

I N D E X

WITNESS:                    EXAMINATION:Q. NO:  
MARTIN BRENNAN            Mr. Healy                    1 - 253

THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY, 17TH  
DECEMBER, 2002 AT 10.30AM.

CHAIRMAN: Mr. McGonigal, I think you had indicated  
you might have some remarks before we embarked upon  
evidence.

MR. MCGONIGAL: Thank you very much, Mr. Chairman.

There are a few remarks which I'd like to address in  
relation to the function and purpose of the Tribunal  
at the present time.

First of all, may I say, Mr. Chairman, Denis O'Brien  
looks forward to and welcomes the opportunity which  
this Tribunal now gives to address many of the issues  
which have been raised by Mr. Coughlan in his Opening  
Statement. It is a fact, Mr. Chairman, that since the  
minnow, if I may call Esat Digifone that for a moment,  
won the right to negotiate this licence over seven  
years ago; that there have continually since that time  
been rumour and innuendo circulating throughout the  
Island and the business community that there was  
something wrong in the way that Esat Digifone won that  
right to negotiate and subsequently obtained the grant  
of the licence.

It is important, and this Tribunal provides the forum that those rumours and those innuendoes be finally laid to rest and answered. It is important, therefore, from this Tribunal's point of view, that

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any material, from whatever source, in relation to those rumours and innuendoes which are already known or which people may believe they have heard, that that material should be made available to this Tribunal to enable those matters to be dealt with.

And in saying that, Mr. Chairman, I address not only the wider public, but those consortia or parties to the consortia that believe themselves that there was something wrong. It is now time for those consortia who have been whinging for the last seven years, who have ultimately taken the slow process and issued proceedings to bring forward any material, any evidence, that they think justifies a finding that the process was in some way flawed. Let them put up or shut up. The time for them has come to stop sitting in the background but to come forward and present any material that they have.

I don't believe, Mr. Chairman, that they do have any, so maybe not too much work, further work will be given to this Tribunal arising from that material.

Let me say, Mr. Chairman, on behalf of Denis O'Brien,

that he asserts in the strongest possible way that Esat Digifone won the right to negotiate and subsequently the grant of the licence legally, fairly, and properly. At the right time, Mr. Chairman, I will be inviting you to make such a finding of fact of this Tribunal, that the right to negotiate was won legally, /RS

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fairly, and properly, and the grant of the licence was equally awarded and granted legally, fairly, and properly.

Equally, Mr. Chairman, Mr. O'Brien will assert that he did not have, at any time, or take advantage of, any confidential or insider information in relation to this process, either during the course of winning the right to negotiate or subsequently during the grant of the licence. That again, Mr. Chairman, will be a finding of fact and a strong finding of fact that I will be inviting you, as Chairman of this Tribunal, to make.

The reality of the winning of the right to negotiate this licence by Esat Digifone, it was won, Mr. Chairman, because Esat Digifone had the best team; they were the best prepared; they were the best worked up; they had the most planning applications for sites in; their advertising was the best advanced; and they had the ability to roll out better than anyone else.

They ultimately obtained the best marks.

Michael Andersen is quoted by Mr. Coughlan on Day 161, at page 30 of same, that "The quality and consistency of Esat Digifone's application with regard to the extent and content of the information provided is among the absolute best that AMI have seen during the many evaluations that AMI at that time and since then has participated in."

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It will be, Mr. Chairman, at the appropriate time, a finding of fact again that I will seek that in relation to this competition and the award of the right to negotiate, that Esat Digifone deserved that right because at the time they were the best.

If I may, Mr. Chairman, in relation to the winning of the right to negotiate, draw the Tribunal's attention once again to what I consider to be the most important and most fundamental part of the process which the PTGSM were involved in, and that question really is this, Mr. Chairman: How did the evaluators come to the conclusion that they came to in late September, early October that Esat Digifone should be placed first, Motorola should be placed second and Irish Mobicall should be placed third?

The answer to that, Mr. Chairman, is partly to be found in Tab 50 of the book of documents which the

Tribunal furnished to the parties. It's the documents re the evaluation, Volume 2, and it's Tab 50. And the particular part that I want to refer to and draw the Tribunal's attention to, because it's important, is on page 6, and it is paragraph 2.4, and it is entitled "The marking and the nomination of the best application".

Now I'll briefly read that out, Mr. Chairman: "An invitation was issued on the 5th September to each of /RS

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the six applicants to attend a presentation meeting with PTGSM. The invitation incorporated an agenda for the presentation and a number of questions to be responded to. This was done on an equal basis to all, such that one hour was reserved to a presentation of the business case behind the application, one hour was offered to answer questions which were equally posed and worthy to all applicants, and one hour was reserved to the PTGSM to pose questions to the applications. The presentation meetings were consecutively held as six separate meetings from the 11th to the 14th September. After the presentation the remaining part of the evaluation was conducted in particular on credibility, risks, and sensitivities, and the overall evaluation and final marking of the applications were completed. The nucleus of the

evaluation was then commenced by the establishment of ten sub-groups, each dealing with one of the dimensions outlined in paragraph 19 of the RFP document, namely market development, coverage, tariffs, international roaming plans, radio network architecture, network capacity, frequency efficiency, performance guarantees, financial key figures, and experience. This approach was agreed prior to the closing date and is also part of the evaluation model adopted. Each sub-group comprised members from the Department and consultants from Andersen Management International. In addition, the Department of Finance participated in the sub-groups on financial key figures and performance guarantees. The sub-groups

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were staffed such that they comprised different members and affiliates of the PTGSM with specific expertise in relation to the subjects to be evaluated. The sub-groups developed a series of indicators against which applications should be measured under each dimension. The award of the grades at the level of the indicator was achieved through a process of discussion and consensus within each sub-group. The subtotal for each dimension was achieved on the basis of a general discussion of the appropriate interpretation of the most important indicators for

each dimension in the context of the evaluation criteria and the information contained in the tender documents. A formal weighting of the indicators was used where appropriate. A similar process was used in relation to the overall award of marks which formed the basis of selection of the winning application and ranking of the top three applications."

In my respectful submission, Mr. Chairman, that is the most important part of the entire evaluation process in relation to understanding how the PTGSM arrived at their A, B, C, or first, second, and third. That process, which involved the ten sub-groups examining one particular subject of the ten subjects to be examined and marking it, is the process and exam testing and results which brought about the result that Esat Digifone were placed first.

And that is demonstrated, Mr. Chairman, by the two  
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tables, one at page 43 of the same book, which is on the screen. And there is set out on the left-hand side the ten subjects: market development, coverage, tariffs, international roaming plan, radio network architecture, all the way down to financial key figures and licence payment. And opposite under each consortia is a letter which represents the letter that the subdivision thought that that consortia should get

in relation to that subject.

So that in market development, A1 got C; A2, C; A3, B; A4, C; A5, A; and A6, C; and that continues all the way down. That then, Mr. Chairman, is translated into marks, which is at page 48 in another tablet, and those sorry, page 49 and those tablets become numbers. And as you will see there, Mr. Chairman, the Cs and the Bs and the As have become numbers. On the left-hand side is the weighting, and at the bottom is the scoring points. And at the end of that process, as plain as night follows day, A5 had 432 points, which is higher than anyone else.

If I may stop there for a moment, Mr. Chairman, and say this: that I am not aware of any evidence or any material which has been furnished that suggests that that process was in any way interfered with or invalidated. In fact, one only has to look at the way the process was set up ten subdivisions, with different people on each division to wonder how it would be possible to interfere with such a process to

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ensure that a particular consortium came first, second or third. In my respectful submission, it would have been impossible and certainly extremely difficult, but in my respectful submission, equally, Mr. Chairman, this in many ways is the most important part of the



process and one to which this Tribunal must pay full accord. Because when that process is completed, when those exam results, if you like, are scored, you have your 3, 2, 1. And that process appears to have been completed in or about late September/1st October.

And once that 1, 2, 3 had been reached, Mr. Chairman, and once the PTGSM were satisfied that those figures were correct, it is difficult, if not impossible, to see how anyone could subsequently come along and try and put number 2 before number 1 or number 3 before number 2. And what those tables represent, in my respectful submission, Mr. Chairman, are the result which entitled A5 the right to negotiate for the grant of the licence. And I say that that comes out of the documents which have been presented by the Tribunal to the parties.

Once that marking system had been determined, once the results were known to the PTGSM, they could not be changed. Therefore, A5 was first, A3 was second, and A1 was third. But all that entitled them to, and all that Esat Digifone got from that, was the right to negotiate for the grant of the licence.

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Now, if there is no challenge, Mr. Chairman, to the As, the Bs, and the Cs, if there is no challenge to the 3s and the 4s and the 5s, if the maths are

correct, then it must be a finding of this Tribunal that Esat Digifone won the right to negotiate the grant of the licence on the tests carried out.

It is also of importance to draw attention in those tables to the fact that within them, the finance was a significant issue and one which carried significant examination. That is visible, again from the documents furnished to the Tribunal, both in the evaluation documents Volume 1, and the evaluation documents Volume 2, the report and the annexes attached thereto. And it is quite clear from looking through Tabs 23, 24, 29, 30, and 31 that significant work was done by the subdivision in charge of the financial aspects of this process.

And it is equally significant that they were alerted to and well aware of the problem concerning Communicorp and its ability to finance. Because it is clearly stated in Appendix 10, again Book 2, and Appendix 10 is a supplementary analysis on financial risks, when dealing with A5, they say at page 6 that "The equity commitment cannot be met by Communicorp today."

In my respectful submission, Mr. Chairman, the PTGSM, in dealing with the financial side of things, had

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regard to two important considerations. One was the

fact that Telenor itself was a billion-pound company and could, if it wanted to, finance the whole process.

Secondly, the team were alerted to the fact that Communicorp was weak in this consortium, and as of that day were not in a position to finance the equity which might be needed.

And to balance that, they incorporated, as set out in page 7, two suggestions which should be incorporated within the licence conditions. And the ones they had in mind were, A, requirements regarding the share of ownership and voting power in Communicorp, and secondly, requirements regarding the equity of Communicorp. So, far from being unaware or silent in relation to the weakness of Communicorp, they were very much aware, as indeed were they aware of the weakness of other aspects of other consortia in relation to their financing. And they were scored Esat Digifone was scored accordingly in the tablets which I have already shown to the Tribunal.

It is clear, Mr. Chairman, in my respectful submission, that looking at that material, one appears to be forced to the conclusion that there was a thorough investigation carried out within the limits of the brief provided by the PTGSM; that they did that fairly and properly and, on the basis of the material before us, without any interference; and that therefore, the result was a correct result and a right

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result and a result upon which negotiations could then commence with the winning consortia, A5, which in this case is Esat Digifone.

I indicated, Mr. Chairman, and I believe it to be the position, but I am subject to correction, that that result appears to have been available, based on the documents which have been furnished to us, sometime around the 29th September/1st October. And I say that, Mr. Chairman, from a perusal of Tabs 31 and 32, which appear to show the first of a number of draft reports on the evaluation process. The one on Tab 31 has a date of the 29/9/95, and the one on Tab 32 has a date of the 1/10/95 and one draft beside it.

And what is significant is that on page 31 of Tab 32, under paragraph 5.6, "the recommendation", it says that "The results of the evaluation means that the evaluators arrived at the following ranking of the three best applications: A5, A3, A1."

Now, if I am right, Mr. Chairman, in what I have said before, it would appear that as of that date, the results of the PTGSM were known to some people within the process.

That, in my respectful submission, is confirmed by a perusal of some of the documents which have been referred to by Mr. Coughlan. And the process that

appears to have been taking place between

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approximately the 1st October and the 25th/26th

October is that the PTGSM were mainly concerned with getting the report of the evaluation process right.

And if one reads through the project meetings and some of the handwritten notes to which Mr. Coughlan has referred to, there seems to be some justification for coming to that conclusion.

In particular, Mr. Chairman, can I refer you to, in the book of documentation, Department documents Volume 2, Tab 121 is the handwritten note, typewritten version of the handwritten note of Margaret O'Keeffe of the 1st February, 2002; and at the top of that, the first entry is the "confidentiality, the Minister knows, shape of evaluation and order of the top 2, Minister of State does not know, quick announcement."

Under that then is the agenda, the draft report and the future work programme producing Draft Number 2, which would seem to indicate the Draft Number 1 had already been produced, was being worked on, and the rest of that memo appears to be dealing with corrections and improvements which should happen or be brought to Draft Number 1.

In particular, Mr. Chairman, can I draw attention to page 2, and what is noted by Ms. O'Keeffe of Mr.

McMahon, when he says that "He would like to see more of a user-friendly overview. Confidence should ooze out of the report. The document will be read by

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Secretary and Assistant (the Minister's programme manager), Department of Finance."

In my respectful submission, Mr. Chairman, that encapsulates the process that was taking place within the PTGSM at this time. They were trying to put together a report which would explain clearly and unambiguously the result of the process which had been carried out and resulted in the two tables that I have drawn attention to, and that it would be necessary for that report to show clearly that there was a winner, a second, and a third.

That is supported again, Mr. Chairman, in my respectful submission, at Tab 20 at the on the meeting of the 9th October, in the opening of that, it says that the "Chairman opening the meeting by stressing the confidentiality of the evaluation report and the discussions re same." Which again brings us back to the report. Not the process.

"He also informed the group that the Minister had been informed of the progress of the evaluation procedure and of the ranking of the top two applicants." Which seems to support the idea that in late September, the

results were known.

"The Minister is disposed towards announcing the result of the competition quickly after finalisation of the evaluation report."

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And then it goes into the discussion of the evaluation report and the future of the work programme.

The third document that I would refer to, Mr.

Chairman, is the meeting of the 23rd October, which is

Volume 3, Tab 132. And in the second paragraph of

that, it records that "A discussion of the draft

report, the meeting then proceeded with a discussion

of the draft AMI evaluation report, views from

Regulatory, Technology, and the Department of Finance

all indicated that while there was general

satisfaction with the detailed analysis and the final

result, the presentation in the draft report of that

analysis was not acceptable."

And in my respectful submission, My Lord, that is a

significant difference, because within that difference

is, in my respectful submission, the division of the

process, in the sense that the evaluation process

ended when you had a 1, 2, 3. The evaluation process

report did not end until you had a report which people

were satisfied, and clearly during the period, the 1st

October to the 25th October, significant work and

discussion took place, as is evidenced by all of the documents which have been furnished by the Tribunal in relation to trying to get an evaluation process report which would stand up with confidence or, to use Mr. McMahon's expression, "Oozing with confidence".

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If I can just for a moment, Mr. Chairman, unusually ask the question rhetorically, what was the Minister's position in all of this? And can I take the question in relation to the period from the 1st October onwards, because there is absolutely no evidence of Ministerial interference prior to that in relation to the process.

And there are four questions, in my respectful submission. First of all, was the Minister entitled to know the result of the evaluation process, and if so, when?

Secondly, was he entitled, if told the result of the evaluation process, to move the report forward?

Thirdly, and possibly most significantly, could the Minister have changed the result? And to answer that question, the last question, if he could have changed the result, how could he have changed the result?

In my respectful submission, he could not have changed the result. There is no obvious way as to how he could have changed the result. There is no obvious



way how he could have influenced the process which took place up to the 1st October. And there will be important findings that I anticipate that this Tribunal will be making: that there was not and could not have been any interference by the then Minister in the evaluation process.

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The process itself, apart altogether from AMI, was carried out by members of the Civil Service, an organisation, Mr. Chairman, who, throughout the history of this State, have shown complete and utter loyalty to the State. Regardless of the government that has been in power, the Civil Service have steadfastly served the interests of the nation.

I believe in this process that they and the work that they did will be completely and utterly vindicated. I believe that if there are any flaws in this process, they were flaws not of Minister Lowry's intervention, but flaws of the process. Possibly by reason of a lack of funds; we don't know yet. But of one thing, I would respectfully submit, this Tribunal can be confident of, and it is this: that those civil servants who were involved in this process did their work fairly, honourably and with integrity, and, Mr. Chairman, with total independence. And the result which they brought about in the evaluation process was

the correct and right result.

If I may, before finishing, throw one word of caution, Mr. Chairman. If I have any concerns in relation to the work of this Tribunal, it concerns the danger of the Tribunal trying to assess the assessors. That, in my respectful submission, is not within its Terms of Reference. And the Tribunal must guard against trying to put itself in the position of the assessors and

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seeing if there were questions which they might have asked which weren't asked, or putting themselves, or thinking that they might have seen a different result to the result that came about. That, in my respectful submission, is not within the Terms of Reference as given to them by the Dail.

The Term of Reference which Mr. Coughlan referred to was (g), "whether Mr. Lowry did any act or made any decision in the course of any Ministerial office held by him to confer any benefit on any person making a payment was referred to in paragraph (e) or any person who was the source of any money referred to in paragraph (f) or in any other person in return for such payments being made or procured or directed any other person to do such act or make such decision."

If I have a concern, it relates to that only, Mr. Chairman, at this stage.

Finally, Mr. Chairman, may I say, at the end of the day the position is very simple, in my respectful submission. A young entrepreneur, Irish, came along and partnered himself to the leading IT firm in the world at the time, Telenor, and they, together, wiped the floor of some of the major corporations of the world. It will be seen eventually that there was nothing wrong in what this partnership did, but in beating the major corporations of the world, and particularly what might be seen as the favourites, it

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was, Mr. Chairman, typically Irish.

Thank you, Mr. Chairman.

CHAIRMAN: Thank you very much, Mr. McGonigal, for those remarks, which are helpful and will be borne in mind.

Mr. Healy?

MR. HEALY: Mr. Brennan, please.

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MARTIN BRENNAN, HAVING BEEN SWORN, WAS EXAMINED AS FOLLOWS BY MR. HEALY:

CHAIRMAN: Mr. Brennan, just before Mr. Healy starts to take your evidence, it's the position that I think you have met with all the members of my legal team on a number of occasions, but it's the first time that

you and I have met. It's probably appropriate that I say a couple of brief words to you, and to your project team colleagues who will follow to give later evidence. It's perhaps appropriate particularly in your case, since, because of the fact that you were the head of the project team and indeed, in colloquial terms, were on stage for a great deal of the quite lengthy and convoluted process, inevitably your evidence is going to take a certain number of days.

It's right that I say, I think, that although we had to have a very lengthy opening to try to put some structure on the reasonably complex events, that the report that I write will be based on the evidence solely that we hear in this room, and I want to assure you that I'll approach that to the very utmost of my ability with a completely open mind and that I'll try to report in as fair and as balanced a way as I can.

It's probably a relatively new development in the history of this State that you have one organ of State such as this Tribunal, established by the Oireachtas, investigating the professional discharge of duties by other organs in regard to your own group and your

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colleagues from your Department and the Department of Finance and the consultants. I think you probably wouldn't be human if you hadn't found some of the

detailed meetings and compilation of questionnaires irksome in the course of the last several months, but it has been a necessary process. So I want to assure you that your evidence will be fairly and properly assessed, and I approach it not in a nit-picking vein of looking for tiny errors that might reflect and be absent of mathematical certainty or exactitude but looking at the real indicators in assessing this aspect of the Tribunal's work. Thank you.

MR. HEALY: Thank you, Mr. Brennan.

Q. You know that what the Tribunal is involved in is an inquiry into a decision made by the Government to award the second GSM licence to Esat Digifone. This was a decision which was the culmination of a very lengthy evaluation process, isn't that right, in which you were intimately involved?

A. That's correct.

Q. And a scheme was put in place which involved conducting this evaluation process, the initial part of it, on I think a basis independent of the Minister in the Department who was conducting the process and independently of the Government ultimately to whom a recommendation following the process was made; isn't that right?

A. Yeah.

Q. And I think the design of this process was that it

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would be an independent and sealed process, sealed because it was necessarily one in which you had to be sure that no competitor got an advantage over any other competitor from having any additional information the other competitors didn't have; isn't that right?

A. Yes, I think that is correct. As regards "sealed", I am not so sure how you interpret that word, in the sense that there were parts of the process which inevitably had to be opened; for example, I didn't have the authority from the Government to do a deal with the EU Commission. I had to refer back to the Minister, and indeed, I presume my colleagues in Finance did also.

Q. Can I put it this way: The ambition was to keep the process and the information involved in the process within as closely knit a group as possible. That was certainly an ambition of the group; isn't that right?

A. That's correct.

Q. You certainly had to demonstrate to the outside world, to the competitors, and to the public that it was a process where you would at least endeavour to achieve this and to put, so far as was reasonably practicable, a scheme in place that would seek to achieve this; isn't that right?

A. That sounds fair to me.

Q. Your current position in the Civil Service is what?

What's your current rank?

A. I am now assistant secretary in charge of energy policy.

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Q. And at the time that this process was being carried out, what was your rank?

A. I was Principal Officer in charge of what was then known as a Telecommunications Development Division.

Q. So far as your dealings with the Tribunal are concerned, I think that you, together with some of your colleagues, met with the Tribunal sometime around mid-1999; that was the first time you met with the Tribunal. Would that be right?

A. That sounds about right.

Q. I think yourself, Mr. Loughrey, and Mr. Towey?

A. That's correct.

Q. Mr. Loughrey was then the Secretary; Mr. Towey was junior to you, I think. Was he an Assistant Principal at the time?

A. He was Assistant Principal at that time. He is now a Principal.

Q. I don't think the Tribunal took up very much more with you after that time until the end of 2001, and really the Tribunal didn't begin to engage with you until 2002; would that be right?

A. Sounds about right.

Q. Between April or I think it was April, maybe June, I am not sure, mid-1999 in any case and the end of 2001 or beginning of 2002, there was no contact with the Department concerning the process; isn't that right?

A. I am not qualified to answer that question, in the sense that the telecommunications division of the Department today has a certain role in connection with

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the Tribunal which I am not particularly familiar with.

Q. You have provided the Department with responses you have provided the Tribunal, I beg your pardon, with responses to a number of lengthy questionnaires, and you have attended a number of very lengthy meetings with members of the Tribunal legal team?

A. That's correct.

Q. In which the process was discussed and in which details of the process were discussed?

A. Mm-hmm.

Q. In your I'll call it statement, or memorandum of intended evidence, which consists of your answers to most of those queries, you say at the outset that and I'll come to the detail of it in a moment that what you had to say is based mainly on recollection of



events that occurred, as it now is, the bones of seven years ago, six or seven years ago?

A. Yeah.

Q. Can I take it that in preparing your responses, you would also have had access to the documents?

A. Yes. I did a first draft from memory, and then I visited documents for some aspects of it.

Q. What the Tribunal would hope to do is to go through your response to a very lengthy questionnaire, and I'll read out the questions, and as we have already discussed, I'll read out the answers too. I think that's what you'd prefer, and if you want to stop me at any point, you can do so; and if there are areas of clarification that are required, we may stop to deal /RS

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with those as we go along, but I won't be coming to it for a while.

You have already well, you have already I presume had an opportunity to look at, you may not have had an opportunity to examine in detail, the many books of documents, not just the Department documents but other documents made available to you by the Tribunal; isn't that right?

A. I have had them in my office, and I have dipped into them.

Q. Well, would you agree with me that and this is

certainly the view that the Tribunal takes at the moment that the Department documents in any case show one view, if you like, the view that on the face of it the Department had when they were conducting this process; isn't that right?

A. Yeah, sounds reasonable.

Q. You have also been furnished with books of what I think the Tribunal is calling participants' documents, which are other documents which, if you like, show the view of the process or the activities being conducted on the other side of the process by the participants or some of the participants?

A. Yes.

Q. Isn't that right? And what the Tribunal is trying to do here is to try to get the whole picture. The picture of what the Department knew, what was happening on the outside, from the documents and from the evidence to be given by you and from your

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colleagues and also from the participants, or some of them.

A. I have to say that I didn't delve, into any significant extent, the documents you are now talking about.

Q. You needn't concern yourself. I am not going to ask you about those in detail, and I'll give you plenty of

warning when we come to it. But what the Tribunal would propose to do after going through your statement is to try to make, with the assistance of your evidence, a chronological survey of the Department documents, perhaps with references here and there to relevant participant documents. And in addition to that, in addition to the documents, there is of course the fact that we now have the tapes of the presentations, which was the other way in which the Department got information in the course of the evaluation process.

You had meetings, as I think Mr. McGonigal has just reminded us, between the 11th and the 14th September with the various consortia, and you taped those meetings to make sure that you had an accurate record of them. And I think those tapes, initially I think mislaid, they have been retrieved now, and copies have been made available for you, I think, and also transcripts; isn't that right?

A. Transcripts of some of them.

Q. Transcripts of some of them, yes. I think transcripts of the first three?

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A. Yeah.

Q. And we'll come to this at various points in the course of the evidence, but I think that is sort of a

division the Department itself made between the various applications. There was a top three and a bottom three; would that be a fair way of putting it?

A. Yeah.

Q. Now, in the course of the evidence, Mr. Brennan, it may appear that either the Tribunal or that I am suggesting or making criticisms of the process. I want to make it clear that this is not intended to undermine the process but to try to understand why it may have taken a particular route at a particular point in time, as to why, for instance, you took one route when that route was open to you. I am not saying the other route was in any way invalid or I may be suggesting that the route you took was invalid, but I am not interested in invalidity and I am not interested in whether you exercised a judgement to go one way or the other way but whether your decision to go one way or the other was in any way influenced or the result of an intervention by a third party or was, I think in the words of Mr. Michael Lowry when he was Minister, "massaged" in any way.

You understand that that's what I am seeking to do?

A. Yeah.

Q. And of course I have one advantage in looking at all of this which you didn't have at the time, and this is why this Tribunal is working in this way; I have the

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advantage of 20/20 hindsight, but I want to you take advantage of that as well. I want to you take advantage of having a retrospective look at this with information now at your disposal which you did not have at your disposal at the time that you were making decisions. You understand that?

A. I understand what you are saying. I am not sure whether it's reasonable or not.

Q. That's what the Tribunal is trying to do: get the whole picture, including the parts of the picture that may have been obscured from you at the time, rightly or wrongly as the case may be.

A. But from the way you present that, it sounds to me as if you will be asking me to speculate as to what might have happened if there were different circumstances.

Q. I may be. I think you have a copy of your own memorandum of intended evidence, so if you can follow what I am saying and correct me if you think I am going wrong in any way.

You say, as I mentioned a moment ago, that "For the most part this statement is based on my recollection of the events, but it should be borne in mind that these events occurred some eight years ago. My recollection is subject to correction. Furthermore, from a first reading of the questions in the schedule, it is clear that the contemporary records are not

sufficiently exhaustive to provide a detailed response

in some areas."

/RS

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You go on to say: "A summary of the relevant part of the Department's organisation for late 1994 to late 1996 has already been provided. The organisation was changed in about September of 1995 with the creation of an additional Principal Officer post and a re-jigging of your portfolio to facilitate the 1996 EU Presidency and your lead role therein and to recognise that the Telecom Eireann strategic alliance project had grown."

Very briefly, can you just explain to me what the organisational structure was at the relevant time and what was driving these changes?

A. When I came back from Brussels, it was the Department of Transport, Energy and Communications hadn't long been formed, and I suppose it's fair to say had a somewhat different economic outlook from its predecessor components, in the sense that we were probably a bit more pro-competition and so on. So in recognition of that, as I was coming back from Brussels, Mr. Fitzgerald came to see me and suggested he wanted to reorganise the telecommunications functions at that time by separating regulatory functions from policy development, and I took the

policy development role.

That entailed me, as well as doing the GSM, we had a major review of strategy for the telecommunications sector. And to put that in context, in, I believe it was June of '93, the relevant Minister came back from /RS

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a consul having, in the words used at the time, saved Ireland from the liberalisation of the telecom sector till the year 2003. Now we set about changing that agenda, and we assembled

Q. Getting Ireland into it

A. We assembled a small group of outside experts and a number of ourselves and we had a strategy group which started to look at a better way of approaching the problem and came up with a report, which was exactly never published but it's quite a robust document, and that gave rise to the consideration of how to get Telecom Eireann ready for competition in a liberalised market and how to eventually bring in a strategic partners and the whole agenda for the telecommunications. Independent regulation was all set from that document, and I was involved in the various bits of it; but when it got to the stage where it was clear there was going to be a transaction involving Telecom Eireann and the Presidency as well, it was impossible for one person to manage both, and

the GSM competition wasn't even fully over at that point. So another chap who was working as an Assistant Principal for me on the Telecom Eireann side, he was promoted to Principal. He took over that part of the load.

Q. You were then asked the date on which and the circumstances in which you were first appointed to spearhead the second GSM process, or licensing process, and you mentioned some of that, so I'll go through it quickly.

/RS

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You said you "led the design of the GSM selection process and chaired the project group which carried out the selection. Sean McMahon and his team carried out much of the detailed work on the preparation of the licence for Esat Digifone, but I and Fintan Towey continued to have an involvement."

You then go on, and I think give some background. You say: "Around the time of my return from an assignment in Brussels in the late summer of 1993, Mr. Sean Fitzgerald asked me if I was interested taking up a post dealing with telecommunications policy in a context that the Department's resources in that area were being restructured to separate policy development from regulatory aspects. I commenced in telecoms in September of 1993. At that time my predecessor in



telecoms, Mr. Paddy Ryan, passed to me a series of files dealing with work in progress, one of which was a very preliminary look at the question of GSM licensing. Sometime in the following couple of months the Minister of the day, Mr. Brian Cowen, asked me, as a matter of priority, to prepare for the licensing of a GSM operator within three months. I responded, based on my limited knowledge of what was at issue, that this would not be possible but that I would attempt to complete research and devise an approach to a selection process within the three months. This was the starting point. I assume that the Secretary General, Mr. Loughrey, as well as Mr. Fitzgerald,

/RS

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would have been consulted by the Minister before that request was made to me."

You were then asked for the names of all officials or persons who assisted you in the initial phases of the process. You say "While there was other staff in the division, in the early research phase I was assisted in the main by Mr. Conan McKenna, who was then an Assistant Principal working with me. I probably also had ongoing informal contact with Mr. Sean McMahon, who was the Principal Officer dealing with telecommunications regulatory affairs in the Department."

When you say "Principal Officer", for the benefit of the record, you are referring to his rank?

A. Yes.

Q. "And who commenced in that capacity at the same time that I was assigned to the area. Mr. McKenna was succeeded by Mr. Fintan Towey. Around the same time, Ms. Maev Nic Lochlainn joined the division as an administrator officer. They were also job-sharing Executive Officers in the division, namely Ms. Nuala Free and Ms. Margaret O'Keeffe. While there were other staff in my division, these were the people whom I recall having a hands-on involvement. I am aware that Mr. McMahon was assisted by a number of people in his own division. From an early stage we had a regular contact with the Department of Finance, initially I believe with Mr. David Doyle, Principal

/RS

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Officer, but then with Mr. Jimmy McMeel, Assistant Principal, and Mr. Billy Riordan, accountant on loan to that Department from the private sector. Mr. Denis O'Connor was on loan from the private sector to the Department of Transport, Energy and Communication" that's your Department "and functioned almost like an internal consultant across the field of the Department's activities and was consulted from time to time in the preparatory phases. Mr. John McQuaid had

come on board as head of the technical side of the telecommunications area, I think, shortly before the project went live in the form of an RFT, and he was assisted by Mr. Ryan. I should say at this stage that Mr. O'Connor reverted to his normal employment at some stage when the project team was up and running and was replaced by Mr. Donal Buggy."

Just so we can get an issue of nomenclature, an RFT is a Request for Tenders. Sometimes in the course of this process it is referred to as RFP, a Request for Proposals, but they are exactly the same, and we are always talking about the same thing; isn't that right?

A. Yes.

Q. You were then asked for details of all consultations which you or any other person assisting you or any other individual in the Department had with interested parties prior to the announcement of the competition, and you were asked to refer to those consultations and to identify the people involved and so forth.

/RS

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And you say: "In the period when I was learning and researching the business of a GSM process, I effectively had an open-door policy to interested parties. It gradually became known out in the market that I was engaged in this task, and various parties representing potentially interested parties came to

see me. Mr. McKenna sat in on most, if not all of those meetings. While I do not now have a schedule of my appointments, which I normally organised in my pocket diary, I know that I had meetings with representatives of lots of telecommunications companies from Europe and the United States in particular, but some from further afield. I have previously given the Tribunal team such scant diary information as is available to me. There was also beginning at that time to be an interest in the market about the liberalisation of the telecommunications sector, the future of Telecom Eireann, etc., and it is difficult to separate in my own mind which meetings had which agendas.

"During the GSM preparatory phase, my feeling is that most of the meetings were about that. I consciously used them as a two-way process, taking soundings about my evolving thinking about various details of the approach to the competition as well as listening to what players wanted to say to me. I feel sure that any written submission received, if any, is on the Department's files.

/RS

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"Examples of the kinds of things that I discussed with the visitors are as follows: What would be a reasonable time-frame between announcement and closing

date? Secondly, views on the respective merits of auction versus beauty contest versus hybrid" meaning an auction combined with a beauty contest.

A. Mm-hmm.

Q. "Thirdly, whether there would be any merit in having all applications compulsorily on plain white paper without names other than in a covering letter which would not be available to the selectors.

"Fourthly, whether it is possible to limit the overall physical size of applications.

"Fifthly, questions about roll-out time frames and geographical coverage, etc. etc.

"It was also clear that a competition could not be launched without consultation with and knowledge from Telecom Eireann. The dealings which I and Mr. McKenna had were led on the part of Telecom by Mr. Alan Corbett, then Deputy Chief Executive with special responsibility for new businesses, including Eircell."

I think at that time Eircell was still an integral part of the whole Telecom business; isn't that right?

A. That's right.

Q. It hadn't been hived off into a separate subsidiary?

A. No.

/RS

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Q. "We had extensive discussions with him about the nature of the business in technical, financial, and

economic terms and about interconnection arrangements and prices, meaning the delivery of calls to and from fixed lines and mobiles, and between Mobile Operators."

Telecom Eireann were going to be a major were going to have a major involvement in any increase in the market in or the use of mobile telephones, isn't that right, regardless of who was going to be the second mobile telephone operator?

A. Absolutely.

Q. Because you had to make contact with fixed lines in the course of using a mobile phone, and they were the only well, effectively the only fixed-line operator; there were small inroads into that market, but it was mainly Telecom Eireann?

A. I am sort of loosely aware that there were a number of licensed operators in certain segments of the market. It wasn't particularly within my own remit, but I'd be aware of it.

Q. We know that in any case Esat Telecom were operating a leased-line business at some point in the early nineties, isn't that right, and there may have been others?

A. That is undoubtedly correct, but you'd know more about it than I would, because Mr. McMahon dealt with it in the Department rather than I.

Q. "I had several meetings in this vein with Mr. Corbett,

/RS

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and he was on notice that we were using the Minister's right to advice and assistance under whatever was the relevant section of the 1983 Postal and Telecommunications Act. When we had developed an outline of what a competition process might look like, which I submitted formally to my super-ordinates and the Minister, it was decided in a process of internal consultation that the proposal would benefit from expert external review at that stage.

The late Mr. Roger Pye, of KPMG London, assisted by Mr. Finbarr Ring, was engaged for this process, and there were two interactions with them. The detail of the interface was conducted for the most part by Mr. Conan McKenna. This review process added considerable value". And you say that the relevant material is included in the files, and we'll have a look at that at a later point.

This was a consultation process whereby you were trying to get up to speed with the latest thinking in this area; would that be right?

A. Yeah. You said the late Mr. Roger Pye. I wasn't aware of that.

Q. Yes. I am afraid so. "In parallel with the GSM project, we also had in the Department an ongoing formal review of telecommunications strategy"

that's the paper I think you may have mentioned a moment ago, an unpublished paper "which was assisted by a number of external parties of which /RS

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Roger Pye was one, and we were able to procure his services to review the GSM documentation at a level of fee below that which would require a formal tendering process. He had been the project leader for KPMG in an immediately germane consultancy assignment for the European Commission, which made him ideal for the task."

You are then asked about the details of various options you considered, which the Department considered, regarding the structure of the licensing process, whether it would be, as we have already mentioned, an auction, a beauty parade, a hybrid, and so on.

And you say: "Apart from the sketchy file given to me by Mr. Ryan and referred to earlier in this narrative, my primary source of intelligence about how to approach a selection process for a licensee for GSM lay in the report referred to in the immediately preceding paragraph prepared by KPMG for the European Commission. This report, which was very current, contained a wealth of detail concerning the issues to be considered and in relation to the approaches taken



and the then current state of play in the member states of the EU. We" by that you mean yourself and Conan McKenna "looked in detail at the various things done by other member states, worked out things like the putative value of the licence, if we adjusted cash figures which applied in other jurisdictions to /RS

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take account of pro rata factors in Ireland, etc. I am fairly sure that Denis O'Connor in our own department and Jimmy McMeel in Finance were consulted informally, and perhaps sometimes formally, about some of the alternatives. I believe I also shared my thinking with Alan Corbett of Telecom Eireann as my thinking evolved. Messrs. Loughrey and Fitzgerald were almost certainly consulted at particular points in the evolution" of the thinking and the thinking of the Department, I presume.

You say: "There is no particular point that I can recollect where we went from one approach to another. We were always conscious of the trade-off between the deal for the consumer and cash for the Exchequer. We had a fair idea, for example, of the investment requirement.

It may be relevant to say at this point that at that time, no one anywhere foresaw a mobile telephone market growing to the extent that it has and in the

time-frame that it has. Analysts who suggested 30 percent penetration by the end of the decade were sometimes derided for overoptimism."

As we know, of course, they weren't, and perhaps even slightly underoptimistic; isn't that right?

A. Penetration here now is close on 3 million.

Q. 3 million?

A. 3 million units. 3 million accounts, whereas when I /RS

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first spoke to Alan Corbett of Eircell, he talked about a great little business with 45,000 customers growing in double digits and with the highest revenue per capita of any such service in Europe.

Q. "The views we were taking were based on the market as it was then seen and appreciated". And you say that "This is substantiated in the AMI report, which contains a graph of the market development views of the applicants. The level of penetration seen by 2009 by the generality of applicants has", you say, "already been exceeded by a factor greater than 2."

You go on: "The Minister of the day, Brian Cowen, got one or at most two informal progress reports and had first sight of the issues in detail in the document prepared by me which was then made the subject of consultation with Roger Pye and probably saw the next iteration in the middle of the Roger Pye engagement".

You are then asked to indicate the date on which and the circumstances in which and the considerations involved in the initial view of the Department that a fixed fee should be charged for the licence and the names of all Department officials and others involved in that decision-making process. And you say: "I am fairly confident that the initial view on a fixed fee came from Conan McKenna and I, but during this phase, there was probably a fair amount of informal interaction between us and Messrs. Loughrey and Fitzgerald. Having said that, we were in a separate

/RS

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building from the Department's headquarters for a lot this time, so it may be that Mr. Loughrey's diary will throw some light on the frequency of our contacts. I am sure that Conan and I regarded this as a work in progress, where our thinking was evolving in response to any new information we were receiving, and also taking account of a growing awareness of the then DG IV competition and DG XIII telecommunications interest or activity in proving the details of approaches taken by certain member states and that they had particular objections to high fees, which they regarded as barriers to the entry of competition into the market place.

DG IV and DG XIII were the two, if you like, divisions

of the Commission of the European Community dealing with the two areas likely to be involved in any process or likely to involve themselves in any process you set up here?

A. That's correct.

Q. Competition and telecommunications:

telecommunications because they were involved in driving forward the harmonisation and liberalisation policy, and competition to make sure that the incumbents weren't getting away with too much?

A. We were also dealing separately with DG XIII on finalising the details of the famous derogation 2003, because they had control, they had to sign off on the details of a derogation as agreed with counsel, they were using that to an extent as a pressure point to

/RS

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get us to do certain things with telecommunications policy, so we had a separate existence in terms of DG XIII from that with DG IV.

Q. I follow.

A. I should probably say, too, because it hasn't come out and I don't know if it does later, that as well as looking at licence fees, we also considered the alternative of some kind of a royalty. Now, that's in documentation, but I don't think it's in my statement.

Q. I think you are right, and I think you considered

having a licence fee, having a licence fee pitched at a certain level plus a royalty payment payable by the operator as he went along and as he made money. And I think, when we look at the documents, the detailed evolution of your thinking becomes clear. But you need have no worry about it; it will come out.

If we go on to Question 7, where you are asked for details of your input into the preparation of the draft tender documents initially submitted to KPMG together with the input of any other official person or persons and the precise input made, and you say:

"It is not possible to be precise as to the inputs to the preliminary draft tender document. This was the subject of constant iteration and reiteration between Conan McKenna and I in response to all of the information we were receiving from interested parties, from Telecom Eireann, and from published material, not least of which was about the activities of the European Commission. Conan and I had worked together

/RS

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in a previous assignment in the energy area, and we had a very informal method of working together on a project of this nature. I have no clear recollection, either, as to the precise involvement of the regulatory side of the telecommunications division."

You go on to say, I think I can go on to answer number

8, "The first commentary received from KPMG was examined in the first instance by Conan McKenna, and he and I discussed at length and in detail how we would deal with the various suggestions. I am reasonably confident that Conan took the lead in much of this and the other approach was one of pragmatism. I expect but cannot confirm Conan would have consulted technical and regulatory people as he would have considered necessary."

Just so we get at some of the concrete details of this which are not clear from the questions because they would be known to you and to the Tribunal, you prepared some, if you like, a draft or a set of ideas as to how you would invite people to tender for this process. You sent that to KPMG and asked them to comment on it, you took their comments on board, and you either ran with them or didn't run with them, and you sent it back to them again. Is that the type of process you engaged in?

A. That's exactly it.

Q. Ultimately your objective being to arrive at or to work up a document which you could then issue on foot

/RS

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of a public advertisement to invite proposals for the licence?

A. I mean, it was probably unreasonable to expect that

the Civil Service, with in-house resources, could come up with a full and competent version of this document. So the decision to get outside assistance or outside review almost certainly came from Mr. Loughrey and Mr. Fitzgerald. And I mean, I believe it added considerable value.

Q. Yes. I am not criticising it. I am just trying to make sure that people can follow what we are talking about.

You were then asked for details of considerations, if any, given to the issue of transparency and competition decision, and in particular to the issue of the disclosure or nondisclosure of the evaluation criteria weightings, including the input of any of other persons and professional advisers to the considerations. And you say that "Considerations of objectivity, confidentiality, equality, and transparency featured very significantly in our thinking. Our entire approach to the competition was motivated by the need to assure the market that it would be carried out competently and correctly. On the particular issue of transparency, in our early drafts, we felt that identifying the criteria by which entrants would be judged was sufficient transparency. This was certainly the standard for major procurement, public procurement at that time. It was Roger Pye who

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suggested that a descending order of priority would be a good signal to give to competitors. We accepted that advice, and we ourselves proposed what the order should be. It is clear from Jimmy McMeel's letter of the 31 March 1995 that the question of formal weightings being settled and released was discussed at the Project Group on the 29th March, 1995, and that the Department of Finance was opposed to this".

You say, "Interestingly, this is not referred to in the minutes of that meeting but in the minutes of 10th April."

And you say that you take up the matter later on, at paragraph 24. And in any case we'll take it up in detail when we look at the documents, but I don't want to delay now by going into the detail of documents.

You were then asked for details of all considerations which to your knowledge, direct or indirect, prompted or contributed to the Department's movement from its initial position of favouring the publication of the weightings attached to the evaluation criteria as specified in paragraph 19 of the RFT document to its ultimate position of non-publication of the weightings attached to the relevant criteria. Before I read your answer, maybe we should clarify one or two things about the question.

At one point in the course of your thinking, or in the



/RS

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course of the evolution of your thinking, am I right  
and if you don't know the precise answer now, we  
can come back to it in the documents that you  
certainly canvassed the notion of publishing the  
weightings?

A. Yes.

Q. You say "The Department's initial inclination in  
response to questions received from interested parties  
was in favour of publication of the weightings. The  
Department of Finance"

A. I'm sorry, I have lost where you are reading from.

Q. Sorry, I am gone to A10.

A. Okay.

Q. This is an agreement with the answer you just gave me  
that your initial thinking was

A. I must have an out-of-date copy, actually, of this  
document.

Q. Is that page 10, just to be absolutely clear?

A. I brought my own document from my office, and the  
Question 10 and Answer 10 are not the ones you are  
reading, so I take it I have the wrong document.

Q. We'll clarify that. Are you at page 10, to begin  
with?

A. I am at page 10.

Q. Is it Question 10, subparagraph 1, and then Answer 1,

subparagraph 1?

A. Question 10. "Details of all of Mr. Brennan's dealings with Mr. Michael Lowry on his appointment as Minister".

Q. I see. Then that in fact is Question 11 on my copy,  
/RS

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so we'd better make sure have you notes on your copy?

A. Not of any significance.

Q. Well, you can use both.

(Document handed to witness.)

Are we on the same wavelength now?

A. Yes.

Q. You say "The Department's initial inclination in response to questions received from interested parties was in favour of publication of the weightings. The Department of Finance, however, did not favour a weighting system or its publication. This stance related to their interest in a high licence fee. It is not possible at this stage to say whether the Project Group found that Department's view persuasive or just that it was necessary to compromise to move forward."

You were then asked for your knowledge of the considerations which prompted favouring the placing of the emphasis in the evaluation criteria on the

criteria of tariffs, which was an initial, as I understand it, view to the ultimate position, in which the first priority was given to the credibility of the business plan and the applicant's approach to market development.

You say "There was never any question of tariffs being accorded the highest priority in the evaluation

criteria. The comments in the memorandum of Jimmy

/RS

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McMeel would seem to relate to the relative weightings of tariffs and the licence fee".

Question 11, you were asked for details of all of your dealings with Mr. Michael Lowry on his appointment as Minister in relation to the GSM licensing process.

And you say "As the competition was not launched on Brian Cowen's watch, clearly on Michael Lowry's arrival as a new Minister, he had to be brought up to speed in relation to our work and our thinking. I have no way of knowing whether this was in one or more than one sessions. Our normal drill on the arrival of a new Minister is for the entire Department to prepare briefing notes on currently topical activities, of which this was a major one, and then on an as-requested basis to engage in oral briefing when the Minister has had an opportunity to read and absorb the written briefing. I do not recall Mr. Lowry taking an

interventionist approach to what we were at, and from the beginning he displayed a keen awareness of the need for a clean, objective process.

"Having said that, the relationship between the Minister and senior civil servants in relation to ongoing important business is not such as to be continually diared and minuted. Key division points would almost always be minuted for the record. In many cases the markings on file covers would be a guide as to when things went up and down the system, although with the passage of years and the growth of

/RS

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files the use of sub-files or folders which would later be integrated has tended to change the reliability of file covers as a definitive guide."

I am sure, Mr. Brennan, that senior civil servants dealing with a Minister depends on the personality and the work practice of one Minister over another Minister?

A. Yes.

Q. I don't know, you can tell me, are there any protocols or regulations laid down for dealing with Ministers?

Is there, for instance, a channel to the Minister? Do you have to go through the Secretary General or his private secretary or whatever?

A. It sort of varies well, normally you wouldn't just

ramble into a Minister, you would, and the private secretary would know you were looking to see him or he was looking to see you, and you would arrange it like that. It's kind of there is not a pattern that you can sort of discern, but walk-in would be very much the exception.

Q. Can you describe in general terms the type of relationship you had at that point? You would have been, I suppose, on the third rung from the top at that point; would that be right?

A. Yeah.

Q. With Mr. Lowry, although in relation to this process you were very close to the top, of course?

A. I have no recollection of having a sort of a detailed informal regular sort of understanding with him. I

/RS

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think a lot of contact was either through Mr. Fitzgerald or Mr. Loughrey or with Mr. Fitzgerald and Mr. Loughrey.

Again, another piece of information I don't have today but I am sure I could find out, for some part of this process we were in Ely Place and the Minister was in Kildare Street, and at some stage we moved into Kildare Street. And that may have had some significance, but I can't imagine particularly what, except that you wouldn't go from Ely Place to Kildare

Street on spec. Whereas if you are in the building, you could be called up.

Q. You mean that you'd be summoned or called by somebody:

"Can you talk to us about this or bring us up to speed on this?"

A. And sometimes the programme manager might be an intermediary or might be present for discussions as well.

Q. And if you are requested or invited to bring the Minister up to speed on something, your recollection is that most of those contacts would have been either through the secretary and assistant secretary or with them; by that you mean you'd go into the room with them and discuss it with the Minister?

A. Yeah. Now, bear in mind there is a sort of there is a practice in departments, which varies as to the extent to which it's observed in all departments, where there is a weekly or a fortnightly management committee meeting, which is the Secretary General and /RS

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the assistant secretaries, and that vehicle would be the most structured way of keeping the Minister up to date with all of the things going on in the Department. I mean, that certainly is the way we carry on now, but I wasn't an assistant secretary then, so I don't know how it happened in that time.

Q. Well, the programme managers are concerned, would they have direct access to you, as it were, as an arm of the Minister, or would you meet the Minister with them?

A. It sort of varied depending on the personality of the programme manager. There were some that particular guy, Colin McCrea, we had reasonably informal contact with. There were others who were a bit more aloof; it just varies with the personality.

Q. Can you recall your contacts with Mr. McCrea, when you say "informal", were they also ad hoc? Would he simply meet you in a corridor, or would you have arranged meetings with him?

A. No, certainly not arranged meetings. He would tend to be present if you are having a discussion with the Minister, a lot of times. And if there was a management committee at the time I assume there was he would have been in attendance at that too.

Q. I see.

You were then asked for your knowledge as to the factors which prompted the decision made by the Minister in or about early February of 1995 that there should be no limitation placed on the licence fee

/RS

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nominated by competition entrants subject to a minimum of £1/25 million together with details of all discussions

with or advices given to the Minister by you or to your knowledge by any other official.

And your response is: "There was a degree of tension between the Department of Transport, Energy and Communications and the Department of Finance, but the latter being more interested in an auction. The record shows that at an appropriate stage a sum of  $\frac{1}{2}$ 25 million was pencilled in unilaterally by Finance to the budget arithmetic as the likely proceeds. Mr. Loughrey and I were always motivated towards minimising the cheque so as to engender the highest level of competition in the mobile telephony market and in representing accordingly to the market place."

Can you just explain to me what you mean by that, "and in representing accordingly to the market place"?

A. We wanted the people who were interested in the competition to understand that the size of the cheque wasn't our primary motivation; that we were interested in a good deal for consumers.

Q. When you say there was a degree of tension between Department of Transport, Energy and Communications and Finance, is this an example of I suppose what we would expect was the normal tension between Finance and any department, in that Finance see departments as sources of money or of losing money, I suppose?

A. People to be controlled in the spending of money.

/RS



Q. Yes.

A. I suppose there was a particular interest in their side in getting a big cheque out of this process, which we just didn't believe in.

Q. You say "I cannot recollect what was the position of Mr. Fitzgerald. Again the records are scanty, but I would be amazed if the recollection of others is not to like effect. The minimum of  $\text{£}1\frac{1}{2}$  million was an attempt to ensure that the full costs of the selection process would, as a minimum, be covered by the winning bidder. Certainly briefing notes given to the Minister for Cabinet discussions for parliamentary questions for the announcement of the licence competition, etc., were designed to support the Department's view of the matter. I would be surprised if the Minister was motivated by anything other than discussions with the relevant officials and discussion among Cabinet Ministers."

Does your reference to Cabinet Ministers and discussion among them mean that you had some impression of what was discussed by the Ministers concerning the process or the way you'd get money out of the process?

A. I don't know how definitive my recollection is; maybe some other witnesses later might throw some light on the matter. But I have a feeling that the

telecommunications the Telecom Eireann, both management and unions, might have been interfacing with the political system, probably with a view to

/RS

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getting whatever competition was run would do the least damage to Eircell. Now, that's an impression.

It's not a definitive statement, but there is something in my mind along those lines.

Q. I understand.

You were asked about your dealings with the EU Commission, and you refer the Tribunal to the answer to another question.

You were then asked about your understanding of the role envisaged for the Cabinet or a Cabinet Sub-Committee in the GSM process, and in particular in the light of correspondence you had with Mr. Jimmy McMeel dating from March to May of 1995, and in the light of paragraph 2 of the Government decision of the 2nd March, 1995, which recited that a process would be put in place, and I think went on to say that "A recommendation be put by the Minister to Government in time for a final decision on the granting of the licence to be made by the 31st October 1995".

And you say "It was certainly in my mind that when the competition was launched with a minimum IRi½5 million licence fee and an open-ended bid possibility, that

there was plenty of room for competing approaches to the competition which could easily have engendered differences between the Project Group, and in particular between the Department of Finance and the Department of Transport, Energy and Communications,

/RS

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which may have needed resolution through Cabinet Sub-Committee or Cabinet itself. It would have been interesting to see how competing bids, where one went for an inordinately high cheque and a reasonable deal for consumers and another went for a low cheque and a sharper deal for consumers, might have been reconciled within the Project Group. This is clearly speculative now, but it can by no means be assumed that the Project Group would have operated on the basis of one person one vote. The fact that the range within which the licence fee could be pitched was narrowed considerably virtually guaranteed that the decision would turn on the deal for the consumers, the quality of the application in technical terms, etc., reducing the scope for tension and making the decision less contentious in interdepartmental terms".

You say that "Civil servants would always take a conservative approach to the time needed to resolve policy differences between departments if they arose."

If you had, as you were speculating in that answer

there, had an open-ended auction, and you ended up with somebody making a high bid in terms of the licence payment and a more modest deal for consumers on the one hand, and a low bid with a better deal for consumers on the other hand, you say that would have caused some tensions, but you presumably at all times envisaged an evaluation process scoring applications in some way; and if you had, of course, a high bid,

/RS

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you'd get a high score for that, and if you had a poor deal for consumers, you'd get a low score for that?

A. Yeah.

Q. And at the end of day you'd still be left with a score, wouldn't you, to go to Government with?

A. You would be left with a score. Whether you'd have had more difficulty in agreeing a score, I don't know.

Q. But you still would have gone, at the end of the day, with a score. You envisaged at all times scoring or grading applications in some way; is that right?

A. Time-wise now, I am not sure whether they are still pre-dating the involvement of Andersens.

Q. I think we are.

A. Because before the involvement of Andersens, I would go so far as to say we hadn't clearly thought out how we were going to evaluate at all. It was the Andersen structure that got us to the whole business of

scoring, etc. I mean, clearly, individuals in the group had conducted selection processes of one kind or another, admittedly not on this scale, at different times, and we would have worked out a matrix of some kind. But it's very speculative to try to imagine what that might have been in the absence of consultants.

Q. But in any case, with the light of the information in the light of information you now have about how Andersen went about his work and about how the project team went about their work in scoring applications according to pre-published criteria, whether you had an open-ended or a closed licence fee,

/RS

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you'd have been scoring them, wouldn't you?

A. I suspect that we would have, as we did for the rest of the process, we would have identified our approach to the scoring of the licence fee in probably blocks of amounts. You know, zero to 20 gets an A or gets a B or whatever it might be. I imagine that's what might have happened, but as I say, it's just a little bit speculative given that events took a different course.

Q. You say "civil servants would always take a conservative approach to the time needed to resolve policy differences between departments if they arose."

I think that answer is an answer that you say should also be referred to in relation to the Tribunal question as to why you allowed a period of six weeks from the date of availability of the evaluation report to the date you planned to announce the result of the competition. And I take it therefore your answer is you are going to give yourself enough time, if you are planning a process, you are going to make sure you have enough time to carry it through?

A. Yeah, I mean, I can recall, not specifically, but several cases where things could be lingering in the Government agenda for absence of interparty agreement within Government, or better departmental agreement.

And bear in mind that at that time, maybe it was the first time we had a three-party government as well no, we didn't, did we? Yes, we did, we had a three-party government.

Q. Maybe not for the first time.

/RS

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CHAIRMAN: Well, I think the previous one was before any of our times, so...

MR. HEALY: I want to put up the RFT to make the answer to the next question clearer.

Q. Now, the document that I have put on the overhead projector is the RFP, the request for proposals. This was the culmination of some of the work we have been

referring to, your dealings with Roger Pye, your brainstorming sessions, your collecting of information from contacts with interested parties, your probing the market place, and so on. Ultimately you came up with this document; isn't that right?

A. Yeah.

Q. And this document not only it's not only the fruit of all those researches and those discussions and that information-gathering exercise, but it also contains the decisions that you made and that you got from Government concerning the precise criteria that would be used in judging the competition and the order of those criteria?

A. Yeah.

Q. And we'll come into the detail, I think, when we look at the documents, but that document itself went before the Cabinet table, didn't it? Or went to Cabinet in the form of an aide-memoire, I think?

A. I presume the document itself, but there certainly was an aide-memoire or a memorandum describing its content, and it almost certainly was appended.

/RS

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Q. The questions you were asked at

A. Actually, now that I think of it, at that time I think there were two separate documents. One was an information memorandum and the other was the detail of

the competition. And then, just to put it in context, there were later a series of other documents which became part of the conditions of the competition, such as the response to questions and the Andersen marking model and various other pieces of information.

Q. But those documents were generated after the process was advertised, whereas this one was the one that went to Government. If you like, it's the one upon which Government gave its imprimatur. And you were asked for your understanding of the RFP document issued by the Department in March of 1995, and in particular paragraphs 3, 9 and 19.

And you refer to paragraph 3, which reads:

"Applicants must give full ownership details for proposed licensee and will be expected to deal with the matters referred to in the following paragraphs in their submissions."

And you go on to paragraph 9: "Applicants must demonstrate their financial capacity and technical experience and capability to implement the system if successful and must include a business plan for at least the first five years in a complete technical proposal." And it goes on in relation to the technical proposal.

/RS

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Paragraph 19 says, in reference to how the Minister



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

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

"- quality and viability of technical approach proposed and its compliance with the requirements set out herein.

"- the approach to tariffing proposed by the applicant must be competitive.

"- the amount the applicant is prepared to pay for the right to the licence.

"- time tabling achieve minimum coverage requirements and the extent to which they exceeded

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

"- the performance guarantee proposed by the

/RS

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applicant.

"- efficiency of proposed use of frequency spectrum resources."

Now, your attention was drawn to those three parts of

the RFP because, firstly, I think they are more or less the three operative parts; would I be right in that? And secondly, because the matters addressed in those three parts of the RFP gave rise to at least what I might describe, I think, as issues in the course of the process and ultimately to issues ventilated in the course of Dail debates and public controversies afterwards; isn't that right?

A. Mmm.

Q. And your response is as follows: "The RFT document was an attempt over a period to gather together all of the things that should be included in a competition process of this kind through several iterations. I find it difficult to add anything to the plain words as cited in the question under reference. In regard to paragraph 19, I think it is clear that the preamble part is a prerequisite admission to the comparative assessment.

"In relation to paragraph 3, this must be read in the context of pages 24 and 25 of the memorandum responding to questions posed by applicants".

Just in relation to paragraph 19, when you refer to

/RS

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the preamble part, I'll take you to the first part:

"The Minister intends to compare the applications on an equitable basis, subject to being satisfied as to

the financial and technical capability of the applicant..."

A. That's what I am talking about, sometimes referred to as the chapeau.

Q. You say that that was you say it's clear that that part is a prerequisite to admission to the comparative assessment?

A. Mm-hmm.

Q. What do you mean by that?

A. Well, I mean that paragraph 9 is where we are talking about must demonstrate the financial and technical capacity, and you must get past that stage to get into the comparative assessment.

Q. Well, I think paragraph 9 says that you must demonstrate it. It doesn't suggest that you demonstrate it as a prerequisite, does it?

A. That's a difficult I suppose a difficult concept to begin with. I mean, the plain words of paragraph 19 are saying that you had first to be satisfied as to the technical and financial capability of the applicant. And that's the sense in which I use the word "prerequisite".

Q. But there were no threshold tests in the competition; isn't that right?

A. No, that's correct.

Q. And insofar as I think any threshold was operated by the evaluators, it was confined to procedural matters;

/RS

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is that right?

A. My recollection is that at an early stage in the evaluation, Andersen Management International came to the project team now, I can't find this in the minutes of the project team, but that's not all that unusual; there are plenty of gaps in them not plenty, but there is one you referred to earlier in this narrative, in fact.

Andersen Management International came to a meeting of the Project Group and said they had examined all the applications for two things: formal compliance with the minimum technical and other requirements, like roll-out and geographical coverage, etc., and for passing the test of financial and technical capability, and they were satisfied that none of the applications had such weaknesses as to fall to be ruled out under either of those two tests.

Q. You say that you think that was mentioned at a project meeting, though I think you indicate that it may not be recorded?

A. Well, I haven't found it in the minutes, but I do recall I do recall Andersens coming with that presentation to us.

Q. We'll come to the detail of the documents at a later point, but am I not right in thinking that Andersens,

in information they have made available to the Tribunal and I think that has been made available to you, have stated that they conducted an examination of the applications to see whether each application was

/RS

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in the correct form, whether it had the correct number of pages or whether it exceeded the number of pages that were stipulated in the application, and whether it did envisage a roll-out with the requisite degree of geographical coverage within the requisite period of time, but that they didn't envisage any other prerequisite test?

A. I don't think they went that far now. We are talking about, I presume, the memorandum that they prepared for the Tribunal.

Q. Yes.

A. My impression of that what way do I say this my impression is that if you go back to other documentation earlier, which I would need to consult, that they make a more robust statement than that.

Q. I see.

A. I think perhaps there is a document of February '96.

Q. If you don't know the precise detail of it...

A. I think it's a document of about February '96 which is called the evaluation of the evaluation, and I have a feeling that that makes a different statement.

Now, the second thing is you said that what the Andersen document does say and then what it it goes on to say that it didn't do anything else.

Q. I am not saying that. I am saying

A. Sorry.

Q. You are correct in that. In the course of this examination of these documents, there may be times when I am going to ask you will you look at that and /RS

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look at that document that you think might identify Andersen articulating the view or at least articulating a view which is some way consistent with the view you have just mentioned, and of course the Tribunal will do the same, before tomorrow or whatever.

You say, just to get back to your evidence a moment ago, that you think that Andersen did make a statement to that effect at a meeting. Can you remember who else was at that meeting?

A. I think it was a full meeting of the project team.

Q. Right. And I presume it would have been fairly early on in the evaluation process?

A. Fairly early on, yes. It may have been the first meeting after the closing date, I think.

Q. Now, you were then asked for your involvement in or knowledge, direct or indirect

A. Before you go on to that, because I think this might figure in the Opening Statement or somewhere, where I say "Paragraph 3 must be read in the context of pages 24 and 25". I think, if I was rewriting that, I would say "must now be seen" or "was eventually seen".

Q. I should have actually brought you back to that, and I should look at those.

MR. HEALY: I don't know what time you intended to rise, Sir, whether at half twelve or one. I was going to try and get out a document

/RS

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CHAIRMAN: I think we might stick to our initially fixed times of a quarter to one and then resuming at two.

MR. HEALY:

Q. I am going to just put pages 24 and 25 of the memorandum responding to questions on the overhead projector, just to put that document in context.

This was a document prepared by the Project Group in response to queries from interested parties so as to give them a better feel for what it is you would be looking for in response to the request for tenders or request for proposals; is that right?

A. Yes. It was a formal step in the evaluation or in the competition process which was designed from the beginning, that an opportunity was given after the

first invitation was issued, an opportunity was given to interested parties, parties who had purchased the documentation and I mean, a price was put on the documentation to avoid publishing it, and parties who purchased the documentation were allowed to ask questions about any aspect of the competition process. And then between ourselves, the consultants, and Telecom Eireann, a series of documents were prepared responding to those questions, and which were always going to be part of the background understanding of how a competition was being operated.

Q. In any case, the RFP required applicants to disclose details of ownership of the proposed licensee. And I

/RS

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know that you wanted to qualify to some extent what you said in your answer, but I'll just go through pages 24 and 25 firstly.

You refer to or you said in relation to RFP, this must be read in context of pages 24 and 25. And page 24 refers, under "Miscellaneous", I think, to questions posed in relation to a number of items. And one of the items which I take to be the item you are referring to; correct me if I am wrong if you look at that projector there, you'll see it, is the third bullet point from the bottom on the screen, I think it looks like it's the fourth.



It says "Whether a change of ownership be allowed without Ministerial approval to a denoted extent and whether approval will be granted for changes of ownership on reasonable grounds."

And as I understand it, the response to that on the next page, page 25, is contained in the paragraph beginning "The second GSM operator shall obtain the written consent of the Minister prior to any major change in the shareholding or control of the licensee, transferring the whole or part of the beneficial interest in this licence to a third party, where such change would substantially alter the identity of the licensee or could materially impair the ability of the licensee to comply with the provisions of this licence. The terms 'major change' and/or

/RS

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'substantially alter' should be taken to mean a change in more than 45 percent of the voting control of the licensee. This would require the prior written consent of the Minister. Such consent shall not be unreasonably withheld."

Where did that answer, you know, come from? Was it it strikes me as a somewhat legally drafted answer.

A. I can't answer that with the precision that you would like, but the entire memorandum of questions and

answers was iterated within the project team. And in the sense that somebody always controls the key word, that somebody was probably Fintan Towey. Beyond that, as regards who put in what piece, there clearly were inputs from the various interested parties, and there may well have been inputs from the Attorney General's Office; I am not sure of that.

Q. What this refers to is likely changes in ownership after a licence is granted, or rather the view the Minister would take as to changes in ownership after the licence was granted, where those changes might have an impact on the control of the licence or impair the ability of the licensee to do what he promised to do in his winning bid. Is that right?

A. Yeah.

Q. But does that really answer the question as to what paragraph 3 meant: "Applicants must give full ownership details for the proposed licensee"? This refers to, as I see it, to a formal obligation in

/RS

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making your application.

A. I mean, if you are asking this in the context of the eventual winner, the eventual winner

Q. Not necessarily for the moment.

A. Okay. But in an effort to try to answer it, the eventual winner was an application made by a

consortium. There was 50% one party, 50% another party, with a declared intention, if they succeeded, to place 20 percent. Now, the view that was taken was that that was full ownership details.

Q. But how did you make how did you arrive at that view? What tests did you apply to form the view that this is full ownership details? What was in your mind, if you like, in saying this is full?

A. It's very hard to be to recall at that level of detail, but this was not dissimilar to statements made in other applications, and we were almost certainly guided by the consultants that this is the way these things are done. I mean, there were several of the applications had various indications of changes in their make-up in the future if they won the licence.

Q. Do I take it, therefore, that where you were told by an applicant that "Look, it will be 50% owned by one part of the consortium, 50% owned by the other, but we do intend to make a proportion of it available to a number of identified or unidentified people", but that if those people were unidentified, you'd want some description of what kind of people they'd be, what class of people they'd be, in technical terms?

A. I'd probably have to revisit the applications to see  
/RS

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exactly, but I mean, one certainly talked about a

flotation of a proportion. For example, by definition you don't know who they are, but if the consultants said yes, that's the way this business was done, we were happy enough to take it like that.

CHAIRMAN: I am concerned, Mr. Healy, cutting to the chase, a little bit precipitous, I think we are on to perhaps a significant question which would require a lot of deliberation.

MR. HEALY: I was only dealing with the part...

Q. If you go back to page 16 of your response to the queries, and Query 17, you say "Mr. Brennan's involvement in and/or knowledge, direct or indirect, of the process which led to the revision of the tender documents resulting in the elevation in the status of the requirements of financial capacity and technical capability and your understanding of the impact of the revision on the overall competition design."

I think this is a reference to the fact that in some of the, as you'd call it, early iterations of the licensing criteria, the requirements of financial capability and technical capacity were simply listed with all the other criteria that we have seen on the overhead projector a moment ago, and they weren't in any preamble part, and your response is: I am not sure that I understand this question. To the extent that I think I may understand it, the comment I would

/RS

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offer is that, at some stage in our preparatory work, we considered the possibility of a two-stage process with the first being a pre-qualifications phase. This was certainly mentioned to or by KPMG when they were assisting us. My feeling, rather than my recollection, is that elevating the financial and technical capability issues to the chapeau, as you will call it, was a pragmatic response to this issue. Other than that, I cannot attach any particular significance".

You were then asked for your role in the establishment of the Project Group and the appointment of departmental and other officials to the Project Group. And you say "While in general the initiative to formally designate members to the Project Group and for them to formally have deputies was mine, I am nearly certain that the idea of having the Department of Finance represented came from either Mr. Loughrey or Mr. Fitzgerald, probably the latter. It may have been originally suggested by the Department of Finance themselves. In hindsight it was a good suggestion, and it certainly eased decision making. The rest of the members of the Project Group were more or less self-selecting on the basis of their roles in the Department. Denis O'Connor was made a member of the group because he was available and was a qualified

accountant".

A. Could I dwell for a moment on the reference to

/RS

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deputies in that statement.

Q. Do, please.

A. I think we originally conceived of the Project Group

being the heads of the relevant divisions plus

Finance, plus the accountants. It was because it was

coming up against a holiday period. After the first

couple of meetings of the Project Group, I raised the

idea that each one should have an alternate, and for

the alternate to be effective if they were on

holidays, that they would need to be present for all

the meetings. But there was a clear and this may

become important at a later stage there was a clear

sense in which it was a group of division heads with

their alternates present.

Q. I see. Did you have an alternate on the

decision-making group?

A. Well, you see, Fintan Towey and I were there from the

beginning, because he was I suppose he started out

almost as secretary of the group. Then he became a

bit more formally involved in it.

Q. Did you start out with a smaller group followed by an

expansion of the group to include alternates, can you

remember?

A. I think, if you look at the minutes of the first few meetings of the Project Group, that its constitution was smaller. But it did include Mr. Towey and I. And by about the third or fourth meeting, the idea of people bringing along second members had come into play, and I think it was arising from a conscious decision to do so.

/RS

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CHAIRMAN: It's probably as good a time as any, Mr. Healy, to leave it until two o'clock.

Thanks, Mr. Brennan.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

/RS

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THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF EXAMINATION OF MR. BRENNAN BY  
MR. HEALY:

Q. MR. HEALY: Thank you, Mr. Brennan.

Before lunch you were describing the composition of the Project Group, and you mentioned the fact that you had alternates, and you were just indicating to me, I think, your recollection of who was an alternate for who. Would it be better if we got a list of some of the people at some of the earlier meetings, or can you do it from memory?

A. The heads of division were John McQuaid, Sean McMahan,

and myself. Dave Doyle in Finance originally intended to be a member of the group himself and Jimmy McMeel to be his alternate. But in practice, Jimmy became effectively a member of the group. At the beginning, Denis O'Connor and Billy Riordan were full members of the group. At different times I can't say I precisely recall the sequence a guy called Eugene Dillon, who may have not previously featured, and then Eddie Callaghan took over that role, and I am not sure whether it was because of changing responsibilities within the division or what. Aidan Ryan I am not sure of the sequence between Aidan Ryan and John McQuaid, because John McQuaid only joined the Department at some stage in the preparatory process.

Q. In '93, '94, or '95, or which of them?

/RS

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A. I suspect it was late '95 in fact it may have been into '95. That's something that can be checked from the records. He had taken an early retirement package out of Telecom and then just applied when our chief technical adviser job became vacant. So I don't have a full recall whether Aidan Ryan was possibly on the group and then John McQuaid became the chief technical adviser; I am just not sure. But the minutes of the meetings themselves should give some guidance in that regard.



Q. And you were saying that Mr. Fintan Towey started off, you say, having a

A. Fintan Towey and I were definitely there from the beginning.

Q. And his role changed, you say, in the course of

A. I am not quite sure whether it actually changed or not, to be honest. I wouldn't have seen him to the same degree as my alternate as, say, I would have seen some of the others.

Q. But you think he may have been your alternate, or at least stood in for you sometimes?

A. I don't know. You see, my division was running the process, and Maev Nic Lochlainn, as you know, was in the process, and the two Executive Officers who sometimes signed the meetings reports were there. So, I just I mean, I probably need to refer back to the meeting reports who was at what meeting. That might give some clue.

Q. I have seen a very early GSM Project Group membership list, but it relates, as far as I can judge, to 1994.

/RS

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The reason I was prompted to try to find it is if you look at the records of the meetings of the groups, I think in 1995 I am looking at a list of the meetings, and there was a meeting, it would appear, on the 29th April of 1994; do you remember it actually

going back that far? And I think that is in fact described as the first meeting. It's not so described in the notes of the meeting, but the meeting that was held on the 6th of March, 1995, which is, if you like, in the course of the process proper or at least very close to the institution of the process proper, that is described as the second meeting of the GSM Project Group.

A. I wasn't conscious of anything happening in '94 that was formally part of the process. I am not conscious that there was a Project Group in existence at that stage, but that's subject to correction by the records.

Q. Well, I am only going by the records, and that record describes the membership of the group as Martin Brennan, Chairman; Pat Carey, T & RT.

A. Mm-hmm.

Q. He subsequently didn't feature in the group; isn't that right?

A. Yeah.

Q. Ed O'Callaghan, who was always a member of the group; isn't that right?

A. I am not sure. I thought that there were a number of meetings early in the period, in '95, where Sean McMahan attended on his own and then where he attended

/RS

with Eugene Dillon, and then subsequently he attended with Ed O'Callaghan.

Q. If I just go through the list anyway, you may be able to help to jog your memory. After Mr. Ed O'Callaghan it's Mr. Denis O'Connor, described as accountant, planning division; Mr. Conan McKenna, who was fulfilling a role subsequently fulfilled by Fintan Towey; would that be right?

A. Yes.

Q. Mr. Sean McMahon or nominee?

A. Mm-hmm.

Q. So obviously Mr. O' Callaghan was in there in addition to Mr. McMahon or his nominee.

Mr. Jimmy McMeel, Department of Finance. He seems to have taken up the running even by that time?

A. Mm-hmm.

Q. Mr. Aidan Ryan, T & RT?

A. Yeah.

Q. And Mr. Sean Tipper, who is described as secretary?

A. Yeah, he was an Executive Officer in the division at that time. I hadn't consciously connected a meeting as early as that with the process.

Q. You state that the group Mr. Fintan Towey joined the group, Ms. Maev Nic Lochlainn joined the group, Mr. Sean McMahon stayed with the group, Jimmy McMeel stayed with the group, Billy Riordan came into the group, isn't that right in place of Denis O'Connor;

would that be right?

A. No

/RS

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Q. Sorry

A. In addition.

Q. He came from Finance, I beg your pardon.

Mr. John McQuaid joined the group. Mr. Aidan Ryan

stayed with the group, and we know that Mr. Donal

Buggy replaced Mr. O'Connor; isn't that right?

A. Yes.

Q. And Mr. Ed O'Callaghan was with the group right up to the end; isn't that right?

A. Yes.

Q. I am at page 17 of your narrative now, Query Number 20

sorry, Query Number 19, I beg your pardon.

You were asked for your for whatever information you had on the purpose for which the Project Group was established, including the function of the individual members and their intended input into the evaluation process and the ultimate outcome of the process. And you say "The Project Group was established to oversee the competition. The individual members brought their particular backgrounds, expertise, and experience to the table with technical, regulatory, economic or accountancy. I do not believe that we started with a clear work plan and allocation of responsibilities.

This came later, after AMI had been recruited, and it became obvious and convenient for our technical people to group with AMI's technical people and so on. I certainly had in mind that the outcome of the process would be the subject of consensus within the group,

/RS

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but that's not something one can definitely plan for."

What do you mean by that, that you had in mind that the outcome of the process would be the subject of consensus within the group?

A. In the sense that almost everything we would do in the Civil Service of a interdivisional nature, we would be aiming to have consensus as to the outcome.

Q. What do you mean when you go on to say "It's not something you can definitively plan for"?

A. Earlier in this narrative, we talked about the interplay between, say, a high licence fee or a sharper deal for consumers, and I can't say that definitively; since we didn't have a marking system or an approach to the evaluation determined at that time, I can't say definitively that it would have been possible to get a consensus between ourselves and the Department of Finance in an issue like that.

Q. Leaving issues like that aside, an issue like that never troubled you anyway, isn't that right, because you didn't have such an issue didn't arise in the

ultimate process. How did you envisage the process being moved forward by the Project Group in terms of whether a consensus would be required to move it forward, or what other proposal did you have for decision making within the group?

A. We didn't have a formal proposal for decision making within the group. I believe I always assumed that it would be consensus in the end.

Q. The next query is Query 20, "Details of protocol /RS

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established for the preparation, circulation and adoption of minutes of meetings of the Project Group, and in particular whether the formal minutes were prepared solely by the official who attended the meeting and kept a contemporaneous note or whether you, or to your knowledge, any other member of the group or any other person had an input into the formal minutes."

And your response is: "I don't recall there being a formal protocol for the preparation, circulation and adoption of minutes of meetings. In general terms in the Civil Service, the minutes of meetings tend to be prepared by one of the more junior members of the team, and such a person would often discuss a rough draft with their immediate superior. I have never had the practice of editing minutes of meetings in this

case or any other case except where I spot a glaring error of fact. I have no recollection of the minutes being formally adopted as might be the case in a group that had standing orders".

The purpose of keeping minutes presumably was, at the same time, to document what was being achieved and what had to be achieved from meeting to meeting; would I be right in that?

A. Mm-hmm.

Q. And to record issues that were to be discussed, and perhaps what the different arguments for and against the resolution of a particular issue might be?

/RS

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A. I don't think there is much in the line of argument in the minutes. The minutes are quite short and the meetings were quite long, so they are very much summary minutes.

Q. But it was presumably envisaged that the minutes would be circulated; isn't that right?

A. There certainly needed to be a record that the meeting took place and what was discussed at it and who was in attendance.

Q. Undoubtedly, if you had alternates, you'd have to have some form of minute so that from one meeting to the next, if different people were attending as an alternate for one another, they'd have some idea of

what was happening?

A. The thinking clearly was to function properly as an alternate, bearing in mind the holiday season, that one would have to be in attendance as much as possible.

Q. Was it in fact the case, therefore, that an alternate was a person who attended most of the meetings, in other words where you had two people, one serving as an alternate for the other, they'd both attend all the time; it wouldn't be sufficient for one of them to attend for progress to be made. Would that be right?

A. Yes, one would be sufficient for progress. What I had very much in mind, I couldn't influence people's holiday arrangements, and I didn't want the project to be slowed down by the absence of a particular branch of the Department.

Q. But it wasn't an alternate in the sense in which you  
/RS

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might have an alternate on we'll say a strict  
on a parliamentary body or on some legislative body.

The idea was to maintain continuity, so that you needed both people to be there all the time, but the idea was that you could proceed with one of them provided that one was as up to speed, more or less, as the absent one was; would that be it?

A. Yeah, that sounds reasonable.



Q. And if they were both there, they'd both contribute?

A. Oh, absolutely.

Q. You were asked for your understanding of the purposes of the protocol adopted by the Project Group at its meeting on the 6th March, 1995, for dealings with potential bidders during the tender process, bearing in mind that all civil servants are bound by duties of confidentiality. And your response is: "This protocol was a personal initiative by me. I was conscious that various members of the group had various kinds of work-related relationships with parties in the telecommunications business. I thought it was appropriate to give guidance to the members as to basic defensive rules of engagement. I wanted to mark the passage from ongoing informal contacts of an open-door variety to a formal selection process.

CHAIRMAN: I suppose we should just recall briefly the terms of protocol.

Q. MR. HEALY: I think that up to that time, I think you were describing the period firstly where you were

/RS

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operating an open-door policy, where you were endeavouring to inform yourself, to educate yourself and other members of your Department until you got to the point where you had enough information, effectively, to issue that document we had on the

overhead projector?

A. Yeah.

Q. And you wanted the other members of the team to know that the information gathering by you, and presumably the reverse process of information gathering by people you were talking to, had to stop, it had to cease to be a two-way process from now on; there was going to be different rules of engagement, if you like?

A. I think my thinking went a bit further than that, in the sense that I didn't have a long and deep history of involvement in the telecommunications business. But several of the people involved did, and it wouldn't be unusual for them to have various levels of contact with various people in the business. Like, the technical people certainly had detailed contact on a regular basis with virtually everybody in the telecommunications market. John McQuaid was recently ex-Telecom Eireann, so I just thought it would be a good idea to mark down for them we are now going into a process where that kind of informal contact is not appropriate.

Q. That their relationship with people was going to be formalised in the context of the competition?

A. Yeah.

Q. And it's on the monitor in front of you; it's also on

/RS

the overhead projector. You say "We had a meeting of our GSM II Project Group this morning for a preliminary run over the course.

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

"1. Always at least two people present on our side".

That speaks for itself; to avoid confusion about who said what and where.

"2. Always stress that discussion is by way of informal clarification subject to formulation in the written information round provided for in the competition."

In other words, that where, as I understand it, you were giving information to somebody, it was on the basis that what was formalised in a written communication is what you'd be standing over; is that right?

A. Mm-hmm.

Q. "Always produce a brief record of attendance and discussion." In other words, keep a note.

Lastly, "As a general rule, contact 'in the office' and thus avoiding social exchanges which almost by definition cannot be controlled."

/RS

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And are difficult to record as well; isn't that right?

A. Yeah.

Q. That was the 6th March, 1995.

The RFP had been produced by that point, hadn't it, at that point?

A. I think it probably was, yeah.

Q. Just before we pass on from it, you had that sort of formal pulling together of what you felt were the duties and the responsibilities of people on the team at that point. Either at that point or at any other point, did the team ever discuss what the RFP meant, in general? I mean, taking its high points now, not the fairly tedious boring detail of all of the conditions, but the main ones; effectively the ones we discussed a moment ago.

A. I can't say definitively that we did at that point. I think we got more into that when Andersen had come on board and when we were discussing the approach to take to the evaluation, but I mean, there must have been some level of discussion, but I don't recall any detailed discussion.

Q. You were asked about the extent to which the protocol was discussed with the Minister. I think you say that "When the group had agreed to the protocol, I circulated it as per the circulation list at the top of it."

And if we just go to the top of the document, please.

You circulated it to the secretary, Mr. Fitzgerald,

/RS

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Mr. McMahon, Mr. McQuaid and staff in T & R

(development division). That would be the staff that would be under Mr. McQuaid; is that right?

A. No, it's my own division.

Q. It's your own division; I beg your pardon.

You say "I recall Mr. Loughrey commenting that it was a sensible initiative. I did not send it to the Minister or discuss it with the Minister", and you say you do not know whether Mr. Loughrey or Mr. Fitzgerald did so.

We know from Mr. Loughrey's own statement that he did in fact discuss it with the Minister, hardly surprisingly, and that the Minister agreed with it.

You were asked to respond to a query concerning your role, direct or indirect, together with your knowledge of the involvement of any other person in the appointment of Andersen Consulting as consultants to the Project Group, and you say "The recruitment of Andersen" or AMI, which was the name of the company by which or through which they traded "was a straightforward piece of procurement. I presume it is well documented in the Department's files. I was directly involved, and I know that I was assisted by Fintan Towey. There was a short-listing process following calls for expressions of interest in the

Official Journal of the European Community. This was done by Fintan Towey and I. I'd be reasonably /RS

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confident that Sean McMahon and Jimmy McMeel were involved in the final selection, and possibly John McQuaid or somebody representing him. The number of bidders was small, five or six. I was not aware of the existence of AMI until they expressed an interest in this project. My recollection is that on quality, they were the second best, but that the better one was several times the AMI price, and had what we considered to be an inappropriate approach to one element of the pricing, which gave them a vested interest in the number of applications, per se, and in the size of the cheque in the auction element."

And they wanted more money if there were more applications to be evaluated.

"I am nearly certain that the group doing the procurement was unanimous, and the group's recommendation was quickly approved up to and including at Ministerial level."

You were next asked as to your precise understanding as to the services to be rendered by Andersen Consultants and the precise terms of their brief. And you say "Without re-reading them, I would be guided by the notice in the Official Journal of the European

Community as to what the Department sought and AMI and the AMI tender as to their approach. I think they introduced the concept of a joint approach to the project. I do not think it was ever a question of

/RS

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out-sourcing a final decision."

What do you mean by that, "out-sourcing a final decision"?

A. I think it had been done in one or two countries, where you recruit a consultant and you say, design and operate a complete process from start to finish. And we didn't go that route. Never contemplated going that route.

Q. The decision was going to be made in-house, or at least the evaluation was going to be conducted in-house?

A. Was going to be conducted by the consultants and the Department. And this would be pretty standard practice for the Civil Service in dealing with consultants, to have a relatively good hands-on relationship with the consultants.

Q. Did you see the consultants, then, as being part of the Project Group?

A. I guess I did, yeah.

Q. You were asked as to the identity of all persons who to your knowledge had any involvement in the setting

of the weightings which were attached to the evaluation criteria, as to the manner in which the weightings were devised, and as to how you were informed of the individual weightings. You have taken all those questions together. I think we'll just treat them as a question on weightings and how they were arrived at.

/RS

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You say "As mentioned previously, there was a discussion in the Project Group and correspondence with the Department of Finance about the question of having weightings and whether they should be made available in advance to applicants both before and after the recruitment of AMI. It is clear that people in Finance at higher levels than Mr. McMeel were involved at that end. The meeting of the Project Group on the 18th May was the main forum for discussion of the weightings. My clear recollection is that AMI came with a proposal which respected the descending order of priority in the initial RFT. This model was discussed, tweaked, and agreed at that meeting. Copies were freely available at the meeting, but at the end of the discussion, most copies were collected for destruction and, as the record shows, three copies were retained under lock and key by Fintan Towey, Sean McMahon, and Jimmy McMeel. So it



is clear that the weightings were devised by consensus within the group. I was aware of them arising from my membership of the group but did not retain a copy.

During the discussion, Group Members contributed in relation to their own expertise. The Department's initial inclination in response to questions received from interested parties was in favour of publication of the weightings. The Department of Finance, however, did not favour a weighting system or its publication. This stance was related to their interest in a high licence fee. It is not possible at this stage to say whether the Project Group found the /RS

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Department's view persuasive or just that it was necessary to compromise to move forward.

You were asked as to the identity of all persons who to your knowledge were informed of or were otherwise aware of the weightings and the source of their knowledge.

And you say "My recollection is that nobody in the Department outside of the Project Group was made aware of the actual weightings. I have no way of knowing whether that was the case also in the Department of Finance."

If I could just pause there for a minute in relation to the confidentiality protocol in which, as you say,

you emphasise the need to maintain strict

confidentiality.

How did you see the protocol operating where, for instance, the Department of Finance were concerned inasmuch as Jimmy McMeel and Mr. Billy Riordan who were, if you like, from the Department of Finance side, would be going back to their Department?

A. That's first and foremost, that's something over which I had no control other than drawing attention to the confidentiality. And secondly, it was formally the position that Dave Doyle in Finance was nominated by Finance as the member of the group and that Jimmy was his deputy.

/RS

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And I presume you'll be putting this question to Mr. McMeel and/or Mr. Doyle. I just don't know. I mean, as far as I was concerned, I drew attention to the confidentiality of information of this type to the people present.

Q. I presume you were doing more than that. You were saying, surely, that the competition is being run on the basis that the information we collect here is not going to be divulged outside of this group except, I would have thought, in certain circumstances.

A. Yeah, we had a lock-and-key approach to the applications themselves eventually, and to custody of

the evaluation model and the weightings.

Q. Could I suggest that it wouldn't be unreasonable that Mr. McMeel would be entitled to discuss this with Mr. Doyle?

A. In the sense that I said Mr. Doyle was formally the representative, I wouldn't have thought it was unreasonable.

Q. But beyond that it would be unreasonable?

A. Yes.

Q. Certainly not advisable.

A. And I am aware from the Opening Statement that Mr. Fitzgerald has said that I told him the weightings. I actually dispute that, because I never retained a copy of the weightings. I never took them outside the room. I certainly had general discussions with him about the dispute with Finance on the principle of weighting or not, but I specifically did not tell Mr.

/RS

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Fitzgerald the weightings.

Q. And in any case, of course, Finance didn't want not only did they not want publications of weightings, they didn't even want weightings; isn't that right?

A. That's true.

Q. You were asked for details of all steps taken by the group to protect the confidentiality of the weightings, and in particular to prevent unauthorised

access. And you say "It was agreed and recorded at the meeting on the 18th May that only three copies would remain in Dublin, under the control of Fintan Towey, Sean McMahon, and Jimmy McMeel, and that each would keep them under key-locked secure arrangements.

Clearly AMI also had a copy. The individuals named will no doubt account for their stewardship of the weightings. In my view, once a decision was taken not to disclose the weightings, confidentiality was critical up to the closing date for applications. Its criticality declined from then on. The weightings were revisited in the context of the relaunch of the competition when the range for the licence fee had been narrowed down as an outcome of the consultation with the European Commission. This revision was discussed within the group and finalised by written procedure. The basic thinking was, reduce the weighting attached to the licence fee to the lowest level consistent with respecting the descending order of priority indicated to applicants and to distribute the few points saved to criteria higher up the scale."

/RS

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That meant you wouldn't have to seek Government approval, or any other approval, for any change in the descending order of priority of the criteria?

A. Yes.

Q. You were asked for details of your involvement, together with your knowledge, direct or indirect, of the involvement of any other person in the drafting of the information memorandum issued to entrants on the 28th April 1995, and in particular, that portion of the memorandum which responded in the following terms to a question posed by Esat Digifone as to how financial capability would be assessed and whether there were any specific criteria.

The quotation is as follows; this is the response:

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

It's on the monitor as well, just in case you want to see it.

/RS

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"Please also provide full details of the criteria intended to be elaborated on as indicated in the

information memorandum together with the date on which and manner in which such criteria were elaborated."

And your answer is as follows: "Esat Digifone may not have existed at that stage. Questions were posed by Esat Telecom."

This was in the information round, and they were seeking to put together a consortium

A. I mean, the question referred to Esat Digifone, so it's thought I'd clarify it.

Q. Yes. I think you are probably right; they didn't exist at that stage.

"My recollection is that Fintan Towey led the task of collating the questions from prospective applicants and responding to them. The responses were prepared in an iterative process with individual members of the Project Group, and some issues were discussed in the Project Group, and some issues were discussed in the Project Group itself. The meetings of the 10th and 19th April gave considerable attention to this issue.

A lot of technical material and appendices were provided by AMI, and other team members contributed in relation to their own areas of expertise and experience. I am reasonably confident that AMI and the accountants in the group took the lead role in drawing up the particular statement about the assessment of financial capability. By the time the

/RS

memorandum and response to questions that was promised to applicants by a given date was being finalised, it was clear within the Project Group that AMI wished to go further in prescribing the structure of applications than we had originally envisaged before their arrival, but consistent with their own tender.

We knew by then that they wanted to publish mandatory tables for the provision of financial and technical information which would make it technically easier for them to compare certain aspects of applications. All of this is contained in a supplementary memorandum bearing the serial number" and you refer to a Tribunal serial number.

"This material was not ready at the time of the issue of the responses to questions, as stated in the second paragraph on the front page of this response. I don't know the exact date of issue of the supplementary memorandum, but it was promised not later than the 12th of May. As well as the mandatory tables, calculatory assumptions were given for the development of leased line tariffs and for radio spectrum fees which would standardise those ingredients of business plans." Eventually we'll come across that again, and we'll look at the documents.

But am I right in saying that you haven't made any mention of the fact that financial capability was to be part of a threshold test, and there was certainly

no indication at that stage, am I right, that it was

/RS

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to be used as a mere threshold test?

A. I need to check documentation for that, I think.

Q. You were asked then, at Query 31, "Details of all of

Mr. Brennan's knowledge, direct or indirect, of the

consideration given by the Project Group or any

individual member or any other person to the draft

response to the Esat Digifone query prepared by

Andersen Management dated 25th April 1995, and in

particular the matters which prompted or contributed

to the adoption of the formulation in the memorandum

rather than the adoption of the formulation proposed

by Andersen Consulting."

I suppose I'd better put that on the monitor;

otherwise we won't know what we are talking about.

What I have on the monitor is the proposed answer

suggested by Andersen. You see that, re input to the

memorandum concerning how the financial capability is

going to be assessed, see for reference the question

posed by Esat Digifone.

"The Department can pick and choose from the following

comments:

"The financial capability will both be assessed

quantitatively and qualitatively. The evaluators will

take a close look at the projected internal rate of



return and a number of other financial key figures.

(See for reference Annex 1 to the memorandum, and in

/RS

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particular table 15). As an example, the evaluators

will consider e.g. the solvency, the liquidity, and

the degree of self-financing during the projected

period. If the solvency, liquidity, and the degree of

self-financing appear to be low compared to the

exposure, or the project seems to be risky, the

evaluators will investigate whether 'deep pockets'

exist, should the business case meet temporary

opposition."

The team didn't run with that response and instead ran

with the response that I have read out, which I think

was drafted either on the basis of, but certainly in

terms different from the Andersen response; isn't that

right?

A. Mm-hmm.

Q. And it doesn't refer to the notion of "deep pockets"

as a potential response to issues of challenged, if

you like, financial capability; is that right?

A. Yeah. I don't know the extent to which in respect of

other answers that Andersen came forward with drafts

and the drafts got changed. It was a genuinely

iterative process of coming up with a competent

response to the collection of questions, and the most

significant difference between the two texts as far as I can see, and I have considered this, obviously, since the two questions came up is that the Andersen draft presupposed that the Andersen approach to the structure of applications would already have been known to applicants, which it wasn't, and

/RS

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therefore there had to be a different draft anyway.

Now, who exactly composed the draft it was certainly within the group.

Q. When you say it was composed, the answer was composed within the group, do you mean that the entire group agreed to how this would be done, or that this was a decision made by a small part of the group?

A. The compendium the memorandum of questions and answers was discussed in considerable detail in the group on at least two on two occasions, I believe.

Now, the extent to which different people engaged or furnished drafts between those two meetings, for example, I don't have a clear recollection of. I don't know whether there is an audit trail or not, but certainly all of the discussion took place within the membership of the group, as far as I am aware.

Q. Just to read out your response here, you say "I have no detailed recollection which would enable me to give a precise answer to this question. It is clear,

however, just from looking at the text, that the Andersen draft of the reply presupposed that a lot of the material issued in the subsequent memorandum would already be in the hands of the applicants, which was not the case. I expect that these general considerations generated the need for a different draft and that the accountants would have influenced the version which issued. It is probable that at this stage we did not want to introduce any element of confusion by quantitative or qualitative assessments either.

/RS

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You were asked for details of all dealings, meetings, and negotiations between Mr. Brennan or any other Department official with any Commission official, the Minister, any person on behalf of the Minister, any member of the Government, any person on behalf of any member of the Government, or any other person in relation to the intervention of the Commission in the competition process, and including in particular the following: the intervention of the Commission in relation to the auction element of the licence fee, the intervention of the Commission in relation to the transparency of the competition design, and specifically in connection with the nondisclosure of weightings.

Because I am not going to go through all the documents in detail at this stage, I should perhaps explain that the Commission intervention dealt with or raised a number of matters, but of those, the more important were, firstly, the auction element of the licence fee, and secondly, a case they were making that the weightings should be published so as to ensure greater transparency. This was their contention.

A. Yeah.

Q. And your response is "My first contacts with the EU Commission were in June 1994. I am not sure whether I was accompanied in that discussion, although it is likely that the desk officer in representation in Brussels accompanied me, which would be a fairly /RS

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normal procedure." This is the desk officer from Ireland's Permanent Representative in Brussels.

A. Yes.

Q. "The next contact was that we sent them for information the competition documentation under cover of a letter from the Minister dated 8th March, 1995. The Commission responded by letter dated 27th April and date-stamped received in the Department on the 3rd May. This was where the Commission raised the issue about the licence fee. It also raised issues about giving the weightings to the applicants and about the

priority order of the selection criteria. This letter gave rise to a meeting with the Commission in June, on June 2nd."

Then you say that you gave the competition documentation to the Commission under cover of a letter from the Minister. By that do I understand that you gave them the RFP, or that they also got the weightings?

A. No, not the weightings.

Q. Not the weightings?

A. Not at all.

Q. Just the RFP?

A. We are clear that the RFP consisted of two documents.

One was the specific request, and the other was the information memorandum. It was those two documents.

Q. What, in other words

A. What had gone to applicants for a fee of  $\frac{1}{2}$ 5,000 on a particular day.

/RS

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Q. Exactly. You say "I led the delegation. I was accompanied by Sean McMahon; Eamonn Molloy, then an Assistant Principal in the Department but not directly involved in the competition process; Jimmy McMeel from Finance; and Michael Andersen. Following the meeting, Mr. Towey and I took contact with the Attorney General's Office. The Project Group at the meeting

reported in that document" and you are referring to a Tribunal document "had a detailed discussion on the appropriate response to the Commission, and it was at this meeting that the idea of a fixed fee at 10 million for Eircell and a cap on bids at 15 million was first mooted. My recollection is that I proposed it as a pragmatic response to the Commission's concerns and taking account of the budgetary requirement. As indicated also in this report, the legal advice was commissioned on the question of pressing on with the process. Following that legal advice, Mr. Towey and I had a teleconference with Messrs. Ungerer and Hoceped of DG IV on the 15th June. This discussion gave us the confidence to issue a letter signed by me to Mr. Hoceped dated 20th June in order to develop a basis for settling the dispute with the Commission. This was followed very quickly with the Minister's letter of the 22nd June, probably drafted in the main by Mr. Towey and perhaps edited to some extent by me, and was issued in circumstances where we knew in advance that it would get a, as you put it, 'nihil obstat' response from the Commission. The competition process was suspended to enable this

/RS

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interaction with the Commission to take place. I should say that not alone had the Minister no direct

involvement in solving the problem with the Commission other than clearing my approaches, but that he was furious with me for putting him in a position of postponing the competition. The Minister was briefed as to the situation at the end of June, and he mentioned the matter at Cabinet on the 4th July. A letter issued to all applicants on the 14th July recommencing the competition with a new closing date and spelling out the basis of a settlement with the Commission. My recollection is that the main point of the Commission's attack was always on the auction element or licence fee. And this was a consistent position across a number of member states. While the Commission did raise the issue of transparency vis-a-vis disclosure of the weightings, I don't recollect that they were difficult to deal with under this heading."

Now, as you will know from the Opening Statement, there are aspects of the dealings with the Commission the Tribunal will be interested in which may not impact in any way on you, but we'll have to go through them in some detail at a later point.

Suffice to say at this stage the Tribunal knew, or rather the Commission knew that you proposed a set of weightings but that you did not propose to publish them?

/RS

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A. And in the Minister's letter, a specific commitment that the licence fee would not exceed a certain weighting was given.

Q. Yes.

A. And in the meeting that we had with the Commission, we discussed in general terms the fact that we had a predetermined evaluation model and that we had weightings, but not the weightings themselves.

CHAIRMAN: And it was the situation you had a reasonably forceful verbal exchange with the Minister; presumably he felt disadvantaged in the delay in the competition and was not pleased.

A. How do I put this: Most politicians don't like unfavourable coverage in the Sunday papers in particular, and this was happening on a Thursday or a Friday. That's the answer, you know, that's my perception of it. And when there were follow-up queries from when the notice went out, there were some follow-up queries to the Department about the details, and he was consulted, and his anger was coming down the phone line at that point.

Q. MR. HEALY: You were asked for details of all information provided to applicants at any time prior to the 14th July 1995 in connection with the suspension of the evaluation process, including in particular regarding the following:



- the manner in which the Department hoped to resolve

/RS

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the Commission's objection to the auction element

of the competition;

- the manner in which the Department hoped to resolve

the Commission's concern regarding the transparency

of the evaluation process;

- the date to which it was likely that the process

would be deferred; any other matter relevant to or

touching upon the evaluation process.

And your answer is: "No information was provided by

the Department other than that which is on the record.

As recorded in Mr. Towey's note numbered 000206, the

views of potential applicants were canvassed as to

what would be a reasonable interval between relaunch

of the competition and the closing date."

You were asking people, in other words, how much time

would be needed to get yourself revved up again to the

point where you could continue?

A. Yeah. In the context of some form of change in the competition, yes.

Q. You had those contacts only with the people who had already shown interest; is that right?

A. Only with people who had purchased the documentation.

There was a list of whatever number of people came in and purchased the documents.

Q. There were other people who had shown interest but who hadn't purchased the documentation; am I right in /RS

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that?

A. I can't see how you could be interested without purchasing the documentation. There was at least one significant player who purchased the documentation and after a close look decided not to bid, if that's what you are getting at. But otherwise, I can't think of any reason why we would have spoken to parties other than those that were on our list.

Q. Did you give any consideration to readvertising the competition at this point?

A. I don't believe we did, no.

Q. When I say "at this point", I mean at the point where the dispute with the EU was resolved in favour of a cap.

A. Well, if you were to readvertise, you'd have to start the clock, and you are prolonging the date of an end result by several months, which I don't think anybody considered appropriate at that stage. I mean, we were anxious to get somebody in the business.

Q. Yes. It's just that you were changing the competition, though, weren't you?

A. We were changing it to a relatively insignificant extent in terms of the RFP or RFT, whichever.

Q. Well, you weren't going to have to bid, now you'd know what you'd be obliged to pay?

A. We presumed at the settlement that everybody would come in at the 15 million figure. It was a natural-enough assumption.

Q. Passing on then to the evaluation model, you were asked for your understanding of the evaluation model

/RS

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adopted by the Project Group, and in particular the qualitative and quantitative approaches, what these approaches entailed and what the distinction between them was. We have heard this from the Opening Statement, that there was this model being promoted by Andersen Management International whereby applications were evaluated quantitatively by number-crunching, I suppose, and ultimately added onto that or complimented by a qualitative evaluation, which would bring to you a final result. Would that be a fair way of putting it?

A. Mm-hmm.

Q. You say "The concepts of qualitative and quantitative approaches were imported into the competition by AMI.

There was also a further concept of supplementary analysis proposed in the AMI tender and clearly elaborated in the final report and mentioned elsewhere in the document. It would therefore obviously be of

interest for the Tribunal to hear first-hand from AMI how they differentiated the different approaches, and the Tribunal has obtained comment from AMI.

"My understanding is that the quantitative approach is the pure outcome of a number-crunching exercise on the raw data but that the qualitative approach allowed scope for a degree of judgement to be exercised and an element of getting behind the numbers to check their internal consistency, etc. I think it was always clear that the qualitative analysis would be the defining one and that the supplementary analysis mentioned

/RS

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could have a critical bearing on the final outcome.

My recollection is that AMI were to carry out the number crunching for the quantitative analysis, but that the qualitative analysis was to be a shared exercise. AMI wanted to differentiate between the two by scoring the quantitative analysis in points and the qualitative analysis in grades.

Towards the end, at a meeting in Copenhagen, probably the 28th September, that will be mentioned in an answer below, Mr. Towey and I took the view that a result expressed in grades only was not sufficiently transparent for the final decision and report. And we persuaded the AMI team that the grades would have to be modelled into numbers so that the weightings could

be applied and such a matrix was developed in situ on the day. It was a simple formula of converting A, B, C, D, E, to 5, 4, 3, 2, 1."

And you say "And where there were plus signs, for example, B-plus, they were given a half mark." A half of the relevant

A. On looking at the documentation, there were no half marks at that point; so in writing that, I was confused about earlier parts of the process.

Q. When you say that AMI wanted to differentiate between the two by scoring the quantitative analysis in points and the qualitative analysis in grades, by "points" do you mean numbers?

A. Yes.

/RS

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Q. Numbers the same as we have mentioned a moment ago?

A. Yeah, yeah.

Q. Although you agreed with AMI at one point that you would convert the grading that they proposed into numbers, the actual qualitative analysis was conducted by applying grades; isn't that right?

A. Yes.

Q. You were asked for the date on which and the manner in which the Project Group determined that each entrant should be admitted to the evaluation process and details of the criteria applied. And you say "I

cannot find a record of the manner in which the Project Group determined that each entrant should be admitted to the evaluation process. I have a strong recollection that there was a specific recommendation by AMI that no basis existed for excluding any applicant and that all to be admitted to the formal selection process. I expect that AMI will be able to confirm this. The chronology of the process suggests that the latest date by which this might have happened was at the Project Group meeting on the 4th September 1995, but this is not recorded in the typed minutes.

I do not know whether or not Billy Riordan was involved in the analysis which led to the AMI recommendation. The fact that a formal decision was made is recorded at page 000300 at paragraph 2.1, which is an early draft of the final report."

Could I just ask you what role Billy Riordan would have in such a process?

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A. I mentioned that in the sense that he was an accountant in the process.

Q. Right. We do know, I think I am not sure whether Mr. Coughlan mentioned it in the Opening Statement, but I seem to recall that he did that AMI did establish a filter for applications but that this was based on the criteria I mentioned this morning, simply

whether the application was in the appropriate form and whether the applicant in fact was prepared to achieve a 90 percent coverage within the stipulated time, because obviously if he wasn't, there was no point in considering him at all.

And would I be right in thinking that he decided that all of the applications bar, I think, the Eurofone application came within these fairly simple formal or satisfied these simple formal tests, but that they didn't; it might have been something to do with the size of their application, they had too many pages, but as the deviation was so small, he decided they shouldn't be ruled out?

A. That's certainly an interpretation that you could put on the document that Andersens drew up for the Tribunal and which was mentioned in the Opening Statement. As I said this morning, I have a very clear recollection that what Andersens or what AMI came to the Project Group with was broader than that, and covered the question of whether they met the basic financial and technical requirements.

Q. I understand that. Just in relation to that, if, as /RS

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you say, you have a recollection of Andersen recommending a sort of a threshold or a hurdle over which all the applications would have to which all

the applications would have to clear, who devised the criteria to which the threshold test would be applied?

A. I don't think I used the word "threshold" at all. My recollection is that Andersens came to the group and said, we have examined the applications, that none of them fall to be disqualified for the technical issues about size and coverage, etc., or for failing to have the financial or technical capacity.

Q. By what tests did they decide, or do you know what tests they applied to decide whether an application failed on financial or technical capacity?

A. I don't remember asking them that question.

Q. Was there any discussion by the Project Group as to what tests would be applied, even if you can't remember them?

A. I honestly don't recall.

Q. The next question asks about the details of the purpose for which the oral presentations by competition entrants were taped, the use to which the tapes were put and by whom, and details of the manner in which and place in which the tapes were retained, together with your knowledge, direct or indirect, of the last known whereabouts of the tapes.

Some of this is historical because they couldn't be retrieved for a period, and eventually they were located. As I said earlier, these are tapes of the

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presentations that were held between the 14th and between the 11th and the 14th September 1995.

And your answer is: "I recommended and the Project Group accepted that it would be a good idea to tape the structured meetings which were held with each applicant so that there would be a definitive version of the discussion in case there were nuances of difference between the interpretation of individuals of what was said. I had very much in mind that we were talking about very long meetings of 3 hours per applicant in a compressed time-frame. I did not see them having a life after the process was over. I do not believe that I ever physically saw the tapes".

Then you go on to deal with where are they and when you last saw them and so on, but fortunately, that's no longer of any consequence. And I think in the last month or so they were located; would that be right?

A. So I gather.

Q. And at this stage, we'll be going into them in detail later on. What they entailed was, as I think was mentioned in the Opening Statement, a question and answer session, a presentation I think initially, an oral presentation where somebody gave the best account he could of his application. Then you had questions asked by members of your team, specific questions that had already been identified, and then follow-up

questions, would that be right, with a view to seeing or clarifying aspects of the applications?

/RS

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A. Yes, the meetings were very structured. It was clear that there was three separate hours for three separate purposes, and I was effectively running the meeting on a stopwatch to make sure that there could be no allegations of disproportionate time being given to any particular aspect of any particular application.

And yes, the first hour was a general presentation by the applicants of anything they wanted to say about their project. The second hour was I think it was specific questions of which they had notice in advance. And the third hour was more free flowing.

Q. So in the first hour they'd hammer home what they felt was the main points of their application. They then deal with your queries, and then, as you say mainly technical, I think, and then you had some other questions from different members of the Project Group, really stemming from their different areas of expertise; would that be right?

A. Yes. I think, while I chaired the meetings and adhered to the structure, that Mr. Andersen probably led the meetings in the second half.

Q. I see.

I think there are a number of queries then about what

transpired at those meetings. Question 38, you were asked for details of all queries raised by the Department in the course of the Esat Digifone presentation, details of queries addressed to the funding of Communicorp's equity participation in Digifone, details of queries regarding a letter of /RS

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comfort provided by Advent dated 10th July, 1995, and appended to the Esat Digifone application, details of queries raised by the Department in the course of the presentation regarding the terms governing the offer of IRi;½30 million to fund Communicorp's equity participation in Digifone, and details of queries raised by the Department in the course of the presentation regarding the commitments provided by the institutional investors in the Digifone bid.

And you say "At the Esat Digifone presentation on the 12th September, 1995, the questioning of that consortium on financing is indicated by manuscript notes on file. I do not recall the extent of the questioning, which would have been the remit primarily of the accountants." And we'll have the transcripts and the tapes in due course.

I am not going to deal with the next question, because again it's going to be overtaken by the actual transcript and the actual tape.

Question 40: "Details of each and every aspect of the Project Group's initial views of the applications arising from the quantitative evaluation which had been confirmed by the presentations as recorded in the minutes of the 11th meeting of the Project Group on the 14th September of 1995".

I think we might just put it on the overhead projector

/RS

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so we know we are talking about the same thing.

Your answer is: "It seems to me that the main consideration of the quantitative evaluation took place at the ninth meeting, on the 4th September.

There is nothing that I can usefully add to the record of that meeting, which makes it clear that the quantitative evaluation displayed shortcomings and suggested that it would not be a reliable basis on its own for decision, as the record shows the document used at that meeting was regarded as highly sensitive, and a limited number of copies were left in the hands of named officials, not including me. The preparatory notes prepared by AMI for the presentation meetings give an overall impression of the kinds of problems that were seen in the data which was used for the quantitative evaluation".

There was an agenda as follows: "the Andersen presentation on the quantitative evaluation of the six

applications." This is the 4th September meeting that you mentioned in your answer.

"2. Discussion of the forthcoming presentations; and

3. The future framework for the project."

And it goes on, under the heading "Quantitative

Evaluation": Prior to presenting the initial draft of

the report of the quantitative evaluation, Mr.

Andersen first acknowledged certain shortcomings in

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the results gleaned so far from the quantitative

scoring. The quantitative evaluation had highlighted

some incomparable elements."

And he outlines those and goes on to say "The highly

sensitive nature of the quantitative scoring document

was noted. Copies were to be retained securely by Mr.

McMahon, Mr. McQuaid, Ms. Nic Lochlainn, and Mr.

Riordan. The remaining copies were returned to AMI."

The meeting discussed each dimension of the scoring

document in turn. The consensus was that the

quantitative analysis was not sufficient on its own

and that it would be returned to after both the

presentations and the qualitative assessment. It was

also agreed that the figures used by the applicants

could not be taken at face value and needed to be

scrutinised. Responsibility for such a scrutiny had

not yet been decided. The need to reflect a change in

the weighting for the licence fee was highlighted.

AMI committed to correct the model in this respect."

Just on that point, had the model proceeded up to

then, the quantitative model, on the basis of the old

weighting for licencing?

A. I don't know; that's something that would need to be checked.

Q. There's nothing to suggest that?

A. It possibly does, yes.

Q. And if that's the case, then the weightings for all of

/RS

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the other well, a number of other elements would

also be out of kilter, if I can put it that way?

A. Yes. But clearly the notion of revisiting it to make that correction was what was discussed.

Q. Yes.

"Mr. Andersen concluded that the scoring at this stage was relatively close and that no conclusions could yet be drawn."

But presumably, going into the presentations, the

project team members had an idea of what the scoring

was at that point.

A. I am sure they had seen whatever documentation

Andersens circulated, and I am sure they understood

how tentative the information was and how its base was

being undermined by data problems and so on.

Q. Do you know if before the presentations, a corrected version of the initial quantitative report had been produced by Andersens?

A. I don't know that.

Q. I don't know from the documentation either, but maybe you might look into it and see. I'll endeavour to look into it as well.

A. Mm-hmm.

Q. But it seems that at this stage Mr. Andersen was of the view that there was a scoring available, however close it was, and suggested that no conclusions could be drawn from it.

A. Yeah, I think it was clear that everybody was aware at

/RS

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that stage that the data wasn't good enough for that kind of scoring to have a major influence on the result.

Q. Why do you say that?

A. There were so many so many problems with the data themselves, in any event, and there were some areas where I suppose the applications weren't, I suppose, quite as predicted I'll give you an example. The most topical example in my own mind is that Andersens compared the tariff offerings on the basis of what was known as the OECD basket at two points in time; I believe it was something at launch and at the

beginning of year 4 or year 5 or year 3, whatever it was, and the group took the view in discussion that there were so many changes within the proposals and so many different segmentations that it would be far more appropriate to graph the full evolution of the tariff approaches over the period of the business plan to see if it would enable them to better compare what was on offer. That kind of discussion took place in the Project Group, and that kind of work was subsequently done.

Q. One of the things that I'll be coming back to, you might try to think about them, is this, and I am just going to flag it for you at this stage: If you look at the criticisms that are alluded to in some of the minutes of the evaluation group meetings of the quantitative report that certain things couldn't be measured, they don't seem to be that many, or there don't seem to have been that many items that couldn't

/RS

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be measured. OECD baskets is one, and I think one or two others; roaming, international roaming, which one would have thought of again anyway. Could the quantitative report not have been re, if you like, consolidated, leaving those out of it?

I am not asking you for an answer to that question now, but you might think about it.



A. I will certainly think about it. From the long recitations from the AMI report for the Tribunal, I thought that AMI made a fairly compelling case that more than 50% of the quantification had fallen away.

Q. That's the part I couldn't follow. I couldn't find 50%. All I found was two items. So maybe you'd look at it again and look at precisely what AMI are saying.

A. Okay.

Q. You are then asked about the composition of each of the 56 sub-groups which met to conduct the qualitative evaluation with indicators including the date on which and the place at which each of the sub-groups met and the duration and manner of their deliberations. This is a question with regard to the way in which the Andersen evaluation was going to be carried out. Andersen divided the evaluation process into a number of headline criteria, followed by sub-headline criteria, followed by sub-groups of those sub-headlines, and so on. I won't go into the names of them now because it's confusing, but eventually it was broken down into 56 items, or 56 items to be evaluated at the bottom of the period, if you like,

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and it's those 56 sub-groups that are being referred to here.

And you say "I cannot reference the existence of 56

sub-groups at the moment." I am fairly sure that's right, but having regard to what you say here, I am having it looked into.

A. There were 56 items to be examined, let's say, but all of the technical items would have been done by John McQuaid, Aidan Ryan, and I have forgotten who on the Andersen team; maybe Michael Traynor or somebody like that. They would have looked at all of the technical ones, whether it was roll-out, locations, etc.

Q. I follow.

A. All of the accounting ones would have been looked at by Jon Bruel, Billy Riordan.

Q. Even if there were 56 sub-items at the bottom of the pyramid to be looked at, there weren't necessarily 56 groups, although the groups who were charged with looking into them had to look at each one of them under a different one of 56 headings?

A. That's right. And then where you get into the qualitative is that you can't just take the raw information that you are getting. You then have to go back and check that, for example, that the tariffs and the billable minutes will generate the revenue that falls into

Q. Is that called a sensitivity analysis or something? I am not sure of that.

A. No. I think that was to do with what Michael Andersen

/RS

described as a holistic approach

Q. Anyway, it's checking the internal

A. To see that the internal consistency holds up, yes, and my recollection is there were cases where it didn't and where we had to go back to applicants and so on in the presentations.

Q. There was a much smaller number of groups. The general principal was that all the technical aspects were examined by a group comprising the representatives of the telecoms radio and technology division and the technical people from the AMI team. I do not know how often they met, but I do know that John McQuaid, who was the head of the division, had at the time quite detailed records of their discussions, because I saw him refer to them in Project Group discussions. The results they produced were incorporated into the final evaluation, and I don't recall their being changed. Equally, when it came to all of the financial matters, Billy Riordan led for us and Jon Bruel for AMI. The evidence available to me at the time was that they had done a thorough analysis, and again the results were taken as read.

Mr. Towey and I, and to a lesser extent Ms. Nic Lochlainn, led for the Department in relation to marketing and management aspects, and my recollection is that Michael Andersen led for AMI. Mr. Towey, Ms.

Nic Lochlainn, Billy Riordan and I attended a two-day meeting in Copenhagen, I think on the 18th and 19th of September, which met in different formats to discuss the markings of a series of aspects. My recollection

/RS

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is that the segments I was involved in, at least, operated on the basis that AMI made presentations of their views based on their analysis, and we raised questions based on our knowledge of the applications themselves. The actual applications were present in the room and were referred to constantly on points of detail. The meeting identified further analysis in some respects, to the best of my recollection, and therefore was not often in a position to finalise markings.

"The note dated 21 September, 1995, Tribunal Document 000288, gives some feeling for the outcome of that meeting and the work still being done at that stage", and we'll examine it in detail in due course.

"A further and very definitive meeting took place at AMI offices in Copenhagen about ten days later, where the relevant further analyses were considered in detail and scoring carried out as appropriate. My recollection is at that that there was a lively debate at the meetings in Copenhagen but that the markings were eventually the subject of consensus."

At the first meeting, when you say that there was a lively debate at the meetings in Copenhagen, are you referring to both meetings?

A. Yes.

Q. The 18 and 19th and presumably the 28th or 29th?

A. Yes.

/RS

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Q. And at those meetings, were you dealing solely with the areas of the evaluation process that you have described, marketing, management, and I think that's it, marketing and management; isn't that right?

A. I think those meetings dealt with those areas and those areas alone. I don't think that I was personally present at all of the discussions, because we had some level of divisional responsibility as between myself and Fintan and Maev Nic Lochlainn and Billy Riordan, but I have forgotten the details, but I have a recollection of meeting in different meeting rooms and so on.

Q. Who was there in the I don't think Billy Riordan was there on the 28/29th, was he?

A. No, the first one, the 18th to the 19th.

Q. Was he there on the second, at the second meeting?

A. The meeting on the 29th?

Q. Yeah.

A. I don't think so, but I mean, that will be on the

record.

Q. Was Mr. Towey at that meeting? He was, presumably?

A. Yes.

Q. Was Maeve Nic Lochlainn at it?

A. I don't actually recall.

Q. So at the first meeting there were five of you, I suppose, or Jon Bruel, six of you, and at the second meeting

A. I don't actually know how many Andersen people were at the first meeting. I suspect there was more than Michael Andersen and Jon Bruel, but I don't recall the

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names.

Q. And at the second meeting, just yourself Mr. Towey?

A. Myself and Towey and whoever was there from Andersens.

Q. And whoever was there?

A. I have forgotten who was there from Andersens, but certainly Michael Andersen was at all meetings.

Q. You described how Mr. McQuaid, you said, kept detailed records of the discussions of his groups. Were any records kept of the discussions of these groups, especially on these two occasions?

A. I don't know whether Andersens kept records. I don't know whether my team kept records or not.

Q. These two meetings ultimately led or led up to the production of the first draft of the report; is that

right?

A. Yes.

Q. That is the 3rd October, 1995?

A. Mm-hmm.

Q. Presumably that report must have resulted from those meetings, in a sense?

A. Well, certainly the two tables that you put up or somebody put up very early this morning were finalised to the extent that they were finalised among the participants at the meeting on the 28th or 29th.

Q. But the Tribunal has been unable to find any record of that meeting. Wouldn't that seem to have been a fairly important meeting, since it was the one at which you crystallised your first full draft report results?

A. Yeah I don't recall there being formal records of /RS

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many or any well, I have seen one or two, of the various sub-groups that engaged in marking. I have seen one or two, but it didn't seem to have been the practice.

Q. I wasn't thinking of records. I was thinking of sort of working papers or that.

A. I am afraid you'll have to ask other witnesses. I personally don't recall keeping records.

Q. Did you keep even working papers, if you know what I

mean, your note of how you were approaching things at the meeting?

A. Well, anything that exists was put on file. And anything that's on file was given to the Tribunal. And I don't recall coming across that kind of stuff, but there is a lot of stuff given to the Tribunal which I never examined.

Q. I see. But when you say anything that exists, did something exist at that time and did it cease to exist, if you follow me?

A. I don't know. I mean, it wouldn't be totally unusual if I made notes on a single piece of paper while the meeting was going on of things I wanted to come back to later, or whatever, and at the end of the meeting just crunch it up and throw it in a bin. It's quite possible. I am not saying that it happened, but it could have happened.

Q. What about Mr. Towey; do you know if he kept records or any note

A. I don't know.

Q. of how you were doing?

/RS

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A. I don't know.

Q. I mean, you have seen this was, after all, a fairly critical part of the process; you have seen in the course of the Opening Statement how, I mean,



solicitors, who know more than civil servants, would have a note-taking discipline, if you like, were able to keep notes of meetings that were held at various points. Were there no similar notes kept by you and/or Mr. Towey or Ms. Nic Lochlainn of these meetings?

A. Certainly not by me, and I wouldn't like to answer for others. I'd prefer for them to answer for themselves; it wouldn't be fair of me. I just don't know the answer to the question. I know it's common practice amongst solicitors for their own reasons, and it was common practice in the Civil Service of 20 years ago. In hindsight I can see why you are interested in the subject, but I can't say whether there are documents in the other people's hands or not.

Q. This was the meeting, was it, therefore, at which the first time you arrived at a final graded totality of the results and at which your decision seems to have been made to convert into numbers; is that right?

A. Yes. Basically when it got to the stage, and a lot of the markings of the things that were being marked had been done at the previous meetings ten days earlier, but there were a number of issues to be revisited on the basis of further work by Andersens to finalise drafts of markings. It wasn't as if this small group was doing all of the marking of a whole big

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significant part of the competition.

Q. Well, they were doing a significant part. They were doing marketing and management aspects, which is a big

A. We were, but to the extent that a lot of the work had been done the previous week or ten days earlier. Now, Andersens were of the firm impression that there were so many As and so little Ds and Es that the result was obvious in the case of A5.

I wasn't convinced that you could come to that conclusion by that route because it ignored the weightings. And I started to explore the question of, can we find a mathematical model that would give us a more robust and more transparent outcome? And I stood up at either a whiteboard or a flip chart and I started to draw the diagram which you now have of numbers raw from the data that was there in grades, to explain why I was thinking the way I was thinking. And that's how that table evolved. I had no idea when I started to do it what it was going to look like, but I figured it was essential it be done.

Q. And when you arrived at that, when you had carried out that exercise, was everybody agreed to use it?

A. All the people present agreed that it was the right thing to do.

Q. Did anybody have any difficulties with it? I mean,

since it wasn't what was envisaged in the original plans for the competition?

A. It's clear that Michael Andersen's starting point was

/RS

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it was unnecessary to do it. I took the opposite view. I figured that I couldn't stand over a result that couldn't be modelled into the numbers in the weightings applied.

Q. I think we'll come to the detail of it later; in his report, he himself said there was a risk that it would distort the result, in one of his draft reports, isn't that right it could distort the results, sorry

A. I don't recall that, but

Q. You can take my word for it, he did say that.

A. I can't for the life of me see how it could do. As far as I was concerned, it was absolutely critical that I come to marks that could be compared, to which I could come to marks to which the weightings could be applied and which could be compared.

Q. Was that you were concerned from a presentational point of view you wanted people to be able to see actual numbers?

A. No, I wasn't happy that the grades were going to give me the result in the way Michael Andersen Michael Andersen thought, okay, it's so obvious there is all these As in the A5 line, they have won the

competition. And I kept saying I can't see that, I can't accept that you can mentally apply weightings to letters, and that there has to be a way of modelling this. And I got up on a white board or flip chart and I started to do it, and my understanding is eventually everybody was agreed that it was right to do it, and that the result turned out to be the one that Michael Andersen thought. I couldn't see how he could have

/RS

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come to that conclusion at that point in time.

Q. If you looked at the result that was eventually arrived at, which I think was 432, 410, 362 I think I am right in quoting those figures?

A. That's right, yeah.

Q. I think the difference between A5 and A3 is 22 points, which is about 4.4 percent. You were marking out of 500; isn't that right?

A. I'd have to check

Q. If you tot up the weightings, they come to 500. So the gap between 1 and 2 was 4.4 percent.

A. Mm-hmm.

Q. The gap between 2 and 3 was obviously somewhat more than that, closer to 50 marks?

A. Mm-hmm.

Q. Nearly 10 percent, I suppose. The grading system was based on the grading system that you converted was A,

B, C, D, E, which you converted to 5, 4, 3, 2, 1, if you like, 100%, 80%, 60%, 40%, and 20%, and from 20 down to zero then.

A. That's I mean, I didn't think of it in those terms, but you could present it that way.

Q. I am just working off the calculations that you did.

And if you look at the difference then between the first ranked and the second ranked at that point, it was about a quarter of a grade; would that be right?

A. That's certainly one way of looking at it. I mean, as far as we were concerned, one was you know, ahead of the other by a not insignificant margin.

Q. Oh I appreciate that, but I am just looking

/RS

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A. We didn't try to relate it to a value back into grades.

Q. But you did change it from grades into numbers. I think they were roughly a B and a B-plus, isn't that it, that was the top

A. I can only repeat that I couldn't accept that I could see a clear result from grades, and I thought it had to be modelled into numbers. And when it was modelled into numbers, there was a difference which is not insignificant.

Q. This is something you may have in part mentioned in one of your answers already. Question 44, page 35:

"Besides details of your knowledge, direct or indirect, of the evolution of the decision that the qualitative evaluation should be decisive and should take precedence over the quantitative evaluation".

You say "I have already dealt with this to some degree at Answer 35 above. It seems to me that the quantitative evaluation was a number-crunching exercise to be carried out by AMI to form a basis for the rest. By 'the rest' I mean qualitative evaluation and supplementary analysis as required or identified. I don't think there was ever much doubt but that the qualitative evaluation would be the dominant one. I would be surprised if there was any difference between the members of Project Group in relation to this, and the record seems to be redolent of this concept, see the 7th and 9th meetings of the Project Group.

/RS

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"Mr. Brennan's involvement, direct or indirect"

next query "together with your knowledge of the involvement of any other person in the decision that the qualitative evaluation should be decisive and should take precedence to the quantitative evaluation, including details of all matters which prompted or contributed to the decision".

And you say "I believe that the relative positions of the quantitative and qualitative evaluations were well

understood by the Project Group. I want to emphasise again that the quantitative evaluation was a number-crunching exercise carried out by AMI based on the compulsory tables which they put into play for inclusion in the applications. It was always, in my view, expected that there would be incomparable data revealed by those tables, and the report of the ninth meeting and the preparatory documents for the presentations confirm that this was the case. This question as posed seemed to suggest that there was a change of tack somewhere along the way, and I am satisfied that the situation was fully understood by the Project Group before the closing date for the receipt of applications".

It is, I suppose, only fair to say that at that point, before the closing date of the receipt for applications, it was understood that there would actually be a quantitative report with a ranking, a useable quantitative report; isn't that right?

/RS

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A. I am not sure what exactly the AMI original tender had to say on the subject.

Q. Well, I think in fact they envisaged perhaps only a quantitative report at that point, but I think if you look and we'll be coming back to this if you look at the evaluation report itself, it asserts that

a quantitative report would be contained in it, and there is no quantitative report in it. You are aware of that?

A. I am, yeah.

Q. So whatever accounts for the fact there is no quantitative report in the evaluation report, it seems clear that if it was mentioned at that point, it must have been envisaged at an earlier point that one was going to be produced?

A. I can see where you are coming from. I don't know whether I can adequately relieve you of the doubts that are in your mind, but it is clear that a lot of the data was not properly comparable. But it's equally clear, by the way, that in some of the qualitative scoring, and I hope I believe you will find this when you go to other witnesses, that it actually was quantitative in the sense that you know, your frequency efficiency is to do with the number of base stations and their location and so on, that's quantitative information taken account of in qualitative marking. And there is lots of that.

Q. I understand the point you are making, that you are deciding whether one applicant is better than another, whether he has got enough, whether his liquidity, his  
/RS

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solvency, measured by some quantitative approach,



warrants a particular qualitative mark; isn't that right?

A. Yes, and the consistency within the internal consistency in the application couldn't be taken account of if you are just doing a pure quantitative based on the information at its face value. It just couldn't be done.

Q. I understand that, but the Tribunal is going to have to try to work out what was understood by a quantitative report originally and why, certainly, if you take the evaluation report and the evaluation model, one was mentioned as something that would be generated.

A. And long before the closing date, there was a discussion in the project team to try to ensure that everybody had an appropriate degree of understanding of the relative positions of the quantitative and qualitative evaluations. I think that's in the record, if I am not greatly mistaken. So it was regarded as important, and I mean they were all intelligent people; they engaged in a discussion, so I presume they understood it. I mean, I am quite comfortable that the end evaluation produced the best application. That's what we were there to do.

Q. You were asked at Query 47 your knowledge of the evolution of a number of decisions, and specifically firstly with regard to the scoring or non-scoring of

some aspects, and you have an introductory paragraph here in your response.

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"It seems to me that everything relevant to the selection criteria in paragraph 19 of the RFP document was scored. I believe that AMI had in mind that if at that stage there was not a clear winner, then what are described now as other aspects would be looked at with a view to seeing whether they could assist in differentiating between close applications. Pages 40 to 42 of the draft evaluation report assists the understanding of this.

And you refer to a note from AMI dated 21st September as relevant, as is Appendix 2 of the final AMI report.

You are asked specifically then about the decision not to score what are called "other aspects", and these were described in the evaluation report as the indicators of sensitivities and credibility.

And you say "I want to reiterate that all the evaluation criteria set out in para. 19 were examined and scored. My recollection is that when the other aspects which are dealt with in the final AMI report in Section 5 were considered, on the basis of the analysis put before the group by AMI, it was decided on the basis of that analysis that they did not throw up any factors which would cause the scoring to

require to be amended."

Can you just clarify one aspect of that for me: Do I understand you to be saying that you were happy that

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all the evaluation criteria set out in paragraph (a)(19) were scored, but that you didn't score the other aspects because you felt that the scoring of those aspects wouldn't cause the original ranking to be amended?

A. What I am saying is that AMI did the analysis and came back with that recommendation.

Q. But how could you be sure this decision seems to me to be a circular one. As I understand what you are referring to, it's being suggested that where you have a ranking according to the scoring of a number of specified criteria, you don't have to score other criteria because the scoring of those criteria wouldn't affect the ranking you already have; but that's a proposition that doesn't seem to me to make any sense.

A. What I am saying is that AMI examined what are now called "other aspects" and came to the group and said, having done so, that there was no basis for amending the scoring.

Q. I understand. Did you understand, therefore, that AMI had in some way scored or graded these other aspects?

A. I'd have to think about that one.

Q. Well, would you, because you can see it's obviously fairly important.

A. Mm-hmm.

Q. You go on to say that in reference to a query concerning the decision to confine the consideration of the indicators that's the indicators of sensitivity and credibility to comment within the

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body of the evaluation report, you say "Subject to what might be said by others involved, and in particular by AMI and Mr. Towey, I have a vague recollection of a discussion where in relation to the other aspects, we discussed the idea that a lot of the material surfacing in this part of the analysis had already been taken into account to a significant extent in the markings, and that to do so a second time would amount to duplicating the effect on the markings. I am not certain whether that discussion took place in Copenhagen among a small group or in the Project Group. I suspect it was the latter."

Why do you suspect that it was discussed among the Project Group as a whole as opposed to among either of the two meetings in Copenhagen?

A. Well, I don't have a specific recollection, but such recollection as I have is that sort of double jeopardy

discussion took place in Kildare Street, but I mean, I can't attest to that as a definitive. That's the best of my recollection.

Q. What do you mean by the double jeopardy discussion?

A. Well, the idea that if you have already taken account of a weakness in of a particular weakness in the scoring, and then you come back in the evaluation of other aspects and you take the same weakness and count it a second time.

Q. But I understood that if you have taken account of something in the scoring and it throws up a problem or an issue, that you could go on to re-examine that in a /RS

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supplementary analysis in any case.

A. You could.

Q. Well, isn't that a form of double jeopardy anyway, as you put it?

A. What we were trying to make sure was that we were being as fair as possible to all of the applications in the work that we were doing. And I just have a recollection that there was a discussion around that, but my recollection isn't clear enough for me to be definitive.

Q. Well, would you like to look at it again, and look at the

A. I am not so sure in this case that looking at it again

is going to help my recall, because I don't believe

there is a whole lot on the record.

Q. I think this question of scoring other aspects was raised in a letter from Michael Andersen on the 29th September, where I think he called for 21st September, where he called for a decision on it. He called for you, the Department, to make a decision on it. I suppose it must follow from that that it couldn't have been decided at the meeting of the 9th, because we know there is no reference to it at that meeting.

A. Yeah, I don't know.

I mean, I am genuinely getting tired now.

Q. I understand. Well, look, I think I'll flag it as a question. And I appreciate I don't want to get too involved in detail at this stage, but in order to make  
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it easier for you, if it was mentioned by Michael Andersen on the 21st September, 1995, and a decision seems to have been reached by the time of the first evaluation, first draft of the evaluation report, which was presumably put in place just after the meeting of the 28th/29th, it must have been between those two times that the decision was made?

A. I don't think it follows that it must have been, but it could have been.

Q. Well, it could have been?

A. Yeah.

MR. HEALY: I think that might be an appropriate place, in view of the fact that I am going on to a lot more detail with this witness here.

CHAIRMAN: Well, I am conscious that it is a long day for Mr. Brennan; indeed it remains the situation, even during public sittings, the Tribunal has other meetings and other matters to attend to.

So we'll pause now, and in those circumstances, I'll say eleven o'clock in the morning, if that's suitable to you, Mr. Brennan. Thank you very much.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,  
WEDNESDAY, 18TH DECEMBER, 2002 AT 11AM.

/RS