

A P P E A R A N C E S

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Mr. Jerry Healy SC

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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 TUESDAY,
21ST JANUARY, 2003, AT 11AM.

CONTINUATION OF EXAMINATION OF MARTIN BRENNAN BY
MR. HEALY:

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

The last day we were at Leaf 79, and I think we got through Mr. Lowry's response to Mr. Karel van Miert of the 22nd June, 1995. And do you recall that you drew to my attention the fact that the letter was marked "Confidential", like some of the other correspondence that you had instituted or the Department had instituted in this case, and you, in addition, drew my attention particularly to the fact that on the second page, it contained a statement in the second-last paragraph as follows: "A clear but confidential decision has also been taken that this element, i.e., the option element, would get less than 15 percent of the overall marks in the quantitative assessment by our consultants."

CHAIRMAN: We seem to have

MR. HEALY: We seem to be on air now.

CHAIRMAN: Sorry about that, Mr. Brennan.

Q. MR. HEALY: I think, in any case

CHAIRMAN: You might just go over the last bit.

Q. MR. HEALY: I think what you were seeking to convey to me was that on your side, there was no doubt but that you had made it clear to the Commission that

information, that not only was the letter confidential, but that the information regarding the weightings was confidential in the sense that it was a decision that had been made within the Department or within the evaluation, on the evaluation side, if you like, of the whole process; isn't that right?

A. Yeah.

Q. Now, do you remember we canvassed before this question of what the competitors or potential competitors, what the applicants would or would not be told in relation to the ratings, and you had made a decision, for all the reasons we discussed earlier, mainly a compromised reasoning, I think, with Finance at that time, not to disclose the weightings, and as far as I can judge, not even to disclose the fact that there were weightings?

A. I think that's correct, yeah.

Q. Now, if you just go on to the next leaf, which is Leaf 81, and it's a note of the 30th June, 1995, from Fintan Towey to you, to the Secretary, and to the Minister's, I take it that's the Minister's private secretary, is it?

A. Yes.

Q. And it says "The Commission has provided us with the attached draft response to the Minister's letter regarding the GSM competition process. It is anticipated that Commissioner van Miert will sign the

final version today or early next week. The draft response signifies that the Commission will not pursue infringement procedures if Eircell is obliged to pay a similar amount to the second operator with the difference being justified by the administrative costs of the GSM competition. Thus a fee of 10 million for Eircell and a voluntary fee subject to a maximum of IR 15 million for the second operator is acceptable. The Commission reserves the right, however, to re-open the question if there is any departure from the stated competition parameters which places the second operator at a disadvantage, vis-a-vis Eircell. The decision not to grant international mobile-to-mobile direct interconnection is still considered to be contrary to the EU competitive rules. However, in the interests of expediting the grant of the GSM license, Commission will not act on this unless a formal complaint is made. This will be a possibility when the second operator is licensed, particularly if Vodafone re-enters the competition and wins. Realistically, however, the Commission would have to take similar action against virtually all Member States which imposed similar restrictions. The next stages of the GSM competition process are:

- fix a new closing date for submissions of applications
- ensure that political acceptance of the revised

terms is in place

notify applicants of the revised competition

parameters and consequential changes in the

selection criteria

press release by the Minister.

"The revised competition terms should not be a

particular surprise to potential applicants in view of

the public statements made by the Minister when the

competition was suspended. Contacts with potential

applicants suggest that about three weeks should be

adequate for revision of bids. Thus, assuming the

formal communication is received from the Commission

on or before Wednesday of next week, i.e. 5th July, a

new closing date could be set as Friday, 28th July.

Andersen Management International have indicated that

the final evaluation report could be prepared by

Monday, 16th October. A final Government decision on

the new license should be possible by Tuesday, 28th

November. Thus the overall slippage in the

competition process, therefore, would only be about

four weeks, which is not a significant price for the

imprimatur of the Commission.

"Given that the original competition terms were noted

by Government, the question arises of whether the

revised terms require mention at Government.

Statutorily, the grant of the license requires only

the consent of the Minister for Finance. The

Department of Finance has been copied with the letter and has suggested that the Minister write formally to the Minister for Finance seeking consent. A draft letter is accordingly attached. It is also recommended that the Minister mention the matter under other business at Tuesday's Cabinet meeting."

Now, because the documents because we know that I am going to come to documents which will show that there is a slight hiccup in compromising this deal with the Commission, these dates or these anticipated dates to wrap up the competition were out by, I suppose, about a week or so, or whatever?

A. That seems so.

Q. But you envisaged in any case that you wouldn't have slippage of more than about four weeks?

A. Mm-hmm.

Q. The next document is Leaf 81. It's a confidential memorandum from John Loughrey to the Minister headed "Confidential, second GSM license proposed fee structure".

There is no date on this, but it refers to a letter, an attached draft letter to Ruairi Quinn, and that letter is dated 3rd July 1995, and I suppose we can assume that the memorandum to the Minister is in or about the same date.

A. I suspect it's Mr. Loughrey reacting to Mr. Towey's note.

Q. Yes.

A. Within a day or two. I don't know what days of the week we are talking about here.

Q. It says "Minister,

"Attached is a draft letter to Ruairi Quinn which should have his agreement as soon as possible.

"In a phrase, Karel van Miert, the EU Commissioner, has bought into your suggestion. You can take it we pulled in all of our I.O.U.s to get such a quick clearance on your instructions.

"The Department of Finance have not raised any objections, to my knowledge, on proposals, i.e. $\text{€}15$ million from the competition winners and $\text{€}10$ million from Eircell.

"As soon as the Minister for Finance buys into this proposal, we will set the revised closing date for the competition at the earliest possible date, i.e. 28th July 1995. This will ensure that that there is little or no slippage on the original timetable, which will now be a final Government decision before the end of November.

"If Minister Quinn is prepared to nod his agreement across the table this afternoon, you could inform the Government that you have got the informal agreement of Karel van Miert, the Commissioner for competition policy, which will translate into a formal go-ahead in the next 48 hours and that both you and the Minister

for Finance are happy with the outcome."

That's bringing the Minister up to speed, telling him that, or indicating that van Miert has yet to formally sign off, as it were; the word "signing off" isn't used, but we know that that was in fact the problem, and that the Minister should get working on getting the competition restarted so far as Government was concerned as opposed to merely getting it kick-started within his own Department; is that right?

A. Yeah, and he is saying that the Irish network has worked in Brussels.

Q. Do you see where in the second

CHAIRMAN: Just one tiny point; might you differ, Mr.

Brennan, with Mr. Loughrey, telling the Minister that Commissioner van Miert has bought into his suggestion?

As we understand the evidence to date, it was essentially yours, that this perhaps is the etiquette

A. That's connecting it to the letter the Minister had signed the previous days.

CHAIRMAN: Yes.

Q. MR. HEALY: Well, I was just going to ask you one other question about that expression. Of course it was the Minister put forward that proposal to Mr. Karel van Miert in terms of the letter that I have just read out, but is it simply flattery to suggest it's the Minister's suggestion?

A. I believe it's a manner of speaking.

Q. Nothing more than that?

A. As I am absolutely adamant that the suggestion originated with me.

Q. Now, do you remember, I think on last Friday I was suggesting to you that now that the effectively the conflict with Finance was over, that you were no longer going to be in a true auction situation, since everyone anticipated that there would be a 15 million offer, as indeed there was by all of the intending applicants, that the you might have given some thought to whether the weightings shouldn't have been published, and I think you "said I simply hadn't thought about it"?

A. Mmm.

Q. Do you remember when we were discussing the timetable and the schedule that you had put in place or critical path for completing the process when you describe the various milestones?

A. Mm-hmm.

Q. Getting the consultants on board, getting the applications in, evaluating them, whittling them down, getting a final decision, bringing it to Government, and ultimately starting the negotiations with the successful with the winner of the competition. And one of the things that was that I was curious about was why such a long gap was allowed between the

completion, as it were, of the evaluation by the Project Group and the time allowed to the Government to digest that and ultimately to stand over the result or take some other route in relation to the recommendation of the evaluation group or the Minister for Transport, Energy and Communications. And I think you indicated to me that apart from the fact that you were trying to give yourself plenty of time and make sure that you weren't caught out by hiccups along the road, there was also again this fact that there would have to be, as you saw it, a significant or potentially a significant Government input if there was still an auction element; and although I think I wasn't entirely upside with you on that kind of thinking, your view was that if you had an auction element, you might get a large auction payment from a potential applicant whose application in other respects mightn't have been as attractive to you, and you might get a lower auction bid by an applicant whose application in other respects was more attractive, and that you felt it might be a matter for Government to decide between one or the other. But now that the auction element was out of it, I notice that you are still leaving a significant amount of time for Government consideration.

A. My only response to that is in Mr. Towey's note, I am fairly confident what he is doing is rolling forward

what he already had in response to the delay without giving any further consideration to the matter.

Q. I can well understand that, that you know, if you were looking at it mechanically, you might simply roll it forward; but could I suggest that at this time you might also have been looking for opportunities to see could it be accelerated, and if there was an element of the process as you had envisaged it in its original form which was now taken out of it, could I suggest that maybe you would have been on the alert for opportunities to accelerate the process, and if you could take out one element, which you had now done, this would have saved you a week or two or whatever?

A. My response is: We just weren't thinking those thoughts at that time.

Q. I see.

A. And in the normal course, you would expect that a decision of this kind would go through the formal Government processes, and it was almost exclusively due to the advice that I got from Michael Andersen, much further on in time, that he had witnessed serious problems caused by delays, and I passed that advice on to Mr. Loughrey and he in turn to the Minister. It was that thought process that caused us to issue the result very quickly after it became known.

Q. Although Michael Andersen had never said that to you up to that time?

A. No, it was late in the process he said that to me.

Q. Although he was aware of your critical path from the very beginning?

A. I presume he was, yeah.

Q. I don't think we need to go into the letter to Mr. Ruairi Quinn; it simply informs Mr. Quinn of the state of play and notified him of Mr. Lowry's intention to mention the matter at the Government meeting on the following Tuesday.

A. Mm-hmm.

Q. Mr. Quinn responded, saying "Michael, I have agreed to this request for you. You may proceed on the basis of your letter to me today, 3rd July. I will send you an official note of acceptance in due course."

We have an informal Government decision noting that the an agreement had been reached with the European Commission regarding the future of the process.

A. Which, given that you know, we didn't fully have the agreement, it's slightly loosely drafted.

Q. I appreciate that.

Now we come to where the hiccup begins. In fact, Mr. Van Miert had not signed, and for a short while could not be persuaded to sign?

A. Mm-hmm.

Q. Now, I think the quickest way to do this this problem was resolved eventually. It's simply to go through the steps the Department were taking by

seeking to invoke Ireland's diplomatic representation, as it were, in Brussels to try to push this along and get the letter signed. As I understand it, the Commission, I think as you indicated the last day, were trying to use Ireland as some kind of a lever to bring pressure to bear on other larger fish that they had to fry at that time. They were seeking to bring pressure to bear on, I think, the Italians, and they were using the arrangements they were making with you as a way of pressurising them, or at least setting up a regime which would put pressure on the Italians and on other larger countries; is that right?

A. I can't say definitively that's what they were doing in this case, but that's certainly their modus operandi.

Q. There is a reference to that in the documents to which I am going to refer you now.

A. When you say you talk about making moves through Irish diplomatic channels, it's not exclusively diplomatic channels. I'd say the Irish network, if you like.

Q. Yes. A number of channels seem to have been used. The one I am going to come to firstly, in any case, is Mr. Joe Brosnan, who was chef de cabinet in Mr. in the directorate from which Mr. Flynn, the then Irish Commissioner, was responsible; isn't that right?

A. Yes, and before that had been the Secretary of the Department of Justice and would therefore be well

known to Mr. Loughrey.

Q. Yes. Maybe I should have used "diplomatic" with a small "d" rather than a big D.

"7. July 1995" it's in Leaf 82.

"Dear Joe,

"after we spoke last night I got hijacked by other events, and I am sorry it is only now I am reverting to you on this potentially very difficult situation on the second GSM II license.

"In short, it may be helpful for you to get a flavour of events by setting out the saga in the following sequence.

1. As you might imagine it would be far more comfortable, if not very wise, to cling on to the comfortable public telephone operations monopoly system that we had in Ireland for as long as possible.

As you know, we have voice telephony derogation up to the year 2003, although it would not be advisable to seek or take up in full such a derogation.

"2. On the basis of the very focused encouragement Martin Bangemann and indeed he spoke on several occasions to the previous Minister and myself on the matter we were urged to start to introduce competition into the Irish telephone markets starting with a second mobile phone license. Consultations with DG IV and DG XIII were an intrinsic part of our approach.

"3. The Department of Finance have, and indeed others would have liked a full-blown auction where the second operator would have to write the largest possible cheque." A special pleading, I suppose, there.

"Other countries have gone this route. Once again, on the advice of DG IV, we chose a competitive framework which would favour competition. We turned our backs on the auction effectively based on the highest possible entrance fee.

"4. We formulated our proposals and put forward what we believed was an acceptable balanced approach, and all these papers were lodged with DG IV and DG XIII in early March last.

"5. We had of course followed all competition rules to both the letter and the spirit of the law.

Explicitly flagged in all our procedures was a closing date of the 23 June last.

"6. You can imagine the Government's dismay when DG IV indicated that they could agree with the balance of the fee structures we had proposed in our approach.

That could

A. There must be "not" missing there.

Q. "Despite this setback, I immediately sent Martin Brennan and Fintan Towey to consult with the Commission and notably with DG IV to see how best we could meet precisely and by way of advance agreement whatever DG IV required. Fresh proposals were agreed

with DG IV.

"8. As a result of this process, we were advised that the Minister should write to Karel van Miert on the lines of the letter already faxed to you this morning.

"9. The Commission's proposed response to the Minister's request was indicated to us in the form of the draft letter also faxed to you this morning. This letter was to be signed by Mr. Van Miert.

"10. We acted in good faith at all stages and now find that the Commission is apparently not prepared to give the go-ahead by way of the agreed letter.

"11. From past dealings with Karel van Miert, both on energy and liberalisation matters and notably on Aer Lingus, we have always found him to be a most reasonable and constructive man.

"12. It may well be that DG IV's perception of events may differ a little from what we honestly believe to be the case, and in that spirit there may well be something we can do to allay any further misgivings the Commission may have. If there is any further information or clarification that is required, you can be assured that I will arrange to have it supplied by return.

"We would greatly appreciate if you could explain our position to Mr. van Miert's Cabinet. We have tried all along to do the right thing, and it has not always been comfortable to do so. The credibility of the

Government in general and the Minister in particular has been dented in this matter in the international telecommunications sector, and we have already had feedback that some of the bigger international players are now casting doubts over our competence to introduce competition effectively in the mobile phone area initially and in the full range of telecommunications services in the near future. I know it is the intention of both Karel van Miert and of Martin Bangemann that they wish to be of help in facilitating the introduction of a more liberal regime. The earliest possible clearance by Mr. Van Miert of our GSM II rebalanced proposal would be of more assistance to us in our approach than in any other measure I can think of.

"I have attached a more formal note prepared by our telecommunications division covering a good deal of the same ground. It might be of help to you if you wish to leave a piece of paper with any of your colleagues in the corridor."

Is the more formal note the information note that's contained in Leaf 83, is it?

A. I think it probably is, but I couldn't say so for certain.

Q. And when Mr. Loughrey says "It might be of help to you if you wish to leave a piece of paper with any of your colleagues in the corridor", what does he mean by

that?

A. I think he means that this information note is more formally drafted, and if you are making representations, you want to leave somebody a reminder document or the aide-memoires were used by diplomats in that context, feel free to give it, I presume.

Q. I see.

A. It would probably be helpful to say that Mr. Bangemann was the Commissioner in DG XIII at that time.

Q. That's dealing with telecommunications who would have had, I suppose, more of a focus in getting telecommunications up and running regardless of the legal issues that were exercising the minds of DG IV?

A. Yes, and with whom we were at that stage probably negotiating the question of a derogation, because what was got in the Council in '93 was a right to the derogation, but the derogation still had to be negotiated.

Q. And I suppose you would have been to some extent assisting Mr. Bangemann in what he was seeking to do, if you were not availing to the full extent of the derogation that you had a right to negotiate?

A. Mm-hmm. The Commission never saw it quite as openly as it was seen in '93.

Q. I see. The information note I think simply sets out in more formal terms, as you have indicated, the principles underlying the Irish approach to the

conduct of a competition to identify a second GSM operator. I think the main part of the note is in the third bullet point, where it says "The parameters of the competition reflected well the objectives of the Commission in achieving a balanced competitive regime.

Unlike other Member States, notably Spain and Italy, we did not go for a pure auction for the license. The emphasis in the selection criteria was on licensing a second operator who would have a progressive approach to market development, a commitment to a high quality nationwide service, and an innovative approach to tariffs. The process also incorporated some 'leading-edge' concessions to the second operator, notably the right to construct an independent transmission infrastructure."

If you go to the last three bullet points there.

"It was therefore decided to suspend the competition process in order to reach an agreement with the Commission. A detailed response was sent to Commissioner van Miert on 2 June which offered a compromise in relation to the fee requirement.

"The Commission services signified their approval of the proposal and faxed a copy of the draft letter for Commissioner van Miert's signature on 29 June 1995.

The compromise was approved by Government on Monday last.

"The Commission now advise that Commissioner van Miert

is not prepared to sign the letter until some progress is achieved with the Spanish and Italian auctions."

It's from that document that I formed the impression that to some extent, the arrangements with Ireland were being used as a lever or as in some way part of the ammunition in the negotiations with Italy and Spain.

A. Yeah, I presume that information was conveyed to somebody in a phone call or something, yes. I mean, this note was, I would guess, written by Ms. Nic Lochlainn, but it could have been written by Fintan Towey equally.

Q. Yes.

The next document in Leaf 84 is a note from you to the secretary saying "We received the signed version of the van Miert letter (copy attached) which is identical to the draft sent by the Commission last week.

"Potential applicants have been notified of the revised terms, and the closing date has been set at 4 August. The final decision will still be made before end November.

"As you agreed with Bridget, no press release has been issued.

"Andersens say this is the first time the Commission cleared a competition before the closing date."

Signed "Martin Brennan", 14th July, 1995.

Now, obviously in the interim between the last document I mentioned and this document, van Miert was persuaded to sign the letter.

You then put in train the process of notifying the people who had already expressed an interest that the competition was going to be, as it were, revamped, and that a number of changes were to be made to the RFP, and you identified those changes?

A. Correct.

Q. Basically telling people that they would no longer be bidding in an open auction, but rather bidding in an auction with a capped or maximum bid price of 15 million?

A. That's correct.

Q. While you had to tell the potential applicants of the change, this change in the competition process, there were also internal changes to be made, of which the most important was to rebalance the criteria, taking account of the diminution, if you like, in the importance of the auction payment, and you set about applying a new weighting to the auction payment; basically what you did was you shared some of the I think it was weighted at 15 percent. You reduced it to 14%, and correct me if I am wrong.

A. I don't know the exact figures. I thought there was a change of three points.

Q. Maybe you are right, maybe I am wrong. In any case,

you applied some of the points up the line and some down?

A. No, all up the line, I'd say.

Q. All up the line?

A. My recollection is that he we reduced the weighting for the auction element to the lowest number that would preserve the descending order of priority and that we distributed those three points to higher priorities.

Q. To tariffs?

A. It may have been split; I am not sure. But I mean, the record

Q. We can check it out. I think they went to tariffs.

A. Okay.

Q. I want to go back now for a moment to something which you mentioned to me the last day, on Friday. Do you remember, last Friday we were discussing the meetings you had with the with a number I think with Persona, in any case, and with Mr. O'Brien representing Esat Telecom

A. Yeah.

Q. in relation to the suspension of the competition.

And I was referring I was about to refer you to something that had been mentioned by Mr. Coughlan in his opening, namely that Mr. Owen O'Connell, in writing a letter to a Ms. Helen Stroud of Baker & McKenzie Solicitors, had indicated that the terms of

the application were to be revised with either no up-front payment required or a maximum cap placed thereon. And you were, I think, about to refer me to some newspaper accounts which I think had referred to similar possibilities?

A. I was doing no more than reminding you that I had your team brought my attention to these newspaper extracts which triggered a memory in me of a conversation that took place in Mr. Loughrey's office, which I have spoken about twice before.

Q. Yes. Can you just go over that ground for me again?

A. After we had suspended the competition, I was in Mr. Loughrey's room on some business, and Joe Jennings, who was the Minister's press officer, arrived with some press queries. The press queries or at least Mr. Loughrey's ideas about how to respond to the press queries were canvassed by phone with Minister Lowry, who was in his car going somewhere at that point, and a line was given arising from that conversation to Joe Jennings for responding to media queries. And without the benefit of documentation on Friday, I was suggesting that to the extent that the press cuttings that we were talking about may have referred to sources close to the Minister, that I'd be fairly certain that those sources were Joe Jennings, and that he was delivering a line agreed between Mr. Loughrey, Mr. Lowry, Joe Jennings in a conversation to which I

was a party on a loudspeaker.

Q. I think this is perhaps the time to refer to some of those newspaper articles. You will recall that in the course of the opening statement, Mr. Coughlan also referred to a letter he had received from Mr. Owen O'Connell some time after he, in his opening statement, touched on the Baker & McKenzie letter; and it was in that letter he had received from Mr. Owen O'Connell that reference was made to the newspaper articles, because you will recall that the Tribunal had taken up with Mr. O'Connell how he came to be aware or how he came to write in his letter to the effect that the terms of the application are to be revised with either no up-front fee required or a maximum cap placed thereon. And Mr. O'Connell had indicated that he couldn't well, firstly, in fact, he stated that he wouldn't write any letter on behalf of a client without instructions, and the content of a letter would be based on the instructions he had received from his client, but that he could find nothing to indicate to him or assist him in identifying any instruction he had received to that effect or any person from whom he had received such an instruction.

Subsequently, after having heard what was stated in the opening statement, he wrote a letter to the Tribunal, and it's in the context of that letter that

I think we should put these documents we should put these documents in evidence.

Writing to the Tribunal on the 10 December 2002, Mr. O'Connell said "Dear Mr. Davis" sorry, Mr. Houghton Fry, I beg your pardon, who was the solicitor in Messrs. William Fry acting for Mr. O'Connell.

"As you know, I have in the past advised my partner, Owen O'Connell, regarding his involvement with the Tribunal in his personal capacity.

"From reports of the opening statement being made by counsel to the Tribunal, I have noted the importance apparently being attached to the above letter." That is a letter that is the letter of the 20th June 1995 from Mr. O'Connell to Baker & McKenzie.

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

I feel, having discussed the matter with Mr. O'Connell, that misunderstandings may have arisen on the part of counsel to the Tribunal in this regard and we concluded that it might assist the Tribunal if Mr. O'Connell volunteered his understanding of those matters now, rather than awaiting the opportunity which will presumably be presented if and when he is called to give evidence.

"I accordingly enclose a brief memorandum on the matter which I hope will be of assistance to the Tribunal. Counsel to the Tribunal may feel that the

information contained therein should be included in the opening statement before it concludes later this week."

Mr. O'Connell then stated in his memorandum, which is Memorandum Number 4, headed "Owen O'Connell".

Paragraph 1.

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

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

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

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

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

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

"(a) I had no direct recollection either of the person from whom or of the date upon which I received

the instructions which enabled me to refer, in any letter of the 20th June, 1995, to Ms. Helen Stroud, to the information summarised in paragraph 1 above;

"(b) I had no direct recollection of the sources of the information comprised in the instructions; and

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

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

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

"(a) a letter such as this written by me on the 20 June 1995 to Ms. Helen Stroud would invariably be written in compliance with instructions received by me from my clients and would convey information received by me from my clients. I would not write, or have written, such a letter upon my own initiative without receiving instructions to do so, and I would not include in such a letter factual or speculative information of the kind referred to by Mr. Davis,

unless it was given to me by my clients or confirmed

by them, and

"(b) the client on whose behalf I wrote the letter of

the 20 June 1995 was Communicorp Group Limited, and

the executives of Communicorp Group Limited from whom

I was accustomed to receiving instructions at that

time were Mr. Denis O'Brien, Mr. Peter O'Donoghue, and

Mr. Jarlath Burke. It is likely that the instructions

and information referred to were given to me by one or

more of those persons.

"4. Since reading transcripts of the opening

statement being made by counsel to the Tribunal, and

since reading and hearing some of the implications and

inferences of impropriety (including a possible breach

of confidentiality on the part of the project team)

made and drawn therefrom in media reports, I have

carried out further research into the matter and feel

that the Tribunal's attention should be drawn to the

following:

"(a) press reports up to and on the date of my letter

of 20 June 1995 contained statements from which all of

the statements listed at 1A to D above could fairly

have been inferred. I append to this memorandum some

samples of those reports. It does not appear to me to

be the case, therefore, that the possession of that

information by my clients necessarily leads to the

conclusion that there had been any impropriety or

breach of confidentiality by any person;

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

"(c) I have learned from documents furnished to me by the Tribunal that at a meeting on the 20 June 1995 with Mr. Condon of the Persona consortium, Mr. Brennan or Mr. Towey was minuted as saying that the closing date for the competition would be delayed by seven to eight weeks (this delay being one of the items of information whose source was queried by Mr. Davis);

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

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

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

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

"C. That the likely sources of the information was/were any one or more of the following:

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

"II. An (unminuted) comment made to Mr. O'Brien and Mr. Kelly by Mr. Brennan or Mr. Towey during their meeting of the 19 June 1995, perhaps similar to the statement made by any one of them on the following day to Mr. Condon; and/or

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

Now, with the letter, Mr. Houghton Fry enclosed an appendix containing extracts from a number of

newspaper articles published in the previous, I think, few months, in which references were made to the competition.

The first of these is headed "A". It's from its two extracts from the Sunday Business Post of the 26th March, 1995, headed "European Commission" I think it's easier to I am going to use the appendix, because I think it's easier to use the appendix.

The extract says "The European Commission may move to scupper Government plans to raise up to 45 million from the award of the second cellular mobile license in Ireland. The Commission is becoming increasingly anxious about member states imposing discriminatory license fees on new cellular network operators. A senior Commission official said the Irish Government was warned about imposing a hefty license fee last January."

Second extract, on the same day, is "Communications Minister Michael Lowry has been anxious to dampen down talks of an auction for the second license."

This is from the Irish Independent; we are coming up to the 17th June, 1995. The first extract is as follows: "Minister Lowry said the EU was objecting to a situation where the country's second mobile phone operator would have to pay an application fee of up to 25 million."

The other extract: "They are effectively saying that

there if you go to charge a fee to the new operator, you are going to have to charge one to the existing Eircell operation".

"C. One approach would be to set a maximum level for the fee" C is references to extracts from the Irish Times on the 17th June, 1995. "One approach would be to set a maximum level for the fee at a substantially lower figure, leaving the license to be decided on the basis of the quality of service the new operator would offer."

The next extract is as follows: "The Minister remained confident that the winner will be selected this year."

The next extract: "The EU may also suggest that Eircell be faced with paying a charge similar to the new operator... to ensure fair competition."

The last extract: "... In most EU states second... Licences have already been issued with no charge levied on the existing operator."

"D" contains extracts from the Irish Times of the 20th June 1995: "The deadline for bids for Ireland's second mobile phone license is likely to be extended by at least two months, sources in the Department of Communications confirmed yesterday."

The next extract: "... The European Commission expressed strong dissatisfaction with the terms of the license. Specifically it said the insistence was an

up-front payment, expected to have been in the region of 15 million to 20 million pounds, gave an unfair advantage to the existing operator, Telecom Eireann.

When new provisions are agreed with the Commission, this payment is likely to be set at maximum level, thus removing the auction element of the second license, Department sources said. The new 'capped' payment is likely to be considerably less than $\frac{1}{2}$ 15 million."

A. Sorry, in reading that, I think "the Department sources said" refers to the previous sentence.

Q. I see. I beg your pardon; you are quite right. Yes, and in fact doesn't that do you want me to read it again, just to be clear about it? "When new provisions are agreed with the Commission, this payment is likely to set at maximum level, thus removing the auction element of the second license, Department sources said."

A. Yeah.

Q. "The new 'capped' payment is likely to be considerably less than $\frac{1}{2}$ 15 million."

Now, recollecting where you drew my attention to the fact that the Department sources had indicated that the payment was likely to be set at a maximum level, and that the Department sources hadn't used the word "capped," I think Mr.

A. Sorry, I don't remember using language nearly as

precise as that.

Q. Yes. The article uses language as precise as that.

The article says "The new 'capped' payment is likely to be considerably less than $\frac{1}{2}$ 15 million." The Department sources aren't quoted as having used that expression; isn't that right?

A. Yes.

Q. That is the expression, I think, as a matter of interest, that Mr. O'Connell used. He referred to a maximum cap being placed on the license fee; isn't that right?

A. Yes.

Q. Do you see, Mr. O'Connell seems to be making two points. Firstly, he says firstly he is suggesting that one or other of the people who might have instructed him to write this letter could, as a matter of likelihood, have got the information to enable him to instruct him to refer to the possibility of a maximum cap and a two-month extension from the newspaper articles to which I have referred.

A. Mm-hmm.

Q. And I just made one point about that. I don't want to make any other point about it unless you want to make some point about it.

And the second point he made was that the information concerning, presumably, the reference to an extension in the timetable might have come from an unminuted

comment made to Mr. O'Brien and Mr. Kelly, either by you or Mr. Towey?

A. We certainly canvassed all of the people who had purchased the documentation as to what, in their view, would be a reasonable time between an announcement of a change in the structure of the competition and a new closing date. And I guess Mr. Towey dealt with some of them, and there was an element of trying to get them all to agree a common amount of time rather than have anyone crying foul because it was too quick for him. So those kind of conversations definitely took place.

Q. I think the specific comment which Mr. Houghton Fry or to which Mr. O'Connell referred was contained in the second paragraph of the note of the meeting kept by Mr. Fintan Towey on the 22nd June, '95, the note of his meeting with Mr. Condon. It's in Leaf 76. Have you got that?

I think that what you and Mr. Towey, either together or separately, from canvassing with interested parties, was how long it would take them to get up and running

A. Yes, mm-hmm.

Q. What that refers to, I think, is something else. You were trying to canvass how long an interested party would need, if you like, to reorientate himself if the rules were changed; and I think there was about two

weeks or three weeks mentioned by most of them, is that right, there or thereabouts?

A. I don't know the details, but that was the general order.

Q. What this note says is that "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."

A. Yeah.

Q. Suggesting a two-month extension in the entire period of time before you'd ever get to revamping the competition; do you understand me?

A. No, I think you may be slightly at cross-purposes. I think what was envisaged there was we thought it would take four weeks to do a deal with the Commission.

Q. Yes.

A. And after that, we would relaunch the competition and give three to four weeks for people to reorientate, as you say.

Q. I understand.

A. Beyond that, I can't understand the point you are making.

Q. Well, that would suggest a two-month extension in the entire process.

A. Two months from the 22nd June.

Q. Yes.

A. Yeah.

Q. And that is the point I think that Mr. O'Connell is making in his letter to Baker McKenzie, and he suggests that he might have got that information from either of three individuals who might have got it from an unminuted comment made by you or Mr. Towey at the meeting you had with Mr. Kelly and Mr. O'Brien?

A. Yeah.

Q. Would you have made unminuted comments like that?

A. I think what I said before Christmas, when I was asked to consider the matter, was that the report seemed to be very carefully drafted and fairly accurate and

Q. That report, you mean?

A. The equivalent one for the previous day, or whatever.

Q. Yes.

A. I think that's the answer I gave on reflection, and I can't think of any reason to change that.

Q. And the two notes are slightly different?

A. Yes.

Q. Indicating that you didn't just prepare a sort of a standard note based on what you knew you were going to cover with everybody, but based on what was actually covered?

A. Yeah, I'd be 100 percent certain that the notes were written after the meetings rather than before, if I could put it like that.

Q. And there are differences between them?

A. There are nuances of difference, of course there are, yeah.

Q. If we now go back to Leaf 84, just again to remind us that you wrote to the Secretary informing him that you had received the signed version, so presumably you must have received the signed version by fax, because the letter, which we'll come to in a moment, is actually dated the 14th?

A. I'll accept that.

Q. The next document, in Leaf 85, is a letter you wrote to Mr. Hardiman, and you wrote similar letters to the other interested parties.

A. Yeah.

Q. In Leaf 86, then, we come to a letter from Ms. Nic Lochlainn to the Project Group members dated 17th July, 1995.

"Dear Project Group Member.

"Please see attached correspondence regarding recent developments in the competition of a granting of a GSM license.

"1. A copy of the letter sent to applicants informing them that some of the original terms of the competition have been revised

"2. Correspondence with Michael Ryan of Telecom Eireann informing Telecom Eireann that Eircell will also have to pay a fee.

"Following the changes in the competition terms, it

will be necessary to amend the evaluation model and the weighting of the selection criteria. It is intended to achieve agreement on proposed changes by way of a written procedure."

The next document is a note to the file on the 27th July 1995. It says "The new revised weightings as agreed in recent telephone conversations with Project Group members and later confirmed in written communications received from each interest represented on the group are as follows: 30, 20, 18, 11, 7, 4, 5, 3."

And I think you may be right that the auction payment was at 14, and the 3 went up to tariffs, which had been at 15, tariffs thus becoming 28?

A. I think that's a reasonable hypothesis, but I don't know for sure.

Q. Somebody will surely correct this if I am wrong.

A. Yes.

Q. Well, we only have to go to the next document to be sure that we are right. It's Leaf 88, and it's a note from Ms. Nic Lochlainn to Mr. Towey regarding the revised weightings. And it simply notifies her of the new weighting configuration which involved the alteration I have just mentioned, 3 off the auction payment and 3 added on to tariffs.

A. Mm-hmm.

Q. I now want to digress for a minute and move away from

this book of documents to a set of documents dealing with the Commission's letter to you notifying you of their view of the proposed changes. And this line of inquiry was prompted by the fact that, as you'll recall from the opening statement, sometime shortly before the opening statement and after, indeed, some considerable correspondence, the Tribunal contained a copy of Mr. Jarlath Burke's file. Mr. Jarlath Burke was mainly dealing with non-GSM related matters, although from what Mr. O'Connell has just stated, it is clear he had some role in this and indeed had some familiarity with and intimacy with the Commission. When the Tribunal got that file, it found on the file one page of a version of the letter which the Commission ultimately sent or which Mr. Karel van Miert ultimately sent to Mr. Lowry, and you will recall in his opening statement Mr. Coughlan mentioned some of the inquiries the Tribunal was making to seek to ascertain how that letter came to be in Mr. Burke's possession.

Now, just before we examine the documents to which I want to draw your attention in relation to this, you are in no doubt that that letter was a confidential letter? Part of a confidential process; let me put it that way.

A. We certainly, in our input into the process, made everything confidential. I don't actually know, not

having a copy in front of me, whether the Commission indicated that the letter was confidential, and I don't know what was the Commission's view of the confidentiality, because the Commission was into kind of sunshine government before we were.

Q. Yes, but leaving that aside, if you sent somebody a confidential letter, if they are not prepared to treat it confidentially, then it's only good manners to send it back to you; isn't that right?

A. That sounds reasonable.

Q. It's part of the convention of any correspondence, business or even personal, if you were to send a person a confidential letter and they are not prepared to engage in confidential correspondence with you, that's the end of the correspondence?

A. The Commission doesn't play by the same rules as we do.

Q. I see. Quite apart from that, if you read the letters, isn't it clear that the contents of the letter relate to a confidential process, and that one part of the letter undoubtedly was confidential, the section dealing with the weightings to be applied to the selection criteria. And indeed, as the whole correspondence with the Commission would have made clear, the mere fact that weightings were being applied, because you had made it clear that you were not prepared to go along with the Commission's

suggestion that the weightings would be published, you weren't in fact even notifying the applicants of the existence of weightings. And it wouldn't seem to make any sense, would it, if you were in, as it were, dialogue with the Commission about that, you were taking one position and they were taking another position, if their sunshine government policy meant that they could give this information out to anyone, the dialogue would have been completely nugatory, wouldn't it?

A. Okay. But at the end of the day I had no control we had no control over the Commission's view of the world.

Q. I appreciate that. I am asking do you agree that if the purpose of correspondence between you and the Commission is to debate the issue about whether something should be disclosed to competitors or not, there is no point in one part of that debate disclosing it in the course of the debate, is there?

A. That is certainly our view of the matter. What I am trying to emphasise, and I can give you an example from this year of how the Commission takes a different view sometimes. I was part of a team that spoke to the Commission this year, on an entirely different subject which I am not going to go into, which I started the meeting by saying "Do we all understand this meeting is taking place on a without-prejudice

basis?" Because it was lawyers to lawyers to clarify issues. And the Commission's response was "We don't accept that concept; we don't accept the concept of without prejudice." What he actually said was "What the Commission knows, the Commission knows and the Commission uses".

So I am just trying to get across the idea that there are different principles of work in the different organisations.

Q. But isn't that precisely the point I was making earlier, where you ask somebody to treat something as confidential or as off the order or as without prejudice, it's an obligation they have, purely as a matter of courtesy to tell you, "no, I won't work with you on that basis"; and isn't that exactly what the Commission have done in the example you have given me? They said "No, we won't go down that road with you"?

A. Yeah.

Q. The point I am making that in this particular case, where the Commission was saying to you "You must disclose these weightings to intending applicants", and you were "saying We won't, and here are our reasons for not doing so", and the Commission agreed with you at the end of the day that you wouldn't have to do it. But it would be a fairly bizarre form of administration if you could agree with the government conducting a competition that the weightings were not

to be disclosed, and at the same time, as part of your openness and transparency policy, to hand that information out to third parties or members of the public?

A. That is certainly the way we would see it.

Q. Now, I am trying to I hope that you have

(DOCUMENT HANDED TO WITNESS.)

You have a little bundle of documents. The first document is headed "European Commission Director General for Competition." It's a fax from Mr. Christian Hoceped of DG IV addressed to you. It's dated 20th June of 1995.

Do you see that? We may have already discussed this document. Very briefly, it says "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."

Remember, we read that letter before?

A. Mm-hmm.

Q. That letter enclosed a copy of a draft letter which the Commission were suggesting would be a response to your proposed letter to them in response to their original intervention; is that right?

A. Yeah.

Q. As we said, you were perfectly legitimately pre-cooking your responses so that you could bring

this thing to a complete conclusion?

A. That's right.

Q. As long as they knew what you were saying, as long as they knew what you were saying to them, they would give you an indication of what they would say to you?

A. That's right.

Q. Now, I am calling that, if you like, a discussion copy of the final letter from the Commission.

A. I think we discussed last week that there was an element of the Commission they sent us their reply before they got our letter, our draft letter.

Q. I appreciate that.

A. And there was an element of them planting thoughts in our mind.

Q. That's why I am calling it a discussion copy, because there are slight differences, aren't there, in the ultimate resolution of the dialogue?

A. Yes.

Q. And I am trying to use that language because there are so many copies of similar documents that it's going to get become difficult to keep track of them.

A. Mm-hmm.

Q. There were, in fact, I think even previous, as you would put it, iterations of this process. But I am not going to go that far back, because I have seen, I think, an earlier document or something like part of an earlier document on your part, but they may have

been purely internal drafts; in other words, they may never have left Dublin and gone to Brussels.

A. Without the documentation, I wouldn't comment.

Q. If you go to the next document, this is again a fax from Mr. Christian Hoceped. It's to Mr. Fintan Towey. It's dated the 29th June, 1995. It says "Dear Mr. Towey.

"As agreed, I send you herewith the unsigned copy of the closing letter which Mr. Van Miert will sign (I hope) tomorrow.

"Best regards.

"Christian Hoceped".

Then the next page of the bundle of documents you have contains the document that Mr. Hoceped sent on. And I think before, we discussed who put the word "Draft" on the top of that. You can't recall whether it's your writing?

A. It's definitely not my writing, but I don't particularly recognise it as anybody else's.

Q. In any case, this is this copy is, in content, similar to or the same as the copy which was ultimately signed and dated by Commissioner van Miert?

A. I think so, yeah.

Q. And it was when you got this you felt that the deal had been done; isn't that right?

A. Yeah.

Q. And you conveyed to your superiors here, who conveyed,

I think, the message politically, that all that was awaited at this stage was a formal signature; isn't that right?

A. Yes.

Q. My understanding of this, and I think it's consistent with the fax that accompanied the discussion copy, is that this draft is prepared by the technical people such as Mr. Hocepied, and it is then it is then transmitted, I gather electronically, directly to the Commissioner's own office in the Directorate, because it's from that office that ultimately it must issue.

A. I mean, it sounds reasonable in a bureaucracy.

Q. And if you go to the next document, which is another fax from Mr. Hocepied, this time addressed both to you and to Mr. Fintan Towey, dated 14th July.

A. Mm-hmm.

Q. So this is after the intervention by the Department to seek to persuade Mr. Van Miert to sign the document?

A. Mm-hmm.

Q. From the fax banner at the top, you can see that this was faxed to you from Mr. Hocepied's fax number, which is 2969819, at three minutes to three (sic). It says:

"As agreed, I send you herewith (finally) an advanced copy of the closing letter signed by Mr. Van Miert."

Now, if you compare this copy, which, I suppose, seems reasonable to call a final signed version although it doesn't contain a date; do you see that?

A. Mm-hmm.

Q. with the agreed draft copy, apart from the fact that the agreed draft copy does not contain a signature on the second page, it doesn't contain on the front page, under the word "Brussels", the legend "F/ft"; do you see that? Do you know anything about how that reference comes to be on the document?

A. I haven't an idea.

Q. My understanding is that when the agreed draft copy prepared by Mr. Hoceped was sent to the Commissioner's office for his signature electronically, it had that legend applied to it in the Commissioner's office, and that legend indicates that, as it were, it's now coming from the Commissioner's office. That's my understanding of how these things operate in the Commission.

A. Yes.

Q. My understanding, unless you can throw any light on it, is that after that legend is applied to it, and after it's signed, the document is then dated and then issued formally.

If you go to the next document, to the fax, the cover sheet if you go to the cover sheet first the cover sheet is of a fax from Mr. Brosnan to Mr.

Cullen, the permanent representative. You will see that it has the word "Fintan Towey" on it. You don't recognise that writing, do you?

A. No.

Q. In any case, it would appear that if this document, which was on your files, arrived on your files from either Mr. Brosnan or Mr. Cullen, either Mr. Brosnan sent it directly to you at the same time as he was sending it to Mr. Cullen or Mr. Cullen sent it to you without any further fax covering sheet other than perhaps Mr. Towey's name?

A. When you say "sent to me"

Q. To Dublin.

A. To Dublin, to the Department yeah, it looks like that.

Q. And that, as you can see from the fax banner at the top, was sent at a quarter past four on the same day that Mr. Hoceped had earlier sent you the final signed version at three minutes to four?

A. Mm-hmm.

Q. I think I said "three minutes to three" earlier; I should have said "three minutes to four".

That version has got, on the second page, the signature of Mr. Karel van Miert, and on the front page has both the legend F/ft and a date, stamped date of the 14th July, 1995. And I understand that that version, which I am calling a final signed and dated version, is regarded as the registered version in the Commissioner's office and is therefore the official document, if you like?

A. I would have said a copy of the official document.

Q. That is of course if it was sent on. It is of course a copy of the official document, yes, because we are going to come to the actual hard text of the official document, which is the next document.

The next document is another is a copy of the final hard text, as far as I can see, which was sent to you, to your Department in Dublin, and is date-stamped "Received" 20th July, 1995.

A. Mm-hmm.

Q. Now, if you go to the next document, this is another version, it has a date, it has the legend F/ft, and on the second page, it doesn't have any signature. And I understand that that is a final dated, but not signed copy, and is in fact the file copy retained in DG IV. The Commissioner's office send it to DG IV as their file copy. And it came to the Tribunal from the Commission described as their official file copy.

A. Yeah, okay.

Q. And the last document in the bundle to which I want to refer you is a one-page document; this is the document that was on Mr. Jarlath Burke's file. Now, as you can see, this is a document that is that doesn't contain a date but does have the "F/ft." The copy we have does not contain a fax banner, and indeed, looking at it, it seems to have been photocopied in such a way that the fax banner is obscured; do you see

that?

A. Yeah.

Q. Because the top of the letter altogether seems to be gone?

A. Mm-hmm.

Q. What the Tribunal was trying to do in accumulating these documents was to identify which of the various, if I can call them, official or semi- official versions to which I have just referred it most closely tallies with. Now, if we go back to the very start, you can see, go back to the very start of the bundle you have, you can see that it does not tally with the discussion copy.

A. Yeah.

Q. It does not tally with the agreed draft copy because it doesn't have the "F/ft" on it.

The next copy is the final signed version?

A. Without a date.

Q. Now, it could be the same as that because it has no date on it?

A. Mm-hmm.

Q. We don't know, of course, whether the second page was signed or not. But all the other versions have a date on them?

A. Yeah.

Q. So it would appear that it is a copy of the final signed version which, as you recall, was faxed by Mr.

Christian Hoceped on the 14th July to you and to Mr.

Towey at three minutes to four.

A. Mm-hmm.

Q. Can you throw any light on why the Commission would send a final signed version to you which was not or why Mr. Hoceped would send you the final signed version in that form on the 14th July, 1995, without waiting for the, if you like, the dated or registered version, in view of the fact that there had been so many hiccups up to then?

A. I have no idea. For example, it's impossible to discern from this I don't know whether it's possible to put a signature, a natural signature electronically on a document, for example. I don't know how this document came into being. I don't know how it came to us.

Q. Can you remember the discussions you had with Christian Hoceped that day?

A. No.

Q. This was presumably a fairly I won't say tense, but nevertheless a fairly tension-filled time, since it was important to get this thing tied down, wasn't it?

A. Mm-hmm. I suspect, but you'll have to wait for other witnesses, I suspect that most of the conversations with Mr. Hoceped which weren't on loudspeaker phone in my office were almost certainly between Mr. Towey and Mr. Hoceped, because I don't recall having a lot

of conversations with Mr. Hoceped. But that's by way of an indication to you; I have no idea.

Q. Do you know whose fax number is on this? Is it a direct fax number? 6622150 or 6041188?

A. I don't. I don't think I had a fax in my own office at this time. It should be easy to ascertain whose fax and where it was located.

Q. Presumably it must have been somebody confidentially involved in the process, in any case, on the project team?

A. I suspect it was on the fifth floor, yeah.

Q. And I suppose we can take it there is no doubt that anybody involved in getting the document knew, A, how important it was to get it and get it in the final signed copy. Nothing else would do you at this stage, surely?

A. It could easily be the phone call came: "Stand by your fax machine, Mr. Towey; there is a letter coming through". I haven't a clue.

Q. You're probably right in that, because it says "As agreed, I send you herewith (finally) an advanced copy of the closing letter signed by Mr. Van Miert." But the actual dated and signed version of the copy came from either Mr. Brosnan or Mr. Cullen; isn't that right?

A. As I think I said before, I would regard that as an informal channel of communication.

Q. Yes.

A. That Mr. Brosnan, because he was a chef de cabinet and because he was interested in the matter, was given a copy or sought a copy from either the cabinet of Mr. Van Miert or from the service of DG Competition and gave it to Mr. Cullen, who was our man in the permanent representation.

Q. The reason I am not seeking to suggest any impropriety; it seems to me you have Mr. Brosnan out there, who was, if you like, almost your agent, seeing as Mr. Loughrey had directly got in touch with him, briefed him about the whole matter, and had sought his assistance in trying to close the gap, as it were.

But you didn't get a final signed and dated version on the 14th July, as far as I can see, from Christian Hocepiéd or from the Commissioner; you got it through Mr. Brosnan. Do you follow me?

A. Yes.

Q. Would that be a normal route?

A. Not really, no. I don't think Mr. Brosnan would like to be described as an agent of ours, mind you.

Q. I appreciate that. He was nevertheless doing some work for you. He was lending his good offices; would that be a fair way of putting it?

A. Yes.

Q. Did you have any contact with Jarlath Burke in which this letter or the contents of it were discussed?

A. I am virtually certain that I didn't.

Q. When you say "virtually certain", do you mean that you may have had some contact with him?

A. No, I'd be amazed if anybody is suggesting that. I mean, it's the kind of thing that I think I'd remember. But I mean, you can never be certain when something is seven years ago. I can't imagine any circumstances in which I would have contact with Mr. Burke about this.

Q. Can you imagine any circumstances in which you would have given Mr. Burke the front page of this document?

A. No, definitely not.

Q. And I am not asking you to speak for other people but could you imagine any circumstances in which any members of the evaluation team could have handed the front page of this document to Mr. Burke?

A. I can't, no.

Q. Do you see the document you received from either Mr. Brosnan or Mr. Cullen has on the top a manuscript legend saying "GSM General File"?

A. Yeah.

Q. Is that your writing, is it?

A. No.

Q. Do you recognise it?

A. No.

Q. It's presumably somebody in the Department directing where it should go?

A. Unless Mr. Cullen had a file in his office also, it could be his handwriting. On balance, it's more likely to be in the Department.

Q. Yes. Does the fact that the other documents don't have any file address on them give any indication as to where they would have gone?

A. Not really, no.

Q. Is it possible that the words "GSM General File" were written on the what I'd call Brosnan/Cullen document because it wasn't clear where they should go, having regard to the fact that nobody on the front of the document, other than Mr. Towey, nobody on the original fax message was associated with the Department?

A. I don't understand the question.

Q. Would any other document that came into the Department, any other of the documents we have discussed here, have a natural home to which it would be filed without the need for anyone to give a specific direction?

A. Yes. I mean, sometimes you'd have the file on your desk, and you might put the thing straight to the file. Sometimes you'd accumulate loose papers and sometime afterwards decide it's time to put these in the file. Anything is possible. I don't think you can draw any conclusions from the fact that "GSM General File" appears on the face of it now. Because

you have no idea I have no idea who put it on and when it was put on.

Q. Can you throw any light on how this document would have been treated in terms of its degree of sensitivity or to whom it would have been circulated to?

A. I can't, unless the material we are talked about earlier going to political was before this letter was signed, so it couldn't have been in that context, so no. Generally speaking, if it was circulated to, say, members of the Project Group, it would be so indicated on its face in somebody's hand.

Q. If you look at the final hard-copy version, that does have a list of people to whom it appears to have been filed, or circulated. Do you see, it says "Secretary, Mr. Fitzgerald, Mr. Brennan, and Mr. McCrea."

A. Yeah, I suspect that was somebody in the Minister's office. But this letter, the final signed version would have been received in the Minister's office, and that's somebody in the Minister's office directing it to the people that they thought should get it.

Q. Does that mean that the final copy was kept in the Minister's office or that the hard copy was kept in the Minister's office?

A. Usually the original would be passed out.

Q. Would be?

A. Passed out into the Department for the record. I

don't know whether the practice in the Minister's office at that time was to keep a copy or not.

Q. I understand. When you got your final signed version, but undated, at three minutes to four, would that have been circulated? It doesn't contain any list of people to whom it might have been circulated, but would you have circulated would a copy have been sent to the Minister's office?

A. I suspect that the secretary would have been told that a letter had been received and that that information would have been conveyed to the Minister's office. It's impossible to say whether a copy of the letter went there or not at this point. Generally speaking, when things are moved around in the Department, somebody annotates the one that's being moved as to where it's going.

Q. When I asked you a moment ago whether you recall having meetings with Mr. Burke, could I be a little more precise and ask you whether you recall having any meeting with Mr. Jarlath Burke in the ten days or so following the 14th July, 1995?

A. I can't think of any circumstances where I would, but I am open to correction if somebody else suggested that

Q. I appreciate that.

A. I just can't imagine how or why.

Q. You do know Mr. Burke, do you?

A. Yes.

Q. How would you have come across him?

A. I knew from relatively early on that he was part of the Denis O'Brien team. And I don't know at what stage he came into the team; possibly when I had I just don't know. I know that I met him a small number of times. I can't place them in time now, but he wasn't on my sort of stream of consciousness during the competition process, because I tended to associate him with the other side of Denis O'Brien's outfit, Esat Telecom and so on. He wasn't somebody that I would have kind of regular informal communication with at any time.

Q. I see.

A. I think I might have met him on a plane going to Brussels and had a few pints with him at some stage, but I have no idea when that was either.

Q. And I take it you'd no formal contact with him of the kind which would have had to be minuted in accordance with your confidentiality protocol around that time?

A. No. I would not have had contact with people to whom that minute that protocol referred on my own at all.

Q. And would you have regarded Mr. Burke as one of the people to whom that protocol applied?

A. I would certainly at this time the state of our knowledge was that Esat Telecom were interested in a

license. We didn't know whether they had partners, we didn't know what partners they had or anything. So I would have regarded anybody working for Esat Telecom as somebody to be treated with the same caution as all others interested in this competition.

Q. I understand.

Have you had any contact with Mr. Burke recently independently of this license process?

A. I suspect that the last time I spoke to Mr. Burke was at the party in the RDS that Denis O'Brien had after he sold out his interest. No, sorry, I am wrong, I am wrong; Jarlath Burke came into the employment of the Aviation Regulator from the beginning, and I met him informally at a cocktail reception in the National College of Physicians on the launch of the Regulator, I think.

Q. You have a good memory.

A. That's something you can't draw any inferences from whatsoever.

Q. I take it you didn't discuss this at that

A. Absolutely not.

MR. HEALY: I am just going to go on to the Commission side of this, Sir, so I think...

CHAIRMAN: Five past two. Thanks.

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: Just before I leave that series of documents, Mr. Brennan, just clarify one matter. I referred you to what I call the final signed version. This is the document that was faxed to you by Mr. Christian Hoceped on the 14th July 1995 at three minutes to four in which he said "As agreed, I send you herewith (finally) an advanced copy of the closing letter signed by Mr. Van Miert."

Do you remember getting that?

A. I have no particular memory of it, no.

Q. Would I be right in thinking that the technical differences between the various documents to which I drew your attention earlier were not differences that you were aware of at the time or maybe not until now?

A. Absolutely. When I heard you talking about the "F" and the "ft", I had never heard that before. I was wondering how you tumbled on it.

Q. I didn't tumble on it. I was informed by the Commission.

And would I be right in thinking that therefore when you got this document, the final signed version from Mr. Christian Hoceped, you thought we now have the final version?

A. Yes. Yeah.

Q. As far as you were concerned, this is it now from Mr. Van Miert. It's signed?

A. Yeah.

Q. Even though you didn't get the dated version until later on?

A. That's right, yeah.

Q. Would I be right in thinking therefore that that final signed version must have found its way to the Minister in some way? It was, after all, the letter's addressed to him?

A. I wouldn't be certain whether he got a copy or was just informed of its existence. I mean, I think I said several times before that I have no sense in which the Minister was looking for documents or anything like that, as long as he was kept you know, and in a case like this, we have the all-clear now, that kind of sentiment, I suppose, that kind of sentence.

Q. I am not suggesting for a moment that I was waiting to see the document. I am simply suggesting that as we mentioned this morning, when we were talking about the hard text that was eventually received by the Department on the 20th, this, as far as you were concerned in the Department, was the fax version of what you would ultimately receive by hard text?

A. Undoubtedly.

Q. And that that therefore should go on the Minister's file, personal file, even if copies went elsewhere?

A. I wouldn't take it that far. I mean

Q. I see.

A. It wouldn't be automatic that because I got it the way I got it that it had to go to the Minister. In fact, I'd be surprised if it went, number one. Number two, if it did, there would normally be some markings on it to indicate, Mr. Towey, please copy to Minister or private secretary or Secretary General, whatever, would tend if I was making the call, that's what I would tend to do.

Q. Maybe you just helped me about that. In the ordinary way, if the document comes to the Department addressed to the Minister as opposed to addressed to the Department, addressed to the Minister by name, where does it go?

A. Ordinary post coming in in an envelope addressed to the Minister would be opened in the Minister's office by a corresponding secretary.

Q. What about a fax sent to the Minister?

A. If it came in on the Minister's office fax machine, and as we discussed, I don't know what fax numbers were on this, but I suspect one of them looks a little familiar; it may have been ours you wouldn't automatically "think I better rush a copy up to the Minister".

Q. I see.

A. At least I wouldn't automatically think of it, but if I did, I'd be likely to mark something on it.

Q. Do you have any recollection of receiving any other version on that day, the 14th July?

A. I don't know whether

Q. It's the next one I am talking about, the one from the dated and signed version that's contained under a fax cover sheet sent by Mr. Brosnan to Mr. Cullen, that one. Do you have a recollection of receiving that that day?

A. I don't. What I would say is, once I had a signed copy, I would have no interest in further copies arriving in the Department. Or if they arrived with somebody else, they wouldn't think I needed to see another version, and in fact, I would only only became conscious of the role of Mr. Brosnan and Mr. Cullen in the opening statement, and at that stage it struck me, this is another unofficial channel of communication.

Q. I see.

Around the time that this matter first came to the attention of the Tribunal, the Tribunal wrote to the Commission but specifically to Mr. Mensching, who is the Director of DG IV, for his views and seeking his assistance in relation to these documents. There was a course of correspondence which I don't think I need concern you with at this stage, concerning a short course of correspondence concerning the documents, and the Tribunal was awaiting a response from Mr.

Mensching.

There was a delay in providing a response, and as it happens, I should say there are continuing delays, but in any case, pending or at a time, rather, while the Tribunal was awaiting a response from the Commission as to how these documents might have found their way into the hands of Mr. Jarlath Burke, an article appeared in the Irish Times on Tuesday, December 10th, with a heading "Commission admits official may have sent letter to Esat". The article is from Denis Staunton in Brussels.

(Document handed to witness.)

"The European Commission has acknowledged that one of its officials may have passed a letter described at the Moriarty Tribunal as "Confidential" to a lawyer representing Esat Telecom in July of 1995.

"But a spokesman insisted the leak could not have given the company an advantage in bidding for the second GSM license because Mr. Michael Lowry had told the Commission its contents were already known to all the bidders.

"The spokesman confirmed one of the Commission officials has agreed to testify at the Tribunal.

"The spokesman declined to identify the official, but the Irish Times has learned it is Mr. Christian Hoceped, a senior official at the Commission's Competition Directorate General who was involved in

negotiations with the Government over the license award. There is no suggestion that Mr. Hocepied was responsible for any leak that may have taken place.

"The Tribunal heard last week that a letter from former Competition Commissioner, Mr. Karel van Miert, to the former Minister for Transport, Energy and Communications, Mr. Michael Lowry, was discovered in the files of Esat Telecom. The letter was sent on July 14th, 1995, and detailed the Government plans to limit the weighting of the auction aspect of the bids to less than 15 percent, thereby giving other aspects such as the technical capacity of the applicant greater weight.

"The applicants were given a list of criteria under which their bids would be judged. Although the criteria were listed in order of importance, the bidders were not given the relative importance or the weight of each criterion.

"The letter had apparently been faxed to a director of Esat Telecom by a Brussels-based lawyer, Mr. Jarlath Burke, who at the time had the title of chief regulatory counsel for the company. A cover letter on the fax, dated July 24th, 1995, noted that Mr. Burke was enclosing a copy of the Commissioner's letter in the transmission.

"A Commission spokesman said yesterday it was possible an official had furnished Mr. Burke with a copy of the

letter on July 24th, 1995. 'we cannot exclude that someone might have sent it as a courtesy to Esat. We cannot exclude that it might have come from here,' the spokesman said.

"But he said that there was no question of such an action compromising the bidding process because Mr. Lowry had already informed all bidders of the letter's contents of July 14th, 1995.

"The spokesman said that according to a Commission official who dealt with the case, Mr. Lowry told the Commission he had informed the bidders about the letter and invited them to resubmit their bids.

"It is this official's clear recollection that after he received the letter, the Minister communicated to the Commission that he had informed all the bidders of its contents on July 14th,' he said.

"Commission officials say the letter was not confidential, and they do not believe it was marked as such. They suggest that the fact that all bids for the GSM license were below the level of the cap shows they were all aware of the Government's intentions.

"this is not really something very sensitive. That letter does not contain a single business secret. The decisive element is that the content was immediately communicated to all the bidders. Esat did not get any information that was not already available. The information was no longer secret,' the spokesman said.

"The spokesman said an internal check had not found any leak, but he added that leaking such a letter would not be regarded as a serious offence. He said the Commission was happy to cooperate fully with the Moriarty Tribunal. The Commission had sent its entire case file to the Tribunal over a month ago.

"The Commission officials involved in the case will testify at the Tribunal. We are actively cooperating with this investigation. We have nothing to hide, and we have done nothing wrong," he said.

"The Tribunal resumes today when Tribunal counsel Mr. John Coughlan SC will continue reading out his opening statement on the license competition inquiry. He has already been reading for four days."

Now, before I come to the correspondence arising out of that article, I just want to come to one or two aspects of the document first.

If you go to the second paragraph of the first column where Mr. Staunton reports "But a spokesman insisted the leak could not have given the company an advantage in bidding for the second GSM license because Mr. Michael Lowry had told the Commission its contents were already known to all the bidders."

Now, have you any comment to make on that, the latter part of that statement, the suggestion that Mr. Lowry had told the Commission that the contents of the letter were known to all the bidders?

A. I'd be surprised if it was accurate. There was no sense in which the letter was copied to all the bidders, and I suspect that "suspect" is the wrong word to use; I think it is likely that Mr. Towey may have told Mr. Hoceped roughly the contents of the letter to which you referred earlier to Mr. Hardiman, and that's the information that was given to all bidders.

Q. And from the documentation the Tribunal has seen, there is no other indication that the bidders were told anything other than that there was a cap on the amount that could not be bid for the license, and nothing more?

A. They certainly weren't told by me, and I have no evidence they were told anything other than what's in the Hardiman letter, which is a sample of the letter which went to all those who had bought the documentation.

Q. And am I right in saying that you are not aware of any member of your staff who informed the Commission that the contents of the letter from the Commission to the Minister had been relayed to the bidders?

A. Not in those terms. It's possible or even likely that Mr. Hoceped might have been told by Mr. Towey that we were communicating to the bidders in the terms of the Enda Hardiman letter.

Q. Yes. So that statement, as it stands there, is

completely wrong, as far as you are concerned?

A. I'd say wrong/loosely drafted.

Q. Well, I want to be clear about this now.

A. What I am saying

Q. Is it right, or is it wrong?

A. Well, what I am saying

MR. NESBITT: Mr. Chairman, I don't like to intervene

in the course of evidence being elicited from a

witness, but it does seem to me we have stepped into a

realm that's a little bit unusual. We have a

newspaper article which is said to report the comments

of third parties. It's not at all clear that those

third parties are going to come and stand over having

made those comments, and this witness is now being

asked to comment on the comment of the parties arising

out of a newspaper article.

I would, with respect, submit that it's only fair to

this witness to be asked to give his own evidence, and

if some other witness is going to come to suggest

that's wrong, he be given the opportunity to deal with

that. But to be asked to comment upon comment, it

appears this article is, with respect, a little bit

unsound, and I am concerned that we are going to be

here some time if that's going to be much of the

questioning of this witness.

CHAIRMAN: Well, I don't think we need dwell on an

argument, Mr. Healy. Mr. Brennan has said in the

terms of his means of knowledge, the comment in the article is wrong.

MR. HEALY: Oh yes, yes. But I want to make it clear I do want to go through the entire article. It's the facts the Tribunal is seeking to establish, and there are several versions of the facts; and insofar as the facts affect the Department, I think we need to know whether the Department did or are aware of any member of the Department saying any of the things that the newspaper article or anybody else says were said to the Commission. And that is what we are seeking to find out.

CHAIRMAN: Well, I think we can proceed on a basis of any material averments in the article that may be at variance with Mr. Brennan's recollections of the facts, and we needn't concern ourselves with the draftmanship of the article.

MR. HEALY: I am not asking Mr. Brennan to comment on anything. I am simply asking him to agree on whether something is a fact or not.

Q. If you'd go to the second column of the article maybe I should be referring you, I think, to the third column, sorry, to the third column of the article.

The same statement or a similar statement, I suppose I should say, is repeated in the paragraph that begins "But he said there was no question of such an action compromising the bidding process because Mr. Lowry had

already informed all bidders of the letter's contents on July 4th."

Again, I take it that you would say that that's not a correct statement, as far as you are aware.

MR. NESBITT: Mr. Chairman, that's the very difficulty I have. We are now looking at a paragraph that is hearsay upon hearsay, and this witness is being asked some unclear question as to what he is going to say.

Either there is a statement of fact that My Friend wants to put to the witness, which is a yes, I agree with that or I don't, but it's not at all clear what he is asking arising from that comment. And this is the problem of using the newspaper articles to

CHAIRMAN: I am not proposing, Mr. Nesbitt, that we do embark into some minute etymological analysis of the article, but insofar as the Tribunal must seek to elicit the facts as to what occurred in relation to this matter having, in somewhat unusual circumstances been found in very proximate time situation in possession of Mr. Burke, I am simply seeking to inquire into whether or not Mr. Brennan's knowledge of the process would indicate that some of the version advanced to Mr. Coughlan by his Brussels sources may be at variance with the presumably more thorough knowledge of Mr. Brennan.

MR. NESBITT: But that's the point, Mr. Chairman. It's not been advanced to anybody. It's appeared in

the newspaper, and maybe some fact can be deferred, defined out of that, and this witness can be asked, "would you agree with that fact?" But I think he should have the fact put to him and asked "do you agree with that fact? Do you know anything about that fact", or whatever his evidence might be. It must be difficult to deal with questions of the nature being put now, based on the information contained in the article and the hearsay on hearsay on hearsay.

CHAIRMAN: Well, I propose, Mr. Nesbitt, to limit it on the minimum of salient facts that emerge. It does appear to me that it's a matter of some materiality that apparently a version was advanced allowing for all the possible hearsay elements from a Brussels source to Mr. Coughlan to the effect that Mr. Lowry had, in any event, appraised all bidders of the content of the letter; and it does appear to have some degree of probative value that Mr. Brennan indicates from his knowledge of events in Dublin that this was not the case. And I propose to limit matters to any specific averments that may appear to be at variance, and I don't think

MR. NESBITT: I am grateful for the limitation.

CHAIRMAN: I don't think it's anything Mr. Healy prepares to dwell on unduly.

A. I think perhaps I can assist you. Just reacting on my now feet to this conversation, I think it is likely

that since we shared all of the competition documentation with the Commission, that the letter, a sample of which we discussed this morning, was probably copied to the Commission, and that the Commission may now be building a house of cards on the fact that that's on their file. That's what I'd suggest is the explanation.

Q. MR. HEALY: Well, I think you have answered all the questions I would have asked you about that proposition; it is a house of cards, isn't it?

A. Yes.

Q. Just go to one final part of this letter or this article. The third column, the penultimate paragraph.

"They suggest that the fact that all bids for the GSM license were below the level of the cap shows they were all aware of the Government's intentions." Do you see that?

A. Yeah.

Q. Again, that's

A. That's a straightforward from the letter, from the letter

Q. The reason I draw these matters to your attention, Mr.

Brennan, is because the Tribunal wrote to Mr.

Mensching, and again, I am not seeking to advance a

case against you or anything like that. I am simply

trying to find out everything that can be found out

from anybody prepared to assist the Tribunal, and I am

absolutely satisfied you are prepared to assist it.

A. And I am certainly not trying to be defensive.

Q. I understand entirely, and I am quite satisfied with

the information you are giving me and that it's as

much as you can give me. I am trying to establish

what happened, and what's more, I am trying to

establish what's now being said about what happened.

And I think you have put it perhaps more eloquently

than I put it when you referred to your "house of

cards" analogy.

If you go to the I don't know if you have got this

document in your book. I gave you a small folder,

this morning, of documents. And if you go to the

second leaf.

A. What you gave me was a series of copies of the same

letter.

Q. You didn't get a small folder?

A. No.

Q. I'll make sure that you get the relevant documents

now.

(Documents handed to witness.)

The letter to which I want to refer you is dated 10th

December 2002, but in fairness to the Commission, I

should put it in context by reading to you a series of

letters that came into existence around that time,

commencing with a letter of the 2nd December 2002 from

Mr. John Davis, the solicitor to the Tribunal, to Mr.

Jurgen Mensching.

"I refer to previous correspondence"; I think that's referring to historical correspondence.

"I am now writing to seek the assistance of the Commission in connection with a draft of a letter, the file copy of which was sent by Commissioner van Miert to Mr. Lowry in or about the 14th July 1995. I enclose a copy of the first page of an undated and unsigned draft of the final letter. This document was found on the files of Esat Telecom and was one of a group of documents being faxed by Mr. Jarlath Burke, legal counsel to Esat Telecom, to a Mr. Mike Kedar on the 24th July 1995.

"I would be obliged if you could arrange for the appropriate inquiries to be carried out by the Commission, and in particular in the first instance by Mr. Christian Hoceped and Dr. Ungerer, with a view to providing the Tribunal with urgent answers to the following queries:

"1. How would a document of this kind, which was part of confidential correspondence between Commissioner van Miert and the Irish Minister for Telecommunications come into the possession of Mr. Jarlath Burke and his employers, Esat Telecom, who were at the time part of a consortium subsequently known as Esat Digifone competing for the award of the second GSM license in Ireland (the process which was

the subject matter of the correspondence between the Commissioner and Minister Lowry.)

"As the Tribunal wishes to refer to its matter at the commencement of opening public sittings tomorrow, 3rd December, and in the course of its opening statement at those sittings, I would be obliged to hear from you as a matter of urgency and in the first instance by return with an indication as to when you would expect to be able to provide a response to this query."

With that letter, the Tribunal enclosed a copy of the document it had found on Mr. Burke's file, namely, the first page of what looks like the final signed but undated version of the letter that was sent by Mr. Karel van Miert.

The next letter is a letter of the 9th December 2002 in which the Tribunal drew to Mr. Mensching's attention a number of other documents, a number of other versions, if you like, of this document which had come to the Tribunal's attention once the Tribunal looked into the matter. And again, I don't want to go into the details of that letter, but in that letter the Tribunal again emphasised the urgency of the matter, and what was enclosed was the discussion version I beg your pardon, no, what was enclosed was the agreed draft version, then the front page of the signed but undated version, that is the one that was on Mr. well, that is the one that is similar to

the one that was on Mr. Burke's file, and then the final dated and signed version.

Then I come to the letter of the 10th December in which the Tribunal said:

"Dear Mr. Mensching,

"I refer to previous correspondence herein and for your consideration, I enclose a copy of material published in today's edition of the Irish Times. This material is attributed to a spokesman for the Commission. The Tribunal has been in touch with the Commission, and no response has been received by the Tribunal along the lines of the material attributed to a spokesman for the Commission in this article. If the contents of the article are correct, then it would suggest that the Commission has been making public statements concerning matters under inquiry by the Tribunal in preference to responding to the Tribunal's request for assistance.

"I would be much obliged to hear from you by return with a response to the following queries:

"1. Please indicate whether the content of the article is in substance correct.

"2. If the article or any part of it is in substance incorrect, please let me have details.

"3. If in fact the article is in substance correct, please let me know why this information was made available to the press in preference to the Tribunal.

"4. Assuming the article to be substantially correct, please identify the spokesman of the Commission and the official who is reported as having a clear recollection of the event."

The Tribunal sent a reminder later on that day. The Tribunal wrote on the 12th December to the Director of the European Commission in Dublin urging the Commission to provide a response to the Tribunal's letters. Eventually, on the 13th December, the Tribunal received a response from Mr. Mensching as follows:

"Dear Mr. Davis,

"I refer to your four faxes of the 2, 9, and 10 December, 2002, relating to the possession by Esat Telecom of a copy of a letter from Commissioner van Miert to Mr. Lowry, the final version of which was sent on the 14th July 1995, and subsequent press coverage.

"I refer first to your fax of 2 December and the document attached thereto. Since you informed Mr. Hocepić by telephone on Thursday 5 December that there are no further elements (such as a fax banner, cover sheet or transmission report) which could assist in determining the source of the document, I cannot provide any further clarification as to how that copy might have come into Esat's possession.

"In order to avoid any misunderstanding, and contrary

to certain recent statements reported in the Irish press, obtaining this letter could not have given Esat a competitive advantage. DG Competition was aware that as soon as the Department received the Commissioner's letter, the participants in the tender would be invited to resubmit their bids in accordance with the terms stated in that letter. Therefore, even if Esat had been the only bidder to receive the letter, or had received it earlier than the other bidders, it could not have obtained a competitive advantage which could have helped it to obtain the license.

"I now refer to your fax of the 9th September, the documents attached thereto with the following:

"1. The second page of a fax sent on 29th June 1995 at 20:17 from a fax machine in DG Competitions Unit C1 consisting of an advanced copy of the letter that Commissioner van Miert had agreed to send to Minister Lowry. The document also carries the fax banner of the Department of Transport, Energy and Communications. The wording of this final version had been agreed at a meeting between Commissioner van Miert and DG Competition held earlier the same day." That is the one I described as the discussion draft, I think.

"Sending to a member state government advance copies of letters approved by the Commissioner to that member

state corresponds to the normal practice of close consultation between the Commission services and the government departments of the Member States.

"2. The second page of a fax consisting of the (final) version of the letter from the Commissioner to the Department, sent from a fax machine in DG Competition's unit C1 on the 14 July at 15.57. There is no indication in our files as to whether this fax was sent by DG Competition to Mr. Burke or any other Esat representatives or whether any similar faxes were sent to other bidders or their representatives."

That is the version sent to you and to Mr. Towey, which was signed in final form but not dated, and which was similar on the front page to the copy that the Tribunal found on Mr. Burke's file.

"3. The second page of a fax sent on the 14th July 1995 at 16.15 from a fax machine in the Cabinet of Commissioner van Miert and consisting of the final signed and registered version of the above-mentioned letter.

"Finally I turn to your faxes of 10 December. DG Competition received several inquiries from Irish journalists which called into question the good administration of the Commission and its officials. Therefore, the Commission's spokesman dealing with competition matters in the telecommunications sector, Mr. Luder, was instructed to respond to those

inquiries. The official who "is reported as having a clear recollection of events" is Christian Hoceped.

"The article published on 10 December is incorrect insofar as it deviates a from the explanation stated above regarding the absence of any competitive advantage which Esat could have obtained through receiving the draft of Mr. Van Miert's letter to Mr.

Lowry. In particular, the article States that 'after he (Mr. Lowry) received the letter, the Minister communicated to the Commission that he had informed all the bidders of its contents on July 14th'.

However, what Mr. Luder in fact said was that it was the official's clear recollection that after the Minister had received the Commissioner's letter, all bidders were promptly informed, in the context of the re-opening of the bidding procedure, of the requirements stated in the letter and were invited to resubmit their bids.

"The information disclosed was not given to the press 'in preference to the Tribunal'. As explained above, the conversation between the Commission spokesman and the journalist was in response to inquiries which called into question the good administration of the Commission and its officials. The Commission takes such matters seriously and considers it important to react swiftly to them. The information was, and is, without prejudice to the more exhaustive reply which

the Commission owes to the Tribunal's more extensive questions.

"I trust that the above is sufficient to assist the Tribunal."

In fact the Tribunal hasn't received any more exhaustive response other than a response to a query seeking a copy of any script or any statement made by Mr. Luder, and the Tribunal was informed that no script of Mr. Luder's discussions was generated and no press release was issued, and that Mr. Luder's response was based on oral discussions with Mr. Hoceped, and no notes were kept or made of those discussions. There is a transcript of Mr. Luder's discussions with the journalist.

A. You were suggesting from the final paragraph that the Commission owes you a more exhaustive response. My reading of that paragraph is slightly different, and it's open to both interpretations, in the sense that what I am taking from it is that the Commission is saying that when they spoke to the press, they only answered the queries, without prejudice to the fact that they then owed you a more exhaustive response. I think that's another reasonable interpretation, but I am doing what I shouldn't do, reacting on the hoof to a document I have had no time to consider.

Q. What you are saying is they informed the press, they responded to press queries, but it was without

prejudice to providing the Tribunal with a fuller response?

A. Yeah.

Q. That was a good while ago, and we still don't have any fuller response.

A. No, I was thinking of this letter might be the fuller response. But I mean, it's just another interpretation.

Q. Well, maybe you are right.

Now, there are differences between what the journalists report as having been said and what is contained in this letter. The reference to a communication to the Commission after the letter from Mr. Van Miert was received by the Department is contained in a number of different parts of the letter. But what the Commission appear to be saying is that DG Competition was aware or was informed that as soon as the Department received the Commissioner's letter, the participants in the tender would be reinvited would be invited to resubmit their bids in accordance with the terms stated in that letter.

And I think what you said to me is that if Mr. Towey communicated anything, he would have communicated no more than that the Department had decided to reinstitute the competition and had informed the interested parties, because there were no applicants, as far as you were concerned, and there was in fact no

resubmission of bids; you hadn't had any bids yet?

A. That's right.

Q. Along the lines of what's contained in Mr. Hardiman's letter. In fact, you think he might have faxed something similar to Mr. Hardiman's letter

A. I think there is a reasonable prospect he sent one sample of that letter to the Commission, but eventually he will come here and you can ask him.

Now, the Department's files should show that as well, if it happened.

Q. If you go now to Leaf 89. This is a letter to Mr. Hardiman of Esat Telecom of the 31st July 1995 from Mr. Fintan Towey. If memory serves me correctly, I think this is similar to other letters sent to other participants. It says:

"Dear Mr. Hardiman,

"When submitting a tender for competition for a license for GSM mobile telephony within Ireland on or before Friday, August 4, 1995, please confirm in writing that you have no objection to the following information being published by the Department.

the name of your consortium

the names of the various parties participating in your consortium; and

the fact that a tender for the GSM competition has been received from you.

"Your co-operation in this matter would be much

appreciated. All other aspects of the application will of course remain strictly confidential."

This was to enable you to, I suppose, announce the people who had applied for the license. I just draw one thing to your attention. This is an article to Mr. Enda Hardiman at Esat Telecom. It must have been clear at that stage, if not some time earlier, that they had a consortium, whatever this was called or going to be called?

A. Well, I wasn't aware of what consortium they had or who their partners were.

Q. I appreciate that

A. I mean, they obviously were I don't think an application by them acting alone would be credible, quite honestly. In fact there was no application from one single partner. Every one of them was a consortium.

Q. At this point, then, the competition was about to be revamped. You were expecting when I say it was about to be revamped, it had been revamped, and you were expecting to get your applications in, the 4th August being the cutoff date?

A. Yes.

Q. The next document is a response by Mr. Seamus Lynch to the letter from Mr. Towey. It's contained in Leaf Number 90, dated 4th August, and this time it's on Esat Digifone notepaper.

It says "Dear Mr. Towey.

"Further to your letter of 31 July, please find below an answer to all the queries that you raised.

"I would like to confirm that we have no objection to the following information being released:

"1. The name of our consortium Esat Digifone

"2. The following names who go to make up the consortium.

Communicorp Group Limited

Telenor

Institutional investors.

"We do not wish the names of the institutional investors to be released at any stage.

"3. The fact that we have submitted a tender for the GSM competition.

"If you have any further queries, or if I can be of assistance in any way, please do not hesitate to give me a call."

The next document, in Leaf 91, contains some pages or some parts of the Esat Digifone application. And they are mentioned at this stage in the context, I suppose, of the last two documents to which I have drawn your attention, the letter from Mr. Towey and the response from Mr. Lynch.

The first document is a commitment which was required to be made by every applicant that their application and a fax, or if you like, the presentation or

indications and commitments contained in it would be valid for a period of 180 days, that they would be valid on the date the application was received or submitted on the 4th August 1995, and that this would remain valid for a period of 180 days thereafter.

I don't think we need to go into the detail of it, except if you go on to the next page, you see an executive summary to which I want to refer you of the Esat Digifone application which 22 points are made.

I just want to refer you to the first two at this point. Point 1 is as follows:

"Will be majority Irish-owned and will remain so for the long term.

"2. ED is an Irish incorporated company currently 50% owned by Communicorp, 50% owned by Telenor.

On award of the license, 20 percent of the equity (10% from each partner's holding) will be made available to third-party investors. (This allocation has been placed by Davy Stockbrokers with AIB, IBI, Standard Life Ireland, Advent International. More detail in the financial volume/appendix)

"Plan to make a percentage of the company's shares publicly available on the Irish Stock Exchange some two or three years after license award."

I think I may have misled you a moment ago, because it just occurs to me as I am reading this document, Mr. Brennan, that it is probably the Department's note of

an executive summary.

A. I think that's likely.

Q. Yes. I, think, in other words, it's your summary

based on what's contained in it's a precis of the

Esat Digifone executive summary, I think.

A. Yes, prepared by somebody in the Department.

Q. In the Department, exactly.

A. That's what it looks like.

Q. Yes.

A. I don't know for what purpose or when, by the way.

Q. I think it may have been for the purpose of the

presentations, but in any case

A. It's coming very early in the chronology, if that's

the case.

Q. Well, we move on to the presentations fairly quickly.

The next document is a document I am not sure if

it's contained on your draft, or your copy, of Book 2,

because it was sent as an addendum. We have already

mentioned it; it's Mr. Andersen's fax to you for the

attention of Michael or to the Department for the

attention of Fintan Towey, setting out his analysis of

the conformance of the applications with the minimum

requirements. Do you remember we mentioned it before

in the context of substantive as opposed to formal

compliance?

A. Yes.

Q. And that was sent on the 8th August, in any case

A. The one I am looking at has a date I have just a one-page fax cover sheet.

Q. As I said, I think the document I mentioned to you of the 8th August is not in the same place in your book as it is in mine, because you received it as an addendum, and perhaps somebody omitted putting it into your book. Because we have discussed it, and I don't want to discuss it again.

What you are referring to on the 9th August is a fax from Mr. Andersen to Mr. Towey containing what Mr. Andersen calls our semi-structured reader's guide; is that right?

A. Yeah.

Q. I think the reason these are put in this chronological order is that by the 8th August, all of the applications had been admitted on the basis that they all conformed formally with the requirements. They contained the appropriate statements valid for 180 days, 90 percent coverage, and so on and so forth. On the 9th, the reader's guide is sent; I don't want to go into it in any detail. It's not something I need to trouble you with. You may recall it contained a list of the aspects, the dimensions, the subindicators, the indicators and so on so that you could have a picture ultimately of what work had to be done and what evaluations had to be carried out. The next document then is on Leaf 93, and it brings

us, as I mentioned a moment ago it would, to the presentations.

The next document is in Leaf 93, and the day of it is not it's the 17th August. It's a letter to Mr.

Seamus Lynch informing him that "In relation to your GSM application, please find attached list of questions which require a written response. Please return your answers to Mr. Fintan Towey by 12.00 noon on Monday 4th September.

"I also attach the time and date of your presentation, i.e. Tuesday 12th September at 2.30am, as already confirmed to you by telephone."

And it indicates how admittance will be gained, what type of computers will be used, and it gave a contact number.

The questions were a list of questions specific to yes, these were questions to Mr. to Esat Digifone to which written responses were required. At that stage, I am simply indicating that the process was underway. You were engaging with the applications, and I think a process anticipated by Mr.

Andersen was now being implemented, namely you were sending queries to the applicants, you were informing them that they would be invited to a presentation.

You were prepping to ask them all a set of questions at the presentation which were the same in each case and ask each individual consortium a separate set of

questions specific to that consortium. So that was the work that was being done, I think, around this time, as well as the quantitative evaluation which was being carried out, so we are told, by number-crunchers under Mr. Andersen's, if you like, control?

A. Yeah. There was one nuance that is of no significance whatsoever. You mention that the letter to Mr. Lynch was dated 17th August. As far as I know, I was on annual leave up to and including the 18th. So I suspect that it's the 19th.

Q. Yes.

The next document, in Leaf 94, is a note of a meeting in the Attorney General's Office on legal issues. I don't think we need to refer to it in any detail.

Again, it's an indication of the work that was being done with a view to establishing how you were going to grant the license, under what section of the relevant legislation was it going to be granted, and what form would the license take and so forth?

A. Mmm.

Q. The next document, in Leaf 95, is a minute or a report of I think the ninth meeting of the GSM Project Group, but I think substantive meeting after the reconstitution or after, rather, the revamping of the competition. It was attended by you, Mr. Towey, Maev Nic Lochlainn, Ms. Free, Mr. Billy Riordan, Michael Andersen, Marius Jacobsen, and Mikkel Vinter,

Mr. Sean McMahon, Mr. Ed O'Callaghan, Mr. John McQuaid, and Mr. Aidan Ryan. If I haven't said it, it was held on the 4th September.

The note is as follows:

"Opening.

"Mr. Brennan outlined the agenda for the meeting:

"1. The Andersen presentation on the quantitative evaluation of the 6 applications.

"2. Discussion of the forthcoming presentations.

"3. The future framework for the project.

"Quantitative evaluation:

"Prior to presenting the initial draft report of the quantitative evaluation, Mr. Andersen first acknowledged certain shortcomings in the results gleaned so far from the quantitative scoring. The quantitative evaluation had highlighted some incomparable elements, i.e.

some applicants will not calculate the OECD baskets to their best advantage.

IRR had not been calculated in accordance with the tender specification in some cases for certain cases, not enough information on roaming was supplied to score the allocation certain of the indicators provide proved highly time-sensitive, e.g. if scored in Year 4 they showed one ranking, Year 15 giving a completely different view.

"The highly sensitive nature of the quantity scoring document was noted. Copies are to be retained securely by Mr. McMahon, Mr. McQuaid, Ms. Nic Lochlainn and Mr. Riordan. The remaining copies were returned to AMI.

"The meeting discussed each dimension of the scoring document in turn. The consensus was that the quantitative analysis was not sufficient on its own and that it would be returned to after both the presentations and the qualitative assessment."

That in any case was envisaged from the outset; isn't that right? You were never going to be bound solely by a quantitative analysis?

A. Absolutely, yeah.

Q. "It was also agreed that the figures used by the applicants could not be taken at face value and needed to be scrutinised. Responsibility for such scrutiny has not yet been decided.

"The need to reflect a change in the weighting for the license fee was highlighted. AMI committed to correct the model in this respect.

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

"Forthcoming presentations:

"A set of general questions for discussion at the presentations as drawn up by Andersens was examined.

Gaps in the questions were identified and new wording agreed. Questions are to be sent to the applicants on the 5th September.

"It was agreed that issues such as the costs of security interception etc. could be discussed with the eventual winner of the GSM II licence and would only be briefly flagged at these presentations.

"Andersens are to draft specific questions for each applicant. The Department of Transport, Energy and Communications and the Department of Finance evaluators will also prepare applicant-specific questions as appropriate. Questions during the presentation should be asked in order, i.e. general strategy, marketing, technical, management, financial, and then other. At the Monday morning preparatory meeting, Andersens will provide an outline of the underlying philosophies and the weak points of each application.

"It was agreed that the sweeping of the conference room for potential bugging devices before each presentation was desirable. It would be preferable to tape each presentation with the consent of all the applicants. The provision of such facilities was to be organised by T&R Development.

"Each applicant would be asked to provide a hard copy of any slides or visual material used. The time limit of three hours for each presentation would be

absolute.

"Future framework of the project.

"10 sub-group meetings for the qualitative evaluations had been proposed by AMI; 5 had already taken place.

AMI committed to provide the Department with documentation on these earlier sub-group meetings.

Project Group members were welcome to contribute/suggest amendments to the scoring.

"Andersens outlined a timetable for the remaining 5 sessions and personnel were nominated to attend. Mr. Towey and Mr. Riordan are to attend the financial and performance guarantee meetings.

"Mr. McQuaid and Mr. Ryan are to attend the radio network capacity of the network and frequency efficiency sessions.

"Andersens stated that the qualitative scoring of dimensions would take place in the sub-groups. Scoring of aspects would take place after the presentations. Mr. Brennan, however, specifically requested an opportunity to revisit the qualitative evaluation of dimensions after the presentations. The group would have an initial discussion on the qualitative evaluation scoring on the afternoon of 14 September. Gaps would be highlighted and the extent of the need for supplemental analyses assessed.

"A date of the 3rd October 1995 for the delivery of draft qualitative report was suggested by Andersens.

"A discussion on the question of the backbone network as proposed by many of the applicants also took place.

It was concluded that very little could be done until a successful applicant had been chosen."

"Signed, Nuala Free.

"PP Maev Nic Lochlainn. Copied to the attendees, Ms. O'Keeffe and Mr. McMeel".

Now, I just draw your attention to something on the second page of this minute. In the third paragraph, where it said "The need to reflect a change in the weighting for the licence fee was highlighted. AMI committed to correct the model in this respect."

Do I take it from that statement that the quantitative evaluation had proceeded on the basis of the old weighting?

A. I think you can take it as somebody asked the question, and the answer probably was yes, and that somebody of the group then suggested you better redo it in that case.

Q. Sorry, I didn't quite catch that. Do you know if it was redone?

A. I don't. I don't know right now. I don't know if evidence later will show it.

Q. I am asking you because I don't know, because the Tribunal has been unable to ascertain from anybody, including Mr. Andersen, whether it was redone.

Anticipating to some degree some of the information

provided by Mr. Andersen, Mr. Andersen informed the Tribunal that there were arithmetical errors in some of the quantitative evaluation calculations, and the Tribunal has been unable to obtain a corrected version of the quantitative evaluation from him.

Do you know if you ever had, firstly, a version devoid of arithmetical mistakes, and secondly, a version devoid of such mistakes but conducted in accordance with the correct weightings?

A. I can't say that I recall that now.

Q. You might, maybe, make some inquiries yourself and see can you establish whether there is any such document, because the Tribunal has been unable to find one.

A. Okay.

On a minute point of detail, the report talks about sweeping the conference room for bugging devices before. It was also during.

Q. Yes. By this stage, in any case, the evaluation group were clearly anxious and Mr. Andersen saw no reason not to provide the were clearly anxious to obtain and Mr. Andersen was happy to provide a corrected version of the quantitative evaluation?

A. Yeah, that's certainly what the report says.

Q. And a version, presumably, had been presented at that point, subject to a few qualifications?

A. Well, I would say a good few qualifications, but some qualifications, anyway.

Q. But there was no suggestion at that stage that it would be abandoned?

A. No, I don't think so.

Q. The next document is a manuscript note, as far as I can see, of that meeting of the 4th September. Can you recognise the handwriting?

A. I can't say I do. It could be Maev Nic Lochlainn, but that's a long shot.

Q. It seems to be a handwritten note prepared by somebody at the meeting.

A. It does, yeah.

Q. And it tallies to some degree, and I say to some degree only, but certainly it tallies at the opening, with the opening of the meeting, in that you see it identifies three matters: AMI presentation of quantitative; next, it goes on to the presentation, that is to say the oral presentations which you were anticipating from the 12th September; and then the future work programme.

And then the first heading is "AMI draft quantitative report", which seems to accord with the way the formal note ultimately minuted what happened at the meeting.

Do you see that?

A. Mm-hmm.

Q. All I would say is that after that, it seems to be a more expansive note of what happened at the meeting, and although it follows roughly the order in which the

minute was ultimately prepared, it's much more detailed?

A. It seems to be, a bit, yeah. It's not the easiest of writing to follow in places, either.

Q. It's not, no. Well, the Tribunal will take up your suggestion and try to establish whether it's Ms. Nic Lochlainn's writing.

If you go to the sixth page, it's number 6 as well the number may not have come out on yours the number is on the top left-hand corner.

A. I have a page number 6.

Q. And I am anticipating, to some degree, something we may come to in the presentations. At the bottom of the page, there is a note "A2/A5", and I read the note as "High level of external financing equity (is leaking away)" and an arrow. Do you see that? Then in brackets, "OD", I read as standing For "operating deficit". Close bracket. Do you see that?

A. I do, yeah. You said "leaking away"; "eating away", maybe. It's hard to make out.

Q. "Taken away"?

A. I don't know. It's hard to make it out. Somebody will explain it, I am sure.

Q. It may become clearer in due course.

If you go on to the next page, do you see "During first investment heavy years, more outflow." Then "Needs to be examined further in qualitative (some

could be shareholder loan, some could be bank loans.)"

Underneath that again, referring to "A2/A5 look bankrupt". Do you see that?

A. I do.

Q. Underneath that, "Shareholder loans" arrowed "To be transformed to equity is a loose commitment" something "shareholders" "loose commitment to shareholders", maybe?

What the Tribunal now proposes to do, Mr. Brennan, is to play the tapes of the presentations; not all the tapes, you'll be glad to know, and in any case you don't have to be here for all of them. But you will recall that as the process evolved, you formed the impression, and we discussed this before, that you could break up the six applicants into either 3:1:2, 2:2:2 or 3:3; do you remember that?

A. Yes.

Q. For the moment, unless you have any other suggestions, the Tribunal proposes to assume that the top three, it was really a two and a one, which was A5, A3 and A1, I think; that those three presentations which were taped on a videotape, but in audio form only, should be played.

Now, the Tribunal is not interested in every aspect of what's contained in these presentations, but it might be unfair to you or to any of the other people involved if the whole of the tape were not presented.

As I am sure you'll be the first to agree, a lot of it contains material in any case which is extremely difficult to follow if you are not an expert in technical matters.

A. The first hour was very philosophical in some cases.

Q. There are, I think I am right in saying, introductory remarks in each case by you. I think then some general introduction by each of the presentation each of the applicant leaders, if you like. Then you go into the question-and-answer session. Transcripts have been made available of the three presentations, and what the Tribunal would propose to do now is to start playing them.

And as I said, you are under no I think, if you have anything else to do, you are perfectly welcome to go elsewhere, but you can sit here with your team if you want to listen to them. Because ultimately there will be aspects of them I want to take up, concentrating mainly with one or two aspects of the introductory remarks and ultimately dealing with the treatment of financial matters.

A. Yeah, okay.

Q. And as I said, if there is anything else to which you want to draw my attention, the Tribunal does not want to have to be replaying these tapes or replaying bits of them. What I would hope to do is, having played them, to rely on the transcripts to refer to

individual passages.

A. I have no difficulty with that as a method of working.

MR. NESBITT: Mr. Chairman, there are transcripts, I understand. I don't think we would have any difficulty if the transcripts being used if it was felt that that was sufficient for the purpose of the Tribunal. So I don't want to stand on dignity to have to have the tapes played, but it's a matter for the Tribunal.

CHAIRMAN: Yes. Well, I think, any aspects of confidentiality having been aired as regards certain matters by some applicants in the course of them, they are now largely redundant matters, and I am inclined to agree with Mr. Healy's view that if the Tribunal were simply to edit out the portions that may be felt to be of primary probative import, it might have possible unfairness or it might result in other persons seeking to have further matters played. So whilst it does admit of a certain measure of tedium, I think the most satisfactory model is that we do play the tapes of the three contenders who, it seems on any appraisal, were considered to be the persons who were best equipped to challenge for the licence. Obviously there will be some measure of tedium in this, and what I anticipate is that we will take perhaps the first hour of Esat Digifone being first today. We will then adjourn, but since there is inevitably a somewhat

architectural, or archaeological nature in the hearing of tapes being played throughout a day, I think it's sensible that we take a somewhat longer day tomorrow, that we perhaps start at ten o'clock and seek I don't think we'll conclude the three, but to make as much progress towards certainly leaving only the remains of the third tape to be played on Thursday. So perhaps I might just allow five minutes for matters to be set up

A. Before you do, Chairman, I'd like your team to consider whether any of the other tapes might be relevant, and I have particularly in mind a discussion in one of my early days here about hypothetical questions about how certain parties would have been dealt with if they had been in from the beginning, and it may be that one of the other there is one consortium, I am not sure whether it's in the top three or not, where there were financial investors with no technical role, and I am wondering whether those particular bits might be of interest to that discussion.

CHAIRMAN: We'll pursue that, Mr. Brennan, but I think in the first instance, we'll have the three contenders who, on any person's appraisal, appear to have been rated the stronger three, and then we will revert to questions which I agree may be of some potential relevance.

I'll sit then again, and we'll take up the start of the Esat tape as soon as matters are ready to roll.

AFTER A SHORT ADJOURNMENT THE TRIBUNAL RESUMED AS FOLLOWS:

TAPE OF PRESENTATION BY ESAT DIGIFONE IS THEN PLAYED:

MR. MARTIN BRENNAN: In starting I will introduce my team. There are so many of them I can hardly even remember their names. One is yet to arrive. If I could start on the extreme right, two representatives of the Department of Finance: Billy Riordan and Jimmy McNeill; Billy is an accountant. Then we have the Andersen Management International team of Ole Feddersen, Marius Jacobson, Jan Bruel and Michael Andersen. On my immediate right is Maeve McLoughlin, some of you know, who works with me. Starting up here is three representatives from the Telecom Radio Technology Division in Findlater House: John Breen, John McQuaid and Aidan Ryan. Then we have Margaret O'Keefe, who works with me, Aid O'Callaghan and Sean McMahan who both work in the regulatory end, as you know. Fintan Touhy will be joining us in a moment, Fintan also works with me.

You have been made aware that we are recording the session for completeness of the record so that if there is any misunderstanding among ourselves we have an exact reference point.

I see you have given us brochures already. I assume

they contain visual material you intend to present because we want to avoid having reruns of applications. We just want to have reminders here today.

The purpose of the meeting is to enable our project team and our consultants to better understand the applications and to give you an opportunity to present yourselves in person and so on, although I would say that our project team is not as big as this. It's because we are tackling this throughout the week that there is more or less duplicate cover for each seat because concentration lapses and one thing and another there may be some absences we felt it maybe we are to err on the high side.

We believe that setting a three hour limit from when you commence is fair to all parties. It's not a minimum, it's a maximum. So I will be sharp on the three hour limit. But we see it in three distinct segments: First, an hour for you to determine what you want to say to us by way of presentation and then the second hour approximately for discussion of the written questions which we sent to you on the 5th September and those questions, obviously they were compiled in the light of the applications in general and not all of them refer in detail to each consortium, but we'll use them as an agenda nevertheless. And the final hour would be more of an

interactive session: questions perhaps specific to your own consortium; questions arising out of the preparation so on.

We will try to group the questions in relation to the volumes of the application for the sake of good order and good management of the meeting. In the latter case, the final hour, we understand that you may not be able to jump in with an answer to every question that arises and if there is a need for pause for reflection, that's fully understandable in the circumstances because you couldn't necessarily anticipate the questions. I see one of my roles as Chairman in the two later sessions is to jog the meeting along if we are getting bogged down because it's both in your interest and our interests to get through the various items that we want to get through and I wouldn't like anybody to interpret an interruption in any way other than a need to keep the flow of the meeting going.

In relation to one subject that's not on the agenda is the whole subject of the security interception, legal tapping and so on. We believe that's a matter that only really necessary to discuss with the eventual winner and there is no point in having such a discussion with all of the applicants.

Finally, when this meeting is over, we would prefer any further communications to be initiated by us. In

other words, if we feel the need for additional information, which we don't particularly anticipate, but if we do, we will seek it in writing. We will prefer not to be in receipt of supplementary information because we want to draw the line under the applications and the same rule applies to everybody.

And finally, on the sort of courtesy side, there is coffee and some flasks and some cups etc. down there.

Rather than interrupt the meeting with such a big crowd in the room, what we have tended to do over the last 24 hours is when people feel the need for coffee, they go and get a coffee. So with that, over to you, and I for one am taking off my jacket.

MR. DENIS O'BRIEN: Good afternoon, ladies and gentlemen. First of all let me introduce Esat Digifone's team today. You will hear from Arve Johannson, who is the Chairman of Telenor Invest and Telenor Invest are the shareholder in Esat Digifone. He is also chief executive of Telenor International; that's the international division of Telenor AS. And he also, quite interestingly, that is relevant for Esat Digifone is that he is Chairman of Panan GSM in Hungary. This was a company that went into operation about two years ago, so he is the founding Chairman of that particular consortium where Telenor play a vital role.

So Arve is going to deal with a number of issues that

we are putting together for this presentation today.

Jan Edvard Thygesen is going to be Esat Digifone's first chief executive and he is currently deputy chief executive of Telenor Mobil, so he basically runs the mobile business that has been so hugely successful for Telenor in Norway and he has profit and loss responsibility for that business. He is a former technical director for the Oslo region and was the project manager for the digitisation of Telenor's network over the last number of years. So he has a wealth of experience in the mobile business and will be based here in Dublin and join the company if we receive this licence.

We have decided to put in place a deputy chief executive and we have appointed Barry Maloney as our deputy chief executive of the company and we envisage that in two years time that he would succeed Jan Edvard on his return to Norway. Barry is an Irishman. He is vice-president of Xerox Corporation, but he has particular relevant experience for this business, because some years ago Xerox decided that instead of selling their office equipment products directly to users, they decided to get into new distribution channels and resellers. So he has global responsibility for implementing this business and this business this year will have a turnover of \$300 million. He is formerly vice-president in charge of

sales and marketing for Digital Equipment

Corporation's business here in Europe in the

distribution and retail area. So has very, very

relevant experience to bring to this particular group.

A vital area as we see it, the whole human resources

area particularly in a start-up and John Hennessy will

serve as our director of human resources. He is

currently personnel manager with ACT Kindle, he is

down the end there, and he is responsible for over 370

staff. Over the last few years alone he has hired

over 200 people. So he is also responsible for their

training and their motivation. And he has telecoms

experience. He has worked for Ericsson where he was

personnel officer for a number of years based in

Athlone. So he is used to hiring technical people and

making them fit into an organisation.

Myself, I am Denis O'Brien and I am the chairman of

Esat Digifone and also of Communicorp Group. The rest

of our panel who are available to answer any of your

questions that you may have this afternoon are: Peter

O'Donoghue, who will be our full-time Esat Digifone

director of finance, he will be moving from his

position of chief financial officer of Communicorp to

take up this position.

Hans Myhre then has a very, very important job in the

technical area, he is Esat Digifone's director of

engineering and operations. His background is he was

formerly operations and roll out manager for Telenor Mobil, based in Oslo. He has also played a very important role in Hungary which I mentioned previously through Panan GSM, so he is well used to working overseas and he will be based in Dublin and in charge of the whole engineering and operations area.

And finally, today, we have Per Simmonson who is not on the management team, as you can see from this slide, but he has been very much involved in putting the bid together and he is co-bid manager with Seamus Lynch.

So these are the people who will actually run this business. Who will be absolutely responsible for the success of Esat Digifone and its timely launch into the Irish market.

We want to use this opportunity today, I am going to go now into formal presentation, to further develop some of the key features of our bid and why you should seriously consider Esat Digifone for this GSM licence.

So what are the critical success factors for Ireland's second GSM operator?

The critical success factors as we have seen it, above all else, is the right ownership structure. And the right operating partnership and the person that we have asked to deal with this is Arve Johannson who is chairman of Telenor International. He is going to deal with this part of the presentation. In terms of

the right approach to developing the market, Barry Maloney, with all his experience, is going to talk about what Esat Digifone's plans are in this area.

The very important area, because of what we have said in our bid in terms of ability to grant an early launch within nine months of granting of the licence, is going to be covered by Jan Edvard Thygesen our chief executive.

And then in terms of making, putting forward what our views are and what we feel are the real areas of what our strong sense of responsibility are in this project, these issues are going to be dealt with by Maloney.

And finally, before we wrap-up, we are going to talk about confidence.

We are confident, we are not over-confident but we have done nearly all the things that we feel are vital in terms of preparing a comprehensive bid firstly, but also comprehensive plan to go into this market in Ireland and develop a real cellular business. Thank you.

Arve Johannson is now going to talk to you now about what are the advantages of Esat Digifone's ownership structure.

MR. BRENNAN: Denis, is it relevant for me to point out to my own team that some of the members of your own team is classified information, in a personnel

sense.

MR. DENIS O'BRIEN: If you wouldn't mind.

MR. MARTIN BRENNAN: That should be noted.

MR. ARVE JOHANNSON: Ladies and gentlemen, Esat

Digifone has the right partnership in place to

succeed. I will explain this to you this afternoon

by highlighting five points. Esat Digifone is an

Irish company. We have sufficient financial capacity

to meet and even exceed the funding requirements.

The partners have complementary skills and experiences

and we have a very high level of commitment and we

have the freedom to choose the best quality

infrastructure.

Esat Digifone is an Irish company. Its evidenced

first of all by the Communicorp Group holding 40

percent as we get going and we have institutional

investors holding 20 percent and they are: the Allied

Irish Bank, the Investment Bank of Ireland, Standard

Life Ireland and Advent International. In addition,

we have Telenor, through its subsidiary Telenor Invest

and Telenor is the major telecommunications operating

company in Norway, having last year an operating

revenue of $\text{€}1.8$ billion and a profit of $\text{€}190$ million.

We already have the funding in place. The total

funding requirements seen from the business plan is

$\text{€}124$ million. We base the capitalisation on 40

percent equity and 60 percent debt and therefore we

are certain we can achieve that in the project in

Ireland on GSM.

The available funding exceeds those requirements

considerably. Telenor has a firm commitment. It's

even already approved by the board of directors at the

top level of the corporation, i.e. 30 million and even

that would not be a hard limit even if you think later

we would benefit from having more equity. The

Communicorp Group has committed i.e. 30 million and the

institutions have committed i.e. 11 million. Meaning that

we have available i.e. 71.1 million in equity and we have

the banks like NatWest Markets and AB Enramo who has

submitted i.e. 90 million meaning that we have available

funds of i.e. 161 million, which is 37 millions above the

current requirements of the Business Plan.

So what are the advantages of a Communicorp/Telenor

operating partnership? Communicorp and Telenor really

have complementary skills. Communicorp through its

subsidiary, Esat Telecom, has a proven ability to

compete effectively in the telecoms market of Ireland.

Telenor, on the other hand, has an experience in a

broad range of telecommunication services but we are

world leader in mobiles. Telenor Mobil alone has

750,000 subscribers currently based on a population of

4.2 million and in Norway more than one in five has a

mobile phone. Together we can make this same thing

happen in Ireland.

Communicorp has the experience of starting up businesses in Ireland and we have, in Telenor, the experience of starting up a lot of operating companies abroad, mostly in the mobile market. Together, that should guarantee for successful start-up of a GSM operation also in Ireland.

Communicorp is an entrepreneurial company and Telenor, on the other hand, is a successful telecoms operating company and it means we have the experience to work in joint ventures. In fact all of our operations abroad are joint ventures. We have experience in working in joint ventures with many partners and with as few as two.

And there is absolutely no doubt that what you need in a good partnership is the partners that can bring to the table the necessary skills and experiences to make it a success; that you don't need more partners than that.

And what we have already achieved with Esat Digifone is a better operating corporation in this project than what would ever be possible in a multi-operating joint venture and I am talking from experience because I have eight partners in the Hungarian Panan GSM operations.

Communicorp has an Irish marketing flair and a market understanding, whereas Telenor is a European leader in development of mobile communications, have been very

active in the specifications and development works in the international organisations of ITU and ETSEE.

Together, this is the partnership that is needed to make this a successful start-up. Communicorp and Telenor are both uniquely committed to this.

Telecommunication services is the core business for both.

This licence is the most important project for both of us and we both share the long-term exclusive commitments to the telecommunications business.

We are free to choose the best supplier. There are quite a few companies today that are capable of manufacturing cellular equipment, many of them present in Ireland. Throughout all our operations, we apply equipment from all. We follow the EU procurement procedures for public procurements. And one of the criteria we will use for selection is the quality and the services offered, the price offered, and not the least important, the delivery times.

This is the only way we can avoid any conflict of interest and secure a successful launch and operation of the service.

To conclude, I believe we have shown you that Esat Digifone has the right ownership structure in place and the right operating partnership to succeed.

The next critical factor is a market development approach and I will leave that to Barry Maloney.

MR. BARRY MALONEY: Good afternoon. Thank you, Arve.

One of the things in thinking about what are the key features of our approach to market development, we put ourselves in the position of what is it the department is looking for in terms of the second player in the GSM market that you are looking for somebody to provide and indeed what's it going to take for us to develop this business successfully? There is a couple of key facts that we believe are going to be vitally important.

The first one is going to be establishing the market, sizing the market and establishing our own market share.

The second one will be to make a high quality service available as soon as was practically possible.

The third issue is designing our products to meet the customers' needs.

The fourth one is making sure that the service is affordable and economic to the customer.

The fifth one to promote the service effectively.

This is going to be a consumer product and promotion is going to be vital to the success.

Lastly, to make sure that we use a wide range of distribution mechanisms to make sure that we get our product into the market place. We believe these are the key things from the Department's point of view and also in terms of any applicant for the second GSM

licence to effectively address in terms of developing this market place. What I'd like to do is take you to Esat Digifone's approach to addressing these issues.

The first one is growing the market. As you are familiar with the market today in Ireland is under developed. The penetration is less than 3 percent but we believe it's about to grow very rapidly and the introduction of the second operator is going to drive a lot of this. In our sizing of the market that we put in our Business Plan, we looked at moving the users up to over 35 to 40 percent by the year 2009.

And I have just mapped here what we believe the estimate is and an independent view just to show you the range.

Now I know there are very different estimates from different people but we believe this is the kind of practical penetration that you can expect based on Telenor's experience in terms of driving this market forward. So there is a big market opportunity here.

Secondly, we have set ourselves a goal to achieve a 49 percent market share by the year 2009. We believe within that and at the beginning the make-up of this is going to be primarily business and then as we get consumer moving, these two lines should cross somewhere around the year between, the year 2000 and 1999 but this is really going to get driven by the market place after the second operator comes in but

there is going to be a change in the mix between business and consumer as the market moves forward.

Another reference point here is what's happened in Norway. Norway today are already at 23 percent penetration of the total population. This is the largest penetration in the world; in fact, over took Sweden just last month. Telenor also has 760,000 users of GSM in their market place with a 70 percent market share so our partner knows this business and will be very effective in helping us move not just our market share but the total market in Ireland forward.

We believe, on the area of quality, that a rapid nationwide coverage is absolutely essential. Our bid includes a proposal that says we will have 80 percent hand held outdoor coverage within nine months of licence award. I'd like to point out that this is not just on the main roads. This will cover most of the major population centres as well.

The actual coverage that that will give us from day one is represented on this diagram here. This will address 80 percent of the population and approximately 57 percent of the geographical area including most of the major population centres of Ireland.

In our second phase, we believe we will achieve 95 percent coverage within nine months after launch. And that is what we are committing to do in terms of providing the service that we believe consumers are

going to need to fully embrace this technology. This was Phase 1.

This is Phase 2.

You can see with Phase 2 you cover all of the geographical areas of Ireland, up to about 95 percent geographical coverage. The key point I'd like to make about this is that this proposal exceeds the Department's requirements for coverage by over two and a half years. We are very, very confident that we are going to be able to do it with our current partner and we believe this is the kind of service that will be required by our customers to get this market place moving at the rate we need to do it at.

I'd also like to draw your attention to the coastal areas. We have shared this proposal with both the Killybegs Fisherman's Association and the Cork and Galway Harbour Commission in terms of talking to them about giving them the service and let me tell you, they have endorsed our bid and are very enthusiastic about our proposal so that they will be able to use the technology in terms of their activities as well.

Having talked about our coverage and the quality that we are trying to bring to the market, it's a very important that the products are designed to meet customer needs. In our bid, we are proposing, at introduction time, three very focused product sets.

One for the high volume user, which is Digifone Max; a

product for the medium, Digifone Pro, and one for the low, Digifone Light.

We are making sure that in developing our product that we try to keep them as simple as possible. Our market research has shown that you see in many parts of world one of the biggest barriers to getting this business going is the complexity of understanding what the vendor's product offering really is. So we are using an approach that says we will have consistent services included in our packages and that the peak times will be very specific from 8:00am in the morning till 6:00pm Monday to Friday, everything else is off peak.

We have also taken a position that says in our monthly rental charges "the following services are included as standard." Again very important in terms of these are services that will be included in the packages we bring to market. They are not separate revenue line items which they are for most other operators.

We believe the customer benefits of this approach are going to be very significant in developing the Irish market. The inclusive services value with the approach Esat Digifone is taking, the consistency of our service package and the consistency of our peak time will make the decision making process for which package a customer needs very easy tailored to the needs they have. We believe this is a fundamental issue in developing market place in Ireland.

The second area is the pricing or tariffing structure.

The approach we have taken here is aggressive in the sense that we need to get the consumer market in Ireland moving quickly and to do this we have set a fixed monthly rental charge of €8.25 to generate that demand. We have also, in the Digifone Max product, which is the high volume large business product, put a very competitive peak calls per minute of 12.5p to make sure that the needs of our large volume users are also met in a very economical way and for off peak calls per minute they are consistent across our three product offerings.

Again, what we are trying to do with our tariffing structure is that it's simple and it's easy to understand. That it's packaged for the needs of individual user groups, whether you are a large company, a professional or an entrepreneur or a consumer, that the rates are highly attractive in terms of offering value for money.

And finally, and most importantly, that it's going to be easy for customers to calculate what their monthly cost bills are going to be. The issue of developing this market is not just the price of the hand held phone. The issue is total cost of ownership and with our proposal, customers will be able to predict exactly what it's going to cost them both for the personal user, the mid-volume user and for the

business users and that's the strategy that we are proposing.

This is going to be a consumer business. The issue of a corporate image on logo is fundamental. With this particular consortium we are fortunate enough in that Esat Telecom established itself in the market in 1991. So Esat Telecom as a brand already has a presence here in the Irish market. What we have done with Esat Digifone is by marrying the two in together this is now going to establish the logo and the corporate image for this particular GSM application. The focus groups that we have shared this with are *Telexstans for an Irish company, an entrepreneurial company, an imaginative company and innovative company and we believe these are the kind of images we will need, any operator will need to be successful in the consumer market in Ireland.

The second issue is the issue of product branding. Many of you will know that the issue of product branding is a key issue for any new entrant to any new business. We are fortunate enough that in our product branding is complete and has been for two months now. Products of Digifone Max, Digifone Pro and Digifone Light are all trademarked, represented and we are ready to go.

Franchise stores. In our proposal we are proposing to put in place throughout selected locations in Ireland

this idea of a franchise store. The concept here is to get the image of the company, its products and its services in high visibility locations in about ten to fifteen sites across Ireland. This schematic gives you an idea as to what one of those store fronts might look like. These will not be managed by Esat Digifone. It will be a franchise where we make sure they get all the collaterals, the frontage design and all the help they need to portray our image and whoever the franchisee is will use it to sell hardware, hand held, other telecommunications and other products.

The fifth issue is customer promotions. Again, this is a consumer market so we have got to find ways, innovative ways to get messages out promotional wise to drive business and the interest of the service.

And this is an example of using the technology that we are talking about to get the message out so you'd have something like: "You have just one 1/2 1,000 with Digifone" and it would run once a week or, you know, a couple of hours a day, to try and generate demand and interest in getting the market developed.

An aggressive media funding is in place. We are taking a very proactive approach to developing this business. We are talking about 3.7 million in 1996, a further 4.8 million in '97 and '98 and 4.4 million in 1998. Just to give a feeling for this, this 3.7 million in '96 will be spent over a four month period.

It's about the same as Proctor & Gamble spent in Ireland for the total year for all of their brands.

It's also more than the combination of Smurfits and Guinness advertising spent in the same year. So just to give you a perspective, a benchmark against which you can judge this against.

Finally, media and communications. How are we going to grab the attention of users to what our offering is? And if you will bear with me for a moment I'd like to share with you a 60 second sample of the first one you will see is a radio ad and then the second one you will see is a tv ad. Derek...

(A radio advertisement is then played.)

This is the television ad.

(A television advertisement is then played.)

The point I want to make with these last two items: that is consumer business, you have to be able to be attractive and to appeal to consumers. These are two sample ads that we have ready to go, are in and we have developed launch plans for next year should we be awarded licence.

Having talked about the product, the pricing, the promotion, I'd now like to cover the area of distribution and how are we going to get our products to market.

I want to start off by, we want to take a phased approach to this particular topic. It's very

important in terms of how we believe the market is going to develop. In the beginning we will start off with a direct account management structure and a network of about 130 dealers.

Let me tell you that already we have a list here of letters of endorsement from over 350 across Ireland wanting to work with us. However, we are realistic enough to know that we are not going to be able to get them all up to speed and ready to go at time of launch so we have chosen 130 of these in terms of people that we are going to work with: 80 of them traditional agents that you would expect. Many of them are the same agents that Eircell have. We have also chosen consumer electronic stores as this channel that we will start with in terms of developing the retail side, consumer side of the business.

I'd just like to spend a minute talking about the account management structure. The needs of large accounts and large companies in Ireland requires us to put in place a direct sales force who will focus on probably no more than 50 accounts across Ireland whose job will be to customise our offering in terms of cost centre billing, volume discount, whatever the needs of big companies are that are going to be different from what your standard product and what our light products are. We have a lot of experience in Ireland through Esat Telecom in terms of selling to businesses.

Business to business is something we know very well.

So we'll be able to leverage those relationships in terms of addressing that particular segment of the market.

The rest of it will be going with and through dealers and you will notice in our proposal we are not in the hand set business so we are talking about selling and moving our services.

The second phase which we anticipate is probably launch plus twelve months, the dealer structure will expand. The reason for that is the slide I showed you, as the consumer market moves up the trend and the need for us to get rapid access to market place. At this point we have targeted the departmental stores, tv and video rental outlets, telephone shops, those kinds of people, people who understand technical issues and technology and are going to be able to understand GSM very, very quickly.

This line shows you the crossover between consumer and business and right now we are looking at, it could happen 1999, it could happen 2000, we are not sure how it's going to develop but this is the plan that we have and therefore, in Phase 3, we need to have a mass distribution approach which will make sure that our products are in every street corner in Ireland. So now we will add Xtravision, who we have a letter of intent and endorsement from, motor garages and

addicts. Addict, as some of will know, is one of the biggest distributors in Ireland for the retail segment in nontechnical products, big distributor of Sharp and they have sent us a letter endorsing a joint business together. They would help us distribute our product to 350 independent retailers across Ireland.

Having got the channels is one thing. You have to understand how to support and motivate them to keep working with you and keep developing your business.

Our plans in this area include putting in place six regional sales offices across Ireland. They will be located in Dublin, Waterford, Cork, Galway and Sligo. These bases will be used out only for our direct sales people but also support centres for all the dealers to deal with technical queries, inquiries, any kind of support they might need.

The second one is a set of direct marketing programmes. We will be doing outbound telemarketing, inbound telesales, direct mail will be a key piece of the things we will do to generate demand for the dealers to close Esat Digifone business. So we will do that as part of our marketing plan to give them air cover so they're effective in selling our products in the market place.

The third issue is an aggressive commission structure. Our bid includes a very aggressive commission structure. The reason for this is we want the dealer

to decide what he does with it. We are trying to stimulate competition. We are trying to stimulate the market. By giving these levels of commission, we want the dealer to decide how much of it they use to pass down to the hand set to get the price down or if their business model is that they have added value services, they can use for that as well. The point here is we are not going to dictate. We are going to make this money available to them and then depends on dealers' business model in terms of what he will do with it.

That's our strategy to develop a very aggressive market place and we are not going to protect any of them. There will be no fixed territory protection for any of our dealers. So that's the strategy we are embarking on to make sure that we get the right kind of coverage and access to the market that we need.

Cooperative marketing programmes. In addition to the monies that I have talked to you about, we have included in our Business Plan 50/50 marketing funding with all of our distributors as they come on-stream, so in year one this will cost us an additional $\frac{1}{2}$ 700,000. This is very typical of a channel based business where you sit down together, work out a joint marketing plan where you brand our product to their distributor for any kind of incentives that they want to put into the market place. So we have also included that in our bid.

So, what I have tried to do in this section was to outline to you from a marketing perspective what we believe the key issues are for the second GSM operator. I have talked about the quality of service, I have talked about the product design, I have talked to you about the price of it, I have talked to you about how we plan to promote it and I have talked to you about how we are going to distribute it to give you a flavour as to how we intend to address these critical issues as part of our bid.

So with that, I'd like to pass over to Jan Edvard who is going to talk to you about the technical roll-out of our network. Thank you.

MR. JAN EDVARD THYGESEN: Good afternoon ladies and gentlemen. I would like to present to you what Esat Digifone has done to guarantee a rapid and successful launch. I will present to you how our philosophy of rolling out at the launch a high quality network, our basic act to do that. What we have done to prepare for that roll-out and what we have really achieved so far.

Today a lot of cellular users experience low quality in the cellular service. This is based on what you see on this schematic figure from our radio network because a lot of operators establish their services based on an existing infrastructure of masts and houses. For example, existing Telecom companies use

their sites for cellular links, make real links, they use their masts for analogue services and housing their Telecom equipment. Newcomers coming in very often in their joint venture have a partner with them which own some land, some sites like electricity companies, like railways, etc., and the result is a radio plan that do not match the quality that's required and what the cellular customers experience is dropout rates, high dropout rates and they experience no coverage and they also experience noise during the speech because of interference.

Esat Digifone has a basic philosophy to establish an excellent service from the first day of launch. We are so confident on that that we have in our Business Plan implemented a dropout guarantee for our customers. That means our customers, if they are dropped out during a connection, they will get credited automatically in our billing system of one minute. That means we have to do our planning from scratch, and not be tied up to any infrastructure.

And we have to know where margins for signal strengths to cover in-house and to cover inside cars. And that's based on our experience from our current operations in Norway and Hungary of course.

When we are going to roll-out such a network you have to invest not only in time not only money, but also in time. And that's why we started up, in fact,

almost two years ago and the basic start-up is to have people ready, have people there to make, assimilate on the computer a radio plan and at the same time, we had to employ a ten man site team to go out and look at the sites to see if they were realistic and then to interact with the radio planners to get such a network.

And at the moment, more than 200 sites surveys have been done and when you have found the optimum sites, then you have to go into negotiations with the land owners and we have completed more than 157 contracts.

We have also in our Plan environmental report to see if there is any health risk in our Plan. And then we have to go to do the formal process to get the planning permission and that is also time consuming and very often we have, we don't get yes for the actual site and we have to go back to the planners to go the process through again.

Today we have invested more than £350,000 in this site planning and site acquisition and we have signed more than 157 contracts. And we have done, to do that, more than 110 individual negotiations with the farmers and the landowners. The reason for the lower number of individual negotiation is because we have some built contracts here and the planning permissions are now starting to come in and at the moment at an average of five per week and we expect them to

increase for the next month.

Here you can have an illustration of where we have been for site acquisition and as you see, we have already started also the process in the Phase 2 part of roll-out.

This is a very important job to do, to really do effectively in the plan before you start out the roll-out because that's where you put your cost, that determines the cost and that determines the quality of the service and then you have to roll-out the network.

And to be sure of the success for that roll-out, we have appointed a very experienced roll-out manager, he is the current roll-out manager of GSM in Norway, he is *Svenad Von Driadson (Phonetic) and he was able to increase the number of base stations rolled out in Norway from seven per month to more than 40 per month and some month we have in fact experienced that there have been more than 50 and the record month is 63 base stations which was done in June this year.

Even if the management team is in place, you need a core team of competents and we want, we have already committed to take 30 high qualified staff from region Telecom which is mostly working with, in the Telenor Mobil and also in the operations down in Hungary. We have already been there for two years. And they have then been established training programme for the new engineering staff so when this core team comes over,

they will be able to transfer the skill to the new employees in a period of less than two years. And in fact, Svenad Von Driadson has developed his own programme which was tested in Norway which shows it's possible to learn new engineers to be effective GSM planners and roll-out planners in a time of only four months. And of course we need to have equipment in place and we have already advertised in the EU official journal to get, to do the formal procedures and we have not yet sent the request for tender because one of our competitors here is one of the possible suppliers and I want so that we have the best possible equipment from the right manufacturer.

The core team of 30 persons is of course not enough and a lot of details and a lot of detailed tasks has to be done and that most of them of course will be done by people employed here in England in Ireland and I would like then John Hennessy to present the status of the this process. Thank you.

MR. JOHN HENNESSY: At launch we will have to have 320 people employed by Esat Digifone. This is a factor that's very, very important to the success of this plan and we know it's not an easy thing to achieve, but we believe at this stage that we can guarantee that, and what I would like to do over the next couple of slides is to let you know what we have been doing over the last number of months.

I want to talk to you about our recruitment achievements to date. I also want to talk to you about our recruitment advertising campaign. And finally I want to talk to you about our training processes.

So first of all, on the recruitment achievement so far. Probably the most poignant thing we have done is we have in place our full senior management team. And most of those people are here in this room. This is a very, very experienced group in the telecoms business and in different specialities as well and on average they would have 20 years of experience behind them.

The second thing that we have done is we have gone a step lower and we have gone down to the next level of management group and so far we have identified and selected 60 percent of those people. Now, we haven't issued contracts of employment yet, obviously, but those people have been selected so far. Also, we have also been targeting individuals in different specialist areas, in the business areas and telecom areas. So when we get the go-ahead for this launch, we can go ahead and contact those people and at this point in time, we have a database of over 900 applicants that we can call on.

No doubt all of you will have seen or recruitment advertising which began over the last number of weeks.

So far that particular ad has run in the Irish Times

twice, it has run in the Irish Independent and it has run in an international magazine called Communications Today. The objective of that ad again is try and stimulate applications from people in the business areas and the telecoms areas.

And the next slide here just gives you an idea of what that response has been. In the sales and marketing area we have applications from 327 people. In the technical areas we have had 270. In the customer care area 231 and in the finance and admin, 95 and actually we brought in all those applications with us as well and all those leverarch folders at the front is where all those applications are.

We also have a few different options as well and other resources that we can actually draw upon. Those resources would be the use of specialist recruitment agencies, number 1. And also we could follow what a lot of organisations who have set up quickly in Ireland in the last number of years have done is to go to colleges, hire graduates and trained graduates so all those options are open to us as well.

Next point I want to talk to you about it training, because hiring people is one thing. Training them is something else. And we believe that training is crucial: training in the culture of this organisation; training in the service ethic we plan to have and finally, training in the technology that we use. And

to do this, we have planned two full training centres: one in Limerick and one in Dublin, staffed by our own experienced trainers. We also have full access to Telenor's expertise in this area, to their trainers and training programmes. Telenor at the moment have, I think it's over 180 different training programmes that are relevant to the GSM business, and we have access to all of that.

Finally, we have extensive secondment training options, both to and from Esat and to and from Telenor. And we see this as being a very important factor in the initial startup of this licence. At the same time the secondment thing we don't see lasting forever. We see it lasting for about three years and at that stage all our people should be fully trained up and be able to handle the system completely.

In summary, we are convinced that Esat Digifone can meet the employment and skill requirements vital for successful launch. I'd now like to hand you over to Barry once again who is going to be talking to you about how responsible a choice Esat Digifone is.

MR. BARRY MALONEY: I guess with any new business opportunity, every company has a set of responsibilities. Being a majority owned Irish company, we are particularly cognisant of that and we want to take a very firm position on what we believe the successful awarding of this bid to us will mean in

terms of what we will give back to the Irish economy and the Irish infrastructure.

So what are the things we believe would make us a responsible choice? I think the first thing is we have a robust Business Plan. We haven't gone outlandish in terms of what we believe the penetration rates are going to move to. We based them on Telenor's experience. We based them on independent sizings of second operators coming into the markets. We have based them on a realistic market penetration going from four and a half percent up to 23.6 percent by the year 2005. Remember, Telenor are already at 23 percent in Norway.

Second one is market share:

Our market share progression is to move from 9 percent up to 47 percent. Typically in other markets when the second person has come into the market, 60 to 40 percent is typically what you see. And in our business case we have targeted 47 percent market share.

Third area is number of subscribers moving from 14,000 rapidly upwards to 411,000 as we get the product to market and as users take to the technology and growth.

The average monthly bill, assuming our plan, goes down from €48 down to €26 by the year 2005. Now obviously one of the key reasons driving that is the shift from the number of business users to the individual and

personal user tariffs but that's what will happen and is the assumption here in our Business Plan.

What we did in terms of checking sensitivity is that the number of users is clearly the most sensitive point in the Business Plan and experience with Telenor has shown that if that happens typically you tend to need for cash to support driving your business and as Arve said in his introduction, if we need more cash, we can get ready access to it depending on how quickly the users take off so we believe our Business Plan is robust.

The area of jobs, we know, is very important and it's very important to us too. However, we don't want to make claims that we not backup and give sound thinking behind. We believe our project will generate approximately 1,700 jobs in terms of direct and indirect. Of those, 580 are Esat Digifone jobs. The quality of those jobs is very high. To give you an idea of average salary assumed in here is about $\text{€}26,000$ because the technical and sales and marketing expertise and finance staff we are looking for.

We are also very cognisant of the needs to spread the jobs regionally so our plan includes 303 in Limerick and 235 in Dublin and the rest scattered around the country between Galway, Cork, Sligo, Waterford and Killarney, depending on how the business develops.

Skills transfer is also very important between Telenor

to us and us into the local market place.

Responsibility to the customer is fundamental to us.

Through our quality and availability in our roll-out plan we believe we are going to give the customer a better service than he is used to today.

We also believe our approach to the products is more innovative than what they have been used to. That the pricing structure that we have at the moment is approximately 20 to 25 percent cheaper than what they are currently paying so they are going to get value for money with the Esat Digifone bid.

Sharing the economic advantages is also very important to us. We have agreed funding with both universities down in Limerick and in Dublin for us to fund research in terms of GSM activities. Our RND expenditure is $\text{€}1/232$ million. This isn't research and development for our own products. In our Business Plan we have taken 2 percent of revenue which equates to $\text{€}1/232$ million that we will put into companies who want to develop added value services on GSM technology that we will fund.

The state will receive over 405 million through the various taxes, fees and charges this business will generate. Telecom Eireann will gain an incremental revenue stream of up to $\text{€}1/2267$ million.

Commitment to the environment is something we are specifically very conscious of and we are very fortunate with the partner we have. Many of you will

know that the Nordic countries in Scandinavia in particular have always been very careful with the environment and with Telenor's experience and reputation we are very confident in this area. We have been very careful with our site selection. Some of you will know that before Telenor came into the this consortium with us we had already started evaluating and selecting some sites. Let me tell you since we have been out to see them we have changed some, based on their experience of the impact on the environment, so we are going to be a very responsible choice in this key issue.

We have incorporated the views of the community. We haven't taken any easy short-cuts here. We have gone down, we have talked to the people. We have talked to people who are concerned about what we were doing. We have turned up for the discussions with the concerned individuals, represented our views and where possible, we have adjusted to take into consideration the views the local community in developing our sites.

We are also doing whatever we can to make sure that they blend with the local environment. You will see on this graphic here, for example, how the antenna would fit into a forestry type environment and we have already discussions with Coillte as to how this could work.

Health and Safety Risks.

Telenor have been a member of the TC1/11 of SENELEC for over 10 years so they know and have a lot of experience in all there is to know about this vital issue.

We believe we will be a responsible corporate citizen.

We have started to work with the regulator with Esat.

We will continue to work with them developing the market in tune with the regulator's requirements.

That will be our commitment as a responsible corporate citizen.

A lot of us on the Irish management team here are avid sports fans and we used to participate till we got too old so we will be making sure that we fund sports, art and culture in terms of helping to get our message out. We just haven't chosen it whether it will be Gaelic football or horse racing or soccer but that debate is going on within the team so we are taking very responsible steps, as an Irish based company, that we need to do is as part of getting our message out.

With that I'd like it hand over to Denis O'Brien, our Chairman who will take you through the concluding part of our presentation.

MR. DENIS O'BRIEN: Good stuff, Barry, thank you.

So ladies and gentlemen, we are coming down the last furlong, as the fella said. I am sure you are all delighted. What we wanted to do was to see whether we

can meet the Minister's objectives and that's our overall goal. Plus the Department's objectives and their consultants, the assessors.

So one of the things that we think is very, very important is that Esat Digifone will be a popular choice for Ireland. We have a track record of success in Ireland. In other words, Esat Telecom has over 600 happy customers. We have never lost a customer. We have nil turn rate so we believe we will be a popular choice throughout the country.

We have the overwhelming support from Irish industry.

This book here contains just a smattering, it contains 500 letters of support; everybody from the Donegal Chamber of Commerce to the Cork Chamber of Commerce to the Irish Medical Organisation. So all of these people feel that Esat Telecom and Esat Digifone are the right choice for Ireland.

Now, I must stress we have no conflicts. There are no conflicts here representing Esat Digifone. We think this is very, very important. When we put together this consortium we decided that this is one of the most important things that we could do in putting a proper plan together. So we have no manufacturer, we have no sweetheart deal with any manufacturer. And this is important, because from Telenor's experience, from Arve's experience and from Jan Edvard's experience, you only go out to the market and buy the

best equipment at the best possible price. Technology is changing, so if you go in with one manufacturer, you won't be able to buy that new technology which will enhance your service to the consumer.

We see no role for manufacturers, and this is our public position. We see no roles for manufacturers in the GSM business. We also see no role for semi-state companies that already have problems of their own.

Four of them are in this race. We have decided to stay clear. And instead, we worked with Coillte who we found excellent to deal with because they wanted to provide services and I think this is in keeping with what the commission wants, the EU Commission wants, is that semi-state companies have lots of things in terms of services to provide but it is not core business for them. So we decided that we'd stay alone and go-it-alone. I think the added point there is that apart from all the hoop-la, none of these semi-state companies can give us the sites. You have to go out and build a no-hole radio plan. That's been proven already. So even if we had gone with one of the semi-state companies, I think we'd only get about 30 percent of the sites. So you'd have that long loop from February '94 all the way to February '96, you'd have to jump in on that bandwagon and start that process. So there are no short-cuts.

We have two operating partners. We have been

associated with a couple of other people in this race, but when we actually sat down with them, we found that they couldn't agree amongst themselves. When we sat down with Telenor, our own Irish experience, they felt, was very valuable. It was a complete 50/50 relationship. It was a joint venture and there was no quarrelling and there was no indecisiveness because we had one mobile partner of outstanding credentials and we had one local partner, Esat Telecom, that has knowledge of the Irish telecommunications market so you have a fantastic and effective marriage. So we have only two cooks in the kitchen.

None of Esat Digifone's shareholders, obviously not Esat Telecom anyway, have a joint venture with Telecom Eireann so we don't have that problem and it's a very straightforward thing in that role. We don't have a conflict.

The second thing is this: the first question that I asked Arve late last year is: "Arve, are you going for the strategic partnership with Telecom Eireann?" And thank God he said, "No." Otherwise we wouldn't be in business today. We think that you can't go and back a horse against another horse in this race.

So these are the things, as such, that we see is a completely distinguishing factor in Esat Digifone's proposal to bid for this licence.

Now, talk obviously is not going to cost us any money.

So we have decided to back it up with some guarantees.

We have put in place an $\text{€}18$ million guarantee to the Government. That's how confident we are to meet that nine month period going into launch and the lads mentioned that we have 138 sites already in planning permission and already contracts signed but we also have added another 17, so effectively we have all the Phase 1 sites plus we have 17 of Phase 2 so we think we will go way beyond that 80 percent requirement and I don't think anybody else can tell you this honestly here in this room.

The customer is very, very important. And if there is any billing errors, what we will give is a hundred free minutes to a customer. We have learnt from Esat Telecom that people like to examine their bills and have confidence in the service provider and if there are any mistakes, because it's all human, we will credit one hundred free minutes.

We also have put in place customer service that if there is a delay in our response as an organisation, they will also get a hundred free minutes. So those are just some of the features in terms of putting our commitment on the line and writing a cheque to you, because that is the equivalent of $\text{€}2.30$, everybody running into Paddy Power bookmakers this afternoon and betting against us getting into business nine months later. So that's how firm we are on this particular

issue.

So Esat Digifone is ready to go. We have an experienced management team in place. You have heard from them here this afternoon. It's done. We have a network already there and a site acquisition plan in place. And planning applications made. It's done.

We have recruitment in progress. All this stuff here on this table, all these applications, thank God I am not reading them anyway, but John has told you that we have 900 people showing an interest in coming to work for this company, so the recruitment is in progress.

It's done. The Business Plan is sound. No blue skies, no dreaming. It's a Business Plan that makes sense. And as Arve has mentioned, both Communicorp and the financial institutions are going to share in this investment and I think this is important, because it's the first time a utility will make available shares to financial institutions. There is a hell of a lot of money, pension money leaving this country and this is a way of tapping that vast resource. So we have two operating partners and financial institutions. So that's done.

The corporate and product branding - so important - is already in place and done.

The marketing and media plans have been developed and they are absolutely done. You have seen the amount of money we are committing to go into this market.

That's a savage amount of money in terms of launching any product in this country and never seen before. So those plans are done.

So finally, my very last point to you here this afternoon is, Esat Digifone is owned by two companies, plus institutions, but the two partners, Esat Telecom has an unrivalled knowledge in this market over the last four years. It's effectively worked with the regulator in opening up the market. And secondly, we have Telenor. And Telenor have one vital statistic which spells and describes everything: one in five people have a mobile phone up in Norway.

And finally, we are an Irish controlled company. And nobody can tell you that. Thank you, ladies and gentlemen.

CHAIRMAN: We'll stop there for today and continue with the rest of the tape at our lengthy sitting tomorrow which will commence at 10:00 a.m.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
WEDNESDAY, 22ND JANUARY 2003 AT 10:00AM.