

MORIARTY TRIBUNAL - DAY 164

I N D E X

WITNESS: EXAMINATION:Q. NO:
MARTIN BRENNAN Mr. Healy 1 - 255

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THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY,
18TH DECEMBER, 2002 AT 11AM:

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

CHAIRMAN: Good morning, Mr. Brennan. I appreciate
it's a long day, Mr. Brennan, so if you want at half
time, so to speak, either morning or afternoon, to
take a short break, just mention it to me.

Q. MR. HEALY: Thank you, Mr. Brennan.
Do you remember yesterday we were discussing at one
point, when we were going through the list of
questions and the list of responses, you mentioned
that you recalled that there had been a discussion at
a project meeting, one that was not recorded, an
unrecorded discussion in which Andersen indicated that
they had, as it were, conducted a threshold testing of
applications, not with reference merely to formal
compliance, but with reference to some substantial
compliance with a threshold test or a similar test of
financial and technical capability. Do you remember
we were discussing that?

A. I do indeed, yes.

Q. And you felt that Mr. Andersen, you thought, had also mentioned this in his evaluation of the evaluation, I think as it's called?

A. Mm-hmm.

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Q. And I don't know if you have had an opportunity to look at that document.

A. I had an opportunity to look in a cursory way at some of the issues that came up yesterday. I think it was clear yesterday evening that I was very tired leaving here

Q. I am not asking to you look at all.

A. I came in a bit early this morning, but I don't have a detailed familiarity with a huge volume of documentation which enables me to do this kind of research very quickly, so I think it is going to take me some time to get to the bottom of some of these issues as time goes by.

I did note that in the I think it's the final report, there is a statement which I wrote down this morning. It says it's Book 3, Tab 33, page 1258:

"All the GSM II applications received were admitted to the evaluation, as none of the applications have substantial deviations from the minimum requirements of the RFP document that they were to be rejected."

And that's the same sentence, I believe, that's in the

evaluation of the evaluation. And my belief is that that covers both the technical requirements of document size, of roll-out, of coverage, and a statement from Andersens based on their work that they had decided that none of the applications fell to be ruled out because of the absence of financial or technical capability.

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Q. Right. What I find somewhat curious about that is there seems to be no record of Andersen having carried out any analysis or investigation by reference to any particular criteria to test financial or technical capability at a preliminary or threshold stage. Do you follow me?

A. Well, I certainly don't have access to Andersen's files. I didn't research any files they disclosed to the Tribunal. I would say, though, that Andersens were experienced consultants who had done this kind of thing before, and if they came with a statement like that, I assume it was based on the practice in the industry at the time.

Q. Yes. Well, can I just approach this in two ways at the moment, and again can I just clarify, so that it will be of assistance to you, what we are doing at the moment. We are simply going through a response to a number of wide-ranging queries which were addressed to

you and to a number other civil servants. They range over particular points in the entire process between the evolution of the process in '93 up to the formal issue of the licence in '94. I appreciate that that sometimes involves access to and familiarity with documents which range over that entire period of time and that it's not easy for to you deal with that, and I am not going to expect you to do it.

Once this task has been completed, we will then be looking at documents as part of a chronological survey of that period of time which should make it much

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easier for you to follow the documentation and to have advance notice of precisely what documents are going to be referred to, so at this point, in raising this, I am simply raising it because it seems to me to be a somewhat critical issue.

And I was interested in your recollection that there was or there had been such a decision made to introduce a preliminary or threshold test of substantive financial and technical capability, and from my examination of the documents, I have looked at what you call the evaluation of the evaluation, and it does contain a statement along the lines you have mentioned, to the effect that all GSM II applications received were admitted to the evaluation as none of

the applications had such substantial deviations from the minimum requirements of the RFP document that they were rejected."

As I mentioned to you yesterday, I am aware from other information provided by Mr. Andersen that what he was referring to, as I understand it, at that point was the compliance with formal requirements, number of pages, whether an applicant was in fact prepared to offer the level of coverage, geographical coverage you were looking for. If they weren't, there was obviously no point at all in assessing them, and so on

A. Yes, I spotted in the Andersen report prepared for the Tribunal this year that certainly that construction

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was capable of being interpreted from the words used.

And I think, given the passage of time and the absence

of detailed records in some instances, that the

Chairman will be hearing evidence from all of the

participants, and it will eventually be for the

Chairman to decide, I mean, which is the more credible

scenario. There isn't a black-and-white answer to

this at this stage.

Q. I understand. I just want to draw to your attention to a passage from that report or memorandum provided to the Tribunal earlier this year by Mr. Andersen.

And just so you'll know what I am talking about, I am going to let you have a copy of the relevant page.

It's the Andersen memorandum on the AMI experiences as lead consultant in the GSM II tender in Ireland 1995.

I'll give you the reference, but I'll also give you a copy, a hard copy of the relevant page. It's in book 39, Tab 1, subtab A, page 9.

(Document handed to witness)

I think what you have now been handed is page 9; isn't that right?

A. Yeah.

Q. If you look at the top of that page, the first paragraph begins "Accordingly"; do you see that?

A. Yes.

Q. "Accordingly, the GSM II tender design had been finalised by the time AMI commenced work, even though it was lacking in certain respects, such as, but not limited to, tender specifications and evaluation methodology. The tender as it was designed by the

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Department and the consultants did not comply with standard European practice at that time (as well as today) for GSM II mobile tenders. This was because there were no predefined substantial minimum requirements which one would expect to see as a matter of course, e.g., a requirement to show a solvency

degree at a minimum 20% (as was to be the case in later GSM tenders in Ireland). Furthermore the RFP did not institute a procedure concerning possible rejection of applications at this phase of the evaluation in case of non-fulfilment of measurable minimum requirements".

What I am suggesting is that that would seem to indicate or at least would you agree with me that that would seem to indicate that there was no minimum substantive requirements, if you follow me, as opposed to merely formal or procedural requirements?

A. That certainly is what the text is saying, it appears at first glance. I am not so sure that I would accept that there was what could be described as standard European practice at that time.

Q. I see.

A. I am not so sure that the fact that later Irish competitions run by Andersens, where it may well be that the decision was completely outsourced was done in more close alignment with the Andersen methodology.

I don't know whether that means anything in terms of what conclusions can be drawn about this discussion at this time or later.

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But please bear in mind that Andersens devised the evaluation model. And while this document is written

seven years after the event, I don't recall the model doesn't show that they had a specific approach of this kind, and if they had, they could have put it into play at that time.

Q. I see. I understand him to say that they couldn't because they came along too late. Now, I am not criticising I am not necessarily in any way running with these sort of, if you like, implied criticisms; I am only interested in whether there was in fact a minimum substantive threshold requirement. And I understand him to be saying, A, that there wasn't, but B, that he couldn't have introduced it at that stage because he had come along too late.

A. I don't believe I'd accept the latter, given that after he did come along, he had significant input into the memorandum in response to questions, and his company drew up the subsequent memorandum which guided applicants as to their approach to the structuring of their application and so on. So if he wanted to do it, I don't think it would have been ruled out by the framework of the competition at that time.

Q. I see. Leaving aside whether he wanted to do it, the fact is it was discussed, and we know that an opportunity did arise, I think when responding to questions on financial capability, and it certainly wasn't taken then, isn't that right, to stipulate a minimum substantive threshold requirement?

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A. No.

Q. I take your point that we'll obviously have to discuss it with other people as well to see what the overall picture was.

Now, to return to the questions and answers. I think we were at page 37, but I want to pass on to page 38 and to Question 50, which I think seems to be the next obvious place to move to.

Question 50 requests you to respond to a query concerning your understanding of the following:

Firstly, the precise status of the data comprised in the tables of the quantitative evaluation dated 10th September, 1995.

And you say "I cannot find tables of 10th September 1995 in the documents furnished to me by the Tribunal.

If these are indicated to me, I would be happy to consider them. It became clear at a relatively early stage that the quantitative evaluation on its own was not sufficiently reliable to form a basis for selecting a winner. It was the outcome of a number-crunching exercise carried out by AIM based on the mandatory tables and presumably using their preparatory software. That exercise demonstrated the extent to which there were flaws with the information, making it incomparable in some respects."

You were then asked for the status of the rankings

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resulting from the qualitative evaluation

quantitative evaluation. This was in fact a different

ranking to the ultimate ranking, although I think it

contained the same three people, isn't that right, the

same three entities?

A. I think it was put up in the Opening Statement; I think that's right.

Q. At one point another entity wanted into the

quantitative, but during the several, if you like,

evolutions of the quantitative evaluation, it was the

same three entities, although in different positions.

The quantitative evaluation became no more than an

informing base from which to go forward with the

qualitative evaluation. There is a telling sentence

at page 5 of the volume of appendices to the final

report, which I quote, and you quote: "Having

realised this, the evaluator decided that the

foundation for a second quantitative evaluation had

'withered away'. The immediately following sentences

and the further information referenced therein also

contribute to understanding the relevant status of the

quantitative and qualitative evaluations."

Next you were asked about the manner in which the

qualitative evaluation was applied to the data

comprised in the tables to arrive at the final ranking in the evaluation report.

And you say: "The quantitative data was present in

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tables, graphs, and figures rather than marks or grades. I have to assume that the various sub-groups used and discussed the information as they saw fit.

For example, I remember in discussing tariffs having detailed discussions about the problems of carrying out the comparative evaluation at different points in time and asking AMI to help us with further analysis."

I understand your answer to mean, as I think you indicated to me yesterday, in the qualitative evaluation, a lot of numbers were still used and a lot of measurable comparisons between applications were still used, but judged qualitatively as opposed to purely by an arithmetical calculation?

A. I think in the round that's correct, yeah.

Q. Question 51: You were asked for "Full details of budgetary/remuneration issues which arose with Andersen Consulting from the date of their appointment to the 16th May, 1996, being the date of issue of the licence, including in each instance the manner in which such issue was resolved and the extent to which such resolution impinged on the evaluation process directly or indirectly."

And the answer is "Fintan Towey and I believed that we had a fixed price agreement with AMI. As we got into the evaluation, Michael Andersen gradually introduced the topic that the fee was not adequate to cover his expenses and that he would be unable to complete the job thoroughly. I expect that Fintan Towey can

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clarify this in greater detail than I can since he led the interface. I believe that Mr. Loughrey, as accounting officer for the Department, and some of the key members of the Project Group were aware of the dispute, but it was dealt with outside the Project Group itself. My recollection is that the discussions we had with Mr. Andersen personally were mostly, if not exclusively, after normal working hours. We took legal advice as to where we stood, and at one stage we considered the option of terminating the contract.

Our legal advice indicated that there was sufficient doubt in key areas to give AMI a negotiating position.

In the event, we negotiated a revised figure. Rather than have the two of us do the same research, I am assuming Fintan Towey will be able to give you dates, etc. My recollection is that there was only one episode. It left a sour taste with me personally and made for difficult interpersonal relationships for a short period during the evaluation, but I am quite

confident that the evaluation was carried out in

accordance with the original plan."

Now, that is a reference to an aspect of the

evaluation which, when we come to the chronological

survey, will become clearer. And I think you have

been provided with Mr. Andersen's January 2002

memorandum in which he goes through it in detail, and

I don't expect you to know any more because, as you

say, the dealings were mainly with Fintan Towey,

unless you want to add something at this point.

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A. When I say the dealings were mainly with Fintan Towey.

I did attend the discussions. I suppose what I'd like

to add is that the original Andersen tender was based

on their estimation of the number of hours required

for different tasks, the number of man-days required

for different tasks, and billing rates for the

individuals concerned. And the Civil Service

generally would not enter into open-ended contracts of

that nature. So we sought, in coming to a contractual

understanding with Mr. Andersen, to work out if he did

all these things and it took that much time, how much

would it cost, and then we negotiated what we believed

to be a fixed price. And then the question of him

coming looking for further resources later on is as

described.

Q. Right. I don't want to get too bogged down in it at this stage; just clarify this for me. The original tender process identified Andersen, I think, as number 2 in terms of price, but in fact there was a huge gap between him and the next man up the scale?

A. Correct.

Q. But did he have a fixed price at that stage?

A. The tender as it came in did not have a fixed price.

It was based on what I think may have been described as their standard practice, which was to give an indication of the number of days of particular individuals and the tasks they would be doing and their billing rates.

Q. I see.

A. And our procurement practices would generally

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discourage us from entering into a contract of that type, so we negotiated a conversion of that into a figure, and of course then there was the usual VAT and travelling expenses and so on.

Q. I am just trying to identify what the procurement process achieved. I had the impression that it enabled you to compare one man's fixed price with another man's fixed price, but what it did do, you are now telling me, is it simply one set of figures which would, on the basis of a number of assumptions, come

out at less than another set of figures put forward

A. But the difference is on a huge scale.

Q. I appreciate that.

A. The one that we described as the better-quality tender was based on, I believe, a fixed price up to a maximum of either three or four tenders and an additional amount, significant amount per tender after that, plus a percentage for the licence fee. And we had particularly considered the idea of the licence fee inappropriate, given our outlook in the competition.

CHAIRMAN: You seem to paint a picture with some similarity to having a builder on-site, doing an extension to your home; extra is charged. In theory, it's all very well to consider dismissing him, but you obviously had time constraints.

A. That's right.

Q. MR. HEALY: You were asked about "the date of the meeting attended by yourself and Mr. Fintan Towey in

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Copenhagen, and representatives of Andersen Consulting at which the results of the evaluation were consolidated, and the ranking emerged which ultimately became the ranking in the evaluation report together with the names of all persons present."

You have already referred to this meeting, and you say in answer: "There were two significant meetings in

Copenhagen. On the 19th and 20th September 1995, Mr. Towey, Ms Nic Lochlainn and I attended in AMI for a meeting which lasted the full two days. Its structures indicate in Tribunal Document 000279. It met in formats related to different parts of the evaluation which were constituted differently for different parts and with people contributing in respect of their own expertise. I think Billy Riordan was also present, but my records do not confirm that. My expense records show that I was in Copenhagen on the 28th September, but this was a trip combined with a council working group in Brussels, so I am not sure whether the meeting in Copenhagen was one day or somewhat more. It was at this second meeting that the final consolidation took place and where the result started to emerge. I have no record of who attended on behalf of AMI, and I feel that some of participants in both meetings were only in for the bits that concerned their expertise. I am fairly certain that Michael Andersen was present throughout. Jon Bruel and Michael Thrane are the names that come immediately to mind, but Marius Jacobson may also have been there for

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a while."

Can you recall in what particular areas of expertise

Mr. Bruel, Mr. Thrane and Mr. Jacobsen were?

A. Mr. Bruel I am virtually certain was on the accounting side. Mr. Thrane, I can't say for sure.

Q. Was he accounting as well, do you think?

A. I don't think so, but I am not sure.

Q. I see.

A. I mean, these people were identified, together with their qualifications, in the Andersen tender document, I am quite sure, so it's a matter of record. And I am not even certain that these are the people who were present, but they may have been present. There may have been others.

Q. I see. Was the Andersen side of the evaluation conducted in these sort of discretely formed groups, as well as the Civil Service side?

A. Yeah, I think it was, yes. Michael Andersen himself, who was in charge of the company, may have moved around between different groups, I am not quite sure. But all the evidence is, for example, that Jon Bruel and Billy Riordan had a lot of interchange on the financial aspects of both the business case and of the consortia members, and it seems to be that that was the level at which that particular part was done. And I am sure other witnesses John McQuaid will be able to tell you exactly who participated in the technical evaluation and so on.

Q. In the context of this methodology, do you know what

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the word "holistic" means?

A. I am not so sure what I mean, either "holistic" or "heuristic" mean in this context. I have wondered about that one.

Q. We can come back to it

A. The concept I have in mind is taking all aspects together, but I haven't gone for the dictionary definition.

Q. Question 53, you were asked for details of all advice given and recommendations made by Andersen Consulting regarding any further supplementary or confirmatory analysis which would be appropriate after the completion of the qualitative evaluation and the consolidation of the scores.

And your answer is as follows: "The meeting on the 28th September clearly had available to it the grading from other groups which had met independently and a number of supplementary analyses which had been completed by AMI since the meeting a week earlier. It is clear from the draft report dated October 3rd that work was continuing on the annexes dealing with supplementary analyses on tariffs, on interconnection, on the effects on the Irish economy at the very least. It is probably the case that AMI made us aware of the state of their thinking and analysis at the meeting, and I will bow to what AMI or Mr. Towey said about

that. It is clear that by the 9th October, AMI had still not completed some of this work but had developed a confidence level in the analysis to /RS

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suggest that it would not be necessary to revise the awarded marks."

You are then asked whether you kept Mr. Sean Fitzgerald, Mr. John Loughrey, the Minister, or any other person informed of the trends and/or ranking emerging from the evaluation process during the course of the process, and if so, the identities of all persons whom you so informed and the precise information which you relayed.

And this is your answer: "It is difficult to be precise in an area where no records whatsoever exist.

I was on annual leave at the closing date for the receipt of applications. I recall that a couple of weeks after I came back, the Minister asked me if I was satisfied that we would get a good operator out of the applications. I remember telling him that I had read them all, even the bits I did not fully understand, and I was confident that the better of them would be very good licensees and that my preliminary assessment was that some were weakish. At a later stage, which I cannot date, I remember using the analogy to Minister Lowry that if you had six

candidates for a job and only one job, that as you considered their merits, they almost inevitably broke down into those for serious consideration and those not, and sometimes some in between. And in this case I could see either a 3:3 or a 2:2:2 split. I don't think I named names at that stage.

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"Closer to the end game, a report of a Project Group meeting of the 9th October records me as telling the meeting that I had informed the Minister of the ranking of the top two applicants. I think, but have no way of confirming, that what I told the Minister was that two applications stood out from the rest and we were still working on separating them. I believe I named the two at that point. I want to emphasise that in all my interactions with Minister Lowry, he was at pains to show me that he understood the sensitive nature of the process and the need for the outcome to be robust and defensible, and at no time did he show any interest in preferring one application over another. Clearly my relationship with both Mr. Fitzgerald and Mr. Loughrey was more informal and more open. I kept them advised in a general way from time to time as to how the process was progressing. I do not know at this stage whether and at what stage I named names, but again it was clear that there was no

interest in their part other than seeing the process

finish on time.

"I cannot recall ever having had occasion to discuss

the project with people outside the Project Group

other than the three just mentioned."

When you had your, I think, first described contact

with the Minister as you have set out in that answer,

you say it occurred sometime after you came back from

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holiday, and I think you have already told us you were

on holiday at the closing date?

A. That's right.

Q. So does that mean the closing date was 4th August,

does that mean you spoke to the Minister in August, or

do you think it was in September? In other words, did

you take your holidays in August, or did you take them

in July?

A. I generally take all of the month of August, but I

don't know whether I did that year, but it's something

that can be checked. The records exist. But what I

do recall is that I was some time back and had time to

look at every volume of every application before that

conversation took place.

Q. And who was present during the conversation, apart

from yourself and the Minister?

A. I don't know.

Q. Can you recall whether it was a semi-formal conversation, in the sense that the Minister might have asked you to come to the secretary's office to discuss the

A. My feeling is it was quite informal.

Q. Well, was it something then that occurred casually?

There was nothing prearranged; you weren't giving a progress report to anyone?

A. No, I have no consciousness of making an appointment to see the Minister, if you put it like that. I don't recall the circumstances in which the conversation took place. I have a feeling it was more likely to be informal than formal. It may well have been tagged

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onto something else that I was dealing with the Minister with; I have no idea.

Q. The next conversation you had with the Minister, you say, occurred at a later stage which you cannot date, but you do recall thinking that you told him that you saw a 3:3 split or a 2:2:2 split; so at that stage, I take it a certain amount of evaluation work had been done?

A. It must have been done, yes.

Q. So that must have been sometime towards the end of August, beginning of September, or even later than that?

A. I'd say probably later, but I don't know.

Q. You say you don't think that you named names at that stage?

A. You see, we were acutely conscious within the group of the sensitivity of what we were doing, and even in conversations among ourselves, we had to refer to these by their code names rather than by their names, in case anybody would overhear. So we were conscious that you know, what we were doing was sensitive and needed to be kept confidential. And I can't think of any reason why I would have named names. I mean, the Minister never showed any interest in I mean, he had a list who the applicants were, but I have no consciousness, never had, of the Minister being interested in knowing what was happening in any particular application or having any interest in any application.

Q. You say he did have a list of who the applicants were;

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he knew

A. I think we published a list.

Q. I think you did at an earlier point, yeah, but he wouldn't have known what their code numbers were?

A. I don't believe he would, no.

Q. The Minister, as we know from Mr. Loughrey in any case, had had the confidentiality protocol brought to

his attention, if only to explain, I suppose, what or by what rules the Project Group were going to govern themselves; but you presumably had no reason to believe other than that your conversations with the Minister were totally confidential?

A. Every Minister is treated by the Civil Service with a presumption of integrity, if I can put it like that.

Q. And you had no reason to think that the Minister's interest was anything other than a genuine administrative interest in how the process was going?

A. That's correct.

Q. You say that closer to the end game, as you put it, a report of a Project Group meeting of the 9th October records you as telling the meeting that you had informed the Minister of the arranging of the top two applicants. And you say you think, but you have no way of confirming, that what you told the Minister was that two applications stood out from the rest and that "we were still working on separating them", and you believed that you named the two at that stage. That would have been A5 and A3, Digifone and Persona?

A. Yeah.

Q. The Project Group minutes record you as having
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informed the group that you had told the Minister the ranking of the top two. So you presumably must have

done that prior to the meeting of the Project Group on the 9th October?

A. Yeah, I am aware that the word "ranking" is used in a number of different texts around that time. I am not quite sure how to interpret it. I mean, I am not trying to construct a scenario

Q. I am just trying to get the date for it, that's all.

A. Well, we have to assume that it was after the meeting in Copenhagen. And we have to assume it was before the 9th.

Q. Yes.

A. Beyond that

Q. Seems reasonable

A. Beyond that, I can't pin it down.

Q. And again, you had no reason to think at that stage other than that conversation was going to be kept entirely between you and the Minister?

A. That's true. And I suppose, assuming the conversation took place, and I have to take it some conversation took place

Q. Yes.

A. It would have been necessary for me to put a health warning on any information, because there was still some supplementary checking going on in any case.

Q. Yes. I think you said that what you told the Minister was that "two applications stood out from the rest and that we were still working on separating them."

A. Mmm.

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Q. So presumably you would have told him that there were two people, 1 and 2 in rank, A3 and A5, but they are close, and we are trying to divide them to see where is

A. Well, there is at least some further checking going on.

Q. Right. It's just you use the words "separating them", which suggests that you must have indicated that the two were close.

A. I presume I must have done, yeah. While I would regard myself as a good drafter of English, I don't have a lawyer's approach to it, let's say.

Q. Well, from looking at the documents that I have seen resulting from your authorship, it seems to me that you were careful about the words you used. And I presume that in using the word "separating", it's what anybody would use to say where he had two people that were close together in a particular race or a contest that you had to work out who was the best, and that would require more work?

A. But at the same time, given that I was at the meeting in Copenhagen and given that I knew there was space between the two applicants, it may well be that it was in the context of a health warning or the further

supplementary work going on that I was trying to put across.

CHAIRMAN: I think the probability, Mr. Brennan, without tying you completely to it, is that it was at this third meeting with the Minister refers to the /RS

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process, that that was the first time that you are pretty sure that you specifically named the two consortia that were at the top.

A. I think that's the case, yeah.

Q. MR. HEALY: With regard to the other two meetings, and again with a view to trying to date them, can you recall whether either of those two, the two, the second and the third meeting, were the result of any sort of formal or even informal but nevertheless structured progress report to the Minister as to how the process was going?

A. I can't recall.

Q. When you expected to finish?

A. I don't like coming here and saying I can't recall, but I can't recall.

Q. Can you remember, during that time, whether you had much contact with the Minister about this or other matters?

A. I don't know. I'd have to do some considerable checking to see what else I was actually engaged in at

that time. I think I said already that the GSM project, while a very significant part of my work wasn't my only work load, so and I don't know, in the absence of diaries which I don't have, I don't know how I can even piece together, but it would be possible for somebody forensically looking through the Department's files in the telecoms area to figure out what I was involved in at that time, and it's work that could be done.

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Q. Were you involved in anything else as big as this at the time?

A. Again, it's a question of having to do some research, because in the time-frame of '94, '5, '6, I was involved in a number of big things. I know, for example, that we were having a detailed review of the state of Telecom Eireann to face competition. And I went into Telecom Eireann for a significant perhaps three or four days of intensive probing into the company. But I couldn't tell you right now whether that happened in July, August, September, October or later. I just don't know. But that kind of information could be discovered from the Department's files by somebody in the telecommunications.

Q. Would that work have entailed contact with the Minister?

A. I'd say that work was mainly under the stewardship of Mr. Loughrey and Mr. Fitzgerald. I doubt if the Minister would have been involved, and again I'd emphasise, I don't know the exact time-frame. I am just giving you an indication that there were other projects around the place and that I was involved in some of them.

Q. You say that you had more informal, more open relationship with Mr. Fitzgerald and Mr. Loughrey. Do I take it that you are distinguishing that from your perhaps slightly more formal relationship with the Minister, and that you therefore would be conveying more information to them on a progress-report basis as you went along?

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A. In relation to things in general, it's clear, for example I think I mentioned this yesterday that the Project Group meetings were routinely copied to Mr. Fitzgerald, except one or two that we regarded as too sensitive to go outside the group.

Q. Mm-hmm. What were those two; can you remember? Can you find out what two? I can't remember now from checking the CCing on them, but can you remember what two were regarded as the most sensitive?

A. I can't remember today, but I know that the CC list in some of the ones in the middle period specifically

don't have Mr. Fitzgerald included; it's just CC

participants.

Q. And what do you say is the middle period? Is that around the time of the presentation?

A. I am not sure, but I mean, it's on the face of the reports.

Q. You say that "The Minister was at pains to show you that he understood the sensitive nature of the process". Can you remember what he might have said, or even the gist of what he might have said to demonstrate to you that he understood the sensitive nature of the process?

A. He certainly was aware that this was one of the most important decisions that would be taken in the period of this Government in office. He was very much aware that it was necessary to have consultants to guarantee the objectivity of the process, and several times early on, at the design phase, he was at pains to say to me, "Make sure that whatever the result is, that it /RS

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stands up and that nobody is going to be knocking it after the event".

Q. You say that he understood the need for the outcome to be robust and defensible. Is that what you are referring to when you say that he didn't want the competition to be capable of being knocked down?

A. Absolutely. My abiding impression is that I had a Minister who wanted this to come out with the right answer and on time, and that he had he showed no interest whatsoever in any application or in preferring any application. I can't recall a single time at any time that I had the impression that he, say, had a favourite or that he had an interest in the result other than having a result which and he was keenly interested in having competition in the sector. Now, whether that was his own starting point or whether it was coming from Government or whether it was buying into our agenda, I don't know.

Q. You are aware from the documents that you have been given that a number of individuals have indicated to the Tribunal that they had conversations with the Minister in which he mentioned the process. You are aware of that?

A. Not particularly. I haven't gone through other people's statements to an extent that I have a good that kind of a detailed understanding. I have dipped into them in relation to particular issues to get insights into particular issues, but I haven't taken out other statements and read them, for example, so I don't have the familiarity you are suggesting.

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Q. Are you aware that Mr. Anthony J. F. O'Reilly has told

the Tribunal that he had a conversation with the

Minister in which

A. I saw that in the Opening Statement. I think it may have been mentioned to me in private by the Tribunal lawyers.

Q. Where he mentioned that he met the Minister at the opening of the Galmoy mine and the Minister was able to tell him that his fellas, I think as he put it, his team hadn't done too well at the presentations?

A. The only thing I am aware of is in the Opening Statement and in private conversations I had with the Tribunal that that has been stated. I have no way of knowing whether it happened, how it could have happened, and I don't particularly want to speculate in relation to it.

Q. I appreciate that. But you must understand that if it did happen, it meant the Minister must have got access to information. There was no way the Minister could have described how somebody got on at a presentation, presumably, unless you got that information either from the Department side, or even

A. From the other side.

Q. or even from the other side; isn't that right?

A. If he had the information, he had to get it from somewhere. There could have been a chance remark from anybody in the team, or he could have met the people going in or out of the building, he could have known

them. I have no idea. I knew that this was something of interest to the Tribunal. I can't help you

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with I mean, what I can say is I have no recollection of me giving him a basis for doing that.

And I can't imagine, in a situation where we were having a series of six three-hour meetings in a compressed time-frame, that anybody could go up and down the stairs telling the Minister how each one was doing. It just doesn't it's not credible, really.

Q. Which is not credible?

A. It's not credible that in between intensive meetings, over a period of days, that people were running up and down to the Minister

Q. I don't know if anybody is suggesting that. I think all that is being suggested at the moment is that the Minister, if he made that comment, must have had information at least about that particular presentation. I don't know, and I have no evidence or no information suggesting that this was the case with other presentations. Have you heard any suggestion that the Minister had access to information about other presentations?

A. No.

Q. You are aware that information has also been conveyed to the Tribunal that the Minister had a conversation

with Mr. Mark FitzGerald about how the evaluation was proceeding, and again that would seem to suggest that the Minister must have had some access to information?

A. That's not the part of Mr. FitzGerald's evidence that stands out in my mind right now. It's something I'd like to have another look at.

Q. But from his dealings with you, the Minister led you

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to believe, at all times, that he was fully behind you in terms of maintaining the confidentiality of the process, and he was fully as far as you were concerned, the impression he gave you was that he understood the sensitivity of the process and how important it was, therefore, presumably, to keep it all within the close quarters of the Project Group?

A. Yes.

Q. Can you remember if anyone was present during either the second or third of the three conversations you have mentioned other than yourself and the Minister?

A. I can't remember.

Q. Do you remember if a programme manager was present?

A. I really don't know. I mean, as I said earlier, it could be a casual remark at the end of another discussion or something. I really don't know.

Q. Was all of this information volunteered by you on each occasion of your discussions with the Minister, or was

it prompted by some question from him?

A. Well, in relation to the first one, I mean, what I have said in my narrative is that he asked me, did it look like we were going to get a good operator? So obviously he prompted the conversation. In the next one, I suspect he started the conversation, but I am not sure.

Q. Yes, but what type of question would he have been asking you to which the answer would be, "Well, we have six applications, and some of them are good and some of them are not so good, and I think it's a 3:3 or a 2:2:2 split"?

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A. Possibly around "Is the evaluation going well, and will it finish on time?" I don't know.

Q. What do you think would have prompted the third answer, where you told the Minister that you actually had a 1 and a 2 but that you were still working on separating them? What sort of queries from him would have prompted that?

A. I can't recall at this stage.

Q. From your conversations with the Minister when he was asking you those questions, did you feel that he was fully entitled to all of the information you were giving him?

A. I think I felt when the result was becoming clear that

he was entitled to have some access to it. But I mean, he didn't at any stage ask for details; he didn't I mean, he wasn't asking why was anybody winning or what was causing the differences. There was no detailed engagement of that kind.

Q. But surely if he was entitled to some information in one sense, in principle, wasn't he entitled to all information?

A. Yeah, he was the Minister. I just don't have a recall of him constantly looking for information. I don't think I am fairly certain that was not the case.

Q. But he did want, on this particular occasion, to know who the identities of the first two people were in the ranking?

A. I wouldn't even say that's for sure. It may be that I volunteered that part of the information. I mean what I am trying to get across is I did not

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have a Minister who was demonstrating to me that he was keenly interested in, more or less, in anybody's name or anybody's application.

Q. I appreciate that, and I mean, you have made that absolutely clear, that the impression you had all the time was that he wasn't interested. But nevertheless, you were also presumably keenly concerned to, I suppose, unless the Minister wanted detailed

information, to keep things as tight as possible, as one naturally would be in relation to a process like this. I am just wondering what would have prompted you to go on to give names as opposed to codes.

A. Maybe the fact that we were getting close to the end.

Q. That could also have been the most sensitive time, couldn't it?

A. When the marks were done in whatever it was, the 29th, at that stage there was clear there was a clear winner unless there was an accident of supplementary analysis finding something major. So to an extent

Q. Well, you thought there was a clear winner, yourself and Fintan Towey, but what about the rest of the team?

A. Well, yeah, certainly we were pulling together the results of some that we did, some that they did, and coming up with the tables that we discussed yesterday. But I mean, there was a significant difference between the first and the second. You don't believe it was significant; I think it's quite significant. There was a supplementary analysis going on which could have created a need to revisit it, but the chances of that happening were slim.

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I said earlier this morning that if I briefed the Minister, I would have put that health warning around what I was telling him in any event.

Q. I see. In your discussions with Mr. Fitzgerald and Mr. Loughrey, and I think you are going to be referring later on to more specific discussions, but do you remember communicating their views back to your Project Group, the way you communicated, do you remember, some of the Minister's views?

A. I think that whenever Mr. Fitzgerald became aware of the emerging winner, he expressed some concerns, and this links into something else. There was a discussion about bankability at the same time and so on; I think Mr. Fitzgerald was concerned about those issues because he knew more about the state of the business of Esat Telecom, in particular, than I would have had reason to know. And he raised the issue of if that's the way it's going, make sure, you know, make sure of the sort of bankability question.

Q. If you go to Question 55: "Mr. Brennan's knowledge, direct or indirect, for the purpose of which narrative summaries of the applications of the six competition entrants were prepared in September of 1995". This is a reference to a number of sort of brief summaries of what the applications entailed.

And your answer is "I have no idea why the narrative summaries were prepared or by whom. I do not recall their playing any part whatsoever in the evaluation

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process. There may be a simple explanation that they were prepared on a "nice to have" basis at executive level in the division. Perhaps one of the other interlocutors can throw some further light on it".

You were asked for the identity of all persons to whom access was given of the draft evaluation report dated 3rd October 1995, between the 4th October 1995, when the draft was received by the Department, and the 9th October 1995, when the report was discussed at a meeting of the GSM Project Group.

And you say: "It would appear from the files that Mr. Sean Fitzgerald had sight of the draft evaluation report, Given the existence on file of an undated table of numbers in Mr. Fitzgerald's handwriting.

There is no evidence from the files that any other persons outside of the Project Group had access to the draft report between those dates. This is also referred to in my response to Question Number 53.

You were asked in Question 57 for details of all meetings and discussions which, to Mr. Brennan's knowledge, direct or indirect, of the officials took place between officials or between officials and other persons or any other discussions regarding the content of the first draft evaluation report of the presentation of the material comprised in the report or any other aspect of the report between the 4th October, when the report was received, and the 9th

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October, when the meeting took place.

And your answer is: "I would expect that some bilateral contact took place with officials on the Project Group about the first draft evaluation report but cannot recall specific details".

You were asked for details of your view regarding the draft evaluation report together with details of your understanding of the contents of the report, and in particular with reference to a specific number of matters to which I'll refer in a moment.

You say: "It is clear that the communication from AMI to myself and Fintan Towey dated 21st September"

sorry, "It is clear from the communication from AMI to myself and Fintan Towey dated 21st September that at that stage, AMI had not commenced drafting the report but intended to do so between then and the 3rd October. The 28th September meeting intervened also.

So the draft was a first cut by AMI at capturing the subject matter of the entire process as a basis for finalising the project."

You were asked about the manner in which the issue of financial capability had been addressed, and in particular the financial capability of Esat Digifone, Persona and Irish Mobicall.

And your answer is: "The primary role in relation to

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the issue of financial capability was conducted by the sub-group dealing with financial aspects in which the State was primarily represented by Billy Riordan.

Clearly, like all other sub-groups, their work was reported to the Project Group as appropriate. It was clear from very early on that AMI had a 'deep pockets' approach to the financial standing of consortia, by which they meant that at least one player in a consortium had the financial strength to run the project on their own. In the words of Volume 2 of the report, page 44, the evaluators had therefore formed the view that subject to at least one of the principals having sufficient financial strength at this stage to ensure completion of the project, a potential financial weakness of one consortium member should not have a negative impact on the ranking of applications.

"It is clear that in the marking of the financial aspects, that the relative or comparable financial aspects of the different consortia were well taken into account in the gradings given. The approach and any concerns of the sub-group were clearly mentioned in the main Project Group probably on more than one occasion, but in the end, their professional advice was accepted.

"While the financial position of consortia members was clearly considered, this was only one part of the financial capability assessment. It is clear that the

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business plans were examined from the points of view of their internal consistency and their profitability, etc."

When you mention the "deep pockets" approach, that is a reference, I think, to that brings us back to a suggestion AMI made in response to the question on financial capability; isn't that right?

A. That's the first reference to it.

Q. Yes

A. But I mean, it came up in the Project Group a number of times.

Q. Of course, yes. And was it from Andersen that this proposition came that

A. Yes

Q. that if one principal had sufficient strength to ensure completion of the project, a potential financial weakness of another consortia member should not have a negative effect on the ranking?

A. That was specifically an Andersen approach.

Q. Did you have any view of it?

A. I think we accepted it as a valid approach, and we were probably guided by Billy Riordan. I am not sure;

I think Donal Buggy wasn't on board at that stage, I am not sure, but we would have obviously taken the professional advice of our own qualified people into account also.

Q. What was the advice of your own qualified people on this notion of deep pockets?

A. I don't know specifically, but I don't remember any

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objections being raised to it.

Q. But what views did they express on it? How did it arise that they were asked to form a view and simply come back with "I have no objections"? How did this arise, and when did it arise? It's not documented, as far as I can see.

A. I don't have a clear recall of that today. I mean, there certainly was a discussion in the Project Group of the Andersen's advice that a 'deep pockets' approach was an appropriate way to go. It was discussed. I don't know whether it's in the record or not, and it's another one of these cases where other witnesses will have to be heard on the subject as well.

Q. But it does seem are you sure your recollection is correct? Because it does seem like a fairly significant approach to how you'd deal with this question of financial capability, and it wasn't, as

far as I am aware, put into the RFP, so that applicants wouldn't have been aware that this was how it was going to be approached. Wouldn't I be right in that?

A. Yeah, it certainly wasn't put into the RFP, but I mean, all applicants were in the same state of knowledge.

CHAIRMAN: It obviously could be put to a state of absurdity, couldn't it Mr. Brennan? I mean, if you had perhaps a hypothetical consortium that had a 40% foreign stakeholder who had all the expertise and all

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the money, it would be ludicrous to suggest that all that consortium needed was two Irish bankrupts to make up the team and they'd have won. That would plainly be ludicrous.

A. Or indeed you had a County Council and a bank with no telecoms experience; they wouldn't pass technical capability.

Q. MR. HEALY: But I think what the Sole Member is saying is that if you had a giant like Telenor, they could have any anyone else could piggyback on them, if you took this proposition to its ultimate conclusion.

A. That's I suppose it's a bit hypothetical. I mean, the judgement was made was in relation to the consortia we were dealing with.

Q. Well, the judgement was made, presumably, at an early stage, before you knew what consortia you were dealing with. Otherwise

A. The discussion of deep pockets took place before we had applications.

Q. So you had no consortia at that stage?

A. And in the sense that a decision was made which, for the moment, you are not fully convinced of, that all applications had the minimum standard of having the financial and technical capability, it's reasonable to infer that Andersens took account of a "deep pockets" approach in coming to that conclusion, but I don't remember them presenting it in that way or in that level of detail.

Q. Yes, I appreciate that, and I appreciate what you are
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saying. But you recall that the Department response was in fact to eschew the "deep pockets" principle in responding to queries on financial capability. And the Department didn't use that principle in responding; they responded in a totally not a totally, but in a significantly different way, in that that whole principle doesn't seem to have been discussed at that stage by anyone in the Department, because presumably, if it had been, they'd have said "Well, we'll give the 'deep pockets' explanation",

wouldn't they, surely?

A. I am not so sure that it was necessary or that it was even considered in that way. I mean, we discussed yesterday how one draft went out versus another draft went out. And it was clearly an iterative exercise, and I could explain why some of the Andersen material wasn't included, because it would anticipate material that applicants didn't have. I don't know why this particular bit wasn't included or what consideration was given to it.

Q. The departmental response referred to the financial strength of consortia members. It doesn't refer to the financial strength of consortia members subject to one member having sufficient financial strength to carry the project in the event of the others not being able to do so.

A. Yeah, that's correct.

Q. And isn't that the type of wording, or perhaps something slightly more elegant than that, you'd need to convey that message to applicants?

/RS

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A. It's kind of difficult to understand where you are going with this line of questioning. It's for to you determine

Q. I am only trying to find out how the contest was run. I don't have any case to make, Mr. Brennan. This is

an inquiry. I am not going anywhere

A. I don't believe for today I can give you any more help on the subject.

Q. It might be of assistance to the Tribunal if you could identify maybe whose writing is on the departmental statement of financial capability. If I just hand it to you, we can ask the other people as well.

(Document handed to witness).

A. Undoubtedly

Q. Book 41, Divider 58.

A. Undoubtedly Fintan Towey.

Q. The next query, Query 58B, refers to other aspects, and we discussed that yesterday and your response to that.

Query C refers to the qualifications expressed by Andersen Consulting regarding the ranking of the top three entrants.

And you say in response: "This is a very wide question, not susceptible, as I currently understand it, to a meaningful brief response. It may help if I understood which particular qualifications are being probed at this point. It seems to me that several of the annexes to the draft report raise numerous

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questions and issues that arise from the comparative evaluation of the applications, many of which could be

said to amount to qualifications.

"To the extent that this question may focus exclusively on the supplementary analysis of financial risks, my impression is that the accountants considered the risks to be manageable, and the Project Group accepted this advice."

Well, to the extent to which there may be some confusion surrounding the question, so that the next time we come to it you'll understand what the Tribunal is referring to, what is being referred to here what the Tribunal has called a qualification introduced by Mr. Andersen in the final part of his recommendation. Now, I think you may or other people may quibble with the use of the word "qualification"; I have no problem with that. I think Mr. Andersen himself describes it as a reservation where he suggests that the winner, and I think also the number 2 ranked applicant, were sufficiently well qualified to be granted the licence but that they, in the case of the winner, had significant financial problems which would have to be addressed and which he believed could be addressed by appropriate licence conditions.

A. Oh, okay.

Q. So in future you'll understand, that is the qualification that's being referred to, specifically

/RS

that one.

A. Thanks.

Q. The next sub query, sub query D, refers to the overall presentation of material. And you say: "It is clear that the 12th meeting of the Project Group on the 9th October was an occasion where various members of the Project Group had an opportunity to offer their comments on the first draft of the report and that the comments were fairly substantive and substantial in relation to content and presentation. It is also clear that at that stage some parts of the draft report were still missing. As regards overall presentation, it is clear here and there that the fact that AMI were operating outside their native language led to cumbersome bits of drafting which we did our best to assist them with. I have no doubt that the final report was the better document as a result of this iterative process. The draft of the 3rd October was examined in detail by the Project Group. The copy of the draft furnished to me by the Tribunal contains many manuscript annotations in my handwriting. I am reasonably confident that I gave this draft to Mr. Towey, who coordinated the various inputs. The minutes of the Project Group meetings of the 9th October and the 23rd October 1995 cover the issue of textual amendments."

In that statement you say that it was clear from the

12th meeting, by which I take it the minutes of the
12th meeting of the Project Group on the 9th, was an
/RS

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occasion when various members of the group had an
opportunity to offer their comments on the first draft
of the report. Was the report in fact handed around
at the meeting at that point?

A. Almost certainly.

Q. Do you not recall from the Opening Statement Mr.
Coughlan referred to a note made by Mr. Sean McMahon
where he recorded that they had very limited time
within which to examine the report and that in fact, I
think they had got it just sometime prior to the
meeting?

A. I can't reference that. I mean, if Mr. McMahon said
it, it's in evidence. I don't know whether in fact it
was the case or not. It may well be that close search
of the documentation will give some clues; I am not
sure.

Q. I'll just try and refer you to the precise note. 42,
122 is the reference, and I am going to get some other
copies now. I'll give you, rather than identify it in
a book.

(Document handed to witness.)

Can you see that note of the 9/10/1995? I don't know
whether you recognise it as Mr. McMahon's handwriting,

but I understand that it's from one of his notebooks.

A. Okay.

Q. You see it says:

"We have Draft Number 1 report of AMI which recommends A5, A3, A1 in that order. (They are not easy to read)" that must be the understatement of the year I suppose.

/RS

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"Only limited number of copies. We have (T & RR) not had a chance to read in full". Do you see that note?

A. I do.

Q. That's the note I am referring to. And that brings me back to the fact that I think that this report was received in the Department on the 4th October, wasn't it?

A. Yes.

Q. But do I understand that although received on the 4th October, it wasn't actually handed around to all of the various Project Group members until much, much later?

A. I don't think you can draw that conclusion from this note. I mean, there is a difference between having something and having time to read it, because Mr. McMahon equally wasn't solely engaged in this project, so it's at least possible that he had the report for a

number of days, just couldn't find the time to read

it.

But I mean, I can't help you with what Mr. McMahon did

or didn't do. The records may show how many copies

were received and what was done with them. I don't

actually know whether they do so show or not.

Q. Was there a system for making the reports and the

relevant other documentation, including the

supplementary analysis, available to project team

members as soon as they came to hand?

A. Well, reports that were received in multiple copies

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from AMI and I don't know whether this one was at

that time or not; I suspect it was were actually

monogrammed on every page

Q. That's right

A. for the individuals concerned. And I have no

reason to think that the individuals didn't get their

monogrammed copies fairly quickly.

Q. Mr. McMahon in his report, or in his statement of

intended evidence to the Tribunal, at Leaf 4, Volume

33, Question 31, what Mr. McMahon says, when he is

asked the approximate date on which he was furnished a

copy of the first draft evaluation report, is "From a

perusal of the files and my notes, this would have

been on or about the 9th October 1995."

A. I mean, I can't answer that question. I don't even know what day of the week was the 9th and what day of the week was the 4th.

Q. The 9th was a Monday, I think.

A. I don't know whether Mr. McMahon may have been out of the office, perhaps in Brussels, perhaps somewhere else, and not have had time to open the envelope. I really can't account for it, but there was no conscious decision on my part or on the part of Maev Nic Lochlainn or Fintan Towey, whoever was the custodian of copies, to delay giving copies to any individual for any particular reason. I never worked like that.

I also, by the way, have a unique advantage on some of my colleagues, that I spend two hours on the train

/RS

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every day so I get time to read things.

Q. This is not an inquiry into CIE.

The point I would just ask you to bear in mind is that the formal minute of that meeting of the 9th October doesn't actually make it clear that some people involved all of one division, as far as we can see had not had an opportunity of really examining and digesting the report at all; and that is, I'd suggest, to some extent a criticism of the a valid criticism of the record, that it's impossible to see who's had

an opportunity of actually digesting what, so that the conclusions contained in the minutes could be relied on. Do you understand?

A. Yeah, but I mean, I am sure there is a lot of lack of detail in several meetings of the project team, in the sense that lots of meetings were very long meetings and lots of the reports are very short reports. And I don't know if it's fair to draw any conclusions from that state of affairs.

Q. Well, is it fair

A. Other than the conclusion that there might have been better records.

Q. Well, is it fair to draw any conclusion from the records, is my point, if the records that are being relied on to some degree, or the minutes, can we actually rely on the minutes as containing an accurate record if important matters like this are not included in the minutes? And if the answer is that we can't, I am happy to accept that.

/RS

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A. I don't know whether you can or not at this stage. It's something that may need further reflection. I should say, by the way, that because the meeting took place on the 9th doesn't mean that there was a cutoff of opportunity for people to further feed into the evolution of the report.

Q. At Question 59 you were asked for details of the analysis and investigations undertaken by the Project Group or by Andersen Management or by any other person in assessing the indicators of sensitivities and credibility as referred to in chapter 4 of the evaluation report.

And you say "I presume this question bears on what became in the event Chapter 5 of the evaluation report but was at Chapter 4 of the draft report. I am mentioning this because the essential difference between the two is that the second, third, and fourth paragraphs in the final report do not appear in the first draft and do not(sic) give an insight into the thinking. Even though the report of the Project Group on the 9th October does not explicitly say so, I assume with some confidence that this material was added as a result of the discussion in the Project Group."

A. In reading, you say "do not give an insight". The "not" isn't in my version.

Q. I am sorry.

CHAIRMAN: That's right.

/RS

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MR. HEALY: "Do give an insight into the thinking." I see.

Q. Question 60 details of all your discussions, if any,

with any members of the Project Group or departmental official regarding the contents or proposed contents of the draft or final reports.

Your answer is: "It is clear that the meeting of the 9th October was the main discussion of the draft report and that the meeting offered substantial comments on content and presentation. That apart, Fintan Towey and I had ongoing and open discussions with drafting grammatical and presentational issues. Mr. Towey was the main point of interface with AMI through these critical days. It would be unusual if I did not have some discussion also with Mr. Sean McMahan about some aspects of detail. My recollection is that all of this was designed towards improving presentation and not at all bearing directly on the evaluation or the result. I don't recall any conscious effort to make the report better support the result in the sense that the Project Group was, by that stage, anonymous. It is also clear that there were sections of the report not available for that meeting which would have required some degree of coordination by Mr. Towey with me and other key members of the Project Group. I don't recall any reason for discussion with departmental officials

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outside of the Project Group about the report. Having

said that, there is on file a table of numbers in the handwriting of Mr. Fitzgerald which is undated. This suggests that it is possible or even probable that I gave him a copy of the draft report at some stage around this time for an external second opinion. This would not be an unusual step for a civil servant to take at this stage at such an important piece of work.

The manuscript notes in the version of the draft report given to me by the Tribunal team are almost all, if not all in my own handwriting. "

What you are saying, I think, in that answer is that your recollection is that all of the post 9th October work on the first draft version of the report dated October 3rd was that it was designed towards improving presentation and not at all bearing directly on the evaluation or the result, and that you don't recall any conscious effort to make the report better support the result in the sense that as far as you were concerned, the view of the Project Group at that stage was unanimous?

A. Yes.

Q. That is not recorded, am I right in that, in the minutes of the Project Group

A. I thought there was a clear statement to the effect that there was general agreement as to the result but that the report needed further work.

Q. I'll put it on the overhead projector. It's not a

very long report, so I'll just read out the relevant

/RS

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parts. It's not a very long minute, sorry.

"Attendance, Mr. Brennan, Mr. Towey, Ms. O'Keeffe, Mr.

Billy Riordan, Mr. Michael Andersen, Jon Bruel, Mr.

Sean McMahon, Mr. Ed O'Callaghan, Mr. John McQuaid,

Mr. Aidan Ryan, Mr. Donal Buggy.

"Opening.

"The Chairman opened the meeting by stressing the

confidentiality of the evaluation report and

discussions re same. He also informed the group that

the Minister had been informed of the progress of the

evaluation procedure and of the ranking of the top two

applicants. The Minister is disposed towards

announcing the result of the competition quickly after

the finalisation of the evaluation report.

"Discussion of the evaluation report.

"The draft evaluation report put forward by AMI was

examined in detail. A range of suggestions in

relation" I suppose that should be "to the manner

of presentation of the results were put forward by the

group, and AMI undertook to incorporate these in the

second draft. The agreed amendments included:

"- Including in the body of the main report of the

proposed appendix in relation to the evaluation

methodology

/RS

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"- an expansion generally of the justification for the award of marks to the various indicators

"- The revision of the financial conformance appendix to a more explanatory format

"- Including of an executive summary and an annex explaining some of the terminology

"- Elaboration of the reasons as to why the quantitative analysis could not be presented as an output of the evaluation process".

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

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

Am I right that that doesn't contain

A. I am obviously confusing two different reports of the Project Group. I have a clear recollection that one of the reports of the Project Group does record that

/RS

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there was general agreement as to the conclusion but that the report needed further work. I assumed it was that one, but I haven't

Q. I see. In your response, which was presumably primarily based on your recollection, you nevertheless did say that you felt that the report was unanimous.

Is that because you had some impression that an attempt was made at this meeting to canvass the members of the Project Group to try to achieve unanimity?

A. I don't know whether it was at that meeting or the next meeting, but there certainly was an attempt to get unanimity, and I believe unanimity was achieved.

Q. I don't know if you recall from the Opening Statement that Mr. Coughlan referred to one of the copies of that minute which was circulated to the attending members of the Project Group. It was the copy that was circulated to Mr. McMahan, and in light of what you say in your answer and what you have just said now, I just want to draw your attention to a note Mr. McMahan made on that minute.

It's on book 43, Tab 148.

(Document handed to witness.)

If you go to page 2 of that document, you see a note at the bottom addressed to Mr. O' Callaghan. It's in Mr. McMahan's handwriting, and if you go firstly to the bottom of that manuscript note, you'll see the

date 1/11, presumably a reference to the 1st November.

/RS

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Do you see where Mr. McMahon says "It's probably too late to change this record, but our intervention at subsequent meetings made clear that

"1. We did not subscribe to unanimity at this meeting" referring to the meeting of the 9th October.

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

"3. The report, while it had probably highlighted the best 2 candidates, had a long way to go."

Can I just clarify that: Is he right, then, in thinking that there was no unanimity at that meeting?

A. He may well be. I notice, as you rightly drew attention, that this was a note written some two weeks after the event.

Q. Yes.

A. And while you put emphasis on "He did not subscribe to unanimity" at this meeting, you can infer that he did subscribe to unanimity at another meeting. That's reasonable to do so.

Q. Perhaps you could, and we'll come to the other meetings, yes. But could I suggest that it also indicates that he certainly was not of the view that there was a clear winner at that stage, and in fact

what he says, could I suggest, is much closer to what you told the Minister, that there were there was a /RS

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top two but that you'd some work to do in separating them.

A. I can see the link you are making, yes.

Q. And Query 61, you were asked for details of all matters discussed and raised at the Project Group meeting on the 9th October, including a number of items, once again.

And your answer is: "It is clear that the meetings on both the 9th and 23rd October were devoted to a very significant extent to the evaluation report. I think that the meeting on the 9th in particular went through the report in a fair degree of detail. The orientation was to get a report which was coherent, complete, clear, and an accurate reflection of the process. My recollection is that it was a full, free discussion".

You are asked for a statement in relation to the Minister's state of knowledge regarding the outcome of the competition, and you have already referred to that. And you go on to say "My recollection, however vague, is that I told the Minister in that time-frame that two applications stood apart from the remaining four, that the third one was slipping back, and I

probably named the two, and I believe I finished by saying that I was confident that with further work we could come up with a clear and unambiguous result.

The Minister was indifferent to the names but emphatic that the result should be unambiguous and clear-cut."

/RS

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You were then asked about statements made by you regarding the Minister's views of the draft evaluation report and/or the approach which should be adopted in the drafting of the final report, and in particular the Minister's view that the report should not undermine itself and/or that the project should be treated as bankable as recorded in the contemporaneous note of the meeting kept by Ms. Margaret O'Keeffe.

And in responding, you were asked to furnish a full account of the Minister's own statement of his views.

MR. HEALY: This may take some time, Sir, and I wonder, should we

CHAIRMAN: It's probably as good a time as any.

Five to two, if that suits you. Thank you.

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:

MR. HEALY: You were answering Question 61, the first answer in relation to the Minister's state of knowledge regarding the outcome of the competition, I have already read out. It's Question 61, subparagraph (a), and you refer to a previous answer. Question 61, subparagraph (b) is as follows: "Statements made by Mr. Brennan regarding the Minister's view of the draft evaluation report and/or the approach which should be adopted in drafting the final report, and in particular the Minister's view that the report should not undermine itself and/or that the project should be treated as bankable, as recorded in the contemporaneous note of the meeting kept by Ms. Margaret O'Keeffe, and in responding please furnish a full account of the Minister's own statement of his views."

In order to make your answer clear, I should just put up on the overhead projector the contemporaneous note of Ms. O'Keeffe, which is Book 42, Tab 121.

(Document handed to witness.)

Now, you'll recall that in the course of the private phase of the Tribunal's work, the Tribunal ascertained that Ms. Margaret O'Keeffe had kept a lengthy handwritten verbatim note of the Project Group meeting

/RS

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of the 9th October. That handwritten note was

converted, for ease of access, into typescript, and Ms. O'Keeffe was asked to confirm that the typescript was an accurate reflection of the handwritten note, and what you have in front of you is the typescript. And I just want to refer to something on the first page. It starts off, I think, a bit like the minute, with a heading or a reference to confidentiality. And then underneath that it says:

"Minister knows.

Shape of evaluation and/or of top two.

Minister of State does not know.

Quick announcement".

Then it goes on to a heading, "Agenda".

"Draft report,

future work programme: A. Producing draft (number 2).

Good working draft produced on time."

This seems to be a reference to the existing draft of the 3rd October 1995.

"Annex should be part of the main report.

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

/RS

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

explained.

"MA brought appendix on supply on tariffs and interconnections.

Description of methodology still missing.

"Different groups examined dealing with commissions etc.

Relevance of annex dealing with conflict.

Full discussion needed on Annex 10.

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

Should be balanced arguments."

I think that is the reference to the reporting of the Minister's views that's mentioned in that question.

And you say "I am not in a position at this stage to be in any way definitive about my unrecorded conversations with the Minister. I reiterate that I am certain that at no time did the Minister seek to influence the result, but he was very definite that whatever result, it should be clear-cut and leave no room for doubt. That is the sense in which the comment that the report should not undermine itself and/or that the projects should be treated as bankable or any such statement need to be understood, in my

/RS

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opinion. There is no basis in which I am in a position to furnish a full account of the Minister's

own statement of his views beyond what I have just said."

Now, you say that the Minister was definite that whatever the result, it should be clear-cut and leave no room for doubt, and that that is the sense in which a comment which you have put in quotation marks, that the report should not undermine itself and/or that the projects should be treated as bankable, should be understood. And you put those words, as I said, in quotation marks.

Now, I am not sure that that's what is actually contained in the verbatim note. If you look at it, it says, "Minute does not want report to undermine itself, e.g. either a project is bankable." Does that look like it's a report of somebody saying "either a project is bankable or not"?

A. I am sorry, I don't get the meaning of the question.

Q. "Either a project is bankable", that's clearly a somewhat incomplete statement such as you might make if you were making a note. I don't know what was said at the meeting.

A. I don't either.

Q. I am suggesting that it seems to be a record of a statement along the lines of "either approach is bankable or not". It's not a big issue. I mean, you may not

/RS

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A. In my reply in the narrative, I simply took the same words as were in the question. And I don't know where we are going with this beyond that.

Q. You say that in that note you are reported as saying that the Minister does not want the report to undermine itself. That obviously refers to a conversation you had with the Minister. Do you think it was one of the three conversations that you have already documented in your response to the Tribunal queries, or do you think it could have been another conversation?

A. I don't know. Logically it would seem to be the third conversation. But I mean, I am conscious that the subject of bankability came up on a number of different occasions. I mean, even back as far as when a significant player indicated that they weren't competing in the competition because the interconnection arrangements that were on offer weren't robust. At that stage the question of whether they were bankable or not was part of the discussion as clear as on the record like that, and when we came up with a new formula, there was a temporary arrangement putting in place a procedure to resolve it because that would be more bankable, was the expression used. I think I recall from the Opening Statement if not there, or somewhere else that

Mr. Fitzgerald, as soon as he became aware that Esat Digifone were emerging, he started to ask questions about "If it comes out like that, you better make sure it's bankable".

/RS

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So I am not sure now whether I can say that this was me being reported directly from the Minister, it could be that Mr. Fitzgerald made his views to the Minister and then fed back to me the Minister's views. I really don't know, but I mean, it's not even axiomatic, in the way Ms. O'Keeffe's notes are, that it's attributable to me, although that it's likely to be.

Q. If you leave aside for the moment the use of the word "bankable", the proposition that the report should not undermine itself is, I suggest, one that must have been prompted by a discussion with the Minister about the way the report was going, a rather detailed discussion. Otherwise why would the Minister be prompted to make a pointed reference to the report?

A. I don't believe that there was a detailed discussion of the report as such with the Minister or that the report was shared with the Minister.

Q. But would you not agree with me, that suggestion from the Minister that the report should not undermine itself could only have been a response to a

description by you or somebody else to the Minister of how the report was going and what form it was taking?

A. I don't have a ready answer. I mean, the words on the record are the words on the record. I don't know how they came to me.

Q. I am just trying to ask you to help me. Would you not agree, if somebody says to you in the context if somebody is reported as having said to you that a

/RS

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report shouldn't undermine itself, while that is what you might carry to another meeting, that expression itself could only have come up in the course of a conversation which the use of those words is prompted by some discussion of the report, of the way it was going, in this case, for instance; could I suggest that if you were explaining to the Minister that you had a ranking 1, 2 and 3, that you had an expression of views by Mr. Andersen but that he had introduced some qualifications or reservations, using his word, that the Minister might have said "Well, I don't want the report to undermine itself; I don't want bits tacked on"?

A. Or I may have said something like, "But the report isn't particularly well drafted", or "The report isn't particularly clear", or whatever; I don't know exactly. But things like that were on my mind, having

read the report. I mean, the report was, I think it has been said before, written in sort of a Danish English, if you like. And the report, the whole evaluation model is a complex piece of work as well.

And I think what the Minister seems to have been looking for there is that the report would be clear, and the report it would be possible to link the report with the result.

I mean, we had never had any difficulty that the result was the result, if you like, as we were getting closer. But we always had problems, and some people more so than others, but we all had problems with the /RS

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way the report was drafted.

Q. But it's in that context, in the context of somebody suggesting that the report shouldn't undermine itself, that this reference to bankability or a project being bankable occurs; and what I'd suggest, and I am happy to corrected, is that that again must have stemmed from a conversation in which some level of detail was imparted to the Minister to prompt him to say, well, look, either a project is bankable or not, or either this project ought to be treated as a bankable project and for instance you don't need to worry about finance as much as Mr. Andersen is suggesting.

A. Which may raise the question of whether Mr. Fitzgerald

might have been present in any conversation I had with the Minister. I just don't have any clear recollection.

Q. I think Mr. Fitzgerald has told the Tribunal and I am sure I'll be corrected that he had no conversations with the Minister, though he did have conversations with Mr. Loughrey, as you might expect.

A. Yeah, okay.

Q. Could it have been a three-way conversation between you, Mr. Loughrey, and Mr. Fitzgerald in which maybe you were conveying some of the Minister's views?

A. I think the first

Q. In light clarify that, in light of Mr. Fitzgerald's remarks about Esat Telecom?

A. The first time that bankability came up in that context was from Mr. Fitzgerald. That much I am fairly confident of.

/RS

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Q. Could you just go back on that, then, just to pin that down. You had a discussion with Mr. Fitzgerald in which he mentioned that I think you were I think what you said earlier was that Esat Digifone were emerging as a winner, and he had he gave you I suppose a note of warning that you want to make sure that Esat Telecom, one of the or Communicorp, whatever you want to call it, one of the members of

that consortium, you'd want to make sure that their

finances were in order?

A. Yeah, and he had seen the report, I think it's clear from earlier in the statement, he may have had independent concerns about the drafting of the report as well. You are saying that he says he didn't have any discussion with the Minister. He may have with Mr. Loughrey. The concern about Communicorp that he had may have been informing all of this conversation.

I really don't I can't help you by saying I definitively recall something.

Q. But if you were having a discussion with him, and in the course of that discussion this issue about the finances of Communicorp/Esat Telecom were discussed and the issue of bankability arose, who introduced it?

That is obviously a solution, or if you like, an answer to a problem about finance, isn't it?

A. It clearly is a solution to a concern about finance. And clearly I mean, it clearly was going to be a bankable proposition; there was never any doubt about that.

Q. Who introduced that as the solution?

/RS

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A. I think Mr. Fitzgerald was the first to talk about bankability.

Q. I see.

A. Who decided to put it into the report or how it got into the report, I don't have a clear recollection of.

Q. But when you conveyed your information to the Project Group meeting, you conveyed, as far as I can see, what we have just now been discussing, to the meeting on the basis that it had something to do with the Minister's desire that the report shouldn't undermine itself, and as an example you gave this issue. What I am saying is, does that suggest that after your meeting with Mr. Fitzgerald and/or Mr. Loughrey, or whoever it was, if there was somebody else with you, you had a discussion with the Minister in which that level of detail was gone into?

A. I mean, it suggests that in whatever conversation I had with the Minister, that either Mr. Fitzgerald or Mr. Loughrey could have been a party to it. Mr. McMahon could have been a party to it simply because he had more dealings with Esat Telecom, in particular, than I had. I just don't know who was party to the conversation. And I don't know where the initiative came from, but I am clear that Mr. Fitzgerald was the first to raise the issue of bankability.

Q. And did he raise that issue in the context of the financial capability of Esat Telecom/Communicorp, their financial strength, if you like?

A. I am sort of relying, I think, on the Opening Statement for what I am saying here; I think you

/RS

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referred in the Opening Statement, Mr. Coughlan, to Mr. Fitzgerald talking about bankability, and it might help me if I could view that.

Q. I don't want to accuse you now, but if we just leave the Opening Statement aside for a minute, can you try to remember yourself your conversations with Mr. Fitzgerald? Because I am not sure you are right about that.

A. I mean, it's clear nobody has total recall of the detail of what went on at this time. And there is no point in me trying to hypothesise what may have gone on. I mean, I am trying to tell you the things I recall, and I am trying to tell you the things that the record suggests to me occurred, and when it gets beyond that, then we get into difficulty. And that's where the evidence of all the various parties will have to be taken into account, I think.

Q. Then leaving aside the efforts that people are making to remember what was said, isn't it reasonable to suggest, as I am suggesting, that a reference to bankability or something being bankable is a reference which arose in a conversation in which, if it occurred with Mr. Fitzgerald, some level of detail was gone into?

A. Well, as I said already, it's clear that Mr.

Fitzgerald had seen the draft of the report.

Q. But if it came up in a conversation with Mr. Lowry, it must follow that it came up in a conversation in which either he had a level of detail from a reading of the report or you conveyed to him a sufficient level of /RS

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detail to enable him to come up with suggestions like this?

A. Or somebody else who could have been either of Mr. Fitzgerald, who says it was not him, Mr. Loughrey, or Mr. McMahon. I mean, it's more likely, I think, that the idea of bankability and the consistency of the report was raised by Civil Service concern rather than Ministerial concern, but I can't say that definitively.

Q. I think that bankability is not a concern, it's a proposed way forward, isn't it?

The next query is Query C, and after that Query D, which you take together. And they are as follows:

"Your knowledge of the request made by certain members of the Project Group that further time was required to consider the results and your knowledge of the request made by certain members of the Project Group that it was necessary to revisit the qualitative evaluation".

And in response to those two, you say "I am now aware of a document numbered 000408" now, I just should

interrupt at this point. You very helpfully refer to these documents, Mr. Brennan, in the course of your evidence. Unfortunately those are the numbers of documents given to you, I think, if I could borrow one of your expressions, a much earlier iteration of the Tribunal documentation. And I don't have any problem with it, but it doesn't tally with the new system that the Tribunal has for referring to things, so in due

/RS

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course we'll have to get that right. But I take it that what you are referring to at that stage is probably a report of a meeting of the 23rd October, maybe a Project Group meeting.

A. Well, it looks like what I am talking about is a view or an annotation by presumably either Mr. McMahon or Mr. O' Callaghan; Mr. McMahon, I think.

Q. Sorry, that's a separate document, then. It's not an annotation on a Project Group meeting. It's another note made on the 23rd, and we'll come to that.

"I am now aware of a document numbered 00408 in the Tribunal's series recording a view of the regulatory division as of the 23rd October 1995." Book 43, 134.

(Document handed to witness.)

Is that the document, is it?

A. I'd say it probably is, yeah.

Q. If it isn't

A. It probably is.

Q. "I am fairly confident that the views recorded therein were not articulated in that manner in the Project Group itself."

The document is headed "Telecommunications and Radio Regulatory Division". Above that, it says "Mr. O' Callaghan for GSM file". Then it says "Apropos our conversation on 23rd." That's probably the document you referred to.

It says:

/RS

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"GSM,

"Views of the Regulatory Division 23 October 1995.

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

"(i) we agree that the finding that A3 and A5 are front runners;

"(ii) we also agree that A3 and A5 are very close;

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

By this time they would have had your numbered scoring system as well as the graded system.

I don't think the next item it seems to have been

crossed out. I'll read it and then mention that it was crossed out, just so the whole picture will be there. "We have a reservation about listing A1 in third place, having regard to its proximity to A4 in fourth place". And then that seems to be crossed out, as if that reservation is not a conclusive view.

"5, we feel strongly that the qualitative assessment of the top two applicants should now be revisited."

/RS

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Underneath that it says "To be signed if PTGSM insists on finalisation of existing draft."

That was the draft of the 18th, or the second draft of the report.

So you say "I am fairly confident that the views recorded therein were not articulated in that manner in the Project Group itself. The manuscript annotation by Mr. McMahon that this was to be signed if the project team insists on finalisation on the basis of existing draft report speaks for itself, given that the report of the project group records that further work was to be done on the draft. My recollection is that there was lively discussion at that meeting of the Project Group and that the two representatives of the regulatory division were less inclined to be as decisive as other members of the group. I am certain that Mr. McMahon did not press a

case for revisiting the qualitative evaluation. That said, it would be a very unusual group indeed if there was total unanimity without considerable discussion of what was after all a very fresh second iteration of the draft report. The report of the meeting speaks for itself when it says that while there was general satisfaction with the detailed analysis and the final result, the presentation of that analysis in the draft report was not acceptable."

/RS

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I think what that note does suggest is that not only was Mr. McMahon not content with the form of the report, but that he wasn't content that at that point you had a winner, although clearly he suggests that you had at least two potential people that could be a winner, and maybe even a third.

A. The report of the group and the quotation you just read, it is a contemporaneous report, after all, and it does say that "there was general satisfaction with the detailed analysis and the final result. The presentation of that analysis in the draft report was not acceptable." I think that's fairly clear.

Q. It is. I think what it says, though, is that there was general satisfaction. Do you think that is inconsistent with what's stated in that statement, or consistent?

MR. NESBITT: Mr. Chairman, I am sorry to interrupt at this point in time, but My Friend has a statement from Mr. McMahon that deals with the result of the final report negotiations in which he makes it absolutely clear that no further qualitative assessments or assessments would change the result of the competition. And we have had since before lunch and since after lunch an attempt to invite this witness to try and understand what Mr. McMahon was thinking, and they have Mr. McMahon's own statement that makes it crystal clear, and I think it's unfair that this witness should be put under these pressures with notes that were going to be signed at some other time. I

/RS

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hesitate to intervene, but it is very unfair on this witness, and he should be told that that's what Mr. McMahon actually says. It's already been made clear to this Tribunal that the witnesses who prepared these answers did so independently, not working together, and My Friend knows about this. I drew it to his attention before lunch.

MR. HEALY: I do intend to go through Mr. McMahon's report.

CHAIRMAN: Well, we'll have the full picture put; very good.

Q. MR. HEALY: Can you tell me whether you think that is

consistent or inconsistent with the minute?

A. I think that the minute is recording consensus.

Q. I'd agree that the minute records consensus, but the minute refers to general satisfaction with the detailed analysis and the final result. Whether this report expresses whether this note expresses real and sustained and sustainable views of Mr. McMahon is another question. I just want to establish at this stage whether you agree that that is in agreement with or in disagreement with the formal minute.

A. I can't see how Mr. McMahon's note can be reconciled with the formal minute.

Q. That's all I am asking you to agree with me on. It's not reconcilable, I think, on the face of it. It's inconsistent with the formal minute. The formal

/RS

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minute records general satisfaction. You might suggest that that means that we agreed that the top three or top two were A5 and A3, but you might suggest that that note is not consistent with that. You say it's irreconcilable with it?

A. Well, my interpretation of what's in the formal minute is that it's recording consensus. And Mr. McMahon's note is suggesting that there wasn't consensus.

Q. Well, let me just be clear about that. And in fairness to the note, I think it's recording a

different consensus, is my point. You see, it says

"We agree with the finding that A3 and A5 are front runners, and we also agree that A3 and A5 are very close."

Do you understand me? It records a slightly different consensus. I think what you are suggesting is that the final report records a general satisfaction with a specific ranking, A5, A3

A. And it's probably not ideal to jump from that on to something else, but the final Andersen report mentions unanimity a number of times in a draft that was in circulation among the same people, and which I don't recall having been contested.

Q. Other than by the note that I read out this morning of the 1st November.

A. I have forgotten

Q. This morning we were looking at a copy of the minute of the 9th October meeting, and on that, I drew to your attention a manuscript note made by Mr. McMahon

/RS

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on the 1st November in which he says that I'll summarise what he says that he doesn't agree, and neither does Mr. O' Callaghan, that there was unanimity as to the result at that point.

A. At the 9th October?

Q. At that point. I think you drew that to my attention,

he was recording that as of that time.

A. Mm-hmm.

Q. Well, that is consistent with his own irreconcilability of these two documents then, isn't it?

A. Well, I keep saying this, I suppose. At the end of the day different people will give their own evidence. I am as certain as certain can be that there came a time in the evaluation when there was no objection to the result or the report, or sorry, no stated objection.

Q. Now, I don't want to have to go through all of Mr. McMahan's statement, because I am not sure that it's going to be of huge assistance at this stage, although in due course I will have to go through it

CHAIRMAN: Mr. Nesbitt, I am trying to devise what is the fairest way of dealing with things, because to some extent I don't want to embark piecemeal into certain of those issues which plainly are going to have to be addressed more thoroughly than others, but I don't want you or indeed Mr. Brennan to feel left short in any way.

/RS

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So whether you prefer that Mr. McMahan's actual statements be now put or whether I should give you some limited opportunity tomorrow, perhaps, because we

will be taking two short further witnesses who have already been part heard on Friday morning to deal with any aspects.

MR. NESBITT: Well, Mr. Chairman, I don't intend to interrupt the flow of the Tribunal. I only got to my feet because I felt, having made the point earlier in the day, it might not have been understood. I think it's easier if My Friend just goes through the questions he wishes to ask, and at the end of the day we'll come back to any issues we need to deal with. I think that's the fairest way to the witness and to get it done in an uninterrupted chronology. But I just did feel that this witness was being put under pressure to try and say something on the basis of what Mr. McMahon was going to say, when we knew Mr. McMahon wasn't going to say exactly what appeared to have been put. And that's the objection I had.

Perhaps I am getting up too early, but I don't think it's necessary that I should do anything else at this stage. I am quite happy to make my concerns known to the Tribunal and hope they will or their counsel, and hope they will assist in giving fairness to the witnesses.

But I felt the pressure on Mr. Brennan at this point

/RS

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in time was slightly unfair, and I think it's been

dealt with now. I don't need Mr. McMahon's report or evidence to be read out now. It can be dealt with in the fullness of time.

CHAIRMAN: Well, then, I think perhaps to proceed with the chronology is preferable.

MR. HEALY: I think that's a preferable course as well.

Q. And I think you should bear in mind, Mr. Brennan, I am mindful that there are differences and nuances in other statements, but at this stage, I am simply seeking to find out, which all the Tribunal is trying to do, as much as the Tribunal can find out at this remove from the events, as much as possible based on the existing documents, and I welcome any view you have on any of the documents and including a view as speculative as you care to be, within reason.

A. Well, I am trying my best to be as helpful as possible.

Q. And I am grateful

A. But to avoid undue speculation.

Q. And I think that's a very good view, and I am happy to proceed on that basis.

If you go on to Question 61, subparagraph (e), you were asked about the request made by certain members of the Project Group that consideration should be

/RS

given to the appropriateness of awarding the licence to Esat Digifone, having regard to the Department's experience of Esat Telecom.

And your response is "Mr. McMahon and Mr. O'Callaghan, who were leaders in the Department's general interface with Esat Telecom" this would be on the regulatory front, wouldn't that be right, in connection with leased lines and a relationship between Esat Telecom and Eircom as operators in the same field; would that be right?

A. My general understanding was concerns about things like leased lines, routers, and the supervision of the licence. But I wouldn't have a detailed knowledge of it.

Q. "Mr. McMahon and Mr. O'Callaghan, who were leaders in that area, always had concerns about the attitude of that company to telecommunications legislation. My onlooker's perspective on that, not in the context of the Project Group, was that Esat was a company that pushed the law to its limits and put it up to the "system" to stop them. There was some degree of discussion as to whether a company with that kind of history should be given the GSM licence, but the preponderant view of the group was that this history provided no basis for overriding the clear result of the competition.

Question 62: "Mr. Brennan's understanding as to the

stage which the evaluation had reached following the

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Project Group meeting of the 9th October 1995, and in particular whether any further significant steps were required to be taken to finalise the evaluation, and if so, to provide full details of such steps".

And you say: "I think it is clear that the Project Group was fairly confident at the end of that meeting, 9th October, that it had a result. But that result was on the basis that AMI had indicated that some supplementary analyses had yet to be provided to the group, but in their view did not suggest that it would be necessary to revise the award of marks. Clearly the Project Group had to allow itself the ability to take an independent view on sight of those analyses, but it probably had no basis at that stage on which to doubt the conclusion that AMI were offering in relation to such supplementary analyses. There were clearly also gaps in the report which the Project Group needed to see. It is a matter for subjective judgement as to how significant these steps were in the light of what is said about them by the various people preparing answers to Tribunal documents of this type."

You were then asked for your input or involvement or your knowledge, direct or indirect, of the input or

involvement of other members of the Project Group and so on, in the preparation of the formal typed minutes dated 17th October 1995 of the Project Group meeting of the 9th October, '95. And this is a reference, I

/RS

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think, to the actual formal minute.

And you say: "I believe I have said previously in this narrative that it was never my practice to second-guess experienced officers as regards what to include or not include in a meeting report. I understand that it is reasonably common practice for a reporting officer to get a second opinion on a report, and given the attendance at that particular meeting, the most likely second opinion would have been Mr. Towey. People working with me down the years are well aware that I prefer short reports to longer ones which purport to paraphrase the exchanges. I note the existence of an amendment suggested by Mr. Buggy and agreed for inclusion."

Then in Question 64 you were asked whether you received or were otherwise aware, directly or indirectly, of the contents of handwritten notes made by Mr. McMahon on a copy of the minute of the 17th October 1995 of the meeting of the 9th October 1995. And this is a reference once again, I think, to those to that note of the 1st November. And you say:

"The first I saw of the notes referred to by Mr. McMahon was when I sought them out for the purpose of preparing this narrative. I clearly recollect and have always acknowledged that Mr. McMahon and Mr. Callaghan were more questioning of the outcome and completeness of the process than were the other

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members of the Project Group. I am fairly sure that this was on the basis that the result was agreed but the report needed some further work as to quality of presentation and style. This had to have happened at the meeting on the 23rd October."

Is that perhaps what you meant when you said there were lively discussions? Is that a euphemism for heated discussion?

A. Not necessarily heated. But there was there was considerable discussion about the drafting of parts of the report, and my recollection is that everybody participated.

Q. Was there any discussion at that meeting about how the marking system was arrived at, the one that you and Mr. Towey and I think just yourself, Mr. Towey and Andersens deployed in Copenhagen, maybe Mr. Riordan as well?

A. It's reasonable to assume that we explained how it came about.

Q. And was the can you recall, was the meeting happy with that?

A. I don't recall there being any dissent from it.

Q. Am I right in thinking that that would be at that meeting, you were presenting now the second draft version of the report? I'll pull out the minute, if you like.

A. I think it probably is. The 18th October version probably I think it probably is, yeah.

Q. Yes, the 18th October version.

/RS

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You had a fairly full attendance at that meeting on the 23rd October, which was the 13th meeting. You see it on the monitor there. I don't think I need to show it to you; it wasn't a very long minute. It referred and this may have been a point you were making to a corrigendum suggested by Mr. Billy Riordan, who noted for the record that "Mr. Jon Bruel of AMI stated at the previous meeting that he was sufficiently satisfied that the financial tables as evaluated were adequate and true. Reference to this statement had been omitted from the minutes of the previous meeting in error."

You then go on to discuss the draft report. And it says "The meeting then proceeded with a discussion of draft AMI evaluation report. Views from Regulatory,

Technology, and 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.

"Hence the discussion focused on the detail of the report. A re-ordering of certain sections of the report, together with some textually typographical amendments was agreed.

"Future work plan.

/RS

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

Now, that suggests that there was all-round general satisfaction both with the analysis and with the result, by which I take it that must have included the ranking as of that time?

A. Yes.

Q. The methodology also, and the marking?

A. I think, yeah.

Q. But once again, I just draw your attention to a note, a contemporaneous note made by Mr. McMahon on that

day. This is Document 43, 148.

(Document handed to witness.)

I just want to draw your attention to the first sentence, or the first note, where I think Mr. McMahon records that "MB" I suppose you, Mr. Brennan "notes that I" meaning himself "have only just seen 'final draft report'".

When he refers to "final draft" there, I think he means that final draft, the 18th draft before you had the final version; isn't that right?

A. Mm-hmm, I assume so.

Q. Now, I don't know whether he got it that day or when he got it, but if he only had just seen it there and

/RS

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then, it seems hard to credit that you could have expected him to have had any concluded view on it; wouldn't that be fair?

A. Yeah, I'll put it like this: If it were me, and I was getting a report at short notice I am not saying at instant notice, but at short notice I would be seeking, rather than to read it through, to see the extent to which it had changed from the previous draft, because that should be the part I am most interested in. But I mean, I have I don't know when he got the report; I don't know when I got the report.

Q. I think you got it on the 19th, the day after it was formalised.

A. I can't think of any reason why it wouldn't have been circulated to the various members quickly, because everybody

Q. Even if it had been so circulated, the fact is that if somebody at an important meeting says "I have only just seen it", then one would have to conclude that it would be hard to draw hard and fast conclusions at the end of that meeting that there was general satisfaction about a result, if somebody had only just seen the report. It's pushing the boat out a little?

A. It's not as if everything in it was new to him. Or to any of us. A lot of it would have been the same as the previous draft. And it is certainly clear that the meeting on the 23rd was a very long meeting. It went on into the late evening, perhaps as late as 10.30. So there was plenty of time during the day to /RS

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go through the report.

By the way, I am not I wouldn't rule out that the meeting resumed on the 24th. I am aware that Mr. Towey in his statement, some of which I have read, has mentioned the meeting of the 24th. I don't specifically recall there being a meeting on the 24th, but it's not to be ruled out that the Irish members of

the team, as indicated in the last paragraph of the official document, may have met. I would rather think it may have been an iterative process between individuals and Mr. Towey, but I am not sure of that, given that he talks about a meeting on the 24th.

Q. You describe a meeting of the 23rd as being long, in any case. When it went into the 24th, although it has generated perhaps one of the shortest minutes of all, isn't that right?

A. Yeah.

Q. You might be able to help me with one other aspect of the minute. I'll give you I think you have it already, in fact; yes, you have the formal minute of the

A. No, it's on the screen, I think.

Q. I am giving you a hard text copy.

(Document handed to witness.)

If we could just have the bottom of the report.

You see that the report is signed off, and copies to Mr. Sean Fitzgerald, the attendees, Ms. Nuala Free, and then to file. Do you see that?

/RS

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A. Yeah.

Q. But do you see the date of the minute is the 12th December of 1995?

A. I do now, yeah.

Q. Which is quite a long time now after it was after the meeting was held. Can you think of any reason why it would have taken so long to produce that?

A. I suppose the most likely reason is the person concerned was under pressure of work. I am sure she'll be here, and you can ask her, but I wouldn't attach any particular significance. I would assume that she had some kind of manuscript notes which she probably retained until she had committed the information to paper, but I can't answer for that.

Q. Question 64B: Whether the contents of the handwritten notes that is, Mr. McMahon's handwritten notes were raised at any subsequent meeting of the Project Group or of any members of the Project Group or otherwise discussed with any other person, and if so, when and the name of each person present or each person involved. And also details of the subsequent meetings referred to in Mr. McMahon's handwritten notes, including the date of each such meeting and the persons present, the matters under discussion, the outcome, and whether any note, attendance, or minute of any such meeting was kept, and if so by whom.

"I do not believe there were any informal or unrecorded meetings of the Project Group. I therefore do not understand what the reference to subsequent

/RS

meetings is about."

Well, maybe I could suggest that the answer you had given a while ago might be a more accurate one, that there was a process going on; there may have been contact with Fintan Towey which perhaps might explain a reference to subsequent dealings anticipated by Mr. McMahan. Is that possible?

A. Yeah, I actually think that that is the 23rd is a night where Mr. Towey may have stayed up all night working on the report and may have worked long into the next day. What I don't know is whether we sat down together or whether he did it in bilateral contact with other individuals.

Q. You were asked for your knowledge, direct or indirect, of or your involvement or the involvement of any other person in, the decision made to accelerate the date on which the result of the evaluation was to be announced to the winner.

And you say "I have a very clear recollection of a conversation with Michael Andersen to which Fintan Towey may also have been a party, but I do not know whether it took place in the context of the Project Group meeting of the 9th October or at the 28th September meeting in Copenhagen. Michael Andersen was expressing a very firm view that in his experience there were a lot of downsides and no upside in delaying the announcements of the results once it was

definitive. I seem to remember him instancing

/RS

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political difficulty caused by delays in other jurisdictions. I certainly conveyed that view somewhere along the way to at least Mr. Loughrey and possibly, if not probably, to Mr. Lowry as well. I seem to remember Mr. Loughrey welcoming the idea that we could get the result out within the deadline originally foreseen before the intervention of the European Commission. I was not conscious of any outside stimulant towards an early announcement. It should be remembered that the originally envisaged announcement date was no more than an informed estimate and left ample time for any political decision-making process required."

Do you recall if you mentioned this question of political difficulty or potential political difficulties to Mr. Lowry before a final result had been reached, or whether you only mentioned it to him after you felt that you had a final result?

A. I think that Michael Andersen said it to me at the time that we either had or were very close to a final result, but I don't know exactly which date, and that I passed it on fairly quickly to at least Mr. Loughrey. I don't know at what stage, whether I conveyed it directly to Mr. Lowry or whether Mr.

Loughrey did. But I almost certainly told Mr.

Loughrey very quickly after I had heard it myself,

because I thought it was sensible.

Q. But what type of political difficulty was Mr. Andersen alluding to, or what did you think he had in mind, if

/RS

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he didn't tell you?

A. He did tell me something of it. Room for speculation

for political intrigue. Now, I saw his report to the

Tribunal; I heard Mr. Coughlan refer to his report to

the Tribunal, also possible stock market implications.

I don't know whether he specifically mentioned that

one or not, but he left a very heavy message on me

that once the result is known, it's better to get it

out there.

Q. But the result presumably would only have been known to the Project Team; isn't that right?

A. Yes.

Q. And I take it you were satisfied, at least on your

side, that from the 28th September, when you believe

you had a winner, there had been no leaking of that

information out into the public domain?

A. There hadn't been any leaking of the information, no.

But the longer it existed and the wider at least my

interpretation of what Michael Andersen was saying to

me was that the longer the position existed and the

wider the circle of knowledge became, the more serious the risk of leaks and the consequences of leaks.

Q. Of course, if you widen the circle of knowledge; but there was no question hereof widening the circle of knowledge, sure there wasn't. Am I right in that?

A. I certainly wasn't moving to widen the circle of knowledge.

Q. As long as it wasn't widened, presumably you could rely on what you believed to be the absolute integrity of the PTGSM group up to that time?

/RS

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A. But, for example, if you went into the formal process of getting a Government decision, where you circulate a memorandum to interested other Ministers for observations and so on, if you were to go a route like that, you'd lose control over it very, very quickly.

Q. But as long as you didn't go up a route like that, as long as it didn't get out into the what I call the political domain, you still had time, didn't you?

A. Yes.

Q. Question 66 asked you to confirm that 8 copies of the final draft report, dated 18th October 1995, were received by the Department and were designated for Mr. Michael Lowry, Mr. John Loughrey, Mr. Sean Fitzgerald, Mr. Colin McCrea, Mr. Martin Brennan, Mr. Sean McMahan, Mr. John McQuaid, and Mr. Jimmy McMeel.

Mr. Colin McCrea was a programme manager; isn't that right?

A. Yes.

Q. Mr. Lowry's programme manager?

A. Yes.

Q. He had been kept up to speed, I think you said, to some degree; he had been at some of the I think are they called 'mac meetings'? I have heard that expression used.

A. No, I don't know, because I wasn't in attendance.

What I said, I think, was that there is a trend for programme managers to be in attendance at management committee meetings in Department. I don't actually know

/RS

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Q. I follow

A. whether or how frequently the management committee met or what went on.

Q. I follow; I must have misunderstood you

A. What I am saying today, in the management committee in my Department, I would go in and give a Cook's tour of the issues that were important on my desk that week or in my divisions that week.

Q. Yes.

A. I noticed recently, by the way, that the particular monogrammed copy for Mr. McCrea is still in the files

of the telecommunications division. I don't know whether that's significant or not.

Q. Maybe it never went to him?

A. The original monogrammed copy I am nearly certain is still in the files of the telecommunications division, if it hadn't been given to you. I came across it in some context. I am not making anything of it; I am just stating it as something I noticed.

Q. It may suggest that he never got it?

A. Could do.

Q. But in requesting one for him, it was only envisaged that he would have an opportunity of reading it and getting up to speed?

A. Yeah. I think, whether I mentioned it or somebody else did, particularly in coalition governments, programme managers play a role in developing political consensus. And in that context

Q. Smoothing the way ahead?

A. Smoothing the way, so if there had been a need for a

/RS

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significant degree of inter-Ministerial discussion, that route may have had to have been opened. Now, I think the record shows, the Opening Statement shows, somebody shows that there happened to be a meeting of a Cabinet Sub-Committee that had the same composition as the one decided for this process meeting to discuss

Aer Lingus business. I don't want to jump forward to other evidence, but there is something of that kind that the Minister was able to take the issue. We'll come to that later, I am sure.

Q. Just while we are on that, if the Minister is taking that to a Cabinet or to a Sub-Committee, or even if it isn't a Sub-Committee at the political heads of the different arms of a coalition, isn't that just the type of situation that is usually preceded by a meeting of programme managers to steer the Ministers in the correct direction?

A. Usually, yes. Now, it may well be and you can ask Mr. Loughrey in due course that he may have advised the Minister. You know, these Ministers are sitting; why not just take this note under your arm and see if you can get a result? It could be just as simple likely was as simple as that. But it's not for me to answer.

Q. You say here in any case that the file shows a covering letter dated the 19th October from Mr. Dennison of Andersens to you stating that 8 copies of the final draft report dated 18th October are enclosed. And you say "The file also shows the initial faxed request from Ms. Maev Nic Lochlainn to

/RS

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Andersen dated 18th October seeking copies of the

report for Mr. Lowry, Mr. Loughrey, Mr. Fitzgerald,
Mr. McCrea, Mr. Brennan, Mr. McMahon, Mr. McQuaid, and
Mr. Jimmy McMeel."

A. Which may have been an indication of the monograms
that were required to be on the copies. And the
monogramming was a security decision of Andersens.

Q. Every single copy had this monogram placed across
every page, like a watermark, or something like that?

A. Yeah.

Q. So that if you tried to photocopy it, they would know
who had leaked it or who had been careless?

A. If it appeared in the front pages of the Sunday
papers, you'd know whose copy it was. So by
definition you would have to be quoted, not
photographed.

Q. Question 67 is "Please provide details of your
knowledge, direct or indirect, of all consideration
given by the Project Group or by any member of the
Project Group or by any other member, whether in
conjunction with Andersen Management or otherwise, to
the qualification placed by Andersen on the financial
capability of Esat Digifone and Persona as set out in
the evaluation report and appendices, and in
particular page 44 of the report and appendices 9 and
10.

You say "The Project Group was aware of a potential
financial weakness of one of the parties in Esat

Digifone. However, this awareness was balanced by the

/RS

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Project Group's belief that the business opportunity was excellent. The concerns reflected on page 44 of the report were followed up by the certification in relation to financing received at the time of the licence award. My impression is that the accountants considered the risks to be manageable, and the project accepted this advice."

I think that's too lengthy a subject to deal with now, because I'd have to go through page 44 and the various changes in that page.

Question 68: "Details of Mr. Brennan's knowledge, direct or indirect, of any discussions with Andersen Consulting concerning further inquiries or investigations or other actions which would have been required to enable Andersens to provide a report with any qualification or rider regarding the financial capability of either Esat Digifone or Persona".

And you say: "There is an inference in this question that Andersen Management International produced a qualified report. This was not the case. The report identified strengths and weaknesses in all applications. In the case of Digifone, although its application was the strongest overall, one weakness related to a financial vulnerability. The Project

Group did not consider that further analysis was necessary in relation to this or any other weakness in the Digifone application. The financing issue was

/RS

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followed up at the time of the licence award. I cannot recall any discussions with Andersen Management International in relation to the need for further analysis."

Again, that's part of the issues addressed in Question 68, and we'll be coming back to it.

Question 69: "Details of your knowledge, direct or indirect, concerning any amendments to the first draft report of the 3rd October and the second draft report of the 18th October including knowledge, direct or indirect, of the contents of the document entitled 'Suggested Textual Amendments' which appears to have been faxed by Mr. Fintan Towey to Andersens at 10.05am on the 25th October 1995 and faxed back by Mr. Andersen to the Department at 2.07pm on the 25th October with his annotated comments.

And you say: "In relation to the draft of the 3rd October, it was examined in detail by the Project Group. The copy furnished to me by the Tribunal contains any manuscript annotations in my handwriting.

I am reasonably confident that I gave this to Mr. Towey, who coordinated the various inputs. The

minutes of the Project Group meetings of the 9th October and 23rd October 1995 cover this issue. The minutes of 23rd October, though short, are very pertinent, especially the statement that "Views from Regulatory, Technology, and Department of Finance all /RS

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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. The content of the document referred to was agreed by the Project Group, excluding Andersen Management International, on the night of the 24th October. The document contained the amendments which the group considered necessary to finalise the evaluation report."

That perhaps was when Mr. Towey worked all night, is it, in producing I think he produced a document which we'll come to later, a very, very lengthy document containing a whole raft of textual amendments, many of them of mere minor stylistic significance, some of more substantial consequence, and one or two I suppose fairly substantial changes?

A. Yeah I am a bit confused as to the chronology between the 23rd and the 24th. I can't now recall the sequence of events. But it's obviously a subject we'll be going into again.

Q. If we look, just to get one thing clear in my head, at the meeting of the 23rd, you went through the report, clearly, in some detail?

A. Mm-hmm.

Q. Obviously not everything was done there and then, at the meeting. I think you have indicated there must have been subsequent exchanges, contacts with between various members of the Project Group?

A. Mm-hmm.

/RS

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Q. Particularly a lot of contact, I think you said, with Mr. Fintan Towey, and one way or another, he produced a very lengthy document by the morning of the 25th, a very, very lengthy document, as I say, containing many purely perhaps even grammatical suggestions, but nevertheless a very lengthy document which was the culmination of either a day or two days' work or a day and a half's work?

A. Mm-hmm.

Q. And that document was then, it would appear, faxed, from the file records we have, to Andersen in Copenhagen?

A. Yes.

Q. That Mr. Andersen must have looked at it and formed some view and then faxed it back at 2.07 on the 25th October. As I understand it, what he faxed back was

or what Mr. Andersen faxed back was his agreement with, or disagreement, as the case may be, with the textual amendments suggested by Mr. Towey; would that be right?

A. That could well be right. I think I understand from a conversation with Mr. Towey, or perhaps from our joint participation in sessions with you gentlemen, that Mr. Towey believes that a fax amended copy of the report came back. But I am not sure whether that's the case or not, and that's not meant to be interpreted or that. I am just not sure.

Q. I think a faxed amended copy came back on the 26th, I think, but there may have been an agreement or, as the case may be, acquiescence in the suggested textual /RS

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amendments on the 25th, so that if you put the textual amendments with the draft of the 18th together, then theoretically you would have

A. It was either one thing or the other.

Q. Am I right in thinking that there was no meeting of the Project Group on the 25th and no further meeting following the faxing

A. I don't believe there was a meeting on the 25th.

Q. of the textual amendments?

And there was no formal further meeting following the 23rd, even if the 23rd went on late into the night of

the 23rd; isn't that right?

A. I don't recall one, but I think Mr. Towey suggests that there may have been one. I don't know. He may suggest

Q. You weren't at one

A. I could easily have been. There is no minute of it, but something of Mr. Towey's evidence suggests that the group may have resumed on the 24th.

Q. Question 70, you were asked for your recollection of any approach made or request made, I think that should be, to you by Mr. Sean McMahon, by Mr. sorry, I beg your pardon, any request or any approach made by you, by Mr. Sean McMahon, by Mr. John McQuaid, or by any other member of the Project Group to Mr. Loughrey on or about the 23rd October, 1995, for further time in which to consider the draft evaluation report.

And you say: "By the end of the meeting on the 23rd

/RS

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October, there was unanimity within the Project Group as to the result, but there remained work to be done on the report. As noted earlier, there was, in the earlier part of the meeting, some dissent, mainly by Mr. O'Callaghan, but consensus was achieved during the discussion. The executive summary of the final report drafted contemporaneously by AMI records that the Project Group unanimously recommended the result. I

don't know whether Messrs. McMahon or McQuaid advanced a contrary view to Mr. Loughrey on that day or any other day before the meeting. I notice that the language in paragraph (a) of the questionnaire talks about time to consider the draft evaluation report and not the recommendation, and that nuance seems significant."

I take it that what you are saying is that you are suggesting that time may have been sought to consider the report as opposed to the result.

A. I mean, I am now aware of incontrovertible evidence that a number of us the heads of division, I suppose went to see Mr. Loughrey about whether extra time was available. And I am accepting fully that that happened, because the evidence, as I say, is incontrovertible, and that the meeting resumed sometime in mid-afternoon. And it was clear that a week seems to be what was agreed, according to the evidence that you have shown.

The only thing I can conclude from that, then, is that

/RS

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went we got back into the meeting, that I, as Chairman, must have said, "Okay, we have a week; we don't want to be in the same position this time next week, so let's discuss how we are going to make use of this time". And that conversation led on to a more

detailed discussion of the report, where it became clearer that it could be solved more quickly than taking a full week.

That's, if you like, a rationalisation rather than a recollection. But I mean

Q. You were saying that Mr. McMahon is right in thinking that he and Mr. O'Callaghan and I think sorry, that he and Mr. McQuaid

A. And I.

Q. and you went to Mr. Loughrey, and that Mr. Loughrey did agree further time, a week.

A. Yes.

Q. And there would have been no reason not to give a week, if you think about it; you were well within your schedule, weren't you?

A. Clearly not, and I mean, if a week if a week was genuinely needed, I have no difficulty with the idea myself either.

Q. There was no problem in giving a week?

A. I wouldn't have thought so, except that I suppose the Minister had been led to expect that now we'll have a result and now we'll have an announcement. Maybe he was then getting impatient to go ahead with it. I don't know what surrounds that.

/RS

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Q. I don't think he was under any pressure, in that as I

understand it, the Minister's spokesman was still flagging the end of November, that day in fact, as the day for the report. I think Mr. Jennings has informed us that, consistent with the instructions he had always had from the project team management in the Department, he was still flagging that, and this was the story that the newspapers were running with, that the report would be out at the end of November. So there was no controversy at that point, and a report was as far as the Minister was concerned, he should have been fairly happy that he was well within that time scale; isn't that right?

A. That sounds reasonable.

Q. But what you are speculating is that if time was given and subsequently time wasn't taken, it must have been because some agreement was reached that the time was not now needed; is that right?

A. What I am speculating is that I sought to engender a debate about what the time was exactly needed for and what programme we would put in place, and that it became obvious in the debate that it could be done in a lot less than a week, and that it went on and got done.

Q. But doesn't can I just ask one thing about that.

If that is, as you say, a rationalisation, this is an attempt you are making to suggest what might have happened, wouldn't it be surprising that I think,

in light of something you said in response to an earlier question, where civil servants would always /RS

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give time or conservatively approach the question of giving time for something, isn't it somewhat inconsistent with the rationalisation like that, that you would have allowed the report to crystallise in such a sort of unsatisfactory way as to have half the report in a draft form and half in the form of a whole load of you know, somewhat untidy textual amendments, and no final physical copy that you could pick up and say "That is the report"?

A. I'd say you're possibly overinterpreting events. I mean, my own

Q. I was just dealing with your rationalisation.

A. My own personal disposition is if the job is done, let's move on.

Q. Why not wait until the 26th, when you might have had a perfect copy?

A. I don't know.

Q. I think the next question is to some extent anticipated in your answer. If you went to Mr. Loughrey, as Mr. McMahon says, and I think you accept, and Mr. Loughrey gave the time, presumably somebody must have then gone back to Mr. Loughrey and said "We don't now need the time", if your rationalisation is

correct.

A. Yeah, at some stage, after whatever number of hours or maybe into the next day, I don't know when, but it seems to be the case that I mean, we certainly got consensus in the group. I mean, I would be something staggered if you don't get a succession of witnesses to come in and say consensus was noted in the group.

/RS

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Q. Well, I am only going by the document of the 1st November, which says no. And no doubt we'll have to test that against what the other people say.

A. Yes.

Q. I am passing on to page 60, because I think that a lot of questions that are contained in page 59 and the balance of page 58 have already been answered in your amplification in your answers just now.

Question 77, you were asked for the precise date on which and the time at which the evaluation report was approved and/or adopted by the Project Group and the name of each person present or who was otherwise a party to such approval or adoption.

And you say: "I do not believe that there was a formal meeting for the purpose of adopting the final evaluation report. My recollection of events is that various suggestions for amendments to the report were put forward orally, and possibly in writing, at the

meeting on the 23rd, and it was left to myself and Mr. Towey to finalise the report with AMI in consultation bilaterally with other members of the group. Mr. Towey led that process, and as I believe I said earlier, interacted with me on a "open-door" basis throughout.

There was no final bringing together, then, of all of the members of the group to include Andersen in one place; would I be right in that?

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A. Certainly not to include Andersen, anyway. As regards 23rd or 24th, we have been over that ground. I don't have clear recollection. I expect that Mr. Towey, who, as I said, led the process of finalising the report, may be able to give more satisfactory answers than I can.

Q. Did you envisage at the very beginning that the report of this Project Group would in fact be put together by somebody who was to some extent on the margin of the group as regards its day-to-day decisions that is, Andersen or would you envisage that it would come from the Department itself?

A. I think it was always going to be a report from Andersens.

Q. So to that extent it wasn't a wholly independently outsourced report, but was it not a predominantly

outsourced report?

A. The report is no more than a record of what happened, or a record of how the thing was handled. And it would be very unusual indeed if you recruited consultants and then decided to write the report yourself.

Q. Just while we are on that point, and the other documents relating to it, which we'll refer to later, but as I understand it from Andersens, they only ever got, I think, one or two copies of the minutes of Project Group meetings. They don't seem to have been within the loop of the Project Group in the same sense as the other attendees at the meetings.

A. Well, they were at all of the meetings, physically /RS

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present at all of the meetings. I can't recall a meeting that they weren't at.

Q. Yes.

A. And if the minutes were in circulation at the meeting, it would be unusual if they didn't get them. But I can't say. I mean, it's clear from the report that Mr. Andersen did for the Tribunal that he doesn't have, on his files, records of those meetings.

Q. He doesn't, yes.

A. Whether that means he never saw them or never got them, I just don't know. I mean, the reports were

marked "attendees plus Mr. Fitzgerald" or "attendees plus file"; I don't know whether that "attendees" incorporated Andersens or any of their people or not.

Q. Did the other members of the group, do you think I am asking you for your impression whether they felt Andersens were an independent adviser to the group or an actual integral member of the group.

A. Well, I think that they were engaged in a joint project; there was us and them. And I think we had this yesterday morning, on the basis of the content of the narrative, I have forgotten the details now, but I mean we recruited consultants to assist us to run this competition, and we let them do a lot of initiative in terms of number crunching, in terms of suggesting the approach to marking, suggesting the marks themselves.

I know that in the one or two marking groups that I attended, it was always Andersens came and said "These are what we would propose, based on these considerations". And then we would dispute and

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discuss, and I would assume that when it came to technical, that Mr. McQuaid and Mr. Ryan would have much the same to say. When it comes to financial, I would assume that Mr. Riordan would have the same to say. I am not sure Mr. Sean McMahon was involved in any of the marking groups, but that's something that

the record shows, whether he was or he wasn't.

Q. But did they sort of make the running, then, in that sense?

A. I think they made a lot of running, yeah.

Q. But when it came to finally putting the report together and taking the final decisions, if you like, the macro or quasi-political decisions, policy decisions seem to have been taken in Dublin; is that right?

A. Certainly the 23rd/24th, Andersens weren't in Dublin.

So in that sense, when the Project Group records in what you rightly drew attention to as a belated minute of the meeting, it was a meeting of the people in Dublin. But since Andersen's people were involved in the sessions in Copenhagen and were interacting in relation to all drafts of the report, I don't think it's possible to drive a wedge between their role in the process and their ownership in the outcome.

Q. You were asked in Question 78 for your knowledge, direct or indirect, of or your involvement or your knowledge of the involvement of any other person in discussions between Mr. John Loughrey and the Minister on the 24th and 25th October whereby Mr. Loughrey informed the Minister of the result of the process.

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And you say "I cannot say for certain that I was in

attendance at discussions between Mr. Loughrey and the Minister on the 24th and/or the 25th October, but it is likely that I was in attendance at at least some such discussions. I was, for example, aware that Mr. Loughrey was making a formal short submission in writing to the Minister informing him of the result and his support for it.

Question 79: "Please provide a full narrative account of any information, direct or indirect, which officials may have had concerning what prompted Mr. Billy Riordan to record his concerns regarding the ownership of the report on page 6 of the final draft of version October 18th, 1995, and in his various handwritten notes".

You say "I have no specific recollection about this. Mr. Billy Riordan did a considerable amount of work on the financial analysis of applications. I am aware that Mr. Towey has a greater recollection of Mr. Riordan's concerns than I have".

You are then asked to provide details of all inquiries which to your knowledge, direct or indirect, were conducted either by those officials or by any other person regarding the conclusion in the document "Suggested Textual Amendments", which is as follows:

"Having regard to the level of interest in the Irish

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competition for the GSM licence and the high profitability of mobile communications generally throughout Europe, that the project is financially robust, and after a licence has been awarded, an attractive opportunity for corporate debt financiers together with precise results of such inquiries, if any."

I think I should refer to that passage. It's a passage which was in the suggested textual amendments but was also it ultimately formed part of the final report. It's in Book 43, tab 139.

(Document handed to witness.)

Go to the 6th page of that document.

There is a heading in the middle of the page which is "Summary of Results"; do you see that?

A. Yes, I have it now.

Q. Can you see the entry "Page 44"?

Page 44 of the report is the page that has the heading "Sensitivities, Risks, and Credibility Factors". And these are the other aspects which, it was decided, would not be scored. You will recall that Messrs. Andersens, on the 21st September, sent a fax to you and Mr. Towey in Dublin asking for a decision on whether these aspects would or would not be scored, and he gave a recommendation which we discussed, I think, yesterday.

/RS

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Now, he then drafted a passage dealing with these issues, but that draft was substantially altered in the final report, and in the final version of the report by the insertion of this passage.

Now, in the question, you were only given half the passage, but I am going to read out the whole passage, to put it in context.

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

Now you say that "This addition was included in the report as agreed text reflecting the collective judgement of the Project Group, which met on the night of the 24th October 1995, but at which AMI were not present. The text was accepted by AMI with only minor

modifications and included in the final report. The

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fact that they made such minor modifications suggests strongly that they considered the text before agreeing to include it."

Now, I know that describes how the text formed part of the final report with, as you would put it, the consent of Andersen, but if you could just go back for a moment, I think what you are being asked is what inquiries, to your knowledge, were made by any person inserting the text; in other words, where was the information or expert, as I would see it, opinion obtained to enable the statement contained in the text to go in? Do you follow me?

A. I follow the question. The reason I am pausing is I don't have an immediate answer to it. There is probably an element of collectivity arriving at that position. I would be very interested to know what Billy Riordan's view of how it came to be drafted, because he was the accountant I don't know, again, if Donal Buggy was there at that stage or not; I mean, I would certainly have been influenced by their view on a text like that. I don't know what was a stimulant for the text to come in existence except the general concern that the report needed strengthening in terms of the results which we discussed an hour

ago, or maybe before lunch.

Q. Well, you think that if the text went in containing what is, I suppose, an expression of a view which would require financial expertise must have come from Mr. Buggy or Mr. Riordan, or involved them, even if it /RS

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didn't come from them. I appreciate Mr. Towey may have drafted it, but it must have involved their input as experts, or having expert knowledge in that area; would that be right?

A. I am certainly assuming that to be the case.

Q. I think you say you are not sure about what stimulated it.

A. Mmm.

Q. Could I suggest that it was stimulated by the passage in Mr. Andersen's draft of the 18th October in which he suggested that Esat Digifone should be awarded the result of the competition but that they had a problem. They had this financial vulnerability where one of the consortia members was concerned, and looking at where that is inserted, it would seem to have been, if you like, stimulated by the need to support the award of the competition result to the Esat Digifone consortium, even if it contained one weak member?

A. I am not so sure that the paragraph is only referring to that consortium, in the sense that

Q. Oh, I am sure you are right, but it's

A. But the same problems existed with others.

Q. Yes

CHAIRMAN: Does it generally seem to expand the concept of bankability?

A. Well, it could be either investor attractive or bankable.

Q. MR. HEALY: Would you see "bankable" and "investor /RS

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attraction" as the same thing?

A. They are certainly close.

Q. I would have thought if a project is bankable, then you are going to get money for that project.

A. I mean, there was never any doubt about the business being bankable, really, so long as you had the technology and you had the licence.

Q. But the problem identified by Mr. Andersen wasn't that the project wasn't bankable; it wasn't that there was a financial weakness in terms of a project like this, but that one of the equity participants wouldn't have been able to raise his share of his equity finance.

You recall that

A. I know, but it's again getting to a late stage in the evening. It's clear to me, at least, that you had a project we touched on this yesterday owned as to 50% by one group, 50 by another, an intention to place

20. That 20, the subject of letters of commitment from a number of banks and the financing of Communicorp, the subject of some form of commitment, which we are not going to go into this hour of the evening, in relation to Advent, which was mentioned at length in the Opening Statement as to its strength or validity or whatever, but what we were seeing at face value was that combination. And it seems to me that during the evaluation, that the people doing the financials were happy with that.

Q. And you think that that was your thinking; your interpretation is that that was what prompted this way of supporting the conclusion?

/RS

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A. Well, I don't think that that particular text is in support of any particular conclusion. It's in support of the concept.

Q. But why would it go into that page dealing with sensitivities, risks, and

A. Right now I don't have that page anyway. I have said that there was at least the next in order had some of the same reservations attaching to it.

Q. Do you think you can do another bit? Are you getting tired?

A. I mean, five minutes one way or the other won't make all that difference, but if you are going to go right

up to the wire at four o'clock, I might fall asleep on you.

CHAIRMAN: We will settle for ten minutes.

Q. MR. HEALY: Question 81, you were asked about your role in or your knowledge, direct or indirect, of the role of any other person in the preparation of the following documents: Mr. Loughrey's recommendation to the Minister dated 25th October, 1995; the briefing note to the Minister regarding the outcome of the evaluation process; and the memorandum to Government dated 26th October, 1995.

You say "I was aware that Mr. Loughrey was doing a written recommendation, either because he told me or because he showed it to me." That's in relation to his recommendation to the Minister dated 25th October

/RS

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1995.

In relation to the briefing note, you say you assume but can't confirm that the briefing note was prepared by Mr. Towey in consultation with you. I think that briefing note sort of presented a summary or an overview of the competition result; isn't that right?

A. I mean

Q. I don't want to pull it out and put you to the trouble of looking at it now, but I think that's what it did contain.

A. Okay.

Q. And in relation to the memorandum to Government, you say "I would be reasonably confident that Mr. Towey made the running in relation to the memorandum to Government also, but given its importance, he almost certainly consulted widely, not least Mr. Loughrey, myself, and Mr. McMahon."

To some extent, of course, the memorandum to Government had been superseded, hadn't it, by the decision by the heads of the various political parties?

A. Yes, it was for the record at that stage.

Q. Question 82 is as follows: "Details of all consideration given by the Project Group, by any member of the Project Group, or by any other person whatsoever, whether in consultation with Andersen Consulting or otherwise, to the qualification placed by Andersen Consulting on the financial capability of
/RS

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Esat Digifone and Persona.

And you say "As is clear from everything that has gone before, the financial analysis was carried out separately by a sub-group comprising accountants where Billy Riordan, I believe, led for the Civil Service side. For sure the financial positions of various members of various consortia were discussed in the

Project Group more than once on the basis of inputs from the sub-group. We were also advised by AMI as to what would be normal for the treatment of such matters in competitions of this type."

And that is to some extent, I suppose, a repetition of what you said to me earlier, that it would be from the financial side, from Mr. Billy Riordan, who led for you on this side, that this type of input would have come?

A. Yeah, but I am probably a bit more aware of some of the detail now than I was when I wrote this from my contact with the Tribunal and the documents surrounding it.

Q. Oh, I am not quibbling with your previous answer. They are consistent, I say.

A. But there is considerable evidence around that, for example, that Billy Riordan focused a lot on the financials of the project and that Andersens focused a lot on the financials of the members of consortia.

And that Billy Riordan did some searches in places like the Companies Office and did some research

/RS

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through Price Waterhouse archives and stuff like that.

So it wasn't as if nothing was done to investigate these things. I am now more comfortable that I know something about the things that were done, but that's

not either in conflict with or trying to reform my answers. It's just further information I now have.

Q. I am simply trying to summarise both answers to the effect that with the new information, you are still satisfied that the information was coming through from Mr. Riordan in any case?

A. Mr. Riordan, and I'd emphasise, Andersens, Jon Bruel in particular.

Q. I'd correct you, to some extent; from the documents, it would appear that Mr. Riordan was devoting time to the financial strengths of individual members of consortia as well as Andersens.

A. He certainly did some work in that area, yes.

Q. Question 82: "Please indicate whether the Department had in its possession a copy of the final draft evaluation report as of 25 October 1995, when the Minister met with members of the Cabinet, and following such meeting announced the result of the evaluation process. If the Department did not have a copy of the final evaluation report in its possession at that time, please indicate precisely what document or documents were in the possession of the Department".

And you say "As of the 25th October 1995, we attached

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considerable importance to having in our possession

the final draft evaluation report."

Now, I have been denigrated by my colleagues for using the expression 'final draft' as opposed to final version. Let's be sure that we are all talking about the same thing and I think the questioner, who wasn't me, also used the word "final draft". It's the 25th October version, I think that's the safest way to refer to it, 25th October final report, final version of the report.

A. Fintan Towey told me at some time that a final copy of that was faxed to the Department on the 25th. I never checked that information. Certainly, as you synthesised earlier, we had the 18th, and we had the agreed suggested amendments and so on, which combined amounted to a final report anyway. But Fintan Towey told me at some stage that he had a recollection of getting a faxed copy of the final report on that date.

Q. But

A. I don't know whether

Q. What you said is "Attached considerable importance to having in our possession the final" I'll call it report.

A. Yeah.

Q. I am sure you did attach considerable importance to it. Am I right that you don't know whether you ever physically saw it on the date that you went to the Minister?

A. I don't know whether I physically saw it on that date,

/RS

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no.

Q. What you described to me already as an abstract conclusion that you had a report of the 18th, and you had a set of textual amendments, and you had a response from Andersens

A. I was playing back to you something you said earlier.

Q. Yes, but that's only an abstract notion of the report, isn't it?

A. Okay.

Q. I think that might be an appropriate place

A. Could I make one small technical amendment to something I said yesterday?

Q. Do, please.

A. That occurred to me when I was doing some research this morning.

Yesterday I talked about checking the validity of the tariff comparisons and graphing the progress of tariffs through time. It's clear that I was erroneous in that recollection. What we actually did was graph them through different size of customer billing, or customer minutes. I said Andersens gave an introductory tariff and a three-year tariff.

I was wrong in my recollection. The correct situation is that they came and said for a customer of that size

they rank this way, and for a customer of that size
and I said "Well, wouldn't it be better to go from a
hundred minutes to a thousand minutes or two thousand
minutes?"

/RS

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Just a nuance of technicality. I thought I might
mention it.

Q. Thank you very much, Mr. Brennan.

CHAIRMAN: Thanks for your assistance, Mr. Brennan.

We will operate the same hours for tomorrow, after
which we will give you some peace for Christmas.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
THURSDAY, 19TH DECEMBER, 2002 AT 11AM.

/RS