

TRIBUNAL OF INQUIRY

(PAYMENTS TO MESSRS CHARLES HAUGHEY AND MICHAEL LOWRY)

Appointed by instrument of An Taoiseach dated

26th day of September 1997

pursuant to the

Tribunals of Inquiry (Evidence) Acts 1921 and 1979

DAY 162

TRANSCRIPT OF PROCEEDINGS HELD IN DUBLIN CASTLE

BEFORE MR. JUSTICE MICHAEL MORIARTY (CHAIRMAN),

ON FRIDAY, 31ST OCTOBER 1997, AND FOLLOWING DAYS:

TRANSCRIPT OF PROCEEDINGS ON THURSDAY, 12TH DECEMBER, 2002:

A P P E A R A N C E S

THE SOLE MEMBER: Mr. Justice Michael Moriarty

FOR TRIBUNAL: Mr. John Coughlan SC

Mr. Jerry Healy SC

Ms. Jacqueline O'Brien BL

Instructed by: John Davis

Solicitor

FOR THE DEPARTMENT OF

COMMUNICATIONS, MARINE &

NATURAL RESOURCES: Mr. Richard Law-Nesbitt, SC

Mr. John O'Donnell, SC

Mr. Conleth Bradley, BL

Mr. Diarmuid Rossa Phelan, BL

Instructed by Matthew Shaw

Chief State Solicitors Office

FOR DENIS O'BRIEN: Mr. Eoin McGonigal, SC

Mr. Gerry Kelly, SC

Instructed by: Eoin

O'Connell

William Fry Solicitors

FOR MICHAEL LOWRY: Michael Kelly

Kelly Noone & Co.

Solicitors

MORIARTY TRIBUNAL - DAY 162

FOR TELENOR: Mr. Eoghan

simons, SC

Ms. Blathna Ruane, BL

Instructed by: Kilroy Solicitors

FINE GAEL: Mr. Charles

Meenan, SC

Tony O'Connor,

BL

Instructed by: Kevin O'Higgins

Solicitor

OFFICIAL REPORTER: Mary McKeon SCOPIST: Ralph

Sproxton

/RS

MORIARTY TRIBUNAL - DAY 162

THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY,

12TH DECEMBER, 2002 AT 11AM.

Continuation of Opening Statement by Mr. Coughlan:

MR. COUGHLAN: Now, Sir, I finished yesterday by

making reference to a debate in the Dail on the 30th

April, 1996, and I said I would return to it. There was also a debate in the Dail on the 16th April, 1996, and they appear to be the two occasions other than question time on the 22nd November, 1995, when the question of the GSM licensing process was considered in Dail Eireann from the information which is available to the Tribunal, it appears that the content of the debate in the House on the 16th April, 1996, and 30th April, 1996, was well informed, particularly on the part of the then opposition. And I intend opening both of the reports of the Dail for both of those days for the assistance of potential witnesses, particularly departmental witnesses, Sir.

But before I do that, I should perhaps just make reference to something I passed over slightly yesterday when we dealt with a fax which Ms. Regina Finn of the regulatory side of the Department sent to Mr. Martin Brennan and Mr. Fintan Towey on the 16th April, 1995, wherein she made reference to information which had just been given to her by Mr. Owen O'Connell, Esat Digifone's solicitor. And attached to the fax which she sent to Mr. Brennan and Mr. Towey

/RS

IARTY TRIBUNAL - DAY 162

was a document or a note, and on the top of that document there was a graphic.

And it shows Esat Telecom Holdings with a number of

bubbles out of it giving information about the shareholding in that company and then that company owned 100 percent of Esat Telecommunications Limited, and then it showed an arrow pointing down to Esat Digifone Limited, 37.5%, and then on the left, Telenor Invest 37.5% into Esat Digifone, and then on the right, institutional investors IIU (Dermot Desmond) 20% plus 5% into Esat Digifone.

Now, that document existed in the Department on the 16th April, 1996. And then if you just go to the text of the document and the very bottom it has, you see there is a reference to the Esat Telecom or Esat Holdings 37.5%, and then there is reference to Telenor having 37.5% of Esat Digifone Limited and then IIU (a Dermot Desmond company) currently holding 20% of Esat Digifone, which it intends placing with institutional investors. It also has the right to acquire a further 5% by means of the 12 percent of Esat Telecom Holdings Limited which is held by "Miscellaneous." That appears to be erroneous in its interpretation.

"Owen O'Connell is to provide further information in writing including deadlines for this change in ownership."

/RS

IARTY TRIBUNAL - DAY 162

But it does appear that as of the 16th April, 1996, the Department had knowledge that the shareholding in

Esat Digifone Limited was 37.5% as to Esat Telecom Holdings, 37.5% as to Telenor and 25% as to IIU/Dermot Desmond.

Then, of course, I referred to the letter from Mr. O'Connell where he wrote to the Department the next day and made reference to the "25% of Esat Digifone Limited held by IIU Nominees Limited" and what he said it effectively represented.

Now, I am going to read to report in the Dail on the 16th April, 1996, dealing with this issue.

"AN CEANN COMHAIRLE: Deputy Molloy gave notice that he wished to ask the Minister for Transport, Energy and Communications if the reason for the delay in signing the GSM licence for Esat Digifone relates to concerns expressed by other applicants about circumstances surrounding the awarding of this licence. I understand the deputy wishes to share time.

"MR. MOLLOY: Yes, with Deputy O'Rourke. The matter I tabled for this debate continues: particularly in relation to US corporations' continued interest in investing in the Irish economy and if he will give details of representations made in this matter by the US Government, US corporations and the IDA, and if he

/RS

IARTY TRIBUNAL - DAY 162

will make a statement on the matter. That was the

full text of my question.

"The awarding of Ireland's second mobile telephone licence is a bizarre affair. At the time of the award the Irish public and my own party welcomed the success of the seeming Irish consortium which was named as the successful tenderer. However, it has since transpired that the entire process which resulted in this decision is being shrouded in secrecy to conceal the fact that the Government has sold the family silver at bargain-basement prices in this case. It is now commonly accepted that the market value of this licence would have been worth  $\text{€}50$  million to  $\text{€}110$  million had free market forces been allowed to operate. Instead, the Minister for Transport, Energy and Communications, Deputy Lowry, announced that he is selling the licence for  $\text{€}15$  million to Norwegian Telecom and 25 percent to unnamed investors who have not yet disclosed the source of their funds. Is Dermot Desmond an investor in yet another Telecom Eireann venture? The public has a right to know the identity of the investors involved.

"In selling the licence, the Minister placed a cap of  $\text{€}15$  million on the price anybody could pay. Contrary to his statements, the European Union did not require this  $\text{€}15$  million cap. What role did Pádraig Ó hUiginn, former Secretary to the Taoiseach, play in the decision to impose the cap? Is he a member of the

/RS

## IARTY TRIBUNAL - DAY 162

successful consortium? The public has a right to know. When the PR hype was put aside, Irish taxpayers will be aghast to discover that they are being short-changed in this deal by at least  $\text{€}135$  million and, had free bidding been allowed as is in any normal sale or auction by as much as  $\text{€}175$  million. This is the most astonishing deal ever contemplated by an Irish Minister. It is the biggest betrayal of the Irish taxpayer that I have witnessed during my time in this House, and this includes the Goodman and other beef scandals.

"To put the value of this licence in context, the House should be aware that in a similar situation in Austria another EU Member State with a population of 7 million the mobile telephone licence fetched the Irish equivalent, in GDP terms, of  $\text{€}110$  million. The actual price was  $\text{€}270$  million. The massive loss of revenue in this case to the Irish taxpayer is only one aspect of this deal. A number of major US corporations in the telecommunications field submitted bids for this licence. They were astonished that the Irish Government gave it away for a song and are completely mystified with regard to how the situation arose. These corporations have been refused an explanation by the Minister, and no information has

been forthcoming with regard to how each application was evaluated.

Astonishingly, the Minister announced the award of the

/RS

IARTY TRIBUNAL - DAY 162

licence to Esat four to five weeks ahead of the publicly stated date for such an announcement. Why was this done? Why did the full Cabinet not get papers in good time to allow for full discussion and subsequent decision? What stroke was being pulled by the Minister and for what reason? How could a Minister in his position deal in such a cavalier fashion with such an important source of massive revenue to the State? Taxpayers have good reasons to be angry. They have been done out of tens of millions of pounds and have never been told how or why this was done. The other companies which tendered are angry.

"My information is that there is a view among US businessmen that this affair would have been handled better in a banana republic and that they would think twice before they or those they influence would consider investing in this economy in future. The Minister and the Taoiseach know that there have already been adverse effects, and in one case a potential investment which would have created 400 jobs in the southern region was transferred to another country because of our Mickey Mouse carry-on over this



licence.

"MR. LOWRY: The Deputy is exaggerating.

"MR. MOLLOY: I do not exaggerate. This afternoon, Mr. Dennis Sandberg of the US Embassy wrote to Mr. Loughrey, Secretary of the Department, protesting on /RS

IARTY TRIBUNAL - DAY 162

behalf of AT&T, Southwestern Bell, Comcast and Motorola and at the nondisclosure of the evaluation process and the lack of justification for a cap of  $\frac{1}{2}$ 15 million. This affair is a scandal and needs to be explained or exposed.

"MRS. O'ROURKE: My party demands full disclosure of all the facts pertaining to the award of this reasons.

We are embarked on the new adventure of the break-up of monopolies and it is important domestically and for our reputation in Europe and throughout the world that this business is carried out in an open, transparent and accountable way for those who were awarded the licence and for those who were not. We must ensure that the miasma is cleared and the questions which need to be answered are done so openly. Any necessary disclosure should be made quickly and instantly. The understandable disquiet which has been expressed publicly and in the media must be cleared once and for all. It is not good enough that the Minister changes the agenda, the criteria and the facts which need to

be addressed. My party wishes to see the matter cleared up forthwith.

"MR. LOWRY: The GSM licence is a milestone document, and it is of critical importance that it be well drafted. The only and I emphasise the word "only" reason for delay in issuing the licence is the time needed to draft this complex document correctly. While an indicative draft was available at /RS

IARTY TRIBUNAL - DAY 162

the time of the competition, it could only be finalised and put into legal form as soon as a decision was made. Much of its detailed content is based on the winning tender. I am determined that the licence be issued as soon as possible. We must not make haste at the expense of accuracy. The content of the licence is agreed between my Department and Esat Digifone, and it is now with the Attorney General's Office for legal clearance.

"In circumstances where there were six professional costly and competitive applications, it is entirely understandable that there are disappointed applicants; there was only one prize. That this disappointment should manifest itself in the type of innuendo and comments we have heard from Deputy Molloy is entirely unacceptable. I want to emphasise, one more time, that the selection process was thoroughly carried out

by a team of officials and consultants without interference of any kind from me or anybody else. They carried out their evaluation by reference to the selection criteria which were well-known to all applicants in advance, and they specifically respected the priority order indicated. The departmental team and the international independent consultants separately and collectively recommended one winner, and the Government approved that result.

"MRS. O'ROURKE: Collectively.

/RS

IARTY TRIBUNAL - DAY 162

"MR. LOWRY: The separate question of whether to give feedback in relation to their applications to individual applicants has been under consideration for some time. The format of such feedback, whether oral or written, is being considered and the details of this approach are being settled in discussions with the consultants and the Attorney General's Office.

There is no question of comparative feedback with the winning applicant or with other applications; the confidentiality rules would not allow it. Please remember that somebody came last as well as first, and they may not wish that fact to be trumpeted. Within that constraint, the intention is to be reasonably forthcoming.

"There have been formal requests from a number of

applicants, informal approaches by the US Embassy and some contact by the IDA on the matter. This country enjoys a high reputation among US corporations for probity and honesty in its business dealings with them. I cannot imagine that failure to win a single licence in a clean competitive process would damage that reputation.

"MR. LAWLOR: The Minister should not bet on that.

"MR. LOWRY: The Deputy would not know a lot about that. He is the master of that art.

"MR. MOLLOY: The affair stinks to high heaven.

/RS

IARTY TRIBUNAL - DAY 162

"MR. LOWRY: I am anxious to facilitate requests for information but can only do so within the legal constraints of the competition.

"MR. LAWLOR: The Minister should answer the question.

"MR. LOWRY: What I most definitely cannot do is change the result of the competition, which was open and fair. Equal opportunity was afforded to all participants under the established and agreed procedure.

"MR. MOLLOY: The Minister even renegeed on a commitment to the US Embassy.

"AN CEANN COMHAIRLE: Deputy Seamus Brennan was selected by me to raise a matter on the adjournment."

And that ended that particular debate.

The portion of that debate which I wish to draw specific attention to is the reference at the beginning by Mr. Molloy that "Deputy Lowry announced that he is selling the licence for  $\text{€}15$  million to Norwegian Telecom and 25% to unnamed investors who have not been disclosed."

Now, the matter arose in the Dail again on the 30th April of 1996. The reason that I am opening this is I

/RS

IARTY TRIBUNAL - DAY 162

made reference to it yesterday and it relates to an inquiry which the Tribunal will be making, but again the text appears to show, from the information available to the Tribunal, an informed debate and particularly informed perhaps on the then opposition side.

MR. LOWRY: "I have made several statements in this case and elsewhere about the competition for the GSM licence and answered questions in the house on a number of occasions.

"MR. MOLLOY: Does the Minister intend to circulate his statement?"

I'll skip down to where Mr. Lowry makes his statement.

"MR. LOWRY: Competition can only succeed where the playing field is level. We have already seen major reductions in handset costs, and I want to see call prices drop too.

"The question of confidentiality needs to be fully understood because it is relevant to various aspects of the matter. The way the competition was structured gave interested parties who had paid a deposit of £5,000 an opportunity in the first four weeks to ask questions in writing about the process. It was agreed at the outset that these questions would be addressed in a memorandum to all competitors a couple of weeks

/RS

IARTY TRIBUNAL - DAY 162

later.

"Nine parties posed written questions. Of these, four who eventually became applicants raised the subject of confidentiality of information supplied in applications. It was clear that confidentiality was an important issue for interested parties. Indeed, it is somewhat ironic that Persona, which has been the most vociferous in relation to disclosure, was one of the consortia which originally sought a commitment of confidentiality. Failure to respond adequately to these questions on confidentiality carried the serious risk of frightening away consortia anxious to secure the licence.

"The responding memorandum from my Department which was sent to all interested parties on 28 April 1995 stated:

"All applications for the GSM licence, including data

provided in electronic form and any data sought during the course of the evaluation of submissions, will remain permanently confidential to the Department and its consultants, Andersen Management International.'

"This was not a clever device intended by me or my Department before or after the event as a block on transparency. It came, as I said, by way of widespread concern by potential applicants before submitting applications and a considered response from

/RS

IARTY TRIBUNAL - DAY 162

those managing the competition. It is understandable why confidentiality was necessary. Any competent application was certain to contain enormous detail on business strategy, marketing philosophy, pricing proposals, company ownership, financial standing etc.

Deputies can get some idea of the sheer volume of the information when I tell the House that the applications ran to 350 pages plus appendices and supporting documentation.

"I also want to make it clear that I have a duty to protect the confidentiality of the strategy of Esat Digifone. To make such information available to Eircell would undermine the impact of the entry of the second operator to the market and run directly counter to the spirit of my intention to create a competitive market based on a level playing field.

"There is a second angle to this which I want to mention briefly. Comparative bidding procedures for mobile licences did not start and finish in Ireland.

Such procedures are now common worldwide. Many of the members of the consortia which applied in Ireland will be competing against each other elsewhere. If a Minister in any country was considering the outcome of a similar competition and he or she was aware that the apparently successful applicant had come last out of six in a recent competition in another country and that this was public knowledge, what would he or she think? That angle alone would have to give

/RS

IARTY TRIBUNAL - DAY 162

disappointed applicants cause for reflection. I am not saying this in any menacing way. I am just stating the obvious.

"Putting together a detailed application for a mobile licence is an expensive business. The total cost of the six applications which we received was probably in the region of 10 to 15 million pounds. This is a large sum of money leading to a lot of disappointment, but it was always known that there could be only one winner. The disappointment is understandable, but the way it manifests itself in terms of innuendo is a problem. This is something that the interested parties, and I do not exclude certain sections of the



media, need to reflect on. How long will they keep this campaign going? What do they expect to gain? I again emphasise that I fully uphold the conduct and integrity of the public officials and the consultants who conducted this exercise.

"I now propose to recite at some length the history of the GSM competition. The Department of Transport, Energy and Communications has been working seriously on a GSM competition since late 1993. The preparatory phase included an "open door" consultation process with interested parties. This, to a large extent, was a learning phase for the Department where various options in relation to the process as a whole were canvassed with consultants and interested parties. London-based consultants had a limited low-cost input

/RS

IARTY TRIBUNAL - DAY 162

into the design phase of the competition in 1994. My predecessor as Minister will know all about this initial preparatory phase of the competition.

"It fell to me as a newly appointed Minister to move the process forward. The style of the competition and the rules which applied were approved by the Government and made known following the announcement of the competition to all interested parties. All parties accepted the rules. This is important because it shows that it was the Government who set out the

rules for the competition; the parameters are a political matter. Once that decision was taken and announced by me on the 2 March 1995, the conduct of the operation of the competition within these parameters was carried out by the Civil Service, in other words, officials of my Department and the Department of Finance, with the aid of consultants.

"My announcement on the 2 March 1995 is interesting.

I am sure copies of my statement are readily accessible for those who care to read them, but to assist those who are not apparently interested in following up the facts, I will cite a few short quotations from it as follows:

"I want to emphasise that this is not an auction where the biggest cheque will win the licence regardless. My aim is to see real competition and a good deal for consumers'.

/RS

IARTY TRIBUNAL - DAY 162

"The fee proposed must leave room for a credible business plan to develop the market and provide effective competition for Eircell, choice of service and a good deal for consumers.'

"In view of the controversy which followed, I want to remind the House of this starting position with which I have been consistent ever since. At an early stage I became acutely aware that rumours were circulating

within the industry that the outcome of the competition was a foregone conclusion. I have no idea whether this was true, but I and my officials moved to assure all interested parties that it would be a clean and open competition.

"We set out at the beginning clear selection criteria which were fully known to all parties. Applications had to pass the first hurdle of demonstrated financial and technical capability. The criteria, which were clearly stated to be in descending order of priority, were as follows: Credibility of business plan and approach to market development; quality and viability of technical approach; approach to tariffing, which had to be competitive; and the licence fee. There followed a series of lower priority criteria, notably, timetable for achieving roll-out of the system; international roaming plans; performance guarantees and spectrum efficiency.

/RS

IARTY TRIBUNAL - DAY 162

"I have now made the full list of eight selection criteria publicly available, together with the weighting formula used. This clearly reflects the fact that the market development, technical quality, call charges and monthly rentals were the principal deciding factors.

"I will deal fully with the licence fee in due course,

but I want to make it absolutely clear at this point that the fee never ranked higher than fourth in the order of priority in the selection criteria. The weightings fully reflected the descending priority order and are consistent with everything which went before.

"I want to remind Deputies also that all the rhetoric is based on a few countries who charged high fees.

The fact that the majority of European countries charged no fees or minor fees is constantly ignored.

As far as we can establish, countries that charged no

fees or insignificant administrative fees include

Denmark, Finland, France, Germany, Norway,

Netherlands, Portugal, Sweden and the United Kingdom.

"It is clear from the outset that the process of evaluation of the applications would be complex, would

require specialist expertise and would have to be

carried out to a high degree of objectivity. An

international competition was held to recruit

appropriate consultancy advice. The contract was

/RS

IARTY TRIBUNAL - DAY 162

awarded to a Danish firm, Andersen Management

International. Andersens had substantial relevant

expertise in similar processes in Europe and

demonstrated in its tender a highly developed approach

to evaluation.

"When I announced the competition for the second GSM licence I was determined to put in place a selection process that would be fair, impartial and objective. An evaluation team led by my Department was set up which included the consultants and officials from my Department and the Department of Finance. This team was given responsibility for the conduct of the entire process and to make a recommendation regarding the award of the licence. The group incorporated special technical and financial and management expertise from the Civil Service as well as the expertise from the consultants.

"It was also recognised that the interested parties would require clarification of some aspects of the original tender documentation and to raise questions. Parties were allowed to pose questions both to the Department and Telecom Eireann which would be responded to in a composite memorandum issued to all interested parties. This was the same memorandum in which the confidentiality aspect was dealt with.

"The Department and Telecom Eireann issued the memorandum on the 28 April. The Department followed /RS

IARTY TRIBUNAL - DAY 162

up with a further memorandum on the 12 May with further points of clarification, guidance on assumptions for the preparation of applications and an

initial draft of the licence. This information process was designed to ensure to the maximum extent possible the success of the competition would not be undermined by any needless efficiency of information, and to ensure absolute uniformity in the information available to all of the interested parties.

"On this latter point, I would like to emphasise that following the launch of the competition the Chairman of the project team set out ground rules for contacts with interested parties which would ensure that no consortium would gain any advantage in terms of information.

"The competition document was made available to the European Commission as soon as it was announced. The original tender document envisaged that applicants would declare the amount that they were prepared to pay for the licence but that Eircell would not pay any fee. The closing date for receipt of applications was originally set at the 23 June 1995. However, on the 3 May, I received a letter from Commissioner van Miert, dated 27 April, wherein the Commissioner raised questions and in particular objected to the auction element of the licence fee.

"The Commission's difficulty with the fee requirement

/RS

IARTY TRIBUNAL - DAY 162

was based on a legal argument stemming from the

competition rules of the Treaty. The Commission considered that a high fee paid by the second GSM operator and not by Eircell would contravene the competition rules of the Treaty unless there were other compensatory measures. It was decided quickly that it was far too risky in terms of legal and financial exposure to complete the competition with the possibility of Commission action after the event. Imagine what would have happened and what Deputies would say if we had announced a winner, issued the licence and then had to change the ground rules, scrap the competition or pay out heavy compensation. Representatives of the project team and consultants had detailed discussions with the Commission on the 2 June 1995 and explored ways of relaunching the competition on an agreed basis.

"It is reasonable to speculate that we could have opted for a high-fee approach and levied the same fee or something close to it on Eircell. This solution is being followed in some cases, although the Belgians have still not settled the fee for Belgacom and the company is threatening litigation against the Government and the EU. We opted for a moderate approach to the fee. It was of course consistent with my starting position. I was simply not prepared to impose a high tax on mobile phone users, and I make no apology for protecting the interests of the consumer.

/RS

IARTY TRIBUNAL - DAY 162

"Following the discussion with the Commission, I wrote a five-page letter to Commissioner van Miert dated 22 June. This letter effectively answered the concerns of the Commission in terms which reflected the discussions on the 2 June. My letter stated:

"having reviewed the matter carefully, I believe imposing a once-off fee on Eircell in the sum of  $\text{€}10$  million tied to a cap on the amount any prospective licensee can offer of say  $\text{€}15$  million guarantees, in concrete terms, that my desire not to penalize Eircell and at the same time charge a fair "once-off entry fee" to the new provider would be seen to be fair and proportionate to all parties' interests.'

"Commissioner van Miert responded on the 14 July. I wish to quote the relevant paragraph relating to the fee and other points of clarification which I had provided:

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



"For this reason, the Commission considers that it is

/RS

IARTY TRIBUNAL - DAY 162

has no grounds for action under Article 90 (1) in conjunction with Article 86 in respect of the auction fee imposed on the second operator.'

"I am told the jargon for this is 'negative clearance'. It could not, however, be any clearer that the Commission agreed to the revised fee structure which I proposed. The Commissioner's letter also contained a series of other conditions which have now been complied with.

"When it was clear that the discussions with the Commission could not be finalised and taken on board by applicants ahead of the original closing date, my Department wrote on the 16 June to interested parties postponing the closing date.

"There were no surprises in the Commissioner's letter of the 14 July, and we were able to relaunch the competition by letter on that date and set out the revised rules to all participants with a new closing date of 4 August. I want to state also that between 14 July and the closing date, no interested party raised the slightest objection against the new fee basis and the cap on the licence fee.

"Six applications were received by the closing date, and details of the applications and consortia members

have already been well publicised. The fact that six applications were received was, in my view, an /RS

## IARTY TRIBUNAL - DAY 162

endorsement of the success of the first phase of the process and of the market confidence in the approach which had been taken. All six applications were from consortia which demonstrated the necessary financial and technical capability. In the event, each applicant proposed the maximum fee of  $\text{€}15$  million and therefore, it did not impact on the comparative analysis.

"As I stated, each application contained an immense amount of detailed information in regard to financial, technical and business development matters. All this material was examined exhaustively by the evaluation team, which worked intensively over a period of more than two months after the closing date.

"I would like to dwell for a moment on the requirement that the applicants provide full ownership details.

The ownership structure of all the applicant consortia was examined by the project team. Four others along with Esat Digifone envisaged that the project would be financed, apart from debt financing, through equity participation going beyond the original consortia members. This wider equity participation involved unidentified stakeholders arising either through

private placement or through a stock market flotation.

The consultants and the project team saw nothing exceptional in this for a project of this size.

Andersens had clearly been down this road before. It is impossible to accept that something envisaged by /RS

IARTY TRIBUNAL - DAY 162

five of the six applicants in some way damaged their applications.

"These equity arrangements were not considered, and rightly so, to be a negative factor in relation to any application. Indeed, if the evaluation process had marked down any application on these grounds, it would be impossible to defend, and I have already made it clear that this process can be fully defended.

"In the case of Esat Digifone, the intention of the consortium partners to arrange a private placement with blue-chip institutional investors was disclosed.

Letters of commitment from the investors for specified amounts were submitted. In addition, strong expressions of interest in loan and equity participation in the Consortium were available from other leading international institutions. Because of the confidentiality constraints I cannot name any of the institutions concerned. The situation would be no different if any consortium had won. The project team established that all of the consortia were capable of

funding the project.

"The evaluation process is fully documented in the consultants' report. This report was approved by the project team which came unanimously to a single result based on the analysis. The following is clear from the report. The evaluators, including the consultants and the relevant officials, settled their approach to

/RS

IARTY TRIBUNAL - DAY 162

the evaluation, including the weighting to be applied to the criteria, in considerable detail well in advance of the closing date; the applications were examined meticulously by appropriate groups of people from the consultants and the home-based project team for example, technical aspects were examined by technical people and financial aspects by accountants, etc.; the tariff aspects were examined in a number of ways and with great care to take into account important aspects such as billing principles, discounts etc.; the selection criteria were broken down into a series of detailed indicators against which the applications could be compared; all relevant aspects of the applications were graded by different groups and the results were then tabulated in various ways with a view to identifying a winner; the applications were carefully checked for internal consistency; the consultants and subsequently the full

project team came to a single result which was the one I announced and which fully respected the priority order of the selection criteria and the weighting formula agreed in advance; it is clear that the applicants were treated in an even-handed manner throughout the competition; they all got exactly the same information and equal opportunity to communicate with the evaluators.

"I can categorically state that the consultants' report is meticulous and was carried out in total good faith by the people concerned. In the course of the

/RS

IARTY TRIBUNAL - DAY 162

evaluation, and in accordance with the evaluation plan, each applicant was given a series of written questions for clarification of their bid on 24 August for reply by 4 September. Consortia were also each given three-hour meetings with the entire project team which were conducted to a preset pattern and held consecutively between 11 and 14 September. Each meeting took the form of a one-hour presentation, one hour to respond to standard questions posed to all applicants and the final hour for a general discussion to the particular application.

"The question has arisen as to whether the Esat Digifone tariffs were the lowest among the applicants.

The tariffs analysis in the consultant's report is

very thorough in this area. All the applicants had different approaches to segmentation of the market and a variety of pricing packages and different metering and billing principles. Their evaluation is quite complex. Confidentiality is a specific constraint in this area. I can say at this stage, however, that the application with the lowest tariffs was demonstrably weak in respect of other major selection criteria.

"The evaluation did not take into account features which were extraneous to the competition. If it did, there would certainly be serious questions about its objectivity and its compliance with the rules. Jobs were not and could not be an issue. Regional location or endowments to universities, for instance, would not /RS

IARTY TRIBUNAL - DAY 162

be taken into account. I have to keep repeating that the evaluation was carried out in accordance with the rules known in advance and nothing else.

"I did not interfere with the evaluation in any way. Neither did any member of the Government. I wish to make it clear that the project team or the consultants were not influenced by any non-telecommunications factors. The consultants are specialists in advising in competitions of this kind, with a high reputation to protect.

"Following the finalisation of the consultants'

report, I discussed the outcome with the leaders of the Government parties and the Minister for Finance. The selection of Esat Digifone for the award of the licence was agreed on the 25 October, and I announced the result that evening.

"In a case as sensitive as this there is great advantage in announcing the result as soon as possible to put an end to speculation which grows around such matters, as was the case on this occasion. There was no undue haste. The plan drawn up by the consultants in July shows clearly that the final report was to be submitted in the week beginning 22 October. The consultants are to be congratulated for achieving this target. My commitment was to announce the result not later than the end of November. If I had not allowed some interval in case of slippage, I would have been

/RS

IARTY TRIBUNAL - DAY 162

open to criticism for not meeting my deadline.

"No political or other extraneous considerations entered into the selection, which was made totally on the basis of objective criteria laid down in advance and made known to all. Esat Digifone won the licence because the project team determined, after meticulous comparative evaluation, that it had submitted the best application.

"I now want to turn to the question of disclosure of

information to unsuccessful applicants. There are some general points I want to make absolutely clear. Under the terms of the GSM competition and the relevant legislation, I am legally advised that I am constrained by the confidentiality agreement inserted at the request of the applicants from giving certain information to applicants. At no point in the competition process or in the associated documentation did I give any commitment to detailed disclosure of the basis on which the successful applicant won. Furthermore, it is not generally the practice in other countries to publish evaluation reports or to provide disclosure of this kind. Arising from accusations made in this house, I raised this specific question with Andersen Management International some months ago. It responded as follows:

"We have followed the GSM evaluation process in Denmark, Holland, Germany, Norway, Spain, Italy, /RS

IARTY TRIBUNAL - DAY 162

Sweden and France. We only know of one country, France, which has published parts of the evaluation documents. In the case of France, two aspects should be mentioned. First, the ministerial evaluation report was modified for the public audience before it was released. Second, prior consent was given by the bidders.



"To our knowledge, the evaluation reports used in the above-mentioned countries except for France were kept secret in order to protect the bidders, who had provided the Government with information under the belief that it would be treated confidentially.

"I am aware that the Austrian Government has a constitutional obligation to justify its decisions. I also note that disclosure is less relevant in cases where the size of the cheque determined the result.

"I explained the confidentiality constraints at the beginning of this statement. I would like to be as helpful as possible to understandably disappointed applicants, but the constraints on me are severe. It is therefore proposed that individual briefing sessions will be held with the unsuccessful applicants where each will be given an outline of the evaluation process and the assessment of their own application.

"MR. MOLLOY: The Minister should have done that months ago.

/RS

IARTY TRIBUNAL - DAY 162

"MR. FINUCANE: We will deal with the Deputy later.

"AN CEANN COMHAIRLE: Let us hear the Minister without any further interruptions.

"MR. OWEN: We will give the Deputy a call later.

"MR. LOWRY: It will not be possible to provide any comparative details on the winning or any application.

"I have already spoken about jobs, but I now want to turn to specific suggestions as regards the loss of jobs in Ireland because of the GSM decision and in particular, the reported loss of Motorola jobs in Cork. Procurement by the second GSM operator will be determined fully within the terms of the European Union procurement rules, which require that major contracts of this kind must be put to open tender. Motorola, or any other equipment supplier, will have an equivalent chance of winning any such contract, regardless of the membership of the successful consortium. I reject, therefore, the speculation that jobs might have been lost because the Consortium of which Motorola was a member was unsuccessful in its bid for the GSM licence.

"I am aware that the Persona consortium has announced its intention to lodge a complaint with the European Commission in relation to the GSM process. I have no

/RS

IARTY TRIBUNAL - DAY 162

problem with that. The bottom line is that I am convinced that the process and the decision will stand up to any scrutiny. I have no problem with an examination by a third party. I welcome it if it puts an end, as I am sure it will, to the damaging questioning of a fair competition. I read in one newspaper that the first line of complaint was to be

about my failure to charge a high-enough fee. In the context of what I have already said to date, there are no marks for guessing what the Commission would do with that.

"The GSM licence is a milestone document, and it is of critical importance that it is comprehensively and accurately drafted. Much of its detailed content is based on the winning tender. The substance of the licence has been agreed between my Department and Esat Digifone and it has been, in recent days, the subject of final legal clearance. I expect this clearance will be forthcoming shortly. This is somewhat behind our original schedule, but I stress that the only reason for delay is due to the time needed to draft the highly complex document.

"Those are the facts. It is clear that every aspect of this historic competition has been carried out in an exemplary manner whether by me, the officials in my and other departments, or in the international consultants.

/RS

IARTY TRIBUNAL - DAY 162

"It is important in view of the recent statements made in this House under privilege to examine what the opposition and, in particular, Fianna Fail have said."

I think there then are a number of exchanges which do not appear to have huge relevance, although I just

refer to them.

Now, if we go to the bottom of page 9, there is a question from Mr. S. Brennan.

"MR. S. BRENNAN: Did the Minister decide on the figure of 15 million, yes or no?"

"MRS. O'ROURKE: Who decided on the figure of 15 million?"

"AN LEAS-CEANN COMHAIRLE: Let us hear the reply.

"MR. S. BRENNAN: I asked a straight question. Was the Minister the first to suggest €15 million?"

"MR. LOWRY: The Commission objected to the auction fee. At my request my officials went to the

Commission and had consultations and discussions with them and agreed a joint approach. The joint approach was to cap the fee at €15 million and for a €10

million fee to be levied on Eircell. We put those terms and conditions in writing to Commissioner van Miert, and he responded as I have stated, by giving

/RS

IARTY TRIBUNAL - DAY 162

clearance for the proposal by the Irish Government.

"MRS. O'ROURKE: The Minister's officials said he had no hand, act or part in it.

"AN LEAS CEANN-COMHAIRLE: Please let us hear the Minister's reply.

"MR. LOWRY: He responded by giving clearance for the proposal by the Department and said it was in

compliance with competition rules and the Treaty rules.

"MR. BRENNAN: This is the core of the matter. Will the Minister confirm, which he has virtually done, that the proposal that the figure of €15 million and not €50 million came from him?

"MR. LOWRY: I have clearly outlined the procedure. We had intended initially that there should be consideration of the auction principle. This principle was castigated by Deputy Brennan at one stage, but later Deputy Noel Treacy and Deputy Sean Doherty said we should have gone to an auction. There was an immediate contradiction in the Fianna Fail position. The Government's position was clear. We sent our proposals to the Commission.

"MR. S. BRENNAN: Who proposed €15 million?

/RS

IARTY TRIBUNAL - DAY 162

"MR. LOWRY: The Commission objected to the auction element. We then entered into consultation with the Commission to get an agreed approach. It was agreed at the consultation and in writing that we should proceed along the lines of €15 million for the incoming operator and €10 million for the incumbent, which was Eircell.

"MR. MOLLOY: Does the Minister agree that much of the disquiet over the granting of the mobile telephone

licence arose from the Minister's refusal to say why the unsuccessful applicants were not successful? Several months after announcing the successful bidder he announced today, when this debate was forced on him, whether he is prepared to give individual briefings to the unsuccessful applicants. If he had done that initially, much of the public disquiet, media comment and questioning in this House would not have been necessary. Opposition members have a duty to ask questions on behalf of the public, and this matter involves taxpayers' money.

"Having decided not to accept the highest-bid principle for this licence, should the Minister not have chosen the bid that would have given the lowest tariffs so the consumers might benefit? The Minister neither accepted the highest bid, which would have benefited the Exchequer, nor the low tariff, which would have benefited the consumer. Who will benefit?

Will it be the Norwegian Government, a major part of

/RS

IARTY TRIBUNAL - DAY 162

the consortium? Does the Minister not see the contradiction in his method of choosing the successful bidder?

"MR. LOWRY: There is no contradiction in this. The process is crystal clear. Of course the Deputy has a duty to ask questions, but he also has a duty to be

responsible

"MR. D. AHERN: Is the Minister talking about being responsible?

"MR. LOWRY: in the manner which he puts those questions so that he is not scaremongering or damaging the reputation of civil servants or consultants of an Irish Government.

"MR. MOLLOY: I have the right to ask questions.

"MRS. DOYLE: The Deputy should listen.

"MR. MOLLOY: I have listened for the past 50 minutes.

"MR. LOWRY: When I set out to provide a licence for the second mobile operator I had one objective in mind namely, to ensure that by way of competition we would reduce the price of telephone hardware, reduce call charges for Mobile Operators and ensure real competition in the market. If I had done what the Deputy proposed when he told me outside the House that

/RS

IARTY TRIBUNAL - DAY 162

I was selling off the family silver to shore up public finances, we would not have the lower prices on telephone hardware or lower tariff charges. The Deputy is arguing again the philosophy of the Progressive Democrats party.

"MR. S. BRENNAN: It is obvious from what the Minister said that on the 22 June he wrote to Commissioner van Miert and proposed a figure of  $\text{€}1\frac{1}{2}$  million. He could

have proposed €150 million, but he chose €115 million.

The Minister stated that letters were submitted and names given, in other words he got the information he sought about who owned shares in the company, but the names were not disclosed on the 22 November.

"MR. LOWRY: Nor will they be.

"MR. S. BRENNAN: Why were names not disclosed on 22

November" that's a reference to the question time

in the Dail on that day "when letters were

submitted before the Minister made the award? Did he

know who owned the 20 percent before awarding the

licence? Did he mislead the Dail in this issue? Will

he tell the House who are the beneficial owners of the

remaining 20 percent of the winning consortium?

"MR. MOLLOY: 25 percent.

"MR. LOWRY: No, I will not do so, because of the

/RS

IARTY TRIBUNAL - DAY 162

Confidentiality Clause I will put the matter in

context."

Then I'll go down to "Mr. Lowry".

"MR. LOWRY: Deputy Brennan's comments are negative

and destructive. The Communicorp funding requirement

was underwritten by a party acceptable to my

Department. The intention of the consortium partners

to arrange a private placement by what can only be

described as blue chip institutional investors was



disclosed by them to my Department. Stockbrokers were named and letters of commitment for specified amounts from the investors were submitted. In addition, strong expressions of interest in loan and equity participation in the consortium were available from other leading international financial institutions.

This was the position when the decision was made.

"MR. S. BRENNAN: The Minister is not telling us who the consortia were.

"MR. FINUCAN: The Deputy should read the Minister's script.

"MR. S. BRENNAN: Who owns the 20 percent?

"MR. LOWRY: I reiterate that there was nothing unusual about the Esat Digifone application in this area compared with most of the other applicants. We

/RS

IARTY TRIBUNAL - DAY 162

are talking about an up-front capital investment of approximately  $\frac{1}{2}$ 120 million. It is understandable that any business of that size would be financed by debt and equity, and the normal ratio is 50:50. That is precisely what happened in this case.

"MR. D AHERN: Someone must own it.

"MR. LOWRY: That is how at least five of the bidders proposed to fund it.

"MR. S. BRENNAN: Who owns it?

"MR. B. AHERN: The man on the moon.

"MR. LOWRY: The principal function of my Department was to ensure that each of the six companies who sought the licence had the capability and necessary funds in place to fund the project. We satisfied ourselves in that regard.

"MR. S. BRENNAN: The Minister does not have the right to sign confidential agreements on behalf of the State. He can not sell the State assets confidentially.

"MRS. GEOGHEGAN QUINN: Who owns it?

"MR. LOWRY: There are confidentiality clauses

/RS

IARTY TRIBUNAL - DAY 162

"MR. BRENNAN: The Minister should not have sold it.

"MR. LOWRY: Before the licence is signed, it will become abundantly clear"

Mr. Lowry continues: "The company concerned is the only source from which information on the beneficial owners of the licence can emanate. We are granting the licence to Esat Digifone, and before it is issued I will request the company to put on public record the composition of the consortium and from where the funding came.

"MR. TREACY: I refer the Minister to the selection criteria weightings. He states that his decision was taken in the interest of consumers. Why did he allocate only 18 percent of the approach to tariffing?

In circulating revised criteria in July 1995, why did the Minister stipulate a minimum bid of  $\text{€}15$  million and a maximum of  $\text{€}15$  million and allow 11 percent in the assessment when everyone knows he is disposing of a national asset worth  $\text{€}50$  million? The Minister was ill advised in putting in the condition. In the interest of international investment in the country, will he appoint an independent consultant to re-evaluate this process "

then there are a number of exchanges which I don't think I need make reference to at the moment.

/RS

IARTY TRIBUNAL - DAY 162

I come down to

"MR. MOLLOY: The Minister said that the weighting was decided up front. Was there a change in the weighting after the cap was imposed? If all the consortia were deemed to be capable of funding the project, why have funds not been forthcoming? Will the full ownership of the licence be disclosed before the Minister signs the licence?

"MR. LOWRY: As has been clearly stated in public on a number of occasions and confirmed by way of statement by the company involved, Esat Digifone, the funds have been in place for a considerable period of time.

"MR. MOLLOY: Does the Minister accept that, and is he happy?

"MR. LOWRY: I accept that. I believe that when companies with a reputation such as that of Esat Digifone make a public statement of that nature, the onus is on all Deputies, unless they have information to the contrary, to accept and believe it. "

I'll then continue with

"MR. LOWRY: "That information should also be passed on to Deputy O'Malley. The ownership of the company is a matter for Esat Digifone. Before the licence is signed, it will make full disclosure in respect of how

/RS

IARTY TRIBUNAL - DAY 162

it has put the funding in place, the ownership of the company and the stakeholders.

"MR. D. AHERN: It is up to the Minister to dictate the terms.

"MR. S. BRENNAN: It is obvious that the Minister gave a licence to people he does not know, because he has not yet found out who owns it. Why was the timing of his announcement brought forward five weeks? Why did he bring it forward and rush it in an afternoon with an hour's notice to the press?"

I then continue down to:

"MR. BRENNAN: "The Minister will not tell us to whom he sold it.

"MR. LOWRY: Five of the consortia decided that in one form or another, whether by placement, flotation or an

input by a financial institution, we are placing 20

percent aside for that particular purpose.

"MR. D. AHERN: It is the Minister's duty to know.

"MR. LOWRY: The Deputy does not expect me to have a crystal ball."

I will continue with

/RS

IARTY TRIBUNAL - DAY 162

"MR. LOWRY: to look into the future and decide as a result of a public placement who in fact would win

it. That is not my business. My business in the

Department was to ensure that the winning consortium

was capable of funding the project which it was

undertaking on behalf of the State. I have satisfied

myself as to that, and I am confident, without

contradiction, that Esat Digifone has the funding in

place and will proceed on target to give us the

roll-out and competition with Eircell before the end

of the year."

I then go to Mr. O'Keeffe. And in the first portion,

I'll just continue down in his intervention.

"Given the Taoiseach's espousal of openness and

transparency and the fact that this was the sale of a

public asset, why did he not insist that matters

pertaining to ownership would be in the public view?

Will the Minister accept that perhaps it was a

mistake, given that we now have press speculation that

20% could be owned by such people as Mr. Desmond and others? The confidentiality has now led to speculation throughout the press. Will the Minister make public the full ownership of Esat Digifone before the licence is signed?

"MR. HOGAN: He said that.

"MR. LOWRY: I will not speculate on what the Tanaiste

/RS

IARTY TRIBUNAL - DAY 162

said."

Then he goes on:

"MR. LOWRY: The Deputy has missed the point. I stated clearly that all five of the participants in this competition had various ways and means of raising funds to fund the project. I will not speculate at this stage or cast aspersions on the credibility of others. The Deputy mentioned Mr. Desmond. If Mr. Desmond or any other company is in a position to fund this project and is acceptable to Esat Digifone, and if it means that this project is up and running, so be it that is their business. It is not my business to determine who should participate in a consortium of this kind. My only priority is to ensure that the necessary funds are in place to fund the project and get it to roll out in time. It is very simple."

And those are the portions of the particular Dail references to the GSM project between the time of the

announcement of the evaluation competition and the issuing of the licence, which took place on the 16th May, 1996.

Just prior to the 30th April, 1996, on the 24th April, 1996, Mr. Fintan Towey of the Department wrote to Mr. McFadden and Mr. Gormley of the Office of the Attorney General and referred to a meeting which he had had with them on the 22nd and 23rd of April, and he

/RS

IARTY TRIBUNAL - DAY 162

enclosed the following:

" a report of the Department's assessment of the compatibility of the conditions of the draft GSM licence with directive 96/2 and a consolidated text of Section 111 of the P&TSA, 1983 Act incorporating amendments contained in Section 145 of 1992 and amendments proposed in the transposition of the Commission directive 96/2."

In that letter, he stated:

"I would also like to reiterate our requirement for a legal opinion on the restructuring of the ownership of Esat Digifone (relevant papers were provided at our meeting on the 22nd April). In particular, the question of whether recent correspondence suggests any change in the identity of the beneficial owners of the company which will be considered incompatible with the ownership proposals outlined in the company's

application must be addressed. Before the ultimate award of the licence it is now considered that it would be preferable to seek warranties in relation both to the beneficial ownership of Esat Digifone and the financing package for the project. This is considered prudent given the nature of the concessions being given to the company. Perhaps you would advise, however, whether such a requirement could be challenged by Esat Digifone as an imposition not /RS

IARTY TRIBUNAL - DAY 162

envisaged in the competition process or otherwise unreasonable on legal grounds."

Now, an opinion was furnished by counsel through the Office of the Attorney General, which addressed the question of change of ownership after the issue of the licence. The specific issue of changes in the ownership of the consortium between the date of the application and the date of the issue of the licence does not appear to have been further pursued by the Department. It appears that the Department continued to be concerned about the ownership issue in May of 1996.

On the 1st May, 1996, Mr. Martin Brennan wrote to Mr. Owen O'Connell of William Fry in the following terms:

"Dear Mr. O'Connell,

"I refer to your letter dated 17 April 1996 concerning



the restructuring of certain ownership interests in Esat Digifone.

"In accordance with the requirements of the GSM competition documentation, Esat Digifone provided ownership details which indicated that at licence award, the ownership would be as follows:

Communicorp Group Limited 40%

Telenor Invest AS 40%

/RS

IARTY TRIBUNAL - DAY 162

Institutional investors 20%

"The application also provided details of the ownership of the operational partners and identified the probable institutional investors and the broker who would be responsible for placement of equity with institutional investors. In the case of Communicorp, it was indicated that it was 66% owned by an Irish investor (Mr. Denis O'Brien) and 34% by Advent International.

"In view of the information contained in your letter of 17 April 1996 it would be appreciated if the following could be clarified:

- The nature of any difference between Communicorp Limited and Esat Telecommunications Holdings Limited in relation in particular to expertise or asset strength, and
- Full details of the ownership and categories of all

shares of Esat Telecommunications Holdings Limited including in particular by persons other than the owners of Communicorp.

"It is essential that the Department can identify precisely any change in the effective ownership (both direct and indirect) of Esat Digifone since the time of submission of the application.

/RS

IARTY TRIBUNAL - DAY 162

"Finally, it would be appreciated if you could confirm that full certification of the following matters will be provided before the award of the licence.

- The precise equity ownership of Esat Digifone, including the identity of all institutional investors

- The identity and financial commitments of the provider of debt financing

"It is essential that these matters are cleared up before the issue of the licence. We also need to discuss the public presentation of these matters.

"I am available for any discussion you may require of the foregoing.

"Yours sincerely,

"Martin Brennan"

The extent of the Department's concerns is apparent from a note made by Mr. Owen O'Connell of a meeting at the Department on the 3rd May 1996. Now, it has been

reconstituted, so I'll just put it up.

It's to file; it's from OO'C. Client: Esat Digifone.

Matter: Licence negotiations.

And it seems to record as present: KD, Knut Digerud;

/RS

IARTY TRIBUNAL - DAY 162

POD, Peter O'Donoghue; AJ, Arve Johansen; MW, Michael

Walsh; P. Connolly; Owen O'Connell at Department of

Communications; Martin Brennan; Fintan Towey; Regina

Finn; and then there is Eanna that may be a

reference to a Mr. Eanna O Chongaile.

The note continues:

"Clear a political football.

Identity of each shareholder legal and beneficial  
ownership

Esat Digifone changes relative to bid.

Change in institutional investment replacement of  
Advent and Davys by IIU.

Need detailed information/quality/about IIU.

Confirmation that Telenor is same as at bid date.

Differences (in detail) as to expertise and asset  
strength between Communicorp and Esat Telecom  
Holdings.

Numbers re IIU.

Telenor "backdrop" statement as operator as last  
resort. AJ that's the way we see it, anyway.

"We'll never abandon this one". Not requesting

/RS

IARTY TRIBUNAL - DAY 162

statement, but would be helpful per MB.

Project finance POD bank 60/equity 40.

ABN plus AIB appointed co-providers

€½25 million bridging committed.

Thought to presentation. More the better provided

agreed in advance.

Donal Buggy plus Billy Riordan, maybe Andersen.

Better than 50% chance that Commission will send us

Persona complaint; Department would already have

replied plus would like us to coordinate response.

When Telenor and Esat began to talk? (Ref:

complaint)"

There is no note or record of this meeting in the

Department documents. The Department did not inform

the Tribunal of this meeting. The Tribunal only

became aware of this meeting from the contents of the

memorandum which I have already mentioned, which Mr.

Arve Johansen made, dated 4th May, 1996, in Oslo.

Now, I have opened portions of this at various stages,

but I think it might be more appropriate now, at this

stage, to open the whole of Mr. Johansen's memorandum.

"Private and confidential.

"Re memo on shareholding in Esat Digifone.

/RS

IARTY TRIBUNAL - DAY 162

"I have below summarised a few points that has become clear to me over the last 24 hours as a consequence of the information acquired regarding Communicorp's attempt to buy back 12.5% of the IIU shares.

"1. Denis O'Brien came personally over to see me in Oslo probably sometime during September last year. He informed me that, based on information from various very important sources, it was necessary to strengthen the Irish profile of the bid and get on board people who would take a much more active role in fighting for Digifone than the 'neutral' banks who basically would like to keep a good relation to all consortia.

"I accepted Denis' word for necessity for this new move. (Note: Underwriting was never used as an explanation).

"2. IIU should apparently be the ideal choice for this function; the only string attached being that they had demanded a 30% equity participation "for the job". Denis had managed to reduce this to 25%, but it was absolutely impossible to move them further down. This was a disappointment to us, since everything we had said and done up to then had been focused on at least 40% ownership for the principal shareholders at the time of the issuing of the licence. But not only that, Denis then pushed very hard for Telenor to swallow 15% of this and Communicorp only 10% to

/RS

## IARTY TRIBUNAL - DAY 162

which I never agreed but I accepted the principle of sharing the pain and maintaining equal partnership (37.5%/37.5%). It was also said that a too-high Telenor ownership stake would be seen as aggressive and could be inhibiting the award of a licence.

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

"3. Some days later the nature of the agreement with IIU comes clearer into the light, as an underwriting agreement to guarantee for Communicorp's timely payment of its share of the capital into Digifone, and including the right to place the shares with up to four nominees. This was unwillingly accepted by Telenor (since we understood it be to be the right steps to be taken from an "Official Irish standpoint" to secure the licence).

"The agreement was drafted by Frys/OO'C and signed in a hurry (basically in draft form) by Denis O'Brien alone on behalf of Communicorp and Digifone (even though we in the JV agreement have made it clear that two authorised signatures are required one from each party).

"4. The agreement was never signed by Telenor, either as authorised Digifone signature nor as a shareholder and a party to the agreement. Sometime shortly after this, the Advent commitment to invest \$30 million into

/RS

IARTY TRIBUNAL - DAY 162

Communicorp disappears as it was essentially not necessary any more since the Communicorp liability to pay capital to Digifone was anyway underwritten by IIU.

"5. In hindsight, it is quite clear who benefited from this arrangement. I have good reason to believe that the terms put forward by Advent for investing into Communicorp did not suit Denis O'Brien. With the above arrangement that he orchestrated for all other sorts of reasons, he has actually achieved to bolster his/Communicorp's balance sheet and paid for it with Digifone shares at the cost of Telenor. He has done this in an atmosphere of trust where Telenor even has agreed to bridge-finance Communicorp while he raises funds through a private placement in the US.

"6. As we go along, we learn more, but it all serves to disclose more details which again more and more prove the above scenario.

"In the meeting with the Department of Communications, Friday May 3rd, it became evidently clear that IIU was not a favourable name from a "Irish public" point of view. On the contrary, the Ministry basically asked for help for how to explain why we had substituted Advent, Davy Stockbrokers and other recognised named institutional investors in the bid (AIB, Investment

Bank of Ireland, Standard Life Ireland).

/RS

IARTY TRIBUNAL - DAY 162

"Eventually the project coordinator from the Ministry Mr. Martin Brennan actually appealed (off the record) to Telenor to write a letter of comfort that we would serve as last resort for the Digifone company for funds and operational support. My feeling was that if Telenor had owned it alone, he had been more comfortable than with the current shareholders.

"I think it would be a very prudent thing for Telenor to do, especially since we then effectively underwrite the whole project, both Communicorp and IIU, after already having paid Communicorp's price for the first underwriting, which now appears to be useless.

"7. But the story doesn't end there. Two days ago I was informed by Denis that he had entered into an agreement with IIU to buy back 12.5% of the shares now held by IIU. I found it absolutely unbelievable, and made it clear that Telenor would not accept anything but equal partnership; either we buy 6.25% of the IIU-held shares each or Telenor should take the other 12.5% of the IIU-held shares.

"I have also now seen the letter of agreement between Communicorp and IIU which strongly supports the scenario outlined above.



- IIU apparently has no (or very little at least) money and cannot afford more than 12.5%. The price /RS

## IARTY TRIBUNAL - DAY 162

agreed is a little cryptic, but it looks as though any advances that IIU has to make for the disposed. 12.5% before the transactions effective date (31 May 1996) is seen as cost (???). It will, if this is the case, serve as a moving target for IIU's eventual gain on the transaction putting an immense pressure on Communicorp to delay capital calls in Digifone until the US placement is finalised.

- The return favour from Communicorp is to release IIU from all its underwriting obligations in Digifone. Does Digifone have an opinion on this, and what about Telenor? This effectively gives Communicorp back its 12.5% of the shares at par (or close to), releases IIU from all its underwriting liability (which Digifone "paid" 25% for), and IIU ends up having delivered absolutely nothing, having done nothing but complicated the award of the licence (if we get it at all) but with (some cash?) And 12.5% of the shares of Digifone which effectively have deprived from Telenor, at the same time as the Department and our honoured partners gently ask us to underwrite the whole

project.

- Fortunately, IIU is at least realistic enough to see that this cannot take place unless Telenor continues to support the project. This fact, the time limit and the cooperative spirit shown (by /RS

IARTY TRIBUNAL - DAY 162

disclosing the letter) may signal a hope for a sensible solution to this mess."

Now, I want to make it clear that Mr. O'Connell's notes of the meeting of the 3rd May was made available to the Tribunal when his documents were subsequently produced to the Tribunal voluntarily. The first indication that the Tribunal had that such a meeting had taken place came, as I have said, was when Mr. Johansen's memorandum became available to the Tribunal.

Mr. Martin Brennan has informed the Tribunal that he can not find any contemporaneous record of the meeting of the 3rd May, 1996. In the context of the documents on file, it seems clear that it was part of their checking of the financial status of the potential licensee in the lead-up to the issue of the licence.

He has informed the Tribunal that he has very little recollection of the detail of this investigation and the meeting itself, which suggested to him that he probably chaired the meeting in an "ex officio"

capacity, having been the Chairman of the Project Group.

Mr. Fintan Towey has informed the Tribunal that he doesn't have a specific memory of this meeting. He has informed the Tribunal that the report by Owen O'Connell would seem to be an accurate account.

/RS

IARTY TRIBUNAL - DAY 162

Ms. Regina Finn has informed the Tribunal that she notes that her name is included on the first page of Mr. Owen O'Connell's note. She has informed the Tribunal that she has no recollection of this meeting or of being present at such a meeting. She has informed the Tribunal that if she was at such a meeting, it is likely that she would have prepared a note herself recording the portion of the meeting that was relevant to her role.

And in that regard I should state that she requested the Tribunal, if we could, let her have a copy of any note which existed on the departmental files, but of course there are none. She has informed the Tribunal that it would be normal that if a senior member of the Department attended such a meeting, a Department note would have been made of the meeting.

On the 7th May, 1996, Mr. Fintan Towey rang Mr. Owen O'Connell and informed him of the Minister's strong preference that the capital configuration of Esat

Digifone should be restored to 40:40:20 from 37.5:37.5:25% to accord with the capital configurations as submitted in the application on the 4th August, 1995.

Mr. O'Connell's attendance of a telephone conversation with Mr. Fintan Towey:

Min. very strong preference for 40:40:20 at time of

/RS

IARTY TRIBUNAL - DAY 162

licence but understands need for flexibility afterwards. Will take Esat Holdings subject to no substantive difference and outline in writing."

At this time there appeared to be a division between the members of the consortium, some of which appeared to date back to the early months of 1996, when Esat Telecom/Denis O'Brien appeared to be endeavouring to acquire a further 12.6% of the ownership of Esat Digifone. They also appear to have related to the Minister's desire that the capital configuration of Esat Digifone be restored to 40:40:20 to accord with what was submitted in the bid.

A memorandum setting out proposals by IIU to help resolve the difficulties which had arisen between the shareholders was prepared on the 9th May and appears to have been circulated to the members of the consortium.

"1(a) Memorandum - this memorandum contains proposals

by IIU to help to resolve the difficulties which have arisen regarding the various shareholdings in Digifone, both from the point of view of the shareholders and to ensure that the licence is granted with the minimum delay. The proposals in this memorandum are subject to detailed discussions by the parties and when agreed in principle, subject to detailed drafting. It would be intended that the proposals (subject to their being agreed) would be

/RS

IARTY TRIBUNAL - DAY 162

incorporated into the existing draft Shareholders' Agreement and that such agreement would be appropriately amended to take account of them. For the avoidance of doubt, this memorandum is for discussion purposes only and is without prejudice to the parties' existing situation.

"(b) the existing shareholders in Esat Digifone Limited are Telenor Invest, Esat, Telecom Holdings Limited and IIU Nominees Limited.

"The existing shareholdings are Telenor 37.5%.

Esat Digifone 37.5%,  
IIU 25%.

"The IIU shares are ultimately beneficially owned by Dermot F. Desmond.

"The following are the proposals referred to above:

"1. Sufficient ordinary shares at par will be issued to each of Telenor and Esat to ensure the following percentage shareholdings in Digifone as of the 13 May 1996.

Telenor 40%.

Esat 40%

IIU 20%.

/RS

IARTY TRIBUNAL - DAY 162

"2. Both Telenor and Esat will grant an option to IIU over 2.5% (i.e. total 5%) of the share capital of Digifone for 1/21 (the option shares) or alternatively IIU will be given the right at any time after the licence issues to subscribe for such amount of ordinary shares as will give it a total of 25% of the entire issued share capital.

"3. IIU will contribute capital to Digifone in relation to said option shares as if IIU were the owners of same, i.e., IIU will act as if they owned 25% of the issued share capital subject to the exercise of the options described later.

"4. Telenor will have a right ('the Telenor right') to acquire from IIU the option IIU has over 2.5% of the capital of Digifone (assuming IIU has such option) together with half of IIU's shareholding as of the 13 May 1996 (i.e. a further 10% or 12.5% of Digifone), as the case may be.

"5. The Telenor right will be exercisable at fair market value (to be defined) at any stage between the third and fifth anniversary of the execution of the Shareholders' Agreement.

"6. Esat will have a right ('the Esat right') to acquire from IIU the option IIU has over 2.5% of the capital of Digifone (assuming IIU holds the same)

/RS

IARTY TRIBUNAL - DAY 162

together with half of IIU's shareholdings as of 13 May 1996 (i.e. a further 10% or 12.5% of Digifone), as the case may be.

"7. The Esat right will be exercisable for one month from the date of execution of this agreement at a price of  $\frac{1}{2}$  £6.5 million pounds together with an amount equal to 50% of all capital subscribed by IIU to Digifone together with the interest on such capital at 2% over DIBOR. Prior to the granting of the Esat right and entry into formal documentation, IIU must receive all the following in a form satisfactory to it:

"A. CSFB confirming that all of the necessary funding for Esat/Communicorp will be in place prior to the 31 May 1996;

"B, confirmation being received that IIU has been released from its underwriting obligations by all relevant parties;

"C. Confirmation being received from the Department of Transport, Energy and Communications that the revised shareholding structure will have no adverse implications for the GSM licence;

"D. The completion of the Shareholders' Agreement substantially in its current form incorporating the proposals set out herein;

/RS

IARTY TRIBUNAL - DAY 162

"E. The provisions of clause 14 of the existing draft Shareholders' Agreement to be amended so as to provide that grace periods for any defaulting shareholder are deleted and the remedy rights for defaulting shareholders are deleted;

"F. An undertaking being given that irrespective of percentage shareholding controlled by Esat, Esat will have no right to vote a greater percentage of shares than that held by Telenor, or alternatively voting rights would be varied to give the same effect.

"8. The parties agree that the final documentation will contain covenants by the parties to float 20% of their shares on a recognised Stock Exchange no later than the fifth anniversary of this agreement. This flotation is to be arranged by IIU on normal commercial terms.

"9. The parties agree that the final documentation will contain covenants by the parties to place a



minimum of 20% of the shares in Digifone at the time of flotation, such placing to be arranged by IIU, said 20% to be placed by each party pro rata to its holding.

"The foregoing proposals are to be treated as heads of terms only and non-legally binding until agreed and incorporated into formal documentation."

/RS

IARTY TRIBUNAL - DAY 162

That was the 9th May of 1996.

Now, following the circulation of that memorandum, it appears that Mr. Arve Johansen wrote to Mr. Michael Walsh on the 11th May, 1996, setting out Telenor's position regarding the proposals contained in the memorandum.

"Dear Michael,

"I refer to your letter of 11 May 1996 where you

"1. Enclose your letter to Communicorp of 1 May 1996

outlining the terms and conditions subject to which

IIU would be willing to sell 12.5% of its shareholding

in Esat Digifone Limited to Communicorp, bringing

Communicorp's shareholding in Digifone up to 50%, and

ask Telenor Invest to confirm that it would continue

to support the Digifone project in such a case, and

"2. Enclose two draft share transfer agreements

subject to which IIU would transfer 2.5 percent of its

shares in Digifone each to Communicorp and to Telenor.

"First we will commit on the arrangement outlined in your letter of 1 May 1996 and then comment on the draft share transfer agreements.

"Communicorp and Telenor last year entered into a joint venture to bid for the second GSM licence in

/RS

IARTY TRIBUNAL - DAY 162

Ireland. Telenor believed that a joint venture between Communicorp and Telenor would be a strong contender for the second GSM licence in Ireland, Telenor being an experienced and successful mobile operator and having sufficient financial strength to commit to such a project and Communicorp representing first of all the Irish participation in the project.

"Although Telenor would have preferred to have a majority participating interest, Telenor accepted that the joint venture with Communicorp was established on a 50:50 basis. This was accepted despite the fact that Communicorp did not have the financial strength to carry half of the financial commitment that was necessary to support the joint venture if it was awarded the licence.

As a consequence of Communicorp's lack of financial strength, Communicorp subsequently has invited institutional investors to participate in the project, necessitating a dilution of the existing shareholders.

Communicorp has strongly argued that Telenor under the

circumstances must accept a dilution of its participation despite the fact that the dilution was caused by Communicorp's lack of financial strength.

Telenor has opposed to the reduction of its participating interests below that of Communicorp. On two occasions, therefore, Communicorp and Telenor's participating interest in Digifone has thus been reduced first to 40% and then to 37.5 percent.

/RS

IARTY TRIBUNAL - DAY 162

"The reduction of Telenor's and Communicorp's participating interests from 50% to 40% each followed a commitment from AIB and some other institutional investors to take a 20 percent stake in Digifone, and Advent's commitment to invest \$30 million in Communicorp. The reduction from 40% to 37.5% followed as you will know from the arrangement agreement entered into sometime in 1995 between IIU and Denis O'Brien. Subject to this agreement IIU also undertook to underwrite Communicorp's financial obligations with respect to the funding of Digifone.

"Communicorp now has established yet another way of financing its shares for the funding of Digifone.

This financing arrangement is organised by Credit Suisse First Boston and would, as we understand from your letter of the 1 May 1996, ideally require Communicorp to have 50% in Digifone. In your letter

of 1st May 1996 you state that you would be willing to sell a 12.5% share in Digifone to Communicorp, bringing Communicorp's share in Digifone up to 50%. In return Communicorp would pay to IIU its historical costs related to said 12.5% share plus an amount equal to the subscriptions due on IIU's remaining 12.5%.

"First, Telenor wish to state that the transfer of 12.5 percent of the shares in Digifone from IIU to Communicorp would require Telenor's express consent, which, as you will know from the copy you have

/RS

IARTY TRIBUNAL - DAY 162

received of our letter to Denis O'Brien of 10 May 1996, Telenor is not prepared to give.

"Second, Telenor cannot confirm that it would continue to support the Digifone project if as a result of the event and arrangements described above Telenor would end up with a lower participating interest in Digifone than Communicorp.

"However, as you will know from the copy you received of our letter to Communicorp of 10 May 1996, we have offered to Communicorp to enter into a "bridging agreement" subject to which Telenor would carry Communicorp's financial obligations vis-a-vis Digifone during a limited time period, allowing Communicorp even more time to arrange its financing.

"With respect to your proposal concerning the transfer

of 2.5 percent of the shares in Digifone to both Communicorp and Telenor, we consider that your handwritten points on the front page of the draft agreement need to be inserted, and in particular the mechanism for the transfer of legal title to the shares with immediate effect from the signing of the agreements. We agree that the recital A should be expanded to refer to the exact present shareholding of IIU. The two agreements require to be made interdependent on one another and should contain the usual warranty as to the title to the shares being sold. We also require that an undertaking be provided

/RS

IARTY TRIBUNAL - DAY 162

in the Telenor agreement that no further shares or interest in shares shall be offered for sale or otherwise dealt with by IIU without those shares or interests being first offered to Telenor.

Specifically, no shares or interest in shares should be offered to Communicorp or any person or entity acting in consort with Communicorp without the prior written consent of Telenor.

Finally, we take this opportunity to stress that it is necessary for the parties to sign the Shareholders' Agreement as soon as possible and at the latest prior to the award of the licence."

It appears from Mr. Johansen's memorandum of the 4th

May, 1996, made in Oslo, Mr. Walsh's or IIU's memorandum of the 9th May 1996, and Mr. Johansen's letter of the 11th May, 1996, that there may have been serious tensions between the members of the consortium in relation to financing issues affecting Esat Telecom, Communicorp and possibly IIU (Dermot Desmond).

On the same day, Saturday 11th May, 1996, there were a number of contacts and meetings between Mr. Michael Walsh and Mr. Denis O'Brien which are recorded in a note made by Mr. Denis O'Brien, and it reads:

"Mr. Walsh came to PC office at 7pm on Saturday 11 May. We had just been to a meeting with Arve

/RS

IARTY TRIBUNAL - DAY 162

Johansen, the Telenor lawyer Rolf and Arthur Moran at Esat Digifone's offices.

"Michael Walsh gave me a copy of a letter from Telenor addressed to IIU.

"He said Arve was getting more "entrenched".

"I told MW that I had been to a meeting with D Desmond. at 6 o'clock and DD had proposed the following:

"1. We would agree to buy 2.5 percent to add to our 37.5%.

"2. Tell Arve that if he was not going to take up IIU's offer of the 2.5%, we would be happy to.

3. We would be agreeable to sign the Shareholder's Agreement on the 40-40-20 basis.

"4. IIU or Dermot Desmond would give Communicorp Group Limited (or Esat Holdings) a loan of the cash required to fund our 40% or 1/26 million.

This is the money that was necessary to pay for Esat Telecom Holdings' portion of the licence fee which was due to be issued some days hence.

"5. Dermot Desmond said once we had the licence we /RS

IARTY TRIBUNAL - DAY 162

were "all in the one boat."

"6. Dermot Desmond said he would in one transaction altogether do the following:

"A, sell 5% each to Telenor and Communicorp so that we could increase to 45% each.

"B. Insist upon Communicorp Group Limited be granted an option for a further 5% of Esat Digifone, which would bring Communicorp Group Limited's holding to 50%. DD thought that this option would be exercisable 12 months later. This was Communicorp Group Limited to consolidate its 50% holding (as per request from CSFB) in Year 2, i.e. 1997.

"7. DD said he would be in a position to force through the above by the fact that Telenor would know that IIU has the right to issue the once to anyone."

It's signed the 11 May. The signature appears to be

that of Mr. Denis O'Brien, and it appears to be

witnessed by Mr. Paul Connolly.

Now, a further note of Mr. O'Brien, "At 8:00pm Michael

Walsh phoned DOB to say:

"He had spoken to DD:

"1. He did not want any pieces of paper around

/RS

IARTY TRIBUNAL - DAY 162

reflecting what was discussed.

"2. That "We would have to trust DD"

"3. DOB said "He wanted to record his understanding

of what was said, as DD sometimes speaks very fast,

and I wanted to make sure I fully understand Dermot

Desmond proposal re now and the 45:45:10 proposal with

5% option, Communicorp Group Limited.

4. Denis O'Brien asked Michael Walsh to confirm that

IIU would sell their 10% to Telenor, i.e. so Telenor

would go from 45 to 55. He said that whatever

assurance Telenor would have, we should have the

same."

And that's signed by Denis O'Brien.

CHAIRMAN: I suppose logically the first person

referred to would be Mr. O'Brien on the first line,

rather than Mr. Desmond.

MR. COUGHLAN: Yes.

Now, there were further discussions concerning the

ways of funding the Consortium, and in particular, of



funding Communicorp's equity commitment which, at that time, it appears, Esat Telecommunications/Communicorp were unable to fund from their own resources or from third-party borrowings. And on the 12th May, 1995,

/RS

IARTY TRIBUNAL - DAY 162

Denis O'Brien wrote to Mr. Arve Johansen in a letter marked "Strictly Private and Confidential" setting out his views on matters raised by Mr. Johansen in earlier correspondence and previous meetings.

"Dear Arve,

"I refer to your letter dated Friday 10th May and your letter dated 11 May to Michael Walsh.

"I am disturbed by the contents and inaccuracy of both these letters. Furthermore, your continuous personal comments throughout the meeting to my colleagues on Friday at the office of Matheson Ormsby Prentice, when you also questioned the integrity of Dermot Desmond, IIU, and myself was outrageous and totally unacceptable.

"Just to remind you of some of the things you said which were noted and minuted at the meeting:

- The IIU agreement prior to the awarding of the licence "Was a method for Denis O'Brien to get back-door control of the business".

- The IIU agreement was entered into without the knowledge of Telenor.

- On a number of occasions you clearly cast  
dispersions (sic) on my character. Having repeated  
/RS

IARTY TRIBUNAL - DAY 162

these dispersions (sic), both Leslie Buckley and  
Paul Connolly stated that they were not prepared to  
accept the personal nature and basis of your  
allegations.

"This kind of behaviour is not acceptable to us as  
partners and prevents reasonable discussion and debate  
taking place.

"May I now remind you of the sequence of events.

"IIU conspiracy theory:

"1. On Friday, 22 September 1995, I travelled to Oslo  
to meet with Sjern Malm and yourself to discuss the  
GSM bid and the participation of IIU in the  
consortium. Per Simonsen also joined us later on in  
the meeting. I had received a letter dated 15  
September (copy attached) from Knut Haga stating that  
Advent's letter of financial support was not  
acceptable. IIU participation for 25% of the equity  
in Esat Digifone was brought about for two reasons.  
Firstly, it was viewed that the consortium needed more  
firmly committed Irish investment content as the other  
institutional letters from IBI, AIB, Standard Life  
were letters of intent and not legally binding, the  
other reason being that Telenor had rejected Advent's

letter of financial support.

In your letter dated 2 October 1995, which I enclose,

/RS

IARTY TRIBUNAL - DAY 162

you state "In order to reassure the Ministry and give an even stronger signal to the Irish community in general, we are pleased with the plan to have another solid Irish underwriter". It was also viewed that by having 62.5% Irish content, the bid would be greatly enhanced.

Later in the same letter you state "But on the basis of the JV and draft Shareholder's Agreement, we feel obliged and accepted a pro rata dilution to 37.5%.

Any further dilution would be in conflict with the principles of our participation and the Board resolution of Telenor AS". The Norwegian content (non-EU) was deemed to be high at 40%, particularly since Sjern Malm and Per Simonsen told me on the 27 April 1995 that Telenor would be selling off half its interest within 12 months of Tele Denmark (from an EU member).

"At our meeting on the 22 September 1995 in Oslo I made two requests:

"1. Communicorp Group did not want to reduce its holding to 37.5% as we were the lead consortium member, having spent two years on the bid; thus we wanted to maintain our 40% interest and asked for

Telenor to reduce to 35% with IIU at 25%. Despite reasoned and rational argument on our side, you rejected this request.

/RS

IARTY TRIBUNAL - DAY 162

"2. Telenor had refused to go pari passu on the bid costs, which at the time were running at 1.5 to 1.6 million. I had asked you to go pari passu and you refused despite reasoned argument by me on behalf of Communicorp. However, your letter of the 2 October 1995 did say that "Telenor, based on the agreement, will absorb its equitable share of these costs. If, however, you feel that Communicorp for some reason is not fully compensated, we are willing to discuss this problem in further detail. Both myself and my colleagues did raise this matter with yourself and Knut Haga when we were told that Telenor was not prepared to go pari passu. In essence, Communicorp risked 1.1 million on the licence bid while Telenor were only prepared to risk half a million. This was not the behaviour of a partner."

"To finish on this point, I feel it incomprehensible that you still argue that IIU have a 20% holding and that you want Communicorp to cede 5% to IIU. You also claim that Telenor never approved IIU's participation in our consortium. This is in direct contradiction to your letter of the 2 October. In fact you told the

meeting on Friday last, minutes of which have been passed to me, that "I do not accept the arrangement with IIU". All documentation between IIU and Esat Digifone was reviewed and cleared in advance of signing by Telenor executives.

Clearly you now have arrived at a situation, despite

/RS

IARTY TRIBUNAL - DAY 162

your letter of 2 October, that you disagree with both partners, Communicorp and IIU.

12.5% shareholding issue:

"IIU hosted an Esat Digifone shareholders breakfast meeting on 9 February. At this meeting I formally asked both Telenor and IIU whether you would be interested in selling Communicorp's 12.5%, as our investment advisers in New York, Credit Suisse First Boston, had advised us that US investors would want us to consolidate our holding in Esat Digifone.

Initially we thought we would need 12.6% in order to consolidate our holding for accounting reasons, but subsequently we were informed by KPMG that only 50% was required. We informed IIU of this. Subsequently Telenor wrote to us to say that they were not interested in selling any shares. On the 27 February we wrote to Knut Digerud to say that they were pursuing a deal with IIU to purchase 12.5% from them.

At all stages we were frank about our pressing need to

purchase 12.5% in order to complete our US placing.

Richard O'Toole, representing Communicorp, had also been open with Knut Haga during the detailed Shareholders Agreement negotiations.

In fact, we did not ask for any changes in the Shareholders Agreement to reflect a 50% shareholding.

We negotiated in good faith on the basis of equality,

/RS

IARTY TRIBUNAL - DAY 162

with no one partner dominating another. We wanted the Shareholders Agreement to reflect this basic principle and pushed for this outcome.

"Since the 27 February you knew we were going ahead

with the purchase of 12.5% from IIU and with the placing in US with CSFB to finance 50% economic

interest in Esat Digifone. At our meeting on 2 May, I

updated you on the CSFB placing and drew out a

financing chart. You expressed some concern about

Communicorp increasing to 50%, but I again explained

the rationale for this, as we needed this economic

interest to close the placing. You also told me

before you left my office to go to the Canadian

Ambassador's residence to sign the Nortel contract

that "there would not have been a licence without

Denis O'Brien."

"At 7.30pm I received a conference call from Scott

Seaton, managing director of CSFB, and his colleague

who is in charge of our placing, Sean Twomey. They told me that you contacted them to ask about the Communicorp placing and whether we needed to consolidate our 50% shareholding in Esat Digifone. They asked whether I had given you permission to talk to them directly about the placing. I told them absolutely no.

"Arve, you interfered without permission by calling my company's investment bank, CSFB, to seek information

/RS

IARTY TRIBUNAL - DAY 162

regarding our forthcoming placement. You had absolutely no right nor did you receive my consent to do this.

I don't believe that, unless anyone else does, for the moment at least, anyway, that the rest of that letter is particularly relevant

CHAIRMAN: Well, it's probably right that we break now, Mr. Coughlan, with a reasonable amount of data still to be covered, but not, I think, if at all possible, sufficient to take this aspect into tomorrow, we might marginally abridge the lunch hour and resume at five past two.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

/RS

IARTY TRIBUNAL - DAY 162

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

MR. COUGHLAN: Between 13 May 1995 and Thursday 16 May 1995, when the second GSM licence was issued to Esat Digifone, there appears to have been considerable activity within the Department, within the consortium, between the members of the consortium and between the consortium and the Department. These activities, which I will return to in detail, appear to have been directed to three main matters.

Firstly, the finalisation of the provision of the draft licence and in particular, Article 8 of the licence which governed transferability of shares in Esat Digifone after the issue of the licence.

Secondly, the Department's apparent concern regarding the financial capacity of Esat Digifone Limited to fund the mobile telephone network, and in particular, whether there was sufficient and sound underwriting in place to meet the financial commitments of Esat Telecom/Communicorp to Esat Digifone in the event that Esat Telecom/Communicorp experienced financial difficulties.

The Department's focus was whether IIU/Mr. Dermot Desmond had the financial capacity to meet its obligation to underwrite 33% of Esat Telecom's financial commitments to Esat Digifone and as to whether Telenor would ultimately underwrite all

/RS



financial commitments to Esat Digifone if the need should arise.

Thirdly, the presentation and handling of material at a press conference arranged to coincide with the grant of the licence to Esat Digifone on the 16th May, 1996, and in particular, the following issues:

A. The ownership of Esat Digifone and whether it was consistent with the ownership of the consortium as submitted in the Esat Digifone application on the 4th August, 1995;

B. The involvement of IIU Limited/Mr. Dermot Desmond as a shareholder in Esat Digifone Limited;

C. The financial capacity of Esat Telecom to meet its obligations to Esat Digifone.

On Monday 13th May, 1996, there was a meeting between Mr. Knut Digerud, Mr. Owen O'Connell, solicitor, Mr. Martin Brennan, and Mr. Fintan Towey at the Department. Mr. Owen O'Connell kept an attendance of the meeting and appears to have subsequently arranged for the preparation of a formal typed report of the meeting. There is no record of this meeting within the Department files, and the Tribunal was not informed of the meeting by the Department or the departmental officials. The Tribunal only became aware of this meeting when Mr. Owen O'Connell

/RS

furnished the Tribunal with a voluntary narrative memorandum and produced relevant documents to the Tribunal. Mr. Owen O'Connell's formal record of the meeting states as follows:

"This minute records a meeting held at 12.30pm on Monday 13th May, 1996, between Knut Digerud, Chief Executive Esat Digifone Limited, Owen O'Connell, William Fry Solicitors, Martin Brennan, Principal Officer, Department of Transport, Energy and Communications and Radio Development Division, Fintan Towey, Assistant Principal Officer, Department of Transport, Energy and Communications, Telecommunications and Radio Development Division.

"The meeting was held in Martin Brennan's office at the Department of Transport, Energy and Communications, 44 Kildare Street Dublin 2, and the subject under discussion was the imminent grant to Esat Digifone Limited of the second GSM licence.

"After an exchange of courtesies, the meeting began with KD handing a number of letters to MB with copies thereof to FT. Martin Brennan and Fintan Towey scanned the letters, with Martin Brennan noticeably pausing to read closely the letters concerning IIU.

"He noted that Farrell Grant Sparks were IIU's auditors and commented that he would like to have known this fact earlier. (This was generally taken to

/RS

## IARTY TRIBUNAL - DAY 162

be a reference to Greg Sparks' position as programme manager to An Tanaiste, Dick Spring). Martin Brennan then said that he would send the documents to the Department's in-house accountant and also to an accountant in the Department of Finance who was awaiting them. He said there may well be requests for further information and/or clarification of the letters, but it was quite likely that more information would be required in relation to IIU, specifically 'more than a statement that they have money i.e., what money?'

"There was some general discussion about the purpose and manner of the presentation of the letters, all of which was acknowledged by Martin Brennan and Fintan Towey.

"Fintan Towey made the point that the bid had referred to 20% of the company being placed with the "blue chip institutions" (acknowledging that the institutions in question were not identified). He queried IIU's intentions in regard to placing of its holdings. Owen O'Connell replied that IIU was a financial institution and qualified under the bid description, so the placing question should not arise and that while it might place its shares in future, if queried now on the point by journalists, might reply that recent turmoil over the licence made such a placing unlikely,

for market reasons, for some time (stressing that this was not Owen O'Connell's view but was based on /RS

IARTY TRIBUNAL - DAY 162

comments made by Michael Walsh).

"Fintan Towey said that a new draft of the licence was imminent and especially that Article 8 thereof would be amended. He said that a new draft of Article 8 had been received late on Friday last, the 10th May, from counsel and was now with a parliamentary draftsman who wished to shorten it. Martin Brennan said that the thrust of the new Clause 8 was that all changes of ownership would be subject to ministerial approval but that the grounds for objection by the Minister were specified in the clause and had been taken largely from the recent EU directive on mobile personal telecommunications.

"After a brief discussion between Martin Brennan and Fintan Towey, Fintan Towey left the room to obtain a copy of the latest draft. Knut Digerud and Owen O'Connell were permitted to review the draft (which extended to two pages) but not to do so at length or in detail or to take copies. After this review, Owen O'Connell raised the point that one of the paragraphs referring to ministerial consent being required for a private placement of shares could be interpreted as requiring such consent for a routine issue of shares

consequent on a financing round. The point was also made that the clause should distinguish between existing shareholders (who were presumably acceptable to the Minister, and thus not require comment on acquisitions of shares by them), and new third-party /RS

## IARTY TRIBUNAL - DAY 162

shareholders. After some discussion these points were acknowledged by Martin Brennan and Fintan Towey, who said they would look at the matter further. Apart from this, Knut Digerud and Owen O'Connell indicated that as a very preliminary view, and subject obviously to both detailed examination of the clause and discussion with the shareholders and colleagues, there did not seem to be any fundamental difficulty.

"Martin Brennan asked whether the banks named in one of the letters given to him (ABN-AMRO and AIB) would consent to their names being used in an announcement of the granting of the licence. Having checked the matter with one of his colleagues, Owen O'Connell indicated that the banks would so agree, subject to no statement concerning them being made which was inconsistent with the letter of 2 May given by them to Martin Brennan and that any written press release or similar statement which referred to them would be subject to prior clearance with them.

"The meeting moved on to a discussion of events in the

immediate future. It was indicated by Martin Brennan and Fintan Towey that they were about to engage in "feedback meetings," these being meetings with unsuccessful applicants for the second GSM licence for the purpose of giving them reasons for their failure to obtain the licence. It was felt that it might be somewhat insensitive to grant the licence while these meetings were underway and that accordingly, the /RS

IARTY TRIBUNAL - DAY 162

proposed date for grant of the licence was Thursday next, 16 May. Martin Brennan also said that the Department had written to solicitors for the Persona consortium informing them of their intention to grant the licence and that if Persona consortium wished to challenge this, they should do so through the courts. However, no response had been received.

"Martin Brennan added the Department's view that the licence had expired as a live issue for the press, and the Minister and the Department were very anxious not to revive it by injudicious statements being made by anyone at the press conference.

"Martin Brennan said that it was the Minister's wish to announce the grant of the licence at a press conference co-attended by Esat Digifone. Great stress was repeatedly laid on the need to prepare extensively and exhaustively for this press conference, and it was

stressed that the journalists present would have been briefed in a hostile way by "others" (this clearly being a reference to unsuccessful consortia). Martin Brennan said he wished to have Esat Digifone identify key questions likely to be asked at a press conference, to draft answers to them and to explain to the Department the reasons for those answers. He would also then wish to arrange a meeting between the Minister for Transport, Energy and Communications and Knut Digerud, together with one or two others, at which the progress of the press conference would be

/RS

IARTY TRIBUNAL - DAY 162

discussed/rehearsed.

"Martin Brennan indicated that there had been discussions within the Department as to whether shareholders should participate in the press conference, and if so, to what extent and in what way.

At this point Knut Digerud made a strong point to the effect that Digifone saw itself as an entity independent of its shareholders, that it had premises, employees, funds and a viable business in its own right, and that there were issues likely to be raised at a press conference which would not necessarily be a matter for the company but rather matters for its shareholders. Fintan Towey conceded this as a "fair point" and acknowledged that the company would be at

liberty during the press conference to refer questions concerning its ownership to its shareholders. Martin Brennan interjected to say that in such a case, the Minister would wish to know what response the shareholders would make when the questions were put to them. Martin Brennan stressed the need to have a number of "definite clear and acceptable statements for use at the press conference" and he outlined a number of "obvious questions" as follows:

"A. Is this the same consortium as that which applied?

"B. Can the Denis O'Brien side of the consortium stand up (adding that either Denis O'Brien or Knut

/RS

IARTY TRIBUNAL - DAY 162

Digerud should answer this question);

"C. Will Telenor support the project to the end? (To this query, Martin Brennan added that it was sensitive in nature as it would have to be answered in such a way as not to imply any doubt in the Department as to Communicorp's financial strength).

Owen O'Connell made the point that within reason (and certainly short of telling any lies) Esat Digifone was willing to be guided by the Department as to the conduct of the press conference and would follow policy lines laid down by the Department; Esat Digifone also expected the Department to have some



input as to the answers to questions to be given by it, i.e. would coordinate such answers with the Department. This was acknowledged by Martin Brennan and Fintan Towey.

The meeting ended with Martin Brennan reiterating that it was "virtually certain that we would have to get more information on IIU, some numbers".

"The meeting concluded at 1.10pm; its tone throughout was cordial, and it concluded amicably."

Now, according to Mr. O'Connell's record, Mr. Martin Brennan and Mr. Fintan Towey attended the meeting.

Mr. Martin Brennan has informed the Tribunal that regarding the meeting at the Department on the 13th

/RS

IARTY TRIBUNAL - DAY 162

May, 1996, he accepts that in general, Mr. O'Connell's contemporaneous record appears reasonable, although his view is that it is clear that in some respects Mr.

O'Connell is recording his impressions. Mr. Brennan does not have a record to contrast with it. Mr.

Brennan has informed the Tribunal, the identity of the attending officials is recorded on the record; the

purpose of the meeting is recorded on that record to advance issues pertinent to finalisation of the

licence and to prepare for a public announcement, and the matters under discussion also appear to have been

recorded in that record. Mr. Brennan has further

informed the Tribunal that regarding the identification of questions likely to be raised at the press conference, this was done by collective brainstorming; Mr. Lowry always prepared thoroughly for "public appearances" and the Department knew well what Mr. Lowry expected. The Department were conscious too that while the arrival of IIU on the scene met the conditions of the competition, it would be new information and needed to be carefully presented. Mr. Martin Brennan has summarised that the fact that the Department pressed these issues does not mean that the officials had been asked to do so in advance. Mr. Martin Brennan recalls that Mr. Denis O'Brien was rehearsed by his team in much the same way as Mr. Lowry.

Mr. Fintan Towey has informed the Tribunal that the report prepared by Mr. O'Connell would seem to be an

/RS

IARTY TRIBUNAL - DAY 162

accurate record.

Apart from the information with which the Tribunal has been furnished by Mr. Brennan regarding the meeting of the 13th May, 1996, Mr. Brennan has informed the Tribunal that he has no specific recollection of any further dealings between the Department and Esat Digifone regarding preparation for the press conference. There are no other documents whatsoever

on the Department's files regarding the dealings between Esat Digifone, the Department and Mr. Lowry in connection with the press conference. The Tribunal has largely been dependent on Mr. O'Connell's file and on files produced to the Tribunal by Telenor for an insight into the manner in which these dealings proceeded.

It appears that following the meeting with Mr. Brennan and Mr. Towey at the Department on Monday, 13th May, Mr. Knut Digerud and Mr. Owen O'Connell attended a meeting with Mr. Neville O'Byrne, solicitor for IIU, Mr. Michael Walsh of IIU, Mr. Paul Connolly of Esat Telecom, Mr. Gerry Halpenny, solicitor for Esat Telecom, Mr. Arve Johansen of Telenor, and Mr. Arthur Moran of Matheson Ormsby Prentice, solicitors for Telenor, and that they reported the outcome of the meeting with the Department. Mr. Arthur Moran kept an attendance of that meeting which has been made available to the Tribunal by Telenor.

/RS

IARTY TRIBUNAL - DAY 162

It's a short attendance, and it's headed "Telenor," and it's dated 13/5/96. It states "RB", which may be a reference to Rolf Busch, who was an internal lawyer in Telenor. "Neville O'Byrne, me, MW" Michael Walsh, "PC", Paul Connolly "GH", Gerry Halpenny, "AJ", Arve Johansen, "AM", Arthur Moran. "Knut

Digerud, Owen O'Connell." "Report by Knut Digerud on  
meeting with Department Martin Brennan by two  
brief review by Department official  
will want more re IIU  
draft licence, paragraph 8 Owen O'Connell to minute  
any transfer or allotment needs consent of Minister."  
Counsel "is assisting in the draft, joint press  
conference date  
when would IIU discuss with the press. Key questions  
to be available and answers and reasons.  
"Thursday hand over licence  
subordinated loans  
IIU what money is being used? Department wants  
to know  
"Shareholders' Agreement and side letter  
articles  
"convertible subordinated loan note  
DIBOR plus 2% gross up value of notes prior to  
conversion  
repay in 12 months or convert  
/RS  
IARTY TRIBUNAL - DAY 162  
no vote  
tax charge  
conversion at option of holder after grace period or  
one  
see the licence."

It appears from information made available to the Tribunal by Mr. Owen O'Connell that on Monday 13th May, there was a telephone conversation between Mr. Denis O'Brien and Mr. Michael Lowry. The Tribunal has been informed by Mr. O'Connell that Mr. O'Brien told him about the telephone conversation on the following day, Tuesday 14th May, 1996.

Mr. O'Connell has produced to the Tribunal his contemporaneous note of what Mr. O'Brien told him on that occasion, which records.

"DOB/Lowry call yesterday "Getting there, slowly but surely,"

Called last night re auto dialers

meeting today Loughrey and Lowry re this."

Mr. O'Connell has informed the Tribunal that he does not know whether this was a summary of Mr. O'Brien's view of the overall position in regard to the licence or a statement made by Mr. O'Brien to Mr. Lowry or vice versa. Mr. O'Connell's note also records that a meeting had been arranged for Tuesday 14th May, 1996,

/RS

IARTY TRIBUNAL - DAY 162

between Mr. Denis O'Brien, Mr. Michael Lowry and Mr. John Loughrey, Secretary General to the Department.

There is no record of Mr. O'Brien's telephone conversation with Mr. Lowry on the 13th May within the Department files, nor is there any record of any

meeting between Mr. O'Brien, Mr. Lowry and Mr. Loughrey on Tuesday 14th May 1996. If such a meeting took place, the Tribunal has not been informed about it other than through the note of Mr. O'Connell and has not yet received a statement or memorandum of intended evidence from other people in relation to this.

It appears from Mr. O'Connell's documents that the meeting which was arranged for Tuesday 14th May proceeded. Mr. O'Connell has a note which indicates that that meeting did proceed on the 14th May, 1996.

He has informed the Tribunal that on Tuesday, 14th May, he met Mr. O'Brien, who briefed him on the meeting he had with Mr. Lowry and Mr. Loughrey.

According to Mr. O'Connell's note, the following matters were the focus of the meeting:

- Mr. Lowry's request for information concerning IIU and the availability of finance;

- Mr. Michael Lowry's requirement that the shareholding of Esat Digifone on the day the licence was granted had to be 40:40:20, but subject to a possible change of ownership to 45:45:10 at a

/RS

IARTY TRIBUNAL - DAY 162

later date;

- Discussions regarding Article 8 of the licence, i.e. the provision for change of ownership after

the licence was issued;

- Discussion regarding the forthcoming press

conference at which the grant of the licence would be announced and the apparent agreement as to the need for a rehearsal.

Mr. O'Connell's note reads:

"14/5/96. DOB re meeting Lowry/John Loughrey

"Minister haven't got information wants

financial information IUU. MW" appears to be a

reference to Michael Walsh "to go to the Department for a private meeting.

" - Letter that finance is in place from the

underwriters

DOB underwriters are Telenor plus IUU; will satisfy

tomorrow

"lot of frustration/pressure.

"All by 11.00 tomorrow, Lowry "Will check with sec."

And hold DOB/Leslie Buckley" has to be 40:40:20 on day

/RS

IARTY TRIBUNAL - DAY 162

"DOB Article 8, very tough, can do nothing. Shares

amongst parties; will not allow Telecom parties to

reduce shareholding

"Loughrey to meet OOC/Martin Brennan tomorrow A M.

"Minister informed of 45:45:10 very quickly

Lowry "Let ink dry".

"Public announcement. Lowry wanted last week. Do

everything in one go. Deflect attention away from ownership. Discuss business infrastructure, contracts, roll-out plan, employment," I don't know what the next two words are "contracts" "hold off buying phones - to public, etc.

Must be phenomenally well briefed on bid document and tender. OO'C to be present and to answer questions.

Legal ownership issue expressly especially important.

All reporters focused on this.

All 3 shareholders to agree OO'C answers questions.

Rehearsed.

Persona have written another letter to ask licence not be granted. Just one person with one signal", it seems to be.

At the meeting in the Department on the previous day, Monday 13th May, to which I have already made reference, Mr. Digerud furnished the Department with a letter from Esat Digifone dated 13th May, 1995,

/RS

IARTY TRIBUNAL - DAY 162

addressed to Mr. Martin Brennan. There were seven enclosures with that letter comprising letters of commitment and certifications regarding the constitution of Esat Digifone Limited, the intentions of the shareholders and the financial capacity of the shareholders to meet their commitments to Esat



Digifone Limited and to the underwriting requirements of the Department.

This is from Mr. Digerud; there were enclosures in respect of Telenor. I'll read the letter.

"Dear Mr. Brennan,

"I refer to our recent meeting and to your request for information concerning this company. I confirm that I am a director and Chief Executive of Esat Digifone Limited.

"I enclose the following:

"1. Letter from Telenor Invest AS concerning support for the project.

"2. Copy of a letter from Arthur Andersen and Co. in Oslo concerning the ownership and finances of Telenor Invest AS.

"3. Letter from Chris McHugh, Secretary of International Investment and Underwriting Limited.

/RS

IARTY TRIBUNAL - DAY 162

"4. Letter from Farrell Grant Sparks financial advisers and auditors to determine Dermot F Desmond, beneficial owner of International Investment and Underwriting Limited.

"5. Letter from Paul Connolly, director, Communicorp Group Limited, concerning its ownership and interest in Esat Digifone Limited.

"6. Letter from KPMG, auditors to Communicorp Group

Limited.

"7 letter from ABN-AMRO Bank concerning our financial facilities.

"Confirmation will be given on or before the grant of this licence that the company is owned as to 40% each by Telenor Invest AS (a wholly-owned subsidiary of Telenor AS) and Esat Telecommunications Holdings Limited (a wholly-owned subsidiary of Communicorp Group Limited) and as to 20% by IIU Nominees Limited (holding on behalf of Mr. Dermot Desmond). IIU Nominees Limited is a wholly-owned subsidiary of International Investment and Underwriting Limited (which in turn is also wholly-owned by Mr. Desmond).

"I hope the above is of assistance.

"Yours sincerely,

/RS

IARTY TRIBUNAL - DAY 162

"Knut Digerud."

On that day, there was also, with that letter, a letter enclosed from Telenor International signed by Mr. Arve Johansen, the Chairman. And it's addressed to the Department, and it reads:

"Dear Mr. Brennan,

"I refer to our meeting on Friday, 3 May 1996, and your request with respect to confirmation of Telenor's commitment to supporting the Esat Digifone project.

"Thus, I can confirm the long-term commitment of

Telenor Invest AS to this project and its determination that Ireland's second GSM network is successfully constructed, launched and operated.

"Telenor is, as you will see from the enclosed documentation, fully capable of financing its share of the necessary investments in order for Digifone to implement a GSM network in Ireland and in compliance with the licensing terms. Furthermore, Telenor is both capable and willing to increase its financial commitment if necessary. Such increase in financial commitment would require that Telenor reach agreement with other interested parties as to its implications for Telenor's influence over Digifone and its operations.

"For your further reference please also find attached

/RS

IARTY TRIBUNAL - DAY 162

some extra information related to Telenor and its international activities over the last months.

"Yours sincerely,

"Arve Johansen"

Now, also attached to Mr. Digerud's letter were two documents relating to IIU. The first one was a letter signed by Mr. Chris McHugh, the company secretary, on IIU notepaper. It's headed "Strictly Private and Confidential," and it's addressed to the Department, and it's re Esat Digifone Limited.

"Dear Sirs,

"International Investments and Underwriting Limited (IIU) is 100 percent beneficially owned by Dermot F. Desmond.

"The directors of IIU are:

Dermot Desmond

Michael Walsh

Chris McHugh

Nigel McDermott

"Yours faithfully, Chris McHugh,

"Company Secretary."

And there was also attached a letter from Messrs.

/RS

IARTY TRIBUNAL - DAY 162

Farrell Grant Sparks, accountants. It's addressed to the Department, it's dated 7th May, 1996, and it's re Esat Digifone Limited.

"Dear Sirs,

"We act as financial advisers and auditors to Dermot F. Desmond. We confirm that Mr. Desmond is the beneficial owner of 100% of International Investment and Underwriting Limited (IIU).

"We are informed that Mr. Desmond/IIU have undertaken to invest and/or underwrite an equity investment of up to 1/240 million in Esat Digifone Limited. We confirm that Mr. Desmond (IIU) is in a position to make this investment and to make the underwriting commitment.

"Yours faithfully

"Farrell Grant Sparks."

There then is a letter attached, also from KPMG relating to Communicorp Group Limited, which states:

"We act as auditors to Communicorp Group Limited. We have been asked by the directors of the company to write to you to confirm the following matters in connection with their joint application through Esat Digifone Limited for the second GSM cellular mobile licence:

/RS

IARTY TRIBUNAL - DAY 162

"1. The company has appointed CS First Boston as exclusive agent for the purpose of a private placement in its subsidiary, Esat Telecommunications Holdings Limited. The placement is being offered in the USA to a limited number of institutional investors.

"2. The amount of funds expected to be raised in the placement is at least IRi½22 million.

"3. The placement process is at an advanced stage and is expected to be completed shortly.

"4. The company has, in addition, entered into an agreement with International Investment and Underwriting Limited (IIU) dated 29 September 1995 under which IIU has undertaken to arrange underwriting for the company's proposed interests (through its subsidiary Esat Telecommunications Holdings Limited)

in Esat Digifone Limited. IIU have confirmed that they have arranged the underwriting."

And then there is a handwritten note, which appears to be a departmental note, and it reads:

"Appears to cease once Shareholders' Agreement is signed (clause 17.11) but superseded by underwriters' agreement and Shareholders' Agreement and letters from Telenor and IIU."

Now, these documents appear to have been provided to /RS

IARTY TRIBUNAL - DAY 162

the Department in response to the Department's concern voiced at the meeting on the 3rd May 1996 to which I have already referred and in particular, its request, according to Mr. Arve Johansen's memorandum of the 4th May 1996, that Telenor should agree to commit to underwriting the entire of the capital requirements of Esat Digifone if the need should arise.

They also appear to have been the documents which were discussed at the meeting of the 3rd May, 1996. They were handed over, it appears, on the 3rd May and discussed at the meeting of the 13th May.

As already mentioned, the Department's concerns regarding the financial capacity of Esat Digifone appear to have been rooted in the financial weakness of Esat Telecom/Communicorp which weakness had been identified in the course of the evaluation process.

These concerns appear to have come to the fore during the four days prior to the granting of the licence.

Mr. John Loughrey, in a memorandum of intended evidence which he has provided to the Tribunal, has characterised his concerns and the actions which he took in the following terms, and I quote:

"In the week or so before the award of the licence on the 16th May, 1996, I set out to satisfy myself that the arrangements between the three partners in the licence were such that the business plan would not be

/RS

IARTY TRIBUNAL - DAY 162

jeopardised in any way on the financing side. Such arrangements were put in place and they were entirely satisfactory.

"My concern prior to the issue of the licence was that the business plan put forward by the consortium would be financed in such a way as to facilitate the rapid roll-out of the effective competition to Eircell, thereby benefiting both the economy and the consumers at the same time. I believe that the steps taken by me and by the Department in general to assure ourselves that this would be so were both sufficient and satisfactory. In short, while the question mark could be posed as to the then robustness of the financing ability of Communicorp Limited, the specific undertakings given by Telenor and IIU to take up any

shortfall on a pro rata basis in the event of Communicorp not being in a position to finance fully its portion of the development cost was more than adequate. Equally, from a common-sense point of view, it is quite clear that Telenor on its own could have bankrolled the whole project quite comfortably so that the Department never felt that somehow the project was being jeopardised in any way because Communicorp did not have a Triple A financing rating. Similar arrangements and assurances would have, in all probability, been required in the event of licence negotiations with quite a number of the other bidders had they been in the competition.

/RS

IARTY TRIBUNAL - DAY 162

"While no doubt I may have discussed the matter with Martin Brennan, who for the most part was out of the loop at this point as the prime responsibility had passed to both the Telecoms Regulatory Division headed by Sean McMahon, and Sean Fitzgerald, my primary focus in resolving any outstanding issues was with Donal Buggy who, while an intrinsic part of the Project Group, worked directly to me as key financial adviser and worked in the room alongside my office. It is with Donal Buggy I would have had the most of the discussions on this matter. Equally, I would have consulted with Sean McMahon, who headed up the licence



negotiations.

"The Department was quite clear that in granting the licence to the Esat Digifone consortium, that the implementation of the requirements of the licence should be facilitated by a clear financing plan. In the lead-up to the granting of the licence, we needed to satisfy ourselves as to the robustness of the financing plan. I had Donal Buggy research the financing of the implementation of the project. He produced a written assessment with supporting documentation, in particular the agreement of Telenor and IIU to take up on a pro rata basis any possible shortfall by Esat gave us sufficient comfort on this aspect."

And I there end reference to the quotation from the memorandum furnished by Mr. John Loughrey.

/RS

IARTY TRIBUNAL - DAY 162

It appears from the documents and information available to the Tribunal that at the direction of Mr. John Loughrey, Mr. Martin Brennan requested Mr. Donal Buggy, a chartered accountant on secondment to the Department from PriceWaterhouse and who had been a member of the GSM Project Group, to carry out a financial analysis on the financial strength of Telenor and IIU Limited/Mr. Dermot Desmond to take over Communicorp/Esat Telecom's financial commitments

to Esat Digifone in the event that Communicorp experienced financial difficulties.

Mr. Donal Buggy has provided the Tribunal with a memorandum of intended evidence in which he has set out details of the instructions which he received, the steps which he took, the information available to him, and the conclusions which he reached. In that regard, he has informed the Tribunal as follows, and again I want to quote from Mr. Buggy's memorandum.

"As far as I recall, I first became aware that the 20% shareholding in Esat Digifone Limited held by IIU Limited was to be held beneficially for Mr. Dermot Desmond on or about 13th May, 1996, when Mr. Martin Brennan asked me to give him some financial advice on the composition of the Esat Digifone consortium and the financial strength of IIU Limited and Mr. Dermot Desmond.

/RS

IARTY TRIBUNAL - DAY 162

"My involvement in the steps taken by the Department to satisfy itself as to the financial capacity of Esat Digifone Limited prior to the issue of the licence revolved around the request by Mr. Martin Brennan that I carry out a financial analysis of the financial strength of Telenor/IIU Limited/Mr. Dermot Desmond to determine if they had the financial capacity to take over Communicorp/Esat Telecom's financial commitments

to Esat Digifone in the event that Communicorp/Esat Telecom experienced financial difficulties. My involvement in this matter commenced on or about 13th May, 1996, and finished on the 15th May 1996 with my memorandum to the Secretary of the Department dated 15th May, 1996. This memorandum, dated 15th May, 1996, includes details of the exercise that I performed and my conclusions. As far as I recall, Department of Finance was not involved in the exercise that I performed, but I do not know whether or not my findings were communicated to the Department of Finance.

"The only meetings and contacts that I had with representatives of or professional advisers to Esat Digifone or any member of the consortium in relation to financial issues in the period prior to the granting of licence took place in the period 13th May 1996 to the 15th May, 1996, as part of the preparation of my memorandum to the Secretary of the Department dated 15th May, 1996.

/RS

IARTY TRIBUNAL - DAY 162

"I am uncertain as to the specific days between the 13th and 15th May on which each of these meetings took place. But as far as I recall, I attended meetings with the following:

Mr. Pearse Farrell of Farrell Grant Sparks

Mr. Michael Walsh of IIU Limited

"I met with each of these people separately and on all occasions I was accompanied by Mr. Martin Brennan, and each meeting took place in Mr. Brennan's office.

"The matter under discussion in each case was the financial strength of IIU Limited/Mr. Dermot Desmond and the ability of IIU Limited/Mr. Dermot Desmond to underwrite the funding commitment of Communicorp/Esat Telecom. I kept some handwritten notes of these meetings, all of which have been produced to the Tribunal. The outcome of these meetings is detailed in my memorandum to the Secretary of the Department dated 15th May, 1996.

"As far as I recall, the information records and documents on which I based my memorandum dated 15th May 1996 to the Secretary of the Department in relation to the financial strength of the Esat Digifone consortium are as follows:

- Letter from ABN-AMRO Bank to Mr. Martin Brennan dated 2 May 1996

/RS

IARTY TRIBUNAL - DAY 162

- A letter from Farrell Grant Sparks to Mr. Martin Brennan dated 7 May 1996

- Letter from Arthur Andersen to Mr. Owen O'Connell dated 8 May 1996"

That relates to Telenor.

" - A letter from KPMG to Mr. Martin Brennan dated 9 May 1996" that I have just referred to, and which refers to Communicorp/Esat Telecom

" - Letter from Esat Digifone to Mr. Martin Brennan dated 13 May 1996

" - A letter from Telenor Invest AS to Mr. Martin Brennan dated 13 May 1996" which I have just referred to

" - A letter from Mr. Chris McHugh of IIU Limited Mr. Martin Brennan dated May 1996" to which I have just referred

" - Letter from Communicorp Group Limited to Mr. Martin Brennan dated 13 May 1996

" - A letter from Anglo Irish Bank Corp to Mr. Martin Brennan dated 15 May 1996

/RS

IARTY TRIBUNAL - DAY 162

" - Letter from Farrell Grant Sparks to Mr. Martin Brennan dated 15 May 1996" which I have just referred to.

And I now end reference to the memorandum furnished to the Tribunal by Mr. Donal Buggy.

Much of the documentation which was available to Mr.

Donal Buggy in carrying out this analysis had been

furnished to the Department under cover of Mr. Knut

Digerud's letter of the 13th May, 1996. In addition,

Mr. Buggy had available to him a letter from Anglo

Irish Bankcorp and a letter from Farrell Grant Sparks,  
financial advisers and auditors to Mr. Desmond,  
addressed to the Department for the attention of Mr.  
Martin Brennan and dated 15th May, 1996. This letter  
recorded that Mr. Dermot Desmond/IIU had undertaken to  
invest and/or underwrite an equity security of up to  
€1/240 million in Esat Digifone Limited and recorded  
their confirmation that Mr. Desmond/IIU were in a  
position to make this investment and to make the  
underwriting commitment. Farrell Grant Sparks also  
set out in that letter valuations of the principal  
assets which they confirmed were in Mr. Desmond's  
beneficial ownership.

It's from Farrell Grant Sparks re Esat Digifone  
Limited.

"Dear Sirs,

/RS

IARTY TRIBUNAL - DAY 162

"We act as financial advisers and auditors to Dermot  
F. Desmond. We confirm Mr. Desmond is the beneficial  
owner of 100 percent of International Investment and  
Underwriting Limited (IIU).

"We are informed that Mr. Desmond/IIU have undertaken  
to invest and/or underwrite an equity investment of up  
to €1/240 million in Esat Digifone Limited. We confirm  
that Mr. Desmond/IIU is in a position to make this  
investment and to make the underwriting commitment.

"We are also authorised to confirm that Mr. Desmond is the beneficial owner of the following principal assets:

"Various marketable securities valued in excess of  $\pounds 10$  million.

"Principal unquoted investments at cost;

"International Investment and Underwriting Limited (IIU):  $\pounds 13$  million

London City Airport and associated companies: 25 million pounds

44% of Pembroke Capital Limited:  $\pounds 9$  million."

Bringing it to a total under that heading of  $\pounds 47$  million.

"Cash at bank:  $\pounds 15$  million.

William Fry client account re investment in Esat

/RS

IARTY TRIBUNAL - DAY 162

Digifone Limited:  $\pounds 5$  million," bringing the total there to  $\pounds 20$  million. And then to the bottom of the page, a grand total of  $\pounds 77$  million.

"We trust that that is the information you require.

Should you have any queries, please contact me."

And it's signed by Pearse Farrell.

Mr. Martin Brennan, who appeared to have played a role

in this analysis as the person who made the request to

Mr. Buggy and who attended meetings between Mr. Buggy

and Mr. Pearse Farrell of Farrell Grant Sparks and

meetings between Mr. Buggy and Mr. Michael Walsh of IIU, has informed the Tribunal in his memorandum of intended evidence as follows:

"It is clear that as the date of issue of the licence approached, there was a close review of the financial standing of the "licencee". Clearly some problems had been signalled in the evaluation process, but they were not regarded at that time as disabling. I have no doubt that Mr. Loughrey took a hands-on role at this stage and that it was he that instigated that analysis by Donal Buggy. My recollection of being involved was in the interface with Michael Walsh who was reluctant to provide any written evidence in support of the financial strength of Dermot Desmond in IIU Limited. I certainly remember speaking to Mr. Walsh and telling him that the absence of such

/RS

IARTY TRIBUNAL - DAY 162

evidence would jeopardize our ability to issue the licence, and I was instrumental in procuring his efforts to secure the letter from Anglo Irish Bank and the letter from Farrell Grant Sparks."

I should state here that the letter from Anglo Irish Bank was that letter that confirmed that there was  $\text{€}10$  million available from them for investment in the project.

In the course of its inquiries regarding this analysis



and the certification provided by Farrell Grant Sparks, the Tribunal requested Mr. Pearse Farrell of that firm to assist it as follows:

A. To provide a detailed narrative account of precisely what was discussed at any meeting or meetings with the Department leading up to the grant of the second GSM licence to Esat Digifone on the 16th May, 1996, and to present the Tribunal with documents in the power, possession or procurement of Farrell Grant Sparks bearing on or arising out of such discussions.

B. To the extent that Farrell Grant Sparks provided assurances to the Department in respect of the financial strength of IIU and/or Mr. Dermot Desmond (including in particular the contents of a letter dated 15th May, 1995, from Farrell Grant Sparks to the Department) that Farrell Grant Sparks identify the /RS

IARTY TRIBUNAL - DAY 162

precise basis for such assurances, including the nature and source of all information relied upon by it in providing same and to produce to the Tribunal all documents available to Farrell Grant Sparks regarding such assurances.

The Tribunal indicated in its request that it anticipated that Farrell Grant Sparks would require a waiver of confidentiality from IIU Limited and from

Mr. Dermot Desmond to enable it to respond to the Tribunal's request and that the Tribunal intended to seek such waiver from IIU Limited and Mr. Dermot Desmond.

IIU and Mr. Dermot Desmond have declined to provide a waiver of confidentiality to enable Farrell Grant Sparks to assist the Tribunal as requested, and in the circumstances, the Tribunal would intend pursuing the inquiries to which I have just referred with Mr. Farrell in the course of its public sittings.

The working papers generated by Mr. Donal Buggy in the course of his analysis have been made available to the Tribunal. These comprise four handwritten documents which have been reconstituted by the Tribunal in a typed format. The working papers include handwritten notes of Mr. Buggy's meetings with Mr. Michael Walsh on the 15th May, 1996, and with Mr. Pearse Farrell on, it appears, the 14th May, 1996.

/RS

IARTY TRIBUNAL - DAY 162

The note is reconstituted.

"Esat Digifone, 13th May, 1996

"Telenor Invest AS, 40%, i½20.8m

Esat Telecommunications Holdings Limited 40%: i½20.8m

IIU Nominees Limited/Dermot Desmond 20%, i½10.4m.

"Total share capital, 100 percent, i½52m.

"Telenor very big financially successful

"1995 profits before tax, €210 million

turnover 2 billion

no balance sheet

very good credit rating from both Moody's and Standard  
& Poor

Arthur Andersen "will be able to fund the €20.8  
million required."

"IIU 100 percent owned by Dermot Desmond

Farrell Grant Sparks invest and/or underwrite up to  
€40 million.

- Confirm in a position to do this

" - Not stated what they are underwriting,  
specifically Communicorp

" - Very little information on which to assess

/RS

IARTY TRIBUNAL - DAY 162

financial strength

"Communicorp owned 65.2% by Denis O'Brien  
34.8% by Advent International.

Owns 100 percent of Esat Telecom Holdings Limited

Financing commitments underwritten by or through IIU

Appointed CS First Boston for private placement in ETH

"Expected to raise at least €22 million not yet  
completed.

"Debt financing, ABN-AMRO Banking and AIB plc  
bridging finance of €25 million

project finance of up to €78 million subject to banks

normal due diligence.

"Possible solutions:

"Due diligence of Dermot Desmond's personal wealth

Escrow account, interest bearing.

"Cash flow required per business plan, is 108.4

million by end of year 3

Share capital of 52 million and loans of 72 million by

end of year 4.

"8.30am Wednesday 15/5/96

"No dilution below 80% stick to 40:40:20 note DTEC

satisfied, cruising altitude is reached.

/RS

IARTY TRIBUNAL - DAY 162

"IIU confirm underwriting Esat.

"Cash balance of DD, but what about liabilities

"conditions under licence agreement

roll-out targets will require capital to remain in the

business

"could 5 financial institutions stand behind DD

"shouldn't be seen to be treating an individual

different from a company therefore need to fall

back on fact that we don't have a track record

"is there a joint and several liability no

use "big" brother

"escrow until money put into company by both parties

can't withdraw

no dividends

"monitoring conditions

quarterly accounts (including cash flow) to

regulator

"meeting with Michael Walsh

"Telenor undoubted ability to bankroll the project

/RS

IARTY TRIBUNAL - DAY 162

"need to ascertain ability of other parties to

bankroll their share

"share capital going in as follows:

"i.e. 1/2 0.75 million, i.e. 1/3 million subscribed so far, today i.e. 1/2 5

million, could be i.e. 1/2 6.3 million" then there is a note

"i.e. 1/2 15 million licence fee

i.e. 1/2 10 million in August

i.e. 1/2 9 million in November

i.e. 1/2 10 million 1997/98

"37 million in 1996 compared to 52 million per

business plan.

"8.30 meeting with Michael Walsh 15/5/96

"Letter from Telenor underwriting up to 66 2/3% and up

to a hundred percent (clause 14)

"Letter from IIU underwriting up to 33 1/3%.

"Bank confirmation on behalf of IIU stating i.e. 1/2 10

million

available of all of 1996 includes i.e. 1/2 5 million to be

paid over today

what about when Denis O'Brien comes up with the

funds?

"Letter outlining in general the assets supporting

/RS

IARTY TRIBUNAL - DAY 162

DD's financial position

"also confirmation of revised capital requirement

from Esat Digifone no

"Shareholders' Agreement

"GSM II meeting with Pearse Farrell 14/5/96:

10.30am.

" resident abroad

assets spread out worldwide. Logistically difficult

before you get to confidentiality.

track record over the years (NCB etc.)

" i;½20 million in a bank at present

but leaving it there for up to 12 months is costly

"imagine that IIU is highly capitalised but can't

comment on it definitively

" need to clarify that IIU are underwriting

Communicorp as per agreement of 29/9/95"

It appears from Mr. Buggy's notes that as regards the

financial capability of IIU Limited/Mr. Dermot Desmond

the following were his views: Firstly, that there was

very little information on which to assess the

financial strength of IIU or Dermot Desmond.

/RS

IARTY TRIBUNAL - DAY 162

Secondly, that Mr. Dermot Desmond was resident abroad.

Thirdly, that Mr. Desmond's assets were spread out worldwide.

Fourthly, that this gave rise to a logistical difficulty before even addressing the issues of confidentiality.

Fifthly, that Mr. Farrell imagined that IIU were highly capitalised but could not comment on that definitively.

On the basis of his analysis, Mr. Buggy produced a formal typed memorandum on the 15th May 1995 which was addressed to Mr. John Loughrey in which he set out the results of his analysis.

Now, the Tribunal is reading this out to contrast it with the handwritten notes and working notes of Mr. Buggy.

It's to the Secretary, and it is marked "noted thanks" and it seems to be the 16/5/1996, so it may have been received by Mr. Loughrey on the 16th.

"From Donal Buggy Planning Unit, re GSM II licence, Financial strength of licensee, draft 15 May 1996.

"Mr. Martin Brennan and I have been involved in /RS

IARTY TRIBUNAL - DAY 162

various discussions in respect of the financial strength of the members backing the Esat Digifone consortium over the last two days, and detailed below

is my understanding of the current position and an assessment of the consortium's financial strength.

"These discussions have been with a number of parties, but principally Mr. Michael Walsh, a director of International Investment and Underwriting Limited (IIU).

"The business plan of Esat Digifone, as submitted with their application in August 1995, states that the share capital will be İ½52 million, all of which will be raised in year 1. We now understand that after further analysis of the cost of providing the infrastructure, Esat Digifone are satisfied that an amount slightly less than IRİ½ 52 million is required and that this will be phased in as follows:

"To date: 3 million

"Upon signing the licence: 15 million

August 1996: 10 million

"November 1996: 8 million.

Total : 36 million.

"Sometime in 1997/98: 10 million.

/RS

IARTY TRIBUNAL - DAY 162

"Total: İ½46 million.

"Under the Shareholders' Agreement each of the parties have four months after the date of each call on share capital in which to come up with the funds or else they will be in default, and they are only allowed 3



delays in total before they are also considered to be in default and excluded from increasing their investment any further.

"The underwriting agreements have been revised in the Shareholders' Agreement so that in the event that any one party defaults, the other two parties will underwrite the defaulting investment in their agreed share proportions. This means that if Esat Telecommunications Holdings Limited (ETH) defaults, Telenor and IIU will provide the funds in the ratio of 66.6% and 33.33%. In the event that both ETH and IIU default then the Shareholders' Agreement provides for Telenor taking on 100% of the financial commitment.

"Under these underwriting agreements, the maximum exposure (based on the original estimated share capital of 52 million) of each consortium member is as follows:

"Telenor: 100 percent or  $\frac{1}{2}$ 52 million

"Esat Telecommunications Holdings: 40% or  $\frac{1}{2}$ 28.8 million (assuming other parties are strong)

/RS

IARTY TRIBUNAL - DAY 162

"IIU: 33.3 percent or  $\frac{1}{2}$ 7.3 million.

"Telenor is a very strong company, based on their 1994 annual report, which shows net assets of IR $\frac{1}{2}$ 1 billion.

Therefore, they appear financially strong enough to carry 100 percent of the share capital ( $\frac{1}{2}$ 52 million)

if necessary.

"Esat Telecom Holdings are currently in the process of arranging a private placement in the US. This is expected to raise at least  $\text{€}122$  million. The process is at an advanced stage but not yet finalised, therefore we cannot rely on it at this particular time.

"As a result we must ensure that the parties underwriting Esat Telecom Holdings shares are financially strong enough to support their portion of ETH's shares along with their own investment.

"We have already seen above that Telenor are strong enough, and IIU is discussed below.

"IIU are 100% owned by Mr. Dermot Desmond (DD) and therefore in looking at IIU's financial strength we are essentially looking at DD. According to Mr. Walsh, IIU are only in existence since August 1995, and therefore no financial statements have been produced for the company to date.

/RS

IARTY TRIBUNAL - DAY 162

"In order to finance its own investment and underwrite its portion of ETH's investment, IIU/DD must have finances of  $\text{€}17.3$  million (being 33.3% of 52 million). While DD is known to be a very wealthy person, this alone is not considered enough information on which to proceed.

"To ascertain if DD has sufficient finances to support this project, we discussed the matter with Mr. Michael Walsh. He informed us that DD had already put three-quarters of a million into the company and has put up another 5 million this evening in advance of signing the licence.

"In order to satisfy us on the remaining  $\text{€}1.55$  million, we received the following:

" - a letter from Anglo Irish Bank confirming that DD has  $\text{€}10$  million available to invest in Esat Digifone (including the 5 million put in this evening) and that this will remain available for the whole of 1996.

- An updated letter from Farrell Grant Sparks which confirms that DD is worth at least 40 million and which outlines in general terms some of the unencumbered assets totalling some 77 million which DD owns and which supports their opinion that he is capable of financing up to  $\text{€}40$  million of this

/RS

IARTY TRIBUNAL - DAY 162

project.

- Letters from Telenor and IIU stating that they are underwriting ETH's investment in the project, in the ratio 66.6% and 33.3%.

- A final version of the Shareholders' Agreement

"On this basis, I consider that the financial

strength of DD has been confirmed to the extent that it can be relied upon to finance its own investment in Esat Digifone and underwrite its agreed portion of ETH's investment.

"We also reviewed the debt financing position of Esat Digifone and received a letter from ABN-AMRO Bank which confirmed that along with AIB Plc, it had agreed to provide bridging finance of up to €25 million to Esat Digifone and that draft terms for project finance had been agreed which would provide up to €78 million subject to the bank's formal due diligence. This appears to satisfactorily cater for Esat Digifone's debt financing requirements.

"Conclusion:

"Based on the discussion documented above and the letters received from the various parties as outlined above, the shareholders in Esat Digifone appear to have enough financial strength to ensure that Esat /RS

IARTY TRIBUNAL - DAY 162

Digifone is financed in line with the expectations under the business plan, and the required debt financing appears to be available to the company."

And it's signed by Donal Buggy.

The Tribunal, in the course of its public sittings, will inquire into how Mr. Buggy concluded that on the basis of the discussions documented in his memorandum

and the letters received from the various parties, that the shareholders in Esat Digifone appeared to have sufficient financial strength to ensure that Esat Digifone was financed in line with the expectations under the business plan and the required debt financing which appeared to be available to the company, in particular having regard to the following observations recorded in his memorandum:

A. That Esat Telecom Holdings (Communicorp) were currently in the process of arranging a private placement in the US which was expected to raise at least  $\text{US} \frac{1}{2} \text{ billion}$  million, and that while the process was at an advanced stage, it was not yet finalised, and therefore the Department could not rely on it at that particular time.

B. That as a result, the Department had to ensure that the parties underwriting Esat Telecom/Communicorp's liabilities were financially strong enough to support their portion of Esat Telecom's

/RS

IARTY TRIBUNAL - DAY 162

share along with their own investment.

C. That IJU Limited, which was the entity which was underwriting 33.3% of ETH's liability, had only been in existence since August 1995 and that therefore no financial statement had been produced for the company to date.

D. That in order to finance Esat Telecom's investment, IIU, in addition to funding its own investment, would have to have available finance of  $\text{€}17.3$  million;

E. That Mr. Dermot Desmond had the financial wherewithal to meet that contingent liability on the basis of a letter from Anglo Irish Bank confirming that he had  $\text{€}10$  million available to invest in Esat Digifone and what purported to be a statement of Mr. Desmond's assets which was unvouched and which did not contain a statement of his liabilities.

In particular, the Tribunal will inquire into whether Mr. Buggy had any further dealings in connection with the production of his memorandum of the 15th May 1996 with any other departmental official or any other person.

The Tribunal will also inquire as to the circumstances in which the Department considered that it had sufficient comfort, based on Mr. Buggy's analysis and

/RS

IARTY TRIBUNAL - DAY 162

based on the documentation available to him, regarding the financial strength of Esat Digifone to enable Mr.

Michael Lowry to issue the licence to Esat Digifone on the 16th May 1996 and the role, if any, of Mr. Michael

Lowry in this determination, bearing in mind that it appears from Mr. O'Connell's note of Mr. O'Brien's

briefing of his (Mr. O'Brien's) meeting with Mr. Lowry and Mr. Loughrey on the 14th May 1996, that Mr. Lowry had a direct involvement in these matters.

While Mr. Donal Buggy was conducting his financial analysis, the efforts of the Department and Esat Digifone to finalise the draft licence and to finalise arrangements for the forthcoming press conference were continuing. On Thursday 15th May, 1996, Mr. Owen O'Connell met Mr. Martin Brennan, Mr. Fintan Towey and Mr. Donal Buggy at the Department. Mr. O'Donnell kept a handwritten note of the meeting which he has made available to the Tribunal. And the note reads as follows:

Again, this has been reconstituted. It's a memo from Owen O'Connell, dated 15th May 1996.

"Client: Esat Digifone.

"Matter: Licence negotiations.

"Department communications M. Brennan, F. Towey, Donal Buggy.

Friday if necessary; 3.30 Thursday

/RS

IARTY TRIBUNAL - DAY 162

"TE big price decreases tomorrow (off record)

"world communications day 17 May

"Bill O'Herlihy per Minister

"MB

"when did Telenor

late April/early May the left-hand columns seems to be questions posed by Mr. Martin Brennan, and the right-hand column appears to be responses.

"When did Telenor late April/early May Knut Digerud phone calls late April, meeting Oslo early May." It seems to be a reference to when Communicorp and Telenor became involved with each other.

"Parties talking 2nd half of April. Double dealing re SW Bell.

"Pain in the ass" comment  
company owned 50/50 intention to place/float 20%,  
strong supporting letters were available from a lot of blue chip investors.

"In normal course when project became real, negotiated but deal available, which we now have. IIU not in /RS

IARTY TRIBUNAL - DAY 162

original.

Comfort Min. favourably disposed re letter

ref: P1 Shareholders' Agreement recital

ref: 4 shareholders

"Dress rehearsal with Minister sometime after 1.00 some hour side.

45:45:10 "Cruising altitude"

This appears to refer to an ultimate change in the share configuration of Esat Digifone.



"In normal trading circumstances, debt/equity around 50%; in start-up phase more fluctuation because of capital suspended, will tend a little more towards equity, especially in early phases.

MB (Martin Brennan) (save Minister, needs our help) whether same project as won competition.

Martin Brennan not keen on Denis as speaker (not attribution)

first conference Denis O'Brien we'll be lowering prices 25% in three years. Focus of attack couldn't have won competition on this basis.

/RS

IARTY TRIBUNAL - DAY 162

Application was stronger than that."

"Prepare better answer, get correction in launch commitment per bid. Good presentation in price area.

Consider (although not in application) 10 second billing units, oral presentation. DOB 1 second billing by end year 1. Different packages, different consumers, 25% simplistic more complex exciting things

to shake up market, e.g. per second billing early on (if Esat Telecom). Attempt to

correct complaint/innuendo 25% in three years, he couldn't have won competition on the basis (not enough another consortia reducing 30 33% within a year of launch.

Why only signed now was licence delayed to put

money in place. Leslie a speaker?

Department delay all on our side

what is impact of delay on launch will there be

delay (especially if different) geographical and

quality coverage stress this.

Everyone knows contract Christmas market critical and

intend to demonstrate seriousness for that.

Question 16 June deferment: 23 June original

closing.

If no deferment could we have bid.

/RS

IARTY TRIBUNAL - DAY 162

Comfort now as to how Minister will act in given

circumstances in the future."

It appears from the documents produced to the Tribunal

by Messrs. Matheson Ormsby Prentice, solicitors for

Telenor, that Mr. O'Connell then attended a meeting

with Mr. Gerry Halpenny, solicitor for Esat

Telecom/Communicorp, Mr. Michael Walsh of IIU, Mr.

Barry Maloney, Mr. Knut Digerud, Mr. Peter O'Donoghue

and Mr. Arthur Moran to report on his meeting with the

Department. Mr. Arthur Moran kept an attendance of

this meeting, which records as follows:

CHAIRMAN: I think it might have been Paul Connolly

rather than Peter O'Donoghue.

MR. COUGHLAN: I beg your pardon, Sir. I think it's

probably Peter O'Donoghue. But anyway, I think that

is so.

On the same day, Thursday 15th May, 1996, Mr. Owen O'Connell received from a Ms. Eileen Gleeson of FCC public relations advisers, a draft press release, together with a series of anticipated questions which she had prepared for the forthcoming press conference. Mr. O'Connell has informed the Tribunal that the handwritten annotation on the page bearing the questions were made by him and recorded his thoughts on possible answers.

/RS

IARTY TRIBUNAL - DAY 162

"FCC Communications Limited,  
15 Clanwilliam Terrace,  
Grand Canal Quay,  
Dublin 2.

15 May 1996, to Owen O'Connell from Eileen Gleeson.

"Attached is a draft press release which would be sent out today if we get approval from the Department to do so (which is not at all definite. The Minister's advisers thought it a good idea, but I think that Loughrey does not). Anyway, regardless of whether it is today or tomorrow, we need to agree the details for publication on ownership and funding anyway.

"Could you look through the attached. I also prepared questions which might be asked on the issue.

"Denis asked me to go to your office at 1:00pm to

discuss the release and the questions which will be asked of the Esat Digifone people at the press conference in the interest of everyone being "on the same line", it is very important that this practice session is undertaken.

"See you in a while then.

"Eileen."

Then the draft press release, which was prepared by

/RS

IARTY TRIBUNAL - DAY 162

this firm, dated 15th May, 1996.

"Esat Digifone shareholding details.

"In advance of the formal signing of the licence to operate Ireland's second mobile telephone network tomorrow, Esat Digifone has confirmed details of its shareholding structure as follows:

"Esat Telecom Holdings Limited (a wholly-owned subsidiary of Communicorp) holds 40% of the shares; Telenor Invest, the Norwegian telecommunications operator, holds 40% of the shares, and International Investment and Underwriting Limited (IIU) holds the remaining 20% of the shares. The owner and Chairman of IIU and therefore the beneficial owner of this 20% shareholding at this time is Mr. Dermot Desmond.

"IIU has stated that the shareholding or part thereof may be placed with additional investors at some future time. This will be reviewed when Esat Digifone is

operational towards the end of this year.

"The shareholders as listed above have each contributed to the investment made in the network to date, and each will discharge its financial responsibilities to the entire investment required for the project, which is in the order of  $\text{€}120$  million.

This capital will be provided by equity from the shareholders and by debt financing which is being

/RS

IARTY TRIBUNAL - DAY 162

arranged by AIB and ABN banks."

And then there is, it's changed as "As joint lead banker and AIB bank.

"Each shareholder has given to the Department of Transport, Energy and Communications details of its ability to provide all of the necessary funding. The Department has stated that it is satisfied with the details of ownership and funding which it has received."

Then there were questions or anticipated questions prepared by this firm, and Mr. O'Connell has informed the Tribunal that the handwritten annotations on these typed questions are his.

"Questions:" now, we have reconstituted these, and we have put in the question first, and the annotation then has been reconstituted.

"When were these shareholding details made known to

the Department?

"Proposed Answer: "Martin Brennan 50% owners by 2

Esat and Telenor

disclosed intention re 20% with the bid i.e. general

operators percentage."

"Was IIU mentioned in the bid document as one possible

/RS

IARTY TRIBUNAL - DAY 162

shareholder i.e. were they one of those who gave

letters of commitment?"

"Proposed Answer: IIU to say no. Department have

said already expressions of interest given. Bid was

confidential in that respect, i.e. backers' identities

were not revealed."

"Question: Who underwrote finance as detailed in the

bid, described as 'acceptable blue chip investors' by

the Minister?"

"Proposed Answer: Financial details are confidential;

Minister satisfied with the particulars (as are we).

Martin Brennan Advent are invidious to name those not

in consortium."

"Question: Are the Department satisfied with the

level of information which you have provided?"

"Proposed Answer: Yes. Otherwise we wouldn't have

the licence/won the competition."

"Question: "Will the shareholdings that you have

announced today stay at those levels for the future?

"Proposed Answer: No arrangements for change;

licence has consent provisions by Minister.

"Question: Will there be any possibility for private

/RS

IARTY TRIBUNAL - DAY 162

shareholders investing in the company?"

"Proposed Answer: Refer 12% in bid.

There is the word 'likely' crossed out "Possibly in

the future, no immediate plans. "

"Question: Is there any possibility of flotation at

any stage in the future?"

"Proposed Answer: ^ ditto.

"Question: What is the breakdown ratio on equity and

debt financing involved?"

"Proposed Answer: "Between 50:50 and 40:60 and

60:40."

"Question: How much capital has been provided by

shareholders to date?"

"Proposed Answer: Up to now all activities funded

from equity up to and including signing licence.

Enough for licence fee and capex to date" that's

"capital expenditure", I presume.

"Question: Is all the debt financing in place from

whom?"

"Proposed Answer: Arrangements in place to draw down

as required

/RS

IARTY TRIBUNAL - DAY 162

confidential

sufficient in place, letter to Minister from AIB and  
ABN-AMRO re balance."

"Question: "What role will the fund raising exercise  
currently underway in the US play in the Digifone  
financing?"

"Answer: It will play a role, but not wholly devoted  
to Digifone.

"Question: How is that fundraising going what is  
the timetable, what are you trying to raise, where  
will the money go?"

"Proposed Answer: Going well, pretty soon, rest  
confidential.

"Question: "What is the timetable of capital  
investment required for the Esat Digifone project,  
when and what amounts will be necessary over the next  
few years?"

"Proposed Answer: "Confidential/commercially and  
competitively sensitive."

"Question: What participation will Dermot Desmond or  
his company have in the operation of the company?"

"Proposed Answer: Board representation, money as  
/RS

IARTY TRIBUNAL - DAY 162

investor, no active operational role.

"Question: Do you regret the fact that the ownership



and funding details of this project have become such a focus, and do you think that this could have been avoided by earlier disclosure of the facts?"

"Proposed Answer: They say that there is no such thing as bad publicity."

"Question: "Why is it only now that you are prepared to confirm what most people were speculating for some time?"

"Proposed Answer: This is the appropriate time and place. Up to now discussions with the Department were ongoing and disclosure would have been improper only now we have become licence holder."

"Question: Has Denis O'Brien contributed his share of the equity?"

"Proposed Answer: Make or break legally and politically. Company to answer; accurate; if fudge, no lies."

Ms. Gleeson's fax to Mr. O'Connell suggests that there may have been contact, direct or indirect, between Ms. Gleeson and Mr. Lowry's advisers on the one hand, and between Ms. Gleeson and Mr. John Loughrey or the

/RS

IARTY TRIBUNAL - DAY 162

Department on the other hand. She suggests that Mr. Lowry's advisers believed that it was a good idea to issue a press statement, whereas Mr. Loughrey did not share that view. Ms. Gleeson's fax further records

that Mr. O'Brien had requested Ms. Gleeson to go to Mr. O'Connell's office at 1:00pm on Thursday 15th May, 1996, to discuss the draft press release and the proposed questions. It is not clear to the Tribunal as of now whether such a meeting took place. It appears that Mr. O'Connell sent a draft press release to Mr. Martin Brennan on the following day, Thursday 16th May, 1996.

As I have already mentioned, there is no indication from the departmental files as to whether similar efforts were being made by the civil servants to prepare for the forthcoming press conference. Mr. Martin Brennan has indicated that he has nothing more specific to add to his comments on the meeting of the 13th May, when it appears that this matter was first mooted. Mr. Fintan Towey has informed the Tribunal that he has a general recollection of some questions and answers being prepared.

Mr. Owen O'Connell has informed the Tribunal that he attended a dress rehearsal for the press conference at the Department at 11.55am on the Thursday, 16th May, 1996. Mr. O'Connell kept a note of the dress rehearsal, but the note does not record the identity of the persons who were in attendance. As Mr.

/RS

IARTY TRIBUNAL - DAY 162

O'Connell notes a contribution which he attributes to

Mr. Denis O'Brien, it is likely that Mr. O'Brien was present.

The note is:

"Esat Digifone, licence negotiations, rehearsal for press conference, 16th May, 1996.

"It's from OO'C, client: Esat Digifone matter. Licence negotiations.

"Rehearsal for press conference.

"When did Telenor and Esat get together (re delay) 2nd half crossed out, April 1995.

"Whether ready to put in bid?

"Certain 9 May: 'April' is answer.

"Were ready 23rd June, felt penalised, better prepared.

"Team disappointed. Add 500K to cost (keeping team together); one new competitor. Arve

"Delay in licence Government/State

"DOB contribution I wish to scotch the persistent

/RS

IARTY TRIBUNAL - DAY 162

rumours on this. The licence fee has been paid; millions have been spent by the company to date, almost entirely out of shareholders' funds, little or no bank funding to date, all of Esat Telecom Holdings' share of the funds have been paid. Arrangements among the shareholders have been concluded to everyone's satisfaction and are working.

"Is this the same consortium as that which applied?"

That completes the note.

During these four days from Monday 13th May 1996 to Thursday 16th May 1996, negotiations continued between the members of the consortium with a view to resolving a number of issues in connection with the Shareholders' Agreement, but primarily the following two issues:

"1. Esat Telecom Holding's desire to increase its shareholding from 40% so as to improve its prospects of raising funding through Credit Suisse First Boston.

"2. The Minister's requirement that the capital configuration of Esat Digifone be restored from 37.5/37.5/25 to one of 40%:40%:20% so as to be consistent with the bid document.

"In addition to these two issues, it would appear that Esat Telecom Holdings did not at that time have funds /RS

IARTY TRIBUNAL - DAY 162

available to meet the initial call of IRi½6 million on its 40% shareholding to capitalise Esat Digifone to enable it to pay the licence fee of IRi½15 million."

It appears that these issues and other issues were not finally resolved until Thursday, 16th May, 1996, when the Shareholders' Agreement and a series of side letters were executed by the parties. It appears from the documents which have been produced to the Tribunal

that these issues were resolved on the following

terms:

Firstly, IIU Limited agreed to transfer 20% of its shareholding, i.e. 5% of the shares in Esat Digifone as to 2.5% each to Telenor and Esat Telecom for  $\text{€}2.7$  million, being  $\text{€}1.375$  million each. It appears that ETH was unable to fund this payment, and from the Share Purchase Agreement concluded between the parties dated 16th May, 1996, it appears that IIU agreed to defer payment until the 30th May, 1996, and that as security, Esat Telecom provided a charge over part of its shareholding in Esat Digifone. This latter security arrangement was formalised in a side letter dated 16th May, 1996.

I am going to refer to an agreement, a Share Purchase Agreement dated 16th May, 1996, and I wish to refer to a portion of it. It's between IIU Nominees Limited and Esat Telecom Holdings Limited

/RS

IARTY TRIBUNAL - DAY 162

CHAIRMAN: I think, Mr. Coughlan, you have probably fifteen minutes or so. I am very anxious that we finish today, perhaps from everybody's concentration point of view, not least your own, and thinking also of the stenographer, a seven- or eight-minute break is probably not a bad idea.

THE TRIBUNAL THEN ADJOURNED FOR A SHORT BREAK AND

RESUMED AS FOLLOWS:

MR. COUGHLAN: I was about to make reference to certain portions of the Share Purchase Agreement entered into between IIU Limited and Esat Telecom Holdings Limited on the 16th May 1996.

"Whereas: The Vendor is the registered owner of the number of shares in the capital of Esat Digifone Limited as set out in Part 1 of the First Schedule hereto and have agreed to sell to the Purchaser the shares specified in Part II of the First Schedule hereto (hereinafter referred to as the 'Shares').

"B. The Purchaser has agreed with the Vendor to purchase 11 of the shares for the consideration and upon the terms and conditions hereinafter set out and accordingly it has been agreed that these presents shall be entered into.

"Now it is hereby agreed as follows:

/RS

IARTY TRIBUNAL - DAY 162

"1. Sale and purchase:

The Vendor agrees as registered owner to sell and the Purchaser agrees to purchase the Shares on the Completion Date (as hereinafter defined) hereof free from all liens, charges and encumbrances and with the benefit of all rights and advantages thereto belonging or accruing for the consideration hereinafter specified.

"2. Consideration: The consideration for the sale and purchase of the shares shall be 1,375,000.

"3. Completion: The Completion of the sale and purchase of the Shares shall take place on the 16th May, 1996 at the offices of William Fry Solicitors, Fitzwilton House, Wilton Place, Dublin 2, whereupon the Vendor shall hand to the Purchaser or as it may direct duly executed stock transfer forms in respect of all the Shares together with the relevant share certificates.

"4. Payment of consideration.

The Purchaser shall deliver to the vendor on the 20 May 1996 a bank draft for the amount of the consideration herein before specified in respect of the Shares.

"5. Security:

As security for the Purchaser's obligation to pay the consideration referred to in paragraph 4 above, the

/RS

IARTY TRIBUNAL - DAY 162

Purchaser shall enter into a Deed of Charge in terms agreed prior to the execution hereof between the Vendor and the Purchaser.

The next document is the security arrangement from Esat Telecom Holdings to IIU Limited entered into the 16th May 1996, headed "Shareholders' Agreement dated 16th May 1996." This is a side letter.

"Dear Sirs,

"We refer to the Agreement and we write to acknowledge that you have entered the Agreement in your own right and that the contractual and other liabilities imposed on you under the agreement are liabilities on your own behalf and not on behalf of any third party.

"We also refer to the Deed of Equitable Mortgage entered into between yourselves and Esat Telecom Holdings Limited on the 16th May 1996 in respect of 75,000 shares in Esat Digifone Limited.

"We hereby confirm that insofar as such Mortgage is concerned and insofar as the enforcement is concerned, the provisions of clause 13 of the Agreement are hereby waived, provided always that should you wish to dispose of the shares the subject of the mortgage, any such disposal will be subject to the provisions of the Agreement and the Memorandum and Articles of Association of Esat Digifone Limited unless you

/RS

IARTY TRIBUNAL - DAY 162

exercise the right contained in the Mortgage to take full beneficial ownership of the shares in satisfaction of the amounts owing to you.

"Yours faithfully, for and on behalf of Esat Telecom Holdings Limited"

Secondly, the parties agreed that the existing shareholders should have pre-emption rights in the



event of any shareholder proposing to dispose of shares. By a side letter, also dated 16th May, 1996, it appears that a special right may have been conferred on Mr. Dermot Desmond as the beneficial owner of the shares held by IIU Limited whereby he was entitled to transfer one tranche of his shares free of the pre-emption rights on a once-off basis. This letter, which was signed by all the parties and addressed to Telenor and Esat Telecom Holdings, stated as follows, and it refers to the Shareholders' Agreement dated 16th May 1996.

"Dear Sirs,

"Refer to the agreement and in particular to the provisions of clause 12.2.

"In accordance with our discussions, we are writing to you to confirm that the shareholding of 20% in Esat Digifone Limited (the Company) held by us as registered owner is beneficially owned in the

/RS

IARTY TRIBUNAL - DAY 162

following manner.

"Name: Dermot F. Desmond. Percentage: 100 percent.

"This letter is further to record our agreement that any transfer of the beneficial ownership listed above will be subject to the terms and conditions regarding transfer contained in the Agreement and the Memorandum and Articles of the Company save and except that the

shares beneficially owned by Mr. Desmond may be freely transferred on a once-off basis without the requirement to abide by the terms and conditions of the Agreement or the Company's Memorandum and Articles provided that if we offer shares to either of you, we will make an offer of an equal amount on equal terms to the other party. If, at the time of the share transfer, Esat Telecom Holdings Limited and Telenor Invest AS do not hold equal amount of shares in the Company, the offer shall reflect the parties' pro rata shareholding.

"Finally, you, either alone or in concert with other parties, agree not directly or indirectly to purchase shares or interests in shares in Esat Digifone Limited from any party holding such shares or interests from any placement exempted from the shareholders' pre-emption rights, or to acquire shares or interests in any party directly or indirectly holding such shares or interests in Esat Digifone without offering to the other shareholders of Esat Digifone the

/RS

IARTY TRIBUNAL - DAY 162

opportunity to participate in the purchase on equal terms and pro rata to their shareholdings in the company.

"Each of us accept that each and every other shareholder in Esat Digifone is a beneficiary of the

commitments we have undertaken in this letter and may take any action including action before the courts to claim right according to this letter.

"To signify your agreement please sign the enclosed copy letter and return it to us."

It's signed by IIU Nominees Limited, Arve Johansen, I think, Telenor, and Denis O'Brien on behalf of Esat Telecom Holdings Limited.

Thirdly, the parties further agreed that the  $\text{€}126$  million to be contributed by Esat Telecom Holdings Limited to Esat Digifone for the payment of the  $\text{€}115$  million licence fee by Esat Digifone to the Department would be met pro rata by IIU paying  $\text{€}2$  million and by Telenor paying  $\text{€}4$  million. That is of course open. The net effect of this arrangement was that the  $\text{€}115$  million licence fee was funded as to  $\text{€}5$  million by IIU and as to  $\text{€}10$  million by Telenor. The arrangement was also formalised by a side letter dated 16th May, 1996.

"IIU Nominees Limited", and it's addressed to Telenor and Esat Digifone Limited (the Company). And it

/RS

IARTY TRIBUNAL - DAY 162

reads:

"Dear Sirs,

"A. We refer to the Agreement and to the terms thereof specifically relating to the mechanism for handling a default by any of the parties thereto in

relation to the provision of Capital (as defined in the Agreement).

"B. At a Board Meeting of the Company held on the 16th May, 1996, the Board resolved to call for a Capital contribution of  $\text{₹}15$  million in respect of the acquisition of the GSM licence. Esat Telecom Holdings Limited indicated that it would not be able to meet this capital call and accordingly, under the provisions of clause 14 of the Agreement a meeting was called to discuss alternative methods of providing the shortfall arising from this default amounting to  $\text{₹}6$  million.

"C. Pursuant to that meeting agreement has been reached between us" that is, between IIU and Telenor "in accordance with the terms of the Agreement as to the provision of the shortfall of  $\text{₹}6$  million in accordance with the following terms:

"1. IIU will contribute  $\text{₹}2$  million of the shortfall.

"2. Telenor will contribute  $\text{₹}4$  million of the

/RS

IARTY TRIBUNAL - DAY 162

shortfall. (The Telenor contribution)

"3. The terms upon which the IIU Contribution and the Telenor Contribution will be invested in the Company are that each of IIU and Telenor will be issued with a loan note in respect of the said contribution in a standard form confirming firstly the principal amount:

Secondly an interest rate of 2% over the Dublin Interbank Offered Rate to Allied Irish Banks plc for funds of an amount equivalent to each of the said contributions on a one-month basis set out on the date of the said contributions and reset monthly thereafter. Interest will be payable on the notes monthly in arrears and if unpaid, will be compounded with the principal and will itself bear interest.

Interest will accrue from day to day;

"4. The notes will have a repayment date on a date which is four months after the date of the distribution, i.e. the 16 September, 1996;

"In the event that the company does not make the repayment on that date aforesaid, we shall either have the option at our unanimous agreement to extend the repayment date or to procure the conversion of our contribution into ordinary  $\frac{1}{21}$  shares in the company on a pound-for-pound basis taking into account any unpaid capitalised interest which has accrued in respect of the contributions aforesaid. If IIU and Telenor are unable to reach agreement in accordance with the terms

/RS

IARTY TRIBUNAL - DAY 162

of this clause by the 16th September, 1996, the contributions shall be converted into ordinary shares accordingly.

"6. In the event that the Company is unavailable to

repay and we are unable to convert the contributions as specified in paragraph 5, then we agree to negotiate together so as to convert our contributions into a quasi-equity instrument on standard and usual terms which will effectively treat the contributions as an equity investment in the Company and will carry the rights of an ordinary share save in respect of voting rights. The intention is to create an instrument which would have the same commercial value in all respects as an ordinary equity share carrying voting rights. In the event that we are unable to agree on the format of the aforesaid instrument, then we agree to refer the matter to an independent chartered accountant agreed between us or appointed by the President of the Institute of Chartered Accountants in default of agreement. The said Chartered Accountants so agreed or appointed, acting as an expert, will fix the terms of the instrument taking into account the provisions of the agreement and of this letter.

"The capital call made on IIU for 1/2 3,000,000 and Telenor for 1/2 6 million at the Board meeting referred to in paragraph B have or will be contributed to the Company on the same terms as the IIU Contribution and /RS

IARTY TRIBUNAL - DAY 162

the Telenor Contribution herein set out."

And it's signed for IIU by Michael Walsh, and it's signed for and on behalf of Telenor by Arve Johansen.

The Department's requirement that Esat Telecom Holdings' obligation to contribute to the capital of Esat Digifone should be underwritten was met on the 16th May, 1996, by a side letter from Telenor and IIU addressed to the Department in the following terms.

"16th May, 1996. Department of Transport, Energy and Communications.

"Esat Digifone Limited, the company.

"Dear Sirs,

"Telenor Invest AS and International Investment and Underwriting Limited hereby confirm that in accordance with the terms of the Shareholders' Agreement governing the Company, they have agreed to make good or to procure that there is made good directly to the Company pro rata to their shareholdings in the Company, any shortfall which may arise in respect of the financial commitment of Communicorp Group Limited (through its wholly-owned subsidiary Esat Telecom Holdings Limited) to the equity requirements of the Company limited to the amounts specified in the Business Plan lodged with the tender.

/RS

IARTY TRIBUNAL - DAY 162

"We believe that you have already been provided with satisfactory assurances concerning the ability of the

undersigned to meet their foregoing commitments."

And it's signed by Arve Johansen on behalf of Telenor and Michael Walsh on behalf of IIU.

It will be recalled that in his memorandum of the 15th May, 1996, Mr. Donal Buggy in reciting the underwriting arrangements between the parties at the third bullet point on the first page of his memorandum stated as follows:

"The underwriting arrangements have been revised in the Shareholders' Agreement so that in the event that any one party defaults, the other two parties will underwrite the defaulting investment in their agreed share proportions. This means that if Esat Telecom Holdings Limited defaults, Telenor and IIU will provide the funds in the ratio 66.67%:33.33%. In the event that both ETH and IIU default, then the Shareholders' Agreement provides for Telenor taking on 100 percent of the financial commitment."

The Tribunal has been unable to identify any such provision relating to Telenor in the Shareholders' Agreement, nor has the Tribunal been able to identify any document within the departmental files or within the files of any of the other parties which could

/RS

IARTY TRIBUNAL - DAY 162

ground such an enforceable agreement.

On the basis of the above arrangements, the Minister



issued the second GSM licence to Esat Digifone on the 16th May, 1996. The press conference which had been arranged proceeded. There is no record or transcript of the press conference in the departmental files.

The sole record available to the Tribunal is a handwritten note which was taken by Mr. Owen O'Connell and is dated 16th May, 1996.

"16/15/1996, from OO'C Esat Digifone, matter: Licence negotiation.

ML

unanimous decision

question conclusively responded to competition fully respected.

Signed, dated" don't know what the next word is.

"Top table Loughrey, Lowry, DOB, AJ Arve Johansen MW, Michael Walsh, JC, KD Knut Digerud " and I can't make out the rest at the moment, probably Barry Maloney.

"Question

why so long

1st hand, very comprehensive very comprehensive complex process, prudent plus cautious process.

DOB whether 120 million has changed from previous

/RS

IARTY TRIBUNAL - DAY 162

hundred. Plan said 124 million total investment

50 million" I really can't make out too much else

of this particular note of the press conference at the moment. It's a short note.

The Tribunal will inquire in the course of these public sittings as to how the Minister issued a licence to Esat Digifone at a time when Esat Telecom Holdings Limited, a member of the company holding 40% of the shares, had no finance available to it either from its own resources or from third-party funds to enable it to contribute to the initial call of  $\text{€}1\frac{1}{2}$  million to fund the payment of the licence fee and:

1. Where Esat Telecommunications Holdings' ability to fund the licensed company was dependent on the outcome of a bond placement in the United States by CS First Boston which Mr. Donal Buggy, in his memorandum of the 15th May, 1996, to Mr. John Loughrey had characterised as: "A process we cannot rely on at this particular time".

2. Where the sole underwriting for 33.33% of the liability of Esat Telecommunications Holdings Limited to contribute to Esat Digifone was provided by IIU Limited, a company which had only been incorporated in August, 1995, and for which no financial statements were available.

The Tribunal will inquire, in the course of its public

/RS

IARTY TRIBUNAL - DAY 162

sittings, as to what were the true facts concerning

Esat Telecommunications Holdings Limited financial position as at and prior to the 16th May, 1996. It will then be a question for the Tribunal as to the extent to which the Department was aware of those facts. If the Department were not aware of the true facts, the Tribunal will inquire as to whether this was due to any intervention on the part of or to influence exerted by Michael Lowry or, to the extent to which it is relevant, whether it was due to some other factors.

The Tribunal will also wish to inquire into the true facts surrounding the identity of the consortium, that is to say the identity of the applicants for the licence and the true facts surrounding the ownership proposals as required by paragraph 3 of the RFP. In this connection, the following questions will need to be examined in the course of the Tribunal's public sittings.

A. Who were the true applicants behind the Esat Digifone application?

B. Were the true facts concerning the identity of the applicants known to the evaluators, and if these facts were not known to the evaluators, was this due to any intervention on the part of or any influence by Michael Lowry?

/RS

C. (1) What were the true facts concerning the ownership of either the Esat Digifone consortium or the licensee proposed by that consortium, and were those facts truly stated in the application evaluated by the evaluators as part of the GSM competition process?

C. (2) What was the state of knowledge of the evaluators concerning those facts as at the date of receipt of the application, at any time during the course of the evaluation process, at the date of the announcement of the result, at any time during the licence negotiations and at the date of the issue of the licence?

D. If the true facts were not known to the evaluators, the Tribunal will once again wish to inquire whether this was due to any act or intervention on the part of or due to any influence exerted by Mr. Michael Lowry. If it appears that at any time the true facts, whether in relation to the financial position of Esat Telecom Holdings Limited or Communicorp or the facts surrounding the question of ownership or identity of the applicants set out above were in fact known to any of the evaluators, the Tribunal will wish to inquire whether due consideration was given to these facts in the carrying out of the evaluation and/or in the negotiation of the licence conditions and/or in the issue of the licence

and whether, once again, the conduct of any of the

/RS

IARTY TRIBUNAL - DAY 162

evaluators was influenced by or was the result of any intervention on the part of Mr. Michael Lowry.

There seems to be no disputing the fact that Mr.

Dermot Desmond, through his vehicle IIU, was a member

of the consortium to which the licence was issued. As

part of the inquiries mentioned above, the Tribunal

will wish to inquire whether Mr. Dermot Desmond or

IIU, although a part of the consortium to which the

competition result was awarded, that is the licence

issued, in fact avoided the evaluation process and

whether this was a result of any intervention on the

part of or as a result of the exertion of any

influence by Mr. Michael Lowry.

Now, as has been the practice at this Tribunal, and I

will go on in a moment to conclude my Opening

Statement, people participating in the Tribunal always

have inquiries made of them by the Tribunal if they

wish to have anything added to the Opening Statement,

and in that regard, Mr. Michael Lowry's counsel has

asked me to include the contents of a statement of Mr.

Lowry at this stage in the Opening Statement, Sir, so

I intend to do that.

"Statement of Michael Lowry in response to letter of

John Davis, solicitor to the Tribunal, of the 16th

October, 2002.

"Preliminary submission:

/RS

IARTY TRIBUNAL - DAY 162

"This statement is one of a large number of responses that I and my legal team have made to requests for information received from the Tribunal in recent weeks in connection with the forthcoming module investigating the decision to award the second GSM licence to the Esat Digifone consortium.

Whilst I am obviously disappointed that the Tribunal's process remains incomplete, in another sense I welcome the opportunity presented by this new phase to dispel what I believe to be an entirely unfounded rumour and innuendo surrounding this matter.

It is now six years since I resigned my post as Minister for Transport, Energy and Communications.

The passage of time has obviously prejudiced my recollection of points of details, dates and sequence of certain events, contacts and meetings. Moreover, the reality of the current module is that it largely concerns matters that would have been dealt with at an official rather than ministerial level.

Thus, in the majority of cases, I am quite certain that I would have been at no stage familiar with the matters raised by the lengthy schedule appended to the letter of Mr. Davis of the 16th October, 2002.

Subject to this disability, I am of course concerned that I put my position on the record of the Tribunal, and I say as follows:

/RS

IARTY TRIBUNAL - DAY 162

"Statement:

"1. Prior to my appointment as Minister for Transport, Energy and Communications, a significant amount of preparatory work had been accomplished by the outgoing Government as outlined in the Aide-Memoire issued from the Office of Minister for Transport, Energy and Communications on the 9th November, 1994.

"2. The GSM competition was launched on the 2nd March 1995 following Government approval of the competitive framework proposed. The closing date was set for the 23rd June, 1995. Summary information, including the selection criteria, was publicised widely.

"3. The full competition documentation became available to the public from the 2nd March 1995 on payment of fee of i;½5,000. The evaluation criteria has also been made available to a specially constituted Cabinet Sub-Committee. The eight evaluation criteria by which the applications were to be assessed were listed in an explicitly indicated descending order of priority.

"4. The competition was managed by a specially

created Project Team led by the Department of Transport, Energy and Communications which also included representatives of the Department of Finance

/RS

IARTY TRIBUNAL - DAY 162

and Andersen Management International (AMI), Copenhagen-based consultants who were recruited following an international tendering procedure. AMI were acknowledged specialists in the matter of international competitions for telecommunications franchises. As Minister, I was appraised in general terms about the progress of the Project Group.

"5. I understood that the weighting model for the evaluation criteria which respected the descending order of priority and the detailed approach of the evaluation were initially agreed by the Project Team on the 18th May 1995 - over a month before the planned closing date for receipt of applications, and kept strictly confidential to the Project Team only. In the Department of Transport, Energy and Communications knowledge of these weightings was strictly limited on a need-to-know basis. I did not at any time seek to know nor was I made aware of the marking system to be applied.

"6. On the 27th April, 1995, I was informed by my Department officials that the European Commission had serious objections to the licence fee element of the



competition (an 'auction' based fee but without any fee imposition on Eircell). The competition was suspended on the 16th June 1995, when it became apparent that negotiations with the Commission would entail some change in the rules of the competition and had, therefore, to be concluded before the competition

/RS

#### IARTY TRIBUNAL - DAY 162

could be closed. Time would have to be allowed to enable prospective applicants to take the changes into account.

"7. Following discussions with the Commission, a compromise proposal was put on the table whereby applicants for the licence would bid a fee in the range of  $\text{€}12.5$  million to  $\text{€}15$  million while Eircell would pay a fee of  $\text{€}10$  million. The compromise proposal was made on an ad referendum basis by representatives of the Project Team and was subsequently approved by me as Minister. The consent of the Minister for Finance was also obtained and the revised fee arrangements were agreed by Government on 4 July, 1995. I wish to make it clear that it was not on my initiative that the licence fee was capped.

"8. On receipt of the Commission's formal clearance for the revised fee structure on the 14th July 1995 by letter from Commissioner van Miert of that date, all prospective applicants were advised of the new

arrangements and the new closing date of 4 August, 1995 for receipt of applications.

"9. I now understand that a slight revision to the weightings for the evaluation criteria was agreed by the project team on the 27th June 1995 and again kept absolutely confidential. This change was to reflect the revised licence fee arrangements agreed with the European Commission. Again I wish to state clearly /RS

IARTY TRIBUNAL - DAY 162

and unequivocally that I, as Minister, did not seek nor was I given details of the revised weighting model or the evaluation approach.

"10. Six applications were received on the 4th August, 1995. Details of the applications were announced publicly. I did not at any time assist or support any particular competitor.

"11. I understand the evaluation of applications took place in the period 4 August to 25 October 1995. Each evaluation criterion had been developed in advance into a series of detailed indicators against which all of the applications were ranked. The detailed evaluation under each criterion was carried out by discrete sub-groups of the Project Team, drawing upon the expertise required for different aspects of the evaluation. The final result was determined by aggregating independently determined scores of each

applicant under each criterion by reference to the weighting model. The Project Team's decision was a unanimous one. Esat Digifone had the highest score, and this is fully documented in the evaluation report prepared by the consultants and approved by the Project Team.

"12. As Minister, I was formally advised of the recommendation of the Project Team by the Secretary of the Department. Their recommendation was accepted by me. I was informed by the Secretary that the

/RS

IARTY TRIBUNAL - DAY 162

recommendation required the approval of the Minister for Finance, which was subsequently given. I in turn briefed the leaders of the Government Parties and was given permission to announce the result. This recommendation was subsequently endorsed by the Government.

"13. It is my understanding that all applicants had equal access and opportunity. This competition was conducted in an objective, fair and impartial manner with strict adherence to competition procedures and rules.

"14. I did not have any meetings or discussions with the Project Team.

"15. I did not have any discussions or meetings with Andersen Management International.

"16. I did not interfere or influence the outcome of the competition. My only concern was to ensure that the deadline of the 31st October was met, although there was, as I indicated at the time, an advantage to announcing the result immediately to end speculation and, ironically, to prevent the creation of a vacuum which could have caused the decision to be revisited with the likely consequence of litigation."

As I say, Mr. Lowry's counsel has asked us to include that in the Opening Statement, and we have done so.

/RS

IARTY TRIBUNAL - DAY 162

While in the course of this lengthy Opening Statement I have identified a large number of issues upon which the Tribunal proposes to focus its inquiries, it should be understood that the Tribunal will not be confined to the examination of these issues.

In the course of the Tribunal's inquiries, it is likely that other issues will arise, and from time to time the Tribunal will no doubt wish to redirect its focus or to add to the issues into which it will be necessary to inquire.

Finally, I should indicate what prompted the institution of this portion of the Tribunal's inquiries.

The Tribunal initially examined the second GSM licence process in April of 1999. This was a limited

examination of the process and was conducted shortly before the Tribunal's first public sittings involving evidence in connection mainly with Mr. Michael Lowry. Nothing emerged from that limited examination or from the evidence given at those sittings which, at that stage, would have prompted further scrutiny of the licensing process.

It was not until further inquiries, prompted by information initially in the public domain concerning what has become known as the \$50,000 Telenor/Esat /RS

IARTY TRIBUNAL - DAY 162

payment to Fine Gael, that the Tribunal decided to review the information to hand in relation to the second GSM licence and to institute further inquiries in relation to same and in relation to the various individuals involved. Of course it is to be remembered that it was around this time also that the Tribunal obtained information from Investec Bank privately, and that information was not, at that time, in the public domain. And this also prompted the Tribunal to revisit a matter and to continue its inquiries.

Those inquiries initially took the form of an examination of the money trail. On this occasion a second money trail, distinct from the money trail or trails examined in the course of the first public

sittings dealing with the Terms of Reference affecting Mr. Michael Lowry.

That examination led the Tribunal to look at apparent connections or relationships between a number of individuals and a number of entities involved in or associated with the second GSM licence. Had the information which then came to hand been available to or made available to the Tribunal at an earlier point, it could have been dealt with in 1999, or at least at a date much closer to the date upon which the events which are now being examined actually took place.

That completes my Opening Statement, Sir.

/RS

IARTY TRIBUNAL - DAY 162

CHAIRMAN: There wasn't one matter in relation to the succeeding Minister

MR. COUGHLAN: As I say, it is a matter which I did refer to, and for completeness' sake, particularly in relation to the information which is now available to the Tribunal and which I have outlined in as brief a format as I could possibly do in this Opening Statement, there is also a letter on the departmental files responding to queries obviously raised by Mr. Robert Molloy TD, as he then was, and signed by Mr. Alan Dukes, TD, Minister for Transport, Energy and Communications on the 6th December, 1996. Of course it is to be said at this stage that Mr. Dukes had just

taken over as Minister in that Department. But the

letter reads:

"Mr. Robert Molloy TD, Dail Eireann, Dublin 2.

"Dear Bobby,

"There appears to be considerable confusion abroad about the precise situation regarding ownership and investment in Esat Digifone. I hope the following information will clarify the matter for you:

"The Esat Digifone application was on behalf of a consortium owned as to 50% each by Telenor Invest AS and Communicorp Group Limited (the holding company for /RS

IARTY TRIBUNAL - DAY 162

Esat Telecom). The application disclosed that, if it was successful, 20% would be placed with financial investors. A list of potential investors was submitted, all of whom are 'blue chip' institutions.

The Minister and Department are specifically precluded from naming these, but there was no room for doubt as to either their bona fides or their financial capacity.

"I can, however, confirm that the names being speculated upon in the last few days were not on this list.

"At the licensing stage, several months later, Esat Digifone was in a position to announce that it had placed the 20% with IIU Nominees Limited, and it was

certified to the Department at that time that Mr.

Dermot Desmond was the sole beneficial owner of the 20%. Adequate evidence of his capacity was disclosed.

Mr. Desmond is still the exclusive beneficiary of the IIU shareholding.

"On the 19th April, when the Department held a press briefing, the fact that it was not in a position to give final definitive information on the placement of the 20 percent minority shareholding may have reduced the clarity of the exchanges. My information is that when the licence was issued shortly thereafter, the precise situation was clearly stated.

/RS

IARTY TRIBUNAL - DAY 162

"If I can be of any further assistance to you, within the constraints of the binding confidentiality arrangements, I would be delighted to do so.

"Yours sincerely,

"Alan Dukes, TD."

The Tribunal has not as yet of course spoken to Mr. Dukes about this, but as I have indicated, he had only just taken over as Minister in the Department. But the Tribunal, in relation to departmental officials, will conduct inquiries as to how this letter came to be drafted.

CHAIRMAN: I'll take you in a minute, Mr. McGonigal.

I should first of all, Mr. Coughlan, express my



gratitude to you and the other members of the legal team for the long hours of hard work, indicating a vast amount of documentation and convening a very large number of meetings to put your very considerable, indeed monumental Opening together.

Thankfully, the Opening Statements of some 28 hours or thereabouts are not yet the norm in our legal or

Tribunal processes, but I think that in this exceptional instance, it would have been extremely difficult to embark upon hearings without an enormously thorough opening. Indeed, I think the evidence could have been well incomprehensible to the public and other persons if there had been either no

/RS

IARTY TRIBUNAL - DAY 162

opening or only a very perfunctory one, and I think that common sense should dictate, as indeed I remarked in July last, that there should be a clear willingness to adopt the considerable amount of agreed or uncontroversial matters alluded to in the opening, and that as regards those matters in which there may be likely to be some controversy, that a considerable degree of focus has been put upon them in the course of the opening remarks.

I do have to remind all persons present, however, that as in previous shorter openings, what has been stated is not evidence. It is not something upon which any

conclusions can be based, and it is merely an attempt to summarise what appears are the principal matters of evidence that are likely to be led in evidence over ensuing months.

It would be wrong and unfair that there be any unwarranted or unfair allegations against any persons based on those opening remarks, and it is only when evidence has been heard and tested, and a report in due course delivered, that in fact any finality can be brought to the process with which we are concerned.

Indeed, it is not unsurprising that the Tribunal, not for the first time, has received in recent days some measure of correspondence by way of complaint in relation to what is contended to be certain matters of unfair or selective or biased media reportage. The

/RS

IARTY TRIBUNAL - DAY 162

response of the Tribunal, as in similar instances in the past, has been largely threefold.

Firstly, to point out that any persons unjustly wronged by damaging untrue facts or comments that exceed the bound of what may be acceptable is entitled to avail of his or her remedies under the law of defamation.

Secondly, that this Tribunal does not have a function in censoring or muzzling the press or the comments that are made in the media on the events that are

being examined in this forum.

Thirdly, it would appear to be the relatively clear experience from other forums that where investigations are embarked upon into matters of comment or unauthorised leaks, it is an almost invariable practice that any member of the journalistic profession will decline to name his or her sources. I may not necessarily empathise with that long-established convention in every connotation of the Tribunal's work, but I understand and appreciate it. And having been a very young barrister at the time of the quite celebrated case many years ago of the distinguished RTE journalist Mr. Kevin O'Kelly, I have no desire, as a Tribunal Chairman or a judge, to be involved in any potential replication of those particular circumstances.

/RS

IARTY TRIBUNAL - DAY 162

I do however reserve the entitlement, as the Sole Member in charge of the processes that take place here, to take action in any extreme circumstances of comment or reporting or other media matters. However, I readily accept that what is taking place in this Tribunal concerns matters of very considerable public importance and interest. It further concerns matters of very considerable economic aspects with obvious public dimensions, and it is readily understandable

that there will be a robust and vigorous comment and investigative journalism carried out into those matters.

I do not propose to address at any length the question that was mentioned at the very outset of these sittings of unauthorised or selective leaking of information to members of the journalistic profession.

It is an undoubtedly unwanted and unsought side effect of compliance with the rules that were most recently laid down by the Supreme Court in the case of Haughey and others against Moriarty and others, that by virtue of the Tribunal being required to serve the essential matters of evidence in advance of hearing on interested persons, this may often mean that quite a wide number of persons will be served with material confidential information in advance of sittings. And it accordingly is the case that there have been a considerable number of unauthorised disclosures of confidential information by persons to members of the media.

/RS

IARTY TRIBUNAL - DAY 162

As I have indicated, the jurisdiction or powers of the Tribunal in this regard are limited, though I have indicated I do reserve powers for any particular extreme contingency that may arise. I did ask Mr. Coughlan, in the course of his opening remarks, to

deal in part with this aspect where, as in the instance relating to certain matters disclosed to the Tribunal by Mr. Mark FitzGerald, the ambit of persons served with the relevant information was extremely small. And as on previous such situations in the past, the Tribunal is examining the situation resulting from that particular matter.

I am satisfied, insofar as I am satisfied of anything in the course of this process, that no leaks take place either from myself or from any members of the Tribunal legal or administrative team. And it remains an unwanted but perhaps inescapable fact of life that there are going to be the type of leaks that have been commented upon that certainly do not assist the investigative or other work of the Tribunal.

Indeed, it has been the experience in the past that members of the media have, on occasion, informally and in a good-humoured way expressed exasperation to persons working in the Tribunal at the very absence of any such leaks.

In the context of the remarks that have been made at

/RS

IARTY TRIBUNAL - DAY 162

some considerable length by Mr. Coughlan, I do propose to give an opportunity, just as it has been availed of by counsel for Mr. Lowry, to any person who feels that there may have been any degree of apparent imbalance

or other matter that may give rise to disgruntlement to seek to have a further picture conveyed.

Because of the particular hour that we are now at in the course of the sitting, it would be my preference that as in previous cases, if any extensive matters are being canvassed in that regard by legal representatives of any person, that this be done by way of conveying those matters to the Tribunal who will immediately on resumption of sittings see that those matters are duly highlighted. But I am not going to shut out anyone who may feel that he or she has a duty to a client, and if anybody wishes to urge any matters at this particular stage consistent with what I have said about what I feel is a need for some brevity at this hour, of course I will hear that.

Just before perhaps Mr. McGonigal may wish to raise something, Mr. Coughlan, I understand you did have some discussion with representatives of other persons as regards

MR. COUGHLAN: And we indicated that people would be in a position perhaps to commence evidence on Tuesday next, I think.

/RS

IARTY TRIBUNAL - DAY 162

CHAIRMAN: Does that fairly reflect matters, Mr. Nesbitt?

MR. NESBITT: It does, Mr. Chairman. Our first

witness will be available on Tuesday at the time

directed by the Tribunal.

CHAIRMAN: And there has been a fair amount of new

material, and to actually embark tomorrow morning

might give you less than a full opportunity to digest.

MR. NESBITT: I think that would be difficult to do,

given the amount of distance travelled since the

opening.

CHAIRMAN: We will be commencing on Tuesday morning

with one of your more substantial project team

witnesses.

MR. McGONIGAL: The only matter I wanted to raise, Mr.

Chairman, it had been my intention, if Mr. Coughlan

had finished earlier and before he had dealt with all

of the things that he dealt with today, to seek some

time to make a statement on behalf of Mr. O'Brien in

relation to some of the matters that have been raised.

And it is still my intention to do that, but I would

be happy to make such a statement on Tuesday, if that

was convenient to the Tribunal.

CHAIRMAN: Certainly, Mr. McGonigal.

/RS

IARTY TRIBUNAL - DAY 162

MR. McGONIGAL: I don't anticipate

MR. COUGHLAN: In the first instance, Mr. McGonigal

could give the statement to the Tribunal legal team

and we will incorporate it into the Opening Statement,

it being the Tribunal's Opening Statement, but I can discuss that with Mr. McGonigal.

CHAIRMAN: I'll leave you to discuss that with Mr. Coughlan in the first instance, but you are happy not to give

MR. McGONIGAL: I am happy not to delay you this evening, Mr. Chairman, and Tuesday will do fine.

CHAIRMAN: In view of that additional aspect and the need to get what we can achieved in the remaining week before Christmas, I'll say half ten on Tuesday next.

Thank you.

THE TRIBUNAL THEN ADJOURNED UNTIL TUESDAY, 17TH  
DECEMBER, 2002 AT 10.30AM.

/RS