

A P P E A R A N C E S

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I N D E X

WITNESS: EXAMINATION:Q. NO:

MARTIN BRENNAN

Mr. Healy

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THE TRIBUNAL RESUMED AS FOLLOWS ON FRIDAY, 17TH

JANUARY, 2003, AT 11AM:

MR. HEALY: Thank you. Mr. Brennan.

CONTINUATION OF EXAMINATION OF MARTIN BRENNAN BY

MR. HEALY:

Q. MR. HEALY: Mr. Brennan, if you go to Leaf 60, please.

This is a document that came to the Tribunal from the Department of Finance. On the top right-hand corner it's headed "JMc 1, 2, 3", and we assume, therefore, that it's a note of Mr. Jimmy McMeel. It is, in fact, the only note the Tribunal has, and I think the only available note of the proceedings of a meeting of the Project Group on the 27th April, 1995. Obviously it deals, presumably, exclusively with those issues that were of particular interest to the Department of Finance.

A. Mm-hmm.

Q. The heading is "Key Issues for the Department of Finance."

It deals with evaluation criteria and use of weightings.

"Department of Finance..."

I am sorry, I want to go back a bit earlier before I come to that. I want to go to another Department of Finance memorandum which I should have dealt with earlier. I am sorry for confusing you,

Mr. Brennan. If you go back to Document 57, which I

think is where we left off yesterday. It's part again of the same issue, the question of weightings and the debate between Finance and DTEC in relation to that issue.

It's a memorandum to the Minister for Finance from Mr. David Doyle, and it's the Finance's analysis of the issues as they saw it arising in connection with the application of weightings to the competition criteria.

Subject: "Update developments in relation to the award of a second mobile telephony licence in Ireland".

"The 1995 budgetary arithmetic includes a minimum license fee of $\text{€}1/25$ million, but with the expectation of a $\text{€}1/30$ million fee payment to the Exchequer for the award of the license. There are indications already from the selection process that because of the policy priorities of the Department of Transport, Energy and Communications, the Exchequer's yield from this license may be in jeopardy.

"DTEC and their recently appointed management consultants, Andersen Management International of Denmark, are anxious to apply the weightings to the criteria involved in the selection process see criteria listed at Tab A." It's presumably a reference to what we'll call the paragraph 19 criteria.

"Weighting would imply stating, for instance, that the

tariffing regime will account for 50 percent of the 'marks' and the upfront payment of 5 percent." That was just an example obviously given by Mr. David Doyle?

A. But a very poor example. I mean, in the sense that you couldn't apply a descending order of priority and come up with those numbers.

Q. Of course, because if you had 50 percent at the point at which tariffing appeared you'd have run out of marks?

A. But you already had other ones higher up.

Q. That's what I mean. So if that's 50 percent you only had 50 percent for the ones above so you have nothing for the ones below. In any case, I think what he is trying to suggest and I think what, if the interpretation I am putting on it is correct and I'd ask you to comment, is correct, what he is saying is the policy of the Department of Transport, Energy and Communications is to emphasise getting a good deal for the consumer, and if a weighting is applied by emphasizing those aspects of the listed criteria, and insufficient emphasis is put on the auction fee element, then the people bidding won't be tempted or prompted to bid enough to get us up to our 25 or 30 million, would that be

A. That seems to be the case he is making, yeah.

Q. "This Department has opposed the adoption of a

weighting formula. Our arguments have been based on Government decision to proceed with the competition which stated that the Minister for Transport, Energy and Communications would put a recommendation to the Government in time for final decision on the granting of a license to be made by 31st October, 1995. We contend that there is a danger that the adoption of a weighting formula will turn the selection process into a foregone conclusion and thereby effectively remove the final decision from Government. In addition, there is a further real danger that if a low weighting is attached to the up-front fee element, as the Department of Transport, Energy and Communications seem inclined to do, the scale of that fee will be considerably reduced. There is no obligation under the EU public procurement rules to adopt or disclose any weighting formula.

"I understand that the steering group overseeing the selection procedures, DTEC's priority, notwithstanding the Government's decision, is the selection criterion dealing with the tariffing approach proposed by the applicants. Ultimately, if the DTEC view were to prevail, it would mean a substantial reduction (i.e. 1/215 million has been mentioned) in the amount bid for the franchise with a corresponding negative impact on the budgetary arithmetic. For that reason, I have told this Department's representative on the

group" that's Mr. Jimmy McMeel "to insist that no weighting formula be applied or disclosed. They have 'Backed off' on this for the present at any rate."

And I think that reflects the note we saw in an earlier minute to the effect that this process or this debate would be cooled down, if you like, and certainly not elevated to the political arena?

A. Yeah, but it's a fairly extreme interpretation of our position in the sense that it talks about

Q. Perhaps the interpretation you would have wanted the EU to take ultimately?

A. Also an element of exaggerating the extent to which I mean, the selection we are dealing with, the tariffing approach proposed by the applicants, seemed to be the only focus of our attention, whereas that was I think third or fourth in the order and the license fee was below it, so I mean, well I suppose people write memoranda to support the case they want to make.

Q. Yes, I accept that it's an extremely trenchant view contrary to the view or the policy view being adopted by your Department.

CHAIRMAN: It seems to be the Minister made the handwritten insert stating that he shared Mr. Doyle's concerns?

A. That is undoubtedly the Minister of Finance, yeah.

Q. MR. HEALY: It's signed RQ in any case.

A. Yeah.

Q. And it's dated the 22nd April, which is in fact I think the only way we have of there is a date on the memorandum at the bottom, the memorandum is dated 20th April. And it's copied to RJC, which I take it is a reference to Mr. Curran?

A. Correct. And PF is Mr. Phil Furlong, who was at that time Mr. Doyle's boss, and I don't know who the COM is.

Q. Right. I want to pass on from the next document for the moment because I think it might be more appropriate to deal with the next two documents in Leaf 58 when we come to the information memorandum. So if we go on now to Leaf 60 or Leaf 59.

This is a letter from Mr. Karel van Miert to Mr. Lowry dated 27th April, 1995. And by this time, am I correct in thinking, that the European Commission had received the RFP?

A. Yes.

Q. And the purpose of giving it to them was to hopefully receive, if not their imprimatur, at least make sure they had no objections to it which would in any way inhibit you from going on with the process, is that right?

A. I suppose there was two purposes. One I was either promised at an earlier or been asked for it at an

earlier date, but we also wanted to increase their comfort, and we were actually going ahead with the process which had been an issue in correspondence earlier.

Q. Yes. When the RFP went to them, it went of course in a form which was different to the form which you had envisaged it would take when you had had your earlier discussions, I think, was it with Mr. Ungerer, much earlier when you felt that what you were proposing would not attract any adverse scrutiny from the EU, wasn't that right? It was now in a form which as you flagged yourself, it could attract some negative scrutiny from the EU, would that be right?

A. Yeah, I mean on the date that the RFP was released, we sent a copy by diplomatic bag or something, quickly anyway, to Brussels.

Q. But what I am suggesting is that your earlier communications with Brussels and the meetings you had had in Brussels left you with the impression that what you had envisaged for the process at that point would pass muster with Europe, but between that time and when you finalised the RFP, for reasons to do with internal political pressures, the RFP had changed quite significantly and you now, it was now in a form in which, as you flagged, there could be some trouble ahead

A. Yeah.

Q. from the EU.

"Dear Mr. Lowry,

"Thank you for your letter dated 8 March, 1995. I am very pleased to hear that you have now completed all the preparatory work for the opening up of the GSM market to competition, and I appreciate in particular the possibility set out in Clause 15 for the future second mobile operator to use other infrastructure than that of the current monopoly provider. However, at this stage of the analysis I cannot exclude that some of the other conditions provided for within the framework of opening up the Irish market could appear to be discriminatory.

"The main issue is the amount the applicant is invited to pay for the right of the license under Clause 19.

As you are probably aware the Commission opened in December 1994 an infringement procedure against Italy which had also included such an auction element as a selection criteria for the second GSM licensee. The Commission is of the opinion that such an auction resulting in a fee which is only imposed on the second operator, can significantly distort competition and favour the extension of the current dominant position of the incumbent telecommunications organisation.

"With regard to this, it is not entirely clear to me from the competition documentation whether Telecom Eireann which currently offers its own GSM service

would also have to pay the same amount as the new competitor.

"In any event, such an initial payment would lead to higher tariffs to recoup the money paid, thus rendering the mobile service less affordable and restricting consumer access to the market, contrary to the objective behind Council recommendation 87/371/EEC of swift GSM roll-out throughout the community.

"Moreover, this documentation does not appear fully transparent. Potential applicants are not aware of the weighting given to the different assessment criteria listed in Clause 19.

"I was somewhat surprised to note that the amount the applicant is prepared to pay will have more importance than the qualitative criteria relating to coverage, performance and efficiency of the service, which would appear to me difficult to reconcile with the coverage aim set out in Clause 7 and the more general objective of ensuring universal service in Ireland.

"Finally, I would be glad to receive confirmation that Clause 12 does not make any distinction between direct interconnection mobile telephony service within and outside Ireland.

"I would, of course, be happy to discuss these issues with you. My services are also ready to take part in a technical meeting with a view to exchanging information and complete their assessment of the

situation.

"I look forward to your reply in due course."

Would you agree with me that what the letter seems to suggest is that the EU have an objection not so much to the auction as such but to an auction where no provision is made for some similar fee being charged to the incumbent. Secondly, that the weightings have not been disclosed to the various applicants, and thirdly, that insufficient priority was accorded to coverage performance and efficiency of service compared to the license fee. Would they be the three main things?

A. Those are the three key points. In relation to the latter one, and this becomes obvious in the further exchange of letters, it's clear that the Commission's position about coverage, etc., is based on a misapprehension, in the sense that what was being scored in the evaluation model was coverage going beyond the 90 percent minimum requirement and so on.

Q. I appreciate that.

A. There are issues around that.

Q. In fact, your application wouldn't merit any consideration if you didn't offer 90 percent because that was an essential and mandatory requirement?

A. And we explain that later. As regards the question of fee, the Commission seemed to be using, as I recall it, different arguments again with different countries

depending on what they proposed. I believe the Commission was against fees in any event, but where they were being charged equally they were against the fee; where they were being charged discriminatorily, they were against discrimination.

Q. Your impression, as I understand from your earlier meetings with them, was that it wasn't the fee they were really objecting to in your case, you felt their problem was discriminatory fees. Was that your impression in relation to the Irish situation?

A. There was no doubt that was where the attack was first coming from. But the letter makes clear that the Commission sees high fees as increasing prices as well.

Q. I appreciate that. As it happens we know that the Italian fee was paid and was not paid back and the Italians didn't have a compensating arrangement, what they did was they introduced asymmetric measures, they claimed they introduced asymmetric measures, so that a large fee was in fact recovered in that case and never paid back. I think in Belgium in a roundabout way asymmetric measures were ultimately introduced?

A. I was familiar with the details at the time. I have forgotten them now. I think in Italy it may have been a preferential arrangement on interconnection.

Q. In Belgium or in literally in Italy there were asymmetric measures introduced. Mr. Coughlan corrects

me in relation to Belgium, the regulator who was brought onto the scene roughly at the same time as one was envisaged coming onto the scene in Ireland compelled the incumbent I think to pay?

A. Okay.

Q. But that's to some extent by-the-by. At this point what I want to know is whether the EU had the weightings that you envisaged applying, if you had at that point

A. I don't think we had settled them at that point. We hadn't even seen a first draft at that point so they couldn't have.

Q. They had no idea at all what kind of weightings you were going to apply?

A. No.

Q. Did they know you were going to apply weightings?

A. No, as far as I know they only had the documentation, the RFP documentation as available to the market.

Q. And in any case, from the documentation we have seen you were still at loggerheads with Finance about (A), any weightings, and (B), disclosure of weightings?

A. Yeah, and the weightings were developed at a later stage. I mean, they ultimately compromised that we would have weightings but not give them to applicants and they were settled at a later date than this.

Q. I appreciate that, but if you look at the last line on the first page of the letter, "Potential applicants

are not aware of the weighting given to the different assessment criteria list in Clause 19."

A. I think that's just a position of principle of the Commission, that they wanted us to have weightings and to give them to applicants, at least that's the sense in which I am reading it now. There were no weightings in existence at that point.

Q. I see. Are you saying that in other words they assumed

A. They assumed they were not doing

Q. They assumed you were doing it, but that

A. I would say they assumed they were not having weightings and they would prefer if we did.

Q. Could I read that again. "Potential applicants are not aware of the weightings given to the different assessment criteria list in Clause 19." I read that to mean, we, the EU, assumed there was going to be weightings, at least I read it to mean that, but we don't know whether the we don't know what the weightings are?

A. Well, the reality is that if you have a series of criteria in descending order of importance, that implicitly says there must be weightings and the issue then is whether they are given to the applicants in advance or not.

Q. Mm-hmm. I think that's your handwriting at the top, is it?

A. No.

Q. On the top right-hand?

A. No, it looks 'like M McL' and the signatory, but I don't know what its "For your info". I'd say, I don't know who it's marked with, I just can't make it out.

Q. I see. 'Mr. Dillon' does it look like 'Mr. Dillon'?

A. Yes, it could easily be that, yes, whom you will recall was on Mr. McMahon's staff and used to attend the Project Group at that point. And I would tend to assume he wasn't the only recipient. The other thing to mention is that even though the letter is dated 27th April, it's date stamped into the Department, it's either the 3rd or the 8th May, so we weren't aware of it in the context of the discussion dealt with in the next note.

Q. Yes. Would it have been faxed to you first, do you think? Looking at other communications from the EU, they seem to have been faxed and then hard copies sent?

A. They would often fax drafts and stuff like that. In this case, Commissioner to Minister and signed, I doubt it but I don't know.

Q. I see.

A. Or put another way: If I was aware of it I would certainly have mentioned it in a meeting on the 27th.

Now, as you say there is no record of the meeting.

Q. Yes, I am not going to come back to what you did in relation to it until such time as we have disposed of the meeting of the 27th.

A. Okay.

Q. Going back to Mr. McMeel's note of that meeting in Leaf 60. "Key issues for the Department of Finance, evaluation criteria and the use of weightings.

"Department of Finance representatives emphasised that the Exchequer had budgetary expectations of around $\text{€}30$ million from the second mobile telephony license fee in 1995. That $\text{€}30$ million was half-way between the equivalent fees achieved in Italy (20 million) and Spain (40 million) translated allowing for Irish conditions, i.e. population, GNP. Because of the level of fees achieved in other countries there would be public criticism in Ireland if only a token fee was achieved.

"It appeared to the Department of Finance that DTEC policy was only focused on the reduction on tariffs, which means that the fee would be commensurately small. DTEC had started out with a position of a $\text{€}5$ million fee only. The successful bidder would have considerable freedom to construct infrastructure which would place them at an advantage for the post-liberalisation telecom environment in Ireland.

This increases the attractiveness of the franchise and

ought to be reflected in the level of fee.

"In response to DTEC's assertion that the whole process could be turned into an auction, the Department of Finance representatives emphasised that they were not totally driven by the fee question. For example, if a bidder offered a large fee but had a wholly implausible business or technical plan, it would not win the franchise. We are sensitive to the interest of the European Commission in the process and the need to avoid accusations of holding an auction. The Department of Finance urged DTEC to respond to the letter that had been issued to them dealing with this issue." That is the letter written by the Department of Finance?

A. I assume so, yeah.

Q. "Consultants are also to examine possible methodologies which would arrive at a fee level corresponding to the 1995 budgetary arithmetic.

"Both DTEC and their clients emphasised that they saw no way of evaluating the bids without some system of weightings. Every other country which has licensed a second mobile operator has used a weighting system.

The consultants seem sensitive to the interdepartmental policies associated with this aspect of the matter. Their evaluation methodologies include 'quantitative' and separate 'qualitative' evaluation as well as a supplementary evaluation.

"Liberalisation of infrastructure:

"It appears that Telecom Eireann have just recently realised, (despite having seen the RFPs, etc.), that the second mobile licensee will be entitled to build its own infrastructure. The logical extension of this is that the licensee should also be able to use existing infrastructures owned by companies such as CIE/ESB. The entire prospect now alarms Telecom. While adhering to its principle of freedom to build or use alternative infrastructures, DTEC have offered Telecom the opportunity to develop its own phraseology which would be used in the DTEC memorandum responding to questions from prospective bidders."

This meeting suggests that in some way some movement toward a compromise or some middle ground is being achieved, is that right?

A. Yes.

Q. The next document I am going to pass over for a moment, and I am going to go on then to your reply to Mr. McMeel. This is in Leaf 62.

It is dated 3rd May, 1995, from the Department of Transport, Energy and Communications to the Department of Finance.

"Dear Jimmy,

"I refer to your letter of the 31st March, 1995, and subsequent discussion been the GSM Project Group of the question of weighting the criteria for selection

of the successful GSM applicant.

"On the basis of your letter and the subsequent discussion, it would appear that your concerns are as follows:

" That the weighting of selection criteria may lead to a situation where the Government may be straightjacketed into a rubber-stamping role, thereby diminishing its legitimate right to select the GSM licensee.

That the budgetary requirements of the Minister for Finance in relation to the license fee might not be fully reflected in a weighting mechanism.

"The primacy of Government in making the final decision on the second GSM operator is fully recognised. However, as mentioned in your letter of 31st March, the Minister is obliged on foot of the Government decision of the 2nd March, 1995, to make a recommendation regarding the award of the license.

The proposed weighting of selection criteria is simply a tool to ensure that this recommendation is made on a fair, objective and transparent basis. The only alternative is to make a recommendation based on intuitive analysis of the relative merits of the applications based on marks under each heading of the selection criteria. Such a process would, however, in my view introduce an element of subjectivity which does not meet the emerging EU requirements of

objectivity and transparency and non-description. It amounts, in any event, to an implicit weighting mechanism, but also opens up the possibility of factors which are not included in the selection criteria at all being brought to bear on the final selection.

"The ultimate relation to Government will be supported by details of the weighting formula and the arguments in favour of the chosen formula. It will also include a short assessment of the conclusions reached on each of the applications for the GSM license. I am satisfied that this approach fully accords with the normal practice in submitting recommendations to Government and does not exceptionally limit the Government's discretion. In these circumstances I regret that I cannot accept your contention that the use of a weighting mechanism is a fundamental change to the selection process approved by Government. It is rather a logical extension of it and this is clearly borne out by the approach to evaluation taken by the consultants who tendered for the evaluation job.

"The weighting approach is also, as you are aware, strongly favoured by the chosen consultants, Andersen Management International, in order to carry out the first stage of the evaluation viz the quantitative method. However, given that Andersens propose to

carry out a qualitative analysis and supplementary analysis in particularly difficult areas, I am confident that this allows flexibility to ensure that a perverse result does not emerge. This matter will be discussed further at the GSM Project Group meeting on the 18th May, 1995, on the basis of a presentation by Andersen Management International.

"Your second concern in relation to a weighting mechanism relates to the importance of the license fee. You are reminded that the order of priority of the selection criteria has been settled by Government, and the fee is fourth in the order of priority. This was agreed by your Department in advance of the Government decision. It was also made clear throughout the process that the selection of the second GSM operator would not be simply an auction, but that the introduction of effective competition to the sector and the provision of a good deal for the consumer would be high priorities. This has been made clear to the market in the Minister's Public Statements in relation to the competition. It would not, in my view, be acceptable to move the goalposts now when the game is on without clarifying the position to potential applicants. It should also be noted that the European Commission has begun a process of inquiry into large GSM license fees paid in other Member States and that we have already received

informal approaches regarding the extraction of a large fee here. I am, however, satisfied that we can reach a reasonable compromise within the established and public parameters of the selection process.

"Paragraph 19 of the competition document states the following:

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

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

Quality and viability of technical approach proposed and its compliance with the requirements set out herein;

The approach to tariffing proposed by the applicant, which must be competitive;

The amount the applicant is prepared to pay for the right to the licence;

The timetable for achieving minimum coverage requirements and the extent to which they may be exceeded;

The extent of applicant's international roaming plan;

The performance guarantee proposed by the applicant;

Efficiency of proposed use of frequency spectrum resources.'

"I am sure that you will agree that an applicant who fails to score well on the requirement for 'Financial and technical capability' or the first two criteria specified in the bullet points should not get the license, irrespective of the fee proposed. There is a clear trade-off between the applicant's approach to tariffing and the proposed license fee. I propose, therefore, that we agree that there be a reasonable balance between the weighting of the approach to tariffs and the license fee.

Your detailed views on the foregoing would be appreciated."

When you say in the third paragraph of your letter on the first page that the "Primacy of Government in making the final decision on the second GSM operator is fully recognised", what did you mean by that?

A. I mean, we had a Government decision to launch the competition on the basis that it would come back to Government. And therefore, it was ultimately a matter for the Government.

Q. Was this your way of responding to his suggestion that in some way the process you had put up was tying the Government's hands?

A. I suppose it was, yeah. I suspect that I wasn't the only drafter or even the primary drafter of this letter, and the person who was will be here in due course I am fairly sure. And I am only saying that because there are clues in relation to grammar and positioning of commas that are not my style, put it like that.

Q. Was it Mr. Loughrey who was responsible?

A. Not at all. I suspect Mr. Towey was the primary drafter of this letter.

Q. But presumably leaving aside the style and the language used or the style rather and the language used, you were nevertheless presumably prepared to stand over the content?

A. Absolutely, I read it and signed it, no doubt about that.

Q. This was after all critical from two points of view. Firstly from the point of view of maintaining the relationship with the Department of Finance on the project team, and in general, maintaining - presumably it's a principle of good Government that interdepartmental rows do not develop?

A. Yeah.

Q. And thirdly, it was important that you get agreement on this issue of weightings?

A. Absolutely, I needed a result.

Q. And I take it that you agree that what is stated here,

leaving aside the language used, is nevertheless a fair statement of the propositions upon which you would have sought to rely in responding to the assertions made by Finance?

A. Yeah. It's a reasonable representation of the state of our mind in bringing about a compromise over the issue that was in dispute. I mean, taking any long letter and passing it and analysing it seven years later will inevitably give rise to questions and uncertainties, but I don't think any particular conclusions, or at least I wouldn't draw any particular conclusion from that.

Q. As I understand it, what the first part of the letter is saying is that the Government agreed an order of priority

A. Yeah.

Q. for the various selection criteria. They didn't just agree the criteria, they agreed an order of priority for them. And I think what you were saying was that if you agree an order of priority consistent with what you said to me a moment ago, you implicitly acknowledge that there must be some way of distinguishing the priority in one case, in the case of one criteria from another and that implies a weighting?

A. Yeah.

Q. Now, in I suppose if we are going to be absolutely

strict about it, Mr. Jimmy McMeel might say that's all very well but the actual weighting, the actual numbers had not been agreed, but be that as it may, your case was that by agreeing an order of priority you implied a weighting, otherwise you implied a weighting and you implied an objective approach to assessment?

A. Yeah.

Q. And that if you didn't have weightings, you'd have a subjective approach to assessment?

A. Yes.

Q. You then went on to, in the second page I think, in the fourth paragraph beginning, "Your second concern in relation to a weighting mechanism relates to the importance of the license fee." And what you were anxious to deal with here was the suggestion being made with, by Finance that the license fee was going to have an insignificant weighting and that therefore it would not attract a sufficiently large payment to meet their budgetary concerns?

A. Mm-hmm, yeah.

Q. I think what you are saying is that, through statements made by the Minister, an indication had been given to the market that a good deal for the consumer would be a high priority?

A. Yes.

Q. And that that was something that had to be reflected one way or another in the weightings, and you couldn't

move the goalposts now?

A. Mmm.

Q. You then quoted paragraph 19 and went on to say, and I think at this point what you are responding to in the last part is the suggestion Mr. McMeel was making that if you were relying completely on a weighting matrix you could end up being straightjacketed into a perverse result, remember that point he made in his letter?

A. Yeah. He was talking, I think he was talking about they wouldn't be so foolish as to accept a cheque from somebody who couldn't do the business.

Q. Yes. What you said, "I am sure you will agree that an applicant who fails to score well on the requirement for financial and technical capabilities or the first two criteria specified in the bullet points which are credibility of business plan and applicant's approach to market development and quality and availability of technical approach, should not get the license, irrespective of the fee proposed."

I think this is perhaps also a more general point you are making, and maybe it reflected some of the discussion that must have taken place at the meeting of which we read out the Department of Finance's note a minute ago, where you may have been to some extent addressing the note, in that if somebody pays a big cheque, who can be sure they can do anything? Either

meet the cheque or have the relevant degree of technical skill and experience and so forth. And what you are saying was that your two headline criteria, financial and technical capability would be a sufficient protection to avoid the risk that somebody who proposed a high fee mightn't be available to deliver either on the financial side or on the technical side. Would that be right?

A. Yeah.

Q. Can I just say one thing at this point; if you look at the final paragraph, what you say is that, "I am sure you will agree that an applicant who fails to score well on the requirement for financial and technical capability or the first two criteria in the bullet points should not get the license, irrespective of the fee proposed." That suggested that at that stage you envisaged that there would be a scoring process applied to financial and technical capability?

A. It certainly reads that way. Again it's a question of whether it was drafted as finally as you are suggesting, I don't know.

Q. Well, let's deal with it on two bases. Firstly that's what it suggests definitely, doesn't it, that you would score these two things?

A. Yes.

Q. Secondly, I think what it acknowledges is that they were of considerable importance and that they were an

overall, as it were, protection for the licensor, for the Minister to make sure that he wouldn't be driven by any other marking system into giving the license to somebody who didn't overall have the requisite degree of financial and technical capability. Would you agree with that?

A. I'd go along with the proposition that you must have financial and technical capability, a credible business plan and a viable technical approach. You have to have those or you wouldn't get the license.

Q. I think it goes further, in that it suggests, because this is something that came up at the end of evaluation process, and we are tracking forward a little, as you know, but it does suggest a scoring of these two, what I would call overall requirements, the financial and technical capability. And could I suggest to you that it suggests more than that, it suggests that that would be an objective, as opposed to a subjective, a merely subjective way of dealing with those two issues. That was the thinking at that time?

A. Yeah, that's the way it reads, yeah.

Q. The next document I want to come on to is the preliminary draft license, but I want to go back for a moment to one or two things that we passed over.

I may be referring to them in a minute. They are at Leaf 58. The document at Leaf 61 is the information

memorandum, and what it contains is a collation of questions from various potential applicants under a number of headings. They are put in boxes in your formal document and then you have the responses underneath them?

A. Yeah.

Q. And this was a document made available to all of the potential applicants. There were no individual responses to individual applicants. You drew all the questions together and you produced a composite response?

A. Exactly.

Q. Page 3 of the document contains the responses.

I just want to deal at this point with one or two aspects of the responses which are relevant to the debate that was taking place (A), with the Department of Finance, and (B), with the EU. If you look at page 4 under the heading "License fee", there are a number of questions posed as follows:

"Whether the license fee is payable in a lump sum or by instalments. The discount rate used to evaluate fee payments over time, the time scale and any interest charges.

" Whether a bid bond is required at the time of the application;

" The treatment of the fee for taxation purposes;

" The rationale behind Eircell not being required to

match the up-front fee requirement and the question of whether a fee would be imposed if Eircell were partially privatised."

The answer is: "The license fee is payable by way of a lump sum payment in the form of a bank draft in favour of the Department of Transport, Energy and Communications on the day of, but prior to the grant of the license. Proposals for payment of the fee in instalments will not therefore be acceptable. A bid bond will not be required. For tax purposes the fee shall not qualify for capital allowances and shall not be regarded as a tax deductible expense.

"Questions about the change of ownership of Eircell are speculative at this time."

You notice that there is no answer at all to the question about the rationale behind Eircell not being required to pay a fee.

A. The last sentence is a response to that, because the question is conditional, the question is "If Eircell were partly privatised would they then have to pay a fee?" And what we are saying that's a speculative question.

Q. I think it goes further than that, doesn't it? "The rationale behind Eircell not being required to match the up-front payment and the question of whether a fee would be imposed if Eircell were partially privatised." As I see it there is two questions,

would you charge them if they were partially privatised? But leave that aside, why would you not charge them anyway?

A. And it's obvious we choose not to answer.

Q. Why was that? Why did you not say "We don't want to answer that" or...

A. I have no idea. I mean, this was a document prepared, iterated across several divisions over a period of some days, maybe even weeks, and that's what came out at the far end.

CHAIRMAN: But I presume that aspect was in the melting pot anyway, wasn't it?

A. Was it still in the melting pot? At that stage it probably was, yeah.

Q. MR. HEALY: I'll get the date of the document. The document is the 28th April, 1995. I think it was still in the melting pot?

A. Yeah.

Q. But why simply ignore it? Was there some decision taken, which there must have been, and if so, why, to ignore that question?

A. I don't know if it's possible to trace the actual taking of a decision.

Q. But can you think, looking at it now, is there any reason why you wouldn't have answered this?

A. No particular reason, no.

Q. This document was examined fairly carefully, wasn't

it?

A. Very carefully, yeah.

Q. I have to assume, I can't see any reason why it wouldn't be appropriate to conclude that there was some deliberate reason, I can't see, but not to respond to that question?

A. I mean, I can't answer it either. The answer at that time was it is not our current intention to do so, but why it wasn't stated, I just don't know.

Q. Well, the answer was not it wasn't your current intention. You were asked for the rationale. The answer might be "I won't give it to you"?

A. Maybe, yeah.

Q. If you go on to the next page, which is page 5, and the heading is "Selection Process".

"The questions posed relate to:

" Whether a weighting formula will be applied to the selection criteria, and whether details can be supplied, including the question of the importance of the fee relative to the other criteria.

" How financial capability will be assessed, and whether there are any specific financial criteria;

" The notice that will be taken of an applicant's relevant experience in the construction and operation of existing GSM networks;

" The extent to which income created for Telecom Eireann either by way of interconnect revenues or

by the leasing of lines will influence the evaluation of the successful applicant."

"The answer:

"A model to be used to assist in the evaluation of tenders for the second GSM license is being developed by the Department in conjunction with its consultants. Criteria will be evaluated in the order of priority detailed in paragraph 19 of the tender document. The Department does not intend to publish further details of this model."

Now, again you didn't answer the question on a weighting formula at that point. Why was that?

A. I am taking it that this paragraph was what we decided to say in response to the first bullet point. And the furthest we were prepared to go is, "The Department does not intend to publish further details of this model".

Q. I am just wondering why? Is there any reason why you weren't prepared to go any further?

A. No particular reason.

Q. I mean, you have already said I think in evidence that it stood to reason that if you had an order of priority you'd have to have a weighting formula?

A. But we were still in discussion with the Department of Finance and we had a deadline to get out a document.

Q. I appreciate that, but when I was asking you about the EU response, this may not nothing much may turn on

this, but it just puzzles me. When I was asking you about the EU response and the questions from the EU relating to a weighting formula, you, I think, responded to the effect that it was assumed, or implicit that there would be a weighting formula, and in fact that's the approach you took in responding to Mr. McMeel as well, that it was implicit that if you had an order of priority there would be a weighting formula. If it was implicit, but not stating that you were having a weighting formula, were you not misleading people who might take the view that it was implicit there would be a weighting formula?

A. The only response I am making to you is, we said in that paragraph what we were prepared to say at the time.

Q. But I am asking you

A. I am not saying it was a conscious decision not to use different words, but those are the words that came out. There is no mystery here that I can see.

Q. Well, the mystery is why you wouldn't have said "I won't answer that question" or "A weighting formula is implicit, but it hasn't been worked out" or "A weighting formula has been agreed" or "It hasn't yet been decided whether there will be a weighting formula or not." It's one or other of those things. The fact is you hadn't yet concluded your deal with Finance. You hadn't yet agreed a weighting formula. Those were

the facts, weren't they?

A. But what we are saying in this response is there will be a model for the evaluation, we are working on it with our consultants and we will not be publishing it.

Q. Did you ever tell people that there would be a weighting formula?

A. I don't think so. I am not sure now.

Q. You never told people that there would be a weighting applied?

A. While the competition was going on? I don't think I did, but we'll see as we go forward through the documents. I don't think I would have had occasion to.

Q. So does that mean that people who were applying, unless they designed it for themselves, were under the impression there was no weighting formula?

A. I think you will find that in a competition of this kind, that each of the bidders would have spent some time trying to second-guess how we would deal with the descending order of priority and what kind of weighting we would give. My guess is that every bidder would have given some attention to that, in the same way as they would if they were bidding for a Government work or bidding for supplies to Government. They would always consider the question. What conclusion they'd come to, I don't know.

Q. I think there is a mystery here, Mr. Brennan, and can

I tell you why, and maybe that will assist you in providing me with what I hope is a more informative answer.

At that point you believe that a weighting formula was implicit in the order of priority, but you hadn't yet concluded some delicate negotiations with the Department of Finance. Ultimately you were aiming to have a weighting formula, isn't that right?

A. Yes.

Q. As far as the EU were concerned you were going to have a weighting formula, but you were not going to disclose it as of that time to intended applicants?

A. I don't think we had told that to the EU at that point.

Q. As far as they were concerned?

A. They were assuming, they were urging upon us.

Q. Yes. You could have said, "We are considering whether to apply a weighting formula and we will let you know in due course", or you could have said, "We are going to apply a weighting formula and we will not give you the details."

A. At this point, if I am remembering correctly, I had a feeling, and probably people in my Department had a feeling, that you couldn't do this without a weighting formula, but we were still having a row with the Department of Finance about whether to go that road or not. And whatever about the chance of getting them to

agree to have weightings, the idea of publishing them was never in the Department of Finance's agenda.

Q. I appreciate you weren't asking them to publish the first question of whether they would be applied, and secondly the details of them being supplied. I just don't understand in what was an information round why more direct answers weren't given. If you can't throw any more light on it, so be it, it seems to me to be a very simple statement of fact that was required here, and it wasn't given?

A. You are free to draw that conclusion. I mean, this is a memorandum prepared collectively by a group of people responding to a variety of questions. And it says what it says. It was done by the people concerned. There was no outside influence in doing it. And I don't know what more I can say to you.

Q. We have already mentioned in passing on one or two occasions the response to the question on how financial capability will be assessed and whether there are any specific financial criteria. And the response that you gave was as follows:

"Financial capability will be assessed by reference to the proposed financial structure of the company to which the license will be awarded if successful. The financial strength of consortia members and the robustness of the projected business plan for the second GSM operation.

"Further details of criteria which will be considered in the assessment of financial capability will be elaborated in the supplementary memorandum to be issued by the Department giving guidelines for submission of applications."

Now, can I ask you to go back for a moment to Leaf 58.

Do you see that leaf contains two documents, each suggesting different approaches to answering that question. And the first response, or the first document contains a contribution from Andersen Management as to how that document or how that query was going to be responded to.

It says, "April 25th, 1995, re input to the memorandum concerning how the financial capability is going to be assessed. cf the question posed by Esat.

"The Department can pick and choose from the following comments:

"The financial capability will be assessed quantitatively and qualitatively. The factors will take a close look at the projected internal rate of return and a number of other key financial figures. cf Annex 1 to the memorandum, in particular Table 15.

As an example, the evaluators will consider the solvency, the liquidity and the degree of self-financing during the projected period. If the solvency and liquidity and the degree of self-financing appear to be low compared to the

exposure or the project seems to be risky the evaluators will investigate whether deep pockets exist should the business case meet temporary opposition."

Now, the last time we discussed this do you remember I asked you why Mr. Andersen's response was not used and why instead the other response, financial capability, the other response to the query contained in handwriting was used? Do you remember we pursued that?

A. Yes.

Q. Maybe I should just put the other response on the overhead projector.

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

"I queried why the Andersen answer was not supplied."

And I think your response was that it referred to a number of items which necessarily, as you saw it, re-figured what the evaluation model would contain, and that you felt it wouldn't make enough sense to people who would be reading the responses, is that

right?

A. It's a little more subtle than that. At the time we knew that Andersens were going to give out a compulsory model for the way to structure applications, and the way they drafted the answer presupposed that that document would have been an annex to the memorandum and it wasn't ready.

Q. Yes.

A. So their approach to the answer wouldn't have made sense on a stand-alone basis without the memorandum, so it was necessary to have a different version. Now, as I said the last time, the different version is in Mr. Towey's handwriting, that's clear. I don't know and he will ultimately speak for himself, I don't know whether that's his interpretation on the hoof of a discussion between a number of us or whether it's his attempt to find a way out of a dilemma or what it was, but it was done within the Department within the group or within the group, sorry.

Q. However it was done, and I am not really concerned about who drafted that document, this is in fact the information that was given to applicants or potential applicants and upon which they were presumably supposed to base their applications, isn't that right?

A. Mm-hmm. But informed later by the supplementary memorandum from Andersens.

Q. Yes. But if you look at the two documents, you will

see that in the Andersen document there is a reference to the proposition that "if solvency, liquidity and the degree of self-financing appear to be low compared to the exposure or the project seems to be risky, the evaluators will investigate whether "deep pockets" exist should the business case meet temporary opposition."

Do you remember you discussed before Christmas with me the principle of deep pockets, as you put it, that was introduced by Andersen?

A. Mmm.

Q. Could I suggest to you that that's not what was contained in the Department's response on the information round, and that the Department indicated that the financial strength of consortia members would be looked at, but there was no reference to the principle of the deep pocket?

A. That's clear, yeah.

Q. As I understand it, in the course of the evaluation the deep pocket principle was applied?

A. We engaged consultants at considerable expense who ran competitions like this. They introduced the notion of deep pockets as a valid, one valid way of looking at this issue. And it wasn't disputed. I mean

Q. I am not criticising that way of looking at it.

A. It was just part of the mindset as we went through the evaluation.

Q. Mr. Andersen was conducting his evaluation. He knew that you had already responded to the information round because the information round material was made available to him. He conducted his evaluation, as you put it. On the basis of this approach he had deep pockets as being a solution for financial problems, but he also must have known that that wasn't what was stated in the information round?

A. He certainly had

Q. I am not criticising

A. He certainly had all the documentation.

Q. But what was, the evaluation that was carried out then was slightly different to what was contained in the information round?

A. I think you are looking for conflict where there isn't any really.

Q. I see. Do you see where the Department's response says the financial strength of consortia members was the basis upon which or one of the basis upon which financial capability would be assessed. As I understand it, Mr. Andersen used the principle of deep pockets, which is somewhat different from assessing financial capability. In other words, you don't necessarily look at the financial strengths of consortia members, you can look at the financial strength of some of them, but if one of them has a deep pocket that will make up for a weakness on the

part of some others.

A. He certainly introduced that as one consideration, there is no doubt about that.

Q. Well, when we come to look at the evaluation you'll have an opportunity to look at it again and to see how it seems to me that a different approach was adopted in the evaluation to what was represented in the information round.

If we go on to Leaf 64, it contains the minutes of the seventh meeting of the GSM Project Group on the 18th May. Now, I think at this point it seems that any issues in relation to weightings had been resolved?

A. Before you go off Leaf 61, I would like to draw attention to one sentence on page 3, because of its importance later.

Q. Just hold on one moment. Yes, page 3?

A. Just above the box "For Draft License", the last point there, "No additional material in relation to the applications may be submitted during or laterally after the closing date, but see also reference to presentations..." because it's there and

Q. Yes, absolutely. And I think what you are drawing attention to here is the fact that once the applications came in, if there was any new material required you'd ask for it. We'll call you, don't call us. And I think that was an expression you may have used in the presentations which we will come to, that

if there was further information to be obtained you'd be asking for it and you wouldn't be accepting it unilaterally?

A. Yeah.

Q. Anticipating what these minutes contain, I am asking you just to help me a little, if you can, as to how the Department of Finance concerns in relation to weightings were resolved. I could find nothing in the documentation dealing with it. It's not a terribly, it's not a huge issue, but there may be some advantage to finding out how they were resolved, if you know how they were resolved, because at this stage we know that you had the weightings?

A. Yeah, this is a meeting at which weightings were settled.

Q. Exactly.

A. I don't know in what circumstances, whether it was by interdepartmental chat or whether it was at this meeting, but it's clear in my mind that the Department of Finance, the compromise that was arrived at was that we would have weightings, because we felt they were necessary, but we wouldn't publish them, which guarded the flank they were trying to guard.

Q. And I am not disputing for one moment that a deal must have been done. Mr. Jimmy McMeel was at this meeting?

A. Yeah.

Q. I take it, would I be right in thinking that what you

agreed is that you would have weightings based on the arguments you advanced, that it was implicit that you'd have to have weightings, and the only way to guarantee an objective assessment or scoring system, and you wouldn't publish them, although you wanted to publish them earlier on, isn't that right?

A. Yeah.

Q. So that the Department of Finance would feel confident that although applicants could see the descending order of priority, they wouldn't know the precise weighting and therefore wouldn't be ungenerous, if you like, or less than they wouldn't be

A. When you say

Q. Sorry, Mr. Brennan, I was side tracked there for a moment. Somebody was drawing my attention to the fact that we have no note of the meeting of, the sixth meeting of the Project Group, but as we have discussed, we have got a Department of Finance account of, to some extent of what happened at that meeting.

You reached a compromise with Finance, that you would have weightings but that you wouldn't publish them.

But not publishing them, I suppose there was a little more hope that Finance, from their point of view, might get the large sum of money they expected to get on the license, would that be right?

A. Yeah. Yes, you used the phrase before you were interrupted that I wanted to publish the weightings.

I would tone that down a bit and say I was impressed with the arguments for publishing the weightings, but it's not something I was on a crusade for.

Q. I fully accept that. What I mean is that it was, the thinking on the DTEC side was that you would have full transparency and that you'd publish the criteria, the priority order, obviously, and the weightings, and that that was the thinking on your side, whereas on the Department of Finance side, it was the opposite.

This was the meeting at which Mr. Andersen presented his evaluation model?

A. Mm-hmm.

Q. Which was, which is a document we may look at eventually, containing an account as to how or of how the process in general would be carried through. It contained a list of the criteria and the proposed weightings to be applied to each of these criteria.

It broke the criteria down into the various sub criteria we discussed when we were discussing Mr. Andersen's tender yesterday and showed how the weightings of the sub criteria when added up would eventually match the weightings applied to the criteria set out by the Government. Is that a fair summary?

A. That's a reasonable resume, yeah.

Q. It described then the various analyses he proposed. Initially I think it envisaged a quantitative

analysis, which he called simply a number crunching analysis, where he prepares something in the nature, if you like, of economic and technical questionnaires to which the applicants would provide answers by ticking off boxes or entering numbers. These are then processed, presumably, on some piece of software he has and a number comes out at the other end?

A. Yeah.

Q. That would then form the basis, if you like, of a first overview of the applications. You then proceed to the qualitative evaluation which would involve, to some extent, using that information, using the results of that information and the overall ranking, but carrying out a much more, a much wider and deeper analysis under the various criteria set out in paragraph 19?

A. Yeah.

Q. And then it envisaged as you mentioned time and again I think, that if the results produced rankings that were very close on any one of the criteria or sub criteria, it might be necessary to focus or to hone in on those close rankings and to conduct a supplementary analysis to see whether they could be divided or if they couldn't to leave them as they were?

A. Yeah.

Q. "Prior to presentation of AMI evaluation model, its confidential nature was emphasised. It was agreed

that three copies would be left in Dublin in the hands of Fintan Towey, Sean McMahon and Jimmy McMeel. Lock and key security would apply at all times."

This meant that this was being held on your side by Fintan Towey, on the technical side by Mr. McMahon, and on the Department of Finance side by Jimmy McMeel?

A. Correct.

Q. Sorry, the regulatory side by Mr. McMahon, I am sorry.

"AMI distributed copies of the draft model. After initial study the group had no major difficulty with the chosen format and a page-by-page scrutiny ensued.

The following points were agreed:"

And I think there is a reference then to some minor changes or adjustment. I don't think, unless you want to draw my attention to any of them, that they are of any particular significance. And I should say, Mr. Brennan, in case it occurs tonight that there was one you should have drawn my attention to, feel free to come back and mention it.

A. There is no difficulty around those, except that there was a very thorough discussion and there was significant elements of change made in the original proposal of Andersens, and the group was intensively engaged with the topic at that point, and I would instance, in particular, because it's an interesting sideline, it doesn't have any particular significance to the process, but at point 3.11 bullet point, where

we talk about the IIRs and the score. The original Andersen model was starting with something like 7 percent IIR gets 1 point, 8 percent gets the next point, 9 percent gets the next point.

The discussion in the group thought this was an entirely inappropriate approach because the higher rate of return was getting the highest marks, so we decided to pick what we thought was a central or a correct rate return for the business and we asked them to tell us what was central and then to mark deviations from it in both directions, that was a change that's just to give you a flavour of the thoroughness with which we examined the model.

Q. Why just while we are on that in relation to IRR, and you may have to help me as I grope my way through this, but it means internal rate of return?

A. Yeah.

Q. And it's a way that financiers use of testing the making decisions as to whether they would or would not invest in projects. Would that be right?

A. That's fair comment, yeah.

Q. If you have a lump of money and you want to invest it and you see a project, you look at the IRR, the internal rate of return on the project and you see if it's more than you might get for the money if you put it into the bank, that's putting it in very simple terms?

A. And there would be different sorts of benchmark rates for different kinds of investments and risk and so on.

Q. I appreciate that. If you put your money in the bank where you'd be absolutely, well relatively safe, where it would be relatively secure, if you could put it in the bank and get X percent, why would you put it into a project where you get risk, where you might only get X plus one or X minus one even? In general terms isn't that the way the tool is used?

A. A utility business, plain old electricity or whatever. The regulator nowadays would allow something in the order of 7, 7 and a half as the IRR, and after IRRs go up from that depending on the amount of risk.

Q. Yes.

A. But we took the view no, there was a very thorough discussion in the group as to whether

Q. Assist me with this. Do you mean that a 7 percent IIR is what utilities achieve?

A. It's not what a regulator would allow utilities to achieve, I think.

Q. I see. But if you were to invest in a utility and there was a high risk involved, you'd be looking for a higher rate?

A. I am talking about a regulated rate for an existing business-like running pipes or wires or whatever would tend to come out around a regulator would normally use something of the order of 7, 7 and a half, 8

percent. And then the rate higher than that, I am not an economist by the way and some other witnesses are, so you can have this again. All I was doing in opening this conversation was illustrating the thoroughness of the discussion.

Q. It's a matter of some interest to us, apart from purely technical interest as some, an arcane aspect of the science of economics of which we are totally ignorant. But apart from that you said that Mr. Andersen came to you with a proposed sort of benchmark rate of 7 percent, is that right?

A. No, I have forgotten what the rates were. What I am saying is my recollection is that the model he brought forward was based on higher marks the higher the internal rate of return. And the group questioned whether that was an appropriate approach given that the higher the rate of return the more likely the prices were going to be high or that the business was going to be super profitable or whatever. So we had a discussion around

Q. Were there economists on the group suggesting that, can you remember?

A. Economists

Q. We have the group here. You can tell me whether there were economists on it?

A. Denis O'Connor is an accountant. Billy Riordan is an accountant. Fintan Towey, I think his basic degree is

economics, you can ask him that. After that, I don't know about the qualifications of the others. Sean McMahon, I think has a degree in law and a degree in economics. I don't know why I am why I am elaborating on this because it's personal information about people.

Q. I appreciate that. Obviously, but there were no practicing economists on the group?

A. No. No. I think I, or somebody else raised the question as to whether the approach was fundamentally correct and there was a discussion, and the approach was changed, I suppose in a fairly significant way.

Q. I am interested in finding out about it for two reasons at this point, Mr. Brennan. Firstly, because I think it's of some relevance and it's something to which the Tribunal has devoted some attention, and that will become clear as we go on, but secondly, because I didn't realise that Mr. Andersen had a role in this and that there had been some debate on the point, and it is extremely difficult to get information from Mr. Andersen, in fact it is impossible to get information from Mr. Andersen at the moment, and the company which has now bought over his business, AMI, this is a company called Merkantil Data, is not terribly enthusiastic, can I put it that way, about providing information to the Tribunal, so for the moment what you are telling me may be the only

way of finding out how this approach to IRR was arrived at.

A. Yeah.

Q. Again, excuse me for trying to come to grips with this with some difficulty, but you say that Mr. Andersen was scoring IRR on the basis that the higher your IRR the more marks you were going to get?

A. I think that's the model he came with, yeah.

Q. And while it's true that if you had a highly profitable business and a very high internal rate of return, it could mean that you were going to charge an awful lot of money. It could also mean that you were going to be an incredibly efficient operator, couldn't it?

A. I suppose it could, yeah. But the discussion in the group that day was around and I suppose informed by the fact that you know, we, most of our business is in regulating I suppose utility businesses or shareholder in utility business and so on. The question is, is his approach fundamentally right or fundamentally wrong? I think I may have generated the debate. It went on for some time and this was the formula that came out at the end of it.

Q. When you arrived I think the ultimate approach that you arrived at was that you would pick a benchmark rate of 11 percent and what you would then mark people on or assess people on was the extent to which they

deviated from that?

A. Mmm.

Q. So that if somebody arrived with or produced an IRR rate, if somebody's figures as transmitted to you by an applicant generated an IRR rate of 11 percent, they'd get five marks over and a A grade. If they produced 10 percent, a deviation of 1 on one side, they'd get a B grade. If they produced 12 percent, they'd get a B grade as well, would that be right?

A. Yes.

Q. That's how you assessed it?

A. Yes.

Q. That 11 percent figure, where did that come from?

A. My recollection is that we asked Andersens what would be a standard or correct or benchmark rate of return for this line of business in which they were experienced. That's the number that came out of that discussion.

Q. You accepted his advice on that 11 percent?

A. Yeah, we were talking around a model which would pick a central rate and move in both directions. And his advice was that 11 percent was the correct centre point.

Q. What about the, if I could pass on from that, the approach then that you were proposing that people would be marked by reference to the extent to which they deviated from that? Did he agree with that

approach, that in other words somebody with a high IRR or a very low, a very high or a very low IRR would not get a high mark?

A. What you are seeing here is that paragraph 3.1 is the outcome of a long discussion and I believe a consensus outcome of a long discussion.

Q. I was going to try to find out a little more about this, but I suppose we should really have the evaluation report in front of us, otherwise we'll end up speculating too much, so we'll come back to it and look at the relevant part of the evaluation report.

You, by the way, could I just ask you this; do you know, and it may be that this is in the documents you have provided to the Tribunal, do you know if the original Andersen approach to this was in documentary form? I am not criticising the Department, there are many documents which we may have simply missed the significance of.

A. I don't know whether it was or whether it might have been slides I really haven't a recollection of that.

Q. Did he bring this to you in documentary form, because if he did it's almost certainly in the documents we have?

A. I don't know. I'd say the chances are that he did because we talk at the very start of the approach, "prior to presentation of the AMI evaluation model".

Now, whether they presented a piece of paper or whether they put up slides on a slide show, I don't know.

Q. To date the Tribunal has been operating on the basis of the evaluation model appended to the three, the two drafts and the final version of the evaluation report, but at that stage, of course, the process of evaluation had, was quite advanced, and I don't, I don't think I think I am right in thinking the Tribunal does not have an earlier this would have been the first draft then, and the one which was amended following this meeting became the basic evaluation model. The Tribunal will try to see if we have got it but you might, your staff may be able to or you yourself may be able to identify it more readily if it's in the documentation.

A. I have tended I have stayed out of the documentary relationship between the Department and the Tribunal.

Q. I understand. I am asking you to get involved if you can. As Ms. O'Brien reminds me, there must have been three copies and they were kept under lock and key security, but be that as it may, they may have ultimately found a way into a box of miscellaneous documents because they became, presumably, historical in the course of the process?

A. It could have been the document that was a lock and key arrangement was a one-page document with the

weightings, I am not sure of that.

Q. I understand. Perhaps you'd look into it, in any case, because you will understand precisely what it is we are looking for at this point.

A. Okay.

Q. Is there anything else in that list of specific items to which you want to draw my attention?

A. No.

Q. If you look under the reference to IRR, under the heading "paragraph 4", I think that's the end of the references to the various parts of the evaluation model, and then the note goes on, "The qualitative evaluation was to provide a common sense check on the quantitative model. This part of the model would need to be clarified further before evaluation begins. If a later challenge were to reveal that any two persons among the evaluators proceeded with a different understanding of the process, then the entire evaluation process could be put in question.

"Logistics/Work Plan for evaluation of tenders:

"AMI proposed presenting an interim evaluation report based primarily on the quantitative results.

Resources from the DTEC/D/Finance angle would need to be clarified, but would best be reserved till after the quantitative stage.

"Availability of DTEC and Department of Finance staff was discussed and the following commitments made:

" Fintan Towey almost full-time involvement in evaluation.

" Martin Brennan available as required maintaining a constant overview.

" Staff from Department of Finance/T&R Division to be available as required.

"It was agreed that everyone would strive to maintain an overview, while focusing particularly on their own area of expertise."

Just on that latter point, or latter two points, you will see where it's noted that the qualitative evaluation was to provide a common sense check on the quantitative model. Would that be is that to your mind, with the knowledge you now have having gone through the process, a wholly correct

A. No, it's relatively loosely drafted.

Q. The last note on the minute is that, "It was agreed that everyone" I am sorry, I didn't know it went over the page. The last note on that page, "It was agreed that everyone would strive to maintain an overview, while focusing particularly on their own area of expertise." That seems a common sense approach to me, that where you are evaluating a whole load of criteria to give somebody a license like this, the entire evaluation team would seek to involve themselves in the entire evaluation, although their inputs would have to be limited to their own area of

expertise?

A. I think I have said before that, in respect of sub-groups, it was common practice enough to come back and say, "This is our approach. This is why we did it and these are the marks we are suggesting", and to have a discussion about it. That's the sense in which that was fulfilled. In terms of the way it worked, I may have said this before, I am not sure, at least in the groups I was involved in, Andersens came with their analysis, their proposals, and then we had a discussion.

Q. I see.

A. And the other thing that's of interest to note at this point, because it may become relevant later on, is when we talk about the availability of resources in the Department, in fact, as it turned out, the regulatory side of the Department, as far as I recall, didn't participate in any of the sub-groups. That's partly because their interest was in the license as the licensing authority later on, and so on, but it is a matter of fact that's worth noting, that they didn't participate in sub-groups.

Q. In sub-groups?

A. In any of the sub-groups.

Q. I see. Would they have been informed of the result of the work of the sub-groups?

A. Yeah.

Q. Was there any doubt that anyone on the Evaluation Group or the Project Group would have been able to maintain an overview?

A. I don't understand

Q. Were you satisfied that everybody in the evaluation team at all times was in touch, even if necessary on an overview from an overview point of view with all aspects of the process?

A. I would say that they each raised questions in discussion outside of their own areas, if that's an answer, which showed that they were intellectually engaged outside of their own specialities.

Q. How were people informed of the results of the sub-groups, there is I mean, it happened over a period of time, in any event.

A. I have a clear recollection in relation to the technical area of Andersens, and Mr. McQuaid coming back and giving fairly detailed presentations as to the views they took and why they took them and so on.

I don't have a strong recollection in the financial area there was some of that, as well as coming back, you know, and giving an explanation of, and indeed discussion about, you know, raising questions about "Did you consider this angle?" And there was a lot of discussion about the overlap between, say, technical and financial and so on, you know. This, I think this came up in my statement before Christmas. I was

trying to make sure that you weren't being penalised under different headings for the same weakness or being credited too much under different headings for the same strength. That kind of discussion went on in the group.

Q. Could I just ask you one thing about the sort of audit trail of the process, if you like. I think you mentioned at the outset that you had an approach to minuting meetings. These meetings are minuted in a very, how shall I put it, in a very bare form. Some of these meetings took hours and nevertheless the minutes are fairly short describing maybe the topic that was discussed, possibly the result, or possibly describing what was on the agenda for the next meeting or what had to be done in the interim. There is no narrative discussion or there is no narrative account reflecting debates or discussions at the meetings?

A. That's right.

Q. Was a decision taken not to have such a narrative note or minute of what occurred at meetings?

A. No such decision was taken. But it would be unusual for a narrative account of very long meetings to be produced in almost any circumstances in the modern Civil Service, rightly or wrongly. I mean, in the Civil Service I joined there was a different style.

Q. If you look at the Department of Finance notes, they seem to be in the form of narrative accounts of the

issues being debated and of the views or the stances being taken on both sides, or if there are more than two sides, of a particular issue?

A. Only in relation to a narrow group of issues of interest to them.

Q. I appreciate that. But this wasn't just an ordinary Civil Service meeting, this was a process, isn't that right, which is set up to achieve a certain result in a way that was objective, transparent and capable of being demonstrated to be objective and transparent, isn't that right?

A. Yeah.

Q. Was any thought given to having a different approach or deviating from the ordinary day-to-day business approach of the Civil Service?

A. It wasn't discussed at the time, no.

CHAIRMAN: Might I just ask you, Mr. Brennan, about the resources that you'd applied in human terms to the project at this stage, noting the reference in page 2 to Mr. Towey being now engaged effectively full-time in the evaluation, you maintaining an overview, and so forth. We know that in latter months when we get to three months further on in late August/September/October, exceptional long hours were worked by all persons connected with the Project Group, but this was a reasonably seminal stage, if you like. The potential turf war between the Department

of Finance and yourselves had been resolved. At this stage how many people were really giving this matter absolutely top priority or how much manpower did you have?

A. I didn't have a whole lot of manpower beyond the people whose names come up here in the documentation.

Mr. Towey, Ms. Nic Lochlainn, two job sharing Executive Officers. Now, I had other staff doing other tasks and I myself was doing other tasks. But that's the size of the number of people that I had at my disposal. Mr. McMahon had well, I had a bigger team doing other things. Mr. McMahon had a reasonable size of team but a very busy agenda. The same was true of the technical side, what we call T&RT. The people here, Mr. McQuaid, Mr. Ryan and Mr. Breen were involved in the extent they were required to be involved, but they had other jobs as well.

CHAIRMAN: Thank you.

Q. MR. HEALY: The next document at Leaf 66 is I don't think I need concern myself with the rest of the minutes of that last meeting. The next document is Leaf 65, it's a Department of Finance file note on the meeting that

A. Before you go off that one, it's something I mentioned yesterday. It's of interest to me, at least, that Mr. Fitzgerald was not copied with this particular report.

Q. That's the point you were making?

A. I was making that point yesterday, because it's important in terms of who saw the weightings, who knew what the debate was about and so on.

Q. Yes. So you regarded the weightings as of an even higher order of sensitivity and warranting an even higher degree of security, that they weren't

A. A conscious decision was made that this report would not go outside the group.

Q. Do you recall that we mentioned yesterday that there had been a report to one of the meetings that the Minister had queries concerning the weightings. Was the Minister given any information at this point that the weightings had been fixed, even if he wasn't of course told what they were?

A. I don't believe he got any such information.

Q. While, of course, I note what you say concerning this document and the fact that it wasn't brought to the attention, or it wasn't copied rather, to anyone outside of the Project Group, it didn't actually contain the weightings, is that right?

A. It didn't contain the weightings.

Q. So it didn't actually contain any information that would have

A. It contained a fair amount of information about the evaluation model.

Q. Yes. It contains an amount of information, but am I

right in thinking it doesn't contain the weightings?

A. It doesn't contain the weightings, no.

Q. Presumably there was some way of communicating to Mr.

Fitzgerald or Mr. Loughrey, to whom some of the other

minutes were copied, that the weightings at least had

been agreed, and what's more, that they were being

kept under lock and key?

A. That could well have happened, yeah.

Q. Also, I mean, while, as I say I can't see any

increased degree of sensitivity where these minutes

are concerned, notwithstanding what I suggested a

moment ago, having looked at it again now, I can't see

any increased degree of sensitivity but they are

nevertheless all marked confidential and I don't think

the other minutes are so marked, are they?

A. They are not, no.

Q. Even though, I think, they were all intended to be

confidential obviously, there was no doubt about that,

is that right?

A. Yeah.

Q. To go on to Mr. McMeel's note of the 19th May, the day

after the meeting, it may throw some light on how we

can possibly get our hands on a copy of the original

draft or the original evaluation model.

It's headed "Note for file. Meeting of the Project

Group for the second mobile telephony GSM II license

on 18 May 1995".

"D/F representatives: J. McMeel and B Riordan.

"Andersens circulated their evaluation methodology document. Consultants emphasised the secrecy of this document which also deals with the weightings issue."

Presumably, therefore, the weightings were in the document and that there was a complete document as opposed to maybe just a page with weightings?

A. The Andersens proposals for the weightings were in the document but the proposals were varied in discussion.

Q. I appreciate that, yes.

"Each member of the Project Group was given his or her own named copy which had to be returned at the end of the meeting. Finance and Department of Transport, Energy and Communications were allowed to retain one copy each on the understanding that it would be held under lock and key.

"The evaluation document deals with quantitative and qualitative evaluations. The latter acts as a check on the former and as such is at a higher level. The quantitative evaluation forms an annex to the evaluation report. The consultants' experience has been that both the quantitative and qualitative evaluations tend to produce the same leading candidates. The qualitative process narrows it down."

That might be, I suppose, a fairer approach or as we now know from the way it worked, a more accurate approach of how it works.

"Weightings for the quantitative evaluation criteria were discussed but it was agreed that for reasons of confidentiality, no formal hard copy record would be kept."

Now, I think the next item on this note will bring us back again to the area we left earlier this morning, back to the EU area and the continuing dialogue with the Commission.

This is the third item, I don't want I don't think I need to discuss interconnect charges. If you go to the third item.

"Letter from the EU Commission on the application of a license fee:

"DTEC are worried about the implications of the Commission's position on the selection process. They feel that it could weaken the State's case in the event of a disappointed applicant taking an action. A disappointed applicant could claim that there would have been a different result if the State had not imposed a fee contrary to EU policy. Consultants advise that DTEC should have a face to face meeting with the Commission as soon as possible. DTEC feel that the liberalisation of infrastructure provision strengthens Ireland's hand. They also believe that the imposition of a fee on Eircell could also avoid action by the Commission. In this context, they raise the possibility of substituting a €10 million fee from

Eircell for a dividend from Telecom Eireann for the 1994/95 year.

"The AG has been consulted. DTEC will meet the Commission before next meeting of Project Group on 9 June."

Now, at this point, there seems to have been some suggestion of an approach to getting money from Eircell to satisfy the EU's concern about discrimination and is this the first time that 10 million was mentioned, do you think?

A. I think it is, yeah.

Q. The 10 million was mentioned here presumably, in a context which didn't include fixing or capping the payment that would be made by the successful applicant?

A. I am not sure about that. I mean, the ultimate formula of 15 and 10 was something that I suggested and it gained currency but I don't know whether this was in my mind at this particular time.

Q. May I suggest from what we have learnt from the Department of Finance's approach to this, if they knew that the 10 million fee from Eircell was going to mean a total of 25 million, that is one thing they would have focused on at this point and could I suggest that maybe I am right in thinking that this was just down to the 10 million fee from Eircell and an open auction for the rest?

A. I'll go along with that for now, yeah.

CHAIRMAN: Two o'clock.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF EXAMINATION OF MARTIN BRENNAN BY

MR. HEALY:

Q. MR. HEALY: The next document is at Leaf 66. This is

an Andersen Management International document, and you

will recall that at the project meetings which we have

been just been discussing, it was suggested that

Andersen would get involved in responding to the

queries from the EU, and I think that this document is

his, I suppose, contains his views on how you might

consider approaching and preparing a response to the

EU. I think if you go to page 4, you come to, I

think, the first part of the meat in the document.

The heading here is: "An initial payment leads to

higher tariffs." And this is Mr. Andersen identifying

one of the contentions of the Commission, and

underneath he has his response.

"However the Commission argues that an initial payment

leads to restrictions in consumer access due to higher

tariffs. This argument might partly be countered by

the Minister by the fact that the restrictions heavily

depend on the amount of the initial payment, the

regulatory regime, asymmetric regulation, etc..

"Nevertheless, it would seem difficult for the

Commission to retain the strict view on initial license fee payments if the Commission has not duly reacted against, in particular Greece and Belgium.

"Furthermore, it is explicitly stated in paragraph 19 of the RFP document that tariffs have a higher priority than the license fee payment. This will demand the Minister to choose the applicant with the lowest tariffs among the applicants which are equal on the license fee. A (high) license fee payment does not necessarily lead to high tariffs, it could, at least in principle, also lead to reasonable tariffs with a sacrifice on the internal rate of return.

"Finally, reference can be made to the US view on the auctioning of the spectrum. Auctioning is, in this country, regarded as being about a rapid deployment of a wide variety of licenses and to be a cost-effective means of finding an efficient and competitive operator."

Then he goes on to deal with the suggestion that the failure to disclose the weighting amounted to a lack of transparency.

The heading is: "Non-transparent weighting, etc.."

"The Commission claims that the documentation is not fully transparent, and that the prospective applicants are not aware of the weighting of the criteria outlined in paragraph 19. This may be true according to the Commission's objective scale. According to a

relative scale, comparing the Irish evaluation model with the evaluation model of other GSM II tenders, it becomes less than true."

I think in what we might call plain English what that means is that it is true to say that you didn't disclose the weighting, but if you compare the Irish model to what happened in other countries, we are not doing too badly at all?

A. Yeah.

Q. "The comparison in Appendix 1 shows that paragraph 19 of the RFP document does, in fact, provide a far more transparent formula than provided in the Italian case.

Appendix 2 compiles an overview of the different evaluation formula, evaluation criteria and their weighting. The overview clearly shows that the Irish paragraph 19 formula is the most detailed, i.e. the most transparent among the compared countries.

"According to the relative scale the Minister should not accept this to be a real problem."

And he deals with the coverage issue, we have already mentioned that.

A. The bit at the bottom of page 3 might also be relevant.

Q. Bottom of page 3?

A. Especially the last sentence.

Q. Yes. "Under the heading license fee payment of Telecom Eireann.

"The Commission cannot get confirmed from the competition document whether Telecom Eireann would have to pay the same amount as the GSM II licensee.

It is more than likely that the Commission is aware of the fact that the Minister does not intend to require a similar amount of payment from Telecom Eireann, given the numerous articles in Ireland and abroad on this matter.

"Thus, the remark from the Commission in this respect might be interpreted as an invitation to suggest a similar fee payment imposed on Telecom Eireann."

If you then go to the bottom of page 5, there is a heading at paragraph 4, "How to untie the Gordian Knot."

"It is difficult to assess whether and when the Commission will open an infringement procedure against Ireland. As outlined above, several of the arguments from the Commission might be counteractive. Taken as a whole, however, it will probably be difficult to fight against the competition rules of the Community that Telecom Eireann subsequently, with a GSM headstart, the TACS 900 network/customer base and a number of other first mover advantages does not have to pay an initial license fee payment, whereas the prospective GSM II licensee as latecomer is invited to offer a unilateral license fee payment in combination with rather restrictive interconnection terms and

conditions with Telecom Eireann, at least during the interim regime.

"In addition, the GSM II operator has a considerable amount of so-called second mover disadvantages, e.g. more difficult access to antennae sites, no familiarity with the fixed network in Ireland, no existing customer base, no familiarity with the regulator, etc.

"The advantages of Telecom Eireann on the one hand, (interconnection regime, headstart)" and so on, "and the disadvantages the prospective GSM II licensee (payment)", and so on, "will not ensure fair competition, in fact rather the opposite as seen from a formal point of view. The most obvious touchstone is then the licence fee payment of GSM II applicant. This might even amount to a Gordian Knot, provided that Telecom Eireann is not yet in a position to be required to pay an equal fee by IRi½15 to 45 million."

I think what is being suggested here is this might even be insoluble if Telecom Eireann wasn't able to come up with between 15 and 45 million?

A. Mm-hmm.

Q. "When trying to untie the Gordian Knot, it has to be kept in mind that the Commission aims for competition among players on as equal a footing as possible.

"Basically there are two ways by which the Gordian Knot may be untied:

"1. One is to request an equal payment from Telecom Eireann, e.g. according to paragraph 4 of the RFP document. In practice this would mean that Telecom Eireann pays IR $\dot{\iota}$ $\dot{\iota}$ $\dot{\iota}$ $\dot{\iota}$ $\dot{\iota}$ 1/25 million. If this is not enough for the Commission it could be communicated to the applicants that they will not be requested to pay more than the minimum payment, i.e, IR $\dot{\iota}$ $\dot{\iota}$ $\dot{\iota}$ $\dot{\iota}$ $\dot{\iota}$ 1/25 million, ultimately equal payments could also mean no payments. Saved payments should then be regarded as a windfall gain to be used to achieve lower tariffs 'pence by pence'.

"2. Another is to introduce asymmetric regulation in favour of the GSM II licensee. The basic philosophy behind asymmetric regulation in this case would be to acknowledge that the competition between the two GSM operators is unequal from the outset, and in order to obtain equality unequal operators should be regulated unequally. In practice, this would mean to give the GSM II operator some advantages, e.g. chief access to national roaming on the GSM 1 network, a more favourable interconnect regime during the first couple of years, immediate access to DCS 1800 or lower payments initially for the use of the frequency capacity needed. The already adopted early liberalisation of infrastructure for GSM II and the potential for national roaming on the GSM 1 network are significant instances of such asymmetric

regulation.

"These two solutions are not mutually exclusive, but somewhat could be combined. It is not recommendable to move ahead with such solutions before the Commission has had a chance to elaborate on the issues raised, therefore it is suggested to welcome the invitation to a technical meeting. Even before that it might also be considered to take informal contact with Mr. Herbert Ungerer and Mr. Hocepied, who are the civil servants in charge of these matters in DG IV of Karel van Miert.

"Attention has also to be paid to the fact that it seems unlikely that the Commission would try to stop the Irish GSM II tender or open an infringement procedure at this stage. Thus, it seems as if it is in the Irish interest to come to a common understanding with the Commission before the evaluation commences, alternatively postpone the expiry date.

"If Ireland does not come to a common understanding with the Commission before the evaluation commence/license award Ireland might later be forced by the Commission to refund the license fee to the GSM II licensee, which might be the outcome of the Italian case. If this turns out to be the case in Ireland, also the possible risk that unsuccessful applicants could then successfully challenge the selection has to

be faced. This risk is considered to be very high, since the unsuccessful might have spent in the order of IR£10 million or more to submit the application, thus the costs of litigation will be considered small compared to the possible fact that changed selection criteria are introduced ex post, which can easily be proved when the fourth criteria in paragraph 19 of the RFP document (the license payment) is removed. Even if the Minister and his Department declare that such a change had not influence on the outcome of the selection, the unsuccessful applicant would still be in a good position to successfully claim that they would have composed the business case/application in quite a different way if they had known that such 'an extremely important criterion' were to be disregarded."

I don't think anyone could disagree that that's a reasonable overview of what the issues were and how they might be approached. Though, at this point there seems to be no suggestion of a capping or fixing of the amount that might be paid by the successful operator?

A. That's right. It's no more than a contribution by Andersen Management International in preparation for a meeting with the Commission.

Q. The next document in Leaf 67 is a letter from Ms. Maev Nic Lochlainn of the project team to Mr.

Denis McFadden in the Office of the Attorney General.

And I think what it does is it includes an aide-memoire for the Office the Attorney General regarding the EU aspects of the competition. It acknowledges the Attorney General's input on the draft license, and it keeps him up to speed on the developing EU issue. Would that be fair?

A. Yeah.

Q. If you go to Leaf 68 now. This is a summary note of a meeting with officials in DG IV on Friday, 2nd June, 1995, in Brussels. This is where yourself, Mr. McMahon, and Mr. Molloy and Mr. McMeel and Mr. Andersen went to meet with Mr. Ungerer of DG IV. Was Mr. Hoceped at that meeting, can you remember?

A. I can't remember. The report was written by Mr. Molloy, I am fairly certain, because it's very much his style. And I should explain perhaps his presence.

Q. I was going to ask you to do that.

A. Mr. Molloy was an Assistant Principal working for me on other projects, and I am fairly certain that we were in Brussels on more than one mission, and that the other one was on his side, I have forgotten exactly which it was, but he was the one dealing with the strategic lines and so on at that stage, and with negotiation of - the 1993 derogation was a right to a derogation to be negotiated with the Commission, and

he was also leading that and he was working for me.

Q. Had he become a sort of temporary member of the project team in a sense?

A. Only for the purpose - he was at this meeting and attended the next meeting of the Project Group when we were reporting on the meeting, but I think that was his sole involvement in the Project Group.

CHAIRMAN: You took it that he had an aptitude of getting the best out of Europe, if he had negotiated in previous derogation matters he had some connection.

A. Absolutely, he had a lot of experience in telecommunications. He was an economist by training and had been placed out in the private sector as an economist for a number of years. And he was working for me on these other important projects.

MR. HEALY: It says "Main points made on the Irish side:

"Request for meeting following letter from Commissioner van Miert.

"The GSM competition represented the outcome of a difficult political package in Ireland. It was not possible to threaten one element of that, the fee, without running into a series of complications in other areas.

"Fees have been charged elsewhere in the EU for the second GSM license.

"The license fee is not the main driver of the GSM II

competition.

"The competition is a beauty contest and not an auction in process. The fee is listed as No. 4 of a set of 8 criteria. The model being used to evaluate the bids was explained to Commission officials.

Telecom Eireann will not be allowed to block book analogue frequency.

"There will be important elements of asymmetric regulation in favour of the new GSM operator.

"The complete infrastructure liberalisation offered the new GSM operator will be beyond what is available elsewhere in the EU and is a major concession.

"The new GSM operator will have an automatic entitlement to deploy DCS 1800 technology this represents another significant concession.

"The Department want to come to an understanding with the Commission side quickly."

"The main points on the Commission side:

"There are basic legal problems with the concept of a fee this is a basic asymmetric condition of entry.

"The Commission are not impressed by collective infringement of the law.

"Formal proceedings are commencing in the case of Italy, this is also likely to be instituted soon in the case of Belgium and Spain.

"The Commission accept that the fee could be compensated for by concessions given to the new

entrant, (e.g. infrastructure rights, national roaming rights on the incumbent's network or possibly concessions on the interconnection fee) but this is a second-best and has not been tested legally.

"The imposition of uncommercial burdens, (e.g. excess staffing) on the incumbent could also be seen as an offset on the fee charged to the new licensee."

I think this may have been a reference to the fact, perhaps a submission you made, indicating that Telecom Eireann acquired a huge staff overhead over the years as a semi-state body, would that be right?

A. It was slightly stronger than that, and this was a commission helping us to put forward the best case we could, if you like. It was in recognition that Telecom Eireann didn't have the commercial freedom to reduce their costs and their staffing levels because the jobs were guaranteed by law.

Q. Right. And they had more jobs than they had more people working than they needed?

A. Thousands more.

Q. The best solution is to have a fee purely covering administrative expenses. If the fee is greater than this, DG IV is obliged to follow it up. In the process which will follow, Ireland will be treated on a basis which is equal to other Member States. Any defence of the fee by Ireland must describe the position of the fee in the evaluation process. The

size of the final fee applied will also be relevant.

The defence must also deal with compensation to the new entrant in areas such as infrastructure rights, national roaming, interconnection, other measures to lower deployment costs, (e.g. site sharing).

"The next step for Ireland should be to reply to the Commissioner's letter.

"The Commissioner is prepared to meet the Minister if so required.

"The collective view of the delegation after that meeting was that, while the GSM fee issue would be followed through on a formal basis by the Commission, it could be resolved by the provision of adequate assurances in writing to the Commission. "

What do you understand by the last sentence in the note, which I think is a sort of summary and not actually part of the Commission's side, maybe I am wrong...

A. No, that's definitely our assessment walking back to the taxi or whatever.

Q. Yes. What do you understand it to mean?

A. Basically what it says in the plain words.

Q. Would I be right in thinking that it means that as long as you told the Commission you were going to do certain things, for instance, in relation to asymmetric regulation, they would accept it?

A. Yeah, that the thing was capable of being resolved

without necessarily surrendering the fee.

Q. Yes. I think before discussing any of these issues in general we might as well go on to the next meeting. I don't think we need to trouble ourselves with the document in Leaf 69, which is the agreement between the Department and Andersen Management, unless you want to draw my attention to any part of it.

A. No, it's okay.

Q. The next document, which is Leaf 70, is the minute of the eight meeting of the GSM Project Group on the 9th June, 1995. It was all of the usual attendants. I notice that Mr. McMahon and Mr. Dillon were there. Mr. Jimmy McMeel and Mr. Billy Riordan was there. Mr. Eamonn Molloy was there also, as you indicated, dealing presumably with this limited issue?

A. Yeah, and Mr. Donal Buggy is a new name at this point.

Q. Yes, Mr. Donal Buggy comes in at this point as someone with accountancy expertise on the Department's side.

Would that be right?

A. Yes.

Q. On your side, as opposed to the Department of Finance side?

A. Correct. We have had the habit for years, I think I said this before, of borrowing accountants from the private sector on two or three-year secondments. Denis O'Connor was in that slot and it just came to the end of his assignment and Mr. Buggy was his

replacement, so he was coming to replace him on this as well, but my recollection is, I think this is borne out by the facts, that he actually had planned his holidays at a time that wasn't particularly convenient for the evaluation, so he was missing for most of September.

Q. I see. You mean Mr.

A. Mr. Buggy. Mr. O'Connor went back to his normal employers shortly after this meeting.

Q. In the private sector?

A. Yeah.

Q. Mr. Andersen was there and Jon Bruel, also of Andersen International, was there.

The first heading is: "Meeting with the Office of the Attorney General re the GSM competition process.

"Mr. Towey reported on a meeting between Mr. Brennan,

Mr. Towey and Ms. Nic Lochlainn and

Mr. McFadden and Mr. Gormley of the AG's office, where

the legal aspects of the GSM competition, particularly

the EU aspects, had been discussed.

"Denis McFadden advised that, if the Commission

challenged successfully the fee, any applicant could

then challenge the whole competition process, as they

would have made their bids on the basis of the fee

being one of the key criteria.

"Contact with the Commission re the GSM process.

"Mr. Brennan, Mr. McMahon, Mr. Molloy, Mr. McMeel and

Mr. Andersen had met with Mr. Ungerer of DG IV on the 2nd June, 1995. A written report of the meeting was circulated." The report we have just been through.

"The collective view of the delegation was that, while the GSM fee issue would be challenged on a formal basis by the Commission, it could be resolved by the provision of the adequate assurance in writing and mitigating factors, etc..

"Prior to the meeting, the Department of Finance had been asked to clarify their final position as regards the license fee, in the light of the group's new awareness of the certainty of the Commission's challenge, with its attendant legal and financial implications.

"Four options were identified in relation to the fee:

"A. Proceed with the competition as is, with the attendant risks.

"B. No fee.

"C. Two flat fees on both GSM operators or a fixed fee for Eircell in conjunction with a cap on bids to become the second operator.

"D. Impose equivalent fee on Eircell after the competition is over.

"It was agreed that options B and D would be politically unacceptable." That is no fee or imposing an equivalent fee on Eircell after the competition was over.

"With regard to option A" that is proceed with the competition as is with attendant risk "The Department of Finance was of the view that the legal advice of a Senior Counsel should be sought at short notice before any change could be contemplated.

"In the event that the legal advice recommended against option A, it was agreed that a fixed fee of $\frac{1}{2}$ 10 million for Eircell and a cap of $\frac{1}{2}$ 15 million on bids to become the second operator might be"

A. Sorry, 15 million.

Q. Sorry, "A cap of 15 million on bids to become the second operator might be an acceptable basis on which to proceed, subject to the agreement of the Commission and the Department of Finance.

"Over lunch, the secretary contacted the Office of the Attorney General and set the process in train for the recruitment of Senior Counsel. A letter was drafted asking:

"1. The basis within the Treaty on which the Commission could initiate infringement procedures against Ireland."

And so on, dealing with the legal implications if you went ahead basically without changing the rules as the Department of Finance required.

"The letter was approved by the group. Late on Friday evening Mr. Nesbitt was engaged to do the job over the weekend.

"The group agreed that the next steps in the process, subject to the legal advice, would be:

On the one hand if the legal advice indicated that the Commission's case was weak and unlikely to be successfully upheld, then the GSM competition could continue as planned or;

On the other hand, if the legal advice indicated substantial risk in proceeding with the competition, particularly the license fee element would have to be amended. Approval of the Ministers for Finance and for Transport, Energy and Communications, of the Taoiseach and the Tanaiste and the Minister for Social Welfare would be required. (The legal advice would be a help here.) Once approval amongst those Cabinet members was assured, there would be no need for more than a mention at Government."

These Cabinet Ministers were mentioned because they were basically the heads of the various different parties in the rainbow coalition, would that be right?

A. Separately from our own two ministers, yes.

Q. Yes.

A. Yeah.

Q. "It was also acknowledged that key issues re the selection criteria would have to be revisited if the terms of the competition were changed.

"Other issues:

"Department of Finance reported that there was no change in the position re capital allowances for the license repayment.

"The Revenue Commissioners would wish to examine relevant extracts from the license before it is finally granted. Finance agreed to write a note to DTEC explaining the requirements of the Revenue Commissioners."

Could I just ask you one question here, it may become relevant, although I somewhat doubt it, but it would certainly complete the picture. Ultimately there were no capital allowances allowed in relation to the license payment, is that right isn't that right?

There was no tax break for or no tax relief on the amount paid for the license?

A. I think that's right, but I am not an expert on it.

How this arose, I think, was that it was one of the questions in the information round, so naturally we asked the Department of Finance to supply an answer, and the answer at the time was tentative and this was firming up on it, I think. I think the answer was that it would not be a tax right a business expense.

Q. It wouldn't be a tax write-off in other words?

A. Yeah.

Q. Can I just ask you this question arising out of that: Was Eircell or Telecom Eireann, as it was at the time,

was that treated for tax purposes the same as a company in private business, in the private sector?

A. Yes, it became a plc in 1983 or '84 I think. 1983.

And was then a normal commercial company.

Q. So it had the same tax implications applied in the case of Eircell, if you like, as a business unit or Telecom Eireann where the fee was concerned, as applied to somebody in the private sector like a successful operator?

A. It's not a particular area of expertise of mine, but it sounds reasonable.

Q. "Correspondence from Vodafone Consortium to the Secretary of the Department.

"AMI had been asked to consider the correspondence on the previous day, weak points identified in their case were" - and this is basically dealing with submissions made by Vodafone, I think specifically with regard to interconnect charges, but also a number of other points which they felt would dictate whether they would enter the competition or not, and I think they ended up saying "We are not happy with the approach you are taking. We may. Therefore, or we may withdraw from the competition." I think you wrote back saying "Thank you very much", or whatever?

A. I have forgotten the correspondence, but I think it was more in the nature of them telling us they were withdrawing but leaving open the possibility of it

changing, that they might come back.

Q. They were complaining about aspects of the competition?

A. Yeah.

Q. You wrote to them ultimately saying this; you thanked them for their interest or whatever.

The second-last heading is, "Evaluation Model: This was approved as presented, with correction of one minor typo on page 66/21.

"Further comments, if any, to be forwarded to Maev Nic Lochlainn within a few days of the meeting."

"Work Plan:

"This was not discussed in depth. The point was made that at least four weeks could be required to get political agreement for the decision on the successful candidate."

Now

CHAIRMAN: I think you said before lunch, Mr. Brennan, that you yourself recollect you were the author of the eventual compromised formula and its particular numbers, namely the 15 million cap and the 10 million on the incumbent?

A. I think I was certainly the driver of that solution as the most likely one to succeed.

Q. MR. HEALY: How was that solution generated, presumably you didn't come up with it there and then at the meeting?

A. I think I did actually. I mean, it wasn't something into which

Q. A flash of inspiration?

A. As you have seen throughout this process so far, my disposition was to achieve consensus and move on, and this was what I thought was the most fruitful basis to satisfy the Minister for Finance and his 25 million, and to keep the Commission on side and get his clearance to run a competition while minimising the possibility of future change leading to challenge.

Q. I think before we come to the conclusions that were reached, at this stage no conclusion had been reached in any case, pending the legal advice as to whether you would jettison the existing regime or proposed regime or not?

A. That's right, yeah.

Q. I think there was no agreement on the no fee regime and there was no agreement on the imposing equivalent fee on Eircell after the competition. You were really talking about either going on as you were, or two flat fees, well in a sense, a flat fee on, a fixed fee for Eircell and a cap on bids to become the second operator or else two flat fees?

A. Mm-hmm.

Q. The EU at this stage were considering this matter, presumably at the same time as you were trying to come up with a solution to it. Can you just enlighten me

on one thing, about how they were going about evaluating your RFP, inasmuch as they didn't have the weightings? At this stage presumably they knew he had weightings?

A. I thought it was in the next telephone conversation, but I am not sure. I mean, I think you said something about weightings.

Q. It's there.

A. Okay. They probably knew that we were having weightings, but not what the weightings were.

Q. Yes. I'll just go on to the next book, where I think we come to that teleconference. The first document at the next book at Leaf 71 seems to be a note relating to the meeting, the minutes of which we have just referred to?

A. Yeah.

Q. Do you know whose handwriting that is, do you?

A. I don't, no. In fact the copy I have is almost unreadable.

Q. Mine isn't much better?

A. And the note I have is, "Whose notes and what issues?"

Q. Well, it seems to me to follow roughly the same agenda as is reflected in the minutes of the meeting. I don't think it throws any additional light on anything.

The next document is a note of a teleconference between yourself and Mr. Fintan Towey, on the one

hand, and Mr. Ungerer, Mr. Hoceped on the other, on the 15th June. The purpose of the discussion was to determine, firstly, the legal basis on which the Commission might initiate an infringement proceeding against Ireland in relation to the license fee requirement for the GSM competition, including in particular the way in which the proposed license fee would have the trade distortion effect precluded by the competition rules.

"What action could be taken by the Department, bearing in mind the political imperative of generating Exchequer revenue through the GSM competition, which would able DG IV to indicate definitely such action would not be taken (for example, a change in the fee requirement to a fee capped at 15 million for the second operator and the imposition of a 10 million fee on Eircell.)"

Do I take it at this time you had decided to run with that proposition rather than two flat fees?

A. When you say "two flat fees", 10 each or 12 and a half each or whatever.

Q. 10 each, 12 and a half each, 10 and 15?

A. I think I had figured from the previous meeting with the Commission that there was scope for a limited differentiation in fee justified by the full costs of running the process and the 5 million wouldn't be regarded as unreasonable in that sense.

Q. It's just at this point you seem to be running with the proposition that a fee capped at 10 million for Eircell and sorry, a fee fixed at 10 million for Eircell but a fee requirement capped at 10 million for the successful candidate, do you follow me?

A. The only point I follow is that we had previously said in the RFP, 5, but more if you are offering it and now we are saying we won't accept more than 15. That's the sense in which I am talking about capping.

Q. But he had decided to jettison the notion of a flat fee for the successful operator. Do you remember that was one of the options canvassed at the meeting, two flat fees or a fixed fee plus a cap?

A. Yeah.

Q. Here you are running with a fixed fee plus a cap for

A. I would regard the 15 and 10 as two flat fees, given that we knew the Commission would accept an element of differentiation, and at the end of the day the cash was the issue.

Q. I think we are slightly at cross-purposes. The fixed fee is for Eircell at 10 million. There is no fixed fee for 15 million, although no doubt you anticipated you would get 15 million. It's a cap at 15 million, so it's not two flat fees therefore. I am simply trying to clarify for myself that the option of two flat fees seems to have been gone by the board and you

were running with an option, you were running with an auction up to a max of 15 million for the competition and 10 million for Eircell?

A. I think in our minds at that stage it was clear that it was going to be 15 million, and that the fee was no longer going to be a selection issue.

CHAIRMAN: And the difference you rationalised on the basis that the incumbent, apart from the pro forma application they were required to make, they didn't have to compete in real terms and face the expenses?

A. No, it was more to do with the fact that the State was incurring hefty expenses in running the process in terms of Civil Service time, consultants fees, etc., and a judgement that the Commission would turn a blind eye to 5 million as a reasonable contribution to those costs.

CHAIRMAN: I see.

Q. MR. HEALY: Do you remember the discussion or the suggestion mooted at one of the meetings and recorded by the Department of Finance, that what they might do is treat a payment by Eircell of 10 million as something in substitution for a dividend?

A. Yeah. That's kind of funny money, in the sense that even a fee on Eircell is coming straight out of Telecom's profits.

Q. Sorry?

A. Any fee paid by Eircell is clearly coming straight out

of the Telecom bottom line, so it's a dividend by another name.

Q. That's right, yes. So that, strictly speaking, therefore, you were only going to be getting 15 million for the license?

A. But the Department of Finance didn't have to recognise this 10 million in determining their approach to dividend. All I am saying is that it has the same effect.

Q. But they didn't get any dividend, they only got this?

A. I have forgotten. I mean, they did have a dividend deal as part of the process of correcting the Telecom Eireann balance sheet, to prepare it for future development and so on. I have forgotten the details of it. There was dividend holidays for a number of years and so on. I don't know when they started and finished.

Q. I think the original deal with Finance was that instead of Finance looking for a dividend from Telecom Eireann, and also looking for money from the competition, they were going to look for 25 for the competition and for a long while they were fairly confident they'd get 25 million or 30 million from the competition. Now, a deal was being done whereby they were going to get a max, and almost certainly they were going to get 15 million from the competition?

A. Yeah.

Q. And 10 million by way of something in substitution for a dividend from Eircom, so all they were getting really was 15 million instead of 25 million, isn't that right?

A. That's a very convoluted argument as to, you know, where we were on dividends at that point, whether we had agreed. I don't know whether we had agreed the dividend policy with Telecom Eireann or not. All I am saying is taking 10 million out of Eircell is not much different in its practical effect as taking a dividend. But whether the fact that you were getting 10 million in a license fee would be taken into account in determining a dividend policy, I don't know at this point. And for me the only thing that was important was, I had a deal that the Department of Finance would buy into.

Q. I agree. You were only concerned about your patch?

A. Absolutely, yeah.

Q. "Mr. Ungerer indicated that the Commission's legal services are of a view that based on existing law there is a strong legal case against large GSM license fees. The European Court interprets the competition rules widely, and the fact that a GSM license fee distorts trade between Member States can therefore be established without difficulty."

And he goes on to explain how that could be established legally. I don't think there is any

dispute about that.

In paragraph 3 it's noted that, "Given the political imperative that Exchequer revenue be generated from the GSM process" - and this was a political imperative on the Irish side, isn't that right?

A. Yeah.

Q. "...Mr. Ungerer recommended that the Department write to the Commission outlining the factors which provide a justification for the imposition of a fee on the second operator, i.e. factors which reduce costs or confer other financial benefits which mitigate the negative impact on the fee on the second operator. This could include infrastructure rights, co-location, national roaming concessions, a beneficial interconnection deal, tax deductibility of the fee, the relevance of the fee in the selection process, etc.. He envisaged a definitive Commission view on the acceptability of the overall package within a period of four weeks of letter. The Commission representatives accepted that this would necessitate deferment of the closing date for the submission of GSM applications, and while it was recognised that this was not desirable, they seemed less concerned than the Department by the implications of delaying the process. The Commission are negotiating similarly with a number of Member States.

"With regard to a possible capping of the fee payable

by the second operator, the Commission would be interested in looking at the possibility, having regard to the ratio between the level of the cap and the overall investment required for the project. Any adjustment which would have the effect of reducing the financial burden on the new applicant would be welcomed. The possibility of such a capping arrangement being put in place in conjunction with the imposition of a fee of a broadly similar magnitude on Eircell was very favourably received by the Commission, although it was mentioned that the effect of a fee payment by a company to its shareholder could be open to question.

"It was agreed that the Department would put its case to the Commission as soon as possible, including any possible changes in the fee requirements. A quick decision by the Commission could be aided if the matter were raised by the Minister directly with Commissioner van Miert at an appropriate time."

That was on the 15th June, 1995.

A. Mm-hmm.

Q. The next document is a press release of the 16th June, it's in Leaf 73, and at this stage presumably a decision had been made that the competition should be suspended, that it was going to take some time to try to conclude a deal with the Commission?

A. Right.

Q. Although presumably you must have some confidence that this was achievable?

A. Yes, the Commission had said "Put your best foot forward and we'll give you a decision in four weeks." But the existing closing date was coming rapidly upon us, so we had to tell the market something.

Q. Well, four weeks from the 15th June you were outside the closing date?

A. Yes.

Q. Which was the 23rd June?

A. Mm-hmm.

Q. In the press release dated 16th June, the second paragraph it stated, "The Minister explained that certain aspects of the terms of the competition required further consultation with the European Commission. He acknowledged that the primary difficulty relates to the role of license fees in the selection process. It was anticipated that consultations would have been completed before the closing date, but this had not proved possible.

"The consultation process could now take a further period of four weeks to complete, but the Minister indicated that he is anxious to clarify the position for potential applicants as soon as possible, and to resume the competition process. Minister Lowry expressed full confidence that the winner will still be selected this year, despite this procedural delay."

And the next document in Leaf 74 is a letter to Mr. Enda Hardiman of Esat Telecom, effectively informing him that the competition had been suspended and the closing date would be extended, but that it wasn't possible to indicate a new closing date at that time.

A. And that's just a sample. A similar letter would have gone to each party that had purchased the documentation.

Q. The next document then is in Leaf 75, and it's a note of a meeting between yourself, Mr. Fintan Towey, Mr. Denis O'Brien and Mr. Ed Kelly, and Esat Telecommunications on the 19th June.

"Esat had requested the meeting to discuss the recent postponement of the GSM competition."

This is Mr. Towey's note of the meeting.

"The following points were clarified by the

Department:

No indication could be given of any revision which might be put in place in relation to the license fee. Potential applicants must, pending further clarification, draw their own conclusions from the Minister's statements as reported in the media."

I take it that's a reference to the statement that I have just read out?

A. I think there may have been more than that in the media.

Q. Do you know if he said anything other than, from principle, or do you know whether he said anything other than what was stated in that letter in substantive terms?

A. I don't know where we are now with documentation. We had an exchange of documentation in December about this, which I'd prefer to have in front of me in answering the question. I mean, there was a stage when there were follow-up queries from the media where some additional information was given out, but I can't recall the details right now.

Q. If we can cut to the chase: There was no information given out to the effect that you were proposing to try to do a deal with the Commission whereby you'd have a 10 million fixed fee for Eircell and a cap on bids from the second operator?

A. It gets back to the documentation we were looking at before Christmas, where there was some press cuttings, and I was seeking to assist you outside of the public hearing as to what might have happened. And what I recollect now, without having further sight of those documents, is that after the media became aware the competition was postponed, a number of press queries came into the Department's press office. That was what gave rise to the phone call to the Minister in his car where I said he was furious with me and so on. And a line of answers to be given to those press

queries was given to the Department's press officer arising from the conversation.

Q. I haven't ever seen those, Mr. Brennan.

A. You have never seen what?

Q. That line of

A. I don't know whether it was in writing or not. What I am saying is that there was a telephone conversation on a loudspeaker in Mr. Loughrey's office where I was present, and I am fairly sure Joe Jennings was present, where we were explaining to the Minister that we had press queries and where Mr. Loughrey was suggesting what response might be given to them. Now, I don't have a clear recollection of what the response exactly was, but before Christmas I was connecting in my own mind what the response might have been with press cuttings which you gave to me, which came to you from Owen O'Connell, I think. So I think there was some further information given in response to media queries which I mean, the press cuttings that we were looking at before Christmas were sources close to the Department or sources close to the Minister or something. I am assuming that that was Joe Jennings arising from the conversation I have just described.

Q. If Mr. Jennings had answered queries from the press on the basis of a discussion that he had with you and Mr. Loughrey and over the phone with Mr. Lowry, wouldn't I be right in saying that the last thing

you'd want to do was to disclose what you were discussing with the Commission because you'd end up having a public debate tying your hands about what you were trying to do in Brussels. Isn't that common sense?

A. I am at a disadvantage here not having the press cuttings and not being able to relate them to this conversation. But I mean, I am saying that there was some conversation about press queries and some line was given out. Now, I have no control over what documents were given to you by the Department. I don't know what, if any, records existed in the press office of the Regulator Department. I don't know whether the press office was taken into the trawl for documents to give you because I played no part in that exercise. I don't think there is anything sinister in all of this, but I am just telling you my recollection of it.

Q. I am going to try and get the press cuttings, but my recollection of them is that there was no reference to capping at all, I think, until reports appeared in the newspapers on, I think it was, the 20th June.

A. I might be mixing up two different time series of events. As I said, I am recalling that was going on between us in private before Christmas. I thought it was relevant to this, it may be at a later stage.

Q. Well, I suppose we'll try to get a look at the

cuttings. If we can get them before 4 o'clock we'll try to examine them.

Can I ask you one thing about the Commission consideration of this matter at this time and during this period. You were seeking to convince the Commission that you should be entitled to continue to run with your auction, that you had put a cap on the amount that was being paid so there could be no suggestion of an excessive fee, and you'd subjected Eircell to an equivalent fee, taking account of the cost of running the competition, and therefore defeat the discrimination argument. On top of that you had the asymmetric regulation argument to throw into the pot, isn't that right?

A. Yeah.

Q. And one of the points you were making in your written submission was that, or one of the points you were making in your ultimate written submission, and presumably you were making it as you went along as well, was that that the license fee payment was not high in the order of priority, it wasn't at the bottom but it was below some of the more important policy drivers in this whole business?

A. Yeah.

Q. Now, as understand it from you, by this time the Commission did not have the weightings. They knew you had weightings?

A. Yeah.

Q. But you didn't give them the weightings?

A. I think the first mention of the weightings to the Commission is in the letter which will be coming up shortly.

Q. But up to the time, did the Commission actually have, or at any time, did they have weightings from you?

A. The Commission at no time had all of the weightings. They were given some assurances about the weightings in the first meeting where we said, we pointed out that it was fourth or fifth or whatever it was in the descending order of priority and would be weighted accordingly. I think the first time we gave any indication of an actual weighting was only the single weighting for the license fee and was in the letter which we are coming to, I think.

Q. You gave them the weighting well, you did mention at various points that the weighting on the license fee was not, I think, greater than a certain percentage?

A. Yes, I think that's true.

Q. But, presumably, one way definitively of enabling the Commission to evaluate this will be to give them the whole set of weightings, wouldn't it, if you were prepared to trust them?

A. I don't think the question arose. I don't think they looked for them, and we were certainly not going to

volunteer them.

Q. Well, yes, but why weren't you volunteering them?

A. There was no particular need.

Q. Wasn't it one way of definitively convincing them that you were not giving a high priority to the license fee?

A. Well, I must have felt I could do a deal without taking that step.

Q. You did, as you say, give them some information to convince them that you were not according a high priority to the license payment by telling them that the weighting attached to it was no more than a certain percentage, isn't that right, and we know that from the correspondence?

A. Or that coming where it came in the descending order of priority it couldn't be more than a certain percentage or whatever, but I gave them some comfort around the weight to be given to the fee. And then I think in the letter from the Minister to Mr. Van Miert we went a little shade further, we'll come to it I am sure.

CHAIRMAN: But it's your positive recollection, Mr. Brennan, that at this particular meeting nothing was intimated either to Mr. O'Brien or Mr. Kelly or to any other persons who might have sought meetings following your letter of the Minister's announcement in relation to what was the further formula?

A. I am positive we didn't give any definitive information. What I am trying to attach to the press cuttings, and it depends on their date; if, for example, the press officer gave some indication of what the dispute with the Commission was about further than that and it was in the media, that would explain why I say "Draw your own conclusions from statements in the media", but I don't have the press cuttings and I don't have the dates at this moment.

CHAIRMAN: Before we revert to that, I take it you may have had meetings with some other consortia who wanted to know what was happening?

A. I think the record shows we had one further meeting.

CHAIRMAN: Yes. What was the tone of those meetings?

Were applicants frustrated or did they indicate they might be subjected to extra expense because of the deferral, or did they seem to accept the situation with equanimity?

A. I don't recollect any particular tone. I think the meetings were very brief, and to use your own, accepted with equanimity. That's the way it is, you know.

CHAIRMAN: Right.

Q. MR. HEALY: The note of the meeting with Mr. O'Brien and Mr. Kelly is as follows:

"The following points were clarified by the Department:

" No indication could be given of any revision which might be put in place in relation to the license fee. Potential applicants must, pending further clarification, draw their own conclusions from the Minister's statements as reported in the media.

" The possibility of new applicants entering the process, although probably unlikely at this point was not precluded.

" In accordance with replies given in the information phase which is now closed. State bodies continue to be free to enter into commercial negotiations on possible involvement in consortia. There is no compulsion to deal with all potential partners on an even-handed basis. (Esat felt they had been treated inequitably by ESB and RTE.)

" Equipment manufacturers will not be precluded from applying for the license. (Esat expressed concern about possible below-cost selling of equipment in the Irish market this was pointed directly at Motorola.)

"With regard to the revised timescale for submission of applications, Esat offered the opinion that a period of two weeks following notification would suffice."

The next document is a note of a similar meeting that you had with Mr. Condon, consultant to Persona

Consortia, also on the 20th June, 1995. And again the purpose of the meeting was to discuss the recent postponement of the GSM competition.

It said: "The Department clarified that the consultation process with the Commission in relation to the license fee may take four weeks to complete.

"The closing date for the competition will be a further three to four weeks.

"Mr. Condon indicated that it was rumoured in the market that Vodafone had complained to the Commission complaining about interconnection arrangements.

Mr. Brennan clarified that the Department had no reason to believe the Commission was acting on complaint from any party. The Department was aware of and regretted Vodafone's decision to withdraw from the process.

"Mr. Condon felt that three weeks would be sufficient for submission of revised applications after agreement is reached within the Commission. The Persona Consortium is also engaged in the revision process, based on media speculation about the new fee requirement.

"The Department clarified that the new applicants for the GSM license would not be precluded from joining the competition at this stage.

"Mr. Condon indicated that members of the consortium (Sigma/Motorola/Unisource/ESB) had sought a meeting

with the secretary to air their concerns about the postponement of the process."

Just on that last point, can you tell me firstly how this meeting came to be held?

A. I am assuming it was on request by Mr. Condon.

Q. That he would have requested a meeting with you or a meeting with the project team or a meeting with anybody in the Department?

A. Almost certainly a meeting with me.

Q. What did you understand the request to have a meeting with the secretary to mean?

A. The secretary is Mr. Loughrey.

Q. Yes. But the request was made to you?

A. That's not stated here at least.

Q. "Mr. Condon indicated that members of the consortium had sought a meeting with the secretary to air their concerns about the postponement of the process."

A. But had sought. I am taking they had made their own approaches.

Q. What did you understand that to mean? What concerns did they have?

A. I have no idea. But my note my manuscript note here suggests that I was at the meeting and that the meeting took substantially the same form as this meeting.

Q. Were they complaining about the delay, in other words?

A. I can't see that they were, I don't know.

Q. I suppose what do the words "Concerns about the postponement of the process" mean? Are they words they used or did they tell you what their concerns were?

A. I think if they had told us what their concerns were, and given that this note may well have served as a briefing note for the secretary, we would probably have recorded them.

CHAIRMAN: Is it not reasonable to assume that if a very substantial businessman like Mr. Boyle took the trouble of seeking a meeting after his colleague had met you, that he must have been a bit upset about it?

A. Well, I am inferring from this that they had already sought a meeting.

CHAIRMAN: Right.

A. Before Mr. Condon came to meet me.

Q. MR. HEALY: If you look at the note at the bottom, whose handwriting is that?

A. That's mine.

Q. It says, "The secretary met Mr. Condon, Mr. Boyle" and somebody else?

A. Hans something.

Q. I think that's the man whose name we have seen, Kurapatwae, is it?

A. It could well be.

Q. "- on the 22nd June and had what amounted to be a rerun of the above discussion."

Can you remember what Mr. Loughrey said to you?

A. I suspect I don't know whether I was at the meeting or whether he told me about the meeting. I may well have been at it and that this was the only record I made of it. I am not saying I was at it, but I could have been at it. And I mean, there is always, I suppose, a bit of gaming going on in meetings of this sort. If you look at the previous one, the last bullet, Esat having a cut at getting Motorola excluded from the competition. You know, this is part of what big business does, presumably.

Q. Except that I suppose it wouldn't be unreasonable for some or indeed any applicant to say, "Listen, this isn't very satisfactory from my point of view, you know, this is a surprise to us that the competition is having to be deferred."

A. I mean, we all know that there was media speculation long, long after the event as to why the delay occurred, which I have always regarded as nothing more than noise in the system and a nuisance value, but I don't recall there being any of that any of what was emerging, say, six months after the event, featuring in these meetings.

Q. Can you recall up to this time if anybody involved in the process had complained about the auction element?

A. I don't recall that they did. I think that the complaints were all coming from Brussels. Now,

whether they complained to Brussels or not, I would have no way of knowing. I wouldn't be surprised if they did, but I don't know whether they did or not.

Q. If you look at paragraph 4 of the note of this meeting, "The Persona Consortium is already engaged in the revision process based on media speculation about the new fee requirement."

Can you recall whether that's a note of a more lengthy indication of what the Persona Consortium were seeking to do?

A. I don't know.

Q. If you go on to the next document which is in Leaf 78.

A. Before you do, I just draw attention to one very minor point of detail. At this stage it's clear that

Persona was a declared consortium with its members identified. The previous meeting we were discussing was with Esat Telecommunications company, a company who had purchased the documentation for the competition, and we had absolutely no knowledge of who their partners were or might be or anything like that.

I think it's important to mention that.

Q. And you mean that you had no formal indication that there was going to be an Esat Digifone application or that

A. We knew

Q. From press speculation or anything?

A. We knew nothing at all about who was talking to whom.

Q. And what did you know about the Persona Consortium?

A. Well, the Persona Consortium clearly came in with Persona with all their constituents, as you see.

Q. The next letter I want to deal with is contained at the next document, rather, is contained at Leaf 77. It's a letter to Mr. Hocepiet from you, dated 20th June, 1995, the same day as the meetings or the day after the meetings, I think, would that be right? I think the day after the meeting with Persona. The same day as the meeting with Persona, the day after the meeting with Esat Telecommunications.

It's headed, it's marked "Confidential". There is no actual subject heading. That's presumably your writing, is it?

A. It is, yeah.

Q. "Dear Mr. Hocepiet,
"Thank you for your fax message today concerning the agreement we are seeking to reach on the competition process for the Irish GSM II license. A copy of the draft letter which is proposed that the Minister issue to your Commissioner within the next day or so is enclosed.

"I would like to offer the following comments in relation to the second paragraph of the Commission's draft response to the Minister:"

Before I go any further, can you just put that into context for me? There seems to have been a degree of

pre-cooking, if I put it that way. I am not suggesting there was anything improper, but pre-cooking of the stances taken by the two politicians in relation to this, is that right?

A. Yes, I think we must have at that stage exchanged drafts mutually. If we say this to you, will you say that to me.

Q. Will everything be all right? Yes.

I think I'll read your letter first. We are then going to have to reverse engines and go back and look at the draft and then go back to your letter, because otherwise it isn't going to make complete sense.

A. Okay.

Q. "I would like to offer the following comments in relation to the second paragraph of the Commission's draft response to the Minister:

"Having regard to the revised fee proposal (15 /10)" - in other words, 15 million, 10 million - "the fee element will probably now have a weighting of 10 percent or less in the quantitative analysis of applications.

"Eircell will be required to pay a fee related to, but less than the new operator. A difference of $\frac{1}{25}$ million can be justified by administrative costs related to the GSM competition design and selection process.

"The points made in relation to infrastructure and

interconnection are fully and factually correct.

"With regard to co-location, the new operator will have a right to equivalent treatment to Eircell by Telecom Eireann in all respects, including co-location, subject only to technical constraints.

"The second GSM operator will have an entitlement to seek to negotiate national roaming with Eircell, but without compulsion on either side.

"Direct international interconnection will not be allowed, for the reasons stated in the enclosed draft letter.

"It should be noted that the second operator will have a right to DCS 1800 license when this technology is licensed in the Irish market.

"The second operator will also have a right to become a reselling or service provider on Eircell's analogue service to prevent this service being used in an anti-competitive way.

"Regard to the legal bases for the grant of the license I can confirm that the Section 111(1) of the Postal and Telecommunications Services Act, 1983 relates to the licensing of services within the exclusive privilege of Telecom Eireann. However, this provision was drafted specifically for the purpose of providing for the introduction of competition in services which at the time of the passing of the Act were provided on a monopoly basis by Telecom Eireann.

Once the license is granted, Section 111(1) does not limit in any practical way the operations of the license, nor does it preclude the grant of a further license.

"It is fully accepted, however, that having regard to the impending liberalisation of the telecommunications sector, it will be necessary to revise many provisions of the 1983 Act. This will be a fairly laborious task, but the process will give rise to a revision of the legal base under which GSM or other licences are granted."

Now, you see that in the letter you are indicating in the first bullet point that the fee element would now have a weighting of 10 percent or less in the quantitative analysis of applications. And this is one of the points I was alluding to earlier. You were letting them know or giving them an indication of the weighting that would be applied, presumably in order to ensure that they were convinced of the relatively, I suppose, low priority being accorded to the tariffing element?

A. Mm-hmm.

Q. Or to the license fee element?

A. Yeah.

Q. Now, you refer in the opening sentence to a fax message from Mr. Hoceped.

Presumably you felt that you had to give him some

information to copperfasten the view that you were seeking to convince them of

A. Yeah, I was looking for a clear outcome from the Commission to enable the process to go forward.

Q. You didn't want to be taking any risks?

A. Mm-hmm.

Q. You had received advice that you might get away with this, but then again you mightn't and you didn't want to be in that position?

A. Mm-hmm, yeah.

Q. You had marked your letter "Confidential"?

A. Mm-hmm.

Q. It was, in any case, obviously a confidential matter?

A. Yeah.

Q. Can there be any doubt that the whole exchange of correspondence and dealings between you on this issue was a confidential one?

A. You will find as we go forward that it's emphasised everywhere that it's relevant.

Q. Yes. You weren't giving, and you certainly don't recall ever giving them any of the other weightings, and they were only getting an indication of one weighting in this?

A. I am virtually certain they never got any they didn't get the list of weightings or any other weightings.

Q. But you felt, nevertheless, that giving them this

weighting was enough to convince them of its relative position?

A. Yes.

Q. We were discussing earlier how Finance, in giving an example of the application of weightings, chose a 50 percent weighting for tariffs as against a 5 percent, or something, for tariffs, and you and I were able to work out, admittedly in what is a fairly absurd case, that that left with you no room for manoeuvre at all in any other weightings. In this case you were giving one weighting which would have enabled the Commission to inform an informed judgement of the relativity or the relative insignificance, I suppose, of this item?

A. Yeah. Bearing in mind that we already had settled a weighting scale and that I was making a judgement that if we fixed the fee we would move down the weighting of tariff somewhat. So it's a little bit vague. Now, when I say we had fixed the weighting scale, I suspect that Mr. Towey actually drafted the first cut of this letter. He was the one who had had the actual list of weightings. I didn't either have it or carry it around in my head.

Q. Right. Now, I am going to try to deal with a number of things that were happening around this happening at the same time as this exchange of correspondence. At the same time I don't want to lose the thread of the correspondence, but if you go to the next document

on page 78, on Leaf 78, it's a reply to two Dail questions. I think it's an oral reply, as opposed to a written reply, to two questions from Mr. Sean Power, TD, and Ms. Mary Wallace, TD, for oral answer on the 21st June.

The questions were as follows:

"To ask the Minister for Transport, Energy and Communications when he will award the second mobile phone license in competition with Telecom Eireann, and whether he has satisfied himself with the policy being pursued on this issue?"

Second question: "To ask the Minister for Transport, Energy and Communications if the EU Commission has sought to prevent in any way the Government from seeking an estimated $\text{€}1\frac{1}{2}$ 45 million for awarding the second mobile phone license?"

And the answer is as follows:

"I propose to take Questions No. 21 and 40 together.

"I am currently in consultation with the Commission regarding certain aspects of the GSM competition, and in particular the requirement that applicants indicate the level of fee they are prepared to pay for the license. The Commission is concerned that this requirement may be contrary to the competition rules of the EU Treaties. It had been anticipated that these discussions would have been completed before the planned closing date of 23rd June for receipt of

applications for the GSM license. Unfortunately it became apparent over the last week that this would not be feasible. Consequently I informed all prospective applicants that the closing date would be extended.

"My priority now is to get the competition back on track as a matter of urgency. Consultations with the Commission could take up to a further four weeks to complete. My aim is to achieve as much legal certainty as possible before announcing a new closing date. While prospective applicants will be allowed an appropriate period to adapt their applications, if necessary, the new deadline for receipt of applications will be set as early as is practically possible, and I am confident the successful applicant will be selected before the end of the year.

"As I have stated on a number of occasions, my primary objective in this competition has always been to select the applicant who will have a progressive approach to market development, a commitment to a high quality national service and innovative approach to tariffs. I am not convinced that a voluntary fee determined by the market for the right to the license would undermine that objective. I should clarify in this context that the Government never indicated a requirement for a fee of £1/245 million. However, in the light of the views of the Commission, I am seeking to agree a compromise solution to the fee which may

involve a contribution from Eircell."

This was a fairly frank indication of what the up-to-date position was at that stage?

A. Yeah.

Q. The Minister was not resiling from the proposition that there was anything wrong with a fee, but he was, I suppose, putting down a marker that he was going to have to seek a contribution from Eircell?

A. Mm-hmm. And when you said this was an oral question, it almost certainly wasn't answered orally.

Q. I see. You think it was a written reply?

A. If it were to be answered orally it would have been surrounded with possible supplementaries and so on. You only do that for the top 10 or 12, knowing that that's all that ever gets reached.

Q. I see. So it was intended for oral answer?

A. No, it was put down as an oral question, but in my view never likely to be answered orally.

Q. I follow. The letter of the, going back for a moment to the letter of the 20th June. It refers to a fax of that date from Mr. Hoceped enclosing the, a copy of the draft letter which was proposed the Minister would issue to your Commissioner. I beg your pardon, it referred to a fax concerning the agreement "we are seeking to reach on the competition process", and then you enclose a copy of a draft letter which is proposed Mr. Lowry would issue to Commissioner Karl van Merit

within the next day or so.

Now, the fax from Mr. Hocepied is not in the books because I think it came to hand after the books in fact it was only identified after the books were put together. Do you have a copy of that?

A. No, but I can see it on the screen.

Q. I think it was given as a supplemental document. You probably have it somewhere.

(Document handed to witness.)

What we are looking at now is the fax that you referred to from Mr. Hocepied.

"Dear Mr. Brennan,

"As agreed I send you herewith unofficially the draft closing letter drafted for Mr. van Miert. This draft must still be reviewed as regards the English and cleared by the legal service of the Commission.

Moreover, the list should be reviewed on the basis of what your Minister could accept.

"The last paragraph will probably be shortened. It aims only to remind the Commission's position that mobile services should not" I don't know what is meant here "should not is maybe too detailed, but aims only to remind the position already expressed the Commission mobile Green Paper. No exclusive rights on mobile services are justified."

CHAIRMAN: Doesn't it indicate that they were reasonably content to do a deal as long as you had to

some significant degree acknowledged their competitive requirements?

A. It does, yeah.

Q. MR. HEALY: Could I just draw your attention to one aspect of this document, because we'll come to the final draft or the final drafts eventually.

Firstly, it's described as a draft prepared for Mr. Van Miert, so obviously while presumably Mr. van Miert had indicated some degree of agreement, but the outlines of the deal that had been agreed, the terms of this letter had not yet been finally accepted by him, to the point where he put his name to them, is that right?

A. I don't know how the service of the Commission work at that level.

Q. Isn't that what he is saying, in any case?

A. He is saying a draft of a letter they proposed to ask Mr. van Miert to sign. It doesn't necessarily follow that he is already party to discussion, I have no idea.

Q. No, but he must have agreed the principles of the deal?

A. I have a feeling that it's like all Civil Services. If the Civil Service agrees, sometimes you bring the Minister or the Commissioner along, but I don't know. It's a question for Mr. Hocepied or Mr. Ungerer.

Q. I see. It goes as follows:

"Dear Mr. Lowry,

"On the basis of the clarifications provided in your letter of XXX June" I don't think that means the 20th, it just means a date "during talks your expert had with my services concerning the granting of the second GSM license in Ireland, the Commission could now complete its preliminary assessment of the auction element in the call for tender of the second operator.

"The Commission, as it stated in its Green Paper on mobile communications of 27th April, 1994, does not favour auction procedures for the granting of mobile licences in view of the effects of such procedures.

The Commission has, however, taken note of the specific factual and legal circumstances list in your letter of blank June regarding the procedure followed for the purpose of granting the second GSM license in Ireland and in particular that:

" The Irish Government has fixed a maximum ceiling regarding the auction element in the call for tender, and that it will give only a limited weighting to this selection criteria (less than 20 percent) in comparison to the others;

" The same license conditions (including the payment of an amount equivalent to the auction fee) will apply to Eircell even before it becomes a separate subsidiary of Bord Telecom Eireann;

" The second operator may set up its own infrastructures without any restriction, or make use of alternative infrastructures instead of the fixed network of Bord Telecom Eireann;

" An efficient procedure provided to deal with interconnection disputes to avoid that the new entrant ... provides both the fixed voice telephony and GSM, and account will be taken of the declining underlying marginal cost of the use of the PSTN;

" The Irish Government will actively promote site location in the areas where planning law would delay the roll-out of the network of the second operator;

" In an initial period Eircell will be required to provide national roaming to the second operator to allow it start marketing its service before having rolled out its network;

" The second operator is allowed to directly interconnect with foreign mobile operators.

"In view of these circumstances, and as far as these measures are effectively implemented, the Commission deems that the granting procedure followed by the Irish Government does not appear to favour the extension of the current dominant position of public telecommunications organisations, Bord Telecom Eireann, to the new GSM market which would constitute

an infringement of the Treaty competition rules.

"For this reason the Commission considers that it has no grounds for action under Article 90(1), in conjunction with Article 86, in respect of the auction fee imposed on the second operator.

"However, this assessment could be reconsidered if the factual and legal context mentioned would be changed and the competitive situation of the second GSM operator would be affected negatively vis-a-vis Bord Telecom Eireann.

"Nevertheless, I still have some concerns regarding the legal basis under which the second GSM license will be granted in Ireland. The preliminary draft license submitted to me refers to Section 111(1) of the Irish Telecommunications Act, which as I understand, applies to services reserved for Bord Telecom Eireann. The GSM license of the second operator would then constitute just an exception to a general monopoly of Bord Telecom Eireann on domestic mobile communications. The Commission could not agree with such a result. It does not see any justification to reserve as a general rule mobile communications, nor in fact either in law to the telecommunications organisation. I would, therefore, be glad if the Irish Government could grant the license under another provision of the Telecommunications Act which would not have the same implications."

I think the last bit there, the legal bit simply is an objection they take to the notion of Telecom Eireann granting the license, because it would tend to recognise they had a right to grant it and maybe could grant other licenses and so on. It's purely a technical matter."

Do you notice in the first of the list of bulleted circumstances which the Commission regarded as in some way justifying allowing the Irish competition to proceed, there is a reference to the tender giving only a limited weighting to the auction element in the selection criteria, less than 20 percent, in comparison to the others?

A. Mm-hmm.

Q. Aren't I right in thinking that at that time the license fee element was only 15 percent, wasn't it?

A. I think so. This is a very interesting kind of a letter, in the sense that at one level it's trying to anticipate the letter we would write to them without having seen a draft and then present a reply, and in doing so it seems to be inaccurately interpreting some of our intentions at the most benign interpretation or deliberately trying to put words in our mouth in the hope that we will take further steps towards the Commission, and I say that not in relation to that particular part, but I say it in relation to, that you can't assume that we had any discussion, because 20

percent doesn't mean anything. But if you look at other parts of it, they talk about, "In an initial period Eircell will be required to provide national roaming to the second operator." We never said that and we never intended it. And it says, "The second operator is allowed to directly interconnect with foreign mobile operators." We specifically said we would not do that, so what you see here is the Commission trying to put words in our mouth.

Q. Is that what it was?

A. I think so.

Q. Do I understand, and this is just my attempt to come to grips with how the Commission do these things, that they never actually balked at the notion that you wouldn't allow direct interconnection with foreign mobile operators?

A. Because it wasn't general practice, it was something they wanted to achieve. And the Commission, as I said yesterday, I think, or the day before, have always tried to use the small fry to create precedents that they can then leverage on bigger countries. It's part of their method of working.

Q. We saw that with Mr. McCreevy here.

A. Yeah, indeed.

Q. It didn't work, we now know from the Germans.

A. Yeah.

Q. But anyway...

Would I be right in thinking, though, that when writing this letter Mr. Hocepić was under the impression that you had attributed a weighting of greater than 20 percent

A. There couldn't be any basis for that. We may have said in one of the discussions with him that, you know, we will be respecting the end descending order of priority, and that means logically that the weighting couldn't be more than some reasonable percentage. But I mean, if we had told him a number, he presumably would have used the number. So again I say that it seems to me that what Mr. Hocepić is trying to do is condition the letter that we would write to them to contain things that we wouldn't necessarily be putting in.

Q. Would it be fair to say, then, that he would have been happy with less than 20 percent, in fact, but on the other hand I suppose if you wanted to ignore parts of his letter, you had to offer him something more on other fronts, because you did ignore the section on direct interconnection with foreign mobile operators, isn't that right?

A. I don't know whether we ignored it or refused it. We had certainly no intention of doing it.

Q. So you crafted your letter in such a way as to refuse to run with some of his propositions and so make some of his other propositions more attractive to him?

A. Yeah.

Q. I am not sure how far we are going to get in dealing with the Commission letters, but sticking with the chronological way this thing developed, that was the fax you received from him. You sent your letter to him offering your comments on the list of items that he had mentioned, and you enclosed a copy of the draft letter which you proposed to send to him?

A. Yeah.

Q. Which Mr. Lowry was going to send to him but obviously drafted

A. If it was going to the Commissioner it would have to be signed by a minister or an ambassador.

Q. We don't have a copy of that draft letter as far as I am aware. Do I understand that that draft letter was in the same form as the final draft that went out?

A. I am fairly confident that it was. I couldn't I mean, I couldn't verify that.

Q. I understand.

A. I'd be quite confident though.

Q. Well, we know that the final draft that did go out was dated 22nd June.

A. Yeah.

Q. So there is only two days. So the chances are that it was a fairly long letter and it was hardly massively redrafted during that period of time?

A. Yeah. My sense of the letter that actually went out,

it feels like a combination of the drafting of Fintan Towey and somebody in the AG's office. I don't know at what stage the AG's office had their final say, but subject to that I think it's almost certainly the same text.

Q. It's in Leaf 79.

A. Yeah.

Q. It's dated 22nd June, 1995, from the Office of the Regulator Minister, marked "Confidential".

It's addressed to Commissioner Karel van Miert.

"Dear Commissioner,

"Thank you for your letter of the 27th April, 1995."

That was the original letter, if you like, taking serious issue with the competition.

"On the subject of the competition process for the award of a license to a second operator of GSM mobile telephony within Ireland.

"I would like to elaborate on the basis for and the motivation behind the structure of the competition.

"As noted, there is a 'once-off initial license fee' of not less than IRi½5 million payable by applicants.

Applicants are invited to offer a higher fee with their license application, if they wish. This provision balances a number of elements all material to a free and fair competition, taking into account the interests of those who will be applying for the new license, the interests of the current GSM

operator, Eircell Limited, and the other material interests."

Was it Eircell Limited at that time?

A. It may not have been.

Q. "It is important to understand that the new operator will have the right of full infrastructural freedom, including access to the existing infrastructure owned by third parties. (See paragraph 15 of the competition document and clarification in the subsequent information memorandum at page 9.) This is a major concession and major advantage to the prospective new licensee in its start-up phase. It also confers a fundamentally important potential headstart advantage when the voice telephony market is liberalised. Further, it is also to be noted that the licensee is offered a right to a DCS 1800 license in due course.

"In addition to the above, the successful licensee will also have the right to become a reseller or service provide on Eircell's analogue service in order to prevent this service being used in an anti-competitive way. I believe this is innovative and extremely attractive to prospective licensees who will be concerned to see an even playing field from the competitive point of view.

"The prospective licensee is also being given the right to equivalent treatment by Telecom Eireann

compared with Eircell in all respects; this includes a right to co-location where technically feasible.

"The new operator will have the possibility of negotiating a commercial arrangement with Eircell for national roaming.

"Above I have listed some of the essential and innovative advantages that will be available to the new licensee. However, to maintain fairness in the market place I have also had to consider the rights of the existing GSM service provider. In particular my mind has been exercised by the need to ensure that the new service provider pays an appropriate price to ensure that the new service provider's entry to the market at its current state of development and in circumstances where he will be obtaining the benefits enumerated does not provide to the new operator a form of disguised commercial aid which is not available to the current operator who has had to engage in ground breaking work, and a level of investment which will not be incurred by those who follow it into the established market.

"The solution to this problem has called for a balancing of interests. My primary concern is to see open competition between providers of GSM services to the advantage of the consumer. The 'once-off license fee' could have been computed on the basis of charging a fee which levied from the new entrant to the real

cost of the advantage they will obtain by entering the GSM market at this point in time. However, I have been forced to conclude that the level of such a charge might act as an inappropriate barrier to entry into the market leading to less competition. On the other hand, in the interests of fairness and open competition I have to gauge what would be an appropriate once-off license fee charge for the benefits I have outlined. I believe the solution achieved is innovative. It is proposed to charge a minimum once-off license fee of 5 million. However, it is reasonably clear that persons who wish to be licensed will be prepared to pay in excess of this sum because they recognise the advantages that will come to them by entering the market at this stage of development, and on the basis of advantages they will receive, some of which are numerated above.

"On the basis that prospective licensees will be best able to value, in commercial terms, what is a reasonable price to pay for these advantages, I have given prospective licensees the opportunity to pay a larger once-off license fee if they consider this is appropriate. However, in order to avoid the possibility that financial might will win over invasion and technological expertise, to the detriment of the end consumer, I have not made the amount of the license fee that any prospective licensee will offer a

definitive selection criterion, rather it is one of the criteria that will be used. It is, in fact, ranked only fourth of eight criteria in descending order of priority. A clear but confidential decision has also been taken that this element would get less than 15 percent of the overall marks in the quantitative assessment by our consultants.

"Despite the considerable argument adduced in the foregoing, on the basis of your letter and in the interests of ensuring that there is an openness and transparency which will ensure nobody can even be seen to complain that Eircell will be favoured, I am prepared to impose on Eircell the requirement to pay a once-off license fee payment to coincide with the licensing of the second operator. I do this in recognition of the fact that some of the costs which have been incurred in starting up the GSM network have not necessarily been incurred by Eircell, but rather by other third parties. Having reviewed the matter carefully I believe imposing a once-off license fee on Eircell in the sum of 10 million tied to a cap on the amount any prospective licensee can offer say of 15 million guarantees, in concrete terms, that my desire not to penalize Eircell and at the same time charge a fair 'once-off entry fee' to the new provider will be seen to be clearly fair and in proportion to all parties' interests. I would not wish this concession

to be seen as an admission of any anti-competitive effect of the existing procedures but rather a concession to the fact that agreement is to be preferred over conflict.

"Furthermore, having regard to your concerns about the priority given to the license fee in the selection process, I am prepared to consider an appropriate reposition of the fee requirement in the selection criteria at paragraph 19 of the competition document.

"On the subject of the application of the criteria detailed, my attention is drawn to your concern that the lender competition is not fully transparent, as prospective applicants do not know how each distinct selection criteria has been weighted by the Department. The level of detail which applicants will be provided is highly subjective. "

"I have at all times been concerned not to limit the flexibility that applicants will have in treating the presentation of their applications. On the other hand, it has been necessary to ensure that sufficient detail will be included to allow an understanding and an evaluation of the applications, one against the other. I believe that the order of priority of the selection criteria elaborated at paragraph 19 of the tender document is a reasonable compromise. I am given to understand that the process I am invoking is, in fact, one of the most advanced and transparent of

its kind in Europe. I have, of course, recruited international consultants to assist in carrying out the valuation. I trust the alteration in the positioning of the license fee criteria will put your mind at rest in this regard.

"Although performance guarantees are at the lower end of the selection criteria, this does not imply performance, per se, is a low priority. Firstly, there is a mandatory coverage requirement; 90 percent of the population to be reached within four years. Secondly, for any prospective licensee to be selected.

In addition to being satisfied that their proposed service is credible they will have to establish technical competence at all levels of their offer, including their ability to sustain and service their operation. The specific requirement in relation to performance guarantees are purely to elicit, to the maximum extent possible, undertakings in relation to performance which may be imposed as binding license conditions to guarantee that the offer made is delivered on.

"You expressly ask whether Telecom Eireann/Eircell will pay the same amount as the new competitor. I trust the explanation given above will establish in your mind why such a demand of Telecom Eireann is inappropriate and in truth will have the effect of imposing on Telecom Eireann an unfair burden,

upsetting what am otherwise be a fair competitive climate. Indeed it is worth repeating, that Telecom Eireann/Eircell, the first mover in the GSM market, a relatively new technology has had to bear costs in relation to network design and implementation and their creation of an awareness among consumers of the benefits of GSM technology. The reality is that Eircell GSM service does not have any major headstart advantage at this time in terms of customers recruited, rather the position is that Telecom Eireann has developed the market which is now ready for exploitation. The introduction of a second GSM licensee is to ensure that this exploitation occurs in a fully competitive environment. However, it would be quite wrong to fail to recognise the rights of Telecom Eireann/Eircell to be treated equally to the new entrant to the market.

"There are also disadvantages for historical reasons which the Telecom Eireann group must overcome. These include, in particular, the social obligations borne by Telecom Eireann generally to provide a nationwide telecommunications service on a monopoly basis. The company must now overcome the problems arising from its monopoly culture, i.e. severe excessive staffing (as illustrated by customer lines per employee figures) and a heavy debt burden if its to meet any competitor challenge.

"I am, as a separate exercise, tackling major problems of Telecom Eireann at present. Officials of DG XIII are broadly aware of our intentions and plans."

"This is relevant background to what follows in the next paragraph.

"You have questioned whether it is intended to allow direct international interconnection between mobile operators. A policy decision has been taken that all international calls must for the time being be switched and delivered via Telecom Eireann. This is doctored necessary since international traffic rights cannot be in practice be limited to mobile telephony. If the second GSM operator is allowed to interconnect direct with mobile operators abroad, it will be virtually impossible to ensure that connections are not made between a mobile operator here and a fixed operator abroad or visa-versa. Our ability to achieve a major turnaround in Telecom Eireann has to able to face full liberalisation well ahead of 2003 is critically dependent upon being able to protect certain of its revenue stream in the short term. We intend to fully liberalise the telecommunications market at the earliest realistic date, but, like other Member States, there is a need to pay particular attention to international traffic for a few years. If we concede the right to switch calls via Northern Ireland at this stage, we would risk seriously

undermining our wider and ambitious policy aims. This aspect of the matter is of critical importance in the short term.

"I hope you will view this letter as an open and constructive response to the concerns you have expressed. You will appreciate your letter has created a substantial impediment in the way of licensing a second operator in Ireland. The suggestion that the terms of the license arrangements are in some way anti-competitive could easily translate into an attack on the license arrangements by a third party. It is essential to avoid any legal uncertainty which would create difficulties at a later stage. Accordingly, I am anxious that we can record our agreement that the licensing arrangements being operated by Ireland are not subject to complaint by the Commission. In order to allow mutual agreement be reached I have deferred the closing date for application to facilitate such agreement.

"I have written a letter with a view to securing the earliest possible agreement from the Commission. Delaying will defeat the introduction of competition. I and officers of my Department will be available to offer any clarification or other assistance which is required."

I don't propose to go into this letter in any detail at this hour, but that, in any case, was the response

which ultimately went and was the response which was probably sent in draft at the time of your response to Mr. Hoceped's fax?

A. I think that's probably true.

Q. And ultimately that was the deal that was done, isn't that right?

A. Yeah.

Q. A cap was put on the license fee at 15 million. You expected to get 15 million in any case. Eircom were to give 10 million. The Department of Finance were happy, they had 25 million at least, as they saw it.

However you viewed the 10 million from Eircell, they were getting 25 million out of this process from your Department?

A. Yeah.

Q. And you were satisfied that you had tied down any legal uncertainties in the process?

A. Yeah.

Q. Could I just ask you one thing, the only question I want to ask about it at this time: Why did you not publish the weightings at this point, seeing as the Department of Finance were now out of the picture on at least the license fee issue?

A. It never arose. I mean, we just didn't consider the question.

Q. I am just wondering why you didn't consider it, because the impetus, if you like, not to disclose them

came from the Department of Finance in a sense, didn't it?

A. Yeah, I mean it's an interesting question about hindsight.

Q. With all the things you had on your mind, I am sure you had

A. The only thing I'd like to draw attention to in relation to the letter, a simple thing. Not only the entire letter was marked "confidential", the particular confidentiality of the weighting information is re-emphasised in the text.

Q. I didn't want to take you through the details of the letter, but you are referring to the second page and the last sentence of the second-last paragraph which says, "A clear but confidential decision has also been taken that this element would get less than 15 percent of the overall marks." So that, I am sure you will be well aware that the Commission take the view that this was not confidential. We'll come to their views next week, but in any case nothing could be clearer but that the correspondence was confidential, but in any case any reference to the weightings was confidential?

A. Yeah.

CHAIRMAN: Well, we should probably leave it there and perhaps to end on a positive note, I have to observe that it was an extremely resourceful, articulate and well crafted letter, and it obviously achieved its

desired result.

I have contemplated when we should resume, and I have given some consideration to sitting on Monday because of my anxiety to expedite matters, but I have to also bear in mind what may not generally be recognised by people attending only the public sittings, that both as regards this demanding phase of evidence and other remaining aspects in which confidential inquiries are ongoing, a very, very large volume of correspondence, meetings and other dealings have generated, even the more eccentric letters that we receive have to be responded to, apart from the vast correspondence of serious and substantive ones, and having regard to our limited numbers, both at legal and administrative level, I think for the time being, while I'll keep an open mind on it, I will fix Tuesday, and if it's suitable to you, Mr. Brennan, 11 o'clock.

A. I don't think I could go five consecutive days.

CHAIRMAN: We will avail of that conflict on our part

THE TRIBUNAL WAS THEN ADJOURNED UNTIL TUESDAY, 21ST
JANUARY, 2003, AT 11 A.M..