of that Report, and as agreed by him in evidence, he had identified a series of substantive issues which went to the kernel of the evaluation conducted.

46.04 At some stage in the course of Monday, 23rd October, and most probably in the morning, in advance of the Project Group meeting, Mr. McMahon and Mr. O'Callaghan met, discussed the second draft Report, and arising from that discussion Mr. McMahon generated a typed document, which he entitled

“Views of the Regulatory Division – 23 October 1995”, in which he recorded the following:

“On the basis of our readings of the applications, on our hearing of the presentations by the applicants, and on the logic of the AMI Report, insofar as we follow it;

- (i) we agree with the finding that A3 and A5 are front runners;*
- (ii) we also agree that A3 and A5 are very close;*
- (iii) By reference to the report alone, we are unable to come to the conclusion as to which (A3 or A5) is, in fact, ahead.*
- (iv) we have a reservation about listing A1 in third place having regard to its proximity to A4 in fourth place;*
- (v) we feel strongly that the qualitative assessment of the top two applicants should now be revisited.”*

Three manuscript entries had been made by Mr. McMahon on the face of the document. The first entry, at the top of the document, was:

“Mr. O’Callaghan for GSM file apropos our conversation on 23rd.”

The second entry consisted of a jagged line, placed by Mr. McMahon through the entire of the text at paragraph (iv), and the third entry, at the foot of the document, was:

“To be signed if PTGSM insists on finalisation of existing draft.”

46.05 The document was not circulated, but was nonetheless placed on the Regulatory Division files, and had not been seen by members of the Project Group, other than Mr. O’Callaghan, until it was brought to their attention in the course of the Tribunal’s inquiries. Mr. McMahon was uncertain as to when he prepared the document: he thought he might have done so on the morning of 23rd October, 1995, in advance of the commencement of the Project Group meeting, or possibly later that day. It appeared to him, from the text, that the document was intended to encapsulate his own view, and that of Mr. O’Callaghan, following discussion between them. Mr. O’Callaghan largely confirmed Mr. McMahon’s evidence. He assumed that the discussion between them, which gave rise to the generation of the document, took place before the commencement of the Project Group meeting. It was his belief that, as it had been the joint understanding of himself and Mr. McMahon at the end of the meeting of 23rd October, that a further week had been made available for the Project Group to finalise its work, there had been no necessity for the document

to be signed, or circulated, and that in those circumstances it had remained in abeyance.

46.06 What is clear is that the discussion between the two Regulatory Division officials, which prompted the generation of the document, took place after Mr. O’Callaghan’s review of the second draft Report, and it was Mr. O’Callaghan’s evidence that the text at paragraph (iii), namely, *“By reference to the report alone, we are unable to come to the conclusion as to which (A3 or A5) is, in fact, ahead”*, arose from his concerns regarding the content of the second draft Report. As is evident from the contents of the document, there can be no doubt that it reflected that the shared concerns of Mr. McMahon and Mr. O’Callaghan were overwhelmingly directed to the substance of the evaluation, and the ranking as disclosed in the draft Report. Whilst being satisfied, as recorded in the document, and as confirmed by them in evidence, that A3 and A5 were the front runners, and that A3 and A5 were very close, their dissent from the ranking recorded in the draft Report, and their objective of revisiting the qualitative evaluation, were expressed in the clearest possible terms.

46.07 As of 23rd October, 1995, the accountants had continuing reservations, primarily surrounding the financial analysis, as reflected in particular in Mr. Riordan’s insistence that AMI should be required *“to take ownership”* of the Report. The annotations recorded on their copies of the second draft Report, which in the view of the Tribunal must have represented, in large part, work undertaken by them independently, in advance of the Project Group meeting of Monday, 23rd October, recorded significant concerns directed to the correctness of the weightings applied in constructing the results tables, and to elements of the markings recorded. They too it seems shared Mr. O’Callaghan’s objection to the passages, incorporated into the second draft, suggesting that unanimity had been achieved at the meeting of 9th October, 1995. The information concerning Mr. Lowry’s strategy of proceeding to Government on 24th October, was also, it seems, known within the Department of Finance and, as will emerge, had seemingly been conveyed to Mr. Ruairi Quinn T.D., the Minister for Finance, by his officials during the previous week.

THE PROJECT GROUP MEETING COMMENCES

46.08 It was with these opposing mindsets that the members of the Project Group gathered together at 11.00am on 23rd October, 1995, for what was to be their final official meeting. Mr. Michael Andersen and Mr. Jon Brüel of AMI were recorded as present at the meeting. However, as in the case of the meeting of 9th October, 1995, it was Mr. Andersen’s evidence that his attendance was foreshortened. Adverse headwinds encountered on his flight from Copenhagen

had delayed his arrival, and he believed that in all he was present for no more than an hour or an hour and a half of the meeting. His departure had been at 2.00pm or 3.00pm that afternoon, and was certainly prior to senior officials consulting separately with the Secretary General, as he believed he would have recalled that development.

46.09 As with all other Project Group meetings, the testimony of Departmental officials was in large part directed to the documentary records available to the Tribunal. Apart from Mr. O’Callaghan’s chronology, and the annotated copies of the second draft Report which, at least to some degree, reflected matters which must have arisen in the course of discussion, the following records were accessible to the Tribunal:

- (i) the official report of the Project Group meeting, a single page typed document signed by Ms. Nic Lochlainn, and dated 12th December, 1995; and
- (ii) a contemporaneous abridged set of handwritten notes made by Mr. McMahon in his personal journal.

There was nothing available to the Tribunal equivalent to Ms. O’Keeffe’s contemporaneous notes of the previous Project Group meeting of 9th October, 1995, in which she had carefully recorded the exchanges between those in attendance. It is unclear whether no such contemporaneous notes were kept, or whether such notes as were kept were not preserved.

46.10 The formal official report signed by Ms. Nic Lochlainn and dated 12th December, 1995, contained the following short record:

“Corrigendum

Mr. Billy Riordan noted, for the record, that Mr. Jon Brüel of AMI had stated at the previous meeting that he was sufficiently satisfied that the financial tables, as evaluated, were adequate and true. Reference to this statement had been omitted from the minutes of the previous meeting in error.

Discussion of Draft Report

The meeting then proceeded with a discussion of the draft AMI evaluation report. Views from Regulatory, Technology and D/Finance all indicated that, while there was general satisfaction with the

detailed analysis of the final result, the presentation in the draft report of that analysis was not acceptable.

Hence the discussion focused on the detail of the report. A re-ordering of certain sections of the report, together with some textual and typographical amendments, was agreed.

Future Workplan

Amendments to certain sections remain to be finally agreed; these were to be agreed within the Irish members of the Group on the following day and Mr. Brennan was then to be deputed to come to final agreement with AMI with respect to the final text of the report.”

46.11 Ms. Nic Lochlainn, who was the author of the meeting report, testified that, as she had different priorities after the completion of the evaluation process, and as she was on annual holidays in November, 1995, she had not got around to preparing and circulating the official report until the following December. The report was drafted by her in accordance with the convention which she had addressed at an earlier point in her evidence, and hence it was confined to recording what had been agreed by the Project Group, rather than the exchanges which led to such agreements. That convention does not, and cannot however explain what are clear inaccuracies in the report. As will already be apparent from the contents of Mr. O’Callaghan’s chronology, and the document entitled “*Views of the Regulatory Division*”, there cannot have been “*general satisfaction with the detailed analysis and the final result*” at that meeting. Likewise, the “*Future Workplan*” details, which inferred that arrangements had been agreed in the course of the meeting of 23rd October, were not accurate. As documented in Mr. O’Callaghan’s chronology, and as confirmed by at least two witnesses in evidence, these arrangements were in fact made at short notice on Tuesday, 24th October, when it became apparent that additional time made available by Mr. John Loughrey, following representations made to him, had been withdrawn. Nor did the report contain even an intimation of what must have been considered the single most significant development in the course of that meeting, namely the provision of an additional week for the Project Group to complete its work.

46.12 In fairness to Ms. Nic Lochlainn, she was not apparently in attendance at the meeting convened on 24th October, and she may not have had the benefit of a full appreciation of what transpired on that day. Moreover, although she drafted and signed the report, the convention in place entailed a procedure whereby Ms. Nic Lochlainn was obliged to submit her draft reports for approval to her superiors within the Development Division. Insofar as the official report was

less than factually accurate, or otherwise deficient, the entire of the responsibility for that does not rest with Ms. Nic Lochlainn.

46.13 The notes made by Mr. Sean McMahon in his personal notebook, in relation to the meeting of 23rd October, 1995, were considerably more abridged than the contemporaneous and detailed record kept by Ms. O’Keeffe of the meeting of 9th October. Mr. McMahon’s notes were never intended as a foundation for the preparation of a formal or official record of the meeting, and as an active participant at the meeting, there was a limitation on the extent of the record he could have kept. His notes were nonetheless of considerable assistance, as an outline of the structure of the meeting, and of the topics that actually arose in the course of it.

46.14 The entries in his notes reflected the progression of the meeting from its commencement at 11.00am until its completion in the late afternoon, or in the early evening. His notes commenced with the following entries:

“MB - notes that I’ve only just seen ‘final draft’ report
- that min wants a result today
- that he hasn’t been promised one”

suggesting that the meeting opened with Mr. Brennan informing the assembled membership that Mr. Michael Lowry wanted a result from the Project Group that day. This would have come as no surprise to the participants, as by then most of them were aware, from the previous week, of Mr. Lowry’s plan to bring the result to Government on Tuesday, 24th October. Whilst it seems that Mr. Brennan stated that he had not given Mr. Lowry a commitment that the result would be available, his Division had made at least provisional arrangements consistent with that eventuality, including the scheduling of a briefing session for 4.00pm that afternoon, and the preparation of briefing documents and of formal documents to accompany an Aide Memoire to Government. In evidence, Mr. Brennan agreed that Mr. McMahon’s note recorded the position as conveyed by him to the meeting. Mr. McMahon testified that he was taken aback by the occasions on which he learned what Mr. Lowry knew about the process, and what Mr. Lowry wanted done, and he thought that the notes he had made reflected his reaction.

46.15 The next set of entries in Mr. McMahon’s notes recorded, in outline, discussions which seem to have commenced with a recognition, attributed to Mr. Andersen, that the award of marks could be different. The entire of the entry is reproduced below:

- “M Andersen - admits that award of marks could be different*
- Discussion – quite clear that people here are still at odds about quant v qual evaluation weighting ranking grading points etc.*
- Me - We (T+RR) cant [sic] justify the conclusion by ref to the draft that we have seen (i.e. last one). Its too close and rept is not clear enough.”*

As is apparent from that entry, Mr. Andersen’s acknowledgment that the award of marks could have been different, seems to have prompted a discussion of some of the issues which had arisen at the previous meeting of 9th October, when the first draft Report was under review, and also reflected the annotations which had been made by officials on copies of the second draft Report, to which detailed reference has already been made. Whilst Mr. McMahon’s note is far from a complete record of the exchanges between the participants, it does nonetheless seem clear that what Mr. McMahon recorded was not merely consideration of the presentation of the material comprised in the Report, but rather pertained to the evaluation itself, and reflected reservations by at least some part of the membership of the Project Group in relation to the outcome of the process, as encapsulated in the second draft Report. The discussions seemingly culminated in Mr. McMahon’s statement, as confirmed by him in evidence, that the Regulatory Division could not justify the conclusion reached by reference to the draft Report, as the result was too close, and the Report was not clear enough.

46.16 There can be no doubting that the statement, which Mr. McMahon attributed in his notes to himself, represented in the clearest terms his view that, in the first place, the result was too close, and that, in the second place, the Report was not clear enough. There is no reason to doubt the accuracy of Mr. McMahon’s note, and the Tribunal is satisfied that Mr. McMahon made his views, as recorded in his note, known to the Project Group. Whilst Mr. Brennan’s recollection of the meeting was that the deliberations of the Group were directed solely to drafting and presentational issues, and whilst it was his evidence that he did not recall Mr. McMahon articulating views of the type recorded in the document entitled “*Views of the Regulatory Division*”, the Tribunal is satisfied that Mr. McMahon’s objection was unequivocally voiced at that meeting, and that there can have been no room for uncertainty on the part of those in attendance that it was his opinion that a sufficiently clear result had not emerged from the evaluation that had been undertaken, as reflected in the second draft Report.

46.17 What then followed in Mr. McMahon's notes was a series of entries, recording the substance of the topics discussed over the greater part of the meeting until 3.30pm in the afternoon, when proceedings were, it seems, suspended to enable the three Principal Officer members to consult with Mr. John Loughrey. The topics under discussion seem to have encompassed consideration of both specific issues, arising from the text of the draft, and wider issues of principle. The following were the entries recorded by Mr. McMahon:

"4.1 more text needed to explain basis of Table 1

- agreed. I made point that bottom lines of Tables doesn't explain the weightings etc.*

3.2 I raised the EU procurement point.

Much discussion of Append. 11. I'm not happy that were using this in a relevant way.

- much discussion about my point as to how to explain result in subtotals*
- Agreed that text will have to explain it*
- Note that it was conceded by MB and MA that different types of weighting were used, sometimes none, sometimes 'feel' to arrive at bottom line.*
- Much discussion about bottom of exec summary '4 different methods' – my point*

We didn't use 4 different methods. Only one. The grading (ie AMI in C'Hagen) simply re-grouped."

46.18 That passage reflected what seems to have been discussion of the selfsame themes that had emerged at the previous meeting of 9th October, 1995, and which had apparently taxed Mr. O'Callaghan, Mr. Riordan and Mr. Buggy, as evidenced by the annotations made by them on their copies of the second draft Report. In the course of what must have been lengthy exchanges, discussion seems to have ranged over, amongst other things, the opaqueness of the tables, the application of weightings, and the proposition that four different methods of evaluation had been used. Amongst the Departmental witnesses who acknowledged having a recollection of the meeting, it was accepted that the exchanges at the meeting were lively, and that debate was robust.

46.19 It seems from Mr. Andersen's evidence that, although matters relevant to the substantive exchanges recorded were attributed to him by Mr. McMahon, he was either not present, did not recall, or had not appreciated the degree of dissent within the Project Group. Whilst there is no doubt that there was very considerable disagreement voiced at that meeting, which ultimately prompted resort to the Secretary General, Mr. Andersen testified to having no such awareness. It was initially his evidence that what he remembered of the meeting was that he had been "*shell-shocked*", as he put it, by an observation made by Mr. McMahon that it would be difficult to regulate Esat Digifone, a consideration which Mr. Andersen regarded as being extraneous to the evaluation.

46.20 However, as Mr. Andersen's evidence proceeded, his memory seemingly improved. He testified that during his attendance at the meeting, there was no internal dissent or complaint of insufficient opportunity to study the draft Report. Had there been, Mr. Andersen believed that he would have remembered, as he would have regarded such matters as a critique of his Report. When he departed the meeting, he believed that the Project Group was of one mind. He recalled that Mr. Brennan specifically asked members whether they agreed with the result and with the scores, and whilst he did not know the exact wording used by Mr. Brennan, there was no dissent when he was present except for the observation made by Mr. McMahon. It was Mr. Andersen's testimony that, when he returned to Copenhagen after the meeting, it was "*game over*", his client had accepted the Report, save for some changes which were subsequently made. Mr. Andersen initially described those changes as "*minor*", but immediately corrected that description to "*important*". Mr. Andersen was never told by Mr. Brennan or Mr. Towey, with whom he subsequently had contact, that members of the Project Group had looked for a further week to review the evaluation in the draft Report.

46.21 Mr. Andersen was surprised by the contents of the contemporaneous records, including Mr. McMahon's note entitled "*Views of the Regulatory Division – 23 October 1995*", Mr. McMahon's contemporaneous notes of the meeting made in his personal journal, Mr. O'Callaghan's chronology, and Mr. Riordan's annotations on his copy of the second draft Report, as none of the matters recorded in them were flagged in his presence. Mr. Andersen, having been a civil servant in his former existence, put the contents of those documents down to tensions within the Project Group, due to Departmental officials positioning themselves for appointment as independent regulator, an office to be established and filled arising from an imminent restructuring of the Department, and to Mr. McMahon's and Mr. O'Callaghan's relative unfamiliarity with the evaluation which had been conducted, they having not participated in evaluation sub-groups.

SIDE-MEETING WITH THE SECRETARY GENERAL AND PROVISION OF FURTHER TIME

46.22 The debate between the members of the Project Group having failed to reach resolution, matters culminated in a decision that the three Principal Officer members should consult with the Secretary General, Mr. John Loughrey. It was agreed by Departmental witnesses, including those who had no memory of that development, that the necessity for that consultation arose from Mr. Michael Lowry's desire for a result that day, and from the impasse between Mr. Sean McMahon, who believed that further time was required to bring the work of the Project Group to conclusion, as the result was too close and the Report was not clear enough, and Mr. Martin Brennan, apparently supported by Mr. Fintan Towe and possibly others, who believed that the evaluation had concluded, the result was available, and that the process should be brought to completion that day.

46.23 Neither the fact nor the outcome of that visitation to Mr. Loughrey was adverted to in the official report of the meeting, nor in any other formal or official Departmental document. But for the availability of the personal notes made by Mr. McMahon contemporaneously in his journal, and by Mr. O'Callaghan a short time later in his chronology, no documentary record whatsoever of that meeting would have come to the attention of the Tribunal, and it is at the very least conceivable that the Tribunal would never have learned of it.

46.24 The following record was made by Mr. McMahon in his personal notes, which appeared immediately below the earlier passages quoted:

*"Me, MB, SF, JMcQ went to see Sec at 3:30
Agreed that rept. not clear enough to support decision
QED!"*

Mr. O'Callaghan had noted the event as follows in his chronology:

"MB, SMacM and JMcQ met Sec and a further week was agreed to consider report. Mtg went on until 7:30pm."

46.25 Amongst the protagonists in attendance at that side-meeting, Mr. Brennan, who it seems may have proposed it as a solution to the obstacle which had been reached, had no memory of it at all. Likewise, Mr. Loughrey who, although expressing some degree of incredulity at the frailty of his memory, shared Mr. Brennan's deficit of recollection. Mr. McQuaid, the third Principal Officer who attended the meeting, had a limited memory of it, and Mr. Fitzgerald, who was then Assistant Secretary with overall responsibility for the three

Telecommunications Divisions, had no recollection of the meeting, or of having had any knowledge of it, or of its outcome. Whilst Mr. McMahon acknowledged that it was possible that he may have been in error in recording Mr. Fitzgerald as present, the Tribunal considers it improbable that Mr. McMahon could have made such an error in his contemporaneous note, and further considers it improbable that the three Principal Officers, in making their approach to Mr. Loughrey, would have bypassed Mr. Fitzgerald, or for that matter that Mr. Loughrey, failing Mr. Fitzgerald's absence from the Department, of which there was no evidence, would have permitted the meeting to proceed without his attendance.

46.26 It was in these circumstances that, with the exception of Mr. McQuaid, whose recollection was limited, Mr. McMahon's testimony was the sole source of evidence available to the Tribunal of the events that led to the side-meeting, and of what transpired at it. As to the circumstances in which the side-meeting arose, Mr. McMahon testified that he had made his views to the Project Group clear, he recalled that discussion had followed, and that he had tested other people on the issues. He had formed the view that when put to it, most of the Project Group agreed with him that the draft Report could not substantiate the result, to the extent that was necessary for a decision of that kind at that stage. Insofar as a qualitative assessment would have helped to further separate the top two candidates, and insofar as it was provided for adequately in the methodology, it was his view that it should have been done. He recalled that there was a strong argument to the effect that the evaluation had been done, but he queried exactly what had been done, and whether a real qualitative assessment had been undertaken. From that exchange, he had formed the view that people did feel that there should be more of a qualitative assessment, although they may have been at that stage unwilling to go ahead with it, given that they felt in their own minds that they had a clear result, and given that Mr. Lowry wanted a decision that day. In his evidence, Mr. McMahon stated that he did not wish to infer that people present at the meeting were influenced by Mr. Lowry's desire for a decision that day.

46.27 Mr. McMahon further testified that, at some point, he had gone to Mr. Brennan and had said that they were not going to resolve matters, and he thought that it had been Mr. Brennan who then proposed that they should consult with Mr. Loughrey. The three Heads of Division left the Project Group meeting at 3:30pm to meet with Mr. Loughrey. Mr. McMahon's testimony was that the side-meeting was relatively short in duration, in comparison with the much lengthier Project Group meeting; it was his recollection that the side-meeting had lasted for well over an hour, or possibly for as long as two hours. He described how the side-meeting had not been an easy experience for him. It had been difficult, as Mr. Lowry wanted a decision that day, and it had also been

difficult for him to argue the point before Mr. Loughrey, who had not read the draft Report himself, and who was trying to adjudicate between two opposing viewpoints. As Mr. McMahon put it, he argued that the draft Report could not justify the conclusion in it, and that more time was needed to revisit the qualitative analysis. The counter-argument was that the Project Group had done all that was needed, that it would not alter the ranking if they went further, and that there was nothing to stop the Project Group from allowing Mr. Lowry to proceed.

46.28 Mr. McMahon testified that the upshot of the meeting was that it was agreed that the draft Report was unsatisfactory, and would require clarification. It was his understanding, as a result of the meeting, that whatever further time was necessary would be made available, and although he could not recall exactly how much further time had been provided, he believed that he formed the view that a further week would be sufficient time. He did not exactly recall that a figure of one week had been agreed, but he had noted that it was Mr. O’Callaghan’s evidence that, following the side-meeting, they had discussed the matter, and that Mr. McMahon had informed Mr. O’Callaghan at the time that a week’s extension had been provided. Mr. McMahon presumed that, having granted the extra time, Mr. Loughrey would then confer with Mr. Lowry.

46.29 The Tribunal found Mr. McMahon’s evidence surrounding the side-meeting both detailed and lucid, and overall accepts that his account was a reliable one. There can be no doubt that Mr. McMahon found the entire episode both a stressful and disturbing experience. It was clear from the content and tenor of his evidence that he had felt under considerable professional strain in challenging the views of his colleague, Mr. Brennan, within the forum of the side-meeting. He was measured and careful in his testimony to the Tribunal, and was scrupulously fair to his colleagues, being at pains both to acknowledge the merit in the opposing view, and to recognise the possible shortcomings and flaws in his own view. The Tribunal further recognises that the giving of that evidence to the Tribunal must, of itself, have been a matter of some discomfort for Mr. McMahon, as he found himself alone amongst his four, or possibly five, colleagues who attended the meeting, as the sole witness admitting to a detailed recollection of it.

46.30 The entry in Mr. McMahon’s personal journal recording the side-meeting was at the foot of the second of three pages of his journal devoted to the events of 23rd October. At the top of the next and final page, he had made the following further entry:

“Add 1 L Lines decisions

2	End V tell	“
3	enforcement of licences	“ ”

That entry was then separated by some blank space from the final note, which commenced with the words “on our return”, clearly signifying the return of the three Principal Officers to the Project Group meeting after the completion of the side-meeting.

46.31 Mr. McMahon confirmed that the above quoted passage appeared to relate to proceedings at the side-meeting, and he testified that it suggested to him that he may have taken that opportunity to drive home, as he put it, some of the points regarding regulation of the fixed-line market that were ultimately reflected in the Government Decision of 26th October, 1995. He added that he would certainly not have missed the chance of having those matters placed before Government. It will be recalled that, around this time, Mr. Sean Fitzgerald had given considerable thought to the impact of Esat Digifone emerging as the winner of the competitive process on the regulatory regime. This was evidenced by the detailed note he had generated, entitled “*The GSM Award and Regulation of Competition*”, and the contents of which he believed he would have discussed with Mr. Brennan and with Mr. McMahon. Mr. Fitzgerald testified that he had prepared that document at some point after his review of the second draft Report, on Thursday, 19th or Friday, 20th October. As has already been observed, certain of Mr. Fitzgerald’s views, as encapsulated in that document, were ultimately reflected in the Government Decision of 26th October, and in particular those parts of the Decision which authorised an increase in tariffs for the provision of leased-lines by Telecom Éireann, and which noted the proposal that the regulatory regime would be strictly enforced.

46.32 Although it is unclear how these regulatory issues ultimately came to form an integral part of the announcement of the result of the process, it would seem that they were raised at some point in the course of the consultation with Mr. Loughrey. In view of the close and detailed consideration given to them by Mr. Fitzgerald at this time, it seems more probable than not that Mr. Fitzgerald had in fact been in attendance at the side-meeting, as had been recorded by Mr. McMahon, and had most probably been the catalyst for such discussion of the topic as ensued.

46.33 Mr. Loughrey’s evidence in regard to what was, by any reasonable standard, a highly significant development, was in a nutshell that he had no knowledge or recollection of the side-meeting, or of any request for additional time, or of the provision of such time. As has already been detailed, it was Mr. Loughrey’s testimony that he had been absent from the Department, through a

combination of sick leave and annual leave, for the greater part of the evaluation process, and had not returned to his desk in the Department until Wednesday, 4th October, 1995. Although he conceded that he was probably aware that the pace of work had increased in the latter part of October, and that the process was moving towards completion, he did not believe that he had any information concerning the emerging ranking until a short number of days before the result was available. Nor it seems, according to his evidence, had he any knowledge of Mr. Lowry's resolve to accelerate the process once the work of the Project Group was completed, even though that had been known to the entire Project Group from 9th October. Nor it seems was Mr. Loughrey aware of Mr. Lowry's intention to bring the result to Government the following day, Tuesday, 24th October, even though known to the membership of the Project Group, and to the Department of Finance, from at latest the previous Tuesday, 17th October, 1995.

46.34 Mr. Loughrey explained in his evidence that he considered that, overall, he and Mr. Fitzgerald had a very limited role in the evaluation process, which had been delegated in its entirety to the Project Group. As regards the substantive evaluation, he saw no role for himself whatsoever. He considered that he and Mr. Fitzgerald might have jointly had a residual role of last resort, in the nature of a court of appeal, if something grave had arisen. It seems to the Tribunal that something very grave had indeed arisen on 23rd October, 1995, when Mr. Michael Lowry wanted a result that day, to bring to Government the following day, and when there was evident conflict within the Project Group, which had reached such proportions that there was an impasse which could not be breached otherwise than by resort to Mr. Loughrey, and seemingly also Mr. Fitzgerald. It is accordingly all the more mystifying that Mr. Loughrey could not recall any aspect of these critical events.

46.35 Mr. Loughrey accepted absolutely, by reference to the documentary record, and the evidence heard by the Tribunal, that members of the Project Group had come to see him on 23rd October, 1995; that there had been a discussion; and that the view was expressed that more time would be made available. He further accepted totally that it was he who had acceded to the request for additional time on 23rd October. If, as testified by Mr. Loughrey, he had no knowledge of Mr. Lowry's intention to proceed to Government the following day, or that Mr. Lowry had requested a result that day, or that a briefing session with Mr. Lowry had been scheduled for 4.00pm that afternoon, the approach made by his three Principal Officers must have been a highly disturbing revelation. As the most senior Departmental official, and as the one responsible for liaison between Departmental staff and Mr. Lowry, as Minister, Mr. Loughrey would surely have been perturbed to learn of these developments. It is therefore all the more baffling that events of such magnitude could have slipped entirely from Mr. Loughrey's memory, and that no amount of stimulation, in form of

documentary records, and the evidence of other witnesses, apparently elicited any recollection on his part.

46.36 Whilst Mr. Brennan, in common with Mr. Loughrey, was consistent in his evidence that he had no glimmer of recollection of these events, other Departmental witnesses, who had not been members of the delegation, acknowledged having a memory of them. Mr. Ed O’Callaghan, who had created a record in his chronology, had no difficulty in recounting his recollection that at the Project Group meeting he and Mr. McMahon, and he thought possibly others, had stated that more time was required. He believed that this view had been articulated in the context of being informed that Mr. Lowry wished to go to Government the following day with a recommendation. He thought that it had been Mr. Brennan who had suggested that he, Mr. McQuaid and Mr. McMahon should discuss the matter with the Secretary General. He recalled the three of them leaving the meeting to see Mr. Loughrey, and he testified that, on their return, the meeting had been informed that Mr. Loughrey had agreed that a further week would be available to the Project Group to consider the Report. It was his recollection that he was informed that Mr. Loughrey would clear that further time with Mr. Lowry.

46.37 Likewise, Mr. Towey testified that it was his understanding that a request for further time had been made by Mr. McMahon, and that Mr. Loughrey had been disposed to allowing some short additional time. Mr. Towey’s memory of detail was more hazy than that of Mr. O’Callaghan, but it must be said that, from the outset, Mr. Towey displayed a readiness to acknowledge the facts and circumstances of these events, and had confirmed his recollection in his Memorandum of Intended Evidence, furnished to the Tribunal some months before the Tribunal commenced its inquiries at public sittings. Whilst Mr. Towey was unclear as to the precise duration of additional time sanctioned, he accepted that, when the Project Group meeting of 23rd October concluded, he had not anticipated that he would have to undertake work of the magnitude which was ultimately required on the following day. In other words, he understood that the time pressure, which had been imposed by Mr. Lowry’s desire to proceed, had been eased.

46.38 It is the Tribunal’s view that there can be no doubt that the result of the side-meeting with Mr. Loughrey was that further time had been made available to the Project Group, and that the time pressure which had been imposed by Mr. Lowry’s deadline, of proceeding to make a recommendation to Government on Tuesday, 24th October, had been lifted. There is no reason that the one week duration of that extension, as recorded in Mr. O’Callaghan’s chronology, should

be doubted, and it is noteworthy that, whilst not recalling the precise duration, no Departmental witness challenged that aspect of Mr. O'Callaghan's record.

THE PROJECT GROUP RESUMES

46.39 The meeting of the Project Group did not conclude on the return of the three Principal Officers from their consultation with Mr. Loughrey, but, according to Mr. O'Callaghan's chronology, continued until 7.30pm that evening. Mr. Andersen and Mr. Brüel did not remain until the meeting concluded, as they had left in the early afternoon to return to Copenhagen. They were not in attendance at any further meeting in Dublin over the following three days, and all communications with them after 23rd October, were by telephone, or by fax. Mr. McMahon testified that his memory of the side-meeting was that it had taken up in excess of one hour, and possibly as much as two hours. Whilst Mr. Loughrey doubted that his day would have been encroached on to the extent of two hours, as he had no recollection whatsoever of the meeting, it seems that little weight should be given to his evidence in that regard. If Mr. McMahon's estimation was correct, and the Tribunal has no reason to doubt it, this means that the Project Group meeting may have resumed for upwards of a further two hours. The deliberations during that final stage of the meeting were reflected in a short two-part entry on the final page of Mr. McMahon's notes in his journal, as follows:

“ On our return:-

Agreed: final decision should not be on Table 16

*- this resulting from both our meet with Sec
and, independently, by Group in our absence*

*it should be Table 17 + 18 !? They can't agree on
whether same weights went in. It seems MB dreamt them up
during qual 'evaluation'.”*

46.40 According to Mr. McMahon's entry, it seems that an agreement was reached relating to the tables in the results section of the draft Report, and in particular that the result of the qualitative evaluation should not be presented in the form of Table 16. This, it will be remembered, was the Aspects table, and was the first of the three tables in the results section, and the one which presented the output of the qualitative evaluation in the form envisaged in the Evaluation Model, namely, by reference to four of the Aspects identified by AMI at the outset. That agreement was also documented in Mr. Riordan's annotated copy of the second draft Report which, as will be remembered, he had used as a working document over the final days of the process. Mr. Riordan had written the word “gone” in a circle beside Table 16 in his copy of the second draft Report.

46.41 Mr. McMahon's entry suggests that this agreement resulted from the deliberations which were proceeding simultaneously in both locations, namely, at the side-meeting with Mr. Loughrey, and amongst the balance of the membership of the Project Group still in attendance at the meeting proper. It seems that what was agreed was that the output of the qualitative evaluation should be presented in the form of Table 17, in which the dimensions were regrouped in accordance with the ranking of the evaluation criteria to which they corresponded, and which displayed numerical weightings for each dimension, and Table 18, which was in the same form as Table 17, save that the grades were converted to numerical scores. Both of these tables were described in the first and second draft Reports as reflecting conformance tests, and the latter was subject to the qualification in both drafts that the conversion distorted the idea of a qualitative evaluation. Mr. Andersen and Mr. Brüel had long departed the meeting for Copenhagen by the time this agreement was reached, and were clearly neither the source of advice which led to it, nor parties to it. Ultimately, as will be seen, that agreement was implemented, but not without some resistance on the part of AMI.

46.42 The final reference in Mr. McMahon's last entry in the context of Table 17 and Table 18 was:

"They can't agree on whether same weights went in. It seems MB dreamt them up during qual 'evaluation'."

This record self-evidently related to the weightings shown in Tables 17 and 18. As was clear from all of the evidence heard, and as was substantiated, both by Ms. O'Keeffe's contemporaneous notes of the previous meeting on 9th October, 1995, and by the annotations made by Mr. O'Callaghan, Mr. Buggy and Mr. Riordan, there was ongoing contention within the Project Group surrounding the equal weightings applied to the three dimensions of the first evaluation criterion, Market Development, Financial Key Figures, and Experience of Applicant, which, according to the agreed Evaluation Model, carried weightings of 7.5, 15 and 10 respectively, but to which equivalent weightings of 10, 10 and 10 had been applied in the generation of Table 17 and Table 18. It seems probable that the dissent recorded in Mr. McMahon's entry related to this same issue. It will be remembered that the annotations made by Mr. Riordan on his working copy of the second draft Report were explicit, and that above the weightings column, as shown in Table 17, he had made two separate notations as follows:

"Not agreed by Project Group"

"No reason why the 10s should be split in this way."

46.43 As already alluded to, Mr. Riordan testified that those entries recorded observations made at the Project Group meeting of 23rd October, although he could not recall whether, in noting them, he was recording his own observations, or those made by some other member of the Project Group. Whether those annotations reflected Mr. Riordan's views recorded in advance of, or in the course of, the Project Group meeting, or the views of another member of the Project Group, it seems beyond doubt that there was a clear recognition that the 10/10/10 weightings were not the weightings adopted by the Project Group in advance, even though the text recorded that the weightings shown in Table 17 and Table 18 were "*agreed prior to the closing date for quantitative purposes.*" It is noteworthy that the Tribunal heard evidence that, as late as 3rd April, 1996, over five months after the final Evaluation Report, Mr. Donal Buggy, in a memorandum to Mr. Fintan Towey regarding proposed correspondence with disappointed applicants, had expressed concern as to whether the equal 10/10/10 weightings had ever been agreed.

46.44 It will be recalled from Mr. Towey's evidence, Mr. Brennan and Mr. Andersen having no memory, and accordingly being unable to assist the Tribunal, that a decision had been made in Copenhagen, in the course of constructing Table 17 to arrive at an overall ranking, that the weightings of the three dimensions of the first evaluation criterion should be distributed equally. It accordingly seems probable that Mr. McMahon's final note, "*It seems MB dreamt them up during qual 'evaluation'*", may reflect an explanation along the lines described by Mr. Towey to the Tribunal having been proffered at this time to the Project Group.

46.45 What seems clear is that the meeting of the Project Group of 23rd October, 1995, broke up on a note of significant discord, directed to the weightings as shown in Table 17 and Table 18. As acknowledged by both Mr. Riordan and Mr. Buggy in connection with the annotations on their copies of the second draft Report, doubts were expressed regarding the relative positions of A3, Persona, and A5, Esat Digifone, as derived from the results tables, and in particular there was concern surrounding:

- (i) the equal weightings applied to the three dimensions of the first-ranked criterion; and
- (ii) whether there was a margin of significance between A3 and A5.

By then of course the deadline had been lifted, as a result of the intervention of Mr. Loughrey, and the membership of the Project Group believed, as was acknowledged by Mr. Towey and Mr. O'Callaghan in evidence, that there would

be ample time to address and resolve these and other areas of disagreement and concern.

46.46 Mr. Michael Andersen, having long departed the meeting, was unaware of developments after 2.00pm or 3.00pm that day. According to his evidence, he knew nothing of the level of disagreement and dissent within the Project Group. He was seemingly labouring under a misapprehension that the Project Group had collectively supported both the ranking and the AMI second draft Report in the course of that meeting. Whilst he agreed that, from the contemporaneous documents drawn to his attention, it could hardly be suggested that there was unanimity at that meeting, he was again “struggling” with their contents, as none of the issues identified in those records were flagged when he was present.

46.47 Whatever recollection Mr. Andersen had when he gave evidence, and whatever weight may be attached to his evidence, the thrust of that evidence was at odds with the contents of the AMI memorandum co-authored by Mr. Andersen in January, 2002, when the Tribunal was informed as follows:

“It should be noted that up until the issuance of the final evaluation report, there was some disagreement among the members of the PT GSM as to whether the evaluation could be viewed as final and a final evaluation report issued. In the opinion of AMI, the evaluation ought to and would under ‘normal’ circumstances have included some further analyses and elaboration of the key documents presented, but due to the budget constraints, the Department did not want a more detailed and thorough evaluation.”

EVENTS OF TUESDAY, 24TH OCTOBER, 1995

THE FURTHER TIME IS WITHDRAWN AND THE RESULT IS TO BE ANNOUNCED THE FOLLOWING DAY

47.01 There were only three Departmental witnesses who acknowledged having a distinct memory of the events of the penultimate day of the process. They were Mr. Ed O’Callaghan and Mr. Fintan Towey, in addition to Mr. Aidan Ryan of the Technical Division. None of the three was a participant in the decisions made, or the directions given on that day, and their knowledge was largely dependent on information conveyed to them by their superordinate officers. This does not however detract from the fact that each of them fairly and honestly endeavoured to engage with the Tribunal’s inquiries, and this was particularly so in the case of Mr. Towey, who was not bound by the contents of any record created by him.

47.02 Apart from these three notable exceptions, the Tribunal’s inquiries were met with a wall of silence based on frailty of recollection and inadequacy of memory. Mr. John Loughrey, Secretary General, remembered nothing. Mr. Sean Fitzgerald, Assistant Secretary, remembered nothing. Mr. Martin Brennan, Project Group Chairman, remembered nothing. Mr. Billy Riordan remembered nothing. Mr. Donal Buggy remembered nothing, likewise Ms. Maev Nic Lochlainn, Mr. Jimmy McMeel, and to a lesser degree Mr. John McQuaid. Mr. Sean McMahon appeared to be confused between the Project Group meeting of Monday, 23rd October, 1995, which concluded in discord at 7:30pm that evening, and a separate drafting meeting, which commenced at 5.00pm on Tuesday, 24th October, 1995.

47.03 The status of proceedings, as of the morning of Tuesday, 24th October, was recorded by Mr. McMeel, the Project Group representative of the Department of Finance, when he sent a written memorandum to the Minister for Finance, Mr. Ruairi Quinn T.D., to which passing reference has already been made. The contents of that memorandum are now reproduced:

“Subject: Competition for the award for the second mobile telephone licence.

David Doyle mentioned to you last week that the result of this was imminent. MTEC had intended to bring the matter to Government today but will not now do so. The reason is that the Project Team (of which I am a member) has not finalised its work with respect to the consultant’s report.”

This memorandum was presumably sent to Mr. Quinn in advance of the scheduled Cabinet meeting that morning, for the purposes of conveying to him that the recommendation, which he had been informed during the previous week would be made that day, would not be made, as further time was required by the Project Group. The memorandum is instructive, both as to the knowledge of the Department of Finance during that previous week of Mr. Lowry's then intention of bringing a recommendation to Government on Tuesday, 24th October, and as to the status of the process following the conclusion of the Project Group meeting of the previous evening.

47.04 The solitary record of the events of 24th October, was contained in Mr. O'Callaghan's chronology, in which he had recorded in the penultimate paragraph:

"...informed that Taoiseach had requested Sec to expedite the position with a view to clearance at Govt the following day. I went through drafting changes with MB 4-5. Mtg at 5pm, left at 7.15 – drafting changes still being discussed to be faxed to MA."

Mr. O'Callaghan had mistakenly dated this entry 23rd October, but in his evidence he corrected that dating, and confirmed that the events recorded in that paragraph occurred on 24th October. Mr. O'Callaghan testified that he was informed on that day that, notwithstanding the further time made available by Mr. John Loughrey the previous evening, Mr. Michael Lowry intended to proceed to Government on the following day, Wednesday, 25th October, 1995. Mr. O'Callaghan explained that it was at some time during the morning of Tuesday, 24th October, when the Regulatory Division representatives were expecting that they had a lengthy period of time to deal with matters aired on the previous day, that he was informed of Mr. Lowry's intention. Mr. O'Callaghan could not recall precisely who it was who had so informed him, but thought it was either Mr. McMahon, or someone from the Development Division. When he received that communication on 24th October, Mr. O'Callaghan testified that as far as he was concerned the matter was a *"fait accompli, the decision has been made"*, as he put it, and the Project Group had to make the best use of the time available to it.

47.05 It was Mr. Towey's evidence that he thought, but was not entirely certain, that it was Mr. Brennan who had informed him of Mr. Lowry's decision to announce the result on Wednesday, 25th October, but he had no direct knowledge of that decision himself. Whilst Mr. Ryan did have a memory of the final session of the Project Group, which commenced on the evening of 24th October, and proceeded to a late hour, he had no recollection of the events of that, or the previous day, in terms of time being made available, and then being withdrawn. With the notable exceptions of Mr. O'Callaghan and Mr. Towey, not

one of the Departmental witnesses, including those who had been at the fulcrum of events, appeared in a position to assist the Tribunal as to how, or why, that additional time was withdrawn, against what must have been the advice of Mr. Loughrey, or as to how, or why, a determination was made that the result should be brought to Government, and announced publicly, on 25th October, 1995.

47.06 Mr. Loughrey, who, it will be recalled, had no memory of the side-meeting of 23rd October, or of further time having been extended at his instigation, but nonetheless absolutely accepted those facts, could not explain how or why, having acceded to the request for further time on Monday, 23rd October, that time ceased to be available on Tuesday, 24th October. Whilst having no memory of those events, Mr. Loughrey in his testimony outlined that part of his role as Secretary General was to act as a mediator between what he described as Ministerial demands, and what Departmental officials could realistically deliver. Where such an issue arose, and he was satisfied that further time was required by officials to complete a task, he would on many such occasions have simply granted time, without reference to his Minister, and would have subsequently informed his Minister of the course he had taken. In other words, in adopting that approach, Mr. Loughrey would, in the ordinary course, have been fully confident of his ability to secure Ministerial support.

47.07 As Mr. Loughrey could not recall any of his dealings with Mr. Lowry on either 23rd or 24th October, the Tribunal must endeavour to piece together what must have occurred from such evidence as was available. What is clear is that someone must have conveyed the outcome of the side-meeting of 23rd October, to Mr. Lowry, and that this must have been done at some point after its conclusion. Mr. Brennan had opened the Project Group meeting that morning by informing the Group that Mr. Lowry wanted a result that day, but had not been promised one. A briefing session had also been arranged for 4.00pm. Even as a matter of mere courtesy, Mr. Lowry must have been informed, at the latest after the completion of the side-meeting, that the briefing session would not be proceeding, that the result would not be available that day, and that it would not be possible for him to bring a recommendation to Government the following day. It was Mr. Loughrey who had taken the initiative in granting further time to the Project Group, and it follows logically that it was to Mr. Loughrey that the task of securing Ministerial approval for his action fell, and it seems inconceivable that Mr. Loughrey would have delegated that function to any subordinate official. Whilst again stressing his absence of recollection, Mr. Loughrey testified that he was confident that, having granted an extension of time, he would not, of his own volition, have withdrawn it, and it was his evidence that the only person who could have countermanded his decision was Mr. Lowry himself.

47.08 Mr. Brennan, also having no memory of these events at all, speculated that there could have been two possible reasons for the withdrawal of the extended time. Firstly, it was possible that, as the Project Group continued its deliberations following the conclusion of the side-meeting, a consensus may have emerged which rendered the further time unnecessary. Secondly, it was equally possible, in his view, that Mr. Lowry may have indicated to Mr. Loughrey that it was his preference that the further time granted should not be made available. Mr. McQuaid, Mr. Riordan, Mr. Buggy and Ms. Nic Lochlainn testified to having no recollection of these events, although Mr. McQuaid recalled his impression that matters moved speedily after Monday, 23rd October. Mr. McMahon, despite having a detailed recall of matters leading up to the side-meeting of 23rd October, and the outcome of the debate before Mr. Loughrey, in which he participated, found himself entirely unable to give an account of the crucial events of Tuesday, 24th or Wednesday, 25th October, 1995.

47.09 What is clear, beyond any doubt, and was undisputed by Departmental witnesses as a whole, is that the additional time provided by Mr. Loughrey, as Secretary General, on the afternoon of Monday, 23rd October, ceased to be available on the morning of Tuesday, 24th October. Mr. Brennan's thesis that the Project Group, having been at loggerheads prior to consulting with Mr. Loughrey, and securing additional time, somehow managed to resolve its difficulties during the resumption of the meeting on the evening of 23rd October, is scarcely credible. There was no support for that proposition in the documentary evidence, comprising Mr. McMahon's contemporaneous note of the meeting, and Mr. O'Callaghan's chronology, nor was there support to be found in the testimony of Mr. O'Callaghan, or of Mr. Towey, the two Departmental officials who acknowledged having a memory of what transpired. On the contrary, the documentary evidence recorded dissent at the end of the meeting of 23rd October, and neither Mr. O'Callaghan nor Mr. Towey testified to any such belated resolution.

47.10 Mr. Lowry's evidence on the withdrawal of time from the Project Group on Tuesday, 24th October, and the decision made on that day that the result would be cleared, and announced the following day, was, in common with all other aspects of his evidence, quite simple. It was his testimony that he had no role whatsoever in any of the decisions made: it was the Project Group that was responsible for delivering the result, and it was Mr. Loughrey, as Secretary General, who was responsible for securing Government clearance. According to Mr. Lowry, he played no role in the acceleration of the process, he had never formed an intention that the result should be brought to Government on Tuesday, 24th October, he knew nothing of any additional time having been provided by Mr. Loughrey to the Project Group on Monday, 23rd October, he was

never informed or consulted about it, and he had no role in relation to, and knew nothing about, the withdrawal of that time on Tuesday, 24th October, 1995. No decision was made by him regarding the obtaining of political clearance for, and the announcement of, the result, and all those matters were directed by Mr. Loughrey, as Secretary General.

47.11 Mr. Lowry's evidence in this regard was entirely inconsistent and at variance with the preponderance of the evidence available to the Tribunal, including the contemporaneous documentary records. It is beyond question that Mr. Lowry was centrally involved in the events of the final days of the process, yet, instead of engaging with that indisputable evidence, and assisting the Tribunal in its inquiries, Mr. Lowry's evidence was wholly formulaic. He knew nothing, and he had no role. The Tribunal has no hesitation in rejecting his account.

47.12 Insofar as can be determined by the Tribunal, what happened on Tuesday, 24th October, is precisely what Mr. O'Callaghan recorded in his chronology, and confirmed in his evidence, namely, that the time allowed by Mr. Loughrey was withdrawn, as a decision had been made that the matter would proceed to Government the following day. As Mr. O'Callaghan put it, it was a "*fait accompli, the decision has been made*". Likewise, Mr. Towey informed the Tribunal in his Memorandum of Intended Evidence submitted in advance of his attendance as a witness, and confirmed in evidence, that he was informed on 24th October, that Mr. Lowry intended to announce the result the following day.

47.13 What Mr. O'Callaghan had recorded in his chronology was that he had been informed that:

"...Taoiseach had requested Sec to expedite the position with a view to clearance at Govt the following day."

The then Taoiseach, Mr. John Bruton T.D., testified that he knew nothing of these events within the Department, and knew nothing about the imminence of the result of the process, until the following day, Wednesday, 25th October, 1995, when he met Mr. Lowry at the latter's request. He did not believe he had intervened in the fashion suggested or otherwise, and felt that someone perhaps could have used his name. There being no reason to question the accuracy of Mr. O'Callaghan's note, it would seem that at some point on Tuesday, 24th October, the Taoiseach's name was invoked by someone as the ultimate source of the determination to accelerate the availability of the result. Mr. Towey's evidence was also of significance in this regard, in that he stated in his Memorandum of Intended Evidence, and confirmed in his testimony, that what

was conveyed to him was that Mr. Lowry intended to announce the result the following day. It seems therefore that the withdrawal of time from the Project Group on Tuesday, 24th October, and the imperative placed on the Group, was not merely to provide a result by the following day, but to provide a result with a view to Government clearance, and a public announcement on Wednesday, 25th October, 1995.

47.14 As the next Cabinet meeting scheduled after Tuesday, 24th October, was not until Thursday, 26th October, it cannot therefore have been intended on that Tuesday that the matter would be brought to the scheduled Thursday meeting. If that was the case, there could have been no prospect of an announcement until at earliest Thursday, 26th October. As no Government meeting was planned for the following day, consideration must have been directed on Tuesday, 24th October, to how Government approval could be secured the next day, to enable an announcement to be made immediately. Whilst it was Mr. Loughrey's evidence that none of these considerations arose until Wednesday, 25th October, and that he was the source of the strategy ultimately followed, this does not accord with the facts as apparent from the evidence heard by the Tribunal. Moreover, it seems unlikely that such a tight deadline would have been imposed on the Project Group, unless careful and measured consideration was given to achieving Mr. Lowry's objective of securing Government approval, and announcing the result the following day, Wednesday, 25th October, and unless those centrally involved were satisfied that such an objective was achievable.

47.15 Whilst the Tribunal was unable to probe fully this aspect of its inquiries due to the frailty of recollection of those who made decisions on that day, Tuesday, 24th October, there was some helpful evidence available to the Tribunal from outside the membership of the Project Group, in the form of the testimony of Mr. Joe Jennings. Mr. Jennings was Press Officer to the Department at that time, having taken up his position before Mr. Lowry's appointment, and having continued in it until some time after Mr. Lowry's resignation. It seems that it was Mr. Jennings who called the press conference held late in the afternoon on Wednesday, 25th October, when Mr. Lowry announced the result of the process. Whilst Mr. Jennings was unclear about the precise timing of an interaction which he had with Mr. Lowry in that regard, it was his evidence that, in the course of meeting Mr. Lowry after a Cabinet meeting, which he initially thought was on 25th October, Mr. Lowry informed him that he had a result of the process.

47.16 Mr. Jennings, according to his evidence, advised Mr. Lowry that he should not delay in announcing the result, as it was his view that, once the matter had gone to Cabinet, there was an increased risk of the confidentiality of

the result being breached. His recollection was that he had postponed calling the press conference until the following morning, as he had not wished to raise speculation overnight. When it was suggested to him that, as the record showed that there was no Cabinet meeting on Wednesday, 25th October, that as the last Cabinet meeting before Mr. Lowry announced the result was on Tuesday, 24th October, and that as it was his memory that he had postponed calling the press conference overnight, it was more probable that his interaction with Mr. Lowry took place after the Cabinet meeting of Tuesday, 24th, Mr. Jennings could not recall if that was so, but he was firm in his evidence that it was his memory that he had deliberately deferred calling the press conference until the next day, because of his desire to avoid igniting undue media speculation.

47.17 If Mr. Jennings' memory of deferring the calling of the press conference overnight is correct, and the Tribunal was impressed with that aspect of his evidence, it seems that there must have been discussions on Tuesday, 24th October, in relation to the positioning of the result, which was consistent with the clear record that a determination was made on 24th October that Government approval should be obtained the following day, and that the result should be made public immediately thereafter.

THE DRAFTING MEETING

47.18 As was recorded in Mr. O'Callaghan's chronology, a late evening meeting of the Project Group was convened at 5.00pm on Tuesday, 24th October, 1995. In advance of that drafting meeting, Mr. O'Callaghan had the benefit of a separate session with Mr. Brennan, which Mr. McMahon may have also attended, to discuss his proposed amendments, arising from his review of the second draft Report. There was no record of the changes requested by Mr. O'Callaghan during his separate discussions with Mr. Brennan. What is however patently clear is that their advance meeting, together with the entire deliberations of the Project Group during the course of the late hours of 24th October, were directed solely to the editing of the second draft Report, and to the presentation of the result based on the marks recorded in that Report, and of the ranking arrived at in Copenhagen on 28th September, 1995. As was evident from the available documentation, not one alteration was made to the draft Report to reflect the doubts and queries variously recorded by Mr. O'Callaghan, Mr. Riordan and Mr. Buggy on their copies of the draft Report surrounding the appropriateness of the marks awarded, or the correctness of the weightings applied.

47.19 It was again to the evidence of Mr. Towey and Mr. O'Callaghan that the Tribunal had to have resort in relation to this meeting. It was Mr. Towey's testimony that it was his understanding that the purpose of the drafting meeting

was for the Project Group to use its best endeavours to resolve the remaining problems concerning the draft Report. It was his recollection that Mr. Brennan, Ms. Nic Lochlainn, Mr. McMahon, Mr. McMeel, Mr. McQuaid, Mr. Ryan, Mr. Riordan and Mr. Buggy had all attended the meeting, and that the meeting had been lengthy, and had not concluded until 10.00pm or 11.00pm that evening. Likewise, Mr. O'Callaghan's recollection was that the object of the meeting was to review proposed amendments. The matter under discussion was the text of the draft, and it was reviewed page-by-page. Each of the amendments proposed was considered, and a decision was made on whether the text should or should not be altered. The meeting was still underway when Mr. O'Callaghan had to leave at 7.15pm. He thought that, in the course of the meeting, Mr. Brennan probably adverted to the amendments discussed by them earlier at their advance meeting.

47.20 No contemporaneous note of this drafting meeting was kept, or if kept, none was retained by the Department, as none was available to the Tribunal. The final official report of the Project Group, compiled by Ms. Nic Lochlainn the following December, made no reference whatsoever to any meeting after that of 23rd October. There were however some documents available from which it was possible for the Tribunal to reconstruct at least a partial account of the deliberations at the drafting meeting. These documents were as follows:

- (i) two separate copies of a document entitled "*Suggested Textual Amendments*", prepared by Mr. Fintan Towey, on which annotations had been made by [Mr. Riordan](#), and by [Mr. Buggy](#);
- (ii) a fax sent by Mr. Towey to AMI in Copenhagen the following day, Wednesday, [25th October](#), containing particulars of the Department's final amendments.

Copies of the documents listed above can be found in the Book of Appendices to this Volume.

47.21 Mr. Towey confirmed that he had generated the initial "*Suggested Textual Amendments*" document in preparation for the drafting meeting, and had done so by reference to discussions at the Project Group meeting of the previous day. As was apparent from the markings made by Mr. Riordan and Mr. Buggy on their copies of that document, it seems that it was tabled at the drafting meeting, and discussion was directed to reaching a consensus on the wording, and on the finer details of proposed amendments. The final document, the fax sent by Mr. Towey to AMI itemising the amendments required by the Department, seemed to reflect, at least partially, the output of the drafting meeting. By tracing the evolution of the proposed amendments from Mr. Towey's initial draft, through the

workings, as recorded by Mr. Riordan and by Mr. Buggy on their copies of that draft, through to the final amendments, as dispatched to AMI, it was possible for the Tribunal to advance its inquiries into what occurred at that meeting, and much of the evidence heard by the Tribunal was directed to the contents of those documents.

47.22 Whilst the documents reflected that in excess of fifty revisions were discussed and made, the vastly greater number of them amounted to no more than minor editing changes directed to the presentation of the material, and were inconsequential in terms of the Tribunal's inquiries. There were however a number of changes discussed and directed which altered, quite dramatically, the manner in which the results were presented, or which impacted on certain key features of the Report, which will now be considered.

Deletion of the “*unanimous support*” passage

47.23 The first of these changes related to the passage in Section 2 of the draft Report which had caused, as will be recalled, considerable dissent within the Project Group, and had been highlighted in each of the annotated draft Reports available to the Tribunal, namely, the passage which suggested that “*unanimous support*” had been given to the result at the Project Group meeting of 9th October, 1995. The paragraph, as it appeared in the second draft Report, was in the following terms:

“A draft report discussed on 9 October has, following the incorporation of comments from the PT GSM, culminated in this final report. As unanimous support was given by the PT GSM to the results of the evaluation, Andersen Management International was requested to submit this final report. It was also decided to present the quantitative and the qualitative part of the evaluation in an integrated fashion in accordance with the agreed procedures, see appendices 2 and 3.”

47.24 The revised wording, as proposed by Mr. Towey in his initial discussion document was, it seems, adopted without amendment at the drafting meeting. The wording was ticked by both Mr. Riordan and Mr. Buggy in their annotated copies of the document, and remained unchanged in the final set of amendments faxed by Mr. Towey to AMI the following day. The revised wording was as follows:

“An initial draft report was discussed by the PT GSM on 9 October. The incorporation of comments on the initial and a subsequent draft by

members of the team in relation to the presentation of the results of the evaluation process has culminated in this final report.”

This revision, as will be seen, elicited a response from AMI which might not have been anticipated.

Revision of Experience of Applicant Dimension

47.25 The second revision of significance was to the presentation of the results of the qualitative evaluation of the dimension, Experience of Applicant. Before addressing the substance of the amendment, it is helpful to recap briefly on the part played by that dimension in the overall evaluation methodology, the approach to its evaluation, and the evolution of the manner in which the results for the dimension had been presented in the two draft Reports.

47.26 Experience of Applicant was one of the three dimensions of the first-ranked evaluation criterion, Credibility of Business Plan and Approach to Market Development. In terms of the quantitative evaluation, by reference to which weightings had been fixed in advance, the Evaluation Model had prescribed a weighting of 10 for the dimension, as against Financial Key Figures and Market Penetration, the other two dimensions of that criterion, which carried weightings of 15 and 7.5 respectively. In the qualitative evaluation, Experience of Applicant was the sole dimension of AMI's so-called Management Aspects. These Aspects were the focus of section 4.3 of the second draft Report, and the grades awarded for Management Aspects were contained in Table 11, again reproduced below:

Management aspects	A1	A2	A3	A4	A5	A6
1. Experience of the applicant	C	D	A	C	B	C
Management aspects (subtotal)	C	D	A	C	B	C

47.27 It will be recalled that the quantitative evaluation of the dimension had proceeded uneventfully, and had produced results which were unqualified by AMI. These quantitative results were, according to the testimony of Mr. Towey, who had been a participant in the sub-group which evaluated the dimension, used as a direct input into the qualitative evaluation, and were represented by the indicator Experience as Cellular Operator, one of four indicators assessed qualitatively. For some reason, which is not apparent, that indicator, as recorded in all versions of the Evaluation Report, was weighted “three times less than” the other three indicators in the overall marking of the dimension. As stated in the draft Reports, and as confirmed by Mr. Towey, the score in the quantitative evaluation was “translated into the award of marks”, and that translation is shown in the table below.

	A1	A2	A3	A4	A5	A6
Points	3.68	0.45	5.00	0.54	0.97	2.74
Marks	B	E	A	D	C	B

47.28 The disparity between the scores in the quantitative evaluation, and the grades into which those scores had been converted, was raised with Mr. Towey in the course of his evidence, as has already been commented upon in some detail. In the first draft Report, it will be recalled that the sub-section contained three tables, Table 11, which showed the overall results for the dimension, as reproduced above, Table 12, which showed the data that had emerged from the quantitative evaluation and the workings to that data to compute the score awarded to each applicant, and Table 13, which showed the total grade for the dimension and a breakdown as between the four indicators in the qualitative evaluation. All of these tables have been reproduced at various points in this Volume.

47.29 In the second draft Report, the version under consideration at the drafting meeting, Table 12 had been truncated, and all entries showing the workings to arrive at the final scores in the quantitative evaluation, together with those final scores, had been deleted. In the absence of those entries, Table 12 contained only the raw data which had emerged from the quantitative evaluation, and, in the absence of the deleted entries, it would have been meaningless to anyone studying it. Mr. O’Callaghan had made a series of annotations to that much reduced Table 12, signifying his problems in understanding it. That difficulty was not, as might have been expected, met by the reinstatement of the original entries, but rather by the removal of the entire of Table 12 from the final Report, and by the deletion of the text which appeared below it, which stated :

“As seen from Table 12, A3 has the widest international experience in OECD member countries, mainly due to the Unisource backer which has a well-established basis as GSM1 in the home countries of Telia, KPN, Swiss Telecom and Telefonica.”

47.30 In place of Table 12 and the above text, the following text was substituted:

“A3 has considerable quantity of cellular experience with its principals being involved in four GSM1 networks and five other cellular networks in OECD member countries. A1 is similarly strong with its principals having a combined experience of 1 GSM2 network, 2 GSM1 networks and 3 other cellular networks. A6 has experience of two GSM2 networks and one other cellular network. A4 and A2 have no GSM

experience but do have experience of other cellular networks. A5, however, has GSM1 experience in a competitive market.”

This revision was proposed by Mr. Towey in his discussion document, and was seemingly approved without qualification by the drafting meeting, and by AMI, as no change to it was apparent from the annotated copies of the discussion document, from Mr. Towey’s fax to AMI of 25th October, 1995, or from the final version of the Report.

47.31 The disparity in the conversion from the quantitative scores to the qualitative grades has already been highlighted in the course of this Volume, and reference has been made to Mr. Towey’s evidence on the point. By truncating the table in the first draft, and by then removing the table in its entirety, together with its accompanying text, from the second draft, all trace of that disparity, which would have been evident to any reader of the first draft, was edited out of the Report. The replacement text could not, on any reasonable appraisal, be considered an entirely balanced or representative account of the results which had emerged from the quantitative evaluation.

Revision to the Sensitivities, Risks and Credibility Section

47.32 The third significant set of changes was to Section 5 of the second draft Report, which addressed the analysis of sensitivities, risks and credibility factors. These were the dimensions of AMI’s so-called “*other aspects*”, and following a decision made in Copenhagen on 28th September, they were not scored or marked. That decision, although not recorded in any form, followed a proposal made by Mr. Andersen in his memorandum of 21st September, 1995, to Mr. Brennan and Mr. Towey, in which he had suggested that:

“If there is a clear understanding between the Department and AMI of the classification of the two best applications, it is suggested not to score ‘other aspects’, the risk dimensions and other dimensions, such as the effect on the Irish economy. In this case, the risk factor will be addressed verbally in the report.”

47.33 Before commenting on the far-reaching revisions to that part of the text which addressed the risks and sensitivities of the A5, Esat Digifone application, it is again necessary to recap briefly both on the evolution of those passages, and on the comment which they had attracted in the course of Project Group meetings, and in separate reviews undertaken by members of the Project Group, and by Mr. Sean Fitzgerald. What was stated in the first draft Report was as follows:

“In general, the credibility of A5 has been assessed as extremely high as A5 is the applicant with the highest degree of documentation behind the business case and with much information evidenced. In addition, it can be stated that A5 does not have abnormal sensitivities in its business case. Taking all the sensitivities defined in the tender specifications into account, A5 still earns a positive IRR. The weakest point concerning A5 is not related to the application as such, but to the applicant, or more specifically to one of the consortium members, namely Communicorp, which has a negative equity. Should the consortium meet with temporary or permanent opposition, this could in a worst case situation turn out to be critical, in particular concerning matters related to solvency.

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

47.34 This, and other passages of the first draft Report addressing the financial frailty of A5, Esat Digifone, consequent on the negative equity of Communicorp, had been the focus of discussion at the Project Group meeting of 9th October, and of observations and considerations outside of Project Group meetings. It will be recalled that, in the course of his opening remarks to the meeting of 9th October, Mr. Brennan was recorded, in Ms. O’Keeffe’s contemporaneous note of that meeting, as having stated:

“Minister does not want the report to undermine itself, e.g. either a project is bankable.

Should be balanced arguments.”

In his evidence, Mr. Brennan accepted that the record reflected Mr. Lowry’s views on how the matter of the financial frailty of consortia members should be addressed in the Report, and his proposal of the notion of bankability as a solution to those frailties.

47.35 At a later stage of that meeting, in the course of the page-by-page review of the first draft Report, Ms. O’Keeffe recorded the following exchange:

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Should be presented in a more balanced way.

Financial risks.

No doubt that A5 will survive.

A3 have agreement that if one shareholder does not come up the other will pay.

Put in requirements in licence conditions.

If things don't go as planned a lot more expenditure may be required.

Problem not unique to anyone.

More balanced statement. The project will survive, no one consortium is weak in itself. Each member of the consortium brings different elements."

47.36 Despite Mr. Andersen's unconvincing testimony that bankability was a principle which originated with AMI, and would have arisen in the course of the work of the Financial Key Figures sub-group, already addressed in earlier chapters, the thinking underlying the considerations recorded in the above passage was not adopted by AMI, as no significant recasting of the material had been made in the second draft Report. The sole change made by AMI to the text was to introduce a note of qualification to the statement of A5's financial weakness, by inserting the word "*maybe*", so that the sentence, as it appeared in the second draft Report, was framed as follows:

"A5's maybe weakest point is not related to the application as such, but to the applicant behind the application, or more specifically to one of the consortium members, namely Communicorp, which has a negative equity."

47.37 That passage was noted carefully by Mr. Sean Fitzgerald in his review of the second draft Report. He had already voiced his concerns to Mr. Brennan, on hearing in September, 1995, that Esat Digifone was then emerging as the front runner. Having scrutinised the draft, it was Mr. Fitzgerald's view that, in recommending Esat Digifone as the first-ranked applicant, AMI had expressed "*a very strong rider*" that the financial problems of Esat Digifone remained, and should be addressed in the course of licence negotiations. Whilst it will be remembered that Mr. Fitzgerald recognised that the financial strength of Telenor was available, and might ensure the financial viability of the consortium, it was his assessment that that would not, and could not, secure the stability of the

shareholding of Esat Digifone, which was, to his mind, inherently unstable as a result of Communicorp's financial frailty. Nor in his opinion could that objective be achieved by any other underpinning of a financial nature.

47.38 Mr. O'Callaghan had also noted that passage in his review of the second draft Report, and had taken exception to the suggestion that the financial weaknesses of A5, Esat Digifone, and A3, Persona, were treated as comparable. He had noted that Sigma, unlike Communicorp, did not have negative equity. Mr. Riordan had likewise annotated the passage: he had highlighted the text which referred to Communicorp's negative equity, and had noted what seems to the Tribunal, in the light of Mr. Riordan's recorded views, to have been a rhetorical question, namely:

"How does this stack up against a B for financial strength?"

47.39 As has already been alluded to, Mr. Riordan had very evidently disagreed with that grade B, and had reduced Esat Digifone's grade for the Financial Strength indicator from B to C, when reviewing the results of the qualitative evaluation of the Financial Key Figures dimension with Mr. Buggy, in advance of the Project Group meeting of 9th October, 1995. Two other significant entries had been made by Mr. Riordan in the right-hand marginal space below that annotation which, from the denser hand in which recorded, seemed to have been made on a separate occasion. Firstly, he had written the word "*Change*" which he had double underlined, and placed in a box, and secondly, below that, he had written the word "*Bankability*". That of course was the very concept which Mr. Brennan had raised in the course of his opening remarks to the Project Group on 9th October, in the context of Mr. Lowry's views on how the financial frailty of consortia members should be handled in the Report.

47.40 These two annotations made by Mr. Riordan must reflect deliberations, possibly at the Project Group meeting on 23rd October, 1995, or at some later point, as they represent precisely the course that was taken in modifying the text. It was that very concept of bankability, together with the notion of "*deep pockets*", that was imported into Section 5, to meet the difficulty created by the financial vulnerability of Esat Digifone, arising from the negative equity of Communicorp. Mr. Towey's discussion document proposed that the two paragraphs in the draft Report addressing Esat Digifone's financial weakness should be deleted, and that in their place a lengthy passage of text should be inserted as follows:

"A critical factor in any consideration of the credibility or risk analysis of applications is the capability of the principals to finance the project

including ability to meet any shortfall in the funding requirement due, for example, to unforeseen capital expenditure. In general terms, the applicants have provided some measure of comfort that appropriate funding arrangements are in place. The evaluators have however taken into consideration that the level of commitment on funding, particularly in relation to debt financing, which applicants can provide is constrained on the one hand by the fact that a licence has not been granted, and on the other, by the conservative bias of the banking community. The evaluators have concluded however having regard to the level of interest in the Irish competition for the GSM licence and the high profitability of mobile telephony generally throughout Europe that the project is fundamentally robust and an attractive opportunity for corporate debt financiers. Nevertheless, the evaluators have recognised the necessity to identify financial weaknesses among the principal backers which could give rise to difficulty in meeting the additional equity burden of unplanned or unforeseen capital expenditure. The financial position of the principals of each consortium has therefore been assessed and some potential weaknesses are identified below. Following a detailed discussion of the matter however, and having regard in particular to the robust nature of the project overall, the evaluators have formed the view that, subject to one of the principals having sufficient financial strength to ensure completion of the project, a potential financial weakness of one consortia member should not have a negative impact on the ranking of applications. These aspects are the subject of further elaboration in appendices 9 and 10.

The assessment of credibility and risks has also taken account of:

- management proposals,
- preparations in relation to development of the distribution channel,
- preparations in relation to site acquisition and equipment procurement,
- consistency of penetration, usage etc. with financial figures.

In general terms, this assessment has sought to identify factors which may have the effect of undermining the projected development of the business plans proposed by applicants.”

The underlined portions of the above quoted material denote those passages of Mr. Towey's proposed text which were deleted following the drafting meeting, and to which further reference will be made.

47.41 Mr. Towey testified that this passage of his discussion document had been drafted by him in response to the views of the Project Group that the issue of the potential weakness of the leading applicants had to be dealt with, and that their views in relation to the bankability of the project had to be put on paper. He had proposed that draft as a reflection of his understanding of the thinking of the Project Group, and his draft was considered at the drafting meeting. His recollection was that his proposed text was reviewed word-by-word, and was revised, and it was his memory that there had been a detailed discussion. According to Mr. Towey, the content of the passage was an expression of the Project Group's assessment of the risks identified by AMI in their risk analysis, which suggested that Communicorp, in a worst case scenario, if the business met with opposition, would not be able to fund its equity requirement, which could in turn give rise to a change in the ownership structure of the consortium. It was Mr. Towey's understanding, as testified by him, that the Project Group's general assessment was that the prospect of meeting with adversity was quite remote, so far as the mobile venture was concerned, and that, to the extent that funding was required for the purposes of that venture, it would be an attractive opportunity for banks and financial institutions. Whilst Mr. Towey recognised and accepted the validity of Mr. Fitzgerald's view, that the willingness of banks to provide funding for the GSM venture could not solve the inherent instability in the consortium consequent on Communicorp's inability to meet its equity requirement, it was his evidence that the intention of the passage was to reflect the Project Group's view that the risks identified by AMI were not risks that were of undue concern to the Project Group, and were not risks that should cause the Project Group to worry about the ranking of the applicants, or about whether the licence should be awarded to Esat Digifone.

47.42 Mr. Towey's recollection of close discussion around the wording of the passage was supported by the large body of corrections recorded by Mr. Riordan, and by Mr. Buggy, on each of their annotated copies of the discussion document. Although having no memory of the drafting meeting, they each confirmed that those corrections had been made by them, and Mr. Buggy acknowledged having a vague recollection of a Project Group discussion about the ability of applicants to raise bank finance, and of a general consensus emerging that finance would be available. Mr. Riordan did not recall involvement in discussions on that topic. Neither Mr. Riordan nor Mr. Buggy knew of any independent inquiries having been made to verify that proposition, and Mr. Buggy, having a general memory of discussions, recalled that those discussions related to debt, as opposed to

equity, financing. They both doubted that they were the source of the corrections recorded on their annotated copies, and they thought it more probable that the corrections had emanated from other members of the Project Group.

47.43 Mr. Brennan, having no memory whatsoever of the drafting meeting, nonetheless recognised that what the revised material addressed was corporate debt financing: in other words, the availability of bank borrowing to Esat Digifone to fund its business, as opposed to the availability of capital to its shareholders to fund their equity participation. Even though he acknowledged that the risk under consideration was not one of debt financing, he protested that he was not the author of the passage, and that he was “*surrounded by financial experts who were all involved*”, as he put it. It was Mr. Brennan’s evidence that the proposition was discussed by the Project Group, albeit on the evening of the 24th October, 1995, when, according to Mr. Brennan, the object of the exercise was to ensure that the Report properly reflected the evaluation process, and properly supported the result.

47.44 As already mentioned, Mr. Towey’s proposed draft was subject to considerable revision, and the body of corrections on the annotated copies supported his recollection that the proposed text was closely scrutinised in the course of the meeting, and was altered consequent on that scrutiny. In general it seems that the amendments made at that meeting entailed the deletion of those portions of Mr. Towey’s draft which introduced notes of caution or uncertainty to the text. The effect of the changes was to strengthen the central thrust of the proposition reflected in the passage, namely, that the notion of bankability, which the Tribunal is satisfied originated with Mr. Michael Lowry, was an answer to the financial frailty of Esat Digifone, consequent on the inability of Communicorp to meet its equity commitment: a proposition which on any realistic assessment, and as acknowledged by Mr. Fitzgerald, did not, or could not, meet the risk posed by the equity deficit in the Esat Digifone consortium.

47.45 The amendments made to Mr. Towey’s draft entailed the deletion of those portions of the draft underlined in the text, as reproduced at paragraph 47-40 above. What was removed were the following:

- (i) Mr. Towey’s qualification that the comfort provided by applicants regarding the availability of funding was of “*some measure*”, so that the sentence, as revised, was without qualification and stated:

“In general terms, the applicants have provided comfort that appropriate funding arrangements are in place.”

- (ii) The passage of Mr. Towey's draft which suggested that the evaluators recognised that the level of commitment on funding which applicants could provide was constrained by the fact that the licence had not been granted, and by what was described as the conservative bias of the "*banking community*."
- (iii) Mr. Towey's acknowledgement that the evaluators "*recognised the necessity to identify financial weaknesses among the principal backers which could give rise to difficulty in meeting the additional equity burden of unplanned or unforeseen capital expenditure.*"
- (iv) Mr. Towey's recognition that the assessment of the financial position of the principals behind consortia had identified "*some potential weaknesses.*"

Apart from those deletions, and some minor consequent modifications to the wording of the text, Mr. Buggy and Mr. Riordan had each noted that a rider was to be introduced, regarding the importance of addressing those matters in the course of the licence negotiations.

47.46 By directing that paragraphs 2 and 3 of the text, as it appeared in the second draft Report, should be deleted, and that Mr. Towey's draft text, as edited by the Project Group, should be substituted, all explicit reference to the financial weakness of Esat Digifone had been excised, and in its place an oblique reference was made to the contents of Appendix 9 and Appendix 10 of the Report. The risks attendant on the financial frailty of Esat Digifone, consequent on the inability of Communicorp to fund its equity participation, were met by importing two concepts, firstly, that of bankability, and secondly, that of "*deep pockets*". The former concept originated with Mr. Michael Lowry, and as recognised by Mr. Towey, Mr. Buggy and Mr. Brennan in their evidence, related to debt financing rather than to shareholder funding: that is, borrowings by a company to fund its business, as opposed to capital invested as an equity contribution to a company. The latter concept, that is "*deep pockets*", which had originated with AML, had not been adopted by the Project Group when proposed by AML at the information round stage, and had been rejected by the accountants in the course of their review of the financial analysis. As testified by Mr. Fitzgerald, it was clear that no amount of financial underpinning could solve the instability of the Esat Digifone consortium caused by Communicorp's equity deficit.

47.47 The application of the concept of bankability to meet the risks identified in Section 5, which was at least a dubious, if not a faulty application of the concept, was disowned by Mr. Brennan, who denied that he had authored

the passage, and who invoked the expertise of the accountants, neither of whom was prepared to accept any responsibility for its application to the risks identified in the section. As was the case on other occasions, it was Mr. Towey who displayed a willingness to assist, and to engage with the Tribunal, and it was Mr. Towey who was left to seek to explain and rationalise the thinking behind its use.

47.48 What remained of the first paragraph of Mr. Towey's text, after it had been edited by the drafting meeting, was the following abridged exposition:

“A critical factor in any consideration of the credibility or risk analysis of applications is the capability of the principals to finance the project including ability to meet any shortfall in the funding requirement due, for example, to unforeseen capital expenditure. In general terms, the applicants have provided comfort that appropriate funding arrangements are in place. The evaluators have concluded having regard to the level of interest in the Irish competition for the GSM licence and the high profitability of mobile telephony generally throughout Europe that the project is fundamentally robust and, after a licence has been granted, an attractive opportunity for corporate debt financiers. The evaluators have therefore formed the view that, subject to at least one of the principals having sufficient financial strength at this stage to ensure completion of the project, a potential financial weakness of one consortia member should not have a negative impact on the ranking of applications. It is important nevertheless to draw attention to the need to deal with this factor where relevant in the context of licence negotiations. These aspects are the subject of further elaboration in appendices 9 and 10.”

What was intended, and what AMI were requested to do the following day, was to delete paragraphs 2 and 3 of the draft in their entirety, and to substitute the above text. However, as will be seen, and as is evident from the documentary trail, this was not acceptable to AMI, who it seems, whilst accepting the insertion of the additional material, insisted on the retention of the two existing paragraphs which highlighted the financial frailty of the Esat Digifone consortium.

47.49 What Mr. Andersen's recent evidence brought into sharp relief was that the considerations reflected by the material contained in this section of the Evaluation Report did not merely represent a narrative exposition of the “other aspects” identified in the Evaluation Model, which were not scored or marked in the course of the evaluation. The considerations were considerably more significant, in that they related to the paragraph 19 precondition of financial capability, which, following the recasting of the RFP document, in advance of the Government Decision of 2nd March, 1995, had, according to Departmental

officials, been elevated to the chapeau of the competitive process. It was Mr. Andersen's evidence that this precondition could not be treated as a substantive prequalification requirement, due to the absence of clear specifications in the RFP document. Accordingly, it was a matter which fell for consideration after the conclusion of the evaluation, and it was Mr. Andersen's intention that the third paragraph of this section in the second draft Report, which the Department wished to delete, should be a marker surrounding A5, Esat Digifone's financial capability in terms of the paragraph 19 precondition. Although Mr. Andersen did not agree to the deletion of that paragraph from the final Evaluation Report, what became evident from his testimony was that the additional text inserted into the section, endorsing the concept of bankability, which originated with Mr. Lowry, and "deep pockets", was devised as a solution to that deficit in financial capability. At the time that solution was devised, Mr. Towey, who had prepared the initial draft of the revised text, together with Mr. Brennan, but no other member of the Project Group, were then aware, from information furnished in breach of the rules of the competitive process, that Communicorp had secured a secondary source of funding for its equity, in the form of underwriting from Mr. Dermot Desmond's company, IIU. The Tribunal is satisfied that Mr. Lowry, the originator of the bankability solution, was also conversant with that arrangement, having learned of it during the course of his interactions with Mr. Denis O'Brien on Sunday, 17th September, 1995.

Revision of the presentation of the Results and Recommendations section

47.50 The fourth and final significant set of changes proposed was probably the most far-reaching, as it altered fundamentally the manner in which the results of the entire process were presented. In essence, it entailed the demotion of Table 16, the Aspects table, which contained the output of the qualitative evaluation, and which, in both the first and second draft Reports, had represented the results of the process, to the status of a summary table. It elevated Table 17, which contained the same data, re-arranged by reference to the evaluation criteria, and displayed numerical weightings, and described in the drafts as reflecting a conformance test, to the status of the decisive table by which the results of the process were presented.

47.51 Those members of the Project Group who had an understanding of the dynamics of that change, and of how the change impacted on the presentation of the results, namely Mr. Brennan, Mr. Towey and Mr. McQuaid, testified that the recasting of the material in this manner was dictated by the imperative that a result should be produced, and a recommendation should be made, by reference to the descending order of priority of the evaluation criteria set by Government. In other words, it was dictated by the necessity that the Report should

demonstrate that the evaluation had been conducted, and the results arrived at, according to those criteria, even though it was never contemplated in the agreed evaluation methodology, as recorded in the Evaluation Model, that the final results would either be arrived at, or presented, in that form.

47.52 What in the Tribunal's view in fact dictated the re-casting of the results was not any infirmity in Table 16, the Aspects table, which contained the output of the qualitative evaluation, but the fact that there had been a deviation from the Evaluation Model, such that the quantitative evaluation, as a separate and self-contained output of the process, had been excluded, that there had been no revisiting of the results of the quantitative evaluation following the qualitative evaluation, and that the sole evaluation actually conducted was, as defined in all versions of the Evaluation Report, a qualitative evaluation. Had the agreed methodology been followed, and had the process been completed in accordance with it, it seems probable that the final results would, at least in part, have been presented by reference to the quantitative results, as modified by the qualitative results, numerically weighted in accordance with the weighting matrix agreed in advance, which in turn reflected the descending order of priority of the evaluation criteria. As observed by Mr. Towey, who in this, as in so many other matters, proved to be constructive and forthcoming in his evidence to the Tribunal, when those who attended the meeting in Copenhagen on 28th September, 1995, looked in practical terms at achieving a ranking in accordance with the Evaluation Model, they then saw that there were certain shortcomings, and they developed a view that the concepts of weighting, and the descending order of priority of the criteria, would have to be taken into account in the qualitative model. It was this pragmatic approach which informed the construction of Table 17, and it was these same factors which led to the decision that Table 17 should be elevated to the position of prominence in the results section of the Report.

47.53 As already indicated, the decision that the presentation of the results should be recast in this manner seems to have been taken at a late stage of the Project Group meeting of 23rd October, 1995, and seems to have arisen both from the side-meeting of the Principal Officers with Mr. John Loughrey, and from the continuing deliberations of the Project Group in their absence. The AMI representatives were not present at that late stage of proceedings, and cannot have subscribed to that agreement, as according to Mr. Towey's evidence regarding his further dealings with AMI concerning these changes, which will be considered in detail, AMI, despite their ultimate acquiescence, were opposed to the re-structuring of the section, and in particular to the demotion of Table 16.

47.54 The changes made to the results section, following the input of the drafting meeting, represented a simplification of the draft proposed by Mr. Towey in his working document. Reference will be made principally to that final form of the text, save for instances where the addition, deletion or revision of text of itself represented a material change, and warrants comment.

47.55 The existing Section 6 of the second draft Report, as will be recalled, comprised six sub-sections which will be revisited briefly. Following an initial introductory passage, which outlined the “4 different models” utilised in the course of the evaluation, and to which description a number of members of the Project Group had taken issue, sub-section 6.1, “*The results based on the aspects, dimensions and indicators*”, contained Table 16, the Aspects table, and, based on the results as contained in that table, nominated the three best applicants as A5, Esat Digifone, A3, Persona, and A1, Irish Mobicall, in that order. Sub-section 6.2, “*The results based on business case sensitivities, risks and credibility*”, comprised a narrative exposition of the risk analysis set forth in Section 5, and it again nominated the same three applicants in the same order. Sub-section 6.3, “*The results based on a re-grouping of the criteria*”, contained Table 17, described as representing a separate conformance test, and arrived at the same ranking and order. Sub-section 6.4, “*The results based on a conversion of marks to points*”, contained Table 18, which presented the same results as contained in Table 17 converted to numerical scores and, in common with Table 17, displayed numerical weightings. The stated purpose of this process of quantification was “*to check the results*”, and was subject to the express caution that “*such a calculation distorts the idea of a qualitative evaluation*”. As has already been addressed at length in earlier chapters of this Volume, it seems that it was in Copenhagen on 28th September, 1995, at the meeting requested by Mr. Michael Andersen, but of which he testified that he had no memory, that the exercises reflected in Table 17 and Table 18 were initiated by Mr. Brennan and Mr. Towey. Sub-section 6.5, “*A last comparison of the best applications*” comprised a narrative exposition of the relative performance of the three top-ranked applicants in the evaluation, which, as has already been observed, was a less than balanced or accurate account. The final sub-section, Section 6.6, “*The recommendation*”, confirmed the ranking of A5, Esat Digifone, A3, Persona, and A1, Irish Mobicall, as the three best applicants and stated that:

“It is therefore proposed to advise the Minister to enter into licence negotiations with the consortium behind the A5 application, with the prior consent of the applicant that if the negotiations fail or are impossible to conclude successfully, then licence negotiations will be commenced with the next nominated candidate. If the consortium behind A5 cannot satisfactorily cover the risks identified (but not scored), it is recommended to consider entering into licence

negotiations with A3. Similarly, if the consortium behind A3 cannot satisfactorily cover the risk identified (but not scored) and abandon the strong reservations concerning the draft licence, it is recommended to consider entering into licence negotiations with A1.”

47.56 The recasting of the presentation of the results involved both the sub-division of the contents of the section into three parts, and the revision and deletion of significant and material passages of the narrative. The changes made can most usefully be addressed by reference to the three portions into which the contents of the section were sub-divided.

The first portion

47.57 The first sub-division of the material involved the removal of Table 16 and the narrative contained in sub-section 6.1 from the results section, and its demotion to, and re-positioning at the end of, Section 4, by far the largest section of the Report, which outlined in detail the outcome of the qualitative evaluation of each of the dimensions. A new sub-section of Section 4 was created, Section 4.5, entitled “*Summary of results*”. Table 16, the Aspects table, was described in this new sub-section as a summary of the agreed markings, and rather than designating the total marks shown in the table as the results of the process, the following commentary was inserted:

“Based on the qualitative evaluation methodology adopted by the PT GSM, an overall award of marks to each application has been agreed. It is noteworthy that the award of marks according to this methodology supports the recommendation reached at chapter 7, where applications are ranked according to the evaluation criteria set out in paragraph 19 of the tender document.”

In other words, far from representing the results of the process, the contents of Table 16 were described as constituting something separate, although confirmatory, of the process by which the applicants were ranked according to the evaluation criteria.

The second portion

47.58 The second sub-division of the material entailed the restructuring of Section 6 under a revised title, “*The final evaluation*”, which title itself echoed the suggestion in the new sub-section 4.5, that some separate and distinguishable process of evaluation had been conducted. The opening narrative omitted all reference to the “*4 different models*” and instead, the section commenced with the statement that:

“It is now necessary to determine the ranking of the applications in accordance with the priorities specified in paragraph 19 of the tender document.”

47.59 It then proceeded to outline how this had been achieved by:

“

- *extracting the marks awarded to each application under each of the eleven dimensions on the basis detailed in chapter 4;*
- *grouping of dimensions according to the eight evaluation criteria;*
- *the award of an overall score to each application on the basis of the marks obtained for the eleven dimensions and determination of the appropriate ranking respecting the weighting formula determined prior to the closing date for the competition;*
- *validation of the result by converting the marks to points and calculating a numerical total score for each application; and finally*
- *validation of the results by a review of the analysis of sensitivities, credibility and risks.”*

47.60 The above text was subject to considerable modification at the drafting meeting, the greater part of which was clearly directed to simplifying and rendering the exposition more readily understandable. An element which warrants specific comment is the amendment to the text of the third and fourth bullet points in the extract quoted above. The material comprised at those bullet points self-evidently related to the construction of Table 17 and Table 18 respectively. Mr. Towey, in his discussion document, had proposed a slightly different formulation, which seems to the Tribunal to have more faithfully reflected his recollection of the manner in which those tables had been constructed in Copenhagen. What he had proposed was as follows:

“

- *the award of an overall score to each application on the basis of the scores for each of the dimensions and determination of the appropriate ranking.*

- *validation of the result by converting the grading marks to points and applying the weighting formula determined prior to the closing date for the competition.”*

In that regard, Mr. Towey’s evidence of the construction of Table 17 by means of a discussion of the relative performance of the two top-ranked applicants will be recalled, as will his evidence of the construction of Table 18 by means of the conversion of the grades for each dimension to numbers, by the application of weightings, and by the computation of the total weighted scores.

47.61 By the amendments made to Mr. Towey’s text, which were recorded in both Mr. Riordan’s and Mr. Buggy’s annotated copies of the working document, the impression was created that the weighting formula had been used in the construction of Table 17, even though that was not correct. By substituting for the term “*applying*”, which had been used by Mr. Towey in describing the weighting formula, the term “*respecting*”, the statement made at the third bullet point, which would otherwise have been incorrect and inaccurate, was carefully nuanced. As the weighting formula mirrored the descending priority of the evaluation criteria, to the extent that the exercise described by Mr. Towey balanced the relative performance of the two top-ranked applicants by reference to the importance of the evaluation criteria, it could be said, at a stretch, that the construction of Table 17 “*respected*” the weighting formula.

47.62 Section 6, as restructured, comprised just three sub-sections: sub-section 6.1, containing Table 17, sub-section 6.2, containing Table 18, and sub-section 6.3, comprising the short narrative relating to the risk analysis. The middle sub-section, containing Table 18, was refined in a manner which impacted materially on the import of its contents. It will be remembered that the sub-section in the draft Reports, which remained unaltered as between the first and the second of those drafts, had described the weightings displayed in both Table 17 and 18 as those “*agreed prior to the closing date for quantitative purposes*”, and had further recorded AMI’s reservation concerning the numerical presentation of the outcome of the process, as represented by Table 18, as one which “*distorts the idea of a qualitative evaluation*”. Both of these statements were deleted, and the commentary was confined to outlining the process whereby the lettered grades had been converted into numerical scores, and to the assertion that “*the scoring confirms the ranking established*” by the previous tables.

47.63 As a result of the removal of those two statements, all reference to the weightings as shown in Table 17 and Table 18, as having been those agreed for quantitative purposes, was removed from the record as contained in the final

sections of the Report, as was AMI's caution concerning the validity of the exercise represented by Table 18. It is however, noteworthy that the final page of Appendix 2 to the second draft Report which outlined "*The methodology applied*", contained reference to the "*Validation and finalisation of the results*" through the application of "*the weightings agreed prior to the close of the competition for the quantitative model*". This text in Appendix 2 was not amended and appeared in that form, in the final version of the Report.

The third portion

47.64 The third sub-division of the material entailed the repositioning of the two final sub-sections of Section 6 of the draft Report into a separate and additional section, Section 7, entitled "*Conclusions and recommendations*". Whilst no revisions were made to either of these sub-sections, it is the Tribunal's view that the repositioning of the narrative exposition, headed, "*A last comparison of the best applications*", which as has already been observed was in many respects a factually unbalanced comparison of the relative performance of the two top-ranked applicants in the evaluation process, elevated that material to a position of additional prominence in the overall scheme of the Report. It will be remembered from the annotations on Mr. Sean Fitzgerald's working copy of the second draft Report, as confirmed by him in his evidence, that he had considered that the results as shown in the results tables were "*very close*", as he had written, and this denoted his view that the two top-ranked applicants were more or less roughly the same, but as further recorded by him, he found that narrative exposition "*more persuasive than the Tables*". According to Mr. Fitzgerald's evidence, it was that narrative which satisfied him that the result was the correct one.

47.65 The editing and restructuring of Section 6, in the manner outlined, served the purpose of presenting the results in a clearer manner. That end was achieved with considerable skill, and what must have been a deep insight into the workings of the process. Whilst there was a reasonably full attendance at the drafting meeting, and whilst it is clear from the annotations made by Mr. Riordan and Mr. Buggy on their copies of Mr. Towey's working document, that the changes made to his draft arose from that meeting, it seems to the Tribunal unlikely that they could have emanated, to any significant degree, from outside the Development Division representatives, who were the only members of the Project Group armed with a sufficient understanding of the process, including the generation of the results tables, to enable them to effect those subtle, yet far-reaching changes.

47.66 By making the changes referred to above, and in particular by:

- (i) demoting [Table 16](#), the Aspects table, to the end of Section 4 of the Report, and describing it as containing a summary of the marks awarded in the qualitative evaluation, rather than as the results of the process;
- (ii) promoting [Table 17](#), which had been described by AMI as no more than a conformance test, to the position of the decisive table;
- (iii) altering the title of [Section 6](#) to “*The final evaluation*”;
- (iv) referring to the ranking in [Table 17](#) as having been achieved through a process of discussion;
- (v) describing that process as “*respecting the [weighting formula](#) determined prior to the closing date for the competition*”;
- (vi) deleting the description of the weightings displayed in Table 17 and [Table 18](#) as the weighting mechanism “*agreed prior to the closing date for quantitative purposes*”;
- (vii) also deleting AMI’s reservation regarding the distorting effect of the process represented by [Table 18](#);
- (viii) placing in a more prominent position the less than balanced and accurate [narrative comparison](#) of the relative performance of the two top-ranked applicants in the process;

the meeting managed to edit out of the final record many of the shortcomings of the process, as they were described by Mr. Towey, the closeness of the result, the application of quantitative weightings to the outcome of a qualitative evaluation, and the reservations entered by AMI to the numerical presentation of the result. AMI’s response to these changes will be considered in due course. The relevant extracts from the final Report can be found in the Book of Appendices to this Volume. It should be noted that, arising from the deletion of a table from Section 4, the results tables in the final Report were renumbered as Tables 15, 16 and 17.

THE CONCLUSION OF THE DRAFTING MEETING

47.67 The drafting meeting concluded, according to Mr. Towey’s evidence, at a late hour. Mr. O’Callaghan had left the meeting at a much earlier stage, and deliberations had proceeded in his absence. Mr. O’Callaghan knew nothing of

the greater part of the changes made to the draft Report, as there was no further meeting of the Project Group in advance of the recommendation being made to the party leaders, and announced publicly the following day. It transpired in evidence that neither he, nor Mr. McMahon, had ever been furnished with, or had ever seen, a copy of the final Report, until it was brought to their attention by the Tribunal in the course of its inquiries. Although Mr. McMahon was in all probability in attendance for the entire duration of proceedings at the drafting meeting, much of what was discussed must have escaped him, as it seems from his evidence that he had no appreciation of the import or effect of the changes discussed and agreed.

47.68 As with other elements of the process, those members of the Project Group centrally involved exhibited opposing expectations regarding the furtherance of matters, following the completion of that meeting. Insofar as the Tribunal can discern from the available evidence, bearing in mind that the greater number of witnesses testified to having no memory whatsoever of the meeting, or of the events over these final days, there again seems to have been a demarcation between the expectations of the representatives of the Development Division, and those of the representatives of the Regulatory Division.

47.69 Mr. Towey testified that, following the intensive discussion at the drafting meeting, it was his view that agreement on the terms of a final Report had been achieved, and that no further step required to be taken in the process, save to agree the changes with AMI. There was no doubt in Mr. Towey's mind that everything that was necessary to agree in order to produce the final Report had been agreed at that meeting. The document which he subsequently generated, and which he faxed to AMI the following day, contained the amendments which the Project Group considered necessary to finalise the Report. In other words, it was Mr. Towey's evidence that it was his view, following the conclusion of the drafting meeting, that final agreement on the Report, and on the ranking, had been achieved, and that there was no continuing role for the Project Group, and no necessity to convene any further meeting on Wednesday, 25th October, 1995.

47.70 In contrast, it was the evidence of Mr. McMahon and Mr. O'Callaghan that their understanding and expectations were very different. Mr. O'Callaghan, having left the meeting at an early point, testified that it was his impression that the Project Group would have a final wrap-up meeting on the morning of 25th October, 1995; that in the meantime the material would have been faxed to Copenhagen overnight by Mr. Towey; that they would have available to them at that final meeting a composite document incorporating the changes discussed at

the drafting meeting; and that the Project Group would have a final glance over it, and would approve it.

47.71 Mr. McMahon, who in his evidence found it difficult to distinguish between his memory of the Project Group meeting proper on 23rd October, and his memory of the drafting meeting on 24th October, was nonetheless firm in his evidence as to his understanding of what was agreed, and what his expectations were at the final conclusion of Project Group deliberations. He testified that it was his position, and he believed that he had made it clear that, if the final Report, incorporating the changes discussed, demonstrated that the ranking was in fact the correct ranking, he would subscribe to it. However, he was equally clear that it had been understood that, if the final Report was not able to show, to his satisfaction, that sufficient qualitative analysis had been done to support the decision, those present knew that he would not subscribe to it.

47.72 On the one hand therefore, there was the view, articulated by Mr. Towey, that at the conclusion of the drafting meeting the work of the Project Group had ended, that the ranking had been agreed, that the necessary changes had been finalised, and that all that was outstanding was for those changes to be cleared with AMI, and for AMI to incorporate them into the final Report. On the other hand, there was the view propounded by Mr. McMahon that he had reserved his position, not only in relation to the drafting changes, but on the far more fundamental issue of subscribing to the ranking, until he had sight of the final Report, which he expected to receive on 25th October, 1995. In light of Mr. McMahon's view, it must be observed that a reference to the Project Group "unanimously" recommending that the Minister enter into licence negotiations with Esat Digifone, inserted on 25th October, 1995, into the executive summary of the final Report, was not, as matters transpired, accurate.

47.73 The final paragraph of the official report of the final Project Group meeting of 23rd October, 1995, recorded as follows:

"Future Workplan

Amendments to certain sections remained to be finally agreed; these were to be agreed with the Irish members of the Group on the following day and Mr. Brennan was then to be deputed to come to final agreement with AMI with respect to the final text of the report."

47.74 That entry would seem to support Mr. Towey's understanding of events. That meeting report was not however produced by Ms. Nic Lochlainn until 12th December, 1995, nearly two months after the fact, and referred only, in the most

oblique fashion, to the meeting of 24th October, 1995. It was also a document generated by the Development Division, and must be taken to have represented their retrospective view of events. Furthermore, having regard to the convention by which official Project Group meeting reports were prepared, namely as records of what was agreed by the Project Group, as opposed to records of what had occurred, the official Project Group meeting report cannot be regarded as an authoritative record of what had been in the minds of the central participants at the conclusion of the drafting meeting. The Tribunal does not doubt the veracity of the evidence given by Mr. Towey, Mr. McMahon or Mr. O'Callaghan, nor does the Tribunal believe that one version of events was necessarily correct, and the other necessarily incorrect. Rather, it is the Tribunal's view that the significance of the evidence lies more in the fact that those in attendance had conflicting expectations regarding the further steps required to be taken in bringing the process to conclusion.

EVENTS OF WEDNESDAY, 25TH OCTOBER, 1995

48.01 Before proceeding to address what occurred within the Department on Wednesday, 25th October, 1995, it is helpful to retrace briefly the events of the previous two days. The Project Group had met on Monday, 23rd October, 1995, there having been no meeting since the previous Monday, 9th October, 1995. It was Mr. Sean McMahon's view in attending that meeting, as recorded by him in writing, that, whilst he accepted that A3, Persona, and A5, Esat Digifone, were the front runners, he considered that they were very close, and that, by reference to the draft Evaluation Report alone, he was unable to conclude which of them was in fact ahead.

48.02 The meeting of Monday, 23rd October, had opened with Mr. Martin Brennan informing the meeting that Mr. Michael Lowry wanted a result that day, but had not been promised one. A briefing meeting had been scheduled with Mr. Lowry for 4.00pm that afternoon, and documents had been prepared, by the Development Division, for that purpose, and for the purpose of making a recommendation to Government, by the Development Division. The Project Group meeting proceeded until 3.30pm in the afternoon, when the three Principal Officer members, by reason of the failure of the Project Group to reach a consensus, met with Mr. John Loughrey, Secretary General, and very probably also with Mr. Sean Fitzgerald, Assistant Secretary, and as a result of that meeting Mr. Loughrey provided the Project Group with a further week to complete its work.

48.03 On Tuesday, 24th October, 1995, that additional time was withdrawn from the Project Group, and it was understood, by those members who acknowledged having a memory of events, that it was Mr. Michael Lowry's intention to secure Government clearance for the result the following day, Wednesday, 25th October, 1995. The Project Group reconvened for a late evening drafting meeting for the purposes of considering drafting changes to the Evaluation Report. On the completion of that meeting, it was Mr. McMahon's view, and one which he believed he had made clear, that he had continued to reserve his position on the ranking until he had seen the final Report, incorporating the drafting changes discussed at that meeting. Provided that final Report supported the ranking, he would then subscribe to it, but if it did not, it was understood that he would withhold his support. Mr. Ed O'Callaghan shared Mr. McMahon's expectations to the extent that he thought that the final Report would be made available the following day, and that the Project Group would have a last wind-up meeting. Mr. Fintan Towey, the sole representative of the Development Division who acknowledged having a memory of those events, held a contrary view: he considered that everything which was required to finalise the

Report had been addressed and agreed at the drafting meeting, and that no further meeting of the Project Group was intended for Wednesday, 25th October.

48.04 It further seems that on Tuesday, 24th October, 1995, following the scheduled Cabinet meeting on that day, Mr. Lowry very probably met with Mr. Joe Jennings, the Departmental Press Officer, as was his practice, and informed him that he had a result of the process. Whilst it seems that it was then Mr. Lowry's intention to proceed to Government, and announce the result immediately after it became available to him, it was also Mr. Jennings' advice that Mr. Lowry should not delay in announcing the result, and it was Mr. Jennings' memory that he had postponed convening a press conference for that purpose until the following morning.

48.05 The senior Departmental personnel who were protagonists in the events of Wednesday, 25th October, 1995, were Mr. Loughrey, Mr. Martin Brennan, and very probably also Mr. Fitzgerald. Whilst Mr. Towey had many demands placed on him during that day, his time was primarily taken up with the detail of finalising amendments to the draft Report, and possibly also preparing documentation which would be required to bring the matter formally to Government the following day. Although Mr. McMahon's memory of 25th October, was, as he described it, "*a complete blank*" until he heard that a press conference had been called, and that the result had been announced, it seems likely, for reasons which will be addressed in this chapter, that he may also have had some substantive input. With the exception of Mr. O'Callaghan and Mr. Jimmy McMeel, of the Department of Finance, who received information on that day, and in the case of Mr. McMeel transmitted it to his superordinate officers, other members of the Project Group played no role.

48.06 No Project Group meeting was convened on 25th October, 1995, for the purposes of reviewing the final Report, nor did Mr. McMahon have any other opportunity to satisfy himself regarding the contents of the Report, or to subscribe to the result. There was no documentation within the Departmental files which recorded systematically, or otherwise, what happened on that day. From such limited documentation as was available, there seem to have been two strands to activity within the Department:

- (i) communications with AMI regarding the textual changes which the Department wished to have made to the draft Report;
- (ii) dealings within the Department between Departmental personnel and Mr. Lowry, with a view to securing political clearance to enable Mr.

Lowry to announce the result that day, and to obtain subsequent Government ratification for that clearance.

Mr. Brennan was a party to both elements of that activity, all of which culminated in a press conference at approximately 5.00pm that evening, at which Mr. Lowry announced that the competition process had concluded, and had been won by Esat Digifone.

COMMUNICATIONS WITH AMI ON RECASTING THE DRAFT REPORT

48.07 Following the conclusion of the drafting meeting, Mr. Towey, either late into the night of Tuesday, 24th October, 1995, or in the early hours of the following morning, produced a document entitled “*Suggested Textual Amendments*”, recording in consolidated form the revisions which he had initially proposed, as modified by the drafting meeting. The document, extending to some eleven pages, was in the same format as his original discussion document, and he had faithfully incorporated the revisions made at the drafting meeting. That document was faxed by Mr. Towey to Mr. Andersen at 10.05am on the morning of Wednesday, 25th October. Mr. Andersen responded by annotating that document, and by retransmitting it to Mr. Brennan and Mr. Towey. In his accompanying fax cover sheet, he stated:

“Dear Martin and Fintan

Attached you will find my hand-written comments to your fax received earlier today. I suggest that we discuss them one by one over the phone asap.

In addition, changes are necessary in appendix two, but I assume that they will be covered by the comments on the appendices, which you will forward to me later today.

Best regards,

Michael Moesgaard Andersen.”

From the banner printed on the copy of that fax, it seems that Mr. Andersen transmitted his response at 14.05pm, Copenhagen time, which means that the fax would have been received in the Department shortly after 1.00pm, Irish time.

48.08 Although Mr. Towey was unable to recall matters clearly, he suspected that, as had been suggested by Mr. Andersen in his fax, there was subsequent telephone contact between the Department and Mr. Andersen, and that in all probability that contact was by means of a conference telephone call between

himself and Mr. Brennan, representing the Department, and Mr. Andersen. Mr. Towey accepted that, having regard to the time at which Mr. Andersen's replying fax was received, that conference telephone call must have proceeded some time after 1.05pm. He could not remember the duration of the conference call, and he did not believe that any note of it was kept. The Tribunal is satisfied that the conference call, which Mr. Towey suspected would have followed on from receipt of Mr. Andersen's replying fax, must have taken place, as it is clear that there was subsequent contact between the Department and AMI, and it is evident from the content and tone of Mr. Andersen's fax message that, as denoted by his acronym "asap", he wished to speak to Mr. Brennan and Mr. Towey as a matter of some urgency.

48.09 The annotations made by Mr. Andersen to Mr. Towey's document as to amendments consisted in the main of ticks signifying his agreement to the proposed changes, many of which, as already mentioned, were directed to the grammar, syntax and language of the draft Report, and were in relative terms inconsequential. It does seem however, from a consideration of the annotations made by Mr. Andersen, and the testimony of Mr. Towey, that Mr. Andersen was not, at least initially, amenable to the substantive revisions which the Department wished to have made to the risk analysis section, and to the results section.

48.10 The revision of the risk analysis section, whereby paragraphs 2 and 3, which addressed the financial weakness of A5, Esat Digifone, consequent on the negative equity of Communicorp, were to be deleted, and were to be replaced by the lengthy passage which introduced the concepts of bankability and deep pockets, was not it seems acceptable to Mr. Andersen. Mr. Towey's instruction that paragraph 3 should be deleted

"...as the point is covered both in the material above and in the final recommendation",

was met by Mr. Andersen with the response

"No, not re A5!"

48.11 The material contained in paragraphs 2 and 3, it will be recalled, included the explicit statement that

"A5's maybe weakest point is not related to the application as such, but to the applicant behind the application, or more specifically to one

of the consortium members, namely Communicorp, which has a negative equity”,

and paragraph 3 contained what Mr. Fitzgerald had recognised was the registration of a rider, namely AMI’s statement that

“Although being assessed as the most credible application, it is suggested to demand an increased degree of liability and self-financing from the backers, if the Minister intends to enter licence negotiations with A5.”

Mr. Andersen was not it seems prepared to permit the deletion of those two paragraphs, as the final version of the Report, although it incorporated the additional material on bankability and deep pockets, which the Department wished to have inserted, retained both paragraphs 2 and 3, at what was Mr. Andersen’s insistence.

48.12 A combination of the absence of annotations denoting acceptance, and a separate note made by Mr. Andersen at an earlier point in the document, were indicative, as was confirmed by Mr. Towey, of Mr. Andersen’s discomfort with the Department’s recasting of the results section. There were no ticks on the pages of the document containing the revised material for the final sections of the Report, and at an earlier point in the document, where the paragraph to be inserted in substitution for that which referred to unanimous support having been given at the meeting of 9th October, had been recorded, and in place of which the Department wished to insert the following passage:

“An initial draft report was discussed by the PT GSM on 9 October. The incorporation of comments on the initial and a subsequent draft by members of the team in relation to the presentation of the results of the evaluation process has culminated in this final report”,

Mr. Andersen had made the following insertion:

“Andersen Management International has followed the instructions PT GSM as to how the results should be presented...”

48.13 Mr. Towey, in his evidence, recognised that the above quoted note reflected Mr. Andersen’s view that the Report should record that the Department had dictated the manner in which that the final result was presented. In that regard, it was Mr. Towey’s testimony that, whilst his recollection was unclear, it was certainly his impression that Mr. Andersen was opposed to the demotion of Table 16 to the back end of Section 4 of the Evaluation Report, and it was his

understanding that Mr. Andersen wished to retain Table 16 as the primary results table in the position which it occupied in both of the earlier drafts. He further agreed that Mr. Andersen's view was that historically Table 16 represented the results of the comparative evaluation which had been conducted, although Mr. Towey did not believe that Mr. Andersen had a reservation of substance.

48.14 Mr. Andersen, when he recently attended to give evidence, confirmed that he had responded by fax to the amendments proposed on the morning of 25th October, 1995. He also agreed that there must have been telephone contact between the Department and AMI, and that they had discussed his comments jointly over the telephone. Mr. Andersen confirmed that the contents of paragraph 43 of his Statement to the Tribunal of October, 2010, were correct, namely, that there were two changes discussed which were of such a nature that AMI had to disagree with or reformulate the Department's revisions. These related to the amendments proposed to the risk analysis section of the draft Report, and to the restructuring of the presentation of the results section. Mr. Andersen in his evidence reiterated that, in his view, the amendments and retentions which he had insisted upon were important.

48.15 As regards paragraphs 2 and 3 of the risk analysis section, Mr. Andersen confirmed that he was not agreeable to their deletion, and that the response

"No, not re A5!"

had been made by him. He testified that he had insisted on the reinstatement of those paragraphs, as they related to what he termed a marker to be put down for the Minister, relating to the paragraph 19 precondition that the Minister had to be satisfied of the financial capability of applicants. As already observed, although paragraph 19 recited that the Minister intended to evaluate applications in accordance with the evaluation criteria, subject to being satisfied of applicants' financial and technical capability, Mr. Lowry was not intended to exercise any decision-making function in the evaluation. The evaluation had been delegated to the Project Group, and the decision on the Project Group's recommendation was reserved to Government. Mr. Andersen, as previously noted, was seemingly unaware of responsibility for decision-making in the process. As events unfolded, his insistence on the retention of paragraphs 2 and 3 was to no avail, as his marker regarding the financial capability of Esat Digifone was never drawn by Mr. Lowry to the attention of Government, and was absent from the formal documents submitted to Government. The former omission was one which Mr. Sean Fitzgerald, Assistant Secretary, testified that he regretted.

48.16 The second limb of Mr. Andersen's objection was directed to the recasting of the presentation of the results section. In his evidence, he focused on his reservations surrounding the presentation of what was a qualitative result in a numerical format, in other words, the conversion of marks to scores as shown in Table 18. In recasting the results section, the Department had deleted the AMI qualification that a numerical computation of the results:

"distorts the idea of a qualitative evaluation."

It had also demoted Table 16, the AMI Aspects table, by removing it from the final section of the Report and repositioning it at the back end of Section 4, where it was described as a summary table of the marks awarded in the qualitative evaluation. Although Mr. Andersen did not focus on that feature of the restructuring of the draft Report in his evidence, Mr. Towey recalled that it was his impression that Mr. Andersen was also opposed to that course. It was those presentational issues which Mr. Andersen confirmed prompted his requirement that the Report should record that:

"Andersen Mangement International has followed the instructions PT GSM as to how the results should be presented..."

48.17 Mr. Andersen, as already observed, wanted to insert this text after the Department's proposed substituted wording for the passage in Section 2, which had recited that unanimous support had been given to the results of the evaluation by the Project Group on 9th October, 1995, and to which members had taken exception. The terms of the statement that Mr. Andersen wished to insert, which amounted to a distancing of AMI from, and disclaimer of responsibility for, the manner in which the Department had recast the presentation of the results, did not appear in the final Report. This issue undoubtedly featured during the course of the conference telephone call between Mr. Brennan, Mr. Towey and Mr. Andersen, and as a result of that, and possibly further interactions, Mr. Andersen agreed to what was a significant dilution of the import of that disclaimer, which, as it appeared in the final Evaluation Report, was in the following terms:

"This report reflects the consensus view of the PT GSM as to how the results of the evaluation should be presented in the final report."

48.18 Mr. Andersen did not recall whether Mr. Brennan and Mr. Towey had refused to accept the terms of the disclaimer which he had wished to insert. He referred back to Mr. Brennan's letter of 14th September, 1995, which had resolved the fee dispute between AMI and the Department, and had defined

AMI's contractual obligations. It had included reference to AMI having regard to the comments made by the Project Group in producing a second draft Report, which he thought was relevant to the terms of the text as it appeared in the final Report. That however ignores the fact that the statement, as it appeared in the final Report, conveyed something very different to the terms of the unequivocal disclaimer that Mr. Andersen had sought to insert. The compromise statement that the Report reflected "*the consensus view of the PT GSM*", as to how the results of the evaluation should be presented in the final Report, would not have suggested to a reader that AMI had reservations surrounding the presentation of the results, particularly having regard to the definition of the Project Group contained in Section 2 of the Report as including:

"affiliated consultants from Andersen Management International."

48.19 It is clear from the documentary evidence, and the testimony heard by the Tribunal, that the Department's view on the presentation of the results prevailed over that of Mr. Andersen on both fronts. The results were presented in the manner of the revisions stipulated by the Department, that is to say, Table 16 was demoted, Table 17 was promoted, and the caveat regarding the distorting effect of Table 18 was deleted from the final Report. Mr. Andersen's requirement, that the final Report should contain a disclaimer of AMI's responsibility for the presentation of the results in that manner, was not acceded to by the Department, and Mr. Andersen was prepared to finalise the Report without that statement, on the basis of a formulation which wholly compromised the substance of his disclaimer.

48.20 It is yet again disturbing that AMI, who were intended to be independent consultants whose expertise was to be brought to bear on the process, were apparently overborne in the closing, albeit rushed, stage of the finalisation of the Evaluation Report. AMI had of course already departed from the methodology outlined in their tender document, and agreed in the Evaluation Model, by abandoning the results of the quantitative evaluation as a separate output of the process, and elevating the qualitative evaluation to the status of sole determinant, even though their own tender document had outlined the inherent unreliability of both techniques when undertaken alone, and which their recommendation that both techniques should be used was intended to meet. They had also conceded the presentation of the outcome of the qualitative evaluation in the form of Tables 17 and 18, and had been a party to the application of a set of weightings which, the Tribunal is satisfied, did not reflect the weightings agreed at dimension level in advance of the closing date. They had also altered the historical record of the agreed quantitative weightings to make that record conform with the weightings displayed in Table 17 and Table 18. They had participated in the presentation of the output of the evaluation,

and the editing of the Evaluation Report, in a manner which, on any objective assessment, overstated the performance of A5, Esat Digifone, in the competitive process, and understated that of A3, Persona. It should not therefore be entirely surprising that at the final hurdle, Mr. Andersen was amenable to acquiescing in the recasting of the presentation of the results in a manner with which he was evidently not comfortable, and which the Tribunal is satisfied had the potential of conveying a false impression of the process.

48.21 It is unclear at what time the conference call between the Department and AMI concluded, whether the issues between them were disposed of by it, whether those issues in fact necessitated further interaction, or whether, for that matter, the issues were even resolved by the time Mr. Michael Lowry made his recommendation to the party leaders at 4.00pm that afternoon, and subsequently made his public announcement. Mr. John Loughrey, who by then had taken control of positioning the result, as he described it, testified that he had not seen a copy of the final Evaluation Report until some day or two after 25th October, and he was quite certain that he had not read the Report until 26th October, 1995, at the earliest. He was supported in that element of his evidence by Mr. Brennan, who confirmed that Mr. Lowry did not have a copy of the final Report, when he attended a Ministerial meeting at 4.00 pm that afternoon, and delivered his recommendation, but Mr. Brennan felt, by that time, that he was in a position to state that everything had been agreed, but had yet to be printed and delivered.

48.22 There was no record within the Departmental files available to the Tribunal of any further fax communication from AMI in the course of 25th October, 1995, and the next communication of which there was a record was dated the following day, Thursday, 26th October, 1995. In that fax, Mr. Andersen stated:

“Dear Fintan,

Attached to this fax you will find the final version with the shadow text of the Minister as agreed. Please check that you agree on the changes. I take it for granted that we implicitly agreed not to change the award of marks, eg. in table 1.

Please give us instructions asap on how many (few!) final colourprinted version [sic] you need and with what shadow texts. If I am not available, please contact Jesper Grønlund Dinesen, who is responsible for the logistics.

Michael Moesgaard Andersen”

The terms of the fax clearly suggest that this was the first occasion on which the final version of the Report was forwarded to the Department. Mr. Andersen, when he attended to give evidence, agreed that it did appear from the record that the final Report was not sent by AMI until 26th October, 1995, after Mr. Lowry had announced the result.

48.23 Despite that record, Mr. Towey testified that a copy of the final Report had been received by the Department before Mr. Lowry announced the result, and Ms. Nic Lochlainn, in her evidence, although having no memory of the events of 25th October, referred to a fax which she had sent to Mr. Andersen, of that date, acknowledging receipt of the first fifty-two pages of the final Report, and enclosing a list of names for six colour copies of it. The contents of that fax were inconsistent with the contents of Mr. Andersen's fax of the following day, 26th October, 1995, and it seems likely that Ms. Nic Lochlainn's fax was incorrectly dated, although this was rejected by her.

48.24 The Tribunal is satisfied that there was no complete copy of the final Evaluation Report in the Department on Wednesday, 25th October, 1995. The terms of Mr. Andersen's fax of 26th October, are entirely at odds with the Department having received an advance copy on the previous day, and the content of Ms. Nic Lochlainn's fax self-evidently addressed the inquiry made by AMI on the following day.

ACTIVITIES WITHIN THE DEPARTMENT DIRECTED TO THE POSITIONING OF THE RESULT

48.25 In the absence of a documentary record of what occurred within the Department on 25th October, 1995, the Tribunal had to endeavour to piece together the probable course of events from such documents as were available, and from what was, overall, unsatisfactory testimony. As already mentioned, it was Mr. John Loughrey, assisted by Mr. Martin Brennan, who was directing activities on that day. What is clear is that, at 4.00pm that afternoon, Mr. Michael Lowry attended a Cabinet Committee meeting, and delivered himself of the recommendation that exclusive negotiation rights should be extended to Esat Digifone, following which Mr. Lowry announced the result at a press conference which had been called for 5.00pm.

48.26 What is equally clear is that, contrary to much of the evidence heard, there was nothing spontaneous, unplanned or unexpected in those events. Mr. Lowry, who knew the provisional ranking from 2nd or 3rd October, 1995, had at that point immediately made his intention of accelerating the process known, as reported by Mr. Brennan to the inter-Divisional meeting of 3rd October. That intention had later been conveyed by Mr. Brennan to the wider Project Group on

9th October, 1995. During the following week, Mr. Lowry's intention was converted into a determination to bring the result to Government on Tuesday, 24th October, 1995. That plan was thwarted by Mr. Sean McMahon's refusal to support the result, and Mr. Loughrey's decision, following his meeting with the delegation of Principal Officers on the afternoon of Monday, 23rd October, that the Project Group should have a further week to conclude its work. That time was withdrawn on Tuesday, 24th October, and from Mr. Loughrey's evidence, it is clear that it was only Mr. Lowry who could have countermanded Mr. Loughrey's decision, and it was Mr. Lowry who insisted that he intended to announce the result publicly on Wednesday, 25th October, 1995. All concerned knew the outcome that would necessarily follow from such withdrawal of time, and there was ample opportunity on Tuesday, 24th October, to plan the steps required in order to proceed the next day. The foregoing had taken place against a background of turbulent dissent within the Project Group, and in particular between the two most senior and experienced Principal Officers, Mr. Brennan and Mr. McMahon. As against that known and undoubted background, Mr. Loughrey's evidence regarding his role in the events of Wednesday, 25th October, 1995, which will now be summarised, was not merely unsatisfactory, but was strikingly at odds with the knowledge that he must be taken to have had at the time.

The official version of events

48.27 It was Mr. Loughrey's testimony to the Tribunal that on the morning of 25th October, 1995, Mr. Brennan came to his room and informed him of the outcome of the process or, as he more colourfully put it, that they had "white smoke". Whilst he acknowledged that it was probable that he may have received an indication some short number of days earlier that the process was nearing completion, he did not consider that there was a definitive result until the morning of 25th October, and he did not focus on it until that time. Prior to informing Mr. Lowry, he dictated a short note confirming the result in the following terms:

“ GSM Competition

Minister,

The process in selecting the most qualified application for exclusive negotiation with the intention of awarding a second licence for a mobile phone operation is now complete.

I am fully satisfied that the process in selecting the potential holder of this licence was carried out in a scrupulously fair and professional way.

The process was cleared with the EU Commission and the independent-Danish-Consultants acted at all times with expert professionalism and disinterest.

The project steering group comprised senior officials of this Department and the Department of Finance. Their selection was unanimous.

John Loughrey

Secretary

25/10/95”

48.28 According to his testimony, Mr. Loughrey then brought this note with him, and went, accompanied by Mr. Brennan, to inform Mr. Lowry of the outcome, and it was Mr. Loughrey’s evidence that it was his clear impression that this was the first time that Mr. Lowry was aware of the result. He believed that he had then briefed Mr. Lowry on the process, and discussed with him the range of options available to secure Government approval. It was Mr. Loughrey’s evidence that it was he who had recommended that approval should be obtained that day, even though it had been intended from the outset that four to six weeks would be available for Government consideration, and even though that had continued to be the position until Mr. Lowry’s determination on 2nd or 3rd October, 1995, on learning the provisional ranking from Mr. Brennan, that the announcement should be accelerated. Mr. Loughrey testified that he feared that once the result was available, a vacuum would arise, which could create the potential for interference, and for lobbying. As far as Mr. Loughrey was concerned, it was he who gave that advice to Mr. Lowry on the morning of 25th October, 1995, and he knew nothing of Mr. Lowry’s previous intention to bring the matter to Government the day before, of Mr. Lowry’s earlier interactions with Mr. Jennings, or of Mr. Jennings’ advice that the result should be announced quickly. Mr. Loughrey could not recall if, in reflecting on how to position the result, he had made inquiries as to whether there were Ministerial meetings scheduled for that day, and he acknowledged that it may well have been that it was Mr. Lowry who had informed him of a Cabinet Committee meeting fixed for that afternoon, or he may have otherwise been aware of it.

48.29 In the course of his evidence, Mr. Loughrey furnished the Tribunal, for the first time, with a document which he had only then retrieved from private papers kept by him in his home, and a copy of which was not within the Departmental files provided to the Tribunal. That note stated as follows:

“ **GSM Competition**

Minister,

Following our conversation a couple of minutes ago we have reflected on how best the GSM decision should be positioned immediately.

There might well be considerable merit in getting agreement of the Minister for Finance, and, of course, the party leaders that you are announcing the decision immediately (today) following the meeting at 4 o'clock.

Clearly this has the certainty that the decision and the process stay under your control and cannot be hijacked in any way.

If a news item is sufficiently interesting, a successful press conference can be arranged at a half an hours notice.

John Loughrey,

Secretary.

25/10/95”

It was Mr. Loughrey's evidence that, having retrieved that document, it was clear to him that he had had an interaction with Mr. Lowry, probably felt that his advice to look for political clearance needed to be reinforced, and that was probably why he had decided to dictate that note, after he had returned from his initial meeting with Mr. Lowry. As regards the two documents, it was Mr. Loughrey's view that, whilst they were not an explicit paper trail, they were at least an implicit paper trail that all of those matters had happened on the one day, and that there was no early warning the previous day, although he accepted that he did not know what Mr. Lowry's state of knowledge was, either on Wednesday, 25th October, 1995, or on any earlier day.

48.30 The Tribunal cannot agree with Mr. Loughrey's assessment that those two documents constituted either an explicit or an implicit paper trail, establishing that the events to which they related occurred on 25th October, 1995. In the light of the facts, as apparent from the documentary evidence, and from the testimony heard by the Tribunal, Mr. Loughrey's evidence in this regard was bizarre, and the Tribunal has grave suspicions that these carefully and skilfully fashioned notes may have been put in place on 25th October, in an effort to regularise what was, on any reasonable assessment, an entirely irregular state of affairs. Unless Mr. Loughrey, as Secretary General, on 25th October, was indulging in some form of charade, or was deluding himself as to what had

occurred in his Department over the previous days, and of which his knowledge was unquestionable, his account of events was without foundation in reality.

48.31 Mr. Loughrey knew the probable outcome of the process at latest on Monday, 23rd October, 1995. He also then knew that Mr. Lowry had intended to bring the result to Government on the following day, Tuesday, 24th October, 1995, as it was that imperative which had prompted the visitation from his Principal Officers. Mr. Loughrey must also be taken to have known that the additional time which he had made available had been withdrawn, an extraordinary and exceptional event in Mr. Loughrey's experience, and probably in that of any Secretary General, and that Mr. Lowry had brought a guillotine down on the work of the Project Group, by insisting, on Tuesday, 24th October, that the result should be made available to him the following day, Wednesday, 25th October, so that he could proceed to announce it publicly. The Cabinet Committee meeting at which Mr. Lowry obtained political clearance was a meeting of the Aviation Committee dealing with the affairs of Aer Lingus, and was a meeting which Mr. Lowry, as the Minister responsible for Aer Lingus, must have been scheduled to attend. There can be no question but that the strategy of securing political clearance at that meeting, and then proceeding immediately to announce the result at a press conference, had been devised before the morning of Wednesday, 25th October, 1995.

48.32 Mr. Lowry's evidence of what occurred on Wednesday, 25th October, was, in common with that of Mr. Loughrey, entirely inconsistent with the events as known, and with the documentary evidence adduced. Apart from his earlier interaction with Mr. Brennan, when he was informed that the Project Group had narrowed the field to two applicants, but had not been told their ranking, he had, according to his evidence, no role whatsoever, and knew nothing of what had occurred until Mr. Loughrey came to him on Wednesday, 25th October, with the result, and a message on paper which he testified was to the effect that *"Minister, we have a winner. We have a clear-cut winner, and we have an anonymous [sic] decision, and the winner is –of the Competition was Esat Digifone."*

48.33 It was Mr. Lowry's evidence that it was on Mr. Loughrey's initiative that it was decided that immediate clearance should be sought, in order to retain control, and to avoid the risk of leaks. Mr. Jennings, the Department Press Secretary, was consulted, and it was again Mr. Loughrey who advised that political clearance should be sought from the Department of Finance, and from the party leaders at the Cabinet Committee meeting scheduled for that afternoon.

48.34 It was in essence Mr. Lowry's evidence that he had played no role in these considerations and arrangements. He had not been instrumental in any of the time constraints or pressures placed on the Project Group. He had never expressed any desire to accelerate the process in early October, nor had he intended to bring the matter to Government on Tuesday, 24th October, 1995. He knew nothing about the evaluation process, and he had expressed no views on how the Report should be presented. He had no knowledge of the financial frailty of Communicorp, and he knew nothing of the concept of bankability. He was unaware of any of the tensions that had emerged within the Project Group on Monday, 23rd October. He had never been informed by Mr. Loughrey that further time had been provided by him to the Project Group on Monday, 23rd October, and he did not know of, nor had he been instrumental in, the withdrawal of that time on Tuesday, 24th October. He could not explain how officials in the Department had created inaccurate records of his intentions and desires, and he could not be responsible for those records. Overall, the Tribunal found Mr. Lowry's evidence of little assistance in progressing its inquiries, wholly unconvincing, and inconsistent with the evidence of other witnesses, and with the clear documentary trail.

The evidence of what actually occurred

48.35 Having formed the view that Mr. Loughrey's recollection was not a reliable one, and that Mr. Lowry's evidence was of little assistance, the Tribunal had to look elsewhere in seeking to ascertain what in fact occurred on Wednesday, 25th October, 1995. It is undoubtedly the position that Mr. Lowry had to be briefed in order to enable him to make a recommendation to the Cabinet Committee and, having regard to the wider background evidence heard of Mr. Lowry's practice of seeking to be well briefed on matters, there is no reason to believe that there was a departure from that practice, and that Mr. Lowry's briefing on this occasion was anything less than structured and comprehensive. Consideration also had to be directed to the ancillary matters relating to the regulation of the fixed-line sector which, at some stage, Mr. Lowry must have agreed should form part of the decision on the GSM process, and which it will be recalled were an integral part of Mr. Sean Fitzgerald's thinking on the outcome of the process, as evidenced by the considered note which he had prepared, following his review of the second draft Report.

48.36 Mr. O'Callaghan's chronology again proved to be a useful starting point. In it, he recorded as follows:

"Min met SeanMacM + MB + Sec + SF. He was to meet party leaders re. the winner. Heard at 4.45 that Min was hosting a Press conf to

announce winner. He did. No signing off on report – we had no final report; No consensus asked for. No vote – effectively no decision by PT.”

Mr. O’Callaghan testified that he recalled bumping into Mr. McMahon on his way to work, near his office, on the morning of 25th October, when Mr. McMahon told him that he was off to a meeting which was to involve Mr. Brennan, Mr. Fitzgerald, the Secretary General and the Minister, about the outcome of the GSM process. Mr. McMahon had a complete blank as regards the events of that day, apart from recalling having learned, out of the blue, that a press conference had been called in the late afternoon. He did however remember something in the back of his mind about meeting Mr. Lowry, and in that regard he noted an entry made by him in his personal notebook regarding points raised, apart altogether from the GSM licence, one of which related to the enforcement of VAS licences. Mr. Brennan had no memory of such a meeting, although he thought it likely that he had been in attendance at some of the discussions between Mr. Loughrey and Mr. Lowry on 24th and 25th October, 1995. Mr. Fitzgerald thought that he had been engaged outside the Department on the morning of 25th October, and did not return until all arrangements had been made.

48.37 Whilst it is unclear whether such an early morning meeting did proceed on Wednesday, 25th October, there can be no doubt that there must have been some forum for discussion of the regulatory issues which had been identified by Mr. Fitzgerald, and the adoption of which it seems, from both the content and tenor of his note, were conditions of his support for the result. What seems to have been agreed, very possibly at an early morning meeting on Wednesday, 25th October, was the course which had been contemplated by Mr. Fitzgerald, namely that the enforcement of the regulatory scheme for fixed-line telecommunications should become a part of the recommendation to Government, and of the decision approving the nomination of Esat Digifone as the winner of the competitive process. Mr. Fitzgerald agreed that the ancillary paragraphs of the Aide Memoire ultimately submitted to Government on Thursday, 26th October, did reflect the concerns that both he, and the staff of the Regulatory Division, had identified, and further reflected the concerns which he had set out in his handwritten note.

48.38 In advance of meeting with his Cabinet colleagues, Mr. Lowry, as mentioned, had to be briefed by his civil servants, to enable him to convey the results of the process to his colleagues, and to respond to queries that they might raise with him. The Tribunal is satisfied that Mr. Lowry already knew the result, and had some familiarity with the main features of the process, but would have required a deeper understanding of the material, to ensure that he was

armed with sufficient information to enable him to brief his colleagues, and to secure political clearance for immediate announcement.

48.39 Mr. Loughrey, Mr. Brennan and Mr. Towey all accepted that Mr. Lowry had been briefed on 25th October, although none of them could recall clearly when or how that had been done. Mr. Towey testified that it was his belief that he had not been directly involved in the interaction with Mr. Lowry, and he thought that the source of his knowledge of what had occurred was Mr. Brennan, or possibly Mr. McCrea, Mr. Lowry's Programme Manager. Mr. McCrea testified that he had not been in the Department on that day, and had no involvement. Mr. Fitzgerald, who likewise on his own evidence was not present that morning, testified that, when he returned around lunchtime, it was his understanding that the briefing of Mr. Lowry had been completed. Mr. Brennan, who could not recall the events of the day at all, nonetheless considered it likely that he was in attendance during at least some of the discussions between Mr. Loughrey and Mr. Lowry. It was Mr. Loughrey's evidence that, when conveying the result to Mr. Lowry, he had reminded Mr. Lowry of the principal features in the process, and had jogged Mr. Lowry's memory of the milestones along the way, including how the competitive process commenced, the role of the Government, how it was set up professionally, how it was genuinely conducted at arms length, and how it was a sealed process.

48.40 To a greater or lesser extent, all of the Departmental officials involved in this process were reluctant to accept that the briefing document which had been prepared by Ms. Nic Lochlainn on the previous Friday, 20th October, 1995, on the directions of Mr. Brennan and Mr. Towey, may have been used in the course of preparing Mr. Lowry for the Cabinet Committee meeting. Mr. Towey did not recall the document going to Mr. Lowry, whilst Mr. Brennan had a memory only of attending some meetings with Mr. Loughrey and Mr. Lowry. Mr. Loughrey, when initially questioned on this matter, indicated that he had some memory of reading what he described as a synopsis. At a later point in his evidence, he clarified that, on reflection, it was his memory that he had seen Ms. Nic Lochlainn's briefing note, which he recalled was composed in telegraphic form, and summarised matters for him. Whilst he was not absolutely certain, he thought it probable that he had seen the document in advance of meeting with Mr. Lowry, and subject to the same qualification, he thought that if he had access to it, he would definitely have given it to Mr. Lowry before the Cabinet Committee meeting. As regards his probable furnishing of the document to Mr. Lowry, his reasoning was that all officials would want their Minister to speak on a key issue with as much conviction as possible, and in Mr. Loughrey's view that document had "*conviction by the spade load*".

48.41 The Tribunal is satisfied that Mr. Lowry must have been thoroughly and systematically instructed on the process by Mr. Loughrey who, having not been instrumental in the process, and having not had sight of any draft Evaluation Report, would in turn have been dependent on Mr. Brennan for the information which he conveyed to Mr. Lowry. It seems scarcely credible that, in the absence of the final Report, the one document that was intended for that purpose, and which had been painstakingly prepared by Ms. Nic Lochlainn, and reviewed and revised by Mr. Towey, should have been disregarded. There was no final Report available, there was no other document generated, and it was Mr. Loughrey's evidence that he did see the document, and thought it probable that he furnished Mr. Lowry with a copy of it. The Tribunal is satisfied therefore that the briefing document was in fact used to arm Mr. Lowry with information in advance of meeting his Cabinet colleagues.

48.42 That briefing document was analysed in some depth in the course of evidence, and has already been commented upon very fully in Chapter 40 of this Volume. It was, as will be recalled, far from balanced in its treatment of the relative performance of the two top-ranked applicants. The contents of the document were in significant respects erroneous, portrayed the result in a manner that was far from an accurate representation of what was recorded in the draft Evaluation Reports, and would have conveyed to Mr. Lowry, or to any other person relying on its contents, a false impression of, and a false confidence in, the outcome. Not only did the contents of the document materially overstate the performance of Esat Digifone in the evaluation, and significantly understate that of Persona, they omitted all reference to the risks attendant on the financial frailty of Esat Digifone. They also omitted reference to the marker which Mr. Andersen had insisted on that very day should be retained in the risk analysis section of the final Evaluation Report, as it related to the paragraph 19 precondition of financial capability.

48.43 No Departmental official involved in the preparation or use of that document was prepared to accept responsibility for its contents. It was Ms. Nic Lochlainn's view, and one with which the Tribunal could not disagree, that, in preparing the document, she was acting on instructions; it was likewise Mr. Towey's view; Mr. Brennan had no memory of it, and disowned any involvement in its generation; Mr. Loughrey rationalised that, as he had not had sight of the final Evaluation Report, he had no reason to dispute the contents of the briefing note. In the event, it seems that it was this document that was utilised in briefing Mr. Lowry, and in the making of a recommendation by him, as he testified, and as confirmed by those in attendance at the meeting of party leaders and the Minister for Finance, at which that recommendation was made.

48.44 Whilst it seems that the strategy of bringing the recommendation to the Cabinet Committee meeting that afternoon for approval, rather than to the full Cabinet meeting scheduled for the following day, was not shared with the Regulatory Division, Mr. Brennan informed Mr. Jimmy McMeel, of the Department of Finance, of that intention. It will be remembered that Mr. McMeel had informed the Minister for Finance, Mr. Ruairi Quinn, by written note of the previous day, that Mr. Lowry, having planned to bring a result to Government that day, would not be doing so, as the Project Group had not finalised its work. On Wednesday, 25th October, 1995, Mr. McMeel communicated again with Mr. Quinn by means of a further note, in which he informed Mr. Quinn that it was his understanding that the Ministers were due to meet at 4.00pm that afternoon, and that Mr. Lowry would be recommending to that meeting that licence negotiations should be opened with Esat Digifone. Mr. McMeel outlined in his note the numerical scores received by each of the six applicants, that is, the results as shown in Table 18, in which the grades had been converted to numbers. He indicated that, as all six applicants had bid the full £15 million, the cap imposed on the licence fee, the selection methodology had been based on the other evaluation criteria, and he noted that the criteria had been approved by Government Decision of 2nd March, 1995. Before submitting that memorandum, Mr. McMeel had made two handwritten annotations on it. Firstly, he had recorded that his knowledge of the meeting that afternoon was:

“Per M Brennan DTEC”,

and secondly, he had inserted the following statement:

“I was a member of the Team and endorsed the recommendations.”

48.45 In the event, it seems that Mr. Quinn was at meetings outside the Department of Finance that morning, did not return to his office before attending the Cabinet Committee meeting that afternoon, and did not have sight of Mr. McMeel’s note in advance of Mr. Lowry making his recommendation to that meeting. It is nonetheless noteworthy that, Mr. McMeel was in possession of that information on the morning of 25th October, and that, in summarising the outcome of the evaluation process, Mr. McMeel had omitted all reference to the financial frailty of Esat Digifone, or the recommendation made by AMI as to how it should be addressed in the course of licence negotiations. It must of course be recognised that Mr. McMeel had played no active part whatsoever in the evaluation proper, and had been absent from a number of meetings of the Project Group, including the critical meeting of 9th October, 1995. As against that, Mr. Riordan, who was intimately involved, and who had serious concerns surrounding the financial element of the evaluation, had shared those reservations with Mr. McMeel, and in those circumstances it does seem

surprising that Mr. McMeel failed to address them. In that regard, it was Mr. McMeel's evidence that he had not made a conscious decision to refrain from informing Mr. Quinn of the financial issues surrounding Esat Digifone. He did not recall that he had considered that matter of sufficient merit to bring it to the attention of his superiors in the Department of Finance.

SECURING APPROVAL OF PARTY LEADERS FOR RESULT AND FOR IMMEDIATE ANNOUNCEMENT

48.46 In contrast to the Departmental witnesses involved in the events of Wednesday, 25th October, 1995, the party leaders, Mr. John Bruton T.D., Mr. Dick Spring T.D., and Mr. Proinsias De Rossa T.D., together with Mr. Ruairi Quinn T.D., Minister for Finance, had a reasonably good recollection of the events of that afternoon. Of those witnesses, Mr. Bruton, then Taoiseach, had the most detailed recollection, as he had the benefit of some handwritten notes made by him in the course of his interaction with Mr. Lowry. It was a practice of Mr. Bruton to take notes of meetings which he attended, and it was a practice which he followed on this occasion. He had retained his notes, and he made them available to the Tribunal.

48.47 By way of background, Mr. Bruton testified that he recalled having come unexpectedly into Government, as leader of what was referred to as the Rainbow Coalition of Fine Gael, Labour and Democratic Left. The GSM competition was among the matters that had been inherited from the previous Government, and Mr. Bruton acknowledged having relatively limited knowledge as to its details, having been primarily preoccupied with the then on-going peace process, and other urgent matters. As leader of a relatively diverse coalition Government, his practice was to delegate relevant functions to the Ministers that he appointed, rather than seeking to do their jobs for them, and so it was with Mr. Lowry, and the GSM competition. The Government of which he was Taoiseach had also made beneficial use of the practice of involving Programme Managers retained by Ministers, particularly the leaders of the three parties within Government. Cabinet papers were furnished to these individuals some days in advance of Cabinet meetings, particularly in relation to potentially contentious issues, and this enabled significant progress to be made before actually addressing matters in Cabinet. Mr. Bruton stated that he took comfort from the involvement of Programme Managers, especially in regard to the then Tánaiste, Mr. Dick Spring, who had appointed Mr. Greg Sparks, viewed by Mr. Bruton as a very able person, and quite knowledgeable on telecommunication matters.

Mr. Lowry’s advance meeting with the Taoiseach

48.48 At some point during that day, Mr. Lowry telephoned Mr. Bruton, seeking access to the three party leaders, with a view to clearance in regard to an announcement of the outcome of the competition process. Mr. Lowry was already aware that all three party leaders were due to attend a Cabinet Committee meeting scheduled for 4:00pm that afternoon. As a result of that contact, prior to the meeting of the party leaders at which Mr. Lowry delivered himself of his recommendation, and sought the support of the party leaders for that result, and their approval of Mr. Lowry’s proposal that it should be announced immediately after that meeting, Mr. Lowry had an advance meeting with Mr. Bruton. It was in the course of that advance meeting that Mr. Bruton made the notes in question, and those notes are reproduced below:

Albert had promised it to Motorola

ML (Michael Lowry) stayed out of the process

Leased line issue – Telecom’s

A/c system can cost inadequately

“M/Communications

It can’t be given before it goes to Cabinet. GSM.

Quinn should not be involved.

Loughlin is a participant in another one.

It is a major decision.

In Italy the Govt. did not accept the Govt. report

And there was a consequential challenge.

European Commission took them to Court because

this change of policy.

2 (of the) project team are of D/F (department of

Finance).”

A copy of [Mr. Bruton’s notes](#) can be found in the Book of Appendices to this Volume.

48.49 Mr. Bruton confirmed the contents of his notes in evidence, and his belief that what he had recorded represented information conveyed to him by Mr. Lowry. As evident from their contents, and as was accepted by Mr. Bruton in evidence, it seems that Mr. Lowry, in discussing the matter with Mr. Bruton, drew a number of matters of a political nature to his attention, namely:

- (i) a rumour that a former Taoiseach had promised the licence to a named consortium;
- (ii) that Mr. Quinn, the Minister for Finance, should not have an involvement in deliberations, as a relative of his was a participant in another consortium.

Those two consortia in question happened to be the second and third-ranked consortia respectively.

48.50 It seems that in outlining matters, Mr. Lowry also referred to the spectre of the experience of the Italian Government, and indicated, in fact incorrectly, that the European Commission had challenged the decision of the Italian Government on the selection of a second GSM operator, as it had failed to follow the recommendation which had emerged from the selection process implemented.

48.51 Mr. Bruton was clear in his recollection that these matters, as recorded by him in his notes, reflected information conveyed to him by Mr. Lowry, rather than matters within his own knowledge. It was Mr. Lowry's evidence that he was nearly sure that the reference to Motorola in the context of a former Taoiseach was one which came from Mr. Bruton, rather than from himself, and that likewise, Mr. Bruton was the source of the suggestion that Mr. Quinn might have a conflict of interest, arising from the involvement of a relative in one of the consortia. As regards the former matter, Mr. Lowry testified that there was no deep discussion, and it may have been that Mr. Bruton asked about that rumour, and that Mr. Lowry had responded to the effect that he had heard of it, but that there had been no substance to it.

48.52 As regards the information provided regarding the experience of the Italian Government, which, as already observed was factually incorrect, Mr. Lowry testified that there may have been some confusion, and that perhaps it would have been more correct for him to have referred in that context to the Belgian Government. He further stated that he had a feeling that the relevant extract of Mr. Bruton's note might have represented a discussion between them, in which Mr. Bruton could have had matters partly incorrect. It was unclear to Mr. Lowry which elements of the record related to statements made by him, and those made by Mr. Bruton. Mr. Lowry however had no difficulty in accepting that he was the source of the balance of the material recorded in Mr. Bruton's notes.

48.53 What is clear from the contents of those notes, as confirmed by Mr. Bruton in evidence, is that in the course of his private advance meeting with Mr. Lowry, reference was made to matters of a political nature extraneous to the competition process. The Tribunal is satisfied that the information recorded, as testified by Mr. Bruton, constituted information conveyed to him by Mr. Lowry. Not only was Mr. Bruton entirely clear in that aspect of his evidence, but the Tribunal considers it singularly improbable that Mr. Bruton, having left this matter to his Minister, and having been pre-occupied with other urgent matters of State, could have been in possession of detailed information of the type recorded by

him. Moreover, and as will be recalled, it was apparent from the evidence heard by the Tribunal that this was not the first occasion on which Mr. Lowry had made reference to the rumour of a connection between a former Taoiseach and Motorola. It will be remembered that this was a matter to which Mr. Lowry had himself drawn attention at a much earlier meeting in March, 1995, when shortly after the official announcement of the competition, Mr. John Loughrey had been advising Mr. Lowry, in the presence of his Programme Manager, Mr. Colin McCrea, of the precautions which Mr. Lowry should take in his dealings with members of consortia, in the course of the competitive process.

48.54 It seems to the Tribunal that these extraneous matters can have been raised by Mr. Lowry only with a view to securing Mr. Bruton's support for his recommendation, and for his proposal that the result should be announced in advance of full Cabinet consideration and approval. Whilst Mr. Bruton did not accept that proposition, and observed that it would be wrong to assume that the matters which he had recorded would have influenced his decision, he did accept that it appeared from the content of his notes that there had been a political flavour to the comments made by Mr. Lowry. Mr. Lowry took offence at the suggestion that he had seemingly raised matters of political prejudice with Mr. Bruton; he was insistent that he had not sought to persuade or prejudice Mr. Bruton for or against any consortium. Whatever may have been Mr. Lowry's motivation in raising these matters, it is clear that his comments had nothing whatsoever to do with the performance of any consortium in the competition process, and can have played no part in the discussion between Mr. Lowry and Mr. Bruton, unless for the purpose of securing Mr. Bruton's support. It is perhaps ironic that, having raised such extraneous matters, Mr. Lowry then delivered himself of a caution as to the possible consequences of the Government not accepting the outcome of the competitive process, albeit that the information which he conveyed, regarding the experience of the Italian Government, was itself erroneous.

Party Leaders' meeting

48.55 Following their private conversation, Mr. Bruton and Mr. Lowry either joined, or were joined by, Mr. Dick Spring, Mr. Proinsias De Rossa and Mr. Ruairi Quinn. Mr. Spring had some recollection that Mr. Loughrey and Mr. Brennan might have been present, although he thought it possible that they might not have joined the meeting until discussion moved on to matters pertaining to Aer Lingus.

48.56 Mr. Lowry testified that, in advance of meeting with the party leaders, he had telephoned Mr. Quinn, and it was his recollection that Mr. Quinn had indicated to him that he had already been briefed by his own officials, and was satisfied that all had been done properly, and that he had no problem with clearance. Mr. Lowry further testified that, when the party leaders and Mr. Quinn assembled, Mr. Spring already knew the result from Mr. Quinn. Neither Mr. Quinn nor Mr. Spring had an opportunity to comment on this aspect of Mr. Lowry's evidence, as it had not featured in Mr. Lowry's Memorandum of Intended Evidence, and the Tribunal had no notice of it in advance of Mr. Lowry's attendance. Nor was it raised with Mr. Quinn or Mr. Spring, when they attended to give evidence, in cross-examination by counsel for Mr. Lowry. It is nonetheless the case that Mr. Lowry's evidence of an earlier interaction with Mr. Quinn, and of Mr. Quinn's knowledge of the result, is inconsistent with Mr. Quinn's evidence that he had been at meetings outside his Department during the entire of that day, and had not received Mr. McMeel's memorandum in advance of meeting with Mr. Lowry. It is also inconsistent with the view, which the Tribunal is satisfied was that of Mr. Lowry, conveyed by him to Mr. Bruton at their advance meeting, that Mr. Quinn was conflicted, and should not be a party to the decision.

48.57 Mr. Bruton, Mr. Spring, Mr. De Rossa and Mr. Quinn each testified that it was their recollection that Mr. Lowry informed them that the GSM competition process had been completed, that he had a result, and that Esat Digifone was the clear winner. Each of them testified to having understood from Mr. Lowry that the outcome was clear, and that Esat Digifone was well ahead of the next-ranked consortium.

48.58 Mr. Spring had a recollection of a document having been tabled, and of a summary of the process having been available, with a recommendation in favour of Esat Digifone as the successful consortium. It was Mr. De Rossa's evidence that he was relieved at the time that there was no controversy surrounding the result, and that there appeared to have been a clear outcome. It was also Mr. Quinn's understanding that Esat Digifone had emerged as clear winner, and that the outcome had not even been close. There was also unanimity amongst those in attendance at that meeting, that no rider or qualification of any sort had been placed by Mr. Lowry on the ranking of Esat Digifone, and no reference was made by him to any financial reservation, frailty or qualification in respect of Esat Digifone.

48.59 None of the party leaders nor Mr. Quinn knew anything of the events which had occurred over the previous days and weeks within the Project Group and the Department. Nor were they aware of the views of certain members of the Project Group, nor of the concerns surrounding the finances of Esat Digifone, nor

of the significant departures which had been made from the evaluation methodology adopted prior to the closing date of the competitive process, and the possible consequences of those departures, nor it seems were they aware of how close the result had been. Had they been so aware, it seems from their evidence that they would have wished to explore matters beyond the level of consideration given by them on the afternoon of Wednesday, 25th October, 1995. Had the result been presented as a close one, Mr. De Rossa testified that he would certainly have sought more information, and Mr. Spring thought that, had there been ambiguity or a draw in the outcome, the matter would probably have been referred back to the full Cabinet. In the event, none of that information was provided by Mr. Lowry. Instead, it was the impression of the party leaders and Mr. Quinn, from what was conveyed to them by Mr. Lowry, that the result had been clear, unequivocal, and unqualified, and they had been led to believe, as Mr. De Rossa put it, that Esat Digifone was so far ahead that they could not give the outcome to any other consortium.

48.60 It was the recollection of Mr. Quinn that, in the briefing he gave, Mr. Lowry had referred to a league table score which covered each of the applicants. He recalled that some of those present had taken notes, and that the figures had been asked for again. Mr. Spring shared Mr. Quinn's recollection: he thought that actual numbers had been given, and that a score of 432 against 410 appeared clear enough to him not to go behind. Likewise, it was Mr. Quinn's testimony that it had been evident to him from the numerical scores that the result was clear. The only numerical scores contained in the draft Evaluation Reports and final Report were those comprised in Table 18, which showed scores of 432, 410 and 362 for Esat Digifone, Persona and Irish Mobicall in that order. What those present did not know, and were not told, was that those numerical scores represented the outcome of a subjective judgmental exercise; that, in arriving at those scores, weightings other than those agreed in advance of the process had been applied; and that the representation of the results in that manner was one which the independent consultants had not recommended, and had regarded as a presentation which could distort the concept of a qualitative evaluation.

48.61 It was Mr. Lowry's evidence that, in conveying the result to the Taoiseach, and to his Cabinet colleagues, he had relied entirely on information provided to him by Mr. Loughrey concerning the process and the results. He testified that he knew nothing in advance. He had been provided with briefing documents, and it was to the contents of those documents that he had regard. He knew nothing of the financial frailty of Esat Digifone, arising from the finances of the Communicorp element of the consortium. As far as he was concerned, he relied on his civil servants, who had informed him that the result was clear and unconditional. It should be observed that it seems that at least one element of

that evidence was correct, namely, that Mr. Lowry had used briefing documents with which he had been provided.

48.62 The Tribunal is satisfied from all of the evidence that was available to it, that the briefing documents which had been prepared by Ms. Nic Lochlainn the previous Friday, 20th October, under the directions of Mr. Towey, and ultimately on the instructions of Mr. Brennan, were made available to Mr. Lowry, and were consulted by him in making his recommendation to his Cabinet colleagues. Those documents have already been analysed in some depth, and it will be recalled that the Tribunal has reservations concerning their content. Those reservations are heightened in the case of the briefing document which presented an outline of the comparative performance of the two top-ranked applicants in the evaluation. The contents of that briefing document were factually questionable in many significant respects, and presented a misleading and distorted impression of the separation between those two applicants.

48.63 Mr. Lowry's evidence as to the availability of that briefing document, and the use to which he put it, was supported by the evidence of Mr. Loughrey and Mr. Spring. Mr. Loughrey remembered the briefing document, and believed that he had provided a copy of it to Mr. Lowry, in advance of his meeting to seek approval of the party leaders. Mr. Spring also recalled that some documentation was put on the table, and that some summary of the process had been provided.

48.64 The Tribunal is satisfied that the briefing document prepared by Ms. Nic Lochlainn was available to, and was used by Mr. Lowry, in his interaction with his Cabinet colleagues. Having regard to the manner in which the result was portrayed in that document, it is perhaps not surprising that Mr. Bruton, Mr. Spring, Mr. De Rossa and Mr. Quinn were left with the impression that there was a clear, unconditional and unequivocal outcome. In the event, the party leaders and Mr. Quinn collectively approved the recommendation made by Mr. Lowry, that exclusive negotiations should be opened with Esat Digifone.

48.65 Mr. Lowry's further proposal that he should proceed to announce the result forthwith, rather than postpone the announcement until after the result had been considered by Cabinet at a meeting scheduled for the following day, was also approved. It seems that Mr. Lowry recommended this course to his colleagues by reference to the potential for unauthorised disclosure once the result was available. Mr. Lowry's design to accelerate the process by proceeding to secure approval, and thereafter to make an immediate announcement, was not one that he formed in consequence of advice received from Mr. Loughrey, Mr. Jennings, the Department Press Officer, or any other official, on 25th October, or earlier days that week. Rather, his intention in that regard was recorded from

as early as Tuesday, 3rd October, when Mr. Brennan so informed the inter-Divisional meeting that day, and was reiterated on 9th October, when Mr. Brennan opened the Project Group meeting by announcing Mr. Lowry's intention to announce the result quickly.

48.66 In securing what was *de facto* Government approval, otherwise than through the route of bringing a recommendation to Cabinet on foot of an Aide Memoire, or a Memorandum for Government, or even by deferring the matter to the scheduled Cabinet meeting the following day, all of the procedures which had so carefully been put in place by Mr. Bruton and his colleagues, when the Rainbow Coalition entered Government, were rendered of no application to the GSM decision. Although it seems unlikely that Programme Managers would have had a significant input into any decision ultimately made, had the matter proceeded by a more formal route, in consequence of the approach taken by Mr. Lowry, the opportunity for scrutiny or consideration by his Cabinet colleagues, or their advisers, was significantly curtailed.

Later interaction between Mr. Dick Spring and his Programme Manager

48.67 The Tribunal heard evidence from Mr. Greg Sparks, then Programme Manager to Mr. Dick Spring, concerning an interaction between them on the evening of Wednesday, 25th October, 1995, after the conclusion of the party leaders' meeting. Mr. Sparks was an experienced chartered accountant, who had taken leave of absence from his practice, of which he was a founding member, to serve as Mr. Spring's Programme Manager. He also had considerable experience of the business of Government, having previously served as Programme Manager to Mr. Spring, who had also held office as Tánaiste in the earlier coalition Government between Fianna Fáil and Labour, which held power from November, 1992, to December, 1994. Mr. Sparks explained that, once Government agreed to the competitive process for the GSM licence on 2nd March, 1995, there would be no further involvement on the part of the office of the Tánaiste until a final decision was made. Although he was involved in Cabinet sub-committee deliberations in relation to leased-line matters of telephony, he had not been involved in relation to any aspect of the GSM evaluation process. He would have had a general awareness of the selection process, including the criteria that had been laid down, but did not have any detailed knowledge of those matters.

48.68 Mr. Sparks testified that he had been unaware of any impending developments in relation to the GSM competition outcome, until he met with Mr. Spring on the evening of 25th October, 1995. On hearing what had transpired at the earlier meeting of party leaders, Mr. Sparks expressed surprise at the

outcome, and raised two matters with Mr. Spring which were of concern to him. The first related to the finances of Esat Digifone, and to some degree echoed the concerns which had been voiced by Mr. Sean Fitzgerald to Mr. Martin Brennan, on being first informed that Esat Digifone was the front runner in the competitive process. The focus of Mr. Sparks' surprise was that it had seemingly been possible for Esat Digifone to deal with the financial weakness attendant on "*the Denis O'Brien side*" of the consortium. Mr. Sparks recalled informing Mr. Spring that, once the licence had been granted, the consortium would have something of value, which would enable the raising of necessary capital, but that it nonetheless seemed to him that the financial strength of the personnel involved was important and relevant.

48.69 The other matter of rumour which Mr. Sparks then also raised with Mr. Spring was to the effect that Mr. Dermot Desmond was a shareholder in Esat Digifone, and Mr. Sparks queried whether or not that possible involvement had been considered in the light of the then relatively recent Report, dated 7th July, 1993, of Mr. John Glackin, the Inspector initially appointed by Mr. Desmond O'Malley, then received by his successor Mr. Quinn, as Minister for Industry and Commerce in the previous Government, into transactions relating to the Johnson, Mooney & O'Brien site in Dublin, which was critical of Mr. Desmond in several respects. Mr. Sparks recalled that Mr. Spring responded that he was not aware of that matter, so it could be taken that he conveyed to Mr. Sparks that this had not been considered. The concern on the part of Mr. Sparks in this latter context was on the basis that an involvement of Mr. Desmond could have created a political problem for Mr. Spring, which was unwarranted, and could have entailed undesirable publicity. In response to both of these matters, Mr. Spring had stated that he had not been aware of them, but it had appeared to him that the AMI Evaluation Report had given a clear recommendation, and that it had been accepted. Mr. Sparks had drawn comfort from that information, and because of the importance in the criteria given to financial strength of applicants, he would probably have assumed that the matter had been fully considered by the consultants. He could not comment on how that matter might have been addressed in the Report, as he was unaware of it, and had never seen the Report.

VIEWS OF THE REGULATORY DIVISION

48.70 The Regulatory Division, in the persons of Mr. Sean McMahon and Mr. Ed O'Callaghan, was not informed of Mr. Lowry's intention to announce the result that day, having first obtained the approval of the party leaders at the Cabinet Committee meeting. The first they knew of these developments was some short time before the commencement of Mr. Lowry's press conference at 5.00pm that

afternoon. Mr. McMahon believed that he had been discussing the matter with Mr. O’Callaghan, when some news came through that a press conference had been called. He then contacted the Departmental Press Office to inquire about it, and was informed that the press conference was about to commence. It was at that point, according to Mr. McMahon’s evidence, that he realised that a full decision was already in effect, and that he was not going to receive a copy of the final Evaluation Report. As to whether he raised that matter with anyone at the time, Mr. McMahon supposed that he discussed it with people, but it seemed rather pointless, when he was surrounded by photographers and press men, and Mr. Lowry was making an announcement.

48.71 It was shortly after that announcement that Mr. O’Callaghan generated his chronology, in the final paragraph of which he recorded that:

“Min met SeanMacM + MB + Sec + SF. He was to meet party leaders re. the winner. Heard at 4.45 that Min was hosting a Press conf to announce winner. He did. No signing off on report – we had no final report; No consensus asked for. No vote – effectively no decision by PT.”

Mr. O’Callaghan, it will be recalled, testified that he had prepared his chronology spontaneously. He had been very busy during that time, and he was conscious that there had been a flurry of activity during the closing weeks of the evaluation process, and according to his evidence, he wished to put events into sequential order for his own benefit. The document was for his personal use, and he did not regard it as an official document. He had retained it through the years from 1995 to 2002, within his personal files kept in his office, even though he had moved offices on a number of occasions. What prompted him to generate the document were his concerns surrounding the withdrawal on Tuesday, 24th October, of the additional week to complete its work, made available to the Project Group the previous evening, coupled with the absence of any wrap-up meeting to review the final Report on Wednesday, 25th October. In the event, neither Mr. McMahon nor Mr. O’Callaghan ever had sight of the final Report, until they were furnished with copies by the Tribunal in the course of the its inquiries.

48.72 It was Mr. O’Callaghan’s evidence that the final entries in his chronology related to nothing more than the absence of an opportunity to approve the text of the final Report. In other words, his evidence was that in writing:

“No consensus asked for. No vote – effectively no decision by PT”,

he was elaborating on the immediately preceding entry that,

“No signing off on report – we had no final report.”

This was not in the view of the Tribunal a persuasive construction of the words written and text generated, by Mr. O’Callaghan. Rather, on the ordinary and natural meaning of those words, it is beyond doubt that Mr. O’Callaghan, having first written, *“No signing off on report – we had no final report”*, and having then written, *“No consensus asked for. No vote – effectively no decision by PT”*, was not merely repeating or emphasising the same matter, but was seeking to address, and did address, two distinct matters, the first of which was the Report, and the second of which was the result. Moreover, the language used by Mr. O’Callaghan in the penultimate and final entries made by him was redolent of issues of substance. Nothing could be clearer than his statement that there had been:

“No vote – effectively no decision by PT.”

48.73 It was suggested to Mr. O’Callaghan that his evidence in that regard, coupled with his reticence around the provision of his chronology to the Tribunal, might have been prompted by an embarrassment on his part over what he had written. Mr. O’Callaghan rejected that proposition, and testified that any reticence on his part related to his belief that the document was personal, and any embarrassment related to what he considered the inelegance of the language and grammar which he had used. The document, as he had testified, was prompted by his concerns that the additional week granted had been withdrawn, and that there had been no final meeting of the Project Group. In generating his chronology, his immediate reaction to those events was clearly uppermost in his mind, and it is clear that what he created, as he himself acknowledged, was a record which would be available to him as an aide memoire in the future. It is therefore understandable that, in recording those events, he adopted a telegraphic style rather than a formal narrative one.

48.74 That style does not, in the view of the Tribunal, detract from the import and substance of what Mr. O’Callaghan had recorded, namely *“No consensus asked for. No vote – effectively no decision by PT”*. Whilst it was regrettable in terms of furthering inquiries into the true facts of what occurred, it is perhaps understandable that Mr. O’Callaghan, in the course of his evidence, sought to distance himself from the stark factual statements recorded by him. His evidence that the final entries of that paragraph related merely to the absence of a meeting to approve the final Report was not persuasive: likewise, his evidence that his references to there having been *“No consensus”*, and *“no decision”* did not relate to the ranking, but to the Report. In that regard, it is significant that Mr.

O'Callaghan did not reject outright the proposition put to him, that the true purpose of his chronology was to protect him in the event that in the future he was held accountable for a decision with which he was uncomfortable, or with which he was unhappy.

48.75 Mr. O'Callaghan's evidence was not consistent with the facts as established in evidence, and as recorded in documentation, and in particular:

- (i) that in attending the Project Group meeting of 9th October, 1995, Mr. O'Callaghan had expected the qualitative evaluation to proceed;
- (ii) that on that date he had agreed that unanimous support for the result had not been forthcoming;
- (iii) that from the annotations made by him on his copy of the second draft Report, which he reviewed on Friday, 20th October, 1995, it is clear that he had serious misgivings relating to the substance of the evaluation conducted;
- (iv) that on 23rd October, 1995, it was his view that, by reference to the Report alone, he was unable to come to a conclusion as to whether A3, Persona, or A5, Esat Digifone, was in fact ahead;
- (v) that on 23rd October, 1995, following the side-meeting which the Principal Officers attended with Mr. Loughrey, Mr. O'Callaghan had understood that a further week would be available to the Project Group to complete its work;
- (vi) that at some time on the morning of 24th October, 1995, he was informed that the additional time had been withdrawn, and that, as he viewed it, it was a "*fait accompli, the decision has been made*";
- (vii) that on 25th October, 1995, he had expected a wrap-up meeting of the Project Group;
- (viii) and that on 25th October, 1995, the result was announced publicly by Mr. Lowry, without any prior knowledge on the part of the Regulatory Division.

The entire of the background evidence points to a lack of support on the part of Mr. O'Callaghan for the result as announced. Mr. O'Callaghan's evidence, in which he sought to rationalise the facts, and the contents of the chronology which he had generated, whilst understandable, cannot detract from the fact

that the Tribunal is satisfied that at that time he did not agree that Esat Digifone had been shown to have submitted the best application, and should be recommended as the winner of the process.

48.76 Whilst there was no equivalent written record of Mr. McMahon's views as of Wednesday, 25th October, 1995, the Tribunal is satisfied that they must be taken to have been in accordance with his evidence that, at the conclusion of the work of the Project Group, he had made it clear that, if the final Report, incorporating the changes discussed, demonstrated that the ranking was correct, he would subscribe to it, but that if it was not able to show, to his satisfaction, that sufficient qualitative analysis had been done to support that ranking, he would not subscribe to it. In other words, Mr. McMahon had reserved his position on supporting the result, until he had sight of the final Report. That opportunity was never extended to him and, as he put it himself in his evidence, he realised when he heard that a press conference had been called at teatime on Wednesday, 25th October, that a full decision was already in effect. In those circumstances, on the logic of Mr. McMahon's own evidence, the Tribunal must conclude that he did not support the result as announced.

48.77 Despite Mr. McMahon's clear evidence as to his stated position at the completion of the work of the Project Group, he nonetheless resiled in his testimony from disassociation from the result as announced by Mr. Lowry. Instead, it was his evidence that on the day he was happy that Esat Digifone was ahead, and that that remained his view. He testified that his change of attitude arose from listening to all of the arguments, and having, insofar as he could, reviewed what was in front of him, using his insider's knowledge, as he termed it. It was unclear what could have prompted such a sea change in his views from those recorded in his document of 23rd October, 1995, in which he had stated:

- “(i) we agree with the finding that A3 and A5 are front runners;*
- (ii) we also agree that A3 and A5 are very close;*
- (iii) By reference to the report alone, we are unable to come to the conclusion as to which (A3 or A5) is, in fact, ahead;*
- (iv) ~~we have a reservation about listing A1 in third place having regard to its proximity to A4 in fourth place;~~*
- (v) we feel strongly that the qualitative assessment of the top two applicants should now be revisited.”*

48.78 Mr. McMahon's evidence that, on Wednesday, 25th October, he was happy with the result, cannot be reconciled with the views which he reported holding at the conclusion of the Project Group's deliberations. All that had occurred between the generation of that document and the announcement of

the result was the Project Group meeting which led Mr. McMahon to seek additional time from Mr. Loughrey, a short resumption of that meeting, which Mr. McMahon had recorded as having concluded on a note of discord, and the final drafting meeting which had focused solely on the editing of the existing second draft Evaluation Report. Nor did Mr. McMahon indicate when, over that short time span, he became sufficiently impressed with the evaluation which had been conducted, that he had moved from a position of dissent, where he had pressed the Secretary General on 23rd October, 1995, in the face of Mr. Brennan's opposition, to sanction a further week for the Project Group to revisit the evaluation, to one of support, where he was satisfied that no further qualitative evaluation would alter the ranking.

48.79 The Tribunal, in weighing the evidence of Mr. McMahon and Mr. O'Callaghan, must balance the clear contemporaneous written records which they generated, together with Mr. McMahon's acknowledgement that he had reserved his position on support until he had sight of the final Report, against their retrospective declarations of support for the result given in evidence seven years after the event. The Tribunal is left in no realistic doubt as to what the true position was, namely that Mr. McMahon and Mr. O'Callaghan were not, as of 25th October, 1995, satisfied that Esat Digifone was the winner of the competition, but that their views were disregarded, and a guillotine was brought down on the work of the Project Group by Mr. Lowry.

EVENTS OF THURSDAY, 26TH OCTOBER, 1995

49.01 In comparison with the pace of events over the previous three days, Thursday, 26th October, 1995, was relatively uneventful. All that was required was to bring the evaluation process formally to a conclusion by asking the scheduled Cabinet meeting to note the decision which had been made, and announced by Mr. Michael Lowry on the previous day, with the approval of the party leaders, and Mr. Ruairi Quinn T.D. The matter came before Cabinet by means of an Aide Memoire containing an outline of the evaluation process, the result of that process, the steps which were then required to be taken, and the implications of the licensing of a second operator. The decision was duly noted by Cabinet, which procedure was, in the circumstances, no more than a formality to ensure substantial compliance with the conditions of the Government Decision of 2nd March, 1995, which had authorised the process at the outset.

49.02 Of greater significance were the ancillary matters relating to the regulation of the fixed-line sector, which Cabinet was asked to note in that Aide Memoire, and which were also duly noted by Decision of that date. Reference has already been made to those matters in the context of Mr. Sean Fitzgerald's review of the second draft Evaluation Report, which, as will be recalled, were covered in a document he had prepared and entitled "*The GSM Award and Regulation of Competition.*"

49.03 It will be recalled that Mr. Fitzgerald, apart altogether from his concerns surrounding the finances of Esat Digifone, also had misgivings regarding the consequences of an award of the GSM licence to a consortium of which Communicorp was a member, arising from the activities of its subsidiary, Esat Telecom, in the fixed-line sector on foot of its VAS licence. Those misgivings related to his belief that there was a perception on the part of Telecom Éireann, with which Mr. O'Brien was in competition, that his activities, through his company Esat Telecom, were immune from regulatory action. It was Mr. Fitzgerald's strong view that an award of the GSM licence to a consortium which included Mr. O'Brien, without concurrent action on leased-lines, and without regulatory enforcement of the fixed-line market, would be seen by Telecom Éireann, its management and unions, "*as consolidating ESAT's position as a formidable competitor in a privileged position with apparent Ministerial and Governmental backing*", as he put it in his note.

49.04 In the event, Mr. Fitzgerald's views on this matter seemingly prevailed, at least in part, and the Government decision, in addition to noting the outcome of the GSM process, also recorded that the Government:

“(3). agreed to the proposal to approve, under Section 90 of the Postal and Telecommunications Services Act, 1983, a range of tariff increases by Telecom Éireann for leased lines, subject to consultation with the Minister or Enterprise and Employment in regard to future adjustments in these tariffs, and

(4). noted the proposal to enforce strictly the law and regulations concerning the provision of telecommunications services, particularly as they relate to the voice telephony and infrastructure services reserved to Telecom Éireann until January, 2000.”

49.05 As has already been commented on, it is unclear when or how Mr. Fitzgerald’s initiative became such an integral part of the Government Decision on the GSM process. Whilst Mr. Fitzgerald agreed that he would have shared his concerns with Mr. Martin Brennan and Mr. Sean McMahon, and he further agreed that the fixed-line elements became part of the Government Decision at his instance, he did not believe that he had attended the side-meeting between the Principal Officer members of the Project Group and Mr. Loughrey on Monday, 23rd October, 1995, nor did he believe that he had been present in the Department on the morning of Wednesday, 25th October, 1995, in advance of Mr. Lowry’s recommendation to the party leaders. As already observed, it seems to the Tribunal likely that Mr. Fitzgerald was in fact present at that side-meeting, particularly in view of the content of Mr. McMahon’s contemporaneous notes of discussions at that meeting, and that Mr. Fitzgerald may also have been at a meeting early in the morning of 25th October, with Mr. McMahon and Mr. Lowry, at which these matters may have been explored.

49.06 It is clear from the content and tenor of Mr. Fitzgerald’s document that his support for the nomination of Esat Digifone as winning consortium was subject to his concerns regarding Communicorp’s fixed-line activity, through its subsidiary Esat Telecom, being met. It is also abundantly clear that, at some point, Mr. Michael Lowry acceded, at least in principle, to Mr. Fitzgerald’s requirements, insofar as provision was made in the Government Decision for a range of tariff increases by Telecom Éireann for leased-lines, and for the strict enforcement of the law and regulations concerning the provision of telecommunications services. However, as matters unfolded, and as will be recalled from Chapter 43 of this Volume, it seems that Mr. Lowry was less than entirely committed to the implementation of the measures necessary to give effect to that policy, as some short time later, in the run-up to Christmas of the same year, Mr. Lowry asked Mr. Fitzgerald to postpone the commencement of monitoring activities on Mr. Denis O’Brien’s leased-lines.

SECTION H

THE EXPERTS

MR. MICHAEL ANDERSEN AND ANDERSEN MANAGEMENT INTERNATIONAL

INTRODUCTION

50.01 Although Mr. Michael Andersen was the last Tribunal witness heard at public sittings when he attended to testify, during the course of nine lengthy days' sittings from 26th October, to 5th November, 2010, his interaction with the Tribunal spanned much of the preceding decade. As principal of Andersen Management International, who acted as consultants to the Project Group during the substantive stages of the evaluation, he was always viewed by the Tribunal as a witness of much potential importance. Being a Danish national and resident, his attendance was obviously not compellable, so that much of the dealings had between him and the Tribunal related, not merely to the information and assistance which he could provide, but to the terms on which he would be disposed to attend public sittings. As will shortly be seen, dealings in this regard appeared to have ground to a halt in 2004, when the Government declined to grant to Mr. Andersen a wide-ranging indemnity that had been sought by him from the State, as a precondition to his attendance as a witness, after earlier attempts on the part of the Tribunal to procure his attendance had proved unavailing.

50.02 Accordingly, although some correspondence between the Tribunal and Mr. Andersen had continued in the context of Provisional Findings and responses in late 2008, it was with some surprise that the Tribunal was notified in April, 2010, not by Mr. Andersen or by his Danish legal advisers, but by Messrs. Meagher & Company, solicitors to Mr. Denis O'Brien, that Mr. Andersen had not in fact resolved against testifying to the Tribunal, and wished to do so in early course. That surprise was compounded some five months thereafter when, following initial unsuccessful efforts to agree a time and duration for the taking of his evidence, it was elicited by the Tribunal after much inquiry that, at the time of that April, 2010, notification, Mr. Andersen had in fact been in receipt of an undisclosed indemnity from Mr. O'Brien in terms equivalent to those previously sought from the Irish State.

50.03 Given these circumstances, it will be necessary, before addressing Mr. Andersen's evidence as to his role in the evaluation process, to set forth some principal features of his general dealings with the Tribunal in years prior to 2010, and also during the months of 2010 preparatory to his attendance as a witness. In then dealing with his testimony as to his role as lead consultant in the GSM competition, it is not proposed to revisit all of the technical matters pertaining to the evaluation, that have been examined in detail and in chronological sequence in preceding chapters, including where applicable relevant testimony of Mr. Andersen, but rather to set forth an overview of how he envisaged his role as lead

consultant, the manner in which he discharged his obligations in that capacity, and his recollections of the principal events and interactions that arose during the currency of the process. It was acknowledged by Mr. Andersen that, following the announcement of the result of the competition, his role in the subsequent licensing process was relatively minor, being confined to an initial meeting with representatives of the winning Esat Digifone consortium, and certain dealings and advices with regard to unsuccessful consortia, so it will be necessary only to relate matters material to the actual course of the competition itself.

INITIAL TRIBUNAL DEALINGS WITH MR. ANDERSEN

50.04 The Tribunal's initial efforts to induce Mr. Andersen to attend as a witness spanned a period of some four years, and entailed dealings with the State, with Irish solicitors acting on behalf of AMI, with two firms of Danish solicitors, one acting on behalf of Mr. Andersen personally, and the other acting on behalf of a Norwegian company, Merkantildata, which had acquired AMI, and a third firm of Danish solicitors, which advised the Tribunal on the prospects of securing Mr. Andersen's evidence through proceedings before the Danish Courts. Ultimately, it became apparent to the Tribunal that Mr. Andersen, irrespective of the efforts made and safeguards provided by the Tribunal, was disinclined to attend to give evidence. It also became clear that, despite receipt of advice which initially seemed encouraging, there was no realistic prospect of achieving a positive outcome through proceedings before the Danish Courts.

50.05 In the meantime, persons affected by the Tribunal's work, who had been informed by the Tribunal of Mr. Andersen's reluctance to attend as a witness, and of the Tribunal's efforts to secure his attendance, most notably Mr. Denis O'Brien, made known to the Tribunal their objection to the Tribunal's inquiries into the GSM process proceeding in Mr. Andersen's absence. The Tribunal convened public sittings on 13th September, 2005, to enable submissions to be made to it by affected persons, directed to the consequences of Mr. Andersen's non-availability, having already invited written submissions. It was submitted to the Tribunal in that regard on behalf of Mr. O'Brien that Mr. Andersen was an essential witness, and that in his absence, the Tribunal should proceed no further, and should thereupon terminate its inquiries into the GSM licence. Having considered all submissions made to it, the Tribunal delivered a Ruling on 29th September, 2005, in which it determined that the absence of Mr. Andersen did not constitute a basis for terminating Tribunal inquiries. Judicial Review proceedings were then issued by Mr. O'Brien in which, amongst other complaints, he challenged the Tribunal's Ruling and sought Orders compelling the Tribunal to secure Mr. Andersen's attendance through Danish Court process. Those proceedings were resisted by the Tribunal, and were dismissed by the High

Court on 21st December, 2005. Following an appeal brought by Mr. O'Brien to the Supreme Court, the proceedings were likewise dismissed by the Supreme Court on 30th May, 2006.

50.06 Mr. Andersen provided some assistance to the Tribunal during the initial stages of its investigative work. He attended a series of private meetings with members of the Tribunal legal team, he co-authored an initial AMI report, provided in January, 2002, for the assistance of the Tribunal outlining the evaluation process, and through his solicitors, he furnished some written responses to queries raised by the Tribunal. This assistance was furnished over a twelve month period from June, 2001, to June, 2002. At that time, the Tribunal's inquiries were in their infancy, and in the absence of a systematic written record of the evaluation process from commencement to completion, or comprehensive account from any source, the Tribunal's understanding of the process, and of how it proceeded, was relatively rudimentary, and was largely dependent on the Tribunal's analysis of information extracted from some 119 files produced to the Tribunal by the Department and the Department of Finance. To that extent, the Tribunal's ability to utilise to its advantage such assistance as was provided by Mr. Andersen was limited. The January 2002 report with which AMI furnished the Tribunal, co-authored by Mr. Andersen, was in large part a consolidation of the Evaluation Report, and a further document in the form of a memorandum which AMI had supplied to the Department in February, 1996, entitled "*Memorandum on the evaluation of the evaluation of the GSM2 tender in Ireland*". The report to the Tribunal in January, 2002, for which AMI were paid £20,000.00 by the Department, was of limited benefit to the Tribunal, as it presented an account of the process which added little to the documents on which it was based, and which did not address, at all, critical areas of inquiries subsequently identified and pursued by the Tribunal.

50.07 During that twelve month period of engagement, AMI continued to be retained as consultants by the Communications Regulator in relation to a number of projects. That consultancy work concluded in mid-2002, and the Tribunal understands that, between 1997 and 2002, fees in the region of €3.9 million were paid by the Regulator to AMI. The completion of that consultancy work in mid-2002 coincided with the Tribunal being informed by the Irish solicitors that had been representing AMI and Mr. Andersen, and by another representative of AMI, that the Norwegian company, Merkantildata, had some time earlier acquired Mr. Andersen's interest in AMI. The Tribunal further learned that, during the twelve month period that Mr. Andersen had engaged with the Tribunal, he had been retained and remunerated for those services by Merkantildata as an independent consultant. Merkantildata was planning to sell its interest in AMI, and did not intend to incur any further expense in connection with Mr. Andersen's assistance to the Tribunal, in the absence of a full indemnity or guarantee from

the Tribunal in relation to continuing costs, including Mr. Andersen's ongoing fees. It was this news, and the requirement for a costs guarantee, which triggered the commencement of the Tribunal's efforts directed to securing Mr. Andersen's attendance, and which, in the face of what appeared to be his recurring resistance, were then to prove unsuccessful.

50.08 As the Tribunal was not at liberty to provide such a wide-ranging guarantee to Merkantildata, it sought to secure Mr. Andersen's assistance directly in his personal capacity, and to that end corresponded with his Danish solicitors, Bech-Bruun Dragsted. They informed the Tribunal that Merkantildata was in dispute with Mr. Andersen over the terms of its acquisition of his interest in AML, and he could not therefore assist the Tribunal in his personal capacity, as such assistance could be interpreted by Merkantildata as an acknowledgement that he was not entitled to retain the fees paid to him for the assistance he had rendered to the Tribunal over the previous twelve months.

50.09 In order to meet Mr. Andersen's concerns, as conveyed by his Danish solicitors, the Tribunal took the matter up with Merkantildata's Irish solicitors, who assisted the Tribunal by providing a letter, dated 12th May, confirming that Merkantildata:

- (i) did not wish in any way to obstruct Mr. Andersen giving evidence to the Tribunal;
- (ii) understood that the Tribunal was seeking assistance from Mr. Andersen in his personal capacity;
- (iii) had no objections to that course; and
- (iv) accepted that it was a personal matter for Mr. Andersen.

50.10 It was the Tribunal's expectation that those confirmations would be sufficient to meet Mr. Andersen's concerns, and the Tribunal duly forwarded that letter to his Danish solicitors. Mr. Andersen was not however satisfied, and he continued to resist the Tribunal's request that he attend to give evidence, although his solicitors intimated that he would not rule out attending on the conclusion of a commercial arbitration in Denmark, to which his dispute with Merkantildata had been referred.

50.11 The Tribunal, having by then commenced public sittings to hear evidence in relation to the GSM process, persisted in its efforts to secure Mr. Andersen's attendance, and to meet his concerns, insofar as they were

understood by the Tribunal. In July, 2003, the Tribunal reopened its correspondence with his Danish solicitors, and clarified the extent to which it was agreeable to covering his legal and incidental costs. This approach did not advance matters, although the Tribunal learned that a decision from the Danish Court of Arbitrators was expected at the beginning of 2004 at the earliest. The Tribunal continued in its efforts, and in October, 2003, it again wrote to Mr. Andersen's solicitors, indicating that it proposed seeking an explicit assurance from Merkantildata that any assistance rendered to the Tribunal by Mr. Andersen would not be treated by them as an acknowledgment of liability for the fees he had already received for his previous engagement with the Tribunal. Mr. Andersen was however unswayed: no attendance would be countenanced until the completion of the pending arbitration.

50.12 Having informed Mr. Andersen's solicitors that the solicitors for Mr. O'Brien had made known to the Tribunal that, in the absence of his evidence, it was their view that the Tribunal might not be able to continue its inquiries into the GSM process, Mr. Andersen agreed to meet members of the Tribunal legal team in private in Copenhagen, in October, 2003. The purpose of that meeting was in part to discuss the terms on which he might be prepared to give evidence at some time in the future. In the course of that meeting, it became apparent for the first time that, in addition to the earlier preconditions he had set, namely a guarantee in relation to costs, and the deferral of any attendance until the conclusion of his Danish commercial arbitration, Mr. Andersen was now seeking to impose yet a further precondition, in the form of a much broader indemnity from the State, in respect of any claims that might be brought against him, arising from evidence he might give to the Tribunal, or arising from any proceedings connected with the GSM process. Moreover, the indemnity sought was to extend to Merkantildata, the then owners of AMI. This meeting will be returned to at a later point in this chapter, as it was to transpire that the accounts of its content, on the part of those in attendance, did not concur.

50.13 By late 2003, it had become apparent to the Tribunal, from its dealings with Mr. Andersen dating from June, 2002, that the reasons conveyed to the Tribunal for his non-attendance as a witness, and the matters which he stipulated as preconditions to his attendance, seemed to alter as each such condition appeared, at least to the Tribunal, to have been met. His initial objection was that his assistance to the Tribunal could be interpreted by Merkantildata as an acknowledgement of liability for the consultancy fees which he had been paid for the assistance rendered to the Tribunal under the aegis of AMI, from June, 2001, to June, 2002. When it seemed to the Tribunal that his concern had been met by the confirmations received from Merkantildata's solicitors, Mr. Andersen was not satisfied, and then stipulated that he could not consider providing any further assistance until the commercial arbitration then pending between him and

Merkantildata was concluded. When the Tribunal then sought to clarify the terms on which he would attend as a witness, after the completion of that arbitration, the further precondition was introduced, namely, the provision of a blanket indemnity by the State, not just in respect of his own liability, but in respect of any liability that might attach to Merkantildata, not only arising from evidence he might give to the Tribunal, but otherwise arising from any proceedings connected with the GSM process.

50.14 At that point, the Tribunal, whilst continuing to hear evidence at public sittings in relation to the GSM process, was faced with apparent intransigence on the part of Mr. Andersen, and an objection on the part of Mr. Denis O'Brien to the continuation of its inquiries in Mr. Andersen's absence. The Tribunal therefore proceeded to relay Mr. Andersen's requirement for an indemnity from the State to the Government. Having received an opinion from a Danish lawyer, Mr. Oluf Engell of the firm Hjejle, Gersted & Mogensen, that a procedure might be available under Danish law whereby Mr. Andersen, on a request from the Irish authorities, could be compelled to attend before the Danish Courts for the purposes of giving evidence, the Government determined that it should defer a decision on Mr. Andersen's request for an indemnity, pending the bringing of proceedings before the Danish Courts to seek to compel the provision of his evidence, even though it was anticipated that such proceedings could delay matters for some two to three years.

50.15 The Tribunal also retained the services of Mr. Engell directly to advise on the compellability of Mr. Andersen, and the prospect of securing his evidence through Danish Court process in a form which could be of use to the Tribunal. Mr. Engell furnished his initial opinion in May, 2004. In that opinion, he emphasised that, whilst there was in theory a procedure that might be available at the behest of the Tribunal, there was no guarantee that the Danish Courts would act upon such a request, and that a successful outcome would depend on a novel development of Danish law. Following further interaction between Mr. Engell and the Tribunal, including a consultation which he attended with the Sole Member and members of the Tribunal legal team in Dublin, in March, 2005, it became apparent from clarifications furnished by Mr. Engell, and from further advices which he provided, that there was no realistic prospect of the Tribunal securing Mr. Andersen's evidence, in a form that would assist its inquiries, through procedures before the Danish Courts.

50.16 The Tribunal duly conveyed to the Government its view, based on the considered opinion of Mr. Engell, that Mr. Andersen's evidence could not be compelled through Danish Court process, and its further view, based on its dealings with Mr. Andersen, that there was no realistic prospect of persuading

him to give evidence at public sittings without an indemnity in the terms which had previously been outlined to the Government. In May, 2005, the Tribunal was informed that the Government had decided, after careful reflection, that it would not grant the indemnity sought by Mr. Andersen.

50.17 The Tribunal had in the meantime kept up correspondence with Mr. Andersen's Danish solicitors, and notwithstanding continuing efforts to procure Mr. Andersen's attendance, in the absence of an indemnity from the Government he resisted all such approaches, and in September, 2005, he withdrew instructions from his Danish solicitors.

50.18 That marked the conclusion of three years of effort on the part of the Tribunal, directed to securing, by any means reasonably possible, Mr. Andersen's evidence. Those efforts entailed attempts to procure his evidence voluntarily, albeit on terms which he stipulated, and an exploration of the possibility of compelling it through Danish Court process. When it became apparent that these endeavours had been to no avail, and bearing in mind the objection to the Tribunal's continuing inquiries into the GSM process, which had been expressed by Mr. O'Brien, the Tribunal notified affected persons of that outcome, and invited and received the written and oral submissions to which reference has already been made. The Tribunal, as already mentioned, delivered its Ruling on 29th September, 2005, whereupon Mr. O'Brien issued Judicial Review proceedings against the Tribunal, which were unsuccessful in the High Court and in the Supreme Court on appeal.

50.19 The dismissal of Mr. O'Brien's appeal in May, 2006, largely brought to finality the additional work undertaken by the Tribunal in consequence of its interaction with Mr. Andersen. It must be recorded that the Tribunal's engagement with Mr. Andersen was then in overall terms detrimental to the Tribunal's investigation of the GSM process. It diverted the Tribunal from its substantive inquiries, and it added considerably to the Tribunal's cost and duration. At the same time, the assistance rendered by Mr. Andersen, at the early stages of its private inquiries, was of limited benefit to the Tribunal's work. As will be seen, some of these considerations were again to arise in the course of the events of 2010.

HOW MR. ANDERSEN CAME TO THE TRIBUNAL

50.20 Following the apparent impasse that had been reached in relation to Mr. Andersen's attendance as a witness when the Government declined to accede to his precondition of a State indemnity, communications between the Tribunal, Mr. Andersen, and his Danish solicitors, Bech-Bruun, and in particular

Mr. Carsten Pals of that firm, were nonetheless maintained. The Tribunal continued to furnish Mr. Andersen with all the relevant books and papers made available to other affected persons from time to time, as subsequently updated, and Mr. Andersen also had and availed of access to the Tribunal's website, including all such Rulings as were made. Having disposed of all the apparently available evidence connected with the GSM process, the Tribunal in November, 2008, proceeded to issue Provisional Findings to affected persons, including Mr. Andersen. Extensive written submissions were received in response to those Provisional Findings, and some additional evidence, arising from or otherwise connected with those exchanges, was heard. Mr. Andersen was amongst those who availed of the opportunity to make written submissions in response to Provisional Findings, which he did, jointly with his former AML colleague, Mr. Jon Brüel, in December, 2008.

50.21 As stated, it was from Meagher & Company, solicitors for Mr. Denis O'Brien, that the Tribunal first learned of Mr. Andersen's belated willingness to testify. This was by letter of 14th April, 2010, under cover of which that firm enclosed a copy of a Statement, said to have been provided by Mr. Andersen with a view to his making himself available as a witness at the Tribunal's sittings. This letter was copied to all affected persons in the Tribunal's proceedings by Meagher & Company, and also to the Attorney General. Portions of its contents will be referred to later in this chapter, when addressing Mr. Andersen's actual evidence. Within a matter of hours of the Tribunal receiving this Statement on 14th April, 2010, it was clear from press references to the content of it that it had also been made available to the media from some source. This prompted a series of queries from the Tribunal concerning breaches of confidentiality, to which reference will be made. In the first instance, the Tribunal was surprised, despite having previously dealt with Mr. Andersen through his Irish lawyers, extensively through his Danish lawyers, and also directly with himself, that what seemed to amount to a significant change of course on his part should have been communicated, not by Mr. Andersen himself, but through solicitors for Mr. O'Brien.

50.22 At that time, a newspaper report in The Irish Times of 15th April, 2010, stated that Mr. O'Brien was not paying Mr. Andersen's fees. The Tribunal subsequently confirmed with the newspaper that this statement was made by an official spokesman for Mr. O'Brien. On receipt of the letter of 14th April, 2010, from Meagher & Company, the Tribunal sought to communicate with Mr. Andersen directly. The Tribunal's primary anxiety at that point was directed to establishing whether Mr. Andersen was willing to make himself available as a witness, whether, even at that terminal stage of the Tribunal's work, what had been relayed to the Tribunal as his Statement was correctly to be viewed as such, and what conditions Mr. Andersen was attaching to his attendance as a witness. Despite the consideration that Mr. Andersen's belated availability would inevitably

extend the duration of the Tribunal, and increase its costs significantly, requiring a detailed revisitation of evidence and documentation addressed a significant time previously, the Tribunal took the view that, having regard to Mr. Andersen's extensive role in the GSM process, the potential significance of Mr. Andersen's evidence was of such importance that it should be proceeded with. Similar considerations had also arisen in 2009, in relation to the belated testimony of Mr. Christopher Vaughan, the English solicitor who had acted in relation to certain property transactions relevant to the Tribunal's Terms of Reference. As with Mr. Andersen, the possibility of procuring Mr. Vaughan's attendance as a witness had first arisen through correspondence from Meagher & Company, although the relative position was somewhat distinguishable, by virtue of Mr. Vaughan's continued retention as a solicitor by Mr. O'Brien, and by reason of Meagher & Company, on the former occasion, having merely intimated to the Tribunal Mr. Vaughan's forthcoming attendance in Dublin to consult with them.

50.23 It should be recorded that from as early as 2003, the Tribunal had left Mr. Andersen in no doubt as to its preparedness to be responsible for his legal costs, and other expenditure likely to result from assisting the Tribunal, both in its inquiries and as a witness. By letter of 29th July, 2003, the Tribunal had informed him that it would meet his legal costs, his travel, accommodation and other expenses incidental upon his attending to give evidence, along with the costs of his time in travelling to and from Dublin, in attending meetings with members of the Tribunal legal team, and of attending to give evidence. Given the lengthy duration of those initial dealings, it was foremost in the consideration of the Tribunal, when it again took matters up with Mr. Andersen some seven years later, on foot of the letter of Meagher & Company, that it should establish the precise position with regard to his requirements in connection with his attendance to give evidence, in the shortest possible time.

50.24 Having thus taken up matters in this regard with Mr. Andersen, the Tribunal was requested in the first instance to indicate that his evidence would be confined to his role in the GSM process, and that the history and background relating to attempts to procure his attendance in past years would be excluded. Despite some reservations as to such an approach, having regard to the fact that the Statement furnished to the Tribunal by Meagher & Company, referred to extensively in media coverage, had referred to dealings with the Tribunal in terms which reflected negatively on it, it was nonetheless felt that in order to expedite his attendance, and obtain what was hoped would be significant substantive assistance through his testimony on the GSM process, it was appropriate to accede in part to this request. Accordingly, the Tribunal confirmed on 27th May, 2010, that the primary focus of Mr. Andersen's examination would be on the substance of that process and his involvement in it, but it was also pointed out that questions relating to the background and history of prior dealings, with a

view to persuading him to testify, could arise either from his own evidence, or from evidence elicited from examination by or on behalf of other affected persons, and that in those circumstances the Tribunal could not be precluded from referring to that history and background.

50.25 Apart from the above, correspondence at the time between the Tribunal and Mr. Andersen's lawyers addressed the matter of Provisional Findings, in addition to matters of costs, including a claim made by Mr. Andersen for approximately €336,000.00 in respect of what he stated had been in excess of 500 hours spent in connection with his assistance to the Tribunal over a number of years prior to his making himself available as a witness. It should be noted that whilst Mr. Andersen, in May, 2010, initially waived his claim to this sum, he subsequently reinstated his claim, albeit at a reduced hourly rate. It was nonetheless asserted on his behalf that he was not setting conditions for his attendance, in response to which the Tribunal pointed out that such a course appeared to have been apparent in the past, particularly in his requirement for an indemnity as a precondition to his attendance. As with much of the correspondence prior to Mr. Andersen's actual attendance to testify, agreement in that regard was not reached.

50.26 Between the letter of Meagher & Company, of 14th April, 2010, and 11th August, 2010, some approximately twenty-five letters were exchanged between the Tribunal and Mr. Andersen, or lawyers acting for him, including twelve letters written by or on behalf of Mr. Andersen. During that period, the Tribunal had sought to establish Mr. Andersen's availability and, apart from brief consideration of other possible dates, proposed that his evidence would be taken over two weeks, commencing on 1st July, 2010. Mr. Andersen rejected this date, on the basis that it was a holiday month in Denmark, and instead proposed that the earliest date on which he could make himself available for that duration was 25th October, 2010. That period of correspondence also comprised queries from the Tribunal surrounding the circumstances in which confidential dealings between Mr. Andersen and the Tribunal came to be made available to the Tribunal by the solicitors to Mr. O'Brien, in addition to the circumstances in which his Statement of 13th April 2010, containing what was confidential information, was made available to third parties, and to the media. In response, Mr. Andersen through his solicitors asserted that he had not had any dealings with the Irish media. The Tribunal then sought confirmation as to whether or not he had had any dealings concerning that matter with any other individuals and, if so, requested details in that regard.

50.27 In response, by letter of 11th August, 2010, it was stated that Mr. Andersen had not discussed or provided any information concerning his dealings with the Tribunal to any individual with whom he did not believe that he had what he described as a “*legal professional relationship*”, and he further informed the Tribunal that one such individual was Mr. Tom Reynolds. Mr. Reynolds, a qualified solicitor, is and was then employed by Digicel Limited, and was not then to the knowledge of the Tribunal in legal practice, either in Ireland or Denmark, but was at material times in the employment of that company, which is associated with Mr. O’Brien, and of which Mr. O’Brien is Chairman.

50.28 It was further then stated on behalf of Mr. Andersen that Meagher & Company, Mr. O’Brien’s solicitors, were acting for Mr. Andersen in providing a copy of his Statement to the Tribunal; in providing that Statement, Mr. Andersen had not done so on the basis that it was confidential; the Statement had been signed by him on 13th April, 2010, and on that day had been sent to Mr. Carsten Pals of Bech-Bruun, his Danish solicitor, who reviewed it, and it was also sent to Mr. Tom Reynolds; Mr. Andersen was not aware of who took care of providing the Statement to Meagher & Company for onward distribution to the Tribunal.

50.29 Prior to receipt of Mr. Andersen’s letter of 11th August, 2010, the Tribunal had sought from Mr. Andersen an express commitment that he would conform to the Tribunal’s confidentiality procedures. In seeking this, the Tribunal had regard to an earlier statement from Mr. Andersen reserving his right to communicate as he saw fit. Queried as to the terms of such confidentiality procedures, the Tribunal responded on 7th July, 2010, as follows:

“Communications between the Tribunal and your client including your firm on behalf of your client are confidential. Your client is under no obligation to provide the Tribunal with information or responses to queries as part of its private confidential engagement with him. It is only as a witness at public sittings or on foot of an Order for Discovery or Production that he can be compelled to provide responses to queries. Any responses provided in the course of his confidential exchanges with the Tribunal will be considered with a view to incorporating them in a memorandum of intended evidence. Your client will have an opportunity of correcting or altering any such memorandum should it fail to reflect his confidential communications.

The Tribunal looks forward to receiving your client’s confirmation and that of Messrs Bech-Bruun that they have to date, and will continue, to abide by this confidentiality. In particular, your client should confirm that he has not provided, and will not provide, any such

documentation, material or information, including the subject matter and/or substance thereof, to any person other than his legal advisers. The Tribunal naturally assumes that you and your firm will abide by the confidentiality protocol as outlined above and would be grateful to receive your confirmation in this regard."

50.30 By letter of 30th July, 2010, Irish solicitors on behalf by Mr. Andersen wrote to the Tribunal, confirming that they had obtained instructions from Mr. Andersen authorising them to confirm that he had not breached the Tribunal's confidentiality rules to date, and that he undertook to honour them in the future. Having regard to the assurance contained in that letter, it occasioned some perplexity on the part of the Tribunal that Mr. Andersen had communicated with Mr. Tom Reynolds, and that, given the circumstances of Mr. Reynolds' employment, Mr. Andersen should have regarded himself as having a "*legal professional relationship*" with Mr. Reynolds. When these concerns were further raised by the Tribunal, Mr. Andersen's solicitors responded that Mr. Andersen, through his Danish lawyer, Mr. Carsten Pals, in advance of 13th April, 2010, had been approached by Mr. Reynolds on behalf of Mr. O'Brien, in furtherance of the latter's desire that Mr. Andersen give evidence; it was additionally then stated that, despite the fact that Mr. Andersen believed that his relationship with Mr. Reynolds was protected by legal professional privilege, Mr. Reynolds had not given legal advice to Mr. Andersen, but had simply facilitated the provision of his Statement to the Tribunal; in this regard, it was further stated that Mr. Reynolds had merely assisted Mr. Andersen in the logistics of supplying the Statement of 13th April, 2010, and that the information disclosed to Mr. Reynolds was merely the contents of the Statement; other than the logistics, the Statement was the work of Mr. Andersen alone, and it was stated that Mr. Reynolds had first contacted Mr. Pals on 8th April, 2010.

50.31 Further queries were then addressed by the Tribunal, concerning Mr. Andersen's dealings with Mr. Reynolds. It was not until 6th September, 2010, that the Tribunal was informed for the first time by Mr. Andersen's solicitors that Mr. Reynolds had met with Mr. Andersen and his lawyer, Mr. Pals, and discussed the possibility of Mr. Andersen attending to give evidence. This meeting, the Tribunal was informed, took place on 9th April, 2010, lasted two and a half hours, and in the course of the meeting the content of a preliminary statement drafted by Mr. Andersen was discussed, together with the possibility of Mr. Andersen giving evidence with an indemnity from Mr. O'Brien. The Tribunal was also informed that, as a result of this meeting, Mr. Andersen finalised the draft statement in the following days, which was perused in Mr. Pals' office, and was subsequently sent to Mr. Jon Brüel, who had been an associate of Mr. Andersen in AMI, and was then furnished to the Tribunal by Mr. Meagher, Mr. O'Brien's solicitor, "*as offered by Mr. Reynolds*".

50.32 This was the first time, some five months after Mr. Meagher's letter of 14th April, 2010, that the Tribunal had learnt that an indemnity had been provided by Mr. Denis O'Brien to Mr. Andersen. The indemnity was described as being contained in a letter from Mr. O'Brien to Mr. Andersen, dated 13th April, 2010, the same date as that on which Mr. Andersen's Statement was sent by email to Mr. Reynolds. The letter of 6th September, 2010, from Mr. Andersen's solicitor further stated that Mr. O'Brien's indemnity letter was confidential, and that Mr. Andersen required the consent of Mr. O'Brien to its release to the Tribunal. This letter of 6th September, 2010, was the culmination of responses to a series of repeated queries from the Tribunal, one of which had sought details of all assistance rendered by or on behalf of Mr. Reynolds to Mr. Andersen, in what Mr. Andersen had described as the logistics of furnishing a statement to the Tribunal, bearing in mind that Mr. Andersen since 2002 had been represented in his dealings with the Tribunal by Mr. Pals, and also requesting that Mr. Andersen identify the apparent obstacles to the furnishing of a statement to the Tribunal directly, which Mr. Reynolds had been able to assist him in overcoming. In response to this, it was stated that Bech-Bruun were not established in this jurisdiction, that Mr. Andersen had not then appointed Irish advisers, and that Mr. Pals had advised him to take advantage of the offer from Mr. Reynolds, to facilitate the furnishing of his Statement to the Tribunal.

50.33 On 15th September, 2010, the Tribunal replied to Messrs. Maples & Calder, who by then had for some time been appointed as Mr. Andersen's Irish solicitors. In the course of that letter, it was stated that Mr. Andersen had declined to give evidence to the Tribunal from 2002 until earlier in 2010, despite Tribunal endeavours to meet his conditions, because he was not provided with a State indemnity. Yet some five months after the Tribunal had been informed by solicitors to Mr. O'Brien that Mr. Andersen was in fact willing to attend, it then transpired that that willingness was based upon the provision of an indemnity by Mr. O'Brien. The information disclosed to the Tribunal in the previous letter on behalf of Mr. Andersen was then referred to, together with the fact that that was the first occasion on which the Tribunal had been informed in that regard, and it was mentioned that that information might seem in conflict with the content of the earlier letter, of 20th August, 2010, stating that *"Mr. Reynolds assisted Mr. Andersen in the logistics of supplying the Statement of 13 April 2010 and the 'information' 'disclosed' to Mr. Reynolds is contained in the aforesaid Statement. Other than the logistics, the Statement was the work of Mr. Andersen alone."* It was then requested that all documentation relating to any dealings had by Mr. Andersen with Mr. Reynolds be furnished to the Tribunal, that the solicitors to Mr. O'Brien be requested to furnish to the Tribunal the letter of indemnity, and that full details of all financial arrangements made between Mr. Andersen and Mr. O'Brien be furnished within the following week.

50.34 In response, by letter of 17th September, 2010, the solicitors for Mr. Andersen asserted that there were no inconsistencies in the content of their two preceding letters. As to a reference to a statement having been “*preliminary*”, this was in regard to the Statement which was furnished by Meagher & Company, and was so described because it was anticipated on behalf of Mr. Andersen that a fuller statement would be furnished by him in due course. As to the meeting in question, it was confirmed that its entire duration was approximately two and a half hours, but that Mr. Reynolds had attended for approximately three quarters of an hour, and that the balance was spent with Mr. Andersen and Mr. Pals reviewing the draft Statement.

50.35 On the following Monday, 20th September, 2010, an article appeared in The Irish Times, referring to an interview provided to that newspaper on the previous day, in which Mr. O'Brien had stated that he had provided an indemnity to Mr. Andersen, but that the indemnity was limited to Mr. Andersen's costs. This was the first reference by Mr. O'Brien or any representative on his behalf to such an indemnity, and appeared to suggest that the earlier statement by his official spokesman, made on 15th April, 2010, and which also featured in The Irish Times of that date, was made in circumstances where that spokesman may not have been informed of the indemnity. Later on that morning of 20th September, 2010, Meagher & Company wrote to the Tribunal, in a letter which was not in response to any Tribunal correspondence, stating that, on their client's instructions, they were enclosing a copy of an indemnity between their client and Mr. Michael Andersen, dated 13th April, 2010. Contrary to what Mr. O'Brien had informed The Irish Times in his interview reported that day, the indemnity was not limited to Mr. Andersen's costs, but was in fact a full indemnity for all losses that might arise, and was equivalent in its terms to the State indemnity that Mr. Andersen had sought in 2003 as a precondition to his attendance as a witness. A copy of this [indemnity letter](#) can be found in the Book of Appendices to this Volume.

50.36 The copy of the indemnity letter from Mr. O'Brien to Mr. Andersen, dated 13th April, 2010, furnished by Meagher & Company, carried a date stamp, recording that it had been received by them on 20th September, 2010. From other correspondence between the Tribunal and Meagher & Company, it had appeared to the Tribunal that that firm had not been informed of the indemnity until that date, but at the conclusion of Mr. Andersen's evidence, at the end of the sitting of 5th November, 2010, counsel for Mr. O'Brien informed the Tribunal that Mr. Paul Meagher, solicitor, had requested him to convey to the Tribunal that he became aware of the indemnity in the course of the first week of May, 2010, rather than having become aware of it only in September, 2010.

50.37 By the date of this receipt of Mr. O'Brien's indemnity to Mr. Andersen, the Tribunal had been in correspondence with Mr. Andersen for the previous five months concerning details of arrangements for his costs, notwithstanding having, since 2003, undertaken to be responsible for them. Moreover, the actual indemnity then furnished related only in part to the payment of legal costs, and contained a much wider indemnity from Mr. O'Brien to Mr. Andersen in respect of his dealings with the Tribunal, whereby Mr. O'Brien undertook personally to indemnify Mr. Andersen in relation to any personal liability that might attach to him, arising from sworn evidence given by him to the Tribunal. It further embraced any personal exposure, and exposure in respect of companies in which Mr. Andersen held a controlling interest, to legal liability arising from legal proceedings taken by third parties that might arise pursuant to evidence given by him to the Tribunal, or arising from statements provided by him to the Tribunal. In effect, its ambit was comparable with the indemnity sought by Mr. Andersen from the State, that was declined in 2005, and substantially equivalent to what was then contemplated.

50.38 The circumstances outlined above appeared to cast considerable doubt on the reliability of the information furnished to the Tribunal in regard to dealings between Mr. Andersen and Mr. O'Brien's associate, Mr. Reynolds. It had emerged that Mr. Andersen had obtained from Mr. O'Brien an indemnity in circumstances whereby, not merely was it not disclosed to the Tribunal when furnished, but was seemingly then also withheld from Mr. O'Brien's own solicitors and public relations representative. When Meagher & Company first notified the Tribunal of Mr. Andersen's availability as a witness, their letter dated 14th April, 2010, was copied to a number of interested parties, including the Attorney General. They asserted that the Tribunal had been misleading in suggesting that Mr. Andersen was not available as a witness, a reference to the Tribunal having previously conveyed that Mr. Andersen was not available except on the terms of an indemnity from the State. Had Meagher & Company known of the fact of the indemnity, their letter alleging that the Tribunal had misrepresented Mr. Andersen's position could not have been written in those terms. It must however be presumed that their letter was written on the instructions of their client, Mr. O'Brien, whose knowledge of that indemnity, as its provider, is beyond question.

50.39 As will be seen in subsequent references to Mr. Andersen's evidence, he testified that the Tribunal must or should have been aware from notification of his availability that this was on terms that he had received an indemnity from Mr. O'Brien, an assertion which would seem surprising in the context of Mr. O'Brien's own professional advisers being unaware of the indemnity at the time of its making, and the contemporaneous media coverage that Mr. O'Brien had not even agreed to pay Mr. Andersen's costs. Furthermore, insofar as the Tribunal had

initially intended to hear Mr. Andersen's evidence in July, 2010, it would clearly seem the position that, had his evidence then proceeded, the Tribunal would have been entirely unaware of the indemnity, or of Mr. Reynolds' role in either the provision of the indemnity, or the circumstances surrounding the generation of Mr. Andersen's Statement of 13th April, 2010.

EVIDENCE OF MR. ANDERSEN IN RELATION TO GSM EVALUATION

50.40 Before seeking to set forth the principal features of Mr. Andersen's testimony on this central matter, two related sources of controversy may be noted, each of which arose in the course of that evidence, were connected with the antipathy which Mr. Andersen had expressed towards the Tribunal and members of its legal team, and gave rise to litigation during and immediately following the two weeks of Mr. Andersen's evidence. The first of these related to the retention of Mr. Michael McDowell SC, as Tribunal counsel for purposes only of the examination of Mr. Andersen. This arose in the circumstances whereby Mr. Andersen had complained in trenchant terms of apparent bias on the part of a number of members of the Tribunal legal team against Esat Digifone, and in favour of the Persona consortium, as he contended was disclosed in the course of certain investigative meetings held, and further in inaccurate and false content, as to what had then transpired, in notes compiled by the Tribunal. In the context of that background, and of illness on the part of one of the Tribunal senior barristers, Mr. McDowell had been retained, and it was stated at the outset of the sittings that not merely would his role be confined solely to examining Mr. Andersen, but that he would have no further input into the process of the Tribunal, and would cease any further involvement upon the termination of that evidence. Objection was taken by counsel for both Mr. O'Brien and Mr. Dermot Desmond, on 26th October, 2010, the first day of those sittings, to Mr. McDowell conducting that examination, on a number of grounds, including prior political offices held by Mr. McDowell, and a prior involvement on his part in litigation in the 1990s relating to the third Irish GSM licence, in which Mr. Andersen had also been involved as consultant. Upon the Tribunal ruling against the various grounds of objection, High Court proceedings were instituted on behalf of Mr. O'Brien and Mr. Desmond by way of Judicial Review. The matter was heard expeditiously in the High Court, which ruled that leave should not be granted by way of Judicial Review on any of the grounds sought. Both these related proceedings have been appealed to the Supreme Court.

50.41 The further matter, which also arose in the course of Mr. Andersen's testimony, had been partly foreshadowed in earlier 2010 sittings, relating to the matter of whether legal advice in regard to changes in the composition and share configuration within the Esat Digifone consortium had at the relevant time been

furnished to the Department. A portion of the evidence heard in that regard related to an earlier meeting held between members of the Tribunal legal team and State legal advisers, including two officials of the Office of the Attorney General. In addressing what transpired at that meeting, it was decided by the Sole Member that, because of the close connection between him and those members of the Tribunal legal team with whom he had worked closely for some years, having regard to the maxim *nemo iudex in causa sua*, the Sole Member regarded himself as being precluded in his own forum from hearing and ruling upon related and potentially conflicting testimony from such members of the legal team. In the context of what latterly arose by way of potential conflict between Mr. Andersen and Tribunal legal members, it was further ruled by the Sole Member that, whilst such conflicts could of course be explored and resolved in a different forum, they were not properly justiciable in the course of the Tribunal's sittings involving Mr. Andersen, and that affected persons would not be permitted to adduce the disputed content of such meetings, dealings or related written memoranda. An exception was made in the case of Mr. Andersen who was permitted to make unrestricted reference to all such matters in his evidence to the Tribunal, and in his examination by his own counsel, since such matters could reasonably bear upon what had transpired in a context of Mr. Andersen attending to testify in 2010, but not having done so in the course of the preceding decade. Further Judicial Review proceedings were instituted on behalf of Mr. O'Brien in relation to this Ruling, in this instance following the conclusion of Mr. Andersen's evidence. Those proceedings were dismissed by the High Court on 1st February, 2011, and the Sole Member's Ruling was upheld. The Tribunal has been informed that Mr. O'Brien has also appealed that decision to the Supreme Court.

Statement circulated in April, 2010

50.42 Proceeding to the actual content of Mr. Andersen's evidence, it commenced with the substance of his Statement of 13th April, 2010, which, as already mentioned, had been circulated to a number of affected persons, and had received extensive media coverage at the time. At the outset, Mr. Andersen summarised his professional background, stating that he holds the position of Adjunct Professor in the field of business strategy at Copenhagen Business School, in addition to holding qualifications in political science, commerce and management consultancy. His primary experience had been in the field of telecommunications, and following engagements in the public and private sector in Denmark, including Deloitte Denmark, he in 1991 established Andersen Management International as a telecommunications consultancy business. He had been involved in the awarding of approximately two hundred mobile communications licences in jurisdictions throughout the world, very many as lead consultant, and had published extensively on related matters.

50.43 As principal of AMI in 1995, Mr. Andersen had acted as lead consultant to the Irish Government in respect of the awarding of the second GSM licence. Neither he nor any of his AMI colleagues had any contact whatsoever with the Minister, Mr. Michael Lowry, as part of this process or otherwise. He was never aware of any preference on the part of Mr. Lowry with regard to any particular applicant in the process, and similarly no such preference was ever intimated to him by any civil servants involved. He did nonetheless recall Mr. Sean McMahon, of the Project Group, on one occasion expressing a concern that Esat Digifone would be particularly difficult to deal with from a regulatory perspective, but that the Persona consortium would not present such a challenge.

50.44 From private meetings had by him with the Tribunal legal team, he formed the view that certain members had a strong view that Esat Digifone ought not to have won the competition, and that Persona was the best candidate. This seemed to him to demonstrate a bias against Esat Digifone in favour of Persona.

50.45 Esat Digifone won the competition because it had the best application in accordance with the criteria set out by the Irish Government in the RFP. It was a clear winner, meaning that there was an appreciable difference between its application and that of Persona, the second-ranked applicant. By clear winner, Mr. Andersen meant that no amount of further analysis or scrutiny of the applications would have changed the result. Indeed, Mr. Andersen regarded the application of Esat Digifone as one of the most impressive that AMI had encountered in any such process worldwide, then or since, particularly in the context of ability to roll out the network.

50.46 The apparent bias against Esat Digifone on the part of some members of the Tribunal legal team, he said, had been particularly apparent at one meeting, where Mr. Jerry Healy SC had expressed doubts as to the authenticity of certain planning permission documentation submitted by Esat Digifone in its application, using, according to Mr. Andersen's judgement, highly inappropriate language, which he found "*troubling*". Such bias, he further stated, was also apparent from a meeting held in Copenhagen on 29th October, 2003, in which Mr. Andersen and Mr. Pals had met with Mr. Healy and Mr. Stephen McCullough BL, on behalf of the Tribunal. The notes of that meeting that had been furnished to him disturbed him by reason of what he described as their inaccuracy, in particular in a context of disparaging observations about Mr. Martin Brennan, the Project Group Chairman, attributed to him, which Mr. Andersen denied having made. It was also the case that private documentation relating to AMI had been put on the Tribunal website without permission, and Mr. Andersen also recalled an occasion on which the Tribunal legal representatives had been extremely late in attending an arranged meeting in Dublin.

50.47 The nature and scope of AMI's work changed very considerably as the process developed from what had been initially agreed upon on 9th June, 1995, and Mr. Andersen testified that AMI was required to undertake work well outside the scope of the initial tender submitted. In particular, the involvement of the European Commission in the GSM process created a very significant level of additional and unforeseen work. Further amendments were required, due to other unforeseen circumstances arising during the process, and this resulted in further work which naturally impacted on the level of fees involved, leading to certain contractual difficulties between AMI and the Department. These culminated in a further agreement of 14th September, 1995, providing for an increased fee ceiling.

50.48 Of particular importance, and a matter to which Mr. Andersen returned on a number of occasions during his testimony, was the fact that AMI had had no role in determining the criteria upon which the competition would be decided, and had not been involved in designing the rules of the competition. This was unusual, as it meant that AMI had to design an evaluation methodology that would "*fit around*" the pre-existing paragraph 19 criteria in respect of the descending order of priority applicable to those criteria set out in the RFP. It would have been normal for AMI to have been involved in defining the criteria to apply, but this was not the case with the Irish competition, and in Mr. Andersen's view the design in this regard did not meet best international practice at that time, and certainly not European best practice. Nonetheless, AMI was bound to respect the criteria as published prior to its engagement. This factor had a significant impact on the evaluation process, particularly in regard to the ability of AMI to complete the quantitative evaluation as envisaged.

50.49 Mr. Andersen stated that he had strongly advised Mr. Brennan on a number of occasions that, once the Department was in possession of a final result, it should be announced as soon as possible. This reflected their extensive previous experience in such matters, and Mr. Andersen understood that this advice was accepted, and the result was announced by the Minister on 25th October, 1995, as accorded with the original time frame of AMI. Mr. Andersen stated that he was not aware that four weeks had been provided for consideration of the outcome at Government level, even though a passage of the report of January, 2002, co-authored by Mr. Andersen, suggested the direct opposite.

50.50 As to the contractual issues between the Department and AMI, these did cause an amount of friction, but they were resolved. The eventual agreement in that regard did not fully compensate AMI in terms of the full cost of the GSM project, and the work towards the end of the evaluation was severely limited, by

agreement with the Department. However, none of this had any impact upon the final result. On 16th July of the following year, 1996, Mr. Andersen had received a letter from Mr. Brennan, acknowledging the assistance and standard of work furnished by AMI, and wishing them well in any similar projects undertaken in the future. In this regard, Mr. Andersen also pointed out that, with regard to High Court proceedings brought, in which the involvement of AMI in the third GSM process, which had been won by Meteor, had been impugned by Orange Communications Ltd, the integrity of that work had ultimately been upheld on appeal by the Supreme Court, in its decision in May, 2000.

50.51 Mr. Andersen stated that he had never told the Tribunal that he was unwilling to give evidence. What had happened was that he was approached by parties represented before the Tribunal, who inquired if he would be willing to testify, and he confirmed that he was. On 9th April, 2010, he had a meeting with Mr. Carsten Pals and Mr. Tom Reynolds, an employee of Mr. Denis O'Brien. What was discussed at that meeting was how to make a statement and the headline issues arising. Neither Mr. Andersen nor Mr. Pals had any experience with Irish Court or Tribunal systems, and Mr. Pals sought assistance from Mr. Reynolds in that regard. There were in any event some matters left over that had not been fully addressed in Mr. Andersen's written responses to the Provisional Findings served in the latter part of 2008. The April 2010 Statement was brought into existence after the meeting with Mr. Reynolds. It was finalised over the course of four days following that meeting, and Mr. Reynolds had said he would handle the matter of bringing it to the Tribunal, and how to structure it. Mr. Andersen's former colleague, Mr. Jon Brüel, had been consulted as to the content of the document, and Mr. Pals had furnished assistance in its drafting.

Memorandum of responses to Tribunal queries

50.52 Mr. Andersen's evidence then proceeded to address his principal written responses to a set of formal queries addressed to him by the Tribunal. These had in large part been outstanding from May, 2002, and responses were not ultimately received from Mr. Andersen until 20th October, 2010, some 6 days prior to his attendance. Regarding the role of AMI as consultants, this was to assist the civil servants in the Department in the evaluation of applications, and to provide guidance to the Department in respect of what was the best application. However, AMI did not decide which applicant should be awarded the licence, or the scoring of the applications. Neither AMI nor its employees were members of the Project Group, did not attend all of its meetings, and from time to time Mr. Andersen himself only attended part of the meetings. AMI was not responsible for record-keeping or other audit trail matters in connection with the evaluation of the applications, which function was solely the responsibility of the

Department. AMI had initially offered to perform this function, but that offer was declined by the Department. Although AMI would normally join in evaluation discussions, it had no decision-making powers, and it was the Irish civil servants who took the decisions, that is, decisions on the weightings and scorings of the applications. As stated in the tender document of AMI, its role was to assist with the evaluation, and not to select or nominate a winner. Following the contractual change in September, 1995, it was decided that AMI was to assist in the ranking of three eligible candidates with whom the Minister could enter into negotiations to award the GSM licence.

50.53 Questioned about the form of the RFP document, Mr. Andersen stated that an international standard had at that time emerged, whereby there was an initial minimum requirement or admittance test, followed by an evaluation of the eligible applications. This dual process was not then set forth in the Department's RFP, although subsequent Irish tenders did incorporate this. Given the absence of such a rejection procedure, what was done was to admit three of the six competing consortia as having complied fully with minimum requirements relating to the content and form of applications, and also to admit the remaining three applications, notwithstanding minor deficiencies which were not deemed sufficient to warrant exclusion.

50.54 Mr. Andersen proceeded to state that paragraph 19 of the RFP became progressively more important as the evaluation process proceeded, and it became increasingly clear that it was not going to be feasible to produce a separate and self-contained report on the quantitative evaluation. In the view of Mr. Andersen, so many deficiencies were detected during the quantification process that it was not defensible.

50.55 Continuing with his evidence derived from responses to Tribunal queries, Mr. Andersen laid further stress on the "*far from....ideal*" RFP: it was inadequately detailed, criteria were excessively broad, and hybrid or unusual in nature, and no weightings were specified, merely an assertion that the criteria were listed in descending order of priority. Regarding what was stated as to financial and technical capability, Mr. Andersen observed that, whilst both Esat Digifone and Persona were technically capable, each had financial issues, but these had not been expressed as admittance or threshold criteria in the RFP, hence AMI specifically referred to such issues in the draft Report.

50.56 As to the matter of weightings, according to Mr. Andersen, the only changes or disparities noted were confined to the 3% change with regard to tariffs and licence fee, after the European Commission intervention, and the eventual rectification of the 8th June, 1995, quantitative weightings from a total of

103 back to 100. These were the only changes made to the weightings, and that rectification explained the reference in the documentation of 9th October, 1995, to the weightings in Table 17 “*being wrong*”.

50.57 Mr. Andersen reiterated that it became clear that a self-contained or separate quantitative evaluation was not going to be possible. The principal reasons for this included the intervention by the European Commission, whereby a standard beauty contest had in effect been mandated, as a result of which some of the hard data from the applications were often not readily comparable on a like-for-like basis; in addition, approximately 50% of the weightings were lost due to lack of statistical reliability; further, it became clear to the evaluators, when reviewing the last draft version of the quantitative evaluation on 9th October, 1995, that this lacked statistical validity, as it generated the applicant A6 as the highest score, although A6 had not been among the three highest-ranked applicants. Accordingly, the view was taken that the quantitative evaluation did not make sense as a separate evaluation, and it was subsequently integrated into a “*holistic evaluation comprising a quantitative and qualitative evaluation*”. As set out in the Evaluation Report, the quantitative element was initially conducted by AMI staff as part of a “*number crunching*” exercise, on foot of data supplied by applicants. In contrast, the qualitative element required a more subjective evaluation, of “*soft*” information. Mr. Andersen did not accept that the quantitative evaluation was relegated to or displaced by the qualitative evaluation, as both were combined.

50.58 Regarding contractual differences with the Department, the main cause, in this instance also, was the European Commission involvement in dictating a shift from an auction element to a beauty contest, thereby greatly increasing AMI’s workload on many fronts. Included among these was imperfect preparation by the Department, prior to AMI’s involvement in the tender process. However, the differences were settled amicably, and did not impact on the level of service provided by AMI, or prevent conforming with deadlines.

50.59 As to the decision not to score Other Aspects, that is, sensitivity and credibility, these were not among the RFP criteria, and AMI decided to support the view of the Department and the Project Group that it was unfair to apply scores or marks to these. Neither were they among the fifty-six indicators, and it was clear that sub-groups had taken into account risks, sensitivities and credibility factors when undertaking their evaluation. In proposing in its letter of 21st September, 1995, that this matter be confined to comment within the body of the Evaluation Report, this was in a context that most of the evaluation was complete, there was great time pressure, and there was a need for AMI to obtain Departmental feedback.

50.60 Regarding supplemental financial analysis of entities within applicants, three years' negative solvency and a weak financial position were identified as Communicorp risks within the Esat Digifone consortium. Similar but worse risks were noted in Sigma, within the Persona consortium. Between 9th and 18th October, 1995, it was decided that Mr. Billy Riordan, along with Mr. Andersen's colleagues, Mr. Michael Thrane and Mr. Jon Brüel, should perform some credit checks by way of supplemental analysis. These were duly comprised in Appendix 10. Although fully addressed in the substantive chapters of this Volume, it should be recorded that the Tribunal is satisfied that Mr. Riordan had no role in that supplemental financial analysis.

50.61 Turning to matters relating to Tables 16, 17 and 18, Mr. Andersen testified that the idea to convert letters to numbers came from the Irish civil servants, and was discussed during the last evaluation meeting in Copenhagen on 18th and 19th September, 1995. AMI did not disagree with taking this type of presentation into the Report, although such a calculation distorted the idea of a qualitative evaluation. In the course of his examination, Mr. Andersen agreed that it was possible that those meetings with the Irish civil servants in Copenhagen may well have taken place on 19th and 20th September, 1995, as opposed to 18th and 19th September, 1995. Mr. Andersen acknowledged that he had not been particularly fond of the conversion adopted, because of it having been potentially distorting.

50.62 Dealing with the Project Group meeting of 9th October, 1995, Mr. Andersen stated that the process was not then complete, as the Evaluation Report had not then been finalised, but the main results had emerged by mid-September. It was considered logical by the Project Group that its Chairman should give Mr. Michael Lowry, as Minister, a briefing on progress. This was not a decision on the part of Mr. Andersen or AMI, but no objection was made by them to it. Mr. Andersen stated that he had no recollection of Mr. Brennan airing any view of Mr. Lowry on the outcome of the competition. Mr. Andersen stated that, with regard to "*bankability*", AMI, together with the delegates from the Department of Finance, had introduced this concept at an early stage in the workings of the financial sub-group. He further stated that at that meeting of 9th October, 1995, AMI brought a version of the draft quantitative tables, and was told by the Project Group that a final separate quantitative report should not be produced and appended to the final Evaluation Report. There were no discussions of the weightings whilst Mr. Andersen was present at the meeting of 9th October, 1995, although a presentation had been given by AMI as to how Tables 16, 17 and 18 had emerged. Nor was there then any request made by any members of the Project Group that consideration should be given to the appropriateness of granting the licence to Esat Digifone, having regard to the

Department's experience in dealing with Esat Telecom, the fixed-line associate of Esat Digifone. Mr. Andersen did however state that he recalled this matter being discussed by the Project Group on 23rd October, 1995, when it was raised by Mr. Sean McMahon, who Mr. Andersen recalled as not having participated in the evaluation or its sub-groups, or indeed in the oral presentation meetings. On that occasion, Mr. Andersen had expressed to Mr. McMahon his clear view that this was not a legitimate criterion according to which a candidate could be assessed as part of the evaluation, and neither was there any such criterion in the RFP. It should be noted that, in referring to the results tables in the course of this chapter, the numbering used in the first and second draft Reports is adopted to avoid confusion.

50.63 On the matter of any qualification placed by AMI on the financial capability of Esat Digifone and Persona, Mr. Andersen testified that it was solely AMI who raised and insisted that the Evaluation Report contain a discussion of the financial markers attached in particular to A5 and A3, respectively those consortia. This was addressed by the Project Group, and also in some communications between the Department and AMI. However, the approach of AMI was to investigate this matter in cooperation with representatives of the Department of Finance. This was because that Department was responsible for the financial evaluation by the civil servants in the Project Group, and because that Department had knowledge, expertise, resources and information which did not appear to be available to the other Department.

50.64 Mr. Andersen stated that he knew nothing of any “*extra time*” request made in the course of the Project Group meeting of 23rd October, 1995, and stated that Mr. Martin Brennan, Mr. Sean McMahon and Mr. John McQuaid did not leave the meeting during any time that he was present. Nor did he recall any request by any member of the Project Group to the effect that further time was required to consider the results, or that it was necessary to revisit the qualitative evaluation.

50.65 With regard to any dealings between AMI and Mr. Fintan Towey, or any other person, regarding the final draft Report, or amendments incorporated, Mr. Andersen recalled a number of discussions with Irish civil servants leading up to 25th October, 1995, with regard to finalisation of the Evaluation Report. He could not comment on what may have been included on Mr. Towey's computer disk, as he was not aware of this. He did recall a communication concerning “*Suggested Textual Amendments*”. There were a number of comments discussed between AMI and the Department of a linguistic nature, however two changes made were of such a nature that AMI had to either disagree or reformulate. One was the wish to restructure the presentation. This was agreed, with the final wording in the

Evaluation Report stipulating that “*This report reflects the consensus view of the PTGSM as to how the results of the evaluation should be presented in the final report.*” The other was with regard to identifying the risks concerning the financial capability of A5 and A3. It was Mr. Andersen’s evidence that AMI, who had identified these risks, and formulated the subsequent implications impacting on licence negotiations, did not concede to the wish expressed in the “*Suggested Textual Amendments*” to delete some of those comments.

50.66 Regarding the manner in which “*bankability*” was in the final instance expressed, “*having regard to the level of interest in the Irish competition for the GSM licence and the high profitability of mobile communications generally...*”, Mr. Andersen stated that it was quite clear that a GSM licence operated by one of the three highest-ranked applicants would be a “*bankable*” project, meaning that the operator would have little or no difficulty in attracting corporate finance for the project. AMI had formed this view based on its extensive experience of the telecommunications business throughout Europe and internationally. Accordingly, he had no difficulty in inserting the agreed paragraphs dealing with this issue, and this was also in line with the understanding at sub-group level and Project Group level, at times when Mr. Andersen was present.

50.67 Further inquiries were made of Mr. Andersen in relation to the grading and scoring of the evaluation criteria, particularly the mechanics of the aggregation of grades to give totals for the dimensions and indicators, of the aggregation of grades for each individual dimension to give the grand total and ranking shown in Table 17, of the conversion of the grades for individual dimensions shown in Table 17 to the marks for each dimension shown in Table 18, and of the basis on which the conversion from grades to marks could be justified, bearing in mind that this seemed to involve a last minute change from a process that had been based exclusively on a grading system. Mr. Andersen responded that all indicators were scored by sub-groups, and the results were presented in Table 16 under marks for “*aspects and dimensions*”. Later, the weightings as per paragraph 19 of the RFP were applied, and the result of this was Table 17; finally, the grades in Tables 16 and 17 were converted into numbers, whereby the alphabetical gradings A-E were converted to points, according to a 5-1 scale. He further stated that this conversion of letters to numbers was not made at the last minute, but had existed in the evaluation process, as one of the possibilities of presenting the results, ever since the final sub-group meetings in Copenhagen. The results presented in Table 18 were one of the ways in which the end result was presented and “*stress-tested*”, and was definitely the one preferred by Mr. Martin Brennan as Chairman; it was, according to Mr. Andersen, Mr. Brennan who had suggested this methodology, at the end of the evaluation in the sub-groups in Copenhagen.

50.68 Mr. Andersen was then queried as to his knowledge of the precise date and time on which a final decision was made by the Project Group regarding the outcome, and each person who was a party to that decision. He responded that the identity of the winner had emerged by mid-September, 1995, after the oral presentations were made. Table 16 was then drawn up, showing that outcome, and was contained in the draft Evaluation Report of 3rd October, 1995. This draft Report was approved at the Project Group meeting on the following 9th October. No one at that meeting expressed any concerns while Mr. Andersen was present. At the subsequent meeting of 23rd October, the final Evaluation Report was unanimously adopted by the Project Group. It appeared that all present unanimously approved the result and the Report, and there did not appear to be any objections. Accordingly, the final decision with regard to the Evaluation Report was taken on 23rd October, 1995, and was subject only to some relatively minor linguistic changes, and some inconsequential changes to the presentation of the results of the evaluation.

50.69 Apart from general agreement with Mr. John Loughrey's written recommendation to the Minister, of 25th October, 1995, as it coincided with his own advice, Mr. Andersen testified that he had had no involvement in the preparation of any such document.

50.70 As to any involvement of Mr. Dermot Desmond, or his company IIU, in Esat Digifone, and the letter of Dr. Michael Walsh, dated 29th September, 1995, Mr. Andersen testified that he recalled no related awareness or involvement in that regard. He further stated that AML was never requested to assist the Department in connection with potential changes to the Esat Digifone consortium, but added that, from such information as he had since obtained, any developments that arose would not have seemed to him sufficient to constitute a basis for disqualifying Esat Digifone from the competition. In addition, he stated that no queries or requests for clarification were addressed to AML, or comments regarding the ranking of the entrants in the Evaluation Report, or comments regarding the financial capability of the two leading applicants.

50.71 Although not referred to in any of his Statements, Mr. Andersen was questioned in regard to the meeting in Copenhagen, on 28th September, 1995, with Mr. Martin Brennan and Mr. Towey, in respect of the unquestionably important content of which each had previously given detailed evidence. Although disposed at a later stage of his evidence to accept that this meeting had taken place as each of them had described, Mr. Andersen's initial evidence was to the effect that he had no recall of any meeting with Mr. Brennan and Mr. Fintan Towey in Copenhagen after the final sub-group sessions, which he accepted were held on 19th and 20th September, 1995. He acknowledged that both Mr. Brennan

and Mr. Towey had testified that it was at the meeting of 28th September, in Copenhagen, that the ultimate ranking emerged, but stated that, notwithstanding his best efforts, he had no recollection in this regard, and he had ascertained that the same position had applied to Mr. Jon Brüel. Possibilities of telephone meetings and conference calls were mentioned, but Mr. Andersen stated that he was not disposed to speculate, and acknowledged that it was only natural that he would have dealt with both Mr. Brennan and Mr. Towey, who were in effect his “clients”, although he did not in any event accept that matters were then finalised, as approval would have been required from the subsequent Project Group meeting.

50.72 Reverting to the three quantitative sets of results, and his assertion that the Tribunal had omitted reference to the last of these, because Persona was not then shown to be the leading consortium, Mr. Andersen stated that he fully accepted that all three sets of results were referred to both in the course of the Tribunal’s lengthy Opening Statement in relation to the GSM process, subsequently posted on the internet, and in the course of the questioning of Departmental witnesses at public sittings. Also, with regard to that third version, Mr. Andersen testified that he recalled bringing what he thought was only one copy to the Project Group meeting of 9th October, 1995, even though he felt there was already a general view that the quantitative evaluation should not proceed separately. At the meeting he brought what he thought was that copy to the table, rather than circulating it; accordingly, although Project Group members had not seen it before the meeting, he felt they would have seen it during the meeting, through being then handed around, after which Mr. Andersen had taken it away. Whilst reiterating his views as to the inadequacy or “withering” of a separate quantitative evaluation, Mr. Andersen acknowledged that the three sets of results generated had in each instance shown Persona two places ahead of Esat Digifone, with the latter never in a higher position than third.

Statement in relation to indemnity

50.73 The last of the Statements furnished to the Tribunal by Mr. Andersen, on the day before his evidence commenced, related to the April, 2010, indemnity, provided to him by Mr. Denis O’Brien. The content of that Statement, which he affirmed in evidence, may be summarised briefly. After he had established AMI in 1991, it fared very successfully, with Mr. Andersen as Managing Director and 75% shareholder, until he agreed to its sale to Merkantidata in April, 2000. Although he continued to act as a consultant in 2002, he encountered serious difficulties with the new owners, primarily relating to concerns on their part at any exposure to them that might result from Mr. Andersen assisting the Tribunal. These differences gave rise to an arbitration. By letter of 30th November, 2002,

the Tribunal had notified Mr. Andersen's Danish solicitor that *"there is a very real potential that negative conclusions could be drawn"*, with regard to AMI's GSM involvement, if Mr. Andersen persisted in reluctance to assist the Tribunal and testify, particularly given the Tribunal's willingness to meet his practical requirements. The Statement continued by referring to what Mr. Andersen regarded as a further critical letter from the Tribunal, of 26th March, 2003, to Mr. Andersen, in respect of which Mr. Andersen suggested that unwarranted criticism of the Evaluation Report there contained had been based on advices received from Mr. Peter Bacon. Mr. Andersen was also aware of complaints and proceedings that had been instituted by Persona, and when he met with Tribunal lawyers on 29th October, 2003, he stressed his requirement for an indemnity if he was to give evidence to the Tribunal, a requirement which seemed to be fully understood. This was essential, not merely in regard to fees and expenses likely to be borne by Mr. Andersen, but also to protect him against any third party claims which might arise. From correspondence in 2004, it was evident that the Tribunal had been unsuccessful in persuading the State to provide such an indemnity, or indeed in providing one itself. Accordingly, notwithstanding much time and assistance afforded to the Tribunal on the part of Mr. Andersen from 2001 to 2003, he had made it clear that, in the absence of an indemnity or, alternatively, of appropriate insurance cover, he would not attend to testify.

50.74 Mr. Andersen's Statement concluded with references to the events of 2010. On 8th April, 2010, Mr. Carsten Pals was contacted by Mr. Tom Reynolds, Mr. Denis O'Brien's associate, with regard to establishing whether Mr. Andersen would be willing to testify to the Tribunal. Given what Mr. Andersen viewed as the Tribunal's mistaken and adverse view of the Evaluation Report, Mr. Andersen expressed to Mr. Reynolds his willingness to give evidence, subject to an indemnity being furnished, both in relation to costs involved, and to any claims that might be made by any third party. Following a two and a half hour meeting with Mr. Reynolds, such an indemnity was provided by Mr. O'Brien on 13th April, 2010. It was further the case that the views expressed by the Tribunal could potentially occasion Mr. Andersen professional damage, which also gave rise to an interest on his part in addressing such misconceptions in evidence. Given Mr. Andersen's view of the evaluation process, it was well known that Mr. O'Brien was anxious for that testimony, and understandable that he offered the indemnity that previously had not been provided. Insofar as the Tribunal appeared to feel that disclosure of this indemnity was belated, no questions in this regard had been raised when his Statement of 13th April, 2010, was furnished to the Tribunal via Mr. O'Brien's solicitors. Had he then been asked, he would have responded fully. When the matter was raised with his Irish solicitors, the relevant information was provided and a copy of the indemnity furnished. Mr. Andersen then reiterated his belief in the integrity of the GSM process, and the quality of the Esat Digifone application. The body of the Statement concluded with reference to the third set

of quantitative evaluation results, a matter already referred to, and in respect of which correction on the part of Mr. Andersen and his solicitors was necessary.

50.75 Having otherwise confirmed the content of his indemnity Statement, Mr. Andersen, in responding further to counsel for the Tribunal, stated that the Tribunal knew that he would not come to testify without an indemnity, and accordingly it should have concluded from his preparedness to attend that he had received such an indemnity without it being explicitly stated at the outset. He had never tried to keep the indemnity provided by Mr. O'Brien secret.

50.76 Mr. Andersen agreed with Tribunal counsel that in 2006, subsequent to matters that led him to believe in the existence of bias on the part of the Tribunal, and following communications from William Fry, former solicitors to Mr. O'Brien, in which a request that Mr. Andersen should testify to the Tribunal, or furnish an affidavit, had been succeeded by a further request that he attend a meeting with representatives of Mr. O'Brien in Copenhagen, he instructed Mr. Pals to reply, by letter of 8th November, 2006, by stating that his independence in his former role as consultant precluded him from attending any such meeting. The Tribunal was then also informed of that communication. Mr. Andersen stated that he had since changed his mind, a course he felt was justified in the context of further Tribunal evidence of which he had become aware, the nature of the Provisional Findings notified to him in November, 2008, and the protracted correspondence and hostility that he felt he had been subjected to by the Tribunal. As to such matters as the role of Mr. Tom Reynolds being expressed to have been confined to handling logistics, and the basis of the furnishing of his April 2010 Statement to the Attorney General and others, Mr. Andersen responded that at the initial stages of his 2010 dealings he had no Irish solicitor, and did not know the appropriate procedures.

50.77 Mr. Andersen further testified that he had no reservation about making the indemnity publicly available and, when the matter arose in August, 2010, based on his dealings with the Tribunal, he discussed the position with his legal advisers, who stated that it would be courteous to consult Mr. O'Brien and his solicitors in this regard, and he then told Mr. Pals that he would like the indemnity to be sent to the Tribunal. Mr. Andersen stated that his initial intention had been to come to the Tribunal unrepresented, but he then decided that it would be necessary for him to have solicitors and counsel.

Examination by affected persons

50.78 The above is no more than an abridged account of the principal matters comprised in Mr. Andersen's various Statements, in the course of a

detailed examination by Tribunal counsel. As earlier observed, matters in the nature of technical stages and procedures arising in the course of the process, including such relevant evidence as was given by Mr. Andersen, are addressed in the course of preceding chapters. Tribunal counsel's examination was then followed by cross-examination on behalf of affected persons. As had been evident for much of the duration of the Tribunal, the designation of cross-examination proved to be somewhat of a misnomer, insofar as the vast majority of the questions and propositions put to Mr. Andersen, based in the main on his earlier evidence, were calculated to and did obtain his support, as opposed to challenging such content. To keep this chapter one of relatively accessible length, the matters that will be noted in this regard are exceedingly limited, but the content of all that transpired in these exchanges, in addition to Tribunal counsel's overall examination, has been fully considered and assessed by the Tribunal in forming its conclusions.

50.79 Mr. Andersen was first questioned by counsel for Mr. Dermot Desmond, IIU and Dr. Michael Walsh. As to the RFP document, Mr. Andersen stated that he would have liked to have had an involvement in framing it, as had been the case with competitions conducted in other countries. This was what had subsequently occurred as regards his involvement in the 3rd Irish GSM process, where he had been involved from start to finish, which gave an advantage. Mr. Andersen acknowledged that he had been aware of the pre-existing RFP when tendering for the consultancy, but he had wanted the appointment, and had not then sought to raise the matter. He confirmed his earlier evidence that the European Commission intervention had had a bearing on the nature of the competition, rendering it more of a beauty contest than formerly, and he had allocated from the available AMI resources less provision for the quantitative evaluation, and more for the qualitative/holistic evaluation.

50.80 As in response to counsel for other affected persons, Mr. Andersen stated that no improper pressures or improprieties of any kind had arisen in the course of the process. As regards the composition of the Esat Digifone consortium, and the change in ownership that had occurred in relation to IIU, it was suggested to Mr. Andersen that there was a difference between being an operator and an investor, to which he responded that there might be a difference in relative importance, given that an operator has experience in the relevant business, whereas an investor merely brings finance.

50.81 Mr. Andersen accepted that there had been a physical meeting with Mr. Brennan and Mr. Towey in Copenhagen on 28th September, 1995. He agreed that this did not constitute the full Project Group, which did not meet until 9th October, and that, whilst important matters were addressed with Mr. Martin

Brennan and Mr. Fintan Towey, this was not a question of decisions being made behind the back of the full Project Group. Agreeing also that Esat Digifone's success had been fairly won, Mr. Andersen added that he felt that all the questions addressed to him by Tribunal counsel had related to Esat Digifone rather than Persona, whereas he had expected to have matters relating to Persona put to him on a like-for-like basis.

50.82 Mr. Andersen was then questioned by counsel for Mr. Denis O'Brien, who commenced matters by expressing his client's gratitude for Mr. Andersen's attendance and evidence. Mr. Andersen agreed that Esat Digifone had presented a particularly good bid, noting its high level of documentation and technical expertise, allied to an impressive level of preparedness in such matters as planning and advertisements.

50.83 Counsel for Mr. O'Brien then addressed in some detail Mr. Andersen's qualifications, experience and relevant writings, dating back as far as 1992. Mr. Andersen again enlarged on the difficulties presented by the pre-existing RFP, in contrast to his experience in other countries. As to illegal or improper conduct in licence competitions, he had experienced this only in some African jurisdictions. Referring to a memorandum made by Mr. Jimmy McMeel, a member of the Project Group, Mr. Andersen stated that he accepted that a qualitative evaluation was of a higher form than a quantitative one, and would really tend to identify a winner. However, he again stated that the holistic approach, referred to on several occasions in his tender, ensured that quantitative data was duly taken into consideration. As to changing weightings in consequence of the European Commission intervention, and the fact that this was drawn only to the attention of Mr. Brennan and Mr. Towey, rather than to the whole Project Group, Mr. Andersen said that this reflected his practice, by reason of the recipients being the Chairman and Secretary, and it would have been too bureaucratic to have notified the entire Project Group. As to differences in weightings ascribed to the first criterion, Mr. Andersen stated that he did not share the concerns of Tribunal counsel.

50.84 Regarding a reference, in the course of an overview of the applicants, to the involvement of three wealthy persons in connection with A1, Irish Mobicall, it was put to Mr. Andersen that there would be no difference if there were three other wealthy persons involved. Mr. Andersen responded that he did not see this as a matter of concern, the roles of those persons having been financial rather than operational, but added that it was always better if identities were known. Later, when a note or minute referring to Mr. Brennan having stated that no further contact with applicants should occur, but that access to the Minister could not be stopped, was raised, Mr. Andersen responded that he did not recall this,

but he thought that at that stage there should not have been such further contact. He was not aware of any that may in fact have transpired.

50.85 With regard to the oral presentation of Esat Digifone, counsel read to Mr. Andersen the Advent letter of 10th July, 1995, stating “*we can confirm that we have offered*” 30 million Irish Punts , and invited Mr. Andersen to agree that this constituted a commitment of £30 million to Communicorp. After some hesitation, Mr. Andersen responded that it was a confirmation.

50.86 The letter of Dr. Michael Walsh, of 29th September, 1995, was then raised, and Mr. Andersen agreed with counsel’s suggestion that Mr. Brennan had been correct in returning that letter to Mr. O’Brien. Asked further whether the letter should have been brought to his attention as lead consultant, Mr. Andersen responded that this could go both ways, insofar as the letter had been returned but its content could have been critical. As already mentioned at an earlier stage in this chapter, he did express the view that, if he had seen the letter, he would not have regarded it as a basis for disqualifying Esat Digifone.

50.87 The main balance of questioning by counsel for Mr. O’Brien consisted in raising with Mr. Andersen a number of selected extracts from the prior evidence of other witnesses, primarily encompassing members of the Project Group, but also including Mr. John Loughrey, Mr. John Bruton, Mr. Proinsias De Rossa and Mr. Peter Bacon, principally in response to questioning by counsel for affected persons. As with some other affected persons, a book containing the extracts or documentation was produced only in the course of the examination of Mr. Andersen by counsel for Mr. O’Brien, a procedure which had also been evident at some previous sittings, and one which, if replicated by the Tribunal, would doubtless have been impugned as denoting a want of fair procedures.

50.88 Counsel for Mr. Michael Lowry’s former Department, and the Department of Finance, then questioned Mr. Andersen. Mr. Andersen agreed that, with regard to the “*less than perfect*” RFP, it was not unreasonable to have engaged the late Mr. Roger Pye, of KPMG, as the initial consultant, but added that Mr. Pye’s area of expertise had been specifically that of telecom policy issues. It was in general preferable that one consultant both designed and carried out the evaluation, but Mr. Andersen added that his tender had been cheaper than KPMG. He stressed the flexibility of the model that he provided, stating that if he had pitched an “*auction*” model, the consequences would have been worse for Ireland. He agreed that he had stated at an early stage that “*the most demanding step is....the qualitative evaluation*”. In further response, Mr. Andersen agreed that he had shown much concern in maintaining a high level of security within the Project Group. He also agreed that the high level of

commitment as Chairman and Secretary on the part of Mr. Brennan and Mr. Towey meant that it was natural that he dealt with them primarily, particularly in the months of September and October, 1995.

50.89 Regarding the contractual dispute with the Department, he had already stated that there had been a measure of compromise in the resolution arrived at in relation to a revised maximum fee of £370,000.00, but acknowledged that AMI were sufficiently happy to continue in their role. Put that it seemed a concern of the Tribunal that in early September, 1995, the process was being undermined, and a change in the model made the process vulnerable to outside influence, including that of Mr. Lowry, Mr. Andersen responded that this was not so, and was a surprising and theoretical proposition. In any event, he stated that what transpired was not a change, since a flexible model had been used, with frequent mention of a holistic evaluation, so that the absence of a separate and self-contained quantitative evaluation was not a deviation. Mr. Andersen's conclusions in this regard have been addressed in the course of preceding chapters.

50.90 As to the fax of 21st September, 1995, sent by Mr. Andersen to Mr. Brennan and Mr. Towey, this conveyed that, whatever remained to be done, it had to be ratified on 9th October, following. Accordingly, nothing could happen on 28th September, without a subsequent imprimatur on 9th October. Mr. Andersen rejected any suggestion of "*cooking of the books*" having occurred in the course of the meeting of 28th September, 1995. In the course of that exercise, it was a key concern that the Government criteria be respected, and that as transparent a result as possible be produced. When Table 16 was viewed, a winner was apparent. A robust result had been obtained, although Mr. Andersen had acknowledged that he had a degree of concern about the process of conversion, and had undertaken this on a basis of complying with what the Department had suggested.

50.91 Turning to the Project Group meeting of 9th October, 1995, Mr. Andersen stated that he and Mr. Jon Brüel had been present for a fairly short time; he recalled a delay on the flight, headwinds, a subsequent traffic jam, and a change of venue as to the location of the meeting. Reminded of the reference at the start of the minutes to Mr. Brennan having stressed confidentiality, and having stated that Mr. Lowry had been informed of progress and the ranking of the top two, Mr. Andersen was asked whether this compromised matters. He responded that this was not the case, that what had been related was only natural and that it could have been said that it would have been wrong if the Minister had not been so informed. No disagreement had taken place at the meeting while Mr. Andersen had been present, nor had there been any

suppression of future scrutiny. There had been some tension among those present, but this had no impact on the scoring. Regarding the entry in the more detailed notes made by Ms. Margaret O'Keefe of a concern having been voiced by Mr. Towey in relation to the course adopted on the quantitative evaluation, Mr. Andersen observed that Ms. O'Keefe may have made bad notes. What had taken place was that there was an open dialogue. Regarding the three results tables, 16, 17 and 18, Mr. Andersen stated that these were different ways to arrive at the same result. Insofar as the Tribunal might contend that the full Project Group was not consulted in advance as to the position, no complaints were made at the meeting whilst Mr. Andersen was present.

50.92 Proceeding to the final Project Group meeting of 23rd October, 1995, Mr. Andersen was asked whether there had been any imposition or suppression of views, and he responded that nothing of that nature had occurred while he was present. He agreed with the statement that there had been general satisfaction with the analysis and result, but that the presentation had not been viewed as acceptable. On the matter of reservations having been expressed by Mr. Sean McMahon, on a basis that Esat Digifone could prove difficult to regulate, it was suggested by counsel that Mr. McMahon had not advanced the view that this should deny them the licence. Mr. Andersen responded that that was not what he recalled: Mr. McMahon had raised that matter of concern regarding regulation, and Mr. Andersen perceived that he would have preferred another front runner or winner, although he was not fighting the scoring or result. After he had flagged that concern, Mr. Andersen testified that the matter was discussed, in consequence of which Mr. Andersen recalled Mr. McMahon as having been fully satisfied. Mr. Andersen was of the view that on the evening of 23rd October, 1995, further analysis was not going to change the result. The civil servants were in no sense in fear of Mr. Andersen, he did not dictate the decision, and it had not been attributable to any intervention on the part of Mr. Lowry. Neither had any further steps been taken by either Mr. McMahon or his colleague Mr. Ed O'Callaghan.

50.93 As to the manner in which the concept of bankability had been proposed for inclusion in the final Evaluation Report, Mr. Andersen said that he had "*ticked*" this in the document received by him on 25th October, 1995. It was not the case that this had been dreamt up to protect Esat Digifone as a winner. He had insisted that reference to Communicorp's financial vulnerability should not be excluded, and nothing sinister or improper had arisen. None of the top three applicants had escaped the expression of a marker or reservation on the part of Mr. Andersen.

50.94 Regarding the timing of the announcement of the result, the view taken by Mr. Andersen was that the longer the period that elapsed between the result and its announcement, the bigger was the risk of rumours. To avoid this, his clear advice had been to announce sooner rather than later. Mr. Andersen in conclusion agreed with counsel that the process had not been affected by any element of interference or discrimination, that it had displayed transparency and objectivity, and that he stood over his entire role in the process.

50.95 The next affected person to cross-examine Mr. Andersen was Mr. Michael Lowry, who appeared in person. Although his public relations consultant and accountant were in attendance, he had no legal representatives with him, and had already during the previous week complained at the Tribunal's refusal, on foot of recent correspondence, to provide him with an interim order for costs such as would have enabled him to retain ongoing legal representation, as had been retained by him in all of his prior dealings with the Tribunal, including attendances to give evidence. Given both his appearance in person, and his central role in the relevant Terms of Reference of the Tribunal, additional latitude was extended to Mr. Lowry, but it has to be said that what ensued largely comprised a long and somewhat repetitious series of assertions on the part of Mr. Lowry, permitting in the main only of uncharacteristically terse responses from Mr. Andersen, which added little by way of fresh factual material to be assessed by the Tribunal. What in essence was contended for in these exchanges was that Mr. Lowry, having inherited a liberalisation policy in relation to mobile telephony from the previous Government, had fulfilled his remit with great success, that a fair and untainted competition had clearly produced a particularly impressive winner in Esat Digifone, that neither Mr. Lowry nor those running the competition had in any sense wrongly interfered in it, or improperly influenced its outcome, and that much in the methods and assumptions adopted by the Tribunal had been wrong, including unwarranted influence on the part of disgruntled losers in Persona, and an inappropriate expert in Mr. Peter Bacon. Mention was also made of there having been no question of any conspiracy between a substantial number of civil servants and consultants involved in the competition, as supposedly contended for by the Tribunal, although Tribunal counsel correctly pointed out that no such contention had ever been advanced on behalf of the Tribunal, and could have flowed only from misconceived or ill-informed comment.

50.96 In accordance with established procedures in the Tribunal, Mr. Andersen was then examined by his own counsel. Regarding the matter of an indemnity, he stated that he would happily have taken the Government indemnity previously sought in 2004. The fact that he had now received an indemnity from Mr. O'Brien had not changed his views or testimony.

50.97 A booklet was then produced and circulated, setting forth a number of matters in respect of which Mr. Andersen took exception to what had been stated by Tribunal counsel on the opening day of the sittings, 26th October, 2010. As stated, these matters, including what was contended for by Mr. Andersen, are addressed in preceding chapters. Among others, these related to weightings used, to the scoring exercise undertaken in Copenhagen on 28th September, 1995, to the personnel having input into the scoring of Financial Key Figures, to the treatment of Other Aspects, and to the number of the competing consortia who were accorded substantive evaluation.

50.98 Regarding the input accorded to the quantitative evaluation, given its deficiencies, and any suggestion that further information should have been sought from applicants, Mr. Andersen viewed this as an incorrect approach, stating that, the more further questions that were put in such circumstances, the more applicants were alert to the position, and likely to furnish tactical responses. In this, as in other matters, Mr. Andersen asserted that there had been due compliance with the original Evaluation Model, and its provisions for flexibility. Proper input of data derived from the quantitative figures had been provided for in the holistic evaluation, so that there had been no abandonment of such usable information as had been obtained.

50.99 Mr. Andersen testified that his original Evaluation Model had remained valid, and was used in the course of the evaluation. Provision had been made in his early dealings with the Department for further development of the outline Model, and later references had adverted to the contingency of uncertainties in regard to scoring of points being dealt with in the qualitative evaluation, to supplemental analysis by AMI being deployed to solve major uncertainties, and to a clear exposition of the various difficulties that had beset the quantitative evaluation. In all these circumstances, Mr. Andersen stated that the Evaluation Model, with its provision for flexibility, had certainly been complied with. He further stated that such useable data as had emerged from quantifiable indicators had indeed been taken into consideration in the holistic evaluation, so that it was incorrect to say that there had been an abandonment of the quantitative evaluation.

50.100 Mr. Andersen then again took the opportunity to express his view as to unfairness shown to him by the Tribunal, not merely in the meetings and dealings with him where he had detected a bias in favour of Persona and against Esat Digifone, but in the manner in which the Tribunal had in recent times characterised his attendance to testify, and the circumstances of the indemnity received by him from Mr. Denis O'Brien.

50.101 In seeking to encompass as fairly as possible both the range of inquiries required to be addressed to Mr. Andersen by the Tribunal, and what was sought to be put to him by and on behalf of affected persons, the Tribunal had compiled and circulated a schedule of the hours assigned to individual affected persons before conclusion of the two weeks of evidence on the afternoon of Friday, 5th November, 2010. This reflected the necessarily lengthier task of Tribunal counsel, who was required to deal with the various statements of intended evidence provided by or on behalf of Mr. Andersen, in addition to addressing questions to him on a wide range of related matters, and did not seek to impose rigid deadlines, insofar as it was accepted that affected persons might choose to share time by agreement between themselves, as duly transpired. Even with such degree of curtailment as resulted from the Ruling on the scope of cross-examination, broad compliance with that timescale proved barely possible, leaving one hour for re-examination by counsel for the Tribunal, before conclusion of the last day's sittings, and Mr. Andersen's return to Denmark. Had the evidence not concluded, it had been made clear by his legal advisers that Mr. Andersen would not be available to return to Ireland until the second half of 2011, a scenario not realistically tenable in respect of the person acknowledged to be the Tribunal's final witness, given the Tribunal's clear duty and commitment to conclude its work without further delay.

Re-examination by Tribunal counsel

50.102 Of the limited matters addressed or revisited by Tribunal counsel at the conclusion of Mr. Andersen's evidence, the first involved reference to earlier evidence as to meetings had with Mr. Michael Lowry in public houses by Mr. Denis O'Brien, and also by Mr. Per Simonsen of Telenor. In this context, Mr. Andersen agreed "*broadly*" with evidence of the former Departmental Secretary General, Mr. John Loughrey, in relation to the GSM competition having been a sealed process, and one in which Ministerial access to overall progress reports differed from imparting information specific to particular applicants. As to the oral presentation phase of the process, and the participation of Mr. Sean McMahon and Mr. Ed O'Callaghan of the Regulatory Division of the Department, Mr. Andersen accepted that each was present at the oral presentations, and that Mr. McMahon had queried funding aspects in the course of the Esat Digifone presentation.

50.103 Returning to the matter of any possible advantage that might have accrued to Esat Digifone, through a differential between a "*worst case*" scenario multiplier of 1.5 being applied to it, as opposed to 2 for other applicants, counsel drew Mr. Andersen's attention to a number of extracts from Appendix 10 of the second draft Evaluation Report. Following consideration of these, Mr. Andersen

was inclined to accept, although he wished to conduct further checks, that the figures for A4, Irish Cellular, seemed to have been transposed to A3, Persona, accordingly giving rise to a significantly more adverse position for the latter. Mr. Andersen agreed it seemed that either the tables were wrong, or there had been a transposition. Asked whether this amounted to a serious mistake, he acknowledged that it seemed to be a mistake, and his response would be one of being dissatisfied or disappointed, but it was indicative of the complexity of these matters.

50.104 Mr. Andersen confirmed his full acceptance that there had been a meeting in Copenhagen on Thursday, 28th September, 1995, even though his calendar for that day had afternoon travel to Sweden inserted. He agreed also that this had been an important meeting, and that feedback was needed from Mr. Brennan and Mr. Towey on the related questions in his prior memorandum to each of them. Put that he appeared to have suggested an ad hoc comparison between the top two, Mr. Andersen responded that he took that on board, but in fact did take all six applicants into account, so that the reference to the two best may have been “*a leprechaun in my computer*”. This should have referred to three applicants, because Mr. Andersen had an obligation to rank three. As to the reference in his memorandum to the method of integrating the quantitative evaluation being left unanswered until the final results were to hand, Mr. Andersen responded that this had to do with having two remaining things to score, Marketing Aspects and a grand total. When it was suggested to him that this made no sense, Mr. Andersen responded that, with papers dating back fifteen years, you will always find something.

50.105 Regarding the note of the inter-Departmental meeting of 3rd October, 1995, made by Mr. Sean McMahon, Mr. Andersen accepted, from the reference to “*Min wants to accelerate process*”, that the civil servants were informed to this effect. He also accepted that he came to the Project Group meeting of 9th October, 1995, in the context of a draft Evaluation Report having been seen by some at least of the Project Group for the first time, and with the meeting commencing with Mr. Brennan’s statement that the Minister had been told of the progress of the competition, and of the ranking of the top two. Mr. Andersen also accepted that the Minister had indicated that he wanted acceleration, so that he was not simply awaiting events, but knew the result, and wished to have it published as soon as possible after the Evaluation Report was finalised. However, Mr. Andersen did not accept that this amounted to a *fait accompli* or a pre-empting of the Project Group.

50.106 It was drawn to Mr. Andersen’s attention that he had agreed with his own counsel’s suggestion that the reservations of the accountants, Mr. Billy Riordan and Mr. Donal Buggy, must have been discussed and resolved in the

course of the Project Group meeting of 9th October, 1995. Yet when this had been put to him some four days earlier by Tribunal counsel, the response had been that Mr. Andersen did not recall the accountants raising these matters, and would have recalled such if he had been present: Mr. Andersen responded that Tribunal counsel was merely looking for inconsistencies.

50.107 Mr. Andersen's lengthy evidence, spanning close on fifty hours, then concluded with some further questions in relation to weightings which, as with considerations relating to possible acceleration of the announcement of the result of the competition, and other matters, are fully addressed in the course of earlier chapters of this Volume.

OBSERVATIONS

50.108 It was conveyed, in both Mr. Andersen's actual Statements and in his evidence, that it should have been plainly apparent to the Tribunal that, when Mr. Denis O'Brien's solicitors intimated his proposed attendance to testify, and included a Statement strongly critical of the Tribunal, in April, 2010, this was on terms that he did so on foot of a full indemnity from Mr. O'Brien. Yet the Tribunal was informed that neither Mr. O'Brien's solicitors nor public relations advisers were then so aware, when the Statement was furnished and circulated to media outlets, and it was only after the matter had been probed in detailed correspondence over several months, with Mr. Andersen and his legal advisers, that the existence and extent of the indemnity afforded was disclosed. Had Mr. Andersen's evidence proceeded on 1st July, 2010, as the Tribunal had sought and intended, it would have been in circumstances in which the Tribunal, and presumably the world at large, would have been unaware of the existence and extent of the indemnity, and the role of Mr. Tom Reynolds, Mr. O'Brien's associate, in the circumstances surrounding the preparation and subsequent handling of that Statement.

50.109 When William Fry, Mr. O'Brien's former solicitors, made inquiry of Mr. Andersen in 2006, as to his willingness to testify to the Tribunal, and requested that he attend a meeting with Mr. O'Brien's representatives, Mr. Andersen instructed Mr. Pals to decline this request, by letter of 8th November, 2006, stating that this course was precluded by reason of his independence in his former role as consultant. It is noteworthy that this correspondence post-dated by a considerable period the correspondence received from the Tribunal to which Mr. Andersen, in his December, 2008, written responses to Provisional Findings, in his April, 2010, Statement and in his evidence, but never before, had taken exception. It was also subsequent to all the meetings had by Mr. Andersen with members of the Tribunal legal team, in relation to which he similarly took exception, notwithstanding no contemporaneous complaint in any form having

been addressed in that regard to the Tribunal by him or on his behalf. All these dealings were succeeded only by the Provisional Findings sent to Mr. Andersen in November, 2008, in response to which considered written responses were delivered by Mr. Andersen, with the assistance of Mr. Brüel, the following month. Yet by April, 2010, Mr. Andersen's proper assertion of independence as a consultant had been succeeded by preparedness to testify, on foot of a partisan Statement involving Mr. O'Brien's associate, Mr. Reynolds, and secured by a clandestine indemnity.

50.110 The reluctance, delay and prevarication shown by Mr. Andersen in the context of making himself available as a witness to the Tribunal was never justified, and occasioned significant delay and expense to the Tribunal. Apart from the circumstances in which Mr. Andersen came to testify, the fact of his having declined to do so until approximately nine years had elapsed since his initial dealings with the Tribunal cannot be viewed other than as patently unsatisfactory, given his highly significant role in the GSM process, and the aggregate of his involvement in, and extent of remuneration derived from, his activities as a consultant in Ireland in mobile telephony matters. In the matter of recommendations, addressed elsewhere in this Part of the Report, the anomaly is noted whereby, whilst Mr. Andersen would have been compellable as a witness in Court litigation relating to his Irish consultancy engagements, no such obligation bound him in regard to assistance sought from him by the Tribunal. Notwithstanding the State having been obliged, when seeking to engage GSM consultants, to advertise throughout European Union Member States, it nonetheless remained utterly at Mr. Andersen's own discretion whether or not he attended to testify at the Tribunal.

50.111 The refusal of Mr. Andersen to attend as a witness in the course of the Tribunal's substantive public sittings in relation to the GSM process undoubtedly caused to the Tribunal very significant additional cost, and protraction of its duration. As one of the latter and more substantial witnesses, the Tribunal would have anticipated calling him, had he made himself available, in the course of 2004, six years prior to his ultimate attendance. The negative consequences of his irresolution, and eventual refusal, after protracted dealings including seeking and obtaining written and oral submissions on the matter, ruling in that regard, seeking and addressing independent Danish legal advice, and contesting the High Court and Supreme Court proceedings brought by Mr. O'Brien, are manifest. Upon Mr. Andersen's belated indication of availability, it was then necessary in effect for the Tribunal to reverse engines, reconsider and reassemble lengthy documentation and prior evidence, and prepare and serve on all affected persons updated hearings books. It is not at this juncture feasible to estimate reliably the additional cost to the public purse occasioned by all these matters, which was undoubtedly substantial, but as regards the delay caused, it would seem that,

even upon a conservative appraisal, a further year was added to the Tribunal's duration. At the conclusion of Mr. Andersen's evidence, counsel for Mr. O'Brien observed that Mr. Andersen's attendance on foot of Mr. O'Brien's indemnity had, or should have, the effect of preventing injustice in respect of the licence: such an observation might have been more cogent had Mr. O'Brien, or any other affected person, sought to persuade Mr. Andersen to attend in 2004, when it became apparent that the Tribunal could not do so.

50.112 Even making allowance for Mr. Andersen's perception of unwarranted criticism on the part of the Tribunal, the incidence, throughout his evidence, of adverse references to the Tribunal and its legal personnel, of protestations of Tribunal unfairness, of responses of being "*shell-shocked*", "*troubled*", and the like, and of invocation of the questions addressed by counsel for other affected persons, displayed a particularly marked sensitivity, and did not sit easily with the concept of an independent expert witness, of much international experience, advancing careful and dispassionate testimony. On matters such as the abandonment of the quantitative evaluation as a separate and self-contained limb of the evaluation, the actual form and use made of weightings, the input of the accountants within the Project Group, the circumstances of the espousal of the concept of bankability, and the divergent versions as to "*acceleration*" in the announcement of the competition outcome, all of which matters are together with others considered fully in preceding chapters, the Tribunal is left with a clear impression that the weight, reliability and extent of accurate recollection apparent from Mr. Andersen's evidence fell so appreciably below what might have been expected, as to amount to very limited assistance to the Tribunal on those matters that were of major consequence. Indeed, the assurance conveyed by his solicitors, as late as 20th October, 2010, that he would attend "*to give evidence to assist the Tribunal with its inquiries on the 26th October next*" must, in all the circumstances, be viewed as verging on the incongruous.

ENGAGEMENT OF MR. PETER BACON

51.01 It is convenient at this juncture, having dealt in some detail with the role of AMI in the GSM competition and with the evidence of Mr. Michael Andersen, as the lead consultant, in relation to how the competition was designed and as to how the evaluation proceeded, to address the matter of the Tribunal's engagement of Peter Bacon & Associates, a firm of independent economic consultants, to assist the Tribunal in its appreciation of certain technical concepts bearing on the matters under inquiry. This was a course of action that the Tribunal decided upon at a relatively late point of its private investigations into the GSM process. In the event, having obtained that assistance from Mr. Peter Bacon, it was decided that his testimony as an expert was not required, and that, accordingly, it was not necessary to call him in evidence.

51.02 As matters transpired, however, Mr. Bacon was ultimately called in evidence, not by way of examination on behalf of the Tribunal, but by way of cross-examination on the part of affected persons who wished to put certain matters to him arising from his role in assisting the Tribunal. This followed proceedings brought by Mr. Denis O'Brien, challenging the Tribunal's dealings with Mr. Bacon and certain related decisions and procedures which, although unsuccessful, had the necessary consequence that Mr. Bacon should be made available for cross-examination by affected persons wishing to avail of that opportunity.

51.03 In the result, and by reason of the unusual circumstances in which Mr. Bacon came to give evidence before the Tribunal, the position is that the Tribunal has determined that no regard should be had to the evidence given by him. Nonetheless, the content of his responses to questions has become part of the record of public sittings of the Tribunal. For this reason, and in order to provide a description of the matters put to him on behalf of affected persons, it is proposed to set out briefly in this chapter an account of Mr. Bacon's evidence. In the course of this chapter, reference is made at various points to reports furnished by Mr. Bacon. Those reports were dated January, 2003, and January, 2005, and were furnished to affected persons.

THE BACON PROCEEDINGS AND THEIR CONSEQUENCES

51.04 As has been alluded to in Chapter 1 of this Volume, the role of Mr. Bacon in assisting the Tribunal generated some controversy in the course of the Tribunal's inquiries. In particular, the lawfulness of the Tribunal's engagement of Peter Bacon & Associates, and the fairness of the Tribunal's procedures in

relation to the assistance provided by that firm, was subsequently challenged by Mr. Denis O'Brien in High Court and Supreme Court proceedings entitled *O'Brien v Moriarty (No.3)* [2006] 2 IR 474. As already indicated, those proceedings were also concerned with the issue of the Tribunal's efforts to secure the attendance of Mr. Andersen, and the entire challenge was dismissed by the High Court in December, 2005, and, on appeal, by the Supreme Court in May, 2006.

51.05 As a result of the High Court's decision and judgment, as upheld by the Supreme Court, it was established that the Tribunal had been lawfully entitled to engage the services of Peter Bacon & Associates, that the Tribunal had acted in accordance with fair procedures in relation to the assistance provided by that firm, and that it could continue its inquiries notwithstanding the non-availability of Mr. Andersen. There were a number of strands to the fair procedures challenge, and the judgment makes clear, in relation to the matters arising from the engagement of Mr. Bacon, that the Tribunal respected fair procedures in the timing and manner in which it disclosed and made available to interested parties information and documentation relating to its interaction with Mr. Bacon; that the Tribunal acted fairly in the manner in which it provided a means of challenging the information provided by Mr. Bacon; and that the Tribunal had not so conducted itself in relation to the assistance provided by Mr. Bacon as to give rise to a reasonable perception of bias.

51.06 Whilst rejecting the substantive complaints made by Mr. O'Brien in relation to the engagement of Mr. Bacon and the surrounding circumstances, at the same time the judgment provided that, even if Mr. Bacon was not called as an expert witness, Mr. O'Brien should nonetheless be entitled to cross-examine him in relation to information supplied to the Tribunal by Mr. Bacon. After subsequently receiving submissions from a number of interested parties on the matter of whether or not Mr. Bacon should testify as an expert witness, all of which urged that he should not, the Tribunal ruled on 17th July, 2007, that although the assistance furnished to it by Mr. Bacon had been of value, it would not call Mr. Bacon as a witness.

51.07 For some considerable period following the above Ruling, the only relevant communications received by the Tribunal from Mr. O'Brien's solicitors were copies of some correspondence sent by them to Mr. Bacon's solicitors. Then, on 1st February, 2008, it was conveyed to the Tribunal by letter that Mr. O'Brien wished to exercise his entitlement to cross-examine Mr. Bacon. For reasons of procedural fairness, the Tribunal then afforded the same entitlement to the Department, to IIU and Mr. Dermot Desmond, and to Mr. Lowry, each of whom availed of it, and to Telenor, who did not.

51.08 When Mr. Bacon was made available for cross-examination on 11th March, 2008, counsel on behalf of Mr. O'Brien applied for an adjournment by reason of a document having been omitted from the disclosure made by the Tribunal. Following an acrimonious hearing, in the course of which Mr. O'Brien's counsel indicated that he was unprepared to proceed with the cross-examination in these circumstances, the Tribunal ruled that it had satisfied what was required of it by having Mr. Bacon in attendance, but placed a stay on that Ruling, in the hope that some accommodation could be arrived at to enable effect to be given to the determination of the Courts.

51.09 Such an accommodation was eventually reached, and the cross-examination of Mr. Bacon was heard over two lengthy days, on 2nd and 7th May, 2008. At the outset of the main portion of Mr. Bacon's cross-examination, conducted on behalf of Mr. O'Brien, it was conveyed that the purpose of the exercise was not in any way to criticise or attack his credibility, reputation or standing; it was further then stated *"We recognise your ability, your reputation and your credibility as a professional. We will argue over whether or not you are an appropriate expert in relation to the particular field, but the purpose of today is not to attack"*. Notwithstanding, much of what then ensued by way of questioning could by no reasonable appraisal be said to have accorded with that preamble.

51.10 In his evidence, Mr. Bacon rejected the suggestion that his meetings and interaction with the Tribunal legal team had compromised his independence. He had been around long enough to know if he was being led by the nose, and he did not regard himself as having been steered towards particular weaknesses perceived by the Tribunal lawyers. Mr. Bacon also repeatedly countered suggestions that those dealings had tainted his advice and reports with an inappropriate methodology. He had provided assistance, as requested, on certain technical concepts arising in the course of the GSM process. These were the dual model of quantitative and qualitative evaluation; the scoring system used in the process; bankability; and the concept of Internal Rate of Return, IRR. In his view, the approach to evaluation eventually adopted, and in particular the effective abandonment of the quantitative analysis and the adjustment of the weighting and scoring system, had resulted in a subjective margin of error which made it difficult to reach a robust and definitive result. In the event, in his view, the subjective margins inherent in the scoring approach were such that it was not possible in his judgment to say who won.

51.11 Although Mr. Bacon undoubtedly dealt with technical matters in the course of his testimony, a greater proportion of the questioning addressed to him in the course of the two days of cross-examination related to the nature and

intent of his relationship with the Tribunal during the period he was engaged by it. More specifically, the central thrust of the cross-examination on behalf of affected persons, including to some extent on behalf of the Department, was that Mr. Bacon had been steered by the Tribunal legal team to make unwarranted criticisms of the GSM adjudication process, including of the methodology, independence and role of Mr. Michael Andersen, and that he had been inappropriately requested to carry out, and did in fact carry out, a wholesale audit of that process rather than a fair appraisal of its methodology and conclusions.

51.12 Mr. Bacon rejected the suggestion that he or the Tribunal lawyers with whom he had had discussions were involved in a rerun of the entire competition. Further, he regarded views expressed by certain affected persons as to his qualifications and expertise as ‘*derogatory*’. In answer to repeated testing on the character of his advices and expertise, Mr. Bacon affirmed that one did not need to be an expert to appraise certain deficiencies that occurred in the process. Mr. Bacon did not believe he had had a duty in the circumstances to meet with civil servants involved in the process, although he agreed that it would have been helpful to have spoken with Mr. Andersen.

MR. BACON'S EVIDENCE RELATING TO TECHNICAL MATTERS

Quantitative and qualitative examinations

51.13 On one of the memoranda of meetings between Mr. Bacon and the Tribunal lawyers, there was a reference, in a context of the “*withering*” of the quantitative process, to “*a choice - interpretation or conspiracy*”, and it was suggested that these words must have come from one of the Tribunal lawyers. Mr. Bacon disagreed, stating that they had been his words, and had come from a discussion of the matter of “*withering*”. Replying later in his evidence to counsel for Mr. Dermot Desmond, Mr. Bacon again stated that the word “*conspiracy*”, as recorded in the relevant memorandum, was his, and did not come from any of the Tribunal lawyers.

51.14 A further reference in one of the memoranda of meetings with Tribunal lawyers was subsequently raised by counsel for Mr. Michael Lowry, which was a reference to it having appeared that Mr. Andersen had been manipulated. Mr. Bacon responded that he had made a comment to this effect, and it had been made on a basis that he had been and remained at a loss as to why an experienced person like Mr. Andersen would have abandoned a key plank of his methodology, namely the quantitative analysis. Mr. Bacon also stated that he continued to hold the view that Mr. Andersen was manipulated. When it was put

by counsel that it appeared that pejorative matters were being discussed behind closed doors, but had not been included in Mr. Bacon's final report, Mr. Bacon replied that he had felt that, in the course of his dealings with the Tribunal legal team, they had come to him with open minds. He further vigorously resisted suggestions made on behalf of Mr. Lowry to the effect that the method by which he had prepared his reports was inappropriate for an independent witness, that the meetings had by him with the Tribunal legal team compromised his independence, that his work for the Tribunal had been tainted by inappropriate methodology, and that this work had been done on a partisan rather than independent basis.

51.15 Much of the rest of the content of the cross-examination addressed the matter of the quantitative and qualitative methods of analysis. This was regarded by Mr. Bacon as the most important part of the work undertaken by him. In response to counsel for the Department, he stated that the bulk of the intellectual content involved was really into the issues of quantitative and qualitative analysis, the manner in which these methodologies were proposed to be used in the Evaluation Model document, and the manner in which they were ultimately applied. He informed counsel for the Department that what was set out in the Evaluation Model was a perfectly recognisable and, he would have said, best practice statement of the way in which the Project Team was going to proceed: there would be two processes of evaluation, one quantitative and the other qualitative, and the Evaluation Model described in some detail how that process would work, and what the relative importance of each would be. But as the process evolved, they moved away from the quantitative evaluation, and the word "*withered*" was used. He went on to describe that, within the literature on the methodology of evaluation, both the quantitative and qualitative techniques were clearly recognised, and the best practice was where both of these methods were deployed, so that one was not relying on one or the other with the shortcomings and strengths that each had, but they were combined, to get a cross-check of one against the other. Mr. Bacon later reiterated this view of the Evaluation Model in response to counsel for the Department, stating that the methodology there set out was in his opinion "*as good an evaluation as you would get, and one I would have identified with in every respect*". Yet the conclusion that was reached by the evaluators was that they were not going to use the quantitative output. They did use it in the first instance: "*They did a run, they got a result, and then they moved away from that quantitative approach*". Mr. Bacon viewed the fundamental advice that he gave to the Tribunal as being to the effect that the evaluators did not properly understand the difference between the quantitative and the qualitative evaluations.

51.16 Continuing with his responses, Mr. Bacon stated that most of the data that was applied to evaluations of the competing consortia were actually

quantitative, and that the methodology propounded in the Evaluation Model seemed to Mr. Bacon to give undoubted precedence to the quantitative approach:

“The qualitative approach was going to be used as a check of the quantitative data, and yet this quantitative model withered, fell out of bed, was abandoned, you choose the word, but it ceased to be used and was replaced by what the evaluators called the qualitative approach.”

51.17 A portion of Mr. Bacon’s report was put to him to the effect that *“However, as will be seen, much of the final report was based on judgements reached after discussions within sub-groups formed to examine various aspects of the applications. In many cases, these either involved non-quantifiable data, or the data were [sic] transformed into non-numeric indicators and scored accordingly. This makes it very difficult to attempt to replicate the outcomes or adjudicate as to the validity of the conclusions reached.”* Mr. Bacon acknowledged that it was fair comment to say that this meant that there were things going on in the sub-groups and groups, about which he had no information, which did not seem to have been recorded or to have been capable of being recorded, and as a result it was impossible to review the conclusions reached. Mr. Bacon proceeded by stating that it had transpired that all that had been agreed in advance by the evaluators were the quantitative weightings, and the problem that they had of course was that when they abandoned the quantitative methodology, they had to come up with a set of weightings in the qualitative methodology.

51.18 Dealing later in his evidence with the matter of “withering” that had been relied upon by the evaluators, Mr. Bacon stated that the process in his judgement had not withered; it was rather the position that the evaluators decided consciously that they were moving away from a quantitative approach, because they were unhappy about the results that were coming from that approach, and as a result of data deficiencies that they had been experiencing. He stated that, to the present day, the view that he held was that he did not understand why they abandoned the quantitative approach, and he did not know what the motivation was. He did know the reasons why they had stated that they abandoned the quantitative approach. When, on the qualitative approach, they had used the same weights as for the quantitative approach, why should they not have stuck with the quantitative approach?

51.19 Returning to this aspect in response to later questioning by counsel for the Department, Mr. Bacon again stated that he failed to understand why, having

set out on a course, quantitative then qualitative, they moved from that to the course that they ultimately pursued, which was to drop the quantitative approach. He confirmed what he had earlier said, to the effect that in colloquial terms a quantitative approach entailed inquiring “*how much did I get?*”, whereas a qualitative approach involved asking “*who is the best or did the best*”. It was put to him that in all these matters he had provided an opinion of how matters might have been done, but with a lack of understanding as to how the Project Team had actually reached its decision. Mr. Bacon responded that he did not know if he could agree with this: while he did not have insight into the discussions within the Project Team, he did have the required economic literature for a professional assessment. It remained his view that the explanation of withering through lack of data struck him as odd:

“They threw out the baby with the bath water. They had a sound methodology, a quantitative approach. They articulated very clearly how they were going to use it, how they were going to challenge it. And they threw it out or it withered, because the data that they received wasn’t what they expected.”

Problems arise with all information, but it appeared to him that at no stage did the Project Team inquire, having not received parts of the relevant information, whether or not it was valid for them to modify the quantitative model, or to return to the competing consortia to seek additional information. With a large team in addition to Mr. Andersen, it seemed that they had never collectively inquired what would happen if they allowed the quantitative approach to wither.

51.20 Thus, an impeccable methodology was not complied with, in the view of Mr. Bacon: they abandoned the quantitative approach after giving much consideration to weightings and criteria; then finally, in Copenhagen, in order to come to a final qualitative determination, it seemed to Mr. Bacon that they had to address the matter of how they weighted these qualitative criteria. Either they could have modified the quantitative model, by using less indicators and making do with what was to hand, or they could have gone back to the applicants and sought the missing information, as presumably had been done in other competitions elsewhere. To have said that the quantitative process withered, because it left a deficiency of numerical information, was wrong, and what they had was better than nothing. Mr. Bacon stated that he could not understand how, when the quantitative approach had been abandoned or allowed to wither, Mr. Andersen had not said to the evaluators “*how are we going to add up these qualitative criteria?*”

51.21 Mr. Bacon confirmed that the purpose of his engagement had been to provide technical assistance in relation to four specific matters identified by the

Tribunal, and agreed that the purpose had not been to say that the civil servants got it wrong, or that a wrong result had emerged. Put by counsel that there was nothing to indicate that the civil servants had been suborned, Mr. Bacon responded that the only observation he would make was that he failed to understand why, having set out on a course that was quantitative and then qualitative, they moved from that to the course that they ultimately pursued, which was to drop this quantitative approach.

The scoring system used in the process

51.22 Mr. Bacon's views on the scoring system applied in the evaluation, as elicited in his cross-examination, related closely to the views he had expressed on what he regarded as the unwarranted abandonment of the quantitative examination. Even before allowing for the additional factor of applying weightings agreed only in the context of a quantitative examination to what was a solely qualitative examination, he left no doubt as to his conviction that substituting A, B, and C for 1, 2 and 3 was not substituting a qualitative for a quantitative approach. In fact, it appeared to Mr. Bacon that the conclusions comprising the result were inherently inaccurate: an A, a B and a C was not an accurate numeric any more than an ordinal numbering 1, 2, 3, that is first, second and third. It was, he felt, fundamental that one could not add letters of the alphabet, weight them and divide them, and then get an answer: it did not work, and that was not what letters of the alphabet did.

51.23 This is what it seemed to Mr. Bacon was done in the evaluation, in which the Project Team members involved went to Table 17, and put in numbers in place of the As, Bs and Cs. From Mr. Bacon's experience, what ought to have been done, as was proposed in Mr. Andersen's Evaluation Model, was to undertake the quantitative examination to obtain an outcome, review it qualitatively, and then adjust it; this however was not what happened. In the event, the essential point was that if you can translate A, B and C into 1, 2 and 3, it is really an imprecise quantitative score that you are getting, which was not a qualitative assessment as envisaged.

51.24 Mr. Bacon stated that he was not aware of Mr. Andersen's expertise, and when it was put to him that Mr. Andersen had carried out many similar tasks throughout the world, he said that this did not alter his view. Indeed, he remarked that one did not have to be an expert in anything, or experienced in anything, to fail to see how they could add A, B, C and D together and get an average, and that was what their Table 16 did.

51.25 Responding to counsel for Mr. Desmond, Mr. Bacon agreed that, from the content of the briefing document furnished to him by the Tribunal, the legal team knew quite a bit about the evaluation procedure, and had a fair degree of understanding of how it had worked. It was put that any lay person could understand the difference between quantitative and qualitative forms of analysis, and that no particular expertise was needed to know the difference. Mr. Bacon responded that this was correct in principle, but that there were specific technical matters: for example, if a scoring range of 1 to 5 was chosen and it was decided to use whole numbers, 3.49 would become 3, and 3.51 would become 4, a difference on a scale running between 1 and 5, which would amount to a 25% rounding error.

51.26 As to the use of the word “conspiracy” in a memorandum of a meeting with Tribunal lawyers, a word which Mr. Bacon stated was his, he was asked what was the nature of any such conspiracy, and why the word was used. Mr. Bacon responded that he had referred to conspiracy in the sense of agreement that Table 17 was going to be the same as Table 16. He reiterated his belief that Table 16 had come first, providing A, B, C and a result, and that there was no way that one could add letters of the alphabet, weight them to produce a result, and then turn around in Table 17, the next one, with a view to a qualitative result. Mr. Bacon recalled that it had been one of the Project Team who had indicated doubt as to how a result could be so obtained, so they sat down and produced Table 17. Accordingly, Mr. Bacon said that he had certainly expressed the opinion that Table 16 had produced a result; Table 17 came afterwards; Table 17 was certainly capable of generating a result, but in his opinion Table 16 was not so capable. What Mr. Bacon had learnt of the evidence from the Project Team was that some of them at least were left scratching their heads as well, when they looked at Table 16, and Table 17 came about on a basis that, if it could not be seen how Table 16 emerged, a further table would be provided that would show how it came about. This was the context of the reference to conspiracy, and Mr. Bacon stated that he had not been trying to “ring a bell”.

51.27 Reference was made in the course of Mr. Bacon’s cross-examination by counsel for Mr. O’Brien to the conclusion expressed in his second report, in the following terms:

“The report concludes that there is a definite well supported ranking of the applications with A5 being the best. In our opinion, the closeness of the final score, the doubts about the methodology employed and the fact that the process was not carried out as intended should have led to this conclusion being stated less definitively.”

51.28 It was put by counsel that on each occasion that an outcome had been obtained, A5, Esat Digifone had come first, and A3, Persona second: Mr. Bacon agreed that that had been the case, except for the first run of the quantitative examination. Put further that it would not therefore have seemed possible for him to have said correctly that everything pointed to Mr. Andersen having been manipulated, Mr. Bacon responded that the problem was that the margins of error were such that it was impossible in his judgement to say who won; the margins inherent in the scoring system made it difficult to determine a robust and definitive result.

Internal Rate of Return

51.29 Regarding the third matter in respect of which technical assistance had been sought by the Tribunal, Internal Rate of Return, IRR, Mr. Bacon expressed the view that what had been done in this regard in the course of the GSM competition was an inappropriate use of the device, which was a measure used to say something about an investment return, but which had in the particular instance been used as an insight into the extent to which consumers of the service would be receiving a good service; Mr. Bacon contended that it was impossible to use IRR as an indicator in this manner.

51.30 Responding to Tribunal counsel at the conclusion of his evidence, Mr. Bacon acknowledged that in latter correspondence the Tribunal had conveyed to him that IRR should thereafter be excluded from his inquiries; this was on a basis that, although initially identified by the Tribunal as a matter warranting inquiry, it had been determined that further inquiries would not be pursued. This was a matter that was addressed in the Tribunal's Ruling of 29th September, 2005, reproduced in Chapter 2 of this Volume.

Bankability

51.31 Only very limited reference was made in the course of Mr. Bacon's evidence to the concept of "*bankability*" as an element in appraising the financial strength of the competing consortia and their constituent partners. What was raised was his view, expressed to the Tribunal, that "*bankability*" was not a remedy for insolvency, that liquidity and solvency were not equal concepts, and could not be viewed as one and the same thing.

OBSERVATIONS

51.32 The unusual procedural background to the cross-examination of Mr. Bacon is not without significance, and merits reiteration: having successfully defended the High and Supreme Court proceedings brought by Mr. O'Brien to restrain the Tribunal from calling Mr. Bacon as an expert witness, the Tribunal sought and received written submissions from affected persons in relation to that course; all such submissions urged against calling Mr. Bacon, and having considered these, the Tribunal acceded and ruled that he should not be called; after considerable delay, the entitlement to cross-examine Mr. Bacon in relation to information supplied by him to the Tribunal was invoked on behalf of Mr. O'Brien; at the said cross-examination hearing, notwithstanding written acceptance on behalf of Mr. O'Brien of the limitation imposed on the scope of cross-examination in the judgment of the High Court as approved by the Supreme Court, frequent endeavours were made on his behalf to extend that entitlement by seeking to impugn both the independence and relevant qualifications and experience of Mr. Bacon, in addition to the *bona fides* of the Tribunal and its personnel.

51.33 It appears to the Tribunal that Mr. Bacon's evidence comprises two clearly separate portions. The first of these relates to the replies elicited from Mr. Bacon in relation to his views expressed to the Tribunal on the technical matters drawn to his attention, in particular as to quantitative and qualitative examinations, and the scoring system used in the process. The Tribunal ruled that it would not adduce his evidence in relation to these matters, yet in the ultimate, having been stated in response to questions, the content of his replies became part of the record of the public sittings of the Tribunal. This applies both to his views expressed on the methodology that was actually applied by the Project Group, and to his observation that it was not necessary to be an expert to appraise certain deficiencies in what occurred in the process. It might be argued that a somewhat analogous situation here arose to an evidential contingency in adversarial court proceedings, where a course taken in examination or cross-examination by an advocate can render admissible as evidence against his client testimony that would otherwise have been inadmissible. However, it is scarcely desirable to embark upon analogies between inquisitorial and adversarial proceedings and the Tribunal has determined that, notwithstanding that matters are now on the record of its proceedings, it should have, and has had, no regard to them in making the findings recorded in this Report.

51.34 The other portion of Mr. Bacon's evidence related to his dealings and interaction with the Tribunal and its legal team, and to his own expertise, as well as the manner in which he discharged the professional duties asked of him.

There is obviously no inhibition whatever upon the Tribunal in reporting or expressing conclusions in relation to what transpired in this regard. At the late stage of the Tribunal's public sittings at which this testimony was heard, the efforts to impugn the bona fides of the Tribunal and its personnel were neither new nor surprising, but the aspersions sought to be cast on the professionalism, objectivity and standing of Mr. Bacon were unwarranted, ill-judged and wholly unsustainable.

SECTION I

NEGOTIATION OF THE SECOND GSM LICENCE

THE POST-COMPETITION NEGOTIATIONS

OVERVIEW OF ACTIVITIES

52.01 The announcement by Mr. Michael Lowry on 25th October, 1995, that the GSM competition had been won by the Esat Digifone consortium marked the completion of the evaluation process. The Project Group, although not formally dissolved, there having been no final meeting convened to approve the Evaluation Report, ceased to have any function or existence distinct from that of its constituent membership. What had been won by the consortium was not the GSM licence, but the exclusive entitlement to negotiate with the Department for the grant of the licence. Although probable, it was not inevitable that those negotiations would proceed to fruition. Had they broken down, the Department was mandated, by virtue of the Government Decision of 26th October, 1995, to open negotiations with the second-ranked applicant, the Persona consortium, and subsequently, if necessary, with the third-ranked applicant, Irish Mobicall.

52.02 The focus of the Department's activities over the approximate seven months between the announcement of the winner of the competition and the grant of the GSM licence on 16th May, 1996, was the production of a licence in a form appropriate to the grant of that privilege, and which would bind Esat Digifone to the commitments which had been made in its application. That was both an onerous, complex, and time consuming task, and entailed the input of the Office of the Attorney General, and in particular that of the Parliamentary Draftsman. Apart from preparing an appropriate licence, technical regulations also had to be finalised to transpose into Irish law, by means of a statutory instrument, an EU Mobile Directive issued in February, 1996, which would govern the grant of the licence. Consideration also had to be directed to whether an equivalent licence should be granted to Eircell.

52.03 Responsibility for overseeing the delivery of the draft licence primarily rested with the Regulatory Division, in the person of Mr. Sean McMahon, who was assisted, as the licensing process proceeded towards completion, by Ms. Regina Finn, an Assistant Principal Officer, who transferred from the broadcasting to the telecommunications section of the Regulatory Division in the early months of 1996. It will be seen however that the two officials who had played a pivotal role in the evaluation process, namely, Mr. Martin Brennan and Mr. Fintan Towey, continued to have an involvement in liaising with the consortium in relation to various issues which arose from the application. That role intensified from mid-April, 1996, when they again became lead representatives of the Department in dealings with consortium representatives, following formal disclosure by the consortium of the role of Mr. Dermot Desmond as a 25% shareholder in Esat Digifone. As will be seen, consideration was then directed by the Department to

the consequences of Mr. Desmond's role in terms of ownership of the intended licensee, and in particular whether that ownership accorded with the information provided in the Esat Digifone application, evaluated in the course of the competitive process, and which had led to Esat Digifone's ranking as the winning consortium. At that point, Mr. John Loughrey, Secretary General, took over direct responsibility for the licensing process, and assumed a central role in all of the Departmental activities which culminated in the grant of the licence on 16th May, 1996.

52.04 The post-competition period was also an eventful time for the consortium, and for its members. A shareholders agreement had to be negotiated and finalised between Communicorp, Telenor and Mr. Desmond. Although that process had commenced, at least as regards Communicorp and Telenor, prior to the submission of the Esat Digifone application on 4th August, 1995, it ultimately proved more problematic and protracted than had been anticipated. The difficulties encountered arose in part from Mr. O'Brien's desire to boost his status in Esat Digifone to that of majority shareholder, through the acquisition of a portion of Mr. Desmond's entitlement under the agreements of 29th September, 1995. It was also now necessary to accommodate a third party in the form of Mr. Desmond, who it seems sought rights under the shareholders agreement, which were not regarded, at least by Communicorp's advisers, as being appropriate to an investor shareholder. Both these matters soured relations between the three partners, Communicorp, Telenor and Mr. Desmond, and led to a measure of internal strife and instability. It was only some four days before the licence was due to be issued on 16th May, 1996, and following intensive negotiations, that these difficulties were resolved sufficiently to enable a shareholders agreement to be finalised and executed.

52.05 The consortium also had to consider how and when it should formally broach with the Department the issue of Mr. Desmond's entitlement to a 25% shareholding in the intended licensee, the potential consequences of which notification were not lost on the consortium. Ultimately, as will be seen, Esat Digifone did not formally disclose that information to the Department until 17th April, 1996, in response to a request made by Ms. Regina Finn, who, as stated, had only recently joined the telecommunications section of the Regulatory Division, who had no knowledge of the evaluation process, and who was very probably one of the few officials involved on the Department side who had no reason to suspect that her inquiry could elicit information at variance with the application. In those intervening months, as will be seen from the evidence available to the Tribunal, this issue was the object of a marked degree of inhibition and hesitancy on the part of the consortium, matched by an apparent disinterest and disinclination on the part of the Department. It was only after the revelations of 17th April, 1996, that the Department exhibited any appetite for

confronting the potential consequences of the alteration to the composition of the intended licensee.

52.06 Lastly, consideration also had to be directed by the consortium to the capitalisation of Esat Digifone which, in the light of Communicorp's finances, or more properly its lack of finance, was also a matter which was not without complication. By then, any notion of Communicorp's funding being provided by Advent, as had been stated in the Esat Digifone application, had long been superseded by the Credit Suisse First Boston appointment and the intended private placement on the US market. That placement was not due to proceed until June, 1996, and as will be seen, Communicorp had no funds available to it to capitalise Esat Digifone, even to the limited extent of its contribution to the licence fee of £15 million payable on 16th May, 1996, and it was Telenor, and to a lesser degree Mr. Desmond, that were obliged to carry Communicorp in the meantime.

THE FORMAL OPENING OF THE NEGOTIATION PROCESS

52.07 On 9th November, 1995, two weeks after Mr. Lowry's announcement, the first formal meeting between the Department and Esat Digifone, as the successful applicant, was convened. There was a full attendance at the meeting of all interested parties. The Departmental delegation comprised all of the three Principal Officers who headed the Telecommunications Divisions of the Department, that is Mr. Brennan, Mr. McMahon and Mr. John McQuaid, and they were accompanied by Mr. Towey, Ms. Maev Nic Lochlainn and Mr. Ed O'Callaghan. AMI were also present, represented by Mr. Michael Andersen and Mr. Tage Iversen. The consortium delegation comprised both Communicorp and Telenor representatives, led by Mr. Denis O'Brien. Also in attendance on behalf of Communicorp was Mr. Richard O'Toole, who had not previously featured in any of Communicorp's interactions with the Department. Mr. O'Toole was nonetheless it seems recognised by the Departmental officials as formerly having served as Chef de Cabinet to Mr. Peter Sutherland when Irish Commissioner to the EU. Mr. Owen O'Connell of William Fry, who was by then acting as solicitor to the consortium, as opposed to Communicorp, was present, as was Mr. Jarleth Burke, Head of Regulatory Affairs with Esat Telecom, with whom the Department was familiar, from dealings with him in connection with Mr. O'Brien's existing fixed-line telecommunications business.

52.08 An official report of this initial meeting was prepared by Ms. Nic Lochlainn on the following 13th November, 1995, and a copy of that report, together with Mr. McMahon's contemporaneous notes, and an attendance kept by Mr. O'Connell, were all available to the Tribunal. It was clear from those

records that the purpose of the meeting was to mark formally the commencement of licence negotiations, to explore matters on an introductory footing, and to provide both sides with an opportunity to state their respective positions.

52.09 Mr. Brennan chaired the meeting, and opened proceedings by informing the consortium delegation that it was intended that the licence to be negotiated would contain all appropriate and necessary terms and conditions to ensure the provision of a mobile service, and that commitments made by the consortium in its application would be converted into binding conditions. The Department would be solely responsible for drafting the licence, but would be open to considering views that the consortium might wish to offer. It seems in that regard that it was noted that the consortium, at the oral presentation the previous September, had expressed no reservation concerning the indicative draft licence circulated as part of the competition materials.

52.10 Mr. O'Brien responded to Mr. Brennan and, according to the official record, he informed the Departmental delegation that he was fully committed to fulfilling the promises made in the Esat Digifone application. Mr. McMahon had noted that what Mr. O'Brien had said on that occasion was:

“we’ll do what we said we’d do. We won’t weasel out.”

It seems that it was then Mr. O'Brien's aspiration that the prospective negotiations might be secured by the following Christmas.

52.11 It was Mr. Andersen who outlined elements of the commitments made in the Esat Digifone application which the Department intended to incorporate into the licence. Although he was recorded by Mr. McMahon as having noted the negative worth of Communicorp, neither Mr. Andersen, nor anyone else from the Departmental side, was recorded as having adverted to the Department's intention to adopt the important recommendation made by AMI in the Evaluation Report, to the effect that conditions should be incorporated into the licence to meet Communicorp's financial frailty, as identified in the course of the evaluation process. Mr. Brennan agreed in his evidence that this was probably something that should have been addressed at an early stage of the licence negotiations. In the event, and as will be seen, it was a matter that was not confronted until virtually the eleventh hour, when the Department had to consider not only the finances of Communicorp, but those of Mr. Desmond, and his ability to meet his capital requirements, something which had never been addressed during the evaluation process, as Mr. Desmond's involvement was then unknown to the Project Group.

52.12 The message which Mr. O'Brien delivered to the meeting was one of complete adherence to the Esat Digifone application, and reassurance to the Department that the consortium would not "weasel" out of its commitments. He did not take that opportunity to inform the Department that Communicorp would not be financing its participation through £30 million of funding from Advent. Nor did he inform the Department that Communicorp had engaged Credit Suisse First Boston to undertake a funding placement on its behalf on the US market. Nor did he inform the Department that it was no longer intended that the four named financial institutions would be shareholders. Nor did he inform the Department that Mr. Desmond, through his company IIU, would have control not just of that shareholding, but of an additional 5% of the equity. And nor did he inform the Department that, under the terms of the arrangement agreement between Esat Digifone and Mr. Desmond, if Communicorp's US fundraising was unsuccessful, and if Telenor decided not to exercise their option to take up Communicorp's unsubscribed shares, Mr. Desmond could potentially have ended up holding 62.5% of the shares in Esat Digifone. Nor for that matter did any other person in attendance, including the Telenor representatives, so inform the Department, even though they were aware of both Mr. Desmond's role and, as will become evident, of the potential sensitivity attaching to it.

52.13 Following that meeting, Mr. Brennan wrote to Mr. O'Brien on 13th November, 1995, confirming the Department's position as outlined on that occasion. He forwarded a draft licence to the consortium which, as noted by him, was the same in content as the indicative draft circulated as part of the confidential materials, which had been altered only in format. He reiterated his invitation to the consortium for its views on that draft, but made it clear that he was doing so without any commitment. Mr. O'Brien responded on 22nd November, 1995, enclosing a document comprising the consortium's preliminary response. Although the formal report of the initial meeting had concluded with an indication that it was expected that a further meeting would be held within ten days, and in his follow-up letter Mr. Brennan had indicated that the Department would provide a more complete draft in due course, it seems that no such further meeting was held for many months, and that no revised draft was furnished, even on an indicative footing, until the following March, 1996.

52.14 Each of the matters touched upon in this chapter will be returned to and explored in the chapters which follow.

THE OWNERSHIP DILEMMA

53.01 It should be recorded at the outset of this chapter that the problems which arose for both the consortium and the Department, as a result of Mr. Dermot Desmond's late entry to the Esat Digifone consortium, were not of Mr. Desmond's making. Whilst Mr. Desmond was the object of those difficulties, he was not the source or author of them. Mr. Desmond did not seek to join the consortium, but was approached by Mr. O'Brien, and was ultimately admitted as a member of the consortium, as the provider of underwriting for Communicorp, in order to dispel the Department's perception, as it was understood by Mr. O'Brien, that Communicorp was financially weak. Whilst Mr. O'Brien and Mr. Desmond had discussed the GSM competition on their return flight from the Glasgow Celtic match on 10th August, 1995, and on the following day, albeit on a basis significantly different to the agreement ultimately concluded between their respective companies on 29th September, 1995, there is no evidence that Mr. Desmond, in what was then the closed period of the competition, had been made aware, either in general terms or in detail, of the rules and procedures governing the competitive process. Neither is there evidence that he was aware of the mandatory obligation imposed on applicants to furnish ownership details of the licensee by which it was proposed that the licence would be operated. Nor is there evidence that Mr. Desmond was aware that a bar had been placed on the submission of additional information by applicants, following their oral presentations to the Department in the second week of September, 1995, and that in transmitting the underwriting letter of 29th September, 1995, signed by Mr. Desmond's associate, Dr. Michael Walsh, the consortium had breached that rule. It is nonetheless the case that Mr. Desmond must have known that some degree of caution and economy was required around the extent of disclosure made to the Department, as evident from his testimony that the letter was firmly planted in mid-air, as he put it.

53.02 The approach of the consortium and of the Department to the issue of Mr. Desmond's shareholding, as already observed, was characterised by hesitancy on the part of the consortium, matched by reluctance on the part of the Department. The consortium was hesitant to disclose to the Department the full extent of Mr. Desmond's ownership, and the Department was reluctant to recognise or confront the existence of that issue.

53.03 The consortium proceeded on the footing that the underwriting letter of 29th September, 1995, had put the Department on notice that Mr. Desmond, through his company, IIU, had assumed a role in the affairs of Esat Digifone. Although that underwriting letter had been returned to Mr. O'Brien, on the footing that it would not be taken into account in the evaluation process, the consortium

was nonetheless confident that the assumption of an involvement by Mr. Desmond's company had thereby been made known to the Department, and critically to Mr. Brennan, to whom the letter was addressed, and who, as Chairman of the Project Group, was the Departmental official most closely identified with the process. Even though the terms of that underwriting letter fell far short of full disclosure of Mr. Desmond's role, it did notify the Department that he was to underwrite all of the shareholding in Esat Digifone other than that to be held by Telenor. The import of this information was not lost on Mr. Fintan Towey, the first Departmental official to see the letter, who understood that it could signify that the financial institutional element of the ownership details contained in the Esat Digifone application had been excluded. Moreover, the Tribunal recognises that the Department could have deduced from the information with which it was furnished that, as underwriter, Mr. Desmond could have ended up as owner "*of circa 60%*" of the shares in the intended licensee. Whatever the inadequacies of the degree of disclosure made by that letter, the view of the consortium that the Department was on notice was not one without foundation. As Mr. Owen O'Connell put it in evidence, although the letter had been returned, Esat Digifone was satisfied that its contents were known to Mr. Brennan.

53.04 It was nonetheless recognised by Esat Digifone, and by its solicitor, Mr. O'Connell, that the late accession of Mr. Desmond was an issue which could be problematic. There can be no doubt that Communicorp and Telenor and their representatives were acutely conscious that the rules of the competitive process had imposed a mandatory obligation on applicants to furnish full ownership details of their intended licensee, and that the ownership details which had been furnished, and the ownership information which had been evaluated in the course of the process, had not included Mr. Desmond, or any of his corporate vehicles, as the holder of a 25% shareholding. Not only did his arrival give rise to an issue of material change in ownership but, as Mr. O'Connell observed in evidence, Mr. Desmond was then also a controversial figure, and that dimension of his involvement would also have to be presented properly.

53.05 Although Mr. O'Connell described these matters as ones of moderate importance for Esat Digifone in the post-competition period, and Mr. O'Brien denounced them as of little consequence or concern to him, there can be no doubt that Esat Digifone's approach to managing this alteration was one that was carefully considered, and delicately weighed. There was no urgency evident in the approach adopted by the consortium, and although it was accepted by Mr. O'Connell, as solicitor for Esat Digifone, that the consortium was under an obligation to disclose the true position to the Department, he regarded that obligation as one to make disclosure before the grant of the licence, and it was his view that the consortium had a discretion as to timing of that disclosure. That view, as acknowledged by Mr. O'Connell, seems, at least in part, to have informed

the consortium's approach to the issue. It may also be the case, as adverted to by Mr. O'Connell in evidence, that the consortium favoured postponement of disclosure, with the intention, if necessary, of availing of the provision of the RFP document which required that applicants furnish a statement that the information submitted would be valid for a period of one hundred and eighty days. This of course could not have provided the consortium with a full answer if the Department had objected to the alteration which had occurred, as that alteration had proceeded to completion well in advance of the expiry of that one hundred and eighty day time period.

53.06 The evidence of Departmental officials, regarding Departmental knowledge of Mr. Desmond's accession to the consortium, was unanimous insistence that his role was unknown to the Department for the six month period from the announcement of the result on 25th October, 1995, to the receipt of Mr. O'Connell's letter of 17th April, 1996, in response to Ms. Regina Finn's query. This was notwithstanding that Mr. Brennan and Mr. Towey both had knowledge of the contents of the underwriting letter of 29th September, 1995; notwithstanding that accurate, authoritative and confirmed media coverage appeared during that time; and notwithstanding that both Departmental knowledge and acceptance of Mr. Desmond's involvement were recorded in the files of the solicitor acting for Communicorp. All of these matters, together with an account of the evidence heard by the Tribunal, will now be explored.

EVENTS OF NOVEMBER, 1995

53.07 In the immediate aftermath of Mr. Lowry's announcement that Esat Digifone had won the competitive process, Communicorp gave prompt consideration to issuing a press release addressed to Mr. Desmond's role. On Friday, 3rd November, 1995, Mr. O'Brien, Mr. Leslie Buckley, Mr. John Callaghan and Mr. Paul Connolly all met with Mr. O'Connell, who at that point was not acting on behalf of Mr. O'Brien or of Communicorp, but was acting as solicitor for Esat Digifone. In his attendance of that meeting, Mr. O'Connell identified in stark terms both the issue which had arisen, and the purpose of the meeting, as follows:

"IIU issue – bullet points for press release

Problem re. material change in shareholders

vs. bid."

53.08 Mr. O'Connell, as already alluded to, recognised that this material change in shareholders, as he had so described it, was one that would have to be

carefully managed. Although no reference had been made to Mr. Desmond at the press conference at which the result had been announced, rumours of Mr. Desmond's involvement were circulating at the time in the business community, and those rumours, as will be recalled, had come to the attention of Mr. Greg Sparks, Mr. Dick Spring's Programme Manager, and had been conveyed by him to Mr. Spring on the evening that the announcement had been made. From Mr. O'Connell's attendance, it appears that what was then under consideration was the presentation of Mr. Desmond's role as that of the placer of 20% of the shares in Esat Digifone with "*institutional + other investors to be located*", rather than as a party with an existing right to 25% of the shares in Esat Digifone.

53.09 No press release was issued by Esat Digifone at that time, and the first formal licence negotiation meeting between Esat Digifone and the Department proceeded the following week, on Thursday, 9th November, 1995, without disclosure being made to the Department. At that point, the consortium was proceeding on the premise that the Department already had notice of Mr. Desmond, by reason of the underwriting letter of 29th September, 1995. This was the subject of discussion between Communicorp and Telenor representatives at a separate meeting at the Davenport Hotel, also on 9th November, 1995, the same day as the meeting with the Department, which was attended by two solicitors, Mr. Arthur Moran, of Matheson Ormsby Prentice, instructed by Telenor, and Mr. Gerry Halpenny, also of William Fry, then acting for Communicorp. Mr. Moran's note of that meeting recorded a query and a response as follows:

"IIU – are Department aware?"

yes 29/9/95 letter to Dept: Dept replied that letter

not taken into account – copy to be supplied to us."

As Telenor had had no dealings with the Department in relation to that letter, it must be taken that the query emanated from the Telenor side, and that the response emanated from the Communicorp side, represented at that meeting by Mr. Peter O'Donoghue and by Mr. Richard O'Toole, apart from their solicitor, Mr. Halpenny.

53.10 Although no immediate press release was issued by Esat Digifone in early November, 1995, the formulation of Mr. Desmond's role, settled on at the meeting with Mr. O'Connell on 3rd November, 1995, was utilised in comments made to the press some short time later, in the context of queries raised by The Irish Times and The Irish Independent newspapers on Friday, 17th November, 1995. Those comments formed part of reports which appeared in the editions of both newspapers for Saturday, 18th November, 1995, in relation to Mr.

Desmond's role in Esat Digifone, and the rumours then circulating that Mr. Desmond would take a 20% stake in Esat Digifone, for himself. The relevant extract from the article which appeared in The Irish Times is reproduced below:

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

The chairman of Esat, Mr. Dennis [sic] O'Brien, last night confirmed that Mr. Desmond's company, International Investment Underwriters (IIU), had been appointed as advisers for the sale of the stake.

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

53.11 The corresponding extract from the report which appeared in The Irish Independent is also quoted below:

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

A statement from Esat Digifone – the winner of the second GSM (global system mobile) phone licence – said Dr. Michael Walsh of the IFSC-based International Investment and Underwriting (IIU) had been appointed to advise the consortium on this aspect of its financing.

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

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

53.12 Both articles reported that Mr. Desmond had been appointed as adviser to Esat Digifone to place a 20% stake in the company, and in the case of The Irish Independent, that the stake would be placed with *"institutions and other investors"*. Both also adverted to speculation that Mr. Desmond had purchased, in the case of The Irish Times, and was likely to purchase, in the case of The Irish Independent, some of that shareholding for himself. What was also clear from their contents was that Mr. O'Brien had spoken to The Irish Times the previous

evening, and that a spokeswoman for Esat Digifone had been in contact with The Irish Independent.

53.13 Those articles it seems followed a story broadcast by RTÉ at 6:45pm on the evening of Friday, 17th November, 1995, as part of its business news bulletin. Ms. Eileen Gleeson, of Weber Shanwick FCC, who had been retained as a public relations adviser to Esat Digifone, and who also advised Mr. Desmond, recalled in her evidence to the Tribunal that Mr. Vincent Wall, business correspondent with RTÉ, had contacted her late in the afternoon of Friday, 17th November, 1995, and informed her that he had reliable information that Mr. Desmond's company had been appointed to advise the consortium in relation to the 20% institutional holding, and that he intended to broadcast the story that evening. Ms. Gleeson could not recall whether she managed to speak with Mr. O'Brien or with Dr. Michael Walsh at that point, but observed that no comment had seemingly been made to RTÉ. It was following the broadcast of that story that The Irish Times and Irish Independent correspondents made contact. Ms. Gleeson recalled that it was decided that the story would not be denied, that Mr. Desmond's involvement would be confirmed, but that it would not be expanded upon further. It was Ms. Gleeson's evidence that the no denial and no expansion approach almost certainly came from Mr. O'Brien and Dr. Walsh, whom she had consulted.

53.14 It seems that at that point Ms. Gleeson, in conjunction with Mr. O'Brien and Dr. Walsh, prepared a draft press statement, in the following terms:

"In Esat Digifone's submission to the Department of Transport Energy & Communications it was stated that Esat Digifone is owned 50% by Communicorp/Esat and 50% by Telenor. It was further stated that Esat and Telenor would reduce their investment to 40% each and a further 20% of the equity was to be allocated to third party investors.

Dr. Michael Walsh of International Investment & Underwriting (IIU) was appointed to advise the company on this aspect of Esat Digifone's financing and IIU will arrange the placing of these shares.

Further details of the investment will be made available when the licence is signed with the Department of Transport Energy & Communications."

Ms. Gleeson had initially proposed a slightly different formulation in describing the role of IIU, which she had referred to in her typed script as *"IIU has underwritten this third party investment and will place these shares"*. That wording was altered to omit reference to underwriting, which Ms. Gleeson believed was made on Dr. Walsh's initiative. Mr. O'Brien had also added to Ms.

Gleeson's script a reference to similar arrangements having probably been contained in proposals from other consortia.

53.15 The information conveyed in that statement reflected the thinking of Mr. O'Brien and his associates, as recorded in Mr. O'Connell's attendance of the meeting of the previous 3rd November, 1995. Not only did the press statement restrict itself to confirming the information in the possession of the media, but it presented a representation of Mr. Desmond's involvement which was far from complete. It stated that Dr. Walsh, who had no function independent of that of Mr. Desmond, had been appointed as an adviser to Esat Digifone on its "financing", and would arrange the placement of 20% of its shares. Dr. Walsh had never been appointed as an adviser to Esat Digifone, rather he was an adviser to Mr. Desmond, and Mr. Desmond was not responsible for any third party financing: his sole responsibility was to finance his own 25% shareholder entitlement and to underwrite Communicorp's equity in Esat Digifone. In the terminology of the media, the statement was what is commonly known as "a spin" and its connection to the true position was tenuous. It should be recorded that no criticism is directed to Ms. Gleeson for the contents of this press statement. Ms. Gleeson had no direct knowledge of what had actually transpired, or of what Mr. Desmond's role or entitlements were, and she had at all times acted on, and been dependent on the instructions of her clients, and in particular those of Mr. O'Brien and Dr. Walsh.

53.16 Ms. Gleeson was not the only adviser to Esat Digifone whose time was taken up, on 17th November, 1995, in endeavouring to present an explanation of Mr. Desmond's role. Mr. O'Connell of William Fry solicitors was also consulted by Mr. O'Brien. It was not press queries or the form of a press statement on which Mr. O'Connell's advice or services were sought, but on the preparation of a letter to be sent by Mr. O'Brien to Mr. Martin Brennan of the Department. Mr. O'Connell duly drafted a carefully considered letter, consistent with the formulation arrived at on 3rd November, 1995, and he faxed that draft letter to Mr. O'Brien. Having referred to Esat Digifone continuing to be owned and controlled by Communicorp and Telenor, and the likelihood of Communicorp introducing new institutional finance, and in that regard having opened negotiations with Credit Suisse First Boston, the draft letter continued as follows:

"Our bid made it clear that ESAT Digifone would also seek minority financing by public and institutional investors. In preparing for this financing, we have been advised by International Investment & Underwriting Limited, who have also agreed to underwrite the finance i.e. to locate investors on behalf of ESAT Digifone and itself to take up any shortfall.

[Given the fact that IIU is publicly identified with Dermot Desmond, some publicity may ensue. I thought it important that the facts of this matter should be made clear, of which the most important seem to me to be firstly that ESAT Digifone comprises and is controlled by ESAT and Telenor, and secondly that IIU are its advisers and underwriters.]”

53.17 The contents of those paragraphs, as framed by Mr. O’Connell, were in line with the press statement issued later that day, in that the role of IIU was described as that of adviser to Esat Digifone, and the function of IIU was defined as that of locator of investors. However, to the extent that Mr. O’Connell’s text did refer to underwriting, and an obligation on the part of IIU to take up any shortfall of that underwritten shareholding, the contents of his draft reflected more closely the reality of the arrangements that had been concluded between Esat Digifone and Mr. Desmond. Moreover, in referring to Communicorp’s efforts to introduce “*new institutional finance*”, and to negotiations in that regard with Credit Suisse First Boston, Mr. O’Connell’s draft introduced, albeit in a careful and measured manner, clearly intended not to undermine the Department’s belief in the financing arrangements as declared in the application, the prospect that Credit Suisse First Boston might have some role on the financing side.

53.18 Apart from the substantive information conveyed in the draft, an additional feature of it, which was of at least equal significance, was the manner in which Mr. O’Connell had framed the commencement of the letter, which he had drafted in the following terms:

“Dear Martin,

I am writing to confirm our conversation of today concerning shareholdings in ESAT Digifone.”

It is clear therefore that Mr. O’Connell’s draft was predicated on a conversation having occurred earlier on Friday, 17th November, 1995, between Mr. O’Brien and Mr. Brennan, in which Mr. O’Brien had already conveyed the information contained in the draft, which was then intended as confirmation of those matters.

53.19 Mr. Brennan, Mr. O’Brien and Mr. O’Connell were referred to all of this documentation, and to the press reports, in the course of their examinations. Before addressing their evidence, there is one final document to which reference should be made to complete the documentary trail. This was an attendance of Mr. Halpenny, solicitor for Communicorp, of a meeting between Communicorp and Telenor personnel on the following Tuesday, 21st November, 1995, at which, according to Mr. Halpenny’s attendance, Mr. Richard O’Toole and Mr. Peter

O'Donoghue of Communicorp, and Mr. Knut Haga and Mr. Per Simonsen of Telenor were present, together with Mr. Arthur Moran, Telenor's solicitor. The first entry recorded by Mr. Halpenny in his attendance was as follows:

"Position re the Dept - IIU

Not a problem for M Brennan in the Dept –

*Main concern that DOB + TN mainly involved on
the operational side."*

53.20 None of the six persons recorded by Mr. Halpenny as present at that meeting could recall from whom that information had emanated, nor did any of them acknowledge having been the source of it. What the attendance conveys is that someone, most probably Mr. O'Donoghue or Mr. O'Toole, understood and informed the meeting that the IIU issue had been discussed with Mr. Brennan, and was not regarded by Mr. Brennan as an obstacle, provided Communicorp and Telenor continued to be involved on the operational side.

53.21 It was Mr. O'Brien's evidence that generally, following the announcement of the result, his focus shifted to the Credit Suisse First Boston planned fundraising to cover Communicorp's equity participation in Esat Digifone, and other issues were of a lesser priority for him. He did not recall a telephone conversation with Mr. Brennan on Friday, 17th November, 1995, and thought that what had occurred was that he had intended to telephone Mr. Brennan, and then to forward the letter which he had instructed Mr. O'Connell to draft, but that ultimately he had not done so. He did not believe that he had spoken to Mr. Brennan. As regards the record made by Mr. Halpenny on 21st November, 1995, which signified that the meeting of that date had been informed that IIU was not a problem for Mr. Brennan, it was Mr. O'Brien's evidence that he had not attended that meeting, and had not received any feedback from it. As regards the comment attributed to him in The Irish Times article, he thought that had probably arisen as a result of his answering a journalist's telephone call, and, in as much as the information imparted by him was limited, it was his policy to tell the media as little as possible.

53.22 Mr. Brennan did not recall the media coverage at that time, nor could he recall it being drawn to his attention. During the latter part of his evidence, having clarified the position, he discovered that press cuttings circulated within the Department had included copies of these newspaper articles. Whilst he thought he had received a telephone call from Mr. O'Brien, inquiring whether it would be problematic for the Department if Esat Digifone was to change its brokers, he did not believe that the issue had arisen at that point. He conceded that contact with Mr. O'Brien could well have occurred, but he thought that any such contact would

have been on a fairly casual basis. He did not remember a conversation of the detail outlined in Mr. O’Connell’s draft letter of 17th November, 1995, and had there been such a conversation, he thought it probable that he would have remembered it. Mr. Brennan assumed that Mr. O’Connell’s draft letter was not sent to him, as there was no record of it on the Departmental files. He could not assist the Tribunal as to how the impression recorded by Mr. Halpenny on 21st November, 1995, regarding his view of IIU involvement as not representing a problem for the Department, could have arisen.

53.23 Mr. O’Connell had no recollection of preparing his draft letter of 17th November, 1995, nor did he know whether there had been a conversation between Mr. O’Brien and Mr. Brennan, as recited by him in the opening sentence. He agreed however that it did seem from his draft that he had been instructed by Mr. O’Brien that he had had a related conversation with Mr. Brennan. Although not recalling events, Mr. O’Connell believed that the background to his preparation of the draft letter was the prospect that news of Mr. Desmond’s involvement was about to be the focus of media coverage. Mr. O’Connell, when he gave evidence to the Tribunal, was aware that Mr. O’Brien did not recall speaking with Mr. Brennan, and recounted to the Tribunal Mr. O’Brien’s belief that, although he might have intended to do so, he had changed his mind, and had neither spoken to, nor forwarded a letter to Mr. Brennan in the terms of the draft prepared by Mr. O’Connell.

53.24 What is certainly clear is that the only version of the letter prepared by Mr. O’Connell, which the Tribunal found in any files available to it, was the draft and copy fax cover sheet in the files of Communicorp, which incidentally recorded that the draft had been transmitted by Mr. O’Connell to Mr. O’Brien at 4:12pm that afternoon. There was no trace of any communication on that date between Mr. O’Brien and Mr. Brennan on the Departmental files.

53.25 It is undoubtedly the case that the consortium received advance notice on 17th November, 1995, that the issue of Mr. Desmond’s role was to feature in imminent media coverage. Mr. O’Brien and his associates had already applied themselves to considering how Mr. Desmond’s involvement in Esat Digifone might be handled, and how his role might be portrayed in the light of the issue, as recorded by Mr. O’Connell on 3rd November, 1995, namely the “*problem re material change in shareholders vs. bid*”. If, as seems to be the case, it was the RTÉ query which propelled Mr. O’Brien into action, and was the source of his request to Mr. O’Connell to draft a letter to Mr. Brennan, it seems that Ms. Gleeson must have been mistaken in her recollection of having received notification late in the afternoon of Friday, 17th November, 1995. As Mr. O’Connell’s fax to Mr. O’Brien forwarding his draft letter was transmitted at

4.12pm that afternoon, the query must have been received by Ms. Gleeson some time earlier, and certainly sufficiently in advance of 4.12pm, to allow Ms. Gleeson time to make contact with Mr. O'Brien, to allow Mr. O'Brien time to instruct Mr. O'Connell, and to allow Mr. O'Connell time to produce his draft.

53.26 Mr. O'Brien clearly intended to speak to Mr. Brennan, and, in the light of the imminent exposure of Mr. Desmond's involvement, that would certainly have been a sensible course for him to take, and he undoubtedly so informed Mr. O'Connell, as acknowledged by the latter in evidence. Mr. Brennan was it seems not the only person who Mr. O'Brien decided to telephone on that day to discuss this issue, and it will be remembered that he also spoke to Mr. Kyran McLaughlin, of Davy stockbrokers, who, following that phone call, and the media coverage which ensued, wrote to Mr. O'Brien at length on the following Wednesday, 22nd November, 1995, referring to Mr. O'Brien's telephone call of *"last Friday"*, and raised with Mr. O'Brien a number of questions regarding the involvement of IIU, some of which remained unanswered for many months, and one of which was never addressed, namely:

"At what stage were the Dept. of Communications and the Assessors told of changes in the institutions providing finance to the Consortium?"

53.27 It is of course possible that Mr. O'Brien instructed Mr. O'Connell to draft a letter to Mr. Brennan on a prospective basis, before he had telephoned Mr. Brennan, and then for some reason changed his mind, and decided against that course. It seems to the Tribunal singularly unlikely that Mr. O'Brien would have done so, and would have permitted information about Mr. Desmond in the possession of the media to emerge, the full extent of which would have been unknown to him, without having first endeavoured to explain matters to the Department, in accordance with the line which had been carefully considered and framed by Mr. O'Brien and his advisers earlier that month. Mr. Brennan did have a recollection of Mr. O'Brien telephoning him and inquiring whether a change of brokers would be problematic for the Department, and thought that such telephone contact was on a fairly casual basis. Moreover, unless there was some other point of contact between the consortium and Mr. Brennan, of which there was no evidence, it seems that senior Communicorp officials understood that the matter had been discussed with Mr. Brennan prior to 21st November, 1995, and further understood that the Department did not regard Mr. Desmond's involvement as problematic. Having regard to all of these elements of the evidence, and in particular the existence of a clear documentary trail, the Tribunal is satisfied that Mr. O'Brien did telephone Mr. Brennan on Friday, 17th November, 1995, and did prepare the ground with the Department in advance of the media disclosure of Mr. Desmond's role.

53.28 There remains Mr. O’Connell’s draft letter, which, as has already been adverted to, Mr. O’Brien believed that he did not in the event send. There was certainly no evidence that the letter was ever sent, or was ever received by the Department. It is the case that the draft was carefully prepared by Mr. O’Connell on Mr. O’Brien’s instructions, that Mr. O’Connell was certainly not aware that Mr. O’Brien had refrained from sending the letter, and he had never been told as much by Mr. O’Brien. Nor indeed did either Mr. O’Connell or Mr. O’Brien proffer any reason as to why that course might have been taken. This was not the only letter drafted by Mr. O’Connell for sending to the Department that was not ultimately forwarded, but on that other occasion, which occurred at a much later point in the licensing process, and will be returned to, Mr. O’Connell believed that the letter, in the form drafted by him, had not been sent following a decision made, either at the request of or with the acquiescence of the Department.

CONTINUING CONSIDERATION BY CONSORTIUM OF PRESENTATION OF MR. DESMOND’S SHAREHOLDING

53.29 Following the media coverage and the contact with Mr. Brennan in November, 1995, members of the consortium were it seems satisfied that the Department knew that Mr. Desmond, through his company, IIU, was to be involved in Esat Digifone. As Communicorp’s consultant, Mr. Richard O’Toole, put it in his evidence, it was common knowledge at this time, even amongst persons not involved in Esat Digifone, that IIU had some relationship with the consortium, and he noted that there had even been publicity surrounding that in the media. Moreover, it was understood that the matter had been the subject of discussion with Mr. Brennan, who, as Mr. O’Connell put it, was regarded by the consortium as the decision-maker on the Departmental side, and from whom there had been an intimation that Mr. Desmond’s involvement would not be problematic for the Department.

53.30 What continued to be a source of concern for members of the consortium was that the Department had not it seems yet been informed, either formally or casually, and did not know, that Mr. Desmond’s shareholding was not to be confined to a 20% shareholding, but that his entitlement extended to a 25% shareholding, and that in consequence the capital configuration of the intended licensee, as detailed in the Esat Digifone application, and as evaluated by the Project Group, had been altered, and that it was intended that the shareholding of Communicorp and Telenor would be diluted from 40% each to 37.5% each.

53.31 These concerns were evident and were recorded by solicitors acting for members of the consortium in attendances made by them after November, 1995. It was also it seems a concern of which other Communicorp advisers were acutely

conscious. In a document which, although undated, was confirmed by Mr. Paul Connolly to have been generated by him some time between 22nd November, 1995, and Christmas, 1995, the “*Need to clarify IIU involvement to Department*” was emphasised, and the “*Political aspects*”, as noted by him, included the fact that Mr. Lowry had made a speech in Dáil Éireann, in which he had stated that the shareholding in Esat Digifone would be in accordance with the ratio 40:40:20. That speech had in fact been made by Mr. Lowry on 22nd November, 1995.

53.32 Mr. Richard O’Toole, who was then actively involved in negotiating a shareholders agreement which had yet to be finalised, was recorded by Mr. Halpenny as having raised, in the course of a telephone conversation between them, on 8th January, 1996, the “*20% v 25% issue*”. That same issue likewise featured in shareholder discussions between Communicorp and Telenor representatives at the offices of William Fry some two days later on 10th January, 1996, at which Mr. O’Toole was also in attendance with Mr. O’Donoghue, and Mr. Simonsen and Mr. Haga represented Telenor, and which was noted by Telenor’s solicitor, Mr. Arthur Moran, in his attendance of the meeting in the following terms:

“Dept still believes in 40:40:20 split.”

53.33 This issue had by January, 1996, assumed some urgency, as it was anticipated that the Department would imminently request sight of the Esat Digifone shareholders agreement, the negotiation of which, as between Communicorp and Telenor, was then at an advanced stage. Although negotiations with Mr. Desmond, through IIU, which were in large part conducted by Dr. Walsh, had not progressed at the same pace, there was a realisation that, once the shareholders agreement was requested by the Department, disclosure of Mr. Desmond’s entitlement, and of the full extent of that entitlement, could no longer be deferred. In that regard, in a lengthy memorandum dated 16th January, 1996, addressed to Mr. O’Brien, Mr. O’Toole recommended that a shareholders agreement should then be concluded between Communicorp and Telenor, on the basis that they would each hold 50% of the shares in Esat Digifone, whilst continuing to negotiate with IIU with a view to concluding a trilateral agreement based on a shareholder ratio of 37.5: 37.5: 25. Mr. O’Toole testified that what he had in mind was that a bilateral shareholders agreement would be submitted to the Department, the Department would be informed that negotiations were proceeding with IIU, and that it was envisaged that IIU would subscribe for up to 20% of the shares in Esat Digifone, and that a further 5% would also be allocated to IIU. In that memorandum to Mr. O’Brien, Mr. O’Toole made reference to what he termed the “*line*” which had been worked out by Mr. Owen O’Connell and Mr. Pádraig O hUiginn, to be consistent with the bid document.

53.34 What Mr. O'Toole was referring to was the product of an exercise undertaken by Mr. O'Connell and Mr. O hUiginn, to devise an explanation for Mr. Desmond's 25% shareholding, which would enable that shareholding to be portrayed in a manner consistent with the shareholder information submitted in the Esat Digifone application. Mr. O'Connell discussed this matter with Mr. O hUiginn, who, according to Mr. O'Connell, because of his knowledge and experience of the workings of the civil service, and of politics generally, gleaned from his former position as Secretary General to the Department of the Taoiseach, would have had a sense of what might be acceptable. Mr. O'Connell also recalled that Mr. O'Brien and Mr. Peter O'Donoghue might have had a hand in their deliberations.

53.35 The solution which they arrived at to explain Mr. Desmond's 25% shareholding, and to make it at least arguably appear consistent with what had been stated in the Esat Digifone application, was to treat Mr. Desmond's 20% shareholding entitlement as representing the shareholding intended to be held by the four financial institutions, and to treat his additional 5% shareholding entitlement as a pre-placement of part of 12% of the shares in Esat Digifone, which it had been stated in the application might be made available to the market for subscription in the medium term, after the grant of the GSM licence. Mr. O hUiginn recognised that, in arriving at that formulation, he and Mr. O'Connell had been engaged in constructing an argument. Likewise, Mr. O'Connell accepted that their explanation of an accelerated pre-placement of shares was a rationalisation of what had transpired, but he nonetheless regarded it as falling within the concept of the professional presentation of his client's actions in the best possible light.

53.36 That rationalisation reflected an artificial construction of what had occurred on 29th September, 1995, and what had been provided for by the arrangement agreement and the side-letters concluded between the parties. Esat Digifone had never resolved to accelerate the placement of part of the 12% shareholding, which its application contemplated might be made available to the market some number of years after it received the licence. Nor had it resolved to make that accelerated placement available to Mr. Desmond. What had in fact occurred was that Esat Digifone had agreed that 25% of its shareholding would be made available to Mr. Desmond in consideration for the provision by him of underwriting for Communicorp's capital requirements as a 37.5% shareholder in Esat Digifone. That commitment entailed an acceptance by both Communicorp and Telenor of a dilution of their respective shareholder rights from 40% to 37.5%.

53.37 Whilst Mr. O’Connell and Mr. O hUiginn had applied themselves to and had finalised that rationalisation before Christmas, 1995, and whilst Mr. Richard O’Toole had recommended that the bilateral shareholder agreement should be submitted to the Department in January, 1996, with the explanation he had proposed, which included the O’Connell/O’hUiginn “line”, no such step was taken. The consortium took no precipitous action, and, despite further and deeper media coverage surrounding Mr. Desmond’s role, kept its counsel as regards the altered shareholding configuration. The Department was told nothing more until, as Mr. O’Connell put it, Ms. Regina Finn of the Department asked the relevant question, in the course of a telephone conversation between them, on 16th April, 1996. It was that question which prompted the consortium to furnish the information which it had been holding since the previous 29th September, 1995, and to do so in terms of the rationalisation devised by Mr. O’Connell and Mr. O hUiginn many months earlier. More detailed reference will be made in a later chapter to Mr. O’Connell’s letter of 17th April, 1996, and to the actions then taken by the Department, when it was finally obliged, by reason of Mr. O’Connell’s letter, to confront the issue of Mr. Desmond’s involvement and his level of shareholding.

DEEPER MEDIA COVERAGE OF 28th FEBRUARY, 1996

53.38 On Wednesday, [28th February, 1996](#), an article appeared in The Irish Times written by Mr. John McManus, the then business correspondent of the newspaper, under the following prominent heading:

***“Esat seeks £30m in debt to fund
mobile phone network launch.”***

This was a far more detailed and comprehensive piece than the press reports which had appeared the previous November. The focus of the article was on Mr. O’Brien’s Credit Suisse First Boston fundraising in the United States, then at an advanced stage of preparation. The article contained wide-ranging information of depth which had not previously entered the public domain. It revealed two highly significant items of information. Firstly, it disclosed that the shareholding in Esat Digifone was to be held as to 37.5% by Communicorp, as to 37.5% by Telenor, and as to 25% by Mr. Desmond, through his company, IIU. Secondly, it disclosed that the £30 million, required by Communicorp to meet its equity commitments to Esat Digifone, was in the process of being raised on the US market by Credit Suisse First Boston, through the issue of loan notes. In that regard, it also referred, again for the first time, to the fact that, in order to facilitate that fundraising exercise, a new company would be created, Esat Holdings, through which all of Communicorp’s telecommunications interests would be held.

53.39 The article was not without colour, in that it identified Mr. O hUiginn, former Secretary General of the Department of the Taoiseach, Mr. John Callaghan, former managing partner of KPMG chartered accountants, and Mr. Leslie Buckley, a management consultant, as outside investors in this new company. It also recorded comments of Ms. Eileen Gleeson, described as a spokeswoman for Esat Digifone, and information provided by the Department that negotiations with Esat Digifone were at an advanced stage. A copy of this article can be found in the Book of Appendices to this Volume.

53.40 The comment attributed to Ms. Gleeson was that the project would be financed through a mixture of equity provided by consortium members, and debt raised by Esat Digifone, and that the equity finance was committed and underwritten. Ms. Gleeson recalled that Mr. McManus had telephoned her in advance of publication of the article, probably on the previous day. It was her recollection that he had put specific queries to her regarding the financing of the GSM project. Before answering those queries, Ms. Gleeson thought that she might have consulted Mr. O'Brien, or possibly Mr. Paul Connolly, but she observed that she thought that Mr. O'Brien was then in the United States in connection with the US fundraising exercise. Ms. Gleeson would not have known at the time that there was any prohibition on release to the media of the fact of Mr. Desmond's entitlement to a 25% shareholding in Esat Digifone.

53.41 Mr. Joe Jennings, the Departmental Press Officer, confirmed that it was he who had been the source of the information, attributed to the Department by Mr. McManus, that negotiations were at an advanced stage. He testified that, during the course of the process, he had been in regular contact with Mr. Michael Lowry, and appropriate Departmental officials, regarding press queries. The Departmental officials with whom he had regular contact were Mr. John Loughrey, Mr. Sean Fitzgerald, Mr. Martin Brennan and Mr. Fintan Towey. Apart from the press cutting service, provided to the Department by an outside agency, which entailed the circulation of all relevant press cuttings to Departmental officials of Principal Officer or higher rank, it was also Mr. Jennings' practice to scan the newspapers himself. He recalled seeing the articles published in The Irish Times and in The Irish Independent the previous November, and he imagined that others would also have seen them if they had been in the Department on the day.

53.42 Mr. Jennings recalled the article published in The Irish Times on 28th February, 1996, and the queries he had received from Mr. McManus prior to publication. He testified that he would have relayed those queries to Mr. Loughrey, Mr. Fitzgerald or Mr. Brennan. They would have decided on the proper response, and Mr. Jennings would then have conveyed that response to Mr. McManus. Although Mr. Jennings could not recollect which of those Departmental

officials he had consulted on that occasion, he was adamant that he would not have responded of his own volition. Having furnished that response on the part of the Department, Mr. Jennings testified that he recalled reading the article, as published in *The Irish Times*, to ensure that the Departmental response had been accurately and correctly reported. It was his view that the article would also have been seen by the Departmental officials involved, or it would have been brought to their attention. Mr. Jennings impressed the Tribunal as an experienced and skilled media practitioner, and as a careful witness, and it has no reason to doubt the reliability of his evidence.

53.43 The article revealed publicly for the first time that, contrary to the information which had been provided in the Esat Digifone application, and contrary to the earlier press coverage, Mr. Desmond was not merely to act as an adviser or as a broker to Esat Digifone, in place of Davy stockbrokers, but he was to be a direct shareholder in Esat Digifone, and was to hold 25% of the shares. That shareholding was to be at the expense of the shareholdings of Communicorp and Telenor, which were to be at a level below that notified in the Esat Digifone application, and were to be diluted from 40% to 37.5%. The article further revealed, again for the first time, important information about Communicorp's equity investment, which had been a source of such concern to the Department, and had resulted in a recommendation in the Evaluation Report that licence conditions should be imposed to meet the consequences of instability arising from Communicorp's negative equity. According to the Esat Digifone application, Communicorp's equity share was to be covered by £30 million to be provided by Advent, but the article stated that it would not be so funded, but was to be raised by a placement on the US market. Furthermore, Communicorp was no longer to exist in the form specified in the Esat Digifone application, and was no longer to be Mr. O'Brien's shareholding vehicle in Esat Digifone, but rather a newly created company, Esat Holdings, was intended to perform that function, and that company was to hold only Mr. O'Brien's telecommunications interests.

53.44 Despite the fact that all of this critical information was in the public domain, in the form of an authoritative article by a professional commentator of considerable repute, and that the information was of immediate significance to the licensing process in which the Department was then engaged, it seemingly prompted no response whatsoever on the part of the Department. The explanation given to the Tribunal for this inaction was that, in common with the press coverage of November, 1995, none of those Departmental officials, namely, Mr. Loughrey, Mr. Fitzgerald, Mr. Brennan or Mr. Towey, had seen the article, or knew of its contents, and they continued to be unaware of that information.

53.45 Mr. Loughrey testified that he was baffled and disappointed that he had missed the article. Mr. Fitzgerald, for whom Communicorp's finances had been such a source of unease from the earliest indication that Esat Digifone was emerging as a front runner, testified that the contents of the article had escaped his attention, although he could not explain how they went unnoticed by him. Likewise, Mr. Brennan had not seen it, but testified that his focus at the time had been towards Brussels, and that in February, 1996, he had spent roughly half of his working week travelling. Mr. Towey had been on leave, and had not returned to the Department until 5th March, 1996, which certainly went some way to explaining his oversight.

53.46 Although it was the evidence of those officials that they had not seen the article, and knew nothing of its contents, it was nonetheless the position that a copy of it was within the Departmental files. What is all the more significant is that, within the same Departmental files, the document which followed immediately after the copy article contained diagrammatic analysis of the share structure of Esat Digifone, which was self-evidently based on information derived from the article, including the fact that Mr. O hUiginn, Mr. Callaghan and Mr. Buckley were to be outside investors in the new company. Mr. Donal Buggy, the accountant on secondment to the Department from PricewaterhouseCoopers, acknowledged that he had prepared that document. He had no recollection of undertaking the analysis, although he acknowledged that the vast proportion of the information contained in his diagram represented information contained in the article. It was his belief, despite having no memory of events, that he must have undertaken that analysis as part of an evaluation which he conducted on the finances of Mr. Desmond which commenced on 13th May, 1996, some three days prior to the issue of the licence. He acknowledged however that the analysis formed no part of that evaluation, although he thought it was something he might have done of his own volition as a preparatory step.

53.47 It is difficult for the Tribunal to accept that Mr. Buggy's analysis of the Esat Digifone share structure, the information for which was derived from the article, was undertaken as part of a financial evaluation of Mr. Desmond which he conducted over the final days preceding the issue of the licence. By then, the share structure described in the article and represented in his diagram had been superseded by events, as the Department had required the restoration of the 40:40:20 shareholding ratio provided for in the Esat Digifone application, so that the exercise would have been nothing more than of historic interest. Irrespective of when that exercise was conducted, and the Tribunal is doubtful that it could have formed part of Mr. Buggy's final days' efforts, it is clear that the article did come to the attention of the senior officials by whom Mr. Buggy was instructed, and that it was regarded as an article containing significant information. It was

Mr. Buggy's evidence that, as regards the tasks he undertook in May, 1996, he had received instructions from Mr. Loughrey and Mr. Brennan.

53.48 The evidence of the Departmental officials of individual and collective ignorance of the information which was in the public domain from 28th February, 1996, regarding Mr. Desmond's role as a shareholder, his intended shareholding of 25% of Esat Digifone, and the altered arrangements for Communicorp's funding, was implausible. Not only was all of this information contained in a prominent article by a leading correspondent, it contained significant information relating to a matter of far-reaching consequence then being dealt with by the Department, and one which had been subject to public disquiet and scrutiny. Mr. Michael Lowry, as Minister, had already made a speech in the Dáil, and the Departmental officials were themselves, some short time later, to take the unprecedented course of convening a press conference. It is inexplicable that the article could have escaped the attention of the senior Departmental officials involved. Those officials were, the Tribunal is satisfied, alerted to its imminent publication by the Departmental Press Officer, Mr. Jennings, and they had been the authors of the Department's response. It is inconceivable in those circumstances that those officials would have been so casual and so indifferent that the article itself would have escaped their attention. The retention of a copy of the article on the Departmental files, and the provision of it to Mr. Buggy, for whatever purpose, puts the matter beyond doubt.

53.49 The Department's inaction in the face of this information was yet further evidence of the reluctance of Departmental officials to confront this issue. In the face of the officials' implacable insistence that they were unaware of the facts, the Tribunal was unable to explore with them why it was that they took no action at that point. It is however undeniably the case that the longer these matters remained in abeyance, the more difficult it would become for the Department, in view of the political and reputational consequences for the State, to take any course inconsistent with the culmination of the process in the grant of the licence to Esat Digifone.

THE STABILITY OF THE CONSORTIUM IS IMPERILLED

54.01 The tensions within the consortium, which had arisen in late September, 1995, from Mr. Denis O'Brien's efforts to persuade Mr. Arve Johansen that Telenor should absorb the entire of the 5% dilution required to make room for Mr. Desmond's 25% shareholding, resurfaced in early March, 1996. These tensions again arose as a consequence of Mr. O'Brien's activities in relation to the intended shareholding in Esat Digifone. On this occasion, what Mr. O'Brien was seeking was to secure an increased shareholding for Communicorp by acquiring roughly half of Mr. Desmond's entitlement. Mr. O'Brien initially sought to enlarge the Communicorp shareholding to 50.1% of Esat Digifone, which he subsequently tempered to 50%. His efforts did not just impact adversely on, and sour relations between, Communicorp and Telenor, but on this occasion extended to Mr. Desmond, and relations between the three shareholders became progressively so corrosive that the trust between them was undermined, and the very existence of the joint venture relationship itself was imperilled. These dealings culminated in a series of meetings and contacts over the weekend of Saturday, 11th and Sunday, 12th May, 1996, some four days before the licence was issued, at which Mr. O'Brien threatened Telenor and Mr. Desmond that he would seek to injunct the issue of the licence.

54.02 This instability, which had been foreseen as a risk both by Mr. Sean Fitzgerald, when he first heard that Esat Digifone was emerging as the front runner, and by AML, in the Evaluation Report, resulted directly from Communicorp's financial weakness and negative equity. Despite what Mr. O'Brien had stated at the oral presentation, Communicorp did not have £30 million available to it to fund its equity participation in Esat Digifone, and as already found, it was never intended that Communicorp's capital requirement would be covered by Advent. The winning of the GSM competition did not alter that fact. Those funds had yet to be raised, and as was always planned, they were to be raised on the US market, through a private placement by Credit Suisse First Boston. That fundraising could not proceed until the licence was granted, because it was Communicorp's interest in the licensed company that conferred value on it, and made it an attractive prospect for potential investors. However, as was confirmed by Mr. O'Brien in his evidence, the success of that exercise was dependent on Communicorp obtaining rights to 50% of the shares in Esat Digifone, and it was Mr. O'Brien's activities in seeking to secure that 50% interest, perceived by Telenor as an effort to take control of Esat Digifone, which were at the root of the shareholder turmoil.

MR. O'BRIEN'S STRATEGY OF STRENGTHENING COMMUNICORP'S STAKE

54.03 Although Telenor did not learn of Mr. O'Brien's desire to enlarge Communicorp's shareholding until February, 1996, and did not become aware until early May, 1996, that Mr. O'Brien regarded himself as having reached agreement with Mr. Desmond to acquire 12.5% of Mr. Desmond's 25% entitlement, Communicorp had identified that objective as a necessity shortly after Mr. Michael Lowry announced the result of the competitive process. At that point, Mr. Paul Connolly, who was a non-executive director of both Communicorp and its subsidiary Esat Telecom, commenced an intensive involvement with Credit Suisse First Boston in connection with the fundraising, which ultimately proceeded successfully in June, 1996. Mr. Connolly operated his own corporate finance business, and had been retained as an adviser to Communicorp on project finance, and it will be recalled that he had, in conjunction with Davy stockbrokers, prepared a memorandum for prospective investors for the purposes of the recruitment in May, 1995, of support from Irish financial institutions.

54.04 In the initial post-competition period, Mr. Connolly, as adviser to Communicorp, undertook an analysis of the various courses open to Mr. O'Brien to restructure his holdings to facilitate the fundraising exercise. He identified a series of options available to Mr. O'Brien, the third of which was the one he recommended. That option entailed Communicorp, through a newly created company, Esat Holdings, in which both the fixed-line and mobile businesses would be consolidated, acquiring 51% of Mr. Desmond's 25% entitlement, which Mr. Connolly estimated would in total require funding of £41.89 million to be raised. This would result in a revised capital configuration for Esat Digifone of Communicorp holding a 50.25% shareholding, Telenor retaining a 37.5% shareholding, and Mr. Desmond holding a residual shareholding of 12.25%. In a memorandum which he furnished to Mr. O'Brien on 5th December, 1995, and in which he set out his detailed analysis, Mr. Connolly identified a number of issues which would arise consequent on the adoption of that option. These included the fact that the alteration of the shareholding in Esat Digifone would be inconsistent with the shareholding as notified in the Esat Digifone application to the Department, and the probability that Telenor would object. Despite these potential adverse implications, Mr. Connolly confirmed in evidence that it was this option which was adopted by Mr. O'Brien, and which informed his strategy of endeavouring to acquire roughly half of Mr. Desmond's 25% shareholding.

54.05 Having determined to take that course, Mr. O'Brien acted promptly and opened negotiations with Mr. Desmond, and on 10th January, 1996, made a formal written offer to him in a letter addressed to Dr. Michael Walsh. That letter,

headed “*Subject to CONTRACT*”, offered to purchase 12.6% of Mr. Desmond’s 25% entitlement. In return, Communicorp would pay all of the capital calls on Mr. Desmond’s remaining 12.4% shareholding up to a ceiling of £6.44 million, and would procure the release of IIU’s underwriting obligations under the arrangement agreement of 29th September, 1995. There was a further condition attached to Mr. O’Brien’s offer, namely, that Mr. Desmond would support Communicorp in securing, through a shareholders agreement, effective board control of Esat Digifone. The offer was subject to a number of further conditions, which significantly did not include the availability of consent from Telenor.

54.06 There were a number of features of that offer which warrant comment. Firstly, Esat Digifone, having not yet been capitalised, was, by virtue only of having won the competitive process, valued by Mr. Connolly at £52 million. Secondly, the offer would have met not only Mr. Desmond’s financing obligations on the acquisition of his residual 12.4% shareholding, but it would have released him from any liability, however remote, to underwrite Communicorp’s equity in Esat Digifone. Thirdly, it is evident that what Mr. O’Brien was endeavouring to achieve, through securing a majority shareholding in Esat Digifone and effective board control, was to displace the relationship of equality between Communicorp and Telenor.

54.07 By 10th January, 1996, the date of Mr. O’Brien’s offer to Mr. Desmond, it had of course become evident that the drafting of the GSM licence by the Department was going to take some further time. The first board meeting of Esat Digifone had been convened on the previous 20th December, 1995, in Dublin, and Mr. Arve Johansen and Mr. Knut Digerud had been appointed directors by Telenor on foot of its entitlement under the joint venture agreement of 3rd June, 1995. The minutes of that meeting noted that board representation from IIU was envisaged, once IIU had confirmed its acceptance of the draft shareholders agreement then under negotiation, and had committed to take up its proportionate share in the capital of Esat Digifone. Relations between Communicorp and Telenor were positive, and the negotiation of the shareholders agreement between them had proceeded to an advanced stage, and by January, 1996, it was only Mr. Desmond and IIU that were regarded as delaying its finalisation. Those relations were so constructive that on 11th January, 1996, Telenor had agreed in principle to provide £9 million in bridging finance to Communicorp to meet its investment obligations in Esat Digifone, pending the receipt of financing from the Credit Suisse First Boston fundraising. A formal document, entitled “*HEADS OF TERMS RELATING TO EQUITY INVESTMENT IN ESAT DIGIFONE LIMITED BETWEEN TELENOR INVEST A.S. (“Telenor”) AND COMMUNICORP GROUP LIMITED (“Communicorp”)*”, which recorded that facility, was executed on 11th January, 1996, and was signed by Mr. Knut Haga on behalf of Telenor, and by Mr. O’Brien on behalf of Communicorp. Telenor of course knew

nothing of the offer which had been made by Mr. O'Brien to Mr. Desmond the previous day.

54.08 Mr. O'Brien's advisers, Mr. Connolly and Mr. Richard O'Toole, were acutely conscious of the adverse impact that this offer to Mr. Desmond could have on relations with Telenor. Mr. O'Toole, in his lengthy memorandum of 16th January, 1996, to Mr. O'Brien on the shareholder negotiations, to which reference has already been made in the previous chapter, registered his reservations surrounding the likelihood of Telenor agreeing to the proposed deal with Mr. Desmond, particularly in view of the control implications. He further recorded that, in his view, even broaching the matter with Telenor would be likely to cause considerable concern on its part.

TELENOR OBJECTS

54.09 Mr. O'Brien did not inform Telenor that he had made the offer of 10th January, 1996, or any other offer, to Mr. Desmond. Instead, it seems that he decided to approach matters in a different way, which he did at a shareholders meeting in Dublin on 9th February, 1996, attended by Mr. Knut Digerud of Telenor, and by Dr. Walsh of IIU. At that breakfast meeting, Mr. O'Brien informed them that Credit Suisse First Boston had advised Communicorp that it would be able to raise funding on the US market on more favourable terms, if Communicorp consolidated its shareholding in Esat Digifone. Mr. O'Brien then formally asked both Mr. Digerud and Dr. Walsh whether Telenor or Mr. Desmond would be interested in selling a portion of their respective shareholding entitlements in Esat Digifone to Communicorp for that purpose. Following Mr. Digerud conveying to Mr. O'Brien that Telenor had no interest in reducing its shareholding, Mr. O'Brien, on 27th February, 1996, wrote to Mr. Digerud indicating that, in the light of Telenor's position, he intended to pursue matters with Dr. Walsh, and would keep Telenor informed. In the course of that letter, Mr. O'Brien intimated that he believed that an adjustment in the shareholding of Esat Digifone would be acceptable to the Department.

54.10 Telenor was disturbed by Mr. O'Brien's actions, and consulted its Solicitor, Mr. Arthur Moran, of Matheson Ormsby Prentice, who strongly advised Telenor that it should respond to Mr. O'Brien's letter by reminding Communicorp of the fundamental understanding of the joint venture, that Communicorp and Telenor would hold equal interests in Esat Digifone, and that Telenor required that the option of achieving that objective should at all times be retained. Mr. Moran, in his advices of 1st March, 1996, observed that Communicorp could not achieve a shareholding of more than 50%, unless Telenor agreed to take a shareholding of less than 50%. He also advised Telenor that Mr. Desmond was "a dealer" in shares, and would be happy to deal with Mr. O'Brien, provided the

terms were acceptable to him. He further observed, quite perceptively, that it was not inconceivable that there was already an agreement in place as to what would be acceptable terms to Mr. Desmond. In that regard, Mr. Moran, mindful that under the arrangement agreement of 29th September, 1995, Mr. Desmond was entitled to place his shareholding with other parties, and mindful that such a placement could be exercised in favour of Communicorp, suggested that Telenor should require Mr. Desmond to disclose the identities of the parties on whose behalf the shareholding would be taken.

54.11 Telenor took Mr. Moran's advice, and on 7th March, 1996, Mr. Arve Johansen wrote to Mr. O'Brien. In his letter of that date, he emphasised Telenor's need to preserve equality with Communicorp, and pointed out that this had always been the basis of Telenor's involvement. He nonetheless indicated that he recognised that Communicorp might be able to secure more favourable terms with a higher shareholding in Esat Digifone, and confirmed Telenor's willingness to consider a solution which would involve a proportionate increase in both of their respective shareholdings. On 12th March, 1996, Mr. Johansen forwarded a copy of that letter to Dr. Walsh, and in his covering fax stressed that Telenor's participation in Esat Digifone had always been founded on an equality of shareholdings by the two operating partners, and recorded his confidence that, if part of Mr. Desmond's stake should become available, it would be offered to Telenor on a pro rata basis. Mr. Johansen, having made Telenor's views known to Mr. O'Brien and Dr. Walsh, was, it seems, reasonably happy that he had ensured that Communicorp would not be able to engineer a majority shareholding for itself, and that the principle of equality in the shareholding of Communicorp and Telenor would be respected by Mr. Desmond. It seems that in that regard he was correct, as Dr. Walsh and Mr. Desmond recognised that the acquisition proposed by Mr. O'Brien could not proceed without Telenor's consent, and Dr. Walsh confirmed that to Mr. O'Brien at a meeting with him on 13th March, 1996, also attended by Mr. Owen O'Connell, and by Mr. Neville O'Byrne, also of William Fry, who was by then representing Mr. Desmond and IIU.

54.12 The issue did not arise again until the early days of May, 1996. In the interim, the consortium pressed the Department for the issue of the licence, and took steps to increase the share capital of Esat Digifone, although no shares were allotted, nor capital calls made. On 17th April, 1996, following Ms. Regina Finn of the Regulatory Division asking Mr. O'Connell the correct and relevant question about the ownership of Esat Digifone, Mr. O'Connell wrote to the Department, detailing the full extent of Mr. Desmond's entitlement to a 25% shareholding, albeit in the context of the rationalisation which had been developed by him in conjunction with Mr. O hUiginn. The Department's response to that notification, and the further dealings between the consortium and the Department which ensued, will be returned to in detail in the next chapter of this Volume. As a result

of the further delay in the issue of the licence, it was clear that Communicorp's fundraising would also have to be deferred, and in consequence, Mr. Halpenny of William Fry wrote to Matheson Ormsby Prentice, Telenor's solicitors, on 11th April, 1996, requesting an extension of the repayment date for the £9 million bridging loan facility, which Telenor had agreed to provide to Communicorp, from 30th June, 1996, to 30th September, 1996.

54.13 One of the other matters which occupied the time of the parties' solicitors at this point, and which warrants mention, was the preparation of a draft side-letter to the shareholders agreement, which had not itself yet been finalised, primarily due to uncertainties surrounding the respective shareholdings of Communicorp and IIU. The side-letter was drafted by Mr. O'Byrne, of William Fry, acting for Mr. Desmond and IIU, and was sent by him on 19th April, 1996, to his colleague Mr. Halpenny, acting for Communicorp, and to Mr. Moran of Matheson Ormsby Prentice, representing Telenor. This letter related to Mr. Desmond's entitlement to make a once-off transfer of his shareholding, free of the pre-emption provisions contained in the draft shareholders agreement. These provisions conferred on Telenor and Communicorp a pro rata right to acquire any shares in Esat Digifone which Mr. Desmond intended to dispose of. In practice, these provisions meant that Communicorp and Telenor would be able to maintain their shareholder equality, as on any such disposal of shares by Mr. Desmond, they would be entitled to purchase them equally. However, as Mr. Desmond, through Bottin International, as assignee of IIU, was entitled to place his 25% shareholding with other parties, it was recognised that he should have an entitlement to vest those shares in such third party investors, should he wish to do so, free of the pre-emption provisions. This right to one free transfer was agreed, and was ultimately enshrined in a side-letter to the shareholders agreement signed on 16th May, 1996, even though those shares, which by then accounted for a 20% shareholding in Esat Digifone, were it seems, to the knowledge of his co-shareholders, held by Mr. Desmond, through his nominee company, on his own account. That one free transfer was not deployed by Mr. Desmond until the year 2000, when he held just one share in Esat Digifone, having disposed of the entire of the rest of his holdings equally to Communicorp and Telenor, and when he exercised it in favour of a subsidiary of British Telecom.

TELENOR LEARNS MORE

54.14 Although Mr. Desmond and Dr. Walsh recognised that Telenor would have to agree to any expansion of Communicorp's shareholding through a placement of Mr. Desmond's shares, it seems that negotiations had nonetheless proceeded in the meantime between Communicorp and Mr. Desmond. On 1st May, 1996, when the capitalisation of Esat Digifone was impending, Dr. Walsh wrote to Mr. O'Brien confirming his understanding of the joint position of

Communicorp and Mr. Desmond. He recorded that IIU had agreed that it would place 12.5% of its shares with Communicorp for a payment of £6.5 million, being 12.5% of £52 million, together with any capital contributions made by IIU in relation to that 12.5% shareholding. Dr. Walsh noted that IIU's willingness to place those shares with Communicorp was conditional upon a number of matters, including IIU being satisfied that Telenor would continue to support the Esat Digifone project.

54.15 It seems that on the following day, 2nd May, 1996, Mr. O'Brien informed Mr. Johansen that those terms had been agreed between Communicorp and Mr. Desmond, and Mr. Johansen was furnished with a copy of Dr. Walsh's letter. It was Mr. Johansen's evidence that he regarded this as a dramatic turn of events. Telenor had believed that the issue had been dealt with two months earlier in March, 1996, when he had corresponded with both Mr. O'Brien and Dr. Walsh, reasserting Telenor's insistence that the principle of equality should be maintained. Mr. Johansen's dissatisfaction on learning that, notwithstanding Telenor's position, negotiations had proceeded on the same footing, was compounded by what emerged at a meeting in the Department on the following day, Friday, 3rd May, 1996. It was a combination of what he had learned from Mr. O'Brien on 2nd May, 1996, and from the Department on 3rd May, 1996, that impelled him to generate his personal memorandum of 4th May, 1996, which has already been referred to in Chapter 28 of this Volume, in relation to the Oslo meeting of 22nd September, 1995, and subsequent dealings between Mr. O'Brien and Mr. Johansen.

54.16 The meeting in the Department on 3rd May, 1996, followed from Mr. O'Connell's notification of the altered ownership details to the Department on the previous 17th April, 1996. The Department had formally responded to that letter in writing, on 1st May, 1996, and had sought further details of the altered ownership structure, together with financial information regarding IIU, Mr. Desmond's corporate vehicle. This meeting on 3rd May, 1996, and the events surrounding it, will be returned to in greater detail in the context of an examination of the political and Departmental response to the altered ownership issue. It should however be recorded at this point that it was from the contents of Mr. Johansen's memorandum of 4th May, 1996, which was produced to the Tribunal within records provided by Telenor, that the Tribunal first discovered that a significant meeting had taken place in the Department, on Friday, 3rd May, 1996, between Departmental officials and representatives of the membership of the consortium. There was no record or reference to that meeting in any of the Departmental files produced to the Tribunal, and until the Tribunal received a copy of Mr. O'Connell's attendance of that meeting, none of the Departmental officials in attendance had evinced any recollection of what had transpired on that occasion.

54.17 In recounting what Mr. Johansen learned at the meeting of 3rd May, and his reaction to that information, and to the revelations of the previous day, it is to his own words, as recorded by him in his memorandum, and confirmed by him in evidence, that reference can most usefully be made. The tone of his memorandum reflected the anger and resentment which, he testified, he had felt as a result of these developments, and his distrust of Mr. O'Brien, and of his motives for introducing Mr. Desmond to the consortium in September, 1995. The initial paragraphs of [Mr. Johansen's memorandum](#), described in evidence by Mr. O'Brien as the "conspiracy memorandum", have already been quoted in Chapter 28, and a full copy can be found in the Book of Appendices to this Volume. In those first five paragraphs, Mr. Johansen had documented the events of September, 1995, and had concluded by recording his view that, in hindsight, it was apparent to him that Mr. O'Brien's motive in promoting Mr. Desmond as a member of the consortium was to strengthen Communicorp's finances, which strengthening had, to his mind, been paid for by Esat Digifone shares, at a cost to Telenor. He then proceeded to record his impressions of what had occurred over the previous two days in the following terms:

"6. As we go along we learn more, but it all serves to disclose more details which again more and more prove the above scenario.

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

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

'I think it would be a very prudent thing for Telenor to do - especially since we then effectively underwrite the whole project, both Communicorp and IIU, after already having paid Communicorp's price for the first underwriting which now

appears to be useless.'

7. *But the story doesn't end there. Two days ago I was informed by Denis that he had entered into an agreement with IIU to buy back 12.5% of the shares now held by IIU. I found it absolutely unbelievable, and made it clear that Telenor would not accept anything but equal partnership, either we buy 6.25% of the IIU held shares each, or Telenor should take the other 12.5% of the IIU held shares.*

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

- => *IIU apparently has no (or very little at least) money and cannot afford more than 12.5%. The price agreed is a little cryptic, but it looks as though any advances IIU has to make for the disposed 12.5% before the transaction's effective date (31 May 1996) is seen as cost (???). It will, if this is the case, serve as a moving target for IIU's eventual gain on the transaction, putting an immense pressure on Communicorp to delay capital calls in Digifone until the US placement is finalised.*
- => *The return **favour** from Communicorp is to release IIU from **all of its underwriting obligation in Digifone**. Does Digifone have an opinion on this and what about Telenor? This effectively gives Communicorp back its 12.5% of the shares at par (or close to), releases IIU from all of its underwriting liability (which Digifone "paid" 25% for), **and IIU ends up having delivered absolutely nothing**, having done nothing but complicated the award of the license (if we get it at all), but with (some cash?) and **12.5% of the shares of Digifone which effectively have deprived from Telenor**, at the same time as the Department - and our honoured partners - gently ask us to underwrite the whole project,*
- => *Fortunately, IIU is at least realistic enough to see that this cannot take place unless Telenor continues to support the project. This fact, the time limit and the co-operative spirit shown (by disclosing the letter) may signal a hope for a sensible solution to this mess."*

54.18 Mr. Johansen confirmed in evidence that it was his impression, from what had been stated by the Departmental officials at that meeting, that the introduction of Mr. Desmond to Esat Digifone had raised both political and reputational difficulties for the Department, and, far from having had a positive impact, it had contributed significantly to the Department's reservations surrounding the finances of Esat Digifone. He further testified that Mr. Martin Brennan had at that meeting asked Telenor to underwrite the finances of the entire project.

54.19 The relationship between Communicorp and Telenor, following the revelations of those two days, was seriously imperilled. Mr. Johansen was emotional and angry, and felt that Mr. O'Brien had taken advantage of Telenor by introducing Mr. Desmond for his own purposes, and persuading Mr. Johansen to agree to Telenor absorbing a consequent dilution of its shareholding. He testified that it was then apparent to him that, contrary to what had been represented to him by Mr. O'Brien in September, 1995, Mr. Desmond had not contributed positively to the consortium, but, on the contrary, his role had undermined the consortium's standing. In addition, Mr. O'Brien was then seeking to acquire 12.5% of Mr. Desmond's shareholding entitlement, and thereby constitute Communicorp a 50% shareholder in Esat Digifone. Mr. Johansen testified that at that time he had begun to regard Mr. Desmond's shareholding as an instrument by which Mr. O'Brien could take control of Esat Digifone.

SHAREHOLDER RELATIONS DETERIORATE FURTHER

54.20 It was against this background of distrust that some six days before the licence was issued, the three shareholders commenced two days of intensive negotiations over the weekend of Saturday, 11th and Sunday, 12th May, 1996. Their interactions over those days were not just directed to resolving the Communicorp share issue. A further dimension had in the meantime arisen by virtue of the Department's requirement that the shareholding of Esat Digifone should revert to the configuration specified in the application, announced publicly, and referred to by Mr. Michael Lowry in the Dáil, namely, 40%, 40%, 20%, which requirement had been conveyed by telephone to Mr. Owen O'Connell by Mr. Fintan Towe on the previous Tuesday, 7th May, 1996, and which will be returned to in a later chapter. The licence was then about to be issued by the Department, the shareholders agreement had not yet been finalised, Esat Digifone had yet to be capitalised, even to the extent of the £15 million required to discharge the licence fee due to the Department, and there was by then a complete breakdown of trust between Communicorp and Telenor by virtue of Mr. O'Brien's actions. As will be seen, that distrust also permeated and infected

relations between Mr. O'Brien and Mr. Desmond, as the shareholders jockeyed for position over that final weekend.

54.21 The series of meetings over that weekend were prefaced by a meeting, on Friday, 10th May, 1996, between Communicorp and Telenor representatives, at the offices of Matheson Ormsby Prentice. Mr. Johansen had arrived back in Dublin from Oslo, accompanied by Mr Rolf Busch, Telenor's General Counsel, and they were both in attendance, as was Mr. Moran of Matheson Ormsby Prentice. Mr. O'Brien was not present, and Communicorp was represented by Mr. Leslie Buckley and Mr. Gerard Halpenny. Mr. Digerud, who was by then Chief Executive of Esat Digifone, was also in attendance, as was Mr. O'Connell. It seems that at this meeting both sides restated their respective positions regarding Communicorp's desire to consolidate its shareholding in Esat Digifone to 50%, although it seems that by then Communicorp was prepared to adhere to the principle of equality in the control, as opposed to ownership, of Esat Digifone. Mr Johansen wrote to Mr. O'Brien following that meeting, again emphasising that Telenor insisted on adherence to the equal participation principle, and stated unequivocally that the proposal to increase Communicorp's shareholding to 50% jeopardised fundamentally the basis for the joint venture between Communicorp and Telenor. He did however seek to strike a conciliatory chord, by indicating that Telenor would be happy to discuss a bridging arrangement to allow Communicorp time to put together financing on the basis of its existing shareholding. A courtesy copy of that letter was sent to Mr. Desmond.

54.22 On the following day, Saturday, 11th May, 1996, Mr. Desmond and Dr. Walsh attended a series of bilateral meetings. Dr. Walsh initially met Mr. Johansen, Mr. Busch, and Mr. Moran, and it seems, from what Dr. Walsh subsequently conveyed to Mr. Paul Connolly, that it was his impression from that meeting that Mr. Johansen had become even more entrenched in his opposition. Mr. Johansen furnished Dr. Walsh with a letter, which again confirmed Telenor's objection and, as with the letter of the previous day to Mr. O'Brien, recorded that Telenor could not confirm that it would continue to support the project, if it ended up with a lesser shareholding than Communicorp. In that regard, Mr. Johansen testified that, had Mr. Desmond proceeded to transfer additional shares to Communicorp in the face of Telenor's opposition, Telenor would have withdrawn from the project.

54.23 At 6:00pm that Saturday evening, Mr. O'Brien met Mr. Desmond. It seems that at that meeting, as far as Mr. O'Brien was concerned, Mr. Desmond had proposed that he would agree to transfer a 2.5% shareholding to each of Communicorp and Telenor to facilitate the realignment of Esat Digifone's share configuration to 40%, 40%, 20%, as required by the Department, and the

shareholders agreement would be signed on the basis of that share configuration. In a separate transaction, Mr. Desmond proposed that he would sell a further 5% shareholding to each of Communicorp and Telenor, thereby increasing their respective shareholdings to 45%, and would grant an option to Communicorp, exercisable twelve months later, to acquire yet a further 5% shareholding. This would enable Communicorp to consolidate its shareholding at 50% by 1997, which would apparently satisfy its fundraising requirements. According to Mr. O'Brien's note, as witnessed by Mr. Connolly, Mr. Desmond would "force" through that option, as Telenor knew that he had an entitlement to one transfer free of pre-emption rights. In other words, he would use that right not for the purpose for which it was intended, namely, to place shares with third party investors, but to enable Communicorp's shareholding to be increased.

54.24 Mr. O'Brien, together with Mr. Paul Connolly, then met Dr. Walsh at 7.00pm in Mr. Connolly's office. Dr. Walsh, according to Mr. O'Brien's note, told Mr. O'Brien and Mr. Connolly about his earlier meeting with Mr. Johansen, and showed them a copy of Mr. Johansen's letter. Mr. O'Brien outlined his understanding of the proposals made to him by Mr. Desmond earlier that evening, and it seems requested that those proposals be put in writing. The meeting having concluded, Dr. Walsh telephoned Mr. O'Brien at 8.00pm. In the meantime, Dr. Walsh had spoken to Mr. Desmond, and had conveyed Mr. O'Brien's request that Mr. Desmond's proposals of earlier that evening be put in writing. Mr. Desmond's response, as relayed by Dr. Walsh, and noted carefully by Mr. O'Brien, was that he did not want "*any pieces of paper around reflecting what he discussed*", and that Mr. O'Brien "*would have to trust DD*". In that regard, it seems that Mr. O'Brien was concerned to ensure that Mr. Desmond would not sell his residual 10% shareholding to Telenor, leaving Telenor with a majority shareholding of 55%, and Communicorp with a minority shareholding of 45%.

54.25 On Sunday, 12th September, 1996, a large gathering assembled in the offices of William Fry, solicitors, for what was to be a lengthy meeting which did not conclude until the early hours of the following morning. Mr. Johansen was accompanied by Mr. Busch and Mr. Moran, Dr. Walsh was accompanied by Mr. O'Byrne, and Mr. Connolly and Mr. Halpenny were also present. Mr. O'Brien arrived at a later stage of proceedings, and Mr. Desmond, although not present, was in telephone contact. Mr. O'Connell, who kept a detailed attendance in which he traced the ebb and flow of the negotiations which proceeded, testified that the principal purpose of the meeting was to finalise the mechanism whereby the share structure would revert to the 40%, 40%, 20%, proportions disclosed in the Esat Digifone application.

54.26 Whatever proposals or deal were discussed by Mr. O'Brien and Mr. Desmond at their 6:00pm meeting of the previous evening, Mr. Desmond, in the face of Telenor's continuing opposition, and indication that it would not support the project if the principle of equality was breached, had reconsidered matters. What was then proposed was that Mr. Desmond would cede a 2.5% shareholding to each of Communicorp and Telenor to restore the share configuration to its pre-existing ratio, and would indicate, without formal confirmation, or binding commitment, that he would transfer a further 10% shareholding equally between them, after the licence had issued. Mr. Desmond would require immediate payment for that 2.5% shareholding by Telenor, but would defer payment by Communicorp until end-May, 1996.

54.27 Mr. O'Brien, having joined the meeting, set forth his requirements. He wanted a four month deferral on payment to Mr. Desmond for the immediate transfer of the 2.5% shareholding; he still wanted to achieve a 50% stake in Esat Digifone, and he still wanted a commitment from Mr. Desmond regarding his intention to transfer the further 10% shareholding after the grant of the licence. It was clear from Mr. O'Connell's attendance, and was confirmed by him in evidence, that Mr. O'Brien then informed the meeting that, unless agreement along those lines was achieved, Communicorp would refuse to join in the acceptance of the licence until 20th May, 1996, when its fundraising would be complete; a date which Mr. O'Connell testified he regarded as optimistic. Following a further restatement of Telenor's position, and an indication that Mr. Desmond would not be prepared to reduce his shareholding below 10%, Mr. O'Connell recorded that Mr. O'Brien had informed the meeting that he no longer trusted Mr. Desmond or Dr. Walsh, and that he would seek an injunction to block the signing of the licence.

54.28 Following Mr. O'Brien's declaration, Dr. Walsh telephoned Mr. Desmond, and then relayed Mr. Desmond's response to Mr. O'Brien's demands, as follows:

"If Denis wants something in writing, he doesn't trust me..."

It seems that Dr. Walsh made it clear to Mr. O'Brien that Mr. Desmond was deeply offended by Mr. O'Brien's attitude, and he recommended that Mr. O'Brien should telephone Mr. Desmond immediately, "*apologise profusely*", and indicate precisely what it was he required, and why. Mr. O'Brien did then telephone Mr. Desmond, and, arising from that contact, it seems that a solution was finally found which met the most pressing concerns of the three shareholders.

54.29 Those terms, as confirmed by Mr. O'Connell, entailed the following:

- (i) Mr. Desmond would sell a 2.5% shareholding to each of Communicorp and Telenor for payments of £1.375 million by each of them. Completion was to be as soon as possible, and payment was to be made by Telenor to Mr. Desmond on completion. Communicorp's payment would be deferred until end-May, 1996, although Mr. O'Brien might request a further fourteen days grace if the Credit Suisse First Boston fundraising was delayed. That payment by Communicorp was to be secured by a mortgage over the 2.5% shareholding to be transferred to Communicorp by Mr. Desmond.
- (ii) Within ten days of the issue of the licence, Mr. Desmond would offer a further 5% shareholding to each of Communicorp and Telenor, on payment terms to be agreed, which would result in a share configuration of 45%, 45%, 10%.
- (iii) Under a "*gentleman's agreement*", Mr. Desmond would dispose of his remaining 10% shareholding at some point three years after the issue of the licence at a fair market value, and that disposal would be subject to pre-emption rights.

As regards the funding of Communicorp's £6 million capital contribution to Esat Digifone, to cover payment of the £15 million licence fee, Mr. O'Brien it seems wanted to borrow that £6 million in the proportion of 60% from Mr. Desmond and 40% from Telenor, as, according to Mr. O'Connell, he regarded Mr. Desmond as a friendlier lender. In the event, those funds were not advanced in accordance with that ratio, but were provided by Telenor as to 66.6%, and by Mr. Desmond as to 33.3%.

54.30 Mr. O'Connell testified that, having concluded those terms, the shareholders agreement could be finalised and signed without further delay. There were also side-letters to the shareholders agreement to be drafted, signed and exchanged between the three shareholders, to enshrine the principle that neither Communicorp nor Telenor would buy shares otherwise than on an equal basis, and that Mr. Desmond, through his vehicle IIU, would likewise not offer shares other than in accordance with that principle.

54.31 Whatever the status of the terms agreed at the meeting of 12th May, 1996, which Mr. O'Connell doubted were either binding or enforceable, aside from the initial transfer of a 2.5% shareholding to each of Communicorp and Telenor, to bring the share configuration of Esat Digifone into conformity with that specified in the Esat Digifone application, disposals were not in the event made by Mr. Desmond in accordance with those terms. The first disposal did not take

place within ten days of the issue of the licence, but was deferred until April, 1997, when an additional 5% shareholding was transferred to each of Communicorp and Telenor. The second disposal proceeded in April, 1999, when a further 4.5% shareholding was likewise ceded to each of Communicorp and Telenor, leaving Mr. Desmond holding a single share. The final disposal of that share by Mr. Desmond proceeded in January, 2000, when he invoked his entitlement to one free transfer, to dispose of that last share to a subsidiary of British Telecom.

54.32 It was Mr. O'Brien's evidence that all of the discord and distrust which arose between the shareholders, and in particular between Mr. O'Brien and Mr. Johansen, stemmed from Telenor's dissatisfaction with the Advent letter of 10th July, 1995. It was, to his mind, that dissatisfaction that drove him to have resort to Mr. Desmond, rather than a need for underwriting of Communicorp's shareholding, in order to dispel the Department's negative view of Communicorp's finances, as he understood that view. It was necessary to recruit Mr. Desmond to meet Telenor's requirements, even though Telenor had agreed to the submission of the Esat Digifone application, and notwithstanding that Mr. O'Brien had himself been the source of the letter signed by Mr. Knut Haga on 22nd September, 1995, but backdated to 15th September, 1995, which Mr. O'Brien contended represented Telenor's repudiation of the Advent letter. Telenor was, according to Mr. O'Brien, the author of those problems. As regards his activities in seeking to expand Communicorp's shareholding to 50%, and his dealings in that regard with Mr. Desmond, it was Mr. O'Brien's evidence that he had been frank with Telenor; he had been totally upfront with them, as he put it himself, and he had negotiated in good faith on the basis of equality.

54.33 Leaving aside any consideration of the business manoeuvrings or tactics of the three shareholders, there can be no gainsaying that it was Communicorp's financial incapacity which was the root cause of the instability in the consortium and the distrust between its members, which was so pronounced over the final weekend prior to the issue of the licence. Telenor intended to withdraw from the project, if any increase in Communicorp's stake was not reflected by a corresponding increase in its own stake. Mr. Johansen deeply resented the manner in which he believed Telenor had been treated, and he distrusted Mr. O'Brien's motives. Mr. O'Brien threatened his partners with an injunction to block the issue of the licence, and he likewise distrusted Mr. Johansen and Telenor, and wished to limit Communicorp's financial exposure to Telenor. He also suspected Mr. Desmond's and Dr. Walsh's motives, so much so that he regarded it as a possibility that, after Mr. Desmond's residual shareholding had been reduced to 10%, he might cede that entire 10% shareholding to Telenor, to constitute Telenor the majority shareholder in Esat Digifone. Whilst a pragmatic solution was ultimately found, which enabled the

shareholders to coalesce, and enabled the roll-out of the GSM network, there can be no doubt that the joint venture, due to Communicorp’s financial incapacity, came perilously close to collapse only days prior to the issue of the licence.

DEPARTMENT IS ULTIMATELY NOTIFIED OF OWNERSHIP CHANGES BY ESAT DIGIFONE

55.01 Following the first licence negotiation meeting between the consortium and the Department on 9th November, 1995, the provision of an indicative draft licence by Mr. Martin Brennan to Mr. Denis O'Brien, and the receipt of the consortium's comments on that draft, the Regulatory Division assumed responsibility for overseeing the production of a licence. Mr. Sean McMahon testified that he had been dissatisfied with the indicative draft circulated with the competition documents, and at that point he set his mind to identifying the matters for which he believed provision should be made in the GSM licence. Having done so, an initial draft was prepared with the assistance of officials from within his Division, and was forwarded prior to Christmas, 1995, to the Office of the Attorney General, and specifically for the attention of the Parliamentary Draftsman, the late Mr. Laney Bacon.

55.02 After the completion of the competitive process, the time of the Development Division was taken up with other activities, including preparations for the Irish Presidency of the European Commission, but, as the Division which led the process, its personnel continued to have an active role, and were responsible for consequential matters arising from the competitive process, such as the preparation of Dáil statements to be made by Mr. Michael Lowry, the drafting of replies to parliamentary questions, dealings with unsuccessful applicants, and the political ramifications which flowed from the announcement of the result. Moreover, the Development Division, in the persons of Mr. Brennan and Mr. Fintan Towey, became increasingly more active in the final weeks prior to the issue of the licence, and were central to the Department's response to the consortium's notification on 17th April, 1995, of changes in ownership and capital configuration, and to the Department's preparations for the issue of the licence.

55.03 The result which had emerged from the competitive process, and the media coverage which had ensued, spawned a degree of political interest on the part of opposition parties. A series of parliamentary questions were put down by members of the opposition, and these were answered by Mr. Lowry in the form of a Dáil Statement, delivered by him on 22nd November, 1995, the Wednesday following the initial media coverage identifying Mr. Dermot Desmond as having a role in Esat Digifone. Mr. Lowry's Statement was made from a prepared script which had been drafted for him by his officials, as had a series of answers to possible supplementary questions. Amongst the questions to be answered, there were a number which had been set down by Mr. Bobby Molloy T.D. In light of what had occurred in the course of the competitive process, and the ownership and financing issues which the Department ultimately addressed in the weeks prior to

the issue of the licence, two of those questions were particularly apposite, and as they appear in the Dáil record, were in the following terms:

“84. Mr. Molloy asked the Minister for Transport, Energy and Communications if he took account of the overriding conditions on technical and financial capability outlined in paragraph 9 of the Bid Document for the second GSM mobile phone licence in addition to the criteria evaluated by the consultants at paragraph 19 of the document.

85. Mr. Molloy asked the Minister for Transport, Energy and Communications if article 3 of his Department’s GSM competition licence documents were complied with in the awarding of the licence; and the identity and ultimate beneficial ownership of the institution [sic] investors who will own 20 per cent of the successful bidding company”.

55.04 These two issues, that is, financial capability and ownership, caused considerable concern during the latter part of the negotiation process. The ownership issue was one that Mr. Molloy pursued assiduously, even after Mr. Lowry resigned as Minister, and as will be seen, formed the subject-matter of correspondence between Mr. Alan Dukes, after he was appointed Minister in place of Mr. Lowry, in December, 1996, and Mr. Molloy. Reference will be made in a later chapter to certain aspects of Mr. Lowry’s Statement to the House on this occasion, in the context of consideration of a later Dáil Statement made on 30th April, 1996. It should nonetheless be observed that it was to this Dáil Statement, on 22nd November, 1995, that Mr. Paul Connolly, Communicorp’s project finance consultant, drew attention in his analysis of the various restructuring options available to Mr. O’Brien, as referred to in a previous chapter, in noting that Mr. Lowry had stated in the Dáil that the capital configuration of Esat Digifone was according to the ratio 40: 40: 20.

55.05 The Department’s draft licence having been submitted to the Parliamentary Draftsman before Christmas, 1995, there was little substantive interaction between the consortium and the Department for some months. Whilst Mr. O’Brien’s focus at this point was on the forthcoming fundraising for Communicorp on the US market, he was nonetheless in touch with Mr. Lowry, and attended meetings with him in the Department. It will be recalled that, on a date which the Tribunal is satisfied was prior to Christmas, 1995, Mr. O’Brien and Mr. Leslie Buckley met Mr. Lowry in the Department in relation to Esat Telecom’s existing fixed-line business. Mr. Sean Fitzgerald, Assistant Secretary with overall responsibility for telecommunications, was requested to join that meeting by Mr. Lowry, which had proceeded to that point without the involvement of

Departmental officials, and without prior knowledge on the part of Mr. Fitzgerald. When Mr. Fitzgerald joined the meeting, it seems that Mr. O'Brien and Mr. Buckley indicated that the Departmental policy of limiting the provision of additional leased-lines unless objectively justifiable by monitoring of traffic on existing lines, if implemented, would cause considerable damage to the business of Esat Telecom. The implementation of that policy had been part of the Government Decision of 26th October, 1995, on the outcome of the GSM licence competition. Following the conclusion of the meeting, and the departure of Mr. O'Brien and Mr. Buckley, it was Mr. Fitzgerald's evidence that Mr. Lowry had asked him to go easy on "*monitoring*", and if possible to defer it until after that Christmas.

55.06 Following a meeting between the Department and the consortium on 26th January, 1996, at which it was explained by the Department that the drafting of the licence had proved a more difficult and time-consuming task than had been envisaged, it seems that in early February, 1996, there was further contact. Neither the meeting of 26th January, 1996, nor that of early February, 1996, were documented by the Department; the only record of the first meeting was a lengthy attendance kept by Mr. Owen O'Connell, of William Fry, and the sole reference to the latter meeting was in a note made by Mr. Sean McMahon in his personal journal of an inter-Divisional meeting on 13th February, 1996, in which he recorded that Mr. Sean Fitzgerald had informed him that the consortium had been in the previous week to see the Minister, and his own response to that news that it was the "*first we heard of it.*"

55.07 That inter-Divisional meeting had it seems been convened to consider what response should be made to a request made by the consortium to Mr. Lowry that the Department should assist it in its dealings with the ESB in relation to co-location, and in particular the sharing of masts and transmission facilities. Ultimately, Mr. Fitzgerald did write to the ESB, encouraging cooperation in that regard, and indicating that, in the absence of agreement being reached, consideration would have to be given by the Department to whether there would be a role for the regulatory and licensing process. Because of the ESB's membership of the Persona consortium, which had been ranked in second place in the competitive process, and with which Mr. Lowry had been authorised by Government to open negotiations if negotiations with Esat Digifone did not proceed to fruition, the Tribunal inquired into this issue in the course of public sittings. The Tribunal is however satisfied that there was nothing in the assistance lent to Esat Digifone, in its dealings in that regard with the ESB, to indicate the existence of any impropriety or irregularity in the negotiation process.

PRESSURE TO ISSUE LICENCE MOUNTS

55.08 On 13th February, 1996, the same day that the Telecommunications Divisions met to consider the above request, Mr. Fitzgerald informed Mr. McMahon that Mr. Lowry had furnished instructions that the issue of the licence should be expedited. Mr. Lowry testified that he had by then understandably become anxious and frustrated at the slow pace of progress in finalising the issuing of the licence. He explained that he was then receiving queries from his Cabinet colleagues about the delay, and he also felt that he was letting the public down.

55.09 On receiving those instructions, Mr. McMahon made contact with the Parliamentary Draftsman, Mr. Laney Bacon, and proposed that, once Mr. Bacon had furnished the Department with his amendments to the existing draft, the Department would provide that revised draft to the consortium. Mr. Bacon, as recorded by Mr. McMahon in a formal note of his contacts with officials of the Attorney General's Office, made by him at the time, was cautious, and informed Mr. McMahon that he understood that Mr. John Gormley and Mr. Denis McFadden, the two advisory section officials who had been assigned to deal with the licence, wished to instruct outside counsel to advise before submitting the draft to the Attorney General for his approval. Mr. McMahon then spoke directly to Mr. McFadden, who confirmed to him the officials' concerns surrounding the complexity of the legal issues, the necessity of instructing outside counsel to advise, and their view that the current draft should be regarded as a preliminary draft only. The course ultimately agreed upon between Mr. McMahon and Mr. McFadden was that the then current draft, as amended, would be forwarded to the consortium, subject to the same legal reservation as had attached to the earlier indicative draft of November, 1995.

55.10 The finalisation of that preliminary draft was it seems subject to further delays, and on 21st March, 1996, Mr. Martin Brennan telephoned the Regulatory Division and spoke to Ms. Regina Finn, who had by then been reassigned from the Broadcasting to the Telecommunications side of that Division, reporting to Mr. McMahon, and had been deputed to the task of progressing the finalisation of the licence. Ms. Finn prepared a formal typed note of her conversation with Mr. Brennan, and her subsequent dealings with the Office of the Attorney General, the contents of which she confirmed in evidence.

55.11 In the course of that telephone call, it seems that Mr. Brennan informed Ms. Finn that he was then at a meeting with Mr. Lowry and Mr. John Loughrey, the Secretary General. Mr. Lowry had directed that a final licence should issue to the consortium by the following Tuesday, 26th March, 1996, but

that resulting from discussion, it had been agreed that a draft licence only should be made available by the following day, and in that regard, Mr. Brennan informed Ms. Finn that he was conveying Mr. Loughrey's instructions. Ms. Finn, in her note, then recorded that the Attorney General's Office had reaffirmed its advice that no version of the draft licence should be furnished until it had been cleared by the Attorney General, but that the Office had "*reluctantly agreed*" that, in order to comply with Mr. Lowry's direction, a copy of that draft could be sent to the consortium, subject to the full legal reservation discussed the previous month.

55.12 As will be seen, the draft which was sent the following day by Mr. McMahon to Mr. Knut Digerud, who by then had been appointed Chief Executive of Esat Digifone, was very much in preliminary form. There was considerable further work yet to be done before a final draft was produced, and it was not until nearly two months later, days before the licence was issued, that an approved draft, together with regulations to be issued by Mr. Lowry to enable the grant of the licence, were approved.

55.13 Rather than allaying the consortium's concerns surrounding the delay in progressing the draft licence, the release of the second indicative draft marked the commencement of a short period of uncharacteristic tension in relations between Esat Digifone and the Department. Mr. Digerud responded to Mr. McMahon's letter with a lengthy letter dated 3rd April, 1996, which Mr. Brennan characterised at the time as a piece of litigation planning. In that letter, Mr. Digerud asserted that, having regard to the adverse impact of the Department's delay on Esat Digifone's ability to launch its service before Christmas, 1996, and on its ability to secure debt financing from its bankers, the consortium was in a position where, "*by reason of commercial duress*", it would be obliged to accept whatever licence was offered by the Department. He proposed that Esat Digifone would accept the licence in the form of the then draft, but would reserve an entitlement to agree amendments after the fact, and sought confirmation, by return, that the licence would issue.

55.14 It was at this point that the Development Division personnel took an increasingly more active role in dealings with Esat Digifone. A draft response to Mr. Digerud's letter was prepared by the Regulatory Division, and together with that letter was copied to Mr. Brennan and Mr. Towey. On 9th April, 1996, Mr. Brennan forwarded a written memorandum to Mr. Towey, recording his thoughts on that correspondence, the contents of which he confirmed in evidence. Having expressed the view, already referred to, that he regarded Mr. Digerud's letter as a piece of litigation planning, he indicated that he believed that Mr. Digerud's assertion should be rebutted and refuted, and recorded that he did not favour granting the licence against the background of that letter. He concluded by asking

Mr. Towey to convey his views to Mr. McMahon, and recommended that Mr. Loughrey should be “*brought into the loop*” at an early stage. Mr. Towey duly conveyed Mr. Brennan’s views to Ms. Finn on 10th April, 1996, and a reply was ultimately prepared, dated 12th April, 1996. That letter was not however signed by Mr. McMahon, but by Mr. Brennan, and was not sent to Mr. Digerud, but instead was handed to him at a meeting in the Department on the same day.

55.15 Before relating what occurred at that meeting, reference should first be made to a significant meeting which had taken place in the Department on the previous day, 11th April, 1996. It seems that, following Mr. Brennan’s recommendation that Mr. Loughrey should be briefed on the issues which had arisen from Mr. Digerud’s letter of 3rd April, 1996, Mr. Loughrey assumed a central role in the Department’s response. On 11th April, Mr. Loughrey met with Mr. Denis O’Brien, in what was evidently an effort to ease and stabilise relations between the Department and Esat Digifone at the most senior level. Mr. Loughrey was not joined at that meeting by Mr. Brennan or by Mr. McMahon, but instead by Mr. Michael Lowry’s Programme Manager, Mr. Colin McCrea, and by Ms. Finn. Mr. O’Brien was accompanied by Communicorp’s consultant, Mr. Richard O’Toole.

55.16 Ms. Finn prepared a report of that meeting, which recorded that Mr. Loughrey opened proceedings by indicating that the meeting would be informal, that the agenda was open, and that Mr. O’Brien should feel at liberty to raise whatever matters he regarded as relevant. The meeting was not, it seems, to be limited to issues relating to the licence, or to Mr. Digerud’s letter of 3rd April, 1996, but was intended to cover all of Mr. O’Brien’s affairs as they related to the Department. From Ms. Finn’s note, it appears that two issues were raised by Mr. O’Brien: firstly, Esat Telecom’s grievance over Telecom Eireann’s refusal to grant it additional leased-lines, and secondly, the draft of the GSM licence. It was agreed that action would be taken in relation to both matters, and, as regards the GSM licence, it was recorded by Ms. Finn that it had been indicated to Mr. O’Brien that the Department was available to negotiate the terms of the licence with Esat Digifone, that there was no question of Esat Digifone being obliged to sign any licence, and that Mr. O’Brien should liaise with Ms. Finn.

55.17 Proceeding to 12th April, 1996, the meeting on that date was directed solely to the GSM licence. Esat Digifone was represented by Mr. Digerud, Mr. Peter O’Donoghue and Mr. Owen O’Connell, and the Department by Mr. John McQuaid, Mr. Towey and Ms. Finn, who attended together with two other Departmental officials, Mr. Eanna O’Conghaile and Ms. Norma O’Sullivan. Mr. Brennan’s letter dated 12th April, 1996, in response to Mr. Digerud’s of 3rd April, 1996, was provided to the Esat Digifone representatives at that meeting. Whilst Esat Digifone was still very anxious to ensure that the issue of the licence would

be expedited, it seems that Mr. Loughrey's efforts of the previous day had reaped dividends, since it was agreed, as recorded by Ms. Finn, that Esat Digifone would respond to Mr. Brennan's letter by effectively withdrawing the allegation of commercial duress.

55.18 At that point it was seemingly expected that a final draft licence would be available to enable the Department and Esat Digifone to review the draft, article-by-article, during the following week. After the meeting, Ms. Finn, in her record, noted that there were two uncertainties that might impact on the timing of the issue of the licence: firstly, the availability of the final approved draft, and secondly, the finalisation of draft regulations to transpose the EU Mobile Directive, which it was intended would amend the Postal and Telecommunications Services Act, 1983, by introducing a new sub-section, pursuant to which the licence would be issued. Although it was envisaged that a meeting would be held the following week, it was in the event to be some weeks more before that final draft licence materialised.

55.19 It warrants comment at this juncture that, apart from Ms. Finn's reports of the meetings which she attended on 11th and 12th April, 1996, no meeting between the Department and Esat Digifone, after the initial licence negotiation meeting of 9th November, 1995, nor communications, other than by correspondence, were recorded in any of the Departmental files produced to the Tribunal. But for Mr. Owen O'Connell's attendances, Mr. Arve Johansen's memorandum of 4th May, 1996, and some limited notes made by Mr. Sean McMahon in his personal journal, there were extensive and highly significant contacts between Esat Digifone and the Department of which it is unlikely the Tribunal would otherwise have learned. The views of the most senior Departmental officials, that is, Mr. Loughrey and Mr. Fitzgerald, on this deficit in the Department's records will be returned to, but at this juncture it is noteworthy that it was Ms. Finn's evidence that it was her experience, of civil service work practices in the 1990s, that senior civil servants attending meetings ensured that fairly formal notes of those meetings were kept.

MS. FINN ASKS THE RELEVANT QUESTION

55.20 It was Mr. O'Connell's evidence that it was during the following week, on Tuesday, 16th April, 1996, in the course of a telephone call, that Ms. Finn asked him about the intended shareholding of Esat Digifone. It was that question, according to Mr. O'Connell, which precipitated the disclosure by the consortium of the full extent of Mr. Dermot Desmond's entitlement, arising from the agreement executed on 29th September, 1995. Whilst, as already explored, Mr. O'Connell accepted that Esat Digifone was obliged to disclose that information to the

Department prior to the issue of the licence, he considered that the consortium had a discretion as to when that disclosure would be made. Reference has been made in previous chapters to the consideration directed by the consortium as to how Mr. Desmond's role might be explained, and to the "*line*" developed by Mr. O'Connell and Mr. O'hUiginn in late 1995, to enable Mr. Desmond's role to be portrayed in a manner that might appear consistent with the ownership information furnished in the Esat Digifone application. Whilst there can be no doubt that it was in response to Ms. Finn that the altered ownership information was furnished by Mr. O'Connell, there can equally be no doubt that the consortium must, at that very late stage, when it was demanding that the licence should be issued, have been anxious to make that disclosure, and Ms. Finn's query was doubtless regarded as opportune.

55.21 It is perhaps ironic that Ms. Finn, who had only then recently assumed responsibility on the Telecommunications side of the Regulatory Division, had no appreciation of the significance of the information disclosed to her by Mr. O'Connell on 16th April, 1996, or that the ownership information which he disclosed was at variance with that submitted in the Esat Digifone application. What is perhaps surprising is that, having conveyed that information to her colleagues in the Development Division, she did not recall that she was aware, or that she was told, that the information was perceived as being significant or new.

55.22 Ms. Finn initially prepared a memorandum of the ownership details she had received from Mr. O'Connell on [16th April, 1996](#), which she forwarded by fax to Mr. Brennan and Mr. Towey on the same day. In that memorandum she presented the information both diagrammatically and in narrative form. A copy of her memorandum can be found in the Book of Appendices to this Volume. As she was conscious that Mr. O'Connell had provided her with a wealth of complex detail regarding the ownership structure of not just Esat Digifone, but of the new company, Esat Telecommunications Holdings, into which Mr. O'Brien's telecommunications interests had been consolidated, and as she doubted her ability to create an accurate contemporaneous record of that information, she took the precaution of asking Mr. O'Connell to confirm matters in writing, and it was that request which resulted in Mr. O'Connell's letter of [17th April, 1996](#), a copy of which can also be found in the Book of Appendices to this Volume. It should be added that Ms. Finn's concerns were unwarranted: the record which she made of the information conveyed to her by Mr. O'Connell in her memorandum was an admirable and accurate distillation of that information.

55.23 Mr. O'Connell's letter of 17th April, 1996, addressed the structure of Esat Digifone, of Esat Telecommunications Holdings, and of other companies within Mr. O'Brien's group of companies. As regards Esat Digifone, Mr. O'Connell

commenced by outlining the ownership of the then issued share capital, which, following resolutions passed on 12th and 13^h April, 1996, stood at £3 million. He then indicated that it was intended that the issued share capital would be increased to £18 million, and he detailed how those shares would be allotted. Whilst IIU Nominees Limited, a nominee holding company of Mr. Desmond, was identified as the entity which would hold the 25% shareholding, and although Mr. Desmond was not named in Mr. O'Connell's letter, he had informed Ms. Finn in the course of their telephone conversation of the previous day, and she had recorded in her memorandum, that IIU was a Dermot Desmond company. The explanation devised by Mr. O'Connell and Mr. O'hUiginn, to portray that 25% shareholding as being consistent with the ownership specifications detailed in the Esat Digifone application, appeared in the fourth paragraph of the letter, and was in the following terms:

“The 25% of Esat Digifone Limited held by IIU Nominees Limited effectively represents the institutional and investor shareholding referred to in Esat Digifone's bid for the licence. You will recall that this referred to an immediate institutional/investor holding of 20%, with a further 12% in short and medium term stages. Of the anticipated 12%, 5% has been pre-placed with IIU Nominees Limited. It is understood that most or all of the shares held by IIU Nominees Limited will in due course be disposed of by it, probably to private and institutional investors.”

The accuracy of this explanation, which Mr. O'Connell recognised amounted to a rationalisation, has already been commented on in Chapter 52 of this Volume.

55.24 As regards the newly created company, Esat Telecommunications Holdings Limited, into which Mr. O'Brien's telecommunications interests had been consolidated in order to facilitate the US placement, Mr. O'Connell indicated that the company was owned as to 57% by Mr. O'Brien, as to 31% by Advent, and as to 12% by other individuals, including Mr. O'Brien, who were primarily current or former directors, employees or advisers of Esat Telecom. Although the composition of this shareholding group was not disclosed by Mr. O'Connell, it will be recalled that some of those shareholders had been identified in the Irish Times article of 28th February, 1996, and included Mr. O'hUiginn, Mr. John Callaghan, and Mr. Leslie Buckley. Having identified the shareholders and share configuration of that new company, Mr. O'Connell then proceeded to inform the Department that a placing of shares in that company was near completion, and that the respective shareholdings would be altered as a result of that placement.

55.25 In the final paragraphs of his letter, Mr. O'Connell confirmed that, whilst other associated companies within Mr. O'Brien's group of companies would

continue to trade, they would have no involvement in the operation of the licence. Mr. O'Connell concluded by reiterating Esat Digifone's anxiety to procure the grant of the licence as soon as possible.

55.26 Ms. Finn forwarded a copy of this letter to Mr. Towey, on whom the significance of its contents, and of Ms. Finn's memorandum of the previous day, was not lost. The notification of that information put the issue of Mr. Desmond's 25% entitlement in Esat Digifone formally on the Departmental record. Mr. Desmond's involvement and shareholding became one of the principal focuses of Departmental consideration and activity over the period leading up to the issue of the licence, although, as will be seen, the official response was in certain respects both uncoordinated and protracted. As the arrival of Mr. O'Connell's letter coincided with intensive preparations within the Department for an unprecedented event, consideration of its implications had to be postponed until after that event had been disposed of.

CONSIDERATION IS DEFERRED PENDING DEPARTMENTAL PRESS CONFERENCE

55.27 By the third week of April, 1996, media comment and press speculation, directed to the manner in which the competitive process had been conducted, and to its outcome, had reached the point that Departmental officials, and in particular Mr. Brennan, felt that some action had to be taken. Political controversy had also persisted, and even though Mr. Lowry had made a further Dáil Statement on 16th April, 1996, disquiet had not been quelled. That Statement had been made by Mr. Lowry in response to another question put down by Mr. Bobby Molloy T.D., in which he had asked Mr. Lowry whether the reason for the delay in signing the licence related to concerns which had been expressed by other applicants about the circumstances surrounding the award of the licence. Mr. Brennan testified that he thought that Mr. Molloy's question had probably been allowed by the Ceann Comhairle as part of the adjournment debate on that day. A script would have been provided for Mr. Lowry by Departmental officials at relatively short notice, and Mr. Lowry would have replied to Mr. Molloy by delivering that script.

55.28 In pursuing that matter, Mr. Molloy, according to the official record of proceedings in the House, expanded on the terms of the question as set down, and in particular raised issues surrounding the ownership of Esat Digifone. In so doing, he referred to what he described as the sale of the licence to "*Norwegian Telecom*" with "*25 per cent to unnamed investors who have not yet disclosed the source of their funds.*" He then posed the following direct question to Mr. Lowry:

“Is Dermot Desmond an investor in yet another Telecom Éireann venture?”

What Mr. Molloy was undoubtedly referring to in that question was Mr. Desmond’s role in the sale of a site in Ballsbridge by Johnson Mooney & O’Brien to Telecom Éireann, which had formed the subject-matter of the Report of Mr. John Glackin published on 7th July, 1993, which had been critical of Mr. Desmond.

55.29 Mr. Lowry, in responding to Mr. Molloy, did not answer that question, but confined himself to explaining that the delay in signing the licence was due to the complexity of the document which had to be prepared. He also adverted to consideration of the extent of the feedback which could be given to unsuccessful applicants, but excluded any provision of comparative feedback due to the confidentiality rules to which the process was subject. That issue of feedback was a matter to which consideration had been directed for some time, but it was not until the eve of the issue of the licence that debriefing meetings were arranged with such applicants.

55.30 It was Mr. Brennan’s view that Mr. Lowry’s omission to answer Mr. Molloy’s question regarding Mr. Desmond’s involvement arose from nothing more than the fact that his response, based on the script prepared for him, related solely to the question allowed by the Ceann Comhairle. However, as will be seen, Mr. Lowry exhibited no such inhibition or reluctance in broaching the topic of Mr. Desmond as a shareholder in Esat Digifone some two weeks later, when he made a further far more elaborate Statement in the Dáil, even though, on that later occasion, there was likewise no provision for reference to Mr. Desmond in his prepared script.

55.31 Returning to the Departmental press conference of 19th April, 1996, it was Mr. Loughrey’s evidence that it was not just the media reporting and the political controversy which had prompted that course, but speculation and rumour circulating within the business community. He recalled that this had rankled with the Department, and in particular with Mr. Brennan. It is all the more surprising that, in the light of the Department’s sensitivities arising from media comment, officials testified to having no contemporaneous knowledge of Mr. McManus’ article which appeared in The Irish Times on 28th February, 1996. Mr. Brennan confirmed that he was personally very frustrated, and felt that the Department was suffering unfair damage in the media. He testified that he had initially proposed to Mr. Loughrey that the Department, with a view to eliminating doubt, should agree to make the Evaluation Report and all of the Departmental files available to a senior counsel, to be selected by the disappointed applicants,

to review the material, subject to conditions of confidentiality. That solution was not found acceptable, and it was Mr. Brennan who then urged that some action had to be taken, and had pressed for the convening of a Departmental press briefing.

55.32 It was in these circumstances that on 18th April, 1996, Mr. Lowry wrote to members of the press, and invited them to a press briefing at 2.30pm the following day. Mr. Lowry indicated that he could not publish the Evaluation Report due to confidentiality commitments, but within that constraint, key members of the Project Group would be in attendance “*to further clarify the process*”. With the benefit of hindsight, it was Mr. Loughrey’s evidence that indignation was possibly not the wisest counsel, and that in deciding to take the course of convening a press briefing, indignation had got the upper hand of measured judgement.

55.33 There was no record of proceedings at that press conference available to the Tribunal, but what was available were statements delivered at the briefing, and issued to the press. The first was a short introductory statement of Mr. Loughrey in which he described the competitive process as “*a model of its type*”. He outlined the Department’s belief that the process was conducted professionally, and that the “*...decision was taken without any outside interference whatsoever*”. He concluded by referring to damage caused by media comment to “*Ireland’s reputation*”, and stated that it was the intention of the Department to answer all questions “*in as open and comprehensive a manner as possible*”, subject only to the constraints of confidentiality, and to the exclusion of political issues.

55.34 The second press statement was a more comprehensive document which, according to the evidence heard by the Tribunal, represented the output of the combined effort of Mr. Towey, Mr. Brennan, Mr. Fitzgerald and Mr. Loughrey. It started life as a personal statement composed in the first person, to be delivered by Mr. Brennan, but in its evolution, it had been converted into a Departmental statement. It opened by reiterating Mr. Loughrey’s concluding remarks that the Department wished “*to put the facts of the situation on the public record in order to provide a basis for informed comment*”. It then proceeded to outline the competitive process chronologically from its inception, through its implementation, to its conclusion.

55.35 It included a number of positive statements which would, it seems to the Tribunal, have tended to give a somewhat misleading impression of the process, and which the Departmental officials involved, and in particular Mr. Brennan, must have known were at variance with the true position. These included the following statements:

- (i) *"The Minister did not meet with the Project Group or with the Consultants in relation to the GSM competition process."*

In that regard, Mr. Brennan accepted that he had met with Mr. Lowry on at least three occasions, and had discussed the substantive process with him, and had received Mr. Lowry's views. He nonetheless testified that he believed that the sense of what had been intended to be conveyed by that statement was that Mr. Lowry had not met with the Project Group as an entity. Whilst that was of course a correct statement, it did not accurately or comprehensively reflect what had occurred.

- (ii) *"The approach to the evaluation including the weighting to be given to the published selection criteria was settled before the closing date and was carried out to the letter."*

This was also a statement which, although carefully framed, was not correct. Far from the evaluation methodology and weighting matrix having been "*carried out to the letter*", the Tribunal is satisfied that the process as prescribed in the Evaluation Model had not been implemented. Amongst matters reviewed in detail in preceding chapters, a separate quantitative evaluation had not been conducted, the results arose solely from a qualitative evaluation, weightings had been applied in a manner never contemplated by the Evaluation Model, and the weightings applied to the constituent elements of the first-ranked criterion were not those "*settled*" prior to the closing date.

55.36 What there was no reference to at all in either of these press statements was the central controversy which had been raging in the Dáil, and in the media, that is, the ownership of Esat Digifone. By 19th April, 1996, there can be no doubt that the Department knew, as confirmed by Mr. Loughrey, that the financial institutions named in the Esat Digifone application were no longer to be shareholders, and that, apart from Telenor and Communicorp, the only other intended shareholder was Mr. Dermot Desmond, and that his entitlement was to a 25% shareholding. Mr. Loughrey, although he had no recollection, did not think that the absence of a reference to IUU or Mr. Desmond was by chance, rather he thought it was by design. That issue was, to his mind, a work in progress, and the Department would not have called a press conference and blurted out that news. It was likewise Mr. Brennan's view that there was no great urgency to announcing Mr. Desmond's involvement, until all of the relevant facts had been considered.

55.37 It was undoubtedly an extraordinary and unprecedented step for Departmental officials to have engaged with and exposed themselves to the media in the manner in which they did on 19th April, 1996. It was a course which

Mr. Loughrey conceded was ill-advised. Far from quelling speculation and disquiet, it had it seems the opposite effect, and instead fuelled further media and political controversy. There can be little doubt but that the decision to call that press conference betrayed a sensitivity on the part of those Departmental officials most centrally involved in the process, and it is apparent, from the press statements issued in that connection, that the information released by them was far from complete, far from comprehensive, and in certain respects less than accurate.

POLITICAL AND DEPARTMENTAL RESPONSE TO NOTIFICATION OF MR. DESMOND'S INVOLVEMENT AND ENTITLEMENT

ABSENCE OF RECORD, REFERENCE AND RECALL

56.01 There were many aspects of the Tribunal's inquiries relating to the evaluation process for which a comprehensive Departmental documentary record of what had occurred was not available. It was however in the context of its inquiries into the actions of Mr. Lowry, and of his Department, in response to the formal notification by the consortium of the full extent of Mr. Desmond's entitlement, and into the events immediately preceding the signing of the licence on 16th May, 1996, that the deficit in Departmental records was at its most pronounced.

56.02 Apart from copies of a single exchange of correspondence between Mr. Martin Brennan and Mr. Owen O'Connell, on behalf of the consortium, apart from formal correspondence in connection with the signing of the licence on 16th May, 1996, and apart from a single letter from the consortium signed by Mr. Knut Digerud urging the issue of the licence, there were no other records or references, within the 119 Departmental files made available to the Tribunal, to what were, on any reasonable assessment, intensive contacts between the Department and the consortium over the month from 17th April, 1996, to 16th May, 1996, in relation to the issues which arose from that formal notification. There were no records of meetings, or of highly significant telephone contacts over those weeks, nor were there any references to those meetings or contacts in any other Departmental documents. Nor, with the single exception of documents generated by one of the seconded accountants, were there any memoranda recording Departmental analysis or consideration of the issues which arose, or of Departmental advice to Mr. Michael Lowry as Minister. This contrasted with the availability of comprehensive records of Departmental consideration of, and actions in, dealing with a complaint lodged by the Persona consortium with the European Commission on 23rd April, 1996. The Tribunal, in its initial private investigations, was not told of any of these events, or of serious concerns on the part of Departmental officials, or that, in the light of the information notified by Mr. O'Connell's letter, that Departmental officials had doubts or reservations over the prospect of the licence being issued to Esat Digifone.

56.03 It was not until the Tribunal received from Telenor a copy of Mr. Arve Johansen's personal memorandum of 4th May, 1996, that it had any inkling that meetings and contacts, of the scale which it ultimately discovered, had occurred. In that memorandum, which has already featured in Chapter 28 and Chapter 53 of this Volume, Mr. Johansen traced his understanding of how Mr. Desmond's

role in the consortium had unfolded from 22nd September, 1995, when Mr. O'Brien visited him in Oslo to introduce him for the first time to the concept of Mr. Desmond joining the Esat Digifone consortium, to 3rd May, 1996, when Mr. Johansen learned that Mr. O'Brien intended to acquire 12.5% of Mr. Desmond's entitlement to bolster Communicorp's shareholding to 50%, and had attended a meeting on that day in the Department at which, in his own words, he had learned the following:

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

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

56.04 It was apparent to the Tribunal from the above-quoted passage that Mr. Johansen had attended a meeting in the Department on 3rd May, 1996, and that it was his impression from what was said at that meeting that the Department was uncomfortable about Mr. Desmond's role as a shareholder, that it was concerned as to how the substitution of Mr. Desmond for the recognised named institutions in the application was to be explained, and that it had such doubts surrounding the finances of Esat Digifone that Mr. Brennan had asked Telenor to guarantee the funding of the GSM business.

56.05 Having received and reviewed Mr. Johansen's memorandum, and in the absence of any record or reference within the Departmental files to that meeting, the Tribunal sought and was furnished with the consortium's records of its dealings with the Department at that time, comprising in the main Mr. O'Connell's file of attendances, correspondence, and draft correspondence. It was apparent from that file that the meeting of 3rd May, 1996, had been highly significant. The Department had been represented by Mr. Brennan, Mr. Fintan Towe and Ms. Regina Finn, and Esat Digifone had been represented by Mr. Knut Digerud, Mr. Peter O'Donoghue, Mr. Johansen, Mr. Paul Connolly and Mr. O'Connell, and, significantly, for the first time by Dr. Michael Walsh, who had not previously attended any meeting, or had any official dealings with the Department in his capacity as Mr. Desmond's adviser. Ms. Finn, who had since left the public

service to take up a position abroad, when asked about this meeting, informed the Tribunal that it was likely that she had prepared a note of it, and if such a note existed, she requested that she be given access to it. Ms. Finn, it will be remembered, had carefully recorded all of her dealings with Esat Digifone, including the meetings of 11th and 12th April, 1996, but no record of that meeting of 3rd May, whether made by Ms. Finn, or any other Departmental official in attendance, could be traced.

56.06 Mr. O’Connell’s file did not just confirm that that meeting of Friday, 3rd May, 1996, had taken place. It revealed that there had been further important meetings on 29th April, 13th May, 14th May, 15th May, and 16th May in the Department; that at least one of those meetings had been attended by Mr. Michael Lowry; that there had been telephone contact between Mr. Lowry and Mr. O’Brien; and that critical dealings between the Department and the consortium had been conducted by means of informal undocumented telephone conversations between Mr. Towey and Mr. O’Connell. None of these contacts were recorded or referred to in the Departmental files made available to the Tribunal, nor had the Tribunal received any intimation of them in its dealings with any of the Departmental officials concerned.

56.07 The deficit in the Departmental records, together with the lack of Departmental recollection surrounding these events, was a matter of considerable disquiet for the Tribunal, and was pursued in evidence with the officials who had been involved. Those inquiries were met with expressions of regret, puzzlement, and concern, and explanations of administrative oversight due to work pressures and time constraints.

56.08 Mr. Loughrey, who as Secretary General, and as the Departmental official ultimately responsible, as acknowledged by him, sympathised with the Tribunal’s concerns, and expressed his disappointment that matters had not been recorded. He testified that he did not believe that the absence of recording suggested that anything untoward had occurred, although he accepted that the deficit was open to an inference being drawn which was less innocent than the one he had given. Mr. Sean Fitzgerald, then Assistant Secretary, likewise acknowledged that it was regrettable that a proper record had not been kept, and whilst he disclaimed any direct involvement in the relevant events of late April and early May, 1996, he testified that he thought that the absence of records had resulted from nothing more than inadvertence. Mr. Fitzgerald could not offer the Tribunal any explanation as to why Departmental officials had not remembered the meetings in question; he testified that he would have thought that those who had participated would have remembered the substance of what had been

discussed, and it was extraordinary to him that the matters which had arisen had neither been recorded nor recalled.

56.09 Mr. Brennan could not account for why records were not kept. He also accepted that it would have been preferable had matters been recorded. He testified that in an ideal world everything would be recorded in a bureaucracy, but that practice had changed over the years. Mr. Towey had little to add to the evidence of his senior colleague: he testified that it would have been normal practice to keep records of important meetings, but observed that occasionally an intention to keep a record might be overtaken by other priorities, or by subsequent events.

56.10 Had it been the case that the absence of records related solely to isolated contacts over this last month of licence negotiations, the Tribunal would have no hesitation in accepting that the omission flowed from administrative oversight. That however was not the position. Apart from formal correspondence, there was no documentation on the Departmental files recording or referencing any of the dealings between the Department and Esat Digifone. Whilst the Tribunal cannot determine how or why this occurred, whether it reflected a policy decision taken at a senior level, or merely a tacit recognition that records should not be made, or should not be retained, the Tribunal must reject any notion that the veritable recording blackout was nothing more than an accidental coincidence. There can be no doubt from the records made by Mr. O'Connell that the issues which flowed from the formal disclosure of the substitution of Mr. Desmond for the financial institutions, and of the extent of his shareholding entitlement, together with his financial capacity and that of the consortium to fund the GSM business, were matters of the most acute concern and sensitivity for the Department.

DEPARTMENTAL THINKING ON OWNERSHIP NOTIFICATION

56.11 It was the evidence of Mr. Loughrey that, notwithstanding all of the media references and coverage of Mr. Desmond's role in Esat Digifone in the preceding months, he was not best pleased, as he described it, when he received Ms. Finn's memorandum, and Mr. O'Connell's letter. It was apparent to him from the contents of those documents that it was intended that Mr. Desmond's company was to have ownership of shares in Esat Digifone. He also noted that the interests of the principal shareholders, that is Communicorp and Telenor, were to be diluted to 37.5%, which, although not fatal in his view, was a variation from the shareholding configuration which had been notified in the Esat Digifone application. He also recognised that neither Mr. O'Brien nor Mr. Desmond were anonymous figures in Irish business. On reviewing that

information, he realised that it would give rise to an issue on ownership, and he wanted to ensure that there would be no additional embarrassment or contentiousness. That issue had of course already been the subject of significant controversy in the media, in business circles, and in the Dáil, which had extended initially to speculation, and latterly to reports, that Mr. Desmond had an interest in Esat Digifone. Mr. Lowry had been directly asked in the Dáil only days earlier by Mr. Bobby Molloy T.D. whether Mr. Desmond was a shareholder.

56.12 Nor was Mr. Loughrey or indeed Mr. Brennan impressed with the line that had been developed by Mr. O'Connell and Mr. O'hUiginn to portray Mr. Desmond's 25% shareholding as consistent with the Esat Digifone application, that is, the explanation that the additional 5% shareholding to be held by Mr. Desmond represented a pre-placement of part of the shares which it had been indicated in the application might be made available to the market over the medium term. Mr. Loughrey regarded that passage of Mr. O'Connell's letter of 17th April, 1996, as a little contrived, and Mr. Brennan perceived it as an effort to convince that the information furnished was in conformity with the application. In that regard, Mr. Loughrey agreed that, having formed that impression, he would have been conscious of the need to be on his guard as matters moved forward. Mr. Loughrey, whose habit it was to meet with Mr. Lowry daily, testified that he would undoubtedly have informed Mr. Lowry of these developments, and that, as matters evolved, he regarded it as inconceivable that he would not have briefed him. Mr. Lowry confirmed that he had been apprised of Mr. Desmond's involvement at the time, and the issues which flowed from it. It was his evidence that he made Mr. Loughrey responsible for dealing with these matters, and that, in the actions he subsequently took, he had relied on Mr. Loughrey's advice.

56.13 Mr. Loughrey testified that once the Departmental press briefing had been disposed of on Friday, 19th April, 1996, he would most certainly have sat down with Mr. Fitzgerald, who he thought probably would have been his first port of call, and perhaps with Mr. Brennan and Mr. Sean McMahon, to ensure that whatever was done thenceforth was done in a very careful manner. If it had not already been attended to, he would have said that advice should be obtained from the Office of the Attorney General. He was resolved that the altered shareholding configuration from the ratio 40:40:20, as specified in the ownership details of the intended licensee contained in the Esat Digifone application, to the then notified configuration of 37.5: 37.5: 25 would not be acceptable, and the original configuration would have to be restored.

56.14 Mr. Loughrey however had no direct recollection of consultations with his subordinate officials in relation to this issue, and in that regard, he was no different to Mr. Fitzgerald, who disavowed any involvement, or Mr. Brennan, or

Mr. McMahon. The last-named testified that the issues which arose from Mr. O'Connell's disclosure were not handled by the Regulatory Division, but by the other side of the house, as he described the Development Division, although he believed that each Division would have exchanged information. Mr. McMahon's testimony in that regard was borne out by the documentary trail, primarily derived from Mr. O'Connell's file, which did not record him as having had any hand in the interactions with Esat Digifone following that disclosure. The documentary record placed Mr. Loughrey, Mr. Brennan and Mr. Towey as central figures in that interaction.

56.15 Mr. Brennan's evidence was that the new information required careful consideration by the Department, and placed a serious question mark over whether the licence could be issued to Esat Digifone. There were to his mind three matters that arose: firstly, whether the intended ownership by Telenor, Communicorp and Mr. Desmond, through his vehicle IIU, was consistent with the ownership details as furnished in the application and evaluated by the Project Group, in other words, whether Mr. Desmond could be regarded as equivalent to the financial institutions which had been named in the application; secondly, whether the altered capital configuration was likewise consistent with the ownership specifications notified and evaluated; and finally, whether Mr. Desmond had the financial capability to fund his 25% interest.

56.16 The view taken by Mr. Loughrey and Mr. Brennan was not it seems shared by Mr. Towey, who could recall no discussion along the lines of whether what had been put to the Department gave rise to a serious question mark over whether Esat Digifone should be entitled to the licence or not. Moreover, it was Mr. Towey's evidence that, whilst there was a process to be undertaken in relation to the ownership and finances of Esat Digifone, he did not personally view it as a likely outcome that the process would result in Esat Digifone not being awarded the licence. He had not had a sense that the matter was going to fall apart, or that the issues which had arisen would thwart the award of the licence. Mr. Towey further confirmed that he had probably also understood that to be Mr. Lowry's view.

56.17 What was entirely absent from the Departmental response, as it was conveyed to the Tribunal in evidence, was any consideration whatsoever of how or when the change of ownership notified had come about. According to the testimony of Departmental officials, nobody within the Department associated the information which came to light on 16th and 17th April, 1996, that Mr. Desmond was entitled to a 25% shareholding, with the information previously furnished on 29th September, 1995, in breach of the rules of the competitive process, that the same company through which Mr. Desmond intended to take his shareholding,

had agreed to underwrite “circa 60%” of the shares in Esat Digifone. Nor does it seem that any of the officials dealing with this matter thought it was relevant to ask when and how Mr. Desmond’s entitlement arose, whether in the light of that letter, or in the light of the statements made by Mr. O’Brien at the Esat Digifone oral presentation on 12th September, 1995, when he had not only confirmed the financial institutions element of the ownership, but had extolled the virtues of that ownership as offering an opportunity for pension funds to invest in a utility enterprise for the first time. The Tribunal was told by Mr. Brennan and by Mr. Towe that they made no connection between Mr. Desmond’s ownership as notified to them in April, 1996, and the letter received by them on 29th September, 1995. It seems however that Mr. Lowry was alert to some element of connection, as on the following 30th April, 1996, in the course of an unscripted addition to a formal Statement made by him to the Dáil, he informed the House that:

“The Communicorp funding requirement was underwritten by a party acceptable to my Department. ...That was the position when the decision was made.”

56.18 The Department’s response, therefore, to the notification of the change of ownership and change in capital configuration, as it was conveyed to the Tribunal by Mr. Loughrey and Mr. Brennan, was that, in the light of that new information, a serious question mark had arisen over whether the licence could be awarded to Esat Digifone, and the awarding of the licence was conditional on the outcome of Departmental consideration of whether Mr. Desmond’s ownership could be considered consistent with the ownership information furnished in the application, whether the reconfiguration of the share capital could likewise be considered to be consistent with that ownership specification, and whether Mr. Desmond had the financial capability to fund his participation. Leaving aside the omission of consideration of when or how that change occurred, the Departmental response, as conveyed to the Tribunal, seemed to be both a measured and an appropriate one. However, in the light of what then occurred, as evident from the documentary record, there must be some doubt as to whether that view had been fully conveyed to or had been understood by Mr. Lowry.

MR. LOWRY’S UTTERANCES IN THE AFTERMATH OF NOTIFICATION

56.19 As has already been related, Mr. Lowry was from mid-February, 1996, understandably frustrated by the slow progress in finalisation of the draft licence. What was then outstanding, and had been with the Office of the Parliamentary Draftsman since prior to Christmas, 1995, was the first draft licence prepared by

the Regulatory Division under the supervision of Mr. McMahon. In addition, regulations were yet to be drafted to transpose into domestic law the EU Mobile Directive, under the framework of which the State was obliged to issue the licence. It was intended that the Directive would be transposed by means of the insertion of an additional sub-section into the Postal and Telecommunications Services Act, 1983, and that the licence would then be issued under that new sub-section. Mr. Lowry, as referred to by him in his evidence, had raised the delay with the then Attorney General on what it seems was 16th April, 1996, and had received a letter from the Attorney General on the following day, explaining that the drafting of the licence was a challenging task in uncharted legal territory, that his officials were naturally prudent, and that they were at that point reluctant to commit themselves to an estimated completion date. That exchange, of course, predated receipt of notification of the change of ownership, and was accordingly before any of the issues flowing from that notification had been identified.

56.20 Having been briefed on the consequences of that notification by Mr. Loughrey, and on the investigations which Mr. Loughrey and Mr. Brennan believed had to be undertaken before any licence could be issued to Esat Digifone, it might have been expected that Mr. Lowry would have exercised a degree of caution in his subsequent official utterances on the topic. Not only was any such caution absent from his later statements, but what is apparent is that, before those inquiries were completed, Mr. Lowry had proceeded to inform first his Cabinet colleagues, then the Dáil, and finally the public, that the licence would be issued to Esat Digifone. What is equally striking is that, in the case of each of these utterances, Departmental officials disavowed either involvement in or knowledge of them, and testified that Mr. Lowry, in making those statements, had acted on his own initiative, and not on Departmental advice, and, moreover, had acted contrary to advice that would have been given had it been sought. It is now intended to review each of those instances.

Informal Government Decision of 23rd April, 1996

56.21 At the scheduled Cabinet meeting on 23rd April, 1996, which was the Tuesday of the week following receipt of notification of ownership changes, Mr. Lowry it seems briefed his Cabinet colleagues on where the licence then stood. There was no record of any Aide Memoire or Memorandum for Government recording that any matter relating to the licence had been submitted to Cabinet on that date, and in the absence of such a documentary record, Mr. Brennan testified that it seemed to him that Mr. Lowry had proceeded on his own initiative, unless it was the case that the matter had been dealt with orally between Mr. Lowry and Mr. Loughrey. The latter had no such recollection, was puzzled by the

Decision, and noted that there was no record of it having been promoted by the Department. It was Mr. Loughrey's belief that the licence must have been raised by Mr. Lowry at Cabinet under the rubric of "*any other business*".

56.22 The record of what was conveyed by Mr. Lowry at Cabinet on 23rd April, 1996, headed "*INFORMAL GOVERNMENT DECISION*", and sub-headed "*GSM Licence*", was signed by the Government Secretariat, and was in the following terms:

"[The Minister for Transport, Energy and Communications referred to the official Press Conference, arranged by his Department on Friday 19 April, which had gone very well. The terms of the proposed contract had been agreed with Esat Digiphone [sic]. Legal clearance was awaited from the Attorney General's Office.

As regard the question of disclosure of information to the unsuccessful bidders the Attorney General's advice had been sought as to what might be disclosed without breaching confidentiality undertakings. The Minister indicated that he was fully satisfied that the competition which had taken place would withstand any scrutiny whether in court or elsewhere.]"

The documentary record of the Decision recorded that copies had been circulated to Mr. Loughrey and Mr. Brennan. Neither had any recollection of having received copies, or of having had knowledge at the time that Mr. Lowry had informed his Cabinet colleagues on 23rd April, 1996 that "*The terms of the proposed contract had been agreed with Esat.*"

56.23 Mr. Brennan testified that he did not know how Mr. Lowry could have formed the impression that the terms of the licence had been agreed with Esat Digifone if, as the Tribunal had been told, he had been fully briefed on the issues which had arisen from the notified ownership changes. He agreed that, on the face of the record, it appeared that Mr. Lowry had informed his Cabinet colleagues that it was his intention to issue the licence to Esat Digifone, even though, on the evidence heard by the Tribunal, it was the Departmental view that a serious question mark had been raised over whether the licence could be granted to Esat Digifone, and Departmental consideration and scrutiny of the issues, identified by Mr. Loughrey and Mr. Brennan as requiring consideration, were then proceeding.

56.24 What is beyond question is that at a time when, as will become apparent, Departmental scrutiny had not in fact yet commenced, and on the

outcome of which the ability of the Department to issue the licence to Esat Digifone was seemingly dependent, Mr. Lowry announced to his Cabinet colleagues that the terms of the licence had been agreed with Esat Digifone, and that, apart from legal clearance from the Attorney General's Office, there was no note of uncertainty, much less conditionality, registered. This statement was it seems made by Mr. Lowry on his own initiative, without Departmental involvement, and against advice that would have been forthcoming from his officials, had it been sought, and was undoubtedly at odds with the briefing which, on the evidence of his officials, he had been given on the consequences of the ownership changes notified by the consortium during the previous week.

Mr. Lowry's Dáil Statement of 30th April, 1996

56.25 One week after Mr. Lowry's declaration to his Cabinet colleagues, he made a personal Statement to the Dáil on the GSM process. His Statement was not made in response to parliamentary questions put down by members of opposition parties, but was, as testified by Mr. Loughrey, a political initiative by Mr. Lowry, intended to quell the political controversy surrounding the licence, which had it seems continued unabated, despite the Departmental press briefing of the previous 19th April, 1996. The making of a personal Statement by a Minister in the Dáil is an important and significant occasion, and Mr. Loughrey and Mr. Brennan confirmed that the preparation of Mr. Lowry's script would have entailed both the input of Departmental officials and of Mr. Lowry's political advisers. Before proceeding to review aspects of Mr. Lowry's Statement, it should be recorded that Mr. Lowry, with the benefit of legal advice, at public sittings of the Tribunal on 31st October, 2001, expressly and unequivocally waived his entitlement to Dáil privilege under Article 15.13 of the Constitution, in respect of all of his utterances in the Dáil, for the purposes of the Tribunal's inquiries.

56.26 There were many aspects of Mr. Lowry's speech to the Dáil on that day which were of relevance to the Tribunal's inquiries. His prepared script, as mentioned, had involved the collaboration of both Departmental officials and Mr. Lowry's political advisers, to the extent that each had contributed to separate and distinct portions of it. The material comprised two parts: the first part, drafted by Departmental officials, comprised a review of the GSM process; the second part, seemingly written by Mr. Lowry's political advisers with his personal input, primarily consisted of material in the form of political rhetoric. During the delivery of that latter part of his script, it is clear, from the Dáil record, that Mr. Lowry had been increasingly subject to interruption and comment by members of opposition parties, and, having concluded delivering his script, Mr. Lowry had been drawn into making unscripted responses. It is those responses which were of particular significance to the Tribunal's inquiries, and reflected very clearly both Mr. Lowry's

then state of knowledge and, most critically, his own views as of 30th April, 1996, as confirmed by him in evidence, regarding the altered ownership information.

56.27 Before proceeding to address those passages of Mr. Lowry's Statement, reference should first be made to some of the initial passages, prepared for him by Mr. Towey and Mr. Brennan, and reviewed by Mr. Loughrey. Given that Mr. Lowry's review of the GSM process was, according to his Statement, for the purposes of putting "*on the record all that can be said about the issue*", it must be said that the account which he gave was in many respects less than factually complete, and it appears to the Tribunal that in that regard his script again reflected a sensitivity on the part of the Department surrounding a number of elements of the process, and in particular the issue of ownership. That issue was of course, according to the evidence heard by the Tribunal, then the focus of close scrutiny by the Department.

56.28 The 30th April speech was not the first occasion on which Mr. Lowry had addressed the ownership of the Esat Digifone consortium in the Dáil, and it will be recalled from earlier chapters of this Volume, that Mr. Lowry had also made a Statement in the House on 22nd November, 1995, when he responded to a series of parliamentary questions, including two put down by Mr. Bobby Molloy T.D., one of which related directly to this issue. That first Statement had followed media coverage in which Mr. Desmond had been identified as having an involvement in Esat Digifone, as the placer of a minority interest, and in which it had been speculated that he would acquire that interest for himself.

56.29 On neither 22nd November, 1995, nor 30th April, 1996, did Mr. Lowry's Statements provide a full factual account of the information on the ownership of the intended licensee which had been declared in the Esat Digifone application, or, as regards the latter Statement, of the ownership information known to the Department on that date. Rather, in both Statements the intended minority ownership was addressed in terms that were incomplete, and left a measure of flexibility around the ultimate designation of that shareholding. What was also evident from both Statements was a portrayal of the uncertainty surrounding the minority ownership, as being no different to arrangements declared by other applicants, even though those arrangements bore no comparison to what had occurred in the case of Esat Digifone. Whilst those approaches were evident in both Statements, they were more pronounced in the Statement made on 30th April, 1996, when the Department knew that Mr. Desmond was the designated shareholder.

56.30 According to the Dáil record, on 22nd November, 1995, Mr. Lowry made the following observations concerning ownership:

“Paragraph 3 of the bid document to which the Deputy referred relates to full disclosure of ownership. That was adequately dealt with in the evaluation of all applications including the successful one. The majority of the applications contained indications of probable changes in the ownership of minority interests by way of flotation, institutional investment, after licence award and the level of such proposed changes considered acceptable. The intentions of the willing [sic] applicant in this regard were fully disclosed....

A number of the investors stated that minority shareholdings would be available through various mechanisms such as by way of flotation or institutional investment. The winning applicant clearly stated that that ESAT would have a 40 per cent ownership, Tellenor [sic] a 40 per cent ownership and the other 20 per cent would be available to institutional investors or other interest groups. That was clearly stated publicly as well as privately.”

56.31 What had in fact been declared in the executive summary of the Esat Digifone application, as will be recalled, was that the 20% shareholding in Esat Digifone had been placed by Davy stockbrokers with Allied Irish Banks Capital Markets, Investment Bank of Ireland, Standard Life Ireland, and Advent International, and this was confirmed in the most unequivocal terms by Mr. Denis O’Brien at the Esat Digifone oral presentation on 12th September, 1995, when he stated, by reference to that element of the intended ownership, *“that’s done”*. Whilst the application, and Mr. O’Brien, had undoubtedly somewhat overstated the then commitments of the named institutions, their letters of commitment having in reality been no more than letters of interest, no uncertainty was attached to their involvement, and the application was evaluated on that footing.

56.32 As is evident from the above Dáil report, Mr. Lowry did not inform the House that it had been intended that the 20% shareholding would be held by financial institutions. Instead, his Statement on ownership was prefaced with an intimation of uncertainty, and an assertion that other applicants had indicated changes of ownership, by flotation or placement *“after licence award”*. Having so stated, Mr. Lowry then informed the House that the Esat Digifone application had stated that the 20% minority interest would be made available to *“institutional investors or other interest groups”*. The intimation that, after the licence had issued, shares might be made available to the market was in no respect comparable with the placement of 20% of the shares in Esat Digifone by Davy stockbrokers with Allied Irish Banks Capital Markets, Investment Bank of Ireland, Standard Life Ireland and Advent International, before the issue of the licence. Nor for that matter had the class of ownership of that 20% shareholding ever been described in the Esat Digifone application as being *“other interest groups”*.

56.33 That self-same approach to describing the minority ownership in Esat Digifone was apparent in Mr. Lowry's personal address to the Dáil on 30th April, 1996. On that occasion, Mr. Lowry was recorded as having stated the following in relation to that issue:

"I would like to dwell for a moment on the requirement that applicants provide full ownership details. The ownership structure of all of the applicant consortia was examined by the project team. Four others along with Esat Digifone, envisaged that the project would be financed, apart from debt financing, through equity participation going beyond the original consortia members. This wider equity participation involved unidentified stakeholders arising either through private placement or through a stock market flotation. The consultants and the project team saw nothing exceptional in this for a project of this size. Andersens had clearly been down this road before. It is impossible to accept that something envisaged by five of the six applications in some way damaged their applications.

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

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

56.34 Again, Mr. Lowry's comments were prefaced by references to proposals by four other applicants, on the footing that they were no different to the Esat Digifone arrangements. In truth, those proposals were in no respect comparable. What they envisaged were possible offerings or flotations after the licensed company had been in operation for a period of three to six years. Reference had indeed been made in the Esat Digifone application to a 12% shareholding being made available to the market three years after the commencement of operation, and that proposal was undoubtedly comparable with those referred to by Mr.

Lowry, but the arrangements surrounding the ownership of the 20% stake prior to the issue of the licence, which by then had increased to a 25% stake, had no connection whatsoever with those future plans of either Esat Digifone or the other four applicants in question.

56.35 As to the ownership of the Esat Digifone minority stake, as stated on this occasion, when both Mr. Lowry and the Department knew that the shareholding was then held by Mr. Desmond, what Mr. Lowry had to say was that the intention to place that shareholding had always been known, that letters of commitment had been provided, and that he was constrained by confidentiality from naming those institutions. Although neither Davy stockbrokers, nor the institutions in question, knew anything of the confidentiality surrounding their identity reserved by Esat Digifone on 4th August, 1995, when the Department had been specifically informed that under no circumstances were the identities of those institutions to be disclosed, there was no inhibition on Mr. Lowry, by reason of that reservation or otherwise, from disclosing to the Dáil on 30th April, 1996, that the minority shareholding was to be held by Mr. Desmond, or, for that matter, that Mr. Desmond had not been amongst the institutions that had furnished letters of commitment. That fact was not disclosed on that or any other occasion, and, as will be seen, its secrecy continued to be guarded so jealously that it was never even disclosed to Mr. Alan Dukes T.D., after he was appointed Minister in place of Mr. Lowry, and was responding as Minister, in writing to Mr. Bobby Molloy on that self-same ownership issue.

56.36 The Tribunal is somewhat surprised by the formulation of the ownership information disseminated to the Dáil on this occasion, and in particular that such emphasis was placed on the receipt of letters of commitment, as they were described, with the Esat Digifone application in relation to the minority shareholding. That emphasis gave the impression that the Department had always known who was to hold the minority shareholding, whereas by then there was no question that the named institutions were to hold any part of the minority shareholding, and whereas Mr. Desmond, who was an unknown entity in terms of the ownership details furnished in the application, had been identified as the sole minority shareholder.

Unscripted statements by Mr. Lowry

56.37 It was two unscripted observations made by Mr. Lowry on that occasion which were of particular significance to the Tribunal's inquiries, as to what had in fact occurred in response to the change of ownership notification. The Departmental witnesses testified that the notification gave rise to uncertainty over whether the licence could be issued to Esat Digifone, and prompted an investigation of whether the changes could be accepted, both in terms of

ownership and capital configuration, and whether Mr. Desmond had the financial wherewithal to meet his equity commitment. Until those inquiries had been completed, that uncertainty remained. Mr. Lowry had testified that he had constituted Mr. Loughrey responsible for dealing with these developments, and he had at all times acted on Mr. Loughrey's advice.

56.38 The first of the unscripted contributions made by Mr. Lowry, in response to questioning by a number of opposition Deputies, was as follows:

“The Deputy mentioned Mr. Desmond. If Mr. Desmond or any other company is in a position to fund this project and is acceptable to ESAT Digifone and if it means that this project is up and running, so be it – that is their business. It is not my business to determine who should participate in a consortium of this kind. My only priority is to ensure that the necessary funds are in place to fund the project and get it to roll out on time. It is very simple.”

Mr. Lowry in evidence confirmed that he had spoken spontaneously, and observed that he had put the matter very well. He testified that the passage reflected the view he had had earlier on: it was his view, and it continued to be his view, that it was not his business to determine who the funders of the 20% were going to be. That, he continued, was a matter for the consortium. It was his understanding that, once the shareholding in Esat Digifone was split in accordance with the ratio 40:40:20, the legal advice the Department had received was that the changed ownership information conformed with the terms of the competition.

56.39 In making that contribution on 30th April, 1996, at a time when the Department had not in many respects even commenced its inquiries, Mr. Lowry was most certainly not acting on the advice of Mr. Loughrey, or of any other Departmental official. Moreover, in stating as he did, on his own initiative, and “off the cuff”, as he put it himself, he declared publicly to the Dáil his view that Mr. Desmond's ownership of that minority shareholding was acceptable. Insofar as Mr. Lowry's statement was at odds with the evidence of Departmental officials that, pending further consideration of the consequences of Mr. Desmond's notified involvement, the entitlement of Esat Digifone to the licence was uncertain, it was Mr. Lowry's evidence that he must have been mistaken in what he had said on that occasion.

56.40 The second unscripted response to which reference should be made, which in fact arose at an earlier point in proceedings, encompassed the associated issue of financing, and was significant in that it suggests that Mr.

Lowry knew about the financial arrangements which had been made with Mr. Desmond, on 29th September, 1995, whereby Mr. Desmond's 25% shareholding entitlement had been provided to him in consideration for his underwriting of Communicorp's equity requirement. In that regard, the official report of proceedings in the Dáil recorded that Mr. Lowry had stated:

"The Communicorp funding requirement was underwritten by a party acceptable to my Department. The intention of the consortium partners to arrange a private placement with what only can be described as blue chip institutional investors was disclosed by them to my Department. Stockbrokers were named and letters of commitment for specified amounts from the investors were submitted. In addition, strong expressions of interests in loan and equity participation in the consortium were available from other leading international financial institutions. That was the position when the decision was made."

56.41 On the basis of the evidence heard by the Tribunal, the Departmental officials who had knowledge of the underwriting letter of 29th September, 1995, had made no association between the underwriting commitment conveyed in that letter, and Mr. Desmond's notified ownership of 25% of the shares in Esat Digifone. It seems, however, that Mr. Lowry, as of 30th April, 1996, was sufficiently conversant with that information to enable him not only to marshal it, when responding off script, but to use it to his advantage in the House. Mr. Brennan could not assist the Tribunal in relation to that passage, nor as to how Mr. Lowry could have known about the underwriting obligation: his only observation was that Mr. Lowry, in invoking the concept of underwriting, may have been referring to Advent as funders of Communicorp's equity participation. Mr. Brennan did nonetheless accept that the term underwriting had never been used in relation to Advent, and had only ever been used in the course of the process in the letter of 29th September, 1995, to describe the obligations of IIU in relation to the "circa 60%" shareholding in Esat Digifone not to be subscribed for by Telenor.

Press statement issued by Mr. Lowry on 8th May, 1996

56.42 On Thursday, 8th May, 1996, Mr. Lowry attended a meeting with European Commissioner Van Miert, of the Competition Directorate General, in Brussels. The Persona consortium had lodged a complaint with the Commission in relation to the GSM process. In the light of that complaint, the Commission had strongly advised the Department against issuing the licence until the Commission had an opportunity to analyse the complaint, and had suggested that Mr. Lowry should discuss the matter directly with the Commissioner. It was to that end that Mr. Lowry travelled to Brussels to meet with Commissioner Van Miert, and he was

accompanied on that occasion by Mr. Loughrey, and other Departmental officials. Mr. Brennan confirmed that as of 8th May, 1996, the Department had not yet completed its inquiries into the changed ownership issue, and, in that light, Mr. Brennan, who was certain that he had not accompanied Mr. Lowry to Brussels, could not explain how Mr. Lowry made a press statement in the terms which he did in Brussels, after the conclusion of his meeting with Commissioner Van Miert. It was Mr. Brennan's view that the press statement would have been drafted by the officials who had travelled to Brussels with Mr. Lowry. Mr. Loughrey was with Mr. Lowry on that occasion. His memory was not however distinct: he testified that he would not have drafted the press statement, and if he had been involved in approving or vetting it, he may have only had a minute or perhaps less in which to do so. It followed from his evidence that his consideration of the press statement would have been at most cursory. What Mr. Lowry had announced was that he had met Commissioner Van Miert in order:

"....to inform him of my intention to issue a second mobile phone licence in the very near future."

56.43 The Departmental officials recognised that Mr. Lowry's statement of intent on that occasion was at odds with the Departmental view, as it had been outlined to the Tribunal in evidence, as was Mr. Lowry's Statement to the Dáil, and as was too his declaration to his Cabinet colleagues as early as 23rd April, 1996. These utterances were not made by Mr. Lowry on casual occasions of comment. On the contrary, each was made on an occasion of the utmost formality, and represented statements of Government intent. His statements were at odds and inconsistent with the position of conditionality which the Tribunal was told had been adopted by the Department in respect of the changed ownership notification, a position which, according to Mr. Loughrey, it was inconceivable he would not have conveyed to Mr. Lowry. If the Department's position was as stated, and was conveyed to Mr. Lowry, it seems that Mr. Lowry either did not appreciate the need for caution, or he did not share that view. Mr. Lowry's statements were not without further significance. It seems to the Tribunal that each of them, and particularly the latter two, at least potentially, amounted to an official acknowledgement of the entitlement of Esat Digifone to the GSM licence, which could have had the effect of undermining the State's freedom of action, if the Department had concluded that the changes of ownership notified were not acceptable.

DEPARTMENTAL ACTIONS

56.44 It was Mr. Loughrey's and Mr. Brennan's determination that the changed ownership notification of 17th April, 1996, gave rise to serious reservations over whether the licence could be issued to Esat Digifone, and this

was dependent on the outcome of investigations into whether Mr. Desmond's ownership could be regarded as consistent with the ownership of financial institutions, whether the altered capital configuration was consistent with the intended ownership specifications notified in the Esat Digifone application, and evaluated during the competitive process, and whether Mr. Desmond had the financial capability to fund his shareholding. The Department did not it seems take immediate action in relation to these matters, apart from a prompt request made by Mr. Towe to the Office of the Attorney General for legal advice, which, according to his own evidence, and the contemporaneous written record made by him, he conveyed to the officials of the Attorney General's Office dealing with the matter, at a meeting on 22nd April, 1996, and confirmed in writing by letter dated 24th April, 1996. Mr. Towe's request, to the Office of the Attorney General for legal advice, and the response received to that request form the subject-matter of the next succeeding chapter of this Volume. Otherwise, nothing of significance in connection with the Departmental inquiries occurred, until the Department formally responded to Mr. O'Connell's letter some two weeks later.

56.45 There were many demands on Departmental resources during those two final weeks of April, 1996, including preparation for Mr. Lowry's Dáil Statement on 30th April, 1996, and a consideration of the complaint made by the Persona consortium to the European Commission in relation to the GSM process, lodged on 23rd April, 1996. That complaint would have itself delayed the issue of the licence, as the Commission indicated to the Department that it would not be advisable for the Department to proceed until the Commission had an opportunity to analyse the complaint. Following Mr. Lowry's meeting with Commissioner Van Miert on 8th May, 1996, the Commission ruled against the granting of any interim protective measures to Persona, thereby removing that obstacle to the issue of the licence.

56.46 Before the Department responded formally to Mr. O'Connell's letter on 1st May, 1996, there were informal dealings between the Department and the consortium, to which there was no reference on the Departmental files, and of which the Tribunal only learned from Mr. O'Connell's records. Apart from those contacts, which will be returned to, there were other interactions between the consortium and the Regulatory Division of the Department in relation to Mr. O'Brien's fixed-line business, during the latter part of April, 1996, in the course of which additional ownership and financial information was provided, which altered the complexion of the information which had been provided by Mr. O'Connell, and reference will first be made to those dealings.

Further information provided to Mr. Sean McMahon

56.47 On Friday, 26th April, 1996, Mr. O'Brien attended a meeting in the Department with Mr. Sean McMahon, of the Regulatory Division. The meeting ostensibly concerned Mr. O'Brien's existing fixed-line business which, following the restructuring of Mr. O'Brien's business interests, had become closely linked to his prospective mobile business through the newly created company, Esat Telecommunications Holdings, in which both interests had been consolidated. It was that new company for which funds were to be raised on the US Market through Credit Suisse First Boston, and that funding arrangement had also been disclosed for the first time in Mr. O'Connell's letter of 17th April, 1996.

56.48 Mr. McMahon had kept a note of that meeting in his personal journal, and he had also prepared a formal report of it, and of subsequent related contacts with Mr. O'Brien, which he had placed on his GSM file, and which, according to a handwritten annotation made by him on the face of the document, he had circulated to Mr. Brennan and Mr. Towey. Mr. McMahon's notes recorded that Mr. O'Brien had, on 26th April, 1996, given him a very different account of the intended ownership of Esat Digifone to that which had been detailed in Mr. O'Connell's letter, and one which reflected Mr. O'Brien's then strategy of acquiring 12.5% of Mr. Desmond's 25% shareholding entitlement. What Mr. O'Brien told Mr. McMahon, as recorded by the latter contemporaneously, and confirmed by him in evidence, was that it was intended that Communicorp's shareholding in Esat Digifone would increase to 50%, Mr. Desmond's shareholding through IIU would reduce to 12.5%, and Telenor's 37.5% shareholding would remain unchanged. That of course would have been the outcome, had Mr. O'Brien's negotiations with Mr. Desmond proceeded to fruition.

56.49 Mr. McMahon recorded in his note that Mr. O'Brien had initially indicated to him that Credit Suisse First Boston, which Mr. O'Brien had described to Mr. McMahon as his lead bankers, had advised that he should endeavour to '*find solution*' to the issue with the Department surrounding his use of routers. Routers were the devices which had been used by Esat Telecom to expand the capacity of its fixed-line network, the legality of which had been challenged by the Department. In that regard, Mr. O'Brien informed Mr. McMahon that Esat Telecommunications Holdings intended to raise £26 million, and that £4 million of those funds were destined for his fixed-line business. Mr. McMahon, having sought to clarify precisely what Mr. O'Brien wished to achieve, had been informed by him that Credit Suisse First Boston in fact wanted him to negotiate with the Department for the provision of additional leased-lines, and that Credit Suisse First Boston would not provide funding unless such additional lines were secured.

56.50 The Department was not in a position to provide any further fixed-line capacity, unless the conditions provided for in the Government Decision of 26th October, 1995, were met, on the basis of a verifiable use through monitoring of traffic over existing lines, and Mr. McMahon so informed Mr. O'Brien. Mr. McMahon also suggested to Mr. O'Brien that, in light of the attitude of Credit Suisse First Boston, it might be advisable for him to uncouple the funding of his fixed-line business from that of his participation in Esat Digifone. In his formal report, Mr. McMahon also noted that three days later, on 29th April, 1996, Mr. O'Brien gave him further information that the financing of Esat Digifone would not be a problem for Communicorp in the short-term, and that the funding from Credit Suisse First Boston was intended for the back-end of the project. This was not the final contact between Mr. O'Brien and Mr. McMahon on the point, and two days later, on 1st May, 1996, Mr. McMahon telephoned Mr. O'Brien to clarify the position regarding Esat Digifone's finances, in the light of what Mr. O'Brien had told him, namely, that Credit Suisse First Boston would not provide £26 million of funding, £22 million of which was designated for Esat Digifone, unless Esat Telecom's leased-line capacity was increased, and that such funding was not intended for the initial capitalisation of Esat Digifone. What Mr. O'Brien told Mr. McMahon on 1st May, 1996, was that Advent and Allied Irish Banks would be providing £40 million, of which £36 million was intended to fund Esat Digifone.

56.51 Mr. McMahon recognised that the ownership details which Mr. O'Brien had given to him were different to those which had been notified by Mr. O'Connell on 17th April, 1996. What Mr. O'Connell had stated was that the shareholding in Esat Digifone would be held according to the ratio 37.5: 37.5: 25, whereas what Mr. O'Brien had told Mr. McMahon, on 26th April, 1996, was that the same shareholding would be held according to a different ratio, namely, 50: 37.5: 12.5. Mr. O'Brien had also told Mr. McMahon that, in the absence of additional fixed-line capacity, he had been informed that Credit Suisse First Boston would not fund Communicorp's participation in Esat Digifone, although he resiled from that on 29th April, when he assured Mr. McMahon that the short-term funding of Esat Digifone was not a problem, and he resiled yet further on 1st May, 1996, when he told Mr. McMahon that the £40 million intended for both Esat Digifone and his fixed-line business would in fact come from Advent and Allied Irish Banks. The new information provided over 26th April, 29th April, and 1st May, 1996, related both to the capital configuration of Esat Digifone, and the funding of Communicorp's participation in Esat Digifone. Whilst Mr. McMahon did not recall conveying that information to Mr. Brennan and Mr. Towey, he testified that he would have been surprised if he had not imparted it to them one way or another. It seems clear, from the annotation made by him on his formal report of those dealings, that he had in fact relayed that material to both of them.

56.52 It is equally clear from the documents generated by Mr. McMahon that he discussed the issues raised by Mr. O'Brien with Mr. Loughrey who, according to Mr. McMahon's note in his personal journal, had telephoned him. In discussing the matter, it is apparent that what was primarily under consideration between Mr. Loughrey and Mr. McMahon was Mr. O'Brien's request for additional leased-line capacity, and what Mr. McMahon had recorded was Mr. Loughrey's view that there was little the Department could do to be of assistance, as Mr. Lowry could not go behind the Government Decision of 26th October, 1995. It is equally clear that the context of their discussions was Mr. O'Brien's fear that he would not be able to raise funding because of the routers issue.

Departmental dealings with Esat Digifone in early May, 1996

56.53 The Department's formal response to Mr. O'Connell's ownership notification to Ms. Finn was by letter, dated 1st May, 1996. This was not however the first response of the Department, and in advance of that letter, on 29th April, 1996, Mr. Towey had contact with Mr. O'Connell. It was Mr. O'Connell's evidence that he thought that he had met Mr. Towey, but as Mr. Towey was clear that he had never met Mr. O'Connell on a one-to-one basis in the course of the process, it was his belief that the interaction between them must have been in the course of a telephone conversation. The Tribunal knew nothing of that interaction until it received Mr. O'Connell's file, at a relatively advanced stage of its private investigations. Mr. O'Connell's note recorded the following exchange:

"Fintan Towey

Trying to hammer down paper trail between beneficial ownership as in bid and as now proposed; to determine whether there are any differences. Legal people involved.

If telecom interests held Esat Holdings and radio by Communicorp - asset base of Communicorp reduced. Doesn't know whether it would be a problem.

Suggested meeting.

Premature. Question is whether co. to be licensed is the same as co. that applied. Has to be assured from a legal perspective.

Haven't reached decision as to whether there is any difficulty, or anything they want done differently.

Warranties regarding ownership + financing. Identifying institutional investors. Means ownership at date of licence.

OOC – no difficulty with that at all.”

56.54 Although Mr. Towey had no recollection of that interaction, and Mr. O’Connell’s note did not refresh his memory, he accepted that an exchange in the terms recorded by Mr. O’Connell had taken place. From the contents of Mr. O’Connell’s note, as confirmed by him in evidence, it is clear that the Department’s initial response, as conveyed by Mr. Towey to Mr. O’Connell, was that the Department had sought legal advice on whether the company to be licensed was the same as the company that had applied, and that no decision had yet been reached by the Department.

56.55 No explicit reference to that position was in fact made in the Department’s formal response, which was by letter dated 1st May, 1996, signed by Mr. Brennan. The draft of that letter had been forwarded by Mr. Towey to the Office of the Attorney General, and its contents had been legally approved prior to its issue. In that letter, Mr. Brennan, having summarised the ownership information supplied in the Esat Digifone application, indicated that in view of the information contained in the letter of 17th April, 1996, the Department wished to obtain clarification in relation to the following:

- *“the nature of any differences between Communicorp and Esat Telecommunications Holdings Ltd. in relation in particular to expertise or asset strength, and*
- *full details of the ownership and categories of all shares of Esat Telecommunications Holdings Ltd. including in particular by persons other than the owners of Communicorp.”*

Mr. Brennan continued by stating that:

“It is essential that the Department can identify precisely any changes in the effective ownership (both direct and indirect) of Esat Digifone since the time of submission of the application.”

and he concluded his letter in the following terms:

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

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

56.56 As is evident from its contents, the principal purpose of that letter was to garner further particulars of the ownership of both Esat Telecommunications Holdings, and of Esat Digifone. In that regard, Mr. Towey agreed in evidence that no view could have been taken by the Department on the issues which had been identified, until that more detailed information was to hand. As regards the latter company, Esat Digifone, it was indicated unequivocally by Mr. Brennan that it was critically important that the Department would be in a position to identify any change in effective ownership since the submission of the Esat Digifone application. Although no direct reference was made in that letter to Departmental uncertainties surrounding the entitlement of the consortium to the licence in light of the changes notified, the consortium could have been under no misapprehension surrounding the Department's position.

56.57 It was Mr. Loughrey's evidence that he was not aware of that letter of 1st May, 1996. Had he been so, he would have wished matters to be put more explicitly, in terms of what was and what was not acceptable to the Department. Whilst undoubtedly that letter of 1st May, 1996, did not record any formal reservation arising from the changed ownership notification, it was approved by the officials of the Attorney General's Office who had been assigned to deal with GSM issues, and who had been briefed by Mr. Towey during the previous week on the matter.

56.58 In what seems to have been in response to Mr. Brennan's concluding remarks in his letter of 1st May, 1996, that the Department was available for discussion, a meeting proceeded in the Department on Friday, 3rd May, 1996. It was what Mr. Arve Johansen learned at that meeting concerning the Department's reaction to Mr. Desmond's introduction as a 25% shareholder, coupled with the news he had received the previous day from Mr. O'Brien that he was persisting in his plan to acquire 12.5% of Mr. Desmond's 25% shareholding, which had prompted Mr. Johansen to write his personal memorandum of 4th May, 1996. In it, he had traced for himself the history of his dealings with Mr. O'Brien in connection with Mr. Desmond's accession to the consortium, he had outlined his own analysis of Mr. O'Brien's motivations, and he had recorded his impressions of what he had learned at the Department on 3rd May, 1996. The contents of that memorandum have already been reproduced in Chapters 28 and 53 of this Volume.

56.59 As already alluded to, it was the contents of Mr. Johansen's memorandum which alerted the Tribunal to the fact that a meeting had taken place in the Department on that date. No record of such meeting, or reference to it, had been found within the Departmental files, and the Tribunal had not been informed of it by any of the Departmental officials who had been in attendance.

As has already been referred to, Ms. Regina Finn, who had been at the meeting, and who had left the civil service some years earlier, when asked about this meeting in the course of the Tribunal's private investigations, requested a copy of any note which she had made of the meeting, if such a note was available, as it was her view that if she had attended that meeting, she would have generated a note of it. No such note made by Ms. Finn, or any other official, was within the Departmental files produced to the Tribunal. It was not until the Tribunal received Mr. O'Connell's file that it discovered that a fully attended meeting had proceeded on that date. Mr. Brennan, Mr. Towey, Ms. Finn and another Departmental official, who had had no role in the evaluation process, represented the Department, and the consortium was represented by a six strong delegation comprising Mr. Knut Digerud, Mr. Peter O'Donoghue, Mr. Johansen, Mr. Paul Connolly, Mr. O'Connell and Dr. Michael Walsh. This was, as already adverted to, the first occasion on which Dr. Walsh had attended any meeting or assumed any role in dealings with the Department. Dr. Walsh was personally known to the Department, which he had served as a consultant some years earlier when engaged by National City Brokers, the stockbroking house formerly owned by Mr. Desmond.

56.60 It is clear from the contents of Mr. O'Connell's note, which he confirmed in evidence, that the hesitancy and caution exhibited in the letter of 1st May, 1996, had been abandoned, and that the Departmental officials had expressed in forthright terms the Department's disquiet at what had occurred, and had indicated in precise terms, and expanded upon, the information sought in that letter. Mr. O'Connell's note is reproduced in full below:

*"KD, POD, AJ, MW, P. Connolly, OOC @ Dept. Comms.
Martin Brennan, Fintan Towey, Regina Finn Eanna*

Clear a political football.

*Identity of each s'holder – legal + beneficial ownership
ESAT Digifone changes relative to bid.*

*Change in institutional investment – replacement
of Advent + Davys by IIU*

Need detailed information/quality/about IIU.

Confirmation that Telenor is same as at bid date.

*Differences (in detail) as to expertise + asset
strength between Communicorp + ESAT Telecom
Holdings.*

Numbers re IIU.

Telenor “backdrop” statement as operator - as last resort. AJ – that’s the way we see it anyway. “We’ll never abandon this one”. Not requesting statement, but would be helpful per MB.

Project finance – POD – bank 60/equity 40. ABN + AIB appointed co-providers. £25 m bridging committed. Thought to presentation. More the better provided agreed in advance.

Donal Buggy + Billy O’Riordan. Maybe Andersen.

Better than 50% chance that Commission will send us Persona complaint; Department would already have replied + would like us to co-ordinate response. When Telenor and ESAT began to talk? (Ref Complaint).”

56.61 As is apparent from the contents of that note, the meeting opened with an observation which can only have been prompted by the ownership issues surrounding Esat Digifone, namely the reference to:

“Clear a political football”.

Mr. O’Connell testified that that reference, as he understood it, related to the political controversy which had surrounded the ownership of Esat Digifone, and that description reflected the then media frenzy, the complaint which had been lodged with the Commission by Persona, and the Statement which had been made by Mr. Lowry in the Dáil earlier that week, on Tuesday, 30th April, 1996.

56.62 Mr. Brennan could not assist the Tribunal as to whether that entry related to something which was said by the Departmental representatives in connection with the ownership issue: he thought that it could have simply reflected Mr. O’Connell’s own view of matters. Mr. Towey acknowledged that Mr. O’Connell had made that entry, and that there was then ongoing political controversy, even though in the view of the Department there were no grounds for that controversy. What is clear is that Mr. O’Connell, a skilled, experienced and careful solicitor, made that record, and the Tribunal has no reason to doubt its accuracy. Moreover, it was the Department’s sensitivity and discomfort, surrounding the late introduction of Mr. Desmond, which was the feature of

exchanges at that meeting, that made the most significant impression on Mr. Johansen. Even allowing for the possibility that Mr. Johansen's personal memorandum may have been impressionistic, as suggested by a number of witnesses, and may have been generated by him to protect his own position and that of Telenor, there can be no doubt that what he recorded was based on what had occurred at that meeting on 3rd May, 1996, as reflected by Mr. O'Connell's attendance.

56.63 It is helpful at this juncture to quote again from the relevant paragraphs of Mr. Johansen's personal memorandum:

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

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

'I think it would be a very prudent thing for Telenor to do - especially since we then effectively underwrite the whole project, both Communicorp and IIU, after already having paid Communicorp's price for the first underwriting which now appears to be useless.'

56.64 Apart from expressing their anxiety surrounding the political controversy, it is evident from Mr. O'Connell's note, and was confirmed by him in evidence, that at that meeting the Departmental representatives had defined exactly what information it wished to receive on foot of its request of 1st May, 1996, and had also expanded upon that request to cover information in relation to Mr. Desmond, and his company, IIU, and specifically had sought an explanation as to how Davy stockbrokers and the financial institutions had been replaced by IIU. The extent of the Department's concern surrounding the finances of the consortium was evident from both Mr. Johansen's memorandum, in which he had

stated that Mr. Brennan had asked Telenor, off the record, to confirm that they would serve as a last resort for Esat Digifone, for both funds and operational support, and from Mr. O’Connell’s attendance, in which he had recorded:

“Telenor “backdrop” statement as operator - as last resort. AJ – that’s the way we see it anyway. “We’ll never abandon this one”. Not requesting statement, but would be helpful per MB.”

56.65 The deficiency in the consortium’s finances had of course manifested itself as a source of concern in the course of the evaluation process, and recommendations had been made in the Evaluation Report as to the imposition of conditions in the licence to meet the risk of instability attendant on Communicorp’s negative equity. These were matters that, irrespective of Mr. Desmond’s accession as a 25% shareholder, were always going to require Departmental scrutiny and attention. What would not of course have required any further action, had the financial institutions not been displaced by Mr. Desmond, was any scrutiny of their finances which, as of 1996, as confirmed in evidence, could have been taken for granted, as they had been in the evaluation process. Mr. Desmond’s finances, unlike those of the financial institutions, required consideration and scrutiny, and, as recorded by Mr. O’Connell in his attendance, the Department required:

“detailed information/quality/about IIU...

....Numbers re IIU.”

56.66 The Tribunal is satisfied that the Department at that meeting on 3rd May, 1996, did, quite understandably, seek Telenor’s support for the project, as recorded by Mr. O’Connell contemporaneously and by Mr. Johansen on the following day, and as confirmed in evidence. It was a sensible and prudent course for the Department to seek the assurance of Telenor, the only one of the three shareholders which, to the Department’s then knowledge, had a balance sheet which could support the rollout of the GSM network. This was so primarily in the light of the following matters: firstly, the qualification to Esat Digifone’s finances registered in the Evaluation Report; secondly, the further developments, whereby the Department had been informed that Communicorp’s funding was not to be provided by Advent, but was instead to be raised through a private placement by Credit Suisse First Boston; thirdly, the further uncertainties introduced by what Mr. O’Brien had told Mr. McMahon concerning Credit Suisse First Boston’s refusal to provide funding unless additional leased-lines were secured; and finally, the alteration in ownership whereby the financial institutions’ shareholding had been allocated, together with a further 5% shareholding, to Mr. Desmond.

56.67 The information and documentation requested by the Department in Mr. Brennan's letter of 1st May, 1996, as expanded upon at the meeting of 3rd May, 1996, was attended to by Mr. O'Connell over the following week, and the consortium's response was by letter, delivered by hand to the Department at a further significant meeting on Monday, 13th May, 1996. Before addressing that response, reference must first be made to a second telephone conversation between Mr. Towey and Mr. O'Connell on the intervening Tuesday, 7th May, 1996. This was another contact between them which was off the record, insofar as neither the fact nor the subject matter of it was either recorded or referenced in the Departmental files. It was however recorded by Mr. O'Connell, and it was from Mr. O'Connell's files that the Tribunal first learned of it. Mr. O'Connell had noted his conversation with Mr. Towey in the following terms:

"Fintan Towey:-

*Min. v. strong preference for 40:40:20
at time of licence, but ~~strongly~~ understands
need for flexibility afterwards. Will take
ESAT Holdings subject to no substantive
difference + outline in writing."*

56.68 Mr. Towey, who had made that telephone call, as he had in the previous week on 29th April, recognised that, in so doing, he had been conveying a significant message to Mr. O'Connell, and testified, as the Tribunal accepts, that he would have been acting on the instructions of his superordinate officials. What Mr. Towey conveyed to Mr. O'Connell was never put in writing, or reflected anywhere in the Departmental files. As recorded in Mr. O'Connell's note, Mr. Towey had informed him that the Department would "*take ESAT Holdings*", and that the Minister's very strong preference was for a reversion in the capital configuration of Esat Digifone to the ratio 40:40:20. That was the ratio specified in the Esat Digifone application, and declared publicly, including by Mr. Lowry in his Statement to the Dáil on 22nd November, 1995. As that latter preference was, on the basis of Mr. Towey's communication, the sole alteration required by the Department in response to the changed ownership information, it follows that the replacement of the financial institutions by Mr. Desmond must have been accepted. Mr. Towey's communication, as he agreed in evidence, amounted to the Department's response to the altered ownership notification.

56.69 It is unclear what prompted the Department to take that action on Tuesday, 7th May, 1996, in advance of receiving the information it had sought to enable it to conduct the inquiries which, on the evidence of Mr. Loughrey and Mr. Brennan, had been identified as necessary to a determination of whether the

licence could be issued to Esat Digifone. At that point, legal advice was awaited in a form which Mr. Towey, who had been the agency through which advice had been sought, would have regarded as definitive. Whilst Mr. Towey, in conveying that response, invoked Mr. Lowry's name as the source of the preference for a realignment of the shareholdings, it was his evidence, in which he was supported by Mr. Loughrey, that it may well have been that he invoked Mr. Lowry's name in order to confer additional emphasis on and substance to his communication. Whilst there was no direct evidence that Mr. Lowry had given any such direction, or expressed any such view, it is clear from Mr. Loughrey's evidence that Mr. Lowry had been kept informed of all the developments which arose in the weeks preceding the issue of the licence. Although the Department never received any legal advice which suggested that the altered shareholding ratio was an impediment to the issue of the licence, it was Mr. Loughrey's evidence that, on learning of this change, he had determined that the capital configuration would be brought back to that specified in the application, and he needed no legal advice on the point.

56.70 As already addressed in Chapter 54 of this Volume, the consortium responded positively to the message conveyed by Mr. Towey on 7th May, 1996. In that regard, it was Mr. O'Connell's evidence that in practice the consortium complied with whatever requests were made by the Department, as it wanted to secure the licence. The terms on which Mr. Desmond would cede a 5% shareholding equally between Communicorp and Telenor, in order to restore the capital configuration of Esat Digifone to 40%, 40%, 20%, was one of the issues which formed the subject-matter of the intensive meetings between the consortium members over the following weekend. It was in fact the least contentious of the issues which had to be resolved, and agreement was reached that Mr. Desmond would sell a 2.5% shareholding to each of Communicorp and Telenor for payments of £1.375 million by each of them. Whilst Telenor would make its payment immediately, it was agreed that Communicorp's payment would be deferred until end-May, 1996, by which time it was expected that the US funding would be available, and it was in the meantime to be secured by a mortgage over the 2.5% shareholding to be transferred by Mr. Desmond to Communicorp.

56.71 Returning to Mr. O'Connell's efforts to assemble and marshal the information which the Department had sought, as part of that task he prepared a draft letter to be signed by Mr. Digerud, which as already indicated was, in its final form, together with its enclosures, delivered by hand to the Department on Monday, 13th May, 1996. That letter, as finalised and signed by Mr. Digerud, and as it appeared on the Departmental files, was a short covering letter. That was not however the form in which the letter had been drafted by Mr. O'Connell, and, as was evident from a copy of his draft of that letter dated 10th May, 1996, and

which he had retained on his files, a lengthy passage had been omitted from the final letter as signed by Mr. Digerud. The passage deleted from the final form of the letter was that in which Mr. O'Connell had set out the explanation sought by the Department at the meeting of 3rd May, 1996, for the replacement of Davy stockbrokers by IIU. The passage which was omitted from the letter was in the following terms:

“During our meeting you asked for an explanation for the involvement of International Investment & Underwriting (“IIU”) in this transaction, having regard to the prior involvement of Davy Stockbrokers and certain of their clients.

As you know, the bid was made jointly by Telenor and Communicorp, who were accordingly responsible for its financing. However, the bid also indicated an intention to place 32% of the company with private and institutional investors (as to 20% immediately and 12% in the short to medium term). At that time, Davys and their clients had given conditional letters of intend in regard to funding 20% of the equity element of the investment, but there was no legally-binding commitment by them.

Throughout the period prior to and after submission of its bid, Esat Digifone behaved consistently on the assumption that it would be awarded the licence, planning and spending accordingly. It was thought desirable to secure the proposed 20% non-Telenor/Communicorp funding, and in addition, Communicorp wished to improve its financing arrangements for its share of the cost of the licence fee and subsequent construction and launch costs associated with a successful bid.

Following a review of the possibilities available in the financial market, IIU indicated a willingness to arrange funding commitments; in exchange it wished to have the placing of shares, and sought in addition, a pre-placing of part of the 12% of Esat Digifone which (as indicated above and in the bid) was to be placed over time. All in all, Esat Digifone and Communicorp felt this to be a very advantageous offer.

As you know, the bid merely provided that institutional investors (which IIU is) would be approached to take up the non-Telenor/Communicorp shares and references to other investors (AIB, IBI, Advent and Standard Life) were given on an indicative/intent basis. Accordingly,

we believe that the present structure is fully in accordance with the bid.

IIU has agreed initially to take up loan stock in lieu of shares in respect of the “pre-placing” element of its commitment, which will result in the shareholding structure certified in the attached letter from Mr. [] of Esat Digifone Limited. In this regard, I should make it clear that the shareholdings and the 40:40:20 ratio certified in that letter (and also referred to in Mr. Connolly’s letter) relate to the situation which will prevail upon and immediately prior to the grant of the licence; their delivery today should accordingly be regarded as being in anticipation of the issue of the relevant shares.”

56.72 Whilst Mr. O’Connell testified that he had no memory of the circumstances in which those paragraphs came to be deleted from the final letter, it was his supposition that they had been removed either at the request of, or with the acquiescence of, the Department. Mr. Brennan and Mr. Towey testified that they never had any dealings in connection with the draft letter. Whilst Mr. O’Connell could not point to any such dealings, having no recollection of the matter, he nonetheless was explicit in asserting his supposition that there must have been an agreement to excise the information, whether it was first proposed by the Department, or by the consortium. None of the other witnesses who had dealings in connection with this matter, including Mr. Digerud, who signed the letter, could be of assistance to the Tribunal as to how it was that the consortium understood that the explanation sought by the Department on 3rd May, 1996, was no longer required. By 13th May, 1996, when the letter was furnished, the Tribunal is satisfied that a decision had already been taken by the Department, and conveyed by Mr. Towey to Mr. O’Connell by telephone on 7th May, 1996, that the substitution of Mr. Desmond or his company, IIU, for the financial institutions, was acceptable. This was a decision of which there was no record in the Department.

56.73 As apparent from the testimony and the contemporaneous documentation which was adduced in evidence, there were two separate strands to the dealings between the consortium and the Department, following Mr. O’Connell’s changed ownership notification of 17th April, 1996. There was the formal exchange of correspondence on the Departmental files, which comprised Mr. O’Connell’s letter of 17th April, 1996, Mr. Brennan’s response of 1st May, 1996, and Mr. Digerud’s covering letter of 13th May, 1996. There were also the informal exchanges, by means of Mr. Towey’s telephone contacts with Mr. O’Connell on 29th April and 7th May, 1996, and the meeting of 3rd May, 1996, none of which were reflected in any documentation on the Departmental files. Apart from Ms. Finn’s memorandum, in which she had recorded the information

imparted to her by Mr. O'Connell on 16th April, 1996, the significance of which had escaped her, and in which she had recorded Mr. Desmond's association with IIU, Mr. Desmond's name did not appear anywhere on the Departmental files.

56.74 By 7th May, 1996, the Department, by means of Mr. Towey's telephone call to Mr. O'Connell, conveyed to the consortium that, despite its earlier concerns, also transmitted by Mr. Towey, on 29th April, 1996, it intended to accept the changed ownership as notified by Mr. O'Connell's letter of 17th April, 1996, subject to the restoration of the capital configuration of Esat Digifone to 40%, 40%, 20%. As will be seen, inquiries were subsequently pursued by the Department, centering upon the finances of Mr. Desmond, in the days preceding the issue of the licence. Conditions were also imposed by the Department, and complied with, regarding the underwriting of Communicorp's equity in Esat Digifone. Those inquiries and conditions cannot however have informed the decision that had been made and communicated on 7th May, 1996.

LEGAL ADVICE ON CHANGES

57.01 It is on any realistic appraisal of the evidence beyond doubt that, whatever the differences between Mr. Michael Lowry, his Department, and Esat Digifone on the matter, as examined and analysed in preceding chapters, there was in the final pressurised weeks leading up to the issue of the GSM licence a serious and controversial issue to be determined, regarding changes in the ownership composition and share configuration of Esat Digifone. In setting forth the rules of the GSM competition, the RFP had expressly required applicants to disclose full ownership particulars of the intended licensees. Both in its written application, and at its oral presentation, it had been expressly represented on behalf of Esat Digifone that its ownership composition and configuration comprised 40% shares on the part of each of Communicorp and Telenor, with the remaining 20% shared equally between the four financial institutions then named. However viewed, the subsequent alteration to 37.5% shares on the part of each of Communicorp and Telenor, with the entire remaining 25% the entitlement of Mr. Dermot Desmond, through his company, IIU, constituted a change in both ownership and share configuration that was not of trifling import.

57.02 Irrespective of how the content of prior oral and written communications between the Department and Esat Digifone on the matter may be regarded, in addition to the incidence of relevant Dáil debates and press articles, it is equally beyond doubt that the exchanges between Ms. Regina Finn of the Department, and Mr. Owen O'Connell, solicitor to Esat Digifone, of 16th April, 1996, confirmed in Mr. O'Connell's letter of the following day, placed the matter of both Mr. Desmond's shareholding in Esat Digifone, and the fact that its 25% exceeded the prior institutional 20%, formally on the record of the Department.

57.03 On [24th April, 1996](#), Mr. Fintan Towey wrote to Mr. Denis McFadden and Mr. John Gormley, both barristers and members of the staff of the Attorney General's Office, who had been assigned to deal with GSM issues, and who the Department had consulted on a number of matters that arose over the preceding months. In that letter, Mr. Towey sought legal advice on certain issues relating to the GSM licence, including the changed ownership issue. Those other issues, already alluded to in a preceding chapter, related to the form of the draft licence itself, draft regulations to transpose the EU Mobile Directive which it was intended would amend the Postal and Telecommunications Services Act, 1983, by introducing a new subsection, pursuant to which the licence would be issued, and the proposed holding of meetings with consortia that had been unsuccessful in the competition. On the ownership issue, what Mr. Towey succinctly stated was:

“I would also like to reiterate our requirement for a legal opinion on the restructuring of the ownership of Esat Digifone (relevant papers were provided at our meeting on 22 April). In particular, the question of whether recent correspondence suggests any change in the identity of the beneficial owners of the company which could be considered incompatible with the ownership proposals outlined in the company’s application must be addressed.”

A copy of Mr. Towey’s letter may be found within the Book of Appendices to this Volume.

57.04 On the same day, 24th April, 1996, a copy of that letter was sent to Mr. Richard Nesbitt, a senior counsel practising in commercial matters, with a view to him furnishing the required legal advice. Amongst other papers provided, including the RFP document, Mr. Nesbitt was furnished with a copy of an extract from the Esat Digifone application, containing a statement of the ownership profile of the proposed licensee, a copy of Mr. O’Connell’s letter to Ms. Finn of 17th April, 1996, and a copy of Ms. Finn’s note of 16th April, 1996, recording the ownership information conveyed to her by Mr. O’Connell in the course of their telephone conversation on that date. It was not the first time that Mr. Nesbitt had been retained by the State in relation to GSM matters, as he had furnished advices and attended meetings on unrelated aspects during 1995, and had also attended at the Office of the Attorney General on 23rd April, 1996, when it appears that this matter was discussed, and certain oral advice was given by Mr. Nesbitt, although neither Mr. Towey, who sought that advice, nor Mr. Nesbitt himself, had any recollection of that exchange. Any discussion of the issue on that occasion would not have been regarded as definitive by Mr. Towey, and would likewise not have been regarded as constituting advice by Mr. Nesbitt. Nonetheless, both Mr. McFadden and Mr. Gormley were certain that advice had been given on that occasion, and in the case of Mr. Gormley, although not Mr. McFadden, it was that advice which led him to interpret a short passage in an opinion furnished by Mr. Nesbitt on 9th May, 1996, as confirming the position, as he had understood it, that no legal difficulty arose from the change of ownership or share configuration.

57.05 The Tribunal is satisfied that, despite significant infirmities in the evidence heard, including the manner in which that evidence was belatedly made known to the Tribunal, it is the case that as a matter of inter-Departmental responsibility, the Department was entitled to regard the Attorney General’s formal sanction of the licence and regulations dated 13th May, 1996, as confirmation that none of the matters raised by the Department gave rise to an impediment to the issue of the licence to Esat Digifone. Whether, in the light of Mr. John Loughrey’s and Mr. Martin Brennan’s evidence that, on receipt of Mr.

O'Connell's letter of 17th April, 1996, there was a genuine doubt concerning Esat Digifone's entitlement to the licence, that formal sanction would have been sufficient to dispel their doubts, is another matter.

57.06 This aspect of the Tribunal's inquiries was not without its complications. These arose from the claim to privilege over Mr. Nesbitt's opinion of 9th May, 1996, maintained by the State until notification of the Tribunal's Provisional Findings in November, 2008, the doubly belated manner in which relevant information was provided to the Tribunal by the State, and, not least, an error made by the Tribunal in the interpretation of a letter furnished by the then Attorney General in December, 2002. In these circumstances, it is necessary to set forth and analyse the manner in which the Tribunal's inquiries progressed, and the evidence heard at various points in the course of those inquiries.

57.07 Before doing so, it is helpful to address in outline the role that Mr. Nesbitt played in the furnishing of advice to the Department over the six weeks prior to the issue of the licence. In early April, 1996, Mr. Nesbitt had been instructed to review both the draft licence and draft regulations initially prepared by the Regulatory Division, and revised by the Parliamentary Draughtsman. Apart from the changed ownership issue, his advice was also sought at this time in relation to a complaint lodged by Persona with the European Commission, and the Department's intention to meet with unsuccessful applicants and furnish them with feedback on their applications, prior to the issue of the licence. On 9th May, 1996, Mr. Nesbitt returned the draft licence and regulations to the Attorney General. He had amended those documents, and together with his covering letter, he furnished an opinion in which he reviewed the amendments he had made, and explained why to his mind those amendments were necessary. In the course of that opinion, in the context of Article 8 of the draft licence, which imposed restrictions on the transferability of shares in the licensee company, after the issue of the licence, Mr. Nesbitt observed as follows:

"If one analyses why the Minister is concerned about the ownership of shares in the licensee the only legitimate concern he can have is that if there is a change of ownership the service that has to be provided will in some way be compromised. I do not think it is tenable to suggest that the licensee has been awarded the licence because of the parties who own the licensee. Rather the licensee has been awarded the licence because its plans and proposals were the most meritorious and it provided a funding plan which looked feasible. There is no reason why any of these matters have to be compromised by a change in ownership. However I do accept that there is a possibility that this might occur. It is also a real issue in the mind of the public."

The paragraph that immediately followed that passage in the opinion began by stating *“In the circumstances I have proposed changing Article 8 quite fundamentally”*, and thereafter set out a summary of Mr. Nesbitt’s changes. A copy of Mr Nesbitt’s opinion and covering letter of [9th May, 1996](#), can be found in the Book of Appendices to this Volume.

57.08 In a nutshell, it was the evidence of Mr. Towey, Mr. Loughrey and Mr. Brennan, when they gave further testimony in June, 2009, of Mr. Nesbitt, when he gave evidence in July, 2009, and of Mr. McFadden, when he gave evidence in March, 2010, that it was this passage of Mr. Nesbitt’s opinion which addressed the prior ownership issue, on which Mr. Towey had sought an opinion on 24th April, 1996. It was likewise the evidence of Mr. Gormley in March, 2010, save that Mr. Gormley recognised that the opinion was addressed to a different matter, namely the draft licence and draft regulations, and further recognised that, without knowledge of earlier oral advice attributed by him to Mr. Nesbitt, which the latter testified he had not given, an outsider reading the opinion would not necessarily understand that passage to address the issue raised by Mr. Towey.

TRIBUNAL’S PRIVATE INQUIRIES

57.09 In the context of the Tribunal’s private investigations into the GSM process, the Department and the Department of Finance produced their relevant files to the Tribunal voluntarily. That production embraced copies of privileged documents, including legal opinions received by the Department from time to time. The production of those documents was subject to the maintenance of privilege by the State, so that, whilst the Tribunal could have access to them for the purposes of its private inquiries, it was not at liberty to adduce them in evidence, and was thereby precluded from questioning witnesses on their contents in the course of public sittings. Having reviewed those privileged documents, including the opinion of 9th May, 1996, the Tribunal was unable to identify any opinion or advices addressed to Mr. Towey’s request of 24th April, 1996, on the legal consequences of the ownership changes formally notified by Mr. O’Connell on 17th April, 1996.

57.10 The Tribunal pursued this matter in the course of its private investigations by means of correspondence with the Chief State Solicitor, representing the Department, and the Office of the Attorney General, by means of a private meeting on 18th October, 2002, with Mr. McFadden and Mr. Gormley of the latter office, and by means of direct correspondence with the Attorney General on the contents of a newspaper article published in December, 2002. All three elements of those investigations will now be considered.

Correspondence with Chief State Solicitor

57.11 Correspondence between the Tribunal and the Chief State Solicitor relevant to this matter opened on 15th March, 2002, when the Tribunal confirmed that it had reviewed all of the privileged documentation furnished, and sought the provision of documents in relation to Mr. Towey's request of 24th April, 1996, together with a narrative account of any response or advice of the Office of the Attorney General which might have been given, other than by way of written advice. That latter element of the Tribunal's request arose from the Tribunal's recognition that it was possible that the opinion requested by Mr. Towey could have been furnished orally. The Department's response to that inquiry was furnished on 15th May, 2002. The Tribunal was informed that Mr. Towey did not recall any written response to his letter, that he thought that the matters raised by him might have been pursued subsequently and dealt with in the context of the finalisation of the licence, in particular Article 8, and in the context of the certification of ownership, which was obtained before issue of the licence. The Tribunal was further told that the Department had been unable to find a direct follow-up to Mr. Towey's request in the Departmental files, other than the opinion of 9th May, 1996, which referred to ownership issues.

57.12 On 27th May, 2002, the Tribunal, in continuing its investigations, wrote once again to the Chief State Solicitor, noting that Mr. Towey did not recall any written response to his letter, and stating that, having read the opinion of 9th May, 1996, it did not seem to the Tribunal that it addressed the question raised by Mr. Towey in his letter of 24th April, 1996. The Tribunal then requested copies of the documentation that had been furnished to the Office of the Attorney General in relation to that request for an opinion.

57.13 Whilst the Tribunal received documentation from the Attorney General's Office in response to that request, no commentary on that documentation was furnished until 30th September, 2002, when the Tribunal was provided with a letter from the Office of the Attorney General of earlier date. In that letter, it was stated that pages one and two of the opinion of 9th May, 1996, appeared to deal with the Department's request for an opinion on 24th April, 1996, and it was further stated that there was nothing on the Attorney General's file to suggest that the Department thought otherwise. That letter from the Office of the Attorney General was furnished to the Tribunal, under cover of a letter dated 30th September, 2002, from the Chief State Solicitor, by which the Tribunal was informed that the contents of that letter from the Office of the Attorney General were:

“...what that Office (including Messrs. Gormley and McFadden) can furnish or say material to the issues that have been raised by the Tribunal in relation to the Department’s said request for advice of the 24th April, 1996.”

57.14 The product of those investigations pursued in correspondence was that the Tribunal was told as follows:

- (i) that Mr. Towey did not recall any written response to his request for an opinion made in his letter of 24th April, 1996, and thought that the matters raised by him had been dealt with subsequently in the context of finalisation of the provisions of the licence, and in particular Article 8;
- (ii) that the Department had been unable to find a direct follow-up in the Departmental files, other than the opinion of 9th May, 1996;
- (iii) that the statement of the Attorney General’s Office that pages one and two of that opinion of 9th May, 1996, appeared to deal with Mr. Towey’s request, was all that the Attorney General’s Office, including Mr. McFadden and Mr. Gormley, could say material to the questions which had been raised by the Tribunal.

At the same time, the Tribunal had made it clear that in investigating this matter, it was not the view of the Tribunal that the opinion of 9th May, 1996, could be regarded as addressing that issue, and it had specifically asked both the Department and the Office of the Attorney General whether any oral advice had been given. In view of the much belated evidence of Mr. McFadden and Mr. Gormley to having had a clear recollection of such oral advice having been given on 23rd April, 1996, by Mr. Nesbitt, notwithstanding assertions to the contrary by the latter in evidence, it must be recorded that it is discomfiting that information regarding that oral advice was not forthcoming in response to Tribunal inquiries in 2002, when the Tribunal was told that, apart from the content of pages one and two of the opinion, there was nothing more that Mr. McFadden or Mr. Gormley could say on the topic.

Meeting of 18th October, 2002 with Mr. McFadden and Mr. Gormley

57.15 Prior to receiving the commentary of the Office of the Attorney General on 30th September, 2002, the Tribunal had written separately to the Chief State Solicitor, requesting that the officials of the Attorney General’s Office who dealt

with the matter, namely Mr. McFadden and Mr. Gormley, attend a private meeting with the Tribunal so that it could ascertain:

“...what advice, if any, whether oral or otherwise was transmitted to the Department or to Mr. Fintan Towey in connection with this request.”

57.16 The meeting with Mr. McFadden and Mr. Gormley, sought by the Tribunal, proceeded on 18th October, 2002. Mr. Matthew Shaw, of the Chief State Solicitor’s Office, and Mr. Nesbitt were also in attendance. Mr. Shaw and Mr. Nesbitt had attended many earlier such meetings, as they represented the Department and the Department of Finance in their dealings with the Tribunal. Mr. John Davis, then solicitor to the Tribunal, kept a note of that meeting, which recorded a discussion in relation to the issue of legal advice, and recorded that the position, as previously asserted, was restated, namely, that nobody had come back to the Attorney General’s office to raise any further queries in relation to the opinion, and it was felt that the opinion of 9th May, 1996, dealt with the query raised by Mr. Towey on the 24th April, 1996. Mr. McFadden furnished the Attorney General with a report of that meeting, which was produced when he attended to give evidence in March, 2010. It recorded:

“The queries raised by the Tribunal and responded to by this Office were discussed. The position outlined in this Office's written response was confirmed by the undersigned and appeared to be accepted. Counsel for the Tribunal questioned Mr. Law Nesbitt at some length about his Opinion of the 9th May, 1996.”

The evidence given to the Tribunal by Mr. McFadden and Mr. Gormley concerning that meeting will be returned to below, but it may at this juncture be stated that, although both witnesses recalled Tribunal lawyers being informed that Mr. Nesbitt’s opinion of 9th May, 1996, responded to the specific request for advice, neither then referred to any recollection of a meeting with Mr. Nesbitt and Mr. Towey on the matter on 23rd April, 1996, still less to Mr. Nesbitt having then advised verbally that, notwithstanding the ownership specifications furnished with the Esat Digifone application and evaluated in the course of the process, the introduction of Mr. Desmond as a 25% shareholder in Esat Digifone was not problematic.

Inquiries of the Attorney General

57.17 Having asked about, but having not been informed of any additional advice, whether oral or written, other than the opinion of 9th May, 1996, the Tribunal was surprised when it read an article which appeared in the Sunday

Business Post on 15th December, 2002. That article recorded that the Tribunal was expected to hear evidence that:

“...just hours before the announcement was made awarding the licence to Esat Digifone, senior civil servants sought advice from the office of the Attorney General on whether consortia should be permitted to alter the make-up of their investors”

and that:

“The advice they received was that consortia could, but only for shareholdings of 20 per cent or less.”

It was advice of that type, relating both to the change in ownership and the change in quantum of the minority shareholding, which the Tribunal had anticipated would have been provided in response to the request of 24th April, 1996, and it was whether advice of that type had been given, that the Tribunal had been endeavouring to ascertain since the previous March, 2002. Moreover, the purported advice, described in the article, accorded with the actions that the Tribunal was aware had in fact been taken within the Department, whereby the change in ownership was permitted, subject to the proviso that the shareholding ratio reverted from 37.5:37.5:25 to 40:40:20.

57.18 Accordingly, the Tribunal wrote to the then Attorney General, the late Mr. Rory Brady SC, on the following day, [16th December, 2002](#), enclosing a copy of the Sunday Business Post article, and inquiring whether the statements made in the article concerning legal advice were correct. The Tribunal raised a number of queries arising from the article, including whether any such advice given was in written or oral form.

57.19 When the Tribunal received the response of the Attorney General by letter dated [20th December, 2002](#), stating that Mr. McFadden and Mr. Gormley had no recollection of furnishing the advice referred to in the article, and that there was no copy of any advice “*of the type mentioned*” having been given by the Attorney General, or any other person in his office, the Tribunal mistakenly believed that the Attorney General was confirming that no advice of the type which the Tribunal had anticipated finding had in fact been furnished at any time. The Tribunal had not appreciated that, in so responding to its query, the Attorney General had confined his response to the precise advice as described in the newspaper article, in terms of both content and timing, and that in so responding, the Attorney General had only intended to convey to the Tribunal that no such advice was given at the time immediately preceding the announcement of the competition result. Whilst the Attorney General in that letter had informed

the Tribunal that Mr. Towey's request of 24th April, 1996, had been "*dealt with*" in the opinion of 9th May, 1996, the Tribunal interpreted that third numbered paragraph of the Attorney General's letter as subsidiary to the earlier paragraphs of his response. In other words, the Tribunal understood the letter to mean that no advice, of the type referred to in the article, was given at any time, and that accordingly, whilst Mr. Nesbitt's opinion "*dealt with*" Mr. Towey's request for advice, it did not in fact contain any such advice. The Tribunal has acknowledged that its understanding of the letter was erroneous. What the Tribunal did not appreciate was that the letter was not intended to differ from or supersede the earlier commentary received on 30th September, 2002, or what was stated at the meeting of 18th October, 2002. The Tribunal accepts that it should have had greater regard to those earlier matters when interpreting the meaning of the Attorney General's letter.

57.20 As the Attorney General's letter of 20th December, 2002, had referred to the relevant events as having occurred prior to 25th October, 1995, the date on which the result of the competition was announced, rather than 16th May, 1996, the date relevant to the Tribunal's inquiries, the Tribunal was concerned that some confusion had arisen, and accordingly pursued matters further with the Attorney General by letter dated [9th January, 2003](#). The Tribunal received a very full response by letter dated [4th February](#), in which the Attorney General indicated that, having made inquiries of Mr. McFadden and Mr. Gormley, and having received clarification from senior counsel, Mr. Nesbitt, he had been apprised of information regarding what had occurred over the days from 14th May, 1996, to 16th May, 1996. Whilst reference was then made to a meeting on 14th May, 1996, no reference was made to any advice furnished at that meeting in excess of that recorded in a note made by Mr. McFadden, which recorded advice directed solely to the then impending meetings with disappointed applicants. Reference was also made by the Attorney General to advice furnished by counsel on the eve of the licence being granted, but it was indicated that counsel had confirmed that such advice was "*forward-looking*", that is, advice relating to the transferability of shares after the licence issued, as governed by Article 8 of the licence. It was only in July, 2009, as will be returned to below, that the Tribunal heard evidence from Mr. Nesbitt, notwithstanding that it had been conveyed by the Attorney General in his letter of 4th February, 2003, over which there had been no error in interpretation, that the advice furnished on that occasion was solely "*forward-looking*", that further oral advice was in fact given on 14th May, 1996, and that that advice was "*backward-looking*", that is, advice directed to the ownership change which had occurred since the Esat Digifone application. Matters became even more confused in March, 2010, when Mr. McFadden and Mr. Gormley testified that "*backward-looking*" oral advice had been given much earlier, on 23rd April, 1996, although Mr. Nesbitt in his evidence had positively asserted to the contrary. Copies of the correspondence

which passed between the Tribunal and the Attorney General can be found within the Book of Appendices to this Volume.

INQUIRIES AT PUBLIC SITTINGS

57.21 The Tribunal's inquiries at public sittings into the furnishing of legal advice, in response to Mr. Towey's request of 24th April, 1996, that is, on whether the altered ownership change was legally permissible, proceeded over three distinct stages. That disjointed and, it must be said, less than satisfactory configuration, resulted from notification on two separate occasions, following circulation of Provisional Findings, that further evidence was available and should be heard by the Tribunal. Following circulation of Provisional Findings in November, 2008, the Tribunal was informed by the State that three witnesses who had already testified on the issue, namely, Mr. Martin Brennan, Mr. Fintan Towey and Mr. John Loughrey, had further evidence that they wished to give. At the same time, the Tribunal was asked to hear evidence from Mr. Nesbitt of oral "*backward-looking*" advice given by him on 14th May, 1996. Thereafter, having heard that evidence, and following notification of Supplemental Provisional Findings in January, 2010, the Tribunal was notified by the State that Mr. McFadden and Mr. Gormley also had relevant information, that their evidence should be heard, and that they were in a position to testify to "*backward-looking*" oral advice also having been given by Mr. Nesbitt on another occasion, this time on 23rd April, 1996, even though Mr. Nesbitt had asserted, when he gave evidence in July, 2009, that he had given no advice on the point on that date. The three stages of the Tribunal's inquiries will now be considered.

Initial Public Sitings

57.22 In determining prior to December, 2002, that it was appropriate to pursue inquiries into the provision of legal advice on the changed ownership information, the Sole Member had regard to the following matters:

- (i) that the Tribunal had been informed that Mr. Towey did not recall any written response to his letter, and that the Department had been unable to find a direct follow-up in the Departmental files, other than the opinion of 9th May, 1996, which referred to ownership issues;
- (ii) that the Tribunal, having repeatedly requested all material information in relation to any written or oral advice furnished, had not been informed of any such advice having been given, other than the opinion of 9th May, 1996;

- (iii) that the Tribunal could not understand how the opinion of 9th May, 1996, addressed the issues raised by Mr. Towey in his letter of 24th April, 1996, as, on reading it, it appeared to the Tribunal that the subject-matter of the opinion was a commentary on the draft licence and draft regulations then approved by senior counsel, that the opinion had been so described, and that it made no reference to Mr. Dermot Desmond, or to any change in the shareholding or capital configuration of the intended licensee from that notified in the Esat Digifone application;
- (iv) that it was apparent that the Department had continued to express concerns regarding the ownership issue after receipt of that opinion of 9th May, 1996, up to the granting of the licence on 16th May, 1996.

57.23 The Tribunal's determination that it was appropriate to pursue inquiries into this matter was not made by reference to the Attorney General's letter of 21st December, 2002. That letter was received after the Tribunal so determined, and after the commencement of public sittings on 2nd December, 2002, and in particular after 12th December, 2002, when, in the course of delivery of the Tribunal's Opening Statement, the issue was clearly identified as material to the Tribunal's inquiries. Having opened Mr. Towey's letter of 24th April, 1996, it was stated:

"Now, an opinion was furnished by counsel through the Office of the Attorney General, which addressed the question of change of ownership after the issue of the licence. The specific issue of changes in the ownership of the consortium between the date of the application and the date of the issue of the licence does not appear to have been further pursued by the Department. It appears that the Department continued to be concerned about the ownership issue in May of 1996."

Whatever Mr. McFadden may have thought and reported to the Attorney General, following the private meeting which he attended on 18th October, 2002, the Tribunal could not have been clearer in making known its view that the opinion of 9th May, 1996, was addressed to the question of change of ownership after the issue of the licence, and that on the basis of the information then available to it, it appeared to the Tribunal that the issue raised by Mr. Towey on 24th April, 1996, had not been pursued by the Department.

57.24 Accordingly, the Attorney General's letter was received on 20th December, 2002, and the Tribunal's error in interpreting that letter was unconnected with its determination that the issue warranted investigation at public sittings. Moreover, it is important to record that, as will be seen, had the

Tribunal interpreted that letter as a restatement of the position that the opinion of 9th May, 1996, addressed the changed ownership issue, that would not have altered the Tribunal's view that the opinion was addressed to a different matter, and that the issue warranted inquiry at public sittings.

57.25 In the course of the Tribunal's substantive public sittings, a number of relevant matters emerged in evidence. It emerged that it was in fact on [7th May, 1996](#), two days prior to the date of Mr. Nesbitt's opinion, that what was acknowledged by all witnesses as a highly significant communication took place between Mr. Towey and Mr. Owen O'Connell, the former having telephoned the latter. This communication has already featured in Chapter 56, and, as noted, in common with several such interactions between the Department and Esat Digifone in the last days and weeks leading up to the issue of the licence on 16th May, 1996, no record was produced from within the Department in relation to what was discussed, but its content was noted by Mr. O'Connell. The note is again reproduced below:

"Fintan Towey:-

*Min. v. strong preference for 40:40:20
at time of licence, but ~~strongly~~ understands
need for flexibility afterwards. Will take
ESAT Holdings subject to no substantive
difference + outline in writing."*

A copy of that note can be found within the Book of Appendices to this Volume.

57.26 As already recounted in Chapter 56, Mr. John Loughrey, as Secretary General, had also testified that, in discussions with his Departmental colleagues, he would have expressed the view that advice from the Attorney General was needed on the ownership issue, but that he would have in any event resolved that the share configuration of Esat Digifone would have to revert to the original proportions of 40:40:20. In his evidence relating to his telephone call to Mr. O'Connell, including evidence subsequently given, Mr. Towey agreed that it was reasonable to accept, given the prior correspondence in relation to ownership change between the Department and Mr. O'Connell, that the content of what he had stated to Mr. O'Connell on that occasion effectively amounted to agreement to the inclusion of Mr. Dermot Desmond in the consortium, provided that the configuration reverted to its original percentages.

57.27 In the initial public sittings, principally in 2003, no reference was made, save for a matter touched briefly upon by counsel for Mr. Denis O'Brien, to the actual content of Mr. Nesbitt's written advices, by reason of the State's ongoing assertion of its claim to privilege. Nonetheless, the fact that the opinion had been sought was material to Tribunal inquiries, and was pursued in evidence. The Tribunal's view of the opinion of 9th May, 1996, was raised on a number of occasions with Departmental witnesses, most particularly with Mr. Loughrey, and was to the effect that the ambit of Mr. Nesbitt's advice extended to the draft licence, and the statutory framework within which the licence should be issued, but that the issue raised by Mr. Towey on 24th April, 1996, namely whether it was legally permissible to substitute Mr. Desmond as a 25% shareholder, had not been the subject of legal advice. This proposition was put to Mr. Loughrey, who acknowledged that, having recently reviewed the Departmental files, he then realised that no such advice had been furnished. That evidence was given by Mr. Loughrey without reference to the Attorney General's letter of 21st December, 2002. Subsequent reference was made to that letter in terms of the Tribunal's mistaken interpretation of it, which in later sittings was asserted by Mr. Loughrey as having misled him in the evidence he gave. It must be said that the Department was fully represented and in attendance at those 2003 public sittings, and can have been in no doubt as to the lines of inquiry pursued by the Tribunal, or the Tribunal's view of the ambit of the opinion of 9th May, 1996, or as to the evidence given by Mr. Loughrey at the time.

2009 sittings

57.28 When on 18th November, 2008, the Tribunal notified certain Provisional Findings to the Department, the response was twofold. In the first instance, the claim of privilege over the opinion of 9th May, 1996, asserted since 2002, was waived, and this was followed by a request, acceded to by the Tribunal, that further evidence should be heard from Mr. Martin Brennan, Mr. Fintan Towey and Mr. Loughrey, and that Mr. Richard Nesbitt should also be called. In the course of furnishing Statements of Intended Evidence on the part of Departmental witnesses, and of Mr. Nesbitt, it was intimated for the first time that, in addition to reliance on the opinion of 9th May, 1996, Mr. Nesbitt had verbally advised that the substitution of the named institutions by Mr. Desmond, and indeed the increased share configuration of 25% acquired, was not viewed by Mr. Nesbitt as material or problematical.

57.29 Whilst that latter evidence was comparatively lengthy, its primary content may be summarised briefly. Both Mr. Brennan and Mr. Towey testified that they had no personal recollection of supplemental oral advices having been furnished to them by Mr. Nesbitt. However, some short time prior to their 2009

attendance, they had been alerted by Mr. Nesbitt to a recollection on his part that he had verbally advised them to the effect that the change in ownership was not material. Each of the three Departmental witnesses in their further evidence in any event viewed the content of Mr. Nesbitt's opinion of 9th May, 1996, and in particular page 2, as in effect legally authorising the issue of the GSM licence to Esat Digifone, notwithstanding the involvement of Mr. Desmond in substitution for the four institutional investors set forth in the consortium's application, and confirmed in its oral presentation. Whilst it was understandable that affected persons and their representatives had concerns about the precise phrasing and intent of Mr. Nesbitt's advices, their examination of the Departmental witnesses tended to focus in somewhat minute detail on isolated portions of the advices, and the broader view expressed by Mr. Nesbitt, when he came in evidence to address his own advices, to the effect that people "*can read the opinion and form their own view*", seemed realistic and preferable.

57.30 In Mr. Nesbitt's evidence, he referred to the consultation held in the Office of the Attorney General on 23rd April, 1996, with Mr. Towey, Mr. McFadden and Mr. Gormley, at which stage he was already preparing his advices on the draft GSM licence and regulations. He recalled learning of the new issue, on the changed ownership information, in the course of that consultation, but stated that he definitely gave no advice at that meeting; a number of complicated matters had been discussed, and he was thinking about matters, rather than offering any verbal advice. As regards additional or supplementary oral advice, he regarded this as having been given on two occasions of relevance, firstly, in the course of a consultation on 14th May, 1996, and secondly, on the final night of negotiations, prior to the issue of the licence on 16th May.

57.31 As to his opinion of 9th May, 1996, he felt that he had addressed the several matters referred to him, including the Esat Digifone ownership issue. Whilst Mr. Nesbitt acknowledged that the matter of ownership changes after grant of the licence was a separate matter, in his view, both ownership issues shared material elements. He had not intended his written opinion to relate only to ownership changes after the grant of the licence. He viewed the inclusion of Mr. Desmond as not constituting a problem, and similarly felt the increase in that shareholding from 20% to 25% was of no particular materiality. It seemed to him that the second paragraph on page two of his opinion was the main matter on changes of ownership, in addition to the two later occasions of oral advice. In relation to Mr. Nesbitt's evidence that his opinion embraced the existing ownership issue, it was suggested, incorrectly, by the Tribunal that this was a position that had never previously been advanced. Although Mr. Nesbitt did not disagree, that proposition should not have been made in those terms, as that position had been advanced at the meeting of 18th October, 2002, attended by Mr. Nesbitt, which the Tribunal had in error overlooked.

57.32 In giving those oral advices, he thought that he had mentioned the analogy of introducing a South American drug lord, by way of an instance of ownership change that would be clearly unacceptable on public policy grounds, as opposed to what had transpired in Esat Digifone. But he reiterated that he did not give any advice until 9th May, 1996, and stated that, whatever happened previously, was without him. He referred to the context in which advice had been sought from him, stating that “*we were dealing with very real commercial events happening very fast with a lot of media attention attaching to it*”. He agreed with Tribunal counsel that on six occasions, during the evidence of Mr. Loughrey, Mr. Brennan and Mr. Towey, given in the course of the Tribunal’s substantive public sittings in 2003, the view of the Tribunal had been made clear, to the effect that his opinion of 9th May, 1996, had not addressed the change arising from Mr. Desmond’s inclusion, and that as leading counsel for the Department, he had not brought any different view to the Tribunal’s attention. However, he testified that this was because of the subsisting privilege attaching to that opinion, which had not then been waived, so that he had not felt free to convey the additional matters until after the relevant waiver. He further stated that, although he thought the RFP document had been included in the documents sent to him, he had not felt that consideration of its content had been necessary in forming his view.

2010 sittings

57.33 Following the further evidence heard in 2009, the Tribunal notified Supplemental Provisional Findings in January, 2010. The response to those Supplemental Provisional Findings was that the Tribunal was requested by the State to hear yet further evidence, this time from Mr. McFadden and Mr. Gormley, the officials of the Attorney General’s Office who had represented the Attorney in dealings with the Department on GSM issues. The Tribunal was informed, notwithstanding Mr. Nesbitt’s evidence given some months earlier that he had furnished no legal advice on the issue on 23rd April, 1996, and Mr. Towey’s evidence that any discussion on that occasion would not have been regarded by him as constituting definitive advice, that it was their recollection that Mr. Nesbitt had given positive advice on the issue on that earlier occasion in April, 1996, and that, in subsequent dealings between them and the Attorney General, and in their subsequent certification, on behalf of the Attorney General, of the draft licence and regulations, they had acted by reference to that advice.

57.34 Both Mr. McFadden and Mr. Gormley testified to the effect that they viewed Mr. Nesbitt’s opinion of 9th May, 1996, as addressing the issue of changed ownership that had arisen, and that they themselves as lawyers shared a similar view. In this regard, they differed only to the extent that, whilst Mr.

McFadden felt that even a law student would have considered that the opinion addressed the issue, Mr. Gormley in contrast felt that, whilst paragraph two of page two of the opinion encompassed the matter, that was only in a context of Mr. Gormley having known all the relevant prior background information, including the content of previous meetings and the prior oral advices of Mr. Nesbitt, of which he gave evidence. His further testimony in that regard will be referred to at a later point in this chapter. Both officials testified that clear oral advice, to the effect that the involvement of Mr. Desmond did not constitute a problem, was given to them by Mr. Nesbitt, in the course of the meeting of 23rd April, 1996, notwithstanding the latter's evidence that he gave no advice at that time. Mr. McFadden confirmed that he was unaware of how Mr. Desmond's accession had arisen, and had no knowledge that it had originated on 29th September, 1995, during the currency of the competitive process.

57.35 On [10th May, 1996](#), Mr. McFadden and Mr. Gormley made a written submission to the Attorney General, in relation to the proposal to grant to Esat Digifone the licence to be the second GSM provider and operator. As a necessary preliminary to the actual grant of the licence on 16th May, 1996, this was duly approved by the then Attorney General, Mr. Dermot Gleeson SC. In his evidence, Mr. McFadden testified that he would not have contemplated seeking such approval, unless he had been clearly satisfied that the issue relating to the past ownership of Esat Digifone had been satisfactorily addressed in the advices received from Mr. Nesbitt. In furnishing the submission, he had enclosed copies of the draft licence and draft regulations, in addition to a copy of Mr. Nesbitt's opinion. Whilst the specific ownership issue had not been referred to in the course of the submission, Mr. McFadden testified that he would have dealt with the Attorney General in this regard, in the context of the complaint that had been made to the European Commission by the Persona consortium, and Mr. Gleeson would accordingly have been aware of the issue. Thus the proposal that was sanctioned, and in relation to which Mr. McFadden was emphatic that legal clearance had been received, was the issue of the licence to Esat Digifone, with Mr. Desmond as a shareholder. A copy of that submission to the Attorney General can be found in the Book of Appendices to this Volume.

57.36 With regard to the meeting with the Tribunal legal team on 18th October, 2002, both Mr. McFadden and Mr. Gormley recalled the occasion. The meeting had been organised at fairly short notice, and what was discussed between the respective counsel primarily related to Mr. Nesbitt's opinion, with Mr. Nesbitt conveying his view that it addressed the IIU ownership issue, and with the Tribunal lawyers appearing reasonably content with this account by the end of the meeting. Because the focus of the meeting was upon the written advices, and no question had been raised at it in relation to oral advices, neither Mr. McFadden nor Mr. Gormley had mentioned the oral advices received in that

regard from Mr. Nesbitt, even though the relevant Tribunal correspondence had specifically sought the meeting with them by reference to whether oral advices had been received.

57.37 The final day of the sittings convened to hear additional evidence on matters in relation to legal advice was 23rd March, 2010. Mr. John Gormley gave his evidence on that day, but the earlier part of the hearings comprised submissions made on behalf of affected persons, and an *ex tempore* Ruling made by the Sole Member. The principal submission heard was that made by counsel for Mr. Desmond, whose observations accorded largely with arguments then or earlier addressed to the Tribunal on behalf of Mr. O'Brien, Mr. Lowry and the Department. It was contended that, given the absence of challenge to the evidence of Mr. McFadden, it followed that it had been established that the State had legal advice available to it in May, 1996, prior to the award of the licence, in regard to the change of ownership issue in Esat Digifone. Whether that advice had been good, bad or indifferent, or others might have advised differently, was irrelevant, it was argued, and it similarly did not greatly matter whether such advice was given orally or in writing, provided it was given. The submission continued that it was also the case that, at the meeting of October, 2002, between the Tribunal legal team and Mr. McFadden, Mr. Gormley and Mr. Nesbitt, it was explained by them to Tribunal lawyers that Mr. Nesbitt's written opinion did relate to the issue of ownership change. In the light of error on the part of the Tribunal, the challenge made on behalf of the Tribunal to the testimony of Mr. Nesbitt ought not to have been made. In all these circumstances, it was contended that the Tribunal was obliged to accept the evidence of Mr. McFadden, to find that legal advice was in fact given, and to vacate such Provisional Findings as sought to suggest otherwise.

57.38 There then followed a brief submission by counsel for Mr. O'Brien, after which counsel for the Department, who had already made submissions of a substantially similar nature, and who, in common with counsel for Mr. Desmond, suggested that it was in the circumstances scarcely necessary to hear Mr. Gormley, concluded by referring to a brief exchange between Mr. Towey and the Sole Member, on 10th June, 2009, Day 360. What had occurred on that occasion was that the Sole Member inquired of Mr. Towey whether he might take it that it was not the situation that Mr. Towey explicitly realised he had not received the advice he sought, but decided to plough on regardless. Mr. Towey's response was:

"The proposition that the advice didn't address all of the issues in a composite way wasn't suggested by anybody who was involved in receiving or interpreting the advice, including the officials of the Attorney General or the officials of our Department."

And earlier in response to questions posed by counsel for Mr. Desmond:

“I have the view, absolutely, that the opinion resolved the legal issues, including ownership conformity question.”

57.39 In his *ex tempore* Ruling in response, the Sole Member acknowledged the making of two related errors on the part of the Tribunal, and that their circumstances would affect the final view taken by the Tribunal on the legal advice issue. In addition to Mr. Nesbitt’s written opinion, the further matter of his also having furnished supplemental oral advices, to the effect that neither the changed membership nor configuration in the consortium constituted a problem, had to be considered, along with what had transpired in the 2002 meeting between the Tribunal legal team and those advising the Department. As to the suggestion that the members of the Tribunal legal team who attended that meeting should be called to testify, the Sole Member took the view that the maxim *nemo iudex in causa sua* had application, that no person should be a judge in his own cause, and that the calling of those witnesses would be utterly inappropriate. Accordingly, the Tribunal would be bound to a substantial degree by the testimony given by Mr. McFadden, in relation to what transpired at that meeting, in addition to the memoranda that had been made as to the content of the meeting. Further, given the seriousness of an ultimate finding that no legal advice on the matter was in fact given, it would be necessary for the Tribunal, if so disposed, to apply a standard of proof that was at the upper level of the civil standard applicable.

THE EVIDENCE OF LEGAL ADVICE

57.40 The Tribunal’s two connected errors, and its response made at public sittings, have been set forth. Whilst some limited contributory factors arise, or have been touched upon in preceding paragraphs of this chapter, it is not proposed to dwell on these, as the errors simply should not have been made. Accordingly, the Tribunal acknowledges that its interpretation of the letter from the Attorney General was incorrect and, in arriving at that interpretation, the Tribunal did not pay due regard to the letter of the Office of the Attorney General, provided on 30th September, 2002, or to the meeting of 18th October, 2002.

57.41 However, it is not the case that, if the Tribunal had interpreted the letter correctly, it would have agreed with the view therein contained. It was then the clearly expressed view of the Tribunal, and, indeed, remains its view, that the opinion, on its face, does not deal with the issue raised in Mr. Towey’s memorandum of 24th April, 1996. The Tribunal was not bound in this regard by

any particular view expressed by the Attorney General, or any member of his staff.

57.42 As regards the Tribunal's failure to produce its note of the meeting on 18th October, 2002, in a timely manner, this should have been done in advance of the taking of evidence from Mr. Richard Nesbitt, after the State had waived privilege in relation to the legal opinion and related documents. That this was not done is a matter of regret to the Tribunal, as, in the course of Mr. Nesbitt's attendance as a witness, his evidence was challenged on the basis that he had never previously brought to the Tribunal's attention his view that his opinion of 9th May, 1996, covered the ownership alteration issue. In light of the evidence of Mr. McFadden and Mr. Gormley concerning the meeting of 18th October, 2002, which the Tribunal is bound to accept for purposes of this Report, this contention should not have been put to Mr. Nesbitt. Whilst it was an error for which the Tribunal must accept responsibility, it is nonetheless of note that, whilst the Tribunal did not recall the meeting at the time Mr. Nesbitt gave evidence, almost seven years later, neither did Mr. Nesbitt himself, perhaps unsurprisingly, then recall it.

57.43 Whilst acknowledged and regretted, what transpired was neither less nor more than genuine human error. Any suggestion that the Tribunal deliberately sought to misinterpret the Attorney General's letter, or deliberately to conceal the meeting of 18th October, 2002, is both absurd and without foundation. The Tribunal's interpretation of the Attorney General's letter was publicly stated on a number of occasions, and was at all times subject to correction. Also, the Tribunal's omission in failing to advert to the meeting of 18th October, 2002, was similarly subject to correction at any time by the other attendees, which is precisely what in fact occurred.

57.44 Nor should the significance of these errors be overstated. As already set out, the Tribunal's view of the opinion of 9th May, 1996, was at all times a view it had independently formed, and was not based on any view perceived by the Tribunal to be held by the Attorney General. What was of genuine significance, however, in the context of the substantive question of whether legal advice was or was not given at the relevant time, was the information only brought to the Tribunal's attention after Provisional Findings had been notified, that supplemental oral advices had also been given, when the Tribunal had been led to believe, and had satisfied itself, from earlier extensive private inquiries, that no such oral advice had been given.

57.45 In considering the evidence and submissions on this matter, it is noteworthy that what was contended for on behalf of affected persons was that a

subjective standard should be applied, in effect meaning that it was only necessary to show that those who received advice believed that legal clearance had been received, and that in addition this ought not to be of an exacting standard. Given the number of uncertainties and discrepancies that arose in the course of the evidence heard, this was unsurprising, and may have reflected an implicit acknowledgment that the available evidence fell appreciably short of providing a seamless record of response to the supplemental query, that undoubtedly had been carefully and accurately expressed by Mr. Towey. Some of these may briefly be noted.

57.46 As to Mr. Nesbitt's written advices in the first instance, the evidence of Mr. McFadden was to the effect that any lawyer, "*probably even a law student*", on reading the second page of the opinion, would see that Mr. Towey's specific query was addressed and responded to in those written advices. In this regard, Mr. Gormley's evidence on the same matter was significant. In reply to Tribunal counsel, Mr. Gormley agreed that the content of the second paragraph of page two of the opinion contained no reference to matters such as IIU, materiality, "*purely*" finance, or clean money, but stated that he was reading this paragraph together with the views expressed verbally by Mr. Nesbitt, on the previous occasion of the 23rd April, 1996, consultation. Asked whether, if one looked at the passage without knowing what had gone before, one might think it addressed only post-licence ownership changes, Mr. Gormley replied "*maybe for an outsider*".

57.47 The matter was further pursued by counsel for Mr. O'Brien, and was confirmed by Mr. Gormley, who stated that he did not think that, without the knowledge of what had gone before, it would be recognised that the passage of the opinion addressed Mr. Towey's request for advices. He added that he supposed that "*you would think it didn't cover it*", because it was written in the context of, and under the heading of, the Draft Licence. This evidence lent support to the initial view taken by the Tribunal, that the opinion in isolation did not address Mr. Towey's specific query. The absence of any reference in the opinion to such matters as the RFP, which set forth the rules of the competition, or the Esat Digifone application, notwithstanding each having been furnished to Mr. Nesbitt by Mr. Towey, although viewed in evidence by Mr. Nesbitt as unnecessary to his deliberations, render it difficult to see how fully this specific query was inquired into and advised upon.

57.48 Despite evidential reliance on specific limited portions of Mr. Nesbitt's covering letter, such as his observation that the Minister "*should not drag his feet*" with regard to the issue of the licence, it is likewise not easy to see how the advices in their entirety constituted "*composite*" advice on both the Article 8 matter, of changes after licence issue, and Mr. Towey's new and specific query,

and it is scarcely unreasonable to take the view that a somewhat strained interpretation of the written advices must be taken, if they are to be viewed as addressing the immediate, sensitive and critical matter of changed ownership. Indeed Mr. Towey, whilst recalling no specific oral advices, and contending that the written opinion answered his question, nonetheless agreed with Tribunal counsel that the RFP document was the vital document for any proper consideration of the issue of ownership conformity, reference to which was nonetheless entirely absent from the written advices furnished.

57.49 Turning to the matter of supplemental legal advices having been given by Mr. Nesbitt, the mere fact of their having been furnished at any relevant stage assumes extra importance in the context of the evidence of Mr. Gormley, as to the insufficiency of the written advices alone, by way of response to Mr. Towey's query. It is in these circumstances, and without at all seeking to go behind the recollections of Mr. McFadden and Mr. Gormley of what transpired during their October, 2002, meeting with Tribunal lawyers, that it is somewhat surprising that no reference whatsoever to any additional oral advices forthcoming from Mr. Nesbitt was made on that occasion, particularly when not merely initial correspondence from the Tribunal had queried this aspect, but when the letter from the Tribunal seeking the meeting had been in the specific context of that particular matter. The Tribunal cannot go behind the evidence that no such specific question was asked but, in the context of the view made known on behalf of the Tribunal of the scope of available written advices, the meeting was surely an ideal opportunity to allay any concerns, by referring to what then were fresher recollections of supplemental oral advice. It is also surprising that, given Mr. McFadden's recollection of a somewhat coarse and disparaging comment on Mr. Nesbitt's opinion made during the meeting, and attributed to Tribunal counsel, a matter elicited in cross-examination on behalf of Mr. O'Brien, that Mr. McFadden nonetheless indicated that, at the conclusion of the meeting, the Tribunal lawyers appeared satisfied with what had been conveyed to them.

57.50 The evidence in relation to the oral advices was not without cryptic factors, not least in the fact that it was solely the persons giving such advices, namely Mr. Nesbitt, Mr. McFadden and Mr. Gormley, who recalled them, whilst neither Mr. Brennan nor Mr. Towey, as the persons receiving any such advice, in a matter that was undoubtedly urgent and crucial, recalled receiving such advices. Neither was the evidence of Mr. Owen O'Connell, solicitor to Esat Digifone, confirmatory of explicit verbal reassurances, to the effect that the ownership issue presented no problem, having been given on 23rd April, 1996. On 23rd October, 2003, Day 241, Mr. O'Connell referred to having met Mr. Towey on a date which he thought was 29th April, 1996. He continued that:

“.. and he had told me that, what he referred to as his ‘legal people’, whom I now understand to have been the Attorney General's Office, had some concerns about ownership issues and the percentage shareholdings. He told me, I think, that he didn't know whether there was any difficulty or problem or whether there was anything that he would want done differently, but he would let me know. And I think this was him letting me know that he did want something done.”

57.51 Yet it is the time frame of the furnishing of any such supplemental oral advices by Mr. Nesbitt that appears to the Tribunal of principal interest and concern. In Mr. Towey's recalled evidence, given on 11th June, 2009, it was put to him by counsel for the Department that Mr. Nesbitt would say that the issue of ownership was first raised with him at the meeting of 23rd April, 1996, but that Mr. Nesbitt did not then advise on the matter. Mr. Towey responded that he thought that that was fair enough. Mr. Nesbitt later in evidence confirmed that that was indeed his recollection, stating that he would not have purported to have given verbal advice on all of the matters drawn to his attention on 23rd April. Given the range of urgent and diverse matters then referred for his attention, it seems to the Tribunal quite understandable that Mr. Nesbitt, as he testified, wanted to think over these matters, rather than seek to impart immediate views.

57.52 In Mr. Nesbitt's continued evidence, he stated that he thought that there had been two particular occasions of oral advice given by him that he felt were relevant to the Tribunal, being respectively the meeting of 14th May, and the night of 15th May, prior to issue of the licence the following day. Both these occasions of course were appreciably subsequent to Mr. Towey's telephone conversation of 7th May with Mr. Owen O'Connell, when he imparted what he accepted was tantamount to acceptance of the change of ownership, provided that the respective share configurations reverted to the original 40:40:20. Both the occasions referred to by Mr. Nesbitt were also subsequent to the submission made by Mr. McFadden and Mr. Gormley to the Attorney General in writing on 10th May, on foot of which the issuing of the licence was on 13th May sanctioned by the Attorney General. The contrast between Mr. Nesbitt's clear and understandable recollection of not having verbally advised on 23rd April, and a recollection on the part of Mr. McFadden and Mr. Gormley of some detail and clarity, in relation to verbal advices then furnished by Mr. Nesbitt, is inevitably a matter that has occasioned some difficulty to the Tribunal. It was also the case that Mr. Towey testified that he would not have regarded oral advices relating to his fresh query as sufficient for him to act upon in the circumstances, and that, accordingly, he would have insisted upon receiving written advice.

57.53 Neither was it the position, assuming that any oral advice proffered by Mr. Nesbitt in relation to the share ownership issue was of major significance, that any note was made by any person present, either of the fact or content of such advices, whether on 23rd April, or on any subsequent occasion. Moreover, given the testimony of Mr. McFadden in particular, of his recollection of Mr. Nesbitt's oral advice as including observations that the involvement of IIU was not viewed by him as material, or a matter of legal concern as regards the issuing of the licence to Esat Digifone, and that, according to Mr. Gormley, it was further stated by Mr. Nesbitt that the increase in the minority shareholding from 20% to 25% was similarly immaterial, it is surprising that no statements, to that or similar effect, appear anywhere in the written opinion. Nor was it the case that Departmental representatives comported themselves thereafter in a manner consistent with having received a legal imprimatur in respect of a troubling query, referred by them to the Attorney General on a matter much canvassed in Dáil and media exchanges. This matter is returned to in each of the two succeeding chapters.

57.54 The foregoing and other matters, including the complete absence of any reference in the submission of 10th May, 1996, to the Attorney General to what was undoubtedly, in terms of Dáil debates and media commentary, a significant and sensitive issue, have been considered. They render an overall finding a less facile exercise than might be surmised from the submissions made on behalf of affected persons. Despite much minute analysis in evidence of the precise form of the written advices, it remains difficult to see how a reasoned construction of the second paragraph of page two of the opinion encompasses the fresh matter. Similarly, to regard an overall observation, to the effect that the Minister should not drag his feet on issuing the licence, as an imprimatur on a wide spectrum of matters referred for advice, would be sweeping indeed. It could be surmised without undue difficulty that, despite his positive evidence that he did not furnish relevant oral advice on the occasion of the consultation of 23rd April, Mr. Nesbitt may then have advanced some provisional or preliminary comments or remarks on the specific fresh matter raised, but it is difficult to reconcile this with the recollections of Mr. McFadden and Mr. Gormley of a substantial and reasoned exposition of his view on that occasion.

57.55 Nevertheless, the Tribunal has had to have regard to the totality of the evidence heard, and to the content of its own Ruling of 23rd March, 2010, following which certain Provisional Findings were withdrawn, and an amendment made to a prior written Ruling which, although in essence directed to legal matters regarding waiver of privilege, had incorrectly set out a portion of what the Attorney General had in correspondence conveyed to the Tribunal, in regard to the content of Mr. Nesbitt's written advices. Applying the less rigorous subjective

test propounded on behalf of affected persons, and with allowance for the urgent and indeed frenetic pace at which advices were being sought and obtained on a wide range of issues connected with the GSM licence, it appears to the Tribunal that an aggregate of some initial limited or even provisional verbal observations by Mr. Nesbitt, at the consultation of 23rd April, later followed by an urgent reading of his written opinion of 9th May, may reasonably have inculcated in those advised a belief that the ownership issue had been positively addressed. Such initial verbal advice, taken in conjunction with Mr. Loughrey's resolve that, irrespective of legal advices, the share configuration of Esat Digifone had in any event to revert to its original 40:40:20 proportions, may be viewed as sufficient to have enabled Mr. Towey to convey to Mr. O'Connell in the first instance that an IIU involvement was acceptable, provided that the original share configuration was restored. Thereafter, following receipt of Mr. Nesbitt's written advices of 9th May, Mr. McFadden and Mr. Gormley may reasonably be viewed as having felt sufficiently reassured on the issue as to submit their submission to the Attorney General for approval.

57.56 That the matters noted above have occasioned a degree of difficulty to the Tribunal in addressing this issue should not be viewed as indicative of any element of carping, reluctance to abandon an initial view formed in good faith, or indeed a contingency into which it was driven by its own errors. These matters and inconsistencies were not trifling. But appropriate weight has to be attributed to the response, cited earlier, in answer to the Sole Member, of Mr. Towey, who on many occasions in the course of his overall lengthy evidence on GSM matters impressed as a helpful witness, and one prepared to engage on difficult issues. Similarly, the evidence of Mr. John Gormley was in some respects contrary to interest, and careful consideration has been given to its overall tenor as to what transpired, in all the matters of which he gave evidence.

57.57 Whilst it is the position that the Department proceeded on the footing that it believed it had received the Attorney General's imprimatur on the legal permissibility of the altered ownership of Esat Digifone, it is surprising that a more detailed appraisal directed to the factual matters outlined, and the specific request framed by Mr. Towey in his letter of the 24th April, 1996, was not regarded as a priority. This was admittedly a very busy time, particularly so as the last days approached, and it is possible that the matter was overlooked, or that time constraints otherwise precluded taking matters further. It does however seem to the Tribunal that the approach adopted, and the acceptance of, at best, an initial discussion on 23rd April, 1996, and a passing reference to a matter of principle in a legal opinion directed to a different issue, hardly reflected a close, careful and open-minded consideration of a significant issue on which the licensing of Esat Digifone was dependent. Rather, as also evident in the Departmental approach to the financial questions, it betokened, as testified by

Mr. Towey, a process that had to be followed and completed, but with little expectation that it would conclude otherwise than in the licensing of Esat Digifone.

ISSUE OF THE LICENCE AND FINAL DAYS OF PREPARATION

INTRODUCTION

58.01 The final four days of the GSM process from Monday, 13th May, 1996, to Thursday, 16th May, 1996, when the licence was issued to Esat Digifone, as might be expected, was a time of frenetic activity and pressure for the Department and for Esat Digifone. As Mr. Lowry had set a deadline of 16th May, 1996, for the issue of the licence, there was a finite time within which a number of matters still outstanding had to be brought to conclusion.

58.02 In these final days, the Department focused on ascertaining whether Esat Digifone, and its shareholders, including its new shareholder, Mr. Dermot Desmond, had sufficient finance to fund the project, to meet their shareholder obligations, and to meet their underwriting obligations as regards Esat Holdings. Whilst it was intended that the financial capability of consortia should be settled in the course of the evaluation, and should be a precondition to entry to the comparative process, that had not occurred. What had transpired was that consideration of financial capability was deferred until the conclusion of the evaluation process. AMI had insisted, in the face of Departmental opposition, that a marker should be retained in the Evaluation Report surrounding the finances of Esat Digifone, as should their recommendation that additional self-financing be sought from shareholders, if it was determined that Esat Digifone should be awarded the licence. On the eve of Mr. Lowry's announcement of the result, that financial incapacity, noted by AMI, was met by importing the concepts of bankability and deep pockets, the former of which originated with Mr. Lowry.

58.03 Between 25th October, 1995, and 13th May, 1996, nothing was done to progress the recommendation made by Mr. Andersen that additional self-financing should be sought from Esat Digifone shareholders. Mr. John Loughrey and Mr. Martin Brennan testified that, following receipt of Mr. Owen O'Connell's changed ownership notification on 17th April, 1996, the Department had to proceed with caution, and had to satisfy itself of the ability of Esat Digifone, and of its shareholders, including its new shareholder, Mr. Desmond, to meet its financial obligations, as a condition to the issue of the licence. Yet, no substantive evaluation of finances commenced until Monday, 13th May, 1996, some four weeks after receipt of that notification, and just three days before the licence was to issue.

58.04 What is also clear from the events of the final days is that the ownership compatibility issue remained a matter of grave concern within the

Department, notwithstanding the belief that Mr. Desmond's accession was legally permissible. The principal challenge for Departmental officials was how to approach the presentation of Mr. Desmond's involvement as a member of the consortium, and much consideration was directed to it by the Department, Esat Digifone, and it seems Mr. Lowry's public relations consultant, including arrangements for a press conference scheduled to coincide with the licence issue, on Thursday, 16th May, 1996.

58.05 For the Esat Digifone shareholders, these days were also ones of intense activity. There were many issues to be finalised. The realignment of Esat Digifone's capital configuration to 40%, 40%, 20%, in accordance with the bid specifications, had to be effected. Arrangements had to be made to cover Mr. O'Brien's funding participation, including his contribution of £6 million to the licence fee. As Esat Holdings' planned placement on the US market could not proceed until after the licence issued, no funds were available to meet its contribution on the date of issue of the licence. Apart from finalising the shareholders agreement, underwriting, to be formalised by Telenor and Mr. Desmond, through IIU, for Esat Holdings' obligations to contribute to the capital of Esat Digifone, and negotiations on elements of the licence, remained to be concluded.

INITIAL DEALINGS OF MONDAY, 13TH MAY, 1996

58.06 On Monday, 13th May, 1996, Mr. Knut Digerud and Mr. Owen O'Connell, representing Esat Digifone, met with Mr. Martin Brennan and Mr. Fintan Towey at the Department for what was to be a significant meeting. As before, there was no record of the meeting within Departmental files, nor was the Tribunal informed of it by Departmental officials in the course of its private inquiries. But for a [formal typed report](#) of the meeting, prepared by Mr. O'Connell and retained by him on his file, and referred to by him in the course of private investigations, the Tribunal would not have learned of it. A copy of Mr. O'Connell's report can be found in the Book of Appendices to this Volume.

58.07 Mr. Brennan, who had some recollection of the meeting, testified that he would have been happier if there had been a record on Departmental files, but that he did not view the absence of a record as a major issue. As to why the Tribunal had not been informed of the meeting by Departmental officials in the course of its private inquiries, Mr. Brennan testified that there had been no deliberate strategy or conscious decision to withhold information from the Tribunal, and any omission in that regard was due to failure of memory, in the absence of a record, and in view of the passage of time. Mr. Towey also recalled the meeting in general terms, and agreed that serious issues had been discussed at it. He did not accept that the absence of a Departmental record

suggested a desire to conceal serious views then held within the Department. He testified that discussions at that meeting related to events and matters that were to follow, and would become apparent, and accordingly, any question of concealment could not possibly arise. Mr. Towey further testified that no direction was ever given that minutes should not be taken at Departmental meetings, as that did not happen in the civil service.

58.08 At the outset of the meeting, as recorded and confirmed by Mr. O'Connell, Mr. Digerud handed a number of letters to Mr. Brennan, comprising firstly, his cover letter dated 13th May, 1996, which, it will be recalled from an earlier chapter, was a substantially abridged version of the draft prepared by Mr. O'Connell on 10th May, 1996. It omitted the passage drafted by Mr. O'Connell, in response to the Department's requirement for an explanation of how the financial institutions named in the bid had been replaced by Mr. Desmond. It was Mr. O'Connell's evidence in that regard that the passage had been excised from his draft, either at the request of, or with the acquiescence of the Department. Seven further letters were enclosed in response to the Department's request for information concerning Esat Digifone, first made by letter dated 1st May, 1996, and expanded upon in the course of the meeting of Friday, 3rd May, 1996. Those letters were as follows:

- (i) letter from Telenor confirming its commitment to support the Esat Digifone project, and its capability and willingness to increase its financial commitment, subject to agreement with other interested parties as to the implications for Telenor's influence over Esat Digifone;
- (ii) letter from Arthur Andersen & Company, Oslo, auditors to Telenor, confirming the financial capability of Telenor to make the required investment in Esat Digifone;
- (iii) letter from Mr. Chris McHugh, company secretary of IIU, confirming that IIU was 100% beneficially owned by Mr. Dermot Desmond, and listing its directors;
- (iv) letter from Farrell Grant Sparks, financial advisers and auditors to Mr. Desmond, confirming that Mr. Desmond/IIU were in a position to invest and/or underwrite up to £40 million in Esat Digifone;
- (v) letter from Mr. Paul Connolly, providing details of the ultimate ownership of Esat Holdings and its interest in Esat Digifone;
- (vi) letter from KPMG, auditors to Communicorp, confirming the appointment of Credit Suisse First Boston for the purpose of a private

placement in the US, then expected to complete shortly, and to raise at least £22 million, and in addition confirming that Communicorp had entered into an underwriting agreement with IIU, dated 29th September, 1995, under which IIU agreed to underwrite all of Communicorp's proposed interest in Esat Digifone, to be held through its subsidiary, Esat Holdings;

- (vii) letter from ABN AMRO Bank, setting out details of debt finance available to Esat Digifone jointly from ABN AMRO and Allied Irish Banks.

Mr. Brennan agreed in evidence that this was the first occasion on which the Department had received documentation from Esat Digifone, concerning the financial capacity of its members, since the announcement of the competition result, and further accepted that there were then only two days available within which to scrutinise it.

58.09 It is clear from Mr. O'Connell's formal report, as confirmed by him in evidence, that a number of issues arose for discussion in the course of the meeting, although principal amongst them were Mr. Desmond's shareholding and intentions, and the public relations management of his involvement.

58.10 Mr. O'Connell's report recorded discussion of whether IIU, Mr. Desmond's vehicle, could be regarded as a financial institution, in terms of consistency with the Esat Digifone bid specifications. It was Mr. Brennan's testimony in this regard that it was this proposition that was then being conveyed by Mr. O'Connell, and Mr. Brennan could not himself determine at that point whether IIU could or could not be so classified. He did not know at the time that IIU, having only recently been incorporated and commenced trading, had not yet produced a set of accounts. Mr. Brennan further agreed that part of the discussion related to a way of presenting the 40%, 40%, 20% configuration, involving Mr. Desmond, in a manner which was consistent with the bid, and of presenting IIU as equivalent to a financial institution.

58.11 As to IIU's intentions in relation to the placing of its shares, Mr. O'Connell confirmed that he had informed Mr. Brennan and Mr. Towe that IIU might place its shares at some point in the future, but, as regards queries that might be raised by the media, or at the press conference, he recorded himself as having stated that:

"if queried now on the point by journalists, might reply that recent turmoil over the licence made such a placing unlikely, for market reasons, for some time."

Mr. O'Connell testified that this view was based on comments made by Dr. Michael Walsh at some time prior to the meeting.

58.12 Much of the latter part of the meeting, as apparent from Mr. O'Connell's report, and as confirmed in evidence, was directed to consideration of the public and media presentation of the ownership of Esat Digifone, and in particular Mr. Desmond's shareholding. Mr. Brennan it seems conveyed Mr. Michael Lowry's views concerning these public relations considerations to Mr. Digerud and Mr. O'Connell. He indicated that Mr. Lowry wished to announce the issue of the licence at a press conference, to be co-attended by Esat Digifone, at which questions could be fielded. Mr. Brennan was recorded as observing that, whilst it was the Department's view that the ownership issue had ceased to be a live one for the press, the Department and Mr. Lowry were anxious that it would not be revived by any injudicious statements at the press conference. Mr. Lowry's desire, that all in attendance should be well briefed and prepared, was emphasised, as was his requirement that all participants, including Esat Digifone representatives, attend a joint rehearsal. Mr. Lowry it seems was anxious to know the intended responses of Esat Digifone representatives to questions likely to be put to them, and Mr. Brennan stressed the need to prepare a number of definite, clear and acceptable statements for use at the press conference.

58.13 In this last regard, Mr. O'Connell had recorded that Mr. Brennan observed that some journalists present were likely to have been briefed in a hostile way by "*others*", understood by Mr. O'Connell as a reference to losing consortia, and that, accordingly, an attempt should be made to anticipate key questions that might arise, and to prepare draft answers for reply. "*Obvious questions*" were noted as including:

- (i) whether the licensee was the same as the consortium that had applied;
- (ii) whether Mr. O'Brien's side of the consortium would "*stand up*";
and
- (iii) whether Telenor would support the project to the end.

58.14 Mr. O'Connell had recorded Mr. Brennan as stating that the last question was sensitive, and would have to be answered in such a way as not to imply any doubt on the part of the Department as to the financial strength of Communicorp, which by this time had been restructured into Esat Holdings. Mr.

O'Connell confirmed Esat Digifone's agreement to the Department's proposals, and recorded in his attendance that:

“within reason (and certainly short of telling any lies), Esat Digifone was willing to be guided by the Department as to the conduct of the press conference and would follow policy lines laid down by the Department; Esat Digifone also expected the Department to have some input as to the answers to questions to be given by it, ie. would co-ordinate such answers with the Department. This was acknowledged by MB and FT.”

Mr. O'Connell's note further recorded:

“The meeting ended with MB reiterating that it was ‘virtually certain that we would have to get more information on IIU, some numbers’.”

58.15 An unrelated element of discussion which warrants mention, as it bore on later negotiations which proceeded in the Department between legal advisers, is that directed to the draft licence, and in particular the provisions of Article 8. It will be recalled from the previous chapter that on 9th May, 1996, Mr. Richard Nesbitt SC furnished a final draft licence and opinion to the Office of the Attorney General. These had been received by the Department on the following day. Although the draft licence was subject to clearance by the Attorney General, it was shown to Mr. Digerud and Mr. O'Connell. They were recorded, by Mr. O'Connell, as having raised concerns surrounding the reservation of Ministerial approval to changes of ownership, and the impact that might have on routine share issues, and transfers between existing shareholders. These concerns were the subject of late evening negotiations on Wednesday, 15th May, 1996, between Mr. O'Connell and Mr. Nesbitt in the Department, which ultimately resulted in the provision of a side-letter by the Department to Esat Digifone, in advance of the licence being issued, to which further reference will be made.

58.16 It is clear that the Departmental intent, in convening the meeting of 13th May, 1996, was that it should address comprehensively all matters that required attention prior to the issue of the licence. There was no caveat or condition to those discussions registered by Mr. Brennan, and there can be no doubt that the meeting was predicated on an assumption that, subject to formal finalisation of outstanding matters, the licence would issue to Esat Digifone on the following Thursday, 16th May, 1996.

CONTACT BETWEEN MR. DENIS O'BRIEN AND MR. MICHAEL LOWRY

58.17 Interaction between the Department and Esat Digifone over these days encompassed contact between Mr. Denis O'Brien and Mr. Michael Lowry. On Monday, 13th May, 1996, they had a private telephone conversation, and on that occasion arranged to meet at the Department the following day. No record of that telephone contact was made by either of them, nor was there a record within Departmental files of Mr. Lowry having reported it to his officials. It was however noted by Mr. O'Connell, following a report to him by Mr. O'Brien. Mr. O'Connell's short note, headed "*Licence Negotiations*", read as follows:

*"DOB / Lowry call yesterday
'Getting there, slowly but surely.'
Called last night re autodiallers
- meeting today Loughrey + Lowry re this."*

58.18 Mr. O'Connell, having no direct recollection of the circumstances giving rise to his note, surmised that the sense of his note was that there had been two telephone contacts between Mr. O'Brien and Mr. Lowry, with the second directed to autodiallers and the affairs of Esat Telecom, with which Mr. O'Connell would not have been concerned. He was unable to assist as to who had initiated the telephone contact, nor who had made the remark quoted in his note, "*getting there, slowly but surely*". Mr. O'Brien's memory was such that he was also unable to assist. Mr. Lowry believed that it was possible that telephone contacts had occurred, although he too could not recall them. Mr. Loughrey, whilst having no recollection of having known of telephone contact at the time, testified that he would not have been surprised if such contact had occurred, and, whilst it would have been more usual for a meeting with the Minister to have been arranged through official channels, he observed that Mr. O'Brien would not have been "*the most usual*" of businessmen, being an entrepreneur, as, indeed, was Mr. Lowry.

58.19 The meeting arranged between Mr. O'Brien and Mr. Lowry proceeded on the following day, Tuesday, 14th May, 1996. Although Mr. Loughrey was in attendance, no note or record of the meeting was within Departmental files. Mr. O'Brien had reported the outcome of the meeting to Mr. O'Connell, who had again created a record of what Mr. O'Brien had told him, which was available to the Tribunal. Mr. O'Brien had regarded the meeting as sufficiently significant to make some short notes himself.

58.20 It appears from the available records that the purpose of the meeting was for Mr. Lowry to reinforce directly to Mr. O'Brien the Department's requirement that the capital configuration of Esat Digifone should revert to the

ratio 40:40:20, and its further requirement for specific financial information regarding the finances of IIU and Mr. Desmond. It appears that Mr. Lowry also reiterated his views that it was imperative that preparations be made for imminent media coverage, and for management of the ownership issue.

58.21 Mr. O’Connell had recorded that Mr. Lowry had informed Mr. O’Brien that the provision of financial information on IIU and Mr. Desmond, and of confirmation that underwriting was in place to cover Mr. O’Brien’s side of the funding, had to be prioritised. As to the former, it was seemingly envisaged that Dr. Michael Walsh would attend a meeting in the Department with Mr. Loughrey for the purposes of furnishing that information. Mr. O’Brien it seems confirmed that these matters would be attended to by the following day. The degree of urgency attending these exchanges, between Mr. Lowry and Mr. O’Brien, was evident from Mr. O’Connell’s note, that Mr. O’Brien had told him that there was a “*lot of frustration/pressure*”, and that Mr. Lowry had demanded that the information sought should be provided by 11.00am the following day, stating that he would check that it had arrived, and would hold Mr. O’Brien and Mr. Leslie Buckley responsible.

58.22 Mr. O’Connell’s note also recorded that Mr. O’Brien raised with Mr. Lowry Esat Digifone’s concerns surrounding the restrictions imposed by Article 8 of the draft licence. In that regard, Mr. O’Brien had seemingly indicated to Mr. Lowry the shareholders’ desire to alter their respective shareholdings to 45%, 45%, 10%, shortly after the licence had issued, to which Mr. Lowry was noted to have responded “*let ink dry*”.

58.23 As to Mr. Lowry’s views on the public relations management of publicity surrounding the grant of the licence, Mr. O’Connell had recorded:

“Public announcement, Lowry wanted last week. Do everything in one go. Deflect attention away from ownership. Discuss business, infrastructure contracts, roll out plan, employment, Limerick, new, contracts. Hold off buying phones – to public etc.

Must be phenomenally well briefed on bid document + tender. OOC to be present + to answer questions.

Legal ownership issue extremely important, all reporters focussed on this.”

Mr. O’Brien’s personal note of the meeting, although more abridged than that of Mr. O’Connell, reflected and confirmed the material recorded by the latter.

58.24 Mr. Loughrey had no recollection of the meeting whatsoever, and, indeed, wondered whether he had been absent for part or all of it. He agreed that, from a reading of Mr. O’Connell’s note, it might be concluded that there was a concern surrounding the question of ownership, and a desire to deflect attention away from that issue. He nonetheless asserted that there was absolutely nothing wrong in what was proposed. He testified that he personally would not have had a preoccupation with that matter, although Mr. Desmond was not the “*least colourful*” of people, and had not been announced as one of the original institutional investors. He remarked upon the tendency of politicians to pay very close attention to media comment, and suggested that Mr. O’Connell’s note reflected an over-reaction to what might have been regarded as a sensitive issue. Whilst Mr. Loughrey’s observations may have been correct, the thrust of Mr. Lowry’s proposals were clearly shared by the Department, whose officials were active participants in the media management of these issues. Moreover, Mr. Loughrey’s evidence in this regard was not at one with his own actions, and, as will become apparent, some months later, he was himself less than forthcoming in furnishing Mr. Lowry’s successor, Mr. Alan Dukes T.D., with information on Mr. Desmond’s ownership.

58.25 Mr. Lowry, Mr. O’Brien and Mr. O’Connell testified that it was exchanges in the Dáil, which Mr. O’Brien characterised as “*hullabaloo*”, together with press coverage and public discussion of the ownership of Esat Digifone, which had caused difficulties, and confirmed that there was a desire to deflect attention away from that issue, by focusing on the more positive aspects of the impending announcement. Mr. Lowry viewed the proposal to deflect attention from this issue as a public relations exercise, but was satisfied that the issue itself was not a problem, and testified to his reliance on Mr. Loughrey’s advice and assurances in that regard. According to Mr. O’Brien, the ownership issue meant nothing to consumers, and Esat Digifone wished to avail of the press conference as an opportunity to promote its services. If that was Mr. O’Brien’s view, it was not one shared by his solicitor, Mr. O’Connell, who testified that the issue had become one of “*major importance*”, and accepted that the need to deflect attention from it may have arisen primarily from Mr. Desmond’s absence from the Esat Digifone application.

EVALUATION OF FINANCIAL STRENGTH

Mr. Buggy’s instructions

58.26 It was on Monday, 13th May, 1996, just three days before the licence was to issue, that Mr. Brennan, having received the letters of confirmation from Esat Digifone that morning, at the request of Mr. Loughrey, asked Mr. Donal Buggy to provide the Department with an analysis of the financial strength of

Esat Digifone, which necessarily entailed an examination of its shareholders, Telenor, Esat Holdings and IIU. Mr. Buggy, it will be remembered, was an accountant by profession, had been seconded from private practice to the Department, and had participated in the evaluation process as a member of the Project Group.

58.27 Mr. Buggy's evidence was that he was requested only to determine "*whether or not the shareholders were financially strong enough to carry the project if the other shareholders experienced financial difficulties.*" He was also requested to assess the capacity of Telenor to finance the whole project, in the event that both Esat Holdings and Mr. Desmond were unable to support their respective shareholdings. Mr. Buggy, in his evidence, described the analysis he undertook as no more than a "*desktop exercise*", as a full due diligence on financial strength was not possible within such a short space of time, nor did the Department expect that full due diligence would be carried out.

58.28 As regards Telenor, Mr. Buggy testified that he had no concerns about its ability to fund its commitments, and accordingly his analysis fell to examining Esat Holdings and IIU/Mr. Desmond. As regards Esat Holdings, Mr. Buggy had difficulty in assessing its financial strength because, although it was expected to raise at least £22 million through an anticipated placement on the US market, it did not, as of 15th May, 1996, the date of his analysis, have such funds in place. Consequently, Mr. Buggy adopted "*the worst-case scenario*", and assumed that Esat Holdings had "*nothing*". Mr. Buggy's treatment of Esat Holdings' then finances, regarded as conservative but nonetheless correct by Mr. Loughrey, was borne out by the company's inability to pay its £6 million share of the licence fee of £15 million, due on 16th May.

Further information is sought

58.29 Mr. Buggy had been instructed to treat IIU and Mr. Desmond as "*one party*", and accordingly his analysis focused solely on Mr. Desmond's ability to meet both his obligations and those of Esat Holdings, for which he then had a contingent liability under the underwriting arrangements then in place, pursuant to the agreements of 29th September, 1995. In order to complete this task, Mr. Buggy sought information concerning Mr. Desmond's finances, and a number of meetings were convened for that purpose.

58.30 The first such meeting was on Tuesday, 14th May, 1996, with Mr. Pearse Farrell, of the accountancy firm Farrell Grant Sparks, auditors and accountants to IIU and Mr. Desmond. Apart from Mr. Farrell and Mr. Buggy, Mr. Brennan also attended. As recorded by Mr. Buggy in his note of that meeting,

and as confirmed in evidence, in response to the Department's request for information about Mr. Desmond's finances, Mr. Farrell indicated that it would be logistically difficult to provide such information, as Mr. Desmond's assets were spread globally, and issues of confidentiality might arise. It was Mr. Brennan's evidence, from his recollection of the meeting, that it was his impression that Mr. Desmond did not wish to furnish information in relation to his wealth, and Mr. Brennan recalled concluding that there was resistance to providing such information.

58.31 Mr. Buggy's note of that meeting recorded the need to clarify that IIU was providing underwriting for Esat Holdings "as per agreement of 29/9/95". The significance of that entry in terms of the position advanced by Departmental witnesses, that the Department had been unaware of those underwriting arrangements, Mr. Brennan having returned the letter of 29th September, 1995, and the Department having failed to recollect its contents on learning formally of Mr. Desmond's intended ownership in mid-April, 1996, was drawn to Mr. Buggy's attention. Mr. Buggy testified that he did not believe that he ever had sight of the agreement recorded in his notes. He observed, correctly, that the agreement had been referred to in the final paragraph of the letter from KPMG, included as one of the attachments to Mr. Digerud's letter of 13th May, 1996. Mr. Buggy noted in his evidence that he had made the following annotation on his copy of that KPMG letter:

"appears to cease once Shareholder's Agreement is signed (clause 17.11) but superseded by underwriting agreement in shareholders agreement & letter from Telenor & IIU."

Mr. Buggy surmised that the information, recorded by him in that annotation, arose from further confirmations he had received the following day.

58.32 Mr. Buggy's inquiries proceeded on the following day, Wednesday, 15th May, 1996, when Dr. Michael Walsh attended at a meeting in the Department. It seems that this was not in fact the meeting arranged and agreed by Mr. O'Brien and Mr. Lowry at their meeting of the previous day, which was a separate meeting between Dr. Walsh and Mr. Loughrey, not attended by Mr. Buggy or Mr. Brennan, and described as "private" by Mr. O'Connell in his note. In meeting Dr. Walsh on 15th May, Mr. Buggy was again accompanied by Mr. Brennan. Mr. Buggy confirmed, as he had recorded in his notes, that Dr. Walsh clarified, in response to the query on underwriting, that Telenor and IIU had agreed to underwrite Esat Holdings' liabilities, as to two thirds by Telenor, and as to one third by IIU. Mr. Buggy's note also recorded his understanding that a bank confirmation, that IIU had £10 million available for investment in Esat Digifone in 1996, would be forthcoming.

58.33 Mr. Buggy recorded discussion concerning documentation that was to be provided to the Department at some point later the same day, following the meeting, comprising:

- (i) a copy of the Esat Digifone shareholder's agreement, to be executed the following day;
- (ii) a copy of an underwriting letter from Telenor and IIU in respect of Esat Holdings' liabilities, also to be executed the following day;
- (iii) a letter from Anglo Irish Bank, concerning the availability of £10 million in respect of Mr. Desmond's contribution to Esat Digifone;
- (iv) a further letter from Farrell Grant Sparks, setting out in general terms the assets available to Mr. Desmond.

It was these further documents, together with the seven letters previously furnished as enclosures with Mr. Knut Digerud's letter of 13th May, 1996, together with the business plan contained in Esat Digifone's application, to which Mr. Buggy had regard in conducting his analysis.

58.34 In the course of his evidence to the Tribunal, Mr. Pearse Farrell testified that neither of the two letters provided to the Department in May, 1996, by Farrell Grant Sparks, as advisers and auditors to Mr. Desmond, that is, the letter dated 7th May, 1996, furnished on 13th May, 1996, confirming that Mr. Desmond/IIU were in a position to invest and/or underwrite up to £40 million in Esat Digifone, or the expanded letter, dated 15th May, 1996, restating that confirmation, and setting out in general terms the value of Mr. Desmond's assets, amounted to certifications. Rather, they were in the form of confirmations, or letters of comfort. Mr. Farrell explained that, in order to provide certifications, a much expanded timeframe would have been necessary, to obtain appropriate documentary evidence and to verify the facts set forth independently. Mr. Farrell also confirmed that the letter of 15th May, 1996, did not, nor was it intended to, state that the assets set out, totalling in value some £77 million, were free from liabilities. Nor was the letter intended to be a statement of Mr. Desmond's net worth, or net asset position. Similarly, the Department officials who received that letter were in no doubt as to its limitations, and Mr. Buggy, Mr. Brennan and Mr. Loughrey all agreed in evidence that the letter contained no indication of Mr. Desmond's liabilities.

Mr. Buggy’s analysis

58.35 Mr. Buggy’s analysis was provided to the Department in the form of a three page memorandum, dated 15th May, 1996, and was addressed to Mr. Loughrey. The memorandum commenced by recording that both Mr. Buggy and Mr. Brennan had been involved in discussions concerning the financial strength of the members of Esat Digifone over the previous two days, with a number of parties, but principally with Dr. Michael Walsh. Having referred to the projections set forth in Esat Digifone’s business plan, submitted with its application in August, 1995, Mr. Buggy stated that he had proceeded on the assumption that the total capital requirement would be in the region of £52 million.

58.36 Mr. Buggy recorded that the underwriting agreements between the shareholders had been revised, such that, if Esat Holdings were to default on a capital call, Telenor and IIU would provide funds to cover that default, in the proportions of two thirds and one third respectively. Further, if both Esat Holdings and IIU should default, the shareholders agreement effectively provided that Telenor would assume 100% of the financial commitment.

58.37 On the basis of a total equity requirement of £52 million, Mr. Buggy calculated the capital each shareholder would be obliged to subscribe as follows:

<i>“Telenor - 100.0%</i>	<i>or IR£52.0m</i>
<i>ETH - 40.0%</i>	<i>or IR£20.8m (assuming other parties are strong)</i>
<i>IIU - 33.3%</i>	<i>or IR£17.3m.”</i>

He noted that Telenor was a very strong company, and based on its 1994 annual report, it had net assets of approximately £1 billion. He concluded that Telenor appeared to be sufficiently financially strong to carry 100% of the share capital of £52 million, if necessary. In relation to Esat Holdings, Mr. Buggy noted that they were currently in the process of arranging a private placement in the US, which was expected to raise at least £22 million, but that, whilst that process was at an advanced stage, it had not yet been finalised, and the Department could not rely on it at that time. Accordingly, it was important to ensure that the other shareholders were sufficiently strongly based to meet, not only their own equity requirements, but their underwriting obligations to Esat Holdings.

58.38 The balance of Mr. Buggy’s memorandum comprised an analysis of IIU’s financial strength. At the outset of that analysis, Mr. Buggy recorded that, as IIU was 100% owned by Mr. Desmond, an analysis of IIU’s financial strength was essentially an analysis of Mr. Desmond’s financial strength. He noted that,

according to Dr. Walsh, IIU had been in existence only since August, 1995, and that no financial statements had yet been produced by it.

58.39 As to the availability of £17.3 million for investment in Esat Digifone, the requirement projected by Mr. Buggy for the purposes of his exercise, he noted that, whilst Mr. Desmond was known to be a very wealthy person, that alone was not sufficient information on which to proceed. He referred to discussions had with Dr. Walsh, who had indicated that Mr. Desmond had already invested £0.75 million in Esat Digifone, and would be investing a further £5 million on the evening of 15th May, 1996, in advance of the signing of the licence.

58.40 Mr. Buggy then listed the further documentation relevant to a consideration of the availability of the remaining £11.55 million required to meet Mr. Desmond's equity exposure. This comprised a letter from Anglo Irish Bank, confirming that Mr. Desmond had £10 million available for investment in Esat Digifone during 1996, inclusive of the £5 million already accounted for. Also listed by Mr. Buggy was the Farrell Grant Sparks letter of 15th May, 1996, confirming that Mr. Desmond was worth at least £40 million, and outlining some of what Mr. Buggy described in his memorandum as Mr. Desmond's "unencumbered assets", totalling some £77 million. Reference was again made to the underwriting obligations assumed by Telenor and IIU in respect of Esat Holdings' investment in the project, and to a final draft version of the proposed shareholders agreement.

58.41 Having set forth those matters, Mr. Buggy stated that:

"On this basis, I consider that the financial strength of DD has been confirmed to the extent that it can be relied upon to finance its own investment in E-SAT Digifone and underwrite its agreed portion of ETH's investment."

He also referred briefly to the debt financing position of Esat Digifone, and the confirmation received from ABN AMRO Bank, of its joint commitment with Allied Irish Banks in that regard, subject to both banks' normal due diligence procedures. He concluded his memorandum by stating:

"Based on the discussions documented above and the letters received from the various parties as outlined above the shareholders in E-SAT Digifone appear to have sufficient financial strength to ensure that E-SAT Digifone is financed in line the expectations [sic] under the

business plan and the required debt financing appears to be available to the company.”

58.42 In the course of his evidence, Mr. Buggy was questioned by the Tribunal as to his use of the designation “*unencumbered*”, in describing Mr. Desmond’s assets, as listed in the Farrell Grant Sparks letter of 15th May, 1996. He testified that it was not a word that he would have used “*lightly*”. He accepted that it was not a conclusion he could have drawn from that letter. He indicated that there were only three sources from which he could have formed that view, namely, Mr. Pearse Farrell, Mr. Martin Brennan, and Mr. John Loughrey. Mr. Farrell, as already related, testified that it was never his intention to convey that Mr. Desmond’s assets were unencumbered, nor did he do so, either in his letters or at his meeting with the Department. Neither Mr. Brennan nor Mr. Loughrey had any knowledge of how Mr. Buggy could have drawn that conclusion, and both suggested that it was a matter that the Tribunal should take up with him. Whether Mr. Buggy’s view that Mr. Desmond’s assets were unencumbered resulted from an error, or some other misunderstanding, on his part, or on the part of others, what cannot be gainsaid is that it was an incorrect characterisation of the information then in the possession of the Department. Whilst all Departmental witnesses involved, namely, Mr. Buggy, Mr. Brennan and Mr. Loughrey, accepted that no information had been provided to the Department regarding Mr. Desmond’s liabilities, it is clear that no steps were taken to establish, even on a basis that was merely indicative, what those liabilities were.

Mr. Loughrey’s determination

58.43 Before proceeding to consider Mr. Loughrey’s determination that Esat Digifone had satisfied the Department of its financial capability, reference should be made to the separate meeting between Dr. Walsh and Mr. Loughrey in the Department on Wednesday, 15th May. Mr. Loughrey and Dr. Walsh were well acquainted from Dr. Walsh’s previous secondment to the Department. They were occasional luncheon companions. In that regard, Mr. Loughrey testified to having been impressed, when he learned that IIU had assumed a role in the venture in place of Davy stockbrokers, referring to the former as the “*new kid on the block*”. Mr. Loughrey had telephoned Dr. Walsh during the negotiation stage, following media speculation that IIU’s shares were held for parties other than Mr. Desmond, and Dr. Walsh had confirmed that Mr. Desmond was beneficial owner of those shares.

58.44 It will be recalled that such meeting was arranged when Mr. O’Brien met Mr. Lowry and Mr. Loughrey the previous day, and Mr. O’Connell had

described that meeting in his record of what Mr. O'Brien had conveyed to him as "*private*". Mr. Loughrey testified that he was not entirely happy with that reference. There was nothing private about the award of the licence, a valuable State resource as far as he was concerned, "*and there was no way that it was going to be awarded on the basis of some private understanding.*"

58.45 Both Mr. Loughrey and Dr. Walsh testified to their recollection of a meeting between them at that time. Mr. Loughrey had no specific recall of the content of the meeting but, in attempting to reconstruct from first principles what was likely to have occurred, Mr. Loughrey testified that he had some career experience in the area of finance, having spent some five years with the European Central Bank, and believed that he would have asked Dr. Walsh questions relating to the value of Mr. Desmond's assets. More particularly, Mr. Loughrey believed that he would have probed the issue of liquidity, which he testified was ultimately satisfied by the letter from Anglo Irish Bank. It was Dr. Walsh's recollection that Mr. Loughrey had made clear his view that, whatever the position in relation to Mr. Desmond's assets, the important issue for him was liquidity, a view which Dr. Walsh shared. Dr. Walsh also regarded that requirement as having been satisfied by the Anglo Irish Bank letter, the provision of which, Dr. Walsh believed, was agreed between them on this occasion. This followed discussion of alternative proposals, such as Mr. Desmond depositing funds in an escrow account, which Dr. Walsh had rejected.

58.46 As to Mr. Buggy's analysis, which Mr. Loughrey thought he might not have had an opportunity to consider until the morning of Thursday, 16th May, 1996, he testified that he regarded it as "*ultra conservative*", particularly in the entire discounting of Esat Holdings' financial capability, by reference to its not yet completed placement on the US market. Whilst recognising that Mr. Buggy was correct in adopting that approach, Mr. Loughrey then contradicted himself, asserting that it was "*incredible*" to proceed on the assumption that Esat Holdings would not raise the requisite capital, given their access to the markets, and as Mr. O'Brien had successfully completed that financing, following the grant of the licence.

58.47 In relation to the availability of £17.3 million from Mr. Desmond, Mr. Loughrey's evidence was that he was satisfied that he could rely on what he initially termed "*an undertaking*", but then called a "*professional confirmation*", from Farrell Grant Sparks, in their letter of 15th May, 1996. Mr. Loughrey agreed that an almost identical confirmation in the earlier Farrell Grant Sparks letter of 7th May, 1996, had not been acceptable to him or to the Department. It was not, according to Mr. Loughrey, the case that he doubted that earlier confirmation, but in fact his concern at the time was with liquidity, so that the important letter

from his perspective was the one from Anglo Irish Bank, confirming that there would be liquidity until the end of 1996. He testified that the additional £5 million, confirmed as available, was sufficient liquidity in his view. He further testified that, whilst he had been unhappy with the earlier Farrell Grant Sparks letter, and even though the subsequent letter amounted to no more than a restatement of that position, the fact that Mr. Pearse Farrell was asked to re-visit his confirmation, in what Mr. Loughrey presumed was a very considered and measured way, meant that Mr. Loughrey could rely on it. In other words, it was Mr. Loughrey's evidence that, whilst he was unhappy with that confirmation the first time, when it was repeated in the same terms, he was satisfied.

58.48 As to why it was that Mr. Michael Andersen was not consulted in relation to this exercise, in particular as he was on that day in attendance in the Department for the purposes of meetings with disappointed applicants, Mr. Loughrey's response was that he "*never made the linkage*", probably because he had never met the man, had never seen him in operation, and didn't attach anything to his skill-set directly.

The worth of the financial evaluation

58.49 The shortcomings in the approach adopted to the evaluation of Esat Digifone's financial capability, a matter of high priority, are patent. Following the change of Government in December, 1994, financial capability was elevated to the "*chapeau*" of the evaluation process, and was intended, as a matter of Government policy, to be a precondition to entry to the comparative evaluation process. Instead, apart from the importation of the concepts of bankability and deep pockets, to meet the financial vulnerability of Esat Digifone, identified by AMI, close consideration was relegated to a rushed exercise, of questionable value, conducted over the last three days before the licence issued.

58.50 Following the announcement of Esat Digifone as the winner of the competitive process on 25th October, 1995, no action was taken to implement the recommendation made by AMI in the Evaluation Report, retained at Mr. Andersen's insistence in the face of Departmental opposition, that the financial weakness of Esat Digifone required a greater degree of self-financing by shareholders. Nothing was done in the face of accurate and authoritative media coverage, of which the Tribunal is satisfied that the Department was aware, to investigate Mr. Desmond's accession as a shareholder, or whether, in the absence of the named financial institutions, his participation might further impact on the financial vulnerability of Esat Digifone. Nor was there ever any action taken in response to the alteration in Mr. O'Brien's funding arrangements, whereby the Advent £30 million commitment, which the Department was

assured at the Esat Digifone oral presentation was in place, was to be substituted by a prospective and indeed lesser fundraising on the US market, after the licence issued, dependent on the licence availability.

58.51 The Department remained passive until receipt of Mr. O’Connell’s formal changed ownership notification of 17th April, 1996. The evidence of Mr. Loughrey and Mr. Brennan, that the financial capability of Esat Digifone and of its shareholders became a critical issue at that point, and a matter that had to be assured, as a condition to the grant of the licence, is not borne out by subsequent events. Again, no steps were taken until 1st May, 1996, when a letter was sent to Esat Digifone seeking no more than information on changes in ownership. That letter was silent as to a view that the grant of the licence was subject to the satisfactory outcome of Departmental consideration of financial capability, as were Mr. O’Connell’s records of interactions and meetings with the Department from 17th April, 1996, to 16th May, 1996, there being no records within Departmental files. The Department’s request for specific financial information on Telenor, Esat Holdings and IIU was not recorded in that letter of 1st May, 1996, but instead was deferred until 3rd May, 1996, and then made in the course of an unrecorded meeting in the Department.

58.52 The Tribunal is satisfied that Mr. Fintan Towey’s evidence in this regard was an accurate assessment of the reality of the Departmental and political response to the changed ownership letter of 17th April, 1996. It necessitated the implementation of a process, in advance of the grant of the licence, to address the issues that had arisen, but, as Mr. Towey testified, there was no actual expectation that the outcome of that process would be otherwise than the grant of the licence to Esat Digifone.

58.53 The substantive evaluation of the financial capability of Esat Digifone, and of its shareholders, which according to Government policy was to have been the first matter satisfied on receipt of applications on 4th August, 1995, was conducted by Mr. Donal Buggy in a desktop exercise on the eve of the grant of the licence. Mr. Buggy treated Mr. O’Brien as having no funds, Telenor as having sufficient to cover the entire of the project, and Mr. Desmond, by reference to the face value of assets owned by him, and a letter obtained that day from Anglo Irish Bank that he had £10 million available to invest in Esat Digifone in 1996, as having sufficient capability to meet his potential £17.2 million exposure to the project. The record of Mr. Buggy’s analysis, the only document on the Departmental file, in the absence of proof, erroneously designated Mr. Desmond’s assets as “*unencumbered*”.

58.54 In truth, the terms on which the Department's process of evaluating the financial capability of Esat Digifone was brought to conclusion were, despite Mr. Loughrey's objection to the term, agreed at a "*private*" meeting between Mr. Loughrey and Dr. Michael Walsh, at the Department, the day before the licence issued. That meeting had been arranged by Mr. O'Brien and Mr. Lowry the previous day. What was agreed between Mr. Loughrey and Dr. Walsh was that Dr. Walsh would secure a letter from Anglo Irish Bank that £10 million was available to Mr. Desmond for investment in Esat Digifone. That letter was duly provided to Mr. Buggy, and was placed on the Departmental file.

FORMALITIES ARE CONCLUDED

58.55 The shareholders agreement, under negotiation since October, 1995, together with a series of side-letters, were signed and executed by Telenor, Esat Holdings and IIU on 16th May, 1996, prior to the licence issuing. Negotiations between the shareholders had concluded over the previous weekend, including negotiations addressed to the reconfiguration of the share capital, in compliance with the Departmental imperative that the shareholding ratio of 40:40:20 should be restored. A number of side-letters were also signed by the shareholders on that date, some to record rights and obligations agreed between the shareholders themselves, and others to satisfy Departmental requirements.

58.56 First and foremost, the funding of the licence fee of £15 million payable to the Department that day had to be formally put in place. To that end, a board meeting of Esat Digifone was convened on 16th May, and it was resolved to call on shareholders for a combined capital contribution of £15 million. Esat Holdings, having no funds, formally registered its inability to meet that capital call. Under the shareholders agreement, a further meeting was then convened to arrange alternative means of funding the shortfall of £6 million, occasioned by that default. It had already been agreed between the shareholders that Esat Holdings' contribution would be covered pro rata by Telenor and IIU, as to £4 million by Telenor, and as to £2 million by IIU, and that agreement was implemented.

58.57 The mechanism by which Telenor and IIU met Esat Holdings' capital call did not entail a loan by Telenor and IIU to Esat Holdings, but rather one to Esat Digifone, in exchange for loan notes convertible to shares, in the event of default in repayment. The unpaid shares were allotted to Esat Holdings, for a subscription of £0.01p, with a liability for a further £0.99p per share, to be paid by 30th May, 1996. On payment of the balance of the subscription due by Esat Holdings, Esat Digifone would repay the loan to Telenor and IIU. This structure was seemingly adopted to meet restrictions on the making of loans by Telenor.

These arrangements were the subject of a side-letter between the shareholders. This was not provided to the Department, although the evidence supports Departmental knowledge of Esat Holdings incapacity, and of that arrangement.

58.58 As regards the realignment of the shareholding ratio, on the previous Sunday, 12th May, 1996, Mr. Desmond had agreed to sell a 5% shareholding equally to Esat Holdings and Telenor, for a total price of £2.75 million. Telenor paid £1.375 million to IIU, but as Esat Holdings was unable to fund that payment, it was agreed that it would also be permitted to defer payment until 30th May, 1996, subject to the provision of a charge over the transferred shares in favour of IIU, as security for payment. These arrangements were reflected in a share purchase agreement between Esat Holdings and IIU, the terms of which were not notified to the Department.

58.59 The Department it seems was unaware that the reconfiguration of the share capital of Esat Digifone had entailed the making of payments between shareholders. In that regard, Mr. Brennan testified that nobody in the Department asked what was done with the 5% shareholding, and whether it simply involved a reorganisation, without money changing hands. He nonetheless accepted in evidence that the arrangements put in place indicated that the value of the licence was traded between the shareholders, before it was even issued.

58.60 The Departmental requirement, that an indemnity should be put in place for Esat Holdings' equity participation in Esat Digifone, was met by the provision of another side-letter, signed by both Telenor and IIU, confirming that they would underwrite capital calls made on Esat Holdings. That side-letter, already furnished in draft form, was submitted to the Department prior to the signing of the licence, in order to satisfy the Department that the requisite underwriting was in place.

58.61 One further side-letter signed by Esat Holdings and Telenor warrants reference, that is, a letter which confirmed that IIU would be at liberty to transfer one tranche of its shareholding free of pre-emption rights prescribed by the shareholders agreement. This right, to one free transfer, had its origins in the arrangement agreement of 29th September, 1995, when Mr. Desmond's shareholder entitlement was framed as an obligation on his part to place 25% of shares issued. Had those shares been placed by IIU with third parties, either at or subsequent to issue, then transfers to such third parties, to give effect to placements, could not perforce be subject to pre-emption rights of existing shareholders. That side-letter therefore merely confirmed what had been agreed on 29th September, 1995. In the event, the right conferred on Mr. Desmond was

not deployed by him until 2000, when it was invoked to transfer his last remaining share in Esat Digifone to a subsidiary of British Telecom.

58.62 Apart from shareholder side-letters, there was also a side-letter provided by the Department to Esat Digifone. This related to Article 8 of the licence, which prescribed restrictions on the future transferability of shares in the licensed company. That article had not only featured in the opinion of Mr. Nesbitt of 9th May, 1996, but had also been a focus of concern for Esat Digifone. In the light of Esat Holdings' intention to increase its shareholding incrementally, after the licence had issued, through transfers from Mr. Desmond, there was an anxiety to ensure that the terms of Article 8 would not unduly restrict transfer of shares between existing shareholders.

58.63 Negotiations had also proceeded on this issue over the final days, and these culminated in a late evening meeting at the Department on the eve of the issue of the licence, attended by Mr. O'Connell and by Mr. Nesbitt. A measure of comfort was agreed at that meeting, and in order to give effect to it, the Department furnished Esat Digifone with a side-letter dated 16th May, 1996, signed by Mr. Martin Brennan, confirming that the Minister would consent under Article 8 to issues of shares by Esat Digifone to direct shareholders, or transfers of shares between direct shareholders, provided that no such issue or transfer would result in the aggregate holdings of Telenor and Esat Holdings ceasing to amount to voting control of the licensee.

58.64 Once these formal steps had been taken, and documents executed and exchanged, the licence itself was signed in a room on an upper floor of the Department, and thereafter the press conference announcing the grant of the licence was convened.

MEDIA MANAGEMENT AND PRESS CONFERENCE

58.65 Apart from Dr. Walsh's meetings with the Department on Wednesday, 15th May, 1996, Mr. Owen O'Connell also spent considerable time at the Department on that day. On that morning, he met Mr. Brennan and Mr. Towey, and it seems that Mr. Buggy may also have been present for that meeting. As before, there was no record of this meeting on the Departmental files, but Mr. O'Connell had kept a note, which was available to the Tribunal.

58.66 As was confirmed by Mr. Towey, the purpose of the meeting was to discuss preparations for the press conference to announce the grant of the licence to Esat Digifone the following day. The importance of these arrangements had featured prominently at the meeting on the previous Monday, 13th May,

when Mr. Brennan had conveyed Mr. Lowry's anxiety that thorough preparations should be made, and had identified the matters which it was anticipated would give rise to the most searching questions. Mr. O'Connell's attendance note of 15th May, recorded discussion of a number of issues. At an early point, Mr. Brennan was noted as having queried when Telenor and Communicorp had joined together for the purposes of submitting a bid, to which Mr. O'Connell responded "*late April/early May*". Mr. Brennan testified that his query most likely related to suggestions made in some quarters, that the closing date for submission of bids had been postponed to facilitate certain consortia, rather than having been necessitated by the European Commission intervention.

58.67 Discussion then seemingly proceeded to the issue of the share configuration of Esat Digifone. In that regard, Mr. O'Connell confirmed that his entries, "45:45:10" and "*cruising altitude*", signified that the Department had indicated that it had no objection to Telenor and Esat Holdings increasing their respective shareholdings to 45%, by each acquiring 5% of Mr. Desmond's shareholding, after the project was established. There then followed discussion of debt/equity requirements, seemingly directed to an anticipated area of questioning at the press conference.

58.68 Mr. O'Connell then noted the following:

"MB:- (some Min. needs our help)

Whether same project as won competition."

Initially, the Tribunal understood Mr. O'Connell's handwritten note to read "*save Min. needs our help*". However, Mr. O'Connell testified that the word was not "*save*" but rather "*some*", indicating that, in relation to the issue of whether the licensee was the same as the consortium that had won the competition, the Minister already had "*some*" information and material, but needed further information from the consortium side.

58.69 There then followed, according to Mr. O'Connell's note, discussion of how best to present certain features of the Esat Digifone application, including tariffs, it being anticipated that Esat Digifone's plan to reduce tariffs by 25% over three years could be criticised as not being as far-reaching as proposals from other consortia. Emphasis was to be placed on "*exciting things to shake up mkt*" in the Esat Digifone plan, such as the introduction of per second billing by the end of the first year of operation, which Mr. O'Brien had referred to in the course of the oral presentation, a matter remarked upon at the meeting.

58.70 There then followed discussion of other questions likely to be raised at the press conference, including why the licence was only then being signed; whether it had been delayed to allow Esat Digifone to put money in place; what impact the delay would have on the launch; the need to stress “*Geographical + quality coverage*”; and whether, if the original closing date had not been deferred, Esat Digifone would have been in a position to bid.

58.71 What was strangely absent from discussions at this meeting, as recorded by Mr. O’Connell, in the context of concern directed to whether the ownership of the licensee could be said to be the same as that of the consortium that had won the competition, was reference to the legal opinion which the Department had by then received. As set out in the preceding chapter, the Departmental witnesses, together with witnesses from the Office of the Attorney General, and Mr. Richard Nesbitt SC, urged the Tribunal in evidence to accept that clear advice had been given to the effect that there was no legal impediment to the involvement of Mr. Desmond. It is noteworthy, in the present context, that no reference was made to the existence of that opinion in the course of discussions on how to deal with potentially troublesome questions on the ownership issue.

58.72 When asked in evidence why the Department had not mentioned that opinion to Mr. O’Connell at that meeting, Mr. Brennan testified that he did not know, but said that sometimes it was not necessary to set things out in “*black and white*”. Mr. O’Connell was aware that the Department was seeking legal advice, and could have concluded that those hurdles had been overcome as the Department was proceeding with plans to issue the licence. As to the need to deflect attention away from ownership, when the simplest and most truthful way of addressing those concerns would have been to refer to the legal advice received, it was Mr. Towey’s evidence that the Department was aware of political sensitivity on the issue, and it was not always the best course to invite attention to a particular subject.

58.73 Following Mr. O’Connell’s meeting with Mr. Brennan and Mr. Towey, preparations on the Esat Digifone side intensified, and Ms. Eileen Gleeson, of Weber Shandwick FCC, public relations consultant to Esat Digifone, assumed an active role. In the absence of Departmental records, it was the evidence of, and records kept by, Ms. Gleeson and Mr. O’Connell which were the principal sources of evidence available to the Tribunal as to what then occurred.

58.74 Initial plans for media management of the licence issue entailed a joint approach. On the previous Monday, 13th May, 1996, Mr. Brennan had proposed to Mr. Digerud and Mr. O’Connell that a rehearsal for the press conference

should be arranged, and be attended by both Departmental and Esat Digifone representatives. That did not transpire. Whilst it was Mr. O'Connell's evidence that this resulted from nothing more than time constraints over the last hurried days, it nonetheless appears that some element of tension and disharmony entered relations between the Department and Esat Digifone surrounding these matters.

58.75 On the morning of Thursday, 15th May, 1996, Ms. Gleeson finalised the preparation of a press release intended to be issued that day by Esat Digifone, subject to Departmental agreement, and forwarded it to Mr. O'Connell. Ms. Gleeson testified that the draft had been prepared by her, with input from Mr. O'Brien, Mr. Desmond, Dr. Walsh and Mr. Michael Lowry's public relations consultant. It was her understanding of her instructions that it was envisaged by Esat Digifone and Mr. Lowry that two press releases would be issued, one on Thursday, 15th May, and the other on 16th May, once the licence was signed. The first would address the structure and shareholding of Esat Digifone, including the involvement of Mr. Desmond through IIU, and the second would focus on Esat Digifone's plans for the launch of its mobile service. However, it seems that Mr. Loughrey resisted this course, and his preference was for a single press release on 16th May, 1996, to coincide with the signing of the licence, and his view ultimately prevailed. Mr. Loughrey testified that there were no circumstances in which he would have agreed to that proposal, as it presumed that substantive matters still outstanding would be resolved, and he did not want anyone to presume what the Department's decision would be. In other words, it seems that Mr. Loughrey continued to regard matters as uncertain, and he was not prepared to countenance the pre-emption of the Department's position, by the issue of an advance press release on 15th May, 1996.

58.76 In forwarding her draft press release to Mr. O'Connell, Ms. Gleeson advised Mr. O'Connell of the timing issue, and added that, whilst Mr. Lowry's advisers were agreeable to an advance press release, she thought that Mr. Loughrey was not. She emphasised the importance, irrespective of timing, of agreeing the manner of presentation of the ownership and funding of Esat Digifone. She referred to a request received by her from Mr. O'Brien, that she attend a "*practice session*" at William Fry at 1:00pm that day, to finalise the terms of the press release, and to discuss questions likely to be posed by the media at the press conference the following day. She concluded by stressing the importance of convening a practice session to ensure that everyone was "*on the same line*", as she put it.

58.77 Attached to her fax was a list of questions which Ms. Gleeson anticipated could arise in the course of the press conference. An annotated copy of that list was within the files of William Fry, as produced to the Tribunal, and Mr. O’Connell confirmed that the annotations had been made by him. Noting that some were in a denser script, and some in a fainter script, he concluded that they had been made by him on separate occasions. He surmised that those in fainter script were initial annotations made by him, on receipt of Ms. Gleeson’s fax, and those in denser script were made by him at a later point, most probably in the course of the final rehearsal attended by Esat Digifone representatives on the morning of Thursday, 16th May, 1996.

58.78 Ms. Gleeson’s list and Mr. O’Connell’s annotations, the latter representing in part discussion in the course of final rehearsals on the Esat Digifone side, covered a number of matters, including the key questions identified by Mr. Brennan at the meeting of the previous Monday, 13th May, 1996. As will be recalled, Mr. Brennan had defined those questions as including whether the licensee was the same as the consortium that had applied, and whether Mr. O’Brien’s side of the consortium would stand up.

58.79 Close consideration of those questions had been given by Ms. Gleeson in advance, and was developed further at the final Esat Digifone meeting of 16th May. As to the ownership issue and Mr. Desmond’s involvement, Ms. Gleeson had framed the question as follows:

“Was IIU mentioned in the bid document as one possible shareholder – ie were they one of those who gave letters of commitment.”

Mr. O’Connell had made two relevant annotations. He had initially noted:

“Bid was confidential in that respect i.e. backers’ identities were not revealed,”

but in his later handwritten note he had recorded:

“IIU to say no.”

Mr. O’Connell testified that, whilst he believed his initial suggested answer to this question was to refer to the confidentiality of the bid, someone else at the final rehearsal had, “*more wisely*”, suggested that IIU should confirm that they were not in the application.

58.80 Whilst it was clearly the case that someone had made that proposal, as recorded by Mr. O’Connell, it was not one that was ever adopted either by Esat Digifone, or by the Department. On the contrary, the issue of Mr. Desmond’s late accession to Esat Digifone was never addressed publicly or even privately in such a candid manner. The fact that Mr. Desmond had not featured in the Esat Digifone application, as a shareholder or potential shareholder, was never made known, and confidentiality continued to be invoked, even, as will be seen, to the point that this piece of information was kept from Mr. Alan Dukes, T.D., when he made inquiries of Departmental officials, following his appointment as Minister in place of Mr. Lowry.

58.81 As to the funding issue, Ms. Gleeson had formulated the following question:

“How much capital has been provided by shareholders to date.”

Mr O’Connell’s initial response was again to record the answer “*confidential*”, but his later note, in the following terms, reflected a more considered view:

“up to now, all activities funded from equity up to + including signing licence. Enough for licence fee + capex to date; arrangements in place to drawdown as required.”

58.82 A more pointed question and response had been proposed by Mr. O’Connell at the meeting of 16th May. That question, and his initial consideration of it, were recorded by him at the foot of Ms. Gleeson’s list, as follows:

*“Has Denis O’Brien contributed his share of the equity?
make or break legally + politically. Co. to answer; accurate; if fudge, no lies.”*

58.83 Mr. O’Connell testified that his note accurately represented the approach he proposed. He recognised that Esat Holdings did not have funds to meet its £6 million contribution to the licence fee, payable the following day. Over the previous weekend, he had been party to the shareholder negotiations whereby Telenor and Mr. Desmond agreed pro rata to cover Esat Holdings’ contribution to the licence fee. He confirmed in evidence that it had been his view that, whilst it was acceptable for Esat Holdings to “*fudge*” that question, it could not be answered dishonestly. The critical significance of the issue was not lost on Mr. O’Connell, who had described it as “*make or break legally + politically.*”

58.84 The carefully framed answer proposed to be given by Mr. O'Brien, and recorded in a separate attendance kept by Mr. O'Connell of that final rehearsal meeting, of 16th May, 1996, was as follows:

“DOB contribution – I wish to scotch the persistent rumours on this. The licence fee has been paid; millions have been spent by the co. to date, almostly [sic] entirely out of shareholders funds, little or no bank funding to date. All of Esat Telecom Holdings share of the funds have been paid. Arrangements among the shareholders have been concluded to everyones’ satisfaction and are working.”

Whilst the question did not arise, and the answer was not given by Mr. O'Brien at the press conference later that day, it is nonetheless instructive that the formulation proposed would have secured the end identified by Mr. O'Connell. By focusing on the discharge of the licence fee, by constructing a passive statement that the Esat Holdings share had been paid, and by referring to satisfactory arrangements between the shareholders, the issue was fudged, but nothing dishonest was proposed.

58.85 The balance of Mr. O'Connell's attendance of that final rehearsal meeting recorded the fine tuning of answers to various anticipated questions, including the date on which the consortium had been formed, and the consortium's readiness to submit its application on the original closing date of 23rd June, 1995, an issue which, as will be recalled, had been raised at Mr. O'Connell's meeting with the Department the previous day.

58.86 Following that final rehearsal meeting, shortly before noon on 16th May, Mr. O'Connell went to the Department again, and attended a further meeting with Mr. Brennan, Mr. Towey and Mr. Buggy in relation to last minute arrangements for the signing of the licence. By then, it seems that Mr. Loughrey's consideration of Mr. Buggy's financial evaluation had concluded, and the Department had accepted that the finances of Esat Digifone had been confirmed. It was at this meeting, again undocumented in Departmental files, that Mr. Brennan asked Mr. O'Connell for a copy of Esat Digifone's draft press release, and this was subsequently furnished to him.

58.87 The licence having been signed, the joint press conference proceeded as scheduled on the afternoon of 16th May, 1996. Mr. O'Connell kept a note of proceedings, and recorded that Mr. Lowry and Mr. Loughrey sat at a top table, accompanied by shareholder representatives, namely, Mr. O'Brien, Mr. Arve Johansen and Dr. Michael Walsh. It seems from Mr. O'Connell's note that Mr.

Lowry opened the press conference by making a short address and, as recorded by Mr. O'Connell, stated:

*“Unanimous decision
Questions conclusively responded to.
Competition fully respected.
Signed, dated, timed.”*

Thereafter, Mr. O'Connell noted that a number of questions had been raised, largely directed to relatively innocuous matters. It seems that the predicted key issues of Mr. Desmond's ownership, and Mr. O'Brien's ability to fund his share, which had been the subject of such intense and close consideration and preparation over the previous days, did not arise.

58.88 A single press release, headed “*MINISTER LOWRY SIGNS GSM LICENCE*”, was issued to coincide with that press conference. The release was an expanded form of the draft prepared by Ms. Gleeson the previous day, with input from Mr. O'Brien, Mr. Desmond, Dr. Walsh and Mr. Lowry's public relations consultant. Additional positive material had been incorporated on a number of topics, including the construction of a network and infrastructure by Esat Digifone, consequent employment opportunities, and the appointment of joint chief executives, in the persons of Mr. Knut Digerud and Mr. Barry Maloney.

58.89 There was one passage of the draft, as sent to Mr. Brennan by Mr. O'Connell earlier that day, omitted from the text as issued. That passage recorded:

“IIU has stated that this shareholding or part thereof may be placed with additional investors at some future time. This will be reviewed when Esat Digifone is operational towards the end of the year.”

Neither Mr. Brennan nor Mr. Loughrey could recall by whom or why it was decided that this passage be deleted. There can be no doubt however that, in the light of the controversy surrounding Mr. Desmond's ownership, and the evident Departmental sensitivity, such a statement of future uncertainty regarding the ultimate ownership of Mr. Desmond's shareholding would have been regarded as likely to fuel, rather than stem, further speculation.

58.90 As to the joint approach taken by the Department and Esat Digifone to the handling and presentation of the issue of the licence, and in particular the issues surrounding ownership and funding, it is clear that the primary concern was to deflect attention from these issues. Notwithstanding Mr. O'Connell's

annotations that, within Esat Digifone, there was a view that IIU should acknowledge that it was not named as an investor in the Esat Digifone application, it is beyond question that the Department's continued preference was to invoke confidentiality as inhibiting disclosure. It was also a clear objective of the Department to present the ownership of Esat Digifone on 16th May, 1996, as consistent with the ownership of the consortium as stated in its bid, insofar as information was within the public domain. Key to this presentation was the Department's insistence on the consortium reverting to a share configuration of 40:40:20, a preference attributed by Mr. Towey to Mr. Michael Lowry in his telephone call to Mr. O'Connell on 7th May, 1996, of which there was no record within the Department.

58.91 In that context, it is notable that over the course of these final days of preparation, no reference was made in any document, or in any evidence heard by the Tribunal, to reliance on the legal advice which the Department believed it had obtained on the permissibility of Mr. Desmond's shareholding. In view of the sensitivities within the Department, and the expectation that intense questioning would ensue when the licence was granted, it is noteworthy that at no point did anyone suggest, even privately, that a solution would be to state publicly that legal advice had been sought and obtained from the Attorney General, so as to put beyond doubt any concern surrounding Mr. Desmond's ownership. In truth, however, had that legal advice been made known, the Department would have effectively been contradicting the position which it was hoped could be publicly sustained, that is, that there had been no change in the consortium. Far from diverting attention away from ownership, or a change in ownership, the advice received, and the request which gave rise to it, would have had the effect of confirming that a change had occurred, something which the Department showed itself not disposed to reveal.

58.92 The Tribunal is satisfied that the overriding concern within the Department was to manage the press release and press conference in such a way as to present the ownership of Esat Digifone as being in conformity with the ownership information in the public domain. The Department's paramount concern was with appearances. Hence, the requirement that the share configuration revert to 40:40:20, a revision which, on the evidence heard by the Tribunal, the Department was aware was not legally required. That concern appears to have been foremost and of far greater priority than the financial evaluation of an investor never identified in the application, which was deferred until the last three days before the licence was due to issue, was then conducted by reference to uncertified figures, and was concluded, to the Department's satisfaction, by reliance on a letter from Anglo Irish Bank that £10 million was available to Mr. Desmond.

THE NEW MINISTER IS NOT TOLD

INTRODUCTION

59.01 Approximately six months after the licence was issued to Esat Digifone, Mr. Dermot Desmond's involvement in the consortium became an issue for the Department once again. By this time, Mr. Lowry had resigned as Minister on 6th November, 1996, with Mr. Alan Dukes, T.D., replacing him at the Department on 3rd December, 1996.

59.02 As incoming Minister, Mr. Dukes was conscious of the controversy raised in some quarters regarding the issue of the licence to Esat Digifone, and felt it incumbent upon him to question closely the Departmental officials involved in the licensing process. Mr. Dukes had listened to the media reports of the Departmental press conference of 19th April, 1996, and was aware of the questions that had been raised in the Dáil and in the media. Mr. Dukes testified that he reviewed and discussed those questions with the senior civil servants involved, namely Mr. John Loughrey, Mr. Sean Fitzgerald, and Mr. Martin Brennan.

MR. BOBBY MOLLOY'S INQUIRIES

59.03 As far back as November, 1995, Mr. Bobby Molloy, T.D., tabled a question to Mr. Lowry in the Dáil, in which he asked whether *"article 3 of his Department's GSM competition licence documents were complied with in the awarding of the licence"*. Mr. Lowry was also asked by Mr. Molloy about *"the identity and ultimate beneficial ownership of the institution investors who will own 20 per cent of the successful bidding company"*. At Dáil Question Time, when the matters came on for discussion, Mr. Molloy expanded upon these questions as follows:

"Question Number 85 in my name requests information regarding compliance with article 3 of the bid document which states that the applicants must give full ownership details for proposed licensee. I asked if that had been complied with in awarding the licence and if the Minister would indicate the identity and ultimate beneficial ownership of the institution investors who will own 20 per cent of the successful bidding company. Were they known to the Minister when he made the decision bearing in mind that recent newspaper articles refer to the fact that a finance company in Dublin has been appointed to place 20 per cent of the consortium shares with institutions and other investors? If the investors were not identified, was article 3 complied with?"

59.04 On 16th April, 1996, Mr. Molloy raised similar issues in questioning Mr. Lowry in the Dáil, when, having referred to “25 per cent” of the licence having been sold “to unnamed investors who have not yet disclosed the source of their funds”, he asked:

“Is Dermot Desmond an investor in yet another Telecom Éireann venture? The public has a right to know the identity of the investors involved.”

It is clear that Mr. Molloy was quite familiar with the ownership compatibility issue, and the problems associated with Mr. Desmond’s late introduction to the consortium. It is also clear that he raised these matters on numerous occasions in the months preceding the announcement of Esat Digifone as the winner of the licence competition, and up to the date of issue of the licence, on 16th May, 1996.

59.05 Mr. Dukes testified that he recalled the general tenor of Mr. Molloy’s Dáil contributions on the matter and, to the best of his recollection, most of these occurred during Mr. Lowry’s tenure as Minister. Mr. Dukes also testified that he remembered thinking at the time that it was probably not surprising that the unsuccessful applicants for the licence would seek, through any means available, including through briefing the opposition in the Dáil, to cast doubt on the integrity of the award of the licence, whether or not there was any objective foundation for such doubt.

MR. DUKES’ LETTER TO MR. MOLLOY OF 6TH DECEMBER, 1996

59.06 On [6th December, 1996](#), Mr. Dukes wrote to Mr. Molloy, providing him with information relating to the composition of the winning consortium, both at the time of application, and at the time of issue of the licence. Mr. Dukes could not recollect whether that letter was sent in response to correspondence from Mr. Molloy, or in response to a statement by him in the Dáil or outside it. In the course of Mr. Loughrey’s evidence, it was drawn to his attention that, immediately prior to Mr. Dukes’ letter, there had been significant comment, in the press and elsewhere, surrounding speculation that a certain named individual was involved in the Esat Digifone consortium. In consequence, Esat Digifone had around that time issued a press statement denying that suggestion. Mr. Loughrey recalled that to be the case, and it is clear from the official report of Dáil proceedings on 5th December, 1996, that Mr. Molloy did raise with Mr. Dukes questions arising from that speculation, and it may well be that Mr. Dukes issued his letter in response. What is clear, whatever prompted that response, is

that the letter was sent in reply to inquiries made by Mr. Molloy of Mr. Dukes, in his capacity as Ministerial successor to Mr. Lowry.

59.07 In putting his name to this letter, Mr. Dukes testified that he was fully briefed by Mr. Loughrey and Mr. Brennan, the senior officials involved in the process, who had prepared his response to Mr. Molloy's queries. Mr. Loughrey gave evidence that Mr. Molloy would have been entitled to accept the contents of the letter of response as being the full truth of the situation. Similarly, Mr. Brennan testified that Mr. Dukes would have been relying on what he was told by Mr. Loughrey, as far as the content of the letter of reply was concerned. As it transpired, no further correspondence emanated from Mr. Molloy in relation to the matter. A copy of the letter can be found in the Book of Appendices to this Volume and its contents are reproduced below:

"Dear Bobby,

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

The Esat Digifone application was on behalf of a consortium owned as to 50% each by Telenor Invest AS and Communicorp Group Ltd. (the holding company for Esat Telecom). The application disclosed that, if it was successful, 20% would be placed with financial investors. A list of potential investors was submitted, all of whom are "blue chip" institutions. The Minister and Department are specifically precluded from naming these but there was no room for doubt as to either their bona fides or their financial capacity.

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

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

On 19 April when the Department held a press briefing the fact that it was not in a position to give final definitive information on the placement of the 20% minority shareholding may have reduced the

clarity of the exchanges. My information is that when the licence was issued shortly thereafter the precise situation was clearly stated.

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

Yours sincerely,

Alan Dukes T.D.

Minister for Transport, Energy and Communications

59.08 The text of the letter was familiar to Mr. Brennan at the time the matter was raised with him in evidence, and he initially testified that he may well have drafted it. However, later in his evidence, Mr. Brennan was more certain, stating that he probably did in fact draft it, and later again, that he was “fairly certain” that he did so. This evidence was consistent with that of Mr. Dukes, who testified that he did not draft the letter, but relied on his Departmental officials in that regard. Mr. Loughrey gave evidence that he would have seen the letter prior to it being sent, and was probably of the view at the time that the business was in the past and, whilst there may have been a hiccup, that was how it had been handled. Mr. Dukes, as was his usual practice, was more concerned with satisfying himself that he could stand over the content of the letter, and in that regard he testified that he ultimately accepted its contents.

59.09 It is clear from a plain reading of the letter that it was written to deal with the apparent “confusion” arising out of the “precise situation regarding ownership and investment in Esat Digifone.” However, the letter did not mention the fact that Esat Digifone’s shareholding configuration underwent a change immediately prior to the issue of the licence, reverting from the ratio 37.5:37.5:25 to 40:40:20, and that Mr. Lowry, through his Department, was instrumental in bringing about that change. The Tribunal has already found in Chapter 57 that, notwithstanding the Tribunal’s concern over evidential discrepancies referred to, a basis for acceptance on the part of Departmental officials had been shown that enabled them to proceed on the footing that legal clearance had been obtained for the inclusion of Mr. Desmond in the Esat Digifone consortium. In no sense is it now sought to undo that finding, but it must nonetheless be stated that the form in which the 6th December, 1996, letter was drafted provides yet further confirmation of the acute sensitivity and ambivalence of senior Departmental officials, concerning the nature, evolution and timeframe of Mr. Desmond’s involvement in Esat Digifone. This was exemplified in the testimony of Mr. Loughrey, in which in one instance he stated that the action of Mr. Brennan and Mr. Towey in returning the 29th September,

1995, letter of Dr. Michael Walsh, was quite correct, whilst on a separate occasion, he declared that Mr. Desmond, by virtue of that same letter, was “trumpeting” his involvement in the consortium. What was conveyed in the draft letter to Mr. Dukes, who of course signed it in utter reliance on the accuracy of its content, was in material respects inaccurate, selective and misleading and, as acknowledged in evidence, should not have been prepared in that form.

59.10 Mr. Dukes further stated that he was also unaware at that time of any suggestion that this change of configuration had come about at the request of either the previous Minister or of the Department, such that the conformity of the capital configuration with that recorded in the consortium’s bid application would be preserved. Had these matters been brought to Mr. Dukes’ attention, he stated that he was sure that they would have stuck in his mind.

59.11 The letter also asserted that the Department was not in a position to give final definitive information on the placement of the 20% holding at its press conference on 19th April, 1996. Mr. Brennan accepted in evidence that, on that date, the Department knew that the configuration of the consortium’s shareholding was 37.5%, 37.5%, 25%. Mr. Brennan’s evidence was that he thought that it was quite possible that Mr. Dukes was never told about the true breakdown as it existed on 19th April, 1996, and accepted that this was an important piece of information concerning the evolution of Esat Digifone’s ownership. Mr. Brennan also acknowledged in evidence that the letter could have been drafted better, and that he did not know why this important information was not brought to the new Minister’s attention. Nor could Mr. Brennan explain why Mr. Dukes was not informed of the Department’s investigations, on learning about Mr. Desmond’s involvement, although he did concede that this was a troubling question. On Day 183, 13th February, 2003, of the Tribunal’s sittings, the following exchange took place between counsel for the Tribunal and Mr. Brennan:

“Q. Did you want to deflect attention from the evolution of the ownership issue in December of 1996?”

A. December of – no, I don't believe so.

Q. Well, then, why wasn't the evolution of the ownership issue being correctly and truthfully set out in the letter that was drafted for Mr. Dukes?”

A. I suspect that at that stage, that level of detail had just been overlooked, forgotten about.”

However, Mr. Brennan had testified earlier that there was a sensitivity surrounding the shareholding structure as it existed on 19th April, 1996, as it was inconsistent with that which was set out in the bid application, and he further acknowledged that, if the full facts concerning Mr. Desmond's late introduction to the consortium, including the letter of 29th September, 1995, had been revealed in April, May or November, 1996, it could have had implications for both politicians and administrators.

59.12 Mr. Loughrey testified that he did not consider that there was anything untruthful in the statement in the letter regarding the Department's state of knowledge at the time of the press conference of 19th April, 1996, that the Department "*was not in a position to give final definitive information on the placement of the 20% minority shareholding*". The Department had already resolved to restore the minority share configuration to 20%, and had rejected the 25% proposal, and, according to Mr. Loughrey, it was not possible to be definitive as to how that would "*pan out*".

59.13 When giving evidence to the Tribunal, Mr. Loughrey was referred to Mr. Molloy's utterances in the Dáil, and in particular to a comment attributed to him in the course of a debate on 30th April, 1996, which made it clear that he was aware that the minority shareholding in Esat Digifone, as at that time, was 25%, as opposed to 20%. Mr. Loughrey testified that he did not believe that he would have looked at the Dáil debate at the time but, having read it, he was then conscious, at the time of his evidence, that Mr. Molloy seemed to have a pointed and informed knowledge of the ownership issue as at end-April, 1996, and, had he been conscious of Mr. Molloy's state of knowledge as regards Mr. Desmond's 25% holding, he clearly would have drafted another letter, or would have so informed Mr. Dukes. In hindsight, whilst Mr. Loughrey felt that matters might not have been wholly satisfactory, he testified that there was no intention to mislead.

59.14 When Mr. Brennan, at the State's request, returned to give evidence to the Tribunal in relation to the receipt of legal advice by the Department on the ownership change issue, he was asked why the fact of such legal advice, and the Department's interpretation of counsel's opinion of 9th May, 1996, as addressing that issue, had not been communicated to Mr. Molloy in that letter. Mr. Brennan could not say why this was so.

59.15 Having considered the relevant evidence, the Tribunal is satisfied that the letter of 6th December, 1996, was drafted by the Departmental officials to give a certain impression to their new Minister, Mr. Dukes, as to what had happened during the licence negotiations, as regards the revelation of Mr. Desmond's involvement in the consortium. Mr. Dukes was given the impression that there had been a seamless transition from the composition of the Esat

Digifone consortium, as disclosed in the application, when it was held as to 50% each by the two principal members, with financial investors to take 20% of the shares prior to the issue of the licence, to the composition at the licensing stage, when the configuration, on foot of the involvement of Mr. Desmond, was 40%, 40%, 20%. The fact that the Department had been formally notified of Mr. Desmond's 25% stake in the consortium in mid-April, 1996, whatever their prior knowledge, was not disclosed to Mr. Dukes, still less any reference to matters relating back to 29th September, 1995. Nor were the attempts at belated evaluation of Mr. Desmond's finances made known to the new Minister by Departmental officials. Moreover, in reliance on the principles of confidentiality, the letter failed to disclose that Mr. Desmond was not amongst the "*potential investors*" identified in the application. In turn, Mr. Dukes was led to communicate that impression to Mr. Molloy, an impression which was inaccurate, selective and misleading. The further consequence of preparing for the Minister a draft letter, in terms that must be viewed as an ex post facto rationalisation of events, was to render Mr. Dukes, a politician of acknowledged experience and eminence, potentially open to having, entirely unwittingly, misled his Dáil colleague on a matter of public importance.

OVERVIEW AND CONCLUDING OBSERVATIONS

OVERVIEW

60.01 What led the Tribunal to investigate the decision made on 25th October, 1995, that Esat Digifone had won the comparative evaluation to select a second GSM operator, and the subsequent grant of the licence to Esat Digifone on 16th May, 1996, was evidence of the commencement, shortly thereafter, of the process whereby payments were made by Mr. Denis O'Brien to Mr. Michael Lowry, in clandestine circumstances. The steps taken to effect the initial payment arose less than seven weeks after the licence was granted, and the payment was made out of the proceeds of the very first tranche of funds available to Mr. O'Brien, after he had successfully completed a placement on the US market, to finance his participation in Esat Digifone. That payment was routed through a series of off-shore bank accounts, commencing in the Isle of Man, moving to Jersey, and terminating back in the Isle of Man, in an account in the name of Mr. Lowry, but was reversed on the appointment of the McCracken Tribunal.

60.02 Despite suggestions to the contrary, it must be recorded that it formed no part of the Tribunal's mandate to review or audit the process by which Esat Digifone was selected as the preferred candidate, and subsequently licensed. Apparent shortcomings or irregularities in that process were immaterial, as were judgements or decisions made in the course of it, unless they reflected influence brought to bear by Mr. Lowry. Likewise, the level of support for decisions taken by the Project Group established to conduct the process, in the course of it, or the degree of dissent evident, were of no import, unless they were indicative of or bore on action or conduct on the part of Mr. Lowry. Moreover, it formed no part of the Tribunal's remit to determine whether the result of the selection process was the correct result, whether Esat Digifone ought to have won the competition, or whether the process was subject to legal infirmity. The Tribunal's sole object in examining the evaluation process, and the decision made on 25th October, 1995, that Esat Digifone was the winner, was to determine whether that decision, on that date, was influenced or impacted upon by Mr. Lowry. So too, the Tribunal's inquiries into dealings between the shareholders of Esat Digifone were solely for the purpose of shedding light on interactions between Esat Digifone and the Department, and between Mr. Lowry and Mr. O'Brien, and whether those interactions themselves reflected influence brought to bear by Mr. Lowry.

60.03 Following the announcement in October, 1995, that the competition had been won by Esat Digifone, there was considerable media and Dáil controversy surrounding the result, directed in particular to the finances of Esat

Digifone, and the shareholding of Mr. Dermot Desmond. The official position at that time, and the position advanced in response to Tribunal inquiries, was as follows. The evaluation process, whereby Esat Digifone had been selected as the winner, was one conducted by a group of civil servants, assisted by expert consultants, and its independence, fairness and impartiality were thereby guaranteed. It was impermeable to political influence, and had been conducted under terms of strict confidentiality. A protocol had been adopted to ensure that contact with interested parties was controlled. Applicants had been judged by reference to the rules and evaluation criteria approved by Government, and the evaluation had proceeded strictly in accordance with an Evaluation Model and a weighting matrix, the latter to reflect the descending order of importance of those criteria, both adopted prior to the closing date for applications. The result had been clear, and the subsequent negotiations for the grant of the licence had proceeded uneventfully.

60.04 The Tribunal's approach to investigating this matter was simple. It examined the process to determine whether the seal of confidentiality had been breached. If so, it scrutinised matters to ascertain whether the process itself was so inherently objective as to be proof against political interference. Having identified marked deviations in the process, between what was envisaged and what was actually implemented, it inquired into whether the breaches of the process had been facilitated by political intervention in or influence on it, which had impacted on the result.

The evaluation process

60.05 What emerged, after difficult and challenging private inquiries and public hearings of evidence, was something very different, and not remotely comparable to public pronouncements at the time, or the account furnished to the Tribunal at the outset of its work. Notable amongst the many inadequacies and shortcomings which afflicted the process were the following.

The Evaluation Model was not followed

60.06 The Evaluation Model adopted by the Project Group on 9th June, 1995, prescribed a technique that represented best practice at the time. It stipulated a combined quantitative and qualitative evaluation. The quantitative limb would generate a limited range of precise objective numerical results, in accordance with predetermined formulae. The qualitative evaluation, through discussion of sub-groups of the Project Group, would generate a wider range of subjective and, in comparison to the quantitative limb, relatively imprecise results. The outcome of the evaluation would entail a consideration of both sets of results, although frequently both limbs of evaluation yielded the same outcome. The rationale for

adopting this dual approach was the need to offset the risk of an arbitrary result emerging, either through the limitation on the range of quantitative results, or the relative imprecision of the wider range of qualitative results, and to ensure that the technique used in selecting the best application was valid and reliable, particularly having regard to the potentially distorting effect of the application of weightings, to reflect the order of ranking of the evaluation criteria. This blueprint was not followed, and instead, in the course of the process, significant departures were made from it, with obvious consequences for its reliability.

The quantitative limb of evaluation was excluded

60.07 The results of the quantitative evaluation, which yielded in all versions a very different ranking to that which ultimately emerged, were never used in the manner prescribed in the Evaluation Model. As a set of results, they formed no part of the analysis or deliberations which led to the ranking of Esat Digifone as the best applicant. They were not published in the Evaluation Report, and consequently no reference was ever made to them in the Report, nor explanation as to why they had generated such a markedly different ranking, or why Esat Digifone, never having ranked higher than third place in the quantitative results, had been nominated the winner. Supposed shortcomings in the results, in large part more apparent than real, which were said to have dictated their exclusion as a separate limb of evaluation, did not withstand scrutiny.

The qualitative evaluation became the sole determinant

60.08 The overall ranking which emerged was determined solely by reference to subjective and impressionistic considerations of a small subset of the Project Group. The proposition advanced in evidence that this limb of evaluation was expanded, and entailed something substantively different to the qualitative evaluation prescribed in the Evaluation Model, was not borne out. The use of quantitative results, as an input to the qualitative evaluation, in the course of those subjective considerations, had always been an integral part of that technique as prescribed at the outset. The graded results, the product of the qualitative evaluation, were the outcome of layer upon layer of subjective judgements, arrived at by a technique intended to be relatively imprecise, and produced a ranking by a margin that was, in the absence of the counterbalance of hard data, one which was so close as to be inherently questionable.

Irregular application of weightings

60.09 The application of numerical weightings was the method by which it was intended that the descending order of priority of the eight evaluation criteria, as approved by Government, would be objectively and verifiably respected. A

weightings system was adopted before the closing date of the process, in order to protect its integrity and fairness. The criteria level weightings were respected, but a vital element of the weighting system, intended to guarantee the fairness of the exercise, that is, the internal weightings of the constituent features of those criteria, was not. Instead, different weightings were applied, and these were ultimately used in a manner never contemplated by the Evaluation Model. The application of those different weightings to the three constituent features of the premier criterion, at a critical point, distorted the outcome of the process in favour of Esat Digifone.

60.10 The historical record of those internal weightings, adopted prior to the closing date of the process, and recorded in the Evaluation Model, was altered as between the draft and final Evaluation Reports, thereby concealing that a set of weightings, other than those adopted in advance, had been applied in determining the result of the process.

Deficiency of financial evaluation including financial capability precondition

60.11 Both the financial assessment conducted as part of the comparative evaluation process, and the separate consideration of the paramount precondition that applicants should demonstrate their financial capability to fund the second GSM network, were fraught with error and irregularity. The former was concluded in the absence of intended accountancy skill, and subsequent key revisions, arising from accountancy review, were unreflected. The precondition of financial capability did not feature at the outset of the process, but was deferred until the emergence of a ranking in the comparative evaluation, and serious and significant financial weaknesses, identified in the course of the process, although not subject to measured assessment, were regarded as capable of remedy on the prospective footing, contrary to Government policy, that the availability of the licence would cure all financial ills, and funding would become available. This turned the intended process and Government policy on its head. Instead of financial capability being at the “*chapeau*” of the process, and a matter to be established as a condition of admittance to the comparative evaluation, it was rendered of no material application, on the footing that the licence was such a valuable asset that, on its issue, financially vulnerable shareholders would be able to raise funds. Rather than financial capability having to be established, it was effectively presumed.

Erosion of Project Group as decision-maker

60.12 It was intended that the evaluation would be conducted by a Project Group of ten Departmental officials, seven drawn from the three Departmental telecommunications sections, two seconded accountants, and one

representative of the Department of Finance, advised by outside consultants, who would collectively determine the outcome. As matters proceeded, that intention was eroded incrementally, until the point was reached that the Project Group, as the organ of decision-making in the evaluation, became redundant. What emerged was a pattern of information being kept outside the Project Group, of the Project Group as a unit being segregated from the consultants, and of critical and determinative decisions being made by a small subset of its membership.

60.13 Apart from the evaluation of technical elements of the process, undertaken by the two professionally qualified engineers of the Technical Division, the balance of matters evaluated, including the financial elements, was substantially determined by two officials, one of whom was Chairman of the Group. From mid-September, 1995, these two officials progressed the evaluation beyond a point ever agreed to or envisaged by the Project Group, and superseded the Group as the organ of decision-making in the process. It was they who interacted with the consultants, to the virtual exclusion of the balance of the membership of the Project Group. It was they who attended a meeting with the consultants in Copenhagen, on 28th September, 1995, at which they determined the overall results of the process, and arrived at a ranking, predicated on a decision, made by them, that the separate results of the quantitative evaluation should not influence that result, and that weightings, other than those recorded as having been adopted by the Project Group in advance, should be deployed. They also subsequently determined that financial reservations surrounding Esat Digifone, in terms of the precondition of financial capability, as identified by the consultants, should be disposed of by an assumption that funds would become available to Mr. Denis O'Brien, once he had secured the licence. As regards the latter determination, they were also, alone, in possession of information furnished by letter, in breach of the rules of the competitive process, that additional financial provision had been made for Mr. O'Brien's funding.

60.14 The ranking that was determined in Copenhagen on 28th September, 1995, was presented to the Project Group as a final outcome of the process, not a provisional outcome for the consideration and approval, or otherwise, of the Group, but for nothing more substantial than, at best, a perfunctory and uninformed process of endorsement. Efforts of the membership to reassert authority, supported by the Secretary General, were overreached, and the result which had been reached on 28th September, 1995, in Copenhagen, was proceeded with and announced publicly, without the knowledge of or reference to the views of dissenting members.

60.15 There was no evaluation conducted by ten civil servants, or by, as variously and inaccurately contended in the course of the Tribunal's inquiries, fourteen or twenty-three civil servants or consultants. Rather, the evaluation was steered by two energetic, professional and committed civil servants, spearheaded by the Chairman of the Group, who, in their concern for the administrative efficiency of the project, unwittingly lost sight of its adjudicative character, and the intended structure of decision-making. In effect, the process lost its bearings.

Consultants provide no guarantee

60.16 The retention of expert consultants provided no guarantee of an objective process, free of political influence. The degree of the consultants' appreciation of the intended structure of the process, and of intended responsibility for decision-making, as between the Government, the Project Group, and the Minister, was, on the basis of Mr. Michael Andersen's belated evidence, woefully inadequate. That the consultants presided over and endorsed an evaluation process, that deviated so markedly from their recommended methodology, was at odds with any reasonable expectation that the rigour of the process would be underwritten by their input. Budgetary issues, which featured so prominently in their engagement with the Department, and the degree to which their interaction in the course of the process was deflected from the Project Group, further undermined the capacity of the consultants to ensure its reliability.

Emergence of problems in licensing process

60.17 The negotiations between the Department and Esat Digifone, culminating in the grant of the second GSM licence to Esat Digifone, on 16th May, 1996, proceeded against a backdrop of considerable controversy, and were far from smooth or straightforward. Notable was the absence of Departmental records of critical dealings with Esat Digifone in relation to serious issues that arose, consequent on the financial incapacity of Mr. O'Brien's element of Esat Digifone, and the accession of Mr. Dermot Desmond as a new shareholder, entitled to a 25% interest. The Tribunal was informed that these issues required close scrutiny, and called into question Esat Digifone's entitlement to the licence. Rather than a careful, measured and open-minded consideration, what in fact emerged was no more than a belated process of rationalisation and resolution, the former directed to minimising public exposure of those issues, and the latter to achieving the licensing of Esat Digifone.

Mr. Michael Lowry's influence

60.18 All of these critical deviations and irregularities in the process would have been immaterial to the Tribunal's inquiries, unless they were impacted upon or influenced by Mr. Michael Lowry. Despite the procedures put in place to preserve the integrity of the process, what the Tribunal found was that the process was far from sealed, and Mr. Lowry was far from being an encouraging but disinterested Minister, who responded positively to the advice of his most senior civil servant that he should exercise caution in dealings with interested parties.

60.19 Rather, what transpired was that Mr. Lowry displayed an appreciable interest in the substantive process, had irregular interactions with interested parties at its most sensitive stages, sought and received substantive information on emerging trends, made his preferences as between the leading candidates known, conveyed his views on how the financial weakness of Esat Digifone should be countered, ultimately brought a guillotine down on the work of the Project Group, proceeded to bypass consideration by his Cabinet colleagues, and thereby not only influenced, but delivered, the result that he announced on 25th October, 1995, that Esat Digifone had won the evaluation process, which ultimately led to the licensing of Esat Digifone on 16th May, 1996. Each of these elements of Mr. Lowry's insidious and pervasive influence on the process will now be addressed.

Mr. Lowry's disfavour towards the second and third-ranked consortia

60.20 Before the ink was dry on the Government Decision of 2nd March, 1995, authorising the process, Mr. Lowry lent currency within his Department to a groundless rumour that, if the Persona consortium won the second GSM licence, it would result in a "nest egg" for a former prominent Fianna Fáil politician. This rumour was also deployed by Mr. Lowry to his advantage, when he relayed it to the then Taoiseach, his party leader, Mr. John Bruton T.D., in asserting and endeavouring to convince Mr. Bruton that there was no room for Government discretion on his recommendation of the result of the process. At the same time, Mr. Lowry sought further to neutralise consideration by Government of that recommendation, by indicating that a brother of Mr. Ruairi Quinn T.D., the Minister for Finance, was connected with a member of the third-ranked consortium, Irish Mobicall. Mr. Lowry's negative view of Persona was also conveyed by him to a relatively junior, but influential, member of the Project Group, when Mr. Lowry spoke to him directly in mid-September, 1995, and sought reassurance that the process had not concluded in favour of Persona, who, on that occasion, he described as the bookies favourite.

Mr. Lowry's appreciable interest in the substantive process

60.21 Mr. Lowry sought and obtained information on the substantive process, and the trends emerging from within the Project Group, at a number of significant stages of the process. Six weeks into the process, he was informed, on inquiry by him, by the same junior member of the Project Group, of the identity of the three applicants then in contention. Shortly after, he received a further briefing from the Chairman of the Project Group, and learned that Esat Digifone was the lead contender, but that reservations remained around its finances. This interaction coincided with the commencement of deviations in the process from its intended pathway, and of operative erosion of the Project Group's intended role as decision-maker in the process.

60.22 On 2nd or 3rd October, 1995, before the Project Group had even been notified of the ranking that had been determined in Copenhagen, four days earlier, Mr. Lowry was informed by the Chairman that Esat Digifone had emerged from the overall evaluation as the top-ranked applicant, but that its finances remained problematic. Some few days later, following receipt of the first draft Evaluation Report, at least an extract of which was it seems furnished by the Chairman to Mr. Lowry's Programme Manager, again before that ranking, or the draft Report, was made available to the Project Group, Mr. Lowry was provided with a further more detailed briefing, and it was at this juncture that Mr. Lowry imparted his views on how concerns surrounding Esat Digifone's finances could be counteracted and met.

Mr. Lowry imparts information to Mr. Denis O'Brien

60.23 Mr. Lowry and Mr. Denis O'Brien had at least two interactions in the course of the process. It is beyond doubt that, in the case of the latter interaction, Mr. Lowry imparted substantive information to Mr. O'Brien, of significant value and assistance to him in securing the licence.

60.24 On the first occasion, in early April, 1995, Mr. Lowry proposed France Telecom to Mr. O'Brien as a potential partner. Mr. Lowry knew from Departmental dealings that France Telecom had an interest in forming a consortium to bid for the licence. Whilst that interaction did not bear directly on the process, what it did reveal was a tendency on the part of Mr. Lowry to be indiscreet, and less cautious in dealings with interested parties than might have been expected, bearing in mind the adjudicative role of his Department. That tendency was also evident in his dealings with other interested parties.

60.25 The second, and profoundly reprehensible occasion, was on 17th September, 1995, when Mr. Lowry encountered Mr. O'Brien at Croke Park, at the

latter's design, subsequently met with him, by arrangement, and departed from the agreed venue to another location for a private conversation. The Tribunal is satisfied that, during that private meeting, Mr. Lowry shared with Mr. O'Brien the information earlier conveyed to him by the Chairman of the Project Group, that Esat Digifone was in pole position in the competition, but that the evaluators had reservations surrounding its financial capability, stemming from the financial vulnerability of Mr. O'Brien's element of the consortium. The Tribunal is further satisfied that, on that occasion, Mr. O'Brien disclosed to Mr. Lowry the proposition that Mr. Dermot Desmond would join the Esat Digifone consortium, and would underwrite Mr. O'Brien's finances, and that Mr. Lowry provided comfort to Mr. O'Brien that notification to the Chairman of the Project Group of such an arrangement, in breach of the rules of the competition, would not impact adversely on Esat Digifone's prospects. It was with that reassurance that Mr. O'Brien proceeded to negotiate with Mr. Desmond for his accession to Esat Digifone, and for the provision by him, through his investment vehicle, IIU, of an underwriting letter, later forwarded to the Chairman of the Project Group, in breach of the competition rules, on 29th September, 1995.

Mr. Lowry resolves Esat Digifone's financial inadequacies

60.26 It was in the first week of October, 1995, that Mr. Lowry's influence on the decision made on 25th October, 1995, became directly operative. Having been informed, in advance of Project Group notification or approval, of the ranking determined by the two officials in Copenhagen, some short days earlier, but of continuing reservations surrounding whether Esat Digifone could be regarded as having met the precondition of financial capability, it was Mr. Lowry who conceived the notion of bankability, that is, that funds would become available after the licence issued, to counterbalance the deficit in Mr. O'Brien's finances. He conveyed that to the Chairman, together with his desire that the Evaluation Report should be clear, and that it should not undermine the result.

60.27 These views, together with the fact that Mr. Lowry had been informed of the ranking that had been determined by those two officials, were relayed by the Chairman to the membership of the Project Group that met on 9th October, 1995, who were presented with that ranking and outcome as a foregone conclusion. Mr. Lowry's notion of bankability, as a solution to Mr. O'Brien's finances, was forcefully asserted by the Chairman, in the context of reservations surrounding Esat Digifone's finances recorded by the outside consultants in the draft Evaluation Report, and was ultimately inserted into the Report on the day Mr. Lowry announced his result. The outside consultants resisted only the efforts made to exclude their stated reservations and recommendations surrounding the finances of Esat Digifone. The precondition of financial capability, a matter of Government policy, was set at nought, at Mr. Lowry's instance.

Application of guillotine to work of Project Group

60.28 The most pervasive and abusive instance of Mr. Lowry's influence on the awarding of the GSM licence to Esat Digifone was his action in withdrawing time from the Project Group, granted by the Secretary General of his Department on 23rd October, 1995, in the face of his requirement that the result be made available to him. The additional time of one week had been granted by the Secretary General, following the insistence of certain members of the Project Group, whose role had been overreached. They were not convinced that Esat Digifone should be nominated as the winner of the process, were confused about the weightings applied and how the result had emerged, and requested that they should have an opportunity to revisit and review the evaluation.

60.29 Mr. Lowry countermanded that decision made by his Secretary General, demanded that the result be made available to him, and thereby prevented any opportunity for reappraisal by the Project Group. By withdrawing that extended time, and terminating consideration by the Project Group, Mr. Lowry ensured that the risk of that result being disturbed by the Project Group could not and did not arise. Mr. Lowry's actions in that regard undermined his own officials, and represented the ultimate deprivation of the Project Group's decision-making function. By overreaching the Project Group in this manner, Mr. Lowry excluded scrutiny of that result, and ensured, as was the case, that Esat Digifone was named, on 25th October, 1995, as the winner of the GSM competition.

Government deprived of role

60.30 By the Government Decision of 2nd March, 1995, authorising the holding of the process, neither Mr. Lowry nor his Department were to be decision-makers. That function was reserved to Government, on Mr. Lowry's recommendation, and, at the outset of the process, four to six weeks had been set aside for Government consideration. In the event, no time was made available for Government to deliberate on that recommendation, and Mr. Lowry's result was approved, as was his immediate announcement of it, by means of an abridged procedure, whereby Mr. Lowry secured approval from the leaders of the parties then in Government by an informal process.

60.31 Mr. Lowry's strategy of depriving Government of an opportunity to scrutinise and review the result was apparent from early October, 1995, when he learned that Esat Digifone had emerged as leader in the comparative process, but of the financial obstacle that remained, and, ignoring Government policy, proposed his bankability solution. In securing *de facto* Government approval in this manner, Mr. Lowry not only misled the party leaders as to the clarity and

certainty of the result that he recommended, and as to the absence of any financial or other reservation, but even more reprehensibly, he sought to overreach his own party leader, the Taoiseach, Mr. John Bruton T.D., by intimating that Government should have no discretion in the matter. In that regard, Mr. Lowry repeated the groundless rumours in relation to the second-ranked consortium and a former Fianna Fáil politician, and also suggested the potential conflict for Government in connection with the third-ranked consortium, consequent on the family connection between the Minister for Finance and a party with a minor interest in that consortium. In securing *de facto* Government approval in this manner, Mr. Lowry deprived Government of its decision-making function, prevented scrutiny of his recommendation, and thereby also ensured that Esat Digifone's position as winning consortium would not be altered.

Securing the licensing of Esat Digifone

60.32 The Tribunal has no doubt that Mr. Lowry was equally determined that nothing that arose in the course of licence negotiations, whether in the form of the accession of Mr. Dermot Desmond as a 25% shareholder, or the rushed financial checks undertaken in the days before the licence issued, would deprive Esat Digifone of the licence. By then, the die was cast, and in the absence of an insuperable obstacle, there was a political and reputational imperative that the licence should issue to Esat Digifone. Anything short of that outcome would have impacted adversely on the Department, the Government and ultimately the State, and would have caused grievous harm in the eyes of the business community, and the wider international community.

60.33 The damage was done when Mr. Lowry secured the winning of the competition for Esat Digifone, and thereafter, neither the altered ownership, in the person of Mr. Dermot Desmond, nor the risk to the project, consequent on Mr. O'Brien's financial shortcomings, so pronounced that he had no funds available on the day the licence issued to meet his £6 million contribution to the licence fee, could alter that eventuality.

Influence on civil servants

60.34 Mr. Lowry's influence on the process was both direct, as in his disgraceful action in bringing a guillotine down on the work of the Project Group, and indirect and insidious, arising from his interaction with the Chairman of the Project Group, and his intimation of his views, both general, in terms of his disenchantment with the second-ranked consortium, and specific, as to how Esat Digifone's financial problems could be met.

60.35 The breaching of the confidentiality intended to bind the process was at Mr. Lowry's instance, and responsibility for it rests with him, and with systemic failures within the Department. Greater precautions ought to have been taken, as a matter of policy, to segregate those conducting the evaluation from their political master, to whom they were ultimately accountable. The absence of the Secretary General from the Department, for the greater part of the process, facilitated interaction between Mr. Lowry and those less senior and experienced officials conducting it. Those officials, with whom he interacted, and principally the Chairman, had no means of knowing that Mr. Lowry was conveying information to Mr. O'Brien, or any other interested party, and had no reason to suspect Mr. Lowry's motives.

60.36 In the implementation of the process and the erosion of the Project Group's role, the same civil servant, assisted by his junior colleague, was no doubt actuated by a desire for a decisive, efficient and productive process, and one that would secure the policy objective of delivering a second operator. The commitment and engagement of those officials could not be faulted. However, in the desire to achieve that objective, and produce a result, the senior of those officials unwittingly lost sight of the single most important feature distinguishing this task from any other previously undertaken by the Department, namely, that it was intended to be an independent adjudicative process, to be conducted in a technically appropriate, robust and objective manner, by a group of Departmental officials, each of whom, for good reason, was to have a role in decision-making.

60.37 It is understandable, but nonetheless regrettable, that the Tribunal's inquiries were met, with notable exceptions, including the admirable and largely unfailing co-operation of Mr. Fintan Towey, with a degree of engagement on the part of Departmental personnel that fell significantly short of what should have been forthcoming. It was undoubtedly the case that the Tribunal's investigations were personally and professionally discomfiting for those officials, who, through no fault of their own, found themselves at the intersection of an irregular and improper relationship between politics and business, in the persons of Mr. Michael Lowry and Mr. Denis O'Brien, of which they had no knowledge at any time. It is Mr. Lowry and Mr. O'Brien who were at fault, and had either of them seen fit to respond to the Tribunal's inquiries openly and honestly, those officials would have been spared the spectre of public scrutiny of their actions.

60.38 Finally, the notion advanced by interested parties collectively, including by unexpected sources, that the Tribunal had pursued inquiries on the footing or had formed a view that ten, or variously fourteen or twenty-three civil servants and consultants, had colluded together with Mr. Lowry to deliver the second GSM licence to Esat Digifone, is one which was groundless, uninformed and bereft of

the slightest objectivity. It did not arise from any aspect of the Tribunal's inquiries, whether directed to the hearing of evidence, or to the provision of fair procedures.

CONCLUDING OBSERVATIONS

60.39 In these final remarks, at the end of a long and diverse Report, it is not proposed to revisit details regarding the money trail or GSM Volumes of this Part, or indeed Part I, related as it was primarily to the late Mr. Charles Haughey. All that remains is to draw together certain common features, arising from the range of evidence heard in the course of this Tribunal's public hearings at different times, and indeed from the findings of this Tribunal's forerunner, the McCracken Tribunal. Regarding the findings expressed in both Volumes of this Part, it will suffice to say that the Tribunal is satisfied that they reflect careful consideration of the evidence heard in accordance with appropriate standards of proof, and the application of fair procedures, including consideration of detailed written submissions furnished on behalf of affected persons. In particular, the Tribunal is satisfied that payments and other benefits, as set forth in Volume 1, were furnished by and on behalf of Mr. Denis O'Brien to Mr. Michael Lowry, and that these were demonstrably referable to the acts and conduct of Mr. Lowry in regard to the GSM process, that inured to the benefit of Mr. O'Brien's winning consortium, Esat Digifone, as recounted in Volume 2, in each instance within the Tribunal's Terms of Reference.

60.40 The exception to what is stated in the preceding paragraph, by reason of falling differently within the Terms of Reference, is Mr. Lowry's attempted intervention in the rent arbitration relating to Marlborough House, in 1995, as recounted in Chapter 13 of Volume 1 of this Part. What Mr. Lowry sought, through endeavouring to deploy influence with his fellow Fine Gael trustee, Mr. Mark FitzGerald, in favour of his benefactor, Mr. Ben Dunne, was a doubling of the rent payable, upon review at arbitration, which, had it succeeded would have resulted in a virtual doubling of the investment value of Mr. Dunne's interest in the property in question as landlord, from £5.4 million (€6.86 million) to £12.75 million (€16.19 million). What made Mr. Lowry's conduct particularly reprehensible was that the tenant of Marlborough House was Telecom Éireann, of which, as Minister for Transport, Energy & Communications, Mr. Lowry was then the ultimate shareholder. Had his attempt succeeded, the resultant benefit would have been at the expense of Telecom Éireann, the shares of which Mr. Lowry held on behalf of the State, and therefore at the expense of the taxpayer. The intervention sought was the improper interference in the discharge of duties on the part of the arbitrator, who was Mr. FitzGerald's auctioneering colleague. That individual had been entrusted with the discharge of a quasi-judicial office, and the intervention sought was as grievous as any attempted interference with

a judge in the conduct of a case in his or her Court. In the light of those events, in which Mr. Lowry was prepared to prefer the promotion of private interests over his public duties as a Minister, it is unsurprising that he was also subsequently disposed to intervene in the adjudicative process being undertaken in respect of the GSM licence competition, which a Project Group, primarily comprising officials of his own Department, was bound to conduct independently and without interference, least of all from the Cabinet Minister with overall responsibility for their Department.

60.41 Although the Terms of Reference of the McCracken Tribunal, from which any details of the Marlborough House events were withheld by both Mr. Lowry and Mr. Dunne, were limited, thereby necessitating the establishment of this Tribunal, it is salutary to recall the extent of its findings on payments made by Mr. Ben Dunne or his associated companies to both Mr. Haughey and Mr. Lowry. These were to the effect that Mr. Ben Dunne made four payments for the benefit of Mr. Haughey, amounting in all to approximately £1.1 million, at the request of Mr. Desmond Traynor, and further personally handed three bank drafts, each in the sum of Stg.£70,000.00, in person to Mr. Haughey on an occasion in November, 1991. As to Mr. Lowry, the aggregate of payments made to him from the same source approximated to £532,000.00, including, as a payment in kind, the substantial works carried out on Mr. Lowry's Tipperary home, and Stg.£220,000.00.

60.42 It is also instructive to recall the portion of Mr. Lowry's personal Statement to Dáil Éireann, which was quoted in the course of the McCracken Report. The relevant portion read as follows:

"I did not make any secret of the fact that Dunnes Stores paid me for professional services by way of assistance towards my house. If someone were trying to hide income, would he or she not be more likely to put it in an off-shore account? The last thing such a person would do would be to spend it on a very obvious structure of bricks and mortar for all the world to see."

The astonishment expressed at those remarks in the course of the McCracken Tribunal Report, in the light of evidence heard by it, must be restated by this Tribunal. The Statement was made on 19th December, 1996, the month following Mr. Lowry's resignation from Ministerial office. On that occasion, as recounted in Chapter 5 of Volume 1 of this Part, the sum of £147,000.00, portion of the £407,000.00 earlier entrusted by Mr. Denis O'Brien to Mr. Aidan Phelan, covertly transferred off-shore with the assistance of Mr. David Austin, through a series of accounts in the Channel Islands, had been and was then held on deposit by Mr. Michael Lowry for almost two months, in the Isle of Man, in an

Irish Nationwide (IOM) account, in opening which Mr. Lowry, bizarrely, had described his occupation as that of a company director.

60.43 Further, given that the title of this Tribunal is the Tribunal of Inquiry into Payments to Politicians and Related Matters, the extraordinary level of personal enrichment illicitly derived by the late Mr. Haughey must not be lost sight of. As recounted in Part I of the Report, the aggregate funds identified as having been available to Mr. Haughey in the years from 1979 to 1996 was £9,106,369.00, the equivalent of €11,565,088.00. The constituent amounts, accruing from a wide variety of sources, all were referable to political offices held by Mr. Haughey during that period, and the manner in which that final sum was calculated was comparatively conservative. In the light of subsequent events, namely, the Tribunal's further findings pertaining to Mr. Michael Lowry, the Tribunal reaffirms its view set forth in Part I of its Report, and observes that it applies with equal force to Mr. Lowry, namely:

“Apart from the almost invariably secretive nature of payments from senior members of the business community, their very incidence and scale...can only be said to have devalued the quality of a modern democracy.”

60.44 In aggregating the known payments from Mr. Denis O'Brien to Mr. Michael Lowry, it is apposite to note that, between the granting of the second GSM licence to Esat Digifone in May, 1996, and the transmission of Stg.£420,000.00 to complete the purchase of the latter of Mr. Lowry's English properties in December, 1999, Mr. O'Brien had made or facilitated payments to Mr. Lowry of £147,000.00, Stg.£300,000.00 and a benefit equivalent to a payment in the form of Mr. O'Brien's support for a loan of Stg.£420,000.00. The value of those sums, in today's terms, is obviously well in excess of the amounts transferred at the various times mentioned in this Report.

60.45 Given the length and diversity of the entire Report, it is crucial to stress the connections and common threads between different portions. These arise as between different chapters in each Volume of Part II. An instance, apparent from Chapters 4 and 5 of Volume 1, is the significant and substantial correspondence, in what was stated by Mr. Denis O'Brien to Mr. Barry Maloney, Chief Executive Officer of Esat Digifone, in their several conversations in the aftermath of the grant of the GSM licence, relating to a payment made by Mr. O'Brien to Mr. Lowry, in connection with the licence, and in explanations subsequently furnished by Mr. O'Brien to an inquiry conducted by the shareholders of Esat Digifone, with what was actually at those times transpiring in relation to the payment of £147,000.00, which passed from Mr. O'Brien's account, through

accounts of Mr. Aidan Phelan and Mr. David Austin, to Mr. Lowry's off-shore deposit account with Irish Nationwide (IOM). A more detailed summary of these circumstances is set forth in Chapter 15, paragraph 12, of Volume 1 of this Report.

60.46 Similarly, although many money trail and GSM matters are separately addressed in Volumes 1 and 2 of this Part, the events described, and many of the persons involved, shared interests that not infrequently intersected. Further, regarding that £147,000.00, the initial steps in its transmission from Mr. O'Brien to Mr. Lowry were through the agencies of Mr. Aidan Phelan and Mr. David Austin, and this process commenced on 3rd July, 1996, less than seven weeks after the formal award of the GSM licence on 16th May, 1996. Whilst the \$50,000.00 Esat/Telenor donation to Fine Gael is distinguishable in its nature and intent from other payments addressed in Volume 1, and is relevant only in the context of Mr. Lowry then having been Chairman of the trustees of Fine Gael, it is nonetheless noteworthy that, on Mr. O'Brien's own evidence, his telephone conversation with Mr. Austin, which set in motion the events leading to the donation, occurred little more than one week after the announcement of Esat Digifone as winner of the GSM competition. Again within Volume 1 of this Part, it was only when a series of revelations in 2001 intensified the focus of the Tribunal upon Mr. Lowry's financial affairs, that it became apparent that, when in early private investigations it was conveyed by and on behalf of Mr. Lowry that matters of relevance did not extend beyond the relatively limited material addressed in short public sittings held referable to him in mid-1999, he had at that very time been crucially engaged in what transpired to be the highly relevant Mansfield UK property transaction, and had further withheld from the Tribunal information and documentation pertaining to his Irish Nationwide (IOM) account.

60.47 What accordingly transpired was that, in separate Governments of entirely different political composition, it was possible for Mr. Haughey and Mr. Lowry in succession to show favour to wealthy or prominent individuals, and in recompense obtain payments or other benefits, in each instance bringing improper influence to bear on public servants for the end as sought. The duration and seniority of Ministerial office held by Mr. Lowry was far below that referable to Mr. Haughey. Such improper benefits and payments as have been shown, in the case of this and the McCracken Tribunal, to have accrued to Mr. Lowry never reached the monetary scale or degree of fruition obtained by Mr. Haughey. But, in the cynical and venal abuse of office, the brazen refusal to acknowledge the impropriety of his financial arrangements with Mr. Denis O'Brien and Mr. Ben Dunne, and by his contemptuous disregard for his taxation obligations, Mr. Lowry displayed qualities similar in nature, and has cast a further shadow over this country's public life.

60.48 As with the shortcomings in regulation apparent in the course of Central Bank inspections reviewed in Part I of the Report, there was an initial reluctance to learn from past experience in this regard, and whilst the Tribunal acknowledges both the emergence of a culture within political parties emphatically more intent on preventing recurrences, and the enactment of legislation and other safeguards to the same end, what has been shown to have occurred does not warrant complacency, and limited proposals in this regard are addressed in the chapter on Recommendations.

60.49 This Tribunal has been protracted and costly, substantially on account of the wilful concealment of material evidence that has recurred, as set forth in many preceding chapters throughout both Parts. It has acknowledged error where made, and accepts just comment and criticism expressed. But certain excesses of “*spinning*”, or comment palpably orchestrated by affected persons, primarily Mr. Denis O’Brien, scarcely serve any cause of objective comment. Still less is this so by way of much in the nature of public relations commentary, encompassing elements both rabid and puerile. Such strategies turgidly replicated, in amplified form, similar invective deployed in aid of major litigation brought by Mr. O’Brien’s Caribbean company against their principal local competitors, scathingly addressed in the High Court of England & Wales, Chancery Division, by Mr. Justice Paul Morgan, in the course of his lengthy judgements of 15th and 23rd April, 2010, dismissing all but a nominal Stg.£2.00 portion of all claims brought, initially said to be for over Stg.£300 million. One element of those judgements is understood to be under appeal.

60.50 It may reasonably be wondered whether communications and responses of this kind, reflecting both paid and partisan support, and a total absence of objectivity, allied to a virtually reflex exercise of the right of access to the courts, with a view to curtailing or hampering Tribunal inquiries in fashions that may be diverse, but are inexorably intent on delaying or preventing the final Tribunal Report, credibly reflect the conduct of persons who apprehend being unfairly wronged. In all these circumstances, whilst appreciating that portions of the Report are relatively technical, its central thrust is neither complex nor uncertain, and an inquiring reader is urged, if unable to devote time to the entire content, to address at least the Executive Summary of both Volumes of this Part, with a view to informing himself or herself of the principal content, and forming an individual and independent view.

EXECUTIVE SUMMARY

CAVEAT

61.01 As in the case of Part I of its Report, published in December, 2006, and of Volume 1 of this Part, the Tribunal is following the practice of including an Executive Summary of the principal conclusions and findings contained in the main body of its Report. Therefore, in this chapter it is intended to set out, as now follows, a comparatively brief resumé of the matters comprised in each of the preceding chapters of Volume 2.

61.02 As before, the Tribunal wishes to record that it is far from an easy task to set out in condensed form an accurate or sufficient summary of chapters, already representing a truncated and distilled account of matters that transpired over many days of evidence, and of voluminous documentation, together with associated conclusions. The Tribunal therefore wishes to reiterate that what follows can be regarded as no more than in itself an endeavour to enable a reader to acquire a superficial overview of the main matters addressed: it cannot hope to replicate the full content of the detailed chapters, or to reflect in a fully satisfactory way the balance conveyed in those chapters, or to enable a full and informed understanding of the substantive content of the Report. Since this Volume primarily addresses the detailed circumstances whereby what was the second Irish mobile telephone licence was competed for and awarded in 1995 and 1996, this caveat applies with particular emphasis to those preceding chapters which describe and analyse the manner in which that competition was regulated and adjudicated upon. In such chapters, primarily comprising Chapters 11, 20, 22, 29, 31, 34, 36, 37, 42, 43 and 44, the related summaries that follow neither seek to, nor realistically can, replace careful reading of their full and unavoidably technical content.

PREPARATIONS FOR A MOBILE LICENCE COMPETITION

61.03 In the early 1990s, a confluence of technological and regulatory developments in Europe led to the introduction in European countries of the Global Standard for Mobile Communications, GSM, a digital technology that enabled mobile phone users to connect across national borders without technical difficulty. At the same time as these developments, and in accordance with EU policy, competition was gradually introduced in the provision of mobile phone services, through the licensing in Member States of single competitors to incumbent providers.

61.04 In Ireland, the GSM system was first introduced to the market in 1993, by Eircell, the dedicated mobile division of Telecom Éireann. Following a period of

consultation and study, and prompted by communications from the European Commission, in November, 1994, the then Minister for Transport, Energy and Communications, Mr. Brian Cowen, T.D., brought forward proposals to Government recommending that a competition be initiated for the selection and licensing of a new entrant to the GSM mobile phone market in Ireland. The successful licensee would be chosen according to specified evaluation criteria including, notably, credibility of business plan and financial viability of applicants, their approach to market development, and their technical experience and capability.

61.05 The second GSM licence would be of substantial commercial value, and it was initially proposed that a licence fee of £3 million be paid by the successful licensee, together with continuing royalties at a level to be nominated by applicants. It was further envisaged that equivalent continuing royalties be imposed on Telecom Éireann.

61.06 In the event, it fell to a new Government, and a new Minister for Transport Energy and Communications, Mr. Michael Lowry T.D., to finally approve and launch the competition process. In February, 1995, Mr. Lowry brought forward proposals that differed from the November, 1994, proposals in certain respects. Firstly, the level of access fee, subject to a minimum of £5 million, became open-ended, and the obligation to make ongoing royalty payments was omitted. What was now contemplated, in terms of the overall selection process was, in substance, a hybrid auction and beauty contest approach. Secondly, the February, 1995, proposals elevated the financial capability and technical capability of applicants from the status of evaluation criteria, by which applicants would be judged comparatively, to preconditions for entry to the evaluation.

61.07 The Government Decision of 2nd March, 1995, approving the launch of the competitive process, recited that the competition should be controlled and promoted by Mr. Lowry's Department, and that a recommendation should be made by Mr. Lowry to Government in time for final Government Decision by 31st October, 1995. The intent of that Decision of 2nd March, 1995, was that the process should be conducted under the aegis of the Department, and that, whilst a recommendation was to be made to Government by Mr. Lowry, the decision on the winner of the competitive process was reserved to Government. Following that decision, the process was launched on 2nd March, 1995. The announcement informed interested parties that a formal invitation to tender, and an information memorandum for the guidance of applicants, could be purchased from the Department, and that the closing date for receipt of applications was Friday, 23rd June, 1995.

FOUNDATION OF THE COMMUNICORP GROUP

61.08 In the early 1990s, Mr. Denis O'Brien, who is now a businessman of international repute, was a young entrepreneur with business interests in the telecommunications and broadcasting sectors. These included Esat Telecom, which provided fixed-line telephone services over lines leased from Telecom Éireann, under a Value Added Service licence from the Department.

61.09 In anticipation of competing for the second GSM licence, in the course of 1994, Mr. O'Brien restructured his businesses so as to amalgamate them within a single parent company, Communicorp Group Limited. He also took steps to strengthen the financial base and mobile telephony expertise of the Communicorp Group, by securing venture capital investment, in return for equity participation in the Group, and by appointing persons of experience to executive and non-executive positions within Communicorp and its subsidiaries. In addition, Communicorp engaged the services of external advisers, including political advisers, Mr. PJ Mara, the late Mr. Jim Mitchell, Mr. Pádraig O hUiginn and Mr. Dan Egan.

ESAT AND THE NEW GOVERNMENT

61.10 Following the change of Government in December, 1994, Mr. O'Brien adopted a strategy of promoting himself and his companies with members of Fine Gael, the senior party in the new Coalition Government. It was through the late Mr. Jim Mitchell that Mr. Lowry and Mr. O'Brien arranged their first face-to-face meeting, which in all likelihood took place in Fine Gael Headquarters on 7th February, 1995. The meeting, also attended by Mr. Mitchell, lasted for 15 minutes or less, and was primarily for the purpose of enabling Mr. O'Brien to introduce himself to Mr. Lowry as a matter of courtesy, for Mr. O'Brien to outline the business of the Esat companies and the challenges they were facing, and for Mr. O'Brien to raise his profile with the new Minister. It was also an opportunity for Mr. O'Brien to address a negative perception within the Department, in respect of compliance by Esat Telecom with the licence conditions in respect of its fixed-line business, and in addition to assuage a belief that appears to have then been current within Fine Gael, and that seems to have been previously voiced by Mr. Lowry in discussions with Mr. Mitchell, that Mr. O'Brien was a Fianna Fáil supporter.

61.11 To the same end, in or around this time, Mr. O'Brien, with the assistance of Mr. Dan Egan, met with other Government Ministers including Mr. Enda Kenny T.D. and Mr. Richard Bruton T.D. In addition, in early 1995, Mr. O'Brien, through his various companies, commenced a campaign of

contributions to Fine Gael, and of attendances at functions, in order to raise his profile, and that of his businesses, within Fine Gael. In total, in the period from March, 1995, to June, 1996, that is to say, during the currency of the GSM competition and subsequent licensing negotiations, Mr. O'Brien or his companies are recorded as having supported fourteen Fine Gael fundraising events, and to have contributed a total of £22,140.00 by way of donations to Fine Gael. This figure is exclusive of the \$50,000.00 Esat/Telenor donation, which features in Volume 1. Over half of the former sum was paid in advance of the announcement of the result of the competition on 25th October, 1995. More generally, by their conspicuous support of Fine Gael fundraising events from early 1995, Mr. O'Brien and Esat succeeded in raising their profile with Fine Gael to an appreciable degree, and, on the evidence, to an extent not remotely matched by members of other bidding consortia.

LAUNCH OF GSM COMPETITION

61.12 The GSM competition was launched on 2nd March, 1995, when the Department issued a Request for Proposals, RFP, entitled '*Competition for a Licence to Provide Digital Mobile Cellular Communications (GSM) in Ireland*'. The RFP was the formal document by which the competition process was constituted. It notified interested parties of the parameters of the intended GSM licence, it outlined the procedure for the competitive process, and it enshrined the rules of that process. It also served to meet the requirements of transparency, in that it laid out for all interested parties both what was required of them, and how applications would be evaluated. For the assistance of interested parties, the RFP also provided a brief guide to the commercial and technical matters to be addressed in applications, including required technical minimum standards relating to service and mobile radio equipment.

61.13 Paragraph 9 of the RFP stated that applicants were required to demonstrate their financial capacity, their technical expertise, and their capability to implement the system, if successful. They were further required to provide a business plan for at least the first 5 years of operation, together with a complete technical proposal. In addition, paragraph 3 of the RFP required applicants to furnish full ownership details for their proposed licensee, which requirement imported a mandatory obligation to declare the ownership of the entity proposed to be licensed. Under the provisions of the RFP, all applications were required to contain a statement that their contents would be valid for a period of 180 days from the closing date.

61.14 Paragraph 19 was the pivotal provision of the RFP, in that it set out the framework whereby applications would be evaluated, in accordance with the criteria that had been approved by Government. Paragraph 19 provided in full as follows:

“The Minister intends to compare the applications on an equitable basis, subject to being satisfied as to the financial and technical capability of the applicant, in accordance with the information required herein and specifically with regard to the list of evaluation criteria set out below in descending order of priority

- *Credibility of business plan and applicant's approach to market development;*
- *Quality and viability of technical approach proposed and its compliance with the requirements set out herein;*
- *The approach to tariffing proposed by the applicant which must be competitive;*
- *The amount the applicant is prepared to pay for the right to the licence.*
- *Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded;*
- *The extent of applicant's international roaming plan;*
- *The performance guarantee proposed by the applicant;*
- *Efficiency of proposed use of frequency spectrum resources.”*

61.15 Although paragraph 19 thereby envisaged that applicants would have to demonstrate their financial and technical capability before they could qualify for entry to the competitive assessment, in the event no separate consideration was given to these matters in advance of the evaluation proper, nor, as will be seen, was such a step prescribed in the Evaluation Model later adopted by the Project Group that carried out the evaluation of tender applications.

61.16 Despite certain criticisms that were made in belated evidence by Mr. Michael Andersen, lead consultant engaged by the Department, about the structure and content of the RFP, in respect of which the Tribunal need not draw any conclusion, there can be no doubt but that the Departmental officials who oversaw the development of the competition design cannot be faulted for their efforts over the previous years in that regard. They had made a close study of the material available to them, and had earlier engaged separate consultants of international reputation to assist them in that part of their work. Further, at no time during the course of their retention did the consultants later appointed to assist

in the comparative evaluation, Andersen Management International, AMI, record any reservation about the design of the competition, as published by the Department in the RFP.

THE FIRST PHASE OF THE COMPETITION

61.17 Following the launch of the competition process, a Project Group was established within the Department, whose task was to manage and conduct the evaluation, in accordance with the competition rules as approved by Government. The Project Group membership was drawn from each of the three Telecommunications Divisions within the Department, with limited representation from the Department of Finance. It consisted of each of the heads of Division plus nominated officials from within each Division, and with a sole representative from the Department of Finance, as well as two private sector accountants on secondment, one to the Department, and one to the Department of Finance. The Development Division representatives were to act as secretariat to the Group, and Mr. Martin Brennan was Chairman. Each member of the Project Group was, in theory, regarded as a full and equal participating member in terms of input to the evaluation process, although it was recognised that those with specialist expertise and experience would have an enhanced input into those parts of the process pertinent to their specialist areas.

61.18 There was no formal written record of the constitution of the Project Group, nor was there any formal written record or protocol determining how it should function or conduct its business. Furthermore, no standing orders were adopted to govern the functions of individual members, the manner of decision-making, or to define the matters reserved for decision by the Group as a whole. During the course of the process, that is, from March, 1995, to October, 1995, the Project Group met on twelve occasions, five of which were during the competition proper. Formal reports of those meetings were generated, and were available to the Tribunal, save in respect of one meeting where a formal report was not available. These reports were not intended to be minutes of the meetings recording deliberations of the Group, but were, rather, short summary reports of sometimes lengthy meetings, designed to record matters agreed by the Group, and to formalise future work programmes.

61.19 At the first full meeting of the Project Group on 6th March, 1995, it was agreed, as had been foreseen in the Government Decision approving the process, that expert consultancy services would be retained in order to assist in the evaluation. It was also agreed, as part of the projected critical path for the process, that ample time, in the order of six weeks, would be allowed between completion of the evaluation and the public announcement of the winner, for

putting the recommendation of the Project Group to Government for consideration and decision. In addition, the Project Group adopted a protocol to regulate contact between the Department and applicants or potential applicants, that made clear that one-to-one meetings or social outings were to be avoided, that records should be kept of any meetings or conversations as did occur, and that where any issue of import arose, it should be referred to the formal written procedures of the competition process.

61.20 The protocol adopted by the Project Group was later discussed at a senior level within the Department, and its terms were subsequently brought to the attention of Mr. Michael Lowry by Mr. John Loughrey, Secretary General of the Department, for the purpose of recommending that these were precautions which Mr. Lowry should adopt and take himself. Mr. Loughrey stated that he advised Mr. Lowry on several occasions to exercise caution around contacts with declared or potential contestants. It was his evidence, supported by the evidence of Mr. Colin McCrea, Mr. Lowry's Programme Manager, that Mr. Lowry readily understood and indicated acceptance of Mr. Loughrey's advice, including his advice that any meetings which Mr. Lowry might have with participants during the closed period of the competition, that is, between the closing date for receipt of applications and the announcement of the result, should be on a courtesy footing only. It was on the first occasion that Mr. Loughrey conveyed this advice to Mr. Lowry, shortly after the launch of the process, that Mr. Lowry seemingly referred Mr. Loughrey and Mr. McCrea to a rumour that, if the GSM licence was awarded to the Persona consortium, it would become the "nest egg" of a Fianna Fáil politician, whom he named, and who had been a prominent member of the preceding Government.

61.21 Mr. Lowry, for his part, gave evidence that there was never any question of the protocol applying to him as Minister, although he accepted that Mr. Loughrey had advised him that it was preferable that he should not meet with applicants. He did not regard this as practicable, although he agreed that it was important not to give any impression of imparting "*inside track*" information. In the operation of his open door policy as Minister, he regarded himself as free to meet with anyone who requested a meeting, whether in the Department or elsewhere.

61.22 If this was Mr. Lowry's view at the time, it was not an intention or practice that he apparently ever shared with any of his Departmental officials. Furthermore, whilst it is entirely understandable that Mr. Lowry could not hermetically seal himself from contact with interested persons, and that as a politician he would not wish to behave in a manner that was less than courteous, what is not at all understandable is that Mr. Lowry would have regarded himself in principle as exempted from the terms of the protocol, or that it was necessary or

appropriate for him to be at liberty to meet interested persons by private arrangement, outside the Department, in the absence of civil servants, during the most sensitive stages of the process.

61.23 Allied to the adoption of that protocol, was the principle that the selection process should be sealed, conducted by the Project Group independent of political or outside interference or input. In particular, it was intended that a seal of confidentiality would attach to the entire of the evaluation process, such that there was no room for disclosure of substantive information, as opposed to information on how the critical path was unfolding, outside the membership of the Project Group, including to other Departmental officials or to Mr. Lowry. By critical path is meant the broad timetable to which the Project Group was working.

61.24 The separate task of selecting consultants to assist the Project Group in its work also commenced in early March, 1995. Following an invitation to tender, six tenders were submitted, including a tender from KPMG, London, who had already advised the Department on the design of the process, and from AMI, Danish consultants, who were ultimately the successful candidates. In tendering for appointment, AMI proposed a methodology for evaluating applications in accordance with paragraph 19 of the RFP document. That methodology entailed disassembling the eight evaluation criteria into their constituent elements, known as dimensions, which, as reflected by indicators, would form the focus of the evaluation proper. A dual evaluation technique was recommended, entailing both quantitative and qualitative approaches, which, according to AMI's tender document, would guard against the risk of an arbitrary result, and would "*maximise the validity and reliability*" of the evaluation output. An additional advantage to that approach, as noted by AMI, was that the two techniques frequently yielded the same result, further confirmation that the correct outcome had emerged. The quantitative evaluation would also generate a range of hard data which would serve as a basis for the qualitative evaluation.

61.25 The choice of AMI had in part been determined by their lower proposed fee, compared to KPMG, and following negotiations, during which it was agreed that payment was to be based on work undertaken, subject to a ceiling of £297,450.00, AMI's appointment was confirmed on 11th April, 1995. The formal contract between AMI and the Department was finalised and executed on 9th June, 1995.

61.26 Following the issue of the RFP document on 2nd March, 1995, two further information memoranda were issued by the Department for the assistance of potential applicants, the first, on 28th April, 1995, containing substantive information regarding the intended competitive process, in response

to queries raised by interested parties, and the second, on 12th May, 1995, outlining the form in which the Department wished to receive applications. Clarification was provided on certain matters in the former, including on financial capability, in respect of which it was stated:

“Financial capability will be assessed by reference to the proposed financial structure of the company to which the licence would be awarded, if successful, the financial strength of consortia members and the robustness of the projected business plan for the second GSM operation.”

61.27 The second memorandum outlined the Department’s preferred structure for the presentation of applications, in separate binders, corresponding to the Aspects into which AMI had classified the constituent features of the evaluation criteria. In addition, applicants were to complete and attach to their applications 22 mandatory tables, primarily intended to yield the source data for the quantitative evaluation, to be conducted by AMI.

EVALUATION MODEL

61.28 In order to ensure that the evaluation criteria were assessed on a fair, transparent and objective basis, and to avoid a purely intuitive analysis, AMI was to prepare an Evaluation Model for adoption by the Project Group. In addition, it was decided, following some discussion and debate within the Project Group, that a weighting matrix should be applied to the evaluation criteria, as identified in the RFP document.

61.29 The Evaluation Model was adopted by the Project Group on 9th June, 1995, following modifications made to an AMI draft discussed at an earlier meeting. The Model prescribed precise techniques for both limbs of evaluation. The eight evaluation criteria were disassembled into eleven dimensions, common to the quantitative and qualitative assessments, and it was the constituent indicators of these dimensions which would be evaluated. That exercise, for quantitative purposes, was illustrated in the Evaluation Model by the table reproduced below.

Evaluation criteria from Paragraph 19 in the RFP document	Dimensions linked to each evaluation criteria	Indicators for the dimensions.
Credibility of business plan and applicant's approach to market development.	Market Development	Forecasted demand
	Experience of the applicant	Number of network occurrences in the mobile field
	Financial key figures	Solvency and IRR
Quality and viability of technical approach proposed and its compliance with the requirements set out herein	Radio network infrastructure	Number of cells
	Capacity of the network	Reserve capacity
The approach to tariffing proposed by the applicant which must be competitive	Tariffs	Competitiveness of an OECD-like GSM2 basket
The amount the applicant is prepared to pay for the right to the licence	Licence payment	Up front licence fee payment
Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded	Coverage	Speed of demographical coverage of class IV (2W) handheld terminals
The extent of applicant's international roaming plan	International roaming plan	Number of international roaming agreements
The performance guarantee proposed by the applicant	Performance guarantee	Blocking rate and dropout rate
Efficiency of proposed use of frequency spectrum resources	Frequency efficiency	Frequency economy figure

61.30 The greater part of the Model was devoted to the quantitative technique, and the formulae by which the quantitative indicators would be measured and scored. Some modifications had been made by the Project Group to the AMI draft, most notably to the intended scoring of the indicator, Internal Rate of Return. It was these indicators, as scored, which would be numerically weighted, and what the weighting matrix in the Evaluation Model set forth was not the agreed weightings for the eight criteria, but the agreed weightings at the lowest denominator level, that is, for the indicators in the quantitative evaluation. These weightings had been substantially altered by the Project Group, most significantly, in terms of Tribunal inquiries, for the indicators of the three dimensions of the first-ranked criterion, Market Development, Experience of Applicant, and Financial Key Figures. AMI had proposed that those dimensions should be weighted equally, but following consideration by the Project Group, those weightings were revised, as illustrated in the table below:

DIMENSION	WEIGHTING DRAFT EVALUATION MODEL	WEIGHTING APPROVED EVALUATION MODEL
Market Development	10	7.5
Experience of applicant	10	10
Financial key figures	10	15

61.31 The Tribunal is satisfied that these changes reflected the Project Group’s view of the relative importance of those three dimensions. In implementing that alteration, an error had been made, as the revised weightings did not equate to 30, the aggregate of the initial weightings, and the agreed weighting for the first-ranked criterion, a matter easily remedied by a simple arithmetic operation.

61.32 Specifications for the qualitative procedure were abridged. In contrast to the “hard” quantitative data, the Model stipulated that the qualitative evaluation would entail a broad “holistic view”. The same eleven dimensions would be evaluated, in this instance, by discussion and analysis of applications. The same indicators as those scored quantitatively would be used, and additional indicators would be adopted only if necessary. Unlike the quantitative evaluation, the indicators and dimensions would not be weighted in advance of evaluation, and instead marks would be awarded on “a ‘soft’ 5-point-scale” of A, B, C, D and E, with A representing the best mark. For the purposes of the qualitative evaluation, the dimensions were to be regrouped into four Aspects, and it was by reference to these Aspects that a qualitative grand total was to emerge. The qualitative marking matrix, as shown in the Evaluation Model, is reproduced below.

Aspects and dimensions	A1	A2	A3	A4	A5
Marketing aspects (subtotal)					
Market development Coverage Tariffs International roaming plan					
Technical aspects (subtotal)					
Radio network architecture Capacity of the network Performance guarantees Frequency efficiency					
Financial aspects (subtotal)					
Financial key figures Licence payment					
Management aspects (subtotal)					
Experience of the applicant					
Other aspects (subtotal)					
Risks (Effects on the Irish economy)					
Grand Total					

That matrix included provision for a fifth Aspect, designated Other Aspects, intended to assess overall risks and sensitivities. Significantly, the marking matrix for the qualitative evaluation did not make provision for the application of quantitative weightings.

61.33 Having specified that a quantitative evaluation should be conducted, followed by a qualitative evaluation, the Model prescribed a final step, entailing

an “interplay” between the two sets of results, when any errors apparent in the quantitative results could be corrected. The results of both evaluations were to be presented in an Evaluation Report, together with any supplemental analysis undertaken. The quantitative results were to form an appendix to the Report, and the qualitative results were to be presented in the main body of the Report. The Model provided no assistance as to the course to be taken if the evaluations yielded different results or rankings.

61.34 As the numerical weightings for the quantitative evaluation, as defined in the Model, were for the lowest denominator level in that evaluation, that is, for the indicators by which the dimensions reflecting the evaluation criteria were to be measured and scored, the criteria weightings could only be discerned by totaling those constituent weightings. In that regard, the Project Group augmented the Evaluation Model by placing a confidential note on the Departmental file, recording the agreed criteria weightings as follows:

“Agreed at the meeting of 18 May 1995:- 30, 20, 15, 14, 7, 6, 5, 3.”

61.35 The Model made no provision for the evaluation of financial and technical capability as preconditions for entry to the comparative quantitative and qualitative evaluations, as stipulated by paragraph 19 of the RFP document. This, according to AMI, was due to the absence of pre-qualification specifications in the RFP document. Insofar as those preconditions were addressed in the course of the process, consideration was deferred until the conclusion of the comparative evaluation, by which time a ranking had already emerged.

EARLY PREPARATIONS FOR THE ESAT BID

61.36 In the meantime, Mr. Denis O’Brien and Communicorp were engaged in the process of preparing their GSM bid, which involved not only continuing to secure planning permissions, carrying out research and writing up their bid, but also, critically, attempting to secure an international telecommunications partner to lend credibility and support to their application. Initially, negotiations had proceeded jointly with Southwestern Bell and Detecon, with a view to forming a consortium, but these terminated by mutual consent in March or April, 1995. Thereafter, Communicorp was on its own for a period of approximately six weeks, before commencing discussions with Telenor. During this interval, Mr. O’Brien had unfruitful meetings with France Telecom, and in that regard it emerged in evidence, following investigation by the Tribunal, that it was Mr. Michael Lowry who had suggested to Mr. O’Brien, when they met at Comms 1995, a telecommunications trade show, on 4th April, 1995, that Mr. O’Brien should contact France Telecom, as they did not have a partner for the Irish GSM process,

and were interested in participating. As it transpired, Mr. Martin Brennan, Chairman of the Project Group, and Mr. John Loughrey, Secretary General of the Department, had met officially with representatives of France Telecom and of the French Embassy in Departmental offices on 30th March, 1995. Whilst Mr. Lowry denied knowledge of this entire episode, the Tribunal is satisfied that Mr. Lowry did proffer the advice in question to Mr. O'Brien, and that the information upon which it was based was learned by Mr. Lowry from within his own Department.

61.37 By this point, Mr. Lowry and Mr. O'Brien were acquainted. Apart altogether from official interactions, they had been introduced by Mr. Jim Mitchell, and later they both attended a Fine Gael constituency lunch on 9th March, 1995. Contacts of this type were inevitable, and had been anticipated by Mr. Loughrey, when he briefed Mr. Lowry on dealings with interested parties. Whilst it was perhaps inadvisable, and possibly indiscreet, for Mr. Lowry to engage with Mr. O'Brien in relation to the GSM process, even at this juncture, Mr. Lowry no doubt recognised that the information conveyed was hardly confidential, it did not relate to any element of the Project Group's work, and the exchange occurred well before the closing date for receipt of applications. What it does nonetheless show was an inclination on the part of Mr. Lowry to be less than discreet, and less cautious in his dealings with interested parties than might have been advisable, bearing in mind the adjudicative role of his Department.

61.38 Later in 1995, following an introduction by consultants engaged by Communicorp to advise and assist in the preparation of its GSM bid, representatives of Communicorp and of Telenor, the Norwegian national telecommunications provider, met with a view to forming a consortium. Discussions progressed at a rapid pace, and were marked by positive engagement on both sides. Mr. O'Brien travelled to Norway on 9th May, 1995, and over the following weeks, a joint venture agreement was negotiated and concluded. The purpose of the agreement was for the parties to establish a joint venture to prepare and submit a bid for the Irish GSM licence. The agreement provided that the parties would incorporate a company, owned by them on a 50/50 basis. That company would be the recipient of the licence, and would establish and operate a GSM network.

61.39 The joint venture agreement was executed on 3rd June, 1995. Under its terms, Communicorp was obliged to provide Telenor with a financial guarantee satisfactory to Telenor, in the amount of £5 million plus 50% of the licence fee. This clause was included because Telenor, following investigation of Communicorp's finances, and having met with representatives of Advent International, the venture capital company that had invested \$10 million in Communicorp, were of the view that Communicorp was not in a position to meet

its expected contribution to the project, and therefore sought formal confirmation of Advent's equity investment and intended financial support. The joint venture agreement recited that the total estimated funds required to establish and operate a GSM network would be in excess of £120 million, and provided for an initial investment in the joint venture company, on receipt of the licence, of £10 million, plus an amount equivalent to the licence fee.

61.40 Having executed the joint venture agreement, and Communicorp and Telenor having thereby established a consortium between them, the joint venture company Esat Digifone was incorporated on 23rd June, 1995, and the Esat Digifone consortium was born.

POSTPONEMENT OF THE COMPETITION

61.41 Reverting to the process, on 3rd May, 1995, the Department received an objection on the part of the Competition Directorate of the European Commission to certain features of the GSM competition as published. These related to the provision of an open-ended licence fee, the ranking of the Licence Fee criterion ahead of certain other criteria, and the absence of full transparency in the competition, due to the non-disclosure of the weightings to be applied. In response, the Department obtained legal advice, and corresponded and met with Commission officials. As these matters had not been resolved by mid-June, 1995, it was decided to postpone the closing date for receipt of applications, which was announced on 16th June, 1995, and communicated directly to all interested parties. Matters were eventually resolved by agreement with the Commission, as confirmed in a letter from Commissioner Van Miert to the Minister, dated 14th July, 1995, and in consequence of that agreement the competition design was modified so as to cap the licence fee at £15 million, and to impose a fee of £10 million on Eircell. In the course of that letter of 14th July, 1995, reference was made to the Department's confidential decision that the Licence Fee criterion would attract less than 15% of the overall marks in the competition.

61.42 It emerged in the course of the Tribunal's investigations that an extract from that letter of Commissioner Van Miert to Mr. Lowry had found its way into Esat files, more particularly the file of Mr. Jarleth Burke, a lawyer then employed by Esat Telecom, who had dealings on behalf of Communicorp with the Department, and with the European Commission, in relation to legal and regulatory aspects of the GSM process. The extract in question, consisting of the first page of that letter, contained that important and valuable information on the weighting allocated to the Licence Fee criterion, highly sensitive and confidential information, which should not have been available to Esat Digifone. In the absence of documentary evidence, and in particular a fax banner on the copy

extract on Mr. Burke's file, or other indication of its source, and in the absence of recollection on the part of those concerned, the Tribunal is unable to conclude how that document came to be in the possession of Mr. Burke. Nonetheless, irrespective of whether that extract emanated from the Commission or from the Department, the two potential sources, the fact remains that, in advance of the closing date of the competition, Esat Digifone had available to it confidential information regarding the weighting matrix adopted by the Project Group, that it was not entitled to have, and which could have conferred an advantage on the consortium.

61.43 Had this circumstance become known to the Department at the time, it would seem that fairness and the integrity of the process would have dictated, at a minimum, that this information be shared with other potential bidders. Furthermore, the Department would have been obliged to inquire into the precise circumstances in which the confidentiality of its process had been breached, to consider any culpability on the part of Esat Digifone, and to determine the appropriate course to be taken to regularise matters.

61.44 The Tribunal also had cause, in the course of this element of its inquiries, to investigate the possible source of information contained in a letter dated 20th June, 1995, from Mr. Owen O'Connell of Messrs. William Fry, then solicitor to Mr. O'Brien and Communicorp, to Ms. Helen Stroud, of Baker McKenzie, the London solicitors acting for Advent. In particular, Mr. O'Connell's letter contained a prediction in respect of the likely resolution of the licence fee issue, in somewhat confident terms, that precisely mirrored the Project Group's thinking and position on the issue, a position that could not in the Tribunal's view have been readily guessed at. Whilst it is clear that Mr. O'Connell received and conveyed this information as instructions from his clients, again, in the absence of any documentary record or recollection on the part of those most centrally involved, the Tribunal cannot determine from whom Mr. O'Connell's instructions emanated, or their ultimate source.

PUTTING ESAT DIGIFONE'S FINANCES IN ORDER

61.45 In the course and aftermath of securing Telenor as a member of his consortium, Mr. O'Brien faced a number of financial challenges. Firstly, some form of Irish institutional backing for the Esat Digifone application had to be secured, it having been decided that such backing would lend financial support and credibility to the bid. Secondly, in the region of £3 million working capital had to be raised for Mr. O'Brien's existing fixed-line and broadcasting businesses, which were then facing a cash crisis. Thirdly, some provision had to be made for

Communicorp's projected £24 million equity participation in Esat Digifone, if Esat Digifone was to meet the paragraph 19 precondition of financial capability.

61.46 As regards Irish institutions, Communicorp, with the assistance of Davy stockbrokers, drafted a memorandum for investors, containing outline information concerning the consortium and the competition process, and reciting that, if the bid was successful, it was proposed to raise up to £12 million of the total projected equity investment of £60 million from new investors, in exchange for 20% of the shares in Esat Digifone, with the balance of £48 million to be funded equally by Communicorp and Telenor. A further £60 million in finance would be raised through bank borrowings, bringing the total projected capital requirement in the business plan to £120 million.

61.47 Positive responses, albeit of a contingent nature, were received in the first two weeks of June, 1995, from Allied Irish Banks, who indicated a preparedness to invest to a level of £3 million, from Investment Bank of Ireland, also to a level of £3 million, and from Standard Life, to a level of £2.5 million. In addition, Advent acquired an entitlement to a 5% shareholding, on foot of a separate arrangement, described below. These four investors were identified in the Esat Digifone application as collectively holding a 20% interest in the intended licensee. The executive summary to the application stated that this 20% allocation had been placed by Davy stockbrokers with these four named institutional investors, and the letters of early June, 1995, together with a letter from Advent, were appended to the application, and were described as "*written investment commitments*."

61.48 As to Mr. O'Brien's immediate financial requirements for his existing businesses, by May, 1995, Communicorp's finances were in a perilous state, and it was in dire need of working capital to stay afloat. It was to Advent International that Mr. O'Brien turned for assistance. At the time, Advent held a \$10 million investment in Communicorp, corresponding to a 34% shareholding, and two seats on the board of directors. One of those directors was Mr. Massimo Prelz, a senior executive of Advent, with experience in the European media and telecommunications sector. In mid-May, 1995, Mr. O'Brien approached Mr. Prelz for a further cash injection of \$5 million, on the security of redeemable preference loan stock, convertible after 5 years into a 20% shareholding in Mr. O'Brien's radio interests. Whilst early indications were positive, ultimately Mr. Prelz informed Mr. O'Brien that the deal had not been approved by Advent's board of directors. Eventually, on 15th June, 1995, a one year straight bridging loan was agreed at an annual coupon, or interest rate, of 30%. Understandably, Mr. O'Brien regarded these terms as harsh, but in the circumstances, including his dependence on these monies to repay a temporary loan to Woodchester

Bank, secured in anticipation of the Advent funding on Mr. O'Brien's personal guarantee, he had no alternative but to accept them, having exhausted all other options.

61.49 As to Communicorp's equity commitment to Esat Digifone, it was an indubitable fact, acknowledged by all witnesses, that there was no question of Communicorp having available to it funds in the order of £24 million, nor did it have access to such funds. It was Mr. O'Brien's evidence that, once he had secured the GSM licence, the value of his business would increase significantly. His intention was to raise the necessary funding by a private placement on the US market with a small number of financial institutions. To that end, from as early as May, 1995, Mr. O'Brien was in negotiation with Credit Suisse First Boston, CSFB, a US equity house, with a view to raising funds for both the GSM business, if secured, and for his existing fixed-line business. By end-June, 1995, CSFB had been appointed as exclusive placement agent and financial adviser to Communicorp, in connection with its proposed fundraising on the US market. That arrangement, dependent as it was on securing the GSM licence, could never have met the paragraph 19 precondition of financial capability.

61.50 To that end, on 15th June, 1995, Mr. O'Brien negotiated a second agreement with Advent, whereby Advent would be entitled to a 5% direct interest in Esat Digifone, in consideration for the provision of letters of comfort to the Department and to Telenor, confirming that Advent had "*offered*" to provide financing of up to £30 million to enable Communicorp to fund its equity in Esat Digifone. This agreement was later reduced to writing, on 12th July, 1995, and the agreed letters of comfort in those terms, each dated 10th July, 1995, duly issued to the Department and Telenor.

61.51 The Tribunal is satisfied that no binding or enforceable agreement or commitment was imposed on Advent to fund Communicorp's equity participation in Esat Digifone, whether on foot of that agreement of 12th July, 1995, or the letters of comfort of 10th July, 1995. Rather, the letters of comfort served two purposes. First and foremost, they sought to demonstrate to the Department that Communicorp had funding in place, and that Esat Digifone should be regarded as having met the precondition of financial capability, notwithstanding Communicorp's financial vulnerability. Their secondary purpose was to meet Communicorp's obligation to provide a financial guarantee to Telenor, under the terms of the joint venture agreement.

61.52 The Advent comfort letter was submitted to the Department with the Esat Digifone application, as was another letter, dated 14th July, 1995, signed by Mr. O'Brien and addressed to Mr. Prelz, in which Mr. O'Brien referred to Advent's

offer of £30 million, and confirmed acceptance of the agreement of 12th July. Mr. Prelz testified that he had never seen this last letter, of which there was no copy on the Advent files, and which the Tribunal is satisfied was a fictitious letter, never sent to Mr. Prelz. It was, however, submitted with the application for the purpose of leading the Department to believe that the agreement of 12th July, 1995, unseen by the Department, was an agreement between Communicorp and Advent for the provision of that £30 million of funding. The impression thereby conveyed was a wholly inaccurate and erroneous one, as no such agreement existed, and the agreement of 12th July, 1995, related solely to the provision of comfort letters by Advent.

THE COMPETITION IS REACTIVATED

61.53 On 14th July, 1995, the Department formally reactivated the competition, by notifying interested parties that the deferred closing date had been fixed for Friday, 4th August, 1995, with the target completion date, for the announcement of a winner, now being end-November, 1995. This timetable, confirmed in evidence by several witnesses and by the documentary record, again allowed for a period of upwards of four weeks for consideration and decision by Government, following the conclusion of the Project Group's work. Interested parties were also informed that the RFP was amended, in that it was now specified that the minimum licence fee was £5 million, but that applicants were free to offer a higher amount, subject to a maximum of £15 million. This change was reflected in modification of the paragraph 19 evaluation criterion, the relevant criterion now being the amount in excess of the minimum initial licence fee which the applicant was prepared to pay.

61.54 As a result of the above change, the Project Group, on the recommendation of AMI, also approved a revision in the weighting matrix to be applied to the evaluation criteria, listed in paragraph 19 of the RFP document, which was now confirmed as 30, 20, 18, 11, 7, 6, 5, 3. This resulted from a re-allocation of a weighting of 3 from the Licence Fee criterion to the Tariffs criterion. Despite a suggestion on the part of Mr. Andersen, when he attended to give evidence, that the capping of the licence fee had the effect of fundamentally changing the entire evaluation process, as having been thereby converted from an auction process, where the quantitative evaluation was critical in demonstrating that the amount paid for the licence was not the decisive consideration, to a beauty contest, where the qualitative evaluation became more central, the Tribunal is satisfied that the dual quantitative and qualitative elements remained fully in place, as did the rationale for having this dual technique, following the reactivation of the process in mid-July 1995. This conclusion is overwhelmingly supported by the contemporaneous record, by the

evidence of Departmental witnesses, and by explanations of the process furnished by Mr. Andersen himself to the Tribunal many years earlier.

TENSIONS EMERGE BETWEEN COMMUNICORP AND TELENOR

61.55 Tensions arose between Communicorp and Telenor in the final days prior to the deadline for submission of applications on 4th August, 1995. The source of these tensions lay in the requirement of the joint venture agreement that Communicorp furnish Telenor with a financial guarantee. It was Telenor's understandable view that the Advent letter of comfort dated 10th July, 1995, was not a financial guarantee. At the time, Telenor had some understanding that Advent had an entitlement to 5% of Esat Digifone, arising from the provision of these letters to Telenor and the Department, but it had not had sight of the agreement between Advent and Communicorp in that regard.

61.56 Not being satisfied with the letter of comfort, or with what was accepted as an inaccurate assurance given by Mr. Peter O'Donoghue of Communicorp at the time, Mr. Knut Haga, on behalf of Telenor, took steps to confirm the precise position directly with Advent, and with their solicitors, Baker McKenzie, in London. The responses he received indicated that there was no binding agreement in place for the provision of £30 million by Advent, but only a strong expression of interest, which however was not legally binding. Mr. Haga was naturally alarmed at this turn of events, and expressed his alarm to Mr. O'Brien, in terms that made it clear that he believed this financial weakness could jeopardise the project as a whole. However, neither he nor Telenor more generally were sufficiently concerned to block the application proceeding.

61.57 Instead, in the days and hours immediately prior to the submission of the bid on 4th August, 1995, efforts were made to secure a confirmation in stronger terms from Advent, although not, it seems, with any desire or expectation on the part of Communicorp that it should succeed in doing so. The net effect of these efforts was an assertion, in graphic and trenchant terms, by Mr. Prelz, that the word "*committed*" was misleading, and that there was no Advent offer, as no terms had been agreed. Accordingly, the letters of 10th July, 1995, never exceeded the status of letters of comfort: there was no binding enforceable commitment, agreement or offer on the part of Advent to provide £30 million in funding.

61.58 Notwithstanding this position, the evidence supports the conclusion that there was no question of Telenor ever having considered withdrawing from the joint venture on this or any other ground. Furthermore, once the bid had been submitted, the issue of the joint venture agreement financial guarantee was

largely moot. In fact, the conflict over the point was in reality no more than a phoney war. The real significance of the evidence lay in the decisive and trenchant response of Mr. Prelz, confirming that there was no commitment on the part of Advent, that there was no agreement to provide such funding, and that there was no continuing offer to that effect then in existence.

61.59 Mr. O'Brien had no intention of financing his participation in Esat Digifone through Advent, but rather, as already alluded to, intended to do so by a placement on the US market, and by this time had formally engaged CSFB to that end. Such an uncertain funding arrangement, dependent on securing the licence in the first place, could scarcely have met the RFP condition of demonstrable financial capability. This was later to become evident from an analysis of Esat Digifone's finances conducted by Mr. Donal Buggy, the Department seconded accountant, in May, 1996, just prior to the issue of the licence. By then, Mr. O'Brien's prospective fundraising arrangements through CSFB were known, and Mr. Buggy, in determining whether Esat Digifone had sufficient funds to meet the roll-out costs of a GSM network, treated the Communicorp element of the company as having zero available funds.

THE COMMENCEMENT OF THE COMPETITIVE PROCESS

61.60 Applications for the GSM licence were received from six consortia, designated by the Department for convenience, but not for anonymity purposes, as A1 to A6. In submitting its application, Esat Digifone, designated A5, indicated that it did not wish the identity of its institutional investors to be released at any stage. The other consortia were A1, Irish Mobicall, A2, Cellstar, A3, Persona, A4, Irish Cellular and A6, Eurofone. The composition of these consortia is described in Chapter 17 of this Volume. In the case of Esat Digifone, it was indicated that the composition of the intended licensee was to be Telenor and Communicorp each holding a 40% shareholding, with a 20% shareholding being made available to third party investors. The executive summary stated that the 20% allocation had been placed by Davy stockbrokers with Allied Irish Banks, Investment Bank of Ireland, Standard Life, and Advent. A slightly different formulation was used in the body of the application, in which it was stated that the 20% shareholding would be formally placed, in the period leading up to the award of the licence, and that written investment commitments had been received from those same four institutions.

61.61 Information regarding the ownership profile of Communicorp was also provided. It was stated that in 1994, Advent had acquired a 34% interest in Communicorp, that it had committed a total of \$19.5 million to the company, and that it had agreed to take a 5% direct equity stake in Esat Digifone. It was also

stated that Advent had a commitment to provide £30 million in funding to Communicorp's GSM bid.

61.62 AMI conducted an initial assessment of applications to ascertain whether they met the Department's minimum prescribed requirements, mostly as to form, and all six applications were adjudged to be valid, and were admitted to the competition accordingly. This conformance check did not extend to any assessment of the financial or technical capability of applicants, as preconditions to entry to the evaluation process proper, and, in the event, no such threshold assessment of those matters was undertaken in advance of the substantive evaluation. In this regard, it was Mr. Andersen's evidence that, in the absence of clear definitions in the RFP document or elsewhere of what constituted financial and technical capability, those requirements could not be assessed as preconditions to eligibility, but could only be addressed after the conclusion of the comparative evaluation and, as it turned out, after a ranking of the top applicants had been established. In that regard, the final Evaluation Report included certain reservations or "*markers*", as Mr. Andersen described them, surrounding the finances of the two top-ranked applicants.

THE CELTIC MATCH AND ENCOUNTER BETWEEN MR. O'BRIEN AND MR. DESMOND

61.63 In 1995, Mr. Dermot Desmond was involved in a large number of commercial projects which had earned him then, and now, a wide reputation as a skilled and shrewd financier. Mr. Desmond was at the same time a somewhat controversial figure. He did not feature as a member of the Esat Digifone consortium in the application for the GSM bid, but, by the time the result of the bid was announced, on 25th October, 1995, the composition of the intended licensee was no longer as envisaged in the Esat Digifone application. By then, the consortium had become a venture of three partners, Communicorp, Telenor and Mr. Desmond, with respective interests of 37.5%, 37.5% and 25%, and that was also by then the composition of the intended licensee.

61.64 Initially, when the GSM competition was announced, Mr. Desmond decided that he did not wish to pursue an involvement in a consortium to compete for the licence. Earlier dealings between Mr. O'Brien and Mr. Desmond arose in May, 1995, in the context of the cash crisis which Mr. O'Brien's existing businesses were then experiencing. It was on 10th August, 1995, on the return journey from a social outing to a football match between Glasgow Celtic and Liverpool, which Mr. O'Brien attended as a guest of Mr. Desmond, that the two retired to the back of the aeroplane, and a private discussion ensued about the GSM competition, and, for the first time, about a potential role for Mr. Desmond in Esat Digifone. Whilst both accepted that issues of financial weakness were

raised, their recollections of the source of weakness attendant on the Esat Digifone application, as conveyed by Mr. O'Brien, diverged. Mr. Desmond's recall of Mr. O'Brien recounting a need for finances for his existing businesses was confirmed by further negotiations the following day, when it was plain that what Mr. O'Brien sought was that Mr. Desmond would provide a £3 million guarantee for Communicorp, subject to a fee and terms of repayment. In exchange, Mr. Desmond would have an option of taking up a 15% shareholding in Esat Digifone, that is, the shareholding designated in the application for the Irish institutional investors.

61.65 These terms did not meet with the approval of Mr. Desmond, who repeated that he was not interested in investing in Mr. O'Brien's fixed-line business. In this regard, Mr. Desmond confirmed that he had no interest in funding what he correctly identified as the true purpose of Mr. O'Brien, which was to draw down a £3 million facility to enable repayment of Advent's bridging loan. Nonetheless, although not then tempted into that course, by the option of acquiring a 15% stake in Esat Digifone, Mr. Desmond was now interested in participating in Esat Digifone, and in the GSM licence, provided it was on equal terms with the existing shareholders, particularly Telenor, whose commercial judgment he held in some esteem.

61.66 In the event, however, no further negotiations took place in the weeks following Mr. Desmond's rejection of Mr. O'Brien's terms on 11th August, 1995. Instead, it was not until mid-September, 1995, after the Esat Digifone oral presentation to the Department, that contact resumed between Mr. O'Brien and Mr. Desmond. At this point, a very different agreement was concluded between them, one which did not entail support for Communicorp's existing business, nor the provision of a guarantee for £3 million by Mr. Desmond, but which conferred an entitlement on Mr. Desmond to a 25% shareholding in Esat Digifone, and imposed an obligation on him to underwrite Communicorp's £24 million equity participation in Esat Digifone. As will be seen below, those terms were substantially agreed between Mr. O'Brien and Mr. Desmond on 17th September, 1995, the selfsame day that Mr. O'Brien had significant contacts with Mr. Michael Lowry.

PERSONA MATTERS

61.67 Persona was ultimately found to be the second-placed consortium, an outcome which its participants found deeply disappointing, and regarded as unwarranted. Predictably, much of the content of the evidence of Mr. Tony Boyle, its Chairman, and of his co-director and associate, Mr. Michael McGinley, related to the disgruntlement of those involved in Persona at what was perceived by them

to be an unfair outcome to the competition. Yet the most pertinent portion of that evidence related to three separate matters, as follows:

- (i) A meeting held in the Fitzpatrick Castle Hotel, Killiney, Co. Dublin, on 16th August, 1995, during the closed period of the competition, between Mr. Michael Lowry and Mr. Tony Boyle, being an encounter which disregarded the agreed Project Group protocol on contacts with consortia personnel which, even if not binding on Mr. Lowry, was known to him. The Tribunal has expressed the view that this meeting, in its timing, circumstances and content, was inappropriate and potentially compromising.
- (ii) Some brief and informal verbal exchanges between Mr. Boyle and Mr. Desmond at the Aintree Grand National on 8th April, 1995, which hinted at an inappropriate association between Mr. Lowry and Mr. O'Brien. The Tribunal has drawn no adverse inferences arising out of this portion of the evidence.
- (iii) The consideration that Mr. Jerry Healy, one of the senior counsel retained by the Tribunal, had previously furnished Persona with a joint opinion on the feasibility of instituting judicial review proceedings in respect of the giving of reasons for the GSM outcome, at a time long before the establishment of the Tribunal. Having regard to all of the relevant facts and circumstances, including the early disclosure made by Mr. Healy to the Sole Member and to affected persons, together with the confirmation of such affected persons that they had no objection to Mr. Healy's continued role with the Tribunal, the Sole Member indicated on 3rd March, 2004, that Mr. Healy had acted correctly and properly in relation to disclosure and notification of his earlier limited retention as counsel, and that no conflict of interest, such as precluded his continued retention by the Tribunal, arose.

61.68 The Tribunal found it unnecessary to make findings or to express views about conflicting positions adopted by Persona and the Department in relation to events subsequent to the announcement of the GSM competition result. Furthermore, insofar as it was suggested that the Tribunal had been manipulated or steered by Persona, the Tribunal at all times independently determined the lines of inquiry it would pursue, and was at all times cognisant of Persona's vested interest in its investigations. As with any information emanating from such a source, it treated all such information with care, circumspection and independence.

THE QUANTITATIVE EVALUATION AND PROJECT GROUP CONSIDERATION

61.69 The first meeting of the Project Group following the closing date for applications was on 4th September, 1995. By that time, AMI had concluded the quantitative evaluation. The principal focus of the Project Group meeting was the presentation and consideration of the first set of quantitative results, dated 30th August, 1995. Before presenting those results, Mr. Andersen pointed to certain shortcomings in the quantitative scoring, and highlighted some incomparable elements that had emerged. Two of these were subsequently remedied, one had been foreseen in the Evaluation Model, and, that apart, the only indicators that ultimately proved resistant to quantitative scoring were those for the criterion, Performance Guarantees, accounting for 6% of the total weighting. A time sensitivity had also been detected in the case of some indicators, but as the year or years for which indicators were to be scored had been fixed in the Evaluation Model, that element could not have undermined the reliability of the scoring, or the fairness of the comparison.

61.70 The results ranked Persona as the highest scoring applicant, with Eurofone in second place, and Esat Digifone in third place. That outcome was noted to be relatively close, with a 5.8% differential between the two top-ranked applicants. It was further noted in the course of discussion that the solvency results for Cellstar and Esat Digifone were poor, with zero and negative solvency respectively. This was the first instance of recorded reservation in the evaluation process concerning the finances of Esat Digifone.

61.71 Correct weightings had not been applied by AMI to the indicator results. The 3% shift in weighting, from the Licence Fee to the Tariffs indicator, had not been reflected in the weightings applied, and no renormalising exercise had been undertaken to bring the weighting base back to 100. It was agreed by the Project Group that AMI would prepare a revised set of quantitative results to reflect the corrections and recalculations required. Whilst Mr. Michael Andersen testified that it was clear to him at this point that, due to the incomparable elements that had arisen, the quantitative analysis was incapable of generating a statistically valid ranking, this was not a view that he ever shared with the Project Group, nor apparently with his own AMI colleagues, who continued to work on the quantitative analysis. The view of the Project Group at that point was that the quantitative results would be returned to after the qualitative analysis and the oral presentations, as prescribed by the Evaluation Model.

61.72 A fully corrected set of quantitative results was never generated by AMI. A second set of partly revised results, dated 20th September, 1995, produced the same ranking. A copy of the second set of results was furnished to

Mr. Martin Brennan when he was in Copenhagen to attend qualitative sub-group meetings on 19th and 20th September, 1995. Those results were never circulated to the Project Group, and the Group as a whole was unaware of their existence.

61.73 A third and final set of quantitative results, yielding a different ranking, with Persona in second place, and Esat Digifone in fourth place, was produced to the Tribunal by solicitors for AMI in June, 2002. The Tribunal was informed that, although not so dated, that set of results had been generated on 2nd October, 1995. These were also partially revised, but, as with the second set of results, were not fully corrected. There was no copy on Departmental files, and no Departmental witness had any recollection of them ever having been discussed or presented. According to Mr. Andersen's belated evidence, he brought a copy of these results with him to the penultimate Project Group meeting of 9th October, 1995, but a contemporaneous record of that meeting made no such reference.

61.74 Having regard to the level of error that afflicted all three sets of quantitative results, it must be said that, leaving aside any element of incomparability or unreliability of information received from applicants, AMI, as expert consultants, who designed the quantitative methodology and the weighting matrix, displayed a surprising ineptitude in what was no more than a relatively straightforward mechanical exercise.

61.75 In the event, the results of the quantitative evaluation were never returned to, or revised, as stipulated by the Evaluation Model, and agreed by the Project Group on 4th September, 1995. The quantitative results, as a separate limb of analysis, did not inform the ranking which ultimately emerged, and were not published in the Evaluation Report. Accordingly, the Evaluation Report contained no explanation as to how Esat Digifone, which had never ranked higher than third place in the quantitative analysis, was nonetheless nominated as the best applicant.

61.76 The balance of matters discussed at the Project Group meeting of 4th September, 1995, included procedures for the then forthcoming oral presentations, scheduled for the week of 11th September, 1995. The future framework of the evaluation was the final topic that arose, with AMI informing the Project Group that five qualitative sub-group sessions had already proceeded, without Departmental representation, in Copenhagen. In the event, such sub-groups were reconvened at a later point, with full Departmental attendance. Arrangements were also made for five sub-group sessions during the following week, and it was agreed that the Project Group would have an initial discussion of the qualitative evaluation marks on 14th September, 1995. A date of 3rd October, 1995, was proposed by AMI for delivery of a draft qualitative report.

THE AMI FEE DISPUTE

61.77 In the course of August, 1995, AMI informed the Department that the evaluation was proving more demanding than had been anticipated, and that, in consequence, AMI proposed to submit additional invoices to reflect the extra work required. In response, the Department contended that these extra items were part of AMI's existing contractual obligations, subject to a fixed fee of £297,450.00. This was met in turn by a letter from Mr. Andersen, notifying the Department that AMI would have no alternative in the circumstances but to scale down their input into the process. In an attempt to resolve the impasse, a meeting was arranged for 4th September, 1995, which was attended by Mr. Andersen and the Development Division representatives on the Project Group, being Mr. Martin Brennan, Mr. Fintan Towey and Ms. Maev Nic Lochlainn. During this meeting, Mr. Andersen advanced the surprising position that, absent an increase in fees, he would regard AMI as being not obliged to produce a ranking, but merely to conduct an evaluation.

61.78 This regrettable turn of events placed the Department in an undoubtedly invidious position, and whilst it forms no part of the Tribunal's mandate to determine the rights or wrongs of the issue, it is observed that, whilst certain criticisms were then made by the Department of the quality of AMI's work, ultimately the dispute was resolved by the Department agreeing to pay the greater part of AMI's additional estimated fees, in the amount of an extra £72,550.00, subject to certain conditions. These included requirements that AMI would provide a ranking of the top three applicants, and would comply with an agreed timetable for submission of draft Evaluation Reports, and would furnish a final Evaluation Report by 25th October, 1995. This timetable had already been fixed by the Project Group at its meeting earlier that day, which as a body was unaware of the fee dispute or of its resolution.

61.79 Mr. Brennan's approach to the fee dispute with AMI was decisive and resolute, and was effective in securing a timely resolution. It is however not clear that the settlement fully resolved AMI's budgetary difficulties, and indeed AMI later confirmed to the Tribunal that for budgetary reasons certain supplemental analysis, that would have been part of a best practice evaluation, was not carried out. Furthermore, in keeping the fact of the fee dispute from the other members of the Project Group, Mr. Brennan, although in many respects acting commendably, may have failed to fully recognise the adjudicative role, even in this specific context, upon which the Project Group as a whole was embarked. As the process evolved, and as further obstacles inevitably arose, this pattern of information and decision-making being kept outside the Project Group became

increasingly pronounced, and ultimately was a pattern which exposed the process to a risk of outside interference and outside influence.

INITIAL QUALITATIVE SESSIONS IN COPENHAGEN

61.80 The substantive portion of the qualitative limb of the evaluation, with full Departmental representation, commenced in early September, 1995, with the convening of two sessions of sub-groups in Copenhagen. Sub-group deliberations were directed to three matters: firstly, agreement on appropriate indicators to be evaluated; secondly, discussion of each application by reference to those indicators, to arrive at consensus indicator marks; and thirdly, discussion of the aggregation of those indicator marks to arrive at an overall dimension mark. The deployment of judgement was a feature of all three stages, with the final stage also entailing the application of implicit weightings, reflecting the consensus view of the relative significance of the selected indicators. The work of sub-groups was facilitated by AMI, who circulated members in advance with proposals for appropriate indicators, their marking, and the marking of each dimension.

61.81 Ten of the eleven dimensions had to be evaluated qualitatively. As all applicants had nominated the maximum £15 million for the licence fee payable, that dimension did not require evaluation. The date and dimensions to be assessed at the two initial qualitative sessions are set forth in the table below:

Date of Session	Dimensions Assessed
6 and 7 September, 1995	Financial Key Figures Performance Guarantees
7 to 9 September, 1995	Radio Network Architecture Capacity of Network Coverage Frequency Efficiency

Mr. Fintan Towey and Mr. Billy Riordan, the accountant seconded to the Department of Finance, were nominated to represent the Project Group at the first session, whilst Mr. John McQuaid and Mr. Aidan Ryan, the two Technical Division engineers, were delegated to the second session.

61.82 The difficulty that the Tribunal encountered, in seeking to clarify how the qualitative evaluation proceeded to a grade for each dimension, and to an overall ranking, was that no record was kept of the exercise performed in the sub-groups of weighting the indicators, whether implicitly or explicitly, or of how those weighted indicators were aggregated. Nor did the Evaluation Report, in either its draft forms or final form, explain or address these matters. This meant that the adjudicative trail on the qualitative side was far from transparent, and not readily

intelligible or verifiable. In particular, the results were presented in a series of tables which Departmental witnesses agreed were relatively impenetrable: further, they were not amenable to verification, and ultimately these tables had to be taken at face value.

61.83 The qualitative evaluation of five of the six dimensions proceeded at these sessions, and the outcome of those evaluations is addressed in Chapter 22 of this Volume. A significant obstacle was encountered in the evaluation of the Financial Key Figures dimension, which was not progressed. Mr. Riordan had identified a serious problem which had to be resolved before the evaluation could commence. He had noted inconsistencies between the financial projections in applicants' business plans, and the figures and computations in their mandatory tables, the latter being intended to yield the source data for the evaluation. As it was recognised that a full comparison would be a lengthy and costly exercise, an abridged solution was adopted, whereby Mr. Riordan and AMI would conduct an analysis of the internal consistency of the mandatory tables themselves, and ensure that, where necessary, those tables were corrected. The Financial Key Figures evaluation was accordingly deferred to enable that task to be completed.

61.84 As of Friday, 9th September, 1995, on the completion of these sessions, it would have been apparent that Esat Digifone, having performed very well, was ahead on that portion of the qualitative evaluation, and that Persona was in first place on the quantitative results. It is unclear to what extent these emerging indications were brought to the attention of the Project Group as a whole, but it was certainly the view of AMI by the following Thursday, 14th September, 1995, when the Project Group met, that the field of applicants had broken into two distinct divisions, and it was Mr. Andersen's evidence that by that time, there was a clear sentiment amongst some Departmental officials that Esat Digifone, and to some extent Persona, had done a very good job, and also that Irish Mobicall would be capable of qualifying for the licence.

THE ORAL PRESENTATIONS

61.85 The last opportunity for applicants to provide information to the Project Group was the occasion of their respective oral presentations, which took place between 11th and 14th September, 1995. Thereafter, as stipulated by the information memorandum issued by the Department prior to the closing date, and explicitly brought to the attention of all applicants at the presentations, no additional material could be submitted, and further contact with the Department was to be avoided, unless initiated in writing by the Department. In the course of the presentations themselves, applicants, following an initial hour set aside for their representatives to make uninterrupted statements, were required to answer

a series of specific questions prepared by AMI, as well as questions common to all applicants, variously prepared by AMI and the Departmental representatives on the Project Group.

61.86 The Esat Digifone presentation was the third of the six presentations, and took place on the afternoon of 12th September, 1995. There were two elements of the presentation that featured most prominently in the evidence heard by the Tribunal, relating, firstly, to the ownership of the intended licensee, and specifically the involvement of the financial institutions named in the application, and, secondly, to the financial capability of the consortium. That second issue had two distinct strands, in that it entailed consideration of both the projected negative solvency of the licensed company over the initial years of operation, as identified in the quantitative results, and separately, the ability of Communicorp to fund its equity commitment.

61.87 In relation to the first issue, Mr. Denis O'Brien and Mr. Arve Johansen, of Telenor, stated in the clearest possible terms that the four named financial institutions had committed themselves collectively to taking a 20% interest in the licensee company. The investment by Irish institutions was advocated as a unique opportunity for Irish pension funds to invest in an Irish utility company. No inquiry was directed by Project Group representatives to the extent of those commitments, or as to whether the letters of support of those financial institutions appended to the Esat Digifone application were consistent with what was asserted. Mr. Johansen's state of knowledge was very much subordinate to that of Mr. O'Brien, and he was unaware that, as of 10th August, 1995, after the application had been lodged, Mr. O'Brien had offered the 15% shareholding of Allied Irish Banks, Investment Bank of Ireland and Standard Life to Mr. Dermot Desmond, in exchange for funding for the fixed-line side of his business.

61.88 In relation to the second issue, it was indicated on behalf of Esat Digifone that its negative solvency position in the first years of its business plan would be covered by guarantees to be provided by its parent companies, Telenor and Communicorp. In addition, in response to questions posed by Mr. Billy Riordan, the seconded accountant, Mr. O'Brien stated that Advent had invested a total of "19,500,000" since October, 1994, and when queried again, he replied "They have actually done it". Those statements were incorrect, as Advent had neither invested £19.5 million nor \$19.5 million. The true position was that Advent had invested no more than \$10 million in October, 1994, in exchange for a 34% stake in Communicorp. The only additional funding provided by Advent as of 12th September, 1995, was the separate \$5 million bridging loan of July, 1995, which was subject to a very high interest rate or coupon of 30% per annum.

61.89 In response to inquiries made, Mr. O'Brien stated that it was intended that the Advent £30 million commitment would be provided in the form of an additional equity investment, whereby Advent's shareholding in Communicorp would increase to 47% or 48%. Furthermore, there would be a 3:1 voting ratio in favour of the 53% shares held in Irish ownership, and control would therefore remain with the Irish shareholders. In the course of this exchange, Mr. O'Brien expressly and unequivocally stated, and it was so understood and carefully noted by those whom he was addressing, that there was an agreement, a commitment and a guarantee from Advent to provide this £30 million funding. There was in fact no agreement in place to that effect, nor was there any commitment or guarantee of the type asserted by Mr. O'Brien. In addition, Mr. O'Brien conveyed the impression that the agreement as between Advent and Communicorp was something separate to the letter of comfort provided by Advent.

61.90 At the conclusion of the Esat Digifone presentation, Mr. O'Brien confirmed his understanding of the rule that there should be no further communications in the final stage of the process, that is, from there on in, and Mr. Brennan, in response to a final query from Mr. O'Brien, indicated that the evaluation would simply proceed, and that the Minister had a political commitment to produce a result by end-November, 1995.

61.91 The presentations provided the evaluators with an opportunity to meet and engage with the people behind the consortia, and to form an impression of them that might impact on judgements made in the course of the qualitative evaluation. However, having said that, there is no evidence to suggest that the qualitative dimensions already scored were ever revisited in the light of the presentations. More generally, it is unclear how the presentations were utilised in the comparative evaluation of the applications.

DEPARTMENTAL ACTIONS IN THE AFTERMATH OF THE PRESENTATIONS

61.92 Following the conclusion of the final presentation that morning, the Project Group met on the afternoon of Thursday, 14th September, 1995. The official report of that meeting noted, among other things, that the presentations had served to consolidate the initial views of the Project Group on the applications, arising from the quantitative assessment, suggesting that they had reinforced the ranking that had emerged from that process. The meeting also agreed, at the suggestion of AMI, that two distinct groups had emerged, and that greater resources would thereafter be expended on the leading consortia, being A1, Irish Mobicall, A3, Persona, and A5, Esat Digifone. Mention was made by Mr. Martin Brennan of the prohibition on further contact between the evaluation team and applicants, although he also indicated that access to the Minister could not

be stopped, a somewhat curious reference. This reference was most probably prompted by Mr. Brennan's awareness that the Minister was due to attend a function at which he was likely to meet a consortium participant. Mr. Brennan was also aware that Mr. Lowry had by then already sought and obtained specific information from Mr. Fintan Towey on the substantive process, in response to what was understood by Mr. Towey as pressure from a participant, and these matters are outlined below.

61.93 As regards arrangements to progress the evaluation, the Project Group noted that what remained to be done was, firstly, the finalisation of the qualitative scoring and the award of marks for dimensions. Six of the eleven dimensions remained to be evaluated qualitatively, of which five, Market Development, Experience of Applicant, Financial Key Figures, Tariffs and International Roaming Plan, required to be analysed in sub-groups. It was intended that these sub-groups would meet in Copenhagen the following week. An ancillary task, to enable the reformatting of mandatory tables to facilitate the Financial Key Figures evaluation, was noted, and was attended to by Mr. Billy Riordan the following day.

61.94 The second step to be taken was to carry out initial scoring of Aspects, the four categories into which the Evaluation Model had grouped the dimensions of the evaluation criteria for qualitative purposes. This was a significant step in the evaluation, as the Aspects sub-totals were important components in the completion of the AMI qualitative marking matrix, intended to produce a grand total of markings, and a ranking of applicants in the qualitative evaluation. It was intended and understood that the remaining Aspects would be aggregated on an "initial" or provisional basis by the Departmental personnel selected to represent the Project Group in the relevant sub-groups. In respect of Technical Aspects, the dimensions of which had already been evaluated, that task was to be completed by close of business that day. It was intended that those initial Aspects sub-totals would be reviewed by the Project Group, following receipt of AMI's first draft Evaluation Report, due on 3rd October, 1995. In the case of the financial sub-group, Mr. Billy Riordan tackled the financial figures the following day, 15th September, and on that day sent a memorandum to AMI, containing an instruction that the mandatory tables should be amended before the financial sub-group met, the following week, to undertake the qualitative evaluation.

61.95 The final step identified as outstanding was supplemental analysis of five particular matters identified in the meeting report, including the carrying out of financial analysis of Sigma, part of the Persona consortium, and of Advent, as funders of the Communicorp element of the Esat Digifone consortium, in connection with concerns surrounding the funding available to meet their respective equity commitments.

61.96 More generally, the records and evidence relating to the Project Group's impression of emerging trends in the evaluation, as of mid-September, 1995, were that Persona and Esat Digifone were both "*DOING WELL*", with Irish Mobicall in third position. There was also a clear sentiment among Departmental officials most immediately involved, that, as between Esat Digifone and Persona, Esat Digifone was the front runner.

MR. LOWRY'S KNOWLEDGE OF THE EMERGING TRENDS AS OF MID-SEPTEMBER, 1995

61.97 In order to guarantee the fairness of the process, it was intended that the selection would be made by a Project Group comprised of Departmental officials possessing the relevant skills and expertise, who would be assisted by specialist consultants, free of political or any other external influence. It was decided that the process should be sealed, and that information regarding the substantive evaluation, as opposed to issues of timing and of meeting the critical path, should be kept confidential, and should not pass outside the membership of the Project Group. In practice, however, that seal was breached on a series of occasions of which the Tribunal heard evidence, some of which would seem to have been of less critical import, as in members of the Project Group reporting to their superordinate officials on the outcome of Project Group meetings, or of trends emerging in the process. It is clear that substantive information was also made available to Mr. Michael Lowry, who, contrary to his testimony to the Tribunal, was far from being a disinterested Minister, but in fact exhibited an appreciable curiosity about the substantive process, as it was proceeding, and sought, and was provided with, information by members of the Project Group.

61.98 One such occasion was when, in early to mid-September, 1995, probably in advance of the oral presentations, Mr. Lowry telephoned Mr. Fintan Towey, in Mr. Brennan's absence, in relation to the progress of the competition, and wished to know whether the process had concluded, in the sense of a winner having been identified. Mr. Lowry informed Mr. Towey that he was under some pressure, because he had been subject to representations by parties who were concerned that the decision had already been made, to ensure that a genuine evaluation process was underway, and that the result was not a foregone conclusion in favour of Persona, the consortium viewed as the betting favourite. Mr. Towey made it clear in response that no finality had been reached, and that there were a number of players still in the game, and he believed that he had indicated to Mr. Lowry who the front runners were at the time. Mr. Towey later informed Mr. Brennan about the Minister's call, and what he had imparted, and testified to his understanding that Mr. Brennan and Mr. Lowry had a subsequent fuller conversation.

61.99 When this evidence was highlighted for Mr. Lowry, he first denied ever having any meetings or discussions with the Project Team, as he described it, including any telephone call with Mr. Towey. However, Mr. Lowry later recalled the telephone call, but was insistent that the pressure in question was not from any competition entrants, as he was outside the process, but was borne of pressure in the Department, where he had had bad days, and wanted a good news story on the GSM competition. He stated that the call had been prompted by a conversation he had had at the time with Mr. Colin McCrea, his Programme Manager, who had heard rumours that there was already a winner, namely the Motorola led consortium, and that the competition was nearly over.

61.100 Overall, the Tribunal has found that the account furnished by Mr. Towey was appreciably more cogent and persuasive than that furnished by Mr. Lowry, whose evidence in this regard was wholly unconvincing. Further, the Tribunal is satisfied that Mr. Towey, in responding to Mr. Lowry, did disclose to him the names of the then leading contenders, A1, Irish Mobicall, A3, Persona, and A5, Esat Digifone, and that in doing so he was responding to a specific inquiry made of him by Mr. Lowry. Mr. Towey cannot be faulted either personally or professionally for his actions in this matter, as he had no realistic alternative but to respond to Mr. Lowry. The fault rests solely with Mr. Lowry, and with a system that enabled Mr. Lowry, as Minister, to make such an inquiry of a then relatively junior civil servant, at a highly sensitive stage of the closed period of the GSM competition.

61.101 Mr. Martin Brennan, for his part, had at least four substantive interactions with Mr. Lowry during the evaluation process, including interactions of critical significance at the concluding stages, in early October, 1995, returned to below. On the evidence of Mr. Brennan, and on other evidence to which regard has been had, the Tribunal has concluded that Mr. Brennan also made Mr. Lowry aware of the emerging trends of the evaluation, in or around the time of the oral presentations, and that this exchange extended to the order of the top-ranked applicants, and concerns surrounding the finances of the top two, Esat Digifone and Persona.

61.102 It follows from these interactions with both Mr. Towey and Mr. Brennan that, from about mid-September, 1995, Mr. Lowry was aware that Esat Digifone was the likely front runner. Furthermore, as of this time, Mr. Lowry had a relatively detailed knowledge of the emerging trends, including who was in contention, the order of the three top-ranked applicants, and concerns surrounding the finances of Persona and Esat Digifone. He also, as will become evident, had been in receipt of additional incidental information on how another consortium had performed in its oral presentation.

61.103 The fact that Mr. Lowry was in possession of this knowledge was contrary to the confidentiality intended to seal the process, and to guard against external or political influence, and thereby to guarantee its fairness, independence and impartiality. It was information which should not have been imparted to Mr. Lowry, and it is surprising that Mr. Brennan, conscious of the likelihood of access to Mr. Lowry by persons connected with competing consortia, should have shared this information with him. Having said that, what Mr. Brennan undoubtedly did not, and could not have known or foreseen, was Mr. Lowry's propensity to interact with and to disseminate sensitive and confidential information to interested parties.

MR. LOWRY MEETS MR. A.J.F. O'REILLY

61.104 On Friday, 15th September, 1995, the day following the final presentation, Mr. Lowry attended an event to mark the opening of a zinc mine by Arcon International Resources at Galmoy, County Kilkenny. Mr. Anthony J.F. O'Reilly was a shareholder in Arcon, and he also attended that function. Mr. O'Reilly was interested in the GSM licence, as he had a significant indirect stake in the Irish Cellular consortium. This consortium had been placed in the second tier of applicants following the presentations, by decision of the Project Group made the previous afternoon, and in the course of that meeting, the Project Group had discussed the relatively poor impression made by the Irish Cellular representatives at their presentation that morning. During the Galmoy ceremony, after the conclusion of formalities, Mr. Lowry made a comment to Mr. O'Reilly along the lines of "*Your fellas didn't do too well yesterday*". Mr. O'Reilly did not know to what Mr. Lowry was referring, and it had to be explained to him by Mr. Lowry that he was adverting to the AT&T representatives who had made a presentation on behalf of Irish Cellular to the Departmental panel in charge of selecting the successful applicant. Further discussion was somewhat brief, and the remainder of the conversation related to the Galmoy mine, and its future.

61.105 Mr. Lowry denied having said anything to Mr. O'Reilly along the lines attributed to him. He said he did not even know that presentations had been held by the Project Group during that week, yet there can be no question but that the comment attributed to him by Mr. O'Reilly accurately reflected the views of the Project Group, and were matters of which Mr. O'Reilly could scarcely have known. Furthermore, by this time Mr. Martin Brennan had told Mr. Lowry of the existence of the divisions of applicants, based on the Project Group's then views of their merits, and Mr. Lowry was aware that Irish Cellular was not within the first division.

61.106 In so concluding, the Tribunal has carefully weighed the competing evidence, and has had regard to the risk that Mr. O'Reilly, as a disappointed bidder, dissatisfied with other features of the then Government's performance affecting his businesses, might have been motivated to give false evidence regarding the Galmoy exchange. The Tribunal has rejected such an hypothesis, and has found that a remark, consistent only with knowledge on the part of Mr. Lowry of an unfavourable assessment of the performance of Irish Cellular within the previous 24 hours, was made by him to Mr. O'Reilly. This in turn can only have resulted from disclosure to Mr. Lowry from within the Project Group, most probably by Mr. Brennan, in breach of the intended seal of confidence.

MR. LOWRY MEETS MR. O'BRIEN AT CROKE PARK AND IN HARTIGANS

61.107 On 17th September, 1995, Mr. Lowry and Mr. O'Brien both attended the All-Ireland Football Final at Croke Park, where they encountered each other during the half time interval. Following an exchange, they arranged to meet later at Houricans licensed premises in Leeson Street, where Mr. Lowry had a prior arrangement to meet friends for an after match drink. In the event, according to both Mr. Lowry and Mr. O'Brien, Houricans was so busy that the two repaired across the road together, to Hartigans licensed premises, where they remained alone for some half hour and, they said, talked of nothing other than the match, and of Mr. O'Brien's fixed-line business. Mr. Lowry then returned to Houricans, and Mr. O'Brien departed.

61.108 This meeting, whatever transpired at it, was not, as in the case of the Galmoy interaction, a meeting which was bound to arise in the course of Mr. Lowry's official functions, but on the contrary was a private meeting, which arose from an arrangement made directly between Mr. Lowry and Mr. O'Brien, when they met at Croke Park earlier that day. Although Mr. Lowry never mentioned this encounter to any of his officials, Mr. O'Brien did tell a number of his associates, including Mr. Per Simonsen, who, as the Telenor GSM co-ordinator, was the Telenor representative most closely connected with the application. Mr. Simonsen testified that Mr. O'Brien told him at some time during the last two weeks of September, 1995, that he had happened to meet Mr. Lowry in a public house, and that Mr. Lowry had suggested that IIU, Mr. Dermot Desmond's investment vehicle, should be involved in the consortium.

61.109 This last evidence came to light from Mr. Simonsen and from other Telenor witnesses, at a time when they were unaware of the information available to the Tribunal, regarding the meetings of 17th September, 1995, including entries in Mr. O'Brien's diary, which indicated that he met or spoke with Mr. Desmond at 6.00pm that day, and then met Mr. Lowry at 6.45pm in Hartigans.

Mr. O'Brien, for his part, denied that he had ever said such a thing to Mr. Simonsen: he stated that this was nonsense, and that Mr. Simonsen must have been confused. He also stated that the entry in his diary, signifying a meeting in Hartigans, was made after the fact, some days later. However, the Tribunal is satisfied on the evidence that Mr. O'Brien did tell Mr. Simonsen of a meeting with Mr. Lowry, that a conversation concerning it did take place between them, and that, in the course of that conversation, in connection with proposals then being canvassed by Mr. O'Brien for the admission of Mr. Desmond as a 25% shareholder in the consortium, entailing a dilution of Telenor's interest from 40% to 37.5%, Mr. O'Brien did inform Mr. Simonsen that Mr. Lowry had suggested that IIU should be involved in the consortium. In so finding, the Tribunal has had regard to the consideration that Mr. Simonsen made a contemporaneous report of the conversation to his associates in Telenor, including Mr. Arve Johansen, and that his evidence should properly be regarded as evidence against interest.

61.110 The fact that Mr. O'Brien stated that Mr. Lowry had said such a thing does not of course mean that Mr. Lowry ever made any suggestion of that type. What it does mean, however, is that Mr. O'Brien said it to Mr. Simonsen, and it must follow that Mr. O'Brien did not at that time feel it inappropriate or improper to make such a statement.

61.111 Both Mr. Lowry and Mr. O'Brien were clear in their evidence that no reference was made by them at any time during the course of their encounters on 17th September, 1995, to the GSM process. Mr. O'Brien testified that he would have regarded it as a taboo subject, and that it would have been wrong and inappropriate for him to raise it. Nor did they discuss the possibility of Mr. Desmond joining the Esat Digifone consortium. It was Mr. Lowry's evidence that no reference whatsoever was made to Mr. Desmond or to IIU, and he presumed that he became aware of Mr. Desmond's involvement at the same time as his officials in the Department. In weighing this aspect of the evidence of Mr. Lowry and Mr. O'Brien, the Tribunal must have regard to all the relevant evidence which was available to it, and to the context of the interactions on 17th September, 1995, in particular:

- (i) Mr. O'Brien had been greatly concerned since the outset as to how the evaluators would assess the financial capability of Esat Digifone, and he testified that, at the conclusion of the Esat Digifone presentation, he regarded the bringing in of Mr. Desmond as a much more serious prospect. He had shared these concerns with certain of his associates on 14th September, 1995, and having been somewhat encouraged in that course, he contacted Dr. Michael Walsh, Mr. Desmond's business associate, on the following day, 15th September, 1995.

- (ii) Although Mr. Desmond testified that he had no memory of meeting Mr. O'Brien on 17th September, and Mr. O'Brien for his part could not recall the venue of their meeting, it is beyond doubt that their interaction, which Mr. Desmond later accepted as possibly having taken place, and the Tribunal is satisfied did take place on that day, was decisive as to the principle of Mr. Desmond joining the consortium, and underwriting Communicorp's financial obligations. This was confirmed by Mr. O'Brien's actions, on the following day, Monday, 18th September, 1995, when he, together with an associate, Mr. Leslie Buckley, attended a meeting with Mr. Owen O'Connell, of William Fry solicitors, and instructed Mr. O'Connell that Mr. Desmond was going ahead with financing the transaction; that they needed an underwriting letter for the Department, because finances were seen as the weakness; and that Mr. Desmond wanted 30% of the GSM company.
- (iii) Mr. Lowry was then in possession of the critical information that Esat Digifone was doing very well in the evaluation, but that the Project Group had reservations surrounding its finances, and he had demonstrated by his actions just two days earlier, at Galmoy, that he had no inhibition about sharing confidential information concerning the evaluation with interested persons.
- (iv) On the evidence, the Tribunal is satisfied that Mr. O'Brien attended the All-Ireland Final in Croke Park precisely in the expectation that he would have an opportunity to engage with Mr. Lowry, who he expected to be in attendance. Far from his fixed-line business then being the key consideration for him, as he testified, it is clear that what was consuming Mr. O'Brien's time, thoughts and actions was his perception of the Project Group's reservations concerning the finances of Communicorp, and whether he should bring in Mr. Desmond, who would guarantee Communicorp's finances, but at the cost of a dilution of its shareholding in Esat Digifone.

61.112 In all the circumstances, the Tribunal finds it wholly incredible and inconceivable that the GSM process was not raised and discussed at the meetings between Mr. Lowry and Mr. O'Brien on 17th September, 1995. The Tribunal has rejected the evidence of both men in this regard, and considers that the only realistic inference to be drawn from all the circumstances is that Mr. Lowry volunteered to Mr. O'Brien the Project Group's then assessment of the Esat Digifone application. It likewise appears to the Tribunal that Mr. Lowry must have imparted some outline information to this effect to Mr. O'Brien, when they met earlier that day in Croke Park, and that it was this information that prompted Mr. O'Brien to make contact with Mr. Desmond, before proceeding to meet further

with Mr. Lowry in Leeson Street. In all likelihood, the contact with Mr. Desmond was by telephone, and was spontaneous, and was not, as stated by Mr. O'Brien, a pre-arranged meeting.

61.113 The Tribunal has concluded that the flight from Houricans was motivated by a mutual desire on the part of Mr. Lowry and Mr. O'Brien to discuss the evaluation process, and Mr. O'Brien's prospects, in relative privacy. Whilst there is no evidence that Mr. Lowry was ever the initiator of Mr. Desmond's involvement in Esat Digifone, the Tribunal has no doubt that in the course of their half hour discussion in Hartigans, Mr. O'Brien must have shared with Mr. Lowry the single matter that was preoccupying his thoughts, namely, his strategy of strengthening the Department's perception of his side of the finances of Esat Digifone, by means of a guarantee from Mr. Desmond. Furthermore, the Tribunal has found that it was what Mr. Lowry said to Mr. O'Brien that confirmed Mr. O'Brien's view, notwithstanding the bar on further communications with the Department, of which he was well aware, that it was vital for his prospects in the evaluation to secure Mr. Desmond's involvement, and to so notify the Department. Otherwise, Mr. O'Brien's instructions to his solicitor, Mr. O'Connell, the following day, that immediate steps should be taken to notify the Department of the existence of underwriting for Communicorp's equity in Esat Digifone, in breach of the competition rules, are inexplicable.

61.114 The Tribunal likewise considers it unworthy of belief that Mr. Lowry did not comment on or give some comfort to Mr. O'Brien, regarding the consequences of conveying that information to the Department, notwithstanding the rule and direction that no further information should be submitted, of which Mr. O'Brien was very much aware. In rejecting as bereft of credibility the evidence of Mr. O'Brien and Mr. Lowry that the sole focus of conversation between them, other than the match, was on fixed-line Esat grievances, the Tribunal also considers it significant that no correspondence or other record of renewed dialogue on these grievances, of an even approximately contemporaneous date, exists.

TOWARDS AGREEMENT WITH MR. DERMOT DESMOND

61.115 Following the events of Sunday, 17th September, 1995, the deal struck between Mr. O'Brien and Mr. Desmond on that day moved speedily to conclusion. There followed a period of intense discussions between the parties, with a view to finalising Mr. Desmond's involvement in Esat Digifone, and the provision of a letter confirming his underwriting of Communicorp's equity in Esat Digifone to the Department. Concurrent with those negotiations, Mr. O'Brien had to convince Telenor that it was imperative to bring Mr. Desmond into the consortium as a

partner, and further Mr. O'Brien had to find a means of liberating Advent's 5% shareholding for acquisition by Mr. Desmond, and, less problematically, the financial institutions had to be notified that their support would not be required.

61.116 Although Mr. Desmond, as of 18th September, 1995, was seeking a 30% shareholding, agreement was reached by the evening of 20th September that Mr. Desmond would settle for a 25% interest, and would underwrite Communicorp's reduced 37.5% interest, with agreement later reached with Telenor that it too would reduce its shareholding to that level. In agreeing to such dilution, Mr. Arve Johansen, of Telenor, had been persuaded by Mr. O'Brien that, on the basis of information from what Mr. O'Brien had described as "*various very important sources*", the bolstering of the Irish element of the consortium was necessary. Telenor went along with this stratagem, believing that it was the right step to be taken from an "*official Irish standpoint*".

61.117 Around this time Mr. O'Brien had told Mr. Per Simonsen that he had met Mr. Lowry in a public house, which he had, and that Mr. Lowry had told him that IIU should be brought in as a member of Esat Digifone. Mr. Simonsen had relayed that information to Mr. Johansen and other Telenor executives, including Mr. Knut Haga, also around the same time. Whilst they all testified that they regarded Mr. O'Brien as exaggerating, there can be no doubt that they knew, whether they believed it or not, that Mr. O'Brien had identified Mr. Lowry to Mr. Simonsen as the source of information relevant to Mr. Desmond's involvement. In all the circumstances, the Tribunal has no doubt that Mr. O'Brien intended Telenor to believe that Mr. Lowry was a source of information to him, and that Telenor by its actions, in diluting its shareholding, and allowing further information to be submitted to the Department in breach of the rules of the competition, must have proceeded in the belief that Mr. O'Brien had a reliable source of information, which emanated from within or close to the circle of Departmental evaluators.

61.118 Mr. O'Brien's evidence on this aspect of Tribunal inquiries was, overall, unsatisfactory, unreliable, and in many respects in direct conflict with the documentary record. In particular, his suggestion that it was Telenor's dissatisfaction with the Advent commitment, and the less than legally binding character of the letters of intent from the other financial institutions, that had prompted him to involve Mr. Desmond, does not withstand scrutiny. In this regard, the Tribunal has found that a related letter to Mr. O'Brien from Mr. Knut Haga of Telenor, dated 15th September, 1995, recording Telenor's dissatisfaction with the Advent comfort letter and demanding a new financial assurance, was not a genuine or contemporaneous letter, but was in fact a letter requested by Mr. O'Brien, drafted with the assistance of Mr. O'Brien's solicitor, backdated to suit

Mr. O'Brien's needs, and most probably not signed by Mr. Haga until 25th September, 1995.

61.119 That backdated letter was utilised by Mr. O'Brien on 26th September, when he forwarded it to Mr. Massimo Prelz, of Advent. In his covering letter, he informed Mr. Prelz that it was clear that Esat Digifone would not be awarded the GSM licence with its existing financial arrangements, that something much stronger would be required if it was to have any chance of success, and that he, Mr. O'Brien, was working on another avenue that would provide the answer. The two men met a few days later, on 2nd October, and on the following day, 3rd October, Mr. O'Brien formally notified Advent that, as Telenor had been dissatisfied with Advent's letter of comfort of 10th July, 1995, a condition precedent to Advent's entitlement to a 5% shareholding in Esat Digifone had not been met, and the agreement of 12th July, 1995, was repudiated and terminated accordingly. This last turn of events led to a dispute between Communicorp and Advent that was not resolved until some two months after the announcement of the winner of the licence competition, by an agreement reached on 24th December, 1995. Ultimately, Advent's investment in Communicorp was to result in an overall net gain to Advent of some \$90 million.

61.120 The matter of notifying the three Irish financial institutions that their support would no longer be required was addressed on 29th September, 1995, when Mr. Kyran McLaughlin of Davy stockbrokers was so informed in person by Mr. John Callaghan, a director of Communicorp. By then, the agreements with Mr. Desmond had been finalised and executed. Later, in November, 1995, when he learned of the involvement of IIU and Mr. Desmond, Mr. McLaughlin wrote a considered letter on the matter to Mr. O'Brien, highlighting a number of concerns. However, he did not then receive a response, and it was only after the licence had been secured, in July, 1996, that Mr. O'Brien and Mr. Callaghan came to see Mr. McLaughlin to explain matters.

61.121 The precise manner in which the deal between Mr. O'Brien and Mr. Desmond was formalised, and communicated to the Department, was a matter that fell for particular investigation, and some critical and relevant comment by the Tribunal. In particular, notwithstanding that it was IIU that entered into an arrangement agreement with Esat Digifone on 29th September, 1995, and that it was IIU who sent an underwriting letter to the Department on the same day, by side-letter, IIU's obligations to Esat Digifone were immediately assigned to Bottin (International) Investments Limited, a Gibraltar-based investment company of Mr. Desmond. In addition, notwithstanding that the arrangement agreement was expressed in terms whereby IIU would procure subscribers for the 25% interest,

that side-letter and a further side-letter made clear that the 25% shareholding was to be placed with IIU or its nominees.

61.122 The two side-letters, together with the arrangement agreement, were stated to constitute the entire agreement between the parties, to the exclusion of any other commitments. A decision was taken not to furnish the Department with the contractual documentation, but instead to furnish only an underwriting letter. This was signed by Dr. Michael Walsh, and merely stated in very carefully worded terms that IIU had *“arranged underwriting on behalf of the Consortium for all of the equity (i.e. circa 60%) not intended to be subscribed for by Telenor”*. This being the full extent of what was disclosed, a number of significant matters were left deliberately undefined, including the changed composition and ownership of the consortium. Whilst the letter did not explicitly disclose that IIU was 100% beneficially owned by Mr. Desmond, he was identified at its foot, as Chairman of IIU.

61.123 Although it was the evidence of Dr. Walsh, Mr. Desmond and Mr. O’Brien that there had been no intention or attempt to obscure or conceal any significant element of those agreements from the Department, and Dr. Walsh’s evidence in particular that the letter was a straightforward commitment, and there was nothing stopping the Department from seeking further information, the Tribunal has found that there was nothing straightforward about the contents of the underwriting letter, or about the commitment that had been made by Mr. Desmond. The letter plainly suggested some third party involvement in the arrangement of underwriting, whereas the truth was that neither Mr. Desmond, nor any of his vehicles, whether IIU or Bottin, had arranged any underwriting for Communicorp’s shareholding, or any other shareholding in Esat Digifone, from any other party. Mr. Desmond, who had assigned his entitlement to Bottin, had himself agreed to underwrite Communicorp’s shareholding, and his consideration for that undertaking, as patent from the side-letters, was his entitlement, as principal, to 25% of the shares in Esat Digifone.

61.124 The true intention behind the underwriting letter, including the rounding terminology *“circa 60%”*, was to inform the Department evaluators of sufficient to enable them to conclude that Communicorp’s equity contribution was covered, but insufficient to lead them necessarily to believe that there had been a departure from the ownership and shareholding specifications provided in the Esat Digifone application. To that end, the letter had been carefully framed and deliberately couched in vague and ambiguous terms. The object of the exercise was to enhance the Esat Digifone application, specifically by endeavouring to dispel the perception that Communicorp’s finances were weak,

and, in doing so, in breach of the rules of the process, to reveal no more than was necessary to achieve that purpose.

THE FINAL QUALITATIVE SESSION IN COPENHAGEN

61.125 Returning to the evaluation process, the five remaining dimensions of the qualitative evaluation were due to be evaluated at meetings of the relevant sub-groups in Copenhagen on 19th and 20th September, 1995. The dimensions to be evaluated were:

- (i) Financial Key Figures;
- (ii) International Roaming;
- (iii) Market Development;
- (iv) Tariffs;
- (v) Experience of Applicant.

All sub-groups proceeded, with the exception of the Financial Key Figures sub-group. That sub-group could not commence until the mandatory tables submitted by applicants had been reformatted, in accordance with specifications furnished by Mr. Billy Riordan on 15th September, 1995. Although Mr. Riordan travelled to Copenhagen on that occasion, the reformatting work was not completed by AMI in time, and Mr. Riordan returned to Dublin at the conclusion of the session, having been unable to advance the substantive evaluation. Ultimately, that evaluation proceeded without his input, and it was not to be until 9th October, 1995, in advance of the scheduled Project Group meeting that day, that Mr. Riordan, together with Mr. Donal Buggy, his accountancy colleague, had an opportunity to review the award of marks made in his absence, used in the meantime to arrive at a ranking of applicants.

61.126 The other four dimensions were evaluated by Development Division personnel, that is Mr. Martin Brennan, Mr. Fintan Towey and Ms. Maev Nic Lochlainn, in consultation with AMI consultants. Among the dimensions to be evaluated, Tariffs, with a weighting of 18, was by far the most significant dimension in the entire evaluation, and two others, Market Development and Experience of Applicant, were two of the three dimensions of the first-ranked criterion. The four dimensions, the other being International Roaming, collectively represented over 40% of the weighting in the entire evaluation.

61.127 As was generally the case with the qualitative evaluation, the Tribunal's attempt to understand how these matters were assessed was hampered by the absence of a reliable documentary record or trail, and, on analysis, there were decisions taken at this time in Copenhagen, in relation to these significant

dimensions, which were surprising and difficult to understand. In this regard, whilst the Tribunal does not believe that the evaluators ever consciously intended to approach the evaluation otherwise than fairly and with open minds, it cannot have been ideal that by this time, as has been seen, they came to this part of the evaluation with the perception that there were now two distinct divisions, and that in the first division Persona and Esat Digifone were both ahead, with Esat Digifone being the likely front runner. The loss of relativity and anomalies apparent in the conversion of the quantitative results for Tariffs and Experience of Applicant, on a scale of 5 to 1, to qualitative marks on a scale of A to E, which benefited Esat Digifone, were notable. A full analysis of the evaluation of those dimensions can be found in Chapter 29.

MR. ANDERSEN'S MEMORANDUM OF 21ST SEPTEMBER, 1995

61.128 The day after the completion of the final qualitative evaluation session, on 21st September, 1995, Mr. Andersen faxed a memorandum to the Department, addressed to Mr. Brennan and Mr. Towey, which contained an analysis of, and a timetable for, the work to be completed by AMI and by Departmental personnel respectively, and identified certain decisions that were required to be taken. These included progressing the qualitative evaluation of the Financial Key Figures dimension, as well as the qualitative evaluation of Other Aspects, of which Risks was one of the defined dimensions. In that connection, Mr. Andersen identified certain financial risks associated with the two top-ranked applicants, Persona and Esat Digifone. In respect of Esat Digifone, this included three years of negative solvency, combined with the weak financial strength of Communicorp. However, having identified those risks, Mr. Andersen suggested that, if there was a clear ranking and separation between the two best applicants, by reference to four of the five Aspects that formed the substance of the qualitative evaluation, the fifth set, Other Aspects, should not be scored, but should merely be addressed in the narrative of the Evaluation Report.

61.129 In addition, Mr. Andersen proposed that at a meeting, or by conference call, on the following Thursday, 28th September, 1995, the Marketing and Financial Aspects sub-totals in the qualitative evaluation should be determined, even though the central dimension of the latter, Financial Key Figures, had yet to be evaluated. He also suggested that the exercise of aggregating the marks for the entire qualitative evaluation, in order to arrive at a grand total, by reference to the qualitative marking matrix, might also be agreed on that day. Finally, and in an extraordinary turn of events, Mr. Andersen asked that the Department instruct him on how the quantitative evaluation results, the second set of which had been furnished to Mr. Brennan in Copenhagen the previous day, should be integrated

in the Report, whilst at the same time indicating his preference that the question be left unanswered until final results were available.

61.130 These questions were set out clearly at the end of Mr. Andersen's memorandum, yet Mr. Brennan and Mr. Towey did not then or ever bring this memorandum or those questions to the attention of the Project Group, nor even to the attention of the two other Principal Officer members of the Project Group, Mr. Sean McMahon and Mr. John McQuaid. Instead, Mr. Brennan and Mr. Towey, without involving any other person, decided that the matter required a face-to-face meeting in Copenhagen on 28th September, 1995, with them alone as representatives of the Project Group.

61.131 Whilst the marking of the four Aspects sub-totals, and the determination of a grand total for the qualitative evaluation, would have been integral elements of the overall evaluation, had it proceeded in accordance with the Evaluation Model, as matters evolved, these steps became decisive as to the ultimate outcome of the process. For reasons which were entirely undocumented, and which Mr. Brennan could not explain, he resolved to exclude the Project Group from these considerations, and effectively to constitute himself and Mr. Towey as sole arbiters of them on the Departmental side for the purposes of the meeting of 28th September, 1995. In the event, the meeting in Copenhagen was attended by only four persons, the other attendees being Mr. Andersen and Mr. Jon Brüel, of AMI, and the decisions taken at that meeting were to prove momentous for the outcome of the competition process.

THE COPENHAGEN MEETING OF 28TH SEPTEMBER, 1995

61.132 Notwithstanding its critical importance, there was a dearth of documentary material available regarding the meeting in Copenhagen on 28th September, 1995, and matters were not assisted by the absence of clear or consistent recollection on the part of those who attended. Notably, Mr. Andersen at first, and until an advanced stage of his belated evidence, maintained that no such meeting took place, and whilst he later recognised that the meeting did take place, as the Departmental witnesses had testified, and as AMI's own invoices demonstrated, in the circumstances he could provide the Tribunal with little or no assistance on what transpired on that occasion. He did however accept that it was an important meeting, at which the matters raised in his memorandum of 21st September, 1995, had been addressed.

61.133 The three principal tasks undertaken at that meeting were:

- (i) the sub-totalling of the Marketing and Financial Aspects;

- (ii) the taking of a decision concerning the evaluation and scoring, or otherwise, of the dimensions of Other Aspects;
- (iii) the aggregation of the marks in the qualitative evaluation to arrive at a grand total for that limb of evaluation, for each of the six applicants.

61.134 In the course of the meeting, three tables of results were generated, which later appeared in the draft and final Evaluation Reports as Tables 16, 17 and 18, and were presented as representing not just the results of the qualitative evaluation, but the results of the entire evaluation. In generating those tables, marks for the Financial Key Figures dimension were used, which Mr. Billy Riordan had no role in determining, and which he and his colleague, Mr. Donal Buggy, subsequently revised. Table 16 was in the form of the qualitative marking matrix set forth in the Evaluation Model. Table 17 contained the same marks, but with the dimensions regrouped by reference to the evaluation criteria which they reflected, in accordance with the paragraph 19 ranking. Table 18, in the same form as Table 17, presented the results numerically. Tables 17 and 18 were further distinguishable from Table 16, in that they set forth what were recorded in the draft Evaluation Reports as the quantitative weightings for each of the eleven dimensions. Within the confines of this executive summary, only Table 17 will be reproduced, but reference should be made to Chapter 31 of this Volume, in which all three tables appear.

Dimension	Weight	A1	A2	A3	A4	A5	A6
Market development	10	C	C	B	C	A	C
Financial key figures	10	A	C	B	C	B	C
Experience of applicant	10	C	D	A	C	B	C
Radio network architecture	10	C	C	B	B	A	D
Capacity of the network	10	C	D	C	B	A	C
Tariffs	18	C	D	B	C	C	A
Licence payment	11	A	A	A	A	A	A
Coverage	7	B	C	A	C	A	D
Roaming	6	A	D	C	C	C	C
Performance guarantees	5	D	E	C	B	A	C
Frequency efficiency	3	A	C	A	A	A	A
GRAND TOTAL		B↓	C↓	B	B↓	B↑	C↑
RANKING		3	6	2	4	1	5

61.135 Table 18 was identical to the above Table 17, save that the marks A to E were converted to scores of 5 to 1, and the grand total was shown numerically, with A5 at 432, and A3 at 410. That exercise was proposed by Mr. Brennan, and although resisted by Mr. Andersen as inappropriate to a qualitative evaluation, was adopted in the Report, subject to a qualification that it distorted the “*idea of a qualitative evaluation*”, which qualification was ultimately excluded, at the instance of the Department, from the final Report. The differential between A5

and A3 on that calculation, less than 5%, was even narrower than that between the top two applicants on the first set of quantitative results of 30th August, 1995, which Mr. Andersen had described to the Project Group as “*relatively close*”.

61.136 It seems that it was by reference to Table 17 that the Copenhagen meeting arrived at a grand total in the qualitative evaluation. It was Mr. Towey who, as in so many other respects, engaged constructively with the Tribunal’s inquiries, explained as best he could how that table was generated. The objective was to separate A3, Persona, and A5, Esat Digifone, and thereafter to mark the other applicants by reference to them. This separation was effected by analysing the comparative performance of Persona and Esat Digifone on the eight evaluation criteria, as reflected by their associated dimension marks. As Esat Digifone was clearly superior on the second criterion, represented by the dimensions Radio Network Architecture and Capacity of the Network, and the seventh criterion, Performance Guarantees, as against Persona’s superiority on Tariffs, the third criterion, it was concluded that Esat Digifone was the better applicant.

61.137 In conducting this analysis, the dimension weightings, as shown in Table 17, were never deployed in an empirical sense, but nonetheless played a significant role. The conclusion that Esat Digifone was the better applicant had proceeded on the footing that Esat Digifone and Persona had ranked equally on the first-ranked criterion, as both had received equal marks, of one A and two Bs for the three relevant dimensions, Market Development, Financial Key Figures and Experience of Applicant. However, in making that assumption, the three dimensions were treated as being of equivalent importance, and weighted equally at 10 each, as shown in Table 17. That did not represent the weightings agreed by the Project Group in advance and recorded in the Evaluation Model, which were unequal weightings of 7.5 for Market Development, 10 for Experience of Applicant, and 15 for Financial Key Figures. Had those weightings, or weightings reflecting the relative significance attributed to those dimensions, been used in the exercise conducted, it could not have been concluded that Esat Digifone and Persona were equal on the first-ranked criterion, and, as acknowledged by Mr. Towey, it would then have been difficult to find that Esat Digifone was the better applicant overall, by means of the analysis he related.

61.138 The application of those equal weightings in Copenhagen on 28th September, 1995, and the consequent treatment of those three dimensions as being of equivalent importance, was never satisfactorily explained. It was an issue which taxed members of the Project Group up to the final day of the process, and was never resolved. Mr. Michael Andersen’s belated evidence, of some undocumented decision having been taken at some unknown point in the

process, was of little assistance. It is beyond doubt that a significant departure was made in the weightings applied at this decisive point in the evaluation process.

61.139 The results and ranking which emerged, without the input of the Project Group, were thereafter treated as the results and ranking in the evaluation process, and were conveyed to Mr. Michael Lowry before the membership of the Project Group was made aware of them. They were predicated on a decision that Other Aspects should not be scored, including the dimension Risks. By then the financial vulnerability of Esat Digifone, arising from the negative equity of Communicorp, a matter intended to be a precondition for eligibility to entry to the comparative process, had been long identified as a material risk. The results and ranking were also predicated on a decision that the separate results of the quantitative evaluation, which had yielded a very different ranking, should not inform or influence the outcome of the process.

THE IIU UNDERWRITING LETTER OF 29TH SEPTEMBER, 1995

61.140 On Friday, 29th September, 1995, the IIU underwriting letter, signed by Dr. Michael Walsh, was faxed to the dedicated GSM competition fax number at the Department, marked for the attention of Mr. Martin Brennan. The letter informed the Department that IIU had arranged underwriting for Esat Digifone in respect of “*all of the equity (i.e. circa 60%) not intended to be subscribed for by Telenor*”. Mr. Brennan, having travelled elsewhere from Copenhagen the previous day, had not yet returned to the Department, and it was Mr. Towey who received the letter. The letter was returned by Mr. Brennan on the following Monday, 2nd October, 1995, not to Dr. Walsh, or to Mr. Seamus Lynch, the Esat Digifone designated GSM co-ordinator, to whom all other Departmental correspondence had been addressed, but directly to Mr. Denis O'Brien, as Chairman of Esat Digifone. Although Mr. Brennan in his initial attendance sought to distance himself from that decision, and from knowledge of the contents of that letter, the Tribunal is satisfied that the determination that the letter should be returned was one for which Mr. Brennan was responsible, and the Tribunal is likewise satisfied that Mr. Brennan knew from that letter that underwriting had been put in place to cover Communicorp's intended equity in Esat Digifone, the focus of Project Group inquiries at the oral presentation the previous week. The Tribunal further regards it as improbable that Mr. Dermot Desmond's association with IIU, as apparent from that letter, did not register with Mr. Brennan or Mr. Towey.

61.141 Neither Mr. Brennan nor Mr. Towey sought to involve AMI as consultants in that decision, nor was the fact of the letter or its contents brought to the attention of the Project Group, or any of its members. In so determining,

and in seeking to protect the integrity of the process, Mr. Brennan undoubtedly acted correctly, and by responding in the manner that he did to Mr. O'Brien, rather than to IIU, he clearly acted in a considered and carefully judged fashion. Having said that, however, there were many elements of this matter which were not satisfactorily explained in evidence. Why was no consideration given to the breach of the competition rules on the part of Esat Digifone? Why did the couched and ambiguous information contained in that underwriting letter not put the Department on inquiry, at least to the extent of investigating the matter further, or, at a minimum, clarifying whether the financial information contained in the Esat Digifone application, or as conveyed at the oral presentation, remained valid?

61.142 Mr. Brennan and Mr. Towey had no difficulty in recognising the letter for what it was, namely, an impermissible effort on the part of Esat Digifone to enhance the financial standing of Communicorp. Their actions and their instincts, in rejecting the letter and returning it, were understandable. Whilst they had insulated the Project Group from awareness of the additional impermissible information contained in that letter, they were themselves burdened with it as the process moved forward, and when issues surrounding the finances of the two top-ranked applicants remained to be resolved.

DEPARTMENTAL DEVELOPMENTS, FIRST WEEK OF OCTOBER, 1995, AND ARRIVAL OF FIRST DRAFT REPORT

61.143 At an inter-Divisional meeting within the Department, on 3rd October, 1995, it was noted among other things that Mr. Michael Lowry wanted to accelerate the GSM evaluation process. This information was conveyed by Mr. Brennan, who must have spoken in advance of the meeting to Mr. Lowry in that regard. Whilst the meeting noted the Minister's position, it was also noted and no doubt recognised that the formal legalities of the process were more complicated, and might require time to come to completion.

61.144 At the same meeting, it was proposed that, contrary to what had previously been agreed by the Project Group, copies of the first draft Evaluation Report, then due from AMI, would not be circulated to members in advance of the next scheduled Project Group meeting, on 9th October, 1995, when this draft was to be discussed. Instead, it would be retained by the Development Division, to be consulted in confidence by Project Group members. This decision was supported by AMI, probably as a result of a discussion in Copenhagen on 28th September, and is exactly what transpired. In consequence, most members of the Project Group did not have sight of the first draft Report until the commencement of the Project Group meeting, on 9th October, 1995, and furthermore, written

observations on the draft, which it had been agreed should be made before that meeting, could not arise.

61.145 The first draft Evaluation Report was received by the Department on Wednesday, 4th October, 1995. Its contents are considered in detail in Chapter 34, and, as appears from that analysis, it reflected the qualitative evaluation conducted over the previous weeks, and the decisions taken in Copenhagen on 28th September, 1995, including, notably, that no consideration should be given to the quantitative results as representing a separate limb of evaluation, and that Other Aspects, including the financial risks identified in the case of the top applicants, should not be scored. The Report comprised five sections, of which the last, which set forth the outcome of the evaluation, comprised the three tables generated in Copenhagen on 28th September, that is, Tables 16, 17 and 18. The weightings shown in Tables 17 and 18, including the equal 10/10/10 weightings for the dimensions of the first-ranked criterion, were misdescribed in the draft Report as the weightings agreed prior to the closing date for quantitative purposes. Table 18, which presented the qualitative marks numerically, was subject to a rider that it distorted the idea of a qualitative evaluation. No reference was made to the quantitative results, either in the body of the Report, or in its appendices.

61.146 Section 3, by far the lengthiest section, outlined in detail the outcome of the qualitative evaluation by reference to each of the eleven dimensions assessed, including the Financial Key Figures dimension. The evaluation of that dimension had been conducted without the input of Mr. Billy Riordan, and was yet to be reviewed by him. Section 4, reflecting the decision taken that Risks and Sensitivities should not be scored, comprised a narrative exposition of the risks identified. Included within the section was a statement that the weakest feature of the Esat Digifone application was the negative equity of Communicorp, and the consequent risk to the project, including to solvency, potentially critical in a worst case scenario, was noted. On the day the result was announced, a Departmental request, implementing Mr. Michael Lowry's views, that this passage, together with a related recommendation that, if licence negotiations were to be opened with Esat Digifone, an increased level of liability and self-financing should be required from its shareholders, be deleted from the final Report, was refused by AMI. It was not until Mr. Michael Andersen's belated attendance, that the true intent of that section, as representing the sole consideration of the paragraph 19 precondition of financial capability, came into focus, as it was a matter which Departmental officials did not draw to the Tribunal's attention at any point in the course of its substantive inquiries.

61.147 A number of appendices were included with the first draft Report, and their contents are also reviewed in Chapter 34. Notable among them was Appendix 3, which reproduced the Evaluation Model. The quantitative weighting table, contained in the Model as reproduced in the appendix, was in accordance with the recorded weightings, and included the unequal weightings of 7.5/10/15 for the three dimensions of the first-ranked criterion. Also of significance was Appendix 10, which set forth the results of supplemental financial analysis conducted by AMI in respect of the two top-ranked applicants, Esat Digifone and Persona. Errors in the figures used in the Persona computation, which significantly overstated the potential worst case equity exposure of its shareholder, Sigma, were apparent. That appendix also recounted in stark terms the inability of members of both Esat Digifone and Persona to meet their capital requirements. Together with the risks and sensitivities section, it featured specifically in the views of Mr. Michael Lowry, as conveyed by Mr. Martin Brennan to the Project Group and later implemented, in relation to how that material should be addressed and downplayed in the final Report.

MR. LOWRY'S INTERACTIONS WITH MR. BRENNAN

61.148 The Tribunal has concluded on the evidence that, by his interactions with Mr. Brennan during the first week of October, 1995, Mr. Lowry directly endeavoured to and did influence both the Project Group and the Departmental handling of the process. In particular, the Tribunal has found, on the basis of the documentary record, and having regard to the evidence of Mr. Brennan, Mr. Lowry and others engaged upon Project Group deliberations at this time, that Mr. Brennan, upon his return from Copenhagen after 28th September, 1995, had a detailed conversation with Mr. Lowry, wherein he informed Mr. Lowry of the outcome of the Copenhagen meeting, including the identity of the two top-ranked applicants, and the ranking that had emerged. This information was furnished to Mr. Lowry before the first draft Evaluation Report was available, before the Project Group had been informed, and before the Project Group had an opportunity to consider the ranking, much less approve it. Furthermore, that ranking, based solely on the outcome of the qualitative evaluation, was disclosed at a time when AMI were in the process of conducting supplemental analysis, and before either Mr. Riordan or Mr. Buggy had reviewed the Financial Key Figures evaluation, and even though the financial capability precondition had yet to be addressed.

61.149 Although denied by Mr. Lowry, the Tribunal is satisfied that it was during this briefing on the part of Mr. Brennan that Mr. Lowry made it known to Mr. Brennan that he wished to accelerate the process. Around the same time, Mr. Lowry also made this desire known to his Programme Manager, Mr. Colin McCrea,

and in turn Mr. Brennan informed those who attended the Departmental inter-Divisional meeting, on 3rd October, 1995, that Mr. Lowry wished to accelerate the process. However, none of the Departmental witnesses could assist the Tribunal as to why Mr. Lowry might have wished to do so. All were agreed that the process had proceeded in accordance with the projected critical path, and that the evaluation was on target for an announcement at end-November. Some witnesses speculated that political pressures might have been at the root of Mr. Lowry's desire, but as Mr. Lowry denied ever having wished to accelerate the process, or ever having had anything to do with the timetable for the process, or its implementation, he could not assist in that regard.

61.150 The Tribunal has no doubt that it was Mr. Lowry, as Minister, who brought about the ultimate acceleration of the process, and who, as will be seen, determined that the result should be announced on 25th October, 1995, more than one month early, notwithstanding that this entailed the abridgement of time sought and granted for further consideration by the Project Group of the results and ranking. Further, it was Mr. Lowry who put in place a strategy that enabled the result to be announced on that day, without a full Government Decision. In these circumstances, what was recorded at the meeting of 3rd October, 1995, to the effect that the Minister wanted to accelerate the process, was entirely consistent with events as they unfolded. This was further evidenced and confirmed by the records and notes of the Project Group meeting on 9th October, 1995, which extended, firstly, to a reiteration of Mr. Lowry's intention to accelerate the process, and secondly, to a recounting of Mr. Lowry's views on how the Project Group should approach the presentation of the ranking in the Evaluation Report, and how in particular the issue of financial vulnerability should be presented, and offset by reference to the notion of bankability.

61.151 In opening that Project Group meeting of 9th October, 1995, whose business was to consider and, for most members, to read the first draft Evaluation Report for the first time, Mr. Brennan informed the Group that the Minister knew the shape of the evaluation and the order of the top two applicants, and was disposed towards a quick announcement, after the finalisation of the Evaluation Report. By the "*shape*" of the evaluation, it was accepted by Mr. Brennan and others, and supported by further recorded references to Mr. Lowry's views, that this signified outline information regarding the main features of the evaluation. In this regard, Mr. Brennan also informed the meeting, at an early stage and before the matter was reached in turn, that when it came to a consideration of Appendix 10, concerning financial risks, the Minister did not want the Report to undermine itself, and that either a project was "*bankable*", or it was not. These views, the Tribunal is satisfied, were the specific proposals of Mr. Lowry, as communicated to Mr. Brennan in a further discussion between them about the GSM process, which took place after 4th October, when

the first draft Report was received, and before 9th October, when the Project Group met.

61.152 Whilst there is no evidence that a copy of the first draft Evaluation Report was provided to Mr. Lowry, there was ample evidence that Mr. Brennan made some part of the Report available for information purposes to Mr. Lowry's Programme Manager, Mr. McCrea, who read it and returned it to him, and that this may well have occurred before the meeting of 9th October, 1995. The Tribunal is satisfied that Mr. McCrea, whose interest in the matter was entirely co-extensive with that of Mr. Lowry, must have discussed what he had learned from his reading with Mr. Lowry. Whether it was on the basis of that source, or from his direct discussions with Mr. Brennan, it is undoubtedly the case that Mr. Lowry offered to Mr. Brennan the concept of bankability as a solution to the financial frailties of the leading consortia. Despite his protests to the contrary, it was a concept with which Mr. Lowry was more than familiar, having been the first to introduce it, and to have referred repeatedly to it, in evidence given to the Tribunal in a different context some years earlier.

61.153 Overall, the Tribunal found Mr. Lowry's evidence in this regard formulaic, evasive and unhelpful. His evidence, of having had no role other than as a recipient of outline information brought to him by Mr. Brennan, was wholly inconsistent and irreconcilable with the documentary trail, and with the evidence of Departmental witnesses, and the Tribunal has had no hesitation in rejecting it.

61.154 Mr. Brennan's dealings with Mr. Lowry in the first week of October, 1995, were contrary to the principles that governed the GSM selection process, and to the safeguards intended to secure its integrity, fairness and independence. Their interactions on the substantive process, which commenced in mid-September, 1995, effectively opened up a separate source of influence on, and direction to, the evaluation, which was outside the Project Group, and impacted significantly on the outcome of the evaluation, and in particular on the pivotal issue of the assessment and treatment of Esat Digifone's financial capability.

THE ACCOUNTANTS' RESERVATIONS SURROUNDING THE FINANCIAL EVALUATION

61.155 On Monday, 9th October, 1995, in advance of the penultimate Project Group meeting of that day, Mr. Billy Riordan and Mr. Donal Buggy had an opportunity to review the results of the qualitative evaluation of the dimension Financial Key Figures. Mr. Riordan was less than comfortable with the reliability of the relevant work that had been undertaken by AMI, including their work in the re-formatting of the mandatory tables, which he had requested in vain should be

done by the time he had travelled to Copenhagen for the final qualitative session on 19th September, 1995. The marks for the Financial Key Figures indicators had since been incorporated into the qualitative marking matrix by those who attended the meeting in Copenhagen on 28th September, in order to arrive at a qualitative ranking, which in turn, to the exclusion of the quantitative analysis, determined the ranking arrived at in the first draft Evaluation Report. This had been achieved without input from Mr. Riordan or Mr. Buggy, who were the accountants deputed to the Project Group from the Department of Finance and from the Department respectively.

61.156 In the course of their review, the accountants made certain changes to the marks that had been awarded for the eight indicators in the qualitative evaluation, and to the overall grades for the dimension Financial Key Figures. In particular, the Financial Strength indicator for Esat Digifone was reduced by them from grade B to grade C, on the grounds that Communicorp did not have sufficient strength for its 50% share. In the case of the indicator Liquidity, the mark awarded to Persona was increased by them from D to C, whereas that for Eurofone was reduced from A to D. In the case of the indicator Profit/Interest Expenditure, Cellstar was downgraded from B to C. The net result of these indicator revisions was that the overall dimension marks for three of the consortia were downgraded, as follows: Irish Cellular from C to D; Esat Digifone from B to C; and Eurofone from C to D. The overall marks for the other consortia were unaffected.

61.157 The accountants' revisions, if adopted, could have had a significant impact on the ranking of applicants in the process as a whole, a consequence recognised at the time by Mr. Buggy. In the event, for reasons that remain unclear, and were not adequately or satisfactorily explained in evidence, their revisions were not considered by the Project Group. Instead, it appears, the revisions may have been addressed in separate discussions and fax communications with AMI, in which, notably, references to the critical modifications to the Esat Digifone mark for Financial Strength, and the Persona mark for Liquidity, were omitted. There are many aspects of what occurred in relation to this financial review which the Tribunal finds strange, and for which no satisfactory solution was given in evidence. The frailty of recollection exhibited by both accountants, regarding every aspect of the exercise they undertook, and how matters transpired thereafter, was striking. It significantly contrasted, in the case of Mr. Riordan, with the clarity of his recall of the qualitative sessions he attended in Copenhagen, and the complications he had identified and subsequently sought to resolve in the base figures contained in the mandatory tables.

61.158 It might have been expected that Mr. Andersen, as lead consultant, would have been able to advance or resolve matters. However his memory of events was likewise poor, and he was unable to provide material assistance. Further, such explanations or rationalisations as he offered, as to how these problems were addressed and resolved, were unconvincing.

61.159 In all the circumstances, the Tribunal has concluded that what in fact must have occurred is that the views and misgivings of the accountants, including in relation to the Esat Digifone and Persona marks, were made known on 9th October, 1995, on an occasion outside the Project Group, and that their advices in that regard were given, but not followed. Although it is surprising that matters were not pursued further by them, it should not be overlooked that the seconded accountants' perception of their role, as providers of an expert resource to civil servants, rather than as decision-makers in their own right, may well have been material to what occurred.

61.160 What is beyond question is that it was the view of the only two members of the Project Group who had accountancy and financial skills, that the mark awarded to Esat Digifone for the financial evaluation was wrong, and that, instead of receiving an overall B grade, the Esat Digifone application warranted a C grade. What is also beyond question is that there is no direct evidence that their views were ever brought to the attention of the Project Group, and it is equally clear that, for some reason, their revisions were not accepted, and that the Esat Digifone grade for the financial limb of the evaluation remained at B, and, consequently, the ranking in the evaluation was not thereby revisited.

THE PROJECT GROUP MEETING OF 9TH OCTOBER, 1995

61.161 The meeting of 9th October, 1995, was the penultimate formal Project Group meeting of the evaluation process. The various participants met with different and opposing expectations and perspectives, whereby some members, who had not seen the draft Evaluation Report until that moment, envisaged that the entire Group would participate collectively in a substantive review of the evaluation; and others, notably Mr. Brennan and Mr. Towey, who considered that the evaluation was effectively complete. In the case of this critical meeting of the Project Group, there was a unique record of proceedings available to the Tribunal, in the form of a full and detailed set of contemporaneous notes made by an Executive Officer, who, in Ms. Maev Nic Lochlainn's absence, attended the meeting for that purpose. Surprisingly, these notes were at one stage subject to a claim of privilege by the Department, later withdrawn, when challenged by the Tribunal. From the records and notes of the meeting, it is clear that the business of the meeting was afflicted by the decision not to circulate the draft Report in

advance. Furthermore, the information imparted to the Group at the outset, that the Minister knew the shape of the evaluation and the order of the two top-ranked applicants, gave rise to a natural element of surprise and concern on the part of some, who from their experience as civil servants knew that it would be very difficult in practice to reverse a ranking of which the Minister was already aware. In the view of Mr. Ed O'Callaghan, of the Regulatory Division, this meant that for all practical purposes the process was at an end.

61.162 At all events, the meeting proceeded on the footing that the ranking that had emerged from the Copenhagen meeting, of 28th September, 1995, represented the result of the evaluation, not just in a provisional sense, but subject only to a review by the Project Group directed towards the presentation of results, and not a substantive review. If there was any doubt about this, in answer to a query from Mr. O'Callaghan as to what would happen in the event of disagreement, Mr. Brennan replied that the evaluation had been conducted by teams comprised of most of the membership of the Project Group. Allied to this was the consideration that the Minister knew that ranking, and had expressed the view that the Report should not undermine itself, and further proposed that the financial frailty of the winning consortium should be addressed by reference to the concept of bankability, meaning that banks would regard the GSM project as an attractive investment, and be willing to fund its operation, which would provide a solution to any perceived financial frailty. As will be seen, this very approach was ultimately adopted, and informed certain eleventh hour amendments made to the Evaluation Report, at the instance of the Department.

61.163 The Project Group meeting also addressed certain structural issues pertaining to the methodology of the evaluation that had been conducted. To what extent the broader membership of the Project Group could have followed the discussion of these issues, or contributed in any meaningful way, is doubtful. Apart from Mr. Brennan and Mr. Towey, the members were entirely unaware of the extent to which the evaluation had progressed, and the evidence confirmed that there was a large degree of confusion among the wider membership as to what was discussed and agreed at the meeting.

61.164 What in fact took place in terms of the methodology and structure of the Report was, first, that it was proposed by Mr. Andersen that the results of the quantitative evaluation should not be presented as a separate output of the process. In so recommending, no reference was made to the consideration that, in all three versions of the quantitative analysis that had by then been completed, the ranking that emerged was considerably at odds with the ranking that had emerged from the qualitative evaluation. Had that been highlighted or properly appreciated, further consideration might obviously have been given by the Project

Group to the reasons for the divergence, to the justification advanced for abandoning the dual approach which underpinned the Evaluation Model, and to the reliability of the approach proposed.

61.165 In fact, most members of the Project Group were not aware of the second version of the quantitative results, dated 20th September, 1995, furnished to Mr. Brennan in Copenhagen on that day and never distributed to the Project Group. Further, although Mr. Andersen testified that he had brought a copy of the third set of quantitative results with him to the meeting, according to the evidence heard, this set was never seen by any Departmental witness. Mr. Andersen contended that the quantitative results were statistically unreliable by a margin of some 50%, which the Tribunal, on examination, and as a matter of common sense, does not believe to have been the case. Although it is not part of the Tribunal's mandate to determine whether the abandonment of the quantitative analysis was justified, it is difficult to overlook the fact that Mr. Andersen himself, in September, 1995, stated that it was his preference that a decision, on how the quantitative results should be incorporated into the Evaluation Report, should be postponed until the results were known. Either the quantitative results were or were not statistically reliable, and if they were not, Mr. Andersen's views on their incorporation should not have turned on the outcome of any results.

61.166 The remaining structural issues raised at the meeting related respectively to the weightings, in respect of which the departures from the Evaluation Model in the Report just distributed were either not noticed, or not pursued; the financial information data, in respect of which Mr. Riordan sought the express assurance of AMI that they were satisfied with every aspect of the mandatory financial tables, and would take responsibility for and stand over the financial evaluation; and the results tables, which were presented, but not explained or critically appraised. A further point in relation to the financial element was that no further analysis of the financial risks associated with Persona or Esat Digifone was necessary because, as advised by AMI, the analysis was effective, and any additional analysis would only constitute a risk to, in the sense of potentially undermining, this element of the evaluation.

61.167 The latter part of the meeting revolved around a page-by-page review of the draft, and the taking of proposals for amendments made by Mr. Brennan and Mr. Towey, the only members who had had an opportunity to study it in advance. Much consideration was directed to Section 4, the narrative treatment of Risks and Sensitivities, not scored in the evaluation. It was that section which recorded AMI's marker directed to the financial capability of Esat Digifone, arising from the negative equity of Communicorp, and the consequent risks to the

project, together with AMI's recommendation, that a greater level of liability and self-financing should be sought from shareholders, if negotiations were to be opened with Esat Digifone. Mr. Andersen regarded these passages as material to consideration of the paragraph 19 precondition, not addressed in advance of the evaluation, or in the course of it.

61.168 The financial risks associated with Esat Digifone, as identified in that section, were met at the meeting with observations to the effect that there was no doubt that Esat Digifone would survive, that the problem was not unique to any one consortium, that a more balanced statement was required, that members of the consortium brought different elements, and that mutual underwriting by shareholders could be required. These contributions, directed to AMI's marker surrounding the finances of Esat Digifone, could not have emanated from Mr. Andersen, who had authored the passage, or from Mr. Riordan or Mr. Buggy, who had earlier that day formed a negative view of Esat Digifone's financial strength by reason of Communicorp's negative equity. The Tribunal is left in no doubt that it was Mr. Brennan who was the protagonist, and that his contributions were an extension of his comments, in opening the meeting, that it was Mr. Michael Lowry's view that, by reference to Appendix 10, containing the financial risk analysis, the Report should not undermine itself, but should be balanced, and regard should be had to the bankability of the project. Mr. Brennan, together with Mr. Towey, was also at that point in possession of information, unknown to the Project Group, that Communicorp's equity was in fact already underwritten.

61.169 From an overall consideration of the records of what transpired at the meeting of 9th October, 1995, it is unclear what purpose the meeting served, in terms of the substantive evaluation, other than to provide a forum for those members of the Project Group who had a familiarity with the draft Report, or portions of it, to make their views known regarding the style and presentation of the material, and to enable AMI to proceed to a second draft Report. There was no presentation to the Project Group of the evaluation conducted, or the ranking which emerged, as recorded in the draft Report, in any provisional sense. Moreover, there was nothing to show that the Project Group was briefed with information that would have enabled the Group to give any meaningful consideration to what had been done in its name, particularly bearing in mind that the majority had come to the Report for the first time.

61.170 With the benefit of an overview of all of the available evidence, the Tribunal is compelled to observe that by 9th October, 1995, events had overtaken the Project Group as the instrument of evaluation and decision-making in the GSM process. In particular, despite the clear evidence that no agreement was reached by the Project Group on that date approving the ranking in the first draft

Evaluation Report, and that some members expected work on the qualitative evaluation to continue, matters proceeded thereafter as if there had been such agreement, and even unanimous agreement. More generally, the determination that the ranking which had emerged should not be reviewed, challenged or disturbed by the Project Group, continued to be the principal objective of activities as events unfolded after 9th October, 1995, and, as will be seen, this led to a complete breakdown of consensus within the Project Group in the days immediately prior to the announcement of the result.

MR. LOWRY'S DETERMINATION TO ANNOUNCE THE RESULT ON 24TH OCTOBER, 1995

61.171 It will be recalled that the projected date for the announcement of the winner of the competition was end-November, 1995. The decision was reserved to the Government, on the recommendation of the Project Group, to be relayed by Mr. Lowry. Yet, on Tuesday, 17th October, 1995, Mr. Fintan Towey, of the Development Division, informed Mr. Ed O'Callaghan, of the Regulatory Division, that Mr. Lowry wanted to bring a recommendation to Cabinet on 24th October, 1995, just one week later. This information had probably come through Mr. Martin Brennan, who in turn may have known about Mr. Lowry's intentions, either directly from discussions or contacts between them, or indirectly through Mr. Loughrey, who, however, and somewhat implausibly, denied knowing anything at all about the matter, or through Mr. Sean Fitzgerald, Assistant Secretary.

61.172 It was Mr. Lowry's evidence, as already alluded to, that he had absolutely nothing whatsoever to do with the acceleration of the process. It was his view that the issue of timing had been determined as of 14th September, 1995, when Mr. Brennan wrote to Mr. Andersen, at the conclusion of the AMI fee dispute, and stipulated a timeframe for the provision of draft Reports, and a final Report, by AMI. As regards the Departmental records, it was his evidence that he could not be responsible for comments that might have been attributed to him, accurately or otherwise. The Tribunal found Mr. Lowry's evidence in this regard wholly unconvincing, and has no difficulty in rejecting it. It is undoubtedly the case, on the basis of the multiplicity of documentary records, and the evidence of Mr. Brennan, Mr. Towey and Mr. Colin McCrea, that Mr. Lowry's design of accelerating the process and announcing the result, which, from the available documentation, can be traced back to 2nd or 3rd October, 1995, when he was informed by Mr. Brennan of the ranking which had emerged from the Copenhagen meeting of 28th September, had, by Tuesday, 17th October, been converted into a definite intent to proceed to Government on 24th October, 1995.

61.173 Whilst there can be no question surrounding Departmental awareness of Mr. Lowry's plans, it is perhaps no more than a mere coincidence, but is

nonetheless noteworthy, that persons outside the Department, and specifically those with an interest in Esat Digifone, were, as of 10th October, 1995, the day following the penultimate Project Group meeting, also in possession of the self-same information. It was on that day that Mr. Per Simonsen, the Telenor GSM co-ordinator, attended a meeting with Mr. Arthur Moran, of Matheson Ormsby Prentice, solicitors, who had just been instructed by Telenor to represent their interests in shareholder negotiations. Mr. Moran kept an attendance of that meeting, in which, as he confirmed in evidence, he had recorded a number of matters, including: *“Decision – end of November 1995 – in fact decision 2/3 weeks.”*

61.174 Mr. Simonsen’s positive statement concerning the timing of the decision was in complete contradiction to the official information then available to Telenor. Whilst all of this may point to nothing more than the existence of coincidence, it is undoubtedly curious that Mr. Simonsen, when instructing Matheson Ormsby Prentice for the first time, should have happened to refer to the very time frame for the announcement of the result that Mr. Lowry himself then had in mind.

61.175 On Friday, 20th October, 1995, steps were taken by the Development Division personnel to prepare documents to be used in briefing Mr. Lowry about the result, and a briefing session for that purpose was arranged for 4.30pm on Monday, 23rd October, to follow the Project Group meeting of that day. These documents were also to form the basis of the formal documents required to bring the recommendation to Government. The Tribunal has concluded that these briefing documents did not, by any objective standard, contain a balanced or factually correct account of the evaluation process, or of the results of the qualitative evaluation, as set forth in the draft Evaluation Report. This conclusion was accepted by the author of the documents, Ms. Maev Nic Lochlainn, who it should be said was acting at the direction of her superordinate officers, Mr. Brennan and Mr. Towey, the latter of whom accepted that he had reviewed and approved the documents. She explained that her object, in preparing those briefing documents, was to endeavour to fulfil her remit to present the winner, Esat Digifone, in the most positive comparative light.

61.176 The results of the evaluation process, as relayed in the principal briefing document, were erroneous. Its contents constituted a slanted presentation of the comparative performance of the two top-ranked applicants, and would have conveyed to any person relying on it a false impression of the results, and of the degree of separation between those applicants. Also critically omitted from the document was any reference to the financial frailty of both applicants, and the reservations recorded by AMI regarding Esat Digifone in the

draft Report, which Mr. Andersen ultimately insisted, in the face of Departmental opposition, on retaining in the final Report. Likewise, the document addressed to the evaluation process methodology had omitted all reference to any intended quantitative evaluation.

61.177 In the event, as the matter never proceeded to Government, otherwise than to ratify a decision of the party leaders made informally, and announced publicly in advance of any Cabinet consideration, it never proceeded to Cabinet for a decision in the sense contemplated by the earlier Government Decision of 2nd March, 1995. Having said that, although the briefing session on the afternoon of Monday, 23rd October, 1995, did not proceed on that date, that does not mean that the documents were not put to use. It seems that the document which purported to detail the performance of the two top applicants was most probably utilised by Mr. Lowry in making his recommendation to the party leaders on 25th October, 1995.

61.178 It is unclear what prompted the Development Division officials to construct such an inaccurate account of the results. This exercise was undertaken in the name of the Project Group, but without the knowledge of the Group, and at a time when it was accepted that the Group had not approved the ranking, and had not yet even met to consider the second draft Report. What is undeniable, however, is that the ethos underlying the construction of the documents, as propounded by Ms. Nic Lochlainn, namely that the result should be presented in a positive vein, accorded entirely with Mr. Lowry's recorded view that the Report should not undermine the result.

THE RELEVANCE OF THE FINE GAEL GOLF CLASSIC EVIDENCE

61.179 Leaving the process to one side for the moment, reference should be made to Esat Digifone's participation at this time as a sponsor, albeit a deliberately discreet if not anonymous sponsor, of a Fine Gael Golf Classic held on 16th October, 1995, which coincided with a critical point in the evaluation process. What distinguished that donation from others addressed in Chapter 6 of this Volume was its proximity in time to the conclusion of the evaluation process, its source, the joint bank account controlled by Communicorp and Telenor used for the purposes of the Esat Digifone application, and its apparent association with interactions relating to Esat Digifone's prospects in the competitive process. It was these distinguishing features which necessitated a deeper inquiry into the circumstances surrounding it.

61.180 Arising from the evidence heard by the Tribunal in this regard, there was a stark and tendentious conflict of evidence between Mr. O'Brien and Mr.

Mark FitzGerald, as polarised as any evidential controversy heard by the Tribunal, relating to two meetings that Mr. FitzGerald testified had taken place between the two men in August and October, 1995, both at Mr. O'Brien's request, in the Shelbourne Hotel, Dublin, and at Lloyds Brasserie, Dublin, respectively. The fact of these meetings, and the detail of what Mr. FitzGerald recounted in relation to them, were vehemently contested by Mr. O'Brien. Particular relevance to the GSM related inquiries of the Tribunal were two strands of Mr. FitzGerald's evidence, to the following effect:

- (i) That, at the first meeting, Mr. O'Brien explained to Mr. FitzGerald that he was applying for the mobile phone licence, and that he was facing an uphill struggle against Motorola, as he described the Persona consortium. He further stated that it was rumoured that a senior Fianna Fáil politician and member of the previous Government, whom he named, was in line for a pay-off if Motorola was granted the licence, this being the same rumour that Mr. Michael Lowry drew attention to at the outset of the process. Mr. O'Brien also said that he wanted to keep up his profile with Fine Gael, and that he had heard of an impending golf outing being run by the party. According to Mr. FitzGerald, his response was that, in his view, it might be unwise for Mr. O'Brien to be involved in the golf outing, in the circumstances of being an applicant for the GSM licence, but that, if he really so wanted, Mr. David Austin was running the event.
- (ii) That, at the second meeting, Mr. O'Brien asked Mr. FitzGerald had he heard any news on the licence, and Mr. FitzGerald informed him, as was the case, that he had bumped into Mr. Lowry at the K Club Golf Classic, and that Mr. Lowry had then volunteered to him, without being prompted by any inquiry from Mr. FitzGerald, that Mr. O'Brien had made a good impression on the Department, and that he had good sites and good marketing. Mr. FitzGerald may also then have imparted to Mr. O'Brien and his companions a further observation that had been made by Mr. Lowry, to the effect that there would be a third licence anyway.

61.181 From an overall assessment of the evidence, including the evidence of Mr. Lowry, the Tribunal has concluded that it is appreciably more plausible that both meetings occurred, largely as described by Mr. FitzGerald, than that he should have fabricated an entirely untrue account in relation to each. As regards the first meeting, it is somewhat surprising that this conflict generated so much controversy, and that it appeared to have been a highly sensitive one from Mr. O'Brien's perspective, as what Mr. O'Brien is said to have ventilated and canvassed hardly diverged significantly from Mr. O'Brien's admitted and

professed intention to attend Fine Gael fundraising functions, with a view to raising the profile of himself and his consortium. The exchange between Mr. Lowry and Mr. FitzGerald at the K Club is not without significance, in that it again demonstrated the propensity on the part of Mr. Lowry, as in the case of his interaction with Mr. Anthony O'Reilly at Galmoy, to volunteer inappropriately confidential aspects of the process, of which he should not even then have been aware, during the closed and most critically sensitive phase of the competition.

THE SECOND DRAFT EVALUATION REPORT

61.182 Returning to the process, the second draft Evaluation Report arrived in the Department on Thursday, 19th October, 1995, was distributed promptly, and at least some members of the Project Group had an opportunity to study its contents in advance of what was to be the final Project Group meeting on the following Monday, 23rd October. It contained a new section on methodology, which aimed to provide a brief resumé of how the competitive process had been conducted, but which, however, gave a less than fully accurate representation of certain elements of the process, including in particular the following:

- (i) the absence of any reference to an intended separate quantitative evaluation and the results of that evaluation;
- (ii) an intimation that an evaluation was conducted on credibility, risks and sensitivities;
- (iii) a statement that unanimous support was given to the result on 9th October, 1995.

61.183 Some of these deficiencies were, at least in part, met following scrutiny by members of the Project Group. However, in respect of the decision not to publish the quantitative results, the Tribunal has concluded that none of the relevant discussions of the Project Group at the time, such as they were, nor any of the explanations later advanced in evidence by any member of the Project Group, including Mr. Michael Andersen, provided either the real or a satisfactory basis for having so radically departed from the Evaluation Model. Furthermore, the Evaluation Model, as adopted by the Project Group on 9th June, 1995, although it had been faithfully reproduced in Appendix 3 to the first draft, was altered in the second draft Report, in that the weightings for seven of the fourteen indicators, as shown in the quantitative weightings tables comprised in the Model, had been changed. Had certain of those weightings, that is, the weightings for the three dimensions of the first-ranked criterion, not been altered from 7.5/10/15 to 10/10/10, it would have quickly become apparent to anyone

making a reasonably close study of the Report that there was an incongruity between the Evaluation Model and the weightings shown in the results tables. However, in consequence of the alteration and reconstruction of the weightings table, anybody who checked the Evaluation Model, as reproduced in Appendix 3, would be led to believe that the weightings shown in Tables 17 and 18 were verifiably those decided upon by the Project Group in advance of the closing date of the competition.

61.184 The Departmental witnesses expressed their shock at this alteration, and testified that they were unaware of it until brought to their attention by the Tribunal. In the case of at least some of the members of the Project Group, this seems understandable, as Mr. Andersen confirmed that the alteration had been made by AMI, and the distribution of the second draft Report may not, at least initially, have included copies of the appendices. At the same time, Mr. Andersen offered no cogent explanation for the alteration of the weightings table in the Evaluation Model as purportedly reproduced in Appendix 3. In particular, his evidence that a fax communication from Ms Nic Lochlainn, dated 6th October, 1995, constituted an instruction to AMI to alter the quantitative weightings table, does not withstand even the most superficial scrutiny.

61.185 In the event, the outcome of the alteration to the weightings table in the Evaluation Model, as reproduced in Appendix 3, falsified the historical record, and the consequence of that falsification was to represent the weightings for the dimensions of the first-ranked criterion, as shown in Tables 17 and 18 of the Evaluation Report, and as explained in the accompanying text, as being consistent with the weightings prescribed for quantitative purposes in the Evaluation Model. Those changes to the weightings of the three dimensions of the first evaluation criterion may have impacted on the overall ranking that emerged. As will become apparent, this issue of the relative weighting of these three dimensions continued to trouble members of the Project Group in the closing days of the process.

61.186 The second draft Report also incorporated significant revisions to the supplemental analysis on financial risks contained in Appendix 10 to the Report. The approach underlying these revisions had been proposed by Mr. Brennan, at the Project Group meeting of 9th October, 1995, and reflected Mr. Michael Lowry's views on how the perceived financial frailty of the winning consortium, or any of its members, should be addressed in the final Report. In the second draft, the scope of the analysis was broadened to include an analysis of the risks of the four last-placed consortia, including Irish Mobicall, the third-ranked applicant, even though the first draft had recorded that their finances were "*not seen as a risk*".

61.187 Whilst a number of minor changes had been made to the presentation of the material comprised in the appendix, a significant substantive revision had been made to the financial risk analysis of Esat Digifone. The multiplier used in estimating the worst case equity requirement of Communicorp had been reduced from 2 to 1.5, thereby limiting its potential exposure from £52 million to £39 million. In revising the multiplier down, AMI based its workings on Esat Digifone's cash flow sensitivity figures. It is unclear whether that revision was warranted, and if so, why the correct multiplier had not been imported in the analysis reflected in the first draft Report. Despite revisiting Appendix 10, what was not remedied in the second draft was the flawed analysis in the case of Persona, for which an incorrect multiplier continued to be used, which overstated by a significant margin the worst case equity exposure of its shareholder, Sigma. That error was never corrected, and was translated into the final Report.

61.188 It seems incontrovertible, from the documentary trail, that the expansion of Appendix 10 to embrace the four last-placed consortia, excluded for good reason from the first draft, was made in response to the proposition advanced at the meeting of 9th October, 1995, that financial problems were "*not unique to anyone*". Likewise, it seems unlikely that AMI's reworking of the figures for the worst case equity exposure of Communicorp, whether these were warranted or not, was unconnected with Mr. Michael Lowry's view that the Report should not "*undermine itself*", in the context of Appendix 10, as recorded in the contemporaneous notes, and that there was "*no doubt that A5 will survive*".

THE OUTSIDE VIEW OF MR SEAN FITZGERALD

61.189 Mr. Sean Fitzgerald, Assistant Secretary of the Department, was at this time given a copy of the second draft Report by Mr. Martin Brennan, for what Mr. Fitzgerald described as an outside view, and in what may also have been an effort to assist in resolving tensions between Development Division and Regulatory Division personnel on the Project Group. Mr. Fitzgerald was already aware that Esat Digifone was emerging as a likely front runner in the process, having previously been so informed by Mr. Brennan. In reviewing the Report, Mr. Fitzgerald reserved his closest scrutiny for the final sections, and in particular the results tables and narrative passages contained in that section. On the basis of the results, as shown in Tables 16, 17 and 18, Mr. Fitzgerald concluded that, as between the two leading applicants, the result was "*very close*", as he had noted, or, as he agreed in evidence, the two were roughly the same. He regarded the narrative comparison of the top two as "*more persuasive than the Tables*". He was unaware that, between the first and second draft reports, that narrative had been deepened by AMI, at the request of the Development Division, and that it tended to overstate the performance of Esat Digifone.

61.190 It came as no surprise to Mr. Fitzgerald that Communicorp did not have the capital required to finance the second GSM network. He noted that there was “a very strong rider”, as he termed it, that the financial difficulties of Esat Digifone remained, and that the financial strength of Telenor would not and could not secure the stability of the consortium’s shareholding. Nor, in his view, could that end be achieved by any other underpinning of a financial nature. In these circumstances, Mr. Fitzgerald very much regretted that, when the recommendation was ultimately made to the party leaders on 25th October, 1995, the rider surrounding the finances of Esat Digifone had not been highlighted, and that the party leaders had not been made aware of the “health warning” surrounding the finances of Esat Digifone, as registered in the Report by AMI.

61.191 Having reviewed the draft Report, Mr. Fitzgerald prepared a separate document, setting out his analysis of the consequences of awarding the GSM licence to Esat Digifone, and the regulatory imperatives which, to his mind, would flow from that decision. These included, notably, a recognition that the award of the licence to Esat Digifone would have to be accompanied by fresh political resolve, and stricter regulatory enforcement of compliance by Esat Telecom with licence conditions, on the fixed-line side of its business. Much of Mr. Fitzgerald’s thinking on this point was soon to find its way into and become an integral part of the Government decision of 26th October, 1995, ratifying approval secured by Mr. Lowry the previous day to open negotiations for the issue of the GSM licence to Esat Digifone as the winning consortium.

DISSENTING VIEWS ON THE SECOND DRAFT REPORT

61.192 The extent of the disparity in understanding between Mr. Ed O’Callaghan, as a member of the Project Group, and Mr. Martin Brennan, as Chairman, who with Mr. Towey was effectively steering the process, was brought into stark relief by Mr. O’Callaghan’s evidence in relation to the second draft Evaluation Report, and the decisions taken in the closing stages of the process. Mr. O’Callaghan had no knowledge of the second set of quantitative results, of 20th September, 1995, which had produced a ranking of Persona, Eurofone, and Esat Digifone in third place, even though a copy of the results were on the Departmental file. Nor was he aware of the third set of quantitative results, of 2nd October, 1995, which had produced a different ranking where Persona was in second place, and Esat Digifone was in fourth place. He had no appreciation that any decision had been taken at the Project Group meeting of 9th October, which he had attended, that the quantitative results would not be published, nor had he any familiarity with the notion that the quantitative evaluation had “withered”. As of 20th October, 1995, when reviewing the draft, he fully expected that the

quantitative analysis would be returned to after the qualitative evaluation had been completed, and this continued to be his understanding right up to the announcement of the winner. Furthermore, as events unfolded, Mr. O’Callaghan never saw a copy of the final Report until it came to his attention in the course of the Tribunal’s inquiries. He testified that he may have assumed at the time that the quantitative evaluation results had in fact appeared in the final Report.

61.193 In the course of his review of the second draft Report, Mr. O’Callaghan had identified a series of queries and reservations that went to the kernel of the substantive evaluation, and, had there been time or opportunity for these points to be considered by the Project Group, they could have impacted on what then continued to be, at least theoretically, a ranking yet to be approved by the Group.

61.194 The accountants, Mr. Donal Buggy and Mr. Billy Riordan, also registered what may fairly be described as dissenting views on the second draft Report. By this stage Mr. Riordan had, understandably in the light of his unsatisfactory dealings with AMI in respect of the financial element of the evaluation, formed a determination that AMI should accept full responsibility for that element of the process. The most significant matters of concern to the accountants related to details of the constituent Aspects tables and the results tables, and whether the dimension weightings shown in the latter tables were those agreed by the Project Group. As regards the weightings shown for the three dimensions of the first ranked criterion, Mr. Riordan had explicitly noted that the weightings used in the results tables were “*not agreed by Project Group*”, and that there was “*no reason why the 10s should be split in this way*”. Details of the points and suggested recalculations recorded by the accountants are considered in Chapter 44 of this Volume, and whilst certain of those matters were addressed at the Project Group meeting of 23rd October, 1995, and in some cases rectified in the final Report, others, including doubts surrounding the weightings applied, and the financial analysis, particularly the grade awarded to Esat Digifone for Financial Strength, continued to subsist.

CLOSING DAYS OF THE PROCESS

61.195 Consideration of events over the closing days of the process must be prefaced with the observation that, to a greater or lesser degree, the Tribunal was not furnished with a fully reliable account of what transpired over those days by any of the witnesses from whom evidence was heard. Were it not for the limited documentary sources available, it is unlikely that even the less than satisfactory accounts tendered would have been forthcoming. Many Departmental witnesses showed a marked reluctance to engage with, or respond to, the Tribunal’s inquiries, and instead relied on the relative remove of those events to justify an

absence of recollection. In many instances, the Tribunal found that want of recall less than convincing, having regard, in particular, to the uniqueness of the events which occurred, the level of dissent prevalent between members of the Project Group, and the turbulent circumstances in which the process was brought summarily to conclusion by direction of Mr. Lowry.

61.196 In outline, and with the benefit in particular of a contemporaneous chronology document prepared by Mr. Ed O'Callaghan, produced to the Tribunal following consideration and legal advice as to whether it was privileged, and a set of contemporaneous notes made by Mr. Sean McMahon in his personal journal, it is clear that what in fact occurred was that on Monday, 23rd October, 1995, the scheduled Project Group meeting proceeded with a full complement of the membership in attendance, although Mr. Andersen was only present for part. The meeting commenced at 11:00am, and Mr. Martin Brennan opened proceedings by informing those in attendance that Mr. Lowry wanted a result that day, but that he had not been promised one. There was pronounced dissent within the Group, and this culminated at 3:30pm with a decision that Mr. John Loughrey, Secretary General, should be consulted to adjudicate on the impasse that had been reached. That impasse was between those members who, in the light of Mr. Lowry's request for a result that day, to enable him to proceed to Government the following day, believed that the result was not sufficiently clear, that they could not conclude whether Esat Digifone or Persona were ahead, and that further time was required to revisit the evaluation, and those who believed that the evaluation had concluded, and that the result should be made available to Mr. Lowry. A delegation comprising Mr. Brennan, Mr. Sean McMahon and Mr. John McQuaid, who were probably accompanied by Mr. Sean Fitzgerald, met with Mr. Loughrey, and a relatively lengthy meeting then ensued.

61.197 There was a surprising and striking absence of recollection on the part of those in attendance, with the exception of Mr. McMahon, and to a lesser extent, Mr. McQuaid. Apart from reference in Mr. O'Callaghan's chronology and Mr. McMahon's personal notes, there was no record of this side-meeting within Departmental files, and the official report of the Project Group meeting, which issued in the following December, was silent as to its occurrence.

61.198 The upshot of the meeting with Mr. Loughrey was that it was accepted that the draft Report was unsatisfactory, and would require further work and clarification. In consequence, Mr. Loughrey agreed that additional time be made available, and what seems to have been contemplated was that the Project Group should have a further week to complete its work. As a result of this decision, which it was understood Mr. Loughrey would clear with Mr. Lowry, the time pressure that had been imposed by Mr. Lowry's deadline, of proceeding to make

a recommendation to Government on 24th October, 1995, had been lifted, and the Project Group believed that it would have a further week within which to revisit matters and complete its work.

61.199 The objections which gave rise to this extension of time were overwhelmingly directed to the substance of the evaluation, and to the ranking, as disclosed in the second draft Report. Whilst being satisfied that Persona and Esat Digifone were the front runners, Mr. McMahon and Mr. O’Callaghan clearly expressed the Regulatory Division’s view that the result was too close to call, and that the Report was not clear enough. More generally, the evidence supports the conclusion that the Project Group remained at odds as to whether certain of the most significant weightings and grades were correct, and in particular there was ongoing contention surrounding the weightings applied to the three dimensions of the first evaluation criterion. On being informed towards the end of the meeting, as a result of the intervention of Mr. Loughrey, that the deadline had been lifted, the membership of the Project Group believed that there would now be ample time to address and resolve these and other areas of disagreement and concern.

A GUILLOTINE IS APPLIED BY MR LOWRY

61.200 The Tribunal’s inquiries into the events of Tuesday, 24th October, 1995, were met with a wall of silence, based on frailty of recollection and inadequacy of memory on the part of those who participated in the decisions made and directions given on that day, which was to be the penultimate day of the process. In particular, with the notable exceptions of Mr. O’Callaghan and Mr. Fintan Towey, not one of the Departmental witnesses, including those who had been at the fulcrum of events, was in a position to assist the Tribunal as to how, or why, the further week extended to the Project Group to revisit the evaluation was withdrawn, against what must have been the advice of Mr. Loughrey, or as to how, or why, a determination was made that the result should be brought to Government, and announced immediately thereafter, on 25th October, 1995.

61.201 It is clear that, at some time after the side-meeting of the previous afternoon, Mr. Loughrey consulted with Mr. Lowry, and Mr. Lowry countermanded the decision to extend time, so that in the course of the morning of 24th October, 1995, it became known to the membership of the Project Group that Mr. Lowry intended to announce the result on the following day, Wednesday 25th October, 1995. In the circumstances, the Project Group had to make do with the time available to finalise the existing draft Evaluation Report, but effectively a decision had been made, in the words of Mr. O’Callaghan it was a “*fait accompli*”, and there was no question of a different ranking or a different winner emerging.

61.202 The withdrawal of time from the Project Group, on Tuesday, 24th October, and the imperative placed on the Group, was not merely to provide a result by the following day, but to provide a result with a view to Government clearance, and to a public announcement on Wednesday, 25th October, 1995. As no Cabinet meeting was scheduled until Thursday, 26th October, it follows that consideration must also have been directed on Tuesday, 24th October, to how Government approval could be secured the following day, to enable an announcement to be made immediately. Otherwise there would have been no reason to impose that deadline on the Project Group. As and from Tuesday, 24th October, 1995, the Tribunal is satisfied that it was intended that the result would be rushed through a meeting of the party leaders, which Mr. Lowry was due to attend the following day, that de facto approval would thereby be secured without formality, and without Cabinet being accorded any time to consider the recommendation or result, much less the four to six weeks contemplated at the outset of the process. The latter course of abridging time for Government consideration was Mr. Lowry's design as and from 2nd or 3rd October, 1995, when he learned of the ranking that had emerged, and first conveyed his intention to accelerate the process.

61.203 The Project Group assembled in the late afternoon, to focus on all that could be achieved in the time now available, namely final amendments to the draft Report. That meeting, which proceeded late into the evening, and concluded at approximately 11.00pm, was directed solely to the editing of the second draft Report, and to the presentation of the result based on the marks recorded in that draft, and the ranking arrived at in Copenhagen on 28th September, 1995. It was in effect a drafting meeting, rather than a formal meeting of the Project Group, and no minutes were taken of its deliberations. No alterations were made to the draft Report to reflect the continuing doubts surrounding the appropriateness of the marks awarded, and the correctness of the weightings applied. Instead, the meeting, as led by the Development Division, edited and restructured the draft Report, by a series of changes which are described and considered in Chapter 47 of this Volume. By those changes, the meeting managed to edit out of the final record many of the shortcomings of the process, the closeness of the result, the application of quantitative weightings to the outcome of a qualitative evaluation, and other matters of qualification or reservation, including reservations that had been entered by AMI to the distorting effect of the numerical presentation of the result, based on a qualitative evaluation.

61.204 An additional and telling set of amendments was proposed by the Development Division to the risks and sensitivities section of the draft Report, which embraced AMI's marker that the negative equity of Communicorp could potentially prove critical to the success of the project, and AMI's recommendation

that, if licence negotiations were to be opened with Esat Digifone, a greater level of liability and self-financing should be required from shareholders. What was proposed was that AMI's marker and recommendation should be removed from the section, and replaced with a passage stating that the weakness of any one member of a consortium was not considered fatal, provided there was a financially strong member, having regard to the bankability of the project. The intention was that this concept, which originated with Mr. Lowry, and which was of questionable application to an equity deficit, should be deployed to counter the financial inadequacy of consortia as identified in Appendix 10, and to give effect to Mr. Lowry's preference that the report should not undermine the result. This it seemed represented consideration of the paragraph 19 precondition of financial capability, although it must be said that it is unlikely that the Project Group as a whole appreciated the import of those proposals.

61.205 On the late conclusion of the drafting meeting, as with other elements of the process, those members of the Project Group centrally involved exhibited opposing expectations about what had been achieved, and what was left to be done. On the one hand, there was the view, articulated by Mr. Fintan Towey, that the work of the Project Group had terminated, that the ranking had been agreed, that the necessary changes had been finalised, and that all that was outstanding was for those changes to be cleared with AMI, and for AMI to incorporate them into the final Report. On the other hand, there was the view propounded by Mr. Sean McMahon that he had reserved his position, not only in relation to the drafting changes, but on the far more fundamental issue of subscribing to the ranking, until he had sight of the final Report, which he expected to receive on 25th October, 1995. His evidence was that he had made it clear that if the final Report did not, in his view, justify the result, he would not subscribe to it.

THE EVENTS OF 25TH OCTOBER, 1995

61.206 On Wednesday, 25th October, Mr. Martin Brennan and Mr. Fintan Towey liaised with AMI concerning the final amendments to the second draft Report. As a result of an exchange of fax communications and a conference telephone call, the Department's amendments were agreed to by AMI, and in particular, notwithstanding reservations on the part of Mr. Andersen to the presentation of the results, the Department's views prevailed. Furthermore, Mr. Andersen's requirement, that the final Report should contain a disclaimer of AMI's responsibility for the presentation of the results in a form not proposed by AMI, was not acceded to by the Department, and in the event Mr. Andersen was prepared to finalise the Report without that statement, on the basis of a formulation which compromised the substance of his disclaimer. What Mr. Andersen was not however prepared to cede was the wholesale revision of the

risks and sensitivities section, and the removal of his marker surrounding Communicorp's finances, and the recommendation made in that regard, although he did accept the importation of the bankability solution as an antidote to those deficiencies. In the event his insistence on his qualification and recommendation being retained was of little consequence, as Mr. Lowry never relayed those matters to his Cabinet colleagues.

61.207 It is unclear at what time the conference call between the Department and AMI concluded, whether the issues between them were disposed of by it, whether those issues in fact necessitated further interaction, or whether, for that matter, the issues were even resolved by the time Mr. Lowry made his recommendation to the party leaders, at 4.00pm that afternoon, and subsequently made his public announcement. Mr. John Loughrey, Secretary General, who by then had taken control of positioning the result, as he described it, testified that he had not seen a copy of the final Report until a day or two after 25th October, and he was quite certain that he had not read the Report until 26th October, at the earliest. He was supported in that aspect of his evidence by Mr. Martin Brennan, who confirmed that Mr. Lowry did not have a copy of the final Report, when he attended a Ministerial meeting at 4.00pm that afternoon, and delivered his recommendation, but Mr. Brennan felt that, by that time, he was in a position to state that everything had been agreed, but had yet to be printed and delivered.

61.208 The Tribunal is satisfied that there can have been no complete copy of the final Report, or of a draft encompassing all amendments, in the Department on 25th October, 1995. It was undoubtedly the position that the Project Group did not have sight of any such copy of the Report on that day, and did not have an opportunity to review or approve its contents. At the same time, it is clear that Mr. Lowry proceeded on the footing that he had a final result, and having secured political clearance during the course of that afternoon from the leaders of the parties in Government, Mr. Lowry called a press conference for 5.00pm, and announced that the competition process had been concluded, and had been won by Esat Digifone.

61.209 The power of decision in the matter was reserved to Government, not to Mr. Lowry, on foot of the recommendation of the Project Group. Yet the matter was not considered by Government until 26th October, 1995, the day following the public announcement, when it proceeded to Government merely to note the result already announced by Mr. Lowry. This course was enabled by Mr. Lowry's actions on 25th October, when he had telephoned the Taoiseach, Mr. John Bruton, and sought access to the three party leaders of the Coalition Government, with a view to advance clearance for his intended announcement of the outcome of the

GSM competition. In response, Mr. Bruton then met in private with Mr. Lowry, and from Mr. Bruton's contemporaneous notes of that meeting, and from his evidence, it is clear that Mr. Lowry, in support of his proposal that the result should be announced in advance of full Cabinet consideration and approval, referred to a number of extraneous political considerations. These included prejudicial references to connections between the second and third-ranked consortia and, respectively, a former Taoiseach and member of the previous Government, and the then Minister for Finance. Incorrectly citing the example of Italy, Mr. Lowry also referred to the possibility of legal action by the European Commission in the event that the Government did not follow the recommendation of the Project Group.

61.210 Following their private interview, Mr. Bruton and Mr. Lowry either joined, or were joined by the Tánaiste, Mr. Dick Spring T.D., Mr. Proinsias De Rossa T.D., and Mr. Ruairi Quinn T.D., who, as Mr. Lowry was aware, were due to meet as a Cabinet sub-committee dealing with an aviation matter that Mr. Lowry, as the Minister responsible for Aer Lingus, was also scheduled to attend. Mr. Bruton, Mr. Spring, Mr. De Rossa and Mr. Quinn each testified that it was their recollection that Mr. Lowry informed them that the GSM competition process had been completed, that he had a result, and that Esat Digifone was the clear winner. Each of them testified to having understood from Mr. Lowry that the outcome was clear, that the evaluators had been unanimous, that Esat Digifone was well ahead of the next-ranked consortium, and that the outcome had not been close. There was unanimity amongst those in attendance that no reference had been made by Mr. Lowry to any financial reservation, frailty or qualification in respect of the first-ranked consortium, a matter regretted by Mr. Sean Fitzgerald, Assistant Secretary with responsibility for all telecommunications activities within the Department.

61.211 The party leaders knew nothing of the events of the previous days and weeks, within the Project Group and the Department. Nor were they aware of the concerns of certain members of the Project Group, nor of the doubts surrounding the finances of Esat Digifone, the significant departures which had been made from the evaluation methodology adopted prior to the closing date of the competitive process, and the possible consequences of those departures. Nor it seems were they aware of how close the result had been. Had they been so aware, it is clear from their evidence, and independently from the evidence of Mr. Greg Sparks, Mr. Spring's Programme Manager, that they would have wished to explore matters beyond the level of consideration given by them on the afternoon of Wednesday, 25th October, 1995.

61.212 In presenting the result, Mr. Lowry referred to the numerical score of the two top-ranked applicants as being 432 as against 410, yet this score emerged from weightings which remained in controversy, and was the product of converting and presenting subjective qualitative considerations numerically, which AMI had cautioned against, on the grounds that it could distort the idea of a qualitative analysis, and which had emerged from a process initiated by two representatives of the Department in Copenhagen, on 28th September, 1995.

61.213 It was Mr. Lowry's evidence, rejected by the Tribunal, that, in conveying the result to the Taoiseach, and to his Cabinet colleagues, he had relied entirely on information provided to him by Mr. Loughrey concerning the process and the results. He testified that he knew nothing in advance. He had been provided with briefing documents, and it was to the contents of those documents that he had regard. He knew nothing of the financial frailty of Esat Digifone, arising from the finances of the Communicorp element of the consortium. As far as he was concerned, he relied on his civil servants, who had informed him that the result was clear and unconditional.

61.214 In the event, and understandably, the party leaders and Mr. Quinn collectively approved the recommendation made by Mr. Lowry that exclusive negotiations should be opened with Esat Digifone. Mr. Lowry's further proposal that he should proceed to announce the result forthwith, rather than postpone the announcement until after the result had been considered by Cabinet at a meeting scheduled for the following day, was also approved. Mr. Lowry recommended this course to his colleagues by reference to the potential for unauthorised disclosure once the result was available. In so securing what was *de facto* Government approval, otherwise than through the route of bringing a recommendation to Cabinet on foot of an Aide Memoire, or a memorandum for Government, or even by deferring the matter to the scheduled Cabinet meeting the following day, procedures which had been put in place by Mr. Bruton and his colleagues, when the Rainbow Coalition entered Government, were rendered of no application to the GSM decision. In particular, the opportunity for scrutiny, or consideration by his Cabinet colleagues, or their advisers, was precluded.

61.215 Contrary to much of the evidence heard, the Tribunal has found that there was nothing spontaneous, unplanned or unexpected in those events. Mr. Lowry's design to accelerate the process by proceeding to secure approval, and thereafter to make an immediate announcement, was not one that he formed in consequence of advice received from Mr. Loughrey, or any other Departmental official on 25th October, or earlier days that week. Rather, his intention in that regard was recorded from as early as Tuesday, 3rd October, when Mr. Brennan so informed the inter-Divisional meeting that day, and was reiterated on Monday, 9th

October, when Mr. Brennan opened the Project Group meeting by announcing Mr. Lowry's intention to announce the result quickly. During the succeeding week, Mr. Lowry's intention was converted into a determination to bring the result to Government on Tuesday, 24th October, 1995. That plan was thwarted by Mr. Sean McMahon's refusal to support the result, and Mr. Loughrey's decision, following his meeting with the delegation of Principal Officers on the afternoon of Monday, 23rd October, that the Project Group should have a further week to conclude its work. That time was withdrawn on Tuesday, 24th October, and from Mr. Loughrey's evidence, it is clear that it was only Mr. Lowry who could have countermanded Mr. Loughrey's decision, and it was Mr. Lowry who insisted that he intended to announce the result publicly on Wednesday, 25th October, 1995.

61.216 The foregoing took place against a background of turbulent dissent within the Project Group, and in particular between the two most senior and experienced Principal Officers, Mr. Martin Brennan and Mr. Sean McMahon. Against that known and undoubted background, Mr. Loughrey's evidence regarding his role in the events of Wednesday, 25th October, 1995, to the effect that he had little recollection of events, but was instrumental in arranging matters on foot of the Project Group's robust and unanimous recommendation, was not merely unsatisfactory, but was strikingly at odds with the knowledge that he must be taken to have had at the time.

61.217 The degree of dissent within the Project Group is graphically illustrated by the fact that the Regulatory Division, in the persons of Mr. McMahon and Mr. Ed O'Callaghan, was not informed of Mr. Lowry's intention to announce the result that day, but first became aware of this development very shortly before the press conference took place. The Tribunal has concluded in this regard that neither Mr. McMahon nor Mr. O'Callaghan had agreed, as of 25th October, 1995, that Esat Digifone was the winner of the competition, yet their views were disregarded, and a guillotine was brought down on the work of the Project Group by Mr. Lowry.

CABINET NOTING OF THE DECISION ALREADY IN FORCE

61.218 The evaluation process was formally brought to a conclusion by asking the scheduled Cabinet meeting of 26th October, 1995, to note the decision already made, and announced by Mr. Lowry on the previous day, with the approval of the party leaders, and Mr. Ruairi Quinn. The matter came before Cabinet by means of an Aide Memoire which contained an outline of the evaluation process, the result of that process, the steps then required to be taken, and the implications of the licensing of a second operator. The decision was duly noted by Cabinet, which procedure was, in the events that transpired, no more than a formality to ensure substantial compliance with the conditions of the

Government Decision of 2nd March, 1995, which had authorised the process at the outset.

61.219 Of further significance were the ancillary matters relating to the regulation of the fixed-line sector, which Cabinet was asked to note in that Aide Memoire, and which were also duly noted by the Decision of that date. In consequence, provision was made for a range of tariff increases by Telecom Éireann for leased-lines, and for the strict enforcement of the law and regulations concerning the provision of telecommunications services. Whilst it seems that these matters must have arisen at the instance of Mr. Sean Fitzgerald, and reflected at least in part his thoughts, following his review of the second draft Report, on regulation of the fixed-line market, Departmental witnesses were uncertain as to how or when it was agreed that those provisions should become part of the formal Government Decision ratifying the authorisation and announcement of the GSM result. However, as matters unfolded, it seems that Mr. Lowry was less than entirely committed to the implementation of the measures necessary to give effect to that policy, as some short time later, in the run-up to Christmas of the same year, Mr. Lowry asked Mr. Sean Fitzgerald, Assistant Secretary, to postpone the commencement of monitoring activities on Mr. Denis O'Brien's leased-lines.

THE POST-COMPETITION NEGOTIATIONS

61.220 The announcement by Mr. Lowry on 25th October, 1995, that the GSM competition had been won by Esat Digifone marked the completion of the evaluation process. What had been won was not the GSM licence, but the exclusive entitlement to negotiate with the Department for the grant of the licence. Although probable, it was not inevitable that those negotiations would proceed to fruition. Had they broken down, the Department was mandated, by virtue of the Government Decision of 26th October, 1995, to open negotiations with the second-ranked applicant, Persona, and subsequently, if necessary, with the third-ranked applicant, Irish Mobicall.

61.221 The focus of Departmental activities over the approximate seven months between 25th October, 1995, and 16th May, 1996, when the licence issued, was the production of a licence in a form appropriate to the grant of that privilege, which would bind Esat Digifone to the commitments made in its application. This was a complex and time-consuming task from a legal and regulatory perspective. The post-competition period was also a demanding time for the consortium, and for its members. In particular, a shareholders agreement had to be negotiated and finalised between Communicorp, Telenor and Mr. Dermot Desmond, in circumstances where the competing positions and

expectations of the shareholders, consequent upon the introduction of Mr. Desmond to the consortium, were to prove difficult to reconcile. It was only some four days before the licence was due to be issued, and following intensive negotiations, that these difficulties were resolved sufficiently to enable a shareholders agreement to be finalised and executed.

61.222 The consortium also had to consider how and when it should formally broach with the Department the matter of Mr. Desmond's entitlement to a 25% shareholding in the intended licensee, the potential consequences of which notification were not lost on the consortium, in terms of possible inconsistency with the ownership as specified in its application. Ultimately, Esat Digifone did not formally disclose that information to the Department until 17th April, 1996. In the intervening months, this issue was the object of a marked degree of inhibition and hesitancy on the part of the consortium, matched by apparent disinterest and disinclination on the part of the Department. It was only after written notification on that date, that the Department exhibited any appetite for confronting the potential consequences of the alteration to the composition of Esat Digifone.

61.223 Lastly, consideration also had to be directed by the consortium to the capitalisation of Esat Digifone which, in the light of Communicorp's finances, was also a matter not without complication. By then, any notion of Communicorp's funding being provided by Advent, as had been stated in the application, had long been superseded by the Credit Suisse First Boston appointment, and intended private placement on the US market. That placement could not proceed until after the issue of the licence, and, in the event, Communicorp had no funds available to it to capitalise Esat Digifone, even to the limited extent of its contribution of £6 million to the licence fee of £15 million payable on 16th May, 1996, and it was Telenor, and to a lesser degree Mr. Desmond, who were obliged to carry Communicorp in the meantime.

61.224 The formal negotiations between the Department and Esat Digifone commenced with a meeting in the Department on 9th November, 1995. The message which Mr. O'Brien delivered to the meeting was one of complete adherence to the Esat Digifone application, and reassurance to the Department that the consortium would honour all of its commitments. The opportunity was not taken by Esat Digifone to inform the Department that, contrary to what was stated in the application, Communicorp would not be financing its participation through £30 million of funding from Advent; that Communicorp had engaged Credit Suisse First Boston to undertake a funding placement on its behalf on the US market; that it was no longer intended that the four named financial institutions would be shareholders; that Mr. Desmond, through his company IIU, would have control not just of that shareholding, but of an additional 5% of the equity; nor

that, under the terms of the arrangement agreement between Esat Digifone and Mr. Desmond, if Communicorp's US fundraising was unsuccessful, and if Telenor decided not to exercise their pro rata option to take up Communicorp's unsubscribed shares, Mr. Desmond could have potentially ended up holding 62.5% of the shares in Esat Digifone. Likewise, the Department, although insisting that the licence conditions would be a matter for Departmental determination, made no reference to the imposition of conditions on foot of the AMI recommendation that, if the Department entered negotiations with Esat Digifone, it should require an increased level of self-financing and liability on the part of its shareholders, in order to offset the potential risk to the project arising from Communicorp's negative equity. That issue was never broached by the Department until 3rd May, 1996, when it was raised at a meeting of which there was no documentary record in Departmental files.

THE OWNERSHIP DILEMMA

61.225 The evidence of Departmental officials, regarding Departmental knowledge of Mr. Desmond's accession to the consortium, was unanimous insistence that his role was unknown to the Department for the six months from the announcement of the result on 25th October, 1995, to the receipt of formal notification by letter of clarification from Mr. Owen O'Connell, solicitor for Esat Digifone, on 17th April, 1996. This was notwithstanding that Mr. Martin Brennan and Mr. Fintan Towey both had knowledge of the contents of the underwriting letter from IIU of 29th September, 1995; notwithstanding that accurate, authoritative and confirmed media coverage appeared during that time; and notwithstanding that both Departmental knowledge and acceptance was recorded in the files of the solicitor acting for Communicorp.

61.226 There can be no doubt that during the licence negotiation phase the management of this matter by Esat Digifone, as a consortium, and by Communicorp, in connection with its wider funding difficulties, was carefully considered and delicately weighed. This included, in the final months of 1995, the issuing, in response to media reports, of press releases, indicating that Dr. Michael Walsh of IIU had been appointed to advise the consortium on the placement of the 20% equity that had been allocated to institutional shareholders, as well as direct discussions with Mr. Brennan, and the preparation of a carefully worded draft letter to the Department preparing the ground, incrementally, for the introduction of Mr. Desmond as a 25% shareholder, a letter ultimately not sent, although by its terms suggestive of contact between Mr. O'Brien and Mr. Brennan.

61.227 A factor which complicated the ultimate handling of Mr. Desmond's shareholder entitlement was a Dáil statement made by Mr. Michael Lowry on 22nd November, 1995. That statement was made in response to media and political controversy surrounding the financing and ownership of Esat Digifone, and to consequent Dáil questions put down by members of the opposition. In the course of that statement, Mr. Lowry declared in the Dáil that Esat Digifone's shareholding would be held as to 40% by Communicorp, 40% by Telenor and 20% by institutional investors. It was accordingly officially on the record that the quantum of the institutional investor shareholding would be 20%.

61.228 A newspaper media report in late February, 1996, revealed very clearly that the shareholding in Esat Digifone was to be held as to 37.5% by Communicorp, as to 37.5% by Telenor, and as to 25% by Mr. Desmond, through his company, IIU; and further that the £30 million required by Communicorp to meet its equity commitments to Esat Digifone was in the process of being raised on the US market by Credit Suisse First Boston, through the issue of loan notes, and a restructuring of Mr. O'Brien's businesses. Most surprisingly, this article prompted no response whatsoever from the Department, and, inconceivably, knowledge of the article was disavowed by all senior officials, notwithstanding that it recorded Departmental comment, of which they must have been the source, and notwithstanding evidence pointing to a close analysis of its contents on Departmental files.

61.229 In the face of the officials' implacable insistence that they were unaware of the facts, the Tribunal was unable to explore with them why it was that they took no action at that point. It is however undeniably the case that the longer these matters remained in abeyance, the more difficult it would become for the Department, in view of the political and reputational consequences for the State, to take any course inconsistent with the culmination of the process in the grant of the licence to Esat Digifone.

THE STABILITY OF THE CONSORTIUM IS IMPERILLED

61.230 Tensions resurfaced within Esat Digifone in the course of March, 1996, this time as between all three shareholders, arising from attempts on the part of Mr. O'Brien to secure an increased shareholding for Communicorp, initially to 50.1%, and subsequently tempered to 50%. These attempts resulted directly from the financial weakness of Communicorp, and specifically from its perceived need to enhance its shareholding in the GSM company, in order to secure the successful outcome of its prospective US fundraising. Mr. O'Brien's persistence in this regard had a corrosive impact on the stability of the consortium, such that protracted and intensive negotiations were required over the final weekend prior

to the issue of the licence, in mid-May 1996, to ensure that the consortium survived. Those negotiations were characterised by a high degree of discord and distrust amongst all parties.

61.231 Leaving aside any consideration of the business manoeuvrings or tactics of the three shareholders, there can be no gainsaying that it was Communicorp's financial incapacity which was the root cause of the instability in the consortium and the distrust between its members. For its part, Telenor intended to withdraw from the project, if any increase in Communicorp's stake was not reflected by a corresponding increase in its own stake. Mr. Arve Johansen deeply resented the manner in which he believed Telenor had been treated, and he distrusted Mr. O'Brien's motives. Mr. O'Brien threatened his partners with an injunction to block the issue of the licence, and he likewise distrusted Mr. Johansen and Telenor, and wished to limit Communicorp's financial exposure to Telenor. He also suspected Mr. Dermot Desmond's and Dr. Michael Walsh's motives, so much so that he regarded it as a possibility that, after Mr. Desmond's residual shareholding had been reduced to 10%, following the licence award, a course agreed in principle between the shareholders, he might cede that entire 10% shareholding to Telenor, to constitute Telenor the majority shareholder in Esat Digifone. Whilst a pragmatic solution was ultimately found, which enabled the shareholders to coalesce, and enabled the roll-out of the GSM network, there can be doubt that the joint venture came perilously close to collapse, only days prior to the issue of the licence.

THE DEPARTMENT IS FINALLY TOLD OF THE OWNERSHIP CHANGES

61.232 A first preliminary draft licence had been furnished to the consortium in November, 1995, for indicative purposes only, and for discussion, and a further draft was prepared by the Department and was forwarded prior to Christmas, 1995, to the Office of the Attorney General for legal advice. It was not until 22nd March, 1996, that a second indicative draft licence was forwarded to the consortium for consideration. It was made clear by way of reservation that this remained a preliminary draft only, and as matters transpired there was very considerable further work yet to be done before a final draft was produced in the days before the licence issued.

61.233 Following the forwarding of this second indicative draft licence, and arising from the delay in negotiations, and from commercial and financial pressures on Esat Digifone at this time, what may be said to have been an uncharacteristic degree of tension emerged in relations between the Department and the consortium. In an effort to resolve matters, Mr. John Loughrey, Secretary General, convened a meeting on 11th April, 1996, attended and led on the Esat

Digifone side by Mr. Denis O'Brien, and this was followed by a further technical meeting on 12th April, 1996, which resulted in an expectation on all sides that a final draft licence would be available, to enable the Department and Esat Digifone to review the draft, article by article, during the following week.

61.234 It was during that following week, on Tuesday 16th April, 1996, in the course of a telephone call, that one of the Departmental officials most closely working on the draft licence, Ms Regina Finn, who had recently assumed responsibility for assisting in its preparation, asked Mr. Owen O'Connell, solicitor for Esat Digifone, about the precise intended shareholdings in Esat Digifone. This prompted, finally, but at what was likely to have been an opportune time from the consortium's perspective, given that it was pressing for the issue of the licence, full disclosure by Mr. O'Connell on 16th and 17th April, 1996, of the changed ownership structure of Esat Digifone. In consequence of the notification of that information, the matter of Mr. Desmond's 25% entitlement in Esat Digifone was placed formally on the Departmental record, and thereafter Mr. Desmond's involvement and shareholding had to be confronted.

61.235 Consideration of the implications of that notification were postponed by the Departmental officials involved, primarily Mr. Loughrey and Mr. Martin Brennan, until after a related but unprecedented event within the Department had passed, namely, a press conference convened by Departmental officials themselves, two days later, on 19th April, 1996. The decision to call that press conference was made in response to continuing media and political controversy concerning the fairness of the competition, and to rumours surrounding Mr. Desmond's ownership, circulating within official and business circles. Speculation had continued, notwithstanding a further Dáil statement by Mr. Michael Lowry on 16th April, 1996. Two press statements were delivered by Departmental officials at the 19th April press conference. Firstly, a statement by Mr. Loughrey, in which he commended the evaluation process as being a model of its type, in which the decision was taken without outside interference. He referred to damage caused to Ireland's reputation by media comment, and stated that it was the Department's intention to answer all questions in as open and comprehensive a manner as possible. There then followed a more detailed statement, which represented a collaboration between Mr. Brennan, Mr. Fintan Towey, Mr. Sean Fitzgerald and Mr. Loughrey. This included a number of positive statements which tended to give a somewhat misleading impression of the adherence of the process to the Evaluation Model, and of its sealed character. Neither statement made any reference to the central controversy that had been raging in the Dáil, and in the media, that is, the ownership of Esat Digifone, even though the Department then knew officially that Mr. Desmond was the third shareholder, and was entitled to a 25% shareholding. That omission was not by error, but by design.

POLITICAL AND DEPARTMENTAL RESPONSE TO MR DESMOND'S INVOLVEMENT

61.236 The deficit in Departmental records relating to intensive contacts between the Department and the consortium between 17th April, 1996, and 16th May, 1996, when the licence issued, was both pronounced and surprising. It was not until the Tribunal received a copy of a memorandum created by Mr. Arve Johansen, of Telenor, dated 4th May, 1996, that it had any inkling that meetings and contacts, of the scale or nature which it ultimately discovered, occurred. It was apparent from that memorandum that Mr. Johansen had attended a meeting in the Department on 3rd May, 1996, when he learned of the Department's discomfort and concerns about Mr. Desmond's role, and about the finances of Esat Digifone more generally. The Tribunal, on inquiry, discovered that this meeting had been a highly significant one, and further that there had been other important meetings and contacts, notably on 29th April, 7th May, 13th May, 14th May, 15th May, and 16th May; that at least one of those meetings had been attended by Mr. Lowry; that there had been telephone contact between Mr. Lowry and Mr. O'Brien during this time; and that critical dealings between the Department and the consortium had been conducted by means of informal undocumented telephone conversations between Mr. Fintan Towey and Mr. Owen O'Connell. None of these contacts were recorded or referred to in Departmental files made available to the Tribunal, nor did the Tribunal receive any intimation of them in its dealings with any of the Departmental officials concerned.

61.237 The deficit in Departmental records, together with the lack of Departmental recollection surrounding these events, was a matter of considerable disquiet for the Tribunal, and was pursued in evidence with the officials who had been involved. Those inquiries were variously met with expressions of regret, puzzlement, and concern, and with explanations of administrative oversight, due to work pressures and time constraints. What the evidence in fact shows is that there were two separate strands to dealings between the consortium and the Department, following notification of the consortium's changed ownership on 17th April, 1996. There was a formal scant exchange of correspondence on the Departmental files, and there was at the same time a much more extensive course of dealing, by means of telephone contacts and undocumented meetings, not reflected on those files. Apart from a single document created by one of the seconded accountants charged with a specific task, none of the Departmental documents made any reference at all, of whatsoever nature, to Mr. Desmond, his ownership, or the problems it posed.

61.238 Whilst the Tribunal cannot determine how or why this occurred, whether it reflected a policy decision taken at a senior level, or merely a tacit recognition that records should not be made, or should not be retained, the

Tribunal must reject any suggestion that the veritable recording blackout was nothing more than an accidental coincidence. There can be no doubt that the issues which flowed from the formal disclosure of the substitution of Mr. Desmond for the financial institutions, and of the extent of his shareholding entitlement, together with his financial capacity and that of the consortium to fund the GSM business, were matters of the most acute concern and sensitivity for the Department. Whilst it was asserted that a serious question mark had thereby arisen over whether the licence could be awarded to Esat Digifone, the Departmental and political response renders this proposition doubtful.

61.239 It was asserted by Mr. Loughrey and Mr. Brennan that the implications of the changed ownership information were potentially grave. The licensing of Esat Digifone was then dependent on the outcome of consideration of whether Mr. Desmond's accession as a 25% shareholder, at variance with the ownership specifications furnished in the application, was legally permissible, and of whether Esat Digifone and Mr. Desmond had the financial capacity to meet the capital requirements of the project. This latter consideration, one which according to Government policy should have been addressed and determined on receipt of applications on 4th August, 1995, was ultimately settled the day before the licence issued.

61.240 The assertion that the positive resolution of these matters was vital to Esat Digifone's entitlement to the licence was not borne out by the Departmental or political response. Instead of timely formal attention being directed to them, what emerged was an unrecorded, indifferent and protracted response on the Departmental side, and repeated official utterances on the part of Mr. Michael Lowry, disowned by his officials, of his intention to issue the licence to Esat Digifone. In truth, as testified by Mr. Fintan Towey, the changed ownership notification gave rise to a process to be undertaken by the Department to put matters in order to allow the licence to be issued to Esat Digifone, a process which Mr. Towey had no expectation would conclude otherwise than with the grant of the licence to Esat Digifone. In other words, a face-saving exercise had to be implemented by the Department, to enable Esat Digifone to be licenced, without further Departmental or political damage.

61.241 No formal response was sent to Mr. O'Connell's letter of 17th April, 1996, for over two weeks. Then, by letter dated 1st May, 1996, from Mr. Martin Brennan, information was sought as to the precise shareholding in Esat Digifone, and on a restructuring of Communicorp's telecommunications interests into a new company, Esat Holdings. No reference was made in that letter to Mr. Desmond's shareholding, to any requirement for financial information, nor was any statement made that the issue of the licence to Esat Digifone was dependent

on the outcome of Departmental consideration. The former matters were left over to an unrecorded meeting on 3rd May, 1996, when Mr. Arve Johansen learned for the first time that Mr. Desmond's accession, in place of the named financial institutions, was regarded as problematic by the Department. It was at that meeting that Mr. Brennan sought financial information about the three shareholders, and proposed that Telenor might confirm, off the record, that it would serve as a provider of last resort in respect of the entire funding and operational support of the GSM business.

61.242 At that meeting of 3rd May, 1996, Mr. Brennan also asked for an explanation of how it had happened that Mr. Desmond, through his company, IIU, had replaced the financial institutions named in the Esat Digifone application. Although this request was undoubtedly made by Mr. Brennan, and acted upon by Mr. Owen O'Connell, to the point of his finalising a draft letter to the Department, that passage of Mr. O'Connell's draft letter was deleted before the letter was delivered to the Department on 13th May, 1996, and, on his evidence, it was excluded at the request of, or with the acquiescence of, the Department.

61.243 The financial information sought on 3rd May, 1996, was not furnished to the Department until 13th May, 1996. By then, the Department had already conveyed to Esat Digifone, by an unrecorded telephone conversation between Mr. Fintan Towey and Mr. Owen O'Connell, that the changed ownership of Esat Digifone would be accepted by the Department, but that the Minister's strong preference was for the capital configuration of Esat Digifone to revert to the ratio 40:40:20. Mr. Towey recognised that this exchange constituted the Department's response to the altered ownership notification.

61.244 It is unclear what prompted the Department to take this action on 7th May, 1996, before the matters supposedly determinative of Esat Digifone's entitlement to the licence had been addressed. What is clear is that it was on that date that the Department conveyed its response that Mr. Desmond's accession would be accepted, provided his shareholding reverted from 25% to 20%, thereby rendering it consistent with the information in the public domain, and with Mr. Michael Lowry's Dáil statements on the subject. As will be seen, a limited analysis of the financial capability of Esat Digifone and of its shareholders was conducted over the last days prior to the issue of the licence, and matters were put to right on terms settled between Mr. Loughrey, and Mr. Desmond's associate, Dr. Michael Walsh, on the day before it issued.

61.245 Having regard to the Departmental assertion that, on receipt of the changed ownership notification of 17th April, 1996, there was a serious question mark over Esat Digifone's entitlement to the licence, and that this was conveyed

to Mr. Michael Lowry, it might have been expected that he would have exercised a degree of caution in his official utterances on the topic of the GSM licence during this period. Not only was any such caution absent, but what is apparent is that Mr. Lowry proceeded to inform first his Cabinet colleagues on 23rd April, 1996, then the Dáil on 30th April, 1996, and finally the public on 8th May, 1996, that the licence would be issued to Esat Digifone. What is equally striking is that, in the case of each of these pronouncements, Departmental officials disavowed either involvement in or knowledge of them, and testified that Mr. Lowry, in making them, was acting on his own initiative, and not on Departmental advice and, moreover, was acting contrary to advice that would have been given, had it been sought.

61.246 These utterances were not made by Mr. Lowry on casual occasions of comment. On the contrary, each was made on an occasion of the utmost formality, and represented statements of Government intent. His statements were at odds and inconsistent with the position of conditionality which the Tribunal was told had been adopted by the Department in respect of the changed ownership notification, a position which, according to Mr. Loughrey, it was inconceivable he would not have conveyed to Mr. Lowry. If the Department's position was as stated, and was conveyed to Mr. Lowry, it seems that Mr. Lowry either did not appreciate the need for caution, or he did not share that view.

LEGAL ADVICE ON CHANGES

61.247 Following receipt of the changed ownership notification, Mr. Loughrey determined that the substitution of Mr. Desmond for the institutional investors, and his shareholding of 25%, necessitated legal advice on whether it was permissible to grant the licence to Esat Digifone. That imperative arose from the rules of the competition process which, under the RFP document, rendered disclosure of the ownership of the intended licensee a mandatory requirement. Mr. Fintan Towe acted promptly, and on 24th April, 1996, he wrote to Mr. John Gormley and Mr. Denis McFadden, both barristers and members of the staff of the Attorney General assigned to deal with the GSM process, and who had been consulted by the Department on a number of matters over the preceding months. Mr. Towe sought advice on a series of issues, and, referring to a meeting of 22nd April, 1996, at which the matter had been mentioned, he confirmed the Department's requirement for a legal opinion on whether the ownership details furnished on 17th April, 1996, could be regarded as compatible with the ownership proposals contained in the Esat Digifone application.

61.248 Despite significant infirmities in the evidence heard, including the manner in which that evidence was belatedly made known to the Tribunal, it is

the case that, as a matter of inter-Departmental responsibility, the Department was ultimately entitled to regard the Attorney General's formal sanction, dated 13th May, 1996, of the draft licence, and regulations to amend the existing legislation under which the licence would be issued, as confirmation that none of the matters raised by the Department, in the course of its dealings with the Attorney General, gave rise to an impediment to the issue of the licence to Esat Digifone. Whether in the light of Mr. Loughrey's and Mr. Brennan's evidence that, on receipt of Mr. O'Connell's letter of 17th April, 1996, there was a genuine doubt concerning Esat Digifone's entitlement to the licence, that formal sanction would have been sufficient to dispel their doubts, is another matter.

61.249 This aspect of the Tribunal's inquiries was not without its complications. These arose from the claim to privilege over an opinion of Mr. Richard Nesbitt SC of 9th May, 1996, maintained by the State until notification of the Tribunal's Provisional Findings in November, 2008, from the doubly belated manner in which relevant information was provided to the Tribunal by the State, and, not least, from an error made by the Tribunal in the interpretation of the import of a letter furnished by the then Attorney General in December, 2002. These matters are fully addressed in Chapter 57 of this Volume.

61.250 On the day prior to his letter of 24th April, 1996, Mr. Towe had attended another meeting at the Attorney General's Office, to discuss the technicalities of the draft licence and regulations. Mr. McFadden and Mr. Gormley were present on that occasion, as was Mr. Nesbitt, who had and was continuing to advise on a series of matters arising from the GSM process. Whilst Mr. Towe had no recollection of the changed ownership issue being discussed on that occasion, and would not in any event have regarded any such discussion as having given rise to definitive advice, and whilst Mr. Nesbitt was clear that no advice had been given by him at that meeting, when Mr. Gormley and Mr. McFadden attended to give evidence, after notification of Provisional Findings, their testimony was very different. They each recalled Mr. Nesbitt advising on the matter at that time, and they each believed that his advice, with which they agreed, was that no legal difficulty arose.

61.251 It was in these circumstances that Mr. Gormley and Mr. McFadden were subsequently to regard the contents of Mr. Nesbitt's opinion dated 9th May, 1996, as confirmatory of that earlier advice, and as definitive on the point. That opinion was directed to the draft GSM licence and regulations, both of which had been revised by Mr. Nesbitt. Article 8 of the draft licence imposed restrictions on the licensee's freedom to alter its ownership after the grant of the licence. Mr. Nesbitt had revised that draft article to render it less restrictive, and in the second paragraph of the second page of his opinion, he explained why he had

done so. It was that paragraph which Mr. Gormley and Mr. McFadden understood to be a response to Mr. Towey's request for an opinion on whether the changed ownership of Esat Digifone, as between the date of application for the licence, on 4th August, 1995, and the forthcoming grant of the licence, was legally permissible. Whilst Mr. McFadden regarded that as self-evident, Mr. Gormley did not, and the latter believed that, without knowledge of the earlier oral advice, a reader might not recognise that passage as addressing the separate issue. Mr. Loughrey, Mr. Brennan and Mr. Towey, having returned to give further evidence after notification of Provisional Findings, and waiver of privilege over that opinion by the State, shared the view that it was that paragraph of Mr. Nesbitt's opinion that was material to the query raised.

61.252 It was and continues to be the Tribunal's view that the construction placed on that passage of Mr. Nesbitt's opinion is a strained one, but, as the Tribunal recognises that the appropriate test in this instance is subjective, that is, what those involved believed at the time, the Tribunal has concluded that the Department proceeded in the belief that legal advice confirming the matter had been obtained. The Tribunal nonetheless regards it as doubtful that such a view would have been reached, had the process then under way been other than one addressed to endeavouring to regularise matters, to enable the licence to be issued to Esat Digifone, rather than one genuinely deployed in an open-minded spirit of inquiry, to determine whether such a course was one that could be taken.

THE FINAL PUSH TO ISSUE THE LICENCE

61.253 In the last three days before the issue of the licence on 16th May, 1996, activity within the Department and within Esat Digifone reached a frenetic pitch. There were many meetings between Esat Digifone and the Department of which there was no documentary record or reference on Departmental files, including a meeting between Mr. Denis O'Brien and Mr. Michael Lowry on Tuesday, 14th May, 1996, at which Mr. Lowry conveyed his insistence that the shareholding in Esat Digifone should revert to the ratio of 40:40:20. That requirement had already been relayed by Mr. Fintan Towey to Mr. Owen O'Connell by telephone on the previous 7th May, 1996.

61.254 The recasting of the shareholding in Esat Digifone, in accordance with the Departmental and Ministerial direction of 7th May, had already been agreed between the shareholders over the weekend of 11th and 12th May, as part of intensive negotiations to resolve the differences that had arisen, in consequence of Mr. Denis O'Brien's desire to increase his shareholding in Esat Digifone, in order to enhance the prospects for his US placement after the licence issued. It had been agreed that Mr. Desmond would cede a 5% shareholding equally

between Communicorp and Telenor, for which they would each pay £1.375 million. As Communicorp had no funds available until after the licence issued, and its US placement proceeded, its payment to Mr. Desmond was deferred. Arrangements were also concluded between the three shareholders to cover Communicorp's initial capital contribution to Esat Digifone to meet the licence fee of £15 million, payable on 16th May, 1996. It was agreed that Communicorp's £6 million contribution would be met, as to £4 million by Telenor, and as to £2 million by Mr. Desmond. These negotiations also disposed of the final matters in issue between the shareholders, and enabled the terms of a shareholders agreement to be finalised and executed on 16th May, 1996.

61.255 The activities over these days were principally directed to ensuring that sufficient information was available to enable the Department to sign off on Esat Digifone's financial capability to fund the project, and to ensuring that all necessary preparations were made to facilitate the smooth passage of the press conference scheduled to coincide with the grant of the licence.

61.256 Dealings commenced with a meeting at the Department on Monday, 13th May, at which the shareholder financial information sought by the Department at the meeting ten days earlier was furnished. Esat Digifone's representatives delivered a letter of that date which omitted an explanation, present in the draft of that letter, of how Mr. Desmond had replaced the financial institutions named in the application. That draft explanation had been prepared in response to a Departmental request, but, on the evidence of Mr. O'Connell, it was excluded at the Department's request, or with its acquiescence. The end result was that no explanation was furnished, and there was nothing on the Departmental file to suggest that it had ever been sought.

61.257 The financial information provided on that day was transmitted to Mr. Donal Buggy, the accountant seconded to the Department, who then conducted what he described as a desktop exercise on the financial capability of Esat Digifone to fund the project. That necessarily entailed an examination of the financial strength of its shareholders, including whether they had sufficient capacity in the event of default by Communicorp. Mr. Buggy's analysis of Telenor and Communicorp, the latter by then restructured as Esat Holdings, was perfunctory. Telenor was financially strong and could, if necessary, carry the entire project. Communicorp was financially weak, and was treated as having zero funds available. The analysis accordingly turned on Mr. Dermot Desmond's ability to meet his potential £17.3 million exposure.

61.258 Very little information had been provided on Mr. Desmond's financial standing, other than a letter, but not a certificate, from his accountant, that he

was in a position to invest or underwrite up to £40 million in Esat Digifone. Following a meeting between Mr. Buggy and Mr. Desmond's accountant on Tuesday, 14th May, the latter being unable to expand on the letter already furnished, the Department formed the view that there was some resistance to furnishing information of detail.

61.259 That matter was raised by Mr. Lowry at his meeting with Mr. O'Brien that day when, apart from insisting that the shareholder ratio should revert to 40:40:20, he demanded that the information concerning Mr. Desmond's finances sought by the Department should be provided by the following day, and, in that regard, proposed that Mr. John Loughrey and Dr. Michael Walsh, Mr. Desmond's associate and adviser, should meet in "*private*". This Ministerial demand produced results, and the next day Mr. Buggy received a letter from Mr. Desmond's accountant detailing the face value of the assets held by Mr. Desmond. Dr. Walsh also met with Mr. Buggy, and intimated that a bank confirmation that £10 million was available to IIU, Mr. Desmond's vehicle, for investment in Esat Digifone in 1996, would be forthcoming. That arrangement was agreed at a separate private meeting that day between Dr. Walsh and Mr. Loughrey, who were otherwise known to one another.

61.260 Mr. Buggy then proceeded with his analysis on Thursday, 15th May, the day before the licence issued, and having regard to what he described as the "*unencumbered*" value of Mr. Desmond's assets, and the bank confirmation subsequently received from Anglo Irish Bank, he concluded that Mr. Desmond's financial strength to meet his potential liabilities to Esat Digifone had been confirmed, and that, accordingly, despite Communicorp having zero funding available to it, Esat Digifone had sufficient financial capability to fund the project.

61.261 Nobody could assist as to how Mr. Desmond's assets had been designated "*unencumbered*" in Mr. Buggy's record of his analysis, as no such statement had been made by his accountant, and the Department had been furnished with no information concerning his liabilities. However, in terms of matters being regularised, the Departmental file now contained Mr. Buggy's analysis, which on its face confirmed Esat Digifone's financial strength.

61.262 The shortcomings of that financial analysis are patent. In truth, the terms on which the Department was prepared to accept that Esat Digifone could be regarded as having demonstrated its financial capability, a matter which should have been attended to on receipt of applications on 4th August, 1995, were settled between Mr. Loughrey and Dr. Walsh at their undocumented, unreferenced, "*private*" meeting, the day before the licence issued, on the footing

that a letter would be obtained from Anglo Irish Bank, stating that £10 million was available to Mr. Desmond to invest in Esat Digifone in 1996.

61.263 The second primary focus of activity in those days was the public relations management of the grant of the licence, and in particular the sensitive issues which had been to the fore of media and political controversy. This featured prominently in discussions at the opening meeting of the week, on Monday, 13th May, 1996, when the key questions identified by the Department, as requiring careful consideration and preparation, were:

- (i) whether the licensee was the same as the consortium that had applied;
- (ii) whether Mr. O'Brien's side of the consortium would "*stand up*"; and
- (iii) whether Telenor would support the project to the end.

In other words, the financial capability of Esat Digifone and Communicorp, together with the accession of Mr. Desmond as a shareholder, were the priorities.

61.264 The extent of joint preparation and joint marked sensitivity on these issues was evident from Mr. Owen O'Connell's file, there being no Departmental record, in which he noted meetings and interactions between the Department and Esat Digifone, extending to Esat Digifone's and the Minister's public relations consultants. Considerable effort and thought was invested over these days in preparing scripted answers to anticipated questions on these topics, which, though not representing false answers, would "*fudge*" the issues. Overall, it was evident that there was a joint determination to divert attention, from ownership and funding, to the positive features of the Esat Digifone business plan. Whilst the extent of preparations on the Esat Digifone side was apparent from Mr. O'Connell's file, including a final rehearsal meeting on Thursday, 16th May, the Tribunal has no doubt that equal but undocumented preparations were made within the Department. A joint press release was drafted, and ultimately issued to coincide with the press conference convened on 16th May, 1996. This was a carefully crafted statement from which a passage, suggestive of a future uncertainty regarding the ownership of Mr. Desmond's shareholding, was deleted, just hours before the statement issued, on what seems to have been the Department's initiative.

61.265 Following the execution of the shareholders agreement, and the provision of a series of side-letters, the licence was signed by Mr. Lowry on the afternoon of Thursday, 16th May, 1996. The joint press conference then

proceeded. The predicted key issues of Mr. Desmond's ownership and Mr. O'Brien's ability to fund his share, the subject of such intense and close consideration and preparation over the previous days, did not seemingly arise.

61.266 The overriding concern within the Department over these days was to manage the press release and press conference in such a way as to present the ownership of Esat Digifone as being in conformity with the ownership information in the public domain. The Department's paramount concern was with appearances. Hence, the requirement that the share configuration revert to 40:40:20, a revision which, on the evidence heard by the Tribunal, the Department was aware was not legally required. That concern appears to have been foremost and of far greater priority than the financial evaluation of an investor never identified in the application, on which the financial capability of Esat Digifone rested. This was deferred until the last three days before the licence was due to issue, was then conducted by reference to uncertified figures, and was concluded, to the Department's satisfaction, by reliance on a letter from Anglo Irish Bank that £10 million was available to Mr. Desmond.

MATTERS KEPT FROM THE NEW MINISTER

61.267 The degree of continuing Departmental sensitivity and ambivalence surrounding the disparity between the intended ownership of Esat Digifone, as disclosed in its application and then evaluated, and the actual ownership when the licence issued, notwithstanding apparent satisfaction that no legal obstacle arose, came into sharp focus some six months later. By then, Mr. Alan Dukes T.D. had been appointed Minister in place of Mr. Lowry, following the latter's resignation.

61.268 As incoming Minister, Mr. Dukes, conscious of the controversy surrounding the ownership and financing of Esat Digifone that had persisted in certain quarters, sought and received a briefing from his Departmental officials. Mr. Bobby Molloy T.D. had also made inquiries of Mr. Dukes relevant to those matters, to which Mr. Dukes replied by letter dated 6th December, 1996, drafted for him by Mr. Loughrey and Mr. Brennan. That letter, being one from a Minister to a T.D., was subject to a strict obligation of truthfulness, on which Mr. Molloy was entitled to rely.

61.269 Mr. Dukes' briefing by Mr. Loughrey and Mr. Brennan, and the letter that they drafted for him, did not reveal what had in fact occurred in relation to the shareholding of Esat Digifone, and Mr. Desmond's accession as a shareholder. Rather, the account conveyed to Mr. Dukes, and by Mr. Dukes to Mr. Molloy, suggested a seamless transition from the intended composition of Esat Digifone, as disclosed in its application, when it was held as to 50% each by the

two principal members, with financial investors to take a 20% shareholding prior to licence issue, to the composition at the licensing stage, when the configuration, on foot of the involvement of Mr. Desmond, was 40%, 40%, 20%. The fact that the Department had been formally notified of Mr. Desmond's 25% stake in mid-April, 1996, whatever the Department's prior knowledge, was not disclosed to Mr. Dukes, still less was any reference made to matters relating back to 29th September, 1995. Nor were the attempts at belated evaluation of finances made known to the new Minister, and, in reliance on the principles of confidentiality, the letter of 6th December, 1996, failed to disclose that Mr. Desmond had not been amongst the "*potential investors*" identified in the application. In turn, Mr. Dukes was led to transmit that account to Mr. Molloy, an account which was inaccurate, selective, and misleading. The further consequence of preparing for the Minister a draft letter, in terms that must be viewed as an ex post facto rationalisation of events, was to render Mr. Dukes, a politician of acknowledged experience and eminence, potentially open to having, entirely unwittingly, misled his Dáil colleague on a matter of public importance.

EXPERTS

61.270 The Tribunal's interaction with Mr. Michael Andersen, which spanned the best part of a decade, culminating in his attendance as the last Tribunal witness heard at public sittings in late 2010, despite previously having declined repeated Tribunal requests to give evidence, is detailed in Chapter 50 of this Volume. The manner in which his attendance arose, following interactions between Mr. Andersen and Mr. Tom Reynolds, an associate and employee of Mr. Denis O'Brien, and following the provision by Mr. O'Brien of an extensive indemnity to Mr. Andersen in respect of his attendance as a witness, is set out, as is the manner in which the Tribunal only belatedly came to learn of those matters. Mr. Andersen's substantive evidence in connection with the GSM evaluation process is also examined at relevant points in other chapters.

61.271 Apart from the circumstances in which Mr. Andersen came to testify, his refusal to do so until approximately nine years had elapsed since his initial dealings with the Tribunal cannot be viewed other than as patently unsatisfactory, and undoubtedly caused very significant additional cost, and protraction of the Tribunal's duration, including seeking and obtaining written and oral submissions from other affected persons on his non-attendance, ruling in that regard, seeking and addressing independent Danish legal advice, contesting related High Court and Supreme Court proceedings brought by Mr. O'Brien, and eventually reversing engines in order to allow for his eleventh hour appearance.

61.272 Having belatedly attended, on matters such as the abandonment of the quantitative evaluation as a separate and self-contained limb of the evaluation, the actual form and use made of weightings, the input of the accountants within the Project Group, the circumstances of the espousal of the concept of bankability, Mr. Andersen's initial denial of the critical Copenhagen meeting of 28th September, 1995, and his divergent versions as to acceleration in the announcement of the competition outcome, the Tribunal is left with a clear impression that the weight, reliability and extent of accurate recollection apparent from Mr. Andersen's evidence fell so appreciably far below what might have been expected, as to amount to very limited assistance to the Tribunal on those matters that were of major consequence.

61.273 The circumstances surrounding the Tribunal's engagement of Peter Bacon & Associates, a firm of independent economic consultants, to assist the Tribunal in its appreciation of certain technical concepts bearing on matters under inquiry, are set forth in Chapter 51 of this Volume. Having obtained that assistance from Mr. Peter Bacon, the Tribunal decided that his testimony as an expert was not required, and that, accordingly, it was unnecessary to call him in evidence. Nonetheless, Mr. Bacon was ultimately called as a witness, by way of cross-examination on the part of affected persons, who wished to put certain matters to him arising from his role in assisting the Tribunal. Notwithstanding that, as a result, certain views and opinions of Mr. Bacon are now on the record of its proceedings, the Tribunal has determined that it should have, and has had, no regard to that evidence in making the findings recorded in this Report. However, it should be stated that, whilst the efforts to impugn the bona fides of the Tribunal and its personnel in the course of that cross-examination were neither new nor surprising, the aspersions sought to be cast on the professionalism, objectivity and standing of Mr. Bacon were unwarranted, ill-judged and wholly unsustainable.

OVERVIEW AND CONCLUDING OBSERVATIONS

61.274 Chapter 60, the preceding chapter, sets forth an overview of the matters addressed in earlier chapters, and records and references in overall terms the matters that have led the Tribunal to find, pursuant to paragraph (g) of its Terms of Reference, that Mr. Michael Lowry, in the course of his Ministerial office, as Minister for Transport, Energy and Communications, by his acts and decisions, conferred a benefit on Mr. Denis O'Brien, a person who made payments to Mr. Lowry, within the meaning of paragraph (e) of its Terms of Reference, and who was also the source of money in accounts held in the name of and for the benefit of Mr. Lowry within the meaning of paragraph (f) of its Terms of Reference. As that chapter seeks to consolidate the lengthy considerations comprised in Chapters 1 to 59 of this Volume, it is not susceptible

to further distillation. It also touches on matters arising from both Volume 1 of this Part II of the Tribunal’s Report, and from Part I of its Report, published in December, 2006.

RECOMMENDATIONS

INTRODUCTION

62.01 In addition to the substantive matters into which the Tribunal was mandated to inquire, under its Terms of Reference, the Tribunal was called upon, in the light of its findings and conclusions, to make whatever broad recommendations it considers necessary or expedient in respect of six areas expressly identified in paragraphs (k) to (p) of its Terms of Reference, as follows:

- “(k) to ensure that the integrity of public administration is not compromised by the dependence of party politics on financial contributions from undisclosed source [sic];*
- (l) for the reform of the disclosure, compliance, investigation and enforcement provisions of company law (including in particular those which relate to directors' duties);*
- (m) for maintaining the independence of the Revenue Commissioners in the performance of their functions while at the same time ensuring the greatest degree of openness and accountability in that regard that is consistent with the right to privacy of compliant taxpayers;*
- (n) for enhancing the role and performance of the Central Bank as regulator of the banks and of the financial services sector generally;*
- (o) for the effective regulation of the conduct of their members by such professional accountancy and other bodies as are relevant to these terms of reference, for the purpose of achieving the highest degree of public confidence; and*
- (p) for the protection of the State's tax base from fraud or evasion in the establishment and maintenance of offshore accounts, and to recommend whether any changes in the tax law should be made to achieve this end.”*

62.02 As anticipated in its Terms of Reference, the Tribunal in the course of its work was called upon to examine and report on a number of matters whose character, context and consequences were likely to raise, and did in fact raise, broader but related issues in respect of which the Tribunal, in the public interest, would wish to make recommendations. In this final chapter, the Tribunal's broad recommendations in respect of the matters outlined at paragraphs (k) to (p) of its Terms of Reference are set forth. In addition, although no specific request for recommendations is made in the Terms of Reference in connection with the

operation of tribunals, certain matters are addressed, and certain recommendations advanced, pertaining to the functioning of the system of tribunals of inquiry. In that regard, the Tribunal believes that it is appropriate to identify certain obstacles that it has encountered in the inquiry process itself, and, where possible, to make recommendations that might enhance that process. Accordingly, and grouped for convenience to take account of certain of their overlapping subject-matter, all of the topics for recommendation are addressed in this chapter together, under the following headings:

- (i) Political Funding
- (ii) Company Law
- (iii) Revenue Matters
- (iv) Regulation
- (v) Tribunals of Inquiry.

In making these Recommendations, whilst the views expressed are its own, the Tribunal wishes to acknowledge with appreciation helpful and constructive co-operation and assistance on the part of a number of agencies and individuals, including the Revenue Commissioners and the Standards in Public Office Commission.

POLITICAL FUNDING

62.03 Unless politics is to be the preserve of the wealthy, the funding of political parties is essential to enable them to fulfil their role in the democratic system. At the same time, in order to ensure that the funding of political parties is not subject to the invisible or disguised influence of powerful individuals or entities, a measure of transparency and openness to scrutiny is essential. This is recognised in the Tribunal's Terms of Reference, and specifically in those that relate to the making of recommendations pertaining to contributions from undisclosed sources.

62.04 Of the material evidence concerning such contributions heard in the course of the Tribunal's proceedings, one of the most significant related to a donation of \$50,000.00 by Esat Digifone, via Telenor, to Fine Gael in 1995. That donation was unwelcome to the party, and was rejected by the party leader. Among its notable features, to which reference has been made in the Tribunal's Report, are that the immediate donor was a company outside of the jurisdiction; that the donation was misrepresented in the books of the immediate donor; that it was transmitted by a covert off-shore route, so that on its face there appeared to be no disbursement by Telenor to Fine Gael; that, following its rejection by

Fine Gael, the payment reposed for some time in an off-shore account in the Channel Islands, where it was retained under the control of the late Mr. David Austin; that it was subsequently introduced to party funds, disguised as a personal contribution by Mr. Austin; and that the payment was initially made at a time when the Esat Digifone consortium, of which Telenor was a key member, was engaged in direct negotiations with a Department of State, for which a Fine Gael Minister had direct Cabinet responsibility, namely Mr. Michael Lowry.

62.05 Of equal significance were donations made to Fianna Fáil in the context of the 1989 General Election by Custom House Docks Development Company, and by Dr. Michael Smurfit. The former, for £75,000.00, was made by way of three bank drafts of £25,000.00, each payable to cash, delivered personally by Mr. Mark Kavanagh to Mr. Charles Haughey. None of these bank drafts were remitted by Mr. Haughey to Fianna Fáil as Custom House Docks contributions, although a separate bank draft for £25,000.00, intended as a contribution to funds to assist the late Mr. Brian Lenihan with medical expenses, was so remitted to Fianna Fáil, and recorded as an anonymous donation. Two of those three £25,000.00 bank drafts were forwarded to party headquarters, but not as a donation by Custom House Docks, but as one by Dr. Michael Smurfit.

62.06 Dr. Smurfit's donation of £60,000.00 in 1989, and the Esat/Telenor 1995 donation of \$50,000.00 to Fine Gael, shared a number of characteristics, not least, that the late Mr. David Austin was instrumental in both. On this earlier occasion, the donation was arranged by Mr. Austin, at Dr. Smurfit's request, and as with the Esat/Telenor payment, was made from one off-shore account to another off-shore account, in this case, from an account of Jefferson Smurfit Foundation Trustees, with Allied Irish Banks (Channel Islands) Limited, to an account of Ansbacher Cayman, with Henry Ansbacher & Company, London. The arrangements for that payment were made between Mr. Austin and the late Mr. Desmond Traynor, Mr. Haughey's personal financial adviser, who had no role in fundraising for Fianna Fáil. Of the £160,000.00 raised from Custom House Docks, and from Dr. Michael Smurfit, £75,000.00 reached Fianna Fáil, and the balance was retained by Mr. Haughey for his own use and benefit.

62.07 Considerable advances have been made in the governance of political donations since the matters into which the Tribunal has inquired arose. The Electoral Act, 1997, as amended by the Electoral (Amendment) Act, 2001, has introduced significant reforms in respect of the transparency and permissibility of political donations. The 1997 Act, as amended, and following the enactment of the Standards in Public Office Act, 2001, provides for the disclosure to the Standards in Public Office Commission of political donations received by political parties, members of the Houses of the Oireachtas, MEPs and candidates at Dáil,

Seanad, European Parliament and Presidential elections. It also makes provision for State financing of qualified political parties and for the limitation, disclosure and reimbursement of election expenses at Dáil, European Parliament and Presidential elections.

62.08 The provisions of the 1997 Act have been strengthened by the Electoral (Amendment) Act, 2001, which introduced limits on the value of donations which can be accepted by political parties and individual politicians, and prohibited acceptance of all foreign donations. The Act also requires the opening and maintenance of political donations accounts, and makes provision whereby lobby or campaign groups are, in certain circumstances, required to register as *'third parties'* with the Standards in Public Office Commission.

62.09 Having regard to all of these developments, it might be thought that there is only limited room, at this remove, for recommendations for further reform. Yet, the outline of the facts of the above payments serve to underline the key role of disclosure in the monitoring of, and in the reception of, political donations, both from the point of view of persons in overall authority in the recipient party, and from the point of view of the public at large.

62.10 Even without having had the benefit of the evidence heard at this inquiry, it would hardly require any justification to recommend that all donations to, and indeed all income of, a political party should be disclosed to relevant authorities. In the view of the Tribunal, not only should disclosure be made of the fact, and the size, of donations, but details should also be provided of any relevant financial, commercial or other interests of the donor which may be material to the context of the donation made. In the case of the Esat/Telenor donation of \$50,000, it will be obvious from the fact that the donation was made by an entity then engaged in the negotiation of a duopoly mobile telephone licence, that this was a vested interest which ought to have been disclosed. Further, it would seem appropriate that, in the case of donations over a certain threshold, an interest, or a potential interest, in Government contracts, as where any such contract has been recently received, applied for, or where a decision in respect of the same is pending, would appear to be appropriate to be disclosed, subject to all necessary temporary protections to avoid damage to the legitimate commercial interests of donors. Such a disclosure obligation would have applied to the donation of £75,000 made by Customs House Docks, then developers of the Irish Financial Services Centre.

62.11 Because the timing of political donations may be a particularly material factor in judging their potential influence or other impact on a political party,

different and stricter reporting and disclosure regimes should apply in the period immediately surrounding an election.

62.12 Having regard to features of the evidence heard, the following broad recommendations are made:

- (i) *All donations, whether in cash or in kind, and including where necessary loans, whether individual or corporate, should be disclosed to the Standards in Public Office Commission (SIPO).*
- (ii) *All income of political parties should likewise be disclosed to SIPO.*
- (iii) *Donations under a modest threshold, to be fixed by law, though disclosable to SIPO, should be exempted from public disclosure, that is, not be publishable, subject to the next following recommendation.*
- (iv) *Where SIPO discerns a pattern of such donations under that modest threshold, SIPO should have discretion, where it is deemed appropriate so to do, to publish such donations.*
- (v) *The size and amount of all donations, whether the identity of the donor is publishable or not, should be published.*
- (vi) *The gross amount of a donation should determine its disclosability, so that, for instance, where tables at dinners or similar functions are paid for by way of political donation, the total contribution, and not the value thereof after deducting the cost of the relevant function, should be disclosed.*
- (vii) *In the case of a single donation, or the aggregate of a number of donations exceeding a certain threshold, the donor should be obliged to identify any relevant financial, commercial or other interests; to the intent that this would embrace any Government contracts received within a certain period of the making of the donation, any contracts pending, any applications for contracts and any involvement in any procurement process, subject only to a limited temporary protection of confidentiality, which may*

be required to safeguard the legitimate commercial interests of the donor.

- (viii) *Donations should if possible be disclosable in something approximating to a real timeframe, so that, whether on the SIPO website, or otherwise, details of donations should be disclosable within a specified period of their having been received. The obligation to disclose on the part of the donee, and the corresponding frequency of publication by SIPO, should be extended in the period surrounding an election, so as to ensure that as many relevant donations as possible are disclosed.*
- (ix) *The foregoing are without prejudice to the general recommendation made at point (ii) above, that all income of political parties should be disclosed, embracing commercial earnings as well as gifted income.*
- (x) *Appropriate measures should be adopted to ensure that equivalent obligations apply to independent or non-party candidates.*

62.13 In addition, since major vested interests may be disproportionately capable, by means of their greater financial resources, of influencing political activity, some consideration should be given to providing tax relief on donations up to a certain limited threshold, a recommendation made in the Neill Report in the UK. This recommendation was intended, in that Report, to encourage small donations, and to thereby reduce the dependency of political life on funding from wealthy donors.

It is recommended that consideration be given to adopting such a tax relief strategy with a view to encouraging small donors to participate in the political process, and so as to lessen the dependency of the political process on large donations.

62.14 In concluding this aspect of the Tribunal's recommendations, it may be observed in passing that, ultimately, the only cast iron guarantee against corruption and abuses in the political system, and against the risk of distortions in the democratic process, that may arise from the private funding of political parties and political representatives, would be to provide for a complete ban on private political funding and, as in some other European countries, to fund political parties entirely from the public purse. The desirability and feasibility of any such general ban, having regard also to any constitutional law issues that

might arise, and to the national financial exigencies, is pre-eminently a matter for the Oireachtas and for public debate and consideration, and falls outside the remit of this Tribunal, whose focus under its Terms of Reference is on political funding from undisclosed sources.

62.15 Having said that, and as a further measure designed to increase transparency, and to safeguard against abuses, the Tribunal believes that consideration should be directed to the introduction of a discretionary or voluntary system, to be assumed by positive election on the part of Office Holders, within the meaning of the Ethics in Public Office Acts 1995 and 2001, that is, on the Taoiseach, the Tánaiste, a Minister, a Minister of State and the Chairman and Deputy Chairman of the Dáil and of Seanad Éireann, whereby they would allow their financial affairs to be audited by an inspector appointed by the Standards in Public Office Commission at any time during their period of office, and for a defined period thereafter.

It is accordingly recommended that consideration should be directed to the introduction of a discretionary or voluntary system, to be assumed by positive election on the part of Office Holders, within the meaning of the Ethics in Public Office Acts, 1995 and 2001, whereby they would permit their financial affairs to be audited by an inspector appointed by the Standards in Public Office Commission, at any time during their period of office, and for a defined period thereafter.

62.16 Finally, reference should be made to control and regulation of the Leaders Allowance, and of the Leaders Allowance account, both of which featured so prominently in Part I of the Tribunal's Report, in the context of Tribunal inquiries pertaining to Mr. Charles Haughey. As indicated in Part I of the Report, significant statutory controls in respect of both the application of the allowance, and in respect of accountability to the Standards in Public Office Commission, have since been introduced, in response to evidence heard at the Tribunal. These are provided for by the Oireachtas (Ministerial and Parliamentary Offices) (Amendment) Act, 2001, and accordingly, recommendations in that regard are not called for.

COMPANY LAW

62.17 In the course of its inquiries, the Tribunal encountered several instances of boards of directors failing to take what appeared to be the logical, common sense and ordinary precaution of more closely inquiring into matters of significance, and in effect turning a blind eye to matters that ought to have been looked into, thus betraying, at the very least, a sensitivity to disclosure that is

difficult to reconcile with the best standards of corporate governance. It is appropriate to consider whether directors of a company, in such instances, should be bound, as part of their duties as directors, to ensure that, in taking action, they should have regard to the highest standards of business conduct. This matter has been addressed in the UK in the Companies Act, 2006. Embracing the evolving concept of corporate social responsibility, to which many companies in Ireland now subscribe in a general way, although voluntarily, section 172 of the UK 2006 Act provides as follows:

“A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to –

- (a) the likely consequences of any decision in the long term,*
- (b) the interests of the company's employees,*
- (c) the need to foster the company's business relationships with suppliers, customers and others,*
- (d) the impact of the company's operations on the community and the environment,*
- (e) the desirability of the company maintaining a reputation for high standards of business conduct, and*
- (f) the need to act fairly as between members of the company.”*

62.18 The circumstances canvassed above, an instance of which concerned actions taken by directors of Esat Digifone, in the context of revelations to which they became privy in the period prior to the publication of a prospectus for Esat Telecom, would appear to fall squarely within the ambit of the principles enshrined in Section 172(e) above, that directors should be obliged to have regard to the desirability of a company maintaining a reputation for high standards of business conduct. Although there is as yet some uncertainty as to the impact of enforcement provisions concerning these UK statutory duties, the Tribunal recommends that a similar provision be enacted in Ireland, and that attention be directed to the implications of a failure to have regard to such considerations, with the intent that appropriate enforcement measures should be available.

It is accordingly recommended that a provision similar to section 172 of the UK Companies Act, 2006, and in particular sub-paragraph (e), be adopted, together with the adoption of additional implementation or enforcement measures.

62.19 A further feature of the UK Companies Act, 2006, which may warrant consideration, concerns the control of political donations and expenditure by companies governed by that legislation. In summary, Part 14 of the 2006 Act requires that any such donations or expenditure should be authorised by the members of the company, prior to being made. Further, the Act imposes liability on directors where no such authorisation has been granted for political donations or expenditure. In relation to that liability, Section 369 of the Act provides that directors are to be jointly and severally liable to make good to the company the amount of the unauthorised donation or expenditure, with interest, and, significantly, are also liable to compensate the company for any loss or damage sustained by it, as a result of the unauthorised donation or expenditure having been made. In terms of enforcing the directors' liabilities, the members of the company can, again pursuant to the Act, institute proceedings in the name of the company against any such director in default. The company itself can also bring proceedings to enforce any such liability.

It is accordingly recommended that consideration be given by the Oireachtas, and/or by the Company Law Review Group, to enacting provisions similar to those contained in Part 14 of the UK Companies Act, 2006, governing the control of political donations and expenditure.

REVENUE MATTERS

62.20 The Tribunal's Terms of Reference refer to possible recommendations in respect of Revenue matters under two sub-paragraphs, (m) and (p), as follows:

“(m) for maintaining the independence of the Revenue Commissioners in the performance of their functions while at the same time ensuring the greatest degree of openness and accountability in that regard that is consistent with the right to privacy of compliant taxpayers

(p) for the protection of the State's tax base from fraud or evasion in the establishment and maintenance of offshore accounts, and to recommend whether any changes in the tax law should be made to achieve this end.”

62.21 It is proposed to deal with these two items under the following three headings: the independence of the Revenue Commissioners; openness and accountability; and the protection of the State's tax base from fraud or evasion by the use of off-shore accounts.

The independence of the Revenue Commissioners

62.22 Addressing firstly the independence of the Revenue Commissioners, this concept appears to be at odds with an anomalous provision that has remained on the statute books since the time of their establishment, in 1923. The Revenue Commissioners Order, 1923 (S.I No. 2 of 1923), which established the Revenue Commissioners, provides in its article 9 that the Commissioners *“shall in the exercise of their duty be subject to the control of the Minister for Finance and shall obey all orders and instructions which may be issued to them in that behalf by the Minister for Finance.”* In spite of the strong wording of this provision, in practice, the principle of the independence of the Revenue Commissioners is observed, and the Minister for Finance does not instruct the Commissioners in the performance of their statutory functions as to the tax treatment to be accorded to taxpayers.

62.23 This principle of independence has been recognised since the establishment of the Revenue Commissioners as a statutory body, as exemplified by the observation made by the then Minister for Local Government in a Seanad Debate, when he stated that *“...the Minister for Finance will not have anything to say to the assessment of taxes payable by any individual. So far as that is concerned the Commissioners will act independently and judicially”* (Seanad Debates, 14.2.1923, Col. 351). A further reference to that independence was made, in advance of the Commissioners assuming their functions on 1st April, 1923, when the then Minister for Finance stated in a letter to their first Chairman, that *“...while the Revenue Commissioners will be responsible directly to the Minister for Finance for the administration of Revenue services, the Commissioners will act independently of ministerial control in exercising the statutory powers vested in them in regard to the liability to tax of the individual taxpayer.”*

62.24 This principle has been adhered to by subsequent Ministers for Finance since that date, and now has the status of a long-standing convention. It is worth noting that each Finance Act provides that *“all taxes and duties imposed by this Act are placed under the care and management of the Revenue Commissioners”*. This usage underscores the independence of the Commissioners, with regard to the administration of the taxation system.

62.25 The Tribunal has been informed that, given the possible ambivalence in their position arising from the above considerations, in recent years the Revenue Commissioners sought and received an opinion of senior counsel as to the current legal status of the 1923 Order. That opinion related to an Ombudsman’s inquiry, in which the limits of Revenue’s *“care and management powers”* were in

issue. In the view of counsel, the 1923 Order was no longer capable of literal interpretation or application, having regard to Article 15 of the 1937 Constitution, and the Minister for Finance would not be entitled to instruct the Commissioners to act otherwise than in accordance with applicable legislation, in dealing with taxpayers.

62.26 The independence of the Revenue Commissioners is undoubtedly critical to maintaining the integrity of the taxation system. The modern framework, within which the Commissioners operate, should not allow for any doubt in relation to the equal treatment of all taxpayers, or the freedom of the Commissioners from political influence or interference in the discharge of their functions.

It is recommended accordingly that an amending statutory provision would be appropriate in order to elevate the principle or convention of the independence of the Revenue Commissioners to the more robust status of legislative provision.

62.27 In Part I of the Tribunal's Report, at Chapter 16, the independence of Revenue arose in the context of elected representatives making representations to Revenue, on behalf of constituents, in particular, in the case of Mr. Charles Haughey, in connection with the tax affairs of the Dunnes Trust. This was in a twofold context: the first related to the primary findings set forth in that chapter that, in approaching the then Chairman of Revenue, the late Mr. Seamus Pairceir, on behalf of Mr. Ben Dunne, in relation to the latter's tax problems, the former Taoiseach, Mr. Haughey, sought to and did confer a benefit on Mr. Dunne, by way of actual and offered amelioration of those problems in subsequent dealings with Mr. Pairceir, connected in turn with substantial payments made by Mr. Dunne to Mr. Haughey. The second, more general matter, stemmed from the evidence of Mr. Philip Curran, Mr. Pairceir's predecessor as Revenue Chairman, who had also been approached by Mr. Haughey on behalf of Mr. Dunne, regarding what Mr. Curran stated had been a fairly regular practice during his tenure of receiving letters from politicians, including Government Ministers, urging more favourable treatment on behalf of constituent taxpayers. Although never suggesting that public representatives should not have a role in drawing to the attention of Revenue particular problems or hardship occasioned to constituents in their affairs, the Tribunal in Part I of its Report expressed some concern at the incidence of this practice, but left open the expression of any final view until the conclusion of its Report.

62.28 To rule out entirely representations by public representatives to Revenue, whether to the Revenue Commissioners, that is, the senior office holders of Revenue, or to other officials, would probably be an unacceptable

restriction on members of the Oireachtas. Whilst in the case of the evidence heard by the Tribunal, the persons upon whose behalf representations were made had at their disposal substantial resources, that will not always be the case, and it is in just such circumstances, where an individual of modest resources requires assistance, that a public representative may be able to come to the aid of a constituent in his or her tax dealings. The problem which arises is the impression of influence, or the inferred communication of a desire to see a certain result achieved, that may be given, especially where there is a disparity in rank between the individual making the political representation, and the official to whom it is made. This will almost always apply, where such representation is made by a Taoiseach or other Cabinet Minister, or even in the case of a Minister of State. A disparity will be all the more marked where the official, to whom the representation is made, is relatively junior.

62.29 The difficulties likely to be faced by an ordinary constituent may stem from an inability, whether through lack of experience, lack of expertise, or perhaps timidity in the face of officialdom, to process an ordinary application, or to make an ordinary representation to Revenue, such as would be made to a local Revenue Office. Since the establishment of the Tribunal, considerable advances have been made by Revenue, in establishing local offices dispensing information and advice in an approachable milieu, a facility which should reduce the extent to which any individual may need to rely on a public representative to assist with his or her tax affairs. This does not mean that the situations canvassed above do not and could not continue to arise. What is at issue is the prospect that undue deference to the wish of a senior politician will result in a desired outcome for a constituent, despite the fact that this may not be entirely appropriate, having regard to the relevant regulatory regime.

62.30 Having said that, the Tribunal on balance is of the view that it would be neither appropriate nor practicable to restrict access entirely by Government Ministers to Revenue in such a setting, since to do so would markedly limit their ability to discharge their duties as ordinary public representatives. Instead, in the Tribunal's view, what is required is a lesser measure, designed to reaffirm and encourage the integrity of the administration, over the requirements of any Minister to facilitate a constituent, or other member of the public, whereby the conduct of Office Holders, in this context within the meaning of the Ethics in Public Office Acts, 1995 and 2001, would become more transparent, and susceptible to monitoring.

It is recommended accordingly that, by Regulation made under the appropriate legislation, any representation to Revenue by Office Holders, within the meaning of the Ethics in Public Office Acts, 1995 and 2001, should be made in writing, stating the precise footing upon which the representation is made, the result

sought to be achieved, and the basis upon which, in the Office Holder's view, it is appropriate to make the representation. All such requests should be responded to in writing to the maker of the representation. Such representations should not be permitted to be made to junior officials of Revenue.

Openness and accountability

62.31 The Tribunal appreciates that there are constraints within which Revenue must operate, when it comes to openness and accountability in the performance of its functions. The confidentiality of a taxpayer's dealings with Revenue is a fundamental principle in the administration of the taxation system. Of necessity, Revenue has to exercise a degree of caution in its approach to openness and accountability, in order to ensure that it does not encroach upon, or infringe, that principle. Revenue's Customer Charter recites that *"Revenue will treat the information you give us in confidence and ensure that it will not be used or disclosed except as provided for by law."* Mr. Frank Daly, who gave evidence to the Tribunal during his tenure as Chairman of the Revenue Commissioners, touched upon this subject. During the course of his evidence, Mr. Daly stated that *"there is always a tension between taxpayer confidentiality, which Revenue attaches human importance to, and quite rightly, and at times a temptation to explain ourselves just a little bit better, but to try to do that without intruding into particular cases."*

62.32 This issue was addressed in a subsequent written submission by Revenue to the Tribunal. Revenue stated that taxpayers' dealings with it should remain confidential, save in exceptional circumstances, and in this regard observed that information provided to Revenue is invariably private, and that information provided by business is often commercially sensitive. Confidentiality, and a relationship of trust between the taxpayer and Revenue, are viewed by Revenue as crucial for the promotion of a climate of voluntary compliance by taxpayers. Confidentiality protections are viewed as essential to the viability of its relationship with taxpayers, and it is a serious disciplinary matter for a Revenue official to make an inappropriate disclosure of confidential taxpayer information.

62.33 It must be recorded that, In the wider context of openness in dealings with taxpayers, there has been a significant improvement in the dissemination of information by Revenue, since the advent of internet technology. Through its website, Revenue has made available to a high proportion of taxpayers detailed information in regard to their obligations, and their potential entitlements and benefits. Since as early as 2000, this facility has also provided for an on-line payment service and, more generally, aided by its adjustment to technology, Revenue has managed to regulate the affairs of a much larger number of taxpayers. Through its press office, and publication of a wide range of news and

information, including Annual Reports and Quarterly Lists of Defaulters, Revenue has sought in recent years to advance public awareness of its operations, with a much greater reliance on self-assessment for taxpayers than formerly.

62.34 On the subject of accountability of Revenue, there are a number of agencies that subject Revenue to scrutiny. The Comptroller and Auditor General examines Revenue from a financial regulatory perspective, and also from the point of view of the efficiency and effectiveness of its operations. The Chairman of the Revenue Commissioners, as Accounting Officer, makes appearances before the Dáil's Public Accounts Committee. Revenue's own Internal Audit Unit, whose director reports to the Chairman, is also active. An Audit Committee oversees this Internal Audit Unit's activities, and the majority of its members are appointed from outside Revenue. Furthermore, the Office of the Ombudsman may investigate Revenue, on foot of any complaint received.

62.35 Having regard to all of the above matters, it appears to the Tribunal that there is no reason to doubt that Revenue is endeavouring to meet its obligations in terms of openness and accountability in relation to the performance of its functions, consistent with the principle of taxpayer confidentiality, and the Tribunal is of the view that no additional legislation or regulatory safeguards are required in that regard. In consequence, it is not deemed necessary in this Report to make any such recommendations.

Protection against fraud or evasion by the use of off-shore accounts

62.36 That persons liable to tax will, if opportunity presents, seek by unlawful means to evade responsibility for payment, as by using off-shore tax havens, with the inevitable increase in the burden on those who pay their taxes, gives rise to issues to be tackled in every tax system. Funds are transmitted to tax havens, not always exclusively to avoid tax rates applicable in the taxpayer's usual place of residence, but also to avoid scrutiny by authorities other than revenue, whether the police or other investigatory agencies, including inquiries such as this one. For many years, these sometimes twin objectives were facilitated by tax havens, to the extent that authorities in those jurisdictions were unwilling, whether by convention, or by law, to accede to requests for disclosure of information directed to them by revenue or investigating authorities in other jurisdictions. It was the guarantee of secrecy which in many cases attracted funds to those off-shore jurisdictions, from persons wishing to avoid revenue or other exposure.

62.37 Since the proceedings of this Tribunal commenced, significant progress has been made in the realm of international co-operation on taxation matters, with a view to limiting the extent to which offshore tax havens can be used to

obscure funds, or their sources, from national revenue authorities. This work, conducted under the aegis of the OECD, has led to a number of important initiatives, of which one of the most significant is the Agreement on Exchange of Information on Tax Matters (2002). Although not a binding instrument, it contains models for bilateral agreements between Member States of the OECD, intended to address tax practices, specifically with a view to establishing effective mechanisms for exchange of information deemed to be significant in deterring harmful tax practices. It is notable that such an agreement has been concluded between Ireland and the Cayman Islands, effective for criminal tax matters since 1st January, 2004, and for all other matters since 1st January, 2011. Agreements have also been reached, among other countries, with Guernsey, Isle of Man, and Jersey, to name but a few of the jurisdictions alluded to in the course of the Tribunal's proceedings. The effect of these agreements is to limit the attractiveness of arrangements of the type put in place by Mr. Desmond Traynor in the course of his own, and Guinness & Mahon's, operation of the Ansbacher Accounts. These agreements also have the added effect of exposing individuals utilising offshore tax havens to the risk that the activities by which sheltered income was generated could potentially be ascertained.

62.38 It remains to consider whether information coming to the attention of the Revenue Commissioners, on foot of the operation of bilateral agreements now in force, ought to be conveyed to other relevant agencies, including tribunals of inquiry. The Tribunal believes that this would be a beneficial course, and one which warrants consideration.

Accordingly, the Tribunal recommends that consideration should be given to establishing an appropriate protocol for the transmission to investigating agencies by Revenue of information derived from the operation of bilateral agreements. In devising such strategy, consideration would have to be directed to the impact of any such further sharing of information on the operation of concluded bilateral agreements.

REGULATION

Regulation of banks

62.39 The conduct of the Central Bank, in relation to the activities of Guinness & Mahon, was one of the particular matters inquired into and reported upon by the Tribunal in Part I of its Report, published in December, 2006. The Tribunal's inquiries in this regard related to a period when the Central Bank acted as regulator of Irish banks, pursuant to the provisions of the Central Bank Act, 1942, as amended from time to time. As from 1st May, 2003, when the

Central Bank and Financial Services Authority of Ireland Act, 2003, entered into force, this function was transferred to the Irish Financial Services Regulatory Authority, IFSRA, also known as the Financial Regulator, within the structure of the Central Bank and the Financial Services Authority of Ireland. This marked the beginning of what was to be a six-year separation of the Financial Regulator from the Central Bank. As of 1st October, 2010, under the provisions of the Central Bank Reform Act, 2010, a new single unitary body, the Central Bank of Ireland, has been established, with responsibility for both central banking and financial regulation.

62.40 The 2010 Act provides the statutory basis for merging the functions of the Central Bank and IFSRA. It creates a single fully integrated Central Bank, subject to the control of a unitary board called the Bank Commission. The new unitary structure replaced the existing structure, where the systemic regulation of the overall financial system was divorced from the prudential supervision of individual firms. The Bank Commission manages and controls the Bank. It comprises up to 12 members, and is chaired by the Governor of the Central Bank. The Act also creates two statutory posts, a Head of Financial Regulation and a Head of Central Banking.

62.41 The far greater range and degree of specificity of the powers of regulation, as provided for in the Central Bank Reform Act, 2010, are such that certain recommendations that could have arisen from the relevant conclusions of the Tribunal, as set forth in Part I of its Report, have been overtaken by events. Furthermore, in circumstances where the Tribunal's inquiries with respect to bank regulation were limited in time, subject-matter and scope, and arose out of a single set of relationships, there was never a basis upon which the Tribunal could have provided a comprehensive set of recommendations concerning the regulation of the banking sector. Nonetheless, from the evidence heard and the findings made, certain observations, whilst perforce not directed to specific details of reform of the banking regulatory system in Ireland, and by necessity of a general character, can and should be made.

62.42 Before proceeding to those observations, and in order to more readily place them in the context of the relevant findings and conclusions of the Tribunal, it is important to stress again the limited character of the Tribunal's inquiries in this regard. In the first place, the Tribunal's relevant inquiries were limited in time, being confined to a period of approximately 6 years, between 1976 and 1982; secondly, they were limited in terms of subjects of inquiry, arising solely from a consideration of what occurred in Guinness & Mahon, in Dublin, in connection with its off-shore subsidiaries in the Cayman Islands and the Channel Islands; and thirdly, the Tribunal was concerned to examine a single feature of the Central Bank's supervision, namely the Central Bank's concern

that Guinness & Mahon was operating a tax avoidance scheme tantamount, in the view of one inspector, to facilitating tax evasion.

62.43 It is clear, from the relevant evidence and findings, that most of the information upon which the Central Bank, as regulator, should have acted, was available to the Central Bank, or ought, on reasonable inquiry, to have been available to it. The reason it did not so act was characterised by a marked degree of unwarranted institutional and regulatory timidity, on its part, and by a corresponding degree of undue and unacceptable commercial defiance, on the part of those subject to regulation. Allied to these considerations, and underlying these attitudes and approaches, was the conviction and culture of all concerned that the attachment of publicity to improper banking behaviour, or the generation of controversy in respect of banking practices and banking standards in Ireland, might lead to the undermining of the Irish banking system. It was not that the Central Bank at the time lacked any requisite powers to enable it to suppress the shamelessly improper operation of the Ansbacher accounts, but rather that it failed to use its ample regulatory powers.

62.44 The function of a regulator is to “*regulate*”, and whilst one can appreciate the dangers of over-regulation, and the prospect that, for instance, in the current climate, the balance could swing in favour of over-regulation, at the time of the matters under review in the evidence at this inquiry, it had swung very much in the other direction. To repeat, it is not that new powers were then required, or indeed that a major review of powers would now be required. Rather, strong action, not amounting to over-regulation, on the part of regulators, should be valued as a key element, as opposed to a retardant, in the promotion of a healthy financial sector. It is extremely difficult to frame recommendations where what is proposed is a change of attitude on the part of the relevant authorities, and indeed in the overall commercial culture in which those authorities are bound to act. As recent events have shown, regulation is the key to the survival of the banking sector, so vital to the national economy.

62.45 It cannot be over-emphasised that what is required, in addition to the fact of regulation, is a culture in which forthright regulation is valued, not merely at a time of financial stringency, but at a time when it might be thought to be an unnecessary brake on commercial activity. Such a change of attitude can probably best be encouraged by increased vigilance on the part of elected representatives. It is nonetheless apt to observe, with some regret, that these and related matters were addressed in considerable detail in Part I of the Tribunal’s Report, published in December, 2006, without apparent consequence.

Regulation of accountancy and legal professions

62.46 The Tribunal is aware that, following the Report of the McCracken Tribunal, a number of professional accountancy bodies examined the findings and evidence of that Tribunal, with a view to considering what action was appropriate, either under their existing constitutional arrangements, or with a view to any alteration of those arrangements.

62.47 The two professions to which the evidence of this Tribunal pertained were the accountancy and legal professions.

62.48 Nothing substantial arose from the Tribunal's evidence or findings relating to the accountancy profession, which would not already be subject to appropriate control under the revised regulatory framework now governing that profession.

62.49 Likewise, notwithstanding that the Tribunal has referred extensively in the course of its Report to the conduct of members of the legal profession, it considers that the existing regulatory framework governing that profession is probably sufficient, if appropriately deployed, to meet any ethical or disciplinary exigencies that could arise in a context similar to the matters under inquiry in this Tribunal.

TRIBUNALS OF INQUIRY

62.50 It would neither be appropriate nor feasible, on the experience of one inquiry, to suggest a conclusive or even standard template for the conduct of public inquiries. The Tribunal notes the wide-ranging and perceptive analysis of many issues pertaining to the conduct of tribunals, contained in the Law Reform Commission's Report on Public Inquiries including Tribunals of Inquiry (LRC 73-2005). The Tribunal contributed to the process leading to the Consultation Paper, preceding the Law Reform Commission's Report, and the Tribunal is in agreement with and endorses the Report and its recommendations. The proceedings of this Tribunal, moreover, together with the experience of tribunals conducted parallel to it, afford a basis upon which it seems both fitting and necessary to make certain recommendations. These pertain mainly to the duration of inquiries, and the impact of delay on the effectiveness of inquiries under the 1921 Act model. The Tribunal's recommendations should therefore be viewed as observations complementary to those set forth in the Law Reform Commission's Report.

62.51 The observations that follow can be divided into two classes. Firstly, there are those that stem primarily from the format and genesis of a tribunal's

terms of reference, and relate to the extensiveness of terms of reference, the number of individuals named as subjects of inquiry, the potential that a number of others could also become subject of inquiry, the nature of the subject-matter of inquiry, and the feasibility of conducting inquiries involving matters occurring in other jurisdictions. Secondly, are observations pertaining to what course can be taken to meet the pervasive and difficult issue, encountered as a significant obstacle over protracted periods of time by this Tribunal, of persons actively withholding or concealing important information, relevant to the matters under inquiry.

Genesis of inquiries and early disclosure

62.52 One of the shortest inquiries conducted in recent times was the Tribunal of Inquiry (Dunnes Payments), otherwise known as the McCracken Tribunal. The genesis of that Tribunal lay in a dispute between members of the family of the late Mr. Bernard Dunne, the founder of the Dunnes Stores business. The circumstances in which that inquiry came to conduct its proceedings stemmed from a prior, and more limited, inquiry conducted by His Honour Judge Gerard Buchanan, whose investigations in turn arose from litigation between members of the Dunne family. From that litigation, there emerged a considerable body of information, in the form of affidavit evidence, allegation and counter-allegation on the pleadings, and arising from the discovery process, and this was supplemented by material in the possession of the parties not deployed in the litigation, but later made available to the McCracken Tribunal.

62.53 Whilst there were other technical elements of the proceedings of the McCracken Tribunal of significance, including the tightly drafted and carefully limited structure of its Terms of Reference, the element of adversarial contest was a defining characteristic of the circumstances which led to it. As stated, a significant amount of information was already in existence, either in the public domain, or in the possession of the parties, and this characteristic has also been a feature of other inquiries, such as the Morris Tribunal, and, in another jurisdiction, the Saville Inquiry.

62.54 The fact that an inquiry is preceded by litigation, in which important aspects of the controversy giving rise to the tribunal have crystallised, is not the only manner in which significant information may be accumulated in advance of an inquiry. This is particularly so with disaster inquiries where, despite the fact that there may be little information available in advance of the inquiry, inevitably there are ranged on opposite sides, in something approximating to an adversarial configuration, the victims, and those whose acts or omissions are under inquiry, as having caused or contributed to the disaster. The obvious examples are the Stardust Inquiry, the Whiddy Inquiry, and the Buttevant Train

Crash Inquiry. In inquiries of that type, significant amounts of time and energy will have been applied by individuals or entities, other than the inquiry itself, in the assembly and presentation of relevant information.

62.55 In the case of the proceedings of a tribunal such as this one, the absence of this adversarial dynamic is an equally defining characteristic. In such a setting, the accumulation and assembly of information is exclusively a matter to be undertaken by the tribunal itself. Even in circumstances where individuals or entities dealing with an inquiry are disposed to provide documentation or other assistance, such a process is inevitably time-consuming, and may frequently entail the making of orders for production, with the added potential for dispute. The entities with which a tribunal finds itself dealing, whilst not wishing to withhold assistance, may have no enthusiasm for the provision of information required, in particular where there is a likelihood that they may feature in the course of the tribunal's public proceedings.

62.56 For a considerable period during the course of its life, the Tribunal, wishing to avoid the delay inevitably flowing from the adoption of such formal procedures for obtaining information, endeavoured to follow a more informal route. This was intended to encourage persons to be candid in their dealings with the Tribunal, on a basis which would both provide information and, from the point of view of those persons, possibly serve to convince the Tribunal that it was unnecessary to proceed with public hearings concerning such information, or involving such persons. Since the decision of the Supreme Court in *O'Callaghan & Ors v. Judge Alan Mahon & Ors* [2006] 2 IR 32, it may prove more difficult, at least on a broad interpretation of the principles flowing from that case, to continue effectively to operate informal information gathering exercises of this type.

62.57 These matters in themselves are bound to take time, and having regard to the inconvenience and delay of proceeding by formal order, it appears to the Tribunal that it would assist if measures could be adopted to encourage those with information relevant to a tribunal's inquiries, to make disclosure, on a voluntary basis, in advance of any request from the Tribunal, on the footing that, in respect of any such disclosure, such persons' costs and expenses would be paid by the Tribunal, subject of course to the disclosure being full and frank in every respect.

62.58 In particular, it may be appropriate to consider adopting a provision whereby, when information is volunteered in this way, it would not be admissible as evidence against the person who provided it in criminal proceedings, to the intent that what the Law Reform Commission has described as "*derivative or*

fruits immunity”, would be available to the person providing the information. Such immunity is to be distinguished from the “*direct immunity*” rule, which currently applies in the case of evidence led at a tribunal. To quote the relevant paragraph of the Law Reform Commission’s Report, at paragraph 10-30:

“Under the direct immunity rule, only the evidence which was tendered to the tribunal is inadmissible in subsequent criminal proceedings. As a result, the authorities may use that evidence as a springboard to discover over [sic] types of evidence, which may prove the same matter, in a manner which may be admissible in subsequent criminal proceedings. Derivative immunity is broader in scope than direct immunity and renders inadmissible not only the evidence tendered to the tribunal but also all evidence that emanates or flows from the evidence tendered before the tribunal.”

62.59 It is accordingly suggested that consideration be given to crafting a mechanism, along the lines of the voluntary disclosure regime operated under the Revenue code, so as to encourage early disclosure of relevant information, leading to a more expeditious dispatch of tribunal business. In judging whether such an approach ought to be adopted, it may be appropriate to consider whether some immunity from civil proceedings should be incorporated. This, though a radical step, might be justified where, though public concern was great, potential access to information was likely to be limited. Whilst, if such a proposal were adopted, what the Law Reform Commission in its Report refers to as the “*downstream consequences*” for individuals implicated in wrongdoing would be undoubtedly mitigated, the wider public interest may be more readily served by a speedy inquiry. A further encouragement, and a counter-balancing provision, might be to the effect that less than full disclosure would result in the loss of the immunity conferred.

It is accordingly recommended that consideration be given to adopting an early disclosure procedure, analogous to the voluntary disclosure procedure operated under the Revenue code, with concomitant advantages to the volunteer, balanced by proportionate disadvantages in the event of disclosure being less than full.

62.60 Where information is withheld or concealed from a tribunal, in particular where that information is not accessible through the making of orders for production of documents, other considerations arise in judging how to avoid the protraction of a tribunal’s inquiries, and this is a matter that will be returned to below.

Range and multiplicity of inquiries

62.61 Two features of the Tribunal's Terms of Reference contributed significantly to the form that the Tribunal's inquiries took, and to its extended timescale. Even assuming that there had been no concealment of information, these features were bound to affect the type and extent of the Tribunal's inquiries. They were, firstly, the range of inquiries required to be carried out, and secondly, the fact that the Terms of Reference applied to two named individuals, without there being any substantive connection between them, other than that they figured independently in payments made by Mr. Ben Dunne, the subject of the Buchanan Report and the McCracken Tribunal Report. Whilst Mr. Dunne had made payments to both, those payments were not associated, although of course there may have been similar motivations.

62.62 With the benefit of hindsight, it seems reasonable to conclude that, had the Tribunal's inquiries been confined to Mr. Charles Haughey, their overall duration would probably not have extended far beyond the year 2000. For reasons already set out in the body of this Report, the inquiries concerning Mr. Michael Lowry were markedly extended, the cause of the delay in the conclusion of those inquiries being due in large part to the conduct of a number of individuals, of whom Mr. Lowry was one. Even so, it is reasonable to assume that the overall duration of the Tribunal's inquiries might have been halved, had the Tribunal not been obliged to carry out substantial investigations into the affairs of two individuals.

62.63 It is of importance, both from the point of view of the members of the Oireachtas, and the public, on the one hand, and from the point of view of the individuals named in a tribunal's terms of reference, on the other, that a report should be delivered, and that an inquiry should be concluded, as soon as possible. Despite the fact that, in the case of Mr. Lowry, the Tribunal's inquiries were significantly retarded by reason of the activities of a number of individuals, which have resulted in criticisms throughout the Report, the overall objectives of the Oireachtas in establishing inquiries would have been better served had the Tribunal's inquiries been limited to one individual.

62.64 It is not always possible to say definitively, at the outset of tribunal inquiries, that proceedings should be divided or separated into a number of distinct limbs. However, were a tribunal empowered to request the Oireachtas to consider dividing the work of the inquiry, this could significantly accelerate the conclusion of the existing inquiry's work, and expedite the inquiries to be carried out by a different body. Obviously, this could only be done where the sponsoring Department could be satisfied that it was in the interests of the expedition of the

inquiry that a further agency be appointed to undertake a specified portion of the work contemplated by the tribunal's terms of reference.

62.65 This approach is reflected in the commentary contained in Chapter 3 of the Law Reform Commission's Report, in particular, in its references to the recommended advance input of tribunals to the drafting of terms of reference of an inquiry, and in the acknowledgement that a tribunal is perhaps best placed to consider the necessity, or appropriateness, of an amendment to its terms of reference, as its inquiry evolves. This approach is reflected also in the provisions of section 6 of the Commissions of Investigation Act, 2004, pertaining to the amendment of the terms of reference of such a Commission. Notwithstanding the provisions of section 1(1) of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1998, which on first reading might seem applicable, it does not appear that this mechanism is in fact provided for under existing law.

It is accordingly recommended that consideration be given to empowering a tribunal to request the Oireachtas, at any time, to consider the appointment of two or more separate forms of inquiry where, from the tribunal's inquiries and investigations, it seems that the original purpose of the inquiry, as appearing from its terms of reference, would be better and more expeditiously served by separate inquiries.

Drafting of Terms of Reference

62.66 As has already been mentioned, closely drafted terms of reference may be a significant factor in limiting the duration of a tribunal's work. Whilst, undoubtedly, over-narrow terms of reference might preclude a tribunal from examining or reporting on matters germane to the overall thrust of its terms of reference, provision could be made for the extension of wording in such circumstances. Again, the recommendations of the Law Reform Commission are relevant in this context, and, adopting the views of the Commission, it seems commendable that the approach incorporated in the Commissions of Investigation Act, 2004, whereby terms of reference may be amended at any time prior to the submission of the relevant report, should apply also to tribunals of inquiry.

It is therefore recommended that consideration be given to amending the Tribunals of Inquiry (Evidence) Acts, 1921 to 2004, by incorporating provisions along the lines of those contained in section 6 of the Commissions of Investigation Act, 2004.

Non-compellable witnesses

62.67 A feature of this Tribunal's inquiries was the non-compellability of certain important witnesses. This arose, mainly, in the following contexts:

- (i) in connection with inquiries into the operation of the Ansbacher accounts, and specifically those pursued with persons in the Cayman Islands;
- (ii) in connection with inquiries pursued with Irish Nationwide (IOM) Limited, the wholly-owned Isle of Man subsidiary of Irish Nationwide Building Society, and specifically in relation to a request for the evidence of an official of the bank;
- (iii) in connection with inquiries into English property transactions in which Mr. Michael Lowry was involved, arising from the refusal of Mr. Kevin Phelan to attend the Tribunal, and from the like refusal of Mr. Christopher Vaughan, until his belated attendance, after notification to him of Provisional Findings;
- (iv) in connection with inquiries into the second GSM licence process, insofar as the role of Mr. Michael Andersen was concerned, and his refusal to make himself available as a witness until very recently; and
- (v) in connection with inquiries into certain share transactions in which the US firm of Donaldson Lufkin & Jenrette was involved, in respect of which Mr. Peter Muldowney, an Irish national, of that firm, refused to make himself available.

62.68 The non-availability of witnesses may affect the Tribunal's capacity to conclude its work. A witness's belated attendance, particularly after the effective conclusion of the Tribunal's hearings and notification of Provisional Findings, will inevitably occasion much unnecessary delay, inconvenience and repetition. At the same time, whilst this matter merits consideration, it is recognised that the negotiation and conclusion of multilateral agreements intended to facilitate the compellability of such witnesses, in proceedings other than court proceedings, is likely to be attended by many potential difficulties. Even where witnesses are within the EU, it is far from certain that Member States could be persuaded to agree to put in place a regime intended to enable witnesses to be compelled to attend at proceedings other than court proceedings, in other Member States.

62.69 However, in the Tribunal's view, this matter may have to be addressed, such that evidence should be compellable, even in a non-judicial context, in connection with contracts, such as that to which Mr. Michael Andersen's company, AMI, was a party. This is so, notwithstanding that the character and procedure of non-judicial inquiries may vary significantly from Member State to Member State. In inviting tenders for such contracts, the Member State in question is obliged, under EU law, to ensure that EU competition and public procurement law is complied with. In circumstances where a valuable public contract is awarded to a person from another Member State, and a public inquiry as opposed to court proceedings later results, it appears as anomalous, as borne out by the experience of this Tribunal with Mr. Michael Andersen, and can give rise to considerable difficulty, if such persons cannot be compelled to answer for their conduct.

Accordingly, the Tribunal recommends that consideration should be directed by the State, in co-operation with its European Union partners, to the harmonisation of rules to govern the compellability of EU nationals retained to provide public services in other Member States, before public inquiries, or like agencies.

Withholding or concealment of information

62.70 Mr. Michael Lowry, Mr. Denis O'Brien, Mr. Denis O'Brien Senior, Mr. Aidan Phelan, Mr. Christopher Vaughan, Mr. Denis O'Connor and Mr. Kevin Phelan at various times, in the course of evidence, and in the course of correspondence, were at pains to assert their desire, and intention, to afford complete co-operation to the Tribunal. These assertions were echoed by their legal representatives.

62.71 However, as Volume I of this Part makes clear, there was persistent and active concealment by all of the individuals named above, calculated to obscure from the Tribunal evidence indicating monetary connections between Mr. Michael Lowry and Mr. Denis O'Brien. It has been suggested to the Tribunal in correspondence, in particular by Mr. Denis O'Brien, that the extensive delay in the conclusion of the Tribunal's work has driven the Tribunal, in order to justify its duration, to frame its findings in sensationalist terms, and specifically in terms reflecting negatively on Mr. O'Brien. The extended length of the Tribunal's sittings was due predominantly to the activities of Mr. O'Brien, Mr. Lowry and their associates, in concealing information from the Tribunal, and in instituting and supporting litigation directed to suspending the Tribunal's inquiries, at a time when they knew that further information pertaining to the matters under inquiry was being withheld by them from the Tribunal. These delays, and the extent to which they were due to the activities described above, are matters which have

reflected negatively in the Tribunal's Report on Mr. Lowry and Mr. O'Brien, and their associates, and justifiably so.

62.72 That certain of the critical information concealed from the Tribunal ultimately came into its possession was due mainly to two factors. Firstly, its perseverance in seeking answers to questions, the responses to which had proved at best unsatisfactory, and at worst, barely creditworthy; secondly, the fact that, occasionally, information was relayed directly or indirectly to the Tribunal, in a manner, that was wholly accidental and fortuitous.

62.73 Where, as is only appropriate, a premium is placed on urgency in the conduct of a tribunal's investigations, the inevitable corollary is that, in the eyes of those who wish to undermine a tribunal, a premium is placed on the value of delay, and on anything likely to promote delay in the conduct of the Tribunal's proceedings. It is not merely in relation to the overall costs of an inquiry that the impact of delay is felt. Delay, if extensive, may ultimately prompt a tribunal to discontinue its investigations. For instance, had the Tribunal in this case not persevered with its queries, it would have been obliged to report without having had available to it the evidence of wholesale alteration of correspondence on Mr. Christopher Vaughan's files, and the further information that flowed from that.

62.74 Where there has been a deliberate effort to mislead a tribunal, the question arises as to whether the existing law is adequate to prevent and punish such conduct, as appropriate. The answer, in the view of the Tribunal, is that the existing offence of obstructing or hindering a tribunal, as provided for in section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, allied to the powers of tribunals of inquiry in respect of the awarding and refusal of costs, where there has been a failure to co-operate with a tribunal of inquiry, as provided for in section 6 of the 1979 Act, confer adequate coercive powers in this context.

62.75 Yet, tribunals must operate on the basis that persons engaging with them are willing to do so on a co-operative footing. To proceed otherwise would be to subject persons dealing with a tribunal to pre-judgement, and, there are sound practical reasons for avoiding the making of formal orders for production in every case. In these circumstances, and having regard to the experience of this Tribunal, the Tribunal believes that it is appropriate, by way of amendment to the existing legislation, to impose a positive duty of co-operation on persons in possession of information or documentation material to a tribunal's inquiries, to co-operate with it. Such an obligation, enshrined in legislation, could be more persuasive than the prospect of an adverse costs order at some indefinable future point.

The Tribunal therefore recommends that consideration be given to amending the Tribunals of Inquiry (Evidence) Acts, 1921 to 2004, to provide for a positive duty on persons in possession of information or documentation material to a tribunal's inquiries to co-operate with such tribunal. This positive duty need not be made the subject of an offence for its breach, although such an additional coercive measure might also be contemplated.

62.76 In so recommending, and in this very last connection, the Tribunal is conscious that tribunals of inquiry already possess extensive powers to require responses to questions, and that, subject always to limitations of existing legal principle in respect of self-incrimination, the answers provided may ultimately result in far-reaching consequences for those concerned. For this reason, the Tribunal believes that the establishment of an express positive duty to co-operate, such as might found, for example, an application to Court to protect a tribunal's process in an appropriate case, but without creating any additional criminal penalty for its breach, would strike the correct balance of interests.

Appendices to Chapter 5

A NEW GOVERNMENT IS FORMED AND THE COMPETITION FOR EXCLUSIVE
NEGOTIATION RIGHTS FOR THE GSM LICENCE IS LAUNCHED

Index

1. Government Decision of 2 March, 1995.

Air Thagarta

S.22048E



Department of the Taoiseach

BAILE ÁTHA CLIATH 2
Dublin 2

2 Márta, 1995.

000304

An Rúnaí Príobháideach
An tAire Iompair, Fuinnimh agus Cumarsáide

I am to refer to the memorandum dated 17 February, 1995, submitted by the Minister for Transport, Energy and Communications and to inform you that, at a meeting held today, the Government approved the announcement of an open competitive bidding process with a view to the granting of a licence to a second cellular phone operator, on the basis that

- (1) the bidding process would be promoted and controlled by the Department of Transport, Energy and Communications;
- (2) a recommendation would be put by the Minister to Government in time for a final decision on the granting of the licence to be made by 31 October, 1995; and
- (3) the general terms and conditions attaching to the licence would be as set out in the Appendix to the aide memoire.

000102


Rúnaí Cúnta an Rialtais

c.c. The Secretary
Mr. Seán Fitzgerald
Mr. Martin Brennan
Mr. Colin McCrea

000663

Appendices to Chapter 7

THE REQUEST FOR TENDERS DOCUMENT ISSUED BY THE DEPARTMENT

Index

1. Request for Tenders (the RFP) issued on 2 March, 1995.



000306

Department of Transport, Energy and Communications
Ireland

COMPETITION FOR A LICENCE TO PROVIDE DIGITAL MOBILE
CELLULAR COMMUNICATIONS (GSM) IN IRELAND

No. 21

1. The Minister for Transport, Energy and Communications of Ireland invites applications for a single licence to provide and operate, within Ireland, a public pan-European cellular digital land-based mobile communications system (GSM) as described in the Annex to Council Recommendation 87/371/EEC of 25th June 1987 (O.J. No. L196, 17.7.1987, p.81), in competition with the equivalent offering by Telecom Eireann.
2. The licence will be issued under Section 111 (1) of the Postal and Telecommunications Services Act, 1983 and will be valid for a period of 15 years.
3. Applicants must give full ownership details for proposed licensee and will be expected to deal with the matters referred to in the following paragraphs in their submissions.
4. The minimum initial fee for the licence will be IR£5,000,000 and applicants are free to offer a higher amount to win the right to the licence.
5. It is intended to recoup from the telecommunications sector the full costs of administering and regulating the sector by means of an annual licence fee which will be based on turnover. It is not possible to specify arrangements at this stage but appropriate notice will be given to all operators.
6. An allocation of 2X7.5 MHz will be made available at an annual fee of IR£10,000 per paired 200 kHz channel for each of the first two years and IR£20,000 per 200 kHz paired channel per annum thereafter. Comparable fees will be paid by the existing mobile operator. (Figures exclude VAT). The fees will be linked to annual changes in the consumer price index as published by the Central Statistics Office. The appropriate authority for allocation of spectrum in Ireland is the Minister for Transport, Energy and Communications. Efficiency of use of spectrum resources will be a criterion for evaluation of applications (see paragraph 19 below).
7. The minimum requirement will be for coverage of 90% of the population within four years of issue of the licence. Applicants should set out clearly the critical path to fulfilling this requirement. Acceleration of the rollout will be a criterion in assessing submissions.

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000455

000307

8. Applicants must indicate their intentions regarding initial tariffing of the service and a proposed regime for the future development of the tariffs together with the extent to which they are prepared to make firm commitments in this area. The approach to a competitive market will be a major evaluation criterion.

9. Applicants must demonstrate their financial capacity and technical experience and capability to implement the system if successful and must include a business plan for at least the first five years and a complete technical proposal. All relevant assumptions made in these plans should be clearly stated. All financial analysis/projections/prices etc. in the plan should be expressed in 1995 prices. Applicants are requested to supply the models etc. used in electronic form to the Department. Use of a standard spreadsheet (e.g. Excel or Lotus 123) would assist with evaluation. The technical proposal should cover, inter alia, an infrastructural plan, critical path, quality of service and standards of equipment. The question of performance guarantee should be addressed and the milestones against which performance may be measured should be indicated. Applicants must demonstrate ability to comply with at least the following minimum standards:

- The service must be provided continuously 24 hours a day, all days.
- The licensed operator will have an obligation to ensure that all failures will be taken care of and the service restored within an acceptable period by reference to international standards.
- General service quality and communication failure rate should be demonstrated to be at an acceptable rate for GSM services by reference to European standards.
- All mobile radio equipment used by both the licensed operator and its subscribers must comply with type approval Recommendations adopted by the GSM Secretariat.

000104

10. Applicants should indicate their proposed approach to service provision/airtime resale which must be designed to lead to a competitive market and be based on equitable principles.

11. The successful applicant will be expected to provide for:

- free access to emergency service numbers;
- a directory enquiry service
- facilities for duly authorised security interception by the State;
- itemised subscriber billing; and
- an arbitration and dispute settlement procedure for customers.

12. Interconnection with the PSTN and public mobile telephony services will be essential and the new operator licensed following this competition will have a right to such interconnection. An interim regime in relation to call delivery between fixed and mobile services will be based on charges/payments as follows:

000456

	Peak IR pence per minute	Off-peak IR pence per minute
Delivery of call within Telecom Eireann local area	4.3	4.3
Delivery of call within Ireland but outside Telecom Eireann local area	8.3	8.3
Delivery of call to Northern Ireland	23	15
Payment to new operator for calls from the PSTN to his customers	8.8	8.8

(Note: Peak time is from 8.00 am to 6.00 pm on Monday to Friday inclusive; all other times are off-peak)

International calls which must be switched and delivered via the Telecom Eireann switched network will be charged on the basis of the published Telecom Eireann tariff rates with due account of applicable volume discounts.

The foregoing interconnection regime will apply equally to Eircell and the new licensee and will be reviewed in detail in due course but increases are not envisaged.

13. Technical aspects of interconnection, the question of national roaming and all other aspects of the commercial relationship between the successful applicant and Telecom Eireann are matters for negotiation between interested parties. Telecom Eireann have undertaken to place senior executives at the disposal of potential applicants for discussions up to 12 noon, Friday 14 April, 1995 and to promulgate a memorandum for the information of all potential applicants on or before Friday, 28 April, 1995. This memorandum will constitute a common understanding of the matters discussed. The Department will assist in resolving any disputes which arise in this process.

14. Applications should contain firm proposals for the disposition of any net windfall gains which arise; declining external costs for delivery of calls are one example.

15. The methods for transmission of traffic (i.e. leased lines, PSTN, private infrastructure or a combination of the above) will be a matter for applicants to propose. It should be noted that spectrum for point to point links consistent with commercially available equipment will be available if necessary. Any radio link network for GSM will have to take account of existing and planned link and satellite networks. The licence fees charged for point to point links are listed in the Wireless Telegraphy (Radio Link Licence) Regulations 1992, (copy attached). The licence fees listed in these regulations are under review. Applicants should indicate in their proposals an estimate of what frequency bands and capacities would be required.

16. Additional information may be sought from applicants in the course of evaluation of submissions.

17. The licence will incorporate a series of conditions including but not limited to

- unauthorised interception of traffic,
- transferability of ownership,

- penalties (including revocation) for breach of the terms of the licence,
- surrender,
- publication of tariffs,
- fair competition,
- provision of information to the Minister.

The Minister will reserve the right to incorporate the terms of a successful application into the terms of the licence which will be issued.

18. The licence will not itself provide exemption from any applicable planning legislation or any powers of compulsory acquisition of or passage over property.

19. The Minister intends to compare the applications on an equitable basis, subject to being satisfied as to the financial and technical capability of the applicant, in accordance with the information required herein and specifically with regard to the list of evaluation criteria set out below in descending order of priority.

- Credibility of business plan and applicant's approach to market development;
- Quality and viability of technical approach proposed and its compliance with the requirements set out herein;
- The approach to tariffing proposed by the applicant which must be competitive;
- The amount the applicant is prepared to pay for the right to the licence;
- Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded;
- The extent of applicant's international roaming plan;
- The performance guarantee proposed by the applicant;
- Efficiency of proposed use of frequency spectrum resources.

20. The Minister cannot be bound in advance to select any particular type of application or any application.

21. The Minister reserves the right to alter any of the deadlines in the competition.

22. The Minister will not be responsible for any costs incurred by applicants in preparing their applications.

23. Each application should contain a statement that it will be valid as to its contents for a period of 180 days from the closing date for receipt of applications.

24. Applicants may present questions regarding the competition for answer by the Department. Any questions should be presented in writing - no later than 12.00 noon on Friday, 24 March, 1995 - to:

"The Secretary
Department of Transport, Energy & Communications
44 Kildare Street,
Dublin 2".

marked for the attention of Mr. Martin Brennan, and should be clearly labelled 'Questions : GSM Competition'. The Department will issue one memorandum to all known prospective applicants who have purchased the competition documentation, in response to the questions received, on or before Friday, 28 April, 1995. 000310

25. Applications should contain an index, an executive summary not exceeding 25 pages and the entire document should not exceed 350 pages. Clearly separate, inessential information outside that limit will, however, be accepted (such as, for instance, annual reports of consortium members).

26. Applications should be sealed and addressed to:

"The Secretary,
Department of Transport, Energy & Communications,
44 Kildare Street,
Dublin 2".

and be received, at that address, in 12 copies in English on or before 12.00 noon on Friday, 23 June, 1995; marked for attention of Mr. Martin Brennan and should be clearly labelled externally "GSM Competition". All applications will remain sealed until the closing time. Late applications will not be considered.

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Appendices to Chapter 8

THE PROJECT GROUP BEGINS ITS WORK

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1. Official report of second meeting of GSM Project Group on 6 March, 1995, dated 6 March, 1995

2nd Meeting of GSM Project Group
on 6 March 1995

000329

Chair :	Mr. Martin Brennan	T&R(Dev)
In attendance :	Mr. Fintan Towey	T&R(Dev)
	Ms. Maev Nic Lochlainn	T&R(Dev)
	Mr. Sean MacMahon	T&R(Reg)
	Mr. Denis O'Connor	Planning Unit
	Mr. Jimmy McMeel	D/Fin
	Mr. Billy O'Reardon	D/Fin
	Mr. John McQuaid	T&RT
	Mr. Aidan Ryan	T&RT

1. Update - MB indicated any significant changes on the GSM issue since the last meeting i.e.
 - a change in emphasis from royalties to up-front payment but considerable emphasis on deal for the consumer;
 - a clause to ensure that the consumer benefits from any windfall profits;
 - a clause signalling that a funding mechanism may be set up for the Regulator when established.
 - Interconnect Prices are included in the documentation, including a listing for N.Ireland; all international calls to be routed through TE's switched network
 - advance warning of a possible Universal Service Fund;
 - agreement for a 7-year duopoly subject to satisfactory performance on the part of GSMII operator;
 - T&R(Regulatory) to provide dispute resolution during tender process
2. Spectrum issue was raised by AR. Although recognising that the 2X7.5 MHz allocation was reasonable for GSMII, this meant that spectrum currently in use by TE would have to be freed. T&RT and T&R(Reg) to co-ordinate between TE, RTE and GSMII on this.
3. Critical Path - Document detailing critical path was circulated - it was agreed that the consultants will be required to advise on a successful applicant by approx. *mid-Sept* in order to give ample time to put the matter to Government for decision. Tender document commits to announcement of successful applicant by 31 Oct 1995. Crucial from a credibility point of view to maintain political commitment and to comply to this deadline.

000113

The Group also flagged the possibility of protracted negotiations with the successful applicant *after* the announcement. To avoid this, it was considered that the Government decision awarding the licence should be *subject to* successful negotiations; in any case, it is expected (a) that GSMII will be under time-pressure to get the 2nd mobile network up-and-running and (b) that negotiations should be eased, as much of the material from the successful GSM bid will form the basis for producing the licence. Furthermore, to speed events, it was agreed that the drafting of the licence should begin *prior* to the decision on the successful applicant. The option of getting the consultants to draft the licence is favoured.

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4. Consultants - MB gave a brief rundown on 6 short listed candidates, who will each make 2 bids - 1 for advising on selection, 1 for drafting the GSM licence. It was agreed that a team with MB, FT and JMcQ (or nominee) would select the consultant, keeping the project group informed of developments. Ongoing liaison with consultants was agreed in principle, consultants themselves to propose a mechanism for this.
5. Information Rounds - while allowing meetings with queries, responses will be subject to formalisation in the memoranda to be circulated on 28 April, 1995 by D/TEC. Significant questions will be dealt with as follows : questions to be submitted in writing, D/TEC to respond in a formal memorandum to all valid bidders, consultants to be involved in this process. SMcM and JMcQ to deal with dispute resolution in TE's info round.
6. Procedures for dealings with potential bidders during the tender process was agreed
 - no one-to-one meetings
 - no social outings
 - a record to be kept of any meetings/conversations between D/TEC people and any of the bidders
 - D/TEC should stress at any such meeting that it is an informal, exploratory contact
 - where any issue of import does arise, the matter will be referred to the formal written procedures
7. Discussion of items which would need to be examined in the context of GSMII followed.


000114

DCS 1800 licence for GSMII ? - AR indicated that GSM and DCS 1800 would be available through a dual-handset from next year. T&RT to :

- review what London's GSM operators can/cannot do re DCS 1800
- examine the issue of charging for spectrum [GSMII will want to use radio links to communicate between base stations and its switch/es]

The Group flagged that difficulties may arise with "ring-fencing" the effective liberalisation of infrastructure for GSM purposes. However this was not seen as a topic for this forum. Other issues flagged - legislative/statutory changes required by GSMII, taxation issues and numbering.

8. The next meeting was arranged for 10 AM on Wednesday, 29 March 1995. At that point, the successful consultants' team will have been selected. All queries will have been received in D/TEC by 24 March, so Group members will be given an opportunity to read over the packaged set of queries on Tues 28 March.



Maev Nic Lochlainn
T&R(Development), 6 March 1995

cc. Attendees, Mr. Sean Fitzgerald, Ass. Secretary, File.

000473

Appendices to Chapter 9

CONSULTANTS ARE APPOINTED

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1. AMI tender document dated 16 March, 1995.

ANDERSEN MANAGEMENT INTERNATIONAL A/S

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Department of Transport,
Energy and Communications
Telecommunications and Radio
(Development) Division
44, Kildare Street
Dublin 2
EIRE

March 16, 1995

Detailed and cost-effective expert and
consultancy services in connection with the evaluation
and licence award to a proposed company to operate
a second GSM network in Ireland.

*D'fhior chogaidh comhailltear stothcháin,
scanfhocal nach sáraighthear;
ní fhaghann slóth acht fear fagla
feadh Banbha na mbánfhoithreadh.*

Tadhg Dall Ó Huiginn

*(For the courtesy of the Andersen team:
To the warlike peace is preserved, a proverb infallible;
none hath peace save men in armour throughout Banva
brackenfair).*



1. Introduction

With reference to the invitation from the Department of Energy, Transport and Communications to submit a detailed and costed proposal (cf. the letter from Mr. Martin Brennan, 2 March 1995), this document comprises the following main issues:

2. Our perception of the complexity of the Irish GSM2 tender (pages 3 - 5)
3. Suggested solutions to some of the anticipated problems and challenges (pages 6 - 11)
4. Preliminary outline of the work programme (pages 12 - 16)
5. Specific comments and suggestions concerning the evaluation models (pages 17 - 23)
6. Necessary profile of competence and suggested staffing (pages 23 - 24)
7. Selected references for assisting regulators within the field of mobile, cellular telephony (pages 25 - 29)
8. Ensuring transparency, independence and confidentiality (pages 29 - 30)
9. Budgetary and contractual projections (pages 31 - 33)
10. Concluding remarks (page 33).

Enclosed as annexes please find a draft Terms of Reference (TOR) and our standard Terms of Cooperation (A), short curricula vitae of the proposed consultants (B), an example of how to use generally accepted methods and techniques of quality control (C), an example of some of our tools (D), one of our company brochures "Mobiles on the move: Helping our Clients Find a Channel in the Untethered World" (E), and some of our recent articles on GSM (F).

In the following sections we have presented an integrated approach dealing with both the evaluation and the licence drafting - the latter being optional at the initiative of the Department. However, should the Department decide not to use this option, only steps 20 and 21 of section 4.3.2, section 5.3 and the TOR + budgetary projections of section 9 is to be disregarded. Thus, these sections should be formally viewed as the optional part of our proposal.



2. Our perception of the complexity of the Irish GSM2 tender

Within recent years a significant process of liberalization, i.e. the opening-up of the telecommunications sector to new entrants, has taken place both in Ireland and internationally. As this process gathers speed, competition increases.

Political decisions have now been taken to the effect that the GSM area will become more open to competition, both as regards the network and the provision of service. Therefore, an alternative GSM operator is now to be awarded a licence based on a (public) tender process.

The forthcoming GSM competition, however, is not an isolated environment vis-à-vis other telecommunications services, cf. Figure 1.

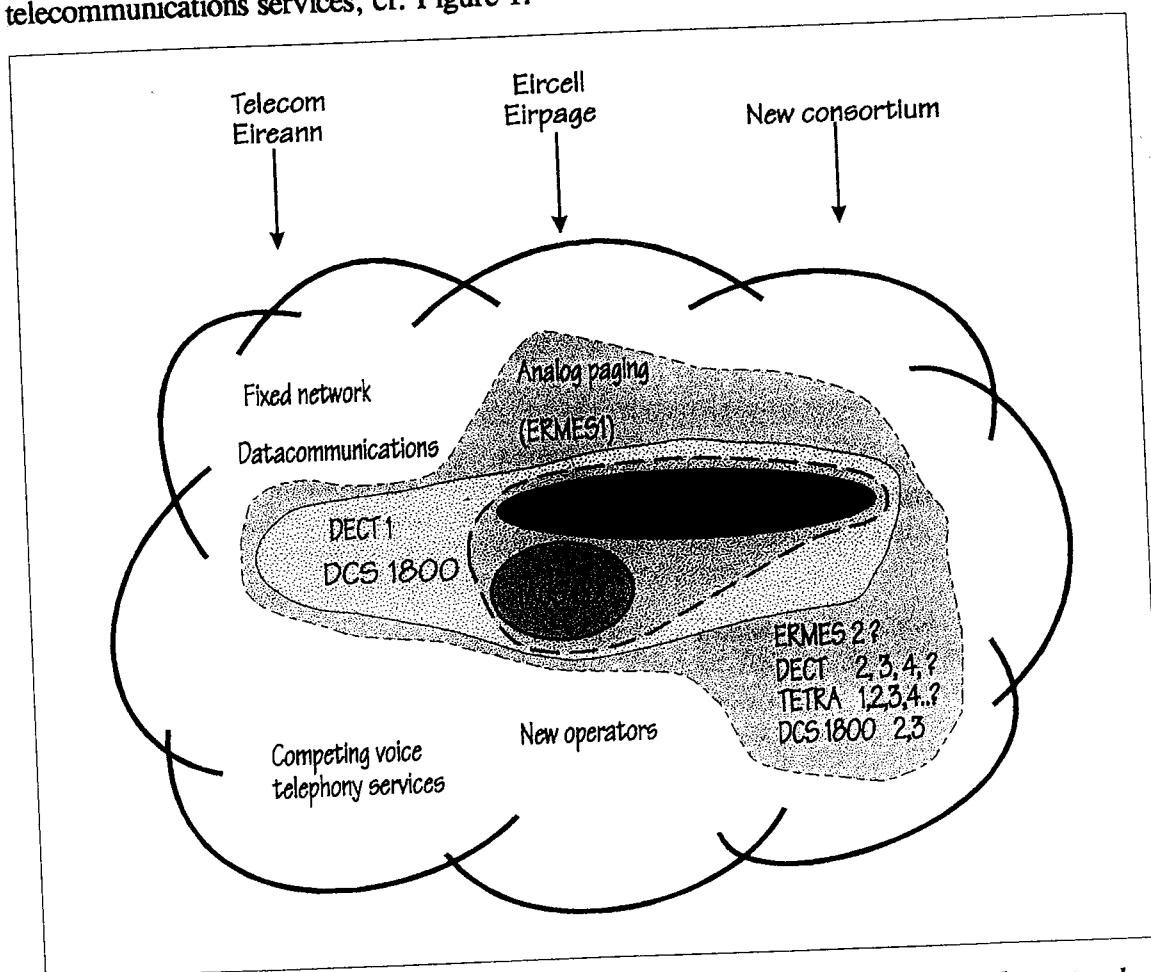


Figure 1: *The competitive environment comprising selected fixed and mobile cellular network and/or services*

As briefly outlined, the alternative GSM operator will face competition not only from the GSM1 operator, i.e. the so-called GSM duopoly, but also de facto from other mobile market players:



- I. The analogue, cellular system (TACS), which together with GSM1 will place the forthcoming GSM2 operator in a triple competitive environment
- II. A number of private mobile systems
- III. Possible new digital, cellular systems, such as DCS 1800 and DECT (countrywide or local)
- IV. Paging services, such as the ERMES system
- V. Mobile satellite systems, such as Inmarsat-C and LEOs
- VI. Forthcoming EU-initiatives, such as TETRA, datacommunications systems and private mobile radio systems with possible access to the PSTN.

Even though a firm decision has been made to retain a GSM duopoly for a period of seven years, the GSM operators will, in practice, be confronted with a wealth of competing network and services.

This highly competitive Irish environment within the mobile field implies inter alia the following foreseeable problems and challenges related to the introduction of a second GSM operator:

- (a) As the frequencies are a natural, scarce resource, the adequate frequencies within the 900 MHz frequency band may be saturated, because of the overlapping needs of TACS and GSM operators, in particular in densely populated areas. According to the Council Directive No. 87/372/EC of 25 June 1987, Ireland has an obligation to release the required frequencies for GSM purposes within the 900 MHz frequency band, in which CT1 and TACS are situated.
- (b) Disputes over interconnect arrangements, because some kind of shared infrastructure between the mobile and fixed network operators may be of considerable interest to society. This also applies to a situation, in which the GSM operators wish to embark on national roaming, e.g. in the sparsely populated areas.
- (c) Disputes over interconnect charges as Telecom Eireann has a clear incentive to go for high charges in addition to the fact that Telecom Eireann has to recoup some of the investments due to the universal fixed network obligations. However, a good starting point has been provided in paragraph 12 of the RFP document.
- (d) Disputes over hidden links, cross-subsidization and mixed interests between the linkages between the GSM1 operator, the operator of TACS and the fixed network operator as long as no formal 'level playing field' has been adopted.
- (e) Disputes over the licensing of new services, such as ERMES, DCS 1800, and TETRA, which may to some extent be considered a synergical addendum to a digital, cellular platform as GSM. For this reason, the value of the GSM2 licence will increase, if the potential applicants could foresee themselves as 'born licensees' with respect to these technologies.
- (f) Difficulties in assessing the right technological platform of GSM2 (focus on short-term technical optimization or long-term adaptation to future requirements).



- (g) Difficulties in assessing the best match between technological investments in the applications and the cost coverage procedures evident through tariffs.
- (h) Difficulties in assessing what is ultimately best for the customers (considering trade-offs between e.g. the combination of speedy rollout/sophisticated services/high tariffs and a high licence fee payment on the one hand and on the other hand the combination of slow rollout/minimum services/low tariffs/low licence fee payment).
- (i) Disputes over tariff principles and the fixation of tariffs as there are substitutional effects determined e.g. by price-elasticity between the competing services, in particular between the TACS and the two GSM systems.
- (j) In addition to these difficulties, the problems and uncertainties of setting up and evaluating business cases on a 15-years' timescale in the outlined competitive environment should be taken into account.

As is evident from such a list of selected key problems and challenges it is essential that the questioning/answering period of the tender and the final evaluation are drawn up so as to replace subjectively founded doubts by objective knowledge and independent judgements.



3. Suggested solutions to some of the anticipated problems and challenges

3.1 Introductory comments

The overall objective of the consultants and the regulator should be to base the project on objective, transparent and non-discriminatory criteria. In a formal sense, consistent observance of these criteria is important in order for the project to comply with the EU regulations. As being consultants in a substantial number of similar GSM2 tenders in Europe, we anticipate that a large part of the potential critique by e.g. the EU and the OECD on the Irish combination of a 'beauty contest' and indirect elements of auction (cf. indent no. 4 in paragraph 19 of the RFP document) may be offset by opting for the integrated approach outlined in Sections 3.2-3.3, 4 and 5 below.

3.2 Preparatory part

3.2.1 Phase A. Framing the work

Based on the existing Postal and Telecommunications Services Act, section 111(1), no other than the concessionaire (Telecom Eireann) has so far been allowed to install, operate and provide voice telephony. Thus, the first cornerstone of a successful introduction of a GSM duopoly is a consistent legal and regulatory GSM framework. Experience from other European GSM tenders underscores the importance of avoiding changing criteria during the preparatory and executing phases.

The legislative and regulatory framework may to some extent define the borderlines of competition and for instance lay down the possibilities of GSM2 coexistence with ERMES, PCN/DCS 1800, TETRA and DECT.

Another touchstone of a GSM2 applicant will be the inter-MSC-configuration of its network and interconnection to international gateways. In this context, the following questions are relevant according to experience from European GSM tenders:

- # Precisely how will the GSM2 applicant be required to interconnect with the fixed network of Telecom Eireann?
- # To what extent will the GSM2 applicant in practise be allowed to anticipate the forthcoming EU galvanization of alternatives to fixed network solutions, e.g. by means of private networks, networks provided by railways and electricity companies, or by the possibility to establish own network infrastructure?
- # And will the GSM2 applicants be allowed/forced to build its own micro-wave backbone network or allowed/forced to share parts of the infrastructure with the existing mobile cellular operators and e.g. embark on national roaming?



Other GSM2 questions related to the legal and regulatory framework include the degree of egalitarian regulatory treatment of the GSM2 operator vis-à-vis the GSM1 operator and the other mobile cellular telephone system TACS, the regulation of the scarce frequency resources within the 900 MHz band, the tariff approval procedures, revocation criteria, and appeal procedures. Legal tapping, which is a really hot issue in a number of other countries, should also be addressed in this context.

In addition, we propose that the consultants initially participate in elaborating a document with an outline of the logical links between key legislative and regulatory options as expressed in the RFP document on the one hand and different kinds of evaluation criteria and techniques on the other hand.

This translates into the final specification of the evaluation criteria which could be grouped around the four categories outlined as follows:

- # Marketing dimensions, such as the applicants' approach to market development, the proposed tariffs degree of customer care, the efficiency of distribution channels (e.g. service providers) and some of the classical quality of service indicators recommended by the OECD (cf. Performance Indicators, OECD 1989), rollout, coverage, national roaming, and the extent of the applicant's international roaming plan.
- # Technical dimensions, such as the quality and viability of the technical approach and the efficiency of the proposed use of frequency spectrum resources (taking into account e.g. cell structure, frequency hopping, and half rate encoding), speed and degree of geographical and demographical coverage, feasibility of cell-planning and antennae sites, degree of redundancy, network security, realism and correctness in traffic planning, network capacity and network quality of service parameters, such as blocking and dropout rates, including performance guarantees.
- # Management dimensions, such as the concerted competence of the single members of the bidding consortium, the legal status of the operating company including financial links to parent companies, the expected appointment of key persons and the credibility of the business plan.
- # Financial dimensions, such as the amount the applicant is prepared to pay for the right to the licence, the ability to provide low tariffs, the degree of financial solidity, including the initial equity offered to the new company, cash-flow profile assessing the necessary period in order to achieve break-even of the discounted cumulative cash flow, and the internal rate of return.

Obviously, most attention should be given to the evaluation criteria outlined in paragraph 19 of the RFP document underscored above.

These specific evaluation criteria, which we assist in detailing in a separate report, can be further developed as shown in Table 1 below:



Table 1: The logical consistency between aspects, dimensions, indicators and sub-indicators

Evaluation criteria	Operationalization, an example
Aspect	Marketing
Dimension	Coverage
Indicator	The speed of rollout of the network in order to achieve at least 95 % geographical coverage for class IV terminals
Sub-indicators	A) Coverage at launch and after B) Field strength targets C) Special coverage, including indoor coverage D) Gearing to the specific Irish environment

As evident from Table 1, each evaluation criteria can be detailed in a rather precise manner. However, there will, of course, always be a need for a general or holistic approach in order to be able to assess the overall performance ability and the consistency of the entire business cases presented by the applicants. Clearly, this is also reflected in paragraph 19 of the RFP document, in which the credibility of the business plan is a top-priority criterion.

Having specified the above-mentioned evaluation criteria, it will be possible to develop preferably two evaluation approaches:

- # One way to go is to compose (one or more) model(s) based on a system of points, whereby the values of the different applications can be scored, e.g. according to a scale of arabic number connected to each specified performance criteria ("Application A1 has 3.5 points more than Application A2, but 5 points less than Application A3, etc.").
- # Another way to go is to award qualitative marks (e.g. A, B, C, D) to the applicants' performance areas, which will finally allow for a simple ranking of the applications ("Application A1 is better than Application A2").

In both models it is difficult to make the addition of the measured performance, since the added results are highly dependant on the weighting of the different evaluation criteria (which do not by nature belong to an interval scale). The addition of results at the 'bottom line' will inevitably contain some arbitrariness, except for the proposed licence fee payment(s), which is normally easy to assess in an objective and transparent manner. It should therefore be considered to use both methods in order to maximize the validity and reliability of the calculated results. Attention should also be paid to the calculation process. One extreme is to let different participants in the evaluation team calculate their own results (the "independence" model). Another extreme is to gather the participants to common sessions in order to discuss and agree on the calculation (a "Delphi" model).

Independent of which evaluation model(s) the Department finally chooses, we recommend that supplementary analyses be carried out where no immediate discrimination among the applications can be made.



After discussions and decision, it is suggested that the consultants prepare a final memorandum on the chosen evaluation-model before the evaluation commences. In addition the consultants offer to use a proprietary computer model in order to validate the scorings.

3.2.2 Phase B. Setting the stage

The second cornerstone deals with the tailoring of the calculatory assumptions and itemisation of the applications, in particular the quantifiable aspects, which are so to speak setting the stage for important parts of the remaining tender process. The assumptions and itemisations have to be tailor-made, as it will (probably) not be adequate to copy existing annexes from other countries.

Furthermore, calculatory assumptions of licence fees, tax issues, discounting rates, interest rates, currency, measuring units of traffic (calls, minutes, Erlangs, etc.), suggested blocking rates and drop out rates, and frequencies will be advantageous. This will increase the transparency of the final evaluation. Without more detailed calculatory assumption it may even not be possible to compare the applications on a fair basis.

Transparency might also be increased through the inclusion of a draft licence as an integral part of the tender documents, if time still allows for such an extension of the RFP document. This will allow the applicant as potential licensee to (fore)see himself in a regulatory interplay with the licensor. A draft licence can also be used as a tool of the licensor to translate the favourable quotations of the applications into binding commitments for obtaining the licence. Thus, it should be considered to include some additional calculatory assumptions and draft licence conditions in the memorandum to be provided 28 April at the latest.

Finally, transparency, objectivity and non-discrimination should be ensured in the tender process by separately outlined rules and procedures to be observed during the tender, and the present RFP document already aims for that. However, in the memorandum to be provided on 28 April at the latest, we would like to suggest a uniform structure of the applications, e.g. by requesting the applicants to structure their applications in physically separated binders, as follows:



- 1: The executive summary
- 2: A description of marketing aspects, such as: The approach to the development of the market, coverage, tariffs, international roaming plans and other marketing parameters.
- 3: A description of technical aspects, such as: The quality and viability of the technical approach, the frequency economy and the performance guarantees.
- 4: A description of the management aspects, such as: The composition and the legal structure of the consortium, the joint venture agreement(s), the rules governing transferability of ownership, and the proposed management.
- 5: A description of the financial aspects, such as: The amount the applicant is prepared to pay for the right of licence and some of the classical key figures, e.g. IRR and the discounted cash flow value of the licence together with indications of risks and sensitivities.
- 6: A description of other aspects, such as comments to the draft licence conditions (and to article 17 of the RFP document), stipulated effects of business cases on the Irish economy, etc.

If it is decided not to request such a structure, the evaluation will be more time-consuming.

3.3 Executing part

3.3.1 Phase C. Evaluating the applications and the applicants

The evaluations of the applications and the applicants constitute the third cornerstone of the tender.

Considering the possibility of 8 applications multiplied by e.g. 350 pages, excluding technical and promotional appendices, there is an initial need for establishing auxiliary tools like: conformance testing against formal requirements and the correct use of (calculatory) assumptions from the tender documents. In addition to this, we will work out a semi-structured "reader's guide". And each participant should be instructed to pay special attention to one or more of the main areas - marketing, technical, management and financial aspects.

The next step will be to relate the applications to the evaluation criteria and to apply the chosen evaluation model(s). As this is often a complex task, some interaction with the applicants will probably be an advantage. The applicants' presentation of their applications should be based on pre-defined guidelines prepared by the licensor with the assistance of the consultants.

Having clarified remaining questions, our evaluation techniques will reveal where the applications are close to being equal, and where major and critical discrepancies appear. The important areas in which critical and decisive discrepancies appear will be subject to supplementary analyses. It might e.g. be difficult to assess whether the applicants' approach to tariffing is competitive, and therefore Section 5 provides an example of how a supplementary analysis can be carried out within this particular area. Other potential areas of supplementary analyses include frequency economy, cell planning, traffic handling, rollout plan, internal rate



of return or contribution margin. Sensitivity analyses will also be carried out, in order to assess inter alia cross-cutting coherence of each application and risks of project failure.

In addition to such analyses, a supplementary analysis of the applicants' track record will be carried out. Emphasis will be placed on the consortia's proven technical capability and ability to attract a substantial amount of binding financial resources in order to finance both the offered licence fee payment and the network investments.

The results of applying the chosen evaluation model, the supplementary analyses made and the track record investigations/verification will be presented in separate documents.

3.3.2 Phase D. Closing the process

We suggest that all the results of the execution phase should be gathered in a comprehensive evaluation document. This document should inter alia comprise the following issues:

- # A general comparison of the underlying philosophies of each application (e.g. on the one hand projects containing high investments, sophisticated technical applications and services, targeting inelastic parts of the business segments or on the other hand projects containing low(er) initial investments, the provision of only the required basic and supplementary GSM services, targeting broad parts of the business segments and the most price-inelastic parts of the residential segments).
- # A general overview of the competitive environment, commenting on each business case's competitiveness compared to e.g. the expected business cases of GSM1, TACS and the like, with some sensitivity.
- # A general comparison on the basis of the selected and detailed evaluation criteria outlined in paragraph 19 of the RFP document.
- # A detailed and specific evaluation on the basis of the chosen score system and/or the award of marks.
- # A profound elaboration of the specific evaluation.
- # Conclusions, suggestions and recommendations.
- # Appendices with résumés of the results of the supplementary analyses and the track record investigations and verification.

Furthermore, we suggest to include the draft licence to the nominated, highest-ranking GSM2 applicant. Such a draft licence should be based on the binding offerings exposed in the nominated applications concerning e.g. financial requirement in particular regarding solvency and solidity, network rollout, proposed tariffs, the use of designated frequencies, legal structure, legal tapping, and an outline of the vast number of bearer-, tele-supplementary and value-added services to be supplied.

Additionally, we provide a final status report on the evaluation phase.



4. Preliminary outline of the work programme

4.1 An overview

Our work programme is determined by the "cornerstone approach" as outlined in Figure 2 below.

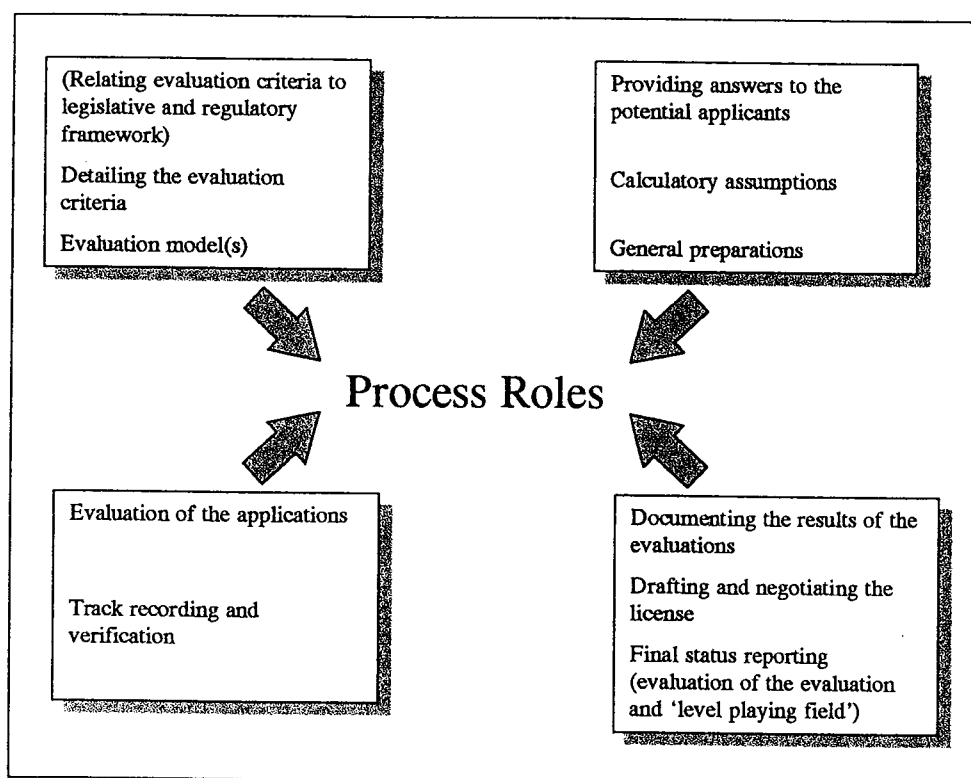


Figure 2: The four cornerstones of our work

As it will not be possible to foresee and anticipate all challenges during the GSM2 tender process, we have divided the project into a phased programme (phase A, B, C and D with the main focus on phase C) within which a number of sub-projects is defined during the individual stages.



Below, the suggested progress of the project is described step by step in as much detail as is possible at present.

4.2 Preparatory part

4.2.1 Phase A: framing the work

- Step 1. The Department evaluates the offers received from the invited consulting firms, signs a contract of cooperation, and the work commences immediately.
- Step 2. Joint meetings between the Department and the consultants are conducted in order to define the logistics of the tender process (including the organizational set-up, meeting frequency, time schedule, final work programme, the IT-facilities and the like). An example of our planning tools, which we also suggest to use in this project, is shown in Annex D. At this stage, we also propose to make a document on all the security procedures to be followed during the process in order to avoid leakages or unauthorized use of sensitive and confidential information. We have e.g. developed a GSM tender document handling system, which has been used in a number of GSM tenders, and which offers 'military security'.
- Step 3. The consultants would like to conduct a series of pre-defined interviews with key persons in order to gather the specific information necessary to carry out the task.
- Step 4. At this point of time it is suggested to assess the general relationship between the legislative and regulatory framework on the one hand and the evaluation criteria on the other hand.
- Step 5. Once the evaluation criteria are further detailed, it will be possible to commence the designing of the evaluation model(s). In this respect, close cooperation and common understanding between the consultants and the Department are exceptionally important. It is suggested to take some of the computer based models developed by Andersen Management International into consideration. In addition, it might also be useful to use the qualitative evaluation techniques developed as a starting point, cf. Section 5 below.

4.2.2 Phase B: setting the stage

- Step 6. The consultants suggest to initially provide a documentation of the link between the legal framework, the tender requirements, the evaluation criteria and the characteristics of the forthcoming applications. In particular, the experience of the consultants should be exploited to ensure a close link between the evaluation criteria and the tender requirements. In order to make the applications as comparable as possible, it will be advantageous to specify as many calculatory assumptions as possible. Detailed calculatory assumptions and itemisation of marketing and financial data will also make the evaluation easier. If such assumptions and itemisations are not outlined beforehand, it will be necessary either to request a substantial amount of new information in accordance with paragraph 16 of the RFP



document or more or less to request new applications as was the case in the Norwegian GSM tender (worst case):

- Step 7. The consultants participate in the question/answering phase of the tender and offer to participate in drafting the memorandum, which is going to be provided by 28 April at the latest. We suggest to annex a template (based on Excel) outlining the exact figures we need the applicants to provide, including the underlying assumptions and itemisations, as this has proven to be an adequate tool for both the applicants and the evaluators.
- Step 8. The detailed work programming, cf. Annex D, will be setting the stage for the rest of the GSM tender and therefore, a specific approval (e.g. by the Minister) should be considered. An adjoining status report should be prepared by the consultants at this point of time, probably suited to be enclosed with the information from the Department to the Minister.

4.3 Executing part

4.3.1 Phase C: executing evaluations

- Step 9. The specific plan of action, cf. the draft in Annex D, states, who is in charge of what in relation to the submitted applications. The analyse is commenced as soon as the applications are received. The first part of the work is to register the applications and to check, whether they conform to the formal requirements, such as the ceiling of 350 pages, excluding appendices.
- Step 10. Once this task is performed, the applications are formally admitted. This means that they can be seriously evaluated. We expect all applications to conform to such a degree that they should be admitted.
- Step 11. Also a preliminary assessment of the fulfilment of formal and non-formal minimum requirements, such as a reasonable degree of geographical coverage, a not too protracted rollout, etc., is to be conducted.
- Step 12. As an entrance to the in-depth evaluation, a lot of critical reading is necessary. The exact amount is, of course, both dependant on the number of applications (we would expect 4-5) and their quality.
- Step 13. The next step is to perform the quantitative evaluation, which can partly be obtained by utilizing our GSM number crunching model, and partly by the use of a more formal security system, cf. Section 5.
- Step 14. Having familiarized with the applications, it will be time to conduct presentation meetings with each applicant. We suggest that all applicants get the same general questions in advance, and that there will be a possibility to pose individual applications-specific questions during the presentation. It is unequally important that the meetings are well-prepared in order to show to the applicants that the evaluation, both in relation to procedural and material aspects, is performed in a professional manner.



- Step 15. The most demanding step, however, is the qualitative evaluation. We suggest to proceed in such a way that it comprises a number of different aspects, such as marketing, technical, financial, management and legal aspects. For each aspect, a number of dimensions, indicators and sub-indicators can be delivered, cf. Table 1. One of the scoring methods is to award marks during a ballot. If agreements concerning the award of marks cannot be reached, or if there are any remaining doubts, we suggest that supplementary analyses be carried out, cf. Section 5.
- Step 16. During the entire evaluation phase, a number of track recording and verification issues should be given attention. The information provided in the applications is not per se fully correct and valid and rather boosting language can be part of the application. The track record of the management team, the proven record of the proposed billing systems and liquidity and solidity statements are prime examples of potential issues for track recording and verification.
- Step 17. Last, but not least, a holistic approach is appropriate in which both the quantitative and the qualitative evaluation is integrated and overall aspects are taking into account in order to meet the objectives set out by e.g. the Minister.

4.3.2 Phase D: closing the tender process

- Step 18. Before the tender process is closed, an important step is the preparation of a complete report documenting the results of the evaluations, including the supplementary analyses. In addition to an executive summary, the report will comprise an overview of the conducted evaluation procedures, a description of the basic philosophies behind the business cases of the applications, a detailed survey of the results from the quantitative and qualitative evaluation, a selected number of salient issues from the applications, and the results of the supplementary analyses.
- Step 19. Together with the evaluation report, a final status report will be prepared. In order to service the Minister, this report will also comprise a survey of the evaluations in which a clear matrix, confronting the evaluation criteria with the characteristics of the applications, appears, cf. Table 3.
- Step 20. Along with the elaboration of the evaluation report, we will assist in the drafting of a GSM2 licence. It is suggested to make some of the favourable offerings in the applications as binding licence requirements. This is normally a more demanding task than expected. However, other parts of the licence can be based on the templates already existing within the area of GSM.
- Step 21. Once the Minister has nominated the best application as the winner, everything is prepared to enter the licence negotiations in a professional manner. Before the first meeting, we will have completed an internal memorandum on salient regulatory and policy issues, which should be discussed beforehand. In addition, we offer to participate in the licence negotiations with but not limited to our expertise in making the closest possible link between the nominated application and the binding licence requirement. Regulatory requirements concerning interconnection arrangement is another important issue to address.



- Step 22. When the licence negotiations have been successfully concluded, rejection letters and other pieces of information should be conveyed to the non-nominated applicants. We suggest to clearly outline some of the reasons for the rejection, as this often happens to make the loosing applicants less likely to complain.
- Step 23. As a final step, we offer to participate in the "evaluation of the evaluation" and on the basis of that we can provide a final status report that may also include a number of suggested future guidelines for the courtesy of an efficient and effective regulation of the competition, e.g. by outlining a level playing field in accordance with the EU rules and the forthcoming guidelines from the OECD.

4.4 Other comments

The outlined 23 project steps comprise a true subset of the services stated in the TOR. Consequently, two alternative approaches emerge from the step-by-step programme outlined in Section 4:

- # Either to deliver the consultancy services as stated in the TOR
- # Or participation of the consultants during all the outlined 23 project steps, i.e. including the optional part on e.g. the drafting of the licence. This approach is labelled TOR+ in the budgetary projections in Section 9.

Evidently, we have a flexible approach to the degree of consultants' involvement. Once the Department has decided which parts of the consultancy services offered, the Department will want to use, we will elaborate a more detailed work programme integrated in our Project Manager tool. Over the entire cooperation period the Department will receive adjusted work plans, including critical paths and deadlines, cf. Annex D, in order to get an indication of the current status of the progress of the work.

We also have a flexible approach in relation to liaison with the Department during the course of the assignment. As we see it, it will not be adequate for the Department to 'outsource' all the work. We would rather suggest that we have the primary responsibility for performing the work and duly delivering the required output, but with close reference to the Department. This means that we intend to liaise closely with the key persons from the Department in relation to e.g. regulatory matters, sensitive content-related issues regarding the evaluation and e.g. the securing and mark-giving of the application. Concerning the latter, we would prefer, if key persons from the Department could be dedicated to participate e.g. in the sub-group-like work (ballots) during the qualitative evaluation. In addition, we would prefer, if output to be delivered from us are addressed to e.g. a "GSM steering-group" with participation from the Department.

The more exact way of cooperation is to be included in the fully-fledged work-plan which has to be agreed on the basis of the first draft contained in Annex D.



5. Specific comments and suggestions concerning the evaluation models

The nucleus of the evaluation is to apply the adopted evaluation models on the admitted applications. In fact, we expect all applications to be substantially better than the minimum requirements and it is therefore likely that 4-5 applications will be admitted to the in-depth material examination during the both the quantitative and the qualitative evaluation. One of the advantages of having both a quantitative and a qualitative evaluation is that they often turn out with the same end result, which will be a strong argument for the validity and the reliability of the procedures behind the nomination of the highest ranked application. In addition, the quantitative evaluation will generate a wealth of useful 'hard data', which can serve as a factbase for the latercoming qualitative evaluation.

5.1 The quantitative evaluation

Initially, we suggest to conduct a quantitative evaluation. As indicated in Table 1, we strongly recommend to clearly distinguish between aspects, dimensions and indicators. Based on the list, outlined in paragraph 19 of the RFP document, the indents could be broken down into aspects, dimensions and indicators, which could be scored and weighted in our computer model.



Table 2: A first draft template of the identification, scoring and weighting of the indicators in the quantitative evaluation

Aspects	Dimension	Indicator (e.g.)	Weight (e.g.)	Points (1-5)					Average
				A1	A2	A3	A4	A5	
Marketing									
	Market development	No. of subscribers	0.05						
	Coverage	95% of the population with class IV coverage	0.1						
	Tariffs	The price for the OECD- basket for cellular servi- ces	0.1						
	Roaming	Speed of introduction of international roaming	0.05						
Technical									
	Quality & viability	Network architecture (including no. of cells, POIs, cell planning, etc.)	0.05						
	Performance guarantee	Dropout and blocking rates	0.05						
	Frequency spectrum resources	Frequency economy	0.1						
Management									
	Credibility of business plan	No. of GSM2 occurrences in the OECD-countries	0.1						
Financial									
	Licence fee payment	Amount in excess of IR £ 5 mio.	0.25						
	Financial credibility	Internal rate of return (IRR)	0.05						
Weighted sum			1.0						

Table 2 provides a first draft template on how the quantitative analysis could be structured. We offer to provide a document on the fully-fledged procedure. In that document the indicators will be further detailed. As an example, it could be stated that the number of subscribers is to be assessed by the number of active SIM-cards, and it could also be detailed that the assessment should take place on the basis of the figure presented ultimo year 4 after licence award.

As seen from Table 2, we suggest during the main part of the evaluation process to make the applications anonymous by using acronyms - such as A1, A2, etc. - for security reasons. In addition to the weighted sum of the scores, our computer model also calculates the average of the total weighted scores, the statistical variance of the total weighted scores and the sum of the weighted variance in order to assess the statistical significance of the identified differences.

5.2 The qualitative evaluation

Once the members of the evaluation team have had the chance to critically read the applications, we suggest to conduct the qualitative evaluation with ballots according to a Delphi-like technique. As common body of knowledge, we will produce spread-sheets and readily understood graphics comparing the applications in a number of areas on the



basis of our number crunching. Also serving as common body of knowledge, we will produce a guideline on how to proceed with the qualitative evaluation and an overview of all the indicators and sub-indicators to be utilized.

Table 3: First draft template for the identification and markgiving of the aspects and dimensions of the qualitative evaluation

Aspects/dimensions	Marks (A-E)				
	A1	A2	A3	A4	A5
Marketing aspects					
- Competitive strategy					
- Market development					
- Coverage					
- Tariffs					
- Services rendered (incl. international roaming)					
Subtotal					
Technical aspects					
- Quality and viability					
- Performance guarantees					
- Frequency economy					
Subtotal					
Management aspects					
- Experience of the applicant					
- Management capability					
Subtotal					
Financial aspects					
- Licence fee payment					
- Solidity					
Subtotal					
Other aspects					
- Risks					
- Effects on the Irish economy					
Subtotal					
Grand total					

As seen in Table 3, it is suggested to deal with some of the same aspects and dimensions as dealt with during the quantitative evaluation, cf. Table 2, although the method immediately switches from 'hard data' to more 'soft data' and a more holistic view on the application in its entirety. However, we also suggest to include other aspects (e.g. risk assessments of the applications and political aspects, such as effects on the Irish economy) and a few extra dimensions, which also paragraph 19 of the RFP document provides room for.

Furthermore, it is suggested to award marks - e.g. A1, A2, A3, A4, A5 - instead of points in order to underscore the qualitative nature of this part of the evaluation.

Finally, a number of supplementary analyses might be necessary to carry out - sometimes in order to document important differences or inconsistencies among the applications, other times in order to highlight important findings so that the licence is awarded in such a way that all salient aspects can be said to have been taken into consideration. The results of the supplementary analyses will form the basis for the award of marks or



revision of marks preliminarily awarded. Below are outlined a few illustrative examples of how and why it might be necessary and useful to conduct supplementary analyses.

5.3 Supplementary analyses - some examples

It is likely that supplementary analyses are needed within areas to which great importance is attached and to which facts and figures could not be taken at the face value as will e.g. probably be the case with the licence fee payment. Recently, we conducted 11 supplementary analyses in a similar GSM2 tender.

We would not be surprised if supplementary analyses are needed in the area of tariffs, to which the RFP document pays specific attention, and in the area of frequency spectrum resources, as saturation with the present cell structure of TACS and GSM might quickly occur within the 900 MHz frequency band, because the demand for GSM may turn out to be underestimated by the Department. In addition, we offer to conduct a specific analysis on each applications' effect on the Irish economy, including but not limited to investments, employment, education and training.

A. Evaluation of tariffs

As per experience from other European countries, the tariffs are a critical and difficult parameter to assess. In the Irish case, it has been decided to let one of the evaluation criteria be to provide the customers with competitive, i.e. probably lower, tariffs than the present tariff level. Even if inexpensiveness is not going to be a decisive criterion, it will probably not be advisable to exceed the present level of mobile telephony tariffs in Ireland. In addition to these considerations, the realism of the applicants' tariff assessments is an important clue to comprehensiveness and coherence of the financial-economic proposal.

The most commonly used method is to take the **direct tariffs** into consideration, i.e. the air time tariff per minute, the (annual, quarterly or monthly) subscription charge and the installation fee. However, when starting to compare applications, some difficulties immediately arise. One is the necessity to make adjustments for discounts and differences in billing principles, because such factors as discounts offered according to the time of day or week, call attempt charges and non-real-time-billing have to be included in the air time per minute compared. Another problem is the fact that the subsequent comparisons will not allow the evaluators to get a comparative picture of the general tariff level of the applicants.

In order to be able to cover this aspect, the **basket method** should be applied. We suggest to use the mobile basket developed in "Performance Indicators" (OECD, 1990), which comprises a call basket, an annual subscription rental and the amortisation of the installation fee over three years. If the typical subscriber is matched, the basket method will make it possible to assess what the typical subscriber will have to pay, if the applicants' proposals were implemented. One of the drawbacks of this method is, however, the missing link to the applicants' financial business case.



By means of a third method, the average revenue per air minute, it is possible to establish a link between the financial part of the business case and the tariffs often contained in the marketing plans. This method will therefore, as an interesting side-effect, test, if there is consistency between the favourable quotations on tariffs and the revenue streams substantiated in the financial part of the applications. This method will make it possible to calculate and to compare the expected average revenue per call minute. Needless to point out, the applicant with the highest call charge will probably also have the highest average revenue per minute.

As further development of the third method, the total annual revenue per subscriber can be calculated. Such a fourth method will make it possible to compare the expected annually collection of money from subscribers. Furthermore, it will be possible to confront the results of the basket method with the results of this model and to give an answer to the question: Do the applicants with high (low) basket price also gain the most (least) revenue per subscriber (?).

Often, all four methods will give approx. the same results. If this turns out to be the case, we will feel safe to nominate one operator as the one who provides the lowest tariffs. Before reaching this conclusion, an analysis should be made on a 15 years' timescale, in order to compare tariffs of the entire environment (including also the tariffs of the TACS system and the GSM1 operator). If the GSM2 applicant in this comparison turns out to have lower and more adequately differentiated tariffs than the GSM1 operator i.e. Eircell, then the GSM2 applicant's tariffs are likely to be competitive.

A strong relation to the overall financial-economic business case can be made by comparing the results of applying the four different methods of tariff comparisons with the accumulated contribution margin. The applicant with comparatively low tariffs and a reasonable contribution margin will have a strong business case, all other things being equal.

B. Frequency economy

With three systems (TACS, GSM1 and GSM2) in the same frequency band (900 MHz), there might be lack of capacity in densely populated areas within a relatively short span of years. One of the reasons is the fact that the development in the number of subscribers normally is underestimated when competition is introduced within GSM. Thus, the present level of 80,000 "mobile telephone" customers in Ireland will probably much more than triple by the year 2000. A second reason is that both the subscribers and the traffic will be very unevenly distributed geographically. In addition, the traffic may be unevenly distributed during the day depending on the peak-to-mean ratio. Thirdly, as the tariffs gradually decrease and GSM finally turns out to be an enabling technology with many new useful services, traffic might increase over time. Therefore, it might be necessary to conduct supplementary analyses in order to identify the exact amount of spectrum needed.

Having participated in a substantial amount of similar frequency analyses within the 900 MHz frequency band, the work in ERC and ERD, our frequency experts have developed a number of tools, formula and techniques in order to assess the issue of frequency



economy, taking e.g. half rate encoding, frequency hopping, VAD and DTX into consideration.

If such investigations turn out with the result that the applicant has an acceptable frequency economy, although the applicant is still demanding more spectrum than it is possible to allocate, the following three solutions might be considered:

- a) One is to allocate more spectrum to the GSM operators. This can be executed in two different ways. One is to take frequencies from the existing TACS-operator, which is in accordance with EU-recommendation, cf. the term 'market requirements'. This is a "more-of-the-same"-approach. However, one major drawback is that this approach might hurt the otherwise healthy TACS business case.
- b) Another solution would be to let the GSM operators migrate to other frequencies, e.g. the extended GSM bands or available frequencies at the 1800 MHz frequency band (DCS 1800). Both solutions are like a "something-different"-approach. One of the major drawbacks of this approach is that it requires both additional investments in the network infrastructure and to some extent investment in new terminals (either EGSM-terminals or combined PGSM-EGSM/DCS 1800-terminals).
- c) A third solution could be to request the GSM(2) licensee to roll out smaller cells, e.g. micro- and/or pico-cells, i.e. a "fixed-ceiling-approach". However, this approach requires substantially higher investments and will therefore translate into a lower licence fee payment or higher tariffs, all other things being equal.

The results of such a supplementary should therefore be viewed in close relation with the evaluation of e.g. tariffs and the proposed licence fee payments.

C. Other supplementary analyses

As an example of other supplementary analyses, we could foresee as relevant and adequate, is an in-depth analysis of each application with respect to its likely effect on investments, (un)employment and the development of technological skills in Ireland, e.g. by means of local education and training.



6. Necessary profile of competence and suggested staffing

We believe that a successful task implementation requires a wide-ranging set of qualifications.

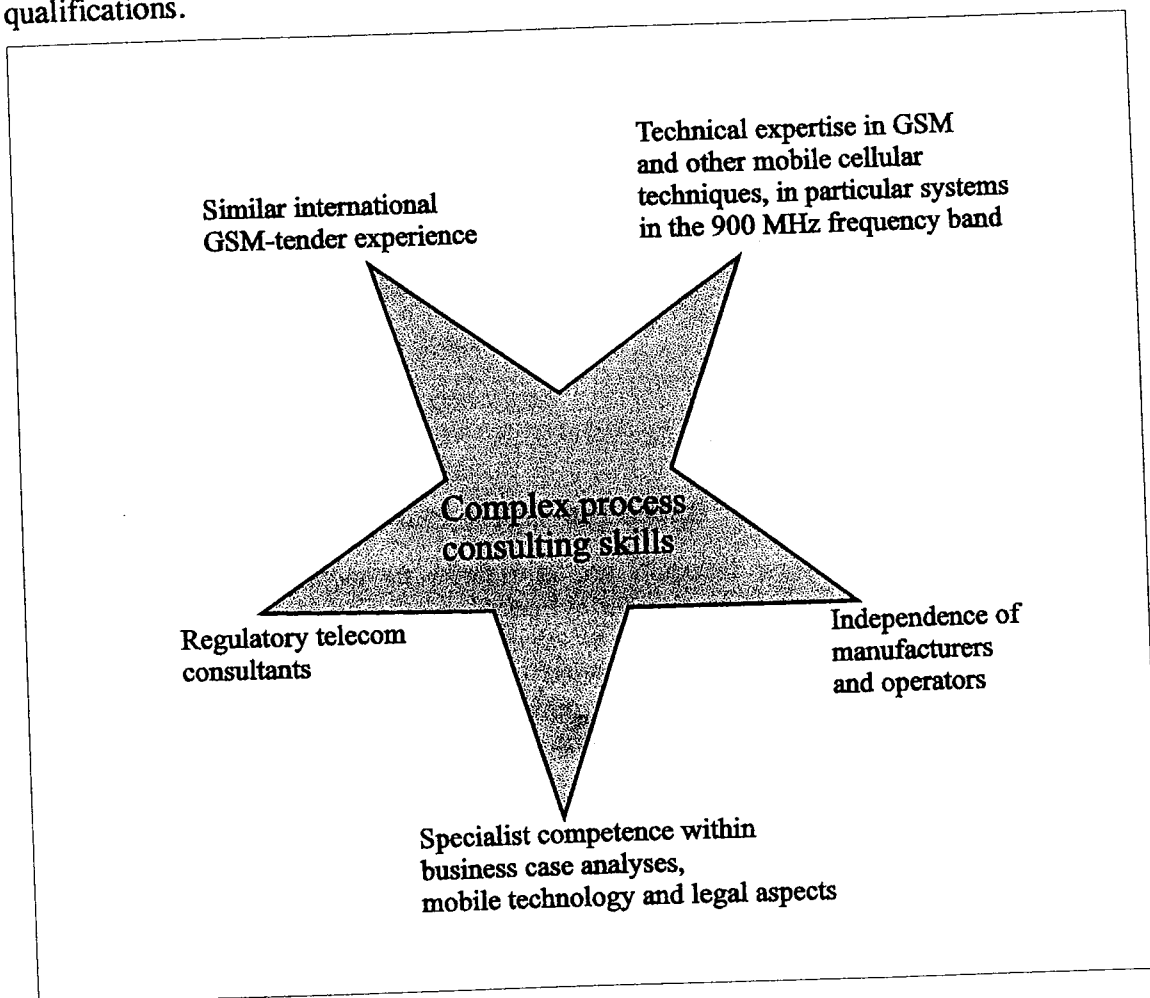


Figure 3: Necessary skills

The skills shown in Figure 3 are all of such importance that they must all be represented in the project simultaneously. Each skill is a necessary but not sufficient condition of project success.

In addition to such skills, it is important for the success of the tender that the chosen consultancy firm cannot be accused of having (hidden) ties to bidding consortia or consortia members. As we are primarily regulatory consultants, we have no bindings to the industry and the operators. Thus, we are at the moment not in a position where we are likely to be accused of having past, present or future cooperation with any of the expected bidding consortia or consortia members.



Another important aspect is the business environment. In the Irish case, the GSM2 network is not only moving into duopoly competition with the GSM1 network. In fact, the environment is above all a triopoly constituted by TACS 900, GSM1 and GSM2.

All other things being equal, we see it as most efficient and effective to staff the consultancy with key experts who have profound experience with such a triopoly of analogue systems in the 900 MHz frequency band and the GSM systems.

Taking into account all the demanded competencies and skills, we suggest our team to be selected among the following consultants:

- # Mr. Michael Moesgaard Andersen, team leader and partner
- # Mr. Jon Brüel, director and partner
- # Mr. Marius Jacobsen, senior consultant
- # Mr. Ole Feddersen, senior consultant
- # Mr. Michael Thrane, senior consultant
- # Mr. Mikkel Vinter, consultant
- # [Mr. Tage Iversen (in agreement with the National Telecom Agency in Denmark)]

We have a large number of experts at our disposal with a strong background in the mobile telephone field and the competitive aspects of tendering. We will thus be able to deliver additional experienced consultants within areas to be covered, if necessary. At the same time, we may also be able to solve consultancy tasks and to cover needs not presently foreseen during the GSM tender. As such, our services will be widely available for the Department at the desired level of quality independent of unforeseen events.

The average years of consulting experience among our staff is above 10 years. Thus, we will be able to provide a large number of additional consultants with at least 10 years' experience as consultants within the mobile area and related areas. On the basis of our experienced niche-specialized consultancy in general and the suggested team of consultants in particular, we can offer the Department the highest possible certainty that we can carry out the project successfully and independently of single persons.

The participation of Mr. Tage Iversen, who is deputy managing director (or other advisors from the National Telecom Agency in Denmark) is highly optional for the Department. Our reasons for the inclusion of a deputy managing director from the NTA is partly that this might further strengthen the position of the Department when both expatriate consultants and an expatriate regulator have provided their independent advice and judgement, partly because the Danish NTA is very experienced within licensing procedures and all kinds of legal aspects of licensing, including but not limited to conformance with the forthcoming licensing requirements of the EU Commission. If the Department sees the same advantages, Mr. Tage Iversen might be invited to participate in the Andersen team.



7. Selected references for assisting regulators within the field of mobile, cellular telephony

In the prequalification material, (cf. our correspondence dated 28 August, 1994) we have already provided the Department with an outline of international references. In addition to these, a few GSM relevant references are listed in the following sections.

7.1 Tender references within the regulatory field of GSM mobile communications

- Norway: In 1991 we gave advice on how to provide a better GSM tender material than the one originally worked out by the licensor.
- Sweden: On behalf of the Swedish government we arranged (in a joint venture with Action Learning Partners) a conference workshop in 1992 on advantages and pitfalls in contracting out.
- Denmark: In 1990-1991 we were asked to perform consultancy services during the entire process of introducing a GSM duopoly comprising the elaboration of tender documents, preparation of evaluation models, answering questions from the applicants, organizing presentations of the applications and the applicants as well as evaluation reporting.
- Denmark: In 1992-1995 we have given advice on regulatory matters within the area of GSM, interconnect agreements, and tariff issues.
- Poland: In 1994 we conducted a feasibility study on the introduction of GSM. The project is likely to continue after the necessary political decisions in 1995, possibly with a tender for two GSM licences, with the Polish fixed network operator (TPSA) as part of a born licensee.
- Nepal: In the beginning of 1995 we were commissioned to make an international GSM tender.
- Albania: At the end of 1994 we were - on behalf of the EU Phare programme and in cooperation with sub-contracted Irish consultants and engineers - assigned the task to quickly make a feasibility study and to follow up by taking the necessary steps to secure, to the extent possible, that one GSM network will be commercially operational by the end of 1995.
- Romania: In 1994 we were asked to undertake the task to review the frequency policy and the legal background for e.g. the establishment of sufficient spectrum in the 900 MHz frequency



band to introduce two GSM operators in Romania. In 1995 onwards we have been commissioned to deliver advice and project leadership concerning the GSM tender in Romania, i.e. the preparatory work, the drafting of the tender documents, the provision of answers to questions from potential applicants, the evaluation of the applications, the drafting of the licence(s), and participation in the interconnect negotiations and the licence negotiations.

- The Netherlands: In 1993 we were commissioned to assist the Dutch regulator, the HDTP, with advice on the conduct of the entire GSM tender in the Netherlands, comprising both the public GSM2 tender and the 'tender' for award of licence to KPN (PTT Netherlands) as born licensee. Subsequently, we have participated with our consultancy resources in making the legal framework, the detailed tender document, the evaluation models, the draft licences, the logistics regarding the presentation of the evaluation and the final evaluation reports to the Minister in March 1995.
- World Bank: From 1992 onwards we are acting as advisors and perform tender analyses on how to introduce GSM in the developing countries, e.g. in Ghana and in Nepal.
- OECD: From 1993 onwards we are conducting the telecommunications project "Principles and Procedures of Licensing". On the basis of a questionnaire we have collected data on the issue and conduct specific country analyses with a regulatory licensing manual as the first outcome. As a second outcome, a number of work-shops and conferences have been held and on this basis, a number of decisions have been made concerning the introduction of cellular competition. We have also been commissioned to give specific advice to the CIS-countries, the former countries of the Soviet Union, on how to establish a transparent and non-discriminatory mobile cellular telephony environment. This also applies to countries where analogue 900 MHz-systems are already introduced and GSM is forthcoming.

As the selected GSM references document, we are above all the regulators' consultants. In addition to this, we have profound knowledge of the competition between GSM and analogue mobile cellular telephony. In particular, we have carried out several business case analyses on the competition within a mixed analogue 900 MHz system, GSM1 and GSM2 environment.

Thus, we have familiarized ourselves with the regulatory problems and challenges involved in introducing a second GSM operator in an environment of analogue 900 MHz systems and GSM1.



7.2 Other selected references on GSM and tender procedures

- Eurogiro:** For five years we have been assigned the task to conduct the project leadership on behalf of 14 European Girobanks in order to establish the Eurogiro network in a duopoly competition with the existing SWIFT-system. We provided the tender documents, investigated the applicants' track record and made the evaluations of the submitted applications.
- CPE&DP:** As consultants with tender expertise, we have been commissioned to carry out approx. 25 international public procurement tenders during the last 5 years, most of them being subject to the EU-requirements of tendering. Some of these tenders have also comprised the procurement of mobile telephony and mobile datacommunications services.
- Conf.:** We have arranged a large number of telecom workshops and conferences. On behalf of the Institute for International Research we have arranged international conferences on telecommunications and GSM in 1993, 1994 and 1995. The conference in 1995 was focused on licensing GSM with a combined element of auction and beauty contest, in particular the Italian, Spanish and Belgium GSM tenders.
- Interconnection:** On a number of occasions we have been commissioned to participate in the solving of disputes regarding interconnection arrangements between mobile and fixed network operators. As another example of our expertise within this field, we held a major internal conference on behalf of the Dutch HDTP and the Ministerie van Verkeer en Waterstaat on a number of complex interconnection issues with a particular view to anticipate forthcoming or foreseeable regulatory problems on interconnection.
- EEC, CEPT, ETSI, ITU:** As single consultants and civil servants our staff has worked internationally on a number of important tasks within the telecommunications sector. For four years Mr. Michael Moesgaard Andersen was a member of the CEPT-group "Statistics and Management Group", which provided salient statistical analyses and regulatory studies on liberalization. Mr. Marius Jacobsen has 30 years' experience of mobile communications. Internationally, he has been dedicated to for instance the WARC-conferences of ITU, EC-corporation, and the technical and strategic basis of GSM as a member of the original Groupe Spécial Mobile (CEPT), which was later transferred to ETSI. Also relevant to the Irish GSM tender, Mr. Marius Jacobsen was among the



"founding fathers" of ERO, the European Radio communications Office.

The above references are just selected mobile telephony references directly relevant to the GSM2 tendering. Thus, we will on request be happy to present more mobile references as well as our vast number of general telecommunications references. If desired, personal references can easily be provided.



8. Ensuring Transparency, Independence and Confidentiality

The overall aim of executing regulatory affairs within a gradually liberalized and privatized telecom environment is to ensure transparency, objectivity and non-discrimination. These aims correspond to the EU-requirements to which the Department has to conform. In addition to the existing requirements, more strict EU-regulation of licensing may appear, as well as some guidelines from the OECD.

External consultancy services can contribute to obtaining the aims, but only if confidentiality and independence is ensured. As appears from the following sections, we more than fulfil the minimum requirements laid down in the letter from 2 March from the Department. Annex C provides more information on our specific approach to qualify control of our services.

8.1 Confidentiality

We suggest to obtain full confidentiality through the following list of measures from which the Department can pick and choose:

1. Using our usual code of conduct according to which each employee of Andersen Management International A/S will be strictly forbidden to communicate to third parties concerning the Irish GSM2 tender. In addition to this, we offer to establish a so-called "Chinese wall" between the team of consultants and other consultants.
2. All communication with the (potential) applicants can only be written communication and in the name of the Department.
3. All employees of our company are contractually bound to observe professional secrecy, and they have all non-competition clauses forbidding them to work with external parts, where conflict of interest may appear. The issues of confidentiality and non-competition cover the period of time, when the employees are working with our company, as well as any possible time after that. In case of breach, severe sanctions will apply. We are therefore ready to sign a confidentiality agreement as requested in the invitation to tender. We do also agree to let the Irish Government/the Department retain copyright to all material produced.
4. All events can be organized confidentially.
5. All written communication will be journalized in a separate system observing a high level of security.
6. Network and discs used will be protected and secured separately.
7. All written communications from us to the Department can carry a footer, shadowed text or a code. If third parties (e.g. applicants or journalists) in an illegal way should be able to get hold of a confidential document secured in this way, we will be able to decipher the code and identify the leak.



8.2 Independence

8. As consultants to regulators we have (probably) not carried out any work on behalf of any forthcoming applicant, or companies behind the expected applicants. Thus, we have no hidden historical or actual links to such companies (should Telecom Denmark International decide to participate in the tender as part of a bidding consortium, we can also state that we have no historic or actual assignments on behalf of this company).
9. We offer to abstain from executing work on behalf of operators, providers, manufacturers or other companies which are known or will become known as participants directly or indirectly in the Irish GSM tender, e.g. Esat Telecom, Irish Cellular Telephones, Motorola/Sigma Wireless, the ESB, Mercury, Detemobil, UNISOURCE, McCaw, Princes Holdings, the baby-Bells (e.g. US West, AirTouch (Pactel), Nynex and BellSouth), British Telecom (Cellnet) and Racal Vodafone.
10. We abstain from doing any work on behalf of the Telecom Eireann and its subsidiaries, including Eircell, and we have never had business relationships with them.
11. We will continue to perform the bulk of our services as consultants to regulators.
12. We will retain our memberships of "The Danish Association of Management Consultants" (FMK), "Fédération Européenne des Association de Conseils en Organisation" (FEACO) and "International Council of Management Consultants" (ICMCI), thereby obtaining the quality stamp of being a certified management consultant in addition to ISO 9001 certification. This also means that we have to follow strict codes of ethics, including performance on confidentiality and independence.
13. We are willing to inform the Department of any consultancy tasks which we carry out as well as of performance on criteria 1-12 at any point in time.
14. The Department is welcome to include criteria 1-13 as an integral part of a possible contract with us.

This regime is even stricter than the tender requirements of the Department, but we believe it is necessary, based on what can go wrong in tenders, where advisors have hidden links. So, by nominating us as advisors to the Department, outside parties, including the EU, could not realistically criticize the choice.



9. Budgetary and contractual projections

Andersen Management International A/S charges consultancy fees according to the actual amount of time spent by the consultants on the assigned project.

As our work load will be dependent on external factors, it is difficult to specify the amount of consultancy time required to fulfil the TOR. Our projections are shown in Table 3, and these are based on the sequential steps outlined in Section 4, the detailed planning in Annex D, and the TOR and our standard Terms of Cooperation in Annex A.

Table 4: Budgetary Projections. Time Consumption (TOR+)

Re- source Step	Work Load factors		Human Resources						Totals	
	TOR	TOR+	MMA	JB	MJ	MIV	MT	OCF	Total days	Total IR £
1										
2	1	0	3	2	1				6	7,800
3	1	0	1	1	1				3	3,600
4	1	0	3		3				6	7,200
5	0.8	0.2	2	2		10	3		17	12,600
6	0.8	0.2	2	2		3			7	6,750
7	0.8	0.2	5	5	5				20	20,250
8	1	0		3		1			4	4,050
9	1	0		3		3		1	7	5,850
10	1	0	1	1					2	2,700
11	1	0	1						1	1,500
12	0.8	0.2	10	10	10	10	10	10	60	58,500
13	0.8	0.2	2	2	2	5	2	2	15	13,050
14	0.8	0.2	10	5	5	5	5	5	35	36,750
15	0.8	0.2	5	10	10	20	20	20	85	73,500
16	1	0		3					3	3,600
17	1	0	2						2	3,000
18	1	0	2			5			7	5,250
19	1	0	1						1	1,500
20	0	1			5				5	4,500
21	0	1	5		5				10	12,000
22	0	1	3						3	4,500
23	0.8	0.2	1						1	1,500
Project leadership			5						5	7,500
Total			58	49	47	67	40	38	305	297,450
TOR: Terms of reference, the main part of the evaluation TOR+: The TOR including the participation on the drafting of the license Exchange rate assumption: DKK100=IR £ 10 The division of the work and the responsibilities may be changed, if desired.						MMA = Michael Moesgaard Andersen JB = Jon Brüel MJ = Marius Jacobsen MIV = Mikkel Vinter MT = Michael Thrane OCF = Ole C. Feddersen				

We offer to provide the Department with a detailed specification of the actual amount of time spent on the project by our consultants. The Department will thus be able to check our activities hour-by-hour. We do not invoice travel time or any other time, when we do not work on the project, i.e. only hours efficiently and effectively spent for direct project purposes will be invoiced. Our Terms of Payment could be more than the 30 days net cash without any interest rate, if that is an appropriate procedure for the Department.



In accordance with our Terms of Cooperation, cf. Article 1.3, we will also invoice our expenses for travel, diems, etc. at cost price without any mark-up. These expenses are likely to amount to less than 10% of the fee quoted in Table 3. This calculation is based on 25 return tickets with Aer Lingus and cost incurred directly in Ireland.

Possible subcontracting and purchase of data, etc. will be made in Ireland. We have had the opportunity to cooperate closely with Irish consultants and engineers throughout the world, the most recent example being our ongoing assignment in Albania, cf. Section 7.1.

We are, as foreseen in Article 6 of our Terms of Cooperation, willing to agree that all information and data arising from the tender process will be and remain the property of the Government.

With the assistance from the Danish Embassy in Dublin, we have been assured that our company will fully comply with the Irish tax clearance requirements, since we have no outstanding tax clearance to be settled. We have also been assured that we do not have to invoice VAT, provided that the Department can forward a VAT-number to us.

Furthermore, we propose that the Department recoup our fees by means of an extra initial licence fee payment from the licensee. This is standard operating procedure in other European countries and the licensees are always willing or even happy to reimburse the Department an extra amount equivalent to our fees. This procedure may also be in accordance with Paragraph 5 of the RFP document and the forthcoming regulation in this respect.

Finally, we would like to underscore the fact that we have specifically opted for being regulators' consultants - which galvanizes our GSM tender expertise and means avoidance of (potential) conflict of interest - and that normally guarantees that we can offer tailor-made services to our clients at economically advantageous conditions. Advice and other consultancy services, which are purely provided on a transparent and objective basis has so far proven to be an economically advantageous candidate of choice in European countries.



10. Concluding remarks

I hope that we have provided a comprehensive presentation of how we view the possibilities for successful execution of the GSM2 tender in Ireland.

Should you require further information or wish a contractual negotiation, please do not hesitate to contact us.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'M. Moesgaard Andersen', with a stylized, cursive script.

Michael Moesgaard Andersen

Managing Director

Appendices to Chapter 11

AN EVALUATION MODEL IS ADOPTED

Index

1. Draft Evaluation Model dated 17 May, 1995.
2. Official report of seventh meeting of GSM Project Group on 18 May, 1995, dated 31 May, 1995.
3. Revised Evaluation Model dated 8 June, 1995.

from Andersen Management
18/5/95.

COVER PAGE

Andersen Management International A/S
Strandgade 24
1401 Copenhagen K
Denmark

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by then

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DOCUMENT NUMBER INFORMATION:					
Type	Doc no	Language	Ver. no	Ver. type	Rel. no
memo	0116	GB	01	draft	01
TITLE					
Quantitative and qualitative evaluation of the GSM applications					
KEY WORDS					
SECURITY LEVEL					
Confidential					
AUTHOR OR SOURCE					
Andersen Management					
INFORMATION DIRECTION					
Outgoing					
FILE REFERENCE					
CIRCULATION LIST NO 54:					
Aidan Ryan Billy O'Riordan Denis O'Connor Fintan Towey Jimmy McMeel John McQuaid Maev Nic Lochlainn Martin Brennan Sean MacMahon					
THIS VERSION					
17.05.95					
REVISION HISTORY:					
Date	Comments				
17.05.95	1. Draft				

To: Sean MacMahon

key comments are in black pen
SMAAM 18/5/95

are applicants to
be entitled to assessment criteria
A. "NO"

Quantitative and qualitative evaluation of the GSM applications

1 Introduction

[It has been decided to apply both a quantitative and a qualitative evaluation model to the eligible applications. This document contains information concerning the quantitative and qualitative evaluation models and intends to give a complete description of these.]

The document comprises two parts: The first part describes the quantitative evaluation procedure including the selection of dimensions/indicators and the scoring model. The second part is a description of the qualitative evaluation model, including the evaluation process and a guide to the award of marks.

As both the quantitative and qualitative evaluation will be performed, the guiding principle will be to work with a manageable set of aspects, which is essentially identical, i.e. marketing aspects, technical aspects, management aspects and financial aspects. In addition to these aspects, which form a common denominator in both evaluations, the qualitative evaluation also deals with the risks, i.e. the sensitivities of the business cases in relation to the evaluation criteria outlined in paragraph 19 of the RFP document.

Each aspect is broken down into dimensions and each dimension is subsequently broken down into indicators. (The chosen division of the evaluation criteria into Aspects, Dimensions and Indicators, is based on the framework described in the proposal from Andersen Management International A/S, and the reader is assumed to be familiar with the content of this proposal).

2 Procedure for the quantitative evaluation process

The following steps describe the procedure for the quantitative evaluation of the applications:

- 1) A set of dimensions and indicators has been selected for the quantitative evaluation process. An assessment, including a point scoring method, will be defined for all indicators. The same set of dimensions, indicators and point scoring must be used for all the eligible applications.
one there min requirement?
- 2) All the selected indicators will be assigned a weighting factor. ~~The weighting factor has been decided by means of discussion.~~
A: Say don't have a rigid set of requirements.
take out or put in should be
- 3) The score for each indicator will be a value between 5 and 1 (both included), with 5 being the best score. All scores should be rounded to the nearest integer.
- 4) Uncertainties regarding the scoring of points may be dealt with in the qualitative evaluation.
- 5) The result of the quantitative evaluation should be considered with due respect to the significance of differences in the total sum of the points assigned. *yes*
- 6) A memorandum comprising the salient issues of the quantitative evaluation will be annexed to the evaluation report.

3 Dimensions assessed in the quantitative evaluation

An overview of the selected dimensions, indicators and the relation to the RFP document paragraph 19 can be seen in the following table:

Evaluation criteria from Paragraph 19 in the RFP document	Dimensions linked to each evaluation criteria	Indicators for the dimensions
Credibility of business plan and applicant's approach to market development	Market Development	Forecasted demand
	Experience of the applicant	Number of network occurrences in the mobile field
	Financial key figures	Solvency and IRR
Quality and viability of technical approach proposed and its compliance with the requirements set out herein	Radio network infrastructure	Number of cells
	Capacity of the network	Reserve capacity
The approach to tariffing proposed by the applicant which must be competitive	Tariffs	Competitiveness of an OECD-like GSM2 basket
The amount the applicant is prepared to pay for the right to the licence	Licence payment	Up front licence fee payment
Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded	Coverage	Speed of demographical coverage of class IV (2W) handheld terminals
The extent of applicant's international roaming plan	International roaming plan	Number of international roaming agreements
The performance guarantee proposed by the applicant	Performance guarantee	Blocking rate and dropout rate
Efficiency of proposed use of frequency spectrum resources	Frequency efficiency	Frequency economy figure

The relation between the evaluation criteria, dimensions and indicators is described in the following:

*This page unclear.
A: AM, will take out*

1. Market development, with the indicator forecasted demand is linked to "Credibility of the business plan and applicant's approach to market development".
2. Coverage, with the indicator speed of demographical coverage of class IV (2W) handheld terminals, is linked to "Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded".
3. Tariffs, with the indicator competitiveness of an OECD-like GSM2 basket, is linked to "The approach to tariffing proposed by the applicant which must be competitive".
4. International roaming plan, with the indicator number of international roaming agreements, is linked to "The extent of the applicant's international roaming plan".
5. Radio network architecture, with the indicator number of cells, is linked to "Quality and viability of technical approach proposed and its compliance with the requirements set out herein".
6. Capacity of the network, with the indicator reserve capacity, is linked to "Quality and viability of technical approach proposed and its compliance with the requirements set out herein".
7. Performance guarantee, with the indicators blocking and dropout rates, is linked to "The performance guarantee proposed by the applicant".
8. Frequency efficiency, with the indicator frequency economy figure, is linked to "Efficiency of proposed use of frequency spectrum resources".
9. Experience of the applicant, with the indicator number of network occurrences in the mobile field, is linked to "Credibility of the business plan and applicant's approach to market development".

10. Licence payment, with the indicator up front licence fee payment, is linked to "The amount the applicant is prepared to pay for the right to the licence".
11. Financial key figures, with the indicators Solvency and IRR, are linked to "Credibility of the business plan and applicant's approach to market development".

The evaluation criteria from paragraph 19 of the RFP document are arranged in descending order of priority. This means that "Credibility of business plan and applicant's approach to market development" is the most important criterion, which is reflected in three different dimensions being linked to this evaluation criterion.

The following subsections discuss the dimensions selected in accordance with paragraph 19 of the RFP document and describe the scoring model for each defined indicator.

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Dimensions and indicators:

3.1 Dimension: Market development

Indicator: Forecasted demand

The expected capability to attract subscribers is an important and measurable dimension which can be assessed quantitatively. As an indication of the expected market development, the forecasted demand will be used as an indicator. The indicator should be assessed by ultimo 4th year of licence award.

It has been decided to use the following scoring formula:

$$\text{Market penetration score} = 1 + \frac{\text{quoted no of active SIM cards} - [50,000]}{[25,000]}$$

With the condition that $1 \leq \text{Market penetration score} \leq 5$

In the specifications to the tender document, the required information may be found in table 1, regarding the number of active SIM cards.

3.2 Dimension: Coverage

Indicator: Speed of demographical coverage of class IV (2W) handheld terminals

Fast coverage of the population has been one of the most important factors of success for GSM systems in other countries, and this is most likely to be of similar importance for the Irish GSM systems as well. Therefore, the coverage should be assessed quantitatively using population coverage for handheld class IV (2W) terminals.

*Geographical
numbers?*

- Market dev is more than just no. of SIM - AR.
- AMI agrees but v. difficult to provide for assessment of traffic frequency.

• Maybe best to combine this with traffic/tariffing and do a combined quantitative measure.

A good AMI will look at this

ie a min acceptable

denominator gives the score in terms of "1" level ie 25K years if he has 75K on top -)

The scoring for the coverage indicator will be the number of months after licence award the applicant reaches 90% population coverage for handheld class IV (2 W) terminals. The following scoring will be used:

Demographical coverage for class IV (2 W) handheld terminals	
Date for 90% coverage	Points
Less than [12] months after licence award	5
Between [12 and 18] months after licence award	4
Between [19 and 24] months after licence award	3
Between [25 and 35] months after licence award	2
Between [36 and 48] months after licence award	1

The required information may be found in the specifications for the tender document, Table 7 Items 22 and 23.

3.3 Dimension: Tariffs

Indicator: Competitiveness of an OECD-like GSM2 basket

The tariffs are an important market penetration factor in any GSM market, and in addition, low tariffs will benefit the Irish customer. In order to match the average customer, the basket method can be utilized as a method for tariff comparison.

Tariffs are evaluated quantitatively by a basket, which is essentially the same tariff comparison indicator as suggested and applied by the OECD. The scoring is related to the applicant's basket ultimo year 4 compared to an identical basket of GSM 1, using the GSM 1 tariffs as of 1 January 1995.

the 45% level

much of them will fall to be qualified assessment

Roaming is also a consideration

we need to provide for people who get > 90% after yr 4

add - for > 90% in every 4 years it can be done

why just compare to GSM 1

The scoring will be defined by the following table:

Basket	
The GSM2 tariff basket compared to the GSM 1 basket in terms of price differences:	Points
\geq [40%] cheaper	5
[30% to 40%] cheaper	4
[20% to 30%] cheaper	3
[10% to 20%] cheaper	2
[0% to 10%] cheaper	1

The required information and the definition of the OECD basket may be found in the specifications for the tender document, Table 8 Item 28.

3.4 Dimension: The applicant's international roaming plan

Indicator: Number of international roaming agreements

An important advantage of GSM over the analogue systems presently in use, is the possibilities of widespread international roaming. The extent of the applicants international roaming plan is an important factor to include in the quantitative evaluation.

The relevant indicator is the number of international roaming agreements planned by the applicant by ultimo year 2 after the licence award. If there is no detailed information available on the proposed number of international roaming plans, even after presentations by the applicants, this indicator will not be scored.

If the information is available, the final score is calculated according to the following formula:

Final score = renormalization factor x roaming score

The roaming score is equal to the number of international roaming agreements. The renormalization factor is common for all applications and is chosen so that:

Factor x roaming score = 5

It might not be realistic

for the application with the **highest** roaming score.

This "renormalization" of the score value will guarantee that the resulting final score will be between 5 and 1. An example of the renormalization process is given below:

Applicant	Temp. score	"Factor"	Final point
A	8	5/20 or 0.25	2
B	16		4
C	20		5
D	15		3,75
E	4		1

3.5 Dimension: Number of cells

Indicator: Number of cells

The cell planning serves as important evidence of the overall quality of the cellular network, which can be compared with the targets for quality of service, making the number of cells in operation a relevant indicator. This figure is not static, so the figure quoted should be ultimo 4th year after licence award.

The following formula applies:

$$\text{Cells score} = 1 + \frac{\text{quoted number of cells} - [300]}{[200]}$$

With the condition that: $1 \leq \text{Cells score} \leq 5$

The required information may be found in the specifications for the tender document, Table 20 Item 150.

3.6 Dimension: Reserve capacity of the network

Indicator: Reserve capacity

The interplay between the capacity supplied by the GSM operators and the requirements from the subscribers is important when evaluating the quality and viability of the proposed technical approach. Besides from developing the network to such an extent that the demand from the subscribers can be met, the operator must also allow for a certain buffer to compensate for unexpected increases in the demand.

The relevant indicator for this dimension is the reserve capacity, as defined in Table 16 Item 98 from the tables the applicants are required to complete.

The following formula applies:

$$\text{Capacity score} = 1 + \frac{\text{Reserve capacity} - [20\%]}{[10\%]}$$

With the condition that: $1 \leq \text{Capacityscore} \leq 5$

3.7 Dimension: Performance guarantee

Indicators: Blocking rate and dropout rate

no. as agreed

The performance guarantee proposed by the applicant in the application will be binding in the licence agreement and is as such an important dimension which furthermore can be assessed quantitatively. For this dimension, the blocking rate and the drop out rate are the most relevant indicators.

The following scoring formulas will be used:

$$\text{Blocking rate score} = 1 + \frac{8 - \frac{1}{4} \sum \text{blocking rate (years 2, 3, 4 and 5)}}{1,1}$$

With the condition that: $1 \leq \text{Blocking rate score} \leq 5$

$$\text{Dropout rate score} = 1 + \frac{8 - \frac{1}{4} \sum \text{dropout rate (years 2, 3, 4 and 5)}}{1,4}$$

With the condition that: $1 \leq \text{Dropout rate score} \leq 5$

As can be seen from the formulas, the indicators defined have been based on an average of the service figures quoted for 4 years (years 2, 3, 4 and 5) after licence award. The required information can be found in the specifications for the tender document, Table 9 Items 30 and 31.

3.8 Dimension: Frequency efficiency

Indicator: Frequency economy figures

The frequency economy which provides crucial evidence of the utilization of frequencies as a common resource is relevant to include in the quantitative evaluation. The available frequency spectrum for the GSM operators is limited, and the GSM operator has to accommodate the active SIM cards within the limited spectrum.

The frequency economy will be assessed ultimo the 5th year after licence award, as this will provide information on the applicants frequency economy in a mature network. The following indicator will be used to express the frequency economy:

$$FE_5 = \frac{\text{Total network traffic in minutes ultimo the 5th year (Item 17)}}{\text{No. of GSM channels demanded ultimo 5th year after licence award}}$$

The required information can be found in the specifications for the tender document, Table 16 Item 100.

The FE_5 figure will depend on the cell planning and the planned capacity margin. The figure will also depend on penetration of half rate coding and in order to prevent spread in the figures due to variances in the applicants' assumptions, the penetration of half rate coding is fixed as a calculatory assumption in the specifications to the tender document.

Assuming that 80% of the subscribers will use half rate coding ultimo year 2000, the final score is calculated according to the following formula:

$$\text{Final score} = \text{renormalization factor} \times FE_5$$

Where the above-mentioned renormalization factor is common for all applications and is chosen so that:

$$\text{Factor} \times FE_5 = 5$$

for the application with the **highest** FE₅ score. This "renormalization" of the score value will guarantee that the resulting final score will be between 5 and 1.

3.9 Dimension: Experience of the applicant

Indicator: Number of network occurrences in the mobile field

The right experience is a very important factor for the credibility of the business case. Therefore, the applicants are requested to inform about the number of countries, where they have played a major role in the installation and commercial operation of:

- 1) GSM networks that compete nationally with the networks dominated by the PTT's
- 2) GSM networks operated in cooperation or controlled by the PTT's
- 3) Other cellular telephone networks.

The scores will be calculated on the basis of the following formula:

$$\begin{aligned} \text{Temp. score} = & 3 \times \text{no. of ad 1), ie GSM-2 experience occurrences} \\ & + 2 \times \text{no. of ad 2), ie GSM-1 experience occurrences} \\ & + 1 \times \text{no. of other cellular telephone network experience occurrences, cf} \\ & \text{ad 3).} \end{aligned}$$

The word "occurrences" may need some further explanation in order to avoid that insignificant or redundant occurrences are counted. As a guideline, the applicant must play a major role. In addition, the network quoted must be in commercial operation in an OECD country. Finally, a number of similar participation in the same country may only be counted as one occurrence.

The final score is calculated according to the following formula:

$$\text{Final score} = \text{renormalization factor} \times \text{temp. score}$$

The above-mentioned renormalization factor is common for all applications and is chosen so that:

$$\text{Factor} \times \text{temp. score} = 5$$

for the application with the **highest** temporary score. This "renormalization" of the score value will guarantee that the resulting final score will be between 5 and 1.

3.10 Dimension: Licence payment

Indicator: Up front licence fee payment

The amount the applicant is prepared to pay for the right to the licence is another factor in the evaluation, and one who can readily be included in the quantitative analysis.

The final score is calculated according to the following formula:

$$\text{Final score} = \text{renormalization factor} \times \text{licence fee score}$$

The above-mentioned renormalization factor is common for all applications and is chosen so that:

$$\text{Factor} \times \text{licence fee score} = 5$$

for the application with the **highest** licence fee score. This "renormalization" of the score value will guarantee that the resulting final score will be between 5 and 1.

3.11 Dimension: Financial key figures

Indicators: Solvency and IRR

There are a number of financial indicators, which all are interrelated. Two indicators have been chosen which both express the credibility of the business case: The solvency and the internal rate of return (IRR) as defined in the supplementary document. The solvency is a value which varies temporarily, and the average for the years 2,3,4 and 5 is used. The IRR is a value derived over the entire period of the business case (15 years), and it is not critical to consider the temporal variation here.

The scoring is based on the following tables:

Average solvency over year 2,3,4 and 5	
Solvency	Score
$\geq 60\%$	5
$\geq 45\%$	4
$\geq 35\%$	3
$\geq 20\%$	2
$< 20\%$	1

Internal rate of return	
IRR	Score
$\geq 13\%$	5
$\geq 11\%$	4
$\geq 9\%$	3
$\geq 7\%$	2
$< 7\%$	1

The required information can be found in the specifications for the tender document, Table 15 Items 91 and 97. Should the applicant prepare a 5 year plan, the score will be 1.

4 Vote casting and weight matrix

The following table shows how the votes will be given for each of the indicators in the quantitative evaluation. A list of the various is included:

Indicator	A1	A2	A3	A4	A5	Weight
1 Forecasted demand						0.10
2 Speed of demographical coverage for class IV (2W) handheld terminals						0.10
3 Competitiveness of an OECD-like GSM2 basket						0.15
4 Number of international roaming agreements						0.05
5 Number of cells						0.15
6 Reserve capacity						0.05
7 Blocking rate						0.025
8 Dropout rate						0.025
9 Frequency economy figure						0.05
10 Number of network occurrences in the mobile field						0.10
11 Up front licence payments from the applicant						0.10
12 Solvency						0.05
13 IRR						0.05
Grand Total						1

Note:

Credibility of business plan and the applicant's approach to market development will be covered in the following indicators, experience of the applicant, market development, solvency and IRR. Quality and viability of technical approach will be covered by the number of cells and reserve capacity.

5 Procedure for the qualitative evaluation process

Despite the "hard" data of the quantitative evaluation, it is necessary to include the broader holistic view of the qualitative analysis. Other aspects such as risk and the effect on the Irish economy may also be included in the qualitative evaluation, which allow for a critical discussion of the realism behind the figures from the quantitative analysis.

The following describes some of the major steps in the qualitative evaluation process:

- 1) The eligible applications are read and analyzed by the evaluators.
- 2) The eligible applications are evaluated by way of discussions and analyses.
- 3) When deemed adequate and necessary, in-depth supplementary analyses will be carried out.
- 4) Initially, the marks will be given dimension by dimension. Afterwards, marks will be given aspect by aspect (subtotals) and finally to the entire applications (grand total).
- 5) When the dimensions are assessed, the evaluators should, as far as possible, use the same indicators as used during the quantitative evaluation. New indicators may be defined, however, if the existing indicators are not sufficiently representative for the dimensions to be evaluated.
- 6) During the qualitative evaluation, the evaluators must take the results from the quantitative evaluation into account, and only compensate when necessary in order to make fair comparisons between the applications.

- (
- 7) If major uncertainties arise (e.g. in accordance with step 4 of the quantitative evaluation or due to incomparable information) supplementary analyses might be carried out by Andersen Management International A/S in order to solve the matter.
 - 8) The results of the qualitative evaluation will be contained in the main body of the evaluation report. The results of the supplementary analyses will be annexed to the report.

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6 Guide to the award of marks

In order to guide the markgiving, a matrix has been elaborated below. The dimensions and indicators are not weighted ex ante. The marks will be awarded according to a "soft" 5-point-scale (A, B, C, D, E) with A being the best mark. Averaging will be made after consensus among the evaluators.

Aspects and dimensions	A1	A2	A3	A4	A5
Marketing aspects (subtotal)					
Market development					
Coverage					
Tariffs					
International roaming plan					
Technical aspects (subtotal)					
Radio network architecture					
Capacity of the network					
Performance guarantees					
Frequency efficiency					
Financial aspects (subtotal)					
Financial key figures					
Licence payment					
Management aspects (subtotal)					
Experience of the applicant					
Other aspects (subtotal)					
Risks (Effects on the Irish economy)					
Grand total					

7th Meeting of GSM Project Group
on 18 May 1995

000618

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Chair :	Mr. Martin Brennan	T&R(Dev)
In attendance :	Mr. Fintan Towey	T&R(Dev)
	Ms. Maev Nic Lochlainn	T&R(Dev)
	Mr. Sean MacMahon	T&R(Reg)
	Mr. Eugene Dillon	T&R(Reg)
	Mr. Denis O'Connor	Planning Unit
	Mr. Jimmy McMeel	D/Fin
	Mr. Billy Riordan	D/Fin
	Mr. Aidan Ryan	T&RT
	Mr. John McQuaid	T&RT
	Mr. Michael Andersen	Andersen International
	Mr. Jon Bruel	Andersen International

Presentation of Evaluation Model by AMI

- Prior to presentation of the AMI evaluation model, its confidential nature was emphasised. It was agreed that three copies would be left in Dublin in the hands of Fintan Towey, Sean MacMahon and Jimmy McMeel. Lock-and-key security would apply at all times.
- AMI distributed copies of the draft model. After initial study, the Group had no major difficulty with the chosen format and a page-by-page scrutiny ensued. The following points were agreed.
- Para. 3.1 An indicator was added to represent active minutes. Figures should be as at end of year 4.
- Para. 3.2 The indicator should measure a combination of (a) rollout in excess of 90% and (b) speed of rollout. Para. should clarify that it is *outdoor* coverage that will be measured.
- Para. 3.3 There should be a measure of the tariffs with which applicants plan to launch, as well as some measure of how they plan their tariffs at a later point. AMI to reconsider this para. in the light of how to measure competitiveness i.e. not only with reference to GSMT.
- Para 3.4 Number of roaming plans in place after 2 years
- Para. 3.5 The issue of "coverage" in the Border area from the GSM network which is already in place in Northern Ireland is to be ignored. The formula should be adjusted to be more in line with Irish experience, TRT to advise AMI in this matter.
- Para. 3.6 TRT approved the formula, as long as applicants have no doubt as to how to derive the reserve capacity figure. [This calculation is detailed in the tables supplied.]
- Para. 3.7 Formula approved.

000185

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- Para. 3.8. Reference to total traffic to be changed to peak traffic.

Note : Corrigendum to para. i of the Guidelines to Applicants to be faxed to all applicants - figure should refer to 50% not 80% of active SIM cards using half rate codecs. Faxes sent on Fri 19 May.

- Para. 3.9. Formula to be revised. Where an organisation has 30% of a consortium, then it scores 30% of the scores for experience. The formula will limit the extent to which additional experience is significant, once one or two instances of experience of operating a GSM network elsewhere has been included for evaluation purposes.
- Para 3.10 Approved
- Para. 3.11 Solvency formula approved. IRR formula adjusted as follows :-

<i>IRR</i>	<i>Score</i>
11	5
12 or 10	4
13 or 9	3
14 or 8	2
>14 or <8	1

- Para.4 Reference can be made on the file to the formulae agreed

The qualitative evaluation was to provide a common sense check on the quantitative model. This part of the model would need to be clarified further, *before* evaluation begins. If a later challenge were to reveal that any two persons among the evaluators proceeded with a different understanding of the process, then the entire evaluation process could be put in question.

Logistics/Workplan for Evaluation of Tenders

AMI proposed presenting an interim evaluation report, based primarily on the quantitative results. Resources from the DTEC/DFinance angle would need to be clarified, but would best be reserved till *after* the quantitative stage.

Availability of DTEC and D/Finance staff was discussed and the following commitments made :-

- Fintan Towey - almost fulltime involvement in evaluation
- Martin Brennan - available as required, maintaining a constant overview
- Staff from D/Finance / T&R(Regulatory) / T&R(Technical) to be available as required

It was agreed that everyone would strive to maintain an overview, while focusing particularly on their own area of expertise.

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Interim Interconnection Regime

Following strong advice from AMI and an approach from one of the prospective applicants, the Department had come to the conclusion that the interim interconnection regime, negotiated with TE almost a year ago, was not satisfactory. In particular, it was recognised that the fixed-to-mobile rate was very low. It was agreed that a commitment to limit the life-span of the "interim" regime, allowing for negotiation between the parties for one year maximum, and for intervention, as required, by the Regulator, would be a bankable solution for applicants. T&R(Dev) and T&R(Reg) to agree a satisfactory text, in consultation with TE.

Text was since agreed and faxed to applicants on Fri 26 May.

CION Letter to the Department

AMI had issued a draft Memo to the Dept. in response to the CION letter. This was discussed; AMI advised that they were fairly certain that the CION would push the licence fee issue again.

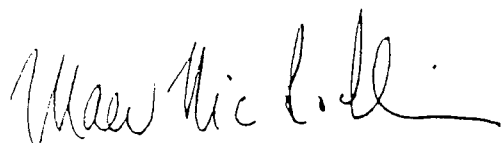
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It was pointed out that :

- the infrastructural freedom was a major example of asymmetrical regulation in favour of GSMII;
- that Belgium now understood that they had the silent approval of the CION, since they had imposed the minimum fee on both the new and on the incumbent GSM operator;

The possibility of describing the TE 1995 dividend as Eircell's "licence fee" equivalent was then mooted; Jimmy McMeel to discuss this as an option in D/Finance.

It was agreed that Mr. Andersen would accompany the Irish delegation for discussions with the CION on this matter.



Maev Nic Lochlainn
T&R(Dev), 31 May 1995

cc Attendees, File



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Quantitative and qualitative evaluation of the GSM applications

1 Introduction

It has been decided to apply both a quantitative and a qualitative evaluation model to the eligible applications. This document contains information concerning the quantitative and qualitative evaluation models and intends to give a complete description of these.

The document comprises two parts: The first part describes the quantitative evaluation procedure including the selection of dimensions/indicators and the scoring model. The second part is a description of the qualitative evaluation model, including the evaluation process and a guide to the award of marks.

As both the quantitative and qualitative evaluation will be performed, the guiding principle will be to work with a manageable set of aspects, which is essentially identical, i.e. marketing aspects, technical aspects, management aspects and financial aspects. In addition to these aspects, which form a common denominator in both evaluations, the qualitative evaluation also deals with the risks, i.e. the sensitivities of the business cases in relation to the evaluation criteria outlined in paragraph 19 of the RFP document.

Each aspect is broken down into dimensions and each dimension is subsequently broken down into indicators. The interplay between the quantitative and qualitative evaluation is described in section 7.

2 Procedure for the quantitative evaluation process

The following steps describe the procedure for the quantitative evaluation of the eligible applications:

- 1) A set of dimensions and indicators has been selected for the quantitative evaluation process. An assessment, including a point scoring method, will be defined for all indicators. The same set of dimensions, indicators and point scorings must be used for all the eligible applications.
- 2) All the selected indicators will be assigned a weighting factor. If the quantitative evaluation turns out to document that the factual basis for any part of the scoring has been wrong, a recalculated scoring will then be conducted.
- 3) The score for each indicator will be a value between 5 and 1 (both included), with 5 being the best score. All scores should be rounded to the nearest integer.
- 4) Uncertainties regarding the scoring of points may be dealt with in the qualitative evaluation.
- 5) The result of the quantitative evaluation should be considered with due respect to the significance of differences in the total sum of the points assigned.
- 6) A memorandum comprising the salient issues of the quantitative evaluation will be annexed to the evaluation report.

3 Dimensions assessed in the quantitative evaluation

An overview of the selected dimensions, indicators and the relation to the RFP document paragraph 19 can be seen in the following table:

Evaluation criteria from Paragraph 19 in the RFP document	Dimensions linked to each evaluation criteria	Indicators for the dimensions
Credibility of business plan and applicant's approach to market development	Market Development	Forecasted demand
	Experience of the applicant	Number of network occurrences in the mobile field
	Financial key figures	Solvency and IRR
Quality and viability of technical approach proposed and its compliance with the requirements set out herein	Radio network architecture	Number of cells
	Capacity of the network	Reserve capacity
The approach to tariffing proposed by the applicant which must be competitive	Tariffs	Competitiveness of an OECD-like GSM2 basket
The amount the applicant is prepared to pay for the right to the licence	Licence payment	Up front licence fee payment
Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded	Coverage	Speed and extend of demographical coverage of class IV (2W) handheld terminals
The extent of applicant's international roaming plan	International roaming plan	Number of international roaming agreements
The performance guarantee proposed by the applicant	Quality of service performance ¹⁵	Blocking rate and dropout rate
Efficiency of proposed use of frequency spectrum resources	Frequency efficiency	Frequency economy figure

The evaluation criteria from paragraph 19 of the RFP document are arranged in descending

¹⁵ Project performance guarantee will be dealt with in the qualitative evaluation.

order of priority. This means that "Credibility of business plan and applicant's approach to market development" is the most important criterion, which is reflected in three different dimensions being linked to this evaluation criterion and the weighting of the indicators.

The following subsections discuss the dimensions and indicators selected in accordance with paragraph 19 of the RFP document and describe the scoring model for each defined indicator.

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Sean MacMahon

Dimensions and indicators:

3.1 Dimension: Market development

Indicator: Forecasted demand

The expected capability to attract subscribers is an important and measurable dimension which can be assessed quantitatively. As an indication of the expected market development, the forecasted demand will be used as an indicator. The indicator should be assessed by ultimo 4th year of licence award. It has been decided to use the sub-indicators, which cover both the value aspect of demand (traffic generated) and the volume aspect (number of subscribers).

It has been decided to use the following scoring formula concerning the value aspect:

$$\text{Market pen. score 1} = 1 + \frac{\text{quoted no of total annual traffic minutes} - 50,000 \times 1,500}{25,000 \times 1,500}$$

With the condition that: $1 \leq \text{Market penetration score 1} \leq 5$

It has been decided to use the following scoring formula concerning the volume aspect:

$$\text{Market pen. score 2} = 1 + \frac{\text{quoted no of SIM cards} - 50,000}{25,000}$$

With the condition that: $1 \leq \text{Market penetration score 2} \leq 5$

In the specifications to the tender document, the required information may be found in Table 1 (item 2) and Table 4 (item 11), regarding the number of active SIM cards and the annual billable traffic.

3.2 Dimension: Coverage

Indicator: Speed and extend of demographical coverage of class IV (2W) handheld terminals

Fast coverage of the population has been one of the most important factors of success for GSM systems in other countries, and this is most likely to be of similar importance for the Irish GSM systems as well. Therefore, the coverage should be assessed quantitatively using population coverage for handheld class IV (2W) terminals for outdoors use.

The scoring for the coverage indicator is a mean value taking both speed and extend into account:

$$\text{Demographical coverage score} = \frac{1}{4} \sum (DCS(\text{year}(i)), i=1,2,3,4)$$

where DCS(i) is given for each year based on the ultimo year demographical coverage for outdoor use class IV terminals by own network using the following curve:

Points	Coverage year 1	Coverage year 2	Coverage year 3	Coverage year 4
1	$\geq 30\%$ and $< 40\%$	$\geq 70\%$ and $< 75\%$	$\geq 80\%$ and $< 85\%$	$\geq 90\%$ and $< 92\%$
2	$\geq 40\%$ and $< 50\%$	$\geq 75\%$ and $< 80\%$	$\geq 85\%$ and $< 90\%$	$\geq 92\%$ and $< 94\%$
3	$\geq 50\%$ and $< 60\%$	$\geq 80\%$ and $< 85\%$	$\geq 90\%$ and $< 92\%$	$\geq 94\%$ and $< 96\%$
4	$\geq 60\%$ and $< 70\%$	$\geq 85\%$ and $< 90\%$	$\geq 92\%$ and $< 94\%$	$\geq 96\%$ and $< 97\%$
5	$\geq 70\%$	$\geq 90\%$	$\geq 94\%$	$\geq 97\%$

The required information may be found in the specifications for the tender document, Table 7 Items 22 and 23.

3.3 Dimension: Tariffs

Indicator: Competitiveness of an OECD-like GSM2 basket

The tariffs are an important market penetration factor in any GSM market, and in addition, low tariffs will benefit the Irish customer. In order to match the average customer, the basket method can be utilized as a method for tariff comparison.

Tariffs are evaluated quantitatively by a basket, which is essentially the same tariff comparison indicator as suggested and applied by the OECD. The scoring is related to the applicant's basket ultimo year 4 compared to an identical basket of TACS 900, using the TACS 900 tariffs as of 1 January 1995. *Elmer.*

The scoring will be defined by the following table:

Basket	
The GSM2 tariff basket compared to the TACS 900 basket in terms of price differences:	Points
$\geq 40\%$ cheaper	5
30% to 40% cheaper	4
20% to 30% cheaper	3
10% to 20% cheaper	2
0% to 10% cheaper	1

The required information and the definition of the OECD basket regarding the GSM2 applicants may be found in the specifications for the tender document, Table 8 Item 28.

3.4 Dimension: The applicant's international roaming plan

Indicator: Number of international roaming agreements

An important advantage of GSM over the analogue systems presently in use, is the possibilities of widespread international roaming. The extent of the applicants' international roaming plan is an important factor to include in the quantitative evaluation.

The relevant indicator is the number of international roaming agreements planned by the applicant by ultimo year 2 after the licence award. If there is no detailed information available on the proposed number of international roaming plans, even after presentations by the applicants, this indicator will not be scored.

If the information is available, the final score is calculated according to the following formula:

$$\text{Final score} = \text{renormalization factor} \times \text{roaming score}$$

The roaming score is equal to the number of international roaming agreements. The renormalization factor is common for all applications and is chosen so that:

$$\text{Factor} \times \text{roaming score} = 5$$

for the application with the highest roaming score.

This "renormalization" of the score value will guarantee that the resulting final score will be between 5 and 1. An example of the renormalization process is given below:

Applicant	Temp. score	"Factor"	Final point
A	8	5/20 or 0.25	2
B	16		4
C	20		5
D	15		3,75
E	4		1

3.5 Dimension: Radio network architecture

Indicator: Number of cells

The cell planning serves as important evidence of the overall quality of the cellular network, which can be compared with the targets for quality of service, making the number of cells in operation a relevant indicator. This figure is not static, so the figure quoted should be ultimo 4th year after licence award.

The following formula applies:

$$\text{Cells score} = 1 + \frac{\text{quoted number of cells} - 300}{150}$$

With the condition that: $1 \leq \text{Cells score} \leq 5$

The required information may be found in the specifications for the tender document, Table 20 Item 150.

3.6 Dimension: Reserve capacity of the network

Indicator: Reserve capacity

The interplay between the capacity supplied by the GSM operators and the requirements from

the subscribers is important when evaluating the quality and viability of the proposed technical approach. Besides from developing the network to such an extent that the demand from the subscribers can be met, the operator must also allow for a certain buffer to compensate for unexpected increases in the demand.

The relevant indicator for this dimension is the reserve capacity, as defined in Table 16 Item 98 from the tables the applicants are required to complete.

The following formula applies:

$$\text{Capacity score} = 1 + \frac{1}{4} \sum \frac{\text{Reserve capacity (year 2, 3, 4 and 5)} - 20\%}{10\%}$$

With the condition that: $1 \leq \text{Capacity score} \leq 5$

The capacity scores is calculated 5th year after licence award.

3.7 Dimension: Quality of service performance

Indicators: Blocking rate and dropout rate

The performance guarantee proposed by the applicant in the application will be binding in the licence agreement and is as such an important dimension which furthermore can be assessed quantitatively. For this dimension, the blocking rate and the drop out rate are the most relevant indicators.

The following scoring formulas will be used:

$$\text{Blocking rate score} = 1 + \frac{8 - \frac{1}{4} \sum \text{blocking rate (years 2, 3, 4 and 5)}}{1,1}$$

With the condition that: $1 \leq \text{Blocking rate score} \leq 5$

$$\text{Dropout rate score} = 1 + \frac{8 - \frac{1}{4} \sum \text{dropout rate (years 2, 3, 4 and 5)}}{1,4}$$

With the condition that: $1 \leq \text{Dropout rate score} \leq 5$

As can be seen from the formulas, the indicators defined have been based on an average of the service figures quoted for 4 years (years 2, 3, 4 and 5) after licence award. The required information can be found in the specifications for the tender document, Table 9 Items 30 and 31.

3.8 Dimension: Frequency efficiency

Indicator: Frequency economy figures

The frequency economy which provides crucial evidence of the utilization of frequencies as a common resource is relevant to include in the quantitative evaluation. The available frequency spectrum for the GSM operators is limited, and the GSM operator has to accommodate the active SIM cards within the limited spectrum.

The frequency economy will be assessed ultimo the 5th year after licence award, as this will provide information on the applicants frequency economy in a mature network. The following indicator will be used to express the frequency economy:

$$FE_5 = \frac{\text{Number of SIMS year 5} \times \text{average peak hour traffic year 5}}{\text{No. of GSM channels demanded year 5}}$$

(All figures in the fraction should be based on the ultimo year values.) The required information can be found in the specifications for the tender document, Table 16 Item 100.

The FE_5 figure will depend on the cell planning and the planned capacity margin. The figure will also depend on penetration of half rate coding and in order to prevent spread in the figures due to variances in the applicants' assumptions, the penetration of half rate coding is fixed as a calculatory assumption in the specifications to the tender document.

Assuming that 50% of the subscribers will use half rate coding ultimo year 2000, the final score is calculated according to the following formula:

$$\text{Final score} = \text{renormalization factor} \times FE_5$$

Where the above-mentioned renormalization factor is common for all applications and is chosen so that:

$$\text{Factor} \times FE_5 = 5$$

for the application with the highest FE_5 score. This "renormalization" of the score value will guarantee that the resulting final score will be between 5 and 1.

3.9 Dimension: Experience of the applicant

Indicator: Number of network occurrences in the mobile field

The right experience is a very important factor for the credibility of the business case. Therefore, the applicants are requested to inform about the number of countries, where they have played a major role in the installation and commercial operation of:

- 1) GSM networks that compete nationally with the networks dominated by the PTT's
- 2) GSM networks operated in cooperation or controlled by the PTT's
- 3) Other cellular telephone networks.

Textbox stating three different types of experiences

The scores will be calculated for each member of the consortium on the basis of the following formula:

$$\begin{aligned} \text{Temp. value} = & 3 \times (\text{experience points of ad 1}), \text{ ie GSM-2 experience occurrences} \\ & + 2 \times (\text{experience points of ad 2}), \text{ ie GSM-1 experience occurrences} \\ & + 1 \times (\text{experience points of ad 3}). \end{aligned}$$

These values are added using the ownership ratios as weighting factors. The weighted sum is called the temporary score, which is renormalized to yield the final score.

The "experience points" depends on the number of occurrences within the GSM-roles defined in the box above.

Number of occurrences	Experience points given
1	2
2	3
More than 2	4

The word "occurrences" may need some further explanation in order to avoid that insignificant or redundant occurrences are counted. As a guideline, the applicant must play a major role. In addition, the network quoted must be in commercial operation in an OECD country. Finally, a number of similar participation in the same country may only be counted as one occurrence.

The final score is calculated according to the following formula:

$$\text{Final score} = \text{renormalization factor} \times \text{temp. score}$$

The above-mentioned renormalization factor is common for all applications and is chosen so that:

$$\text{Factor} \times \text{temp. score} = 5$$

for the application with the **highest** temporary score. This "renormalization" of the score value will guarantee that the resulting final score will be between 5 and 1.

3.10 Dimension: Licence payment

Indicator: Up front licence fee payment

The amount the applicant is prepared to pay for the right to the licence is another factor in the evaluation, and one which can readily be included in the quantitative analysis.

The final score is calculated according to the following formula:

$$\text{Final score} = \text{renormalization factor} \times \text{licence fee score}$$

The above-mentioned renormalization factor is common for all applications and is chosen so

that:

Factor x licence fee score = 5

for the application with the **highest** licence fee score. This "renormalization" of the score value will guarantee that the resulting final score will be between 5 and 1.

3.11 Dimension: Financial key figures

Indicators: Solvency and IRR

There are a number of financial indicators, which all are interrelated. Two indicators have been chosen which both express the credibility of the business case: The solvency and the internal rate of return (IRR) as defined in the specifications. The solvency is a value which varies temporarily, and the average for the years 2,3,4 and 5 is used. The IRR is a value derived over the entire period of the business case (15 years), and it is not critical to consider the temporal variation here.

The scoring is based on the following tables:

Average solvency over year 2,3,4 and 5	
Solvency	Score
$\geq 60\%$	5
$\geq 45\%$	4
$\geq 35\%$	3
$\geq 20\%$	2
$< 20\%$	1

Internal rate of return	
V = Numeric value of IRR (11%)	Score
$V < 1\%$	5
$1\% \leq V < 2\%$	4
$2\% < V < 3\%$	3
$3\% < V < 4\%$	2
$V > 4\%$	1

The required information can be found in the specifications for the tender document, Table 15 Items 91 and 97. Should the applicant prepare a 5 year plan, the IRR score will be 1.

4 Vote casting and weight matrix

The following table shows how the votes will be given for each of the indicators in the quantitative evaluation:

Indicator	A1	A2	A3	A4	A5	Weight
Market penetration score 1						3.75
Market penetration score 2						3.75
Speed and extend of demographical coverage for class IV (2W) handheld terminals						7.5
Competitiveness of an OECD-like GSM2 basket						15
Number of international roaming agreements						6
Number of cells						10
Reserve capacity						10
Blocking rate						2.5
Dropout rate						2.5
Frequency economy figure						3
Number of network occurrences in the mobile field						10
Up front licence payment from the applicant						14
Solvency						7.5
IRR						7.5
Grand Total						100

Note:

Credibility of business plan and the applicant's approach to market development will be covered in the following indicators: experience of the applicant, market development, solvency and IRR. Quality and viability of technical approach will be covered by the number of cells and the reserve capacity.

5 Procedure for the qualitative evaluation process

Despite the "hard" data of the quantitative evaluation, it is necessary to include the broader holistic view of the qualitative analysis. Other aspects such as risk and the effect on the Irish economy may also be included in the qualitative evaluation, which allow for a critical discussion of the realism behind the figures from the quantitative analysis.

The following describes some of the major steps in the qualitative evaluation process:

- 1) The eligible applications are read and analyzed by the evaluators.
- 2) The eligible applications are evaluated by way of discussions and analyses.
- 3) When deemed adequate and necessary, in-depth supplementary analyses will be carried out.
- 4) Initially, the marks will be given dimension by dimension. Afterwards, marks will be given aspect by aspect (subtotals) and finally to the entire applications (grand total).
- 5) When the dimensions are being assessed, the evaluators should, as far as possible, use the same indicators as used during the quantitative evaluation. Supplementary indicators may be defined, however, if the existing indicators are not sufficiently representative for the dimensions to be evaluated.
- 6) During the qualitative evaluation, the evaluators should take the results from the quantitative evaluation into account, as a starting point, and make the operationalizations of the dimensions (cf. indent 5 above) in order to make fair comparisons between the applications.

- 7) If major uncertainties arise (e.g. in accordance with step 4 of the quantitative evaluation or due to incomparable information) supplementary analyses might be carried out by Andersen Management International A/S in order to solve the matter.
- 8) The results of the qualitative evaluation will be contained in the main body of the draft evaluation report. The results of the supplementary analyses will be annexed to the draft report.
- 9) The draft report is to be presented and discussed among the 'essential persons' (identified by the Department). On this basis, Andersen Management will be asked to propose a final report.

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6 Guide to the award of marks

In order to guide the markgiving, a matrix has been elaborated below. The dimensions and indicators are not weighted ex ante. The marks will be awarded according to a "soft" 5-point-scale (A, B, C, D, E) with A being the best mark. Averaging will be made after consensus among the evaluators.

Aspects and dimensions	A1	A2	A3	A4	A5
Marketing aspects (subtotal)					
Market development					
Coverage					
Tariffs					
International roaming plan					
Technical aspects (subtotal)					
Radio network architecture					
Capacity of the network					
Performance guarantees					
Frequency efficiency					
Financial aspects (subtotal)					
Financial key figures					
Licence payment					
Management aspects (subtotal)					
Experience of the applicant					
Other aspects (subtotal)					
Risks (Effects on the Irish economy)					
Grand total					

7 The interplay between the quantitative and the qualitative evaluation

Initially, the quantitative evaluation is conducted in order to score the applications. This initial score will be given during the first three weeks after 23 June. This initial score - together with number crunching performed on the basis of Excell spreadsheets - will then form the basis for the presentation meetings and the qualitative evaluation.

When the bulk of the qualitative evaluation has been performed, however, this evaluation will conversely form the basis for a recalculation of scoring applied initially if mistakes, wrong information or similar incidentals can be documented.

The results of both the quantitative and the qualitative evaluation will be contained in the draft report with annexes to be prepared by the Andersen team.

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Sean MacIvor

Appendices to Chapter 13

THE COMMISSION INTERVENTION

Index

1. Fax from Mr. Hocepić to Mr. Towey on 29 June, 1995, enclosing draft unsigned DGIV closing letter to Mr. Lowry.
2. Fax from Mr. Burke to Mr. Kedar on 24 July, 1995, enclosing copy of page 1 of DGIV closing letter to Mr. Lowry.



EUROPEAN COMMISSION

DIRECTORATE-GENERAL FOR COMPETITION

FAX

Date: 29.6.95
Sender: Christian HOCEPIED
IV B 2
C158-3/39
Addressee: Mr Fintan Towey
Telephone: (+32-2)296.0427
Fax: (+32-2)296.9819
Telephone: 670.7444
Fax: 353 1. 6622 150
6041 188

Number of pages: 1 + 2

Subject: GSM-reply

Message:

Dear Mr Towey,

As agreed, I send you herewith the unsigned copy of the closing letter which Mr. Van Miert will sign (I hope) tomorrow

Best regards,

Christian HOCEPIED

- use of alternative infrastructures, rather than the fixed network of Bord Telecom Éireann;
- an efficient procedure will be provided to deal with interconnection disputes to prevent the new entrant being at a disadvantage vis-à-vis Bord Telecom Éireann (which provides both the fixed voice telephony and GSM) and account will be taken of the declining underlying marginal cost of the use of the PSTN;
- the new operator will have a right to the same treatment as Eircell by Bord Telecom Éireann in all respects, including co-location, subject only to technical constraints;
- the second operator will have a right to a DCS 1800 licence when this technology is licensed in the Irish market;
- 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;



EUROPEAN COMMISSION
KAREL VAN MIERT

Member of the Commission

DRAFT

Brussels,

Dear Mr Lowry,

On the basis of the clarifications provided in your letter of 22 June 1995 and during discussions your experts had with DG IV concerning the granting of the second GSM license in Ireland, the Commission is now in a position to complete its assessment of the auction element in the call for tender of the second operator.

The Commission, as it stated in its Green Paper on mobile Communications of 27 April 1994, is not in favour of such auction procedures for granting mobile licences. The Commission has, however, taken note of the specific factual and legal circumstances listed in your letter of 22 June regarding the granting of the second GSM license in Ireland and in particular that

- the Irish Government will give only a limited weighting to the auction element in the call for tender (less than 15 %);
- the same license 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 Éireann;
- the second operator may set up its own infrastructures without any restriction or make use of alternative infrastructures, rather than the fixed network of Bord Telecom Éireann;
- an efficient procedure will be provided to deal with interconnection disputes to prevent the new entrant being at a disadvantage vis-à-vis Bord Telecom Éireann (which provides both the fixed voice telephony and GSM) and account will be taken of the declining underlying marginal cost of the use of the PSTN;
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- the second operator will have a right to a DCS 1800 licence when this technology is licensed in the Irish market;
- 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;

Mr Michael Lowry,
Minister of Transport, Energy and Communications,
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Dublin 2
Ireland

7 Ely Place
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Telephone: direct line (+32-2)295 25 30 exchange (+32-2)299 11 11 Fax (+32-2)295 25 83
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- 2 -

Moreover, I understand that the fact that the second licence will be granted under Section 111(1) of the Irish Telecommunications Act, which relates to licensing of services within the exclusive privilege of Bord Telecom Éireann, will not limit in any practical way the operations of the licensee, nor preclude the grant of a further licence, once the 1983 Act is reviewed to take account of Community Law.

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 ~~our~~ the extension of the current dominant position of its public telecommunications organisation, Bord Telecom Éireann, to the new GSM-market, which would constitute an infringement to the Treaty competition rules.

For this reason, the Commission considers that it has no grounds for action under Article 90(1) in conjunction with Article 86 in respect of the auction fee imposed on the second operator.

This assessment could nevertheless be reconsidered if the factual and legal situation cited above is changed and the competitive situation of the second GSM operator was adversely affected vis-à-vis Bord Telecom Éireann.

Finally, I take note that the Irish Government will, for the time being, not allow direct cross-border interconnection between Mobile Operators. I understand that the concern is to avoid by-passing of the current exclusive privilege Bord Telecom Éireann as regards the provision of voice telephony. However, the Commission believes that there are other less restrictive means of preventing telephone calls from the fixed network being routed through Mobile networks to the fixed network in another country. A formal undertaking by the Mobile operators could suffice. No serious by-pass is indeed possible without advertisements or the circulation of price-lists and this makes the monitoring of possible contravention a relatively easy task. For these reasons, the prohibition of direct cross-border interconnection would seem to contravene Article 90 in conjunction with Article 59 of the Treaty. Given that this condition is only ancillary to the licensing 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.

Yours sincerely,



Facsimile

Fax: 353.1.6620919
Tel: 353.1.6616010

To: Mike Kegan

Date: 24/7/95

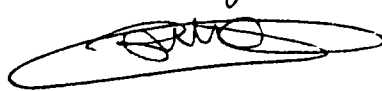
Fax Number: 00 1 905 470 6376

Number of Pages: 7

From: Janet M. Luth

Re: See attached

- ① My first draft reply to the Dats letter
- ② Commissioner Van Marts letter to the Minister on GST
- ③ Michael H. Ryan's Business card

Kind regards


If message is incomplete, please call Joan McCourt at
353.1.6616010



KAREL VAN MIERT
Member of the Commission

Brussels,
F/R

Dear Mr Lowry,

On the basis of the clarifications provided in your letter of 22 June 1995 and during discussions your experts had with DG IV concerning the granting of the second GSM license in Ireland, the Commission is now in a position to complete its assessment of the auction element in the call for tender of the second operator.

The Commission, as it stated in its Green Paper on mobile Communications of 27 April 1994, is not in favour of such auction procedures for granting mobile licences. The Commission has, however, taken note of the specific factual and legal circumstances listed in your letter of 22 June regarding the granting of the second GSM license in Ireland and in particular that:

- the Irish Government will give only a limited weighting to the auction element in the call for tender (less than 15 %);
- the same license 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;
- the second operator may set up its own infrastructures without any restriction or make use of alternative infrastructures, rather than the fixed network of Bord Telecom Eireann;
- an efficient procedure will be provided to deal with interconnection disputes to prevent the new entrant being at a disadvantage vis-à-vis Bord Telecom Eireann (which provides both the fixed voice telephony and GSM) and account will be taken of the declining underlying marginal cost of the use of the PSTN;
- 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;
- the second operator will have a right to a DCS 1800 licence when this technology is licensed in the Irish market;
- 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;

Mr Michael LOWRY,
Minister of Transport, Energy and Communications,
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Appendices to Chapter 14

PUTTING ESAT DIGIFONE'S FINANCES IN ORDER

Index

1. Handwritten note by Mr. Callaghan of meeting on 15 June, 1995, with Mr. O'Brien, Mr. Prelz and Mr. O'Donoghue.
2. Agreement between Advent, Communicorp Group and Mr. O'Brien dated 12 July, 1995, with attachments.
3. Letter from Advent to Mr. Brennan dated 10 July, 1995.

£3.2m

Bridging Finance.

- 1 year bridging facility. (Drawdown - £1.2, £1.0, £1.0 as required).
- 30% Interest/charge for year's use of facility drawn.
- Denis O'Brien's book treated the same.
- If Refinancing takes place, look favourably at taking out advent and paying the year's charge.

5% Equity in GSW Company

- Advent to invest in 5% of the 20% institutional investment (at par)
- Advent to give letter to satisfy Telnor and requirements of GSW Bid.

(strong letter but cannot be a 'commitment' to West)

- Advent to have opportunity to participate in financing arrangements for Group and/or GSW Company. If money is raised directly for SSH Co
- If GSW licence is secured, the contingent payment is deemed to be £3.6. (Originally \$4m for 50%).

THIS AGREEMENT is made this 12th day of July 1995

BETWEEN

- (1) ADVENT INTERNATIONAL CORPORATION of 101 Federal Street, Boston, Massachusetts 02110, United States of America ("AIC");
- (2) COMMUNICORP GROUP LIMITED, whose registered office is at 8, Upper Mount Street, Dublin 2 ("Communicorp"); and
- (3) DENIS O'BRIEN of 77 Wellington Road, Dublin 4 ("DOB").

RECITALS:

- (A) Each of Communicorp and Telenor Invest AS ("Telenor") currently hold 50% of the issued share capital of E-Sat Digifone Limited ("Digifone");
- (B) Digifone proposes to make an application (the "Application") to the Minister for Transport, Communications and Energy to be granted the licence to operate the second GSM cellular system throughout Ireland (the "GSM Licence");
- (C) In connection with the Application, AIC on behalf of the Advent Funds (as hereinafter defined), has written to the Minister and to Telenor confirming its offer to provide financing of up to IR£30 million to enable Communicorp to fund its equity participation in Digifone which will be required should the GSM Licence be granted to Digifone (the "Comfort Letters", copies of which are attached at Schedule 1);
- (D) In consideration of the issue of the Comfort Letters by AIC, Communicorp has agreed, subject to fulfilment of the conditions hereinafter set out, to procure that certain of the Advent Funds will be entitled to such number of shares in Digifone as is equal to 5% of its Fully Diluted Share Capital (as hereinafter defined) and to give the Advent Funds a right to participate in the funding of Digifone in connection with the GSM Licence as more specifically set out herein;

- (E) DOB is a party to this Agreement to record his consent to the amendment to the Investment Agreement referred to in Clause 6.

TERMS AGREED:

1. Definitions

1.1 In this Agreement unless expressly indicated to the contrary:--

"Advent Funds" means any company, partnership or fund which is affiliated to the Advent international network;

"Application" has the meaning given to it in Recital (B);

"Comfort Letters" has the meaning given to it in Recital (C);

"Digifone" means the company in Recital (A);

"Fully Diluted Share Capital" means the total number of shares comprised in the equity share capital of the relevant company, which would be in issue if all outstanding options to subscribe for such shares were exercised to the maximum extent possible and all outstanding commitments of that company to issue such shares or to convert existing shares or loan stock into such shares were performed, on the assumption that:

(i) any time periods which must pass before an option can be exercised or a commitment be performed have passed; and

(ii) any pre-conditions to the exercise of an

option or the performance of a commitment which are capable of being satisfied have been so satisfied;

- "GSM Licence" has the meaning given to it in Recital (B);
- "Member of the Communicorp Group" means Communicorp and any subsidiaries of Communicorp from time to time (where "subsidiary" has the meaning set out in Section 155 of the Companies Act 1963 but, for the avoidance of doubt, excluding for these purposes, Digifone); and
- "Relevant Company" means that Member of the Communicorp Group which provides financing to Digifone (whether by way of loan or equity finance or otherwise howsoever);
- "Relevant Proportion" means the percentage of the Fully Diluted Share Capital of the Relevant Company, as at the date upon which the same requires to be determined, held by Communicorp directly or indirectly (and if indirectly, such percentage shall take into account Communicorp's percentage interest in the subsidiary actually holding the shares in the Relevant Company) multiplied by the percentage of the Fully Diluted Share Capital of Communicorp held by the Advent Funds.
- For example: if the Advent Funds hold 35% of the Fully Diluted Share Capital of Communicorp and (i) Communicorp holds 88% of the Fully Diluted Share Capital of the Relevant Company, the Relevant Proportion is $35\% \times 88\% = 30.80\%$; or
- (ii) Communicorp holds 50% of the Fully

Diluted Share Capital of a subsidiary which itself holds 50% of the Fully Diluted Share Capital of the Relevant Company, the Relevant Proportion is $(50\% \times 50\%) \times 35\% = 8.75\%$;

"Telenor"

has the meaning given to it in Recital A.

2. Agreement to Sell

2.1 In consideration of the issue of the Comfort Letters by AIC and subject only to fulfilment of the conditions set out in Clause 4 by the date specified therein, Communicorp agrees within 7 days after such conditions have been fulfilled ("Completion Date"):

(i) to use its reasonable endeavours to cause Digifone to issue such number of shares; or

(ii) in the event that Communicorp is not able to procure the issue of new shares by Digifone, to transfer at par such number of the shares held by it in Digifone;

as will in either case, ensure that the Advent Funds nominated to Communicorp by AIC (the "Relevant Funds"), receive in aggregate 5% of the Fully Diluted Share Capital of Digifone at that date. AIC agrees to procure that the Relevant Funds will subscribe for or accept the transfer of (as the case may be), such number of shares (in the proportions to be notified by AIC to Digifone) at par and otherwise on no less favourable terms and conditions than each of the investors specified in the Application (or any replacements of such investors), in accordance with their respective letters of commitment to Communicorp.

2.2 In the event of a subscription for new shares in accordance with paragraph (i) of Clause 2.1, Communicorp shall procure that a meeting of the directors of Digifone is held on the Completion Date at which, upon receipt of the subscription monies

from the Relevant Funds, the shares specified in Clause 2.1 shall be allotted and issued fully paid to the Relevant Funds, in the proportions to be notified by AIC to Digifone.

- 2.3 In the event of a transfer of Communicorp shares in Digifone in accordance with paragraph (ii) of Clause 2.1, Communicorp shall be deemed to transfer to the Relevant Funds the entire legal and beneficial interest in those shares as beneficial owner free from any lien, charge or other encumbrance and together with all rights attaching thereto. Completion of such transfer shall be effected by delivery to the Relevant Funds on the Completion Date of duly executed transfers in respect of such shares together with the relative share certificate(s) against payment by the Relevant Funds of the price due in respect therefor. Communicorp shall use its best endeavours to ensure that the Relevant Funds are entered in the register of members of Digifone on or immediately after the Completion Date. Communicorp shall indemnify the Relevant Funds from and against any and all stamp duty or other transfer taxes which are charged on the transfer of the Digifone shares to them.
- 2.4 Communicorp shall procure that, on or prior to the subscription by, or transfer to, the Relevant Funds in accordance with Clause 2.1, Digifone shall make such changes to its Articles of Association as shall be necessary to ensure to the reasonable satisfaction of AIC that the issue of Digifone shares of whatever class or denomination, is subject to pre-emption rights in favour of all existing shareholders in Digifone.
- 2.5 Communicorp hereby undertakes to AIC, on behalf of the Advent Funds, that it will not and will procure that no Member of the Communicorp Group will, transfer or agree to transfer any interest in any of the shares in Digifone held by any Member of the Communicorp Group to any third party (whether or not a shareholder in Digifone) unless the third party purchaser makes an unconditional and binding offer to acquire all the shares held by the Advent Funds in Digifone (in the case of a sale by the relevant Member of the Communicorp Group of more than 20% of the aggregate of all Digifone shares held by the Communicorp Group to such third

party, and in the case of a lesser percentage, in the same proportion) at the same price per share and otherwise on no less favourable terms and conditions than those which the third party has offered to the Communicorp Group.

3. **Right of First Refusal**

Subject only to fulfilment of the conditions set out in Clause 4 by the date specified therein, Communicorp hereby grants to the Advent Funds the right to provide the Relevant Proportion of the aggregate monies raised from time to time by Digifone or by any Member of the Communicorp Group for subscription in (whether direct or indirect) or lending to Digifone Provided That:-

- 3.1 if Communicorp decides not to participate directly or indirectly in its proportionate entitlement ("Communicorp's Funding Entitlement") to fund Digifone (whether itself and/or through any other Member of the Communicorp Group) pursuant to the Shareholders' Agreement relating to Digifone to be entered into between Communicorp and Telenor (as amended from time to time) or any other agreement or arrangement between those parties supplementing or replacing the same, the Advent Funds shall be entitled to provide such proportion of Communicorp's Funding Entitlement as is equal to the percentage of the Fully Diluted Share Capital of Communicorp held by the Advent Funds at that time (the "Advent Proportion") or, in the event that the total funding provided to Digifone by all Members of the Communicorp Group at the relevant time is less than Communicorp's Funding Entitlement, the Advent Proportion of the shortfall;
- 3.2 the Relevant Proportion shall be calculated as applying to the aggregate funds raised from outside the Communicorp Group, so that, for the avoidance of doubt, the Advent Funds shall not be entitled to participate in subscriptions or loans by Members of the Communicorp Group to other Members thereof; and
- 3.3 the terms upon which the Advent Funds shall be entitled to provide monies as aforesaid shall be no less favourable than the terms and conditions as are applicable

to other providers thereof; and

- 3.4 on every occasion on which Digifone or any Member of the Communicorp Group shall propose to raise monies to which this Clause 3 would apply, Communicorp shall give notice of such intention to AIC as soon as the terms and conditions of the financing have been substantially determined and AIC shall be required within 14 days of such notice to elect to participate therein or to decline to do so (and in the absence of making any such election shall be deemed to have declined to participate).

4. Conditions

- 4.1 The rights and obligations of AIC and the Advent Funds under this Agreement are conditional upon the following matters being fulfilled by no later than 31 December 1995:-

4.1.1 the GSM Licence being awarded to Digifone; and

4.1.2 the other providers of loan/equity financing detailed in the Application (or any replacements of such providers), having made fully available the funds committed by them on the terms and conditions set out in the Application.

4.2 The obligations of Communicorp under Clause 3 of this Agreement are conditional upon Telenor having been satisfied with the Comfort Letter issued to it and on the basis thereof, having resolved to proceed with its participation in Digifone and the Application PROVIDED THAT Communicorp will use all reasonable endeavours to ensure fulfilment of this condition.

4.3 AIC at any time waive the conditions in Clause 4.1 and may, with the consent of Communicorp, extend the period during which any of such conditions must be fulfilled.

4.4 Communicorp may at any time waive the conditions in Clause 4.2.

4.5 In the event that the conditions set out in Clause 4.1 have not been satisfied by the date set out in that Clause and AIC has not exercised its discretion under Clause 4.3, the terms of this Agreement and the Comfort Letters shall cease to have effect and none of Communicorp, any other Member of the Communicorp Group or Digifone shall have any claim against AIC or the Advent Funds in connection with this Agreement or the Comfort Letters and neither AIC nor the Advent Funds shall have any claim against Communicorp, any other Member of the Communicorp Group or Digifone.

5. Guarantee

5.1 In consideration of AIC, on behalf of the Advent Funds, entering into this Agreement, Communicorp hereby guarantees to AIC and the Advent Funds the due and punctual performance of all the obligations of Digifone arising under this Agreement. For the avoidance of doubt, this guarantee shall not be deemed to extend to a guarantee of any repayment obligations which Digifone may hereafter have to the Advent Funds. If specific performance of any obligation of Digifone cannot be procured by Communicorp for whatever reason, this guarantee shall be deemed to oblige Communicorp to put the Advent Funds in the same economic position they would have been in, had Digifone complied with such obligation.

5.2 The obligations of Communicorp under this guarantee shall not be affected in any way by any act, omission or thing whatsoever which, but for this provision, might operate to release it from its obligations hereunder.

6. Redeemable Loan Stock

Pursuant to clause 5 of the Investment Agreement dated 6 October 1994 between the AI Funds (as therein defined), DOB and Communicorp, the AI Funds may be required in certain circumstances, to subscribe for Redeemable Loan Stock in

Communicorp to a maximum amount of \$4,000,000, as more particularly set out in that clause. AIC on behalf of the AI Funds, DOB and Communicorp have now agreed that:-

- (i) the formula for calculation of the Company's Equity Participation shall hereby be amended so that "a" shall be the aggregate of the amount produced by the formula in clause 5 and the percentage of the Fully Diluted Share Capital of Digifone held by the AI Funds at that time; and
- (ii) the maximum amount of Redeemable Loan Stock for which the AI Funds can be required to subscribe under that clause is \$3,600,000 (which amount shall be deemed to replace the figure of \$4,000,000 throughout that clause 5) so that, depending on the Company's Equity Participation, the subscription amount shall be whichever is the lesser of \$3,600,000 and the amount produced by the formula in that clause 5 as amended by this Clause 6.

For example: if at the date of grant of the GSM Licence, Communicorp has 40% of the Fully Diluted Share Capital of Digifone (which for these purposes is assumed to be the Relevant Subsidiary for the purposes of clause 5) and the Advent Funds have 5% of the Fully Diluted Share Capital of Digifone, the "Company's Equity Participation" will be 45% and therefore the amount of Redeemable Loan Stock for which the AI Funds may be required to subscribe is \$3,600,000.

For example: if at the date of grant of the GSM Licence, Communicorp has 20% of the Fully Diluted Share Capital of Digifone (which for these purposes is assumed to be the Relevant Subsidiary for the purposes of clause 5) and the Advent Funds have 2.5% of the Fully Diluted Share Capital of Digifone, the "Company's Equity Participation" will be 22.5% and therefore the amount of Redeemable Loan Stock for which the AI Funds may be required to subscribe is \$1,800,000.

7. Confidentiality

7.1 Each of the parties undertakes to the others that, subject to Clause 7.2, it will keep secret and confidential, and shall not disclose to any person the existence and contents of this Agreement and any information obtained by it concerning any other party which is of a confidential nature but no party shall be required to treat as confidential any information which properly enters the public domain, or is properly obtained by that party otherwise than from another party.

7.2 Clause 7.1 shall not prevent the use or disclosure of information:

- to the Minister referred to in Recital (B) or to the investors specified in the Application provided such disclosure is made only for the purposes of the Application; or
- as ordered by a court of competent jurisdiction; or
- by AIC in providing its own investors or potential investors with information regarding the performance of its investments; or
- to any adviser to any of the parties.

8. Costs

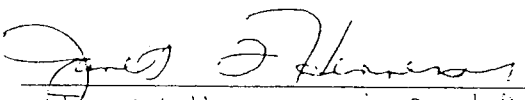
Each party shall bear its own legal and other professional costs, fees and expenses in connection with the preparation of this Agreement.

9. Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the Republic of Ireland. Each of the parties submits to the jurisdiction of the Irish courts for the purpose of any proceedings arising in connection herewith.


IN WITNESS whereof the parties have executed this agreement the day and year first
 before written AIC is signing on behalf of the following entities: Advent Crown Fund C.V.
 European Special Situations Fund L.P., Global Private Equity II L.P., Global Private Equi-
 II Europe L.P., Global Private Equity II P66M L.P., Advent International Investors II L.P., Adv-
 International Investors III L.P. and Advent Global GECC L.P.
 SIGNED for and on behalf of:)

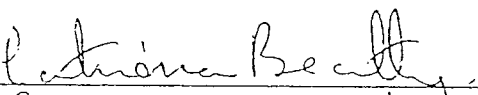
ADVENT INTERNATIONAL CORPORATION)

By:  Senior Vice President/Vice President
 Janet L. Hennessy, Vice President)

SIGNED for and on behalf of:)

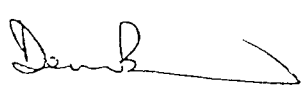
COMMUNICORP GROUP LIMITED)

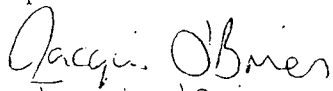
By: 
 and)

By: 
 Company Secretary)

SIGNED by)

DENIS O'BRIEN)

in the presence of: )


 Jacqui O'Brien
 12 Fleurville
 Grysport Ave,
 Blackrock
 Co. Dublin

SCHEDULE 1

The AI Letter to the Minister and to Telenor

Advent International Corporation

100 Federal Street
Boston, MA 02110
Phone: (617) 951-9400
Telex: (617) 951-0500
Internet: Advent.com

10th July 1995

Mr. Martin J. Brennan,
Principal,
Telecommunications & Radio (Development) Division,
Department of Transport, Energy and Communications,
44 Kildare Street,
Dublin 2.

Dear Mr. Brennan,

We refer to the application made to you today by E-Sat Digifone Limited in connection with the grant by you of a licence to operate the second GSM cellular system throughout Ireland.

Introduction to Advent International

Advent International Corporation is a leading international private equity provider.

With funds under management in excess of \$1.4 billion and offices in North America, Europe and Asia, Advent International has provided development capital and private equity to over 200 companies, giving entrepreneurs adequate financial resources to develop independent businesses.

Advent International's investment strategy is to focus on a selective number of industrial sectors which experience an above average level of growth. In particular, our funds have made significant investments in media and telecommunication companies in Europe and have developed a good understanding of the telecommunication business and a strong interest in investing in the same.

Advent's Investment in the Communicorp Group

In 1994, certain of the funds managed by Advent International invested a total of approximately \$10 million in Communicorp Group Limited ("Communicorp") in return for just over 25% of the voting share capital. Communicorp is the holder of 50% issued share capital of E-Sat Digifone Limited ("Digifone").

MB

10th July 1995

These funds have committed to invest an additional \$9.5 million to further develop the group's activities.

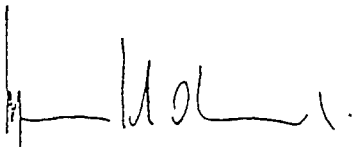
Advent's Commitment to the GSM Licence Application

We have reviewed the business plan prepared by Digifone in connection with its application for the second GSM licence and consider its operation of the second GSM cellular system in Ireland to be an attractive and viable project. The application to you by Communicorp sets out how it is intended to inject new equity into Digifone on the licence being granted to it and shows the Advent Funds as 5% shareholders, participating in the 20% holding which has been allocated to institutional investors. We are delighted to have the opportunity of investing directly in Digifone as well as our indirect investment in the company through Communicorp and E-Sat Telecom.

The said application also shows Communicorp Group remaining as a 40% shareholder in Digifone and being required to provide up to 30 million Irish Punts to fund that 40% equity participation. We can confirm that we have offered that amount to Communicorp to enable it to fund its obligations.

Please do not hesitate to contact Massimo Prelz Oltramonti on +44-171-333 0800 should you have any queries on the information in this letter.

Yours sincerely,
for and on behalf of
Advent International Corporation



Massimo Prelz Oltramonti
Senior Vice President & Managing Director - Europe

Advent International Corporation

Federal Street
MA 02110
Telephone: (617) 951-9400
Facsimile: (617) 951-0566
Internet: AdvInt.com

10th July 1995

Mr. Knut Haga,
Assistant Director,
Telenor International AS,
PO Box 6701, St. Olavs plass,
N-0130 Oslo,
Norway.

Dear Mr. Haga,

We refer to the application to be made by E-Sat Digifone Limited in connection with the grant of a licence to operate the second GSM cellular system throughout Ireland.

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h/a

10th July 1995

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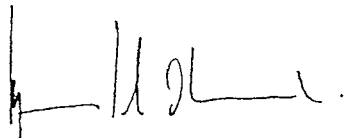
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Yours sincerely,
for and on behalf of
Advent International Corporation



Massimo Prelz Oltramonti
Senior Vice President & Managing Director - Europe

Advent International Corporation

Federal Street
N. MA 02110
Phone: (617) 951-9418
Telex: (617) 951-0566
E-mail: Advent.com

10th July 1995

Mr. Martin J. Brennan,
Principal,
Telecommunications & Radio (Development) Division,
Department of Transport, Energy and Communications,
44 Kildare Street,
Dublin 2.

Dear Mr. Brennan,

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In 1994, certain of the funds managed by Advent International invested a total of approximately \$10 million in Communicorp Group Limited ("Communicorp") in return for just over 25% of the voting share capital. Communicorp is the holder of 50% issued share capital of E-Sat Digifone Limited ("Digifone").

1/12

10th July 1995

These funds have committed to invest an additional \$9.5 million to further develop the group's activities.

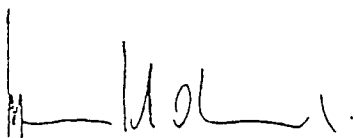
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Yours sincerely,
for and on behalf of
Advent International Corporation



Massimo Prelz Oltramonti
Senior Vice President & Managing Director - Europe

Appendices to Chapter 15

THE COMPETITION IS REACTIVATED

Index

1. Letter from Mr. Brennan to Esat Telecom dated 14 July, 1995.
2. Gantt Chart for GSM Evaluation Project, version 14 July, 1995.



An Roinn Iompair,
Fuinnimh agus Cumarsáide
44 Sráid Chill Dara,
Baile Átha Cliath 2.

000700

Department of Transport
Energy and Communications
44 Kildare Street,
Dublin 2.
Telephone: (01) 6707444
Fax: (01) 6709633

14 July, 1995

Mr. Enda Hardiman,
ESAT Telecom,
Jenkinson House (Basement),
18-20 Sth. Cumberland Street,
Dublin 2.



Dear Mr. Hardiman,

I refer to my letter dated 16th June, 1995 concerning the competition for the award of a licence to become the second operator of GSM mobile telephony within Ireland.

The Department's discussions with the European Commission have now concluded. The Commission are satisfied with the procedures being followed by the Department for the grant of a licence to a second operator of GSM mobile telephony within Ireland. It has been agreed between the Department and the Commission that a cap of IR£15m be placed on the initial licence fee payable by the applicant. It is also agreed that Eircell be subjected to a once-off fee of IR£10m to maintain competitive equality.

As a consequence of the above, the original terms of the competition require to be revised. The appropriate amendments to the competition documentation are detailed below.

- Paragraph 4 of the document entitled "Competition for a licence to provide digital mobile cellular communications GSM in Ireland" issued on 2nd March, 1995 is replaced by the following:

"The minimum initial licence fee for the licence will be IR£5,000,000 but applicants are free to offer a higher amount subject to a maximum of IR£15,000,000 to win the right to the licence".

- Paragraph 19 of the same document is amended by the substitution of the following words for those at the fourth bullet-point *"the amount, in excess of the minimum initial licence fee which the applicant is prepared to pay for the right to the licence"*.

000715


- Paragraph 26 of the same document is amended by the substitution of "on or before 12.00 noon on Friday, 4 August, 1995" for "on or before 12 noon on Friday, 23rd June, 1995".
- The second and third sentences of the first paragraph of section 2.3 of the document entitled "Competition for the award of a licence for a second GSM operator in Ireland - Memorandum for the information of applicants" is revised as follows:

"An arms length relationship with the parent company will apply and conditions will, as far as reasonably possible, be equivalent to those applicable to the successful applicant for this licence. This will apply to both the relationship between Telecom Eireann and the mobile operators and between the licensor/regulator and those operators from a date not later than the date of issue of the new licence. Eircell will be required to pay a fee of £10m to retain its statutory right to operate mobile telephony".
- The third bullet point of section 3 of the same document is revised by the substitution of "12.00 noon on Friday, 4 August 1995" for "12.00 noon on Friday 23rd June, 1995".
- The fourth bullet point of Section 3 of the same document is revised by the substitution of "4 August to end November, 1995" for "23rd June to 31st October, 1995".

The information memoranda issued on 28th April and 12th May, 1995 should be interpreted in the light of the amendments to the original competition document as detailed above.

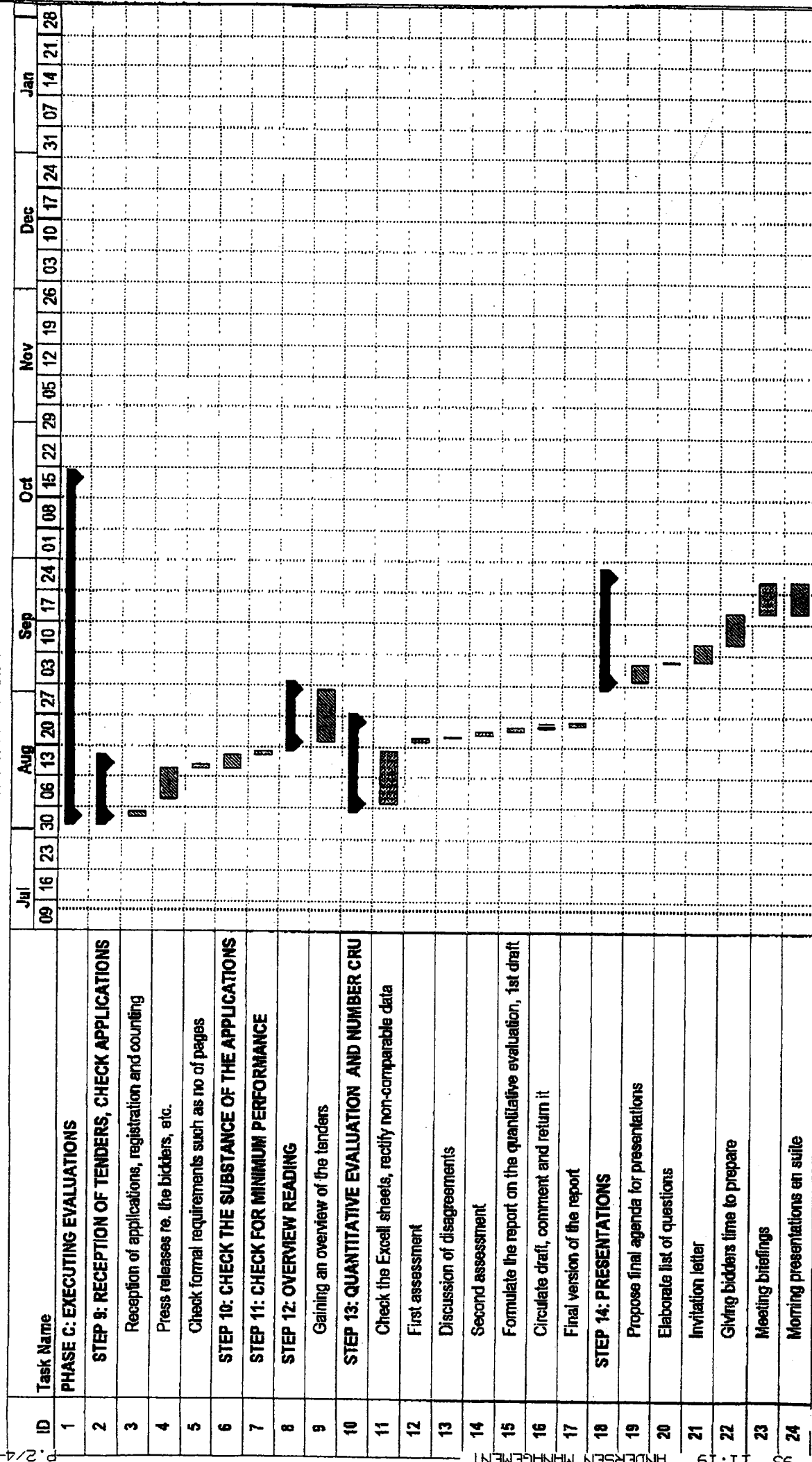
Please confirm receipt of this letter by fax (353 1 6041188)

Yours sincerely,

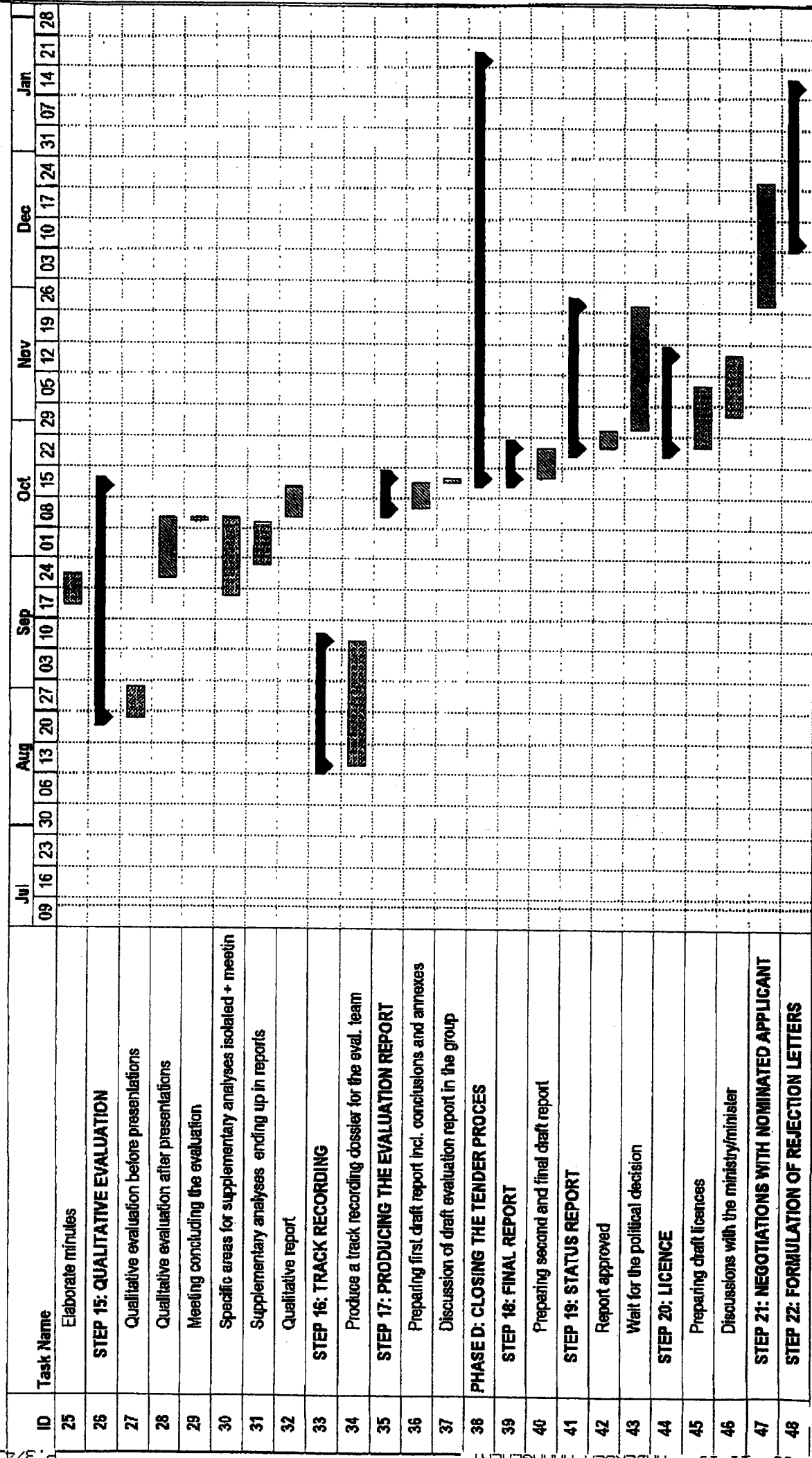


Martin Brennan
Telecommunications and Radio
(Development) Division

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VERSION 14-07-95 21.57



GANNT CHART FOR THE GSM EVALUATION PROJECT
VERSION 14-07-95 21.57



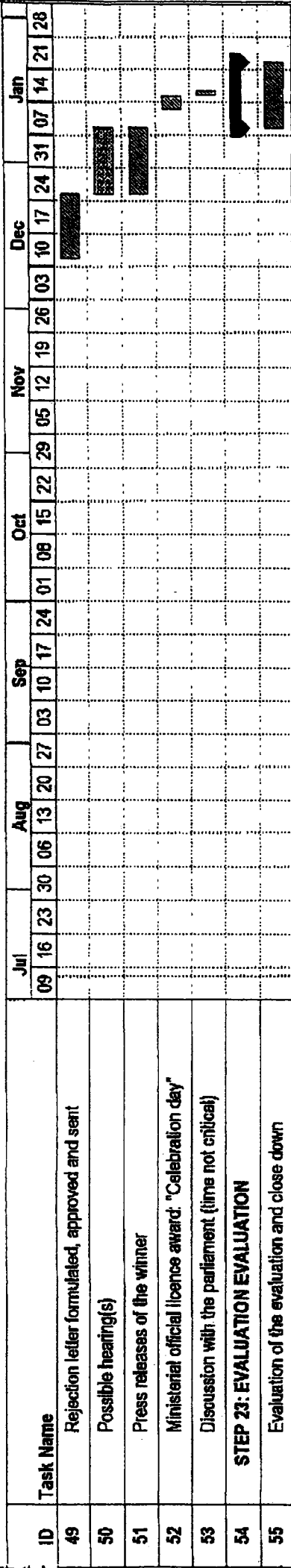
Project:
Date: 14-07-95

Task

Critical Task

Summary

GANNT CHART FOR THE GSM EVALUATION PROJECT VERSION 14-07-95 21.57



Project:
Date: 14-07-95

Task

Critical Task

Summary

Appendices to Chapter 16

TENSIONS EMERGE BETWEEN COMMUNICORP AND TELENOR

Index

1. Fax from Mr. O'Donoghue to Mr. Haga dated 31 July, 1995.
2. Letter from Mr. Haga to Ms. Stroud dated 1 August, 1995.
3. Letter from Mr. Prelz to Mr. Haga dated 2 August, 1995.
4. Faxed letter from Mr. Haga to Mr. O'Brien dated 2 August, 1995.
5. Draft letter from Advent to Mr. Simonsen dated 3 August, 1995.
6. Fax from Mr. O'Donoghue to Mr. O'Connell dated 3 November, 1995, with attached handwritten note of telephone call with Mr. Prelz on 3 August, 1995.
7. Letter from Mr. O'Donoghue to Mr. Prelz enclosing draft letter from Advent to Communicorp Group, both dated 4 August, 1995.

COMMUNICORP GROUP LIMITED

8 Upper Mount Street, Dublin 2
Tel: 353 1 6768800, Fax: 353 1 6616839

F A C S I M I L E

FAX NO : 0047 22 779909
TO : Knut Haga, Telenor
FROM : Peter O'Donoghue
DATE : 31 July 1995
RE : Financial Commitment to Digifone

Advent:

confirm pls.
+
copy

Further our conversation today I confirm that Advent International Corporation and Communicorp Group Ltd have formerly entered an agreement whereby Advent have committed up to IR £30 million to the Communicorp Group in the event that Esat Digifone is successful in its bid for the second GSM licence in Ireland. In consideration of Advent making these funds available, Communicorp has agreed that Advent will be entitled to participate in up to 5% of the equity capital of Digifone Ltd. Denis O'Brien is also a signatory to this agreement.

Accordingly, as the above parties represent 100% of the shareholders of the Communicorp Group, they have given their consent to the increase of capital required in Communicorp to facilitate the investment in Esat Digifone.

I hope the above will assist you in finalising your outstanding issues.

With best regards


Peter O'Donoghue

MB4071 JUL



Telenor
International

Ms Helen L. Stroud
Baker & McKenzie
pr fax: 095 44 171 919 1999

Oslo 1. August 1995

Dear Ms Helen L Stroud

The Communicorp Group:

Thank you for your letter of July 13th. Based on the received information I would kindly ask you to provide Telenor with some statements from AIC, confirming the following:

1) that the forwarded financial information (enclosure to your letter dated 13 July) related to various funds as of 31.12.94 is correct - please make references to each specific fund.

2) that no material changes have occurred since 31.12.94.
- please make references to each specific fund.

No
→ 3) that an agreement between Advent (AIC) and the Communicorp Group has been signed and that the agreement is related to an equity increase in Communicorp due to an award of a GSM 2 licence in Ireland to Digifone.

4) that investing in the Communicorp Group is within AIC's mandate as the general partner of the funds mentioned.

The statements should be faxed and mailed (address below) to Telenor International cc Knut Haga fax no + 47 2277 9909.

Please note that the information must be available on Thursday 3rd of August and that the statements should be duly signed by Mr Massimo Prelz Oltramonti.

Kind regards.

Yours sincerely

Knut Haga

cc: Per Simonsen, Peter O'Donoghue, Massimo Prelz Oltramonti

Telenor International AS

Office address:
Keyersgt. 15
N-0165 Oslo


Postal address:
P.O. Box 6701
St. Olavs pl.
N-0130 Oslo

Telephone:
+47 22 77 99 00
Telefax:
+47 22 77 99 09

Bank account:
7029 05 20078

Head office:
Keyersgt. 15
N-0165 Oslo
Enterprise number:
NO 964 026 165

41

 Telenor Invest AS	
KORR. KODE: 3401	
ARK.NR.: 5.9	DATO: 11/9-96

Knut Haga
Telenor International AS
Keysergt. 15
N-0130 Oslo

August 2nd 1995

Dear Mr. Knut Haga,

ref: your letter dated August 1 1995 re The Communicorp Group

let me answer to the different points in your letter one by one.

1) We have sent you informations regarding the following funds(the "Funds"):

Advent Global GECC L.P.,
European Special Situation Fund L.P.,
Advent Crown Fund C.V.,
Global Private Equity II L.P.,
Global Private Equity II (Europe) L.P.,
Global Private Equity II (PGGM) L.P.

All the financial informations supplied to you have been audited by a leading firm of accountants and are correct to the best of our knowledge.

2) For all of the above Funds, no material changes have occurred. In the normal course of business, each fund has continued to make investments. Attached you will find a schedule, showing for each fund the committed capital and the investments made as of June 30, 1995. The difference represents the uninvested portion of our committed funds available for new investments (attachment 1).

3) As we wrote to you in our letter dated July 10th 1995, we confirm that we have offered to finance the amount required to fund Communicorp Group 40% participation in Digifone.

4) The investment in Communicorp Group falls within the charter of the Funds.

I hope this satisfy your requirements. Please fell free to contact me directly if you need any further information.

Best regards,

Massimo Prelz Oltramonti.

cc: Peter O'Donoghue

RGENT



Telenor
International

FAXMEMO

Aft: Denis O'Brian Communicorp pr fax 095 353 1 6616039

cc: Per Simonsen 095 353 1 6620339

From Knut Haga

Ref: Financial guarantees

Date: 02.08.1995

Dear Denis,

with reference to Joint venture agreement, dialogue with Peter O'Donoghue and facsimile letter from Peter 31 July (enclosure) I would like to express my concern related to the issue 'financial guarantees'.

Based on the letter from Peter, I required a similar statement from Advent International through Baker & McKencie. Ms Helen L Stroud called this afternoon and told me that there were not made any agreements between Advent and Communicorp related to the said 30 mill IEP.

If this information is correct I believe we may have serious problem related to establishing an acceptable level of financial comfort.

Please be aware of the fact that this situation may jeopardise the whole project.

Enclosure: 2 pages

Telenor International AS

Office address:
Kjellerstr. 15
N-0165 Oslo

Postal address:
P.O. Box 6701
St. Olavs pl.
N-0130 Oslo

Telephone:
+47 22 77 99 00
Telefax:
+47 22 77 99 09

Bank account:
7029 05 20078

Head office:
Kjellerstr. 15
N-0165 Oslo
Enterprise number:
NO 984 026 165

3 August 1995

Mr Per Simonsen
Telenor AS
PO Box 6701
St. Olavs plass
N-0130 Oslo
NORWAY

Dear Per

Advent International Plc. hereby guarantee Telenor AS that it will offer IR £30,000,000 (Thirty Million Irish Pounds) to Communicorp Group Limited for the necessary equity increase in Esat Digifone Limited to establish and operate a GSM network in Ireland.

This offer is true and valid until 60 days after the Ministry of Transport, Energy and Communications has awarded the license to Esat Digifone Limited. Telenor AS can call this guarantee.

Yours sincerely

MEM03.AUG

FACSIMILE

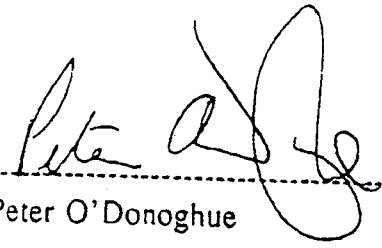
FAX NO : 6688208
TO : Owen O'Connell, William Frys
FROM : Peter O'Donoghue
DATE : 3 November 1995
RE : Draft Reply to Baker & McKenzie Letter

Further to our conversation this morning, I now attach some hand-written notes of my telephone conversation with Massimo Prelz on the 3rd of August 1995.

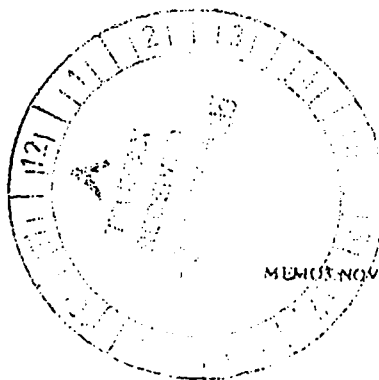
He accused me of trying to mislead Telenor and stated that "You Guys" (reference to Denis and I) "have a way with playing with words". This would go back to our original discussions on the terms of the IEP £3.2 million facility and what was agreed in respect of the 5% of Esat Digifone. He stated that the word 'committed' was misleading and that the fact that there was no offer as no terms were agreed. I reminded him that he had put outline terms to Denis and even though these were not acceptable to ourselves, they were in themselves terms. He stated he would not be signing any letter. Letters require the approval of the Investment Committee and no letter would be forthcoming.

I will leave it to yourself Owen as to how much, if any of the above you may wish to incorporate into your reply to Baker & McKenzie.

Regards



Peter O'Donoghue



94 F/S were approved / related paying a directors transaction
should be ticked up

He will not sign the letter / there will be no
letter / letter would require instant committee approval

DOB-e PSD misleading Telecom / paying with words / there
is 'no offer' / no terms required / word committed was mis/used

COMMUNICORP GROUP LIMITED

8 Upper Mount Street, Dublin 2
Tel: 353 1 6765800, Fax: 353 1 6616039

faxed 9-30am
AndB

4 August 1995

Mr Massimo Prelz
Avent International Plc.
123 Buckingham Place Road
London SW1W 9SR
ENGLAND

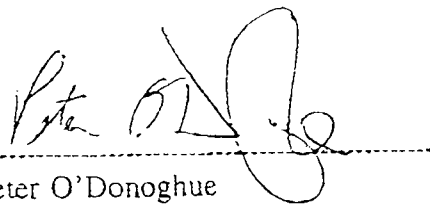
Dear Massimo

Re : GSM Bid

I attach a copy of a revised letter that Telenor have requested Advent to provide to Communicorp Group Limited. They wish to establish that the offer referred to in your letter to them on the 12th of July 1995 will remain valid for a period of 60 days after the GSM license is awarded.

If you have any queries concerning the attached please contact either Denis or myself.

Kind regards



Peter O'Donoghue
CHIEF FINANCIAL OFFICER

MEM04.AUG

4 August 1995

Communicorp Group Ltd
8 Upper Mount St
DUBLIN 2

Dear Sirs

Advent International Plc., on behalf of its funds under management, confirms that it has offered IR £30,000,000 (thirty million Irish pounds) to Communicorp Group Limited for the necessary equity increase in Communicorp Group Limited to establish and operate a GSM network in Ireland.

This offer is true and valid until 60 days after the Ministry of Transport, Energy and Communication has awarded the licence to Esat Digifone Limited.

Yours sincerely

CC Telenor AS, attention: Per Simonsen

MEMO4.AUG

Appendices to Chapter 20

THE QUANTITATIVE EVALUATION AND FURTHER CONSIDERATIONS AT PROJECT GROUP MEETING OF 4TH SEPTEMBER, 1995

Index

1. Official report of ninth meeting of GSM Project Group on 4 September, 1995, dated 6 September, 1995.
2. Results of the quantitative evaluation dated 30 August, 1995.
3. Second set of quantitative evaluation results, dated 20 September, 1995.
4. Final version of quantitative results, generated by AMI on 2 October, 1995.

9th Meeting of the GSM PROJECT GROUP
REPORT OF MEETING ON MONDAY 4TH SEPTEMBER, 1995

Attendance

Mr Martin Brennan) T Dev	Mr Sean McMahon) Regulatory
Mr Fintan Towey)	Mr Ed O Callaghan)
Ms Maev Nic Lochlainn)		
Ms Nuala Free)	Mr John McQuaid) T&RT
		Mr Aidan Ryan)
Mr Billy Riordan) Finance		
Mr Michael Andersen) A M I		
Mr Marius Jakobsen)		
Mr Mikkel Vinter)		

Opening

Mr Brennan outlined the agenda for the meeting :-

1. The Andersen presentation on the quantitative evaluation of the 6 applications.
2. Discussion of the forthcoming presentations.
3. The future framework for the project.

Quantitative Evaluation

Prior to presenting the initial draft report of the quantitative evaluation, Mr Andersen first acknowledged certain shortcomings in the results gleaned so far from the quantitative scoring. The quantitative evaluation had highlighted some incomparable elements i.e.:-

- some applicants had not calculated OECD baskets to their best advantage.
- IRR had not been calculated in accordance with the tender specification in some cases.
- for certain cases, not enough information on roaming was supplied to score the application.
- certain of the indicators proved highly time-sensitive, e.g. if scored in year 4 they showed one ranking, year 15 giving a completely different view.

The highly sensitive nature of the quantitative scoring document was noted. Copies are to be retained securely by Mr McMahon, Mr McQuaid, Ms Nic Lochlainn and Mr Riordan. The remaining copies were returned to AMI.

The meeting discussed each dimension of the scoring document in turn. The consensus was that the quantitative analysis was not sufficient on its own and that it would be returned to after both the presentations and the qualitative assessment.

It was also agreed that the figures used by the applicants could not be taken at face value and needed to be scrutinised. Responsibility for such a scrutiny has not yet been decided.

The need to reflect a change in the weighting for the licence fee was highlighted. AMI committed to correct the model in this respect.

Mr Andersen concluded that the scoring at this stage was relatively close and that no conclusions could yet be drawn.

Forthcoming Presentations

A set of general questions for discussion at the presentations, as drawn up by Andersens, was examined. Gaps in the questions were identified and new wording agreed. Questions are to be sent to the applicants on the 5th of September.

It was agreed that issues such as the costs of security interception etc. could be discussed with the eventual winner of the GSM2 licence and would only be briefly flagged at these presentations.

Andersens are to draft specific questions for each applicant. The Department of Transport, Energy and Communications and the Department of Finance evaluators will also prepare applicant-specific questions as appropriate. Questions during the presentation should be asked in order i.e. general strategy, marketing, technical, management, financial and then other. At the Monday morning preparatory meeting, Andersens will provide an outline of the underlying philosophies and weak points of each application.

It was agreed that the sweeping of the conference room for potential bugging devices before each presentation was desirable. To assist the evaluation team it was decided that it would be preferable to tape each presentation with the consent of all the applicants. The provision of such facilities to be organised by T&R(Dev).

Each applicant would be asked to provide a hard copy of any slides or visual material used. The time limit of three hours for each presentation would be absolute.

Future Framework of the Project

10 subgroup meetings for the qualitative evaluations had been proposed by AMI. 5 had already taken place. AMI committed to provide the Department with documentation on these earlier sub-group meetings. Project group members were welcome to contribute/suggest amendments to the scoring.

Andersens outlined a timetable for the remaining 5 sessions and personnel were nominated to attend. Mr Towey and Mr Riordan are to attend the Financial and Performance Guarantee meetings. Mr McQuaid and Mr Ryan are to attend the Radio Network, Capacity of the Network and the Frequency Efficiency sessions.

Andersens stated that the qualitative scoring of dimensions would take place in the sub-groups. Scoring of aspects would take place after the presentations. Mr Brennan however specifically requested an opportunity to re-visit the qualitative evaluation of dimensions after the presentations. The Group would have an initial discussion on the qualitative evaluation scoring on the afternoon of 14 September. Gaps would be highlighted and the extent of the need for supplementary analyses assessed.

A date of 3rd October 1995 for the delivery of a draft qualitative report was suggested by Andersens.

A discussion on the question of the backbone network, as proposed by many of the applicants, also took place. It was concluded that very little could be done, until a successful applicant had been chosen.

ip Mr. Nuala Free

Nuala Free

6th September, 1995

c.c. Attendees, Ms. O'Keefe, Mr. McMeel

Quantitative evaluation for Irish GSM2.

2. Draft

Dimension 1. Market development (number of traffic minutes and number of SIM-cards)

These indicators should be assessed for year 4.

	A1.	A2	A3.	A4.	A5.	A6.
Quoted no. of billable traffic minutes (1000x)	134,858	112,809	137,330	242,256	168,821	120,608
Market penetration score 1	2.6	2.0	2.7	5.5	3.5	2.2
Points	2.60	2.01	2.66	5.00	3.50	2.22

	A1.	A2.	A3.	A4.	A5.	A6.
Quoted no. of SIM-cards	125,500	100,000	159,600	98,000	116,800	130,900
Market penetration score 2	4.0	3.0	5.4	2.9	3.7	4.2
Points	4.02	3.00	5.00	2.92	3.67	4.24

Dimension 2. Coverage (speed and extent of demographical coverage)

as at 31.12.199X

	A1.	A2.	A3.	A4.	A5.	A6.
Coverage percent class IV (2W) year 1	59%	78%	76%	70%	79%	75%
Coverage percent class IV (2W) year 2	97%	98%	93%	85%	97%	93%
Coverage percent class IV (2W) year 3	97%	98%	93%	95%	98%	93%
Coverage percent class IV (2W) year 4	97%	98%	93%	95%	98%	93%
Points	4.50	5.00	4.00	4.25	5.00	4.00

Dimension 3. Tariffs (Competitiveness of an OECD-like GSM2 basket)

The GSM 2 tariff basket ultimo year 4 compared with a TACS 900 basket of 1. January 1995

	A1.	A2.	A3.	A4.	A5.	A6.
OECD tariff basket for GSM2 year 4	466.3	462	391.41	640	485.79	442
OECD tariff basket TACS 900	521.9	521.9	521.9	521.9	521.9	521.9
Price reduction compared to TACS 900	11%	11%	25%	-23%	7%	15%
Points	2.00	2.00	3.00	1.00	1.00	2.00

Dimension 4. The applicant's international roaming plan (number of roaming agreements)

As there is no detailed information available from the applicants on the proposed number of international roaming plans, hence this indicator is not scored individually.

	A1.	A2.	A3.	A4.	A5.	A6.
Number of roaming agreements	70	70	70	70	70	70
Renormalization factor	0.07	0.07	0.07	0.07	0.07	0.07
Points	5.00	5.00	5.00	5.00	5.00	5.00

Dimension 5. Radio network architecture (number of cells)

The number of cells in the applicant network ultimo year 4.

	A1.	A2.	A3.	A4.	A5.	A6.
Number of cells	270	282	351	421	633	262
Cells score	0.8	0.9	1.3	1.8	3.2	0.7
Points	1.00	1.00	1.34	1.81	3.22	1.00

AVERAGE -

QUANTITA.XLS 30/08/95

Dimension 6. Reserve capacity of the network (reserve capacity)

the reserve capacity in percent year 2,3,4,5

Reserve capacity in percent year 2
Reserve capacity in percent year 3
Reserve capacity in percent year 4
Reserve capacity in percent year 5

A1.	A2.	A3.	A4.	A5.	A6.
18%	176%	68%	284%	596%	114%
18%	69%	42%	238%	373%	164%
18%	26%	29%	180%	295%	114%
18%	23%	24%	150%	255%	88%

Capacity score

0.8 6.4 3.1 20.3 37.0 11.0

Points

1.00 5.00 3.08 5.00 5.00 5.00

Dimension 7. Quality of service performance (Blocking rate and dropout rate)

Blocking rate and dropout rate in year 2,3,4,5

Blocking rate year 2
Blocking rate year 3
Blocking rate year 4
Blocking rate year 5

A1.	A2.	A3.	A4.	A5.	A6.
2	0	0.34	2	2	1.9
2	1.1	0.47	2	2	1.9
2	1	0.53	2	2	1.9
2	1.2	0.52	2	2	1.9

Blocking rate score

6.5 7.5 7.9 6.5 6.5 6.5

Points

5.00 5.00 5.00 5.00 5.00 5.00

Dropout rate year 2
Dropout rate year 3
Dropout rate year 4
Dropout rate year 5

A1.	A2.	A3.	A4.	A5.	A6.
4	1	2	1	1	0.99
4	1	2	1	1	0.99
4	1	2	1	1	0.99
4	1	2	1	1	0.99

Dropout rate score

3.9 6.0 5.3 6.0 6.0 6.0

Points

3.86 5.00 5.00 5.00 5.00 5.00

Dimension 8. Frequency efficiency (frequency economy figures)

The level of efficiency in the use of frequencies year 5

	A1.	A2.	A3.	A4.	A5.	A6.
Number of SIM-cards ultimo year 5	179,800	142,000	197,300	132,000	148,800	182,900
Peak hour traffic ultimo year 5 (Erl.)	0.0143	0.0122	0.0093	0.021	0.01334	0.00909
GSM channels demanded year 5	30	37	33	37	37	20
FE5 figure	85.7	46.8	55.6	74.9	53.6	83.1
Renormalization factor	0.0583399	0.0583399	0.0583399	0.0583399	0.0583399	0.0583399
Points	5.00	2.73	3.24	4.37	3.13	4.85

Dimension 9. Experience of the applicant (number of mobile network occurrences in OECD)

The number of experience occurrences for GSM2, GSM1 as well as other cellular telephone networks

	A1.	A2.	A3.	A4.	A5.	A6.
GSM2 experience occurrences	1	0	0	0	0	2
GSM1 experience occurrences	2	0	4	0	1	0
Other cellular telephone networks	3	1	5	2	1	1
GSM2 experience points	2	0	0	0	0	3
GSM1 experience points	3	0	4	0	2	0
Other cellular experience points	4	2	4	3	2	2
GSM2 ownership weight	0.20	0.00	0.00	0.00	0.00	0.80
GSM1 ownership weight	0.50	0.00	1.07	0.50	0.45	0.00
Other cellular experience, ownership weight	1.50	0.62	1.33	0.50	0.45	0.20
Temporary score	10.200	1.240	13.868	1.500	2.700	7.600
Renormalization factor	0.36	0.36	0.36	0.36	0.36	0.36
Points	3.68	0.45	5.00	0.54	0.97	2.74

Dimension 10. Licence payment (Up-front licence fee payment)

	A1.	A2.	A3.	A4.	A5.	A6.
Licence fee payment (million IR£)	15	15	15	15	15	15
Renormalization factor	0.33	0.33	0.33	0.33	0.33	0.33
Points	5.00	5.00	5.00	5.00	5.00	5.00

Dimension 11. Financial key figures (solvency and IRR)

The solvency of the GSM2 applicant as an average over years 2,3,4,5, and the IRR after 10 years

	A1.	A2.	A3.	A4.	A5.	A6.
Solvency year 2	36%	61%	22%	13%	5%	23%
Solvency year 3	34%	58%	20%	10%	-17%	16%
Solvency year 4	35%	-55%	34%	3%	-24%	11%
Solvency year 5	66%	-62%	52%	3%	-15%	9%
Average solvency over years 2,3,4,5	43%	0%	32%	7%	-13%	15%
Points	3.00	1.00	2.00	1.00	1.00	1.00

	A1.	A2.	A3.	A4.	A5.	A6.
for the 10 year planning period	15%	11%	17%	11%	12%	6%
V-score	0.04	0	0.06	0	0.01	0.05
Points	2.00	5.00	1.00	5.00	5.00	1.00

TO AVOID PROBLEMS
w re-investment
post yr 10.

RESULTS OF THE QUANTITATIVE EVALUATION

. Total annual traffic minutes	A1.	A2.	A3.	A4.	A5.	A6.
	2.60	2.01	2.66	5.00	3.50	2.22
1.b. Number of SIM-cards	A1.	A2.	A3.	A4.	A5.	A6.
	4.02	3.00	5.00	2.92	3.67	4.24
2. Demographical coverage	A1.	A2.	A3.	A4.	A5.	A6.
	4.50	5.00	4.00	4.25	5.00	4.00
3. OECD-basket	A1.	A2.	A3.	A4.	A5.	A6.
	2.00	2.00	3.00	1.00	1.00	2.00
4. Number of roaming agreements	A1.	A2.	A3.	A4.	A5.	A6.
	5.00	5.00	5.00	5.00	5.00	5.00
5. Number of cells	A1.	A2.	A3.	A4.	A5.	A6.
	1.00	1.00	1.34	1.81	3.22	1.00
6. Reserve capacity	A1.	A2.	A3.	A4.	A5.	A6.
	1.00	5.00	3.08	5.00	5.00	5.00
7.a. Blocking rate	A1.	A2.	A3.	A4.	A5.	A6.
	5.00	5.00	5.00	5.00	5.00	5.00
7.b. Dropout rate	A1.	A2.	A3.	A4.	A5.	A6.
	3.86	5.00	5.00	5.00	5.00	5.00
frequency economy	A1.	A2.	A3.	A4.	A5.	A6.
	5.00	2.73	3.24	4.37	3.13	4.85
9. Number of network occurrences	A1.	A2.	A3.	A4.	A5.	A6.
	3.68	0.45	5.00	0.54	0.97	2.74
10. Licence fee payment	A1.	A2.	A3.	A4.	A5.	A6.
	5.00	5.00	5.00	5.00	5.00	5.00
11.a. Solvency	A1.	A2.	A3.	A4.	A5.	A6.
	3.00	1.00	2.00	1.00	1.00	1.00
11.b IRR	A1.	A2.	A3.	A4.	A5.	A6.
	2.00	5.00	1.00	5.00	5.00	1.00

Weights

1.a. Total annual traffic minutes	3.75%
1.b. Number of SIM-cards	3.75%
2. Demographical coverage	7.50%
3. OECD-basket	15.00%
4. Number of roaming agreements	6.00%
5. Number of cells	10.00%
6. Reserve capacity	10.00%
7.a. Blocking rate	2.50%
7.b. Dropout rate	2.50%
8. Frequency economy	3.00%
9. Number of network occurrences	10.00%
10. Licence fee payment	14.00%
11.a. Solvency	7.50%
11.b. IRR	7.50%

Total weighted score

A1.	A2.	A3.	A4.	A5.	A6.
3.05	2.91	3.48	2.96	3.13	3.19

The highest weighted score is:

3.48

The highest scoring applicant is:

A3**Statistics for each indicator**

- 1.a. Total annual traffic minutes
 1.b. Number of SIM-cards
 Demographical coverage
 3. OECD-basket
 4. Number of roaming agreements
 5. Number of cells
 6. Reserve capacity
 7.a. Blocking rate
 7.b. Dropout rate
 8. Frequency economy
 9. Number of network occurrences
 10. Licence fee payment
 11.a. Solvency
 11.b. IRR

Average	Weigt. Var.	Variance
3.00	0.038	1.01
3.81	0.027	0.72
4.46	0.031	0.42
1.83	0.103	0.69
5.00	0.000	0.00
1.56	0.080	0.80
4.01	0.152	1.52
5.00	0.000	0.00
4.81	0.011	0.46
3.89	0.027	0.89
2.23	0.171	1.71
5.00	0.000	0.00
1.50	0.060	0.80
3.17	0.131	1.74

Average of total weighted score:

3.12

Variance of total weighted score:

0.185

Sum of weighted variances:

0.83

3 Return
Final version**Quantitative evaluation for Irish GSM2.****2. Draft****Dimension 1. Market development (number of traffic minutes and number of SIM-cards)**

These indicators should be assessed for year 4.

	A1.	A2.	A3.	A4.	A5.	A6.
Quoted no. of billable traffic minutes (1000x)	134.858	112.809	137.330	242.256	168.821	120.608
Market penetration score 1	2,6	2,0	2,7	5,5	3,5	2,2
Points	2,60	2,01	2,66	5,00	3,50	2,22

	A1.	A2.	A3.	A4.	A5.	A6.
Quoted no. of SIM-cards	125.500	100.000	159.600	98.000	116.800	130.900
Market penetration score 2	4,0	3,0	5,4	2,9	3,7	4,2
Points	4,02	3,00	5,00	2,92	3,67	4,24

Dimension 2. Coverage (speed and extent of demographical coverage)

	A1.	A2.	A3.	A4.	A5.	A6.
Coverage percent class IV (2W) year 1	59%	78%	76%	70%	79%	75%
Coverage percent class IV (2W) year 2	97%	98%	93%	85%	97%	93%
Coverage percent class IV (2W) year 3	97%	98%	93%	95%	98%	93%
Coverage percent class IV (2W) year 4	97%	98%	93%	95%	98%	93%
Points	4,50	5,00	4,00	4,25	5,00	4,00

Dimension 3. Tariffs (Competitiveness of an OECD-like GSM2 basket)

The GSM 2 tariff basket ultimo year 4 compared with a TACS 900 basket of 1. January 1995

	A1.	A2.	A3.	A4.	A5.	A6.
OECD tariff basket for GSM2 year 4	466,3	462	391,41	640	485,79	442
OECD tariff basket TACS 900	521,9	521,9	521,9	521,9	521,9	521,9
Price reduction compared to TACS 900	11%	11%	25%	-23%	7%	15%
Points	2,00	2,00	3,00	1,00	1,00	2,00

Dimension 4. Radio network architecture (number of cells)

The number of cells in the applicant network ultimo year 4.

	A1.	A2	A3.	A4.	A5.	A6.
Number of cells	270	282	351	421	633	262
Cells score	0,8	0,9	1,3	1,8	3,2	0,7
Points	1,00	1,00	1,34	1,81	3,22	1,00

Dimension 5. Reserve capacity of the network (reserve capacity)

The reserve capacity in percent year 2,3,4,5

	A1.	A2	A3.	A4.	A5.	A6.
Reserve capacity in percent year 2	18%	176%	68%	284%	596%	114%
Reserve capacity in percent year 3	18%	69%	42%	238%	373%	164%
Reserve capacity in percent year 4	18%	26%	29%	180%	295%	114%
Reserve capacity in percent year 5	18%	23%	24%	150%	255%	88%
Capacity score	0,8	6,4	3,1	20,3	37,0	11,0
Points	1,00	5,00	3,08	5,00	5,00	5,00

Dimension 6. Quality of service performance (Blocking rate and dropout rate)

Blocking rate and dropout rate in year 2,3,4,5

	A1.	A2.	A3.	A4.	A5.	A6.
Blocking rate year 2	2	0	0,34	2	2	1,9
Blocking rate year 3	2	1,1	0,47	2	2	1,9
Blocking rate year 4	2	1	0,53	2	2	1,9
Blocking rate year 5	2	1,2	0,52	2	2	1,9

Blocking rate score	6,5	7,5	7,9	6,5	6,5	6,5
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Points	5,00	5,00	5,00	5,00	5,00	5,00
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	A1.	A2.	A3.	A4.	A5.	A6.
Dropout rate year 2	4	1	2	1	1	0,99
Dropout rate year 3	4	1	2	1	1	0,99
Dropout rate year 4	4	1	2	1	1	0,99
Dropout rate year 5	4	1	2	1	1	0,99

Dropout rate score	3,9	6,0	5,3	6,0	6,0	6,0
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Points	3,86	5,00	5,00	5,00	5,00	5,00
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Dimension 7. Frequency efficiency (frequency economy figures)

The level of efficiency in the use of frequencies year 5

	A1.	A2.	A3.	A4.	A5.	A6.
Number of SIM-cards ultimo year 5	179.800	142.000	197.300	132.000	148.800	182.900
Peak hour traffic ultimo year 5 (Erl.)	0,0143	0,0122	0,0093	0,021	0,01334	0,00909
GSM channels demanded year 5	30	37	33	37	37	20

FE5 figure	85,7	46,8	55,6	74,9	53,6	83,1
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Renormalization factor	0,0583399	0,0583399	0,0583399	0,0583399	0,0583399	0,0583399
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Points	5,00	2,73	3,24	4,37	3,13	4,85
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Dimension 8. Experience of the applicant (number of mobile network occurrences in OECD)

The number of experience occurrences for GSM2, GSM1 as well as other cellular telephone networks

	A1.	A2.	A3.	A4.	A5.	A6.
GSM2 experience occurrences	1	0	0	0	0	2
GSM1 experience occurrences	2	0	4	0	1	0
Other cellular telephone networks	3	1	5	2	1	1

GSM2 experience points	2	0	0	0	0	3
GSM1 experience points	3	0	4	0	2	0
Other cellular experience points	4	2	4	3	2	2

GSM2 ownership weight	0,20	0,00	0,00	0,00	0,00	0,80
GSM1 ownership weight	0,50	0,00	1,07	0,50	0,45	0,00
Other cellular experience, ownership weight	1,50	0,62	1,33	0,50	0,45	0,20

Temporary score	10,200	1,240	13,868	1,500	2,700	7,600
Renormalization factor	0,36	0,36	0,36	0,36	0,36	0,36
Points	3,68	0,45	5,00	0,54	0,97	2,74

Dimension 9. Licence payment (Up-front licence fee payment)

	A1.	A2.	A3.	A4.	A5.	A6.
Licence fee payment (million IRE)	15	15	15	15	15	15
Normalization factor	0,33	0,33	0,33	0,33	0,33	0,33
Points	5,00	5,00	5,00	5,00	5,00	5,00

Dimension 10. Financial key figures (solvency and IRR)

The solvency of the GSM2 applicant as an average over years 2,3,4,5, and the IRR after 10 years

Solvency year 2

Solvency year 3

Solvency year 4

Solvency year 5

A1.	A2.	A3.	A4.	A5.	A6.
33%	61%	22%	13%	5%	23%
31%	58%	20%	10%	-17%	16%
34%	-55%	34%	4%	-24%	11%
64%	-62%	52%	5%	-15%	9%

Average solvency over years 2,3,4,5

41% 0% 32% 8% -13% 15%

Points

3,00 1,00 2,00 1,00 1,00 1,00

These could not be correct

IRR for the 10 year planning period

A1.	A2.	A3.	A4.	A5.	A6.
0,127	0,018	0,138	0,138	0,103	0,004

V-score

0,0168128 0,0919298 0,0280422 0,0281609 0,0068254 0,106415

Points

4,00 1,00 3,00 3,00 5,00 1,00

B E C C A BE

RESULTS OF THE QUANTITATIVE EVALUATION

1.a. Total annual traffic minutes	A1.	A2.	A3.	A4.	A5.	A6.
	2,60	2,01	2,66	5,00	3,50	2,22
1.b. Number of SIM-cards	A1.	A2.	A3.	A4.	A5.	A6.
	4,02	3,00	5,00	2,92	3,67	4,24
2. Demographical coverage	A1.	A2.	A3.	A4.	A5.	A6.
	4,50	5,00	4,00	4,25	5,00	4,00
3. OECD-basket	A1.	A2.	A3.	A4.	A5.	A6.
	2,00	2,00	3,00	1,00	1,00	2,00
4. Number of cells	A1.	A2.	A3.	A4.	A5.	A6.
	1,00	1,00	1,34	1,81	3,22	1,00
5. Reserve capacity	A1.	A2.	A3.	A4.	A5.	A6.
	1,00	5,00	3,08	5,00	5,00	5,00
6.a. Blocking rate	A1.	A2.	A3.	A4.	A5.	A6.
	5,00	5,00	5,00	5,00	5,00	5,00
6.b. Dropout rate	A1.	A2.	A3.	A4.	A5.	A6.
	3,86	5,00	5,00	5,00	5,00	5,00
7. Frequency economy	A1.	A2.	A3.	A4.	A5.	A6.
	5,00	2,73	3,24	4,37	3,13	4,85
8. Number of network occurrences	A1.	A2.	A3.	A4.	A5.	A6.
	3,68	0,45	5,00	0,54	0,97	2,74
9. Licence fee payment	A1.	A2.	A3.	A4.	A5.	A6.
	5,00	5,00	5,00	5,00	5,00	5,00
10.a. Solvency	A1.	A2.	A3.	A4.	A5.	A6.
	3,00	1,00	2,00	1,00	1,00	1,00
10.b IRR	A1.	A2.	A3.	A4.	A5.	A6.
	4,00	1,00	3,00	3,00	5,00	1,00

Weights

1.a. Total annual traffic minutes	3,99%	} 7.98
1.b. Number of SIM-cards	3,99%	
2. Demographical coverage	7,98%	
3. OECD-basket	15,96%	
4. Number of cells	10,64%	
5. Reserve capacity	10,64%	
6.a. Blocking rate	2,66%	
6.b. Dropout rate	2,66%	
7. Frequency economy	3,19%	
8. Number of network occurrences	10,64%	
9. Licence fee payment	11,70%	
10.a. Solvency	7,98%	
10.b IRR	7,98%	

Total weighted score

A1.	A2.	A3.	A4.	A5.	A6.
2,77	2,62	3,22	2,67	2,85	2,91

The highest weighted score is:

3,22

The highest scoring applicant is:

A3

Statistics for each indicator

1.a. Total annual traffic minutes
1.b. Number of SIM-cards
2. Demographical coverage
3. OECD-basket
4. Number of cells
5. Reserve capacity
6.a. Blocking rate
6.b. Dropout rate
7. Frequency economy
8. Number of network occurrences
9. Licence fee payment
10.a. Solvency
10.b IRR

Average	Weight. Var.	Variance
3,00	0,040	1,01
3,81	0,029	0,72
4,46	0,033	0,42
1,83	0,110	0,69
1,56	0,085	0,80
4,01	0,162	1,52
5,00	0,000	0,00
4,81	0,012	0,46
3,89	0,028	0,89
2,23	0,182	1,71
5,00	0,000	0,00
1,50	0,064	0,80
2,83	0,106	1,33

Average of total weighted score:

2,84

Variance of total weighted score:

0,197

Sum of weighted variances:

0,85

Quantitative evaluation for Irish GSM2.

2. Draft

Dimension 1. Market development (number of traffic minutes and number of SIM-cards)

These indicators should be assessed for year 4.

	A1.	A2	A3.	A4.	A5.	A6.
Quoted no. of billable traffic minutes (1000x)	134.858	112.809	137.330	242.256	168.821	120.608
Market penetration score 1	2,6	2,0	2,7	5,5	3,5	2,2
Points	2,60	2,01	2,66	5,00	3,50	2,22

	A1.	A2.	A3.	A4.	A5.	A6.
Quoted no. of SIM-cards	125.500	100.000	159.600	98.000	116.800	130.900
Market penetration score 2	4,0	3,0	5,4	2,9	3,7	4,2
Points	4,02	3,00	5,00	2,92	3,67	4,24

Dimension 2. Coverage (speed and extent of demographical coverage)

	A1.	A2.	A3.	A4.	A5.	A6.
Coverage percent class IV (2W) year 1	59%	78%	76%	70%	79%	75%
Coverage percent class IV (2W) year 2	97%	98%	93%	85%	97%	93%
Coverage percent class IV (2W) year 3	97%	98%	93%	95%	98%	93%
Coverage percent class IV (2W) year 4	97%	98%	93%	95%	98%	93%
Points	4,50	5,00	4,00	4,25	5,00	4,00

2/10/95

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Dimension 3. Tariffs (Competitiveness of an OECD-like GSM2 basket)

The GSM 2 tariff basket ultimo year 4 compared with a TACS 900 basket of 1. January 1995

	A1.	A2.	A3.	A4.	A5.	A6.
OECD tariff basket for GSM2 year 4	466,3	462	391,41	436	485,79	293
OECD tariff basket TACS 900	521,9	521,9	521,9	521,9	521,9	521,9
Price reduction compared to TACS 900	11%	11%	25%	16%	7%	44%
Points	2,00	2,00	3,00	2,00	1,00	5,00

Dimension 4. Radio network architecture (number of cells)

The number of cells in the applicant network ultimo year 4.

	A1.	A2.	A3.	A4.	A5.	A6.
Number of cells	270	282	351	421	633	262
Cells score	0,8	0,9	1,3	1,8	3,2	0,7
Points	1,00	1,00	1,34	1,81	3,22	1,00

Dimension 5. Reserve capacity of the network (reserve capacity)

The reserve capacity in percent year 2,3,4,5

	A1.	A2.	A3.	A4.	A5.	A6.
Reserve capacity in percent year 2	18%	176%	68%	284%	596%	114%
Reserve capacity in percent year 3	18%	69%	42%	238%	373%	164%
Reserve capacity in percent year 4	18%	26%	29%	180%	295%	114%
Reserve capacity in percent year 5	18%	23%	24%	150%	255%	88%
Capacity score	0,8	6,4	3,1	20,3	37,0	11,0
Points	1,00	5,00	3,08	5,00	5,00	5,00

Dimension 6. Quality of service performance (Blocking rate and dropout rate)

Blocking rate and dropout rate in year 2,3,4,5

Blocking rate year 2

Blocking rate year 3

Blocking rate year 4

Blocking rate year 5

A1.	A2.	A3.	A4.	A5.	A6.
2	0	0,34	2	2	1,9
2	1,1	0,47	2	2	1,9
2	1	0,53	2	2	1,9
2	1,2	0,52	2	2	1,9

Blocking rate score

6,5 7,5 7,9 6,5 6,5 6,5

Points

5,00 5,00 5,00 5,00 5,00 5,00

Dropout rate year 2

Dropout rate year 3

Dropout rate year 4

Dropout rate year 5

A1.	A2.	A3.	A4.	A5.	A6.
4	1	2	1	1	0,99
4	1	2	1	1	0,99
4	1	2	1	1	0,99
4	1	2	1	1	0,99

Dropout rate score

3,9 6,0 5,3 6,0 6,0 6,0

Points

3,86 5,00 5,00 5,00 5,00 5,00

Dimension 7. Frequency efficiency (frequency economy figures)

The level of efficiency in the use of frequencies year 5

Number of SIM-cards ultimo year 5

Hourly traffic ultimo year 5 (Erl.)

GSM channels demanded year 5

A1.	A2.	A3.	A4.	A5.	A6.
179.800	142.000	197.300	132.000	148.800	182.900
0,0143	0,0122	0,0093	0,021	0,01334	0,00909
30	37	33	37	37	20

FE5 figure

85,7 46,8 55,6 74,9 53,6 83,1

Renormalization factor

0,0583399 0,0583399 0,0583399 0,0583399 0,0583399 0,0583399

Points

5,00 2,73 3,24 4,37 3,13 4,85

Dimension 8. Experience of the applicant (number of mobile network occurrences in OECD)

The number of experience occurrences for GSM2, GSM1 as well as other cellular telephone networks

	A1.	A2.	A3.	A4.	A5.	A6.
GSM2 experience occurrences	1	0	0	0	0	2
GSM1 experience occurrences	2	0	4	0	1	0
Other cellular telephone networks	3	1	5	2	1	1

GSM2 experience points	2	0	0	0	0	3
GSM1 experience points	3	0	4	0	2	0
Other cellular experience points	4	2	4	3	2	2

GSM2 ownership weight	0,20	0,00	0,00	0,00	0,00	0,80
GSM1 ownership weight	0,50	0,00	1,07	0,50	0,45	0,00
Other cellular experience, ownership weight	1,50	0,62	1,33	0,50	0,45	0,20

Temporary score	10,200	1,240	13,868	1,500	2,700	7,600
Renormalization factor	0,36	0,36	0,36	0,36	0,36	0,36
Points	3,68	0,45	5,00	0,54	0,97	2,74

Dimension 9. Licence payment (Up-front licence fee payment)

	A1.	A2.	A3.	A4.	A5.	A6.
Licence fee payment (million IRE)	15	15	15	15	15	15
Renormalization factor	0,33	0,33	0,33	0,33	0,33	0,33
Points	5,00	5,00	5,00	5,00	5,00	5,00

Dimension 10. Financial key figures (solvency and IRR)

The solvency of the GSM2 applicant as an average over years 2,3,4,5, and the IRR after 10 years

	A1.	A2.	A3.	A4.	A5.	A6.
Solvency year 2	33%	61%	22%	13%	5%	23%
Solvency year 3	31%	58%	20%	10%	-17%	16%
Solvency year 4	34%	-55%	34%	4%	-24%	11%
Solvency year 5	64%	-62%	52%	5%	-15%	9%

Average solvency over years 2,3,4,5	41%	0%	32%	8%	-13%	15%
Points	3,00	1,00	2,00	1,00	1,00	1,00

	A1.	A2.	A3.	A4.	A5.	A6.
IRR for the 10 year planning period	0,172	0,106	0,171	0,106	0,122	0,057

V-score	0,0616884	0,00407	0,0605973	0,0039002	0,01199769	0,0525312
Points	1,00	5,00	1,00	5,00	4,00	1,00

RESULTS OF THE QUANTITATIVE EVALUATION

	A1.	A2.	A3.	A4.	A5.	A6.
1. Total annual traffic minutes	2,60	2,01	2,66	5,00	3,50	2,22
1.b. Number of SIM-cards	4,02	3,00	5,00	2,92	3,67	4,24
2. Demographical coverage	4,50	5,00	4,00	4,25	5,00	4,00
3. OECD-basket	2,00	2,00	3,00	2,00	1,00	5,00
4. Number of cells	1,00	1,00	1,34	1,81	3,22	1,00
5. Reserve capacity	1,00	5,00	3,08	5,00	5,00	5,00
6.a. Blocking rate	5,00	5,00	5,00	5,00	5,00	5,00
6.b. Dropout rate	3,86	5,00	5,00	5,00	5,00	5,00
7. Frequency economy	5,00	2,73	3,24	4,37	3,13	4,85
8. Number of network occurrences	3,68	0,45	5,00	0,54	0,97	2,74
9. Licence fee payment	5,00	5,00	5,00	5,00	5,00	5,00
10.a. Solvency	3,00	1,00	2,00	1,00	1,00	1,00
10.b IRR	1,00	5,00	1,00	5,00	4,00	1,00

Weights

1.a. Total annual traffic minutes	3,75%
1.b. Number of SIM-cards	3,75%
2. Demographical coverage	7,50%
3. OECD-basket	18,00%
4. Number of cells	10,00%
5. Reserve capacity	10,00%
6.a. Blocking rate	2,50%
6.b. Dropout rate	2,50%
7. Frequency economy	3,00%
8. Number of network occurrences	10,00%
9. Licence fee payment	11,00%
10.a. Solvency	7,50%
10.b IRR	7,50%

Total weighted score

A1.	A2.	A3.	A4.	A5.	A6.
2,73	2,90	3,19	3,09	3,01	3,41

The highest weighted score is:

3,41*The highest scoring applicant is:***A6****Statistics for each indicator**

1.a. Total annual traffic minutes
1.b. Number of SIM-cards
2. Demographical coverage
3. OECD-basket
4. Number of cells
5. Reserve capacity
6.a. Blocking rate
6.b. Dropout rate
7. Frequency economy
8. Number of network occurrences
9. Licence fee payment
10.a. Solvency
10.b IRR

Average	Weight. Var.	Variance
3,00	0,038	1,01
3,81	0,027	0,72
4,46	0,031	0,42
2,50	0,226	1,26
1,56	0,080	0,80
4,01	0,152	1,52
5,00	0,000	0,00
4,81	0,011	0,46
3,89	0,027	0,89
2,23	0,171	1,71
5,00	0,000	0,00
1,50	0,060	0,80
2,83	0,137	1,83

Average of total weighted score:

3,06

Variance of total weighted score:

0,214

Sum of weighted variances:

0,96

Appendices to Chapter 23

THE ORAL PRESENTATIONS

Index

1. Official report of tenth meeting of GSM Project Group on 11 September, 1995, dated 15 September, 1995.

10th MEETING OF THE GSM PROJECT GROUPREPORT OF MEETING ON MONDAY 11TH SEPTEMBER 1995Attendance

Mr Martin Brennan) T Dev

Mr Fintan Towey)

Ms Maev Nic Lochlainn)

Ms Margaret O'Keeffe)

Mr Sean McMahon) Regulatory

Mr Ed O Callaghan)

Mr John McQuaid) T&RT

Mr Aidan Ryan)

Mr John Breen

Mr Billy Riordan) Finance

Mr Jimmy McMeel)

Mr Michael Andersen) A M I

Mr Marius Jacobsen)

Mr J Bruel)

Mr O Feddersen)

000224

Mr Brennan outlined the agenda for the meeting which was to discuss a strategy plan for the presentations.

Despite the fact that taping of the presentations had been agreed, it was decided that written minutes would also be taken. As it would be impossible for any one person to take the minutes it was agreed that Ms Nic Lochlainn and Ms O'Keeffe would record a general résumé and that GSM Project Group Members with technical and financial expertise would record the information that pertained to them.

Mr Andersen advised that the opening questions to each applicant should be easy so as to give the presenters a chance to warm up and that they should also be informed that they may have time to confer on questions if the need arose.

Mr Towey sought clarification on whether the prices and tariffs quoted in the tenders would be binding in a contract. It was decided that this was the case.

T.&R.T. had a set of technical questions that they wished to pose to each applicant; of particular importance was the question on the applicant's backbone network.

000873

It was decided to ask the applicants questions on their mandatory tables and their business plans as there appeared to be many discrepancies between these two.

As a general rule, it was decided that applicants would be given a last opportunity to provide clarification orally at these meetings; further contact would be avoided. If it became apparent, that clarification was essential after the meetings, contact would be initiated in writing by the Department. The applicants were to be informed in this regard.



Margaret O'Keeffe

15 September, 1995

000225

000359

Appendices to Chapter 24

DEPARTMENTAL ACTIVITIES AND INTERACTIONS IN THE IMMEDIATE AFTERMATH OF THE PRESENTATIONS

Index

1. Official report of eleventh meeting of GSM Project Group on 14 September, 1995, dated 29 September, 1995.
2. Memo by Mr. McMeel “*Subject: Second mobile telephone*”, dated 16 September, 1995, with attached Annex 1.

~~Maev Nic Lochlainn~~
File

11TH MEETING OF THE GSM PROJECT GROUP
REPORT OF MEETING ON THURSDAY 14TH SEPTEMBER, 1995

000940

Attendance

Mr Martin Brennan) T Dev

Mr Fintan Towey)

Ms Maev Nic Lochlainn)

Ms Nuala Free)

Mr Sean McMahon) Regulatory

Mr Ed O Callaghan)

Mr John McQuaid) T&RT

Mr Aidan Ryan)

Mr John Breen

Mr Billy Riordan) Finance

Mr Jimmy McMeel)

Mr Michael Andersen) A M I

Mr Marius Jacobsen)

Mr Ole Feddersen)

Mr Jon Bruel

000254

Opening

All the presentations had now been made. Mr Brennan suggested that, in view of the intensity of the weeks' schedule, no conclusions, should yet be drawn by the group.

The agenda proposed was:

1. Discussion of the morning's presentation by A4.
2. Review of current position.
3. Decide how to progress the evaluations further.

Mr Andersen spoke about the success of the presentations generally. He felt that because AMI were well prepared from the earlier quantitative assessment, they had attained the required information from all the applicants. The presentations had served to highlight considerable variation between the applicants.

The A4 presentation was good. But AMI felt that the lack of familiarity with the Irish scene was poor. It was generally evident that:

000860

- A4 spent too much time on matters that were not relevant to the tender requirements,
- was unfamiliar with ETSI standards.

000911

Review of Current Position

The Group agreed that the presentations had served as a useful exercise.

- the ability of each applicant to work as a team had been highlighted,
- all applicants had been treated equally,
- the presentations had served to consolidate the initial views on the applications arising from the quantitative assessment,
- the importance both of a foreign applicant having a good knowledge of the Irish scene, and an Irish applicant having an understanding of the global picture was noted.
- Some companies showed that they could take a proactive role in developing the market where required.

000255

Mr Brennan also stated, and the group agreed, that no further contact between the evaluation team and the applicants was possible, although access to the Minister could not be stopped.

AMI said that while all the applications would be scored, greater resources would from now on be expended on the leading applications. Two distinct groups had emerged - those with a good score to date and - those whose ranking was such that further intensive evaluation was deemed unnecessary.

How to progress the Evaluations

The assessment of the technical dimensions was complete. T&RT project group members had attended all but one of the sub-groups and were happy with the conclusions. T&RT/AMI are to score the technical aspects by close of business on 14 September.

AMI listed the next steps as:

1. finalise the qualitative scoring and award marks on the dimensions,
2. perform initial scoring of the aspects, and
3. perform supplementary analyses in:
 - blocking/drop out

000861

000942

- financial analysis concerning SIGMA/ADVENT
- adherence to EU procurement rules
- tariffs
- interconnection (since assumptions vary widely between applicants).

The scoring of the marketing, financial and management dimensions would take place in Copenhagen next week; DTEC to appoint the appropriate personnel to attend. AMI would provide the first draft evaluation report on the 3rd October. This would be discussed by the Group on Monday 9 October. The three DTEC Divisions would supply any written comments prior to that meeting. Following that, AMI would produce a second draft report by 17 October.

Other Issues

Mr Towey reported that the draft licence was being examined by the AG's Office. The licence itself would include conditions from the winning application. AMI would be involved in any negotiation with the successful applicant.

000256

Mr Riordan is to do some work on the financial indicators and is to forward material to AMI who would amend their spread sheets accordingly.

Nuala Free

Nuala Free,
Telecommunication and Radio (Dev) Division
29 September, 1995

c.c. attendees, Ms O'Keeffe

000862

Mr. Doyle

Mr. Furlong

Mr. Curran

Subject: Second mobile telephone licence. (E-mail message attached plus Mr Curran's note)

A list of the consortia is attached.

1. A copy of the Govt decision on the TE SA is at Appendix 1.
2. The prices proposed by the applicants are at Appendix 2. These are weighted averages. Typically an applicant has 3 pricing plans targeted at different market segments - corporate, self employed and private.

2. identify the proposals on tariff and conditions. How its not vary to the 17.5 points this change is needed.

The applicants for the second licence were told of the interconnect regime in the RFP - Appendix 3. However, this is an interim regime and the licensee will renegotiate it with TE. If agreement cannot be reached the Regulator will intervene if it is decided that regulation should act in that way. Most of the applicants have expressed unhappiness with the interim regime. The consultants say that the regime is disadvantageous to the second licensee and is out of line with regimes elsewhere. The assumptions made by the applicants with respect to interconnection vary widely. It is important to emphasise that interconnection will not be the sole determinant of pricing; the licensee will have costs of his own. In addition, the licensee will have significant interconnection revenues for calls made from the PSTN.

TE will be required to treat the new licensee on the same basis as its own mobile offshoot, Eircell, with respect to interconnect fees and leased line charges. However, what the Eircell and the new licensee ultimately charge for calls which do not use each others systems will probably be a matter for the companies. That is the whole purpose of licensing a second operator - to introduce competition thereby improving economic efficiency. Regulation is required mainly to deal with the intrinsic monopoly aspects of telephony - the local loop of the PSTN, the finite resource that is radio spectrum. We have to await the development of a regulatory regime to see what its philosophy will be in terms of scope, powers and manner of intervention.

3. The weightings of the selection criteria are at Appendix 4.
4. The financial strength of each component of all of the applicant consortia is being assessed. Two of the consortia have SSB's on board - in one case the ESB; in another RTE and BnM. Regardless of who wins Coillte, ESB etc will be making their sites and facilities available on a commercial basis. (One consortium mentioned the Gardai also) The

(22)

X | impact on the Exchequer is a quantitative evaluation criterion only in respect of the licence fee. The indirect impact of say dividends flowing from the ESB is not a selection criterion and if we were to introduce it now we would run the risk of again falling foul of the EU Commission. The bottom line is that commercially the licence is a certain winner but not in the short term due to the heavy start up investment.

W. M. C. C. C.
16/9/95

the X paper that we cannot alter the rules. But what we can & should do is to try to look at the financial impact on the public sector. For example, a State company has to know to participate that would increase the PSBR. If it occurred "free" a part of the licence ownership that would also be relevant, even if it could not be quantified. A State company might also obtain cash/income for access to its sites. Even if we were to ignore the wider public sector financial dimensions it seems almost inevitable that others will join it & we would not be on our own. I accept that some elements might not be quantifiable & that even those that we would probably not be additive.

Meeting 4/8/95

Annex 1

Translation of labels used	
Label	Consortium
A1	Irish MobiCall - Southwestern Bell, 25 % - DETECON, 25 % - Tele Danmark International (Telecom A/S), 25 % - Martin Naughton, 10,5 % - Lochlann Quinn, 10,5 % - Kieran Corrigan, 4 %
A2	Cellstar - Comcast Corporation, 60-64 % - Radio Telefis Éireann, 15 % - Bord na Móna, 6-10 % - G.C.I. Limited, 15 %
A3	Persona - ESB, 20 % - Motorola, 26,7 % - Sigma, 26,7 % - Unisource, 26,7 %
A4	Irish Cellular Telephones - AT&T, 26 % - Princes Holdings Ltd, 48 % - United and Philips Communications B.V., 16,4 % - Independent Newspapers, PLC, 2 % - Riordan Communications Ltd., 2,6 % - Semi-state body, 5 % (Shannon Development)
A5	Esat Digifone - Telenor Invest AS, 50 % - Communicorp Group, 50 %
A6	EuroFone - Millicom Inc., 40 % - Kinnevik, 20 % - An independently administered Trust, 40 %

← 3rd PHASE

← DOING WELL

← DOING WELL.

Appendices to Chapter 27

MR. MICHAEL LOWRY MEETS MR. DENIS O'BRIEN AT CROKE PARK AND IN HARTIGANS PUBLIC HOUSE ON 17TH SEPTEMBER, 1995

Index

1. Extract from diary of Mr. O'Brien for 17 September, 1995.
2. Attendance note by Mr. O'Connell, solicitor, of meeting with Mr. O'Brien and Mr. Buckley on 18 September, 1995.

WEEK 37							
Monday	Sept 11	Tuesday	Sept 12	Wednesday	Sept 13		
Lunch							
Evening							
(254-111)		(255-110)		(256-109)			
Thursday	Sept 14	Friday	Sept 15	Saturday	Sept 16		
		Respect for the Aged Day (Holiday Japan)					
				(259-106)			
Lunch							
Evening							
(257-108)							
				Sunday	Sept 17		
				London			
				1.45 vs. to Dublin			
				3.30 All Ireland			
				6pm D. O'Connell			
				6.45 HL. Kanto's			
				(260-105)			

MEMO

WILLIAM FRY
SOLICITORS

TO: File
FROM: DOZ

DATE: 12/9/95

CLIENT: ESAT

MATTER: GSM

FILE No.

Dennis O'Brien + Leslie Buckley.

Dennis O'Brien going ahead with financing transaction.

led "underwriting" letter for Sept. because finances are
seen as the weakness.

DD wants 30% of GSM. A/B Standard + B to
be excluded.

30

DD

5

Advent

32.5

ESAT

32.5

Telenor.

Appendices to Chapter 28

TOWARDS AGREEMENT WITH MR. DERMOT DESMOND

Index

1. Attendance note by Mr. O'Connell, solicitor, of meeting with Mr. O'Brien and Mr. Buckley on 18th September, 1995.
2. Letter from Mr. Walsh to Mr. Brennan dated 29 September, 1995.
3. Memo by Mr. Johansen of Telenor dated 4 May, 1996.

MEMO

WILLIAM FRY
SOLICITORS

To: File
FROM: DOZ

DATE: 8/9/95

CLIENT: FIAT

MATTER: GSM

FILE No.

Louis O'Brien + Leslie Drobby.

David Leonard going ahead with financing transaction.

led "underwriting" letter for Sept. because figures are
seen as the weakness.

1) wants 30% of GSM. AIB Standard = 10% to
excluded.

30

11)

5

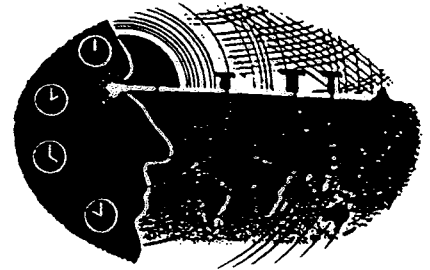
Advent

32.5

FIAT

32.5

Telecom



Department of Transport, Energy & Communications,
44 Kildare Street,
DUBLIN 2.

IFSC House
Custom House Quay
Dublin 1

Att: Mr. Martin J. Brennan
Telecommunications and Radio (Development) Division

Tel +353-1-6054444
Fax +353-1-6054455

29th September, 1995.

Re: ESAT DigiFone Ltd. ("the Consortium")
South Block, The Malt House, Grand Canal Quay, Dublin 2.

Dear Sirs,

We refer to the recent oral presentation made by the Consortium to the Department in relation to their proposal for the second GSM cellular mobile telephone licence. During the course of the presentation there was a detailed discussion in relation to the availability of equity finance, to the Consortium, from Communicorp and a number of institutions.

We confirm that we have arranged underwriting on behalf of the Consortium for all of the equity (i.e. circa 60%) not intended to be subscribed for by Telenor. In aggregate the Consortium now has available equity finance in excess of £58 million.

We do not foresee any additional need for equity, however, we are confident that if such equity is required we will not have a difficulty in arranging it.

Yours faithfully,

Professor Michael Walsh
Managing Director

International Investment & Underwriting Limited

Registered in Ireland. No: 225660

Directors / Partners: D. F. Desmond (Chairman), N. McDermott, C. McHugh, M. Walsh

002572

PRIVATE AND CONFIDENTIAL

Re: Memo on shareholding in ESAT Digifone

I have below summarised a few points that has become clear to me over the last 24 hours as a consequence of the information acquired regarding Communicorp's attempt to buy back 12.5% of the IIU-shares.

1. Denis O'Brian came personally over to see me in Oslo probably some time during September last year. He informed me that, based on information from various very important sources, it was necessary to strengthen the Irish profile of the bid, and get onboard people who would take a much more active role in fighting for Digifone than the "neutral" banks who basically would like to keep a good relation to all consortia.

I accepted Denis' word for the necessity for this new move. **Note: Underwriting was never used as an explanation.**

2. IIU should apparently be the ideal choice for this function; the only string attached being that they had demanded a 30% equity-participation "for the job". Denis had managed to reduce this to 25%, but it was absolutely impossible to move them further down. This was a disappointment to us, since everything we had said and done up to then had been focused on at least 40% ownership for the principal shareholders at the time of the issuing of the license. But not only that: Denis then pushed very hard for Telenor to swallow 15% of this and Communicorp only 10% - to which I never agreed - but I accepted the principle of "sharing the pain" and maintaining equal partnership (37.5%/37.5%). It was also said that a too high Telenor ownership-stake would be seen as aggressive and could be inhibiting the award of a license.

This was the first time I experienced real hard, and very unpleasant, push from Denis.

3. Some days later the nature of the agreement with IIU comes clearer into the light, as an underwriting agreement to **guarantee for Communicorp's timely payment** of its share of the capital into Digifone, and including the right to place the shares with up to four nominees. This was unwillingly accepted by Telenor (since we understood it to be the right steps to be taken from an "official Irish standpoint" to secure the license).

The agreement was drafted by Fry's/OOC and signed in a hurry (basically in draft's form) by Denis O'Brian alone on behalf Communicorp and Digifone (even though we in the JV-agreement have made it clear that two authorised signatures are required - one from each party).

4. The agreement was never signed by Telenor, neither as authorised Digifone signature nor as a shareholder and a party to the agreement. Sometime shortly after this, the Advent commitment to invest USD 30 mill. into Communicorp disappears, as it was essentially not

necessary anymore, since the Communicorp liability to pay capital to Digifone was anyway underwritten by IIU.

5. In hindsight it is quite clear who benefitted from this arrangement.

I have good reasons to believe that the terms put forward by Advent for investing into Communicorp did not suit Denis O'Brian. With the above arrangement, that he orchestrated for all other sorts of reasons, he has actually achieved to bolster his/Communicorp's balance sheet and paid for it with Digifone-shares at the cost of Telenor. He has done this in an atmosphere of trust, where Telenor even has agreed to bridge finance Communicorp while he raises funds through a private placement in the US.

6. As we go along we learn more, but it all serves to disclose more details which again more and more prove the above scenario.

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

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

I think it would be a very prudent thing for Telenor to do - especially since we then effectively underwrite the whole project, both Communicorp and IIU, after already having paid Communicorp's price for the first underwriting which now appears to be useless.

7. But the story doesn't end there. Two days ago I was informed by Denis that he had entered into an agreement with IIU to buy back 12.5% of the shares now held by IIU. I found it absolutely unbelievable, and made it clear that Telenor would not accept anything but equal partnership, either we buy 6.25% of the IIU held shares each, or Telenor should take the other 12.5% of the IIU held shares.

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

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

- ⇒ The return favour from Communicorp is to release IIU from all of its underwriting obligations in Digifone. Does Digifone have an opinion on this and what about Telenor? This effectively gives Communicorp back its 12.5% of the shares at par (or close to), releases IIU from all of its underwriting liability (which Digifone "paid" 25% for), and IIU ends up having delivered absolutely nothing, having done nothing but complicated the award of the license (if we get it at all), but with (some cash?) and 12.5% of the shares of Digifone which effectively have deprived from Telenor, at the same time as the Department - and our honoured partners - gently ask us to underwrite the whole project.
- ⇒ Fortunately, IIU is at least realistic enough to see that this cannot take place unless Telenor continues to support the project. This fact, the time limit and the co-operative spirit shown (by disclosing the letter) may signal a hope for a sensible solution to this mess.

Oslo, 4 May 1996



Appendices to Chapter 30

MR. MICHAEL ANDERSEN'S MEMORANDUM OF 21ST SEPTEMBER, 1995

Index

1. Fax from Mr. Andersen to Mr. Brennan and Mr. Towey re. “*Work programme for the next approx. 10 days*”, dated 21 September, 1995.

To: Martin Brennan/Fintan Towey
From: MMA
CC: Andersen team members
Date: 21 September 1995
Re: Work programme for the next approx. 10 days

000000

A. The remaining award of marks to the 10 dimensions

Some calculatory and graphical work needs to be done concerning the tariff dimension. MT has the initiative to circulate the resulting graphics and suggest an award of marks to the new indicator as well as to the tariff dimension as a whole. Deadline: Monday the 25th. [record +

Concerning the dimension financial key figures, the existing calculatory work needs to be checked and reviewed by as well MT/JB as BR. MT is - together with BR - to suggest a revised award of marks on the basis of reviewed figures. Deadline: Wednesday the 27th.

The reports on the radio network architecture, capacity of the network, performance guarantees, frequency efficiency and coverage have been concluded.

In addition to the reports on the tariff and the financial dimensions, the market development report is to be finished by MT, the report on roaming is to be finished by MNL and the report on experience is to be finished by MMA. These reports should be finally drafted no later than Wednesday the 27th.

B. Scoring of the marketing aspect, financial aspect and other aspects

It is suggested that the award of marks to the remaining aspects is decided at a meeting Thursday the 28th. The meeting may either be a conference call or a meeting in Copenhagen.

The scoring of the financial aspect will be self-explanatory, whereas we need to consult each other concerning the scoring of the marketing aspect.

Concerning the award of marks to the other aspects we suggest to proceed as follows:

1. We need to make some risk investigations, of which the following are proposed:
A1: No major risks are identified yet, except for the DETECON issue and the potential conflicts in decision making among three operators.

000571

- A2: Non-conformance with EU-rules (procurement of equipment and terminal subsidies) to be investigated by TI, lack of understanding re European standards and technical matters to be documented by OCF, and the solvency ratio together with the equity of Comcast and its Irish partners (JB/MT/TI) have been identified as some of the risks. All risks taken together, the A2 application has a low degree of credibility and for that reason it is the present view of the Andersen team that we could not recommend that the GSM2 licence is awarded to A2.
- A3: The equity of Sigma (and ESB) to be documented by JB and FT, and the potential abuse of dominant positions or lack of competition due to the relationships between on the one hand Motorola and Sigma and on the other hand Telecom Eireann have been identified as risks (TI).
- A4: Non-conformance with the EU-rules re procurement of infrastructure (TI), unrealistic traffic assumptions (MMA), lack of understanding re European standards and technical matters to be documented by OCF, and the approach to planning permissions (OCF?) are some of the identified risks.
- A5: Three years of negative solvency combined with a comparatively weak financial strength of Communicorp Group is identified as a risk (JB/BR/-MT). In addition it might be a risk factor that A5 is to establish its own radio (backbone) network (OCF), but A5 seems to have a comparatively high degree of preparedness.
- A6: Possible non-conformance with the EU rules (procurement of equipment and terminal subsidies) to be further investigated by TI, lack of Irish touch (MMA). In addition it has been identified as a risk that A6 in its base business case comes out with a negative IRR under some of the sensitivities identified.

Other risks might be identified and dealt with later in the process.

If there is a clear understanding between the Department and AMI of the classification of the two best applications, it is suggested not to score "other aspects", the risk dimensions and other dimensions, such as the effect on the Irish economy. In this case, the risk factor will be addressed verbally in the report.

If there is no immediate unanimity, it is suggested to score the other aspects and the dimensions under this heading.

A decision has to be taken at the meeting 28 September.

C. The grand total

The grand total is to be scored at the meeting 28 September.

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D. Supplementary analyses

The following status can be outlined concerning the status of the work with the supplementary analyses:

- Financial conformance check, etc. (MT, finished)
- Comparison of blocking and drop-out rates (OCF has prepared the first draft version, the second draft version should be ready 28 September)
- Consortia composition and abuse of dominant positions etc. (TI has drafted the first version and the second draft version is to be ready 28 September, and the same deadline applies for all TI's deliveries)
- Handset subsidies (TI)
- Conformance with EU procurement rules (TI)
- Legal aspects and matters related to the licence (TI)
- Tariffs (MT, deadline for the first draft version: 28 September)
- Interconnection (MT, deadline for the first draft version: 28 September)
- Effects on the Irish economy (JB, deadline for the first draft version: 28 September)
- Track recording (JB, deadline for the first draft version: 28 September).

These and other supplementary analyses should as far as possible be annexed to the first draft report.

E. The first draft report

A short synopsis of the first draft report can be outlined as follows:

1. An introduction, where the procedural aspects and the evaluation model, including the criteria are presented.
2. Key characteristics of the applications, including a short description of each applicant and the basis philosophy behind each applications, such as the core strategy, and some key characteristic related to each of the four aspects of the business case (marketing, technical, management and financial aspects).
3. A comparative evaluation of the applications, structured around the four aspects and based on the dimensions. Under each dimension, also the indicators will be mentioned. Each subsection in this chapter will be structured around the dimensions and the indicators identified.
4. Sensitivities and risks. Also the general credibility of the application will be mentioned.
5. Summary and conclusion. In this chapter, a general overview of the award of marks will be given and, as a minimum, the three best applications will be ranked in an order of merits together with a recommendation to enter into licence

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negotiations with the consortium behind the best application.

F. Questions to the Department

AMI has the following questions to the Department:

- Should the identified meeting September 28 be conducted by means of a conference call or a meeting in Copenhagen?
- Does the Department wish to score "other aspects"?
- Given the time frame and the fact that we are not yet ready to begin the drafting of the report, will it be acceptable for the Department that AMI produces a non-edited report to be received by the Department by fax late October 3rd?
- How do we integrate the quantitative evaluation in the report (we prefer to leave this question unanswered, until we have the final results)?
- How do we proceed with acronyms/names concerning the applicants (we prefer to continue with acronym, but at least in chapter two we need to mention the names of the consortia and the consortia members)?

We look forward to receiving the answers and will proceed as stipulated in this memorandum.

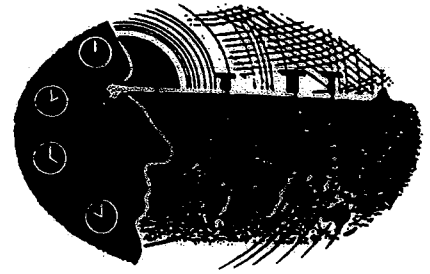
000874

Appendices to Chapter 32

ARRIVAL AND RETURN OF THE ESAT DIGIFONE UNDERWRITING LETTER

Index

1. Letter from Mr. Walsh to Mr. Brennan dated 29 September, 1995.
2. Letter from Mr. Brennan to Mr. O'Brien dated 2 October, 1995.



Department of Transport, Energy & Communications,
44 Kildare Street,
DUBLIN 2.

Att: Mr. Martin J. Brennan
Telecommunications and Radio (Development) Division

29th September, 1995.

IFSC House
Custom House Quay
Dublin 1

Tel +353-1-6054444
Fax +353-1-6054455

Re: ESAT DigiFone Ltd. ("the Consortium")
South Block, The Malt House, Grand Canal Quay, Dublin 2.

Dear Sirs,

We refer to the recent oral presentation made by the Consortium to the Department in relation to their proposal for the second GSM cellular mobile telephone licence. During the course of the presentation there was a detailed discussion in relation to the availability of equity finance, to the Consortium, from Communicorp and a number of institutions.

We confirm that we have arranged underwriting on behalf of the Consortium for all of the equity (i.e. circa 60%) not intended to be subscribed for by Telenor. In aggregate the Consortium now has available equity finance in excess of £58 million.

We do not foresee any additional need for equity, however, we are confident that if such equity is required we will not have a difficulty in arranging it.

Yours faithfully,

Professor Michael Walsh
Managing Director

International Investment & Underwriting Limited

Registered in Ireland. No: 225660

Directors / Partners: D. F. Desmond (Chairman), N. McDermott, C. McHugh, M. Walsh



An Roinn Iompair,
Fuinnimh agus Cumarsáide
44 Sráid Chill Dara,
Baile Átha Cliath 2.

COPY

Department of Transport,
Energy and Communicatio
44 Kildare Street,
Dublin 2.
Telephone: (01) 6707444
Fax: (01) 6709633

2 October 1995

Mr. Denis O'Brien,
Chairman,
ESAT Digifone Ltd.,
South-Block,
The Malt House,
Grand Canal Quay,
Dublin 2.



Re : Additional Correspondence Received

Dear Mr. O'Brien,

I refer to the ground-rules of the competition as outlined at our recent meeting with you on Tuesday 12th September. The Department has already made it clear, that applicants shall not be permitted to provide any further material to supplement their applications, except where expressly requested to do so by the Department.

Accordingly, the additional material received from you on Friday last is enclosed herewith. It shall not be taken into consideration in the evaluation process.

Yours sincerely,

Martin Brennan
Principal Officer
Telecommunications & Radio(Development)

Appendices to Chapter 34

ARRIVAL OF THE FIRST DRAFT EVALUATION REPORT AND CERTAIN RELATED DEALINGS

Index

1. First draft Evaluation Report dated 3 October, 1995.
2. Appendices to the first draft Evaluation Report dated 3 October, 1995.
3. Chronology of Mr. O'Callaghan.

ANDERSEN MANAGEMENT INTERNATIONAL A/S

STRANDGADE 24 DK-2300 KØBENHÅVN

TEL +45 32 96 64 32 FAX +45 32 96 64 33 CRONR

000333



Evaluation of the
six applications for
the GSM2 licence
in Ireland

October, 3 1995

1st draft version

Confidential

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1. Introduction

This report contains the results of the comparative evaluation of the applications for a GSM2 licence in Ireland. The evaluation has been carried out jointly by the Department of Transport Energy and Communications and Andersen Management International.

The evaluation is based on a number of pre-adopted procedures and techniques, which were drawn up and documented in writing prior to the closing date 4 August 1995, see appendix 2 and appendix 3.

Basically, the evaluation has been performed in accordance with the method 'best application', which is often dubbed "beauty contest". This method is strongly recommended by the EU Commission, and the Commission has been duly informed about the methods and techniques of this method applied in Ireland.

Furthermore, the evaluation has been based on the tender documents, in particular the RFP document, which sets out the following statements concerning the evaluation criteria in § 19:

"The Minister intends to compare the applications on an equitable basis, subject to being satisfied as to the financial and technical capability of the applicant in accordance with the information required herein and specifically with regard to the list of evaluation criteria set out below in descending order of priority.

- * Credibility of business plan and applicant's approach to market development;*
- * Quality and viability of technical approach proposed and its compliance with the requirements set out herein;*
- * The approach to tariffing proposed by the applicant which must be competitive;*
- * The amount the applicant is prepared to pay for the right to the licence;*
- * Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded;*
- * The performance guarantee proposed by the applicant;*
- * Efficiency of proposed use of frequency spectrum resources."*

These criteria have been structured as marketing aspects, technical aspects, management aspects, financial aspects and other aspects. Each aspect has been subdivided into so-called dimensions, and each dimension has been subdivided into indicators and sub-indicators in order to measure and compare the relative merits of the applications in a consistent manner.

The evaluation comprises both a quantitative and a qualitative evaluation, and it was decided prior to the closing date that the qualitative evaluation should be the nucleus of the evaluation. As outlined in appendix 2, a heuristic methodology has been

applied with an award of marks to each application based on a scale from A to E, A being the best.

In order to sort out as much uncertainty as possible, a number of supplementary analyses have been conducted and they appear as Appendices X-X to this report. Some of the analyses have been deemed necessary in order to make the information provided by the applicants more comparable. Other analyses have been deemed adequate to conduct in order for the evaluators to sufficiently document certain decisive marks awarded to certain applications.

The Department has received an "application" from Éircell (A7), which is already in commercial operation with a GSM (1) system. Since this application is not mandatory, it has not been subject to a comparative evaluation. However, the business case information provided by Éircell has been used as a valuable reference point and for comparative purposes, when judged relevant.

Initially, this report describes some of the key characteristic of each application (chapter 2). Subsequently, section 2.1 provides a short description of each applicant, and section 2.2 sets out to describe the basic philosophy behind each application.

Having in a general way introduced the applications, the next chapter (chapter 3) as the main body of this report presents the detailed results of the comparative evaluation. This part of the report is structured around the four main aspects of the evaluation - the marketing, the technical, the management and the financial aspects. Each aspect will then be broken down into one or more dimensions, and each dimension will be described by several indicators. Thus, the presentation of the results of the evaluation follow the structure laid down prior to the closing date of the tender.

A separate chapter (chapter 4) has been devoted to cater for sensitivities and risks in each application. In this way, conclusions regarding the overall credibility of the application have been qualitatively assessed.

The last chapter (chapter 5) will provide a summarising overview of the results of the evaluation and in this part of the report, the three best applications are identified and ranked. In the last part of the chapter, the only recommendation in this report appears, namely to enter into licence negotiations with the consortium behind the application that came out with the best results from the comparative evaluations based on the method recommended by the Commission and on § 19 of the RFP document.

Supplementary information and the summary of the results from some of the supplementary analyses conducted are to be found in the appendices.

2.1 The applicants

All the applications are backed by different consortia. In each application it is suggested to implement the proposed business plan in a legal entity, i.e. a separate operation company, created by the partners behind the consortium.

As outlined in figures 1-6, each operating company is backed by shareholders as consortium members. In addition, all consortia include at least one foreign telecommunications operator as an important partner. Except for A6, which is entirely owned by foreign companies, all other consortia include Irish members. None of the consortia have stated intentions to make major changes in the consortium construction. However, all applications, with the exception of A3, have expressed interest in making flotation on the Irish stock market.

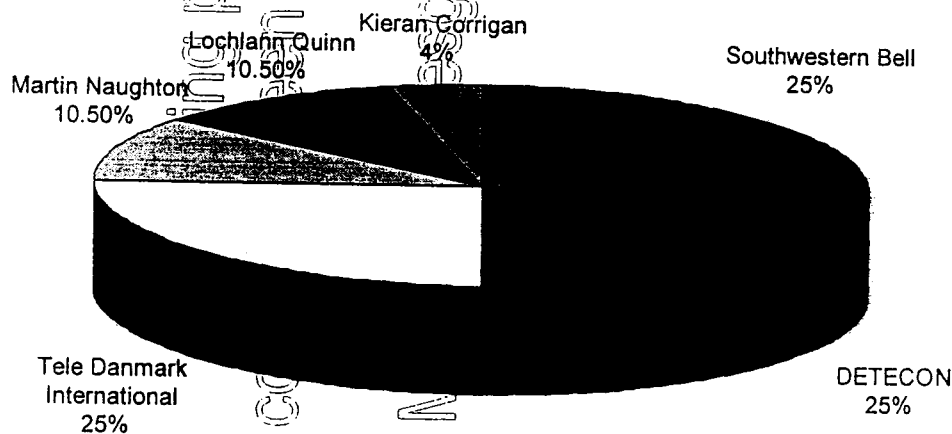


Figure 1. The participants behind A1.

A1 will operate as a private company limited by shares under the name of Irish Mobicall. A1 is partly backed by the subsidiaries of three foreign operators (Southwestern Bell, Tele Danmark and Deutsche Telecom through Detecon), partly by three Irishmen with a commercial background. Martin Naughton and Lochlann both have shares in Glen Dimplex, one of the potential distribution channels. It is not entirely clear from the application, which operator is the leading partner, if any. The consortium does not stipulate a managing partner. On the contrary, a division of responsibilities has been exposed in the application.

Key characteristic of the applicant

The application states an intention to make a flotation of 25% of the shares presently owned by the consortium members. The flotation will be initiated after 3 years of operation, depending on the success of the company and the market conditions on the Irish stock market. The initial share held by Irish investors will be 25%. Although this share might be increased by the projected flotation, the Irish ownership share will remain below 50%.

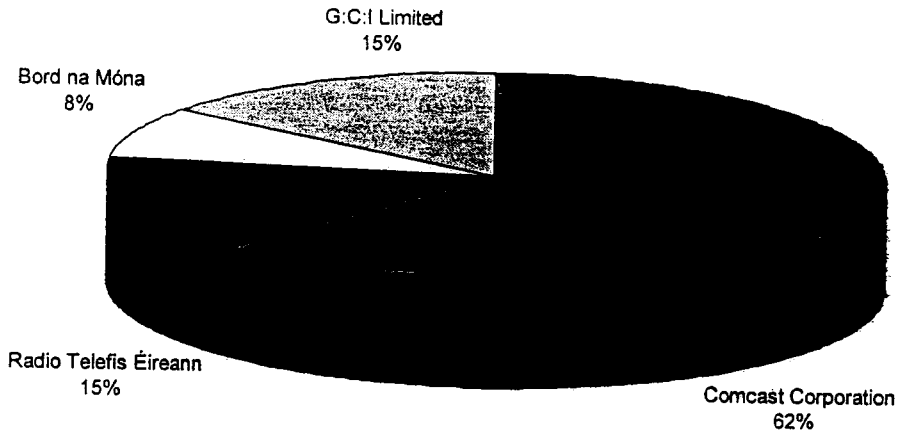


Figure 2. The participants behind A2

A2 has stated an intention to operate as an Irish legal entity under the name of Cellstar, but is not an incorporated company yet. The leading company is a subsidiary of Comcast Corporation US, with an ownership share of 60-64%. The consortium is backed up by three Irish companies (RTE, Bord Na Móna and GCI), which all together hold a 36-40% ownership share. The Irish ownership share could increase by means of a flotation. If desired by the Government, the application states a willingness to offer up to 30% as ordinary shares at some time in the future (3-5 years after launch).

Key characteristic of the applicant

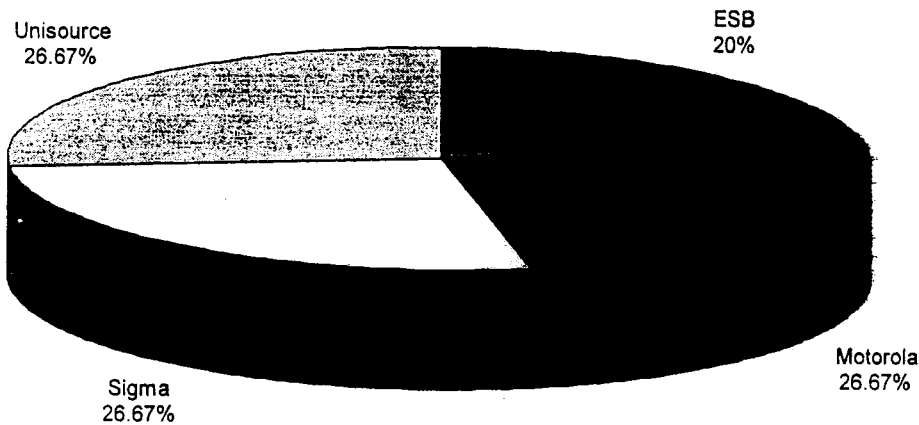


Figure 3. The participants behind A3.

A3 will operate under the name of Persona, and Persona is incorporated in Ireland as a limited company. Motorola, Unisource (Mobile) and Sigma Wireless each hold 26.7% of the shares, whereas ESB holds 20%. Principal activities of Sigma Wireless are the exclusive distribution and sale of Motorola radio communications products and systems in Ireland, following a management buy-out of Motorola's Irish distribution activities in 1991. The Irish share defined by the share of companies domiciled in Ireland and owned by Irish people living in Ireland is 46.7%. The application states no intention of flotation, and consequently the business case is not based on a flotation.

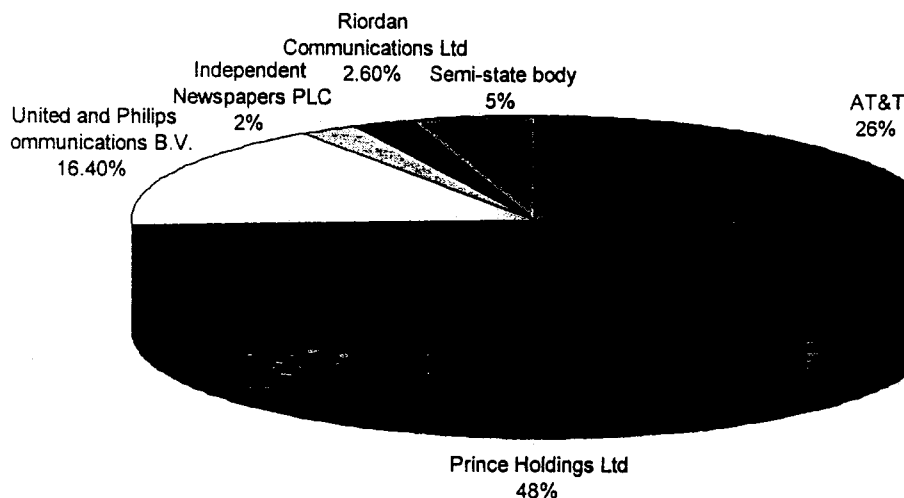


Figure 4. The participants behind A4.

A4 will operate as a private limited company, which has been incorporated in Ireland in 1994 under the name of Irish Cellular. The consortium behind A4 is

characterised by a comparatively low concentration of ownership among the participants, except for Princes Holdings Ltd which presently holds 48% of the shares. Later on, however, Princes Holdings will re-allocate its shares such that United and Philips Communications B.V. will increase its shareholding to 26%, Independent Newspapers Plc will also increase its shareholding to a level of 26%, Riordan Communications will increase its shareholding to 5%, and Tele-Communications Inc, affiliated with Comcast in the US, is to become a 12% owner. In addition, 5% has been reserved for an Irish semi-state body. Thus, the Irish share will drop to 36%, but might within 3 years of licence award increase again as a flotation of approximately 25% of the shares is planned.

AT&T, holding 26% of the shares, is the leading operator of the company by means of it's mobile subsidiary, better known as McCaw.

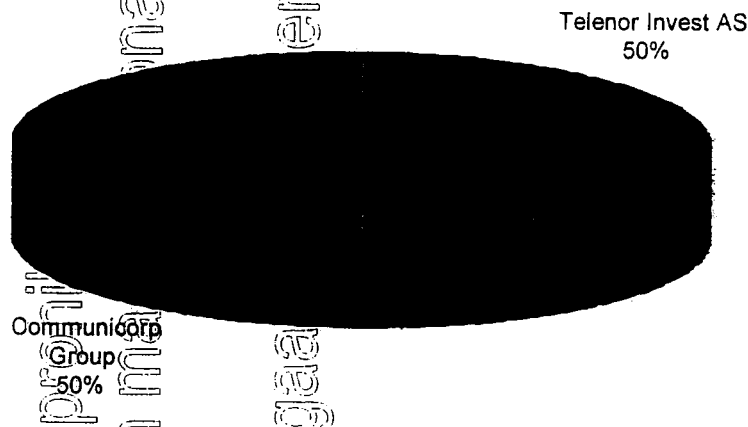


Figure 5. The participants behind A5

A5 will operate as an Irish limited liability company, which has been incorporated in Ireland under the name of Esat Digifone. The participants are two operators, namely Esat who operates in Ireland on the basis of a VAS licence and the Norwegian carrier Telenor. However, Communicorp Group is the shareholding company behind Esat, and 34% of these shares are held by Advent International plc. It is the intention of the applicant to make 20% of the equity available to institutional investors during the period prior to the commercial launch, including a 5% equity stake to Advent International plc. Furthermore, the application states an intention to make 12% available for flotation within three years. It is difficult to state the exact Irish ownership share. Before the flotation, it could as a maximum become 55% and after the flotation it could increase to a maximum of 67%. In practice, the Irish share could turn out to become significantly lower.

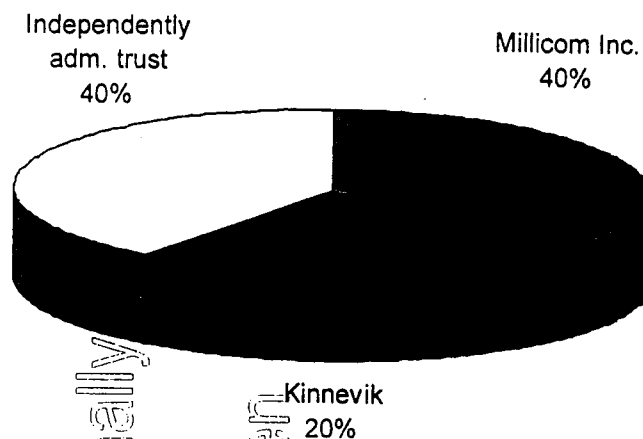


Figure 6. The participants behind A6

A6 has established a consortium, the Eurofone Consortium, to apply for the licence, and a joint venture agreement between the 2 backers has been concluded. The leading operator is Millicom with 40%, but also a subsidiary of Kinnevik, holding of 20% share has operating experience e.g. through the GSMoperator Comviq of Sweden. It should be remarked that Kinnevik owns 39% of the shares in Millicom. The remaining 40% of the share are to be administered by an independent trust. Cora Imopair Éireann (CIE), which is not exposed as a fully-fledged consortium member in the A6 application, has a 10% option and 30% or more might be subject to flotations after the award of the licence. The initial shareholding by Irish investors could as a maximum amount to 40%. The application states as an intention, however, to increase this share to 50% within 4 years after the award of the licence.

2.2 The basic philosophy behind each application.

Despite the fact that there are a number of similarities between the applications, a comparative assessment of the underlying philosophies and strategies shows considerable differences, based on a number of issues.

The diverseness of the business plans presented in the applications is to an unproportionate large extent influenced by the diversity in market and marketing approach. For this reason, this part of the applicants' approach is heavily reflected in the short description of the various basic philosophies per applicant provided below.

A1, backed up by three well-know mobile operators, intends to launch quickly with a proprietary roll out, leaving the option of national roaming open for further negotiations with Telecom Éireann. The applicant will use its own sales forces and has in addition set up agreements with a number of dealers/outlets, leaving the

service provision path open. A1 does not opt for market leadership, as the applicant foresees itself as taking up less than 50% of the market.

Consequently, A1 views itself as pursuing a **differentiator type of strategy**, which is consistently reflected in the application for example by a focus on the variety of service and packages, and, not least, customer care aspects. This focus is also substantiated by the fact that A1 quotes the highest operating costs per subscriber during the initial years. This implicit wish to compete with Eircell on services and quality as opposed to fierce competition on tariffs, also seems to be consistently reflected by the fact that A1 expects to have a comparatively low degree of private consumer penetration.

A2, with the US operator Comcast as the main backer, also tends to view itself as a **differentiator** in the Irish market, but clearly in a less ambitious way. This is for example reflected in a comparatively weak focus on customer care aspects, some high tariffs, and a weak technical plan. The Irish and the EU touch is generally low. The latter is reflected in the fact that the application is not fully in accordance with the EU rules in relation to the procurement of equipment and the approach to the distribution lower than the terminal prices.

However, the role as differentiator is substantiated by the relatively low ambitions in relation to market share, where A2 foresees itself with only 44% of the GSM-market in year 2009, the lowest of all applicants.

A3, backed up by Motorola and Unisouce as the major operating player, pursues a strategy with considerable similarities to **cost leadership**. A3 intends to build a network with a rather low capacity and to run the company in such a way that the operating costs are comparatively low. In general, the tariffs are projected to be low as well.

Subsequently, A3 ultimately aims at the mass market, with an expected private consumer penetration representing above 50% of A3's subscriber base at the end of the 14 year planning period. The penetration is substantiated by an advanced segmentation, based on the identification of specific Irish types of customers. Furthermore, A3 intends to play a major role among the distribution channels with the establishment of a wholly-owned service provider under the brand 'person-to-person'. A3 does not opt for market leadership measured by the long range market penetration ambitions, as A3 only projects to obtain a modest 45% share of the GSMmarket.

A4, with AT&T as the dominant operator, specifically opts for **market leadership** in the long run and projects to have taken up well above 50% of the GSM market at the far end of the 14 year planning period. This is consistently supported by a comparatively large network with many antenna sites and a high traffic capacity of the proposed network. A4 does not specifically aim at bringing mobile services to the mass market. Furthermore, A4 assumes a level of traffic usage which is not common among European GSM operators and which is considerable higher than the real life experience of Eircell in the Irish market.

The applicant plans a modest entrance in the Irish market, for example with a comparatively slow roll out. Finally, the application seems to be somewhat in contradiction with the Irish interpretation of the EU procurement rules, as A4 has already selected and contracted some of the infrastructure vendors.

A5, with Esat as the Irish fixed provider and Telenor as the mobile operator, intends to provide good and quick coverage. In addition, A5 has a high degree of preparedness. A5 intends to differentiate itself by a number of innovative marketing initiatives, for example by advanced customer service, broad distribution channels, lower tariffs, and branding. In general, A5 opts for **market leadership**.

The ambitions are supported by the technical plans, and the level of experience of the consortium partners is reflected in the initial set up of the organization, including, but not limited to, the top level management. The financial plans, however, indicate some weaknesses against the background of market leader ambitions, in particular with a degree of solvency below 0% during some of the decisive initial years.

A6, which is backed up by ample mobile expertise based on Millicom and Comviq of Sweden, intends to pursue a **cost leadership** strategy with low end user tariffs. This strategy is also consistently reflected in the market penetration ambitions of A6, as the applicant expects to penetrate the mass market such that 2/3 of A6's customers will belong to this segment during the far end of the planning period.

In the application, the cost leadership strategy is seen to be adopted from for example Comviq of Sweden. Similarly, A6 does not plan to bring service provision to the Irish market, but to let the cost drivers, including low entry cost, boost the market. Although the cost leader strategy leaves a number of weapons in the hands of the operator, A6 seems to be incomparably unprepared for the Irish market. As an example, no tailor-made Irish market research has been conducted to support the market and marketing plans.

Also the technical, financial and management plans reveal that A6 is relatively unprepared for the Irish market. As an example, the business plan generates a comparatively low IRR, which might even turn negative, by the introduction of sensitivity factors.

Despite many similarities among the applicants taken at their face value, a careful study of the applications reveals that the applicants intend to pursue widely different strategies. Two applicants opt for market leadership (A4 and A5), two applicants opt for cost leadership (A3 and A6) and two applicants opt for a differentiator type of strategy (A1 and A2). Thus, the basic philosophies behind the applications are widely different. Such differences are to be further investigated in the next chapter, which sets out to summarise the results of the evaluation conducted.

3. The comparative evaluation of the application

This chapter intends to provide a presentation of the results of the comparative evaluation. Each section deals with one of the identified aspects comprising an overview of the various dimensions attached to the aspect together with the assessment (marks awarded) of both the dimensions and the aspect.

In order to proceed systematically and consistently, each dimension has been broken down into so-called indicators, and sub-indicators have been used to further refine the assessment of the dimensions. The applications are described in relation to each dimension after the overview provided in each sector of this chapter. The assessment of the dimensions is based on factual information and the methodology described in appendices 2 and 3.

3.1 Marketing aspects

The dimensions of the marketing aspects are identified as market development, coverage, tariffs and international roaming plans.

Marketing	A1	A2	A3	A4	A5	A6
1. Market development	C	C	B	C	A	C
2. Coverage	B	C	A	C	A	D
3. Tariffs	C	D	B	C	C	A
4. International roaming plan	A	D	C	C	C	C
Marketing aspects (subtotal)	B	C	B	C	A/B	C

Table 1: Marketing aspects: Award of marks

Clearly, A3 and A5 are the strongest applications on marketing aspects. A5 has the most elaborate approach to market development, the dimension with the highest priority and the highest weight, cf. 19 of the RFP document. A5 is also strong within coverage, but less strong within the tariff and roaming dimensions. The in-depth analyses have shown, however, that A5 indeed has a competitive approach to tariffing. Therefore, the marketing aspect of the A5 application supports an ambitious market leader strategy in the Irish market.

Almost as strong as A5 comes A3, with a slightly more favourable approach to tariffing due to the cost leader type of strategy, but with a weaker approach to the market development. Next to A3 comes A1 with the highest overall marks of all within the roaming area, which has a comparatively low weight in the overall evaluation. In addition, A1 is less favourable than A3 concerning market development, coverage and tariffs, but seems to consistently pursue the strategy of a differentiator.

All the other application are assessed less favourably, for various reasons. A4 simply lacks high scores on any of the marketing dimensions. Although having comparatively low tariffs, A6 has less favourable performance on the other

dimension, in particular the 'hard' dimension, coverage, which is to become a binding licence dimension. A2 has obtained the lowest score of all applications.

3.1.1 Market development

Market demand forecasts are indeed essential in any mobile business case. Two obvious indicators of demand allow for some quantification. The first most commonly used is the projected number of SIM cards, i.e. subscribers, although such projections could turn out to be either too optimistic or pessimistic in real life.

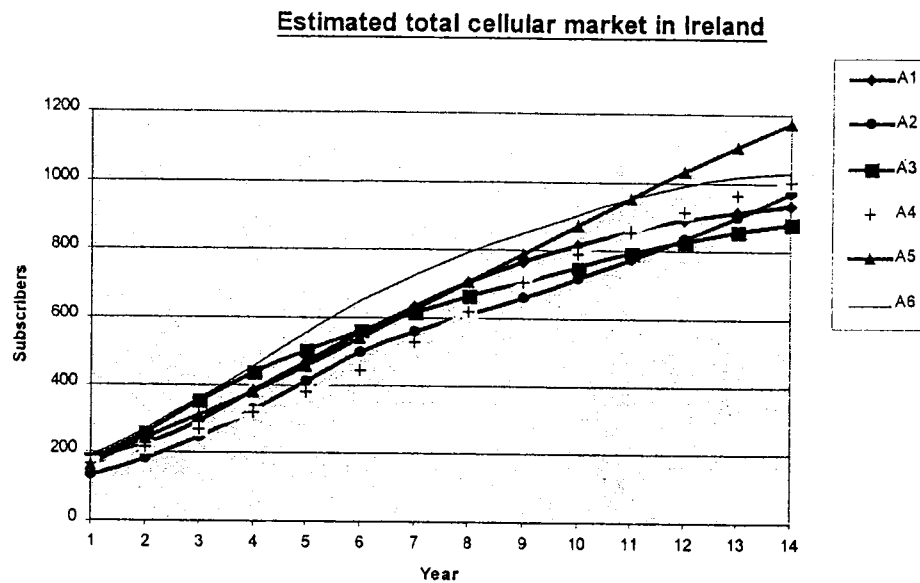


Figure 7. The estimated total cellular market in Ireland (x1000)

With the possible exception of A5, there is hardly any difference among the applications in relation to the projection of the total market. They all project around 1 million subscribers in year 2009, which will be equal to a degree of penetration around 25%, i.e. close to the present level of penetration in for example Norway and Sweden.

All applications take into consideration competition from other cellular systems than GSM1 and GSM2, e.g. TACS900, GSM3, and most likely, DCS1800. Most applications assume that the expansion of competition from a duopoly environment to an industry structure with more than two operators will lower the tariffs and increase the penetration in Ireland. Conversely, if the duopoly remains intact throughout the planning period, it is indirectly concluded in some of the applications that these positive effects will not materialise.

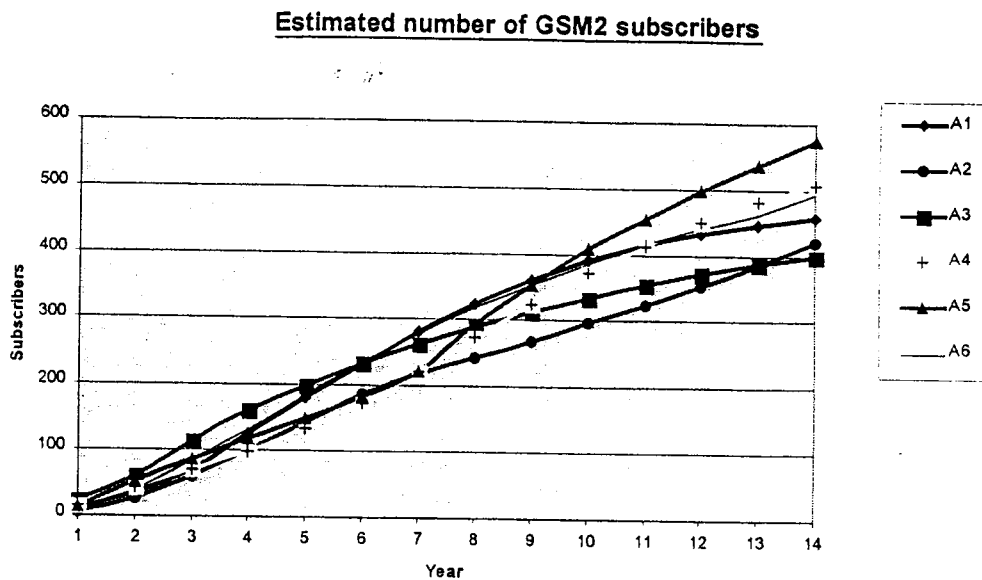


Figure 8. The projected number of GSM2 subscribers (x1000) in the applicants own network

As also seen from figure 8, the trend line illuminates a striking similarity among the projections concerning the projected number of GSM2 subscribers in the applicants own network. Clearly, A5 has the highest long-range market penetration ambitions, whereas A3 quotes more modest projections with less than 70% of the projected subscriber base projected by A5 in year 2009.

Another demand indicator is the traffic generated. This indicator can be illuminated in various ways.

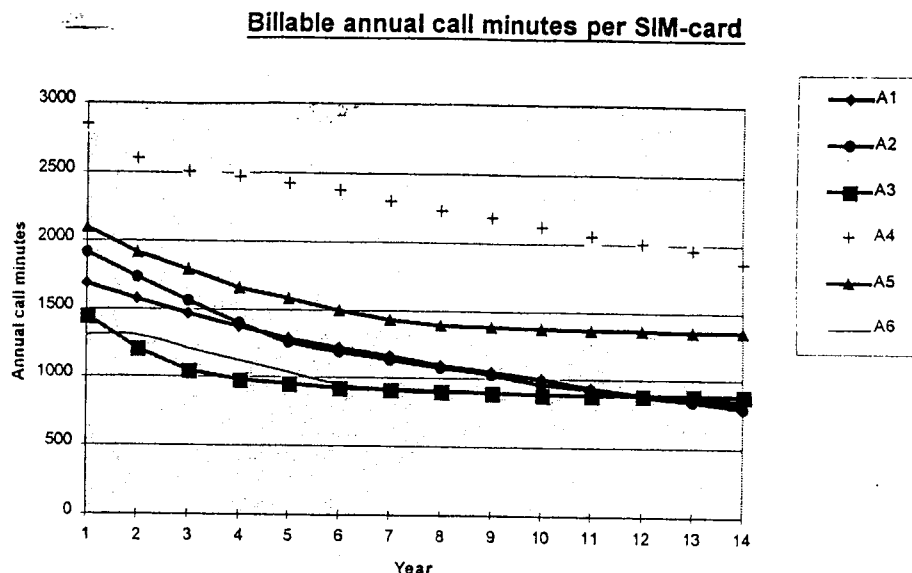


Figure 9. The projected billable annual call minutes per SIM card

As seen from figure 9 the projections on the traffic generated in the GSM2 networks seem to be grouped around three categories. Most significantly, A4 has quoted the highest number of average call minutes per SIM card, whereas A1, A2, A3 and A6 all project the average traffic per subscriber to be approximately half of the traffic projected by A4. A5 is grouped somewhat in-between. However, all the applicants assumed a decrease in the development of the traffic, which mainly reflects the increased take-up of subscribers from the private consumer segment.

The evaluation of the market development has not only taken the projected demand into consideration, but also a number of other indications which exert influence on the credibility of the approach to the development of the Irish market. Thus, also the relative consumer penetration, the degree to which the market and marketing plans are evidenced by market research in Ireland, the distribution strength, the segmentation, the dealer/commissions/handset prices, the magnitude of the market share target, the communications planning, and the customer care and churn.

Dimension Marketing	A1	A2	A3	A4	A5	A6
1. Market penetration (projected number of GSM2 subscribers in own network)	C	D	C	C	B	A
2. GSM market share (including traffic)	B	C	C	A	B	B
3. Consumer penetration	E	A	B	D	B	B
4. Market research	C	C	B	A	A	E
5. Distribution strength	C	D	B	C	A	E
6. Segmentation	D	E	A	C	B	B
7. Dealer commission handset prices	C	A	A	C	A	A
8. Marketing budget	A	C	D	E	A	A
9. Communications planning	D	E	B	C	A	D
10. Customer care and churn	C	C	B	E	A	B
Marketing (subtotal)	C	C	B	C	A	C

Table 2. The award of marks concerning the dimension market development

The marks awarded under each indicator are summarised in table 2. The demand indicators are reflected in the first two indicators. The third indicator is the relative consumer penetration as expressed by the consumer/business subscriber partition. In the long run, A2 plans to take the largest proportion of private consumers (77%), followed equally by A5 and A6 (67%) and swiftly by A3 (comfortably above 50%). Consequently, these applicants have been awarded the highest mark concerning this indicator.

The fourth indicator, market research, has been found relevant insofar as the applicant have been requested to evidence and document their applications as much as possible. A4 and A5 have both carried out several types of market studies in Ireland, which warrant an A. A6, on the contrary, has explicitly dissociated itself from market analyses in the Irish market prior to licence award.

The fifth indicator is the distribution strength. A5 has here been awarded an A because it has the most elaborate distribution concept building on impressive preparatory work such that the risks of distribution failure is almost non-existing. A3 has been awarded a favourable mark (a B), since A3 in a convincing way has opted for the establishment of its own, wholly-owned service provided. A6 has not paid attention to the specific Irish environment, but seems to rely entirely on the transferability of experience in particular from the Swedish market.

The sixth indicator is segmentation. A3 has here been awarded the highest mark, since a convincing segmentation of the Irish market into 5 archetypes of customers has been developed and is consistently used in the application. A2 has here been awarded the lowest mark (an E), since it only provides a usage type of segmentation, which is not assessed as a true segmentation, the distinguishing criteria between segments are not specific identified needs. A5 and A6 both provide some analysis, differentiating between light/heavy business segments as well as the light/heavy consumer segments.

The dealer commissions and the handset prices have also been taken into consideration as an indicator relevant to market development, since commissions and similar incentives are important vehicles to lower the entrance barriers to the GSM market. A number of applicants (A2, A3, A5 and A6) expose strong incentives to lower the entry barriers.

The size of the marketing budget in the hands of the operator has been assessed separately as an indicator in order to primarily reflect the ambitions of prospective operators to effectively build up the awareness in the Irish market. A5 has allocated most money to this budgetary item, followed by A3.

The communications planning prior to the closing date has also been evaluated as an indicator. As one extreme, A5 presents an elaborate market communications plan supported by advertisements and television commercials. As another extreme, A2 seems largely unprepared in this respect.

The tenth and last indicator assessed is the customer care and churn. Again, A5 has presented the most detailed and customer-friendly care, including performance standards and quality control, leading forward to high and sustained focus on churn. A4, on the contrary has only presented a short, general description of customer care and has presented an exorbitant level of churn during the initial years (25%), expressing low confidence in its ability to maintain its subscriber base from the outset.

Taken all together, A5 has provided the most elaborate and consistent approach to market development which leaves no doubt that A5 will give a substantial contribution as a driver of market development in Ireland. A3 has a number of strong points, but is assessed as weaker than A5, and therefore A3 warrants a B. All the other applicants have fewer strong points and a number of weaker points, and they have subsequently been awarded a C.

3.1.2 Coverage

The coverage of a mobile telephone network is a fundamental quality directly understandable and measurable by all customers: *Will it be possible to initiate and complete a call from my immediate geographic position?*

A good coverage is necessary for a successful market introduction of any GSM operation and, hence, a thorough evaluation of this dimension is an important contribution to the assessment of the different applicants. The subject of 'coverage' has been included in the marketing aspects for obvious reasons, but it is also a product of the technical construction of the network. Consequently, a mix of market-related and technical indicators/subindicators has been applied in order to reflect the composite nature of this matter.

The obvious indicator of coverage is the roll-out plan which displays the applicant's intended speed and completeness in providing coverage.

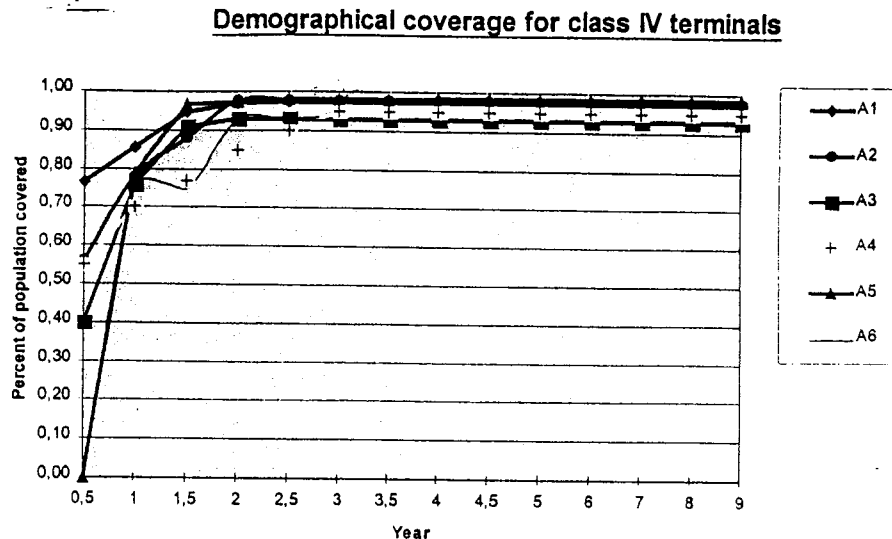


Figure 10. Offered coverage in percent of the Irish population (class IV terminals, outdoor)

Figure 10 is based on the mandatory tables provided by the applicants. It shows that all applicants in due time intend to provide a comprehensive coverage serving more than 90% of the population in less than 4 years. The minimum requirement of the RFP document is thus fulfilled, but from a market-introduction point-of-view, it is furthermore important to focus on coverage during the first years of operation when the new business must build up the confidence of its customers. Detailed information on this subject is found in the text sections of the applications.

A1, A3, and A4 commit themselves to launch commercial operation by mid-96 with an initial coverage of 56%, 40%, and 55% of the population, respectively. A2 and A5 postpone the launch until the beginning of fourth quarter of 1996, but A5 makes use of this extra time to establish coverage for 80% of the population at launch. A6 has the latest launch of operations with a start in december 1996. The launch information should be related to information about the point in time when 90% coverage of the Irish population has been obtained. This point is reached by A1, A3, and A5 in June 1997, with A1 as the first-comer, while A2 and A6 take a further half year and A4 a full year to reach the same level.

In terms of the planned roll-out, A1 and A5 are given the highest marks (A) due to A1 providing an early and reasonably high demographic coverage at launch and A5 offering a remarkably higher launch coverage slightly later. A3 is rated a little lower (B) primarily because of the relatively low coverage at launch (40%) which is considered somehow questionable for customer accept.

The evaluation of the coverage dimension has been further influenced by 3 other indicators which serve to substantiate the roll-out plan from a technical and a logistic point of view and furthermore demonstrate the applicants' understanding and willingness to take special precautions where extraordinary coverage needs could be expected. In total, the viability of the projected coverage is assessed with an equal weighting of the roll-out plan (as described above) and the applicants'

radio link budget assumptions, site acquisition preparations, and special coverage provisions.

Dimension coverage	A1	A2	A3	A4	A5	A6
1. Roll-out plan	A	C	B	C	A	C
2. Radio link budget	A	A	A	B	A	B
3. Site acquisition	C	B	A	B	A	D
4. Special coverage	B	D	A	D	A	E
Coverage (subtotal)	B	C	A	C	A	D

Table 3. The award of marks concerning the dimension coverage

The summary of the marks as presented in table 3 shows that the indicators 2, 3, and 4 slightly influences the picture provided by the marks of the roll-out plan. A3 is raised to the highest rating (where also A5 remains) due to an excellent performance on the other indicators, while A1 in total is awarded a B primarily due to non-convincing site acquisition preparations.

The indicator **radio link budget assumptions** was included for establishing the technical credibility of the postulated coverage. The indicator encompasses a control of the applicants' radio link budget calculations with design parameters as BTS transmitter power level, applied outdoor field strength, and isotropic path loss, all of which are relevant for assessing the probability of having coverage within the area of a radio cell. Also the assumed building penetration losses have been investigated in order to justify the claimed in-door coverage. In general, all applicants have provided complete and adequate information on these subjects, but A4 and A6 did not verify that this information was actually valid for Ireland, whereas the other applicants A1, A2, A3, and A5 have documented local efforts concerning drive tests and field measurements to substantiate their design assumptions.

The third indicator concerning **site acquisition preparations** is particularly important for those applicants claiming the earliest launch of commercial operation. Preparations must include actions to overcome the Irish planing permission procedures as well as documented access to identified sites, which in turn should lead to considerations of environmental constraints. In this respect, A5 has completed an unusual comprehensive study and due to the assets of the consortium partners also A3 has an excellent background for launching the service at the planned time.

The fourth indicator in which the applicants provisions for **special coverage** are evaluated, is composed of subindicators concerning coverage of railway lines, road/street traffic hotspots, border regions, and other areas outside usual traffic demand as well as provisions for maritime coverage. A3 and A5 (and to a slightly minor degree A1) have demonstrated the experience obtained from their activities elsewhere in Europe by providing adequate plans and information on these subjects. A6 did not at all address these subjects in the application, hence an E was awarded.

3.1.3 Tariffs

The evaluation has also paid attention to the tariff dimension, since this dimension is visible for the customers. In addition to the price for the terminal equipment, the costs for the customers typically include call charges, initial charges, subscription charges as well as charges for supplementary and value added services.

The proposed tariff schemes vary markedly among the applicants, and they are furthermore influenced by metering and billing principles, discounts, special packages, off-peak reductions, free minutes and similar offers. In addition, there is considerable variation in the amount of extra services and features, the customers get for an ordinary subscription. Although one should be cautious when comparing single indicators of often complex tariff and service packages, the evaluators decided to proceed indicator by indicator, and supplemented afterwards by analyses in order to identify potentially distorting effects in such a methodology.

One of the indicators defined prior to the closing date is the OECD-like basket, comprising 1/3 of the initial charge corresponding 3 years amortisation, one yearly subscription and 1500 outgoing call minutes during peak hours.

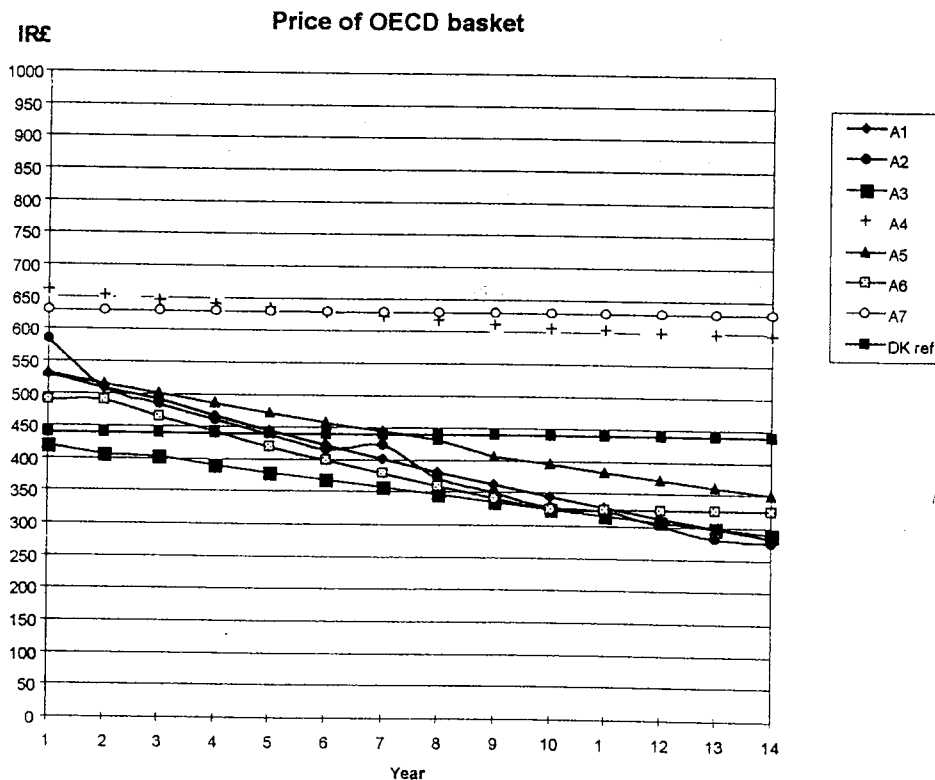


Figure 11. Tariff comparison on the basis of the OECD-like basket

The most significant information provided in figure 11 is that the applicants in general foresee a level of tariffs comfortably below the existing tariff level of Eircell. This picture, which only represents one package, can be further refined by looking at call volume impact on the tariff, with the fixed part of OECD-like basket (1/3 of the initial charge and one yearly subscription) as the starting point.

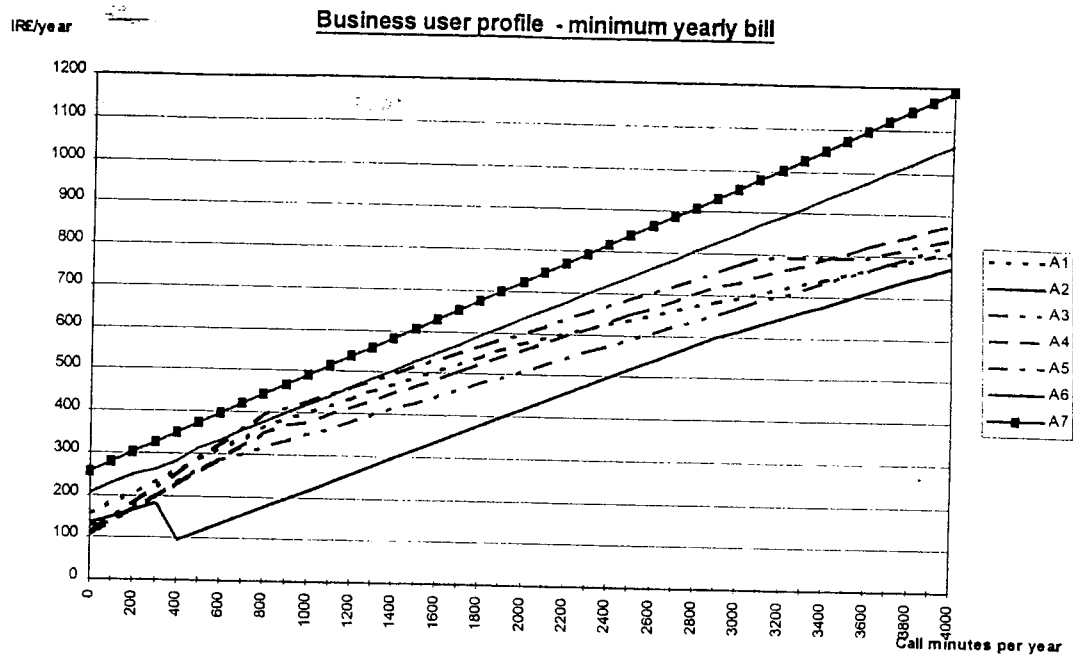


Figure 12. Basket comparison of a business user profile

A basket of an Irish business user profile as presented in figure 12 roughly confirms the general picture exposed from the OECD-like basket. The same appears to be the case with a basket comprising a consumer type of profile as presented in figure 13.

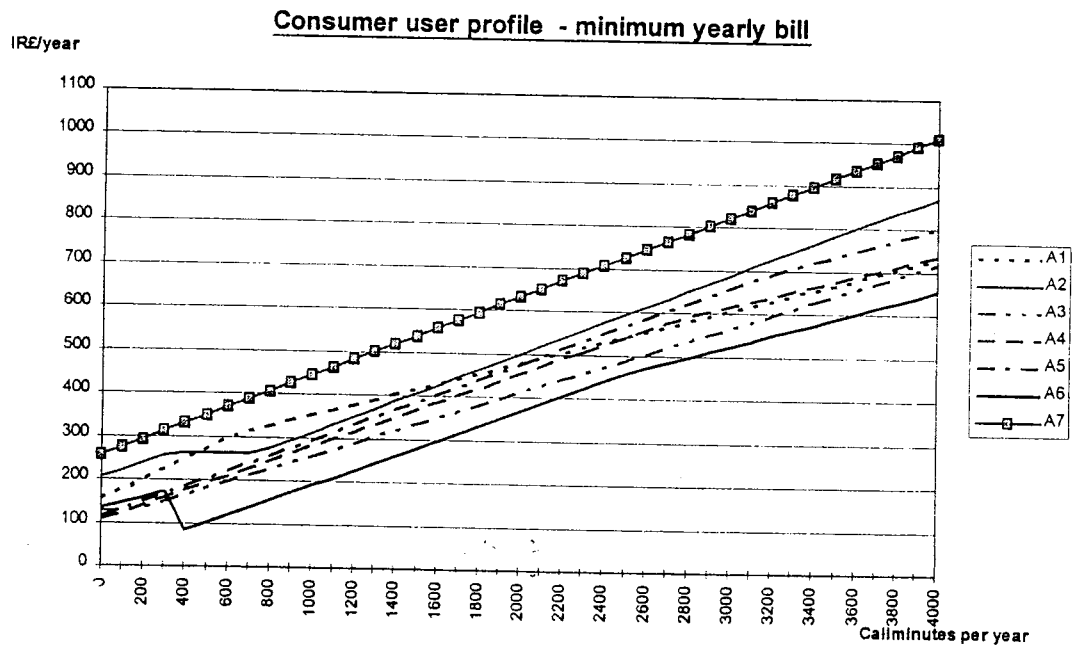


Figure 13. Basket comparison of a consumer user profile.

Both refinements of the OECD-like basket come out with A6 as the cheapest and A2 as the most expensive operator. In order to award the specific marks to the applications, the following indicators have been defined: The initial charge, the basket comparison of a consumer user profile, the basket comparison of a business user profile, the definitions of the peak and off-peak periods, the metering and billing principles suggested, special tariff offers, international roaming surcharge, international call charges and the OECD-like tariff basket.

Dimension Tariffs	A1	A2	A3	A4	A5	A6
1. Initial charges	B	B	A	B	C	B
2. Consumer graph	E	E	B	C	C	A
3. Business graph	C	E	B	C	D	A
4. Peak period	B	C	A	C	A	A
5. Metering and billing principles	A	C	C	C	B	A
6. Special offering	B	C	A	C	A	B
7. International roaming surcharges	B	D	B	B	B	B
8. International call charges	C	E	A	C	A	C
9. OECD-like basket	D	D	B	C	D	A
Tariffs (subtotal)	C	D	B	C	C	A

Table 4. The award of marks concerning the dimension tariffs

The award of marks is summarised in table 4 including the marks awarded to each indicator under the tariff dimension. In general, A6 proposes the lowest tariffs waiving the subscription charge due to a certain consumption of traffic minutes, whereas A2 proposes the highest tariffs.

A1, A3, A4 and A5 all propose moderate tariffs below the present level of Éircell. However, in particular A3 and A5 have a number of appealing special tariffs, which in practice will benefit many customers such that the actual bill will be cheaper than presented in figures 11, 12 and 13.

The difference between A3 and A5 is quite small, which has been confirmed by a supplementary analysis (see appendix 6). It could be questioned whether the low tariffs proposed by A6 is consistent with for example its revenue projections and an IRR at an appropriate level. The answer to this questions, however, has been transferred to the risk analysis presented in chapter 4.

The initial charges are evaluated at launch. Clearly, A3 has low initial charges, which are waived for the first 2 years, and has thus received an A. A5 has the same standard initial charge, which is among the highest, probably related to the variety of included start-up services. The other applicants have several package dependent initial charges.

For consumers, the graph presented in figure 13, is mainly relevant for up to 1200 outgoing call minutes per year. A6, generally the applicant with the lowest tariffs, has a kinked graph, which is mainly due to special circumstances in the structure of packages. A6 has received an A for the very low tariffs for consumers generating

between 400 and 1200 minutes a year. Clearly, A1 and A2 have the highest tariffs and consequently they have been awarded the mark E. A3, A4 and A5 lie in-between these brackets.

The more **business oriented graph** presented in figure 12 outlines the same kind of general brackets of A6 and A2 respectively. Focusing on business user ranging from 1500 to 3000 yearly minutes, the remaining applications have received marks between the A of A6 and the E of A2. The fact that A5 improves its position for high volume business users above 3000 year minutes of use has not been taken into consideration.

The consumer graph was designed with 80% of the traffic in off-peak and 20% in peak hours, whereas the business graph was designed with 80% of the traffic in peak hours and 20% in off-peak hours. However, **the definition of the peak and off-peak periods** has an impact on the deal for the customers. It appears from the applications and the answers to the written questions that A3, A5 and A6 have the most attractive definition of peak hours seen from the customers' point of view (corresponding to 8 am to 6 pm, Monday to Friday), whereas A2 and A4 have less attractive definitions (8 am to 8 pm).

The next modifying indicator to the general comparisons made is **the metering and billing principles**. Seen from the customers' point of view, A1 and A6 are the best with pure per-second-billing, which deserve an A. No one of the applications assumes call set-up charges. The other applications assume billing in 10 seconds increments and the charging of a minimum of 30 seconds per call, and they have consequently been awarded the mark C, except for A5. A5 has expressed an intention of changing to per second billing, leaving out the 10 second units and the minimum of 30 seconds, as well as A5 states that the business case is based on per second billing.

In practice, the operators behind the applications will supply a number of **special offerings**, which will modify or even change the basis for the comparison of the applications. Thus, special tariffs has been used as an indicator. A3 has 40% reductions to certain foreign countries, a special home town tariff package, volume discounts, a package with half rates for calls within a group of 5 persons and the possibility of calling 5 other pre-identified subscribers at 5 pence per off-peak minute. A5 matches these offerings, with for example discounts for corporate subscribers, special home town tariff package, a family package including extra SIM cards with restricted call possibilities at low costs, as well as discounted call charges between nominated family members, plus affinity group calls at reduced rates. Furthermore, A5 plans to make special feature and to launch a number of special tariff promotions. Consequently, both A3 and A5 have been awarded an A. Except for A2 and partly A4, which have been awarded a C, the remaining applications all provide some special offerings.

As a specific tariff element, attention has also been paid to the **international roaming surcharges**. All applications, with the exception of A2, project a 15% surcharge on the roaming abroad tariffs, which have been awarded a B. A2 suggests a fixed amount, which will normally be more expensive than the 15%, and consequently, A2 has been awarded a D. It could be added that the projected tariffing of A2 is not in accordance with the present understanding of the GSM MoU members.

Another international tariff element is **the international call charges**. Concerning this indicator, A5 will only charge Telecom Éireann's fixed international call charges without any mark up, and this deserves an A. A3 has quoted proprietary tariffs close to the tariffs of Telecom Éireann and this has been assessed as almost as favourably as A5. A1, A4 and A6 will add their national airtime charge to the international call charges of Telecom Éireann, and they have all received a C. Like A3, A2 has quoted proprietary tariff, but A2's tariffs generally exceed the international call charges of Telecom Éireann to such an extent that an E has been awarded.

The OECD-like basket defined in the tender specifications has been used as the last indicator with the quoted tariffs in year 4 as the basis for comparison. A4 and A6 did not quote their most advantageous tariffs for the defined OECD-like basket, but the evaluators have re-calculated their baskets, which leads to a more favourable result than these applicants deserve, based on their own quotations. Consistent with the graphs of figure 11, A6 has been awarded an A, A3 a B, A1, A4 and A5 all have been awarded a C whereas A2 has come out with a D concerning this indicator.

This concludes the so-called indicator-based evaluation of the tariff dimension. However, reference is also made to the risk/credibility issues dealt with in chapter 4 of this report and the supplementary analyses summarised in appendices 6 and 7.

3.1.4 International roaming plans

The plans for international roaming have been described in the applications in such a widely different way that it has not been possible to carry through a quantitative comparison of the applications. Admittedly, the applicants face a number of imponderables prior to the closing date, and it is impossible to conclude a substantial amount of roaming agreements without having status as a licensee.

The evaluation of this dimension has therefore been carried out as an entirely qualitative evaluation with focus on the degree of creativity and commitments in the applications by way of the following indicators: The understanding of GSM roaming issues, the commitment of European GSM roaming, and additional roaming features.

Dimension	International Roaming	A1	A2	A3	A4	A5	A6
1. Understanding of GSM roaming issues		A	E	C	E	B	D
2. Commitment to European GSM roaming		A	D	A	B	B	A
3. Additional roaming features		A	D	D	B	D	D
International roaming (subtotal)		A	D	C	E	C	C

Table 5. The award of marks to the dimension of international roaming plans

A significant difference appears between the applications concerning this dimension, with A1 as the best and A2 as the least satisfactory application. The other applications, i.e. A3, A4, A5 and A6, all have received moderate marks.

The first indicator, **the understanding of GSM roaming issues**, has been scored on the basis on what has been reflected in the various applications only. A1 shows by

far the most understanding, with a considerable amount of detail contained in both the technical and marketing volumes of the application. A1 therefore deserves an A. A2 and A4 show no understanding of the complexity of the negotiating process necessary to set up international roaming, and they have therefore received Es. A5 displays a good level of understanding gained from relevant experience and allows for a time-frame for concluding roaming agreements which has demonstratively turned out to be realistic. A3 also displays good understanding but seems to rely on an extremely tight time frame in order to conclude roaming agreements. While A6 displays considerable knowledge of the technical requirements for the establishment of roaming, no mention is made of the timetable to allow for the conclusion of roaming agreements.

The next indicator, **the commitment to European GSM roaming**, focuses on how the applications reflect commitments as well as a careful evaluation of the perceived ability to conclude the number of outlined agreements. A1, A3 and A6 commit to a given number of European countries at launch and demonstrate enough capability in the applications to give comfort that the promised levels of roaming will be achieved, thereby being awarded an B. A2 has no particular focus on Europe and does not demonstrate the needed capability in the application, obtaining not more than a D. While naming a number of European GSM countries at launch, A4 does not adequately demonstrate the necessary capability to reach its targets. A5 has prioritised European countries at launch, although it mentions only one country explicitly, and the application provides evidence that the consortium has the needed capability.

As the last indicator, it has been investigated whether additional international roaming features are offered. A2, A3, A5 and A6 only discuss the standard GSM roaming provisions, therefore, they have been awarded a D. A1, however, has committed itself to extensive services to facilitate or substitute roaming, for example with roaming arrangements with non-GSM networks worldwide and with rental of equipment, and A1 has thus received an A. A4 provides some general details of arrangements for roaming on non-GSM networks and has thus received a B.

3.2 Technical aspects

The dimensions of the technical aspects are identified as radio network architecture, capacity of the network, performance guarantees, and frequency efficiency. Also the subject of 'blocking and drop-out rates' was originally considered as an ingredient in the technical evaluation, but with the applicants using incomparable calculation methods for these parameters it was decided to omit direct comparison of the submitted figures. Instead blocking and drop-out rates have been subject to a supplementary analysis, cf. appendix 5.

The applied 4 dimensions are related to different criteria mentioned in § 19 of the RFP document. Radio network architecture and network capacity form part of 'indent 2' while the two other dimensions are related to indents 7 and 8, respectively. For this reason it was decided that the marks awarded under the different dimensions should not contribute with the same weight to the calculation of the final marks of the technical aspects.

Technical aspects	A1	A2	A3	A4	A5	A6
1. Radio network architecture	C	C	B	B	A	D
2. Capacity of the network	C	D	C	B	A	C
3. Performance guarantees	D	E	C	B	A	C
4. Frequency efficiency	A	C	A	A	A	A
Technical aspects (subtotal)	C	D	B	B	A	C

Table 6: Technical aspects: Award of marks

A5 provides a technical solution of supreme quality and is considered as the strongest of the applications with the award maximum marks in all dimensions. A3 and A4 has both been awarded a 'B', which is apparently fair for A4, but somehow lucky for A3, as A4 is obviously the best of these two.

A3's solution has been awarded low marks in overall network capacity as has the capacity of A1, A2 and A6. A1, A2 and A6 furthermore lack high scores on the 'hard' dimension of radio network architecture. It should be emphasised that these ratings are also a reflection of the information level actually provided by each applicant on the different indicators.

The licence conditions for the finally selected applicant should be made up to reflect the technical solution upon which the marks were awarded.

3.2.1 Radio network architecture

The design and the construction of the radio network is the obvious foundation for the entire mobile communications operation in terms of coverage, capacity, and quality. An essential part of the network design is the applied structure of radio-cells covering the service area and, hence, important indicators of the architecture are the number of antenna sites and the number of cells.

The number of antenna-sites provides information on the minimum number of cells to be deployed and thereby the potential density of coverage. Also, this indicator has a strong influence on the total investment in network equipment.

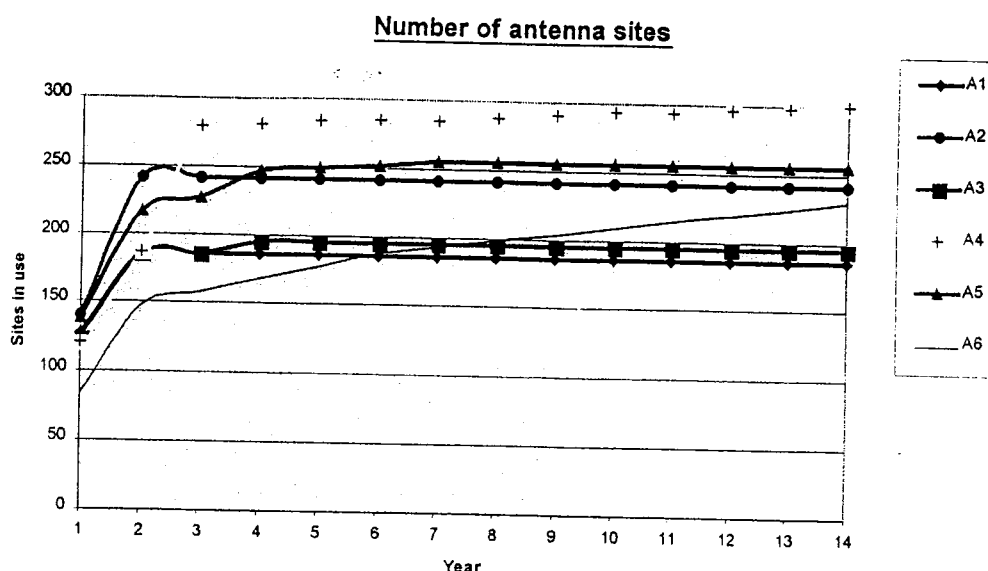


Figure 14. The number of antenna sites per applicant

Evidently the applicants have different architectural approaches in terms of this indicator with A4 as the strongest. Awarding an A to A4 leads subsequently to awarding a B to A2 and A5, and a C to the remaining applicants. Five of the applicants obtain within a few years a stable situation while A6 keeps adding new sites throughout the observation period. This could result in continued disruptions for users of the network in the latter case.

The second indicator **number of cells** is of course depending on the first indicator, but provides further information on the planned use of sectorised antennas and thereby on network quality and capacity. For this indicator A5 is awarded the highest mark with A4 as a close second. Specifically A1 has a very low number of cells in the mature network. This is considered a weakness in their solution leading to the award of only an E.

Dimension Radio Network Architecture	A1	A2	A3	A4	A5	A6
1. Number of antenna sites	C	B	C	A	B	C
2. Number of cells	E	D	C	B	A	D
3. Cell planning	A	A	A	A	A	B
4. POI	B	A	A	A	A	B
5. Redundancy	A	C	A	B	A	D
6. Dublin area	A	D	A	D	B	E
Radio network architecture (subtotal)	C	C	B	B	A	D

Table 7. The award of marks concerning the dimension radio network architecture

The marks awarded under each indicator are summarised in table 5. Further to the two first indicators the third indicator **cell planning** reflects the professionalism with which each applicant has planned his cell structure. As it appears all applicants have

demonstrated a high degree of professionalism making use of state-of-the-art cell planning techniques and tools. Only A6 is rated a little lower, mainly due to limitations in the contents of the application.

The fourth indicator **Points of interconnect (POI)** reflects the approach and the philosophy applied in connecting the GSM network with the PSTN. Again the applicants are almost considered equal, however, with A1 and A6 rated a little lower due to a very short dealing with this subject.

The redundancy indicator shows the applicants' consideration of backbone network design and traffic routing capabilities with emphasis on the possibility of alternative routing in case of line errors or congestion. In this case A1, A3, and A5 have all described competent and safe solutions awarded by an A. A4's solution seems reasonable, but is not very detailed described, whereas the suggestions of A2 and A6 are of poorer quality.

The sixth and the last indicator places special attention on the radio network deployed in the Dublin area where the most critical conditions are expected. Design of this part of the architecture requires local knowledge of adequate site positions and hotspots which not all applicants seem to have investigated. A1 and A3 have made a well documented and comprehensive planning of this part of the network closely followed by A5. A2 and A4 have made very little in this area, and A6 has provided nothing at all.

3.2.2 Capacity of the network

The network capacity is, besides the coverage, of greatest importance for the perceived customer satisfaction with the service. By adding extra capacity the operator makes his network less sensitive to fluctuations in number of customers and traffic level, but on the other hand capacity costs investments. All applicants will provide surplus capacity in the early years of operation, but as the customer base and the traffic volume increases it is especially important to provide sufficient capacity where it is mostly needed - i.e. in the Dublin downtown area (cf. indicator no. 6 in section 3.2.1).

The following capacity considerations make use of 4 indicators all based on average, overall capacity calculations.

The capacity of the proposed network

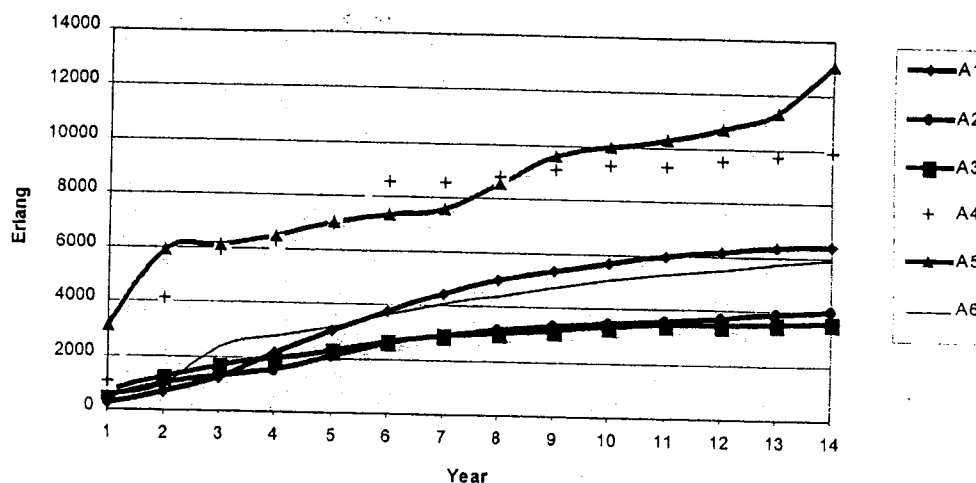


Figure 15. Capacity (in the radio part) of the proposed network (Erlangs)

The capacity of the radio network is planned in order to respond to the traffic demand in busy hour. It is a highly customer-relevant quality of the solution and especially business users would require the capacity to always be sufficient. As it appears, A5 has designed a network with a considerable capacity closely followed by A4 and with the other applicants at lower capacity levels. However, the offered capacity must be assessed in relation to the size of the projected customer base. This is accomplished by calculating the capacity per subscriber and the spare capacity (based on the projected usage per subscriber).

Evaluation of the average capacity per subscriber still points to A5 as the best performer with A4 as the second. The figures decrease over the planning period for all applicants and especially A2 and A3 become very low in year 2009. The same trend is repeated in the calculated spare capacity, where A4 and A5 have provided an abundant capacity all through the planning period and with also A6 offering a network with a good spare capacity. A1, A2 and A3 have suggested a spare capacity to the low side, and in particular A1 has constantly the same low value all through the planning period. Special attention has been paid to this indicator in the assessment of the dimension.

Dimension Network capacity	A1	A2	A3	A4	A5	A6
1. Capacity of radio network	C	C	C	A	A	A
2. Capacity of own infrastructure	A	C	A	C	B	E
3. Capacity of interconnect	B	D	B	A	A	C
4. Capacity of central components	A	B	A	B	A	C
Network capacity (subtotal)	C	D	C	B	A	C

Table 8. The award of marks concerning the dimension network capacity

In general A5 plans a solution of high capacity of radio network throughout the different network elements. This solution is furthermore well substantiated and is here

awarded an A. A4's solution is weaker on own infrastructure capacity, hence a B, and the other applicants have lower performance. A2 is lowest which is also due to lack of factual information in the application.

The indicator **capacity of own infrastructure** is not easily quantifiable. It has been assessed from the applicants' own presentations of the dimensioning procedures applied in the network design and from the viability of the approach to establish their own infrastructure. Some of the applicants have furthermore indicated the number of interconnecting 2MB/sec.lines between their network components. A1 and A3 have presented the most convincing design, including discussion of as well traffic capacity as signalling capacity. A5's solution is almost as good, but seems to prefer construction of a new infrastructure rather than making use of existing facilities. This is considered slightly less favourable.

The third indicator is the **capacity of the interconnect** to PSTN. This has been assessed by extracting the number of POIs, the number of interconnecting 2 MB/sec lines through the POIs, and the average number of subscribers per interconnecting line. A4 and A5 have planned a remarkably high capacity at this interface leading to the award of an A. Also A1 and A3 have described a thorough solution, however with a more limited capacity, while A2 and A6 have not provided sufficient information. This indicator has been given a low weight in the aggregated scoring of the dimension.

The fourth and the last indicator was originally intended as an assessment of the **capacity of the central components** in terms of the number of subscribers that could be served. This information was, however, not readily available from any of the applicants so instead the mere number of main network elements has been assessed. A1, A3 and A5 have all suggested a well balanced and a well deployed network with A2 and A4 almost as good. A6 has suggested a network with a remarkably low number of BSCs without any further explanation. This indicator has been given a low weight in the aggregated scoring of the dimension.

3.2.3 Performance guarantees

The RFP document indicates that the idea of including this dimension is to give the applicants an opportunity to emphasise how strongly they intend to honour the 'promises' (or design objectives) presented in their applications. This could e.g. be demonstrated by issuing relevant performance guarantees, however, leaving it to the inventiveness of each applicant to suggest the relevant guarantee conditions.

The assessment of this dimension is not directly quantifiable even if some of the applicants have suggested penalty amounts in case of non-compliance. Instead the subject has been covered by investigating the applicants' general dealing with the concept of 'performance guarantees' as well as procedures indicated to remedy non-complying, guaranteed performance targets.

Also the nature of the committed performance targets have been studied as well as the offered (legally binding) penalties to be suffered by the applicant in case of non-compliance.

Dimension Performance guarantees	A1	A2	A3	A4	A5	A6
Performance guarantees (subtotal)	D	E	C	B	A	C

Table 9. The award of marks concerning the dimension performance guarantees

A4 and A5 have as the only applications suggested a legally binding guarantee with built-in penalties. A5 has provided comprehensive and satisfying information on all indicators incl. a penalty clause in case of non-compliance with coverage/roll-out milestones and the guaranteed performance level. Hence the rating A.

A4 has provided a brief information on the different indicators incl. a penalty clause in case of non-compliance with coverage/roll-out milestones. The penalty amounts are considerably lower than those of A5. Hence the rating B.

A3 has not presented any guarantee obligations, but suggests a number of "technical" action-plans (which may involve expenses) in case of proved non-compliance. This is considered poorer than A4, and hence the rating C is decided.

A6 has not presented any guarantee obligations, but realises the nature of the "guarantee requirement" by suggesting co-operation with the Department to develop a suitable guarantee structure so that A6's performance can be measured on a regular basis. This is considered poorer than A4, but not below A3. Hence the rating C.

A1 has addressed the concept of performance guarantees by listing a number of network design target-values without indicating remedial procedures in case of non-compliance. Consequently the applied heading "performance guarantee" is misleading and should rather be "design objectives". This is considered poorer than A3 and A6, and hence the rating D is decided.

A2 has not addressed the concept of performance guarantees (e.g. in a dedicated section of the application) and the applied network design target-values must be extracted (by the reader) from a variety of positions in different parts of the application. Hence the rating E.

3.2.4 Frequency efficiency

The frequencies allocated for the Irish GSM2 service are quite limited in number and should principally be exploited efficiently. Good frequency planning is a demanding discipline which calls for as well experience as consideration of local details in the radio propagation patterns. Also, good planning will result in an increased capacity of the network as well in a better quality of communication as perceived by the customers.

Avoiding that a considerable part of the allocated spectrum is used only occasionally during busy hour is one example of good frequency use. An effective traffic and network planning should tend to obtain an evenly distributed traffic throughout the day by means of market/traffic regulation and by a good network design. A quantifiable indicator in this respect is the **peak/mean traffic ratio** which separates the applicants in 3 classes. A3 and A4 obtain a value between 2 and 3 of the indicator which is awarded by an A. A5 and A6 come out with a value between 3 and 4, good for a B, while A1 and A2 stay above 4.

Dimension: Frequency efficiency	A1	A2	A3	A4	A5	A6
1. Peak/mean traffic ratio	C	C	A	A	B	B
2. Number of 200 kHz channels	A	B	B	B	B	A
3. Frequency economy factor	A	C	C	B	B	B
4. Cells per site	C	C	B	C	A	C
Frequency efficiency (subtotal)	A	C	A	A	A	A

Table 10. The award of marks concerning the dimension frequency efficiency

The marks awarded under each indicator are summarised in table 10. Even if the different indicators display a certain variety in the scorings, it was during the qualitative evaluation understood that the applicants in general showed a very efficient use of the allocated frequencies and that consequently the majority of applicants should be awarded an A. Only A2 were found to have a generally poorer performance and, hence, was awarded a C in the summary.

The second indicator is the number of 200 kHz channels actually called for in each application, and figure 16 provides an overview of these demands.

The use of frequency by each applicant

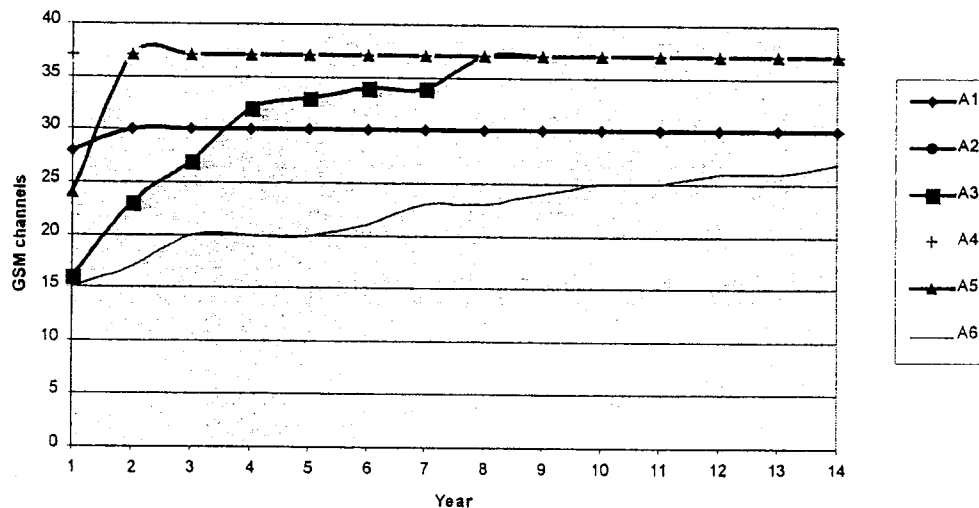


Figure 16. The use of frequencies by each applicant

Obviously A1 has opted for a solution in which only 30 frequencies are needed. This is awarded with an A in this indicator, which is also the result of A6 due to the generally low usage of frequencies. The other applicants will some time in the planning period make use of all the allocated 37 channels.

The third indicator is the calculated frequency economy factor which reflects also the way the available frequencies are turned into useful network capacity.

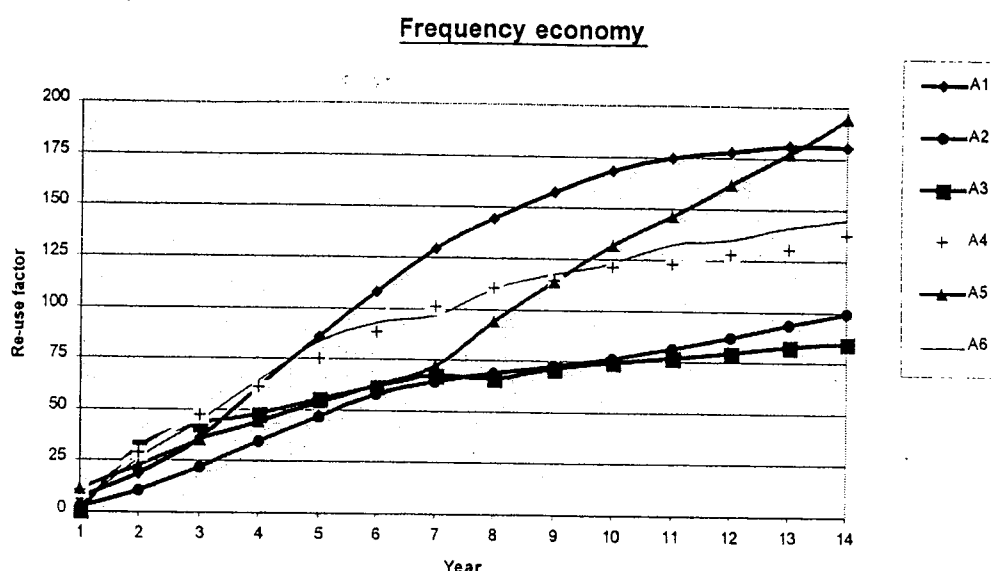


Figure 17. Frequency economy

A1 has for the majority of the planning period the highest value of this factor (see figure 17) due to the lower number of applied frequencies (see figure 16). This results in the award of an A, whereas A4, A5, and A6, all having all good values, are awarded a B. Particularly A5 shows at the end of the planning period a value even higher than A1's due to the offered higher network capacity. A2 and A3 are in time separated out as those applicants with the lowest frequency economy.

The fourth and the last indicator is the average number of cells per site which reflects the ability of the applicants to apply sectorisation and thereby an intensified frequency reuse. A5 has clearly the highest value (2,5) of this indicator, which is awarded by an A. A3 obtains a B for the value 1,8 while the remaining applicants stay at lower values (1,4 - 1,6).

3.3 Management aspects

The management aspects have been evaluated by just one dimension, namely the experience of the applicant. The award of marks to this dimension and to the subtotal of the management aspects will therefore be identical.

Management	A1	A2	A3	A4	A5	A6
1. Experience of the applicant	C	D	A	C	B	C
Management aspects (subtotal)	C	D	A	C	B	C

Table 11. Award of marks: The management aspects

A3 comes out with the best results of this part of the evaluation as shown in table 11. A5 is also assessed positive, but not to the extent of A3. A3 has more GSM occurrences in OECD-member countries than any other applicant, and A3 already

has a strong presence in Ireland, covering both part of the cellular market and the billing and subscription experience to the mass market through one of its consortium members. Subsequently, A3 has been awarded an A.

A5 does not have the broad national and international GSM experience of A3, but still retain a growing foothold on the Irish fixed telecommunications market with the service provision related activities of Esat. In addition, Telenor is a recognised cellular operator, although a niche player in the international market. In addition, A5 seems to have a fully fledged organisation and management to undertake the GSM2 operations.

A1, A4 and A6 have also been assessed positive, but not to the extent of A3 and A5, since they have all some weaker points and not compensating stronger points. Among this group, A1 clearly has the strongest points.

A2 is the least satisfactory application in relation to management aspects. The degree of experience and preparedness is low, and the consortium has no practical GSM experience.

3.3.1 Experience of the applicant

The dimension experience of the applicant has been evaluated entirely on the basis of the applications. Consequently, the award of marks is based on information, which is identifiable in the application. Most of the evaluation is based on qualitative information, although it has also been possible to compile some quantitative information.

	A1	A2	A3	A4	A5	A6
GSM2 experience occurrences	1	0	0	0	0	2
GSM1 experience occurrences	2	0	4	0	1	0
Other cellular network	3	1	5	2	1	1
GSM2 experience points	2	0	0	0	0	3
GSM1 experience points	3	0	4	0	2	0
Other cellular experience points	4	2	4	3	2	2
GSM2 ownership weight	0,20	0,00	0,00	0,00	0,00	0,80
GSM1 ownership weight	0,50	0,00	1,07	0,50	0,45	0,00
Other cellular experience ownership weight	1,50	0,62	1,33	0,50	0,45	0,20
Temporary score	10,200	1,240	13,868	1,500	2,700	7,600
Renormalisation factor	0,36	0,36	0,36	0,36	0,36	0,36
Points (quantitative)	3,68	0,45	5,00	0,54	0,97	2,74

Table 12. Number of network occurrences in OECD member countries

As seen from table 12, A3 has the widest international experience in OECD member countries, mainly due the Unisource backer which has a well-established

basis as GSM1 in the home countries of Telia, KPN, Swiss Telecom and Telefonica.

This kind of experience has been taken into consideration, but in order to retain mainly a qualitative perspective on the evaluation of the experience dimension, the following 4 indicators have been defined: Experience and preparedness of the proposed management team, relevant experience of the applicant in the Irish market, sufficient experience of the applicant as a GSM operator in an European market and finally the mentioned quantitative experience of the applicant as a cellular operator in OECD member countries.

Dimension: Management aspects	A1	A2	A3	A4	A5	A6
1. Proposed management team	C	E	B	C	A	D
2. Experience of Irish Market	C	C	A	B	B	E
3. Experience of European market	A	D	A	C	A	A
4. Experience as cellular operator	B	E	A	D	C	B
Management aspects (subtotal)	C	D	A	C	B	C

Table 13. The award of marks concerning the experience dimension

In the case of A2, the application does not provide information relevant to the indicator **experience and preparedness of the proposed management team** at all, which has lead to an E. A5 has conversely described the company structure in details and has allocated the key person to join the top level management of the operating entity. A number of the necessary constituents for success are present, and A5 has thus obtained the highest mark. A3 has described the composition of the management team in some detail, but the cellular experience among the top-level management is less hands-on rooted than is the case of A5, and A3 has thus been awarded a B. Both A1 and A4 provide detailed account of the organisational structure and the division of responsibilities, but they have neither identified nor allocated named persons among the top level management. Consequently, they have both been awarded a C. A6, however, provides even fewer details and has accordingly been awarded one mark lower.

The **experience of the applicant in the Irish market** has also been evaluated as an indicator of experience in general. With Motorola, ESB and Sigma as the consortia members, A3 has a strong and relevant Irish market experience, both with cellular products and with the billing, subscriptions and customer care of the mass market. Consequently, A3 has been awarded an A. Both A4 and A5 have "operating" telecommunications experience in Ireland - A5 through Esat and A4 through AT&T and even more through the MMDS operations of Princes Holdings. They have both been awarded a B, as the experience does not have the communality with cellular communications as is the case of A3. A1 and A2 have the same degree of experience in the Irish market - A1 through the 3 individual members and A2 through the Irish members of the consortium. In both cases, the Irish market experience is not directly and relevantly mirrored in the applications, and thus a C has been awarded to both applicants. The application of A6 is the least satisfactory in relation to this indicator, as A6 has no local representation presently, except for the potential consortium membership of CIE.

Another indicator is whether sufficient experience of the applicant as a GSM operator in a European market is present. This is clearly the case with A1, A3, A5 and A6, which have all gained As. A2 however, has no GSM experience and lacks operating presence in Europe; but because of the US experience with non-GSM cellular systems, A2 has not been awarded the second-lowest mark (a D). AT&T has through McCaw a broader base of experience. The fact that A2, A4 and partly A6 appear to have some shortcomings in relation to European standardisation and the EU procurement rules and competition rules has not been taken into account in this part of the evaluation, but is transferred to the assessments of risks.

The quantitative experience of the application as a cellular operator in OECD member countries has also been defined as an indicator. The quantitative scoring, which appears in table 12 has been translated into the award of marks, A3 getting the highest mark and A2 the lowest. This indicator has been weighted 3 times less the other indicators during the scoring of the experience dimension.

3.4 Financial aspects

The financial aspects have been evaluated by means of two dimensions. One is the performance according to a number of financial key figures and the other is the licence fee payment offered for the right to the licence.

Finance	A1	A2	A3	A4	A5	A6
1. Financial key figures	A	C	B	C	B	C
2. Licence payment	(A)	(A)	(A)	(A)	(A)	(A)
Financial aspects (subtotal)	A	C	B	C	B	C

Table 14. Financial aspects: Award of marks

The dimension licence fee payment has been comparatively easy to score as all the applications offer the maximum payment of IR£ 15 million. The main purpose of the dimension financial key figures is to establish, whether the business cases exposed in the applications are supported by a sound, i.e. a reasonable, financial performance. This means that the angle of view is the Customers' and that of the Irish society, rather than investor's criteria which is not a prime concern of the licensor.

For example, this angle of view has an impact on the valuation of the IRR. A high IRR would be seen as less favourable than a medium-sized IRR, as a "too high" IRR should alternatively be converted to the provision of better and/or cheaper services to the customers. However, also a low IRR below the general interest rate, could be assessed as unfavourably.

Furthermore, it must be noted that the financial business plans have been subject to a number of calculatory assumptions as described in the specifications to the mandatory tables of the tender documents. By necessity, this means that some of the figures will be different in reality. Nevertheless, the focus of the licensor on the specifications to the financial plans has allowed for comparisons of the applications

which otherwise might not have been possible. Some of the basis for comparison is summarised in appendix 4.

In general, A1 has the best performance on the financial aspects. For various reasons, A2 (solvency and financial strength), A4 (liquidity) and A6 (the ratio accumulated turnover/accumulated investments) have been awarded low marks. Some of these weak points have been identified as risks factor which are dealt with separately. A3 and A5 come out with scores in-between these two groups.

3.4.1 Financial key figures

The different strategies described earlier in this report is also reflected in the financial part of the business case.

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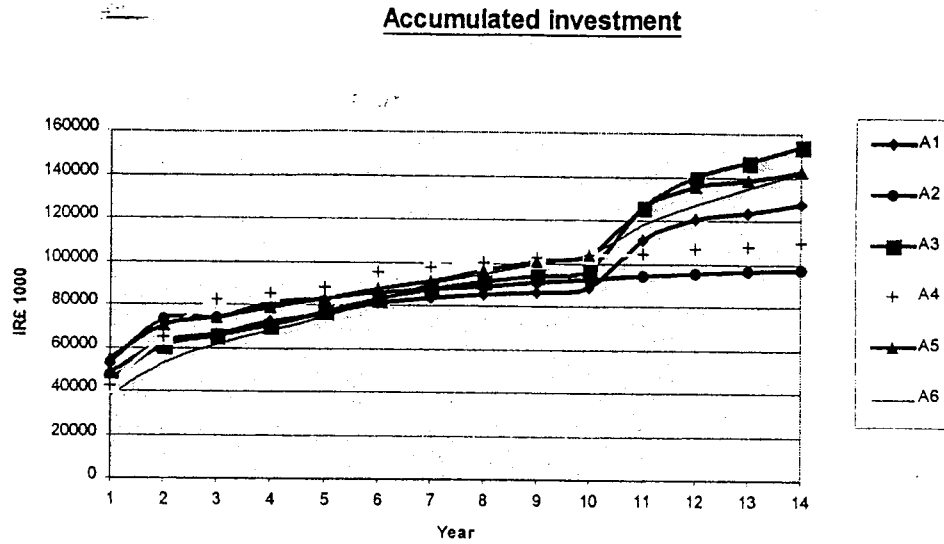


Figure 18. Investment projections

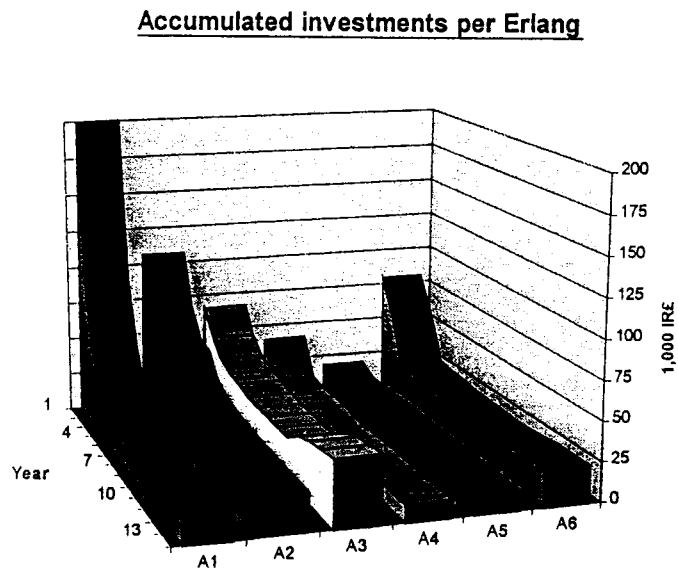


Figure 19. Investment projections

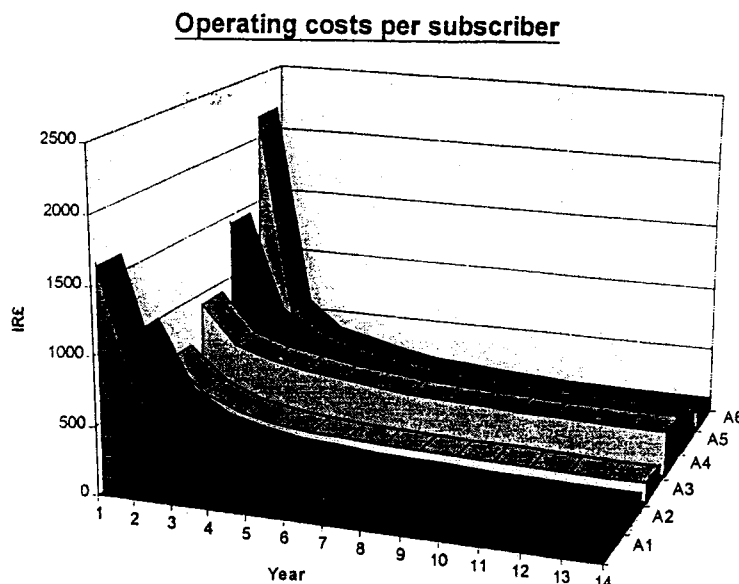


Figure 20. Operating costs per subscriber

The investment profiles, the different timing in relation to the take-up of subscribers, and some of the different assumptions made are all mirrored in the financial snapshot presented in figures 18, 19 and 20.

In order to deal consistently with the award of marks to the dimension financial key figures, a number of indications have been identified as follows: Solvency, financing, profitability and efficiency. Furthermore, these indicators have been broken down into sub-indicators.

Solvency is measured by the degree of solvency as defined in the mandatory tables. In addition, also the financial strength of the consortia members has been taken in consideration in order to assess whether so-called "deep pockets" exist among the backers in order to safeguard the business case or to compensate for a low degree of solvency.

Financing is dealt with by the sub-indicator liquidity. The notion of "deep pockets" has not been taken into account under this heading, as it is dealt with under solvency. Furthermore, it should be remarked that the exposure of the business cases has been addressed under risks.

The profitability indicator is partly measured by the IRR earned over the first 10 years, partly by profit/interest ratio. The angle of view is not investor's criteria, rather consumer's criteria.

As sub-indicators to the efficiency indicator, the following three have been taken into consideration based on the first 10 years of the business cases: accumulated operating costs/accumulated turnover, accumulated operating costs/SIM cards, and accumulated turnover/accumulated investments.

Dimension of Finance	A1	A2	A3	A4	A5	A6
1. Solvency	A	E	B	C	D	C
2. Financial strength of consortia members	A	E	A	A	B	B
3. Liquidity	B	C	D	E	A	A
4. IRR	D	A	D	A	A	D
5. Profit/interest expenditure	A	B	A	C	B	C
6. Accumulated operating costs/ accumulated turnover	A	B	B	D	C	D
7. Accumulated operating costs/ SIM card years	A	A	A	D	B	A
8. Accumulated turnover/ accumulated investments	D	A	D	B	D	E
Finance (subtotal)	A	C	B	C	B	C

Table 15. The award of marks concerning the dimension financial key figures

Turning to solvency, the most significant findings are two applicants with a degree of solvency below 100%, with solvency expressed as the equity in percentage of the total balance. A2 has projected a negative solvency in 11 out of 14 years considered, whereas A5 has projected 3 years of negative solvency. Invariably, A2 has been awarded an E and A5 a D. A1 has projected a solvency above 30% during the entire period, and A1 has thus been awarded an A. For 2 years, A3 has projected a solvency below 30% and has thus been awarded a B. A4 and A6 are slightly worse and have been awarded Cs.

The financial strength of the consortia members is a matter of "deep pockets", under the assumption that the liability is not effectively limited. When looking at an equity of the mother companies of the backers exceeding IR£ 1 billion, A1 (Southwestern Bell, Tele-Danmark and, through Detecon, Deutsche Telecom/3 big German banks), A3 (Motorola, Unisource and ESB) and A4 (AT&T and Philips) all have sufficiently "deep pockets" to be awarded As. A2's main backer, Comcast, has a negative equity, which also is the case with Bord Na Móna. As the only main backer, RTE has a moderate equity (IR£ 63.7 million in 1993). A2 has thus been awarded an E. A5 is backed by Telenor with an equity in excess of IR£ 1 billion and Communicorp with a negative equity, which have been transformed to a B. A B has also been awarded to A6 backed by Kinnevik (approx. IR£ 400 million) and Millicom (approx. IR£ 75 million). As Millicom is 39% owned by Kinnevik, the strength of these backers is less than the sum of their respective equities.

The liquidity, which is calculated as the current assets in percentages of the current liabilities, has been evaluated with respect to the number of years, the applicant has a liquidity within each of the following bands: below 100, 100-200, and above 200. In the mandatory tables, A4 has not stated any current liabilities, which means that the liquidity cannot be calculated, and A4 thus been awarded an E. A5 and A6 have the best liquidity performance with many years above 200, and they have both been awarded As. A1 comes close to this performance, but 3 years below 100 only warrant a B. A2's business plan shows a liquidity below 100 for 3 years and a

liquidity between 100 and 200 for 11 years, which deserve a C. A3 is slightly worse than A2 with 6 years below 100, and consequently A3 has been awarded a D.

In order to make fair comparisons, the IRR has been re-calculated to reflect the same level of re-investments and with same relative level of terminal value, i.e. the net value of the fixed assets in year 10. A2, A4 and A5, which all earn medium-sized IRRs have been awarded As, whereas the major deviations from this pre-defined level have been awarded a D.

The ratio between profit (before depreciations, financial costs and tax) and interest expenditure has been evaluated counting the number of years where this ratio appears to have the value 2 or less. A1 has 3 years and A4 and A6 have 5 years with a ratio of 2 or less.

One of the sub-indicators of efficiency is the operating costs in relation to the turnover. When using accumulated figures to cover a 10 year timescale, A1 comes out with the most favourable ratio (0.55), with A6 at the other extreme with the most vulnerable ratio (0.77).

Operating cost per SIM card is another sub-indicator of efficiency, and this ratio has also been calculated on the basis of accumulated figures. A1, A2, A3 and A6 all come out with approx. IR£ 200, with A5 at IR£ 290 and A4 above IR£ 400.

Also on the basis of accumulated figures, the turnover in percentages of the investments has been calculated across the 10 years. A2 (713%) and A4 (605%) has a large turnover to cover the investments needed. However, A1, A3, and A5 has a considerable lower level around between 200 and 300%. A6 comes out with an abnormal figure of 129%, i.e. obtaining only 29% turnover in excess of the investments needed during the 10 years considered. As A6 has already been awarded the best mark under tariff, A6 has scored an E in this respect, and this issue has been transferred to the risk analysis.

3.4.2 Licence fee payment

As mentioned earlier, all applicants have offered IR£ 15 million for the right to the licence, which is IR£ 10 million in excess of the required IR£ 5 million minimum payment. This dimension does therefore not discriminate among the applications. Extra payments offered, for example in connection with the performance guarantees, have not been considered part of this dimension.

4. Sensitivities, risks and credibility factors

Various analyses and investigations have been conducted in order to deal with the sensitivities, risks and credibility of the applications and the business cases behind the applications.

In general, the credibility of A5 has been assessed as extremely high as A5 is the applicant with the highest degree of documentation behind the business case and with much information evidenced. In addition, it can be stated that A5 does not have abnormal sensitivities in its business case. Taking all the sensitivities defined in the tender specifications into account, A5 still earns a positive IRR. The weakest point concerning A5 is not related to the application as such, but to the applicant, or more specifically to one of the consortium members, namely Communicorp, which has a negative equity. Should the consortium meet with temporary or permanent opposition, this could in a worst case situation turn out to be critical, in particular concerning matters related to solvency.

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

The A3 application has also been found highly credible as well, although not reaching the degree of documentation and evidencing as A5. In addition, the supplementary investigations concerning tariffs indicates that there might be a lack of consistency between the marketing and the financial plans, as the projected usage revenue per call minute exceeds the normal call tariffs by far and no substantiated by solely by the non-time true metering principles suggested by A3. For this reason, the difference in the level of tariff between A3 and A5 is not substantiated by the projected revenues streams, where A5 projects a lower revenue per call minute than A3.

In addition, A3 has a similar type of problem as A5, namely the extremely small equity of Sigma Wireless. It is questionable, whether Sigma Wireless can bridge the gap between the weak degree of solvency and the general liability as a comparatively big shareholder in a business that requires "patient money" and a high exposure.

Furthermore, A3 has expressed so strong reservations concerning the draft licence, which was circulated as part of the tender documents, that the Minister will formally have a weak favourable starting point. However, should the Minister wish to enter into licence negotiations with A3, both these reservations and the Sigma Wireless issues should be solved satisfactorily as necessary, but not sufficient, conditions in order to conclude the licence negotiations.

Finally, it has not been taken into consideration at all during the award of marks in the evaluation that Motorola and Sigma have interests with and links to the incumbent operator, whereby it could, in theory, be questioned, whether some of the consortium members of A3 could be exposed to conflicts of interests, thereby weakening the competitive edge of the GSM2 operator (or the incumbent). This risk should be dealt with at the political level, as has been the case in other European mobile tenders, most recently during the DCS1800 tender in France, where the

French Government abstained from the nomination of a consortium with conflicts of interest between the incumbent and the potential status as a second mobile licensee.

A1 is assessed to be a credible application, although not reaching the heights of A3 and in particular A5. No dramatic sensitivities related to the IRR earned have been identified. Like A3, but less gravely, A1 might have a lack of consistency between the tariffs offered and the projected revenues.

A risk factor may be found in the commitment from one of the backers and in the composition of the consortium as a whole. Notwithstanding the fact that Deutsche Telecom throughout the A1 application from time to time is presented as consortium member, Detecon is the true consortium member. Detecon is only 30% owned by Deutsche Telecom, the remaining part being owned by 3 German banks. Deutsche Telecom has only stated intentions, no commitments to back Detecon and A3. In addition, having three similar types of operators in the same consortium, without presenting the decision-making rules in the applications, could pose a risk.

If the Minister intends to enter licence negotiations with A1, these risk factors should be taken into consideration.

A4 has delivered an application, which is credible in a number of aspects. The sensitivities of the A4 business case is acceptable, as A4 earns sufficient IRR to withstand the sensitivities defined in the tender specifications.

However, the A4 application poses more severe risks than the A1 application. For example, AT&T and Nokia have been selected and contracted as vendors, which is not fully in accordance with the EU rules on procurement. Another example is the degree of understanding concerning the European standards and technical matters. A third example is the approach to the planning permissions in Ireland, which might turn out to be more difficult to obtain than expected by A3, thereby potentially protracting the roll out and the commercial operations.

Also A6 has presented a generally credible application. A6 has sensitivity problems, however, as A6 earns a negative IRR in some of the sensitivity scenarios outlined in the tender specifications.

A6 has potential problems with the conformance to EU regulation concerning procurement and terminal subsidies. In addition, it has been assessed as a risk that A6 lacks the Irish touch, as the application in many respects rests on the experience from countries with other conditions of success in the mobile field. In particular the lack of market research in the Irish market is a risk factor.

The A2 application is the least satisfactory application in relation to credibility and risks. Concerning credibility, it has been obvious during the evaluation that some of the mandatory table and the application as a whole have a number of shortcomings.

Concerning risks, the most obvious are the non-conformance with EU regulation on procurement and terminal subsidies, the lack of understanding concerning European standards and technical matters, the solvency ratio of the consortium together with the equity of the main driver, Comcast.

In total, the evaluators have arrived at the conclusion that the other aspects investigated under the dimensions credibility, sensitivities and risks widens the gaps between the applicants and thus confirm the results of the award of marks presented

The evaluators have also concluded that it has not been necessary to score the so-called "other aspect" contained as an option in the agreed evaluation model, since the mandatory part of the evaluation generates results that discriminate among the application, and since it has been concluded that the general credibility of the applications is equal to the ranking of the applications. As such, it has been assumed that the risks identified can be handled satisfactorily during the licence negotiations.

It should be remarked that the effect on the Irish economy - to which much attention has been paid in some of the applications - has not been scored at all, since the scoring of this dimension might intervene with EU considerations. Anyhow, it appears from appendix 8 that a short supplementary analysis on the effect on the Irish economy does not generate significant differences. Such effects are furthermore difficult to measure, and even if they were easily measurable, some of them might never materialise in the projected manner.

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$\frac{d}{dt} \left(\frac{\partial L}{\partial \dot{x}} \right) = \frac{\partial L}{\partial x}$

5. Summary, concluding remarks and the recommendation

It has been clearly stated in the tender documents that the licensing methods is the so-called 'best application'. With the application of this method, the evaluation has been based on the evaluation criteria outlined in § 19 of the RFP document.

This report aims at nominating and ranking the 3 best applications on the basis of the evaluation. This has been conducted by way of four different models, which can briefly be summarised as follows:

1. The results on the basis of the evaluation of the marketing, technical, management and financial aspects (qualitative award of marks).
2. The results on the basis of business case sensitivities, risks, and credibility issues (qualitative assessment).
3. The results on the basis of a re-grouping of the criteria (qualitative award of marks).
4. The results on the basis of the application of a quantitative scoring model (conversion of marks to points).
5. A last comparison of the best applications.

5.1 The results based on the aspects, dimensions and indicators

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

Aspects and dimensions	A1	A2	A3	A4	A5	A6
Market development	C	C	B	C	A	C
Coverage	B	C	A	C	A	D
Tariffs	C	D	B	C	C	A
International roaming plan	A	D	C	C	C	C
Marketing aspects (subtotal)	B	C	B	C	AB	C
Radio network architecture	C	C	B	B	A	D
Capacity of the network	C	D	C	B	A	C
Performance guarantee	D	E	C	B	A	C
Frequency efficiency	A	C	A	A	A	A
Technical aspects (subtotal)	B	C	B	C	AB	C
Financial key figures	A	C	B	C	B	C
Licence payment	(A)	(A)	(A)	(A)	(A)	(A)
Financial aspects (subtotal)	A	C	B	C	B	C
Experience of the applicant	C	D	A	C	B	C
Management aspects (subtotal)	C	D	A	C	B	C
GRAND TOTAL	B	B	B	B/C	AB	C
RANKING	3	6	2	4	1	5

Table 16. Summary of the marks awarded

The marks awarded under each aspect and each dimension are outlined in table 16, whereas the award of marks to the indicators and sub-indicators appears in chapter 3.

As seen from table 16, the evaluation has produced the following results concerning the 3 best applications:

1. A5
2. A3
3. A1

with the indicated ranking. The difference between A5 and A3 is approximately the same as the difference between A3 and A1.

5.2 The results based on business case sensitivities, risks and credibility

The assessments of the credibility, the sensitivities and the risks of the applications generate a ranking among the applications, and it has been concluded that differences do in fact exist, for example within the group of the three best applications, between this group and the remaining applications, as well as

internally among the non-nominated applications, with A2 as the least satisfactory application.

As the attention has been to nominate the 3 best applications, the following has been concluded:

1. A5
2. A3
3. A1

with the indicated ranking. The risks identified among the 3 best applications might turn out to be general business type risks, whereas some of the risks identified for A4, A6 and, in particular, A2 with the indicated ranking are more serious.

Some of the risks have been subject to supplementary analyses, which are summarised in appendices 9 - 13.

5.3 The results based on a re-grouping of the criteria

In order to investigate whether the conclusions of the evaluators are consolidated on the basis of § 19 of the RFP document, the evaluators have carried out a separate conformance testing.

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

Dimension	Weight	A1	A2	A3	A4	A5	A6
Market development	10	C	C	B	C	A	C
Financial key figures	10	A	C	B	C	B	C
Experience of the applicant	10	C	D	A	C	B	C
Radio network architecture	10	C	C	B	B	A	D
Capacity of the network	10	C	D	C	B	A	C
Tariffs	18	C	D	B	C	C	A
Licence payment	11	A	A	A	A	A	A
Coverage	7	B	C	A	C	A	D
Roaming	6	A	D	C	C	C	C
Performance guarantees	5	D	E	C	B	A	C
Frequency efficiency	3	A	C	A	A	A	A
GRAND TOTAL		B1	C1	B	B1	B1	C1
RANKING		3	6	2	4	1	5

Table 17. The award of marks, re-grouped

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

From this, it can be concluded that the 3 best applications are the following:

1. A5
2. A3
3. A1

with the indicated ranking.

5.4 The results based on a conversion of marks to points

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

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

Dimension	Weight	A1	A2	A3	A4	A5	A6
Market development	10	C	C	B	C	A	C
Financial key figures	10	A	C	B	C	B	C
Experience of the applicant	10	C	D	A	C	B	C
Ratio between production	10	C	C	B	B	A	D
Capacity of the company	10	C	D	C	B	A	C
Human resources	18	C	D	B	C	C	A
Management	11	A	A	A	A	A	A
Governance	7	B	C	A	C	A	D
Reputation	6	A	D	C	C	C	C
Performance indicators	5	D	E	C	B	A	C
Frequency and quality	3	A	C	A	A	A	A
SCORING (POINTS)		462	268	210	313	432	347
RANKING		3	6	2	4	1	5

Table 18. Conversion of marks to points

As illuminated by table 18, the quantitative scoring of the applications generates the same ranking of the applications. Thus, also this method lead to the following nomination of the 3 best applications:

1. A5
2. A3
3. A1

with the indicated ranking.

5.5 A last comparison of the best applications

A1 has ample operating experience and is backed up by qualified consortium members. Furthermore, A1 has a strong position concerning international roaming, frequency efficiency as well as the financial key figures which document a financially sound business case. However, in assessing some of the marketing aspects, definite weaknesses can be identified, in particular concerning market development, tariffs and the (lack of) performance guarantees, where it generally turn out less favourably when compared to A3 and A5. In addition, it has not received the same high marks for the technical approach as have A3 and A5, although the technical approach clearly demonstrates that A1 would have the capability to make it happen.

Therefore, although A1 is a qualified candidate, when comparing it with A3 and A5 it must be concluded that A1 can be awarded no more than a 3rd place in the ranking of the three best applicants.

Both A3 and A5 are assessed favourably on marketing aspects, although some differences are clearly identifiable. A3 does not opt for market leadership, but seems inclined towards a cost leadership in order to bring the tariffs considerable down. A5 may appear to be more expensive than A3, but supplementary analyses show that A5 has a number of unique selling propositions and a sound link to the revenue streams evidenced in the financial part of the business case, leaving A5 just a fraction behind A3 on tariffs, and far below the offerings of Eircell at present.

A5, on the other hand, clearly opts for market leadership, definitely intending to pursue a more competitive marketing strategy thereby giving the strongest push to the market development in Ireland. And A5 not only opts for market leadership at the operator's level, but also creates the circumstances at the distribution and terminal levels to such an extent that competition at these levels will help boosting the market development. This strategy is reflected by the many arrangements in place, not only with dealers and other distribution channels, but also with expression of interest from key accounts, value-added-service providers/developers, developers of applications, etc. Prior to the closing date A3 opted for a more passive model, relying quite heavily on the future success of its own service provider channel.

Concerning coverage, both A3 and A5 have been awarded the same and the highest marks. Extensive special coverage is offered by both, which enhances the appeal of GSM for different groups of users as well as it stimulates the traffic and improves

the quality. However, A5 has been assessed slightly more favourable than A3, primarily because of the intention to launch commercially at a point in time, when it has approximately 80% coverage. This advantage is furthermore substantiated by the fact that A5 is better than A3 concerning both the radio network architecture and the network capacity. These technical dimensions are important as they are determinants of the network quality of service that the customers will meet. As it has been impossible just to rely on the quoted figures concerning blocking and drop out rates, all that can be concluded is that the customers of an A5 network will, with a high probability, meet a better network quality of service than the customers of an A3 network.

In addition, A5 demonstrates a willingness to give much better performance guarantees than does A3. A3 has not presented any guarantee obligations, but suggests a number of "technical" action plans. A5 has not only stated milestones and some guaranteed performance levels, but has value-added its promise with a severe penalty clause in case of non-compliance. As this offering can be converted to a licence condition, the enforcement task of the regulator will be eased by the model offered by A5.

Both A3 and A5 possess much experience. A3, however, distinguishes itself better than A5, partly because of the fact that Unisource has more cellular experience than Telenor, partly because the joint Irish-rooted experience of Motorola, Sigma Wireless and ESB is more relevant to cellular operations than the experience of Esat. A5 has a slightly higher degree of preparedness and experience at the top management level of the operation entity. This advantage does not outweigh the stronger point of A3, and A5 has thus been assessed less favourable than A3 concerning the experience dimension.

Finally, A3 and A5 are equal on the remaining dimensions relevant to the definition of the comparative evaluation, i.e. the financial key figures, the licence fee payment, the international roaming plans and the frequency efficiency.

The total assessment demonstrates that A1 is a qualified candidate and that both A3 and A5 are highly qualified candidates, each presenting applications comprising strong business plans.

Marginally, A3 is stronger than A5 concerning tariffs and experience. A5, however is significantly stronger than A3 concerning market development, radio network architecture, capacity of the network and performance guarantees. The dimensions, where A5 is stronger than A3, have a more heavy weight in § 19 and in the weighting concluding prior to the closing date, as well as the difference between A3 and A5 is smaller, where A3 is the strongest and bigger, where A5 has the strongest points. Additionally, A5 has lower tariffs than the existing GSM1 tariff as well as it has been assessed that A5 does indeed have the necessary and sufficient experience to operate successfully.

Summarising, it can be concluded that A5 is the best application based on the approved methods and the criteria outlined in § 19, whereas A3 and A1 are the second best and third best applications, respectively.

5.6 The recommendation

The results of the evaluation mean that the evaluators have arrived at the following ranking of the 3 best applications:

1. A5
2. A3
3. A1

It is therefore proposed to advise the Minister to enter into licence negotiations with the consortium behind the A5 application, with the prior consent of the applicant that if the negotiations ^(is) assessed by the Minister to fail or to be impossible to conclude successfully, then licence negotiations will be commenced with the next nominated candidate. If the consortium behind A5 cannot satisfactorily cover the risks identified (but not scored), it is recommended to consider entering into licence negotiations with A3. Similarly, if the consortium behind A3 cannot satisfactorily cover the risk identified (but not scored) and abandon the strong reservations concerning the draft licence, it is recommended to consider entering into licence negotiations with A1.

Prior to the licence negotiations, it is recommended to redraft the licence in order to transform the favourable offerings in the application into binding licence requirements and to cover the risks identified simultaneously.

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Annexes
to the
Evaluation of the
six applications for
the GSM2 licence
in Ireland

October, 3 1995

1st draft version

Confidential

6/10/95

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3. The evaluation model

3.1 Introduction

It has been decided to apply both a quantitative and a qualitative evaluation model to the eligible applications. This document contains information concerning the quantitative and qualitative evaluation models and intends to give a complete description of these.

The document comprises two parts: The first part describes the quantitative evaluation procedure including the selection of dimensions/indicators and the scoring model. The second part is a description of the qualitative evaluation model, including the evaluation process and a guide to the award of marks.

As both the quantitative and qualitative evaluation will be performed, the guiding principle will be to work with a manageable set of aspects, which is essentially identical, i.e. marketing aspects, technical aspects, management aspects and financial aspects. In addition to these aspects, which form a common denominator in both evaluations, the qualitative evaluation also deals with the risks, i.e. the sensitivities of the business cases in relation to the evaluation criteria outlined in paragraph 19 of the RFP document.

Each aspect is broken down into dimensions and each dimension is subsequently broken down into indicators. The interplay between the quantitative and qualitative evaluation is described in section 7.

3.2 Procedure for the quantitative evaluation process

The following steps describe the procedure for the quantitative evaluation of the eligible applications:

- 1) A set of dimensions and indicators has been selected for the quantitative evaluation process. An assessment, including a point scoring method, will be defined for all indicators. The same set of dimensions, indicators and point scorings must be used for all the eligible applications.
- 2) All the selected indicators will be assigned a weighting factor. If the quantitative evaluation turns out to document that the factual basis for any part of the scoring has been wrong, a recalculated scoring will then be conducted.
- 3) The score for each indicator will be a value between 5 and 1 (both included), with 5 being the best score. All scores should be rounded to the nearest integer.
- 4) Uncertainties regarding the scoring of points may be dealt with in the qualitative evaluation.
- 5) The result of the quantitative evaluation should be considered with due respect to the significance of differences in the total sum of the points assigned.

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A memorandum comprising the salient issues of the quantitative evaluation will be annexed to the evaluation report.

3.3 Dimensions assessed in the quantitative evaluation

An overview of the selected dimensions, indicators and the relation to the RFP document paragraph 19 can be seen in the following table:

Evaluation criteria from Paragraph 19 in the RFP document	Dimensions linked to each evaluation criteria	Indicators for the dimensions
Credibility of business plan and applicant's approach to market development	Market Development Experience of the applicant Financial key figures	Forecasted demand Number of network occurrences in the mobile field Solvency and IRR
Quality and viability of technical approach proposed and its compliance with the requirements set out therein	Radio network architecture Capacity of the network	Number of cells Reserve capacity
The approach to pricing proposed by the applicant which must be competitive	Tariffs	Competitiveness of an OECD-like GSM2 basket
The amount the applicant is prepared to pay for the right to the licence	Licence payment	Up front licence fee payment
Attainable (or achievable) minimum coverage requirements and the extent to which they may be exceeded	Coverage	Speed and extent of geographical coverage of class M 200 handheld terminals
The extent of applicant's international roaming plan	International roaming plan	Number of international roaming agreements
The performance guarantees proposed by the applicant	Quality of service performance ¹⁾	Blocking rate and dropout rate
Efficiency of proposed use of frequency spectrum resources	Frequency efficiency	Frequency economy figure

The evaluation criteria from paragraph 19 of the RFP document are arranged in descending order of priority. This means that "Credibility of business plan and applicant's approach to market development" is the most important criterion, which is reflected in three different dimensions being linked to this evaluation criterion and the weighting of the indicators.

1) Project performance guarantee will be dealt with in the qualitative evaluation.

The following subsections discuss the dimensions and indicators selected in accordance with paragraph 19 of the RFP document and describe the scoring model for each defined indicator.

Dimensions and indicators:

3.3.1 Dimension: Market development

Indicator: Forecasted demand

The expected capability to attract subscribers is an important and measurable dimension which can be assessed quantitatively. As an indication of the expected market development, the forecasted demand will be used as an indicator. The indicator should be assessed by ultimo 4th year of licence award. It has been decided to use the sub-indicators, which cover both the value aspect of demand (traffic generated) and the volume aspect (number of subscribers).

It has been decided to use the following scoring formula concerning the value aspect:

$$\text{Market pen. score 1} = 1 + \frac{\text{quoted no of total annual traffic minutes} - 50,000 \times 1,500}{25,000 \times 1,500}$$

With the condition that: 1 - Market penetration score 1 - 5

It has been decided to use the following scoring formula concerning the volume aspect:

$$\text{Market pen. score 2} = 1 + \frac{\text{quoted no of SIM cards} - 50,000}{25,000}^2$$

With the condition that: 1 - Market penetration score 2 - 5

In the specifications to the tender document, the required information may be found in Table 1 (item 2) and Table 4 (item 11) regarding the number of active SIM cards and the annual billable traffic.

3.3.2 Dimension: Coverage

Indicator: Speed and extend of demographical coverage of class IV (2W) handheld terminals

Fast coverage of the population has been one of the most important factors of success for GSM systems in other countries, and this is most likely to be of similar importance for the Irish GSM systems as well. Therefore, the coverage should be assessed quantitatively using population coverage for handheld class IV (2W) terminals for outdoors use.

The scoring for the coverage indicator is a mean value taking both speed and extend into account:

$$\text{Demographical coverage score} = \frac{1}{4} \sum (\text{DCS}(\text{year}(i)), i = 1, 2, 3 \text{ and } 4)$$

where DCS(i) is given for each year based on the ultimo year demographical coverage for outdoor use class IV terminals by own network using the following curve:

Points	Coverage year 1	Coverage year 2	Coverage year 3	Coverage year 4
1	≥ 30% and < 40%	≥ 70% and < 75%	≥ 80% and < 85%	≥ 90% and < 92%
2	≥ 40% and < 50%	≥ 75% and < 80%	≥ 85% and < 90%	≥ 92% and < 94%
3	≥ 50% and < 60%	≥ 80% and < 85%	≥ 90% and < 92%	≥ 94% and < 96%
4	≥ 60% and < 70%	≥ 85% and < 90%	≥ 92% and < 94%	≥ 96% and < 97%
5	≥ 70%	≥ 90%	≥ 94%	≥ 97%

The required information may be found in the specifications for the tender document, Table 7 Items 22 and 23.

3.3.3 Dimension: Tariffs

Indicator: Competitiveness of an OECD-like GSM2 basket

The tariffs are an important market penetration factor in any GSM market, and in addition, low tariffs will benefit the Irish customer. In order to match the average customer, the basket method can be utilised as a method for tariff comparison.

Tariffs are evaluated quantitatively by a basket, which is essentially the same tariff comparison indicator as suggested and applied by the OECD. The scoring is related to the applicant's basket ultimo year 4 compared to an identical basket of TACS 900, using the TACS 900 tariffs as of 1 January 1995.

The scoring will be defined by the following table:

Basket	Points
The GSM2 tariff basket compared to the TACS 900 basket in terms of price differences	
10% to 30% cheaper	5
30% to 40% cheaper	4
40% to 50% cheaper	3
50% to 60% cheaper	2
60% to 70% cheaper	1

The required information and the definition of the OECD basket regarding the GSM2 applicants may be found in the specifications for the tender document, Table 8 Item 28.

3.3.4 Dimension: The applicant's international roaming plan

Indicator: Number of international roaming agreements

An important advantage of GSM over the analogue systems presently in use, is the possibilities of widespread international roaming. The extent of the applicants' international roaming plan is an important factor to include in the quantitative evaluation.

The relevant indicator is the number of international roaming agreements planned by the applicant by ultimo year 2 after the licence award. If there is no detailed information available on the proposed number of international roaming plans, even after presentations by the applicants, this indicator will not be scored.

If the information is available, the final score is calculated according to the following formula:

$$\text{Final score} = \text{renormalisation factor} \times \text{roaming score}$$

The roaming score is equal to the number of international roaming agreements. The renormalisation factor is common for all applications and is chosen so that:

$$\text{Factor} \times \text{roaming score} = 5$$

for the application with the highest roaming score.

This "renormalisation" of the score value will guarantee that the resulting final score will be between 5 and 1. An example of the renormalisation process is given below:

Applicant	Temp. score	Factor	Final point
A	8	5/20 or 0.25	2
B	16		4
C	20		5
D	15		3,75
E	4		1

3.3.5 Dimension: Radio network architecture

Indicator: Number of cells

The cell planning serves as important evidence of the overall quality of the cellular network, which can be compared with the targets for quality of service, making the number of cells in operation a relevant indicator. This figure is not static, so the figure quoted should be ultimo 4th year after licence award.

The following formula applies:

$$\text{Cells score} = 1 + \frac{\text{quoted number of cells} - 300}{150}^4$$

With the condition that $1 \leq \text{Cells score} \leq 5$

The required information may be found in the specifications for the tender document, Table 20 Item 150.

3.3.6 Dimension: Reserve capacity of the

Indicator: Reserve capacity

The interplay between the capacity supplied by the GSM operators and the requirements from the subscribers is important when evaluating the quality and

viability of the proposed technical approach. Besides from developing the network to such an extent that the demand from the subscribers can be met, the operator must also allow for a certain buffer to compensate for unexpected increases in the demand.

The relevant indicator for this dimension is the reserve capacity, as defined in Table 16 Item 98 from the tables the applicants are required to complete.

The following formula applies:

$$\text{Capacity score} = 1 + \frac{1}{4} \frac{\sum_{i=2}^5 \text{Reserve capacity (year 2, 3, 4 and 5)} - 20\%}{10\%}^5$$

With the condition that: $1 \leq \text{Capacity score} \leq 5$

The capacity scores is calculated 5th year after licence award.

3.3.7 Dimension: Quality of service

Indicators: Blocking rate and dropout rate

The performance guarantee proposed by the applicant in the application will be binding in the licence agreement and is as such an important dimension which furthermore can be assessed quantitatively. For this dimension, the blocking rate and the drop out rate are the most relevant indicators.

The following scoring formulas will be used:

$$\text{Blocking rate score} = 1 + \frac{8 - \frac{1}{4} \sum \text{blocking rate (years 2, 3, 4 and 5)}}{1,1}^6$$

With the condition that: $1 \leq \text{Blocking rate score} \leq 5$

$$\text{Dropout rate score} = 1 + \frac{8 - \frac{1}{4} \sum \text{dropout rate (years 2, 3, 4 and 5)}}{1,4}^7$$

With the condition that: $1 \leq \text{Dropout rate score} \leq 5$

As can be seen from the formulas, the indicators defined have been based on an average of the service figures quoted for 4 years (years 2, 3, 4 and 5) after licence award. The required information can be found in the specifications for the tender document, Table 9 Items 30 and 31.

3.3.8 Dimension: Frequency efficiency

Indicator: Frequency economy figures

The frequency economy which provides crucial evidence of the utilisation of frequencies as a common resource is relevant to include in the quantitative evaluation. The available frequency spectrum for the GSM operators is limited, and

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the GSM operator has to accommodate the active SIM cards within the limited spectrum.

The frequency economy will be assessed ultimo the 5th year after licence award, as this will provide information on the applicants frequency economy in a mature network. The following indicator will be used to express the frequency economy:

$$FE_5 = \frac{\text{Number of SIMS year 5} \times \text{average peak hour traffic year 5}}{\text{No. of GSM channels demanded year 5}} \times 8$$

(All figures in the fraction should be based on the ultimo year values.) The required information can be found in the specifications for the tender document, Table 16 Item 100.

The FE_5 figure will depend on the cell planning and the planned capacity margin. The figure will also depend on penetration of half rate coding and in order to prevent spread in the figures due to variances in the applicants' assumptions, the penetration of half rate coding is fixed as a calculatory assumption in the specifications to the tender document.

Assuming that 50% of the subscribers will use half rate coding ultimo year 2000, the final score is calculated according to the following formula:

$$\text{Final score} = \text{renormalisation factor} \times FE_5$$

Where the above mentioned renormalisation factor is common for all applications and is chosen so that

$$\text{Factor} \times FE_5 = 5$$

for the application with the highest FE_5 score. This "renormalisation" of the score value will guarantee that the resulting final score will be between 5 and 1.

3.3.9 Dimension: Experience of the applicant

Indicator: Number of network occurrences in the mobile field

The right experience is a very important factor for the credibility of the business case. Therefore, the applicants are requested to inform about the number of countries, where they have played a major role in the installation and commercial operation of:

- 1) GSM networks that compete nationally with the networks dominated by the PTT's
- 2) GSM networks operated in cooperation or controlled by the PTT's
- 3) Other cellular telephone networks.

1 Textbox stating three different types of experiences

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The scores will be calculated for each member of the consortium on the basis of the following formula:

$$\begin{aligned} \text{Temp. value} = & 3 \times (\text{experience points of ad 1}), \text{ i.e. GSM-2 experience} \\ & \text{occurrences} \\ & + 2 \times (\text{experience points of ad 2}), \text{ i.e. GSM-1 experience} \\ & \text{occurrences} \\ & + 1 \times (\text{experience points of ad 3}). \end{aligned}$$

These values are added using the ownership ratios as weighting factors. The weighted sum is called the temporary score, which is renormalised to yield the final score.

The "experience points" depends on the number of occurrences within the GSM-roles defined in the box above.

Number of occurrences	Experience points given
1	2
2	3
More than 2	4

The word "occurrences" may need some further explanation in order to avoid that insignificant or redundant occurrences are counted. As a guideline, the applicant must play a major role. In addition, the network quoted must be in commercial operation in an OECD country. Finally, a number of similar participation in the same country may only be counted as one occurrence.

The final score is calculated according to the following formula:

$$\text{Final score} = \text{renormalisation factor} \times \text{temp. score}$$

The above-mentioned renormalisation factor is common for all applications and is chosen so that:

$$\text{Factor} \times \text{temp. score} = 5$$

for the application with the highest temporary score. This "renormalisation" of the score value will guarantee that the resulting final score will be between 5 and 1.

3.3.10 Dimension: Licence payment

Indicator: Up front licence fee payment

The amount the applicant is prepared to pay for the right to the licence is another factor in the evaluation, and one which can readily be included in the quantitative analysis.

The final score is calculated according to the following formula:

$$\text{Final score} = \text{renormalisation factor} \times \text{licence fee score}$$

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The above-mentioned renormalisation factor is common for all applications and is chosen so that:

$$\text{Factor} \times \text{licence fee score} = 5$$

for the application with the **highest** licence fee score. This "renormalisation" of the score value will guarantee that the resulting final score will be between 5 and 1.

3.3.11 Dimension: Financial key figures

Indicators: Solvency and IRR

There are a number of financial indicators, which all are interrelated. Two indicators have been chosen which both express the credibility of the business case: The solvency and the internal rate of return (IRR) as defined in the specifications. The solvency is a value which varies temporarily, and the average for the years 2,3,4 and 5 is used. The IRR is a value derived over the entire period of the business case (15 years) and it is not critical to consider the temporal variation here.

The scoring is based on the following tables:

Average solvency over year 2,3,4 and 5	
Solvency	Score
$\geq 60\%$	5
$\geq 45\%$	4
$\geq 35\%$	3
$\geq 25\%$	2
$\geq 20\%$	1

Internal rate of return	
V=Numeric value of IRR (%)	Score
$V \geq 14\%$	5
$13\% \leq V < 14\%$	4
$12\% \leq V < 13\%$	3
$11\% \leq V < 12\%$	2
$V \geq 10\%$	1

The required information can be found in the specifications for the tender document, Table 15 Items 91 and 97. Should the applicant prepare a 5 year plan, the IRR score will be 1.

3.4 Vote casting and weight matrix

The following table shows how the votes will be given for each of the indicators in the quantitative evaluation:

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Indicator	A1	A2	A3	A4	A5	Weight
Market penetration score 1						10
Market penetration score 2						10
Speed and extent of demo/roll-out coverage of classical WWW and GPRS services						7.5
Competitiveness of applied like GSM2 basket						10
Number of international roaming agreements						6
Number of cells						10
Reserve capacity						10
Blocking rate						2.5
Dropout rate						2.5
Frequency economy figure						3
Number of network occurrences in the mobile field						10
Up front licence payment from the applicant						14
Solvency						7.5
IRR						15
Grand Total						100

Note: Credibility of business plan and the applicant's approach to market development will be covered in the following indicators: experience of the applicant, market development, solvency and IRR. Quality and viability of technical approach will be covered by the number of cells and the reserve capacity.

3.5 Procedure for the qualitative evaluation process

Despite the "hard" data of the quantitative evaluation, it is necessary to include the broader holistic view of the qualitative analysis. Other aspects such as risk and the effect on the Irish economy may also be included in the qualitative evaluation, which allow for a critical discussion of the realism behind the figures from the quantitative analysis.

The following describes some of the major steps in the qualitative evaluation process:

- 1) The eligible applications are read and analysed by the evaluators.

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- 2) The eligible applications are evaluated by way of discussions and analyses.
- 3) When deemed adequate and necessary, in-depth supplementary analyses will be carried out.
- 4) Initially, the marks will be given dimension by dimension. Afterwards, marks will be given aspect by aspect (subtotals) and finally to the entire applications (grand total).
- 5) When the dimensions are being assessed, the evaluators should, as far as possible, use the same indicators as used during the quantitative evaluation. Supplementary indicators may be defined, however, if the existing indicators are not sufficiently representative for the dimensions to be evaluated.
- 6) During the qualitative evaluation, the evaluators should take the results from the quantitative evaluation into account, as a starting point, and make the operationalisations of the dimensions (cf. indent 5 above) in order to make fair comparisons between the applications.
- 7) If major uncertainties arise (e.g. in accordance with step 4 of the quantitative evaluation or due to incomparable information) supplementary analyses might be carried out by Andersen Management International A/S in order to solve the matter.
- 8) The results of the qualitative evaluation will be contained in the main body of the draft evaluation report. The results of the supplementary analyses will be annexed to the draft report.

The draft report is to be presented and discussed among the 'essential persons' (identified by the Department). On this basis, Andersen Management will be asked to propose a final report.

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3.6 Guide to the award of marks

In order to guide the markgiving, a matrix has been elaborated below. The dimensions and indicators are not weighted ex ante. The marks will be awarded according to a "soft" 5-point-scale (A, B, C, D, E) with A being the best mark. Averaging will be made after consensus among the evaluators.

Aspect and dimensions	A1	A2	A3	A4	A5
Market aspects (subtotal)					
Market development					
Coverage					
Plans					
International roaming plan					
Technical aspects (subtotal)					
Radio network architecture					
Capacity of the network					
Performance guarantees					
Frequency efficiency					
Financial aspects (subtotal)					
Financial key figures					
Licence payment					
Management aspects (subtotal)					
Experience of the applicant					
Other aspects (subtotal)					
Risks (linked to the host economy)					
Grand total					

3.7 The interplay between the quantitative and the qualitative evaluation

Initially, the quantitative evaluation is conducted in order to score the applications. This initial score will be given during the first three weeks after 23 June. This initial score - together with number crunching performed on the basis of Excel spreadsheets - will then form the basis for the presentation meetings and the qualitative evaluation.

When the bulk of the qualitative evaluation has been performed, however, this evaluation will conversely form the basis for a recalculation of scoring applied initially if mistakes, wrong information or similar incidentals can be documented.

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The results of both the quantitative and the qualitative evaluation will be contained in the draft report with annexes to be prepared by the Andersen team.

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4. Supplementary analysis on financial conformance check

4.1 Introduction

In addition to the mandatory financial tables some of the applicants describe their business plans in different tables. Unfortunately, there are examples of lack of conformance in the applications between the different financial statements.

The purpose of this supplementary analysis is to give a quick overview of the conformance between mandatory tables and voluntary financial figures from each applicant.

4.2 Conduct of the analysis

This analysis has concentrated on some financial total figures where a comparison has been made between mandatory and voluntary tables.

The highlighted figures are:

- ⊗ Total turnover (item 36)
- ⊗ Total operating costs (item 51)
- ⊗ Net profit (item 59)
- ⊗ Accumulated profit (item 60)
- ⊗ Total investments (item 70)
- ⊗ Accumulated investments (item 71)
- ⊗ Net fixed assets (item 73)
- ⊗ Total assets (item 78)
- ⊗ Equity (item 81)
- ⊗ The relation between the profit & loss account and the equity
- ⊗ Operating and investment cash flow (item 104)
- ⊗ Net cash flow (item 110)
- ⊗ IRR (item 97)
- ⊗ Solvency (item 91).

Comparison is not possible on all figures for all applicants. For example has applicant A4 not stated a balance sheet in the voluntary tables.

4.3 Findings

A1:

The mandatory tables are used in the voluntary part, e.g. conformance.

In the mandatory tables the following shortcomings have been found:

- ⊗ item 71, accumulated investments, is not in conformance with the sum of item 70
- ⊗ item, 72 accumulated depreciation, is not in conformance with the sum of item 53
- ⊗ unclear connection between the profit statement and the equity.

A2:

In the voluntary cash flow summary (Financial book, 15 year Business Plan) is an extra IR£ 20 mill. licence in year 1996 compared to the mandatory tables, i.e. the voluntary balance sheet and equity is influenced by + IR£ 20 mill. The consequence is that the solvency and IRR will not be the same in the mandatory and the voluntary part.

A3:

Conformance.

In the mandatory tables it has been noticed that in item 110, net cash flow, the dividend is added and not subtracted. This has no consequence on the equity or the IRR.

A4:

Item 54, profit before finance and tax, in the mandatory tables is miscalculated by adding the depreciation. This figure deviates from the voluntary projections in volume 5, Financial Plan, which are calculated correctly. The consequence of the miscalculation is that item 57, 59 and 60 are all wrong.

It seems like the equity is correct (there is no balance sheet in the voluntary part).

The solvency and IRR calculations are not influenced by the item 54-failure.

A5:

Conformance.

A6:

Conformance.

4.4 Conclusion

This analysis does not indicate major problems of conformance between mandatory tables and voluntary financial figures and it gives no reason for correcting the quantitative scoring.

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5. Supplementary analysis on blocking and drop-out rates

5.1 Introduction

The applicants for the second Irish GSM licence have in their applications described planning approach and network design assumptions upon which their respective solutions have been prepared. The qualitative evaluation of the applications aims at establishing a comparison of the solutions by looking into the expected "quality" of the suggested mobile telephone networks. An important quality issue in this respect is the so-called "Grade-of-Service" (GOS) which is typically related to the parameters specified as blocking and drop-out rates.

Originally intended to be combined into one of the evaluation-dimensions under the technical aspect in the qualitative evaluation, the blocking and drop-out rates were found to be calculated incomparably from applicant to applicant. In order to maintain the principle of fairness and objectivity throughout the evaluation, it was decided to omit direct comparison of specified blocking and drop-out rates as one dimension among others in the planned evaluation. **Instead, this supplementary analysis has been carried through to compensate for the apparent differences in the applicants' definitions and specifications.**

5.2 Sources of Information

The "Guidelines for submission of applications to become the second operator of GSM Mobile Telephony within Ireland" requests calculation of busy hour blocking and drop-out rates on the radio path only. The figures submitted by the six applicants are presented, ~~uncommented~~, in the report on "Quantitative evaluation for Irish GSM2". (For reference enclosed as Appendix 1 at the end of this analysis).

The applicants have in general submitted average figures for blocking and drop-out rates which are considered non-representative for the suggested service where it is mostly needed, i.e. downtown Dublin. Consequently, all applicants were requested in writing to expand their description of expected blocking/drop-out rates by taking into account all factors resulting in an unsuccessful call(attempt) to and from PSTN under worst-case conditions. Particularly the following information was requested:

- ⊗ Worst-case blocking and drop-out rates on the applicant's own infrastructure.
- ⊗ Worst-case end-to-end blocking and drop-out rates. End-to-end is to be understood as the entire communication path on the applicant's own infrastructure and on the PSTN.

Taking into account the information given in the applications, the written answers to the questions given by letter, and the answers given during the presentation meetings, the following observations could be made concerning each of the 6 applicants:

A1

A1 has from Telecom Eireann acquired the information that the average blocking rate in the Irish PSTN is 2% in 1996, falling to 1% in year 2001 and onwards.

A1 has provided a written discussion of the applied calculation principles and presents in a table the worst case blocking rates during the period 1996 to 2010. Figures are stated for traffic in both directions and stay in the range between 3.2% and 4.2%.

A1 informs that Telecom Eireann cannot provide drop-out rate figures for the Irish PSTN. Experience shows that drop-out rates for A1's own network will be 2% in year 1 and 1.75% from year 2 and onwards. By estimating an average 0.75% drop-out rate of the Irish PSTN, A1 finally states the total worst case drop out-rates to be 2.8 in year 1 and 2.5 for the rest of the period.

A2

A2 has not acquired blocking/drop-out rates for the Irish PSTN, but assumes a 1% blocking of this network (claimed to be a typical level in Europe).

A2 has in its application indicated very low figures for blocking and drop-out rates. Surprisingly in its written answers to the questions given by letter, following a short discussion of the applied calculation principles, A2 has indicated very high worst case blocking rates 5.3% for city centres, 8.2% for urban areas and roads and 13% for rural areas.

However, the discussions during the presentation meeting revealed that (in spite of the guidance in the written question No. 6) A2 had calculated the new blocking rates by also taking into account areas without coverage (consideration of a factor representing the probability of coverage). During the presentation meeting it was agreed that the resulting worst case blocking rate could be calculated by omitting the coverage probability factor. By applying this principle in the analysis, we find the relevant worst case blocking/drop-out rates to be constant 3.3% during the period 1996 to 2010 (no matter the coverage area type).

Concerning the worst case drop-out rate, A2 has indicated a figure of less than 1%. As this undoubtedly did not include drop-out in the PSTN, it was agreed during the presentation meeting, that A2's figure for worst case drop-out rate should be "less than 2%".

A3

A3 has, like A1, been in contact with Telecom Eireann concerning blocking rate figures of the PSTN. Based on own values and the information given by Telecom Eireann, A3 presents a table of worst case blocking rates during the period 1996 to 2010. The figures stay between 2% and 2.92%

A3 has not commented on the drop-out rate of the PSTN. Concerning the GSM network, a monitoring is claimed to ensure a maximum drop-out rate of 1% during 1996 to 2010.

A4

A4 has not acquired blocking/drop-out rates for the Irish PSTN, and in its written answers to the questions given by letter, the subject of worst case drop-out rates is not commented at all.

Following a short written discussion of the applied calculation principles, A4 presents a table of worst case blocking rates during the period 1996 to 2010. The figures (which are representative of A4's own network only) stay between 0.15% and 1.94%. From the discussions during the presentation meeting it was furthermore agreed to add blocking rate figures as specified by Telecom Eireann (cf. A1 & A3) to obtain the worst case end-to-end blocking rate. The resulting figures stay between 2.15% and 2.94% during the 15 year planning period.

The only reference to the subject of drop-out rates is found in A4's original application in the form of the mandatory tables or in the technical plan as the subject of "call continuity". In any case, A4's worst case drop-out rate is accordingly specified as constant 1% (for own network) during the period 1996 to 2010.

A5

A5 has not acquired blocking/drop-out rates for the Irish PSTN, but assumes a 1% blocking of this network (claimed to be a typical level in Europe).

A5 has provided a written discussion of the applied calculation principles and accordingly presents its end-to-end worst case blocking rate as constant 4% during the period 1996 to 2010.

A5 has not commented on the drop-out rate of the PSTN. Concerning the GSM network a maximum drop-out rate of constant 2% is stated during the period 1996 to 2010.

A6

A6 has not acquired blocking/drop-out rates for the Irish PSTN, but assumes a 1% blocking/drop-out of this network (claimed to be a conservative value for calculation purposes).

Following a short written discussion of the applied calculation principles, A6 presents a table of estimated worst case end-to-end blocking and drop-out rates during the period 1996 to 2010. The figures stay between 1.5% and 3.3%.

During the presentation meeting it became evident that A6 had mixed up the subjects of blocking and drop-out. It was subsequently declared that the above figures are representing blocking rates only.

During the presentation meeting A6 further stated that the worst case end-to-end drop-out rate should be constant 2% during the period 1996 to 2010.

5.3 Conclusion

Based on the above findings, the results of this supplementary analysis can be summarised in the following tables. For convenience, the entries have been limited to the same years as applied in the quantitative evaluation.

Selected worst case end-to-end blocking rates:

(as retrieved from the applicants' information)

(PRIVATE %)	A1	A2	A3	A4	A5	A6
Year 2	4.0	3.3	2.92	2.27	4.0	3.0
Year 3	3.8	3.3	2.65	2.30	4.0	2.5
Year 4	3.6	3.3	2.54	2.28	4.0	2.5
Year 5	3.4	3.3	2.30	2.21	4.0	2.7

The values are in all cases below a 5% blocking rate with A4 displaying the lowest (best) result. This could in fact be true due to the excessive spare capacity offered by A4's network solution.

For the same reason, it is remarkable that A5 displays the highest blocking rates, as A5, too, has provided a high spare network capacity (similar to A4's). It is close to conclude that A5's real blocking rates would in fact be considerably lower and that the displayed figures represent an attitude of prudence (realism?) not always encountered in licence application competitions.

The most complete and comprehensive information on worst case end-to-end blocking rates appears to be provided by A1.

The above figures reflect the individual network designs planned by the applicants, but as far as the blocking contribution from PSTN is concerned the comparison is not totally fair. The applicants have no direct influence on the quality of the PSTN-controlled path, and the experienced blocking herefrom should in practice remain almost independent of the applicant (apart from local variations due to differences in the selection of interconnect points).

A reasonable adjustment of the figures would consequently be to change the above table by replacing the PSTN blocking assumed by the applicants with the figures provided by Telecom Eireann in the answers to A1 and A3. This transaction results in the following table:

Selected worst case end-to-end blocking rates:

(adjusted to identical PSTN contributions)

*Annex 5:
Supplementary analysis on blocking and drop-out rates*

%	A1	A2	A3	A4	A5	A6
Year 2	4.0	4.1	2.92	2.27	4.8	3.8
Year 3	3.8	3.9	2.65	2.30	4.6	3.1
Year 4	3.6	3.7	2.54	2.28	4.4	2.9
Year 5	3.4	3.5	2.30	2.21	4.2	2.9

The drop-out rates are summarised as follows:

Selected worst case end-to-end drop-out rates:

(as retrieved from the applicants' information)

%	A1	A2	A3	A4	A5	A6
Year 2	2.5	< 2	1+PSTN	1+PSTN	2+PSTN	2
Year 3	2.5	< 2	1+PSTN	1+PSTN	2+PSTN	2
Year 4	2.5	< 2	1+PSTN	1+PSTN	2+PSTN	2
Year 5	2.5	< 2	1+PSTN	1+PSTN	2+PSTN	2

Further adjustment of the end-to-end drop-out rates can not be justified due to the lack of definite information on Telecom Eireanns contribution.

The figures in the tables should speak for themselves and of course be studied in the light of the comments given to each of the applicants on the preceding pages.

In terms of comparing evaluation-dimensions and under consideration of the relative uncertainty in deciding these figures, it could be added that the differences between the applicants are marginal from the offered network/service quality point of view.

*Annex 5:
Supplementary analysis on blocking and drop-out rates*

Appendix 1

Dimension 6. Quality of service performance (Blocking rate and dropout rate)

Blocking rate and dropout rate in year 2,3,4,5

	A1.	A2.	A3.	A4.	A5.	A6.
Blocking rate year 2	2	0	0,34	2	2	1,9
Blocking rate year 3	2	1,1	0,47	2	2	1,9
Blocking rate year 4	2	1	0,53	2	2	1,9
Blocking rate year 5	2	1,2	0,52	2	2	1,9
Blocking rate score	6,5	7,5	7,9	6,5	6,5	6,5
Points	5,00	5,00	5,00	5,00	5,00	5,00

	A1.	A2.	A3.	A4.	A5.	A6.
Dropout rate year 2	4	1	2	1	1	0,99
Dropout rate year 3	4	1	2	1	1	0,99
Dropout rate year 4	4	1	2	1	1	0,99
Dropout rate year 5	4	1	2	1	1	0,99
Dropout rate score	3,9	6,0	5,3	6,0	6,0	6,0
Points	3,86	5,00	5,00	5,00	5,00	5,00

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6. Supplementary analysis on tariffs

[Not fully drafted]

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7. Supplementary analysis on interconnection
[Not fully drafted]

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8. Supplementary analysis on the effects on the Irish economy
[Not fully drafted]

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9. Supplementary analysis on consortia composition and selected risks

9.1 Introduction

This note contains information on the composition of the consortia as described in the applications concerning aspects such as

- ⊗ shareholding by Irish partners and the public
- ⊗ plans or intentions of share flotation
- ⊗ shares held by State-owned or semi-state owned bodies
- ⊗ interests/partnership rel Telecom Eireann
- ⊗ interest relations between partners in a consortium

9.2 The consortia composition

A1	Irish MobiCall
25%	SBC Communications Inc (Southwestern Bell Corp)
25%	DETECON (30% Deutsche Telekom, 3 banks)
25%	Tele Danmark International (Telecom A/S)
25%	3 Irish investors:
	10.5% Martin Naughton
	10.5% Lochlann Quinn
	(The two together own all shares in Glen Dimplex)
	4% Kieran Corrigan.

The application states an intention to enlarge the ownership base by flotation of 25% of the share holdings held by MobiCall's members. This will be initiated after 3 years of operation, depending on the success of the company and on stock market conditions.

The initial shareholding by Irish investors will be of 25%. After flotation, as mentioned above, this amount could rise to nearly 45%.

A2	Cellstar
60-64%	Comcast Corporation US

36-40% 3 Irish investors:

15% Radio Telefis Eireann (100% State owned)

6-10% Bord na Mona (100% State owned)

15% GCI Limited (newly formed Irish company)

The application states a willingness, if desired by the government, to offer to the public at some time in the future (after 3-5 years) up to 30% of the equity in the form of ordinary shares.

The initial shareholding by Irish investors will be of 36-40%, which after a flotation could rise to about 55%.

Tele-Communications, Inc., (TCI), who indirectly owns a 12% share in consortium A4 (through Prince Holdings Ltd), has entered into partnership with Comcast Corporation e.a. on US PCN networks.

A3 Persona

26.7% Motorola

26.7% Unisource (NL, S, CH, E telecom joint venture)

26.7% Sigma Wireless (Irish mobile communications group)

20% ESB (100% State owned)

The initial shareholding by Irish investors will be of 46.7%. The application includes no intention of share flotation.

Sigma Wireless was formed in 1991, following a management buy-out of Motorola's Irish distribution activities. The principal activities of the company are the exclusive distribution and sale of Motorola radio communications products and systems in Ireland.

Motorola is a 49% shareholder in a joint venture with Telecom Eireann, called Eirpage, which provides the only nationwide paging service in Ireland.

A4 Irish Cellular Telephones

26%	AT&T	26%
48%	Princes Holdings Ltd	
16.4%	United and Philips Comm	9.6% 26%
2.0%	Independent Newspapers	24% 26%
2.6%	Riordan Communications	2.4% 5%
	Tele-Communications Inc	12% 12%
5%	Semi-State Body	5%

The semi-state owned body is Shannon Development (Shannon Free Airport Development Company Limited), a company established by the Government of Ireland.

The last column represents the distribution of total interests after allocation of the share holdings of PHL among its partners. From this, the initial Irish share of interests in ICT will be 36%. ICT proposes to make a public offering of approximately 25% of its shares within 3 years of the award of the license.

A5 Esat Digifone

50% Telenor Invest AS

50% Communicorp Group (34% held by Advent Int. plc)

The initial shareholding by Irish investors will be of 33%. It is the intention of the applicants to make 20% of the equity available to institutional investors in the period prior to service launch, including a 5% equity stake to Advent International (US). Within three years of launch, it is the intention to make a further 12% of the total equity available for flotation.

A6 Eurofone

40% MIC (Millicom International Cellular)

20% Kinnevik (39% shareholder in MIC)

40% Independent Trust:

10% option to Coras Iompair Eireann (CIE) (semi-state)

30% public share issue after receipt of license

The initial shareholding by Irish investors would thus be approx. 40%, with the intention of the applicants to increase this to 50% within 4 years from the award of the license.

A7 Eircell

100% Telecom Eireann (State owned).

9.3 Final remarks

It should be noted that many relationships exist between a number of the partners participating in the competing applications. It seems to be normal procedure that a telecom company can cooperate with another telecom company in one area of business, and at the same time compete vigorously with the same company in another area of business. Only a few relationships are mentioned here.

Following relationships and other points of interest should be noted:

- ⊗ Consortium A3 Persona: Motorola has a 26.7% stake in the consortium and close business relations to Sigma Wireless (26.7% shares).

Furthermore, Motorola, is a 49% shareholder in Eirpage, a joint venture with Telecom Eireann. Sigma Wireless has an agreement with Eirpage, entitling the company to receive commission in respect of existing customers that are still active on the paging network. Furthermore, Motorola which is a potential supplier of infrastructure equipment to the consortium, has obtained a terminal marketshare (through Sigma Wireless) of 40% on the Éircell network.

Motorola's potential position as a dominant player in public mobile communications systems and markets in Ireland may thus be discussed. The aspects of this discussion are:

- ⊗ Motorola as a dominant partner in the consortium: This will not be a problem in relation to license conditions and EU rules.
- ⊗ Motorola as a potential supplier of infrastructure to A3 and even to Éircell: This will not be a problem when EU rules on procurement are being observed.
- ⊗ Motorola as a partner participating in EirPage, a joint-venture with Telecom Eireann: This will not be a problem according to the rules set up in the Draft License, which states that "The licensee shall neither have direct nor indirect participation in the share capital of any other GSM operator in Ireland, provided there is a clear separation of activities and financial relations in Éircell and EirPage."
- ⊗ Motorola and Sigma Wireless as dominant players in the mobile terminal market in Ireland: This will be a problem, if and when a cross-subsidisation will occur between the A3 consortium (as a special rights holder) and the terminal market (a competition area), and in cases of discrimination of vendors of terminal equipment.
- ⊗ Consequently, the problem of Motorola being directly, or indirectly through its consortia partners, in a dominant position in the mobile telecommunications sector, from a formal point of view, when looking separately at each area of activity as described above may be expected not to be a problem, provided the relevant competition rules on procurement, cross-subsidisation, etc. are observed. The question of Motorola being in a dominant position due to its simultaneous activities in several areas of the mobile telecommunications sector in Ireland will have to be considered a potential risk in relation to the objectives on "the introduction of competition and consumer choice" set up the Minister, when announcing the competition for a second licence.
- ⊗ Four applications (A2, A3, A4, A6) have included a number of semi-state or fully State owned bodies as partners, i.e.: RTE, Bord na Mona, ESB, Shannon Development, and CIE. The shareholding of such companies varies from between 5% to a maximum of 25%, with the highest potential stake in consortium A2 Cellstar (RTE 15%, Bord na Mona 6-10%).

*Annex 9:
Supplementary analysis on consortia composition and selected risks*

The problems and potential conflicts of interests (due to a.o. the State ownership of Telecom Eireann) arising from the participation of State owned bodies in the consortia should be discussed.

A separate supplementary analysis has been carried out concerning the financial risks of A3 and A5. Please confer annex 10.

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10. Supplementary analysis on financial risks

10.1 Introduction

As stated in the main evaluation report, the two top ranked consortia have members, who presently do not have the capital required to finance the GSM-2 network.

The consortia members, who thus need capital for the funding of the GSM-2 consortium, have "secured" this capital by various instruments including the shareholders agreement and letters of commitment from investors.

In this analysis we discuss the risks due to lack of funding. We further suggest means to close the uncertainty related to financing.

The risk analysis does not include an assessment of A1, A2, A4 and A6. The financial strength of A1 is in the assessment of the financial aspect awarded the highest mark, and is not seen as a risk. The financial strengths of the three other consortia, A2, A4 and A6 are not taken into account in this risk analysis because the overall scoring already places them among the three lowest ranked consortia.

10.2 A3

The consortia members of A3 and their share distribution is as follows:

- 26.7% Motorola International Ventures Inc.
- 26.7% Unisource NV (NL, S, CH-E telecom joint venture)
- 26.7% Sigma Wireless Networks Ltd. (Irish mobile communications group)
- 20% EBSI Telecoms Ltd. (100% State owned)

The initial share holding by Irish investors will be 46.7%. The application includes no intention of share flotation.

Sigma Wireless was formed in 1991, following a management buy-out of Motorola's Irish distribution activities. The principal activities of the company are the exclusive distribution and sale of Motorola radio communications products and systems in Ireland.

Motorola is a 49% shareholder in a joint venture with Telecom Eireann, called Eirpage, which provides the only nation-wide paging service in Ireland.

In the financial plan (base case), the equity contribution is stated to be IR£ 39,935,000 with a debt financing of IR£ 42,403,000. The applications did not include a sensitivity analysis regarding these figures, but the sensitivity analysis regarding the cash flow shows that the minimum accumulated cash flow increases (numerically) from minus IR£ 102 mio. to minus IR£ 255 mio. in the event of a two year delay of subscriber uptake. Although this figure represents a possibly unrealistic event, a combined set of events influencing the business case in a

*Annex 10:
Supplementary analysis on financial risks*

negative direction could lead to a situation, where the need for finance is twice as high as in the base case.

If the ownership ratios are used as an indicator for the finance requirements, the following equity requirements holds:

Member	Ownership	Equity	Estimated worst case equity
Unisource	26,67%	10.649.333	21.298.667
Motorola	26,67%	10.649.333	21.298.667
Sigma	26,67%	10.649.333	21.298.667
ESBI	20%	7.987.000	15.974.000
TOTAL	100,00%	39.935.000	79.870.000

Table 1 Base case and worst case equity requirement

Although the financial strength of ESBI is not revealed in the application, the shareholders' agreement states, that ESBI will get all the necessary backing from the mother company, ESB. Therefore, the financial strength of ESBI seems well secured.

Unisource and Motorola are both financially strong companies, who has ample funds for this - for their small project.

Sigma is the weak partner with an equity capital of only IR£ 1 mio. The application does not state how Sigma will provide the necessary funds, but the presentation revealed that they have a letter of commitment from an Irish investment bank, AIB. As a matter of the tender procedure this piece of information can only be interpreted as a willingness to secure the necessary capital. Further, nothing definitive about the "price" of such commitment with respect to gaining equity in or control of Sigma has been stated. However, it is unlikely that Sigma's existing shareholders will give away a majority part of the shares. This is because the shareholders' agreement (see the text box below) gives a way out of the funding problem. It states that if one of the shareholders is not capable of providing a required guarantee for a loan, the other shareholders may provide the necessary backing.

The shareholders' agreement thus provides Sigma with a tool to guarantee Sigma's funding. Sigma may still decide not to use this opportunity due to other reasons. One reason could be, that the financial burden imposed by the ownership of Persona is of such a magnitude that it might cause Sigma's bankruptcy. This may happen if Sigma does not increase its equity capital to a level which will cover the initial losses in Persona during the period of the first years. Therefore, there is a need for an injection of further equity capital in Sigma if it shall persist as a stable partner in the consortium. This aspect is not addressed in the application and it leaves an uncertainty about the ownership of Sigma.

If Sigma is not able to provide the necessary funding the shareholders' agreement states that "failure by a shareholder to subscribe to its pro rata share in a subsequent share capital increase shall result in dilution of the proportionate shareholding percentage of such shareholder." Thus the consequence is that Motorola, ESB and Unisource get a higher stake. This may lead to the situation where Persona is controlled by non-Irish partners.

Annex 10:
Supplementary analysis on financial risks

Notes on the shareholders' agreement:

- ESBI may decide not to participate as a consortium member if the IRR is less than an agreed on figure,
- (MICHAEL: DENNE TEKST VISES KUN PÅ SKÆRMEN, IKKE NÅR DU PRINTER UD.) The shareholders agreement foresees the event that the Minister may not want a public utility as ESBI to participate with a 20% share.
- New shareholders may be added to the consortium upon shareholders' supermajority approval.
- All shareholders agree to pay their share of the First Stage Equity². It is stated that this will be required within 18 months of licence award.
- Failure by a shareholder to subscribe to its pro rata share in a subsequent share capital increase shall result in dilution of the proportionate shareholding percentage of such shareholder.
- It is agreed to try to maximise the debt equity ratio to at least 60:40.
- If one of the shareholders is not capable of providing a required guarantee for a loan, the other shareholders may provide the necessary backing.
- (MICHAEL: DENNE TEKST VISES KUN PÅ SKÆRMEN, IKKE NÅR DU PRINTER UD.) Rate of return which "will adequately compensate the parties for their investment".

Notes on the articles of association:

- All shares rank pari passu in all aspects.

Text box 2: Extracts from the shareholders' agreement and from the articles of association.

To conclude, the weak financial position of Sigma will not lead to financial problems for Persona, but may lead to a different ownership structure of Persona either directly through the division of its shares or indirectly through the ownership of Sigma.

This uncertainty can be limited by a proper set of licence conditions. As examples, the following types of conditions are suggested:

- Requirements for minimum equity capital of Sigma
- Requirements regarding the voting power in Persona
- Requirements regarding the loans to Sigma and their conditions.

10.3 A5

The consortia members of A3 and their share distribution of the existing corporation ESAT digifone is as follows:

50%	Telenor Invest AS
50%	Communicorp Group (34% held by Advent Int. plc)

² The first equity relates to the equity commitment stated in the first business plan. It is our interpretation that this business plan is identical to the business plan submitted with the application.

*Annex 10:
Supplementary analysis on financial risks*

With current assets of IR£ 550,000,000 Telenor has the financial strength to provide the necessary financial backing of its wholly owned (sub-)subsidiary Telenor Invest.

Communicorp is a new company which has invested heavily in telecommunications infrastructure and has a very weak balance sheet which needs capital injection before it can support the shareholders' equity commitments stated in the shareholders' agreement:

Notes on the shareholders' agreement:

- A total equity requirement of IR£ 52,000,000 is described as well as a commitment to keep a 40:60 equity debt ratio. This commitment will require that the shareholders provide cash for new ordinary shares.
- The increased share capital shall be subscribed by the parties' pro rata shareholding.
- The inclusion of new shareholders (where four are mentioned by name) is described.
- A condition for the inclusion of a new investor is the need to agree with the principles of the shareholders' agreement.
- Provided the consortium wins the licence the two consortium members have agreed to reduce their stakes to a minimum of 40% by allowing three to five institutional investors to hold a maximum of 20% of the shares.
- Telenor and Communicorp have agreed that as new shareholders will be chosen two or more of the following four companies:
 - Allie Irish Banks plc
 - Investment Bank of Ireland
 - Standard Life Ireland
 - Advent International plc
- It is the shareholders' intention to go public with a pro rata reduction of the shareholders. 34% will be held as a minimum by Telenor and Communicorp. This will be arranged either by increasing the share capital or by transfer of shares.

Notes on the articles of association: The articles of association are not included in the supporting material of the application.

Text box 3: Extracts from the shareholders' agreement.

In the period after a licence award, Communicorp will have between 40% and 50% of the shares. This may be diluted to 34% at a later stage, where up to 32% of ESAT digifone's equity is made available to public or institutional investors. Even with only 34% shareholding the financial commitment of the two original partners will be high. If IR£ 52,000,000 are used as the base case requirement, and if 2*IR£ 52,000,000 is used as the worst case equity requirement, the individual equity commitment for Telenor or Communicorp amounts to:

	Ownership	Equity, base	Estimated worst case equity
Commitment at minimum equity	34,00%	17.680.000	35.360.000
Commitment at medium equity	40,00%	20.800.000	41.600.000
Commitment at minimum equity	50,00%	26.000.000	52.000.000

Table 2 Base case and worst case equity requirement

This equity commitment cannot be met by Communicorp today. According to a letter of commitment to the Department of Transport, Energy and Communication,

dated 10 July, Advent has committed to fund up to IR£ 30,000,000 in support for Communicorp's 40% shareholding. The letter of commitment does not clearly state what the "price" would be if the commitment should be brought into life, but according to the presentation, the price would be a close to 75% stake in Communicorp. Further, according to the information given in the presentation, the control will still be in the hands of the Irish investor (Denis O'Brien), as his shares bear a three times higher voting power.

The legal basis for this commitment has not been included as a part of the applications supporting material. Taking into account the very high proportion of Communicorp's intangible assets (most of this is goodwill), the risk of a dispute about the share ratio between O'Brien and Advent seems evident.

This may result in a situation of instability or a situation where the control of Communicorp is transferred to Advent. It could also lead to a situation where the commitment of Advent cannot be fulfilled.

The size of commitment by Advent does not cover our worst case estimate of the equity requirements for Communicorp. In a worst case scenario, the requirement for further funding is expected to arise 2-3 years into the project. At this stage Advent will already have invested the committed figure, and it is judged to be very unlikely that Advent will retreat as this could lead to a 100% loss of the invested funds. Therefore, it can be concluded that the major risk is related to possible instability of Communicorp or to the transfer of power to a non telecommunications investor.

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

- Requirements regarding the share of ownership and voting power in Communicorp
- Requirements regarding the equity of Communicorp.

11. Supplementary analysis on procurement of infrastructure, etc.

11.1 Introduction

This note contains information on planned procurement procedures, as stated in the applications. The objective is to check for any possible infringement of EU rules on procurement.

11.2 The EU rules on procurement procedures and their application

The rules are laid down in Council Directive 93/38/EEC. The rules shall apply to contracting entities in their activities concerning a.o. "the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services".

In order to ensure complete evaluation of proposals for supply of infrastructure equipment in a process complying with EU rules, the following steps will have to be executed by the contracting entity:

- ⊗ announcement of the contract availability in the Official Journal with a deadline for receipt of requests to participate
- ⊗ prequalification and shortlisting of potential suppliers
- ⊗ call for proposals and/or negotiations with shortlisted suppliers.

The announcement of the contract of contract availability shall include information on a number of topics: addresses where to achieve further information, time limits for delivery, facts about nature and quantification of equipment to be supplied, technical standards and specifications, company information, criteria for evaluation and selection of suppliers, etc.

According to the EU rules on procurement the contracting entity is obliged to establish a fair and non-discriminating evaluation and selection procedure among the proposals received in accordance with the specified selection criteria.

The necessary time span in order to carry through the procedures set up in 90/38/EEC will be dependent on the procedures applied by contracting entities:

- ⊗ Open Procedure (where all interested suppliers may submit their tenders):
52 days, which can be reduced to 36 days, when an indicative notice has been published at an earlier date.

The total time span necessary for an Open Procedure may thus be assessed as follows: 52 days (the announcement period) plus preparation time for announcement and tender papers. Additional time must then be added for the evaluation of the proposals received. The above resulting in not less than 60-90 days.

⊗ **Restricted Procedure** (only invited candidates may submit tenders):

- The prequalification phase: 22 days (in some cases 15 days)
- The tender receipt phase: 21 days (in some cases 10 days)

The total time span necessary in a Restricted Procedure may thus be assessed as follows:

- preparation time for announcement and tender papers
- prequalification announcement period of 22 days
- selection of shortlisted suppliers
- tender receipt phase of 21 days
- evaluation of proposals received.

The result is a total time span of not less than 60-90 days.

⊗ **Negotiated Procedure** (the contracting entity consults suppliers of its own choice and negotiates the terms of the contract with one or more of them):

- The prequalification phase: 22 days (in some cases 15 days)

The total time span necessary in a Negotiated Procedure may thus be assessed as follows:

- preparation time for announcement and tender papers
- prequalification announcement period of 22 days
- selection of shortlisted suppliers
- negotiations with one or more suppliers.

The result is a total time span of not less than 60 days.

The negotiated procedure described here includes a prior call for competition announcement (the qualification phase). A contracting entity can choose to use a negotiated procedure without a prior call for competition only in very special situations.

11.3 The applications

The information given in the applications can be summarised as follows:

A1 Irish Mobicall

The application states that MobiCall, being completely vendor-independent, will comply with all EU directives on infrastructure procurement. Mobicall expects to announce final vendor selection immediately after license award.

MobiCall has stated as a strategic goal: "buy Irish" whenever possible in order to secure employment within the Republic".

A2 Cellstar

Cellstar has explicitly stated that it has selected Alcatel Alsthom Group as equipment supplier to the consortium. The application contains no statement on compliance with EU rules on procurement. During the oral presentation, A2 conveyed to the evaluators that no contract has been concluded between A2 and Alcatel.

A3 Persona

The application states that a detailed open tender process for final vendor selection has been initiated which will comply with EU rules. The public procurement will be in accordance with the negotiated procedures as set out in 93/38/EEC.

The consortium includes Motorola, which is a major supplier of GSM infrastructure equipment. Motorola is also an important supplier of mobile terminals and through its Irish distributor, Sigma Wireless, Motorola has supplied equipment to approx. 40% of the subscribers connected to the Eircell network. In co-operation with Siemens AG and other subcontractors Motorola has provided a detailed quotation for infrastructure equipment.

A4 Irish Cellular Telephones

ICT has evaluated proposals from 6 potential vendors and AT&T and Nokia have been identified as suppliers of infrastructure equipment. The application does not mention compliance with EU rules and it appears from the oral presentation that so far the consortium has paid no attention to the compliance with EU procurement rules. One of the suppliers selected - AT&T - is a partner in the consortium. AT&T's base station system is manufactured through an alliance with Philips PKI. It should be noted that Philips N.V. through its 50% ownership in United and Philips Communications is a partner in the consortium.

A5 Esat-Digifone

The application states that procedures concerning supplier selection will meet EU criteria, and that none of the shareholders in the consortium manufactures cellular communications equipment, or have any business interests as suppliers or partners to Telecom Eireann or its subsidiaries.

In the EU Official Journal of 10.8.1995 Esat Digifone has announced a call for requests to participate in a supply contract (framework agreement) with deadline on 29.8.1995. This is the only announcement among the present applicants seen yet. Furthermore, Esat Digifone has made yet an announcement for the supply of backbone equipment, etc.

A6 EuroFone

The application states that EuroFone is not bound to any one infrastructure supplier and is free to select the most appropriate equipment supplier. Selection will be made from a shortlist after a short tender process. No references are made to EU rules. It is stated that EuroFone will, wherever possible, give preferential treatment to Irish suppliers for all sources of material and services.

During the oral presentation, A6 stated that the consortium intends to use the same vendor procedures as has been followed in Sweden. This means indirectly that the procurement directive will not be followed.

A7 Éircell

It is stated in the Éircell Business Plan Template, that Éircell will contract Telecom Eireann to plan, develop, construct and maintain the cellular network in line with the requirements of the business plans of Éircell. No details on procurement procedures are given.

11.4 Concluding remarks

Three applicants (A1, A3 and A5) have positively stated intentions of compliance with EU rules of procurement. At least one of these, namely A5, have initiated the procedure by means of announcements in the Official Journal.

During the preparation of applications, most or all of the applicants have had contacts or negotiations with potential suppliers of infrastructure. Obviously, two applicants (A2 and A4) have chosen suppliers. Most questionable in this respect is application A2 because of its selection of a single supplier, omitting apparently a public or other tender procedures.

Infringements of the EU rules on procurement procedures and complaints of infringement shall be treated according to the provision in the Council Directive 92/13/EEC on co-ordination of laws and public orders concerning the application of the EU rules on procurement procedures.

The provisions of this directive shall be implemented in the national legislation of the member states. A number of sanctions to be applied towards infringements are specified in the directive, including a.o. still-stand or annulation of contracts, economic compensation or penalties.

12.1 Introduction

The applications mention a number of planned initiatives, to be used by one or several of the consortia's, in order to influence the prices, subscribers will have to pay for their handsets. The described methods can be grouped as follows:

- ## 12.2 Information given by the applicants on subsidisation

MobiCall intends to use the volume buying power of its partners with multiple vendors to ensure that handsets and peripheral equipment will be available at prices lower than found in Ireland today for both customers and distribution channels. There is no mention of direct equipment subsidies are not mentioned.

Cellular terminals will be sold on the basis of prevailing world-wide wholesale prices, less some direct handset subsidies offered by the operator and authorised service providers.

Persona will indirectly subsidise personal phones by making significant connection bonus payments to its independent service providers to ensure that the end customer will be able to purchase them for approx. IR£ 149 incl. VAT at the time of service launch. This price will quickly fall to below IR£ 100, and further down to IR£ 65 after 5 years.

ICT will consider subsidising the cost of handsets to ensure that prices will be reduced sufficiently to stimulate adoption rates which will match its market

development goals. ICT will use the buying power of its partners to achieve volume discounts on handsets. It will place a competitive pressure on distributors by setting low prices in its direct sales channels.

A5 Esat Digifone

Esat Digifone expects the price barrier to be addressed directly by the dealers, who in many cases will subsidise the costs of handsets from their once-off commission payments in order to gain additional sales.

A6 EuroFone

Handsets will be subsidised to deliver highstreet prices of IR£ 149.99 (including VAT) or lower up to 1998 and IR£ 99.99 or lower thereafter. EuroFone estimates the cost of handset subsidy will decrease from L101 to L37 per average new subscriber over the period of the license.

A7 Éircell

No information is given, but it is stated as an opinion, that service provider subsidisation of handset prices eventually fall back on the consumer in ongoing service charges and is no substitute for true lower-priced terminals.

12.3 Concluding remarks

The subsidisation of mobile terminals by GSM operators will raise the following problems:

1. By the means of a licence the GSM operators have been granted special rights to offer GSM services to the public. Direct subsidisation from the GSM operator to an agent or dealer in order to lower the price a customer will have to pay for a handset can be considered a cross-subsidisation from an area of special rights to an area of competition. Such cross-subsidisation is normally not allowed, according to EU rules on competition (91/C 233/02, article 104).
2. The market for GSM terminals is a liberalised market with open competition between terminal vendors. In principle anyone can offer and sell GSM terminals. Any GSM terminal equipment may - provided it has been type-approved - be used when establishing a call through a GSM network, when the user has a SIM card which is valid for that network. Direct subsidisation from the GSM operator can - apart from cross-subsidisation as described above - discriminate the GSM terminal market to the extent that such subsidies are offered only to terminals that are purchased by or through the operator, and/or are sold exclusively by the operator's network of agents and dealers. A similar discrimination may arise when subsidisation of terminals is offered only through operator-owned distribution entities.
3. Subsidisation of GSM terminals can be considered fully legal when effectuated by an operator's distribution network of agents and dealers, even when it is financed through the commission paid by the operator to the agent or dealer by

Annex 12:
Supplementary analysis on the subsidisation of mobile terminals

the connection of a new subscriber to the GSM network. In this situation, all the actors in the market (agent, dealer, terminal vendor) are operating in a competitive market. The commissions paid by the operator shall, however, be based on transparent and non-discriminating criteria.

This copy has been made personally for
Copying prohibited.

Martin Brennan

13. Supplementary analysis on legal aspects and matters related to the licence

13.1 Introduction

This note describes the comments on the draft licence given in the applications. The information will be presented as follows:

- ⊗ Overview and principal problems to discuss
- ⊗ Reservations and principal comments in the applications
- ⊗ Comments on the draft licence, article by article
- ⊗ Articles of the licence, including information from the application of the selected applicant
- ⊗ Articles of the draft licence, not fully elaborated.

13.2 Overview and principal problems to discuss

The draft licence has been issued to the applicants as an indicative first draft, and does not purport to provide a comprehensive list of the terms and conditions which may appear in any such licence. This is supported by the fact that text proposals for several articles in the draft licence have not been formulated yet. Other articles are foreseen for the inclusion of relevant parts of the successful application.

All applicants (excluding Eircell) have commented on the draft licence, as detailed in the following parts of this note. General reservations on the principles of the licence have been expressed by A3-Persona, and several applicants have expressed reservations or made proposals on specific articles in the draft licence.

The main points of view expressed by the applicants are as follows:

- A. All applicants expect to get the opportunity, when selected as the second GSM operator, to comment on and further elaborate on an number of articles in the licence in order to seek clarification where necessary to achieve a common and unambiguous understanding of terms and conditions set up in the licence. This includes especially the articles not finally elaborated and formulated in the draft licence.
- B. Several applicants have expressed reservations or made proposals on those articles (e.g. 3, 77) dealing with the Minister's right to attach additional conditions to the licence or change the terms laid down in the licence at any time.
- C. Two applicants (A3 and A6) have expressed the view that the terms set up in articles 10 (international traffic), 32-34 (interconnection) e.a. will not be durable throughout the 15 years of life span of the licence, and that the future liberalisation of telecommunications infrastructure and services should in some way be reflected in the licence.

- D. Applicant A6 has made a reservation on articles 12-13 (terminal equipment) and proposes, that "it should be made explicit that subscriber equipment does not form part of the licensed network, therefore the licensee is not bound to provide maintenance services in respect of terminals purchased from an independent supplier".
- E. Several applicants (A1, A3, A6) have made comments and proposals on the allocation of radio spectrum (articles 8, 16-22) concerning availability of frequencies for the GSM network and for microwave links, change of frequencies, procedures and handling time of the Regulator, guarantees of freedom from interference of allocated frequencies.
- F. The interconnect issues (articles 30-34, and also issues included in the Telecon Eireann Information Memorandum of 28th April 1995) have been commented by applicants A3, A5 and A6.
- G. The issue of numbering (articles 48-51) has been commented by applicants A1 and A3. They express concern on the amount of numbers made available, and on number portability and roaming facilities.
- H. Most applicants have expressed comments on article 73 (on penalties and revocation of the licence) and want to review and discuss the content of this article, when the full amount of terms and conditions of the licence are known.
- I. Applicant A5 has expressed a comment on "structural planning permission", an issue not addressed in the draft licence.

13.3 Reservations and principal comments in the applications

A1 Irish MobiCall

MobiCall has expressed no general objections or reservations on the draft licence.

MobiCall has expressed reservations on article 3 (licence changes), article 49 (availability of numbers), article 51 (number portability), and article 73 (on penalties and revocation of the licence).

A2 Cellstar

Cellstar has expressed some special design considerations: assumption that all applicants will have access, via the free market system, to all existing useful infrastructure, including southees that may be competing for the second GSM licence. This issue is partly answered in the Q/A-memorandum (Co-location) and in CFL-paper (point 15).

In general Cellstar has expressed the following on licence terms: It is understood that any and all information in the application is subject to inclusion of the licence upon final granting by the Minister. It is further understood that the Minister reserves the right to incorporate additional terms in the licence and that these terms will be the subject of negotiation.

Cellstar has no general reservations and only a few specific comments on the draft licence.

Supplementary analysis on legal aspects and matters related to the licence

A3 Persona

Persona has in a general comment pointed on four principles as relevant for setting up fair and equal terms for competition in the licence:

- 1) the terms shall not limit the commercial freedom of the licensee
- 2) all related licences and permits should be included
- 3) all financial conditions need to be known
- 4) changes to the licence are to be approved by the licensee

Persona, in particular, has reservations on the licensor's right to change the terms laid down in the licence and to add additional conditions to the license (articles 3 etc.), on articles 48-51 (on number portability e.a.), and on article 73 (penalties/-revocation).

A4 Irish Cellular Telephones

General acceptance of the draft licence conditions.

Reservation/comment on article 73 (penalties/revocation of licence).

A5 Esat Digifone

Generally in agreement with draft licence.

Expects the final licence will be the subject of detailed consultation.

Has noted the relations to the draft EU directives on mobile communications and competition.

Legal basis for licence (Section 111(2) agreed).

Comment on structural planning permission, an issue not addressed in the draft licence. Site co-location is mentioned here.

Esat Digifone acknowledges the right of the Minister to attach additional conditions to the second GSM licence. It is expected by Esat Digifone, that any such additions will only be made once fair procedures have been observed and the existing licence conditions have been deemed to be deficient.

A6 EuroFone

EuroFone has given additional comments to the proposals made by Telecom Eireann for interconnection to the PSTN and Éircell.

EuroFone has no general reservations on the draft licence. However, concerning a number of articles (8 (leasing of infrastructure), 10 (international traffic), and others), EuroFone has expressed the opinion that such licence conditions will have to be changed during the 15 year life of the licence as a consequence of the coming liberalisation of telecommunications infrastructure and services.

A7 Éircell

No comments given on the draft licence.

13.4 Comments on the draft licence, article by article

This section presents - at this stage still at a key word level - an overview of the comments expressed in the applications for each article in the draft licence.

Article 1:

Licence renewal (text proposal by A1).

Conditions for extension (by A3).

Same comment by A5.

The conditions for renewal will be further elaborated in the draft licence (Q/A-memorandum).

Article 2:

To be specified (general comment by A3).

Article 3:

Licence changes (text proposal by A1).

General comment by A3.

Accepted, on condition of fair procedures (A5).

Article 4:

Reservation on legal structure (by A3).

Article 5:

Change of ownership, transfer of licence, etc. (text proposal by A1).

Transferability of ownership (A2 expects to have the ability to transfer ownership as in any other business venture. Intention to maintain control over shares for the first five years).

Q/A-memorandum - answer on "major change" (Miscellaneous).

Article 6:

Relations to any other GSM operator in Ireland (A3: to be elaborated).

Article 7:

Provision of GSM services (A1 proposal to include ancillary and complementary telephony services).

Provision of value added services via GSM (proposal by A3).

The licence should be more explicit regarding non-voice services (A6).

Requests the right to provide fixed termination services (A6).

Article 8:

The right to use the necessary frequencies for GSM and for the microwave links infrastructure should be stated here (comment by A3).

The right to lease infrastructure from a supplier other than Telecom Eireann should be allowed within the duration of the licence (A6).

Article 9:

Development of services based on emerging GSM standards (A6).

Article 10:

A1 proposes a statement, that it's customers may make and receive international calls.

Considerations on closed user groups (A3).

Minor concern expressed by A5.

The possibility of future international gateways other than Telecom Eireann (A6).

Article 12:

Operator's responsibility for terminal equipment (comment by A3).

Make explicit, that subscriber equipment does not form part of the licensed network, and that the licensee is not bound to provide maintenance services in respect of terminal equipment purchased from an independent supplier (A6).

Article 16:

The frequencies will need to be agreed and inserted (A6).

Article 18:

The ministry shall ensure, that frequencies allocated are not subject to interference and designated for exclusive usage by the licensee (proposal by A3).

Article 19:

Frequency allocation changes (text proposal by A1).

Circumstances to be specified (comment by A3).

Article 28:

A1 comments on flexibility and pre-notification time.

Same comment by A3.

Article 30:

Negotiation of interconnect agreement with Telecom Eireann (A3).

A number of comments made by A6.

Article 31:

Mobile to mobile direct interconnect should be allowed (A6).

Article 32:

To be elaborated (A3).

Too restrictive seen throughout the life of the license (A6).

Article 34:

Too restrictive seen throughout the life of the license. Direct access connections should be allowed, including PABX's. (A6).

Q/A-memorandum: Direct connection to/from closed user groups and PABC switches will not be permitted.

Topics to be discussed (connections through RTE, ESB, etc. for non-partners).

Discussed by A2 (not really relevant under article 34).

Conditions described in CFL paper (point 15) and Q/A-memorandum (Co-location).

Article 40:

Rules associated with quality requirements (text proposal by A1).

The ministry should reflect industry practice and emerging international standards (A6).

Article 43:

A1: relevant sections to be identified in the license.

Article 44:

To be commented once a text is provided (comment by A3).

Article 46:

Right to apply for other licenses (by A3).

Article 47:

To be stated, that a DCS 1800 license will be awarded to the applicant upon request, and with no additional licence fee required (proposal by A3).

Article 49:

Availability of numbers (text proposal by A1).

To be elaborated by mutual consent (A3).

Article 51:

Number portability (text proposal by A1, with further comments in the technical binder).

To be further elaborated by mutual consent (A3).

Article 59:

Payment for interception equipment (comment by A1).

Same comment by A5.

Article 60

Windfall gains, to be clarified (comment by A3).

Article 62

Applicant will propose relevant wording (A3).

Article 65:

To be specified and defined (comment by A3).

Article 66:

To be studied and discussed (A3).

Assumes that the licence will be awarded on the basis of no access deficit and no USO (A6).

Article 73:

Penalties and revocation of licence (comment by A1).

To be reviewed, when conditions are known (A3).

Same comment by A4.

Article 74:

Confidentiality of information (text proposal by A1).

The required information to be defined (A3).

Confidentiality (A4).

Article 77:

Further amendments to be agreed between the parties (A3).

It is worth noticing that no specific comments have been given on the following sections of the draft licence:

- ⊗ Compliance with international standards/obligations (article 11)
- ⊗ Charges for Radio Spectrum (articles 23-26)
- ⊗ Coverage (articles 35-36)
- ⊗ Emergency calls (articles 52-54)
- ⊗ Directory Information (articles 55-58)
- ⊗ Roaming (article 61)
- ⊗ Airtime reselling of analogue (article 63)
- ⊗ Assurance and Maintenance of Essential (Priority) Communications (article 64)
- ⊗ Relations with customers (articles 67-72).

13.5 Inclusion of information from the successful application in the final licence

As stated in the introduction to the draft licence, information from the application of the selected second GSM operator is foreseen to be included in the following articles or parts of the licence (as stated in the draft licence):

Articles 4-5 - The Licensee

Description of the legal structure of the licensee.

Change of ownership, transfer of licence.

Article 28 - Tariffs and other tariff matters

Provisions relating to tariffs, drawn from the application.

Publication of tariffs and adequate notice of changes.

Articles 35-36 - Coverage

Roll-out plans, milestones, etc. from the application.

Articles 37-41 - Performance Guarantees

Provisions in relation to performance guarantees from the application.

Performance bonds, if stated in the application.

Articles 44-45 - Relations of licensee with parent organisation(s)

To be elaborated, based on the successful application.

Article 60 - Windfall Gains

Substitute text from application.

Article 62 - Airtime Resale

Text will be dependent on the content of the successful application

Those are the areas specifically mentioned in the draft licence.

The following other areas should be considered for inclusion of undertakings from the successful application into the licence:

- ⊗ Relations to service providers, sales agents, etc. including areas of responsibility concerning standard customer contract, subsidisation of handsets, etc.
- ⊗ Elements of the business plan to be included in the licence? And the same question in relation to the other plans?
- ⊗ Concerning financial basis of the applying company: Responsibility and liability of the applicant's parent organisation(s) and their commitments.
- ⊗ Arbitration and dispute settlement procedure for customers.
- ⊗ Interconnection agreement to be separated from the Licence.
- ⊗ Efficiency of proposed use of frequency spectrum, as from application.

13.6 Articles of the draft licence not fully elaborated (other than those above)

A number of articles in the draft licence had not been formulated or fully elaborated at the time of distribution. This section presents an overview of these articles.

The comments given below to some of the issues raise the point of view, that some of the topics to be elaborated (on issues such as interconnection charges, fees for spectrum allowances, handling of emergency calls, etc.) could preferably and more conveniently be contained in documents not being an integral part of the licence. This would facilitate the procedures when making adaptations or changes in those areas, not having to initiate a procedure of revision of the licence.

Article 11 - Compliance with international standards/obligations

To be elaborated (GSM standards, ETSI, GSM-MOU).

Article 16 - Allocations of frequencies for microwave links

To be inserted.

Article 27 - Fees for spectrum for microwave links

To be inserted.

Article 29 - Charges and payments for interconnections

To be inserted. (Or should it be included in a separate interconnection agreement?)

The same comment is relevant to article 30.

Articles 38 - Blocking rate, and 39 - Drop out rate

Final values to be inserted.

Article 40 - Rules on definitions, etc.

To be elaborated, preferably in a separate document.

Article 43 - Regulations under section 111(5) of the P&T Services Act

To be elaborated.

Article 51 - Number portability and numbers for roaming customers

Further conditions to be incorporated.

Article 54 - Handling of emergency calls

The Minister may lay down specific rules, preferably in a separate document.

Article 59 - Security interception

Relevant Irish legislation should be specified.

Article 65 - Administration of sector

The annual fee based on turnover to be specified and not in the licence.

Article 66 - Universal service regime

To be elaborated.

Article 70 - Information about customers

Relevant Irish legislation should be specified.

Article 73 - Penalties for breach of licence/revocation

To be elaborated.

Article 77 and 78 - Amendment

Could this be elaborated? Procedures to be applied in relation to the licensee.

Other topics to be considered for inclusion in the licence:

- ⊗ Secrecy of communication, data security (if not covered elsewhere).
- ⊗ The licensee's obligation to participate in international activities, GSM-MOU-group, ETSI standardisation work, etc. ad article 11 (compliance with international standards/obligations).
- ⊗ The issue of fair competition, not mentioned specifically, but mentioned shortly in articles 2 (accordance with the laws of Ireland), 6 (relations to other GSM operators in Ireland), 42 (equivalent treatment to Éircell), 44-45 (relations of licensee with parent organisation(s)).

13.7 Conclusions

It can be concluded from the above sections that further work needs to be done in relation to the drafting of the licence and to the licence negotiations. It can also be concluded that these foreseeable troubles seem to differ depending on which application is nominated as the best. A3 has for example expressed severe reservations concerning the licence, and for that reason the licensor's starting position might be difficult. Conversely, A5 has expressed almost no reservations, which - all things being equal - thus leaves the licensor in a better (or at least less troublesome) bargaining position.

This copy has been made personally
Martin Brecht

Chronology

1. I learned that AMI had forwarded a first draft of final report in week ending 6.10.95. I asked M.B. who had they nominated & he refused to tell me on 6.10. The report was not circulated that week. St MacM held me the order of pref holes that day.
2. Did not see copy of first draft final report until 9.10.95. I raised? of what happens if there is disagreement & M.B. said that most of the PT had been involved - the assessment which led to the ranking. M.B. said that St MacM already knew the winner.
3. Remainder of week taken up entirely with Conventions on Short Alliance
4. 17.10.95 informed by F.T. that Min wanted to ~~announce winner by end of Oct.~~ go to Glast the following Tues with the winner. Mly of PT for 23.10 at 11.30
5. Went to Brussels 18.10. - returned 19.10. Read ^{2nd draft} Report on 20.10 but not appendix.
6. Informed at mly of 23.10 that Min wanted to go to Glast 24.10 & get clearance from me. St MacM + I said we could not sign off on it as the report was dependent & had not been fully read. M.B., St MacM + St MacD met Sec and a further week was agreed to consider report. Mly next m until 7.30 PM
7. ~~23.10~~ 23.10 informed that Townsend had requested Sec to expedite report. He position with a view to clearance at Glast the following day. I went through drafting changes with M.B. 4-5. Mly at 5 PM, left at 7.15 - drafting changes still being discussed to be faxed to MA
8. Min met Sen MacM + M.B. + Sec + SF. He was to meet party leaders re the winner. heard at 4.45 that Min was hosting a Press Conf to announce winner. He did no sign off on report - we had no final report; No consensus asked for but no vote - effectively no decision by PT.

Appendices to Chapter 35

MR. LOWRY AND MR. BRENNAN INTERACT IN EARLY OCTOBER, 1995

Index

1. Official report of twelfth meeting of GSM Project Group on 9 October, 1995, dated 17 October, 1995.
2. Verbatim note by Ms. O’Keeffe of GSM Project Group meeting on 9 October, 1995.

NB: Note at next meeting that Billy Riordan asked AMI if they were now happy that the financial ~~statement~~ tables were correct. AMI replied that they were sufficiently satisfied that the tables were reasonably correct.

12th MEETING OF THE GSM PROJECT GROUP
REPORT OF MEETING ON MONDAY 9TH OCTOBER 1995

Attendance

Mr Martin Brennan) T Dev

Mr Fintan Towey)

Ms Margaret O'Keeffe)

Mr Sean McMahon) Regulatory

Mr Ed O Callaghan)

Mr John McQuaid) T&RT

Mr Aidan Ryan)

Mr Billy Riordan) Finance

Mr Michael Andersen) A M I

Mr J Bruel)

Mr Donal Buggy) Planning Unit

Opening

The chairman opened the meeting by stressing the confidentiality of the evaluation report and the discussions re same. He also informed the group that the Minister had been informed of the progress of the evaluation procedure and of the ranking of the top 2 applicants. The Minister is disposed towards announcing the result of the competition quickly after the finalisation of the evaluation report.

Discussions of the Evaluation Report

The draft evaluation report put forward by AMI was examined in detail. A range of suggestions in relation the manner of presentation of the results were put forward by the Group and AMI undertook to incorporate these in the second draft. The agreed amendments included:

- inclusion in the body of the main report of the proposed appendix in relation to the evaluation methodology.
- an expansion generally of the justification for the award of marks to the various indicators
- revision of the financial conformance appendix to a more explanatory format.

- inclusion of an executive summary and an annex explaining some of the terminology.
- elaboration of the reasons as to why the quantitative analysis could not be presented as an output of the evaluation process.

AMI also indicated that the supplementary analysis in relation to interconnection and tariffs which had yet to be provided did not suggest that it would be necessary to revise the award of marks.

Future Work Programme

It was agreed that AMI would provide the first draft of parts of the report which had not been included in the first draft of the overall report for comments before submission of a complete second draft the following week.

pp. Karen Jewell

Margaret O'Keeffe,
17th October, 1995

CC: Attendees, Maev Nic Lochlainn, Nuala Free

Verbatim Note of Handwritten Meeting of Project Group
on 9th October, 1995

[Corrected by Ms. O'Keeffe in evidence on 28th May 2003, Day 224]

Confidentiality

Minister knows.
Shape of evaluation and order of top two.
Minister of State does not know.
Quick announcement.

Agenda

Draft Report
Future Work Programme: A. Producing draft number two.

Good working draft produced on time.
Annex should be part of the main report.
Object to get feedback on context style of report, content accuracy.

Report too brisk. Critically needs more elaboration and reasoning more significantly. Few lay readers but they will be critical – terminology needs to be explained.

MA brought appendix on supply on tariffs and interconnections.
Description of methodology still missing.

Different groups examined dealing with commissions etc.
Relevance of annex dealing with conflict.
Full discussion needed on annex 10.
Minister does not want the report to undermine itself e.g. either a project is bankable.
Should be balanced arguments.

M Andersen (Changes).

Page 23 B should be A
Page 44 C, D, B, B, A, C Technical aspects.

Supplementary Analysis

Tariff analysis almost prepared when the report was done.
A5 and A3 almost equal.

Interconnection

No changes A3 or A4.
Supplementary analysis will not change marks in the main report.

Quantitative Evaluation

View is QE should not be performed separately but are taken into account in main report.

Already agreed that international roaming should not be used.

Hard to score the block-out and drop-out rates.

Tariffs – Well defined basket of tariffs.

Metering – Billing should be a score indication.

Data not reliable for comparison purposes.

To be left over for discussion.

If included it will give a false confidence in some figures.

M Brennan

Would proceed in the way Andersen suggests and would strengthen report, the annex on methodology should cover this and become main report.

S McMahon

Would like to see more of a user friendly overview – confidence should ooze out of the report – The document will be read by Sec and Ass – The Minister's programme manager (no technical) Department of Finance.

John McQuaid

Page 44 – Correct, ok evaluation model appendix. quantitative analysis ↑ report based on qualitative analysis. Concluding remarks (Page 44).
Are tables 16, 17 and 18 of equal importance.

Weighting

Table 17 different from agreed weighting.

Overall Presentation

Details and summary results at end.
Should summary\they be at start?
Should do an executive summary.

Michael Andersen

16, 17, 18 tables reflect discussions in Copenhagen. If different weighting used to prove you get the same result with different approach.

Paragraph 19 was regrouped to reflect that.
Have to apply a numerative approach.

If 3 tables gave a different answer MB said further analysis would be required and seek to re-examine.

Michael Andersen

It is difficult to make a report with detail and easy to read. He would prefer to leave report in present format with a long letter on front rather than an executive summary.

Executive summary will pull the main report up to the front, give an overview of technical data.

Billy Riordan

Methodology stitched back closer and

F Towey

Should we not include quantitative analysis up-front.
Quantitative analysis too simplistic to give results.

1. The scoring
2. Would like to stick to the evaluation model

Should quantitative analysis be shown. Would have to open discussion again.
Quantitative evaluation unfair and impossible. Figure impossible to compare.

F Towey

Chain of events, evaluation model 80% deals with quantitative evaluation.
Results of quantitative evaluation not reliable.
Quantitative analysis became less and less.
Should be explained in methodology report and wording is important.

B Riordan

Are Andersen happy to go forward with the position as it is now.
They are sufficiently happy.
Aim is to conduct the evaluation in such a way that 10 more people would come up with the same results.

Because of uncertainty cannot trust quantitative.

Quantitative

Ranking is probably different now (Annex D).

50% of the weighting is lost due to scoring that cannot be used and quantitative analysis has been undermined.

It is not necessary to publish the original.

Billy Riordan

Do we carry out any further assessment of the validity of the information presented?

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Fax copy with grammatical errors.

First draft of chapters on methodology along with 2nd draft of report.

24 – 36 hours

2nd report to be of quality to be shown to Secretary.

Appendices to Chapter 36

THE ACCOUNTANTS' RESERVATIONS SURROUNDING THE FINANCIAL EVALUATION

Index

1. Handwritten notes by Mr. Buggy of meeting with Mr. Riordan on 9 October, 1995.
2. Handwritten notes by Mr. Riordan of meeting with Mr. Buggy on 9 October, 1995.
3. Fax from Mr. Buggy to AMI enclosing memo from Mr. Buggy and Mr. Riordan dated 9 October, 1995, fax transmitted on 10 October, 1995.

Executive Summary → up front.

✓ Pg. 36 & 37 Need to expand narrative on graphs to explain what they mean

✓ Pg. 37 2nd line indicators as opposed to indications

✓ Pg. 37 "Deep pockets" - Backers have sufficient financial strength in their own right.

(*) Pg. 38

	A1.	A2.	A3.	A4.	A5.	A6.
Solvency	A	E	B	C	D	C
Financial strength	A	E	A'	A	BC	B
Liquidity	B	C	DC	E	A	AD
IRR	D	A	D	A	A	D
PROFIT / Int	A	BC	A	C	B	C
Acc Oper Costs / Acc Turnover	A	B	B	D	C	D
Acc Oper Costs / SIM	A	A	A	D	B	A
Acc Turnover / Acc Invest	D	A	D	B	D	E
	A	C	B	CD	BC	CD

(*) Pg. 38 2nd Para RTE english?
Telener & Communicorp C from B as Communi doesn't have sufficient strength for 50% share

(*) 3rd Para A6 - all years < 100 ⇒ D.
(*) Pg. 39 1st Para A3 - more or less the same as 2 yrs > 200 ⇒ C

Pg. 39 2nd Para IRR - consistent with quantitative analysis?
- mention jumps of 2
- state actual IRR's

(*) Pg. 39 Para 3 - A1 & A3 = 3 yrs
A4 = 4 yrs
A2, A4 & A6 = 5 yrs

Pg. 39 Para 4, 5 & 6 - Calculations not checked yet.

Pg. 40 Para 3 - What does this mean

(*) Para 5 - Inconsistent with "A" given in Table 15

Para 6 - English?

Para 7 - Should this not have been sorted out before start of tendering.

Pg. 41 Para 5 2nd line "...case are acceptable ..."

Para 8 "Irish touch" - is this needed?

Pg. 41 Table 16 may change as a result of changes to Table 15.

→ Annex - not read yet - no time.

Grammatical errors to Margaret.

① MUB re Kether Guide

② Sustainability Analysis

③ Sigma + Community + Advant

Grouping the 5 sheets in
for 5000

Meeting with DBuyers

NOTES FOR MEETING ON 9/10

① Have not checked tables + are relying on the rechecked
tables produced by AA.

② Need to do a final check of numbers

Types + English

Big Pocket's Phrase

	A1	A2	A3	A4	A5	A
Solvency	A	E	B	C	D	C
Strength	A	E	A	A	(B)	B
Liquidity	B	C	(D) C	E	A	B
IRR	D	A	D	A	A	D
TI/Int	A	(B)	A	C	B	C
Govt / Minor	A	B	B	D	C	D
Govt / SM Govt	A	A	A	D	B	A
TIO / Int	D	A	D	B	D	E
	A	C	B	(C) D	(B) C	(C) D

~~Strength~~ - Sigma difficulties not raised in forward section
P33 on strength but listed in section 4

Liquidity - A6 is given as A over high < 100 over
P33 all 15 years.

Strength - A5 - Government has -ive equity as does
P33 A2 + A4 ratios. This should indicate a
C for A5 surely

IRR - Paragraph should say that the IRR used are and
P39 shall be consistent with Quantitative Analysis Describe
method with units of 2

Interact Case : T1/Dr 12 says for AC which gets a B.
P35

It should be a C as 5 yers are < 2 .

Page 40 : Does the 3rd paragraph suggest that there had
not a further equity injection for
Communications

Page 40 : Para 5 indicates that Symes has a 2 over the
strength. This is not consistent with a A
in the table. Something has to move.

Page 40 : Get para - does this say that if a co deals
with TE they are out of the way.



An Roinn Iompair,
Fuinnimh agus Cumarsáide
44 Sráid Chill Dara,
Baile Átha Cliath 2.

Department of Transport,
Energy and Communications
44 Kildare Street,
Dublin 2.
Telephone: (01) 6707444
Fax: (01) 6709633

Sent
9.15 am
10/10/95

DB



Facsimile Cover Sheet

To:	Mr. Michael Andersen
Company:	Andersen Consulting International
Phone:	
Fax:	00 - 45 - 3296 6433
From:	Dónal Buggy
Company:	Department of Transport, Energy & Communications. 44 Kildare Street. Dublin 2
Phone:	(01)
Fax:	(01) 6709633
Date:	9 October 1995
Pages including this cover page:	2

Comments:

Billy

A copy of the fax
to AMI as requested

Dónal

Memorandum

To: Mr. Michael Andersen & Mr. Jon Bruel, Andersen Consulting International

From: Donal Buggy & Billy Riordan, GSM 2 Project Group

Re: 1st Draft of Evaluation Report

Date: 9 October, 1995

Further to our discussions this afternoon, as promised, we set out below our particular queries on the financial section of the Report.

- ✓ • Need to expand the narrative on each of the graphs on pages 36 & 37. - *Now satisfactory*
- ✓ • Need to replace "Deep pockets" with an alternative phrase throughout the document. - *Replaced*
- ✓ • Page 38, paragraph 2 doesn't refer to Sigma's financial concerns. For consistency with Communicorp should they not be mentioned? } - *Not included*
Not material given
size of other cons.
members
- Recheck liquidity on A6 with reference to the number of years the ratio falls below 100 (see page 38, paragraph 3). If this changes the grading then please consider the consistency of the revised grade with those attributed to the other applicants. } - *9/5*
- ✓ • Page 39, paragraph 3 doesn't refer to A2, A3 and A5 when A3 is given a different grade than A2 and A5. Also please recheck A2 as it would appear that it has a ratio of 2 or less for 5 years and therefore merits a grade C. - *Now included*
on rounding it appears as 2
but it is actually > 2 => OK
- ✓ • Page 39, could you please supply workings for the following calculations:
 - ✓ - Operating cost per SIM card; - *OK*
 - ✓ - Turnover in percentages of the investments. - *OK*

If you have any queries you can contact Donal Buggy at 353-1-6041029 and Billy Riordan at 353-1-6045845.

Donal Buggy & Billy Riordan

Appendices to Chapter 37

THE PROJECT GROUP MEETING OF 9TH OCTOBER, 1995

Index

1. Official Report of twelfth meeting of GSM Project Group on 9 October, 1995, dated 17 October, 1995.
2. Verbatim note by Ms. O’Keeffe of GSM Project Group meeting on 9 October, 1995.
3. Handwritten note by Mr. McMahon of GSM Project Group meeting on 9 October, 1995.
4. Handwritten note by Mr. Riordan of GSM Project Group meeting on 9 October, 1995.
5. Regulatory Division copy of official report of GSM Project Group meeting on 9 October, 1995 with handwritten note addressed to Mr. O’Callaghan.
6. Chronology of Mr. O’Callaghan.
7. Corrigendum re. twelfth meeting of GSM Project Group in official report of thirteenth meeting of GSM Project Group on 23 October, 1995, dated 12 December, 1995.

NB: Note at next meeting that Billy Riordan asked AMI if they were now happy that the financial ~~statements~~ tables were correct. AMI replied that they were sufficiently satisfied that the tables were reasonably correct.

12th MEETING OF THE GSM PROJECT GROUP

and that any error would not have a significant impact on any of the grades awarded

REPORT OF MEETING ON MONDAY 9TH OCTOBER 1995

Attendance

Mr Martin Brennan) T Dev

Mr Fintan Towey)

Ms Margaret O'Keeffe)

Mr Sean McMahon) Regulatory

Mr Ed O Callaghan)

Mr John McQuaid) T&RT

Mr Aidan Ryan)

Mr Billy Riordan) Finance

Mr Michael Andersen) A M I

Mr J Bruel)

Mr Donal Buggy) Planning Unit

Opening

The chairman opened the meeting by stressing the confidentiality of the evaluation report and the discussions re same. He also informed the group that the Minister had been informed of the progress of the evaluation procedure and of the ranking of the top 2 applicants. The Minister is disposed towards announcing the result of the competition quickly after the finalisation of the evaluation report.

Discussions of the Evaluation Report

The draft evaluation report put forward by AMI was examined in detail. A range of suggestions in relation the manner of presentation of the results were put forward by the Group and AMI undertook to incorporate these in the second draft. The agreed amendments included:

- inclusion in the body of the main report of the proposed appendix in relation to the evaluation methodology.
- an expansion generally of the justification for the award of marks to the various indicators
- revision of the financial conformance appendix to a more explanatory format.

- inclusion of an executive summary and an annex explaining some of the terminology.
- elaboration of the reasons as to why the quantitative analysis could not be presented as an output of the evaluation process.

AMI also indicated that the supplementary analysis in relation to interconnection and tariffs which had yet to be provided did not suggest that it would be necessary to revise the award of marks.

Future Work Programme

It was agreed that AMI would provide the first draft of parts of the report which had not been included in the first draft of the overall report for comments before submission of a complete second draft the following week.

pp. Karen Fennell

Margaret O'Keeffe,
17th October, 1995

CC: Attendees, Maev Nic Lochlainn, Nuala Free

Verbatim Note of Handwritten Meeting of Project Group
on 9th October, 1995

[Corrected by Ms. O'Keeffe in evidence on 28th May 2003, Day 224]

Confidentiality

Minister knows.
Shape of evaluation and order of top two.
Minister of State does not know.
Quick announcement.

Agenda

Draft Report
Future Work Programme: A. Producing draft number two.

Good working draft produced on time.
Annex should be part of the main report.
Object to get feedback on context style of report, content accuracy.

Report too brisk. Critically needs more elaboration and reasoning more significantly. Few lay readers but they will be critical – terminology needs to be explained.

MA brought appendix on supply on tariffs and interconnections.
Description of methodology still missing.

Different groups examined dealing with commissions etc.
Relevance of annex dealing with conflict.
Full discussion needed on annex 10.
Minister does not want the report to undermine itself e.g. either a project is bankable.
Should be balanced arguments.

M Andersen (Changes).

Page 23 B should be A
Page 44 C, D, B, B, A, C Technical aspects.

Supplementary Analysis

Tariff analysis almost prepared when the report was done.
A5 and A3 almost equal.

Interconnection

No changes A3 or A4.
Supplementary analysis will not change marks in the main report.

Quantitative Evaluation

View is QE should not be performed separately but are taken into account in main report.

Already agreed that international roaming should not be used.

Hard to score the block-out and drop-out rates.

Tariffs – Well defined basket of tariffs.
Metering – Billing should be a score indication.
Data not reliable for comparison purposes.
To be left over for discussion.
If included it will give a false confidence in some figures.

M Brennan

Would proceed in the way Andersen suggests and would strengthen report, the annex on methodology should cover this and become main report.

S McMahon

Would like to see more of a user friendly overview – confidence should ooze out of the report – The document will be read by Sec and Ass – The Minister's programme manager (no technical) Department of Finance.

John McQuaid

Page 44 – Correct, ok evaluation model appendix. quantitative analysis ↑ report based on qualitative analysis. Concluding remarks (Page 44).
Are tables 16, 17 and 18 of equal importance.

Weighting

Table 17 different from agreed weighting.

Overall Presentation

Details and summary results at end.
Should summary\they be at start?
Should do an executive summary.

Michael Andersen

16, 17, 18 tables reflect discussions in Copenhagen. If different weighting used to prove you get the same result with different approach.

Paragraph 19 was regrouped to reflect that.
Have to apply a numerative approach.

If 3 tables gave a different answer MB said further analysis would be required and seek to re-examine.

Michael Andersen

It is difficult to make a report with detail and easy to read. He would prefer to leave report in present format with a long letter on front rather than an executive summary.

Executive summary will pull the main report up to the front, give an overview of technical data.

Billy Riordan

Methodology stitched back closer and

F Towey

Should we not include quantitative analysis up-front.
Quantitative analysis too simplistic to give results.

1. The scoring
2. Would like to stick to the evaluation model

Should quantitative analysis be shown. Would have to open discussion again.
Quantitative evaluation unfair and impossible. Figure impossible to compare.

F Towey

Chain of events, evaluation model 80% deals with quantitative evaluation.
Results of quantitative evaluation not reliable.
Quantitative analysis became less and less.
Should be explained in methodology report and wording is important.

B Riordan

Are Andersen happy to go forward with the position as it is now.
They are sufficiently happy.
Aim is to conduct the evaluation in such a way that 10 more people would come up with the same results.

Because of uncertainty cannot trust quantitative.

Quantitative

Ranking is probably different now (Annex D).

50% of the weighting is lost due to scoring that cannot be used and quantitative analysis has been undermined.

It is not necessary to publish the original.

Billy Riordan

Do we carry out any further assessment of the validity of the information presented?

Martin Brennan

Some validation had been done.

A3 and A5 have much evident [?] information and are satisfied with what they have. Michael Andersen advises not to carry out extra analysis without risk to the process.

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24 – 36 hours

2nd report to be of quality to be shown to Secretary.

8/10/95

GSR group

We have draft (no 1) Rept of AMI which recommends A5, A3 A1 in that order.

(They are not easy to read)

[Only limited no of copies
we've (TARR) not had a chance
to read & prep]

MB • goes thru some points

M.A. • p.23, 44, p1 see changes

- no changes to AMI recommendation as a result.
- Report reflects quant + qual evaluation
-

Going Through Report

Andis used method of working
descriptive.

Description of Quarterly

* Expansion of information is a very different matter research work

- Common
- Methodology
- Brighton Discussion - Conference Call
- Financial breakdown to be found.
- End of week - methodology session
- Next week 16/10 2nd Draft.

*Mr O'Callaghan*12th MEETING OF THE GSM PROJECT GROUP*to file p. 2.*REPORT OF MEETING ON MONDAY 9TH OCTOBER 1995Attendance

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pp Karen Fennell

Margaret O'Keeffe,

17th October, 1995

CC: Attendees, Maev Nic Lochlainn, Nuala Free

Mr J Callaghan

*It's prob too late to change this report, but
our intervention at subsequent meetings made
clear that:*

- ① We did not subscribe to unanimity at this meeting*
- ② We expected the qual. assessment to continue from that time*
- ③ The report while it had probably highlighted the best 2 candidates had a long way to go.*

ph 4

Chronology

1. I learned that AMI had forwarded a first draft of final report in week ending 6.10.95. I asked M.B. who had they nominated to be refused to tell me on 6.10. The report was not circulated that week. S.MacM told me the order of pref dates that day.
2. Did not see copy of first draft final report until 9.10.95. I raised? of what happens if there is disagreement + M.B. said that most of the PT had been involved in the assessment which led to the ranking. M.B. said that M.B. already knew the winner.
3. Remainder of week taken up entirely with Consultation on Short Alliance
4. 17.10.95 informed by F.T. that Min wanted to ~~announce winner~~ ^{and} go to York the following Tues with the winner. Mly of PT for 23.10 at 11.30
5. Went to Brussels 18.10. - returned 19.10. Read ^{2nd draft} Report on 20.10 but not appendix.
6. Informed at mly of 23.10 that Min wanted to go to York 24.10 + get clearance from me. S.MacM + I said we could not sign off on it as the report was dependent + had not been fully read. M.B., S.MacM + S.MacM met Sec and a further week was agreed to consider report. Mly went on until 7.30 PM
7. ~~23.10~~ 23.10 informed that Tournier had requested Sec to expedite report the position with a view to clearance at York the following day. I went through drafting changes with M.B. 4-5. Mly at 5 PM, left at 7.15 - drafting changes still can discussed to be faxed to MA
8. Min met Sen MacM + M.B. + Sec + SF. He was to meet party leaders re the winner heard at 4.45 that Min was hosting a Press Conf to announce winner. He did no signing off on report - we had no final report; No consensus asked for but no vote - effectively no decision by PT.

001002

13th Meeting of GSM Project Group
on 23rd October 1995

Chair	Mr. Martin Brennan	Communications (Dev & Corp. Affairs)
In attendance	Mr. Fintan Towey	Communications (Dev & Corp. Affairs)
	Ms. Maev Nic Lochlainn	Communications (Dev & Corp. Affairs)
	Ms. Margaret O'Keefe	Communications (Dev & Corp. Affairs)
	Mr. Sean MacMahon	T&R(Regulatory)
	Mr. Ed O'Callaghan	T&R(Regulatory)
	Mr. Donal Buggy	Planning Unit
	Mr. Jimmy McMeel	D/Fin
	Mr. Billy Riordan	D/Fin
	Mr. Aidan Ryan	T&RT
	Mr. John McQuaid	T&RT
→	Mr. Michael Andersen	Andersen Management Intl [AMI]

Corrigendum

Mr. Billy Riordan noted, for the record, that Mr. Jon Bruel of AMI had stated at the previous meeting that he was sufficiently satisfied that the financial tables, as evaluated, were adequate and true. Reference to this statement had been omitted from the minutes of the previous meeting in error.

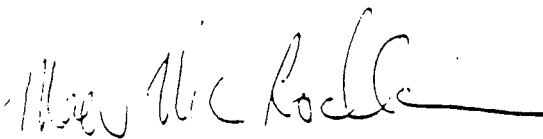
Discussion of Draft Report

The meeting then proceeded with a discussion of the draft AMI evaluation report. Views from Regulatory, Technology and D/Finance all indicated that, while there was general satisfaction with the detailed analysis and the final result, the presentation in the draft report of that analysis was not acceptable.

Hence the discussion focused on the detail of the report. A re-ordering of certain sections of the report, together with some textual and typographical amendments, was agreed.

Future Workplan

Amendments to certain sections remained to be finally agreed; these were to be agreed within the Irish members of the Group on the following day and Mr. Brennan was then to be deputed to come to final agreement with AMI with respect to the final text of the report.



Maev Nic Lochlainn

Communications (Development & Corporate Affairs), 12/12/1995

c.c. Mr. Sean Fitzgerald, Attendees, Ms. Free, File.

[✓] doe

Appendices to Chapter 39

INTERACTION BETWEEN DEVELOPMENT DIVISION AND AMI

Index

1. “*Comments on the presentation of the results by AMI...*” document sent to AMI on 13 October, 1995.

✓ Sent to AMI on 13/10/95

COMMENTS ON THE PRESENTATION OF THE RESULTS BY AMI OF THE EVALUATION OF THE GSM APPLICATIONS

Introduction

1. Further to the suggestions put forward at the GSM Project Group meeting in relation to the presentation of results of the GSM evaluation process, the following comments are offered on the further material now provided by AMI.

Chapter entitled "The evaluation process"

2. This chapter should in our view be re-titled "Outline of the conduct of the competition process". The use of subheadings would also improve readability.

Paragraph 1 does not in our view reflect fully the part played by AMI. The description of the competition process might usefully record the following facts in the appropriate chronological order:

- the announcement of the competition on 2 March, 1995 with a closing date of 23 June. Inclusion of the tender document in the annexes might be useful for completeness.
- the number of interested parties who purchased the tender documentation.
- a brief mention of the facility in the competition process in relation to the provision of further information to applicants, and the number of interested parties which posed questions.
- reference to the memoranda promulgated by both the Department and Telecom Eireann on 28 April and the subsequent memorandum promulgated by the Department on 12 May.
- reference to the supplementary information provided in relation to interconnection.
- the agreement prior to the closing date of the basic evaluation. This should incorporate the material which it is currently proposed to include in Appendix 2 (More detailed comments on the evaluation model are provided below).

- the difficulties raised by the Commission could be dealt with in less detail along the following lines:

"Shortly before the original closing date of 23 June, the European Commission expressed serious reservations concerning the inclusion in the selection criteria of an auction element in relation to the licence fee for the second operator without the imposition of any fee on Eircell.

It subsequently became clear through bilateral contact with the Commission that infringement procedures would, as in the Italian case, be initiated against Ireland if the eventual licence fee discriminated against the second GSM operator relative to Eircell. The Office of the Attorney General advised against proceeding with the competition in its then form and risking further legal action by the Commission. The process was accordingly suspended. A revised licence fee requirement was negotiated with the Commission whereby the second GSM operator would volunteer a licence fee in the range £5m to £15m and Eircell would pay a fee of £10m. This approach was endorsed by Commissioner Van Miert on ... July and the competition process was then re-opened with a closing date of 4 August."

- mention the dates on which supplementary questions were posed to applicants and replies received and include the justification for posing additional questions as outlined in the present Appendix 2..
- mention the dates on which written questions were posed for answer at presentations and on which the presentations were held.
- the fact that the subgroups which conducted the evaluations comprised different members of the project group with specific expertise in relation to the various aspects.
- the fact that "the draft report discussed on 9 October has, following the incorporation of the comments of the Group on the presentation of results of the evaluation process, culminated in this final report.
- A final comment in this chapter is desirable on the professional view of AMI on the extent to which interested parties initially and applicants for the licence

subsequently were dealt with on a transparent, objective and non-discriminatory basis throughout the process.

Comments on Appendix 2

3. It is recommended that, appendix 2 be imported into the chapter we have suggested entitled "Outline of the conduct of the competition process" under an appropriate sub-heading and that Appendix 2 be dispensed with. The material might also be usefully expanded to include the following.

- a description of the quantitative analysis e.g. *"based on extracting from the applications the "hard" quantitative commitments in relation to critical indicators associated with the selection criteria prescribed in the tender document. It is thus limited to clearly identifiable figures as expressed by applicants and does not have the capacity to take account of considerations such as market research, planning, management preparedness, credibility etc. In the event following receipt of the applications, it became clear that a number of the twelve (?) indicators in the qualitative model were either impossible or difficult to score e.g."*
- A further expansion on the qualitative model is also desirable e.g.

"The qualitative model differs from the quantitative in that it allows a more holistic comparison of the critical elements of the applicants. In accordance with the evaluation document agreed prior to the close of the competition, the indicators for the model under the 10 dimensions were expanded to a total of 53 (?) taking account of critical but non-quantifiable aspects of applications such as performance guarantees, cell planning, market research, understanding of roaming, special tariff provisions, customer care etc."

The description of the marking carried out by the sub-groups would be improved by the inclusion of comments along the following lines;

"The members of the sub-groups were drawn from the overall project group according to expertise relevant to the dimension under discussion".

and

"The process involved the award of grades to each application under each of the ten dimensions. The grades under each dimension were developed through an assessment of the gradings for each of the relevant indicators. This process necessarily involved some degree of implicit weighting of the indicators. The result in each case was arrived at through a process of discussion and consensus within each sub-group".

- An explanation of the manner in which the supplementary analysis, sensitivity credibility and risks have been taken into account is also necessary. e.g.

"Apart from a detailed evaluation of Management, Marketing, Technical and Financial aspects of applications as presented by applications, the evaluation team carried out an assessment of:

- *the overall credibility of applications and the consistency of the business case presented with details and assumptions elsewhere in the applications,*
 - *risk factors which could have the effect of derailing the business plan including, for example, failure to achieve coverage as planned or failure in the distribution channel, and*
 - *identified weaknesses in specific applications including for example basic assumptions which are considered dubious, possible conflicts of interest or financial weaknesses.*
- The report refers to four separate evaluation models. We tend towards the view that it would be more appropriate to present the results along the following lines:

"The report aims at nominating and ranking the 3 best applications. This has been achieved through:

1. *Qualitative award of marks to the six applications with respect to the (53?) indicators outlined at the introduction to this report.*
2. *Qualitative assessment of applications according to the Marketing, Management, Financial and Technical aspects.*

3. *Validation and finalisation of the results through:*

- *regrouping of the criteria to directly reflect the selection criteria outlined at paragraph 19 of the Report.*
- *Application to the qualitative marks of the weightings agreed prior to the close of the competition for the quantitative model.*
- *Analysis of sensitivities, risks and credibility issues focusing in particular on the three best applications.*

Other remarks

4. In the "last comparison of applications" it is desirable that the explanation of the difference between A3 and A5 be deepened. It is not considered necessary to include A1 as this application is clearly inferior to the two top-ranked applications. In essence what is required is a detailed answer to each of the following:
- Why is A5 considered superior to A3 in relation to market development, radio network architecture, capacity of the network and performance guarantees?
 - Why is A3 considered superior to A5 in relation to tariffs (Mention the specific tariffs) and experience?
 - Why are the applications considered equal in relation to coverage, financial key figures, roaming and frequency efficiency.

Appendices to Chapter 40

MR. LOWRY'S DETERMINATION TO ANNOUNCE THE RESULT ON TUESDAY, 24TH OCTOBER, 1995

Index

1. Attendance note by Mr. Moran, solicitor, of meeting with Mr. Simonsen on 10 October, 1995,
2. Briefing note for Minister "*Evaluation Process for the GSM Competition*".
3. Briefing note for Minister "*GSM Competition - Advancing the Process further*".
4. Briefing note for Minister "*Recommendation regarding the Best Application in the GSM Competition*".

MATHIASON
ORMSBY
002428 PRENTICE
SOLICITORS

ATTENDANCE TIME COSTING:

ESAT Digi fone 160.

Michael Walsh
Deputy Demand

* Int Insured Indemnities
will indemnify the insured
part of the bid.

Bid to Dept. in writing and verbal proposal

Communicated

Political contacts

Shareholder Agreement - Telenor drafted: William Fry Green
37.5 /

141 Considered

37.5

(2) Telese

37.5%

(四) 鉄鋼の生産

new party

25% + veritate comunico
(i.e. a dual pole)

114 letter to Department of understanding between Tel...

complete & negotiate agreements: on award of contract you would bill to 3 firms of lawyers.

Schedule - finalize agreement within 2 weeks

Lesson - 1 November 1995 - in fact lesson 2/3 weeks

As a result of the above, the following is recommended:

311. *Desmodium* *Chamaecrista*

18 million dollars

For Personal use

Aids Memoire
Annex I

Bulleted pts)

→ No problem
need to
mention it
OK

Briefing Note for the Minister

Evaluation Process for the GSM Competition

Evaluation Methodology

The competition for a licence to become Ireland's second GSM operator was announced on 2 March 1995. Interested parties were invited to purchase the tender documents. The main tender document outlined clearly the methodology which was to be used in evaluation i.e. the best application or so-called 'beauty contest' approach was adopted by the Minister. 'Best' would be measured using the selection criteria listed in descending order of priority in para. 19 of the tender document. Para. 19 of the tender document read as follows :-

" The Minister intends to compare the applications on an equitable basis, subject to being satisfied as to the financial and technical capability of the applicant, in accordance with the information required herein and specifically with regard to the list of evaluation criteria set out below in descending order of priority.

- Credibility of business plan and applicant's approach to market development;
- Quality and viability of technical approach proposed and its compliance with the requirements set out herein;
- The approach to tariffing proposed by the applicant which must be competitive;
- The amount, in excess of the minimum initial licence fee, which the applicant is prepared to pay for the right to the licence;
- Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded;
- The extent of applicant's international roaming plan;
- The performance guarantee proposed by the applicant;
- Efficiency of proposed use of frequency spectrum resources. "

→ Licence fee small para.

GSM Project Group

The GSM Project Group was established early in 1995 to oversee the GSM competition process. The Group consists of members of the three Divisions with responsibility for telecommunications matters in the Department (i.e. Development, Regulatory and Technology Divisions) together with representation from Planning Unit and from the Department of Finance. When Andersen Management International [AMI] was recruited by the Department to advise on the competition process, consultants from the AMI team also began to participate in the GSM Project Group.

(Planning Unit + Dept of Finance representatives include 2 accountants or secondment from private sector - accountancy houses)

Information Phase

The terms of the competition provided for an information phase, when applicants were allowed to pose questions either to the Department or to Telecom Éireann. This resulted in three communications being circulated to all applicants by the Department, together with a single memorandum issued by Telecom Éireann. Throughout the information phase, the Department was at pains to ensure that all prospective applicants received exactly the same information. This allowed applicants to develop their business plans based on a common knowledge base as regards the future regulatory environment.

Evaluation Model

An evaluation model, expanding on the criteria listed in Para. 19 of the tender document, was proposed by AMI and agreed by the Project Group in June 1995, prior to the closing date for receipt of applications. This model agreed a relative weighting for the eight criteria in Para. 19.

Evaluation Process

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

- initial examination of applications;
- qualitative evaluation by sub-groups;
- presentations by applicants; and
- evaluation report by AMI.

These steps are described below.

- Initial Examination

An initial examination was conducted and it was noted that applications were not fully comparable. To rectify the matter, written questions specific to each application were prepared and forwarded to applicants for written reply. This process was provided for in Para. 16 of the tender document and it proved of considerable assistance in enhancing the comparability of the applications.

- Qualitative Evaluation by Sub-groups

Sub-groups were then established to conduct the central qualitative evaluation of the applications. The sub-groups consisted of members of the Department, consultants from AMI and occasionally, representatives from the Department of Finance. As a general rule, Project Group members participated in sub-groups focusing on aspects related to their particular area of expertise. Each sub-group meeting was chaired by an AMI consultant.

In all, ten sub-groups met, each focusing on one or more aspects of the criteria listed in Para. 19. Within the framework of the model agreed in June, the criteria were expanded and over 50 indicators were accepted as the best means of examining and comparing the detail of the applications. The results of the qualitative evaluation were agreed unanimously by the sub-groups.

- *Presentations*

In early September, each applicant was invited to make a presentation to the Project Group. Each applicant was allowed one hour for presentation of its business case and one hour to respond to a set list of questions which were common to all applicants and had previously been forwarded to them. The final hour was reserved for questions, which were specific to the application under discussion. Thus the presentations were conducted in a manner which treated all applicants equally. The process was helpful in allowing the Project Group to gain a better understanding of the relative strengths and weaknesses of the six applications.

- *AMI Evaluation Report*

Following further analysis of the risks associated with each application, the overall evaluation, incorporating inputs from the sub-groups' deliberations, was completed and a final ranking of the applications proposed. A draft evaluation report was submitted by AMI and discussed at a Project Group meeting on 9 October. Unanimous support was given by the Project Group to the results of the evaluation. Having incorporated comments from the Project Team in relation to the format of the report, AMI submitted a final draft evaluation report to the Department on 20 October. The Project Group is unanimous in its support of the conclusions of that report.

Imprimatur

The Project Group is in full agreement with the view expressed by AMI in its final draft report, that the competition has been conducted throughout in a transparent, objective and non-discriminatory manner. There is consensus in the Group that the evaluation process treated each of the six applications in a fair and equitable manner.

11/12/95 memo
Amend

Briefing Note for the Minister

GSM Competition - Advancing the Process further

The GSM Project Group has unanimously recommended to the Minister that he should enter into licence negotiations with A5. The process should now develop as follows :-

- Announcement

The winner and the five unsuccessful applicants will be informed of the result of the competition. The Minister will announce the name of the successful consortium to the media.

- Licence Negotiations

The Minister will commence licence negotiations with the winner. Andersen Management International will provide expert advice on this process, which is expected to take approximately eight weeks. Commitments made by the successful applicant in its application will be incorporated in the licence as special licence conditions.

- Legal Issues

Certain legal issues must be finally clarified before the formal award of the GSM licence. The Department will progress this matter in close co-operation with the Office of the Attorney General.

- Licence Award

The Department intends to conclude licence negotiations by January 1996. The licence will then be formally awarded to the successful applicant.

- Jobs Created

The second GSM operator intends to create over 300 highly skilled jobs by the end of 1996. The bulk of these will be based in Limerick and Dublin; further positions will be established in Cork, Galway, Killarney, Rosslare, Sligo and Waterford, as the mobile market develops.

- Service Launch

The second mobile operator has committed to launch its GSM service 9 months after formal licence award. It is therefore expected that outdoor coverage will be provided to 80% of the population by October 1996.

- Competition in Mobile Services in Ireland

The second GSM operator has guaranteed that a national mobile service will be provided eighteen months after formal licence award. This means that the benefits of competition and greater consumer choice will flow to approximately 90% of the population by July 1997.

an effective competition will be in place.

1. A de Memoire
→ bullet pt.

Briefing Note for the Minister

Recommendation regarding the Best Application in the GSM Competition

Evaluation of the Applications in light of Para. 19 of the tender document

Evaluation of all six applications quickly led to agreement among Project Group members that two applications, namely A5 and A3, stood head-and-shoulders above the rest. Detailed examination has shown, however, that the A5 application is clearly superior to that of A3. This conclusion is substantiated below by a comparison of the top two applications on the basis of the evaluation criteria listed in Para. 19 of the tender document.

1. Credibility of the business plan and the applicant's approach to market development

A5 substantiates its ambitions to become market leader with detailed plans for brand development and market expansion. Its application is consistent as between the projected tariffs/usage levels and the projected revenue streams, a coherence which is not as apparent in A3's application. This, together with hard evidence of a high degree of preparedness, lends greater credibility to A5's business plan. Furthermore, while A3 presents a well thought-out marketing plan, its aims for growing the market are less ambitious, its distribution planning is weaker, its proposed marketing budget is far smaller and it seems generally less 'ready to go' than A5.

Hence A5 is judged to be clearly superior to A3 on this, the most important evaluation criterion.

2. Quality and viability of technical approach proposed and its compliance with the requirements set out therein

The technical approach is evaluated primarily by comparing radio network architecture and network capacity. The Project Group, including experts from the Department's Technology Division and from the consultants' technical team, agrees unanimously that A5's proposals are better in both these respects. A5 has, for example, a more attractive radio network design, more antenna sites and more cells than A3, while it also surpasses A3 in respect of the capacity of its proposed network.

Hence A5 is also clearly superior to A3 on this, the second most important evaluation criterion.

The critical issue in relation to ~~signal~~
technical configuration - signal availability & strength

Signal

3. The approach to tariffing proposed by the applicant which must be competitive

Both A5 and A3 offer tariffs which are highly competitive when compared to Eircell's offers at present. However A3 proposes lower tariffs than A5 for its domestic calls; its airtime charge to consumers, at 9.9p per minute, is ~~26%~~ cheaper than A5's equivalent offering at 12.5p per minute. To counter that, A5 has cheaper international tariffs and offers volume-related discounts of 5-15%. Furthermore A5 plans to use metering and billing principles, which are more consumer-friendly, a factor which could cause a difference of ~10% in the price of an effective call-minute. Therefore the actual bills to be paid by A5 customers might well turn out to be broadly equivalent to those paid by A3 subscribers, or at any rate only a fraction higher.

20-8%
cheaper
✓

Accordingly, it has been agreed that, while A3 has the lower tariffs at launch, A5 is judged to be only marginally inferior in respect of its overall approach to competitive tariffing.

Should this be reflected in the evaluation?

4. The amount, in excess of the minimum initial licence fee, which the applicant is prepared to pay for the right to the licence

Since all applicants have offered the maximum fee of £15 million, this criterion has become irrelevant to the evaluation.

5. Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded

Both A5 and A3 fulfil the minimum requirement of serving more than 90% of the population within 4 years. However A5 offers a remarkably high coverage at launch [80%], a feature which will be highly significant in building up the confidence of its customers. A3's plans to launch with only 40% coverage are somewhat dubious in terms of providing an acceptable level of service.

Therefore A5 is the clear winner on this, the fifth evaluation criteria.

6. The extent of the applicant's international roaming plan

Since it is impossible for any organisation, which does not hold a GSM licence, to enter into negotiations to establish roaming agreements, none of the applications contained hard facts on the extent of proposed international roaming plans. Hence it was agreed to focus instead on the understanding of roaming issues displayed by applicants and the level of commitment expressed to developing roaming agreements within Europe. Both A5 and A3 proved to be satisfactory in both these respects. Due to the necessarily nebulous nature of this criterion, it has proven difficult to distinguish further between A5 and A3. It has therefore been agreed to judge them as equal on this, the sixth criterion.

7. The performance guarantees proposed by the applicant

A5 has proposed milestones by which its performance can be measured. These promises have been substantiated with specific penalty clauses, should A5 not conform to the service levels to which it commits in its application. A3, for its part, has merely suggested a number of 'technical' action plans in cases of proven non-compliance with service level commitments. The A5 approach offers far more assurance that promises on performance will be honoured, therefore it has been judged as far superior to A3.

8. Efficiency of proposed use of frequency spectrum resources

While both A5 and A3 intend to request the same amount of frequency, expert examination of the technical volumes of their applications has shown that A5's methodology displays much better economy. A5 has conducted effective traffic and network planning in order to avoid wasteful use of spectrum.

Therefore A5 is clearly superior to A3 on this, the eighth and final evaluation criterion.

Conclusion

A5 is judged to be superior to A3 in the two most important evaluation criteria i.e. market development/credibility of business plan and technical approach. While A3 scores marginally better than A5 with respect to the third criterion, tariffing, A5 proves superior in respect of coverage, performance guarantees and spectrum efficiency, the fifth, seventh and eighth criteria respectively. Licence fee and roaming have become irrelevant in the final analysis, since both applications score the same in respect of these.

Disregarding the criteria where both A3 and A5 score the same, A5 is seen to be superior in five out of six cases, including in respect of the two most important criteria [market development/business plan and technical approach]. Where A3 is judged to be better than A5 as regards tariffing, it is noted that A5 scores a very close second. Hence it is clear that, evaluating in accordance with the criteria set out in paragraph 19 of the tender document, A5 has the best application.

Recommendation

The GSM Project Group is therefore unanimous in its recommendation, that the Minister should enter into licence negotiations with the consortium which submitted the A5 application. ~~Furthermore the Project Group is also in agreement that, should negotiations with the A5 applicant fail, the Minister should enter licence negotiations with the candidate behind the application-ranked second, namely A3.~~

Consortium

✓

Appendices to Chapter 42

ARRIVAL OF THE SECOND DRAFT REPORT AND ITS CHANGES

Index

1. Extract from second Draft Evaluation Report dated 18 October, 1995 (pages 4-6).
2. Appendix 2 to Second Draft Evaluation Report dated 18 October, 1995.
3. Appendix 3 to Second Draft Evaluation Report dated 18 October, 1995.
4. Appendix 10 to Second Draft Evaluation Report dated 18 October, 1995.

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**Evaluation of the
6 applications for
the GSM2 licence
in Ireland**

Michael Moesgaard Andersen

October 18, 1995

Final draft version

Confidential

This report is prepared for the Department of Transport, Energy and
Communications by Andersen Management International

2. Outline of the conduct of the competition process

2.1 The organisation

The Department of Transport, Energy and Communications has had the overall responsibility for the conduct of the competition. The drafting of this report as well as the provision of advice during the tender has been the responsibility of Andersen Management International.

The Project Team on GSM (PT GSM) has been the nucleus of the competition process. The PT GSM comprises members from the 3 telecom divisions of the Department of Transport, Energy and Communications, the Department of Finance, and affiliated consultants from Andersen Management International.

2.2 Selected milestones of the competition process

The competition process was announced on 2 March, 1995 with a closing date of 23 June. 12 interested parties purchased the tender documents.

A facility was provided in the competition process such that interested parties could pose questions in writing. 9 interested parties took advantage of this facility and posed 230 groups of questions of which several contained more than one question.

On the basis of these questions, the Department and Telecom Éireann (concerning technical matters of interconnection) promulgated 2 memoranda on 28 April, allowing all interested parties to work on the basis of the same, mainly regulatory, information. This was further strengthened by a subsequent memorandum, comprising a number of tender specifications, including a number of mandatory tables, as well as a draft licence.

One of the interested parties claimed that the interconnection regime was not adequate in order to sustain and maintain a GSM2 business case in Ireland. The Department, in conjunction with Andersen Management International, then decided to circulate supplementary information on the subject of interconnection stating that the indications in the RFP document on this issue is a matter for commercial negotiation within 6 months of commercial operations subject to arbitration by the Regulator.

2.3 The framing of the evaluation

In order to frame the evaluation work, the PT GSM finished a number of activities prior to the closing date, including, but not limited to, the following:

- ⊗ A division of responsibilities was agreed, according to which Andersen Management International was to be initiator of the work during the evaluation.

Outline of the conduct of the competition process

- ④ An evaluation model was adopted as to how a combined quantitative and qualitative evaluation should be performed, see appendix 2.
- ④ Detailed work programmes were adopted in order to ensure timely deliveries.

Shortly before the original closing date of 23 June, the European Commission expressed serious reservations concerning the inclusion in the selection criteria of an auction element in relation to the licence fee for the second operator without the imposition of any fee on Éircell.

It subsequently became clear through bilateral contact with the Commission that infringement procedures would, as in the Italian case, be initiated against Ireland, if the eventual licence fee discriminated against the second GSM operator relative to Éircell. The Office of the Attorney General advised against proceeding with the competition in its then form and risking further legal action by the Commission. The process was accordingly suspended. A revised licence fee requirement was negotiated with the Commission whereby the second GSM operator would volunteer a licence fee in the range of IR£ 5 million to IR£ 15 million and Éircell would pay a fee of IR£ 10 million. This approach was endorsed by Commissioner van Miert on 14 July.

In this way, Ireland became the first EU member state to receive a prior consent from the Commission on the agreed fee structure. The Department then re-opened the competition process with August 4, 1995 as the new closing date.

On the closing date, the Department received 6 applications plus a preliminary GSM business case description from Éircell, which is already in commercial operation with a GSM (1) system. The Department and Éircell agreed that this description was insufficient to meet the need of the Department, and subsequently Éircell submitted on 11 August, 1995, a more detailed business case description following the mandatory tables. Since this "application" is not mandatory, it has not been subject to a comparative evaluation. However, the GSM business case information provided by Éircell has been used as a valuable reference point and served comparative purposes, when judged relevant.

All the GSM2 applications received were admitted to the evaluation, as none of the applications have such substantial deviations from the minimum requirements of the RFP document that they were to be rejected, see appendix 2. With a view to making comparative evaluations, it appeared at an early stage in the evaluation that some of the applications had prepared insufficient information.

In accordance with the provision made in § 16 of the RFP document, it was thus decided to pose a number of tailor-made written questions to the applications, and these questions were forwarded to the applicants on 24 August. The answers received on 4 September revealed that this part of the process had resulted in valuable improvements of the basis for comparisons. For example, a number of questions on metering and billing principles demonstrated that the different applications have used widely different assumptions concerning the charge units (time-true per second billing or billing in increments of, say, 10 seconds) and concerning initial call charge (ranging from no charge to 30 seconds independently of the actual duration of the call).

A large part of the quantifiable side of the applications was then compiled and put into graphics in order to serve as a background for the evaluation.

2.4 The marking and the nomination of the best application

The nucleus of the evaluation was then commenced by the establishment of 10 sub-groups each dealing with one of the dimensions outlined in § 19 of the RFP document, namely market development, coverage, tariffs, international roaming plans, radio network architecture, network capacity, frequency efficiency, performance guarantees, financial key figures, and experience. This approach was agreed prior to the closing date and is also part of the evaluation model adopted, see appendix 3, except for the evaluation of the licence fee offered, which did not require sub-group meetings. Each sub-group comprised members from the Department and consultants from Andersen Management International. In addition, the Department of Finance participated in the sub-groups on financial key figures and performance guarantees. The sub-groups were staffed such that they comprised different members and affiliates of the PT GSM with specific expertise in relation to the subjects to be evaluated.

The next step in the evaluation was to invite for presentation of the applications, which was executed on 5 September together with an agenda and a number of questions to the applicants. This was done on an equal basis to all such that one hour was reserved to a presentation of the business case behind the application, one hour was offered to answer questions, which were equally posed and worded to all applicants, and one hour was reserved for the PT GSM to pose questions to the applications. The presentation meetings were consecutively held as 6 separate meetings from 11 to 14 September.

After the presentation, the remaining part of the evaluation was conducted, in particular on credibility, risks and sensitivities, and the overall evaluation and final marking of the applications were completed.

A draft report discussed on 9 October has, following the incorporation of comments from the PT GSM, culminated in this final report. As unanimous support was given by the PT GSM to the results of the evaluation, Andersen Management International was requested to submit this final report. It was also decided to present the quantitative and the qualitative parts of the evaluation in an integrated fashion in accordance with the agreed procedures, see appendices 2 and 3.

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

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Michael Moesgaard Andersen

Appendices **to the report on** **evaluation of the** **6 applications for** **the GSM2 licence** **in Ireland**

October 18, 1995

Final draft version

Confidential

2. The methodology applied

2.1 Introduction

This appendix aims at describing the methodology and evaluation techniques applied in order to arrive at the results of the evaluation. Initially, a description is provided as to how the evaluators have laid down the work in such a way that the criteria of success concerning the project are met to a reasonable degree.

2.2 The success criteria

Focusing specifically on the evaluation phase of the GSM2 tender, the criteria of success have especially centralised around the following three categories:

- ⊗ Temporal effectiveness, i.e. timely deliveries. In principle, the deliveries of the PT GSM should not be a critical path, although the Irish GSM2 tender has not been run as an EU tender.
- ⊗ Procedural effectiveness, i.e. compliance with the licensing principles of the best application method, according to which the procedures should be transparent, objective and non-discriminative. By strictly following these general principles, it should also be ensured, to the highest extent possible, that no successful litigation or complaints could be pursued by the applicants ex post.
- ⊗ Substantial effectiveness, i.e. successful introduction of cellular competition (GSM). Provided that the Irish GSM2 has been based on the method best application, it is unequally important to nominate and select a candidate that can compete efficiently and effectively in the market-place.

These areas of focus are commented below. Before the more specific comments are introduced (chapter 5), a general overview of the evaluation process is provided (chapter 3) together with specific comments on how the best application method has been applied during the Irish GSM2 tender.

2.3 A general outline of the conduct of the competition process

The evaluation process outlined below intends to focus on the activities immediately before the closing date(s), and the period until this report was finally drafted. This means that the overview provided below covers the period from May 1995 to October 1995.

The organisation

The Department of Transport, Energy and Communications has had the overall responsibility for the conduct of the competition. The drafting of this report as well

Appendix 2: The methodology applied

as the provision of advice during the tender has been the responsibility of Andersen Management International.

The Project Team on GSM (PT GSM) has been the nucleus of the competition process. The PT GSM comprises members from the 3 telecom divisions of the Department of Transport, Energy and Communications, the Department of Finance, and affiliated consultants from Andersen Management International.

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A facility was provided in the competition process such that interested parties could pose questions in writing. 9 interested parties took advantage of this facility and posed 230 groups of questions of which several contained more than one question.

On the basis of these questions, the Department and Telecom Éireann (concerning technical matters of interconnection) promulgated 2 memoranda on 28 April, allowing all interested parties to work on the basis of the same, mainly regulatory, information. This was further strengthened by a subsequent memorandum, comprising a number of tender specifications, including a number of mandatory tables, as well as a draft licence.

One of the interested parties claimed that the interconnection regime was not adequate in order to sustain and maintain a GSM2 business case in Ireland. The Department, in conjunction with Andersen Management International, then decided to circulate supplementary information on the subject of interconnection stating that the indications in the RFP document on this issue is a matter for commercial negotiation within 6 months of commercial operations subject to arbitration by the Regulator.

The framing of the evaluation

In order to frame the evaluation work, the PT GSM finished a number of activities prior to the closing date, including, but not limited to, the following:

- ⊗ A division of responsibilities was agreed, according to which Andersen Management International was to be initiator of the work during the evaluation.
- ⊗ An evaluation model was adopted as to how a combined quantitative and qualitative evaluation should be performed.
- ⊗ Detailed work programmes were adopted in order to ensure timely deliveries.

Shortly before the original closing date of 23 June, the European Commission expressed serious reservations concerning the inclusion in the selection criteria of an auction element in relation to the licence fee for the second operator without the imposition of any fee on Éircell.

It subsequently became clear through bilateral contact with the Commission that infringement procedures would, as in the Italian case, be initiated against Ireland, if the eventual licence fee discriminated against the second GSM operator relative to

*Appendix 2:
The methodology applied*

Éircell. The Office of the Attorney General advised against proceeding with the competition in its then form and risking further legal action by the Commission. The process was accordingly suspended. A revised licence fee requirement was negotiated with the Commission whereby the second GSM operator would volunteer a licence fee in the range of IR£ 5 million to IR£ 15 million and Éircell would pay a fee of IR£ 10 million. This approach was endorsed by Commissioner van Miert on 14 July.

In this way, Ireland became the first EU member state to receive a prior consent from the Commission on the agreed fee structure. The Department then re-opened the competition process with August 4, 1995 as the new closing date.

On the closing date, the Department received 6 applications plus a preliminary GSM business case description from Éircell, which is already in commercial operation with a GSM (1) system. The Department and Éircell agreed that this description was insufficient to meet the need of the Department, and subsequently Éircell submitted on 11 August 1995, a more detailed business case description following the mandatory tables. Since this "application" is not mandatory, it has not been subject to a comparative evaluation. However, the GSM business case information provided by Éircell has been used as a valuable reference point and served comparative purposes, when judged relevant.

All the GSM2 applications received were admitted to the evaluation, as none of the applications have such substantial deviations from the minimum requirements of the RFP document that they were to be rejected. With a view to making comparative evaluations, it appeared at an early stage in the evaluation that some of the applications had prepared insufficient information.

In accordance with the provision made in § 16 of the RFP document, it was thus decided to pose a number of tailor-made written questions to the applications, and these questions were forwarded to the applicants on 24 August. The answers received on 4 September revealed that this part of the process had resulted in valuable improvements of the basis for comparisons. For example, a number of questions on metering and billing principles demonstrated that the different applications have used widely different assumptions concerning the charge units (time-true per second billing or billing in increments of, say, 10 seconds) and concerning initial call charge (ranging from no charge to 30 seconds independently of the actual duration of the call).

A large part of the quantifiable side of the applications was then compiled and put into graphics in order to serve as a background for the evaluation.

The marking and the nomination of the best application

The nucleus of the evaluation was then commenced by the establishment of 10 sub-groups each dealing with one of the dimensions outlined in § 19 of the RFP document, namely market development, coverage, tariffs, international roaming plans, radio network architecture, network capacity, frequency efficiency, performance guarantees, financial key figures, and experience. This approach was agreed prior to the closing date and is also part of the evaluation model adopted, see appendix 3, except for the evaluation of the licence fee offered, which did not require sub-group meetings. Each sub-group comprised members from the Department and consultants from Andersen Management International. In addition,

Appendix 2: The methodology applied

the Department of Finance participated in the sub-groups on financial key figures and performance guarantees. The sub-groups were staffed such that they comprised different members and affiliates of the PT GSM with specific expertise in relation to the subjects to be evaluated.

The next step in the evaluation was to invite for presentation of the applications, which was executed on 5 September together with an agenda and a number of questions to the applicants. This was done on an equal basis to all such that one hour was reserved to a presentation of the business case behind the application, one hour was offered to answer questions, which were equally posed and worded to all applicants, and one hour was reserved for the PT GSM to pose questions to the applications. The presentation meetings were consecutively held as 6 separate meetings from 11 - 14 September.

After the presentation, the remaining part of the evaluation was conducted, in particular on credibility, risks and sensitivities, and the overall evaluation and final marking of the applications were completed.

A draft report discussed on 9 October has, following the incorporation of comments from the PT GSM, culminated in this final report. As unanimous support was given by the PT GSM to the results of the evaluation, Andersen Management International was requested to submit this final report. It was also decided to present the quantitative and the qualitative parts of the evaluation in an integrated fashion in accordance with the agreed procedures.

2.4 The evaluation model and techniques

Prior to the closing date, the PT GSM had discussions on how to evaluate the application. It was agreed to proceed as follows:

- ⊗ The general method to be used is the so-called best application method, which is often dubbed "beauty contest". This method has been recommended repeatedly by the Commission and in its green paper on mobile communications as the best among several licensing methods. Basically, this method requires that the nominated and selected winner is the best application.
- ⊗ 'Best' should be measured against the criteria outlined in § 19 of the RFP document. More specifically, each criterion was broken down into dimensions and indicators. In addition, the PT GSM adopted a weighting of the dimensions, which was in compliance with the descending order of priority by which the criteria of § 19 of the RFP document were listed.

The PT GSM then requested the Andersen team to draft a memorandum on the evaluation model to be applied prior to the first closing date on 23 June, 1995. At that time, there was no limitation on the amount to be offered to the right to the GSM2 licence. Thus, the evaluation model should include some degree of quantitative evaluation in order to avoid a situation where the Irish Government could easily be accused of having prioritised the fee aspect higher than the ranking as the fourth criteria stated in § 19 of the RFP document. The resulting document is basically appendix 3.

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The methodology applied*

By the change of fee structure, cf. section 2.3 above, the PT GSM decided to slightly change the relative weighting of tariffs and the licence fee such that the licence fee should count for 11% (instead of 14%) and that tariffs should count for 18% (instead of 15%). The new weighting was, like the initial weighting, still in accordance with the ranking of the criteria outlined in § 19 of the RFP document.

Essentially, the evaluators decided that all the results of the evaluation should be presented in one comprehensive report, as is the case with the main report such that the results of the evaluation (both quantitative and qualitative techniques) should be presented in an integrated fashion. No changes were made in the memorandum, but it was decided that the qualitative evaluation should be the decisive and prioritised part of the evaluation.

Furthermore, it became clear during the evaluation that a number of indicators in the quantitative evaluation were either impossible or difficult to score, e.g. the following:

- ⊗ It was impossible to score the international roaming indicator due to lack of adequate information on the number of roaming agreements.
- ⊗ Having requested more comparable information concerning blocking and drop out rates, it turned out by means of a supplementary analysis, cf. appendix 5, that the information provided was incomparable by nature and too heavily influenced by arbitrary assumption, imponderables, and optimistic versus pessimistic approaches.
- ⊗ Concerning tariffs it turned out that 2 applicants, namely A4 and A6, have provided wrong information and furthermore, that A1, A6 and partly A5 have been compared with the rest on an incomparable basis, as A2, A3 and A4 all suggest metering and billing principles, which do indeed increase the actual bill, the customers have to pay for the specified amount of traffic. For this reason, it would be unfair to the applicants to award marks to only one, single indicator (the OECD-like) basket, without taking all the other tariff aspects into consideration.
- ⊗ The licence fee payment did not discriminate among the applicants at all.

Having realised this, the evaluator decided that the foundation for a separate quantitative evaluation had withered away. As the memorandum on the evaluation had not been changed, it was checked (page 1, indents 4 and 5, and pages 10-11, indents 5, 6, 7 and 8) that this was also consistent with the memorandum.

Consequently, the evaluators have used the information generated by the number crunching of the mandatory tables and other quantification as valuable input in the integrated, holistic evaluation. In the main report this is reflected in particular in chapter 4 in several ways. One is that quantification appears as tables, graphics, figures, etc. Another is that all the clearly quantifiable indicators have been taken into consideration and have been scored:

- ⊗ The demand indicators (number of SIM cards and amount of billable traffic) form part of the 10 indicators of the market development dimension.

*Appendix 2:
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- ⊗ The speed and extent of demographical coverage for class IV (2W) terminals outdoors form part of the roll-out indicator, one of 4 indicators of the coverage dimension.
- ⊗ The price of the OECD-like basket is one of 9 indicators of the tariff dimension.
- ⊗ The number of roaming agreement is not an integral part of the evaluation, since it has not been possible to score this indicator. The indicator has thus been deleted which is in accordance with the evaluation memorandum.
- ⊗ The number of cells appears as one of 6 indicators of the dimension radio network architecture.
- ⊗ The reserve capacity is one of 4 indicators of the dimension network capacity.
- ⊗ Following the decision stated in the evaluation memorandum, project performance rather than quality of service, has been the object of evaluation under the dimension performance guarantees. Therefore, the quality of service parameters, measured by the blocking and drop out rates, have not been directly included in the evaluation at all, cf. the conclusion of the supplementary analysis presented in appendix 5.
- ⊗ The frequency economy factor appears as one of 4 indicators of the dimension frequency efficiency.
- ⊗ The number of network occurrences appears as one of 4 indicators under the dimension management aspects.
- ⊗ The licence fee payment appears both an indicator and a dimension. Essentially, this means that this dimension/indicator is easy to score and it is the most obvious indicator for a quantitative evaluation. However, it has been easy to score this dimension/indicator, since all the applicants have offered the maximum level of payment, i.e. IR£ 15 million.
- ⊗ Both solvency and IRR appear as indicators among a total of 8 indicators defined under the finance dimension.

As illuminated above, all the indicators defined for quantification have been taken into consideration, and, in compliance with the evaluation memorandum, all the eligible indicators have been taken into consideration in the holistic evaluation.

Thus, the quantitative analysis is based on extracting from the applications the "hard" quantitative commitments in relation to critical indicators associated with the selection criteria prescribed in the tender document. It is thus limited to clearly identifiable figures as expressed by applicants and does not have the capacity to take account of considerations such as market research, planning, management preparedness, credibility, etc. In the event following receipt of the applications, it became clear that a number of 14 indicators in the qualitative model were either impossible or difficult to score.

The qualitative model differs from the quantitative in that it allows a more holistic comparison of the critical elements of the applicants. In accordance with the evaluation document agreed prior to the close of the competition, the indicators for the model under the 10 dimensions were expanded to a total of 56, taking account of

Appendix 2: *The methodology applied*

critical but non-quantifiable aspects of applications such as performance guaranties, cell planning, market research, understanding of roaming, special tariff provisions, customer care, etc.

The techniques applied in the holistic evaluation can be described by a mainly heuristic methodology as follows: Assessments by consensus among the evaluations, elaborate evaluation analyses by means of qualitative and quantitative methods, award of marks (rather the scoring by points assuming an interval scaling), and averaging of marks by consensus. This is furthermore substantiated by the marking procedures and techniques summarised below.

2.5 The marking of the applications and the nomination of the best application

The members of the sub-groups were drawn from the overall project group according to expertise relevant to the dimension under discussion in order to maximise the relevant qualifications behind each mark awarded.

The process involved the award of marks to each application under each of the ten dimensions. The marks under each dimension were developed through an assessment of the marks for each of the relevant indicators, dimensions and aspects. The process necessarily involved some degree of implicit weighting of the indicators. The result in each case was arrived at through a process of discussion and consensus within each sub-group.

In addition, also credibility, risks and sensitivities were taken into account. Therefore, apart from a detailed evaluation of marketing, technical, management and financial aspects of applications as presented by applications, the evaluation team also carried out an assessment of:

- ⊗ The overall credibility of the applications and the consistency of the business case presented with details and assumptions elsewhere in the applications,
- ⊗ Risk and sensitivity factors which could have the effect of derailing the business plan including, for example, failure to achieve coverage as planned or failure in the distribution channel, and
- ⊗ Identified weaknesses in specific applications including for example basic assumptions which are considered dubious, possible conflicts of interest or financial weaknesses.

However, these factors were not directly awarded marks, because the major evaluation had already demonstrated significant differences among the applications, and because the ranking turned out to be the same as the ranking generated by the main evaluation.

The report aims at nominating and ranking the 3 best applications. This has finally been achieved through:

1. Qualitative award of marks to the six applications with respect to the 56 indicators outlined at chapter 4 of the main report.

*Appendix 2:
The methodology applied*

2. Qualitative assessment of applications according to the marketing, technical, management and financial aspects.
3. Validation and finalisation of the results through:
 - ⊗ Regrouping of the criteria to more directly reflect the selection criteria outlined at paragraph 19 of the Report.
 - ⊗ Application of the qualitative marks to the weightings agreed prior to the close of the competition for the quantitative model.
 - ⊗ Analysis of sensitivities, risks and credibility issues focusing in particular on the three best applications.
 - ⊗ Conversion of marks to points as a final check.

2.6 Final remarks

Summarising, the PT GSM has tried to obtain a high degree of temporal, procedural and substantial effectiveness by a number of means. With reference to these 3 criteria, the PT GSM will make an "evaluation-of-the-evaluation" after the nomination and selection of the best application, once the licence has been awarded.

So far, the status as per mid October 1995 is that it can be concluded that the PT GSM in the Irish GSM2 tender has achieved a comparatively high degree of temporal and procedural effectiveness. Furthermore, a high substantial effectiveness should materialise when the nominated and selected candidate is based on the best application.

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Appendices
to the report on
evaluation of the
6 applications for
the GSM2 licence
in Ireland

October 18, 1995

Final draft version

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3. The evaluation model

3.1 Introduction

It has been decided to apply both a quantitative and a qualitative evaluation model to the eligible applications. This document contains information concerning the quantitative and qualitative evaluation models and intends to give a complete description of these.

The document comprises two parts: The first part describes the quantitative evaluation procedure including the selection of dimensions/indicators and the scoring model. The second part is a description of the qualitative evaluation model, including the evaluation process and a guide to the award of marks.

As both the quantitative and qualitative evaluation will be performed, the guiding principle will be to work with a manageable set of aspects, which is essentially identical, i.e. marketing aspects, technical aspects, management aspects and financial aspects. In addition to these aspects, which form a common denominator in both evaluations, the qualitative evaluation also deals with the risks, i.e. the sensitivities of the business cases in relation to the evaluation criteria outlined in paragraph 19 of the RFP document.

Each aspect is broken down into dimensions and each dimension is subsequently broken down into indicators. The interplay between the quantitative and qualitative evaluation is described in section 7.

3.2 Procedure for the quantitative evaluation process

The following steps describe the procedure for the quantitative evaluation of the eligible applications:

- 1) A set of dimensions and indicators has been selected for the quantitative evaluation process. An assessment, including a point scoring method, will be defined for all indicators. The same set of dimensions, indicators and point scorings must be used for all the eligible applications.
- 2) All the selected indicators will be assigned a weighting factor. If the quantitative evaluation turns out to document that the factual basis for any part of the scoring has been wrong, a recalculated scoring will then be conducted.
- 3) The score for each indicator will be a value between 5 and 1 (both included), with 5 being the best score. All scores should be rounded to the nearest integer.
- 4) Uncertainties regarding the scoring of points may be dealt with in the qualitative evaluation.
- 5) The result of the quantitative evaluation should be considered with due respect to the significance of differences in the total sum of the points assigned.

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A memorandum comprising the salient issues of the quantitative evaluation will be annexed to the evaluation report.

3.3 Dimensions assessed in the quantitative evaluation

An overview of the selected dimensions, indicators and the relation to the RFP document paragraph 19 can be seen in the following table:

Evaluation criteria from Paragraph 19 in the RFP document	Dimensions linked to each evaluation criteria	Indicators for the dimensions
Credibility of business plan and applicant's approach to market development	Market development Experience of the applicant Financial key figures	Forecasted demand Number of network occurrences in the mobile field Solvency and IRR
Quality and viability of technical approach proposed and its compliance with the requirements set out herein	Radio network architecture Network capacity	Number of cells Reserve capacity
The approach to tariffing proposed by the applicant which must be competitive	Tariffs	Competitiveness of an OECD-like GSM2 basket
The amount the applicant is prepared to pay for the right to the licence	Licence payment	Up front licence fee payment
Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded	Coverage	Speed and extend of demographical coverage of class IV (2W) handheld terminals
The extent of applicant's international roaming plan	International roaming plan	Number of international roaming agreements
The performance guarantee proposed by the applicant	Quality of service performance ¹⁾	Blocking rate and dropout rate
Efficiency of proposed use of frequency spectrum resources	Frequency efficiency	Frequency economy figure

The evaluation criteria from paragraph 19 of the RFP document are arranged in descending order of priority. This means that "Credibility of business plan and applicant's approach to market development" is the most important criterion, which is reflected in three different dimensions being linked to this evaluation criterion and the weighting of the indicators.

1) Project performance guarantee will be dealt with in the qualitative evaluation.

The following subsections discuss the dimensions and indicators selected in accordance with paragraph 19 of the RFP document and describe the scoring model for each defined indicator.

Dimensions and indicators:

3.3.1 Dimension: Market development

Indicator: Forecasted demand

The expected capability to attract subscribers is an important and measurable dimension which can be assessed quantitatively. As an indication of the expected market development, the forecasted demand will be used as an indicator. The indicator should be assessed by ultimo 4th year of licence award. It has been decided to use the sub-indicators, which cover both the value aspect of demand (traffic generated) and the volume aspect (number of subscribers).

It has been decided to use the following scoring formula concerning the value aspect:

$$\text{Market pen. score 1} = 1 + \frac{\text{quoted no of total annual traffic minutes} - 50,000 \times 1,500}{25,000 \times 1,500}$$

With the condition that: $1 \leq \text{Market penetration score} \leq 5$

It has been decided to use the following scoring formula concerning the volume aspect:

$$\text{Market pen. score 2} = 1 + \frac{\text{quoted no of SIM cards} - 50,000}{25,000}^2$$

With the condition that: $1 \leq \text{Market penetration score 2} \leq 5$

In the specifications to the tender document, the required information may be found in Table 1 (item 2) and Table 4 (item 1D) regarding the number of active SIM cards and the annual billable traffic.

3.3.2 Dimension: Coverage

Indicator: Speed and extend of demographical coverage of class IV (2W) handheld terminals

Fast coverage of the population has been one of the most important factors of success for GSM systems in other countries, and this is most likely to be of similar importance for the Irish GSM systems as well. Therefore, the coverage should be assessed quantitatively using population coverage for handheld class IV (2W) terminals for outdoor use.

The scoring for the coverage indicator is a mean value taking both speed and extend into account:

$$\text{Demographical coverage score} = \frac{1}{4} \sum (\text{DCS}(\text{year}(i)), i = 1, 2, 3 \text{ and } 4)$$

where DCS(i) is given for each year based on the ultimo year demographical coverage for outdoor use class IV terminals by own network using the following curve:

*Appendix 3:
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Points	Coverage year 1	Coverage year 2	Coverage year 3	Coverage year 4
1	≥ 30% and < 40%	≥ 70% and < 75%	≥ 80% and < 85%	≥ 90% and < 92%
2	≥ 40% and < 50%	≥ 75% and < 80%	≥ 85% and < 90%	≥ 92% and < 94%
3	≥ 50% and < 60%	≥ 80% and < 85%	≥ 90% and < 92%	≥ 94% and < 96%
4	≥ 60% and < 70%	≥ 85% and < 90%	≥ 92% and < 94%	≥ 96% and < 97%
5	≥ 70%	≥ 90%	≥ 94%	≥ 97%

The required information may be found in the specifications for the tender document, Table 7 Items 22 and 23.

3.3.3 Dimension: Tariffs

Indicator: Competitiveness of an OECD-like GSM2 basket

The tariffs are an important market penetration factor in any GSM market, and in addition, low tariffs will benefit the Irish customer. In order to match the average customer, the basket method can be utilised as a method for tariff comparison.

Tariffs are evaluated quantitatively by a basket, which is essentially the same tariff comparison indicator as suggested and applied by the OECD. The scoring is related to the applicant's basket ultimo year 4 compared to an identical basket of TACS 900, using the TACS 900 tariffs as of 1 January 1995.

The scoring will be defined by the following table:

Basket	
The GSM2 tariff basket compared to the TACS 900 basket in terms of price differences:	Points
≥ 40% cheaper	5
30% to 40% cheaper	4
20% to 30% cheaper	3
10% to 20% cheaper	2
0% to 10% cheaper	1

The required information and the definition of the OECD basket regarding the GSM2 applicants may be found in the specifications for the tender document, Table 8 Item 28.

3.3.4 Dimension: The applicant's international roaming plan

Indicator: Number of international roaming agreements

An important advantage of GSM over the analogue systems presently in use, is the possibilities of widespread international roaming. The extent of the applicants' international roaming plan is an important factor to include in the quantitative evaluation.

The relevant indicator is the number of international roaming agreements planned by the applicant by ultimo year 2 after the licence award. If there is no detailed information available on the proposed number of international roaming plans, even after presentations by the applicants, this indicator will not be scored.

Appendix 3: The evaluation model

If the information is available, the final score is calculated according to the following formula:

$$\text{Final score} = \text{renormalisation factor} \times \text{roaming score}$$

The roaming score is equal to the number of international roaming agreements. The renormalisation factor is common for all applications and is chosen so that:

$$\text{Factor} \times \text{roaming score} = 5$$

for the application with the **highest** roaming score.

This "renormalisation" of the score value will guarantee that the resulting final score will be between 5 and 1. An example of the renormalisation process is given below:

Applicant	Temp. score	"Factor"	Final point
A	8	5/20 or 0.25	2
B	16		4
C	20		5
D	15		3,75
E	4		1

3.3.5 Dimension: Radio network architecture

Indicator: Number of cells

The cell planning serves as important evidence of the overall quality of the cellular network, which can be compared with the targets for quality of service, making the number of cells in operation a relevant indicator. This figure is not static, so the figure quoted should be ultimate 4th year after licence award.

The following formula applies:

$$\text{Cells score} = 1 + \frac{\text{quoted number of cells} - 300}{150}^4$$

With the condition that: $1 \leq \text{Cells score} \leq 5$

The required information may be found in the specifications for the tender document, Table 20 Item 150.

3.3.6 Dimension: Reserve capacity

Indicator: Reserve capacity

The interplay between the capacity supplied by the GSM operators and the requirements from the subscribers is important when evaluating the quality and viability of the proposed technical approach. Besides from developing the network to such an extent that the demand from the subscribers can be met, the operator must also allow for a certain buffer to compensate for unexpected increases in the demand.

The relevant indicator for this dimension is the reserve capacity, as defined in Table 16 Item 98 from the tables, the applicants are required to complete.

The following formula applies:

$$\text{Capacity score} = 1 + \frac{1}{4} \sum \frac{\text{Reserve capacity (year 2, 3, 4 and 5)} - 20\%}{10\%} \quad 5$$

With the condition that: $1 \leq \text{Capacity score} \leq 5$

The capacity scores is calculated 5th year after licence award.

3.3.7 Dimension: Quality of service

Indicators: Blocking rate and dropout rate

The performance guarantee proposed by the applicant in the application will be binding in the licence agreement and is as such an important dimension which furthermore can be assessed quantitatively. For this dimension, the blocking rate and the drop out rate are the most relevant indicators.

The following scoring formulas will be used:

$$\text{Blocking rate score} = 1 + \frac{8 - \frac{1}{4} \sum \text{blocking rate (years 2, 3, 4 and 5)}}{1,1} \quad 6$$

With the condition that: $1 \leq \text{Blocking rate score} \leq 5$

$$\text{Dropout rate score} = 1 + \frac{8 - \frac{1}{4} \sum \text{dropout rate (years 2, 3, 4 and 5)}}{1,4} \quad 7$$

With the condition that: $1 \leq \text{Dropout rate score} \leq 5$

As can be seen from the formulas, the indicators defined have been based on an average of the service figures quoted for 4 years (years 2, 3, 4 and 5) after licence award. The required information can be found in the specifications for the tender document, Table 9-Items 30 and 31.

3.3.8 Dimension: Frequency efficiency

Indicator: Frequency economy figures

The frequency economy which provides crucial evidence of the utilisation of frequencies as a common resource is relevant to include in the quantitative evaluation. The available frequency spectrum for the GSM operators is limited, and the GSM operator has to accommodate the active SIM cards within the limited spectrum.

The frequency economy will be assessed ultimo the 5th year after licence award, as this will provide information on the applicants' frequency economy in a mature network. The following indicator will be used to express the frequency economy:

$$FE_5 = \frac{\text{Number of SIMS year 5} \times \text{average peak hour traffic year 5}}{\text{No. of GSM channels demanded year 5}} \quad 8$$

Appendix 3: The evaluation model

(All figures in the fraction should be based on the ultimo year values.) The required information can be found in the specifications for the tender document, Table 16 Item 100.

The FE_s figure will depend on the cell planning and the planned capacity margin. The figure will also depend on penetration of half rate coding and in order to prevent spread in the figures due to variances in the applicants' assumptions, the penetration of half rate coding is fixed as a calculatory assumption in the specifications to the tender document.

Assuming that 50% of the subscribers will use half rate coding ultimo year 2000, the final score is calculated according to the following formula:

$$\text{Final score} = \text{renormalisation factor} \times \text{FE}_s$$

Where the above-mentioned renormalisation factor is common for all applications and is chosen so that:

$$\text{Factor} \times \text{FE}_s = 5$$

for the application with the **highest** FE_s score. This "renormalisation" of the score value will guarantee that the resulting final score will be between 5 and 1.

3.3.9 Dimension: Experience of the applicant

Indicator: Number of network occurrences in the mobile field

The right experience is a very important factor for the credibility of the business case. Therefore, the applicants are requested to inform about the number of countries, where they have played a major role in the installation and commercial operation of:

- 1) GSM networks that compete nationally with the networks dominated by the PTTs
- 2) GSM networks operated in cooperation or controlled by the PTTs
- 3) Other cellular telephone networks.

Textbox stating three different types of experiences

The scores will be calculated for each member of the consortium on the basis of the following formula:

$$\begin{aligned} \text{Temp. value} = & 3 \times (\text{experience points of ad 1}), \text{ i.e. GSM-2 experience occurrences} \\ & + 2 \times (\text{experience points of ad 2}), \text{ i.e. GSM-1 experience occurrences} \\ & + 1 \times (\text{experience points of ad 3}). \end{aligned}$$

Appendix 3: The evaluation model

These values are added using the ownership ratios as weighting factors. The weighted sum is called the temporary score, which is renormalised to yield the final score.

The "experience points" depends on the number of occurrences within the GSM-roles defined in the box above.

Number of occurrences	Experience points given
1	2
2	3
More than 2	4

The word "occurrences" may need some further explanation in order to avoid that insignificant or redundant occurrences are counted. As a guideline, the applicant must play a major role. In addition, the network quoted must be in commercial operation in an OECD country. Finally, a number of similar participation in the same country may only be counted as one occurrence.

The final score is calculated according to the following formula:

$$\text{Final score} = \text{renormalisation factor} \times \text{temp. score}$$

The above-mentioned renormalisation factor is common for all applications and is chosen so that:

$$\text{Factor} \times \text{temp. score} = 5$$

for the application with the **highest** temporary score. This "renormalisation" of the score value will guarantee that the resulting final score will be between 5 and 1.

3.3.10 Dimension: Licence payment

Indicator: Up front licence fee payment

The amount the applicant is prepared to pay for the right to the licence is another factor in the evaluation, and one which can readily be included in the quantitative analysis.

The final score is calculated according to the following formula:

$$\text{Final score} = \text{renormalisation factor} \times \text{licence fee score}$$

The above-mentioned renormalisation factor is common for all applications and is chosen so that:

$$\text{Factor} \times \text{licence fee score} = 5$$

for the application with the **highest** licence fee score. This "renormalisation" of the score value will guarantee that the resulting final score will be between 5 and 1.

3.3.11 Dimension: Financial key figures

Indicators: Solvency and IRR

Appendix 3:
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There are a number of financial indicators, which all are interrelated. Two indicators have been chosen which both express the credibility of the business case: The solvency and the internal rate of return (IRR) as defined in the specifications. The solvency is a value which varies temporarily, and the average for the years 2,3,4 and 5 is used. The IRR is a value derived over the entire period of the business case (15 years), and it is not critical to consider the temporal variation here.

The scoring is based on the following tables:

Average solvency over year 2,3,4 and 5	
Solvency	Score
$\geq 60\%$	5
$\geq 45\%$	4
$\geq 35\%$	3
$\geq 20\%$	2
$< 20\%$	1

Internal rate of return	
V=Numeric value of (IRR-11%)	Score
$V < 1\%$	5
$1\% \leq V \leq 2\%$	4
$2\% < V \leq 3\%$	3
$3\% < V \leq 4\%$	2
$V > 4\%$	1

The required information can be found in the specifications for the tender document, Table 15 Items 91 and 97. Should the applicant prepare a 5 year plan, the IRR score will be 1.

3.4 Vote casting and weight matrix

The following table shows how the votes will be given for each of the indicators in the quantitative evaluation.

*Appendix 3:
The evaluation model*

Indicator	A1	A2	A3	A4	A5	A6	Weight
Market penetration score 1							5
Market penetration score 2							5
Speed and extend of demographical coverage for class IV (2W) handheld terminals							7
Competitiveness of an OECD-like GSM2 basket							18
Number of international roaming agreements							6
Number of cells							10
Reserve capacity							10
Blocking rate							2.5
Dropout rate							2.5
Frequency economy figure							3
Number of network occurrences in the mobile field							10
Up front licence payment from the applicant							11
Solvency							5
IRR							5
Grand Total							100

Note: Credibility of business plan and the applicant's approach to market development will be covered by the following indicators: experience of the applicant, market development, solvency and IRR. Quality and viability of technical approach will be covered by the number of cells and the reserve capacity.

3.5 Procedure for the qualitative evaluation process

Despite the "hard" data of the quantitative evaluation, it is necessary to include the broader holistic view of the qualitative analysis. Other aspects such as risk and the effect on the Irish economy may also be included in the qualitative evaluation, which allow for a critical discussion of the realism behind the figures from the quantitative analysis.

The following describes some of the major steps in the qualitative evaluation process:

- 1) The eligible applications are read and analysed by the evaluators.
- 2) The eligible applications are evaluated by way of discussions and analyses.
- 3) When deemed adequate and necessary, in-depth supplementary analyses will be carried out.

*Appendix 3:
The evaluation model*

- 4) Initially, the marks will be given dimension by dimension. Afterwards, marks will be given aspect by aspect (subtotals) and finally to the entire applications (grand total).
- 5) When the dimensions are being assessed, the evaluators should, as far as possible, use the same indicators as used during the quantitative evaluation. Supplementary indicators may be defined, however, if the existing indicators are not sufficiently representative for the dimensions to be evaluated.
- 6) During the qualitative evaluation, the evaluators should take the results from the quantitative evaluation into account, as a starting point, and make the operationalisations of the dimensions (cf. indent 5 above) in order to make fair comparisons between the applications.
- 7) If major uncertainties arise (e.g. in accordance with step 4 of the quantitative evaluation or due to incomparable information) supplementary analyses might be carried out by Andersen Management International A/S in order to solve the matter.
- 8) The results of the qualitative evaluation will be contained in the main body of the draft evaluation report. The results of the supplementary analyses will be annexed to the draft report.

The draft report is to be presented and discussed among the 'essential persons' (identified by the Department). On this basis, Andersen Management will be asked to propose a final report.

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Appendices
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*Appendix 10:
Supplementary analysis on financial risks*

10. Supplementary analysis on financial risks

10.1 Introduction

As stated in the main evaluation report, the two top ranked consortia have members, who presently do not have the capital required to finance the GSM2 network.

The consortia members, who thus need capital for the funding of the GSM2 consortium, have "secured" this capital by various instruments, including the shareholders' agreement and letters of commitment from investors.

This analysis discusses the risks due to lack of funding. It further suggests means to close the uncertainty related to financing.

The risk analysis includes a brief assessment of A2, A4 and A6 (cf. Section 1.2), and a more detailed assessment of the three top ranked consortia A1, A3 and A5 (cf. Section 1.3, 1.4 and 1.5).

10.2 Brief assessment of A2, A4 and A6

The shares of A2 are owned by the following shareholders:

- | | |
|--------|--|
| 60-64% | Comcast Corporation US |
| 36-40% | 3 Irish investors: |
| | 15% Radio Telefis Éireann (100% State owned) |
| | 6-10% Bord na Móna (100% State owned) |
| | 15% GCI Limited (newly formed Irish company) |

The main financial problem with this consortium is the fact that the majority owner Comcast has a negative equity. For the last 3 years, the company has consistently had a net loss of \$ 270 million in 1992, \$ 859 million in 1993 and \$ 87 million in 1994. With current assets of less than 10% of the total assets, the risk exists of not being able to raise the sufficient funds for the Irish GSM2 venture. The financial statements for Bord na Móna also show negative equity capital, whereas RTE has a financially more sound balance sheet.

The shares of A4 are owned and will be owned by the following shareholders: AT&T, Princes Holdings Ltd, United and Philips Communications, Independent Newspapers, Riordan Communications, Tele-Communications Inc., a "semi-state owned body". The consortia members are generally financial sound businesses, and no financial problems regarding the financing of the GSM2 operation are envisaged.

A6 is owned by MIC (Millicom International Cellular), Kinnevik (39% shareholder in MIC) and an independent trust funded by the two former shareholders. The consortia members are generally financial sound businesses, and no financial problems regarding the financing of the GSM2 operation are envisaged.

10.3 Assessment of A1

The consortia members of A1 and their share distribution is as follows:

- 25% SBC Communications Inc. (Southwestern Bell Corp.)
- 25% DETECON (30% Deutsche Telekom, 3 banks)
- 25% Tele Danmark International (Telecom A/S)
- 25% 3 Irish investors:
 - 10.5% Martin Naughton
 - 10.5% Lochlann Quinn
 - (The two together own all shares in Glen Dimplex)
 - 4% Kieran Corrigan.

The application states an intention to enlarge the ownership base by flotation of 25% of the share holdings held by Mobilcall's members. This will be initiated after 3 years of operation, depending on the success of the company and on stock market conditions.

In the financial plan, the base case equity contribution is stated to be IR£ 71 million with a debt financing of IR£ 32 million. The applications did not include a sensitivity analysis regarding these figures, but the sensitivity analysis regarding the cash flow shows that the minimum accumulated cash flow increases (numerically) from minus IR£ 104 million to minus IR£ 136 million in the event of a two year delay of subscriber uptake. Although this figure represents a possibly unrealistic event, a combined set of events influencing the business case in a negative direction could lead to a situation where the need for finance is 40% higher than the base case.

If the ownership ratios are used as an indicator for the finance requirements, the following equity requirements hold:

Member	Ownership	Equity	Estimated worst case equity
SBC Communications Inc (Southwestern Bell Corp)	25%	17,654,000	24,715,600
DETECON (30% Deutsche Telekom, 3 banks)	25%	17,654,000	24,715,600
Tele Danmark International (Telecom A/S)	25%	17,654,000	24,715,600
Martin Naughton	10.50%	7,414,680	10,380,552
Lochlann Quinn	10.50%	7,414,680	10,380,552
Kieran Corrigan.	4%	2,824,640	3,954,496

The concern in this consortium could be placed on DETECON. Although DETECON has an equity capital of DM 77 million - equivalent to 50% of the worst case equity commitment - the commitment may place a too big burden on DETECON. According to DETECON, the minority owner Deutsche Telecom will act as backer. Considering, however, that the equity capital does exist, we do not assess DETECON as an investor, which will not be able to fulfil its commitments.

With the intention of flotation, an escape clause is left for the three Irish investors, if they have problems with the equity capital. If the presence of the three Irish private investors is seen as an important asset to the consortium, this must be addressed in the licence agreement.

*Appendix 10:
Supplementary analysis on financial risks*

10.4 Assessment of A3

The consortia members of A3 and their share distribution is as follows:

- 26.7% Motorola International Ventures Inc.
- 26.7% Unisource NV (NL, S, CH, E telecom joint venture)
- 26.7% Sigma Wireless Networks Ltd. (Irish mobile communications group)
- 20% EBSI Telecoms Ltd. (100% State owned)

The initial shareholding by Irish investors will be 46.7%. The application includes no intention of share flotation.

Sigma Wireless was formed in 1991, following a management buy-out of Motorola's Irish distribution activities. The principal activities of the company are the exclusive distribution and sale of Motorola radio communications products and systems in Ireland.

Motorola is a 49% shareholder in a joint venture with Telecom Éireann, called Eirpage, which provides the only nation-wide paging service in Ireland.

In the financial plan (base case), the equity contribution is stated to be IR£ 39,935,000 with a debt financing of IR£ 42,403,000. The applications did not include a sensitivity analysis regarding these figures, but the sensitivity analysis regarding the cash flow shows that the minimum accumulated cash flow increases (numerically) from minus IR£ 102 million to minus IR£ 255 million in the event of a two year delay of subscriber uptake. Although this figure represents a possibly unrealistic event, a combined set of events influencing the business case in a negative direction could lead to a situation where the need for finance is twice as high as in the base case.

If the ownership ratios are used as an indicator for the finance requirements, the following equity requirements hold:

Member	Ownership	Equity	Estimated worst case equity
Unisource	26.67%	10,649,333	21,298,667
Motorola	26.67%	10,649,333	21,298,667
Sigma	26.67%	10,649,333	21,298,667
ESBI	20%	7,987,000	15,974,000
TOTAL	100.00%	39,935,000	79,870,000

Table 1. Base case and worst case equity requirement

Although the financial strength of ESBI is not revealed in the application, the shareholders' agreement states that ESBI will get all the necessary backing from the mother company, ESB. Therefore, the financial strength of ESBI seems well secured.

Unisource and Motorola are both financially strong companies with ample funds for this - for them - small project.

Sigma is the weak partner with an equity capital of only IR£ 1 million. The application does not state how Sigma is going to provide the necessary funds, but the presentation revealed that they have a letter of commitment from an Irish investment

Appendix 10:
Supplementary analysis on financial risks

bank, AIB. As a matter of the tender procedure, this piece of information can only be interpreted as a willingness to secure the necessary capital. Furthermore, nothing definitive about the "price" of such commitment with respect to gaining equity in, or control of, Sigma has been stated. However, Sigma's existing shareholders cannot be expected to give away a majority part of the shares. This is because the shareholders' agreement (see the text box below) leads a way out of the funding problem. It states that if one of the shareholders is not capable of providing a required guarantee for a loan, the other shareholders may provide the necessary backing.

The shareholders' agreement thus provides Sigma with a tool to guarantee Sigma's funding. Sigma may still decide not to use this opportunity due to other reasons. One reason could be that the financial burden imposed by the ownership of Persona is of such a magnitude that it might cause Sigma's bankruptcy. This may happen if Sigma does not increase its equity capital to a level which will cover the initial losses in Persona during the period of the first years. Therefore, there is a need for an injection of further equity capital in Sigma if it shall persist as a stable partner in the consortium. This aspect is not addressed in the application and it leaves an uncertainty about the ownership of Sigma.

If Sigma is not able to provide the necessary funding, the shareholders' agreement states that "failure by a shareholder to subscribe to its pro rata share in a subsequent share capital increase shall result in dilution of the proportionate shareholding percentage of such shareholder." Thus, the consequence is that Motorola, ESB and Unisource get a higher stake. This may lead to the situation where Persona is controlled by non-Irish partners.

Notes on the shareholders' agreement:

- ESBI may decide not to participate as a consortium member if the IRR is less than an agreed figure.
- New shareholders may be added to the consortium upon shareholders' supermajority approval.
- All shareholders agree to pay their share of the First Stage Equity³. It is stated that this will be required within 18 months of licence award.
- Failure by a shareholder to subscribe to its pro rata share in a subsequent share capital increase shall result in dilution of the proportionate shareholding percentage of such shareholder.
- It is agreed to try to maximize the debt equity ratio to at least 60:40.
- If one of the shareholders is not capable of providing a required guarantee for a loan, the other shareholders may provide the necessary backing.

Notes on the articles of association:

- All shares rank *pari passu* in all aspects.

Text box 1. Extracts from the shareholders' agreement and from the articles of association.

To conclude, the weak financial position of Sigma will not lead to financial problems for Persona, but may lead to a different ownership structure of Persona

³ The first stage equity relates to the equity commitment stated in the first business plan. It is our interpretation that this business plan is identical to the business plan submitted with the application.

*Appendix 10:
Supplementary analysis on financial risks*

either directly through the division of its shares or indirectly through the ownership of Sigma.

This uncertainty can be limited by a proper set of licence conditions. As examples, the following types of conditions are suggested:

- ⊗ Requirements for minimum equity capital of Sigma
- ⊗ Requirements regarding the voting power in Persona
- ⊗ Requirements regarding the loans to Sigma and their conditions.

10.5 Assessment of AS

The consortia members of A5 and their share distribution of the existing corporation ESAT digifone is as follows:

- 50% Telenor Invest AS
- 50% Communicorp Group (34% held by Advent Int. plc)

At present, Telenor has with current assets of IR£ 550,000,000 - the financial strength to provide the necessary financial backing of its wholly owned (sub-) subsidiary of Telenor Invest.

Communicorp is a new company which has invested heavily in telecommunications infrastructure and has a very weak balance sheet which needs capital injection before it can support the shareholders' equity commitments stated in the shareholders' agreement:

Appendix 10: Supplementary analysis on financial risks

Notes on the shareholders' agreement:

- A total equity requirement of IR£ 52,000,000 is described as well as a commitment to keep a 40:60 equity debt ratio. This commitment will require that the shareholders provide cash for new ordinary shares.
- The increased share capital shall be subscribed by the parties' pro rata shareholding.
- The inclusion of new shareholders (where four are mentioned by name) is described.
- A condition for the inclusion of a new investor is the need to agree with the principles of the shareholders' agreement.
- Provided the consortium wins the licence, the two consortium members have agreed to reduce their stakes to a minimum of 40% by allowing three to five institutional investors to hold a maximum of 20% of the shares.
- Telenor and Communicorp have agreed to choose two or more of the following four companies as new shareholders:
 - Allies Irish Banks plc
 - Investment Bank of Ireland
 - Standard Life Ireland
 - Advent International plc
- It is the shareholders' intention to go public with a pro rata reduction of the shareholders. 34% will be held as a minimum by Telenor and Communicorp. This will be arranged either by increasing the share capital or by transfer of shares.

Notes on the articles of association:: The articles of association are not included in the supporting material of the application.

Text box 2. Extracts from the shareholders' agreement.

In the period after a licence award, Communicorp will have between 40% and 50% of the shares. This may be diluted to 34% at a later stage, where up to 32% of ESAT digifone's equity is made available to public or institutional investors. Even with only 34% shareholding, the financial commitment of the two original partners will be high.

The applications did not include a sensitivity analysis regarding these figures, but the sensitivity analysis regarding the cash flow shows that the minimum accumulated cash flow increases (numerically) from minus IR£ 108 million to minus IR£ 156 million in the event of a two year delay of subscriber uptake. Although this figure represents a possibly unrealistic event, a combined set of events influencing the business case in a negative direction could lead to a situation, where the need for finance is 50% higher than the base case. IR£ 52,000,000 are used as the base case requirement, and if 1,5 x IR£ 52,000,000 is used as the worst case equity requirement, the individual equity commitment for Telenor or Communicorp amounts to:

	Ownership	Equity, base	Estimated worst case equity
Commitment at minimum equity	34.00%	17,680,000	26,520,000
Commitment at medium equity	40.00%	20,800,000	31,200,000
Commitment at maximum equity	50.00%	26,000,000	39,000,000

Table 2. Base case and worst case equity requirement

This equity commitment cannot be met by Communicorp today. According to a letter of commitment to the Department of Transport, Energy and Communication,

*Appendix 10:
Supplementary analysis on financial risks*

dated 10 July, Advent has committed to fund up to IR£ 30,000,000 in support for Communicorp's 40% shareholding. The letter of commitment does not clearly state what the "price" would be if the commitment should be brought into life, but according to the presentation, the price would be close to a 75% stake in Communicorp. Furthermore, according to the information given in the presentation, the control will still be in the hands of the Irish investor (Denis O' Brien), as his shares bear a three times higher voting power.

The legal basis for this commitment has not been included as part of the applications supporting material. Taking into account the very high proportion of Communicorp's intangible assets (most of this is goodwill), the risk of a dispute about the share ratio between O' Brien and Advent seems evident.

This may result in a situation of instability or a situation where the control of Communicorp is transferred to Advent. It could also lead to a situation where the commitment of Advent cannot be fulfilled.

The size of commitment by Advent does not cover our worst case estimate of the equity requirements (at a constant 50% ownership) for Communicorp. In a worst case scenario, the requirement for further funding is expected to arise 2-3 years into the project. At this stage, Advent will already have invested the committed figure, and it is judged to be very unlikely that Advent will retreat, as this could lead to a 100% loss of the invested funds. Therefore, it can be concluded that the major risk is related to possible instability of Communicorp or to the transfer of power to a non-telecommunications investor.

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

- ⊗ Requirements regarding the share of ownership and voting power in Communicorp
- ⊗ Requirements regarding the equity of Communicorp.

Appendices to Chapter 43

MR. SEAN FITZGERALD’S REVIEW OF THE SECOND DRAFT AND HIS OTHER THOUGHTS

Index

1. Handwritten notes by Mr. Fitzgerald “*The GSM award and regulation of competition*”.

● NOTE

THE GSM BOARD AND REGULATION OF COMPETITION.

PRESENT POSITION

- ESAT TELECOM have a VAS licence (Value added Service licence) to provide non voice telecommunication services to the public. That includes data fax, voice mail & any "added value" service. By applying a very narrowly defined set of circumstances it can also include "voice telephony" which falls outside the "public voice telephony" service reserved exclusively by law to Telecom Mission, where the voice service is originated or delivered over a private leased line & not over the public network.

- (2)
2. Telecoms leased line charges from ESAT's operations in the 2 categories of line they ~~are~~ require are priced below cost. (i.e. local lines to connect a customer to ESAT's own system & large capacity (2 megabit) lines to ~~be~~ transmit large traffic volumes over ~~trans~~ long distances within Ireland & to London.

Proposals to re-baseline leased lines would remove these anomalies.

3. ESAT in our view have gone outside the terms of their licence and are ^{now} offering a voice telephony service to customers that is clearly within the definition of services reserved to Telecom. They use devices called auto diallers & routers to connect customers not over leased lines but over the public network. This opens up a

and greater field of customers in small or medium sized business or residential customers will significantly long distance or overseas calls. The potential business & damage to Telecom is significant.

What is worse is that the law is not being upheld & the regulatory process is shown to be ineffective. The lesson is not lost on other operators who are likely to move into this area also but may feel constrained as long as they are potential candidates for the Strategic Alliance process. ~~If the situation continues with the alliance process without action~~

4) Award of GSM licence

Strict conditions to ensure fair competition will apply to both the 2nd GSM operator & to Eircell. If the Working Consortium includes ESAT which is perceived to be

- immune from any regulatory action w.r to now
 it will strain credibility in the process.
 It will also then create door for non
 licenced activity. The GSM winners will
 have the right to build its own infrastructure
 to carry GSM traffic. but only GSM w.r to
1/1/2000. ~~It is likely that such a~~
~~restriction would be abided by~~
 It is also required
 to hand over international traffic to Telecom
 w.r to 1/1/2000.
 ESPT would now have both an internal
 infrastructure and its international link for
 licensed traffic. Is it credible that without
 strong regulatory enforcement that license restrictions
 would be complied with?

5) Impact of Telecom Management & Aircois

- Onward to a consortium including ESAT without co-ordinated action ^{by the company management} or regulatory enforcement will be seen, in ^{the} ~~the~~ ^{company} ~~management~~ ^{consolidation} consolidating ESAT's position as a formidable competitor ~~again~~ in a privileged position with apparent Ministerial & Government backing. We have so far managed to persuade & restrain Telecoms management from initiating operational or legal action to restrain or disrupt ESAT's operation. It has also been very difficult to get operational staff to provide even legitimate facilities to ESAT. Early unilateral action by management or industrial action by unions is a distinct possibility. Equally there could be ^{politically} legal & industrial action directed at the Minister to enforce his responsibilities as Regulator.

6. Effect on Strategic Alliance outcome

The mandate for the Strategic Alliance approved by Government preserves the current "privileges" of TE (Public Voice Telephony & infrastructure) until 1/1/2000 & promises strict enforcement of licence conditions. This is very important to determining the business plan of TE, the valuation of the company & the likely price to be realised for a stake in the company.

Consolidating ESN's position as ~~and~~ a strong competitor will have an effect but this cannot be avoided. If ~~it~~ coupled with an unwillingness to enforce regulatory & legal obligations, it would seriously undermine the process ~~and~~ bring the credibility of the Dept. & Government into question. The Government will have to set out clear regulatory, procedural & structural as part of the process.

What will it be worth?

Action needed

- 1 The outcome of the GSM competitive process must be respected.
- 2 The credibility of the regulatory system both in relation to mobile competition, the strategic alliance process, and the plans & actions of all existing & potential operators must be upheld. A public announcement to this effect must be made.
- 3 ESAT could be invited to review the nature of their voice services & indicate how they will comply with licence conditions both as regards existing customers & future promotion.
- 4 A failure to get a satisfactory response from ESAT will bring on a consequence.
 - (a) Legal or operational action to enforce compliance
 - (b) A review of the desirability of concluding

~~new~~ L2SM license negotiations with a ~~compar~~ ^{compar} ~~tion~~
containing a party, which is not in
compliance with existing license conditions.

It should be noted that failure to reach agreement
on license conditions will the first recommended
bidder allow for opening negotiations
with the second placed bidder.

~~1105~~ (240)
300
1003

A5
A3
A1

(3/21)

A1 ²⁵ MAN. L.R. KR.
D.L. F. B. L. D.F. (100)
25

A2 RTE KMM 501 38
Com 685 621

A3 Sign FSB 47
Motor 271 LINSON 271

74 Pm Holinsworth 38
AT&T Phila 42

5. Comm Eng (FESOT) PDVENT
50
TELENR 50

1/6 (CIE 10/10/10)
Hinner Mubien

Appendices to Chapter 47

EVENTS OF TUESDAY, 24TH OCTOBER, 1995

Index

1. Suggested Textual Amendments document with handwritten notes by Mr. Riordan.
2. Suggested Textual Amendments document with handwritten notes by Mr. Buggy.
3. Suggested Textual Amendments document faxed to Mr. Andersen on 25 October, 1995.
4. Extract from Final Evaluation Report dated 25 October, 1995 (Renumbered Table 15, page 43).
5. Extract from Final Evaluation Report dated 25 October, 1995 (Renumbered Table 16, page 48).
6. Extract from Final Evaluation Report dated 25 October, 1995 (page 47).
7. Extract from Final Evaluation Report dated 25 October, 1995 (Renumbered Table 16, page 48).
8. Extract from Final Evaluation Report dated 25 October, 1995 (page 47).
9. Extract from Second Draft Evaluation Report dated 18 October, 1995 (page 50).
10. Extract from Second Draft Evaluation Report dated 18 October, 1995 (page 50).
11. Extract from Final Evaluation Report dated 25 October, 1995 (pages 50-52).

SUGGESTED TEXTUAL AMENDMENTS

- Page (i), paragraph one. List the selection criteria as per paragraph 19. ✓
- Page (i), paragraph two. Delete "consequently". ✓
- Page (i), paragraph three. "On the basis of the applications received, supplementary written communication with the applicants and the clarifications provided at the presentation meetings, the evaluation concluded that the three best applications are :". ✓
- Page (i), paragraph four, second line. Replace "is not at all weak" with "is also, strong". ✓
- Page (i), paragraph four, final sentence. Replace with "it is emphasised that the credibility of the business plan and approach to market development and the technical approach ranked higher than tariffs in the selection" ✓
- Page (1), Final paragraph. Replace with "On the basis of the selection criteria adopted by the Irish Government and an objective, transparent and non-discriminatory qualitative comparison of the six applications received the PT GSM unanimously recommends that the Minister enter into licence negotiations with applicant A5. In the ~~event~~ ^{called out} ~~event~~ of failure of these negotiations, the PT GSM recommends that negotiations on the award of the licence be opened with applicant A3 and subsequently, if necessary, with applicant A1." ^{Enter Tawey's paragraph} This goes in at end of last page
- Page (ii). ~~The~~ table of contents should come before the Executive Summary. ✓
- Page 1, licence fee criterion. This should be annotated with a footnote along the following lines; "Following the launch of the competition, for the reasons described in chapter 2, the licence fee requirement became subject to a minimum of IR£5m and a maximum of IR£15m." ✓
- Page 2, paragraph five, second and third sentences. Replace with

~~The key~~ characteristics of each application including a description of each applicant and of the basic philosophy underpinning each application is contained in chapter 3. ✓

- Page 2, final paragraph. "European Commission" rather than "Commission". ✓
- Page 4, final paragraph. Replace "finished" with "completed". ✓
- Page 5, third complete paragraph. "Resumed" rather than "re-opened". ✓
- Page 6, third paragraph, first sentence. Replace with "An invitation was issued on 5 September to each of the six applicants to attend a presentation meeting with the PT GSM. The invitation incorporated an agenda for the presentation and a number of questions to be responded to. *This was done etc...* ✓
- Page 6, fifth paragraph. Replace with : "An initial draft report was discussed by the PT GSM on 9 October. The incorporation of comments on the initial and a subsequent draft by members of the team in relation to the presentation of the results of the evaluation process has culminated in this final report. ✓
- Page 6, final paragraph. Replace with : "It is ^{the professional} a view of AMI that the competition process has, as reflected in this report, been conducted, in a non-discriminatory way and with a high degree of transparency and objectivity." ✓
- Page 7, fourth paragraph, second last and final sentences : Replace with "The consortium does not stipulate a managing partner but a division of responsibilities has been identified in the application" ✓
- ~~Page 11, first paragraph.~~ *Page 11 - do something* "Córas Iompair Éireann" ✓
- Page 12, second complete paragraph, final two sentences. Replace with "The understanding of relevant ^{Irish} ~~Irish~~ and EU legislation appears to be generally low. This is reflected in particular in that the application contains elements which may not be fully in accordance with the EU rules in relation to procurement of equipment. ✓
- Page 12, final paragraph, second sentence. Replace with : "Finally, with regard to procurement, the application would seem to contradict the Irish

interpretation of the EU procurement rules as A4 has already selected and contracted some of the infrastructure vendors". ✓

- Page 13, fourth paragraph, second last sentence. Replace "incomparably" with "comparatively". ✓
- Page 14, Section 4.1 - Comments provided elsewhere.
Page 14 3rd Para - last sentence to be deleted.
- Page 15, fourth paragraph, first sentence. Delete "as well as for the Irish society as a whole". ✓
- Page 16, third paragraph. Replace "discrimination" with "difference". ✓
- Page 18, first paragraph, second sentence. Replace "demand indicators" with "demand projections". ✓
- Page 18, first paragraph, final sentence. Replace "the highest mark" with "high marks". ✓
marks
- Page 19, fourth paragraph. Replace "exorbitant" with "exceptional". ✓
Page 21 last 3rd Para 1 - only warranted
- Page 24, third paragraph. Delete "unfairly". ✓

- Page 25, third paragraph, first sentence. Replace with "The more business oriented graph ~~presented~~ similar comparative positions. ~~In figure 12~~ reveals to those in the consumer oriented graph for A2 and A6. ✓
- Page 26, second paragraph, final sentence. Replace with "It could be added that the projected tariffing of A2 is not in accordance with a Memorandum of Understanding between GSM operators in relation to roaming".
- Page 26, paragraph four, line four. Replace "evaluators" with "Andersen Management International". ✓
- Page 28, third paragraph, final sentence. Delete words following "B" ✓
- Page 32, first complete paragraph, final sentence. Replace with : "This is considered slightly less favourable from a timing perspective". ✓
- Page 33, seventh paragraph, first sentence. Replace "principally" with "in principle". ✓
- Page 36, third paragraph. Replace "have been assessed positive" with "have been assessed positively". ✓
- Page 36, paragraph five, first sentence. Replace "The dimension experience of the applicant has" with "This dimension has ...". ✓
- Page 36, Table 12. Delete table and incorporate text along the following lines.
 "A3 has a considerable quantity of cellular experience with its principals being involved in four GSM1 networks and five other cellular networks. A1 is similarly strong with its principals having a combined experience of 1 GSM2 network, 2 GSM1 networks and 3 other cellular networks. A6 has experience of two GSM2 networks and one other cellular network. A4 and A2 have no GSM experience but do have experience of other cellular networks. A5 however has GSM1 experience in a competitive market".
- Page 37, Table 13. The first induction should read "Management Team" with a foot note giving the full title.

- Page 37, second paragraph. Replace "same degree of experience" with "a similar degree of experience". ✓

- Page 37, final paragraph, final sentence. Replace with:

"The fact that A2, A4 and to and extent A6 may have some shortcomings in relation to European standardisation and the EU procurement rules ^{has} not been taken into account in ~~this part~~ of the evaluation. These factors are considered in the assessment of risks". ✓

- Page 38, Table 4. <sup>Page 37 - "MWDJ + Cete" in 2nd paragraph
"does to have" last paragraph</sup> Delete brackets around AS in relation to the licence fee payment. ✓

- Page 41, second paragraph, first sentence. Replace with:

"Financing is dealt with by the sub-indicators of liquidity and profit/interest rates. ✓

- <sup>Delete "Profit/interest rate" for 2nd paragraph
"was point" instead of ask of me</sup> Page 41, paragraph 5, first sentence. Replace "the total balance" with "the total assets balance". ✓

- Page 42, first paragraph, second sentence. Replace with:

"RTE along among the principals has a positive equity, albeit at a moderate level (IR£63.7 million in 1993). ✓

- New material to be added here is suggested elsewhere.

- Page 44. Insert new paragraph two and three along the following lines:

~~"A credit factor in any consideration of the credibility or risk analysis of applications is the capability of the principals to finance the project including ability to meet any shortfall in the funding requirement due, for example, to unforeseen capital expenditure. In general terms, the applicants have provided some measure of comfort that appropriate funding arrangements are in place.~~

~~The evaluators have however taken into consideration that the level of commitment on funding, particularly in relation to debt financing, which~~

~~applicants can provide is constrained on the one hand by the fact that a licence has not been granted, and on the other, by the conservative bias of the banking community. The evaluators have concluded however having regard to the level~~

^{and the} ~~that no engines~~ ^{and difficulties caused by}

of interest in the Irish competition for the GSM licence and the high profitability of mobile telephony generally throughout Europe that the project is fundamentally robust and ^{at a licence has been granted,} an attractive opportunity for corporate debt financiers. Nevertheless, ~~the evaluators have recognised the necessity to identify financial weaknesses among the principal backers which could give rise to difficulty in meeting the additional equity burden of unplanned or unforeseen capital expenditure.~~ The financial position of the principals of each consortium has therefore been assessed and ~~some potential weaknesses are identified below.~~ Following ~~a detailed discussion of the matter however,~~ and having regard in particular to the robust nature of the project overall, the evaluators have formed the view that, subject to one of the principals having sufficient financial strength to ensure completion of the project; a potential financial weakness of one consortia member ^{at this stage} should not have a negative impact on the ranking of applications. These aspects are the subject of further elaboration in appendices 9 and 10.

The assessment of credibility and risks has also taken account of:

- management proposals,
- preparations in relation to development of the distribution channel,
- preparations in relation to site acquisition and equipment procurement,
- consistency of penetration, usage etc. with financial figures.

In general terms, this assessment has sought to identify factors which may have the effect of undermining the projected development of the business plans proposed by applicants."

- should be considered in licence negotiations*
- ~~Page 44, paragraph 4.~~ Clarify the point in relation to the average call revenues of A.T. & T. and Nokia.
 - Page 45, paragraph 6, second sentence. Replace with:
"For example, A.T.&T. and Nokia have been selected and contracted as vendors which ~~may not be fully in accordance with EU rules on procurement~~ *could cause difficulties*"
 - Page 45, final paragraph, first line. Add "possible" before "non-conformance".
 - Page 45, final paragraph, final sentence. Delete sentence. ✓

- Page 46, final paragraph, first and second sentences. Replace with:

~~It~~ should be remarked that the effect on the Irish economy - to which some attention has been paid in some of the applications - has not been taken into consideration in the evaluation process as it is not included in the selection criteria at paragraph 19 of the RFP. In any event, a short supplementary analysis of this aspect reveals that the differences between applications are not significant.

- Page 47-51. Detailed comments provided elsewhere.

~~Rank the applications in the order of~~

Summary, Concluding Remarks and the Recommendation

(Suggested redraft)

The Final Evaluation

Introduction

It is now necessary to determine the ranking of the applications in accordance with the information contained in the document and in accordance specifically with the evaluation criteria set out in paragraph 19 of the tender document in descending order of priority.

descending order of priority

This report aims at nominating and ranking the three best applications in order of merit by reference to the evaluation criteria. This has been achieved by:

- ~~developing~~ ^{developing} in respect of each of the eleven dimensions ^{of applications} (which in turn represent the eight evaluation criteria) a series of indicators against which the applications could be compared.
- ~~scoring~~ ^{grading} of each of the application on a scale A to E under each of the several indicators,
- the award of an overall ~~score~~ ^{grade} to each application under each dimension.
- ~~grouping~~ ^{grouping} of the dimensions according to the eight evaluation criteria, ^{set out in para 19.}
- the award of an overall score to each application on the basis of the ~~scores~~ ^{grades} for each of the dimensions and determination of the appropriate ranking.
- validation of the result by converting the grading marks to points and applying the weighting formula determined prior to the closing date for the competition. ^{resulting in a total score for each application}
- validation of the results by a review of the analysis of sensitivities, credibility and risks, ~~and finally~~
- quantification of the differences between the top two applications.

Grading Final Scoring According to Evaluation Criteria

(Include Table 17 here)

The ^{marks} ~~marks~~ awarded under each dimension are outlined in table 17 (the award of marks to the various indicators underpinning the indicators are shown in Chapter 4). The result in the grand total line has been ^{agreed through} ~~achieved by~~ a process of discussion by the evaluators taking account of the weighting of the evaluation criteria ~~determined prior to the closing date~~. Although this weighting mechanism was agreed primarily in the context of the quantitative model it inevitably ^{has validity} ~~carries weight~~ as to the evaluations interpretation of the importance of the various evaluation criteria subject to respecting the order of priority agreed by the Irish Government.

The Result Based on a Conversion of Marks to Points

In order to ^{of} ~~validate~~ the result contained in table ¹⁷ ~~18~~, the evaluators decided to convert the ^{grades} ~~marks~~ (A, B, C, D, and E) to ^{numeric} ~~arabic~~ points (5, 4, 3, 2, and 1 respectively) in order to generate an overall numeric score for each application

(Insert Table 18 here)

As can be seen from the table, the scoring confirms the ranking established in table 17.

Assessment of Results against Business Case Sensitivities, Risks and Credibility

The overall credibility, sensitivities and risks inherent in each of the six business cases has been examined in Chapter 5. It is concluded that differences do exist between the three highest ranked applications and between this group and the remaining applications. The risks identified among the three best applications are generally considered to be normal business risks, whereas those identified for A4, A6 and in particular A2 with the indicated ranking are more serious. This analysis has not revealed any factors in relation to the three top ranked applications which necessitate that the overall ranking be reconsidered or that further analysis be carried out.

Quantification of Differences Between the Two Best Applications

A brief comparison of the best application
(As at pages 51, 52 and 53 of existing draft)

Admission +
(as at page 54 of existing draft)

The Recommendation

Next chapter

Evaluation Process - Award of Marks

The award of marks at the level of the indicator was achieved through a process of discussion and consensus within each sub-group. The overall score according to each dimension was achieved in some instances through a process of formal weighting of the relevant indicators but more generally on the basis of a general discussion of the appropriate interpretation of the most important elements of each dimension in the context of the evaluation criteria and the information contained in the tender documents. A similar process was used in relation to the overall award of marks which formed the basis of selection of the winning application and ranking of the top three applications.

Addition to Chapter 4

Summary of Results

grading
The agreed ~~markings~~ for the marketing technical management and financial aspects are shown in the following table:
summarised

(Insert table 16)

grades
Based on the qualitative evaluation methodology outlined in Appendix III, an overall award of ~~marks~~ to each application has been agreed. It is noteworthy that the award of ~~marks~~ according to this methodology supports the ~~final decision reached~~ at chapter 6 where applications are formally ranked according to the evaluation criteria.

grades

*evaluation
recommendation*

SUGGESTED TEXTUAL AMENDMENTS

✓. ~~Page (i), paragraph one. List the selection criteria as per paragraph 19.~~ ✓

✓. Page (i), paragraph two. Delete "consequently". ✓

✓. Page (i), paragraph three. "On the basis of the applications received, supplementary written communication with the applicants and the clarifications provided at the presentation meetings, the evaluation concluded that the three best applications are :"

✓. Page (i), paragraph four, second line. Replace "is not at all weak" with "is also strong". ✓

✓. Page (i), paragraph four, final sentence. Replace with "it is emphasised that the credibility of the business plan and approach to market development and the technical approach ranked higher than tariffs in the selection" ✓

✓. Page (i), Final paragraph. Replace ^{entire paragraph} with "On the basis of the selection criteria adopted by the Irish Government and an objective, transparent and non-discriminatory qualitative comparison of the six applications received the PT GSM unanimously recommends that the Minister enter into licence negotiations with applicant A5. In the unlikely event of failure of these negotiations, the PT GSM recommends that negotiations on the award of the licence be opened with applicant A3 and subsequently, if necessary, with applicant A1." ✓

✓. Page (ii). The table of contents should come before the Executive Summary. ✓

✓. Page 1, para 3 "method" to be moved to 2nd line.

✓. Page 1, licence fee criterion. This should be annotated with a footnote along the following lines; "Following the launch of the competition, for the reasons described in chapter 2, the licence fee requirement became subject to a minimum of IR£5m and a maximum of IR£15m." ✓

✓. Page 2, paragraph five, second and third sentences. Replace with

new sentence referring
to Para 14 of
REP and
7.3.18

"The key characteristics of each application including a description of each applicant and of the basic philosophy underpinning each application is contained in chapter 3.

- ✓. Page 2, final paragraph. "European Commission" rather than "Commission".
- ✓. Page 4, final paragraph. Replace "finished" with "completed".
- ✓. Page 5, third complete paragraph. "Resumed" rather than "re-opened".
- ✓. Page 6, third paragraph, first sentence. Replace with "An invitation was issued on 5 September to each of the six applicants to attend a presentation meeting with the PT GSM. The invitation incorporated an agenda for the presentation and a number of questions to be responded to.
- ✓. Page 6, fifth paragraph. Replace with : "An initial draft report was discussed by the PT GSM on 9 October. The incorporation of comments on the initial and a subsequent draft by members of the team in relation to the presentation of the results of the evaluation process has culminated in this final report.
- ✓. Page 6, final paragraph. Replace with : "It is ^{the} view of AMI that the competition process has, as reflected in this report, been conducted, in a non-discriminatory way and with a high degree of transparency and objectivity." *such that the result achieved is a fair representation of the applications received, in our opinion comparative evaluation*
- ✓. Page 7, fourth paragraph, second last and final sentences : Replace with "The consortium does not stipulate a managing partner but a division of responsibilities has been identified in the application"
- ✓. Page 9, 2nd pie chart "Princes Holdings Ltd."
- ✓. Page 11, first paragraph. "Córas Iompair Éireann"
- ✓. Page 11 2nd last para, "disproportionately"
- ✓. Page 12, second complete paragraph, final two sentences. Replace with "The understanding of relevant ^{Irish} ~~Irish~~ and EU legislation appears to be generally low. This is reflected in particular in that the application contains elements which may not be fully in accordance with the EU rules in relation to procurement of equipment.
- ✓. Page 12, final paragraph, second sentence. Replace with : "Finally, with regard to procurement, the application would ~~seem to contradict the Irish~~ *may cause difficulties with*

~~interpretation of the~~ EU procurement rules as A4 has already selected and contracted some of the infrastructure vendors".

- ✓ • Page 13, fourth paragraph, second last sentence. Replace "incomparably" with "comparatively".
- ✓ • Page 14 para 3 - delete last sentence
- ✓ • Page 14, Section 4.1 - Comments provided elsewhere. Change text to exclude Para 19 & explain how mkt dev. is more important than tariffs
- ✓ • Page 15, fourth paragraph, first sentence. Delete "as well as for the Irish society as a whole".
- ✓ • Page 16, third paragraph. Replace "discrimination" with "difference"
- ✓ • Page 18, first paragraph, second sentence. Replace "demand indicators" with "demand projections"
- ✓ • Page 18, first paragraph, final sentence. Replace "the highest mark" with "high marks".
- ✓ • Page 19, fourth paragraph. Replace "exorbitant" with "exceptional"
- ✓ • Page 24, third paragraph. Delete "unfairly"

- ✓ *reveals*
• Page 25, third paragraph, first sentence. Replace with "The more business oriented graph ~~presented~~ similar comparative positions. ~~In figure 12 reveals~~ to those in the consumer oriented graph for A2 and A6. X
X
- ✓ • Page 26, second paragraph, final sentence. Replace with "It could be added that the projected tariffing of A2 is not in accordance with a Memorandum of Understanding between GSM operators in relation to roaming".
- ✓ • Page 26, paragraph four, line four. Replace "evaluators with Andersen Management International".
- ✓ • *Page 26, para 5 Chapter 5 instead of 4*
- ✓ • Page 28, third paragraph, final sentence. Delete words following "B"
- ✓ • Page 32, first complete paragraph, final sentence. Replace with : "This is considered slightly less favourable from a timing perspective".
- ✓ • Page 33, seventh paragraph, first sentence. Replace "principally" with "in principle".
- ✓ • Page 36, third paragraph. Replace "have been assessed positive" with "have been assessed positively".
- ✓ • Page 36, paragraph five, first sentence. Replace "The dimension experience of the applicant has" with "This dimension has ..."
- Page 36, Table 12. Delete table and incorporate text along the following lines. "A3 has a considerable quantity of cellular experience with its principals being involved in four GSM1 networks and five other cellular networks. A1 is similarly strong with its principals having a combined experience of 1 GSM2 network, 2 GSM1 networks and 3 other cellular networks. A6 has experience of two GSM2 networks and one other cellular network. A4 and A2 have no GSM experience but do have experience of other cellular networks. A5 however has GSM1 experience in a competitive market".
- ✓ • Page 37, Table 13. The first induction should read "Management Team" with a foot note giving the full title.

✓ Page 37, 1st para. less hands on rected, delete rected

- ✓ Page 37, second paragraph. Replace "same degree of experience" with "a similar degree of experience".

✓ Page 37, 2nd para
RMS & Cabiz possibility

- ✓ Page 37, final paragraph, final sentence. Replace with:
"The ~~fact~~ that A2, A4 and to ~~an~~ extent A6 may have some shortcomings in relation to European standardisation and the EU procurement rules, ^{has} not been taken into account in this part of the evaluation. These factors are considered in the assessment of risks".

- ✓ Page 38, Table 4. Delete brackets around As in relation to the licence fee payment.

- ✓ Page 41, second paragraph, first sentence. Replace with:

"Financing is dealt with by the sub-indicators of liquidity and profit/interest rates.

✓ Page 41, third para take out partly & change angle of view to viewpoint

- ✓ Page 41, paragraph 5, first sentence. Replace "the total balance" with "the total assets balance".

- ✓ Page 42, first paragraph, second sentence. Replace with:

"RTE ^{alone} ~~along~~ among the principals has a positive equity, albeit at a moderate level (IR£63.7 million in 1993).

- New material to be added here is suggested elsewhere. Table 16 inserted

- ✓ Page 44. Insert new paragraph two and three along the following lines:

"A critical factor in any consideration of the credibility or risk analysis of applications is the capability of the principals to finance the project including ability to meet any shortfall in the funding requirement due, for example, to unforeseen capital expenditure. In general terms, the applicants have provided ~~some measure of~~ comfort that appropriate funding arrangements are in place.

~~The evaluators have however taken into consideration that the level of commitment on funding, particularly in relation to debt financing, which applicants can provide is constrained on the one hand by the fact that a licence has not been granted, and on the other, by the conservative bias of the banking community. The evaluators have concluded ~~however~~ ^{that} having regard to the level~~

after the licence has been granted

of interest in the Irish competition for the GSM licence and the high profitability of mobile telephony generally throughout Europe that the project is fundamentally robust and an attractive opportunity for corporate debt financiers. Nevertheless, ~~the evaluators have recognised the necessity to identify financial weaknesses among the principal backers which could give rise to difficulty in meeting the additional equity burden of unplanned or unforeseen capital expenditure.~~ The financial position of the principals of each consortium has ~~therefore~~ been assessed, ~~and some potential weaknesses are identified below.~~ Following ~~a detailed discussion of the matter however,~~ and having regard in particular to the robust nature of the project overall, the evaluators have formed the view that, subject to ^{at least} one of the principals having sufficient financial strength to ensure completion of the project, ^{at this stage} a potential financial weakness of one consortia member should not have a negative impact on the ranking of applications. These aspects are the subject of further elaboration in appendices 9 and 10. *The evaluators believe it is important to draw attention to this in licence negotiations.*

The assessment of credibility and risks has also taken account of:

- management proposals,
- preparations in relation to development of the distribution channel,
- preparations in relation to site acquisition and equipment procurement,
- consistency of penetration, usage etc. with financial figures.

In general terms, this assessment has sought to identify factors which may have the effect of undermining the projected development of the business plans proposed by applicants.

- ✓ Page 44, para 3 delete.
- ✓ Page 44, paragraph 4. Clarify the point in relation to the average call revenues of A3 and A5. Replace ~~In addition with~~ In the case of A3, change indicate to indicated and delete suggested by A3.
- ✓ Page 44 para 6 "such" instead of "so"
- ✓ Page 45, paragraph 6, second sentence. Replace with:
"For example, A.T.&T. and Nokia have been selected and contracted as vendors which ~~may not be fully in accordance with EU rules on procurement~~ could cause difficulties"
- ✓ Page 45, final paragraph, first line. Add "possible" before "non-conformance"
include these include possible difficulties
- ✓ Page 45, final paragraph, final sentence. Delete sentence.
- ✓ Page 44, 6th para change as indicated on report.

- ✓ • Page 46, final paragraph, first and second sentences. Replace with:
"It should be remarked that the effect on the Irish economy - to which some attention has been paid in some of the applications - has not been taken into consideration in the evaluation process as it is not included in the selection criteria at paragraph 19 of the RFP. In any event, a short supplementary analysis of this aspect reveals that the differences between applications are not significant.
- Page 47-51. Detailed comments provided elsewhere.

Summary, Concluding Remarks and the Recommendation

(Suggested redraft) The Final Evaluation

Introduction It is now necessary to ~~examine~~^{determine} the ranking of the application in accordance with the priorities specified in para 14 of the RFP. It is clearly stated in the tender documentation that the evaluation would be carried out on an equitable basis in accordance with the information contained in the document and in accordance specifically with the evaluation criteria set out ~~at~~ in ~~paragraph 19 of the tender document~~ in descending order of priority ~~therein~~.

This report aims at nominating and ranking the three best applications in order of merit by reference to the evaluation criteria. This has been achieved by:

- ~~the eight evaluation criteria represented by~~
- ~~developing in respect of each of the eleven dimensions of applications~~
which in turn represent the eight evaluation criteria, a series of indicators against which the applications could be compared,
- ~~assessing the applications, in a manner agreed prior to the closing date for the competition, by developing a series of indicators which relate back to the~~
- ~~scoring of each of the application on a scale A to E under each of the eleven dimensions and ultimately to the eight evaluation criteria.~~
- ~~the award of an overall score to each application under each dimension.~~
- grouping of the dimensions according to the eight evaluation criteria,
- the award of an overall ^{grade} score to each application on the basis of the ^{grades} scores for each of the dimensions and determination of the appropriate ranking, Y
- validation of the result by converting the grading marks to points, and ^{and calculating an overall total points score for each} applying the weighting formula determined prior to the closing date for the competition, X
- validation of the results by a review of the analysis of sensitivities, credibility and risks, and finally
- ~~quantification of the differences between the top two applications.~~

{ extracting the grades awarded to each of the eleven dimensions on the basis detailed in chapter 4.

Final Scoring According to Evaluation Criteria

(Include Table 17 here)

The ^{grades} marks awarded under each dimension are outlined in table 17. ^{the award of marks} ~~to the various indicators underpinning the indicators~~ are shown in Chapter 4. The result in the grand total line has been ^{agreed through} ~~achieved by~~ a process of discussion by the evaluators ^{respecting} ~~taking account of~~ the weighting of the evaluation criteria determined prior to the closing date. ~~Although this weighting mechanism was agreed primarily in the context content of the quantitative model it inevitably carries weight as to the evaluations evaluators interpretation of the importance of the various evaluation criteria subject to respecting the order of priority agreed by the Irish Government.~~

The Result Based on a Conversion of Marks to Points

~~In order to validate~~ The result ^{arabic 7} contained in table 18, ^{were} ~~the evaluators decided to convert~~ ^{from the marks} (A, B, C, D, and E) to ~~arabic~~ points (5, 4, 3, 2, and 1 respectively) in order to generate an overall numeric score for each application

(Insert Table 18 here)

As can be seen from the table, the scoring confirms the ranking established in table 17.

Assessment of Results against Business Case Sensitivities, Risks and Credibility

The overall credibility, sensitivities and risks inherent in each of the six business cases has been examined in Chapter 5. It is concluded that differences do exist between the three highest ranked applications and between this group and the remaining applications. The risks identified among the three best applications are generally considered to be normal business risks, whereas those identified for A4, A6 and in particular A2 with the indicated ranking are more serious. This analysis has not revealed any factors in relation to the three top ranked applications which necessitate that the overall ranking be reconsidered or that further analysis be carried out.

Chapter 7

Conclusion and Recommendation

Quantification of Differences Between the Two Best Applications

A last comparison of the best applications
(As at pages 51, 52 and 53 of existing draft)

The Recommendation

(as at page 54 of existing draft)

Evaluation Process - Award of Marks

The award of ^{grades} ~~marks~~ at the level of the indicator was achieved through a process of discussion and consensus within each sub-group. The ^{sub total} ~~overall score~~ ^{for each} ~~according to each~~ dimension was achieved in some instances through a process of formal weighting of the relevant indicators but more generally on the basis of a general discussion of the appropriate interpretation of the most important ^{indicators} ~~elements~~ of each dimension in the context of the evaluation criteria and the information contained in the tender documents. A similar process was used in relation to the overall award of marks which formed the basis of selection of the winning application and ranking of the top three applications.

Addition to Chapter 4

Summary of Results

The agreed ^{gradings throughout this chapter} ~~markings~~ for the marketing, technical, management and financial aspects are summarised ~~shown~~ in the following table: X
X

(Insert table 16)

Based on the ^{grades} qualitative evaluation methodology outlined in Appendix III, an overall award of ~~marks~~ to each application has been agreed. It is noteworthy that the award of ~~marks~~ according to this methodology supports the ~~final decision~~ reached at chapter 7 ^{grades} where applications are ~~formally~~ ranked according to the evaluation criteria. ^{in para 19 of the RFP} set out ^{recommendation}



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Michael,

Detailed comments as promised. Generally speaking we would prefer if the references to marks were changed to grades. Also the suggested revisions will necessitate revision of the table numbers and of the table of contents.

Regards,

Fintan.

SUGGESTED TEXTUAL AMENDMENTS

- Page (i), paragraph two. Delete "consequently".
- Page (i), paragraph three. "On the basis of the applications received, supplementary written communication with the applicants and the clarifications provided at the presentation meetings, the evaluation concluded that the three best applications are ."
- Page (i), paragraph four, second line. Replace "is not at all weak" with "is also strong".
- Page (i), paragraph four, final sentence. Replace with "it is emphasised that the credibility of the business plan and approach to market development and the technical approach ranked higher than tariffs in the selection"
- Page (i), paragraph three. Replace "best application" with "best application method".
- Page (i), Final paragraph. Replace with "On the basis of the selection criteria adopted by the Irish Government and an objective, transparent and non-discriminatory qualitative comparison of the six applications received the PT GSM unanimously recommends that the Minister enter into licence negotiations with applicant A5. The manner in which this recommendation is derived from the selection criteria at paragraph 19 of the tender document is summarised in tables 17 and 18 in Chapter 6. In the event of failure of these negotiations, the PT GSM recommends that negotiations on the award of the licence be opened with applicant A3 and subsequently, if necessary, with applicant A1."
- Page (ii). The table of contents should come before the Executive Summary.
- Page 1, licence fee criterion. This should be annotated with a footnote along the following lines; "Following the launch of the competition, for the reasons described in chapter 2, the licence fee requirement became subject to a minimum of IR£5m and a maximum of IR£15m."
- Page 2, paragraph five, second and third sentences. Replace with

"The key characteristics of each application including a description of each applicant and of the basic philosophy underpinning each application is contained in chapter 3.

- Page 2, final paragraph. "European Commission" rather than "Commission".
- Page 4, final paragraph, first line. Replace "finished" with "completed"
- Page 5, third complete paragraph. "Resumed" rather than "re-opened".
- Page 6, Add the following to the first paragraph of Section 2.4.

The Subgroups developed a series of indicators against which applications should be measured under each dimension. The award of grades (A,B,C,D and E) at the level of the indicator was achieved through a process of discussion and consensus within each sub-group. The sub-total for each dimension was achieved on the basis of a general discussion of the appropriate interpretation of the most important indicators for each dimension in the context of the evaluation criteria and the information contained in the tender documents. A formal weighting of the indicators was used where appropriate. A similar process was used in relation to the overall award of marks which formed the basis of selection of the winning application and ranking of the top three applications.

- Page 6, Section 2.4. Reconsider the order of paragraphs and in particular whether the existing paragraphs two and three should come before paragraph one.
- Page 6, third paragraph, first sentence. Replace with "An invitation was issued on 5 September to each of the six applicants to attend a presentation meeting with the PT GSM. The invitation incorporated an agenda for the presentation and a number of questions to be responded to".
- Page 6, fifth paragraph. Replace with : "An initial draft report was discussed by the PT GSM on 9 October. The incorporation of comments on the initial and a subsequent draft by members of the team in relation to the presentation of the results of the evaluation process has culminated in this final report".
- Page 6, final paragraph. Replace with : "It is the view of AMI that the competition process has, as reflected in this report, been conducted, in a non-discriminatory way and with a high degree of transparency and objectivity such

that the result achieved is in our opinion a fair comparative evaluation of the six applications."

- Page 7, fourth paragraph, second last and final sentences : Replace with "The consortium does not stipulate a managing partner but a division of responsibilities has been identified in the application"
- Page 9, Figure 4. "Prince's Holdings".
- Page 11, first paragraph. "Córas Iompair Éireann"
- Page 11, Second last paragraph. "disproportionately" rather than "unproportionately".
- Page 12, second complete paragraph, final two sentences. Replace with "The understanding of relevant Irish and EU legislation appears to be generally low. This is reflected in particular in that the application contains elements which may not be fully in accordance with the EU rules in relation to procurement of equipment.
- Page 12, final paragraph, second sentence. Replace with : "Finally, the fact that A4 has already selected and contracted some of the infrastructure vendors may cause difficulties in relation to the EU procurement rules if they were awarded the licence".
- Page 13, fourth paragraph, second last sentence. Replace "incomparably" with "comparatively".
- Page 14, paragraph three. Delete final sentence.
- Page 14, Section 4.1. Delete second and third sentences of the first paragraph. Incorporate the existing paragraph 2 into the first paragraph. Replace the second and third sentences of the existing third paragraph with the following: "A5 has the most elaborate approach to market development and is also strong within coverage but less strong within the tariff and roaming dimensions". Existing paragraph four of Section 4.1, second sentence. Delete the words "which has a comparatively low weight in the overall evaluation".

- Page 15, fourth paragraph, first sentence. Delete "as well as for the Irish society as a whole".
- Page 16, third paragraph. Replace "discrimination" with "difference"
- Page 18, first paragraph, second sentence. Replace "demand indicators" with "demand projections"
- Page 18, first paragraph, final sentence. Replace "the highest mark" with "high marks".
- Page 19, fourth paragraph. Replace "exorbitant" with "exceptional"
- Page 21, first paragraph. Replace "in total is awarded" with "only warranted".
- Page 24, third paragraph. Delete "unfairly"
- Page 25, third paragraph, first sentence. Replace with "The more business oriented graph reveals similar comparative positions to those in the consumer oriented graph for A2 and A6."
- Page 26, second paragraph, final sentence. Replace with "It could be added that the projected tariffing of A2 is not in accordance with a Memorandum of Understanding between GSM operators in relation to roaming".
- Page 26, paragraph four, line four. Replace "evaluators with Andersen Management International".
- Page 26, paragraph five. "Chapter 5" rather than "Chapter 4"
- Page 28, third paragraph, final sentence. Delete words following "B"
- Page 32, first complete paragraph, final sentence. Replace with : "This is considered slightly less favourable from a timing perspective".
- Page 33, seventh paragraph, first sentence. Replace "principally" with "in principle".

- Page 36, third paragraph. Replace "have been assessed positive" with "have been assessed positively"
- Page 36, paragraph five. Replace the first two sentences with the following.
"The award of marks under this dimension is based on information which is identified in the applications"
- Page 36, Table 12. Delete table and incorporate text along the following lines.
"A3 has a considerable quantity of cellular experience with its principals being involved in four GSM1 networks and five other cellular networks. A1 is similarly strong with its principals having a combined experience of 1 GSM2 network, 2 GSM1 networks and 3 other cellular networks. A6 has experience of two GSM2 networks and one other cellular network. A4 and A2 have no GSM experience but do have experience of other cellular networks. A5 however has GSM1 experience in a competitive market".
- Page 37, Table 13. The first indicator should read "Management Team" with a footnote giving the full title.
- Page 37, paragraph one. Delete "rooted" after "hands-on".
- Page 37, second paragraph. Replace "same degree of experience" with "a similar degree of experience".
- Page 37, second paragraph. Add "and cable" after MMDS.
- Page 37, final paragraph. Replace "has" after AT&T with "appears to have".
- Page 37, final paragraph, final sentence. Replace with:
"The possibility that A2, A4 and to an extent A6 may have some shortcomings in relation to European standardisation and the EU procurement rules has not been taken into account in this part of the evaluation. These factors are considered in the assessment of risks".
- Page 38, Table 14. Delete brackets around As in relation to the licence fee payment.
- Page 41, second paragraph, first sentence. Replace with:

"Financing is dealt with by the sub-indicators of liquidity and profit/interest rates.

- Page 41, third paragraph. Replace with " The profitability indicator is measured by the IRR earned over the first ten years. This indicator is assessed from the perspective of the consumer rather than that of an investor".
- Page 41, paragraph 5, first sentence. Replace "the total balance" with "the total assets balance.
- Page 42, first paragraph, second sentence. Replace with:
"RTE along among the principals has a positive equity, albeit at a moderate level (IR£63.7 million in 1993).
- Add the following material to the end of Chapter 4.

Summary of Results

The agreed gradings throughout this chapter for the marketing technical management and financial aspects are summarised in the following table:

(Insert table 16)

Based on the qualitative evaluation methodology outlined in Appendix III, an overall award of grades to each application has been agreed. It is noteworthy that the award of grades according to this methodology supports the recommendation reached at chapter 6 where applications are ranked accordingly to the evaluation criteria set out in paragraph 19 of the tender document.

- Page 44. Insert new paragraph two and three along the following lines:

"A critical factor in any consideration of the credibility or risk analysis of applications is the capability of the principals to finance the project including ability to meet any shortfall in the funding requirement due, for example, to unforeseen capital expenditure. In general terms, the applicants have provided comfort that appropriate funding arrangements are in place. The evaluators have concluded having regard to the level of interest in the Irish competition for the GSM licence and the high profitability of mobile telephony generally throughout Europe that the project is fundamentally robust and, after a licence has been granted, an attractive opportunity for corporate debt financiers. The

evaluators have therefore formed the view that, subject to at least one of the principals having sufficient financial strength at this stage to ensure completion of the project, a potential financial weakness of one consortia member should not have a negative impact on the ranking of applications. It is important nevertheless to draw attention to the need to deal with this factor where relevant in the context of licence negotiations. These aspects are the subject of further elaboration in appendices 9 and 10.

The assessment of credibility and risks has also taken account of:

- management proposals,
- preparations in relation to development of the distribution channel,
- preparations in relation to site acquisition and equipment procurement,
- consistency of penetration, usage etc. with financial figures. ✧

In general terms, this assessment has sought to identify factors which may have the effect of undermining the projected development of the business plans proposed by applicants.

- Page 44, paragraph three. Delete paragraph as the point is covered both in the material above and in the final recommendation.
- Page 44, paragraph 4, second sentence. Replace "In addition" with "In the case of A3". Also replace "indicate" after "tariffs" with "indicated". Finally delete the words "suggested by A3" at the end of the sentence.
- Page 44, second last paragraph, first line. Replace "so" with "such". Also in second sentence, delete the words "both" , "Sigma Wireless issues" and the words following "satisfactorily".
- Page 45, paragraph 6, second sentence. Replace with:
"For example, A.T.&T. and Nokia have been selected and contracted as vendors which could cause difficulty in relation to EU rules on procurement".
- Page 45, final paragraph, first sentence. Replace with "Concerning risks, these include possible difficulties in relation to EU regulation on procurement and terminal subsidies, the lack of understanding concerning European standards

and technical matters, the solvency ratio of the consortium and the equity of the main driver, Comcast".

- Page 45, final paragraph, final sentence. Delete sentence.
- Page 46, final paragraph, first and second sentences. Replace with:
"It should be remarked that the effect on the Irish economy - to which some attention has been paid in some of the applications - has not been taken into consideration in the evaluation process as it is not included in the selection criteria at paragraph 19 of the RFP. In any event, a short supplementary analysis of this aspect reveals that the differences between applications are not significant.
- Final Chapter. It is recommended that the final chapter be replaced by the following two chapters:

The Final Evaluation

It is now necessary to determine the ranking of the applications in accordance with the priorities specified in paragraph 19 of the tender document. It is clearly stated in the document that the evaluation would be carried out on an equitable basis in accordance with the information contained therein and in accordance specifically with the evaluation criteria set out in descending order of priority.

This report aims at nominating and ranking the three best applications in order of merit by reference to the evaluation criteria. This has been achieved by:

- extracting the graded awarded to each application under each of the eleven dimensions on the basis detailed in chapter 4;
- grouping of dimensions according to the eight evaluation criteria;
- the award of an overall score to each application on the basis of the grades obtained for the eleven dimensions and determination of the appropriate ranking respecting the weighting formula determined prior to the closing date for the competition;
- validation of the result by converting the grades to points and calculating a numerical total score for each application; and finally
- validation of the results by a review of the analysis of sensitivities, credibility and risks.

Final Scoring According to Evaluation Criteria

(Include table 17 here)

The grades awarded under each dimension are outlined in table 17. The result in the grand total line has been achieved through a process of discussion to reach an agreed result taking account of the weighting of the evaluation criteria determined prior to the closing date.

The Result based on a Conversion of Grades to points

The results contained in table 17 were converted to arabic points (A,B,C,D and E converted to 5,4,3,2 and 1 respectively) in order to determine an overall numeric score for each application.

(Insert table 18 here)

As can be seen from the table, the scoring confirms the ranking established in table 17.

Assessment of Results against Business Case Sensitivities, Risks and Credibility

The overall credibility, sensitivities and risks inherent in each of the six business cases has been examined in Chapter 5. It is concluded that differences do exist between the three highest ranked applications and between this group and the remaining applications. The risks identified among the three best applications are generally considered to be normal business risks, whereas those identified for A4, A6 and in particular A2 with the indicated ranking are more serious. This analysis has not revealed any factors in relation to the three top ranked applications which necessitate that the overall ranking be reconsidered or that further analysis be carried out.

Conclusions and Recommendations

A last comparison of the best applications

(Insert section as is in pages 51 to 54 of existing draft)

The recommendation

The results of the evaluation as reflected in table 17 and confirmed in table 18 mean that the evaluators have concluded the following ranking of the three best applications:

(Remainder of section as per page 54 of existing draft report).

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**Evaluation of the
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the GSM2 licence
in Ireland**

October 25, 1995

Final version

Confidential

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Andersen Management International

The comparative evaluation of the applications

4.4.2 Licence fee payment

As mentioned earlier, all applicants have offered IR£ 15 million for the right to the licence, which is IR£ 10 million in excess of the required IR£ 5 million minimum payment, and these maximum offerings have all been awarded As. This dimension does therefore not discriminate among the applications. Extra payments offered, for example in connection with the performance guarantees, have not been considered part of this dimension.

4.5 Summary of results

The agreed markings throughout this chapter for the marketing, technical, management and financial aspects are summarised in the following table:

Aspects and dimensions	A1	A2	A3	A4	A5	A6
Market development	C	C	B	C	A	C
Coverage	B	C	A	C	A	D
Tariffs	C	D	B	C	C	A
International roaming plan	A	D	C	C	C	C
Marketing aspects (subtotal)	B	C	B	C	A/B	C
Radio network architecture	C	C	B	B	A	D
Network capacity	C	D	C	B	A	C
Performance guarantees	D	E	C	B	A	C
Frequency efficiency	A	C	A	A	A	A
Technical aspects (subtotal)	C	D	B	B	A	C
Experience of the applicant	C	D	A	C	B	C
Management aspects (subtotal)	C	D	A	C	B	C
Financial key figures	A	C	B	C	B	C
Licence payment	A	A	A	A	A	A
Financial aspects (subtotal)	A	C	B	C	B	C
GRAND TOTAL	B	D	B	B/C	A/B	C

Table 15. Summary of the marks awarded

Based on the qualitative evaluation methodology adopted by the PT GSM, an overall award of marks to each application has been agreed. It is noteworthy that the award of marks according to this methodology supports the recommendation reached at chapter 7, where applications are ranked accordingly to the evaluation criteria set out in paragraph 19 of the tender document.

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The final evaluation

6.1 Final scoring according to evaluation criteria

Dimension	Weight	A1	A2	A3	A4	A5	A6
Market development, etc.							
- Market development	10	C	C	B	C	A	C
- Financial key figures	10	A	C	B	C	B	C
- Experience of the applicant	10	C	D	A	C	B	C
Technical viability, etc.							
- Radio network architecture	10	C	C	B	B	A	D
- Network capacity	10	C	D	C	B	A	C
Tariffs	18	C	D	B	C	C	A
Licence payment	11	A	A	A	A	A	A
Coverage	7	B	C	A	C	A	D
International roaming plan	6	A	D	C	C	C	C
Performance guarantees	5	D	E	C	B	A	C
Frequency efficiency	3	A	C	A	A	A	A
GRAND TOTAL		B↓	C↓	B	B↓	B↑	C↑
RANKING		3	6	2	4	1	5

Table 16. The award of marks, re-grouped

The marks awarded under each dimension are outlined in Table 16. The result in the grand total line has been achieved through a process of discussion to reach an agreed result taking account of the weighting of the evaluation criteria determined prior to the closing date.

6.2 The result based on a conversion of marks to points

The results contained in Table 16 were converted to arabic points (A,B,C,D and E converted to 5,4,3,2 and 1, respectively) in order to determine an overall numeric score for each application.

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This report aims at nominating and ranking the three best applications in order of merit by reference to the evaluation criteria. This has been achieved by:

- ⊕ extracting the marks awarded to each application under each of the eleven dimensions on the basis detailed in chapter 4;
- ⊕ grouping of dimensions according to the eight evaluation criteria;
- ⊕ the award of an overall score to each application on the basis of the marks obtained for the eleven dimensions and determination of the appropriate ranking respecting the weighting formula determined prior to the closing date for the competition;
- ⊕ validation of the result by converting the marks to points and calculating a numerical total score for each application; and finally
- ⊕ validation of the results by a review of the analysis of sensitivities, credibility and risks.

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The final evaluation

6.1 Final scoring according to evaluation criteria

Dimension	Weight	A1	A2	A3	A4	A5	A6
Market development, etc.							
- Market development	10	C	C	B	C	A	C
- Financial key figures	10	A	C	B	C	B	C
- Experience of the applicant	10	C	D	A	C	B	C
Technical viability, etc.							
- Radio network architecture	10	C	C	B	B	A	D
- Network capacity	10	C	D	C	B	A	C
Tariffs	18	C	D	B	C	C	A
Licence payment	11	A	A	A	A	A	A
Coverage	7	B	C	A	C	A	D
International roaming plan	6	A	D	C	C	C	C
Performance guarantees	5	D	E	C	B	A	C
Frequency efficiency	3	A	C	A	A	A	A
GRAND TOTAL		B↓	C↓	B	B↓	B↑	C↑
RANKING		3	6	2	4	1	5

Table 16. The award of marks, re-grouped

The marks awarded under each dimension are outlined in Table 16. The result in the grand total line has been achieved through a process of discussion to reach an agreed result taking account of the weighting of the evaluation criteria determined prior to the closing date.

6.2 The result based on a conversion of marks to points

The results contained in Table 16 were converted to arabic points (A,B,C,D and E converted to 5,4,3,2 and 1, respectively) in order to determine an overall numeric score for each application.

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- ③ validation of the result by converting the marks to points and calculating a numerical total score for each application; and finally
- ③ validation of the results by a review of the analysis of sensitivities, credibility and risks.

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Evaluation of the 6 applications for the GSM2 licence in Ireland

Michael Moesgaard Andersen

October 18, 1995

Final draft version

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Communications by Andersen Management International

Summary, concluding remarks and the recommendation

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

From this, it can be concluded that the 3 best applications are the following:

1. A5
2. A3
3. A1

with the indicated ranking.

6.4 The results based on a conversion of marks to points

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

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

Dimension	Weight	A1	A2	A3	A4	A5	A6
Market development, etc.							
- Market development	10	3	3	4	3	5	3
- Financial key figures	10	5	3	4	3	4	3
- Experience of the applicant	10	3	2	5	3	4	3
Technical viability, etc.							
- Radio network architecture	10	3	3	4	4	5	2
- Network capacity	10	3	2	3	4	5	3
Tariffs	18	3	2	4	3	3	5
Licence payment	11	5	5	5	5	5	5
Coverage	7	4	3	5	3	5	2
International roaming plan	6	5	2	3	3	3	3
Performance guarantees	5	2	1	3	4	5	3
Frequency efficiency	3	5	3	5	5	5	5
SCORING (POINTS)		362	268	410	353	432	347
RANKING		3	6	2	4	1	5

Table 18. Conversion of marks to points

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From this, it can be concluded that the 3 best applications are the following:

1. A5
2. A3
3. A1

with the indicated ranking

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

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

Dimension	Weight	A1	A2	A3	A4	A5	A6
Market development, etc.							
- Market development	10	3	3	4	3	5	3
- Financial key figures	10	5	3	4	3	4	3
- Experience of the applicant	10	3	2	5	3	4	3
Technical viability, etc.							
- Radio network architecture	10	3	3	4	4	5	2
- Network capacity	10	3	2	3	4	5	3
Tariffs	18	3	2	4	3	3	5
Licence payment	11	5	5	5	5	5	5
Coverage	7	4	3	5	3	5	2
International roaming plan	6	5	2	3	3	3	3
Performance guarantees	5	2	1	3	4	5	3
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Table 18. Conversion of marks to points

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7. Conclusions and recommendations

7.1 A last comparison of the best applications

A1 has ample operating experience and is backed up by qualified consortium members. Furthermore, A1 has a strong position concerning international roaming, frequency efficiency as well as financial key figures which document a financially sound business case. However, in assessing some of the marketing aspects, definite weaknesses can be identified, in particular concerning market development, tariffs and the (lack of) performance guarantees, where it generally turns out less favourably when compared to A3 and A5. In addition, it has not received the same high marks for the technical approach as have A3 and A5, although the technical approach clearly demonstrates that A1 would have the capability to make it happen.

Therefore, although A1 is a qualified candidate, when comparing it with A3 and A5 it must be concluded that A1 can be awarded no more than a 3rd place in the ranking of the three best applications.

Both A3 and A5 are assessed favourably on marketing aspects, although some differences are clearly identifiable. A3 does not opt for market leadership, but seems inclined towards a cost leadership in order to bring the tariffs considerably down. A5 may appear to be more expensive than A3, but supplementary analyses show that A5 has a number of unique selling propositions and a sound link to the revenue streams evidenced in the financial part of the business case, leaving A5 just a fraction behind A3 on tariffs, and far below the offerings of Eircell at present.

Appendix 6 furthermore documents that A5 does have a more favourable tariff scheme for international calls than has A3. Concerning domestic tariff, A3 is clearly better than A5, when taking the figures at their face value. A5, however, has more favourable metering and billing principles and has furthermore made stronger provisions for discounts, thereby improving its comparative price/performance ratio considerably. The actual bills to be paid by the A5 customers might, therefore, not be bigger than for the A3 services, or are at any rate only a fraction above.

A5, on the other hand, clearly opts for market leadership, definitely intending to pursue a more competitive marketing strategy thereby giving the strongest push to the market development in Ireland. A5 not only opts for market leadership at the operator's level, but also creates the circumstances at the distribution and terminal levels to such an extent that also competition at these levels will help boosting the market development. This strategy is reflected by the many arrangements in place, not only with dealers and other distribution channels, but also with expression of interest from key accounts, value-added-service providers/developers, developers of applications, etc. Prior to the closing date A3 opted for a more passive model, relying quite heavily on the future success of its own service provider channel.

Concerning coverage, both A3 and A5 have been awarded the same and the highest marks. Extensive special coverage is offered by both, which enhances the appeal of GSM for different groups of users as well as stimulating the traffic and improving the quality. However, A5 has been assessed slightly more favourably than A3, primarily because of the intention to launch commercially at a point in time, when it

Conclusions and recommendations

has approximately 80% coverage. This advantage is furthermore substantiated by the fact that A5 is better than A3 concerning both the radio network architecture and the network capacity. A5 has, for example, a more attractive radio network design with more antenna sites and more cells than A3, and A5 clearly surpasses A3 concerning the capacity of the network and of interconnect. These technical dimensions are important as they are determinants of the network quality of service that the customers will meet. As it has been impossible just to rely on the quoted figures concerning blocking and drop out rates, all that can be concluded is that the customers of an A5 network will, with a high probability, meet a better network quality of service than the customers of an A3 network.

In addition, A5 demonstrates a willingness to give much better performance guarantees than does A3. A3 has not presented any guarantee obligations, but suggests a number of "technical" action plans. A5 has not only stated milestones and some guaranteed performance levels, but has value-added its promise with a severe penalty clause in case of non-compliance. As this offering can be converted to a licence condition, the enforcement task of the regulator will be eased by the model offered by A5.

Both A3 and A5 possess much experience. A3, however, distinguishes itself better than A5, partly because of the fact that Unisource has more cellular experience than Telenor, partly because the joint Irish-rooted experience of Motorola, Sigma Wireless and ESB is more relevant to cellular operations than the experience of Esat. A5 has a slightly higher degree of preparedness and experience at the top management level of the operation entity. This advantage does not outweigh the stronger point of A3, and A5 has thus been assessed less favourably than A3 concerning the experience dimension.

Finally, A3 and A5 are marked equally on the remaining dimensions relevant to the definition of the comparative evaluation, i.e. the financial key figures, the licence fee payment, the international roaming plans and the frequency efficiency. A5 is, however, also when marked equally with A3, slightly better than A5. Concerning coverage, A5 does have a more attractive roll out plan. Concerning frequency, for example, both applicants have been awarded the same marks because they demand the same amount of frequency spectrum, namely the initial 37 200 MHz channels. As was shown in figure 17, A5 has a much better frequency economy than A3 throughout the planning period. This means that A5, all other things being equal, is in a better position to demand more spectrum from the Regulator than is A3, and this will potentially increase the comparative price/performance ratio of A5.

...

The total assessment demonstrates that A1 is a qualified candidate and that both A3 and A5 are highly qualified candidates, each presenting applications comprising strong business plans.

Marginally, A3 is stronger than A5 concerning tariffs and experience. A5, however is significantly stronger than A3 concerning market development, radio network architecture, capacity of the network and performance guarantees. The dimensions, where A5 is stronger than A3, have a more heavy weight in paragraph 19 of the RFP document and in the weighting concluding prior to the closing date, as well as the difference between A3 and A5 is smaller, where A3 is the strongest and bigger, where A5 has the strongest points. Additionally, A5 has lower tariffs than the

Conclusions and recommendations

existing GSM1 tariff as well as it has been assessed that A5 does indeed have the necessary and sufficient experience to operate successfully.

Summarising, it can be concluded that A5 is the best application based on the approved methods and the criteria outlined in paragraph 19, whereas A3 and A1 are the second best and third best applications, respectively.

7.2 The recommendation

The results of the evaluation as reflected in Table 16 and confirmed in Table 17 mean that the evaluators have concluded the following ranking of the three best applications:

1. A5
2. A3
3. A1

It is therefore proposed to advise the Minister to enter into licence negotiations with the consortium behind the A5 application, with the prior consent of the applicant that if the negotiations fail or are impossible to conclude successfully, then licence negotiations will be commenced with the next nominated candidate. If the consortium behind A5 cannot satisfactorily cover the risks identified (but not scored), it is recommended to consider entering into licence negotiations with A3. Similarly, if the consortium behind A3 cannot satisfactorily cover the risk identified (but not scored) and abandon the strong reservations concerning the draft licence, it is recommended to consider entering into licence negotiations with A1.

Prior to the licence negotiations, it is recommended to redraft the licence in order to transform the favourable offerings in the application into binding licence requirements and to cover the risks identified simultaneously.

Appendices to Chapter 48

EVENTS OF WEDNESDAY, 25TH OCTOBER, 1995

Index

1. Notes by Mr. Bruton, Taoiseach, of meeting with Mr. Lowry on 25 October, 1995.

Spring - £27 m added to ODA by
June

ML D. Higgins

Albert had promised it to Motorola

ML (Michael Lowry) stayed out of the process
Leased line issue - Telecom's
A/c system can cost inadequately

Mj Communications

It can't be given before it goes to Cabinet. GSM.
Quinn should not be involved.
Loughlin is a participant in another one.

It is a major decision.

In Italy the Govt. did not accept the Govt. report
And there was a consequential challenge. European
Commission took them to Court because this
change of policy.
2 (of the) project team are of D/F (department of
Finance).

John Bruton T.D., Cornelstown, Dunboyne, Co. Meath
Ph: (01) 6183117 / (01) 6183107 (01) 6183004 - Fax: 6184141
E-MAIL: john.Bruton@oireachtas.ie

October 1995 - November 1995

Madrid, New York
Madrid II, Israel

M/Communion

It will be in the begin of
the year to collect. 6-8 of
the year held. not be
involved

beginning is a participant
in another one.

It is a major decision

to study the subject and to accept
it. I expect there are a
few more people who are
interested in the subject.
The other is to wait.
There is a change of policy
and I expect there are a D.F.

win - 2.11m raised to
OD of 1.5m
- M. D Higgins

What had promised it to
Mortola. He had to
stop out of the room
because time is over - 1.5m.
If I had a car a week, it

Appendices to Chapter 50

MR. MICHAEL ANDERSEN AND ANDERSEN MANAGEMENT INTERNATIONAL

Index

1. Indemnity letter from Mr. O'Brien to Mr. Andersen dated 13 April, 2010.

DENIS O'BRIEN

RECEIVED

20 SEP 2010

Meagher Solicitors

13 April 2010

Strictly Private & Confidential

Mr. Michael Andersen
Chief Executive Officer
Andersen Advisory Group A/S
Kristianiagade 7
DK-2100 Copenhagen
Denmark

Re: Moriarty Tribunal of Inquiry

Dear Mr. Andersen,

I refer to recent discussions you have had with my representative, Mr. Tom Reynolds, in relation to the Moriarty Tribunal of Inquiry ("the Tribunal") and the Tribunal's inquiries into the circumstances leading to the awarding of the second Irish mobile phone licence to Esat Digifone Limited on 16 May 1996. As you are of course aware, I was Chairman of the Esat Digifone consortium and a significant indirect shareholder in that company.

I understand that you have had discussions with Mr. Reynolds in terms of you possibly giving sworn evidence before the Tribunal in relation to your involvement in the second mobile phone licence process. I am of the view that your sworn evidence would be of extremely significant value to the public interest in terms of properly understanding the detail of the licence competition process that led to the awarding of the second mobile phone licence. Your evidence will undoubtedly make it considerably more likely that the Final Report as issued by the Tribunal in relation to the licence process is factually correct and accurate. As a result, I am most anxious that your evidence be given to the Tribunal in an appropriate manner and form part of the evidence to be considered by the Sole Member of the Tribunal prior to the publication of his Final Report.

I understand that you have raised an issue in relation to the provision of a personal indemnity to you in terms of any personal liability that may attach to you (or potentially attach to you) pursuant to your giving of sworn evidence to the Tribunal.

Provision of General Indemnity

I hereby confirm that I am personally willing to provide you with a full personal indemnity in relation to your interaction with the Tribunal, including the giving of sworn evidence by you to the Tribunal. Indeed, this letter, as signed by me, constitutes a binding and absolute commitment on my part to you that I will personally indemnify you in relation to any personal liability that may attach to you arising from sworn evidence given by you to the Tribunal.

This indemnity does not extend to personal statements made or action taken by you, or on your behalf, outside of your direct dealings with the Tribunal. For the avoidance of any doubt, this exclusion includes the making of personal statements outside of the privilege afforded to witnesses appearing before the Tribunal.

Costs and Expenses Incurred to Date

I understand that you have already incurred legal costs and expenses in terms of your dealings with the Tribunal in the period 2001 to date. I assume that your lawyers will engage in discussions with the Tribunal in relation your position as regards the reimbursement of these costs as incurred to date prior to your actual giving of evidence to the Tribunal.

In the event that this matter in relation to your costs as incurred to date is not resolved bilaterally with the Tribunal to your satisfaction, then I confirm and hereby agree that I will personally discharge any such reasonable legal costs and expenses as incurred by you to date on an indemnity basis subject to the presentation of all appropriate documentation to me in this matter (legal invoices etc) necessary to support such claims for reasonable costs and expenses.

Please note that this liability in terms of all reasonable legal costs and expenses incurred to date is subject to a maximum ceiling of €30,000. Any liability arising under this section of this letter shall be discharged, in line with the above, within 30 days after the giving of your first day of sworn evidence before the Tribunal.

Costs and Expenses to be Incurred

I assume that your lawyers will also engage with the Tribunal in terms of how your legal costs and expenses into the future will be dealt with. To this end, I would note that other witnesses to the Tribunal from outside the Irish Jurisdiction have managed to secure appropriate and acceptable arrangements, in advance of the giving of evidence, with the Tribunal (by way of example) including agreeing hourly rates for the preparation for, and the actual giving of, sworn evidence.

In the event that it does not prove possible to secure a satisfactory agreement bilaterally with the Tribunal in terms of how your legal costs and expenses moving forward are to be dealt with, then I confirm and agree that I will personally discharge any such legal reasonable costs and expenses on an indemnity basis subject to the presentation of all appropriate documentation to me in this matter (legal invoices etc) necessary to support such claims for reasonable legal costs and expenses. This agreement and commitment under this section of this letter relates solely to costs incurred post the date hereof.

Please note that invoices properly presented for any such reasonable legal costs and expenses in relation to these reasonable costs so incurred in the future will be discharged within thirty (30) days of receipt of same.

Cost recovery by Michael Andersen pursuant to an Order for Costs made by the Tribunal

In the event that my personal commitment and agreement with you as set out in the above two sections of this letter in relation to your reasonable legal costs and expenses arising from your dealings with the Moriarty Tribunal is called upon by you and in the event that you are subsequently awarded costs from the Tribunal pursuant to an Order for Costs as made in your favour, then, in that eventuality, you will repay directly to me, any sum received pursuant to such an Order for Costs in your favour, such sum to equal the amounts as previously paid by me to you pursuant to my personal commitment and agreement in relation to costs.

Please note that any liability in this regard arising pursuant to the receipt of monies by you pursuant to an Order for costs in your favour shall be limited to the amount of monies actually paid by me to you pursuant to my personal commitment and agreement in relation to legal costs and expenses. This liability shall be payable within 30 days of the receipt of any such monies by you pursuant to the making of any Order for Costs in your favour.

General

For the avoidance of any doubt, this personal indemnity as provided by me in your favour includes any personal exposure and/or exposure by companies in which you hold a controlling interest to legal liability from legal proceedings taken by third parties (including legal costs and expenses) that may arise pursuant to evidence given by you to the Tribunal.

This indemnity encompasses documentary evidence as provided to you by the Tribunal (included signed statements / memoranda of intended evidence) and other documentary material provided by you to the Tribunal which is referred to in evidence before the Tribunal.

In the event of any dispute in relation to the terms of this indemnity and/or related matters, it is agreed and confirmed that Danish law shall be applicable. In the event of any dispute arising that cannot be resolved between us by mediation; then the matter shall be referred to Arbitration. The seat of the Arbitration shall be Copenhagen and the dispute shall be subject to the rules of Arbitration as applicable in Denmark.

I know that these matters are not something you take lightly and I understand that your treatment to date by the Tribunal in this matter has been very much less than satisfactory or appropriate. Please be fully assured of my absolute commitment to you in terms of the provision of this indemnity.

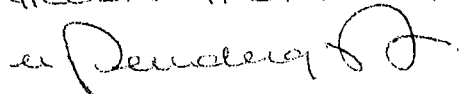
I should be obliged if you would confirm your agreement and understanding of the terms of this letter of indemnity by countersigning and returning a copy of same by return.

With kind regards.

Yours sincerely,


DENIS O'BRIEN

Witness: NICOLA TRENDERGAST

Signature: 

Address: 27 ANNESLEY PARK, RANELAGH, D6

Date: 13/04/2010.

I confirm that I have read and understood the contents of this letter of indemnity and agree that I am in agreement with the terms thereof.

Signed: 

Date: 13/04/2010

Appendices to Chapter 53

THE OWNERSHIP DILEMMA

Index

1. Article from The Irish Times “*Esat seeks £30m in debt to fund mobile phone network launch*” dated 28 February, 1996.

Esat seeks £30m in debt to fund mobile phone network launch

By John McManus
COMMUNICORP, the parent of Esat Telecom, is seeking to raise £30 million in debt to fund its share of the £100-million cost of launching the second mobile phone network.

The company is hoping to raise the bulk of the money in the US and its chief executive, Mr. Denis O'Brien, is understood to have been making presentations to US investors over the last two weeks. Communicorp is a 37.5 per cent shareholder in the winner of the second licence, Esat Digifone, through its holding in Esat Telecom. The Norwegian state phone

company Telenor owns another 37.5 per cent while Mr. Dermot Desmond's company, International Investment, and Underwriting, holds the remaining 25 per cent.

Under the terms of the planned fund-raising, Communicorp will be reorganised. A new company, Esat Holdings, will be created as the holding company for Esat Telecom and for the group's stake in Esat Digifone.

Communicorp's other interests, including the Dublin radio station 88FM and radio stations in Prague and Stockholm, will be held separately.

Esat Holdings will be 88 per cent owned by Communicorp and

12 per cent by outside investors on Esat's board, including the former Secretary of the Department of the Taoiseach, Mr. Pádraig O'Uiginn, the former senior partner of KPMG/Stokes Kennedy Crowley, Mr. John Callaghan, and the management consultant Mr. Leslie Buckley.

Communicorp is 65 per cent owned by Mr. O'Brien and 35 per cent by the US venture capital company Advent.

The £30 million in debt will be raised through Esat Holdings and will mainly be used to fund its share of the cost of starting up the new network. However, some of the money may be used to fund

Esat Telecom's planned expan-

sion. It is understood that Esat Holdings wants to raise the £30 million through loan notes. The notes will be split into £15 million of loan notes with convertible stock warrants and £15 million convertible into second preference shares. The US bank, CS First Boston, is advising the company.

A spokeswoman for Esat Digifone said last night the project would be financed through a mixture of equity put up by the consortium members and debt raised by Esat Digifone itself. The equity finance was committed and underwritten, she said. AIB and ABN Amro banks

were organising the debt portion and had already committed £25 million in bridging finance at this stage, she said.

Esat Digifone won the competition to operate the second mobile phone system in October last year. However, the company has not yet been officially awarded the licence. The Department of Transport, Energy and Communications said yesterday that the negotiations were at an advanced stage.

Esat Digifone plans to spend £100 million over the next five years developing its network. The investment will include an upfront payment of a £15 million licence fee to the Government.

The Irish Times
28 February 1996
Ref: Esat Digifone
Subject: Finance
Page: 19 - Business

Appendices to Chapter 54

THE STABILITY OF THE CONSORTIUM IS IMPERILLED

Index

1. Memo by Mr. Johansen of Telenor dated 4 May, 1996.

002572

PRIVATE AND CONFIDENTIAL

Re: Memo on shareholding in ESAT Digifone

I have below summarised a few points that has become clear to me over the last 24 hours as a consequence of the information acquired regarding Communicorp's attempt to buy back 12.5% of the IIU-shares.

1. Denis O'Brian came personally over to see me in Oslo probably some time during September last year. He informed me that, based on information from various very important sources, it was necessary to strengthen the Irish profile of the bid, and get onboard people who would take a much more active role in fighting for Digifone than the "neutral" banks who basically would like to keep a good relation to all consortia.

I accepted Denis' word for the necessity for this new move. Note: Underwriting was never used as an explanation.

2. IIU should apparently be the ideal choice for this function; the only string attached being that they had demanded a 30% equity-participation "for the job". Denis had managed to reduce this to 25%, but it was absolutely impossible to move them further down. This was a disappointment to us, since everything we had said and done up to then had been focused on at least 40% ownership for the principal shareholders at the time of the issuing of the license. But not only that: Denis then pushed very hard for Telenor to swallow 15% of this and Communicorp only 10% - to which I never agreed - but I accepted the principle of "sharing the pain" and maintaining equal partnership (37.5%/37.5%). It was also said that a too high Telenor ownership-stake would be seen as aggressive and could be inhibiting the award of a license.

This was the first time I experienced real hard, and very unpleasant, push from Denis.

3. Some days later the nature of the agreement with IIU comes clearer into the light, as an underwriting agreement to **guarantee for Communicorp's timely payment** of its share of the capital into Digifone, and including the right to place the shares with up to four nominees. This was unwillingly accepted by Telenor (since we understood it to be the right steps to be taken from an "official Irish standpoint" to secure the license).

The agreement was drafted by Fry's/OOC and signed in a hurry (basically in draft's form) by Denis O'Brian alone on behalf Communicorp and Digifone (even though we in the JV-agreement have made it clear that two authorised signatures are required - one from each party).

4. The agreement was never signed by Telenor, neither as authorised Digifone signature nor as a shareholder and a party to the agreement. Sometime shortly after this, the Advent commitment to invest USD 30 mill. into Communicorp disappears, as it was essentially not

necessary anymore, since the Communicorp liability to pay capital to Digifone was anyway underwritten by IIU.

5. In hindsight it is quite clear who benefitted from this arrangement.

I have good reasons to believe that the terms put forward by Advent for investing into Communicorp did not suit Denis O'Brian. With the above arrangement, that he orchestrated for all other sorts of reasons, he has actually achieved to bolster his/Communicorp's balance sheet and paid for it with Digifone-shares at the cost of Telenor. He has done this in an atmosphere of trust, where Telenor even has agreed to bridge finance Communicorp while he raises funds through a private placement in the US.

6. As we go along we learn more, but it all serves to disclose more details which again more and more prove the above scenario.

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

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

I think it would be a very prudent thing for Telenor to do - especially since we then effectively underwrite the whole project, both Communicorp and IIU, after already having paid Communicorp's price for the first underwriting which now appears to be useless.

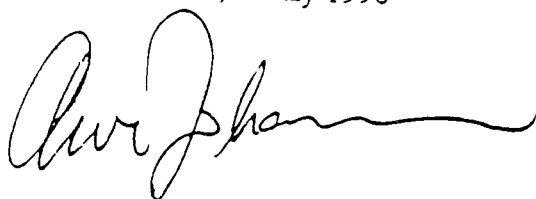
7. But the story doesn't end there. Two days ago I was informed by Denis that he had entered into an agreement with IIU to buy back 12.5% of the shares now held by IIU. I found it absolutely unbelievable, and made it clear that Telenor would not accept anything but equal partnership, either we buy 6.25% of the IIU held shares each, or Telenor should take the other 12.5% of the IIU held shares.

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

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

- ⇒ The return favour from Communicorp is to release IIU from all of its underwriting obligations in Digifone. Does Digifone have an opinion on this and what about Telenor? This effectively gives Communicorp back its 12.5% of the shares at par (or close to), releases IIU from all of its underwriting liability (which Digifone "paid" 25% for), and IIU ends up having delivered absolutely nothing, having done nothing but complicated the award of the license (if we get it at all), but with (some cash?) and 12.5% of the shares of Digifone which effectively have been deprived from Telenor, at the same time as the Department - and our honoured partners - gently ask us to underwrite the whole project.
- ⇒ Fortunately, IIU is at least realistic enough to see that this cannot take place unless Telenor continues to support the project. This fact, the time limit and the co-operative spirit shown (by disclosing the letter) may signal a hope for a sensible solution to this mess.

Oslo, 4 May 1996



Appendices to Chapter 55

DEPARTMENT IS ULTIMATLEY NOTIFIED OF OWNERSHIP CHANGES BY ESAT DIGIFONE

Index

1. Fax from Ms. Finn to Mr. Brennan and Mr. Towey dated 16 April, 1996, attaching memo with diagram re. ownership of Esat.
2. Letter from Mr. O’Connell, solicitor, to Ms. Finn dated 17 April, 1996.

001608



Department of Transport, Energy and Communications

Telecommunications and Radio (Regulatory) Division
7 Ely Place
Dublin 2

Facsimile Transmission

To: Martin Brennan / Fintan
Towey

Company: Communications Division

Phone:

Fax: 604 1188

From: Regina Finn

Company: Department of Transport, Energy
and Communications

Phone: 670 7444

Fax: 662 2150

Date: 16/04/96

Pages including this

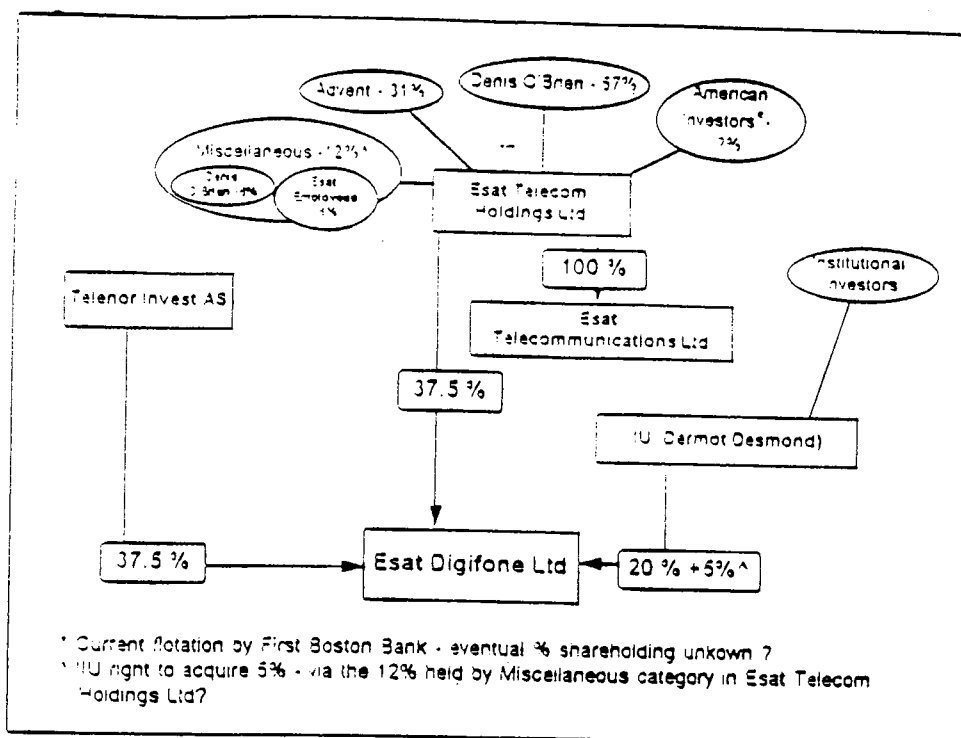
cover page: 2

Comments:

Martin/Fintan,

Attached is the latest information to come to light about the shareholdings in Esat Digifone. Eoin O'Connell is to provide further detail in writing. You may wish to pursue further.

Regina



Eoin O'Connell, William Fry Solrs, provided the following information on behalf of Esat Digifone Ltd.:

At present Communicorp is the vehicle whereby Denis O'Brien holds shares in Esat Digifone. Communicorp also has ownership of Esat Telecom and the Radio interests of Denis O'Brien. The objective is to uncouple the telecommunications and the radio elements of Communicorp because they are incompatible from the point of view of investors. With this in mind, Communicorp will retain the radio interests and "slide out" of the current picture in relation to telecommunications.

Esat Telecommunications Holdings Ltd has been incorporated to take over the telecommunications interests of Communicorp. Ownership comprises:

Denis O'Brien	- 57%
<u>Advent</u>	- 31%
Miscellaneous	- 12%
- Denis O'Brien	6%
- employees of Esat	6%

A "floatation" is currently underway by First Boston Bank which involves the placing of shares in Esat Telecommunications Holdings Ltd. It is not yet known what percentage of the company will finally be owned by American investors.

Esat Telecommunications Holdings Ltd in turn owns

<u>Esat Telecommunications Ltd</u>	- 100%
<u>Esat Digifone Ltd</u>	- 37.5%

Telenor Invest AS owns 37.5% of Esat Digifone Ltd

IU (A Dermot Desmond company) currently holds 20% of Esat Digifone which it intends placing with institutional investors. It also has the right to acquire a further 5% [by means of the 12% of Esat Telecom Holdings Ltd which is held by "Miscellaneous"?]

Eoin O'Connell is to provide further information in writing, including deadlines for this change in ownership

WILLIAM FRY

SOLICITORS

001510

FITZWILTON HOUSE, WILTON PLACE, DUBLIN 4, IRELAND
TEL: 01-2611000 FAX: 01-2611400
TELEX: 944900 DDB BOX NO 103

CLASIF

WAFR/11/10/1007

12457-001-00C

17 April 1996

Ms Regina Finn
Department of Transport
Energy & Communications
44 Kildare Street
Dublin 2

copy to Regina
5/4/96

Esat Digifone Limited

Dear Regina,

I refer to our telephone conversation of yesterday regarding the ownership of Esat Digifone Limited and of Esat Telecommunications Holdings Limited. The position is as follows:-

Esat Digifone Limited

There are 3,000,000 ordinary shares of IR£1 each in issue in this company. They are held as to 1,125,000 shares by each of Esat Telecommunications Holdings Limited and Telenor Invest AS, and as to 750,000 shares by IIU Nominees Limited.

It is intended that by the time notification is received from you that the second GSM licence is available for issue, the issued share capital will have increased by IR£15m to IR£18m (all comprising shares of IR£1 each) held as to 6,750,000 by each of Esat Telecommunications Holdings Limited and Telenor Invest AS, and as to 4,500,000 by IIU Nominees Limited.

The 25% of Esat Digifone Limited held by IIU Nominees Limited effectively represents the institutional and investor shareholding referred to in Esat Digifone's bid for the licence. You will recall that this referred to an immediate institutional/investor holding of 20%, with a further 12% in short and medium term stages. Of the anticipated 12%, 5% has been pre-placed with IIU Nominees Limited. It is understood that most or all of the shares held by IIU Nominees Limited will in due course be disposed of by it, probably to private and institutional investors.

LONDON OFFICE: AUDREY HOUSE, 15-20 ELY PLACE, LONDON EC1N 6SN, ENGLAND. TELEPHONE 0171-430 2738, FAX 0171-430 3982.

PARTNERS: HOUGHTON FRY, FRANCIS E. SOWMAN, EDMUND FRY, NEVILLE R. O'BYRNE, ALVIN F.M. PRICE, MICHAEL T. O'CONNOR, BRIAN H. O'DONNELL, DANIEL MORRISSEY, OWEN O'CONNELL, MICHAEL WOLFE, BOYCE SHUSBOOTHAM, GERARD HALPENNY, PATRICIA TAYLOR, BRENDAN HENECHAN, AISLINN O'FARRELL, JOHN LARKIN, MYRA GARRETT, ELAINE HANLY, MICHAEL QUINN, FRANK KEANE, BRENDAN CAHILL, NORA WHITE

ASSOCIATES: KENNETH MORGAN, MARIA BRENNAN, WILLIAM PRASIFKA (QUALIFIED NEW YORK), LOUISE CAREY, JOAN FAGAN, EDWARD EVANS.

* Resident in London

CONSULTANT: OLIVER G. FRY.

Esat Telecommunications Holdings Limited

This company is owned (either directly or indirectly) as to approximately 57% of its issued share capital, by Denis O'Brien and as to approximately 31% thereof by a group of investment funds managed and controlled by Advent International. The remaining 12% is owned (again directly or indirectly) by a number of individuals (including Denis O'Brien) who are primarily present or former directors, employees, advisers or shareholders in Esat Telecom Limited. (These percentages assume the full conversion of all existing issued convertible debentures in the company i.e. they are expressed on a "fully diluted" basis.)

A placing of shares is near to completion in the United States whereby the effective ownership of Esat Telecommunications Holdings Limited will be altered by the subscription for a substantial number of shares by a number of US financial institutions. The US institutions are likely to hold approximately one third of Esat Telecommunications Holdings Limited after the placing (although Mr. O'Brien will retain a majority of voting shares); in addition, Advent International may increase its holding somewhat by participating in the placing.

Other Group Companies

You asked me about a number of other companies of which you were aware, including Esat GSM Holdings Limited and Communicorp Group Limited. While these companies remain in being and are within the overall group structure, they will not have a direct role in the licence.

I believe that the foregoing accurately summarises the effective and beneficial shareholdings of the parties concerned, although the full shareholding structure is somewhat more complex than outlined and, as I told you on the telephone, many of the effective shareholdings are held indirectly through other companies. If you wish, a full briefing can be given as to exact shareholdings of all parties in and through all companies, but I am not sure that this will serve any productive purpose. Please contact me if you would like such a briefing.

At the risk of labouring the point, I must reiterate the anxiety of Esat Digifone to procure a grant of the second GSM licence as soon as possible, since significant damage to its plans and prospects is already being incurred and could largely be avoided by the grant of the licence.

I look forward to hearing from you.

Yours sincerely,

PP. Owen O'Connell
Owen O'Connell
WILLIAM FRY
Solicitors
1147200:29

Appendices to Chapter 57

LEGAL ADVICE ON CHANGES

Index

1. Letter from Mr. Towey to Mr. McFadden and Mr. Gormley dated 24 April, 1996.
2. Cover letter and opinion of Mr. Nesbitt SC, both dated 9 May, 1996.
3. Letter from Tribunal to Attorney General dated 16 December, 2002, with attached newspaper article.
4. Letter from Attorney General to Tribunal, dated 20 December, 2002.
5. Letter from Tribunal to Attorney General dated 9 January 2003.
6. Letter from Attorney General to Tribunal, dated 4 February, 2002 [sic].
7. Attendance note by Mr. O'Connell, solicitor, of telephone call with Mr. Towey on 7 May, 1996.
8. Submission by Mr. Gormley and Mr. McFadden to Attorney General dated 10 May, 1996.



An Roinn Iompair,
Fuinnimh agus Cumarsáide
44 Sráid Chill Dara,
Baile Átha Cliath 2.

Department of Transport,
Energy and Communicatio
44 Kildare Street,
Dublin 2.
Telephone: (01) 6707444
Direct Dial: (01) 604
Fax: (01) 6709633

24 April, 1996.

Mr. D. McFadden/Mr J. Gormley,
Office of the Attorney General,
Upper Merrion Street,
Dublin 2.



Dear Mr. McFadden/Mr. Gormley,

Further to our meetings on 22 and 23 April, I enclose the following:-

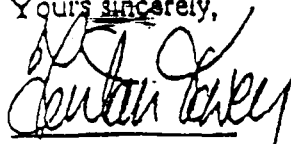
- a report on the Departments assessment of the compatibility of the conditions of the draft GSM licence with Directive 96/2 and
- a consolidated text of Section 111 of the P&TSA, 1983 incorporating amendments contained in SI45 of 1992 and amendments proposed in the transposition of Commission Directive 96/2.

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

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

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

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Fintan Towey', written over a horizontal line.

Fintan Towey,
Communications (Development
and Corporate Affairs) Division.

RICHARD LAW NESBITT

Senior Counsel

No. 2 ARRAN SQUARE, ARRAN QUAY, DUBLIN 7. TEL: 873 3344 FAX: 873 3737

V.A.T. No. F4565915P

Office of the Attorney General,
Government Buildings,
Upper Merrion Street,
DUBLIN 2.

9 May 1996

re : Licensing Mobile Telephones.

Dear John,

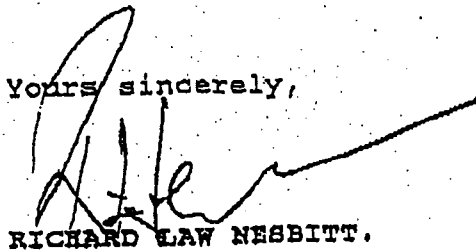
I enclose my suggested amendments to the ESAT Licence, my suggested amendments to the Statutory Instrument given to me, and some general advices.

I am sending my views on the complaint made to the Commission under separate cover. However I remain of the view that the Minister should not drag his feet in issuing the licence. If there was to be litigation so be it but delaying does not achieve any end. Before issuing the licence you should make it clear to Persona's Solicitors that he is not holding his hand on the issue of the licence. The form of draft letter has already been discussed with you. My reasoning in this regard is that the Minister is committed to grant a licence. He is now in between two competing interests. One ESAT who say they are entitled to the licence and the other Persona who are indicating that the licence should not issue. Delaying issuing the licence will clearly damage ESAT. If persona wish to stop ESAT getting the licence they should be required to take appropriate legal action to restrain the issue. They will then be required to give undertakings to the parties affected, particularly ESAT. This will concentrate their minds, particularly in circumstances where the commission are likely to be making unsympathetic noises in relation to their complaint.

There is one final matter that is important. It occurred to me that the Minister may wish to impose on the persons backing ESAT Digiphone an obligation to stay with their commitment to back ESAT Digiphone for a given period, say 3 to 5 years. It could be possible to include in the licence a condition that the licence shall not be actioned until an appropriately worded commitment is to hand. I do not know enough about the terms of the application to know what sort of commitment you could seek or from whom. However it is a matter worth

considering and in my opinion a sustainable condition to attach to the granting of a licence to carry on an activity which by definition means that somebody else will be deprived of the opportunity to carry on that activity.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'R. Law Nesbitt', with a long horizontal flourish extending to the right.

RICHARD LAW NESBITT.

ADVICES

Querist : The Minister for Transport, Energy &
Communications and The Department of Transport,
Energy & Communications.

re : The ESAT Digiphone (GSM) Mobile Telephony
Licence

I have now had the opportunity of considering the complicated issues which arise relating to the introduction of a statutory instrument to take into account the effects of Commission Directive 96/2/EC and to settling the terms of the draft "ESAT Digiphone Telecommunications licence" which the Minister wishes to issue.

The Draft Licence

I have dealt with the draft licence by taking the draft of the 2nd of May 1996 and indicating where I think there should be amendments. The balance of the document can remain in its current form. Attached to these advices are the amendments I suggest. You should also include in the licence the sub-headings that exist in the articles. I did not trouble to repeat them in the amendments that I have suggested.

The terms of the amendments I have suggested to Article 1, 2, 4 and 5 should be self explanatory.

The amendments I have suggested to Article 8 are more substantial. Article 8 imposes conditions material to the ownership of the licence and the management of the licence service, most particularly the ownership of shares in the licensee company. I view these matters as being particularly sensitive and an area where the Minister's hand is substantially tied. The Minister agreed to give the licence in question prior to the introduction of

4

Commission Directive 96/2/EC. However as a matter of law I am forced to conclude that if the licence document includes terms and conditions which are not sustainable under the Directive and licensee in my opinion is free to apply to the Courts to have such non-conforming provisions struck down.

If one analyses why the Minister is concerned about the ownership of shares in the licensee the only legitimate concern he can have is that if there is a change of ownership the service that has to be provided will in some way be compromised. I do not think it is tenable to suggest that the licensee has been awarded the licence because of the parties who own the licensee. Rather the licensee has been awarded the licence because its plans and proposals were the most meritorious and it provided a funding plan which looked feasible. There is no reason why any of these matters have to be compromised by a change in ownership. However I do accept that there is a possibility that this might occur. It is also a real issue in the mind of the public.

In the circumstances I have proposed changing Article 8 quite fundamentally. What I have proposed is that the licence continue to be personal to ESAT Digiphone, the restrictions on transfers and assignments of interest in the licence and assets remain and that the Minister include in the licence provisions which will allow him add additional conditions to the licence should ESAT Digiphone wish to issue shares to the public or by private placing and give to the Minister the right to veto any proposal to issue shares or transfer the ownership of existing shares. However the right must be prescribed and I have done this by only allowing the Minister to act if forms the opinion that the proposals will be to the detriment or will compromise all or any of the matters which the Directive indicates are proper concerns for the Minister when issuing licenses. I find it difficult to imagine circumstances where the Minister will see a proposed issuing of shares and/or change of ownership which justifies saying he will not consent to it. However I think it is prudent to try and maintain such right. It will certainly allow the Minister to say that he has taken appropriate steps to protect the public interest in this regard.

I am dubious as to whether or not the Minister can demand that the administration and management of the business be carried on in premises in the State. However I can understand why this has been included.

In relation to Article 15 I have suggested an amendment. It is largely cosmetic.

Article 17 holds the licensee to the provision of a service which develops in accordance with the promises he made in his submission at competition stage. I am concerned that the penalties that are imposed on failure to deliver as promised are likely to be subject to attack falling outside what the Minister can do, given the recent Commission Directive. However I understand why they are being imposed and simply flag these as provisions in the licence which could be subject to attack.

As I have already stated I am gravely concerned about the terms of Article 18. I am aware that Mr. O' Brien promised such a windfall gains provision in his submission and should be held to his promise but am equally satisfied such an arrangement falls well outside what is permitted under the recent Commission Directive. I have left it in the terms as drafted but again point out that if challenged it will be in difficulty.

In respect of the proposed Statutory Instrument, I have caused this to be re-typed and where I have made amendments I have over lined the Sections in question. Essentially since the implementation of Commission Directive 96/2/EC, which amends Directive 90/3/88/EEC the State is obliged to offer available radio frequencies to prospective communication service providers. The frequencies are to be licensed by open non-discriminatory and transparent procedures.

The proposed Statutory Instrument amends Section 111 of the Act by inserting two new sub-sections (2 B) and (2 C) for the provision of mobile and personal communication services and mobile and personal communication systems is subject to licence by the Minister. What the Statutory Instrument does not do is to provide a mechanism by which the Minister will alert people to the available frequencies or provide the practical arrangements which need to be put in place for the processing of applications by persons who want to operate such services or systems. It would be prudent for the Department to consider how this is to be done because otherwise there will be complaints by persons who would like to operate such a scheme that are not being advised as to the availability of frequencies and have not been provided with a procedure whereby applications can be submitted. This will not stop people making applications but it does call into question how open, non discriminatory and transparent the procedures really are. Frankly I do not know enough about the availability of frequencies to make any sensible suggestions at this stage. However it is something that needs to be considered urgently and be the subject matter of a set of regulations.

The ability of the State to limit the number of licences for mobile and personal communication systems is restricted to certain specified non economic reasons in the public interest and the lack of availability of frequency spectrum. Restrictions have to be proportionate to the aim to be achieved. It is also clear that the Directive seeks to outlaw restrictions on operators in respect of the establishment of their own infrastructure, the use of infrastructure provided by third parties and the sharing of infrastructure and other facilities and sites. Interconnection must be permitted and restrictions on interconnection lifted. Finally access to the public network must be guaranteed. Obviously interconnection requires conditions but these must be based on objective criteria which are transparent, non-discriminatory and compatible with the principle of proportionality. Clearly the Department should think about setting out a set of interconnection conditions of general application to allow prospective licence applicants know what lies in store for them. Rather than repeat the amendments I have made to the Statutory Instrument I suggest you take time to consider the draft I return and I can deal with any questions that arise.

Nothing further occurs at present.

Richard Law Nesbitt,
2 Arran Square,
Arran Quay,
DUBLIN 7.

9 May 1996

[gsm.1 {opi}]

**PRIVATE & CONFIDENTIAL
ADDRESSEE ONLY**

16th December, 2002

Mr. Rory Brady SC
Attorney General
Office of the Attorney General
Government Buildings,
Upper Merrion Street,
Dublin 2.

**RE: TRIBUNALS OF INQUIRY (EVIDENCE) ACTS, 1921 AND
1979 (NO. 2) ORDER 1997**

Dear Attorney General,

I am writing to you in my capacity as Solicitor to the Tribunal of Inquiry appointed by the above Order of the Oireachtas.

I enclose herewith a copy extract from an article which appeared on page 11 of yesterday's edition of the Sunday Business Post. The relevant portion of the article reads as follows:

"The tribunal is expected to hear that just hours before the announcement was made awarding the licence to ESAT Digifone, senior civil servants sought advice from the Office of the Attorney General on whether consortia should be permitted to alter the make-up of their investors. The advice they received was that consortia could, but only for shareholdings of 20% or less.

Legal sources believe this advice may become a source of contention at the inquiry, however. It is understood that, in recent months, the state have been examining the basis on which advice was given in order to establish whether it would stand up to close scrutiny. The matter is known to be causing considerable anxiety in Government circles."

The Tribunal wishes to know whether the above extract is correct. In particular, the Tribunal wishes to establish whether the following statements of fact are correct:-

1. that *"just hours before the announcement was made awarding the licence to ESAT Digifone, senior civil servants sought advice from the office of the Attorney General on whether the consortia should be permitted to alter the make up of their investors"*.
2. that *"the advice they received was that consortia could, but only for shareholdings of 20% or less"*,
3. that *"in recent months, the State has been examining the basis on which advice was given"*.

If the above statements (or any one or more of them) are correct, the Tribunal would be anxious to obtain a narrative account setting out all of the information available regarding these matters and in particular:-

- a. the identity of the civil servants who sought advice from the Office of the Attorney General;
- b. precisely when the advice was sought and in what circumstances;
- c. the identity of the officials (or Counsel retained by the Attorney General) who provided such advice;
- d. whether such advice was furnished orally or in writing;
- e. the "basis" on which the advice was given.
- f. all of the information made available to the Attorney General in connection with such request for advice (if any).

The Tribunal would also be very much obliged if you could provide the Tribunal with copies of all documents in your power, possession or procurement which touch or concern these matters insofar as it is confirmed that they are factually correct.

This request for assistance is being made in the course of the investigative phase of the Tribunal's work when the Tribunal is engaged in the process of gathering evidence or information which may lead to evidence material to its Terms of Reference. Documents or information provided to the Tribunal in response to this request will remain strictly confidential unless in the absolute discretion of the Sole Member they are or they become material to the Tribunal's Terms of Reference and appropriate to be led in evidence at public sittings of the Tribunal.

I would be very much obliged to hear from you at your earliest convenience.

Yours faithfully,

John Davis
Solicitor to the Tribunal

of the kept, members are not sube- at the might good t. Lowry's of an ich a Inter- would invest- ich is said and. that IU ifone ll be y ex- al of into con- Des- his ttin rust s a in- en in- 'or on oc- by nt m s- of as ts ts J r e t

should the then minister have had any role in ratifying the participation of any firm or individual in a consortium. Yet sources say none of the dozens of sworn statements received by the Tribunal suggest Telenor questioned Lowry about the suitability of IIU.

Were it to be established that he did, the entire mobile phone competition edifice would come crashing down, providing powerful evidence on which O'Brien's defeated rivals could base claims for huge damages in legal actions.

Interest in suggested Lowry/Desmond links has become all the more acute since the tribunal heard a sensational claim by a Telenor executive, Per Simon- sen, that Lowry told O'Brien to include Desmond as an investor.

The alleged advice, which is denied by Lowry and O'Brien, is said to have been given at a meeting between the two men at Hartigan's pub in Dublin on September 17, 1995 – the evening of the all-Ireland football final.

Lowry will protest his innocence on the question of Desmond's involvement in O'Brien's bid. He is also expected to cite events within his department to bolster claims that nothing improper occurred.

The tribunal is expected to hear that just hours before the announcement was made awarding the licence to Esat Digifone, senior civil servants sought advice from the office of the Attorney General on whether consortia should be permitted to alter the make-up of their investors. The advice they received was that consortia could, but only for shareholdings of 20 per cent or less.

Legal sources believe this advice may become a source of contention at the inquiry, however. It is understood that, in recent months, the state has been examining the basis on which the advice was given in order to establish whether it will stand up to close scrutiny. The matter is known to be causing considerable anxiety in government circles.

Lowry is likely to testify

that, far from Telenor being worried about the suitability or otherwise of Desmond's IIU investment group, the Norwegian company's executives were concerned exclusively with their own position within the deal.

It is also possible, sources suggest, that IIU had been on board for some time before O'Brien revealed this information to Telenor.

"Telenor perceived Desmond getting 25 per cent as Denis O'Brien being smart in terms of getting control of the consortium. They presumed that O'Brien and Desmond were acting in concert," a source said.

"That came up after the award of the licence. At that stage John Loughrey took over the negotiations, it was realised that Desmond had 25 per cent, and he was forced to sell 2.5 per cent to each one of them," the source said.

"In other words the department wasn't going to stand over a situation where there was a material change in the make-up of it. But they were never worried about who was

in it, but I would say the officials in the department certainly played a role in ensuring that the pitch was levelled, and that they ended up [buying Desmond's extra five per cent on the basis of] 50-50," the source continued.

Sources say the department was never concerned about Denis O'Brien's funding: "Their attitude was very simple, and it was that whoever won the damned licence was bankable anyway."

As Loughrey prepared for the press conference to announce the decision, sources say, he was told by Esat Digifone that Dermot Desmond now made up part of the consortium.

"The legal advice they got from the Attorney General was that there was no problem whatsoever in switching anything up to 20 per cent from any named investor to Dermot Desmond," a source said. "What would have happened if the Department had said 'We can't have that?' They'd be in court since."

They, and others, may well be yet.

THE SUNDAY BUSINESS POST

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- **Dr Detlef Eckert**, Group Manager of Microsoft's Trustworthy Computing Initiative.

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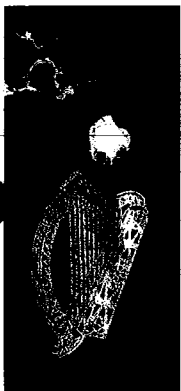
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AN tARD-AIGHNE
THE ATTORNEY GENERAL

Tithe an Rialtais Sráid Mhuirfean Uacht Baile Átha Cliath 2

Government Buildings Upper Merrion Street Dublin 2

Telephone: 01 661 6944 Fax: 01 676 1806

email: info@ag.irlgov.ie url: www.irlgov.ie/ag

20 DEC 2002

20th. December, 2002,

Mr. John Davis,
Solicitor to the Tribunal,
Tribunal Office,
State Apartments,
The Upper Yard,
Dublin Castle,
Dublin 2.

Re: Tribunals of Inquiry (Evidence) Acts 1921 and 1979 (No. 2) Order, 1997.

Dear Mr. Davis,

Thank you for your letter of the 16th instant and its enclosure.

Messrs. Gormley and Mc Fadden of this Office (Legal Assistants here at the relevant time) have read the extract from the article which appeared in the Sunday Business Post and refers to advice being given by the Attorney General "just hours before the announcement was made awarding the licence to Esat Digifone". It is understood that the announcement was made on the 25th. of October, 1995. After an examination of the Office's file they have reported to me in the following terms.

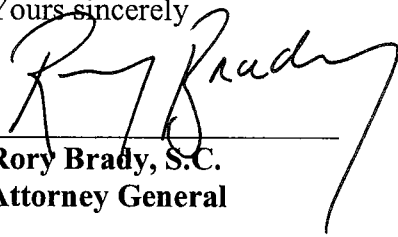
1. They have no recollection of furnishing the advice referred to in the said extract or receiving a request for same and do not believe that they gave such advice.
2. There is no copy on this Office's file of any advice of the type mentioned in the extract or any note of same having been given by the Attorney General or any other person in his Office.
3. There was a request for advice contained in the Department's minute of the 24th April, 1996 concerning the restructuring of the ownership of Esat Digifone since the date of their Application and the Attorney General's response thereto has already been made available to the Tribunal. Mr. Nesbitt's Opinion of 9 May, 1996 which was released to the Department with the sanction of the then Attorney General on the 13th. May 1996 dealt with the matter.

For my own part I wish to state that there has been no examination by me or my Office of the alleged advice mentioned in the extract (and referred to as statement of fact no. 3 in your letter) nor have I been made aware of such examination being carried out by any other State authority.

Finally I should point out that neither I nor my Office has made contact with Dermot Gleeson, Esq., S.C. in relation to the content of your letter.

If I can be of any further assistance to the Tribunal in relation to this matter please let me know.

Yours sincerely



Rory Brady, S.C.
Attorney General

**PRIVATE AND CONFIDENTIAL
ADDRESSEE ONLY**

9th January, 2003

Mr. Rory Brady SC
Attorney General
Office of the Attorney General
Government Buildings
Upper Merrion Street
Dublin 2

**RE: TRIBUNALS OF INQUIRY (EVIDENCE) ACTS, 1921 AND
1979 (NO. 2) ORDER 1997**


Dear Attorney General

Thank you for your letter of 20th December last in response to mine of 16th December. The Tribunal is grateful for your prompt response to its inquiries.

Having given further consideration to the wording of the article which appeared in the Sunday Business Post on 15th December, 2002, the Tribunal is of the view that the reference to advice given by the Attorney General "*just hours before the announcement was made awarding the licence to Esat Digifone*", may refer to the actual grant of the second mobile phone licence to Esat Digifone rather than the announcement of the result of the competition process. While the announcement of the competition result was indeed made on 25th October, 1995, the announcement of the actual awarding of the licence to Esat Digifone was not made until 16th May, 1996.

In the light of such interpretation, the Tribunal would be very much obliged if you could kindly reconsider the Tribunal's request by reference to the announcement of the actual award of the licence on 16th May, 1996.

Yours sincerely



John Davis
Solicitor to Tribunal



AN tARD-AIGHNE THE ATTORNEY GENERAL

Tithe an Rialtais Sráid Mhuirfean Uacht Baile Átha Cliath 2
Government Buildings Upper Merrion Street Dublin 2
Telephone: 01 661 6944 Fax: 01 676 1806
email: info@ag.irlgov.ie url: www.irlgov.ie/ag

Our Ref: C4284

4 February 2002

Mr. John Davis
Solicitor to the Tribunal
Tribunal Office
State Apartments
The Upper Yard
Dublin Castle
Dublin 2

Re: Tribunals of Inquiry (Evidence) Acts 1921 and 1979 (No. 2) Order, 1997.

Dear Mr. Davis,

Thank you for your letter dated 9 January 2003.

Messrs. Gormley and McFadden of this Office have again read, in the context of your recent letter, the extract from the article which appeared in the Sunday Business Post. There has been a further review of this Office's files - in relation to the Esat licence - and I now set out further information on the basis that the article in question related to the date of the announcement of the actual awarding of the second mobile phone licence to Esat Digifone Ltd, i.e. 16 May 1996. In addition this Office has sought and recently received clarification from Counsel (Richard Law Nesbitt SC) and Mr. Fintan Towey on the issues raised in your letters.

On the basis of the information of which I have now been apprised the following is the position.

1. On 14 May 1996 there was a consultation with Counsel (and others) attended by Mr. McFadden and Mr. Gormley of this Office. Mr. McFadden kept a note of that meeting.
2. On 15 May 1996, Mr. Fintan Towey of the Department sought advice from this Office regarding the content of a draft letter which the Minister proposed to send to the Chief Executive of Esat Digifone Ltd concerning

the consent required under Article 8 of the Licence in relation to the issue of shares by the Licensee and to the transfer of shares in the Licensee in specified circumstances and under certain conditions. Messrs. Gormley and McFadden regarded the draft letter as merely relating to the then ongoing process of negotiating the terms of the Licence - in particular Article 8.

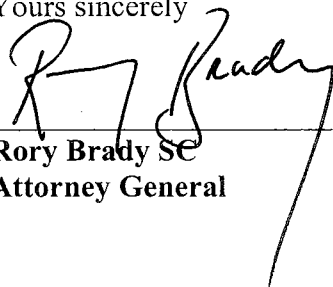
3. On receipt of the draft letter this Office (Denis McFadden/John Gormley) sent it to Counsel for his general advices.
4. On the afternoon of 15 May 1996, Counsel furnished his written advices wherein *inter alia* he advised certain amendments to the draft letter.
5. Counsel's advice was forwarded (John Gormley) to the Department at 6.25pm approx on 15 May 1996.
6. Subsequent to Counsel furnishing his written advice, he was requested to attend at the Department during the closing stage of the licence issuing process. Counsel has informed this Office that, while he was there, he furnished oral advice in relation to the licence condition regarding ownership changes and, in particular, he was asked whether such condition was solely "forward-looking". Counsel advised that that was the case.

No officials from this Office or the Chief State Solicitor's Office attended this meeting. Mr. Owen O'Connell of William Fry was present at the meeting. Other officials from the Department may have been present but this has not been confirmed at this stage. So far as this Office is aware there is no note of attendance of this meeting.

Copies of documents from this Office's file concerning the events listed at points 1 to 5 above are enclosed herewith. I am informed that Mr. Towey's letter of 15 May 1996 and that Counsel's opinion of 15 May 1996 were previously furnished to the Tribunal by the Department. I also enclose other documents from this Office's files which may be relevant.

If I can be of any further assistance to the Tribunal in relation to this matter please let me know.

Yours sincerely



Rory Brady SC
Attorney General

MEMO

WILLIAM FRY
SOLICITORS

TO: file

FROM: 002

DATE: 7-5-96

CLIENT: ESAT Digifone

MATTER: ~~6798749~~ licence negotiation

FILE No. 12457-001-002

Funtan Toney:-

Mum v. strong preference for 40:40:20
at time of licence. But ~~strongly~~ understands
need for flexibility afterwards. Will take
ESAT Holdings subject to no substantive
difference + outline in writing.

6055010.

OIFIG AN ARD-AIGHNE

Tagairt:

Our ref.: SR 3/79, 4249/95

COPY

Re.: 1. Proposal of the Minister for Transport, Energy and Communications to grant a licence to Esat Digifone Limited to be the second provider and operator of a GSM mobile telephony service in Ireland and,

2. Stamped Draft of regulations entitled "European Communities (Mobile and Personal Communications) Regulations, 1996" to give effect to Commission Directive No. 90/388/EEC of 28 June 1990 and Commission Directive No. 96/2/EC of 16 January, 1996 and

3. Stamped Draft of licence proposed to be granted under subsection (2) of section 111 of the Postal and Telecommunications Act, 1983 (No. 24 of 1983) as amended by the above mentioned regulations when made, and

4. Advices of Richard Law Nesbitt, Esq., S.C. dated 9 May, 1996.

Ard Aighne ,

1. This Office's files of papers concerning the above are attached. Also attached are copies of the above mentioned stamped draft of regulations and stamped draft of licence which have been prepared in the Office of the Parliamentary Draftsman by EB and have flags "D1" and "D2" thereon.

2. Richard Law Nesbitt, Esq., S.C. was briefed with the said draft regulations and draft licence and asked to furnish his advices in relation to the validity thereof and same have now been received and have flag "D3" thereon.

A copy of the Postal and Telecommunications Services Act, 1983, S.I. No.45 of 1992, Commission Directive 90/388/EEC of 28 June 1990 and Commission Directive 96/2/EC of 16 January, 1996 are in the pouch with flag "D4"thereon.

OIFIG AN ARD-AIGHNE

2

Tagairt:

A report prepared by the Department on its assessment of the compatibility of the conditions of the draft licence with Directive 96/2/EC which was included in counsel's brief has flag "D5" thereon.

A letter from Dr. Herbert Ungerer of DG 1V to Mr. Brennan of the Department of Transport, Energy and Communications dated 28 March 1996 which gives guidance on the implementation of Directive 96/2/EC has flag "D6" thereon.

3 The draftsman and the undersigned met with Department officials today to discuss counsel's said advises. The Department are agreeable to the amendments to the draft licence suggested by counsel. However the wording of the amendment to Article 8 suggested by counsel is being settled by EB and will be returned for approval to Mr. Law Nesbitt later today.

The amendments to the draft regulations suggested by counsel were fully considered at the meeting and save for the amendment to regulation 6 were felt not to be required.

It is proposed to amend the stamped licence and regulations to incorporate the amendments suggested by counsel to the aforesaid extent.

The undersigned telephoned counsel to clarify the content of the third paragraph of his covering letter and informed the Department of the clarification. We also informed them that counsel stated that Department officials could telephone him over the weekend if they wished to discuss this aspect of his advises with him further.

4. Commission Directive 96/2/EC of 16 January 1996 which was first brought to the attention of this Office last month further complicates the already legally complex proposal to licence a second provider and operator of a GSM mobile telephony service in Ireland. A very large number of issues could validly be raised in relation to the exact meaning of that Directive and Directive No. 90/388/EEC of 28 of June 1990 which it amends. These issues have not been explored with the Commission and most likely will arise in the future and perhaps will be the subject of litigation the outcome of which cannot be predicted. In this regard it is to be noted that the Commission has not had sight of drafts of either the proposed regulations or licence. Further as you are aware one of the unsuccessful applicants for the licence has already lodged a complaint with the Commission.

5. The preparation of the draft regulations having regard to the time frame allowed and the opaqueness of the Directives has been an extremely difficult task. As you are aware the Minister wishes to grant the licence to Esat Digifone Limited next Monday. There is always the possibility that some of the terms and conditions of the licence to be granted will be successfully challenged resulting in varying degrees of impact. Mr. Law Nesbitt in his said advices has highlighted some of the terms and conditions he considers could be subject to attack. Whilst the "windfall" provision in Article 18 of the licence is suspect it was felt that it should be inserted rather than left out- especially since it was part of the "offer" made by the licensee of its own accord. Accordingly, any challenge under Community law to that condition would not be surprising and would have little impact.

6. For sanction to transmit the stamped draft regulations and stamped licence together with a copy of Mr. Law Nesbitt's advices to the Department under cover of a minute in the terms of the attached draft which has flag D47 thereon.


JFG


DMcF

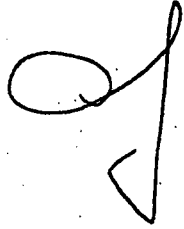
10.5.96.

I am very grateful for the speed with which this matter has been completed.

The complexity of the issues, the volume of paper and the shortness of the time available has meant that my review of his work has been only cursory. I am delighted, and am very happy, to rely on the excellent professional work of the 2 L.A.s, the P.D. 7 Council is included. The only document I have altered is D.7 (minute to Dept.) where I have made some

suggestions for change. It is not practical in the
time available for me to conduct a detailed
examination of the drafts.

I agree with the contents of the minutes.

A stylized handwritten signature, possibly reading "J. J.", consisting of a large loop and a vertical stroke.

12.5.96

Appendices to Chapter 58

ISSUE OF THE LICENCE AND FINAL DAYS OF PREPARATION

Index

1. Typed minute by Mr. O'Connell, solicitor, of meeting with Department on 13 May, 1996.

MINUTE

This Minute records a meeting held at 12.30 p.m. on Monday, 13 May 1996 between:-

Knut Digerud ("KD")	Chief Executive, Esat Digifone Limited
Owen O'Connell ("OOC")	William Fry, Solicitors
Martin Brennan ("MB")	Principal Officer, Department of Transport, Energy & Communications (Telecommunications and Radio (Development) Division)
Fintan Towey ("FT")	Assistant Principal Officer, Department of Transport, Energy & Communications (Telecommunications and Radio (Development) Division)

The meeting was held in Martin Brennan's office at the Department of Transport, Energy & Communications, 44 Kildare Street, Dublin 2 and the subject under discussion was the imminent grant to Esat Digifone Limited of the second GSM Licence.

After an exchange of courtesies, the meeting began with KD handing a number of letters to MB, with copies thereof to FT (copies of the letters in question are enclosed).

MB and FT scanned the letters, with MB noticeably pausing to read closely the letters concerning IIU. He noted that Farrell Grant

Sparks were IIU's auditors and commented that he would like to have known this fact earlier (this was generally taken to be a reference to Greg Sparks' position as programme manager to An Tanaiste, Dick Spring). MB then said that he would send the documents to the Department's in-house accountant and also to an accountant in the Department of Finance, who was awaiting them. He said there may well be requests for further information and/or clarification of the letters but it was quite likely that more information would be required in relation to IIU, specifically "more than a statement that they have money - ie. what money?".

There was some general discussion about the purpose and manner of presentation of the letters, all of which was acknowledged by MB and FT.

FT made the point that the bid had referred to 20% of the company being placed with the "blue chip institutions" (acknowledging that the institutions in question were not identified). He queried IIU's intentions in regard to placing of its holding. OOC replied that IIU was a financial institution and qualified under the bid description, so the placing question should not arise; and that while it might place its shares in future, if queried now on the point by journalists, might reply that recent turmoil over the licence made such a placing unlikely, for market reasons, for some time (stressing that this was not OOC's view, but was based on comments made by Michael Walsh).

FT said that a new draft of the Licence was imminent, and especially that Article 8 thereof would be amended. He said that a new draft of Article 8 had been received late on Friday last (10 May) from Counsel and was now with the Parliamentary Draughtsman, who wished to shorten it. MB added that the Counsel involved was Richard Law Nesbitt S.C. MB said that the thrust of the new Clause 8 was that all changes of ownership would be subject to Ministerial approval, but that the grounds for objection by the Minister were specified in the Clause (and had been taken largely from the recent EU Directive on mobile

personal telecommunications). After a brief discussion between MB and FT, FT left the room to obtain a copy of the latest draft.

KD and OOC were permitted to review the draft (which extended to two pages) but not to do so at length or in detail, or to take copies. After this review, OOC raised the point that one of the paragraphs referring to Ministerial consent being required for a private placement of shares could be interpreted as requiring such consent for a routine issue of shares consequent on a financing round. The point was also made that the clause should distinguish between existing shareholders (who were presumably acceptable to the Minister, and thus not require comment on acquisitions of shares by them), and new third party shareholders. After some discussion these points were acknowledged by MB and FT who said they would look at the matter further. Apart from this, KD and OOC indicated that as a very preliminary view and subject obviously to both detailed examination of the Clause and discussion with shareholders and colleagues, there did not seem to be any fundamental difficulty.

MB asked whether the banks named in one of the letters given to him (ABN AMRO and AIB) would consent to their names being used in an announcement of the granting of the Licence. Having checked the matter with one of his colleagues, OOC indicated that the banks would so agree, subject to no statement concerning them being made which was inconsistent with the letter of 2 May given by them to MB, and that any written press release or similar statement which referred to them should be subject to prior clearance with them.

The meeting moved on to a discussion of events in the immediate future. It was indicated by MB and FT that they were about to engage in "feedback meetings", these being meetings with unsuccessful applicants for the second GSM Licence for the purpose of giving them reasons for their failure to obtain the Licence. It was felt that it might be somewhat insensitive to grant the Licence while these meetings were underway and that

Accordingly, the proposed date for grant of the Licence was Thursday next, 16 May. MB also said that the Department had written to solicitors for the Persona Consortium informing them of their intention to grant the Licence and that if Persona Consortium wished to challenge this, they should do so through the Courts. However no response had been received.

MB added the Departments view that the Licence had expired as a live issue for the Press, and the Minister and the Department were very anxious not to revive it by injudicious statements being made - by anyone - at the press conference.

MB said that it was the Minister's wish to announce the grant of the Licence at a press conference co-attended by Esat Digifone. Great stress was repeatedly laid on the need to prepare extensively and exhaustively for this press conference, and it was stressed that the journalists present would have been briefed in a hostile way by "others" (this clearly being a reference to unsuccessful consortia). MB said he wished to have Esat Digifone identify key questions likely to be asked at a press conference, to draft answers to them and to explain to the Department the reasons for those answers. He would also then wish to arrange a meeting between the Minister for Transport, Energy & Communications and KD, together with "one or two others", at which the progress of the press conference would be discussed/rehearsed.

MB indicated that there had been discussions within the Department as to whether shareholders should participate in the press conference, and if so, to what extent and in what way. At this point KD made a strong point to the effect that Digifone saw itself as an entity independent of its shareholders, that it had premises, employees, funds and a viable business in its own right and that there were issues likely to be raised at a press conference which would not necessarily be a matter for the Company but rather matters for its shareholders. FT conceded this as a "fair point" and acknowledged that the Company would

be at liberty during a press conference to refer questions concerning its ownership to its shareholders. MB interjected to say that in such a case, the Minister would wish to know what response the shareholders would make when the questions were put to them. MB stressed the need to have a number of "definite, clear and acceptable statements for use at the press conference" and he outlined a number of "obvious questions", as follows:-

- (a) "Is this the same consortium as that which applied?";
- (b) "Can the Denis O'Brien side of the consortium stand up?" (adding that either Denis O'Brien or KD should answer this question);
- (c) "Will Telenor support the project to the end?" (To this query MB added that it was sensitive in nature as it would have to be answered in such a way as not to imply any doubt in the Department as to Communicorp's financial strength).

OOC made the point that within reason (and certainly short of telling any lies) Esat Digifone was willing to be guided by the Department as to the conduct of the press conference and would follow policy lines laid down by the Department; Esat Digifone also expected the Department to have some input as to the answers to questions to be given by it, ie. would co-ordinate such answers with the Department. This was acknowledged by MB and FT.

The meeting ended with MB reiterating that it was "virtually certain that we would have to get more information on IIU, some numbers".

The meeting concluded at 1.10 p.m.; its tone throughout was cordial and it concluded amicably.

146700C:hn

146700C

Appendices to Chapter 59

THE NEW MINISTER IS NOT TOLD

Index

1. Letter from Mr. Dukes, T.D., to Mr. Molloy, T.D., dated 6 December, 1996.

6 December, 1996.

002238

Mr. Robert Molloy, T.D.,
Dáil Éireann,
Dublin 2.

Dear *Bobby*

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

The Esat Digifone application was on behalf of a consortium owned as to 50% each by Telenor Invest AS and Communicorp Group Ltd. (the holding company for Esat Telecom). The application disclosed that, if it was successful, 20% would be placed with financial investors. A list of potential investors was submitted, all of whom are "blue chip" institutions. The Minister and Department are specifically precluded from naming these but there was no room for doubt as to either their bona fides or their financial capacity.

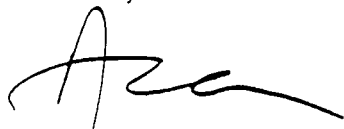
I can, however, confirm that the names being speculated upon in the last few days were not on this list.

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

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

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

Your sincerely,



Alan Dukes, T.D.,
Minister for Transport, Energy and Communications.

PART II, VOLUME 2,
LIST OF PARTIES GRANTED REPRESENTATION

No	Applicant	Date of Application/Order Granted	Order Granted
1	The Revenue Commissioners	31 st October 1997	Representation Granted
2	Mr. Michael Lowry	31 st October 1997	Representation Granted
3	The Public Interest	5 th November 1998	Representation Granted
4	Mr. Dermot Desmond	1 st December, 1999	Representation Granted
5	Telenor	31 st May 2001	Representation Granted
6	Fine Gael	31 st May 2001	Representation Granted
7	Mr. Denis O'Brien	1 st June, 2001	Representation Granted
8	Esat Group	2 nd July, 2001	Representation Granted
9	Dr. Michael Walsh	11 th July, 2001	Representation Granted
10	Mr. Leslie Buckley	12 th July, 2001	Representation Granted
11	Mr. Owen O'Connell and William Fry Solicitors	13 th July, 2001	Representation Granted
12	Mr. Mark FitzGerald	16 th July, 2001	Representation Granted
13	Department of Communications, Marine & Natural Resources	31 st December, 2002	Representation Granted
14	Mr. Donal Buggy	18 th June, 2003	Representation Granted
15	Mr. Christian Hocepiet	11 th July, 2003	Representation Granted
16	Mr. Jarleth Burke	11 th July, 2003	Representation Granted
17	Mr. Paul Connolly	20 th January, 2004	Representation Granted
18	Ms. Sarah Carey	21 st January, 2004	Representation Granted
19	Mr. Tony Boyle and Mr. Michael McGinley	24 th March, 2004	Representation Granted
20	Mr. Dermot Desmond's Order was extended to include International Investment & Underwriting Limited	25 th March, 2004	Representation Granted
21	Mr. A.J.F. O'Reilly	31 st March, 2004	Representation Granted
22	Mr. Michael Andersen	26 th October, 2010	Representation Granted

GSM WITNESS LIST

Tuesday 17th December, 2002 (Day 163)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

18th December, 2002 (Day 164)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

19th December, 2002 (Day 165)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

15th January, 2003 (Day 167)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

16th January, 2003 (Day 168)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

17th January, 2003 (Day 169)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

21st January, 2003 (Day 170)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

23rd January, 2003 (Day 172)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

24th January, 2003 (Day 173)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

28th January, 2003 (Day 174)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

29th January, 2003 (Day 175)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

30th January, 2003 (Day 176)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

31st January, 2003 (Day 177)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

4th February, 2003 (Day 178)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

5th February, 2003 (Day 179)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

6th February, 2003 (Day 180)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

11th February, 2003 (Day 181)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

12th February, 2003 (Day 182)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

13th February, 2003 (Day 183)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

14th February, 2003 (Day 184)

Mr. John Loughrey,
Former Secretary General, Department of Communications, Marine & Natural Resources

18th February, 2003 (Day 185)

Mr. John Loughrey
Former Secretary General, Department of Communications, Marine & Natural Resources

19th February, 2003 (Day 186)

Mr. John Loughrey
Former Secretary General, Department of Communications, Marine & Natural Resources

20th February, 2003 (Day 187)

Mr. John Loughrey
Former Secretary General, Department of Communications, Marine & Natural Resources

21st February, 2003 (Day 188)

Mr. John Loughrey
Former Secretary General, Department of Communications, Marine & Natural Resources

25th February, 2003 (Day 189)

Mr. John Loughrey
Former Secretary General, Department of Communications, Marine & Natural Resources

26th February, 2003 (Day 190)

Mr. John Loughrey
Former Secretary General, Department of Communications, Marine & Natural Resources

27th February, 2003 (Day 191)

Mr. John Loughrey
Former Secretary General, Department of Communications, Marine & Natural Resources

Mr. Sean Fitzgerald
Former Assistant Secretary, Department of Communications, Marine & Natural Resources

28th February, 2003 (Day 192)

Mr. Sean Fitzgerald
Former Assistant Secretary, Department of Communications, Marine & Natural Resources

4th March, 2003 (Day 193)

Mr. Sean Fitzgerald
Former Assistant Secretary, Department of Communications, Marine & Natural Resources

5th March, 2003 (Day 194)

Mr. Sean Fitzgerald
Former Assistant Secretary, Department of Communications, Marine & Natural Resources

Ms. Maev Nic Lochlainn
Principal Officer Department of Transport

6th March, 2003 (Day 195)

Ms. Maev Nic Lochlainn
Principal Officer Department of Transport

7th March, 2003 (Day 196)

Mr. Ed O'Callaghan
Assistant Principal Officer, Department of Transport

11th March, 2003 (Day 197)

Mr. Ed O'Callaghan
Assistant Principal Officer, Department of Transport

Mr. Sean McMahon
Principal Officer, Examiner of Title, Land Registry

12th March, 2003 (Day 198)

Mr. Sean McMahon
Principal Officer, Examiner of Title, Land Registry

13th March, 2003 (Day 199)

Mr. Sean McMahon
Principal Officer, Examiner of Title, Land Registry

14th March, 2003 (Day 200)

Mr. Sean McMahon
Principal Officer, Department of Communications, Marine & Natural Resources

25th March, 2003 (Day 201)

Mr. Ed O'Callaghan
Assistant Principal Officer, Department of Transport

26th March, 2003 (Day 202)

Mr. John McQuaid
Former Director of Telecommunications and Radio Technology in the Department of Transport, Energy and Communications

27th March, 2003 (Day 203)

Mr. John McQuaid
Former Director of Telecommunications and Radio Technology in the Department of Transport, Energy and Communications

28th March, 2003 (Day 204)

Mr. John McQuaid
Former Director of Telecommunications and Radio Technology in the Department of Transport, Energy and Communications

2nd April, 2003 (Day 205)

Mr. Sean McMahon
Principal Officer, Examiner of Title, Land Registry

2nd April, 2003 (Day 206)

Mr. Sean McMahon
Principal Officer, Examiner of Title, Land Registry

3rd April, 2003 (Day 207)

Mr. Sean McMahon
Principal Officer, Examiner of Title, Land Registry

4th April, 2003 (Day 208)

Mr. Colm McCrea
Programme Manager for Michael Lowry Feb 1995 to July 1996

Mr. Jimmy McMeel
Principal Officer, Department of Finance

8th April, 2003 (Day 209)

Mr. Jimmy McMeel
Principal Officer, Department of Finance

9th April, 2003 (Day 210)

Mr. Billy Riordan
Accountant on secondment to Department of Finance (October 1994 to September 1996)

10th April, 2003 (Day 211)

Mr. Billy Riordan
Accountant on secondment to Department of Finance (October 1994 to September 1996)

11th April, 2003 (Day 212)

Mr. Billy Riordan
Accountant on secondment to Department of Finance October 1994 to September 1996)

7th May, 2003 (Day 213)

Mr. Fintan Towey
Principal Officer, Department of Transport

8th May, 2003 (Day 214)

Mr. Fintan Towey
Principal Officer, Department of Transport

9th May, 2003 (Day 215)

Mr. Fintan Towey
Principal Officer, Department of Transport

13th May, 2003 (Day 216)

Ms. Regina Finn
Regulator, Department of Communications, Marine & Natural Resources, Channel Islands

Mr. Fintan Towey
Principal Officer, Department of Transport

14th May, 2003 (Day 217)

Mr. Fintan Towey
Principal Officer, Department of Transport

15th May, 2003 (Day 218)

Mr. Fintan Towey
Principal Officer, Department of Transport

16th May, 2003 (Day 219)

Mr. Fintan Towey
Principal Officer, Department of Transport

20th May, 2003 (Day 220)

Mr. Fintan Towey
Principal Officer, Department of Transport

21st May, 2003 (Day 221)

Mr. Fintan Towey
Principal Officer, Department of Transport

22nd May, 2003 (Day 222)

Mr. Fintan Towey
Principal Officer, Department of Transport

23rd May, 2003 (Day 223)

Mr. Fintan Towey
Principal Officer, Department of Transport

28th May, 2003 (Day 224)

Mr. Joe Brosnan
Former Chef de Cabinet to EU Commissioner, Mr P. Flynn in July, 1995

Ms. Margaret O'Keeffe
Former Executive Officer, Department of Transport Energy and Communications

Ms. Maev Nic Lochlainn
Principal Officer, Department of Transport

29th May, 2003 (Day 225)

Ms. Maev Nic Lochlainn
Principal Officer Department of Transport

18th June, 2003 (Day 226)

Mr. Donal Buggy
Accountant on secondment to Department of Transport Energy and Communications (June 1995 to October 1996)

19th June, 2003 (Day 227)

Mr. Donal Buggy
Accountant on secondment to Department of Transport Energy and Communications (June 1995 to October 1996)

25th June, 2003 (Day 228)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

26th June, 2003 (Day 229)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

27th June, 2003 (Day 230)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

9th July, 2003 (Day 231)

Mr. Aidan Ryan
Telecommunications Advisor and Project Group Member, Department of Communications, Marine & Natural Resources

10th July, 2003 (Day 232)

Mr. Aidan Ryan
Telecommunications Advisor and Project Group Member, Department of Communications, Marine & Natural Resources

Mr. John Loughrey
Former Secretary General, Department of Communications, Marine & Natural Resources

11th July, 2003 (Day 233)

Mr. Christian Hocepiéd
European Commission Official

Mr. Joseph Jennings
Press Officer, Department of Communications, Marine & Natural Resources

15th July, 2003 (Day 234)

Mr. Joseph Jennings
Press Officer, Department of Communications, Marine & Natural Resources

Mr. John Loughrey
Former Secretary General, Department of Communications, Marine & Natural Resources

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

16th July, 2003 (Day 235)

Mr. Mark FitzGerald
CEO, Sherry FitzGerald Group

17th July, 2003 (Day 236)

Mr. Mark FitzGerald
CEO, Sherry FitzGerald Group

14th October, 2003 (Day 239)

Mr. Jarleth Burke
Former Director, Legal & Regulatory Affairs, ESAT Telecom

23rd October, 2003 (Day 241)

Mr. Owen O'Connell
Solicitor, William Fry, Solicitors

24th October, 2003 (Day 242)

Mr. Owen O'Connell
Solicitor, William Fry, Solicitors

28th October, 2003 (Day 243)

Mr. Owen O'Connell
Solicitor, William Fry, Solicitors

29th October, 2003 (Day 244)

Mr. Owen O'Connell
Solicitor, William Fry, Solicitors

30th October, 2003 (Day 245)

Mr. Owen O'Connell
Solicitor, William Fry, Solicitors

31st October, 2003 (Day 246)

Mr. Owen O'Connell
Solicitor, William Fry, Solicitors

4th November, 2003 (Day 247)

Mr. Owen O'Connell
Solicitor, William Fry, Solicitors

11th November, 2003 (Day 248)

Mr. Denis O'Brien
Businessman, Former Chairman and CEO of ESAT Telecom

12th November, 2003 (Day 249)

Mr. Denis O'Brien
Businessman, Former Chairman and CEO of ESAT Telecom

13th November, 2003 (Day 250)

Mr. Denis O'Brien
Businessman, Former Chairman and CEO of ESAT Telecom

24th November, 2003 (Day 251)

Mr. Denis O'Brien
Businessman, Former Chairman and CEO of ESAT Telecom

25th November, 2003 (Day 252)

Mr. Denis O'Brien
Businessman, Former Chairman and CEO of ESAT Telecom

26th November, 2003 (Day 253)

Mr. Denis O'Brien
Businessman, Former Chairman and CEO of ESAT Telecom

4th December, 2003 (Day 254)

Mr. John Callaghan
Former Director, ESAT Digifone

9th December, 2003 (Day 255)

Mr. Denis O'Brien
Businessman, Former Chairman and CEO of ESAT Telecom

10th December, 2003 (Day 256)

Mr. Denis O'Brien
Businessman, Former Chairman and CEO of ESAT Telecom

11th December, 2003 (Day 257)

Mr. Denis O'Brien
Businessman, Former Chairman and CEO of ESAT Telecom

13th January, 2004 (Day 258)

Mr. Leslie Buckley
Former Director, ESAT Digifone

14th January, 2004 (Day 259)

Mr. Peter O'Donoghue
Company Executive, ESAT Digifone

20th January, 2004 (Day 260)

Mr. Paul Connolly
Former Director of Esat Telecom, Current Director Communicorp

21st January, 2004 (Day 261)

Ms. Sarah Carey
Marketing Coordinator, Esat Telecom

Mr. P.J Mara
Consultant, Esat Telecom/Communicorp

22nd January, 2004 (Day 262)

Ms. Eileen Gleeson
Chairman of Weber Shandwick FCC, Communications Consultancy

3rd February, 2004 (Day 263)

Mr. Knut Haga
Telenor Executive

4th February, 2004 (Day 264)

Mr. Knut Haga
Telenor Executive

5th February, 2004 (Day 265)

Mr. Per Simonsen
Telenor Executive

6th February, 2004 (Day 266)

Mr. Per Simonsen
Telenor Executive

10th February, 2004 (Day 267)

Mr. Knut Digerud
Telenor Executive

11th February, 2004 (Day 268)

Mr. Knut Digerud
Telenor Executive

12th February, 2004 (Day 269)

Mr. Amund Bugge
Telenor Executive

13th February, 2004 (Day 270)

Mr. Arthur Moran
Solicitor, Matheson Ormsby & Prentice, Solicitors

19th February, 2004 (Day 271)

Mr. Gerry Halpenny,
Solicitor, Partner, LK Shields & Partners, Solicitors

20th February, 2004 (Day 272)

Mr. Richard O'Toole
Part-time Consultant to Communicorp / Esat Telecom (Sept '95 to Mar'96)

24th February, 2004 (Day 273)

Dr. Michael Walsh
Director, IIU Nominees Limited

25th February, 2004 (Day 274)

Dr. Michael Walsh
Director, IIU Nominees Limited

1st March, 2004 (Day 275)

Mr. Dermot Desmond
Businessman, Director IIU Nominees Limited

3rd March, 2004 (Day 276)

Dr. Michael Walsh
Director, IIU Nominees Limited

4th March, 2004 (Day 277)

Mr. Arve Johansen
Telenor Executive

5th March, 2004 (Day 278)

Mr. Arve Johansen
Telenor Executive

23rd March, 2004 (Day 279)

Mr. John Bruton
Former Taoiseach

24th March, 2004 (Day 280)

Mr. Pádraig O hUiginn
Director of Esat Telecom during the GSM evaluation and licensing process

Mr. Tony Boyle
Chairman of Persona Digital Telephony Limited

25th March, 2004 (Day 281)

Mr. Pearse Farrell
Accountant and Adviser to Mr. Dermot Desmond

Mr. Michael McGinley
Co-director Persona Digital Telephony Limited

Mr. Prionsias de Rossa
T.D.

26th March, 2004 (Day 282)

Mr. Hans Myhre
Telenor Executive

30th March, 2004 (Day 283)

Mr. Ruairi Quinn
T.D.

Mr. Sean Donlon
Programme Manager and Special Adviser to former Taoiseach, Mr. John Bruton

31st March, 2004 (Day 284)

Dr. A.J.F. O'Reilly
Businessman

Mr. Dick Spring
T.D. and Former Tánaiste

1st April, 2004 (Day 285)

Mr. Kyran MacLaughlin
Managing Partner, Davy Stockbrokers

Mr. Alan Dukes
Former T.D.

2nd April, 2004 (Day 286)

Mr. Greg Sparks
*Programme Manager to Mr Dick Spring T.D., Tánaiste,
Dec '94-June '97*

10th November, 2004 (Day 304)

Mr. Tony Boyle
Chairman of Persona Digital Telephony Limited

11th November, 2005 (Day 305)

Mr. Tony Boyle
Chairman of Persona Digital Telephony Limited

15th November, 2005 (Day 306)

Mr. Martin Brennan
*Assistant Secretary, Department of Communications, Marine & Natural
Resources*

16th November, 2005 (Day 307)

Mr. Fintan Towey
Principal Officer, Department of Transport

5th December, 2005 (Day 308)

Mr. Denis O'Brien
Businessman, Former Chairman and CEO of ESAT Telecom

6th December, 2005 (Day 309)

Mr. Michael Lowry
T.D.

12th December, 2005 (Day 310)

Mr. Michael Lowry
T.D.

13th December, 2005 (Day 311)

Mr. Michael Lowry
T.D.

2nd May, 2008 (Day 352)

Mr. Peter Bacon
Economist

7th May, 2008 (Day 353)

Mr. Peter Bacon
Economist

9th June, 2009 (Day 359)

Mr. Fintan Towey
Principal Officer, Department of Transport

10th June, 2009 (Day 360)

Mr. Fintan Towey
Principal Officer, Department of Transport

11th June, 2009 (Day 361)

Mr. Fintan Towey
Principal Officer, Department of Transport

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

12th June, 2009 (Day 362)

Mr. Martin Brennan
Assistant Secretary, Department of Communications, Marine & Natural Resources

16th June, 2009 (Day 363)

Mr. John Loughrey
Former Secretary General, Department of Communications, Marine & Natural Resources

20th July, 2009 (Day 367)

Mr. Massimo Prelz
Partner, GMT Communications Partners Limited

22nd July, 2009 (Day 369)

Mr. Richard Nesbitt
Senior Counsel

20th November, 2009 (Day 371)

Mr. Massimo Prelz
Partner, GMT Communications Partners Limited

18th March, 2010 (Day 372)

Mr. Denis McFadden
Advisory Counsel, Office of the Attorney General

19th March, 2010 (Day 373)

Mr. Denis McFadden
Advisory Counsel, Office of the Attorney General

22nd March, 2010 (Day 374)

Mr. Denis McFadden
Advisory Counsel, Office of the Attorney General

22nd March, 2010 (Day 374)

Mr. John Gormley
Advisory Counsel, Office of the Attorney General

23rd March, 2010 (Day 375)

Mr. John Gormley
Advisory Counsel, Office of the Attorney General

26th October, 2010 (Day 376)

Mr. Michael Andersen
Consultant

27th October, 2010 (Day 377)

Mr. Michael Andersen
Consultant

28th October, 2010 (Day 378)

Mr. Michael Andersen
Consultant

29th October, 2010 (Day 379)

Mr. Michael Andersen
Consultant

1st November, 2010 (Day 380)

Mr. Michael Andersen
Consultant

2nd November, 2010 (Day 381)

Mr. Michael Andersen
Consultant

3rd November, 2010 (Day 382)

Mr. Michael Andersen
Consultant

4th November, 2010 (Day 383)

Mr. Michael Andersen
Consultant

5th November, 2010 (Day 384)

Mr. Michael Andersen
Consultant