

THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY,

5TH DECEMBER, 2002 AT 11AM:

CONTINUATION OF OPENING STATEMENT BY MR. COUGHLAN:

MR. COUGHLAN: The ninth meeting of the GSM Project

Group took place on the 4th September, 1995. In

attendance were Mr. Martin Brennan, Mr. Fintan Towey,

Ms. Maev Nic Lochlainn, Mr. Nuala Free, Mr. Billy

Riordan, Mr. Michael Andersen, Mr. Marius Jacobsen

and Mr. Mikel Vinter, Mr. Sean McMahon, Mr. Ed

O'Callaghan, Mr. John McQuaid, and Mr. Aidan Ryan.

"The opening, Mr. Brennan outlined the agenda for the meeting.

1. The Andersen presentation on the quantitative evaluation of the 6 applications.

2. Discussions of the forthcoming presentations.

3. The future framework for the project.

Under the heading "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 applicant had not calculated OECD baskets to their best advantage.

- (IIR) 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 was 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. Maev Nic Lochlainn, and Mr. Riordan.

The remaining copies were returned to Andersen Management International.

"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 presentation 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 had not yet been decided.

"The need to reflect a change in the weighting for the licence fee was highlighted. Andersen Management International 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."

Under the heading "Forthcoming Presentations":

"A set of general questions for discussions 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 September.

"It was agreed that issues such as the costs of security interception etc. could be discussed with the eventual winner of the GSM II 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, Andersen will provide and outline 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 division.

"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.

"Ten sub-group meetings for the qualitative evaluations had been proposed by AMI. Five 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 revisit the qualitative evaluation of dimensions after the presentations. The

Group would have an initial discussion on the qualitative evaluation scoring on the afternoon of the 14th September, gaps would be highlighted and the extent of the need for supplementary analyses assessed.

"A date of the 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."

And that was copied to attendees, Ms. O'Keefe, and Mr. McMeel.

The Tribunal has been informed that it is probable that the reference to the initial draft report on the quantitative evaluation referred to in the minute of the ninth meeting of the GSM Project Group is a set of tables comprising eight pages which was the draft evaluation produced by Andersen Management International on the 30th August, 1995. The Tribunal has been informed that as of that time the total weighted score and ranking of the applications was:

A1: Score 3.05: Rank 4.

A2: Score 2.91: Rank 6

A3: Score 3.48: Rank 1.

A4: Score 2.96: Rank 5.

A5: Score 3.13: Rank 3.

A6: Score 3.19: Rank 2.

A5 was Esat Digifone.

On the 7th September, 1995, Mr. Peter O'Donoghue sent a fax to Mr. Michael Walsh. Michael Walsh has already given evidence to this Tribunal and was an executive of IIU Limited, a company of Mr. Dermot Desmond.

The fax reads:

"Michael,

"Further to our conversation of this morning the cash requirements for the Communicorp Group to the 31st March 1996 would be in the order of IR£1/25 million.

This does not take into consideration any scale-back of investment or asset disposals that may be required in the event that the First Boston money is not forthcoming."

On the 11th September, 1995, Mr. Knut Haga of Telenor International wrote to Mr. Denis O'Brien as follows:

"Oslo, 11/9/95.

"Dear Mr. O'Brien,

"As a financial adviser to Digifone and Telenor Invest AS, I would like to raise some of my concerns relating to the content of a letter from Advent International Corporation (AIC) to Mr. Martin J. Brennan dated 10th July 1995."

That is a letter which was appended to the bid documents which were submitted to the Department on the 4th August, 1995.

He then makes reference to Section 3 of this letter.

I have already opened this letter, but the letter is in three sections. One is an introduction to Advent International, and the second is Advent's investment in the Communicorp Group, and Section 3 is Advent's commitment to the GSM licence application.

Section 3 reads:

"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 that 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 Esat 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"

number given "should you have any queries on the information given in this letter.

"Yours sincerely."

It is that section of the letter that Mr. Haga made reference to in his letter of the 11th September, 1995.

And he continues:

"Based on the contents of Section 3 in this letter, I have drawn the following conclusions:

"- Advent International Corporation has not committed itself to participate as an equity partner.

- Advent International's underlying statement is that they regard their position as having an option to participate with a 5% equity stake (without any premium or obligation).

- There has not been made any formal or legal binding agreements between Digifone and AIC (correct me if I am wrong).

"On this basis, I would like to stress that Digifone must not enter into a position where it is obliged to bring in AIC as an equity partner.

"In any case, the terms and conditions for any other equity partner must be based on commercial issues to be determined between Esat and Telenor.

"Based on this fact I would like to stress that Advent's letter to Mr. Martin Brennan does not add any



value to Digifone. Please take this fact into consideration when you are discussing alternative equity partners."

There was a tenth meeting of the GSM Project Group on the 11th September, 1995, for the purpose of discussing the oral presentations. In attendance were Mr. Martin Brennan, Mr. Fintan Towey, Ms. Maev Nic Lochlainn, Ms. Margaret O'Keefe, Mr. Billy Riordan, Mr. Jimmy McMeel, Mr. Michael Andersen, Mr. Marius Jacobsen, Mr. J. Bruel, Mr. O. Feddersen, Mr. Sean McMahan, Mr. Ed O'Callaghan, Mr. John McQuaid, Mr. Aidan Ryan, Mr. John Breen.

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'Keefe would record a general resume and that the 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&RT had a set of technical questions that they wished to pose to each applicant. Of particular importance was the question of the applicant's backbone network.

"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."

On the 12th September 1995 the Esat Digifone consortium made an oral presentation, but before I come to deal with that, perhaps I should say that at this stage, it appears from the documents which I have referred to, and from the information furnished to the Tribunal by Mr. Dermot Desmond and Mr. Denis O'Brien to which I have referred, that the position as of the 12th September, 1995, appears to be:

1. That on the 12th July, 1995, Mr. Denis O'Brien and Communicorp Group had entered into an agreement with Advent International, and it appears that this was known to Mr. Denis O'Brien.

2. That agreement entitled Advent International to a 5 percent shareholding in Esat Digifone in return for a letter of comfort addressed to the Department and a letter of comfort addressed to Telenor in terms acceptable to Telenor, and it appears that this was known to Mr. Denis O'Brien.

3. Mr. John Callaghan recorded that this letter would be under the heading "Advent to give letter to satisfy Telenor and requirements of GSM bid", and under that: "Strong letter but cannot be a 'commitment' to invest."

Under that, "Advent to have opportunity to participate in our financing arrangements for Group and/or GSM company if money is raised directly for GSM company."

I actually went through the whole of this document yesterday, and it appears that this was known to Mr. Denis O'Brien.

4. That no letter of comfort had been provided in terms acceptable to Telenor, and it appears that that was known to Mr. Denis O'Brien.

5. That Communicorp had no entitlement to  $\text{€}1/230$  million funding from Advent or, to the best of Tribunal's knowledge, from any other source, and it appears that

that was known to Mr. Denis O'Brien.

6. Communicorp had opened negotiations with Credit Suisse First Boston, a US merchant bank, with a view to raising funds by a bond issue, and it appears that that was known to Mr. Denis O'Brien.

7. Mr. Denis O'Brien had been engaged in negotiations since the 10th August, 1995, with Mr. Dermot Desmond with a view to substituting Mr. Dermot Desmond for the institutional investors named in the bid, and with a view to seeking from Mr. Dermot Desmond funding support for Communicorp, and it appears that was known to Mr. Denis O'Brien.

8. Communicorp's finances were in such a poor state that that it resorted to accepting a loan from Advent at a cost of 30 percent per annum whether or not the loan was cleared off within the year, and it appears that that was known to Mr. Denis O'Brien.

9. Communicorp had not provided Telenor with a guarantee for  $\text{€}125$  million plus a guarantee for half the licence fee required under the joint venture agreement between Communicorp and Telenor, and it appears that that was known to Mr. Denis O'Brien.

10. Mr. Owen O'Connell was unable to provide an opinion to Telenor that Communicorp had a right to funding for  $\text{€}130$  million from Advent, and it appears that that was known to Mr. Denis O'Brien.

Again, from the documents which I have referred to, it

appears:

1. That Telenor had concerns about Communicorp's financing.
2. That Telenor knew that the letter of comfort furnished by Advent was not acceptable to them.
3. That Telenor knew the stronger letter of comfort they had sought had not been forthcoming.
4. That Telenor knew that Owen O'Connell of William Fry Solicitors did not provide them with an opinion that Communicorp had a right to funding of i£1/230 million from Advent.
5. That Telenor knew that Communicorp had not provided a guarantee of i£1/25 million plus a guarantee for half of the licence fee as required under the terms of their joint venture agreement.
6. That Telenor knew that Mr. O'Connell's letter of the 17th August, 1995, that Communicorp were seeking alternative source of funding.

On the 12th September, 1995, as I have said, the Esat Digifone consortium made an oral presentation.

Present for the Esat Digifone consortium were:

Jan Edvard Thygesen of Telenor; Barry Maloney; Peter O'Donoghue; Hans Myhre, Telenor; Per Simonsen, Telenor; John Hennessy; Denis O'Brien; Arve Johansen.

Present for the evaluation group were:

Michael Andersen; Jon Bruel; Marius Jacobsen and Ole Feddersen of Andersen Management International.

Martin Brennan, Fintan Towey, Maev Nic Lochlainn, Margaret O'Keefe, Sean McMahon, Ed O'Callaghan, John McQuaid, John Breen, A. Ryan, J McMeel, and Billy Riordan.

And Mr. Fintan Towey appears to have joined a little time after the commencement of the presentation.

At the presentation, Mr. Arve Johansen stated:

"Esat Digifone is an Irish company. We have sufficient financial capacity to meet and even exceed the funding requirements."

He also stated: "Esat Digifone is an Irish company.

It's evidenced first of all by the Communicorp Group holding 40% as we get going and we have institutional investors holding 20% and they are: The Allied Irish Bank, the Investment Bank of Ireland, Standard Life Ireland and Advent International. In addition, we have Telenor, through its subsidiary Telenor Invest, and Telenor is the major telecommunications operating company in Norway, having last year an operating revenue of  $\text{€}1.8$  billion and a profit of  $\text{€}190$  million.

"We already have the funding in place. The total funding requirement seen from the business plan is  $\text{€}124$  million. We base the capitalisation on 40% equity and 60% debt, and therefore we are certain that 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, i.e. \$30 million, and even that would not be even a hard limit, even if you think later we would benefit from having more equity. The Communicorp Group has committed i.e. \$30 million and the institutions have committed i.e. \$11 million, meaning that we have available i.e. \$71.1 million in equity. And we have the banks like NatWest Markets and ABN Amro who have submitted i.e. \$90 million, meaning that we have available funds of i.e. \$161 million, which is i.e. \$37 million above the current requirements of the business plan."

Mr. Denis O'Brien stated at the presentation:

"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 that this is important, because it is 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."

The following exchanges took place between Mr. Michael Andersen, Mr. Denis O'Brien, and members of the Project Group.

MR. MICHAEL ANDERSEN: "Okay, I think, given the time

we have allocated to the remaining questions, I will leave out some questions concerning value added services and distribution, etc., and then move to financial, some financial questions we have; is that okay, Chairman?

"So now you will have a financial question, if that's okay. And it is on solvency, and we have remarked that in your application, you are presenting yourself as having a solvency degree less than zero percent for three years, and we would like you to elaborate on that."

MR. DENIS O'BRIEN: "You mean to say that we are going to be making losses in the first three years?"

MR. PETER O'DONOGHUE: "You see, you look at the business plan, you see that we have actually negative capital for a period of about three years, and so what we have looked at, this is an operation and how it can be funded and it's funded through equity and through debt finance and that's from a business plan point of view and we are quite confident that this type of business can carry that ratio of debt to equity. Now, that's on a business plan point of view.

"On the other hand, if you look at it from a statutory point of view, because it's illegal to have an insolvent company trading, so we would see this as a technical issue. What we would technically from a statutory point of view in complying with Irish



company law, what we would do in this situation, we would receive parent company guarantees to support the Esat Digifone over this period of time, which would satisfy the legal requirements here in Ireland, so that any liabilities undertaken by Esat Digifone would be underwritten by Telenor and Communicorp. So if that required a quasi-injection of capital or capital to be put in a separate account, we'd be willing to do that.

"So really in our business plan, we have looked at from a point of view of just a commercial entity, how much debt and how much equity we have to put in but from a statutory point of view, we would put procedures in place to ensure that we are not breaking the law."

MR. ARVE JOHANSEN: "I would like to say that it's pretty certain that we can finance this on a project finance basis on the equity/debt ratio of 40 to 60, so the question is more of a technical nature regarding the company law."

MR. BILLY RIORDAN: "You are saying that operationally you can actually get over this hurdle, but technically you are going to have to take steps to redress the balance so it will never be that way?"

MR. PETER O'DONOGHUE: "Exactly."

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  $\text{€}10$  million for 25 percent of the company, and then at some stage in the proposal, it says that they have  $\text{€}19.5$  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  $\text{€}19,500,000$  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  $\text{€}10$  million in Communicorp, and it leaves it at that. They are committed to investing an extra  $\text{€}9.5$  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 is that Advent have said they are providing up to  $\frac{1}{2}$ 30 million to Communicorp.

MR. DENIS O'BRIEN: "30 million, I think it's pounds."

MR. BILLY RIORDAN: "Sorry, you are right, IR  $\frac{1}{2}$ 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 the money has come from the 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 it's 31 percent. 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: "Yes, 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  $\frac{1}{2}$ 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  $\frac{1}{2}$ 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  $\frac{1}{2}$ 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."

I should indicate at this stage that this transcript is a transcribing of the oral tapes which were furnished to the Tribunal by the Department, and the speaker I should identify is Mr. Sean McMahon, who was one of the Project Group team.

"SPEAKER: 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. MARTIN BRENNAN: 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."

From the information available to the Tribunal, it is

unclear how the statements made by Mr. Arve Johansen,

Mr. Peter O'Donoghue, and Mr. Denis O'Brien came to be

made. The Tribunal will inquire into the

circumstances surrounding the making of these

statements and the content of the statements. The

Tribunal will also inquire into the scrutiny, if any,

to which the Project Group subjected these statements.

On the 14th September, 1995, the 11th meeting of the

GSM Project Group took place. The minute of the

meeting records as follows:

Present in attendance were Mr. Martin Brennan, Mr.

Fintan Towey, Ms. Maev Nic Lochlainn, Ms. Nuala Free,

Mr. Billy Riordan, Mr. Jimmy McMeel, Mr. Michael

Andersen, Mr. Marius Jacobsen, Mr. Ole Feddersen, Jon

Bruel, Mr. Sean McMahan, Mr. Ed O'Callaghan, Mr. John

McQuaid, Mr. Aidan Ryan, and Mr. John Breen.

It reads "Opening -

"All the presentations had now been made. Mr. Brennan suggested that in view of the intensity of the week's 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 evaluation further.

"Mr. Andersen spoke about the success of the presentations generally. He felt that because AMI were well prepared from the earlier quantitative assessments, 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:

- A4 spent too much time on matters that were not relevant to the tender requirements.
- Was unfamiliar with ETSI standards.

Under the heading "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 pro-active role in developing the market where required.

"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 the 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.

- 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 for the winning application. AMI

would be involved in any negotiation with the

successful applicant.

"Mr. Riordan is to do some work on the financial

indicators and is to forward material to AMI who would

amend their spreadsheets accordingly."

Mr. Sean McMahon, who attended that meeting, made a note, and his note records:

"Post hoc evaluation.

All members of groups present.

AMI: Michael Andersen.

1. Capital funding of some applicants.

2. EC procurement

- to be reassessed.

Martin Brennan short-listing, can we do it now?

Michael Andersen: Okay. Two groups, A1, A3, A5.

A2, A6, not waste too much resources,

A4."

This seems to indicate the groupings. And they are in numerical order.

"Martin Brennan: We'd probably still look at" ( and then something is crossed out ) "some of second group.

All agreed process is still intact and not compromised."

If we continue on that page, there is then Mr.

McMahon's note which shows list of the applicants on different lines, and on the first line is "A3

Persona."

The next line is "Esat Digifone". Followed by

"Euro phone"

"? Were Mobicall"

"Irish Cellular" and

A2, Cellstar.

And then the rest of the note reads

"Start-up date,

work due

handsets

management/operator

equity

experience

tariffs and ... plans."

Over on the next page it reads "Next steps:

- Finalise scoring in dimensions
- Technical dimensions complete
- Scoring of the aspects next week
- (This Wednesday next week)
- 3rd October for 1st draft
- 9th October next to meet to consider 11 o'clock.

1. What's the end result?

- a report and recommendation,
- a recommendation only.

2. Do we deal with goodies?"

It would appear that that reference to "goodies" is a reference to job commitment in the Irish context, Sir.

Mr. Denis O'Brien's diary for the 15th September, 1995, has an entry for 10am, Michael Walsh.

I have already made reference to information furnished to the Tribunal by Anthony J. F. O'Reilly of his

belief that the first meeting he had with Mr. Lowry took place at the opening of the Arcon mine in Galmoy on the 15th September, 1995. On the 27th June, 2001, Mr. Michael Lowry furnished a statement to the Tribunal in response to an inquiry made of him of what contacts he may have had with anyone connected with the GSM licensing competition. He informed the Tribunal that one of the people he had contact with was Tony O'Reilly. He informed the Tribunal as follows:

"I recall attending the Curragh races on the weekend of the Derby in July 1995. While at the races, some party, whom I cannot now recall, approached me and asked me if I would go to see Tony O'Reilly in his executive box. During the course of the afternoon, I went to Mr. O'Reilly's box and a discussion ensued. He discussed his consortium's application for the licence and sought to impress upon me his commitment to Ireland and his investment in the country. He also spoke about recognition of his personal standing as an international business leader. He stated that he expected that his consortium would be successful, and he also demanded that I, as Minister for Communications, should forthwith order a shutdown of unlicensed T.V. deflector systems. Sometime subsequently, he conveyed to the Government his extreme displeasure at his consortium's failure to get

the licence. I understand that the then Taoiseach, Mr. John Bruton, met with Mr. O'Reilly by appointment in Glandor on the 25th August, 1996. Mr. Bruton reported back on his minutes of the meeting to a Fine Gael Ministers' meeting. He stated that Mr. O'Reilly was seriously aggrieved and annoyed with a number of Government decisions which affected the Independent Group, including the GSM licence and the T.V. deflector issues. During the Minister's discussions, it was generally felt that Mr. O'Reilly's dislike of the then coalition Government was reflected in Independent Newspapers' political coverage. It was decided to involve Government advisor Sean Donlon to mediate in the matter, and on September 4th, 1996, Mr. Donlon met with representatives of Independent Newspapers at Hatch Street, and amongst those attending on behalf of Independent Newspapers were Mr. Liam Healy, Mr. David Palmer, and the late Mr. John Meagher.

Mr. Sean Donlon reported back that it was a most difficult meeting and that some very harsh comments were made about the Government and individual Ministers. He outlined a list of grievances and a series of demands from the Independent group. Mr. Donlon expressed concern that the Government was being placed over a political barrel. He told me that I was persona non grata with the Independent group. On the

morning of the election in June 1997, the front page of the Irish Independent carried a banner headline "Pay-back time". This was accompanied with a front-page editorial urging the electorate not to vote for the Government parties."

When the Tribunal received Mr. Lowry's statement, that portion of it was furnished to Mr. O'Reilly, because the statement made references to other people as well. That portion was furnished to Mr. O'Reilly, and he was asked if he wished to respond to it. The Tribunal had no previous contact with Mr. O'Reilly about the GSM process. In response, Mr. O'Reilly furnished a statement to the Tribunal dated 24th September, 2001. That particular statement was subsequently formalised by Anthony J. F. O'Reilly, and there is no significant alteration in relation to the matter.

As I said, Mr. O'Reilly informed the Tribunal as follows:

"I, Anthony J. F. O'Reilly have considered the contents of the letter dated 6th July 2001 sent by the Tribunal to my solicitor. I was taken aback by the contents of this letter and totally reject Mr. Lowry's assertion that I made any comment to him concerning the second GSM licence or any application by any consortium for such licence. I did informally meet Mr. Lowry on the weekend of the Derby. I believe, although I am not certain that, this meeting took

place on Derby Day 1996, 30th June 1996, and not Derby Day 1995, 2nd July, 1995. In any event, Mr. Lowry has seriously misrepresented what took place at that meeting. As more particularly described at paragraph 6 below, the meeting in question took the form of a social visit by Mr. Lowry, who was accompanied by at least one friend, to my box at the Curragh races.

"2. I will deal with Mr. Lowry's allegations on a point-by-point basis but wish to make it absolutely clear that I never informed Mr. Lowry that I expected that "my" consortium would be successful in relation to its application for the second GSM licence. I will outline the circumstances of my meeting with Mr. Lowry in greater detail below, and I will explain why I believe I met Mr. Lowry during the Derby weekend of June 1996 and not July 1995 as suggested by him.

However, before doing so, I should mention that it has been drawn to my attention that Mr. Lowry was invited as a guest of Heinz to the Heinz 57 Phoenix Stakes at Leopardstown on Sunday 13th August 1995. I am informed that Mr. Michael Lowry TD and guest are listed as having been two of 631 people who accepted such invitations to the races that Sunday. The invitees would have included politicians from all parties, business people and individuals from all walks of life. I am not aware whether or not Mr. Lowry attended on that occasion as I cannot recall



meeting him.

"3. I believe that my first meeting with Mr. Lowry took place at the opening of the Arcon mine in Galmoy. This took place on the 15th September, 1995, and it is referred to in greater detail below.

"4. Mr. Lowry states that at the Derby day meeting I demanded that he as Minister for Communications should forthwith order the shut down of unlicensed T.V. deflector systems. I do not believe I made any demands. This issue was, to the best of my recollection, discussed by me with Mr. Lowry on Derby Day 1996 and not Derby Day 1995.

"5. I will now deal specifically with Mr. Lowry's allegations in the context of the meeting which took place at the Curragh during the Derby Weekend of what I believe to be June 1996.

At Number 6, he refers to Mr. Lowry's statement, the content of Mr. Lowry's statement, as follows:

"During the course of the afternoon, he went to Mr. O'Reilly's box."

Mr. O'Reilly continues:

"This is correct. I cannot recall whether or not I invited him to join me and my party in the box. The box is one of a number of rooms which range along the length of a corridor in a section of the stand at the Curragh race course. At the time I was entertaining numerous guests in the box, and visitors arrived and

left constantly during the course of the afternoon.

Invariably they were either going to or coming from other boxes. Mr. Lowry arrived into the box accompanied by at least one friend. As far as I was concerned, they were quite welcome. He stayed, to the best of my recollection, for approximately 30 minutes. There were a number of other people in the box at that time. I believe that I spoke with him for a short period of time in an informal context. I believe that I had met him only once previously, at the opening of the Galmoy mine, as explained in paragraph 14 below.

At Number 7 he again refers to the content of Mr. Lowry's statement, which is as follows: "They had a discussion in which Mr. O'Reilly referred to his consortium's application for the second GSM licence."

Mr. O'Reilly continues: "This is absolutely untrue. I never had any discussions about "my" consortium's application for the second GSM licence."

At Number 8, again reference is made to a portion of Mr. Lowry's statement: "That Mr. O'Reilly sought to impress upon Mr. Lowry his commitment to Ireland and his investment in the country.

Mr. O'Reilly continues: "See paragraph 9 below" and at paragraph no. 9 again there is a reference to the content of Mr. Lowry's statement which was: "That he also spoke about recognition of his personal standing as an international business leader."

Mr. O'Reilly continues: "I believe that Mr. Lowry is misrepresenting what I said to him. I probably expressed concern about the failure to take any action against the "pirate" television broadcasting operators, and in that context possibly did emphasise my commitment to Ireland.

At no. 10 there is again a reference to a portion of Mr. Lowry's statement: "That Mr. O'Reilly stated that he expected that his consortium would be successful."

Mr. O'Reilly continues: "This is absolutely untrue. As already mentioned, I most certainly made no such statement.

At no. 11 there is again a reference to a portion of Mr. Lowry's statement: "That he also demand that had Mr. Lowry as Minister for Communications should forthwith order the shut down of unlicensed T.V. deflector systems."

Mr. O'Reilly continues: "This was something that Independent Newspapers plc and its international partners felt strongly about, and I probably mentioned this matter to him. Independent Newspapers plc, as it was then called, had, with its equity partners, invested approximately  $\text{€}1\frac{1}{2}$  million in the television signal re transmission business popularly known as MMDS. This business operated on foot of exclusive MMDS licences granted by the Government. Minister Lowry and the Government were fully aware of the fact

that a substantial number of unlicensed "pirate" television broadcasting systems were operating throughout the country in breach of the relevant legislation. We were very concerned that the Government, as with previous Governments, did not appear to be taking sufficient action to enforce the law and to close down these illegal operators.

"12. The extent of our concern at the Government's failure to deal properly with the pirate television broadcasting operators was particularly great in mid-1996 when we made extensive preparations to Government in an effort to have legal action taken against the "pirates". It was ultimately made plain to us that prosecutions of the "pirate" operators was not going to happen because of concerns about a potential Electoral Act backlash. The Government was concerned that prosecution of "pirate" operators would cause loss of votes in the event of a General Election. In other words, the "pirate" operators could break the law with impunity for the time being. I found this situation to be wholly unsatisfactory and had no hesitation in making my views known to the then Taoiseach, John Bruton. However, it is totally untrue to say that I expressed to Mr. Bruton or to the then Government any annoyance or displeasure, extreme or otherwise, at the non-award of the second mobile telephone licence to the Irish Cellular Telephones

Limited, (the consortium of which Independent is a member). Similarly it is untrue to suggest that I was "seriously aggrieved or annoyed" with the non-award of this licence to Irish Cellular Telephone Limited. My thoughts in relation to the GSM award, such as they were, are probably best encapsulated in a letter which I sent to Denis O'Brien on the 30th October 1995 very shortly after it had been announced that his consortium was to receive the licence. For ease of reference, I attach to this statement a copy of that letter."

The letter attached to the statement is dated 30th October, 1995, to Mr. Denis O'Brien, Chairman, 98FM, South Block, the Malt House, Grand Canal Quay, Dublin 2.

"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.

"Yours sincerely."

"13: Mr. Lowry refers to a meeting of the 4th September, 1996. It is notable, contrary to Mr. Lowry's assertion, that neither David Palmer nor the late John Meagher were present at that meeting. It is also notable that the meeting was concerned entirely with Independent's frustration at the Government's complete unwillingness to take actions against the pirate MMDS operators. Prior to conclusion of the meeting, both Liam Healy and Brendan Hopkins hinted that Independent would resort to litigation against the Government/the State to protect its corporate interests. It is worth mentioning that Independent's international partners in the MMDS venture were at that time adamant that litigation should be immediately pursued. Independent were reluctant to commence litigation until all other methods of resolution had been exhausted. As it happens, the envisaged litigation was subsequently instigated by Independent and its partners against the State as a result of the State's failure to close down illegal "pirate" MMDS operations. High Court proceedings were issued against the Minister for Public Enterprise, Ireland, and the Attorney General and the Director of Telecommunications Regulation on the 15th September, 1997. Neither Mr. Healy nor Mr. Hopkins at this or any other meeting described Mr. Lowry, or for that matter any other individual Minister, as persona

non grata with Independent Group. Nor do they describe Ministers collectively, i.e. the Government, in such terms.

"14: I should mention that I did meet Mr. Lowry on one other occasion. This meeting, which I recall was the first time I met with Mr. Lowry, took place at the opening of the Arcon mine in Galmoy on the 15th September, 1995. As mentioned at paragraph 3 above, I believed this to have been my first meeting with Mr. Lowry. As I recall, after the official opening ceremony, I was proceeding with a number of guests, including Mr. Lowry, whose constituency is proximate to the mine, towards the refreshments tent. My recollection is that Mr. Lowry made a comment to me along the lines of "Your fellas didn't do too well today". I told him that I did not understand what he was saying. He explained to me that he was talking about the presentations which were being made by various applicants for the second mobile telephone licence. Independent was at that time an applicant for the second mobile telephone licence in a consortium with six other companies, including the American telephone company AT&T. Mr. Lowry explained to me that the "your fellas" which he was referring to were in fact the AT&T representatives who had made a presentation to the departmental panel in charge of selecting the successful applicant. I have recently

learnt that this presentation was made the previous day, 14th September 1995. I can therefore only presume that my recollection is not 100 percent correct and that Mr. Lowry must have said to me "Your fellas didn't do too well yesterday". The fact remains that such a statement was made to me by Mr. Lowry. I am aware that the Esat consortium was named as the successful applicant on the 25th October 1995. I wish to emphasise that on the 15th September, 1995, I neither raised with Mr. Lowry the issue of the GSM licence nor approached him about it. I in fact was totally unaware that "my fellas " as he put it, had the previous day made a presentation to his Department. Further discussion with him about the matter was somewhat brief, to say the least. My personal awareness of Princes Holdings Limited involvement in the application was very limited indeed. As I recall, the remainder of our conversation related to Galmoy Mines and its future.

"15: I am very surprised that Mr. Lowry is making unfounded allegations against me and can only suspect that he is doing so in order to cause me as much damage as possible. This is something to which I take the strongest exception."

Now, in this statement which Mr. O'Reilly furnished to the Tribunal, which responded to Mr. Lowry's statement of the 27th June 2001, it raised one new matter. The



new matter was the statement by Mr. O'Reilly that the first meeting he had with Mr. Lowry took place at the opening of the Arcon mine in Galmoy on the 15th September, 1995, and what he alleges Mr. Lowry said to him on that occasion.

From the information furnished to the Tribunal by Mr. O'Reilly, and in particular the information furnished at paragraph 15 of his statement, in other words, that Mr. Lowry had made reference to him that his fellows had not done well at the presentations and went on to elaborate what that meant, it appeared that the GSM competition process, and more particularly the oral presentation part of that process, may have not remained intact and may have been compromised.

Mr. O'Reilly's statement was furnished to Mr. Michael Lowry, and he furnished the Tribunal with a supplemental statement dated 20th June, 2002.

Supplemental statement of Michael Lowry:

"I refer to my original statement furnished to the Tribunal by Kelly Noone & Company Solicitors with letter dated 27th June, 2002, and I refer to the statement of Anthony J. F. O'Reilly to the Tribunal dated 24th September 2001, a copy of which has been provided to my advisers herein.

"I believe that my account of events and the date of my meeting with Tony O'Reilly on the weekend of the Derby in July 1995 fairly reflects what transpired at

that meeting.

"In relation to my recount of what transpired at that meeting, I would like to make one comment to the effect that in my previous statement I stated, and I quote, 'He stated that he expected that his consortium would be successful'. I do not wish to convey a wrong impression by this. Mr. O'Reilly was simply expressing his opinion in relation to his consortium's application, rather than making a specific demand from me in relation to the matter.

"In relation to Mr. O'Reilly's statement of the 24th September 2001, and in particular in relation to paragraph 15 of that statement, I accept that I would have met with Mr. O'Reilly at the opening of the Arcon mine in Galmoy on the 15th September, 1995. I most certainly did not and could not have made the comment which Mr. O'Reilly attributes to me on that occasion.

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

The Tribunal will inquire into the circumstances of what transpired between Mr. Michael Lowry and Mr. Anthony J. F. O'Reilly to ascertain whether or not the

integrity of the GSM competition process and, in particular, the oral presentation part of the process was compromised.

The Tribunal has been informed by a Ms. Rita O'Regan, an employee of the Fine Gael Party, that there was a telephone conversation between her and a Ms. Sarah Carey of Esat whereby Esat indicated that they did not want any signage at the upcoming Golf Classic and that the disk with the Esat logo was returned.

I am going on to something that will take a considerable length of time.

CHAIRMAN: Mr. Coughlan, because of the matter you are about to introduce, I think to all the persons who are potentially involved, it's preferable

MR. COUGHLAN: It would be in one piece.

CHAIRMAN: So accordingly we'll rise now a little early and resume at a quarter to two. Thank you.

THE HEARING THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF OPENING STATEMENT BY MR. COUGHLAN:

MR. COUGHLAN: There is an entry in the diary of Mr. Denis O'Brien for the 15th September, 1995, and the entry is, "Michael Walsh".

Mr. Denis O'Brien's diary for Sunday, 17th September, 1995, has the following entries: 3.30, All-Ireland; 6 p.m., D. Desmond; 6.45, M. L. Hartos.

Mr. Michael Lowry has informed the Tribunal as

follows:

"On Sunday 17th September, 1995, Mr. Lowry attended the All-Ireland football final. He met Mr. Denis O'Brien in a hospitality area in Croke Park. Mr. O'Brien inquired as to where Mr. Lowry was going after the match, and Mr. Lowry advised him that he was meeting friends in Hourican's licensed premises which is located at the bottom of Lower Leeson Street. Mr. O'Brien indicated that he would see him there.

"Subsequently Mr. Lowry went to Hourican's licensed premises. Mr. O'Brien arrived and the premises was extremely crowded. They agreed to go across the road to Hartigan's. In the course of a drink in Hartigan's, some general chat took place, and Mr. Lowry does recall that Mr. O'Brien did engage in some conversation in relation to Telecom Eireann and the availability of the leased lines, and he expressed his unhappiness and dissatisfaction at what was happening in that regard. After some general conversation, Mr. O'Brien left and Mr. Lowry went back to join his friends in Hourican's, who included the late Mr. Sean Murray, Mr. Denis O'Connor and his wife, and Mr. Sean Barrett.

"On the question of further contact as between Mr. O'Brien and Mr. Lowry between 17th September, 1995 and the evening of the 25th October, 1995, Mr. Lowry does not believe that any such meetings or contacts took

place, but after a lapse of seven years, Mr. Lowry cannot be absolutely certain, but to the best of his recall, he does not remember having met with Mr. O'Brien subsequent to the above contact."

Mr. Denis O'Brien has informed the Tribunal:

1. "The only time that Mr. O'Brien has a recollection of meeting Mr. Michael Lowry between 17th September 1995 and the 25th October 1995 is a contact on the 17th September 1995. There are two entries in Mr. O'Brien's diary, one for the 2nd October, "Fine Gael lunch at Berkley Court", and one on the 16th, "Fine Gael dinner." Mr. O'Brien has no recollection of meeting Mr. Lowry on those occasions, and indeed he is not positive at this remove that he attended either or both of those functions.

2. "The 17th September 1995 was the day of the All-Ireland football final, and Mr. O'Brien recalls being seated a number of rows behind Mr. Lowry during the game. He spoke to Mr. Lowry briefly in the hospitality area, probably at half time, and tentatively arranged to meet Mr. Lowry for a drink afterwards.

3. They subsequently met at Leeson Street outside Hourican's/Hartigan's. Mr. O'Brien believes that Mr. Lowry was there with the late Mr. Sean Murray and others. Hourican's being extremely busy, Mr. O'Brien and Mr. Lowry went across the street to Hartigan's,

where they discussed a number of matters, mainly the match. Mr. O'Brien also took the opportunity to advise Mr. Lowry of the serious issues then affecting Esat's fixed line business which, at the time, was of considerable concern to the company. Mr. O'Brien does not recollect or believe that any other matters concerning Esat were discussed. The contact in Leeson Street lasted approximately fifteen minutes/half an hour.

4. The matter was entered into Mr. O'Brien's diary along with several other entries for that week subsequent to the events taking place. There was no arrangement to meet with Mr. Lowry prior to seeing him on the 17th September at the All-Ireland final.

Mr. Denis O'Connor has informed the Tribunal:

1. "I have difficulty in recalling the events surrounding the All-Ireland final of 1995 due to the time which has lapsed.
2. It is my recollection that I went to same with my wife and that we would have had tickets in the Cusack Stand. I further believe that I would have got the tickets from either Mr. Lowry or my late father; on balance, probably from my late father.
3. In the course of probably a telephone conversation, Mr. Lowry would have asked if my wife and myself were interested in meeting for a drink after the match. I agreed, and he said to go to

Hourican's in Leeson Street. Michael Lowry would have given me directions, as I had never been there previously, and indeed would not have been clear as to the exact location until actually arriving there.

4. I believe I would have driven to the match in my own car and parked in the Fairview area.

5. I would have certainly left Croke Park after the match but cannot recall whether I waited for the presentation; I may have, because Dublin won.

6. If I did, I would have left Croke Park at approximately 5.20pm.

7. I would have certainly walked to my car and driven over the East Link, through Ringsend, down Leeson Street and probably parked in Earlsfort Terrace.

8. If I stayed for the presentation, I probably arrived at Hourican's at 6.15/6.20pm. If not, I probably arrived at 5.55 or 6 p.m.

9. I recall there were people present who had the appearance of being at the match. The pub was full, with standing room only. Michael Lowry was not there when we arrived, and we stood at the bar to the left inside the door.

10. I can recall the late Sean Murray being there when I arrived, but I did not engage in chat with anyone until Mr. Lowry arrived.

11. When Mr. Lowry arrived he joined us for a drink, and I can recall discussing the match with him, being

introduced to Sean Barrett by him (Michael Lowry). I cannot recall when Michael Lowry arrived, but it could easily have been any time up to 7 or 7.15pm.

12. My wife and myself would probably have left somewhere between 7.30 and 8:00pm.

13. I did not see Denis O'Brien and have no recollection of Michael Lowry leaving Hourican's, although he circulated in Hourican's and left our group. When leaving I would certainly have made Michael Lowry aware of my exit.

14. Until the issue arose, I was not aware that Michael Lowry attended a VIP reception."

Mr. Per Simonsen of Esat Telecom has informed the Tribunal that

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

Mr. Lowry has informed the Tribunal as follows:

"Mr. Lowry has already furnished the Tribunal with an account of the meeting which took place with Denis O'Brien in Hartigan's licensed premises in September of 1995, and Mr. Lowry has, to the best of his recall, informed the Tribunal as to the conversation which



took place. The Tribunal letter of the 8th November brought to Mr. Lowry's attention certain information received from Mr. Per Simonsen, an employee of Telenor, to the following effect:

"That in or about the last two weeks of September 1995, Mr. Denis O'Brien informed Mr. Simonsen that Mr. O'Brien had happened to meet Mr. Lowry in a public house. Mr. Simonsen had no knowledge as to whether a meeting actually took place. Mr. O'Brien apparently informed Mr. Simonsen that Mr. Lowry suggested that IIU should be involved in the Esat Digifone consortium."

Mr. Lowry continues:

"If it is being suggested that matters as outlined in the Tribunal's letter of the 8th November were discussed, then this is absolutely refuted by Mr. Lowry. Neither at the meeting in Hartigans nor on any other occasion did Mr. Lowry ever suggest to Mr. O'Brien any matter such as that outlined in the Tribunal's letter of the 8th November, 2002.

Mr. Denis O'Brien has informed the Tribunal that he has no recollection of any meeting or conversation with Per Simonsen in the last two weeks of September, being the time when Mr. Simonsen recalls that the conversation or the meeting occurred during which the alleged reference to the Minister could have been made. There is nothing in Mr. O'Brien's diaries nor

in any of the correspondence, notes, minutes, or other materials which have come to light concerning that period which disclose either a meeting between Mr. O'Brien and Mr. Simmons or even an apparent opportunity for such a meeting.

Mr. Arve Johansen has informed the Tribunal that he has no direct knowledge of any meeting or discussions, dealings, or contacts between Denis O'Brien or any person on his behalf, with the Minister or with the Department. Mr. Johansen cannot remember the date, but he believes it was sometime in September 1995 when Mr. Per Simmons informed Mr. Johansen that Mr. Simmons had been told by Mr. O'Brien of a meeting between Denis O'Brien and the Minister in a public house. Mr. Johansen cannot remember exactly what he was told by Mr. Simmons, but it was to the effect that Denis O'Brien had told Per Simmons that the Minister had suggested to Denis O'Brien that the involvement of IIU would be helpful. Mr. Johansen has informed the Tribunal that he attached no importance to this. Mr. Johansen has informed the Tribunal that sometime on or about the 23rd October 1997, at a meeting in IIU's offices, he asked, in the context of the IPO investigation and the story that Mr. O'Brien had made two payments of  $\frac{1}{2}$ 100,000, if anyone had heard the story of the meeting in the public house. Mr. Johansen asked this question towards the very end of

the meeting or just after it was over. No one responded for a while, and then John Callaghan said he had heard of a meeting on a plane. The impression Mr. Johansen formed was that no one else had been told this story and that this was not taken seriously. Mr. Johansen does not remember any note being taken of the question. He cannot say who would have heard him ask the question, and the only response he received was from Mr. Callaghan.

Mr. Dermot Desmond has informed the Tribunal that he attended the All-Ireland final on the 17th September 1995, but he does not remember meeting with Mr. O'Brien on that day. Mr. Dermot Desmond has informed the Tribunal that he has no knowledge, direct or indirect, of any arrangement which Mr. O'Brien may have had to meet Mr. Lowry on the evening of the 17th September, 1995, and that he never heard about Mr. Denis O'Brien's meeting with Mr. Michael Lowry on the evening of the 17th September 1995 until the Tribunal raised the issue with him.

Mr. Dermot Desmond has informed the Tribunal that he was out of the country from 8:00pm on the 17th September 1995 and for the following week.

On the 18th September 1995, Mr. Denis O'Brien and Mr. Leslie Buckley consulted Mr. Owen O'Connell of William Fry's. Mr. Leslie Buckley has informed the Tribunal that he did not become aware of Mr. O'Brien's meeting

with Mr. Desmond until he was in the company of Mr. Denis O'Brien when they were both in a car on their way to a meeting in William Fry's on the 18th September 1995. He has no recollection of whether or not Mr. O'Brien mentioned to him where the meeting took place, and he can not now recall. And he still does not know where the meeting took place or if there were other people present at it or what the purpose of such a meeting was, except to say that following on from the information that such a meeting had taken place, Mr. O'Brien stated that Mr. Dermot Desmond was going ahead with the financing transaction.

Mr. Buckley has also informed the Tribunal that he was never aware, directly or indirectly, of any arrangement of Mr. O'Brien to meet Mr. Lowry on the evening of the 17th September, 1995. He first became aware of Mr. O'Brien's meeting with Mr. Lowry when they were both in a car on Monday, 18th September, 1995, on their way to meet Mr. Owen O'Connell of William Fry. Mr. O'Brien informed him that he had met Mr. Lowry the previous evening at the public house after the All-Ireland football final. Mr. Buckley does not recall if he ever mentioned the name of the public house. This meeting was not mentioned to Mr. Buckley by any other person at any stage prior to it being mentioned to him by Mr. O'Brien. Mr. O'Brien informed Mr. Buckley he does not recollect that he

mentioned whether or not there were any other persons present.

Mr. Buckley has informed the Tribunal that while they were driving to Mr. Owen O'Connell's office as mentioned, Mr. O'Brien informed him that he discussed with Mr. Lowry the problems they were having concerning the Esat Telecom fixed line business, particularly as they related to the shortage of capacity. This was the area of business for which Mr. Buckley was particularly involved and connected with. He has no recollection whatsoever of Mr. O'Brien mentioning anything else about his conversation with Mr. Lowry.

Although a request for assistance has been made of Mr. O'Brien concerning any meetings he may have had with Mr. Dermot Desmond, including this particular meeting, the Tribunal has not yet received a response.

Mr. Owen O'Connell's attendance of the meeting of the 18th September, 1995, reads:

Client: Esat.

Matter: GSM.

Date: 18/9/95.

"Denis O'Brien plus Leslie Buckley."

That appears to indicate who attended at this particular consultation with Mr. O'Connell.

"Dermot Desmond going ahead with financing transaction. Need underwriting letter for Department

because finances are seen as the weakness.

"DD wants 30% of GSM, AIB, Standard plus IBI to be excluded." "Standard" is probably a reference to Standard Life Assurance. And those references to "AIB, Standard plus IBI" appear to be references to the three institutions who had furnished letters which accompanied the bid made by Esat Digifone and submitted to the Department on the 4th August, 1995, and referred to in the presentation at the Department on the 12th September, 1995.

"30 DD

5 Advent

32.5 Esat

32.5 Telenor."

On Tuesday 19th and Wednesday 20th September, 1995, there was a meeting of the Project Group in Copenhagen for qualitative sub-group meetings regarding tariffs, roaming, marketing aspects, financial and management dimensions.

On the 19th September, 1995, a draft letter was prepared from Mr. Denis O'Brien to Mr. Kyran McLaughlin of Davys indicating that the letters provided by the institutions did not provide the certainty necessary on the availability of sufficient equity finance to the consortium.

The draft reads:

"Dear Mr. McLaughlin.

"I refer to our previous discussions in relation to the funding of the above. Unfortunately the letters provided by the institutions did not provide the certainty necessary on the availability of sufficient equity finance to the consortium.

"Accordingly, I have arranged firm commitments through IIU Limited for  $\frac{1}{2}$ 30 million of equity finance, being the 60% of the consortium not held by Telenor.

Accordingly, we will not be taking up the conditional proposals from the institutions AIB, IBI and Standard Life.

"I want to thank you for your help in the above matter.

"Yours sincerely  
Denis O'Brien."

CHAIRMAN: I think you have stated that was a draft letter.

MR. COUGHLAN: That was a draft that was prepared on the 19th September, 1995. I will be coming, in due course, to matters and how they evolved with Davys, Sir, so...

On the 19th September 1995, Mr. Denis O'Brien wrote to Mr. Michael Walsh as follows:

"Dear Michael

"Thank you for your letter of this morning. I have reviewed its contents both commercially and legally.

As a result I have had Owen O'Connell prepare the

enclosed draft of this document. The following points are relevant:

"1. We did not agree any underwriting fee - your reward for underwriting is participation in Esat Digifone Limited.

"2. The level of participation which I can give you is limited to 20%. Third-party constraints make it impossible to commit to more. However, Advent's right to 5% of the project is, according to Owen O'Connell, doubtful, subject to you taking responsibility for cost, etc., involved in a challenge by Advent. I will try to secure that 5% for you.

"3. I have retained Owen O'Connell's format because I feel that it is more likely to achieve our common objective with the Department. I understand that Points 1 (subject to an increase to IRi½35 million) 3, 4, (subject to a decrease of 20% and point 2 above), and 5 are reflected in his draft.

"4. DD agreed to meet his proportion of the bid costs, win or lose.

"I hope that the document is acceptable and look forward to hearing from you. I will be available this afternoon on my GSM number", which he gives.

On Tuesday, 19th September, 1995, there was a draft underwriting letter prepared by William Fry Solicitors to be signed by IIU and delivered to Esat Digifone Limited.



It's addressed to Mr. Denis O'Brien, Esat Digifone.

"Re Digifone".

"Dear Denis.

"I am writing to confirm the basis of our agreement with the consortium as consideration for us issuing the attached letter to the Department of Transport, Energy and Communications.

"1. The total maximum commitment under the underwriting and placing will be  $\text{€}1\frac{1}{2}$ 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.

"Please sign the enclosed copy of this letter in confirmation of your acceptance of the terms of this placing and underwriting agreement and in confirmation of the consortium's undertaking to use IIU as its underwriting agent."

Mr. Denis O'Brien's diary has an entry for the 20th

September, 1995, "Spoke to DD on phone".

On the 19th September, 1995, Mr. Owen O'Connell wrote

to Mr. Denis O'Brien as follows:

"Dear Denis

"I refer to Knut Haga's letter to you of the 11th September. While the letter may be of assistance in denying Advent participation in Esat Digifone (if sent to Advent with an appropriate letter revoking the agreement with them promptly), it also contains some assertions by Telenor which should be challenged.

"I think, in particular, it should be stated to Telenor in writing that a formal legally binding agreement has been made between Digifone and AIC and a copy has, so far as I am aware, been given to or at least seen by Telenor. On the basis of that agreement, Digifone has already entered into a position where it may be obliged to bring in Advent as an equity partner.

"If you would like me to draft letters to Mr. Haga and to Advent, I will be happy to do so."

That, Sir, appears to be a reference to the agreement of the 12th July, 1995, entered into between Communicorp and Advent which provided that in consideration for Advent making available the letter which accompanied the bid submitted on the 4th August, 1995, that they would be entitled to 5% of the

shareholding of Esat Digifone. This letter from Mr. O'Connell is of course correct in saying that there was a legally binding agreement between the parties, but that agreement did contain provision that Digifone had already entered into a position where it may be obliged to bring Advent in as an equity partner, but that agreement did not provide for any obligation on the part of Advent to participate as a partner, and there was no ability to enforce that agreement against Advent or any agreement any facility whereby the enforcement of sorry, I'll say that again: that Advent could be obliged to comply with making share capital available. And Mr. O'Connell himself had previously furnished a letter to Mr. Haga where he had indicated that he was not in a position to give an opinion as to the enforceability of any commitment or any alleged commitment of Advent.

I am now moving to what was happening on the departmental side of affairs.

On the 20th September, 1995, the second draft quantitative evaluation was prepared. The Tribunal has been informed that it should be taken into consideration that the number of quantitative evaluation indicators forming the basis for each result was different as between the first draft, which had been prepared on the 30th August 1995 by Andersen Management International, and two subsequent drafts,

this being one, and another one carried out on the 2nd October, 1995.

The Tribunal has been informed that fourteen quantitative indicators were being scored in the draft of the 30th August, 1995, whereas the number of quantitative indicators was only thirteen in the draft of the 20th September, 1995 and the one which was prepared on the 2nd October, 1995. This was due to the elimination of the indicator "Number of roaming agreements," which indicator was found ill suited for quantification. As of the 20th September, 1995, the total weighted score and ranking on the quantitative evaluation was:

A1: Score 2.77: Rank 4

A2: Score 2.62: Rank 6

A3: Score 3.22: Rank 1

A4: Score 2.67: Rank 5

A5: Score 2.85: Rank 3

A6: Score 2.91: Rank 2.

Returning again to matters between Mr. O'Connell and Mr. O'Brien.

On the 20th September, 1995, Mr. Owen O'Connell has an attendance on Denis O'Brien which reads:

"Denis O'Brien

"20% plus 5% (from Advent or from Communicorp)

"Fee of  $i\frac{1}{2}$ 375 K, but offset against IIU share of bid costs. Ignore issue in agreement.

"I.e. 15% from institutions plus Communicorp and Telenor dilute by 5 of 10% (depending on Advent outcome)"

On the 21st September, 1995, there is an entry in the diary of Mr. Denis O'Brien, "12pm Michael Walsh".

It would appear that a draft deed of covenant of the 21st September 1995 was with Telenor's legal division at around 14.22. That draft deed provided for IIU's entitlement to take up not less than 25% of the ordinary shares in Esat Digifone in return for IIU agreeing to subscribe for any shares not validly taken up or to procure other persons to subscribe for such shares up to 60%.

On the 21st September 1995, Mr. Michael Walsh sent a letter to Mr. Denis O'Brien which was a synopsis of the activities and interests of Mr. Dermot Desmond over the previous ten to fifteen years. It stated:

"Dermot Desmond, aged 45, has been a major initiator of change in the Irish financial market and is a leading Irish entrepreneur. A brief synopsis of his activities and interests over the past 10 to 15 years is as follows:

"1. In 1981 he founded National City Brokers (NCB) which became Ireland's largest independent stockbrokers. In 1994 he sold his 56% stake in NCB to Ulster Bank, the Irish subsidiary of National Westminster Bank.

"2. He has a number of software businesses in Dublin, together with financial businesses in Ireland and Switzerland. In July, 1995, he sold his 80% shareholding in Quay Financial Software Limited to CSK in Japan. Quay Financial Software is a leading producer of digital platforms for dealing rooms.

"3. Previously Chairman of Aer Rianta, the Irish airports authority. Under his Chairmanship, Aer Rianta was responsible for managing Dublin, Shannon, and Cork airports. In addition, Aer Rianta manages duty-free shops in a number of locations, including Moscow and Stanstead, and a chain of hotels in Ireland.

"4. He has recently acquired a 50% stake in Pembroke Capital for \$15 million. Pembroke Capital is staffed mainly by ex Guinness Peat Aviation employees and concentrates on tax-efficient international trading of aircraft.

"5. In Dublin he was the initiator of the Irish Financial Services Centre and the Irish Future and Options Exchange.

"6. In August, 1995, he founded a new company, International Investment and Underwriting Limited (IIU), at the Financial Services Centre, to specialise in corporate finance and funds management.

"7. In terms of leisure investment, he has a significant holding in Celtic Football Club plc, a

sponsorship relationship with Jordan Formula 1, and was the main sponsor of the only-ever Irish entry in the Whitebred Round-the-World Race."

Also on the 21st September, 1995, Mr. Michael Andersen of Andersen Management International sent a memorandum to Martin Brennan and Fintan Towey which appears to have been received at the Department on the 22nd September, 1995, sometime in the afternoon. The memorandum dealt with:

"A. The remaining award of the marks to the 10 dimensions.

"B. Scoring of the marketing aspect, financial aspect, and other aspects.

The remaining award of marks to the 10 dimensions.

Some calculatory and graphical work needs to be done concerning the tariffs dimensions. MT has the initiative to circulate the resulting graphics and suggest an award of marks to the new indicator as well as to the tariffs dimension as a whole. Deadline Monday the 25th.

"Concerning the dimensions 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."

Turning to the scoring of the marketing aspects, financial aspects and others.

"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.

"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 risk. 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 GSM II 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 EU rules re procurement of infrastructure. Unrealistic traffic assumptions, lack of understanding re European standards and technical matters to be documented by OCF, and the approach to planning permissions are some of the identified risks.

"A5: Three years of negative solvency combined with the 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, 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 Aspect', 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.

"Grand total.

"The grand total is to be scored at the meeting 28 September.

Under that is "supplementary analysis", there are a list of matters which I will just pass over for the moment.

Then under that, it states "these and other supplementary analyses, as far as possible, be

annexed to the first draft report."

Under the heading "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 basic philosophy behind each application, such as the core strategy and some key characteristics 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 merit, together with a recommendation to enter into licence negotiations with

the consortium behind the best application.

"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."

On the 21st September 1995, Mr. Denis O'Brien sent a fax from Esat Telecom to Mr. Owen O'Connell of William Fry Solicitors enclosing a draft letter to be received from Telenor and the document that was circulated to the institutions. The draft letter to be received from Telenor reads as follows:

It is a draft letter to be received from Telenor.

The document, which is headed "Draft, Denis O'Brien, Esat Telecom, 8 Upper Mount Street, Dublin 2, date 1995-09-19", being the 19th September, 1995.

"Dear Mr. O'Brien

"We refer to the comfort letter provided by Advent International on July 10th. We regret to inform you that having considered the matter at length and taken into account William Fry's representation in their letter of August 17th, we remain dissatisfied with the comfort letter and require appropriate financial assurances immediately.

"It is also clear from our meeting with the Department of Communications last week that there is considerable doubt within the Department regarding Communicorp's ability to fund 40% of Esat Digifone.

"In order to avoid any uncertainty at this critical stage, we urge you to take appropriate action immediately.

"Yours faithfully, for Telenor,  
Knut Haga, Assistant Director."

The last two documents which I put up, one being the fax cover sheet and the other being a draft letter which was to be furnished by Telenor, appear to have been generated in Ireland. Mr. Knut Haga, of Telenor, has informed the Tribunal in relation to this draft letter:

"1. He is certain that he did not draft the letter of the 19th September, 1995.

"2. He does not recognise the draft letter, and he is unfamiliar with it.

"3. He is unable to recollect such a draft letter being furnished and converted into a final letter.

"4. In particular, Mr. Haga disclaims any responsibility for the content of the second paragraph of the draft letter. Mr. Haga was not present at the meeting with the Department of Communications last week, whether this was the oral presentation or any other meeting. Furthermore, Mr. Haga was not informed by anyone in Telenor and has no recollection of being informed that any doubt had been expressed by any departmental officials concerning Communicorp's ability to fund 40% of its required capital contribution to Esat Digifone."

Mr. Haga has informed the Tribunal that he has drawn our attention to a number of discrepancies in relation to this draft letter which reinforces his assessment that he did not prepare this draft letter.

Mr. Haga has informed the Tribunal that he was not in his office on the 19th or the 20th September, 1995.

He returned to his office late on the 21st September, 1995, from Stockholm. Mr. Haga has informed the Tribunal that he has no recollection whatsoever of being involved in any way in the production, approval,

or issue of a letter based on this draft letter and that this draft letter has come as a complete surprise to him.

On the 21st September, 1995, Mr. Owen O'Connell of William Fry Solicitors sent a fax to Mr. Denis O'Brien, and it reads as follows:

"Re Esat Digifone:

"Dear Denis,

"Further to our telephone conversation of this afternoon, I enclose three draft letters. I would intend that the letter to Kyran McLaughlin would be accompanied by a more informal and friendly cover note from you.

"I stress again the irrevocable nature of these letters and especially the Telenor and Kyran McLaughlin letters. Accordingly, I strongly urge that you should not issue the McLaughlin letter or obtain the Telenor letter until and unless you are absolutely confident of:

"1. Obtaining a commitment in appropriate terms from IIU;

"2. Fulfilling the conditions and delivering the consideration for the IIU commitment; and

"3. That IIU can and will live up to its commitment.

"I am aware that this is ultimately a commercial decision and will be happy to discuss it further with you if you wish.

"Yours sincerely,

"Owen O'Connell.

"PS: I remain concerned at the rights and vetoes

which Advent have in relation to Communicorp and other companies under their original investment agreement.

As you know, I am not fully familiar with this agreement since I did not draft or negotiate it.

However, as the consequences of an outright dispute with Advent could be serious both for the GSM project and other businesses, you should be sure that the 5 percent of Esat Digifone justifies the risk (which is not to say, of course, that such a dispute cannot be resolved by negotiation and will not ultimately turn in your favour)".

It would appear from this letter that Mr. O'Connell was informing Mr. O'Brien that if he obtained the letter which was in draft form from Telenor and sent a letter to Mr. Kyran McLaughlin to, in effect, exclude the institutional investors, that he was taking an irrevocable step and that he would have to be absolutely confident of obtaining a commitment in appropriate terms from IIU.

He would also have to be confident that IIU were capable of fulfilling the conditions and delivering the consideration for IIU commitments, and be sure that IIU could and would live up to its commitments.

It would also appear that Mr. O'Connell was concerned



about the rights and vetoes which Advent might have in relation to Communicorp and other companies under the original investment agreement, and that any dispute with Advent could be serious for the GSM project and other business.

The Tribunal will inquire into the circumstances which prompted Mr. O'Brien to proceed as he did in the context of the information then being imparted to him by Mr. O'Connell and in the context of the concerns expressed by Mr. O'Connell.

Mr. Denis O'Brien's diary has an entry for the 22nd September, 1995, "2.30, Arve Johansen and Per".

Mr. Arve Johansen has furnished the Tribunal with a private and confidential memorandum on the shareholding in Esat Digifone which he has informed the Tribunal was prepared by him in Oslo on the 4th May, 1996. That date precedes the establishment of this Tribunal and the establishment of the McCracken Tribunal. In that memorandum, Mr. Johansen records as follows:

"I have below summarised a few points that have 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."

This is something I will turn to in due course and was a transaction or a proposed transaction around that time. I'll come back to it.

"1. Denis O'Brien came personally over to see me in Oslo probably sometime during September last year."

That of course was a reference to September 1995.

"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 on board 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's 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 licence. But not only that: Denis then pushed very hard for Telenor to swallow 15% of this and give 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 inhibit the award of a licence.

"This was the first time I experienced real hard, and very unpleasant, push from Denis."

On Friday, 22nd September, 1995, it would appear that Telenor's legal department received a second draft of the deed of covenant between Esat Digifone Limited and International Investment and Underwriting Limited with handwritten annotations.

A letter dated Sunday 24th September 1995 from Mr. Michael Walsh to Mr. Denis O'Brien confirms the basis of the agreement between Esat Digifone Limited and IIU Limited as consideration for IIU Limited issuing an attached letter to the Department of Transport, Energy and Communications. The letter indicated that their agreement would be based substantially on an attached draft document prepared by William Fry Solicitors as modified to reflect the points in Mr. Walsh's letter.

The document of the 24th September, 1995, is on IIU headed notepaper, at the IFC house.

Mr. Denis O'Brien, Esat Digifone Limited, 24th September, 1995.

"Re Esat Digifone Holdings Limited (the consortium)"

"Dear Denis,

"I am writing to confirm the basis of our agreement with the consortium as consideration for us issuing the attached letter to the Department of Transport,

Energy and Communications. Our agreement will be based substantially on the attached draft document prepared by William Fry Solicitors, as modified to reflect the points in this letter.

"1. 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 Limited or its nominees (together "the Placees"). IIU Limited ("The Arranger") will arrange underwriting for the 37.5% of the equity which Communicorp Group Limited ("Communicorp") has committed to subscribe for. The maximum combined commitment under the placing and underwriting will be  $\frac{1}{2}$ 36.5 million ("The Commitment").

"2. In the event of any shares being issued on a partially paid basis, then the Placees will have security over the 37.5% of the shares so issued to Communicorp.

"3. In the event that Communicorp does not subscribe for its 37.5% of any tranche, then Telenor and the underwriters will each take their pro rata share of the shares in relation to which the default has occurred. In this event the Placees will be entitled to place these shares with any other party, and no restrictions, whether in the articles of association or otherwise, on the transfer of such shares will be applicable, save that the Placees will not place such

shares with a direct competitor of Telenor.

"4. The Placees will be entitled to nominate a representative ("The Placee Representative") to represent their aggregate interest in the consortium and the Placees' representative will be a party to the Shareholders' Agreement, which will be executed in a form substantially similar to the draft supplied to the Arranger by William Fry, Solicitors, on September 21, 1995, and the Placees' representative will be deemed to hold the aggregate of all shares held by the Placees for other such purposes.

"5. In the event that Telenor fail to fully subscribe for their 37.5% share in the consortium or fail to honour their commitments under this agreement or otherwise, then all obligations of the arranger or placee are void.

6. The existing shareholders in the consortium represent and warrant that the consortium will, at the date of the award of the licence, be free of all debts and liabilities other than those bid costs properly incurred. The Placees and arranger will be fully indemnified by Mr. O'Brien and the existing consortium shareholders if this is not the position.

"7. The attached letter is strictly private and confidential for the department to which it is addressed. It may not be used or taken as a commitment for any purpose other than for the

departmental submission. Mr. O'Brien and Communicorp will fully indemnify the Arranger and the Placee in the event of any cost or obligation or liability arising as a result of the use of this letter or the attached letter for the Department other than for the purpose of submitting the attached letter to the Department to which it is addressed.

"Please sign the enclosed copy of this letter in confirmation of your acceptance of the terms of arrangement for a placing and underwriting agreement and in confirmation of the consortium's undertaking to use IIU as its arranger".

And that draft is signed by Michael Walsh. It is not signed on behalf of Esat Digifone at that stage.

A copy of Mr. Walsh's letter was faxed to Telenor, and there is a second copy of the same letter, with handwritten annotations which appear to be in Norwegian, in the documents furnished by Telenor's legal department to the Tribunal. Telenor's legal department have furnished to the Tribunal a draft letter dated 25th September from IIU Limited to the Department with no clear indication as to when this was provided to Telenor.

There is a draft letter dated 25th September, 1995, from IIU to Denis O'Brien/Esat Digifone confirming the basis of the agreement with the consortium as the consideration for issuing the letter to the

Department.

On the 26th September, 1995, Jon Bruel of Andersen Management International wrote to Mr. Billy Riordan of the Department of Finance and attached a spreadsheet of A1 through to A6. The letter from Mr. Bruel informs Mr. Riordan that "A new Table 32 has been added. This table shows the IIR sensitivity based on the cash flow sensitivity figures given by the applicants. Please note that I have adjusted the terminal value included under Year 10 in item 132, 133, and 134 by the infrastructure price adjustment value mentioned in Column 2. This adjustment does not give an entirely correct assessment of the terminal value, but it represents a "qualified guess".

With respect to Advent, Sigma and Communicorp, I would like to share your conclusions with respect to the investigations you have conducted. We also need to discuss how to include them in our risk analysis.

From the papers on Sigma, which you had obtained from the Registrar's office, I understood that they have registered some mortgages. Please notify me if this observation should be taken into account when analysing the risks and the financial strength of Sigma.

"Yours faithfully, Jon Bruel."

On the 26th September, 1995, Mr. Denis O'Brien of Communicorp Group Limited wrote to Mr. Massimo Prelz

of Advent International as follows:

"Dear Massimo,

"I attach a letter from Telenor which is self-explanatory.

"Regardless of Telenor's position it is now clear that we will not be awarded the GSM licence with the existing financing arrangements. We need something much stronger to have any chance of success. I am working on another avenue which could provide us with the answer and, at the same time, significantly strengthen our bid in other respects. I will explain in further detail when we meet.

"Regards

Denis O'Brien"

Attached to that particular faxed letter was a letter on Telenor International notepaper, a draft of which I have just referred a moment ago, but the difference on this particular document is that there is a signature of Knut Haga at the bottom. There is also this difference: the draft letter was dated the 19th, and this letter has a date the 15th on it.

The Tribunal is still unclear as to how Mr. Knut Haga came to sign this letter dated 15th September, 1995.

A further statement is being provided by Telenor's solicitors, by Mr. Haga on this particular aspect, and we hope we will be able to mention this as soon as possible.



On the 26th September, 1995, Mr. Gerry Halpenny of William Fry Solicitors wrote to Michael Walsh and informed him that he was uncomfortable with IIU signing the letter to the Department without having finalised the agreement. The letter was copied to Per Simmons and Denis O'Brien.

I'll deal with this in a moment and should perhaps explain that around this time, it would appear that Messrs. William Fry Solicitors, through different solicitors in that firm, were acting for different consortia members and indeed for IIU. It would appear that William Fry Solicitors, through different solicitors in that firm, were acting for Esat Digifone, which was the consortium; Communicorp Group, and/or Esat Telecom; and IIU, through different solicitors in the same firm.

This particular letter dated 26th September, 1995 is in fact a fax, and it's a message - states:

"E-sat Digifone.

"Dear Michael,

"Further to my conversation with you earlier this morning, I enclose revised draft of the deed of covenant marked to show the amendments made from the previous draft.

"As mentioned to you, I am uncomfortable with the idea of signing the letter as drafted by you with the

agreement to be entered into later on. Given the consequences of the issue of the letter to the Department, I feel strongly that the Deed of Covenant should be executed before that letter is issued.

"I have tried to incorporate all of the points in your letter into the agreement and hopefully it will be possible to agree the document very quickly. The two outstanding issues are probably the transfer provisions and the requirement of Telenor regarding the number of Places.

"In relation to the transfer provisions we discussed on Sunday, the replacement of the words "is likely to" with the words "has stated an intention to," I will put this wording to Telenor for their views. I should also point out that I have added Esat Telecommunications Limited in the fifth line from the end of paragraph 5(d)(ii). I will also talk to Telenor regarding the number of Places. As I understand it you are happy to have the number of Places limited to four as long as one of those Places is a nominee who may hold the interest of a number of other investors. Your particular concern in this regard is, should your underwriting obligations be called upon, you would wish to have the ability to seek investment from a larger number of parties.

"On the basis of the Deed of Covenant being agreed,

your letter to Esat Digifone would then I think be reduced to the last two paragraphs 6 and it is not appropriate to cover those in the Deed of Covenant.

The introductory paragraph then should simply refer to the fact that the Deed of Covenant has been signed and that it is on that basis that the attached letter to the Department is to be issued.

"I am also sending a copy of this letter to Per Simonsen of Telenor by way of asking him to comment on the revised draft of the Deed of Covenant and in particular the two points mentioned above."

That appears to be copied to Mr. Per Simonsen of Telenor and Denis O'Brien, Esat Telecommunications.

On Thursday, 28th September, 1995, Mr. Per Simonsen sent a fax to Mr. Gerry Halpenny of William Fry setting out Telenor's comment on the draft arrangement agreement. I don't think I need to make any reference to the contents of that fax.

Mr. Fintan Towey of the Department has informed the Tribunal that he dealt with Minister Michael Lowry on several occasions in relation to the GSM licensing process from the launch of the competition through the announcement of the result, the award of the licence, and defending the integrity of the process. These generally occurred in the context of Public Statements in relation to GSM process. He does not recall the details of individual meetings, but none of the

face-to-face meetings were on a one-to-one basis. He has also informed the Tribunal that he spoke to Minister Lowry when he telephoned him sometime in August or September 1995, and Minister Lowry was anxious to know how the competition was going because he was subject to representations by parties who were concerned that the decision on the winner had been made. Mr. Towey recalls that at the time of the call, it was not clear which consortium would be the winner. He made this clear to Minister Lowry. Mr. Towey also believes that he mentioned that it may be to Minister Lowry's advantage not to have knowledge of how the evaluation was proceeding.

On Thursday 28th September and Friday the 29th September, 1995, Mr. Martin Brennan, Mr. Fintan Towey, and Mr. Michael Andersen met in Copenhagen to award marks to the remaining aspects as had been suggested by Andersen Management International in their fax to the Department on the 21st September, 1995.

On the 29th September, 1995, IIU Limited sent the following letter to the Department. It's from IIU Limited, IFSC house, Custom House Quay, Dublin 1. The telephone number is given and the fax number is given.

It's addressed to Department of Transport, Energy and Communications, 44 Kildare Street, Dublin 2.

It's for the attention of Mr. Martin J. Brennan, Telecommunications and Radio Development Division.

It's dated 29th September, 1995.

And it reads:

"Re Esat Digifone Limited ("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 proposals 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  $\text{€}1\frac{1}{2}$ 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"

Also on the 29th September, 1995, Mr. John Callaghan called to see Mr. Kyran McLaughlin at his office. Mr. McLaughlin has informed the Tribunal that Mr. Callaghan told him that the Esat Digifone consortium had been advised that the financial element of the bid was insufficiently strong to allow Esat Digifone to be awarded the licence and that Esat Digifone were negotiating with a financial party who would provide the stronger financial backing necessary to be awarded the licence. Mr. Callaghan did not inform Mr. McLaughlin who had provided this advice nor the identity of the stronger financial party. Mr. Callaghan asked Mr. McLaughlin if he would ascertain whether the three institutions who had made the previous commitments would agree to step aside so that the equity to which they would have been entitled would be available to the investor who was prepared to provide firmer financial support. Mr. McLaughlin duly approached the financial institutions in question, who agreed to step aside. Mr. John Callaghan has informed the Tribunal that on the 29th September, he met Kyran McLaughlin at his office. He cannot precisely recall what was said, but he believes they discussed the conditions of institutional support, and Mr. Callaghan explained that they needed such firmer commitments to be credible enough to win the licence; that they were in negotiations with another party on an arrangement

that would give them the stronger financial backing they needed, and that they wanted Mr. McLaughlin to ask the institutions involved to step aside so that the 20% would be available to the new investor.

Now, I want to again say that on this same day, the day of the letter to the Department, the day of Mr. Callaghan's visit to Mr. McLaughlin, that two separate letters from IIU to Denis O'Brien, one to Denis O'Brien (Communicorp) and one to Denis O'Brien (Esat Digifone), were signed by both Michael Walsh and Denis O'Brien. It would appear that both of these documents were signed by both Michael Walsh and Denis O'Brien in Michael Walsh's office on the 29th September, 1995.

The first letter is a letter re Esat Digifone Limited, the Consortium, and it's addressed to:

Mr. Denis O'Brien of Esat Digifone,

South Block,

The Malt House,

Grand Canal Quay,

Dublin 2.

It's dated 29th September, 1995.

Re Esat Digifone Limited ("the Consortium").

"Dear Denis,

"I am writing to confirm the basis of our agreement with the consortium as consideration for us issuing the attached letter to the Department of Transport, Energy and Communications. Our agreement is based on

the attached agreement (the "agreement") document prepared by William Fry Solicitors but sorry, I beg your pardon; I am reading the wrong one first.

I should go to the other letter. That's the side letter.

It's the letter addressed to Denis O'Brien in Communicorp, and it's re Esat Digifone.

"Dear Denis,

"I am writing to confirm the basis of our agreement with Communicorp Group Limited in consideration for us issuing the attached letter to the consortium and the Department of Transport, Energy and Communications."

"The definitions in this letter and the letter to the consortium are the same.

"1. Communicorp has undertaken to subscribe for 37.5% of the consortium ("the obligation") on the same terms and pari passu with the placees. IIU Limited has arranged underwriting for the obligation. As consideration for arranging the underwriting, Communicorp will pay to IIU Limited ("the Arranger") a fee of £219,000.

"2. All shares will be subscribed for on an absolutely pari passu basis other than as specifically provided for in the agreement by all members of the consortium.

"3. In the event of the bid not being successful, the Placees will pay 25% of the net bid costs, excluding



the arrangement fee, of the GSM licence incurred by the Consortium. The aggregate of the bid costs will be a maximum of i;½1,600,000 and will be independently verified as being properly incurred and paid. The Placees' obligation in relation to 25% of the net bid cost will be paid after deduction of the underwriting fee.

"4. In the event that Communicorp fails to meet the obligation in full and the Arranger or its assignee is called upon to satisfy any of the obligation, the Arranger will procure that for a period of four months Communicorp will have a right to meet the obligation or the balance not satisfied as the case may be paying the amount of the balance of the obligation together with interest at a rate of DIBOR plus 2 percent on the amount of such balance.

"5. 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 its shareholders on the other hand.

"Please sign the enclosed copy of this letter in confirmation of your acceptance of the terms of this arrangement and confirmation of Communicorp's undertaking to use IIU as its arranger."

Now, at the same time, there was another letter signed

by Michael Walsh I presume that is Professor Michael Walsh, who wrote to the Department and Mr. Denis O'Brien.

And it's addressed to Denis O'Brien at Esat Digifone Limited, and it reads:

"Dear Denis,

"I am writing to confirm the basis of our agreement with the Consortium as consideration for us issuing the attached letter to the Department of Transport, Energy and Communications. Our agreement is based on the attached arrangement agreement ("the Agreement") document prepared by William Fry Solicitors, but it is subject to this side letter.

"1. 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 Limited or its nominees (together "the Placees"). IIU Limited ("the Arranger") will arrange underwriting for the 37.5% of the equity which Communicorp Group Limited ("Communicorp") has committed to subscribe for. The maximum combined commitment under the placing and underwriting will be 36.5 million ("the Commitment").

"2. The Arranger has assigned the agreement in its entirety both benefits and obligations to Botin (International) Investments Limited.

"3. The obligations of the arranger or its assignee

under the agreement are conditional on:

"A, the terms of the grant of the GSM licence not being materially different from the requests for proposals in connection therewith from the Department of Transport, Energy and Communications.

"B, Communicorp and Telenor having signed a Shareholders' Agreement to which the Arranger is also named as a party containing protections in favour of the arranger which would be reasonable for a shareholder subscribing for 25 percent of a private company, and

"C, GSM market conditions in the Irish telecommunications industry not being materially disimproved

"in each such case, on or before the date of the first issue under the commitment,

"4. The Placees will be entitled to nominate a representative ("the Placees representative") to represent their aggregate interest in the consortium, and the Placees Representative will be a party to the Shareholders' Agreement which will be executed in a form substantially similar to the draft supplied to the Arranger by William Fry Solicitors on September 21, 1995, and the Placees' representative will be deemed to hold the aggregate of all shares held by the Placees for such purposes.

"5. In the event that Telenor fail to fully subscribe

for their 37.5% shares in the consortium, then all obligations of the arranger or its assignees or Placees are void save where Telenor and Communicorp collectively subscribe for their 75% share provided; in such instances Telenor will retain 30%.

"6. The existing shareholders in the consortium represent and warrant that the consortium will, at the date of the award of the licence, be free of all debt and liabilities other than those bid costs properly incurred. The Placees and arranger will be fully indemnified by Mr. O'Brien and the existing consortium shareholders if this is not the position.

"7. The attached letter is strictly private and confidential for the Department to which it is addressed. It may not be used or taken as a commitment for any purpose other than the departmental submission. Mr. O'Brien and Communicorp will fully indemnify the Arranger and the Placee in the event of any cost or obligation or liability arising as a result of the use of this letter or the attached letter for the Department other than for the purpose of submitting the attached letter to the Department to which it is addressed.

"8. The terms other than the amount of any tranche of the obligation governed by the agreement will be subject to the prior approval of the arranger.

"Please sign the enclosed copy of this letter in

confirmation of your acceptance of the terms of this arrangement for a placing and underwriting agreement and in confirmation of the consortium is undertaking to use IIU as its arranger."

It would appear that on Friday, 29th September 1995, the draft arrangement agreement was faxed to Telenor, and that has been furnished to the Tribunal by Telenor's internal legal department. Also on the 29th September 1995, the formal arrangement agreement between Esat Digifone and IIU was signed.

Now, there is an undated document which appears in the files of IIU, which appears to be a draft press release indicating the involvement of IIU in Esat Digifone. It would appear that this draft was never issued.

CHAIRMAN: I think you are moving now to a series of recollections of members of the Project Group as supplied to the Tribunal, which perhaps is somewhat separate; and as you have been on your feet for just under two hours, it's probably appropriate now to defer until eleven o'clock tomorrow morning.

Thank you.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY, FRIDAY, 6TH DECEMBER 2002, AT 11AM.