

THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY,
10TH DECEMBER, 2002 AT 12.00 NOON.

CONTINUATION OF OPENING STATEMENT BY MR. COUGHLAN:

CHAIRMAN: In view of the late start required by some
internal matters, we'll sit until twenty past one,
then resume at half past two until half four.

MR. COUGHLAN: I wish to make reference to something I
have already referred to in the Opening Statement last
week, Sir. I said on that occasion that on the 20th
June, 1995, Mr. Owen O'Connell of William Fry
Solicitors responded to a fax from Baker McKenzie
dated 19th June, 1995, and informed Ms. Stroud that
the Commission had "objected primarily to the
'auction' concept inherent in the proposals for grant
of the second GSM licence. Accordingly, the terms of
the application are to be revised with either no
up-front payment required or a maximum cap placed
there on. It is expected that the time will be
extended by about two months." I also said on that
occasion that this appears to reflect a discussion at
the GSM Project Group of the 9th June, 1995.
The section of the fax by Mr. O'Connell to Ms. Stroud
that I also made reference to was as follows: "It is
fundamental to the current arrangement that the
comfort letter to Telenor be in whatever form will
satisfy Telenor. If it does not do so, then the
entire arrangement fails" (and this is also the reason

for my clause 5.1.3)."

I stated that the Tribunal wrote to Owen O'Connell on the basis that it assumed that he had instructions which enabled him to make the statement that "the Commission had objected primarily to the auction concept inherent to the proposals for grant of a second GSM licence. Accordingly, the terms of the application are to be revised with either no up-front payment required or a maximum cap placed thereon. It is expected that the timetable will be extended by about two months."

The Tribunal wished to know from whom and when he had received instructions which enabled him to make these statements. The Tribunal also wished to obtain details of his knowledge, direct or indirect, as to the source or sources of the information comprised in his instructions. I stated that Mr. O'Connell informed the Tribunal in the first instance that he had no direct recollection either of the person from whom or the date upon which he received the instructions referred to by the Tribunal, nor the source or sources of the information comprised in his instructions. He informed the Tribunal that he was undertaking a review of his files to ascertain whether they contained any correspondence or notes which might throw some light on the matter.

Having considered his files, Mr. O'Connell informed

the Tribunal that no written record had been located either of his receipt of instructions in regard to the statement referred to by the Tribunal or which assisted in recalling the source of the information comprised in his instructions. I stated that the Tribunal will have to inquire from whom and when Mr. O'Connell received the instructions which enabled him to make his comment in the letter of the 20th June 1995.

This morning the Tribunal received a letter which is dated 10th December, 2002, from Mr. Houghton Fry of William Fry Solicitors in the following terms:

"Dear Mr. Davis,

"As you know I have in the past advised my partner Owen O'Connell regarding his involvement with the Tribunal in his personal capacity. From reports of the Opening Statement being made by counsel to the Tribunal, I have noted the importance apparently being attached to the above letter.

"I have also read media reports thereof which appear to draw inferences of impropriety in regard thereto.

I feel, having discussed the matter with Mr. O'Connell, that misunderstanding may have arisen on the part of the counsel to the Tribunal in this regard, and we concluded that it might assist the Tribunal if Mr. O'Connell volunteered his understanding of these matters now rather than

awaiting the opportunity which will presumably be presented if and when he is called to give evidence.

"I accordingly enclose a brief memorandum on the matter which I hope will be of assistance to the Tribunal. Counsel to the Tribunal may feel that the information contained therein should be included in the Opening Statement before it concludes later this week."

The Tribunal recognises that it will be some time before Mr. O'Connell gives evidence, so it seems appropriate that this memorandum should be referred to in the Opening Statement, Sir.

"1. On the 9th October 2002, Mr. John Davis, the Tribunal's solicitor, wrote to me inquiring as to the person from whom I received instructions in relation to a letter written by me on the 20th June, 1995, to Ms. Helen Stroud of Baker McKenzie Solicitors, the date upon which I received those instructions and the source(s) of the information comprised in my instructions. The information in respect of which the source(s) was/were queried amounted essentially to four statements:

"A. The European Commission had objected to the "auction" concept inherent in the licence competition.

"B. The terms of the competition were to be revised.

"C. The revision would provide for either no up-front payment or had a maximum cap thereon; and

"D. The timetable for the competition was expected to be extended by about two months.

"2. In my letters to the Tribunal of the 11th and 16th October 2002, responding in both cases to Mr. Davis's letter of the 9th October, I stated that:

"A. I have no direct recollection either of the person from whom or the date upon which I received the instructions which enabled me to refer, in any letter of the 20th June 1995 to Ms. Helen Stroud, to the information summarised in paragraph 1 above;

"B. I had no direct recollection of the source(s) of the information comprised in the instructions;

"C. A review of the relevant files did not locate either any written record of my receipt of instructions or anything which was of assistance to me in recalling the sources of the information comprised in my instructions.

"These statements are true and correct responses to the questions raised in Mr. Davis' letter of the 9th October.

"3: Since giving my responses, I have read transcripts of the Opening Statement being delivered by counsel to the Tribunal, which statement is still in course of delivery at the time of preparation of this memorandum. I wish to make it clear that:

"A. A letter such as that written by me on the 20th June, 1995, to Ms. Helen Stroud would invariably be

written in compliance with instructions received by me from my clients and would convey information received by me from my clients. I would not write, or have written, such a letter upon my own initiative without receiving instructions to do so, and I would not include in such a letter, factual or speculative information of the kind referred to by Mr. Davis, unless it was given to me by my clients and/or confirmed by them; and

"B. The client on whose behalf I wrote the letter of the 20th June 1995 was Communicorp Group Limited, and the executives of Communicorp Group Limited from whom I was accustomed to receiving instructions at that time were Mr. Denis O'Brien, Mr. Peter O'Donoghue, and Mr. Jarlath Burke. It is likely that instructions and information referred to were given to me by one or more of those persons.

"4: Since reading transcripts of the Opening Statement being made by counsel to the Tribunal and since reading and hearing some of the implications and inferences of impropriety, (including a possible breach of confidentiality on the part of the project team) made and drawn therefrom in media reports, I have carried out further research into the matter and feel that the Tribunal's attention should be drawn to the following:-

"A. Press reports up to and on the date of my letter

of the 20th June 1995 contained statements from which all of the statements listed in 1(a) to (d) above could fairly have been inferred. I append to this memorandum some samples of those reports. It does not appear to me to be the case, therefore, that the possession of that information by my clients necessarily leads to the conclusion that there had been any impropriety or a breach of confidentiality by any person:-

"B. I am aware (from documents in the possession of the Tribunal) that Mr. O'Brien and Mr. Ed Kelly of Communicorp Group Limited had a meeting on the 19th June 1995 with Mr. Martin Brennan and Mr. Fintan Towey at which matters relevant to the information in question were referred to, although I am also aware that minutes of that meeting prepared by or on behalf of Mr. Brennan and Mr. Towey do not record the revelation of the specific information referred to by Mr. Davis. However, Mr. Brennan and Mr. Towey specifically directed Mr. O'Brien and Mr. Kelly to examine media reports of the matter and to draw their own conclusions;

"C. I have learned from documents furnished to me by the Tribunal that at a meeting on the 20th June 1995 with Mr. Condon of the Persona consortium, Mr. Brennan or Mr. Towey was minuted as saying that the closing date for the competition would be delayed by seven to

eight weeks (this delay being one of the items of information whose source was queried by Mr. Davis);

"D. I am aware that at the time in question Mr. Burke had a good relationship with officials of the European Commission engaged in the telecommunications sector and frequently obtained information from them as to developments in that sector and their intentions in regard thereto.

"5: Arising from all the foregoing, and subject to the qualification that, as I have already stated, I do not have a direct recollection of these matters nor records which would assist in my recollection thereof, I regard it as:-

"A. Certain that I received information and instructions from Communicorp Group Limited pursuant to which I wrote the letter of the 20th June, 1995;

"B. Very likely that the information and instructions were given to me by one or more of Mr. O'Brien, Mr. O'Donoghue or Mr. Burke;

"C. Likely that the source(s) of the information was/were any one or more of:-

"1. Press reports published up to and upon the date of my letter (all of which appeared in the Irish Press and would not have been available to Ms. Stroud who lived and worked in London); and/or

"2. An unminuted comment made to Mr. O'Brien and Mr. Kelly by Mr. Brennan or Mr. Towey during their meeting

of the 19th June 1995, perhaps similar to the statement made by one of them on the following day to Mr. Condon; and/or

"3. Comments made and/or documents provided to Mr. Burke by a contact or contacts in the European Commission.

"Dated 9th December, 2002

"Owen O'Connell."

As Mr. O'Connell has fairly stated in his correspondence with the Tribunal and in this memorandum, he has no recollection of matters himself, and the speculation which he has embarked upon in the memorandum is helpful to the Tribunal in conducting its inquiries as to from whom and when Mr. O'Connell received the instructions which enabled him to make the comments in his letter dated 20th June, 1995.

MR. MCGONIGAL: Mr. Chairman, just in conclusion in relation to that. I don't know if I am interrupting Mr. Coughlan, but I think it's only fair to point out that attached to Mr. O'Connell's letter was an appendix wherein is set out a number of newspaper articles and sources, some of which have been underlined, which appear to have a linkage to the first part of Mr. O'Connell's letter and which indicate that the information referred to in paragraphs 1(a) to 1 (d) were contained within those newspapers. I simply think that that should be drawn,

for completeness' sake, to the attention of those listening, because there were suggestions that the information which was available was in the media, and if this is correct, that would appear to be the case.

CHAIRMAN: I note that.

MR. COUGHLAN: As I have indicated, Sir, the information supplied by Mr. O'Connell is helpful to assist the Tribunal in carrying out its inquiries in relation to these matters.

Now I wish to return to the activities of the GSM Project Group in the early days of the month of October 1995.

It should be recalled that the first draft evaluation report, which was dated 3rd October 1995, was perhaps received in the Department on the 4th October, 1995, and this was the first meeting to consider it.

The 12th meeting of the GSM Project Group took place on the 9th October 1995. This is the first occasion that members of the Project Group other than Fintan Towey and Martin Brennan had access to the draft report of the 3rd October, 1995. From information supplied to the Tribunal, it would appear that Mr. Sean Fitzgerald, Assistant Secretary, had considered the report, he having been given a copy of it by the Chairman, Mr. Martin Brennan.

Mr. Fitzgerald, who was the Assistant Secretary of the Department at the time, was not a member of the

Project Group. Mr. Fitzgerald has informed the Tribunal that he returned the report to Mr. Martin Brennan and kept Mr. John Loughrey, the Secretary, informed of the situation but that he had no communications with the Minister.

A formal minute of the meeting records:

"12th meeting of the GSM Project Group, report of meeting on Monday 9th October, 1995.

"Attendance: Mr. Martin Brennan, Mr. Fintan Towey, Ms. Margaret O'Keefe, Mr. Billy Riordan, Mr. Michael Andersen, Mr. J Bruel, Mr. Sean McMahon, Mr. Ed O'Callaghan, Mr. John McQuaid, Mr. Aidan Ryan, Mr. Donal Buggy.

"Opening.

"The Chairman opened the meeting by stressing the confidentiality of the evaluation report and the discussions re same. He also informed the group that the Minister had been informed of the progress of the evaluation procedure and of the ranking of the top two applicants. The Minister is disposed towards announcing the result of the competition quickly after the finalisation of the evaluation report.

"Discussion of the evaluation report:

"The draft evaluation report put forward by AMI was examined in detail. A range of suggestions in relation to the manner of presentation of the results were put forward by the group, and AMI undertook to

incorporate these in the second draft. The agreed amendments included:

- Inclusion in the body of the main report of the proposed appendix in relation to the evaluation methodology
- An expansion generally of the justification for the award of marks to the various indicators
- Revision of the financial conformance appendix to a more explanatory format.
- Inclusion of an executive summary and an annex explaining some of the terminology.
- Elaboration of the reasons as to why the quantitative analysis could not be presented as an output of the evaluation process.

"AMI also indicated that the supplementary analysis in relation to interconnection and tariffs which had yet to be provided did not suggest that it would be necessary to revise the award of marks.

"Future work programme:

"It was agreed that AMI would provide the first draft of parts of the report which had not been included in the first draft of the overall report for comments before submission of a complete second draft the following week."

The Tribunal has been furnished with a copy of this formal minute which was circulated to Mr. Sean McMahan, a member of the Project Group, on which he

wrote a note to his colleague, Mr. Ed O'Callaghan,
sometime later.

I should state that it appears that this note was
appended to or placed on the draft minute furnished
to Mr. Sean McMahon perhaps in November 1995. His
note reads:

"It's probably too late to change this record but our
intervention at subsequent meetings made clear that:

"1. We did not subscribe to unanimity at this
meeting.

"2. We expected the qualitative assessment to
continue from that time.

"3. The report, while it had probably highlighted the
best two candidates, had a long way to go."

The Tribunal has been furnished with the handwritten
notes made by Ms. Margaret O'Keefe, who signed the
official minute of the meeting, at the meeting of the
Project Group on the 9th October, 1995.

The handwritten notes appear to differ from the typed
minutes in a number of respects. Some of these
differences appear to be significant and I'll come to
read her note in a moment.

1. Ms. O'Keefe's manuscript note records that the
Minister notes the shape of the evaluation and the
order of the top two and that the Minister for State
does not know. The typed minute records that the
Minister had been informed of the progress of the

evaluation procedure and the ranking of the top two applicants.

2. It is recorded in Ms. O'Keefe's manuscript notes that 'the Minister does not want the report to undermine itself, e.g. either a project is bankable', whereas there is no reference to this in the typed minute.

Now, I should state that the handwritten note of Ms. O'Keefe was typed up, and both the handwritten note and this typed version were given to her, and she has approved these as being the verbatim note of the meeting of the Project Group on the 9th October 1995.

It was approved by Margaret O'Keefe on the 1st February, 2002.

"Confidentiality.

"Minister knows.

Shape of evaluation and order of top two.

Minister of State does not know.

Quick announcement.

Agenda:

Draft report

Future work programme: A. Producing draft number two.

"Good working draft produced on time.

Annex should be part of the main report.

Object if to get feedback on content style of report, content accuracy.

"Report too brisk. Critically needs more elaboration and reasoning more significantly. Few lay readers but they will be critical terminology needs to be explained.

"MA brought appendix on supply on tariffs and interconnections.

Description of methodology still missing".

CHAIRMAN: It's presumably Mr. Andersen.

MR. COUGHLAN: Mr. Michael Andersen.

"Different groups examined dealing with commissions etc.

Relevance of annex dealing with conflict.

Full discussion needed on annex 10.

Minister does not want the report to undermine itself e.g. either a project is bankable.

Should be balanced arguments."

A reasonable interpretation of Ms. O'Keefe's notes, both manuscript and typed, is that the Minister appears to have had a certain knowledge and understanding of the details of the evaluation and that he might have in fact contributed to the overall approach to be adopted in finalising the evaluation, in particular with regard to financial contribution.

It would be for the Tribunal to inquire to what extent the Minister was made aware of the details of the ranking, of the precise state of the evaluation and also of the extent to which he contributed to the

evaluation or the progress of the evaluation at that point.

Ms. O'Keefe's manuscript note records that there were lengthy discussions about the quantitative evaluation which do not appear to be reflected in the typed minute of the meeting of the 9th October, 1995. It appears that the focus of these discussions related to the inadequacies of the quantitative data. The manuscript note continues that 50% of the weighting was lost due to scoring and could not be used, and quantitative analysis had been undermined.

That is at page 4 of the verbatim version of the manuscript under the heading "Quantitative". "Ranking is probably different now, 50% of the weighting is lost due to the scoring that can not be used and quantitative analysis has been undermined. It is not necessary to publish. The original".

It appears further (although not recorded in the typed minute) that a decision was made that it was not necessary to publish the quantitative data and that this would be explained in the methodology section of the evaluation report. This may have represented a significant departure from the evaluation methodology fixed prior to the closing date of the competition.

I have already drawn attention to the fact that the evaluation report formerly asserts that the quantitative evaluation would be incorporated in one

of the appendices. This, as I have already mentioned, was not done.

Under the heading "Financial Risks" on the 6th page of the handwritten notes, it is recorded that there was a discussion about financial risks. The discussions focused on A3 and A5. I should perhaps state here that A3 was the Persona consortium and A5 was the Esat Digifone consortium.

The note reads:

"Financial risks.

"No doubt that A5 will survive.

"A3 have agreement that if one shareholder does not come up the others will pay.

"Put in requirements in licence conditions.

"If things don't go as planned a lot more expenditure may be required.

"Problem not unique to anyone.

"More balance statement. The project will survive.

No one consortium is weak in itself. Each member of the consortium brings different elements."

It appears from this note that particular concern appears to have been expressed regarding the need for more capital expenditure in the event of problems encountered in the operation of the business. It was noted that "A5 will survive". It was also noted that

"Project will survive". It may be that this reflects the earlier note attributed to the Minister that the

project was bankable, and that this in some way made up for financial risks associated with some of the consortia.

The draft report of the 3rd October, 1995, was the first of two draft reports. The second was dated 18th October, 1995. The final report, or the final version, as it is called, is dated 25th October, 1995.

In due course, I will refer to the 18th October version of the report and the 25th October version. I will also be referring to the extent to which the issues concerning financial risks highlighted at the meeting on the 9th October 1995 were canvassed by members of the project team at other times between that date and the generation of the final version report.

In due course also, I will have occasion to refer once again to the extent to which some of the ideas canvassed at the meeting of the 9th October, 1995, may be reflected in changes made on the 18th October 1995 and the 25th October 1995 versions of the report.

On the 10th October, 1995, Telenor instructed the firm of solicitors Matheson Ormsby Prentice to act on their behalf. Mr. Per Simonsen had a meeting with Mr. Arthur Moran of that office. Mr. Moran's attendance on Mr. Simonsen notes:

"Per Simonsen

Esat Digifone Limited.

Bid to Department in writing and verbal proposal.

"Communicorp", then on the right: "Michael Walsh,
Dermot Desmond, IIU Limited underwrite the Irish part
of the bid.

Political contacts.

Under that: "Motorola less jobs.

Shareholders' Agreement Telenor drafted: William
Fry Gerry Halpenny.

Communicorp 37.5%

Telenor 37.5%

IIU, new party 25% plus underwrite Communicorp (i.e. a
dual role)

IIU letter to Department and understanding between

Telenor IIU

complete and negotiate agreements:

an award of contract would talk to three firms of
lawyers.

Schedule.

Finalise agreement within two weeks.

Decision: End November 1995 in fact decision 2/3
weeks.

Andersen Consulting, Denmark, EU procurement rules
observe

€15 million and I can't make out the rest of it for
the moment.

Now, this particular attendance of Mr. Moran's notes a
number of matters, but the matter I wish to make

reference to at present is that his attendance on Mr.

Simonsen notes that "decision end November 1995," that of course was in the public domain. And then it continues "In fact decision 2/3 weeks."

The reason why it was in the public domain that the decision was to be at the end of November 1995 is because of the EU intervention to which I have already referred, which caused the whole competition to be put back by one month. And that was announced publicly.

It will be recalled that last week in this Opening Statement I drew attention to a note of Mr. Sean McMahon, when he attended a meeting around the 3rd October, 1995, and he noted under the heading "GSM: Minister wants to accelerate process."

Mr. Lowry has informed the Tribunal that he had no discussion with any official which could have caused them to believe that he wished to accelerate the process.

The Tribunal will wish to inquire into the source of the information conveyed by Mr. Simonsen to Mr. Moran as to whether that information was a true reflection of either the Minister's intent or the view of the project team and whether that information was acquired as a result of some breaching of the seal of confidence surrounding the operations of the project team.

On the 12th October, 1995, Mr. Knut Digerud on behalf

of Telenor International wrote to Mr. Michael Walsh as follows:

"Mr. Michael Walsh

"International Investments and Underwriters Limited

"IFSC House, Customshouse Quay, Dublin 1.

"Dear Mr. Walsh,

"Although we have not yet had the chance to meet, let me take this opportunity to welcome you aboard as a stakeholder in Esat Digifone Limited. We appreciate your underwriting of the Irish side of the bid, and sincerely hope that this step will remove any doubt within the Ministry about our consortium's financial capabilities and commitments in the face of the second GSM licence.

"A matter of concern for Telenor is, however, the side letter signed by Denis O'Brien and yourself on the September 29th, especially clause 2 assigning the arrangement agreement to Bottin (International) Investments Limited. In order to determine or follow-up on this issue, we urgently need the following information on Bottin:

"Date of foundation.

"Owners.

"Board of directors

"Balance sheet as of the 30/6/1995

"Annual reports for the last three years.

"Please forward such information to Mr. Knut Haga and

Mr. Per Simonsen. You may also contact our legal representatives in Dublin, Mr. Michael Irvine and Mr. Arthur Moran of Matheson Ormsby and Prentice.

"As we intend to finalise the Shareholders' Agreement and Articles of Association within the next few weeks, I will contact you within short to arrange for the necessary meetings. I look forward to meeting you soon."

On the 12th October 1995, Mr. Arthur Moran of Matheson Ormsby Prentice sent a fax to Mr. Per Simonsen of Telenor International which contained the following message.

Message re Esat Digifone Limited (the "Company")

"Further to our meeting on 10 October, I confirm that I have read the copy Joint Venture Agreement, the Arrangement Agreement, correspondence between IIU and the Company and the Department of Transport, Energy and Communications, the draft Articles of Association of the Company and the draft Shareholders' Agreement between Telenor and Communicorp.

"I would make the following points:

"1. The financing of the Company has changed significantly since the Joint Venture Agreement was entered into due to Communicorp's requirement to seek outside underwriting of its obligation.

"2. The Arrangement Agreement effectively commits the company in a number of ways in its dealings with IIU

and the shareholders introduced by IIU. For example, the Company accepts at clause 5(f) that partly paid shares may be issued to Communicorp. It would appear preferable that the company issue fully paid shares and that Communicorp borrow in order to be able to pay the subscription.

"3. I would also draw attention to the provision of clause 5(e)(1) and (2) which should more properly be in the Shareholders' Agreement.

"4. The Arrangement Agreement refers to a draft Shareholders' Agreement supplied to the Arranger by William Fry Solicitors on 21 September 1995. Is that the same as the draft Shareholders' Agreement which you have left with us? If not, I would like to see the draft referred to.

"5. In relation to the side letter, I have checked the Companies Registration Office and find that no such company as Bottin (International) Investments Limited has been registered in Ireland. I cannot therefore comment on whether it is a wholly-owned subsidiary of IIU or otherwise.

"I have considered your draft Shareholders' Agreement and would make the following general comments. I do not propose at present to deal in detail with the draft agreement.

"1. Clearly IIU or Bottin will have to be added as a party to the Agreement and certain of the provisions

of the Arrangement Agreement reflected in the Agreement.

"2. Generally, I think that the draft will need considerable work to remove some provisions which apply by operation of law and are therefore not required to be set out in the Agreement, for example, clauses 7.3, 7.4 and 7.5. I consider the Agreement should focus more on defining the restricted transactions, the actions which may be taken at shareholders' meetings, and defining the requirement majorities for certain sorts of decisions defining the power of the board which are all touched upon in the draft but not in as great detail as I think necessary, particularly now that there are more than two shareholders.

Please let me know how you wish to proceed with the drafting of the Shareholders' Agreement assuming that the draft which I have seen is the only draft in existence.

"I have considered the contents of the side letter dated 29th September, 1995, which seems to be clear evidence of a breach of good faith with the Department. However, because it is not strictly legal, I do not think that I can object to it on legal grounds but rather on good faith grounds, which I appreciate does not assist you in your discussions with Communicorp/IIU.

"I will be glad to hear from you as to how you wish me to proceed and whether in particular you wish me to draft the Shareholders' Agreement."

It would appear that the concern expressed by Mr. Moran about the side letter dated 29th September 1995 relates to the fact that the true nature of the relationship between IIU Limited and Esat Digifone Limited had not been disclosed to the Department in the letter of the 29th September. It would appear that Mr. Moran and Telenor may have been unaware on the 12th October 1995 that the Department had returned the IIU letter not to Mr. Michael Walsh but to Mr. Denis O'Brien.

On the 12th October, 1995 Mr. Knut Digerud wrote to Mr. Denis O'Brien and indicated that Telenor believed that it would be a good idea to finalise the Shareholders' Agreement and Articles of Association before the decision in the Ministry was announced. Mr. Digerud informed Mr. O'Brien that they were prepared to do this either late that week or early November.

On the 13th October 1995, Mr. Denis O'Brien sent a fax to Mr. Gerry Halpenny of William Frys Solicitors enclosing the letter of the 12th October which he had received from Telenor, and he indicated that he would contact Gerry Halpenny about the letter that day.

Around this time there is an undated compliment slip

from Denis O'Brien to Michael Walsh attaching a copy of Knut Haga's letter of the 6th October and indicating that Denis O'Brien would give Michael Walsh a buzz in relation to the letter.

That letter referred to by Mr. Denis O'Brien is a letter to Mr. O'Brien seeking particulars about Bottin International.

On the 18th October 1995, Ms. Maev Nic Lochlainn sent a fax to Mr. Michael Andersen with the list of names for colour copies of the report. The names listed were:

Minister Michael Lowry, John Loughrey, Sean Fitzgerald, Colm McCrea (programme manager), Martin Brennan, Sean MacMahon, John McQuaid and Jimmy McMeel.

Mr. McMeel is from the Department of Finance.

The final draft version of this report of the 18th October 1995 was circulated to members of the GSM Project Group, and, it would appear, the Secretary, on the 19th October, 1995.

Now, this report under the heading "Sensitivities, Risks and Credibility Factors" stated at page 44 of this draft:

"5. Sensitivities, risks and credibility factors:

"Various analyses and investigations have been conducted in order to deal with the sensitivities, risks and credibility of the applications and the business cases behind the applications.

"In general, the credibility of A5 has been assessed as extremely high as A5 is the applicant with the highest degree of documentation behind the business case and with much information evidenced. In addition, it can be stated that A5 does not have abnormal sensitivities in its business case. Taking all the sensitivities defined in the tender specifications into account, A5 still earns a positive IRR (Internal Rate of Return). A5's maybe weakest point is not related to the application as such, but to the applicant behind the application, or more specifically to one of the consortium members, namely Communicorp, which has a negative equity. Should the consortium meet with temporary or permanent opposition, this could, in a worst case situation, turn out to be critical, in particular concerning matters related to solvency.

"Although being assessed as the most credible application, it is suggested to demand an increased degree of liability and self-financing from the backers, if the Minister intends to enter licence negotiations with A5.

"The A3 application has also been found highly credible as well, although not reaching the same degree of documentation and evidencing as A5. In addition, the supplementary investigations concerning tariffs indicate that there might be a lack of

consistency between the marketing and the financial plans, as the projected usage revenue per call minute exceeds the normal tariffs by far and not substantiated solely by the non-time true metering principles suggested by A3. For this reason, the difference in the level of tariff between A3 and A5 is not substantiated by the projected revenues streams, where A5 projects a lower revenue per call minute than A3.

"In addition, A3 has a similar type of problem as A5, namely the extremely small equity of Sigma Wireless. It is questionable, whether Sigma Wireless can bridge the gap between the weak degree of solvency and the general liability as a comparatively big shareholder in a business that requires "patient money" and a high exposure.

"Furthermore, A3 has expressed so strong reservations concerning the draft licence, which was circulated as part of the tender documents, that the Minister will formally have an unfavourable starting point.

However, should the Minister wish to enter into licence negotiations with A3, both these reservations and the Sigma Wireless issues should be solved satisfactorily, as these are necessary, but not sufficient conditions in order to conclude the licence negotiations.

"Finally, it has not been taken into consideration at

all during the award of marks in the evaluation that Motorola and Sigma have interests with and links to the incumbent operator, whereby it could, in theory, be questioned, whether some of the consortium members of A3 could be exposed to conflicts of interest, thereby weakening the competitive edge of the GSM 2 operator (or the incumbent). Andersen Management International clearly views this as a risk. This risk should be dealt with at the political level, as has been the case in other European mobile tenderers, most recently during DCS 1800 tender in France where the French Government abstained from the nomination of a consortium with conflicts of interest between the incumbent and the potential status as a second mobile licencee.

"A1 is assessed to be a credible application, although not reaching the height of A3 and in particular, A5.

No dramatic sensitivities related to the IRR earned have been identified. Like A3, but less gravely, A1 might have a lack of consistency between the tariffs offered and the projected revenues."

A, I should state here of course is Irish Mobicall.

"A risk factor may be found in the commitment from one of the backers and in the composition of the consortium as a whole. Notwithstanding the fact that Deutsche Telecom throughout the A1 application from time to time was presented as a consortium member,

Detecon is the true consortium member. Detecon is only 30% owned by Deutsche Telecom, the remaining part being owned by 3 German banks. Deutsche Telecom has only stated intentions, no commitments to back Detecon and A3. In addition, having three similar types of operators in the same consortium without presenting the decision-making rules in the application could pose a risk.

"If the Minister intends to enter licence negotiations with A1, these risk factors should be taken into consideration.

"A4 has delivered an application which is credible in a number of aspects." Perhaps I should not at this stage, Sir, deal with the other three applications because the ranking, as of this stage, appears to have been A5, A3 and A1, and it was the risks and sensitivities which were being identified at that time. And to put it in context, perhaps I should read from pages 41 and 42 of that draft evaluation report, the same draft."

Sorry; to put it in context, perhaps I should read from page 46 of this draft evaluation report.

"In total, the evaluators have arrived at the conclusion that the other aspects investigated under the dimensions credibility, sensitivities and risks widen the gap between the applicants and thus confirm the results of the award of marks present in chapter

4, in particular concerning the difference between on the one hand A1, A3 and A5, and on the other hand, A2, A4 and A6.

"The evaluators have also concluded that it has not been necessary to score the so-called "other aspects" contained as an option in the agreed evaluation model, since the mandatory part of the evaluation generates results that discriminate among the applications and since it has been concluded that the general credibility of the application is equal to the ranking of the applications. As such, it has been assumed that the risks identified can be handled satisfactorily during the licence negotiations."

Now, the draft of the 18th October, 1995, differed from the draft of the 3rd October, 1995, under the heading "Sensitivities, Risks and Credibility Factors" in that it is similar in most regards. It reads:

"Various analyses and investigations have been conducted in order to deal with the sensitivities, risks and credibility of the applications and the business cases behind the applications.

"In general, the credibility of A5 has been assessed as extremely high, as A5 is the application with the highest degree of documentation behind the business case and with much information evidenced. In addition, it can be stated that A5 does not have abnormal sensitivities in its business case. Taking

all the sensitivities defined in the tender specification into account, A5 still earns a positive IRR."

That is in the same form in the draft of the 18th October.

The draft of the 3rd October reads:

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

Whereas that paragraph in the draft of the 18th of October is to the fourth sentence, it reads in the draft of the 3rd October: "The weakest point concerning A5 is not related to its application as such."

And reads, in the draft of the 18th October: "A5's maybe weakest point is not related to the application as such". So the word "maybe" has been inserted.

Now, I want to draw attention to this because when I come to the final version of the report, this changed again. But at this stage, I just want to draw attention to the draft of the 3rd and the draft of the 18th and this particular change. And it appears that

this change may have been intended as a reflection of the discussions of the Project Group at the meeting on the 9th October, 1995, where reference was made to the views of the Minister. In other words, that the report should not argue against itself and either the project is bankable.

I'll be getting into some more fairly complicated stuff about this, Sir, and it might be appropriate just to rise at this time.

CHAIRMAN: Very good. Twenty-five past two.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

MR. COUGHLAN: I have been referring to the drafts of the evaluation report dated 3rd October, 1995, and the 18th October, 1995, before lunch, Sir. The Tribunal has been furnished with a copy of the draft report of the 18th October, 1995, which was annotated by Billy Riordan with reference to A5. Mr. Billy Riordan was a member of the Project Group and was attached to the Department of Finance at the time.

The handwritten note on the margin of the draft evaluation report of the 18th October 1995 with reference to A5 reads as follows:

"How does this stand up against a B for financial strength? Change. Bankable".

The reference to "bankable" appears to reflect the comment attributed to the Minister at the meeting of

the Project Group on the 9th October, 1995.

Now, the Project Group had its 13th meeting on the 23rd October 1995, and the minute of the meeting is a one-page minute, and it records as having attended Mr. Martin Brennan, Mr. Fintan Towey, Ms. Maev Nic Lochlainn, Ms. Margaret O'Keefe, Mr. Sean MacMahon, Mr. Ed O'Callaghan, Mr. Donal Buggy, Mr. Jimmy McMeel, Mr. Billy Riordan, Mr. Aidan Ryan, Mr. John McQuaid, Mr. Michael Andersen.

Then there is a corrigendum: "Mr. Billy Riordan noted, for the record, that Mr. Jon Bruel of AMI had stated at the previous meeting that he was sufficiently satisfied that the financial tables, as evaluated, were adequate and true. Reference to this statement had been omitted from the minutes of the previous meeting in error."

Then it records:

"Discussion of draft report.

"The meeting then proceeded with a discussion of the draft AMI evaluation report. Views from Regulatory, Technology and D/Finance all indicated that, while there was general satisfaction with the detailed analysis and the final result, the presentation in the draft report of that analysis was not acceptable.

"Hence, the discussion focused on the detail of the report. A re-ordering of certain sections of the report, together with some textual and typographical

amendments, was agreed.

"Future work plan.

"Amendments to certain sections remained to be finally agreed; these were to be agreed within the Irish members of the Group on the following day, and Mr. Brennan was then to be deputed to come to final agreement with AMI with respect to the final text of the report."

On the morning of the 23rd October, 1995, or perhaps sometime later in the day during an interval of the meeting of the GSM Project Group, Mr. Sean MacMahon prepared a document entitled "Telecommunications and Radio (Regulatory) Division, GSM.

Views of the Regulatory Division, 23rd October 1995."

"On the basis of our readings of the application, on our hearing of the presentations by the applicants, and on the logic of the AMI report, insofar as we follow it:

"I. We agree with the finding that A3 and A5 are front runners;

"II. We also agree that A3 and A5 are very close;

"III. By reference to the report alone, we are unable to come to the conclusion as to which (A3 or A5) is in fact, ahead."

Then there is a crossed-out portion of the note.

"V. We feel strongly that the qualitative assessment

of the top two applicants should now be revisited."

"To be signed if the PTGSM insist on finalisation of existing draft." And it's signed by Mr. McMahon.

It's addressed to Mr. O' Callaghan of his office.

This document was placed on the files of the Regulatory Division of the Department, but was not circulated, and it appears to suggest some element of unease in the Department, at least on the Regulatory Division side.

The Tribunal has been furnished with handwritten notes made by Mr. Sean MacMahon of the meeting of the GSM Project Group on the 23rd October, 1995. The notes read:

"23/10/95 GSM group.

"MB" that appears to be a reference to Mr. Martin Brennan "notes that we have only just seen the final draft report

- That Minister wants a result today
- That he hasn't been promised one.

M. Andersen

- Admits that award of marks could be different
- Discussion quite clear that people here are still at odds about quantitative versus qualitative evaluation weighting, ranking, grading, points etc.

- Me that is apparently a reference to Mr. McMahon himself "we" (that's the regulatory division)

"can't justify the conclusion by reference to the draft that we have seen (i.e. last one). It's too close and report is not clear enough."

Then there is a reference to portions of the report.

"4.1, more text needed to explain "basis of Table 1" agreed. I made point that bottom lines of Tables doesn't explain the weighting, etc.

"3.2, I raise the EU procurement point. Much discussion of Appendix II. I am not happy that we were using this in a relevant way.

much discussion about my point as to how to explain result in?

- Agreed that text will have to explain it

- Note that it was conceded by MB" (a reference to Martin Brennan) "and MA" (a reference to Michael Andersen) "that different types of weightings were used, sometimes none, sometimes "feel" to arrive at bottom line.

- Much discussion about bottom of summary "4 different methods" my point.

We didn't use 4 different methods. Only one. The grading (i.e. AMI in Copenhagen) simply regrouped.

Me, Martin Brennan, Sean Fitzgerald, John McQuaid went to see secretary at 3.30.

Agreed that report not clear enough to support decision." That seems to be a reference to that meeting at 3.30 and then "QED!!"

The top doesn't appear to be relevant. It's "?1?"

Reasons, 2 End V Tel, 3 enforcement of?

Then it reads:

"On our return:

Agreed: Final decision should not be on table 16

this resulting from both our meet with secretary
and, independently, by group in our absence.

It should be table 17 plus 18. They can't agree on
whether same weights went in. It seems MB dreamt
them up during qualitative evaluation."

From Mr. McMahon's note and what Mr. McMahon has
informed the Tribunal, it appears that he (Mr.
McMahon), Mr. Martin Brennan, Mr. John McQuaid and Mr.
Sean Fitzgerald, (the Assistant Secretary), went to
see the Secretary, Mr. John Loughrey, with a view to
ascertaining whether more time could be obtained to
examine the draft report dated 18th October, 1995.

Mr. McMahon has informed the Tribunal that as a result
of his discussion with the Secretary, he understood
that further time would be allowed for consideration
of the matters under discussion at the Project Group.
He understood that this time would be in the region of
one week. While apart from Mr. McMahon, other members
of the Project Group recollect Mr. McMahon going to
see Mr. Loughrey, the Tribunal has been informed by
Mr. Loughrey, Mr. Brennan, and Mr. McQuaid that they
have no recollection of this event.

The Tribunal has been informed that some members of the Project Group worked on the draft report on the evening of the 23rd October, 1995, and on the afternoon and evening of the 24th October, 1995. The Tribunal has seen no record of such work.

On the 24th October 1995, Mr. Jimmy McMeel sent the following note to his Minister, the Minister for Finance.

"Minister from J. McMeel

"Subject: Competition for the award of the second mobile telephone licence.

"David Doyle" that is another official in the Department of Finance "mentioned to you last week that the result of this was imminent. MTEC" that's a reference to the Minister for Transport, Energy and Communications, Mr. Michael Lowry "had intended to bring the matter to Government today but will not do now do so. The reason is that the project team of which I am a member has not finalised its work with respect to the consultant's report.

"J McMeel, 24/10."

A briefing note for the Minister's recommendation regarding the best applicant in the GSM competition was prepared.

It's a briefing note for the Minister. It's undated.

It's a recommendation regarding the best application in the GSM competition.

"Evaluation of the applications.

- Initial evaluation shows that A5 and A3 stood head and shoulders above the rest.

- Detailed examination has shown that A5 is clearly the best application.

"Evaluation of the top two applications in light of paragraph 19 of the tender document.

"1. Credibility of the business plan and the applicant's approach to market development.

A5 is better because it

- Has detailed well advanced plans for brand development and market expansion

- Is consistent as between projected tariffs/usage levels and revenue streams

- Demonstrates high degree of preparedness.

"This lends considerable credibility to its business plan.

"For its part, A3 is

- Less ambitious for growing the market

- Its distribution planning is weaker

- Its marketing budget is far smaller

- Does not display full consistency between projected tariffs/usage and revenue

- Seems generally less "ready to go"

"2. Quality and viability of technical approach

proposed and its compliance with the requirements set out herein.

- Critical issue is radio signal availability and strength, so technical approach is evaluated by comparing radio network architecture and network capacity.

Technical experts agree A5 is better because it has

- A more attractive radio network design
- More antennae sites and more cells
- It surpasses A3 in respect of the capacity of its proposed network.

"3. The approach to tariffing proposed by the applicants, which must be competitive.

- Both A5 and A3 offer tariffs which are highly competitive when compared to Eircell.
- A3 has lower tariffs than A5 for its domestic calls. i.e., A3's air time charge for consumers is 9.9p per minute, 20.8% cheaper than A5's charge of 12.5p.

"However, A5 has

- Cheaper international tariffs
- Offers volume-related discounts of 5 to 15 percent
- plans metering and billing methods which could cause a difference of 40% on the price of an effective call minute.
- Actual A5 customer bills might well turn out to be broadly equivalent to A3's, or at any rate, only a fraction higher.
- Therefore, while A3 has lower domestic tariffs at

launch, A5 is only marginally inferior in respect of its overall approach to competitive tariffing.

"4. The amount in excess of minimal licence fee which the applicant is prepared to pay for the right to the licence.

- All applicants offered the maximum fee of £15 million.

- Consequently this criterion has become irrelevant in the evaluation.

"5. Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded.

- Both A5 and A3 fulfil the minimum requirement of serving more than 90% of the population within four years.

- A5 is better because it

- Offers a remarkably high coverage at launch (80%)

- This will be significant in building up customer confidence and growing the market.

- A3 plans to launch with only 40% coverage, which is poor in terms of providing an acceptable level of service.

"6. The extent of the applicant's international roaming plan.

- Impossible for an organisation with no GSM licence to enter negotiations to establish roaming agreements.

- Therefore none of the applications contained hard facts on this criterion.

- It was agreed to focus on

- The understanding of roaming issues displayed

- The commitment expressed to developing roaming agreements within Europe.

- Both A5 and A3 proved to be equally satisfactory in both these respects.

"7. The performance guarantees proposed by the applicant.

- A5 is better because it

- Has promised milestones by which its performance can be measured

- These have been substantiated with specific penalty clauses, should A5 not deliver on its promises on time.

- A3, for its part, has only suggested a number of 'technical's action plans in cases of proven non-compliance with service level commitments.

"8. Efficiency of proposed use of frequency spectrum resources:

- Both A5 and A3 intend to request the same amount of frequency.

- However, expert examination has shown that A5 displays much better economy since it has conducted effective traffic and network planning in order to avoid wasteful use of spectrum

- Therefore, A5 is better than A3 in this regard.

"Conclusion:

- Disregarding the criteria where both scored the same, A5 is superior to A3 in five out of six cases, including in respect of two most important criteria, i.e. market development/credibility of business plan and technical approach.

- Where A3 is judged to be better than A5 as regards tariffing, it is noted that A5 scores a very close second.

- Hence it is clear that evaluating in accordance with the criteria set out in paragraph 19 of the tender document, A5 has the best application.

"Recommendation:

"The GSM Project Group is therefore unanimous in its recommendation that the Minister should enter into licence negotiations with the A5 consortium.

"Should negotiations with A5 fail, the Minister should enter licence negotiations with the applicant ranked second, namely A3."

Nobody in the Department can assist the Tribunal as to when this briefing note was prepared and by whom it was prepared. This briefing note makes no reference to sensitivities, risks and credibility factors identified in the draft evaluation report dated 3rd October, 1995, or the draft evaluation report dated 18th October, 1995. Significantly, this briefing note

does not refer to the new approach taken to sensitivities, risks and credibility factors in the final version report which is dated 25th October, 1995, but which does not appear to have arrived in the Department until the 26th October, 1995. I'll be referring to that in a moment.

Now, what's described as the final version report dated 25th October 1995 under the heading

"Sensitivities, risks and credibility factors" reads:

"Various analyses and investigations have been conducted in order to deal with the sensitivities, risk and credibility of the applications and the business cases behind the applications.

"A critical factor in any consideration of the credibility or risk analysis of the applications is the capability of the principals to finance the project, including ability to meet any shortfall in the funding requirements due, for example, to unforeseen capital expenditure. In general terms, the applicants have provided comfort that appropriate funding arrangements are in place. The evaluators have concluded, having regard to the level of interest in the Irish competition for the GSM licence and the high profitability of mobile communications generally throughout Europe, that the project is fundamentally robust and, after a licence has been awarded, an attractive opportunity for corporate debt financiers.

The evaluators have therefore formed the view that, subject to at least one of the principals having sufficient financial strength at this stage to ensure completion of the project, a potential financial weakness of one consortia member should not have a negative impact on the making of applications. It is important, nevertheless, to draw attention to the need to deal with this factor where relevant in the context of licence negotiations. These aspects are the subject of further elaboration in appendices 9 and 10.

"The assessment of credibility and risks has also taken account of:

- Management proposals
- Preparations in relation to development of the distribution channel
- Preparations in relation to site acquisition and equipment procurement
- Consistency of penetration, usage etc., with financial figures.

"In general terms, this assessment has sought to identify factors which may have the effect of undermining the projected development of the business plans proposed by the applicants.

"In general, the credibility of A5 has been assessed as extremely high as A5 is the applicant with the highest degree of documentation behind the business case and with much information evidenced. In

addition, it can be stated that A5 does not have abnormal sensitivities in its business case. Taking all the sensitivities defined in the tender specifications into account, A5 still earns a positive IRR. A5's maybe weakest point is not related to the application as such, but to the applicant behind the application, or more specifically to one of the consortium members, namely Communicorp, which has a negative equity. Should the consortium meet about with temporary or permanent opposition, this could in a worse case situation turn out to be critical, in particular, concerning matters related to solvency.

"Although being assessed as the most credible application, it is suggested to demand an increased degree of liability and self-financing from the backers, if the Minister intends to enter licence negotiations with A5.

"The A3 application has also been found highly credible as well, although not reaching the same degree of documentation and evidencing as A5. "In the case of A3, the supplementary investigations concerning tariffs indicated that there might be a lack of consistency between the marketing and the financial plans, as the projected usage revenue per call minute exceeds the normal call tariffs by far and not substantiated solely by the non-time true metering principles. For this reason, the difference in the

level of tariff between A3 and A5 is not substantiated by the projected revenues streams, where A5 projects a lower revenue per call minute than A3.

"In addition A3 has a similar type problem as A5, namely the extremely small equity of Sigma Wireless.

It is questionable whether Sigma Wireless can bridge the gap between the weak degree of solvency and the general liability as a comparatively big shareholder in a business that requires 'patient money' and a high exposure.

"Furthermore A3 has expressed such strong reservations concerning the draft licence, which was circulated as part of the tender documents, that the Minister will formally have an unfavourable starting point.

However, should the Minister wish to enter into licence negotiations with A3, these reservations should be solved satisfactorily.

"Finally, it has not been taken into consideration at all during the award of marks in the evaluation that Motorola and Sigma have interests with and links to the incumbent operator, whereby it could, in theory, be questioned, whether some of the consortium members of A3 could be exposed to conflicts of interests, thereby weakening the competitive edge of the GSM II operator (or the incumbent). Andersen Management International clearly views this as a risk. This risk should be dealt with at the political level, as has

been the case in other European mobile tenders, most recently during the DCS 1800 tender in France, where the French Government abstained from the nomination of a consortium with conflicts of interest between the incumbent and the potential status as a second mobile licencee.

A1 is assessed to be a credible application, although not reaching the heights of A3 and in particular A5. No dramatic sensitivities related to the IRR earned have been identified. Like A3, but less gravely, A1 might have a lack of consistency between the tariffs offered and the projected revenues.

"A risk factor may be found in the commitment from one of the backers and in the composition of the consortium as a whole. Notwithstanding the fact that Deutsche Telecom throughout the A1 application from time to time is presented as Consortium member, Detecon is the true consortium member. Detecon is only 30 percent owned by Deutsche Telecom, the remaining part being owned by three German banks. Deutsche Telecom has only stated intentions, no commitments to back Detecon and A3. In addition, having three similar types of operators in the same consortium, without presenting the decision-making rules in the applications, could pose a risk.

"If the Minister intends to enter licence negotiations with A1, these risk factors should be taken into

consideration."

Now, if I go to page 46 and the second-last paragraph:

"The evaluators have also concluded that it has not been necessary to score the so-called "other aspect" now, sensitivities, risks and credibility come in under the heading "Other Aspects" "contained as an option in the agreed evaluation model, since the mandatory part of the evaluation generates results that discriminate among the applications, and since it has been concluded that the general credibility of the applications is equal to the ranking of the applications. As such, it has been assumed that the risks identified can be handled satisfactorily during the licence negotiations."

Now, I first of all want to deal with the content of this, which has been furnished to the Tribunal as the final version evaluation report. It appears that the content of the final version evaluation report under the heading "Sensitivities, Risks and Credibility Factors" reflects the decision which took place at the meeting of the Project Group on the 9th October, 1995, and in particular appears to reflect the comment attributed to the Minister, that he did not want the report to undermine itself, e.g. either a project is bankable.

It also appears to reflect other work by individual members of the project team in which the issues raised

at that meeting and subsequently referred to in relation to the review of the 18th October version of the report were canvassed: In particular, it appears to reflect a draft of the additional material prepared, as far as the Tribunal can ascertain, by Mr. Fintan Towey. The Tribunal has been unable to identify any record of any formal meeting of the Project Group or any other contemporaneous record indicating that the Project Group arrived at a unanimous consensus which agreed with the content of the final version of the evaluation report, in particular, insofar as it related to sensitivities, risks and credibility factors.

What the documents, including the various drafts of the evaluation report, appear to show is that at the conclusion of the process, it would appear that the evaluation team decided not to score what had been called "other aspects". This, as well as others, refers to the financial risks.

The Tribunal has not been able to discover any mention of this decision at any meeting of the Project Group.

However, such a decision having been made, it would appear that the final recommendation did not in fact involve the scoring of all the attributes of the competing applications. The final recommendation therefore, entailed on the one hand, it appears, a result based on the scoring of a number of the

attributes and, on the other, a narrative evaluation or narrative consideration of certain aspects, including the financial risks I have already referred to.

The Tribunal has been informed by Mr. Michael Andersen that he viewed the form of the final report in which the financial risks were canvassed in this way as constituting a recommendation coupled with a marker which he envisaged being brought to the attention of the Minister. In other words, his impression was that it was for the Minister to accept or reject the recommendation and that in doing so, he believed that the marker concerning financial risks would have to be taken into account.

He went so far as to inform the Tribunal that he anticipated that he himself would have been invited to meet the Minister to assist in the exploration of these issues concerning financial risks and the impact they might have on any final decision.

As I have indicated, Mr. Andersen used the word "marker". The Tribunal suggested, in the course of a meeting with him, that the word "qualification" was a more appropriate term. But Mr. Andersen did not agree.

Sometime after the announcement of the result of the evaluation process in October of 1995, Mr. Ed O'Callaghan, a member of the Project Group, prepared a

handwritten chronology of the events of the final days leading to the announcement of the winner of the competition. This note was not prepared for Department files but was a personal note made by Mr. O' Callaghan.

Now, this handwritten note of Mr. O' Callaghan has been reconstituted, and it might be easier if we refer to, at this stage, the typed version.

"Chronology of Ed O'Callaghan"

"(Being a handwritten memorandum prepared by Mr. O'Callaghan around the time of the award of the second GSM licence in October 1995).

"Chronology.

"1. I learned that AMI had forwarded a first draft of final report in week ending 16 October 1995."

That should in fact read "the 6th". "I asked Martin Brennan who they had recommended and he refused to tell me on the 6th October. The report was not concluded that week. Sean MacMahon told me the order of preference later that day.

"2. Did not see copy of the first draft report until 9th October 1995. I raised question of what happens if there is disagreement and Martin Brennan said that most of the project team had been involved in the assessment which led to the ranking. Martin Brennan said that the Minister already knew the winner.

"3. Remainder of week taken up entirely with [...??]

"4. 17 October 1995, informed by Fintan Towey that Minister wanted to (announce winner by end of October) go to Government the following Tuesday with the winner. Meeting of project team for 23/10 at 11:30.

"5. Went to Brussels 18 .10 returned 19.10. Read second draft report on 20.10 but no appendix (if this Appendix 2.)

"6. Informed at meeting of 23.10 that Minister wanted to go to Government 24.10 and get clearance for winner. Sean MacMahon and I said that we couldn't sign off on it as the report was deficient and had not been fully read. Martin Brennan, Sean MacMahon, John McQuaid met Secretary and a further week was agreed to consider report. Meeting went on until 7.30pm.

"7. 23.10, informed that Taoiseach had requested Secretary (?) To expedite the position with a view to clearance of Government the following day. I went through drafting changes with Martin Brennan 4-5. Meeting at 5:00pm. Left at 7.15-drafting changes still being discussed and to be faxed to Michael Andersen.

"8. Minister met Sean MacMahon and Martin Brennan and Secretary and Sean Fitzgerald. He was to meet Party Leaders re the winner. Heard at 4.45 that Minister was holding a press conference to announce winner. He did no signing off on report we had no final report. No consensus asked for. No vote

effectively no decision by project team."

On the 25th October, 1995, Mr. Fintan Towey faxed Mr. Michael Andersen with suggested textual amendments.

Mr. Michael Andersen replied to Mr. Towey's fax on the same day, and it is to be noted that it is stated on the second page of the fax sent by Mr. Andersen, that Andersen Management International had followed the instructions of the PTGSM as to how the results should be presented.

Now, perhaps I can deal with it from the return fax which Andersens sent to Mr. Towey regarding textual amendments.

On the second page, there is a handwritten note at the bottom, "Andersen Management International has followed the instructions PTGSM as to how the result would be presented."

Now, if I may turn to the textual amendment which had been faxed to Andersen Management International for inclusion in page 44, that portion of the report dealing with sensitivities, risks and credibility, that was faxed by Mr. Towey on the 25th October, 1995.

And it has page 44, insert new paragraph 2 and 3 along the following lines: "A critical factor in any consideration of the credibility or risk analysis of applications is the capability of the principals to finance the project including ability to meet any shortfall in the funding requirement due, for example,

to unforeseen capital expenditure. In general terms, the applicants have provided comfort that appropriate funding arrangements are in place. The evaluators have concluded, having regard to the level of interest in the Irish competition for the GSM licence and the high profitability of mobile telephony generally throughout Europe that the project is fundamentally robust and, after a licence has been granted, an attractive opportunity for corporate debt financiers. The evaluators have therefore formed the view that, subject to at least one of the principals having sufficient financial strength at this stage to ensure completion of the project, a potential financial weakness of one consortia member should not have been a negative impact on the ranking of applications. It is important nevertheless to draw attention to the need to deal with this factor where relevant in the context of licence negotiations. These aspects are the subject of further elaboration in appendices 9 and 10."

And then there is the inclusion of some other further amendments on page 44.

Now, it appears that the final version evaluation report was not received in the Department until the 26th October, 1995. On the 25th October, 1995, Mr. Jimmy McMeel sent a memorandum to the Minister for Finance, his Minister.

"Minister from J. McMeel. Secret.

Subject: Award of the second mobile telephony licence.

"It is understood that Ministers are meeting at 4pm today to discuss the above matter. The project team, which included the Danish consultants, Andersen Management International, who drew up the report, will be recommending to MTEC that he open licence negotiations with the top-rated applicant, which is the Esat Digifone consortium. I was a member of the team and endorsed the recommendation.

"The marks achieved by the six applicant consortia in the competition were as follows:

"Esat Digifone: 432

"Persona: 410

"Irish Mobicall: 362

"Irish Cellular Telephone: 353.

"And we are not interested in the rest.

"The composition of the various consortia are attached.

"All six applicants bid 15 million, so the selection methodology was based on the evaluation criteria (in descending order of priority) disclosed to the applicants:"

He then sets them out, and he sets out that the criteria were part of an Aide-Memoire agreed by a Cabinet Sub-Committee.

There is an asterisk after the word "It is understood"

and at the bottom it reads: "Per Martin Brennan in DTEC."

On the 25th October 1995, Mr. John Loughrey, Secretary in the Department of Transport, Energy and Communication, furnished a memorandum to Minister Lowry.

It reads:

"Minister,

"The process in selecting the most qualified application for exclusive negotiation with the intention of awarding a second licence for a mobile phone operation is now complete.

"I am fully satisfied that the process in selecting the potential holder of this licence was carried out in a scrupulously fair and professional way.

"The process was cleared with the EU Commission, and the independent Danish consultants acted at all times with expert professionalism and disinterest.

"The project steering group comprised senior officials of this Department and the Department of Finance. Their selection was unanimous.

"John Loughrey

"Secretary

"25/10/95."

There is no document in the Department files recording a meeting of the PTGSM which records a unanimous

selection, or any selection.

Now, the note of Mr. McMeel where he made reference to the fact that he believed, per Mr. Martin Brennan, that there was to be a meeting of Ministers to discuss the GSM project on that afternoon of the 25th October, 1995, may be a reference to a Cabinet committee which had been established to address issues concerning Aer Lingus, known as the Aer Lingus Committee, which took place on that afternoon in the office of the Taoiseach in Government Buildings, or it may be a reference to a meeting which was taking place in the office of the Taoiseach in Government Buildings, where budgetary matters were being considered. In any event, it appears that present at the meeting were the Taoiseach, Mr. John Bruton; the Tanaiste, Mr. Dick Spring; the Minister for Social Welfare, Mr. Prionsias de Rossa, and it appears the Minister for Finance, Mr. Ruari Quinn.

It appears that Michael Lowry communicated with the then Taoiseach to the effect that he needed to speak to the Tanaiste, the Minister for Social Welfare and the Taoiseach about the GSM licence. Mr. Bruton has furnished the Tribunal with a note which he believes he made when Mr. Lowry spoke to him. Mr. Bruton noted

I am reading the top portion from left to right, so the top portion seems to be some reference to some form of allocation of funds, and then the next note

reads I want to pause after it:

"Albert has promised it to Motorola." I want to state here again that the Tribunal has no reason to believe that Mr. Albert Reynolds behaved with any impropriety in respect of these matters.

"ML (Michael Lowry) stayed out of the process.

Leased line issues Telecom's accounts system can cost inadequately." And then on the right:

"M Communications" seems to be a reference to Minister for communications.

"It can't be given before it goes to Cabinet GSM.

"Quinn should not be involved.

"Loughlin is a participant in another one.

"It is a major decision.

"In Italy the Government did not accept the Government's report and there was a consequential challenge. European Commission took them to court because of this change of policy.

2 (of the) project team are D F (Department of Finance)."

It appears that Mr. Lowry then informed the then Taoiseach and the then other Ministers present that he had a result of the GSM competition and that he wished to announce it that afternoon prior to the Cabinet meeting the following day. This was agreed to by the Taoiseach and the other Ministers present.

It appears that the Taoiseach and the other Ministers

present at that meeting were not informed of the risks concerning Communicorp's funding of its equity participation, if the licence had been awarded, Sigma's difficulties, as were included in the considerations of the PTGSM or referred to in the evaluation report or any draft evaluation report.

On the evening of the 25th October, 1995, it was publicly announced that Esat Digifone consortium had won the GSM competition. On the 26th October, 1995, Michael Lowry brought an Aide-Memoire to Government which reads as follows:

"Decision sought.

"1. The Minister for Transport, Energy and Communications requests the Government to note:

- His intention to award a licence to Esat Digifone to provide and operate GSM mobile telephony within Ireland under the Postal and Telecommunications Services Act 1983 with the statutory consent of the Minister for Finance and agreement of the appropriate licence terms with Esat Digifone;
- That in the event of failure of the licence negotiation process, to seek agreement of licence terms with the second and subsequently, if necessary, the third ranked applications."

And then other matters which I need not deal with at this stage.

Now, under the heading at paragraph 2 of the

Aide-Memoire, "The award of the GSM mobile telephony licence," it is noted:

"Background

"2. A competitive application process for the award of a licence for GSM mobile telephony was launched in March 1995 following the approval of the Government for the competition parameters, including evaluation criteria designed to secure a licensee with a progressive approach to market development, a commitment to a high quality nationwide service and a innovative approach to tariffs. (Decision is then recorded). The detailed evaluation criteria in order of priority are listed in Appendix 1.

"3. The proposals to have an open-ended licence fee was abandoned following questions raised by the European Commission, and the fee was capped at $\text{€}15$ million. Eircell and Telecom Eireann Mobile Operator will also be obliged, in accordance with the agreement negotiated with the Commission, to pay a fee of $\text{€}10$ million.

"Receipt of applications and evaluation:

"4. Six applications were received on the closing date, 4 August 1995. Details of the principals of each of the six consortia are set out at Appendix 2.

"5. The evaluation was conducted by a project team led by the Department of Transport, Energy and Communications and incorporating representatives of

the Department of Finance and independent advisers, Andersen Management International. All applicants were treated equally both in relation to the provision of information before the closing date and afterwards in relation to clarification of aspects of the applications both in writing and in oral presentations. There is no question of any consortium having enjoyed any advantage in this respect.

"6. The comparative evaluation involved grading applications according to a range of detailed indicators representing the predetermined evaluation criteria. The final result was reached by consensus within the project team having regard to the grades awarded to the various indicators and the order of priority of the selection criteria. The detailed results of the evaluation and rationale for selection of the winner are documented in a report prepared by Andersen Management International and approved by the project team.

"7. The result:

"The consultants' report gives a clear-cut recommendation in favour of the Esat Digifone application but notes that two further applications could be considered for licensing in the event of failure of negotiations with the winning applicant."

The Aide-Memoire makes no reference to that portion of the evaluation report identifying sensitivities, risks

and credibility factors.

On the 26th October, there was a Government decision based on the Aide-Memoire in the following terms:

"I am to refer to the Aide-Memoire dated 26 October 1995 submitted by the Minister for Transport, Energy and Communications concerning telecommunications issues and to inform you that at a meeting held today, the Government

"1. Noted the proposal to award a licence to Esat Digifone to provide and operate GSM mobile telephony within Ireland under the Postal and Telecommunications Services Act 1983 with the statutory consent of the Minister for Finance and agreement of appropriate licence terms with Esat Digifone;

"2. Noted that in the event of failure of the licence negotiation process, the Minister proposed to seek agreement of licence terms with the second and subsequently, if necessary, the third ranked applications;"

and then other decisions are recorded of the Government.

Sorry, number 4 of the decision is probably also relevant.

"4. "Noted the proposal to enforce strictly the law and regulations concerning the provision of telecommunications services, particularly as they relate to the voice telephony and infrastructure

services reserved to Telecom Eireann until January, 2000."

The Tribunal will inquire as to whether the evaluation process was accelerated to the advantage of Esat Digifone and if so, whether such acceleration resulted from the influence or intervention of Michael Lowry, and if not as a result of the intervention or influence of Michael Lowry, how such acceleration occurred.

This matter was brought to the Cabinet Committee and ultimately to Government without reference to the programme managers. It was apparently the practice in this coalition Government to ensure that sensitive and important issues were reviewed by programme managers in advance of Committee or Government meetings so as to avoid unnecessary political or policy conflict at Cabinet meetings and to ensure the smooth flow of Government business.

I now wish to turn to a question about Andersen Management International. Andersen Management International were the Danish consultants retained by the Department to provide expert assistance in the evaluation process. Andersen Management International were selected as consultants following an independent tendering and procurement process conducted by the Department. While a number of consultants attached to Andersen Management International provided expert

services in their role in the process during the course of the evaluation, the primary point of contact between the Department and AMI was Mr. Michael Andersen, the then managing director of AMI. The precise role of AMI in the evaluation process is not entirely clear to the Tribunal. In a memorandum which AMI provided to the Tribunal, they described themselves as "Lead adviser in connection with the evaluation of the GSM II tender". They also informed the Tribunal in the same memorandum in connection with the issue of project organisation as follows:

"The Department has overall responsibility for the conduct of the competition, but the ultimate responsibility was naturally with the Minister. A steering group or project team was established to conduct the tender process. The project team GSM comprised members of the then three telecommunications divisions of the Department and representatives of the Department of Finance. AMI consultants participated in some of the meetings from time to time, although AMI had no permanent members of this group. It is AMI's impression that written minutes of meetings were taken for each project team GSM meeting by the Department, but AMI has only one of these.

Besides the project team, specialised sub evaluation working groups were also established temporarily to carry out the evaluation of the applications.

"The civil servants of the Department had control of the entire competition process including contact with the potential applicants and the Minister. AMI did not meet the Minister at any stage, before, during or after the process.

"The Minister in his announcement of the appointment of AMI on the 11th April, 1995, stated "Andersens are particularly well suited to be his independent advisers."

The Tribunal has difficulty in understanding the relative roles of individual members of the Project Group and AMI in the evaluation process, and in particular, in relation to certain significant decisions and steps taken in the course of the process, and including the decision made to abandon the initial evaluation methodology of a separate quantitative evaluation and qualitative evaluation, and to substitute this with what is described as a "holistic" approach.

The decision to refrain from scoring other aspects, and in particular, the indicators of sensitivities and credibility which resulted in the perceived sensitivities associated with the financial frailty of Communicorp and of Sigma being unscored.

The decision that instead of scoring other aspects, the perceived financial frailty of Communicorp and of Sigma would be described and addressed in the

evaluation report.

The final amendments which were made to page 44 of the evaluation report on the 25th October, 1995, on the proposal of certain members of the Project Group.

The description by the Minister of AMI as his specialist consultants does not appear to be consistent with the information provided by AMI that they did not at any time meet with the Minister.

Furthermore, Mr. Michael Andersen has independently informed the Tribunal that he was surprised that the Minister did not request a meeting with him to discuss the evaluation report and in particular, that portion of the report addressed to the financial frailty of members of the two top-ranked entrants.

AMI has provided assistance to the Tribunal in the course of the investigative phase of its work. That assistance commenced in July 2001, when Mr. Michael Andersen attended a private meeting with members of the Tribunal legal team. Since then, Mr. Andersen attended further meetings on the 7th February, 2002, the 28th February, 2002, and the 30th April, 2002. On one of those occasions Mr. Andersen was also accompanied by a Mr. Michael Thrane, another AMI consultant. Mr. Andersen has also provided the Tribunal with a number of formal written narrative memoranda addressing various general and specific issues raised by the Tribunal. In all, the Tribunal

has received four memoranda from Mr. Andersen, as

follows:

1. A memorandum of January 2002 comprising a general overview of the involvement of Andersen Management International in the second GSM evaluation process in Ireland.

2. A memorandum relating to the transparency of the evaluation criteria fixed by the Department which was prepared on a comparative basis and which was furnished to the Tribunal on the 26th February, 2002.

3. A statement regarding the Minister's access to the evaluation methodology document and which was also furnished to the Tribunal on the 26th February, 2002.

4. A memorandum setting out Mr. Andersen's responses to a number of issues raised by the Tribunal and in particular relating to the quantitative evaluation, the withering away of the separate quantitative evaluation, amendments made to the final draft and the final version of the evaluation report and certain related issues which was furnished on the 20th June, 2002.

The Tribunal understands that the principal narrative made available by Mr. Andersen in January of 2002 was delayed due to the issue of costs between Andersen Management International and the Department. The Tribunal understands that this issue was resolved by the agreement of the Department to discharge a fee of

US\$20,000 to Andersen Management International for the preparation and provision of the memorandum.

During the course of the four private meetings attended by Mr. Andersen, he also dealt with a number of queries raised by the Tribunal. On the 17th May, 2002, the Tribunal requested Mr. Andersen to provide a narrative account of his involvement and knowledge of the evaluation process and appended to its letter a schedule setting out 55 separate matters which the Tribunal wished Mr. Andersen to address.

The Tribunal's purpose in seeking this narrative was to obtain much of the information already provided by Mr. Andersen, together with some additional information, in a structured format which would be appropriate to the giving of evidence if the Tribunal resolved that it should proceed to hear evidence at public sittings.

On the 7th June, 2002, the Tribunal requested that Jon Bruel, another AMI consultant, provide a similar narrative. The Tribunal received no response to its requests, and on the 20th June, 2002, members of the Tribunal legal team met with the solicitors acting for AMI in this jurisdiction at the latter's request. Ms.

Lisbeth Bork, internal lead counsel to AMI, also attended the meeting. At that meeting, the Tribunal was informed of the following:

1. That Michael Andersen had sold his interest in AMI

sometime earlier to a Norwegian company, Ementor, which was ultimately controlled by a larger Norwegian concern, Merkantil Data.

2. That Mr. Andersen had since then been retained by Ementor as a consultant in relation to the provision of assistance by AMI to the Tribunal.

3. That Ementor/Merkantil Data were considering a disposal of AMI and did not intend to dispense any more funds in assisting the Tribunal.

The Tribunal understands that during the time that AMI and Mr. Andersen were providing assistance to the Tribunal, that Andersen Management had been retained as consultants to the Office of the Telecommunications Regulator in connection with the recent evaluation process for the grant of the third generation licences.

The Tribunal has been informed by the Office of the Regulator that work on that project was completed in July 2002. Prior to that date, the Tribunal understands that AMI were retained by the Office of the Regulator in relation to a series of projects, including the Spectrum tenders which preceded the GSM II tender, the third mobile licensing process, the two FWPM tenders, the Orange case in the High Court and in the Supreme Court, the Broadnet FWPM litigation in the High Court, the subsequent review of the FWPM evaluation, the DCS 1800 Spectrum tender with Esat

Digifone and Eircell, two FW tenders and a tender on the Tetra.

The Tribunal has requested the Office of the Regulator to provide it with details of all fees in relation to AMI in connection with its retention as consultants by the Office of the Regulator but has been informed that there was a Confidentiality Clause in the terms under which AMI were appointed and that AMI have declined to waive their rights to confidentiality to enable the Regulator to provide the Tribunal with the information sought. The Tribunal may, if appropriate, hear evidence in the course of its public sittings regarding payments made by the Office of the Regulator to AMI since the establishment of the Office.

At a further meeting with the solicitors for AMI on the 10th October, the Tribunal was furnished with a faxed letter from Andersen Management International to its Irish solicitors dated 10th October, 2002. That faxed letter confirmed that AMI was willing to continue assisting the Tribunal if Mr. Michael Andersen or Andersen Advisory Group AS, a company controlled by Mr. Andersen, guaranteed to indemnify AMI in respect of all costs incurred by them in connection with AMI's continued assistance to the Tribunal.

At this meeting, by letter of the 11th October 2002 to AMI's Irish solicitor, the Tribunal noted that

AMI/Ementor were not compellable witnesses as they were outside the jurisdiction and registered its disappointment that they had set their face against providing assistance to the Tribunal, notwithstanding the fact that at the completion of the Tribunal's work, they would be in no different a position to any other witness in applying for their costs. The Tribunal also requested AMI's Irish solicitors to indicate whether they had instructions to act for Mr. Michael Andersen in his personal capacity.

In response to the Tribunal's letter by facsimile transmission dated 25th October 2002, AMI's Irish solicitors notified the Tribunal of the content of an email which they had received from Mr. Michael Andersen in relation to the Tribunal's query.

It's from Landwell Solicitors to the Tribunal solicitor.

"Dear Sirs,

"We refer to a telephone conversation with Mr. Davis this morning and set out below the email we received last night from Mr. Michael Andersen in response to ours, explaining his present inability to assist the Tribunal." Then it gives Mr. Andersen's address.

"Hello Carol, thank you for your email and for your understanding. You are of course welcome to give the Tribunal my contact details together with an explanation. I think that you should give them the

explanation that your understanding and experience always was that I personally would very much like to assist the Tribunal and accordingly did so.

Furthermore that AMI/Ementor's decision not to assist the Tribunal any longer in your understanding leaves me with a dual problem in that they do not accept I represent AMI unless they receive an indemnity from me or one of my companies and that I am not able to assist the Tribunal in my own capacity due to various clauses and lockups.

"In summary, there is no way by which I can assist the Tribunal at this stage, despite my good intentions.

"Maybe things will change next year one never knows.

"Given the development over the last couple of weeks, I am not even in a position to be able to take a private meeting with the Tribunal.

"My solicitor receives a copy of this email.

"My very best regards," and it's personal then.

Now, in order to assist in the resolution of the difficulty which had arisen, the Tribunal then wrote to AMI's Irish solicitors on the 29th October and asked them to indicate whether AMI/Ementor were prepared to provide a waiver to enable Mr. Andersen to give evidence to the Tribunal without the necessity of obtaining any further co-operation from AMI/Ementor.

Having received no response to that letter, the

Tribunal wrote again on the 11th November last indicating the Tribunal's concern that by reason of some contractual or other arrangement, Mr. Andersen might be precluded from attending to give evidence at the Tribunal's public sittings, and requesting details of any such contractual or other arrangements together with copies of any relevant documents.

In the meantime, the Tribunal made direct contact with Mr. Andersen by telephone, and on foot of the Tribunal's solicitor, Mr. John Davis's conversation with Mr. Andersen, wrote to him on the 13th November regarding the matters which had been discussed as follows. Lest there be any doubt about this, the Tribunal did this having first consulted with Landwell Solicitors.

"As you will recall, you informed me that arising from your disposal of your interest in AMI you were still owed a substantial sum of money; that the new entity carrying on the business of AMI following your disposal of your interest had indicated that if you provided any further assistance to the Tribunal, it would make deductions from what you are owed.

"You indicated that your Danish lawyer had received a letter on the point from AMI/Ementor but that you could not make this letter available to me. This, you stated, was due to the fact that you felt that to do so would be interpreted as a friendly gesture or

overture toward the Tribunal and therefore expose you to the type of deduction mentioned."

The Tribunal in that letter recorded its concerns at these events, particularly bearing in mind that AMI had been taken over by a company with a connection in the form of a joint venture to Telenor, which was a member of the winning consortium in the second GSM evaluation. The Tribunal continued that on the face of it, it appeared that Mr. Andersen was being obstructed from assisting the Tribunal and that he was being effectively subjected to a threat that he would suffer a material penalty. The Tribunal once again requested formally that Mr. Andersen reconsider making available to the Tribunal the correspondence between AMI/Ementor and his Danish lawyer.

On the following day, 14th November, 2002, the Tribunal received from AMI/Ementor's Irish solicitor an email which they had received from a Mr. Michael Neilson, a lawyer who had been retained by AMI to respond to the Tribunal's request. It appeared from that email that the position which had been adopted by AMI/Ementor is that they were not prepared to engage Mr. Andersen as a consultant to assist the Tribunal, that they had no objection to Mr. Andersen assisting the Tribunal in his personal capacity, but they were insisting on maintaining a potential claim that they might have in the future against Mr. Andersen in the

event of any claim against AMI in relation to consultancy services provided to the Department in connection with the second GSM process.

The Tribunal once again wrote to Mr. Andersen on the 14th November, 2002, enclosing a copy of the email received from AMI's Danish solicitor, and drew Mr. Andersen's attention to the fact that AMI did not appear to have any difficulty with his attending the Tribunal as a witness or otherwise providing assistance to the Tribunal. In the circumstances, the Tribunal asked Mr. Andersen to confirm, as they had previously indicated, that he would make himself available to assist the Tribunal and to attend its sittings.

In response to that request, the Tribunal received correspondence dated 20th November, 2002 from a Mr. Carsten Pals of Bech-Broun Dragsted lawyers in Copenhagen. Mr. Pals disputed that under the agreement whereby Mr. Andersen disposed of his interest in AMI to Ementor/Merkantil Data that he had any personal liability for any matter arising out of the second GSM process in Ireland. Mr. Pals also contended that the assistance previously provided by Mr. Andersen to the Tribunal was on behalf of AMI, and that if he was to provide any further assistance, that assistance would be treated by Ementor/Merkantil Data as an acknowledgment by him or by his company,

Andersen Advisory Group AS, of a liability in respect of the assistance to the Tribunal previously rendered.

In those circumstances, Andersen was not prepared to assist the Tribunal and suggested that the Tribunal should seek assistance from other consultants who continue to be in the employment of AMI.

The Tribunal took the matter up again with solicitors for AMI, and by letter of the 20th November, 2002, enclosed a copy of the letter received from Mr.

Andersen's Danish lawyer. The Tribunal summarised the position as it understood it to be and requested that AMI confirm that any further assistance by Mr.

Andersen in his personal capacity would not be treated by Ementor/Merkantil Data as an acknowledgment by Mr. Andersen of a liability in respect of the assistance previously rendered.

On the same date, the Tribunal responded to Mr.

Andersen's Danish lawyers. The Tribunal once again emphasised that what it was seeking was not to substitute Mr. Andersen's assistance for that of AMI, but to seek Mr. Andersen's assistance personally as distinct from AMI. The Tribunal further proposed that if necessary, appropriate documentation could be put in place to protect Mr. Andersen from any claim by Ementor/Merkantil Data for the costs and expenses connected with the previous assistance provided by AMI. The Tribunal received a further response from

Mr. Andersen's Danish lawyer on Friday last, 29th November, in which he again reiterated Mr. Andersen's concern regarding the impact for his relationship with AMI/Merkantil Data of assisting the Tribunal and repeated his assertion that AMI/Merkantil Data were insisting on the provision of an indemnity in relation to future costs.

Following this exchange of correspondence, the Tribunal informed the solicitors for Mr. Andersen and the solicitors for Ementor/Merkantil Data that it viewed the stance being adopted with concern; that the Tribunal intended to refer to its dealings and correspondence with both parties in the course of its Opening Statement, and that both parties should be aware of the potential for the drawing of negative conclusions arising from the unavailability of Mr. Andersen, particularly bearing in mind the importance of his role in the evaluation process. These letters from the Tribunal were dated 29th and 30th November last.

On the 3rd December, 2002, the Tribunal received a letter from Mr. Andersen's Danish solicitors. The Tribunal was informed that Mr. Andersen was maintaining his position that he could not at this stage assist the Tribunal. It was, however, suggested that the Tribunal might wish to take up its inquiry, particularly those relating to the financial portion

of the analysis, with two of AMI's specialised consultants, Jon Bruel and Mr. Michael Thrane, the latter of whom continues to be a director of AMI.

By letter of the 5th December, 2002 from Ementor/Merkantil Data's Irish solicitors, the Tribunal was informed that AMI did not wish in any way to obstruct Mr. Andersen giving evidence; that AMI understood that the Tribunal was seeking assistance from Mr. Andersen in his personal capacity and that AMI had no objection to that course. It was further asserted that Ementor/Merkantil Data, as the owners of AMI, wanted to make it abundantly clear that they wished to be of assistance in any way that they could, subject to the resolution of the issue of their costs.

The Tribunal received a further letter today. It's dated 10th December, 2002, from Mr. Michael Andersen's Danish lawyers, and it reads:

"Dear Mr. Davis,

"Thank you for your faxes of the 3rd and 5th December 2002. For the reasons stated in the faxes sent to you previously in relation to AMI/Merkantil Data, it is not possible to make a distinction between my client's assistance to the Tribunal on a personal basis and my client's assistance in his capacity as the managing director of AMI. The letter provided to the Tribunal by Landwell solicitors does not alter this situation.

"Consequently, my client can unfortunately not render

further assistance to the Tribunal at this stage.

When I use the term "at this stage," it means that my client will not rule out the possibility of assisting the Tribunal once the financial and legal implications towards AMI/Merkantil Data have been satisfactorily solved.

"With respect." Then he gives the address of Mr.

Thrane and somebody else.

Moreover, I can inform that you it does not appear to be fully correct when Merkantil Data conveys the message to the Tribunal that "there are no personnel remaining in AMI who have any first-hand knowledge of the event." Both Jon Bruel, who continually acts as director of AMI, and Mr. Ole Feddersen, who is senior consultant with AMI, have first-hand knowledge of the events and in particular the events you are addressing.

"Finally, also Marius Jacobsen was heavily involved in the GSM II licensing project."

The Tribunal intends to continue its endeavours to secure the assistance of Mr. Andersen and other AMI specialist consultants as witnesses to the Tribunal.

The Tribunal intends to ventilate portions of the reports furnished to the Tribunal by Mr. Andersen tomorrow.

I don't think I should do it today, Sir. They are fairly lengthy, and it would take up a fair amount of

time.

Subsequent to the announcement of the result of the evaluation, a dispute arose between Communicorp and Advent in relation to Communicorp's purported determination of the agreement of the 12th July, 1995, which I have already referred to. It will be recalled that by virtue of that agreement, Advent was entitled to subscribe for 5% of the shareholding in Esat Digifone Limited and to participate up to a stated extent in the funding of Communicorp in consideration of the provision of a letter of comfort addressed to the Department and a letter of comfort acceptable to Telenor.

Communicorp had sought to terminate that agreement by reason of Telenor's dissatisfaction with the letter of comfort provided by Advent. Correspondence passed between Baker McKenzie, the UK solicitors for Advent, and William Fry, solicitors for Communicorp. Baker McKenzie asserted that Clause 4.2 of the agreement on the 12th July, namely the requirement that a letter of comfort be provided in terms acceptable to Telenor be provided, was only relevant to clause 3 of the agreement, being the right to participate in the funding of Communicorp. They further asserted that Communicorp had failed to use all reasonable endeavours to ensure that Telenor were satisfied with the proposed letter of comfort.

William Solicitors contended that Clause 4.2 were also applicable to Advent's entitlement to 5% of the equity shareholding in Esat Digifone Limited and that as the letter of comfort was not acceptable to Telenor, Communicorp was not obliged to procure 5% of the equity in Esat Digifone for Advent.

That dispute was ultimately resolved in December 1995.

In the course of the dispute, Mr. Peter O'Donoghue forwarded to Mr. Owen O'Connell on the 3rd November, 1995, a facsimile transmission summarising a telephone conversation between Mr. O'Donoghue and Mr. Massimo Prelz of Advent International, who was also a director of Communicorp Group Limited, on the previous August 3rd. I have already referred to the content of Mr. O'Donoghue's handwritten note.

Mr. O'Donoghue's fax stated as follows:

"Further to our conversation this morning, I now attach some handwritten notes of my telephone conversation with Massimo Prelz on the 3rd August, 1995.

"He accused me of trying to mislead Telenor and stated that 'you guys' reference to Denis and I 'have a way with playing with words'. This would go back to our original discussions on the terms of the IRi₁23.2 million facility which was agreed in respect of the 5% of Esat Digifone. He stated that the word "committed" was misleading and that the fact that there was no

offer as no terms were agreed. I reminded him that he had put outline terms to Denis, and even though these were not acceptable to ourselves, they were in themselves terms. He stated he would not be signing any letter. Letters require the approval of the Investment Committee, and no letter would be forthcoming.

"I will leave it to yourself and Owen as to how much, if any, of the above you may wish to incorporate into your reply to Baker McKenzie."

As I have mentioned, the dispute between Advent International and Communicorp (Mr. O'Brien) was resolved in December 1995. The terms of the agreement between the parties was reduced to writing and recorded in a formal memorandum of understanding which was signed on behalf of Advent International on the 24th December, 1995, and also signed by Mr. Denis O'Brien 24th December 1995. The purpose of the memorandum appears to have been twofold.

"Its stated intentions were:

"1. To facilitate competition of a proposed private placement to be arranged by CSFB" that's Credit Suisse First Boston "on behalf of Esat Telecom Holdings Limited, a limited newly formed company which was to hold the telecommunications interest of Communicorp Group Limited and Esat Telecom.

"2. To resolve on a comprehensive basis all of the

outstanding issues of dispute between the parties that had then recently arisen.

The principal provisions of the agreement can be summarised as follows:

"1. It was agreed that the telecommunications business and interests of Communicorp Group would be transferred to Esat Holdings Limited.

"2. Advent agreed, subject to the transfer of the telecommunications business and interests of Communicorp Group to Esat Holdings Limited, to transfer the entirety of Advent's interest in Communicorp to Mr. O'Brien, which was a 35% equity interest in the residual radio business of Communicorp Group Limited.

"3. Mr. O'Brien agreed to transfer to Advent 3.5% of his shares in Esat Holdings as constituted prior to the completion of the contemplated financing by Credit Suisse First Boston.

"4. Mr. O'Brien agreed that Advent should be entitled to take up to 30% of each of the contemplated Credit Suisse First Boston subscriptions.

"5. Advent agreed that completion of these transactions would satisfy in full their claim to an entitlement to a 5% equity stake in Esat Digifone."

From the documents furnished to the Tribunal, it appears that in the closing months of 1995, in the course of negotiating the shareholders' agreement,

there were concerns on the Communicorp side of the Consortium and on the Telenor side of the Consortium regarding the involvement of IIU in the Consortium and as to how this might impact on the Consortium's entitlement to negotiate a licence as winner of the evaluation process.

It appears that there was concern as to whether the Department was aware of the IIU involvement and if so, what attitude the Department was adopting or would adopt.

On the 31st October, 1995, Mr. Arthur Moran of the solicitors firm of Matheson Ormsby Prentice, Telenor's newly appointed Irish solicitors, noted in an attendance on Mr. Per Simonsen of Telenor:

"1. Your fax of today.

"2. Re ESB threatened action. Express the view that from my knowledge of the facts, there is not a good cause of action against the Consortium whatever about against Esat itself. It would of course be damaging if there were to be any comment in relation to IIU and the side letter although it is hard to see how it could become public.

"I will send you a fax shortly.

"Knut

"next week, discuss tomorrow morning."

On the 3rd November, 1995, Mr. Owen O'Connell's attendance on Denis O'Brien, Leslie Buckley, Paul

Connolly, and John Callaghan records as follows:

"IIU issue:

Bullet points for press release.

Problem re material change in shareholders against bid.

Group of institutional and other investors to be located by underwriters IIU.

Had to upgrade financial arrangements.

Primary criterion, from comfort to underwriting.

IIU willing to give underwriting commitment and did so.

Clearly gave control of 20% to underwriter.

Understanding is that underwriters will be placing shares with investors and institutions. M. Walsh call?

Proposal

financial options, complicated at present, will be revealed in due course when finalised."

On the 9th November, 1995, Mr. Arthur Moran's attendance on Knut Haga, Per Simonsen and Knut B recorded:

"IIU are Department aware?

Yes, 29/9/95 letter to Department.

Department replied that letter not taken into account, copy to be supplied to us."

That appears to be a reference to the letter of the 29th September which Professor Michael Walsh had sent

to Mr. Martin Brennan in the Department and which we have been informed was sent to Mr. Denis O'Brien by Mr. Fintan Towey, having been signed by Mr. Martin Brennan, but Mr. Martin Brennan not having been made aware of the content of it.

In a letter dated 10th November 1995, Mr. Gerry Halpenny of William Fry Solicitors wrote to Mr. Arthur Moran, Telenor's solicitors, in relation to the negotiation of the shareholders' agreement. It was stated under the heading "Parties":

"Although I missed the discussion at the start the meeting, I understand Telenor wish Communicorp Group Limited to be the party to the agreement as opposed to Esat Telecommunications Limited. I am awaiting instructions on this point. In addition IIU will not specifically be named as a party for the time being."

And then over the page dealing with particular clauses in relation to Clause 1.6. It's noted:

- Clause 1.16: "As discussed, for the moment specific reference will not be made to IIU."

On the 21st November 1995, Mr. Gerry Halpenny of William Fry Solicitors recorded in a memo of a meeting with Richard O'Toole, Peter O'Donoghue, Knut Haga, Per Simonsen, and Arthur Moran:

"Position re the Department - IIU

"Not a problem for M. Brennan in the Department. Main concern that DOB and TN mainly involved on the

operational side. Present the agreement to IIU ASAP."

On the 19th December, 1995, there was an internal memorandum from Neville O'Byrne of Messrs. William Fry

Solicitors acting on behalf of IIU Limited to Mr.

Gerry Halpenny of Messrs. William Fry Solicitors,

acting on behalf of Communicorp Group, regarding the

draft shareholders' agreement in which he stated as

follows: "Our client may not wish to state in the

Shareholders' Agreement that they have joined in the

Agreement as trustees for investors. They are to

confirm to us their position in this regard."

Subsequent to the announcement of the result of the

evaluation, it appears that there was some publicity

concerning the involvement of IIU in the financing of

Esat Digifone.

CHAIRMAN: I understand you now, Mr. Coughlan, to be

going on to a section involving dealings between Esat

directors and Messrs. Davy Stockbrokers. It will

probably be preferable, because it can hardly be

completed with the documents remaining, that we will

take it up at eleven o'clock in the morning.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,

WEDNESDAY, 11TH DECEMBER, 2002 AT 11AM.