

A P P E A R A N C E S

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I N D E X

WITNESS: EXAMINATION:Q. NO:

MARTIN BRENNAN

Mr. Healy

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THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY,

30TH JANUARY, 2003 AT 11AM:

CONTINUATION OF EXAMINATION OF MARTIN BRENNAN BY

MR. HEALY:

Q. MR. HEALY: Thanks, Mr. Brennan.

There is one other reference to the information provided to the Tribunal by Mr. Andersen in the course of private meetings that I should have mentioned yesterday. And again, I am not sure; you probably haven't had an opportunity to digest all of those things yet

A. I haven't looked at them.

Q. I am just going to draw your attention to one other passage. It's Attendance Number 3, paragraph 8.

Rather than delay while we try to locate the original,

I am going to read out the relevant portion.

It's as follows: "Financial capacity was scored as regards the first criteria, i.e. credibility of the business plan. And in the report, reference is made to the financial frailty of Communicorp and Sigma.

Michael Andersen felt it was important that these risks which had been identified should be

assessed sorry, I beg your pardon, Mr. Brennan, I may have referred you to the wrong attendance. I am looking at a note at the top of my copy of the extract when I should have referred to the one at the end.

It's Attendance Number 1, paragraph 11, and I'll let

you have that now.

(Document handed to witness.)

You can see it on the screen.

"Financial capacity of scored as regards the first criteria, i.e. credibility of the business plan. And in the report, reference was made to the financial frailty of Communicorp and Sigma. Michael Andersen felt it was important that these risks which had been identified should be assessed by the Minister. As far as Andersens are concerned, they put down a marker regarding both A5 and A3. Normally a Minister reading this would have wanted to speak directly to the consultants and would have asked what the consultants meant. Andersens were surprised that Michael Lowry did not request a meeting with them regarding the financial frailty of A5 and A3. Michael Andersen regarded the marker as a very significant reservation on his part."

I just should say one thing about that. Leaving aside the fact that there was no completed report available on the 25th, I think we agreed yesterday that it's unlikely that a Minister would read an entire document like that in any case, or even be expected to, and I suppose might have read the conclusions at the end, or if not, was probably entitled to rely on a briefing document. But the briefing document, as we describe, didn't contain the reference to the reservations;

isn't that right?

A. Yes.

Q. You don't know if the Minister or I am asking you, do you know if the Minister ever got a copy of the you know, the final pages of the report? I suppose that's the end of paragraph or Sections 5 and 6; am I right in that, the numbering?

A. I don't know the answer to that. Some of my colleagues think, and this will be further examined, that there may have been a faxed copy of the final report in the Department on the afternoon in question. But I can't verify that.

Q. I see.

I just want to refer to one other aspect of the steps taken in the period leading up to the Minister going to his colleagues and letting them have the recommendation. You will recall that I think you were asked about the speed with which the announcement was made, and you have already mentioned it in evidence.

And if I could just remind you of your response, at page 53 of your response to the Tribunal's questionnaire, Question 65, which was as follows:

"Your knowledge, direct or indirect, of or your involvement or the involvement of any other person in the decision made to accelerate the date on which the result of the evaluation was to be announced by the Minister".

You responded "I have a very clear recollection of a conversation with Michael Andersen to which Fintan Towey may also have been a party, but I do not know whether it took place in the context of the Project Group meeting of the 9th October or the 28th September meeting in Copenhagen. Michael Andersen was expressing a very firm view that in his experience there were a lot of downsides and no upside in delaying the announcement of the result once it was definitive. I seem to remember instancing political difficulty caused by delays in other jurisdictions. I certainly conveyed that view somewhere along the way to at least Mr. Loughrey and possibly, if not probably, to Mr. Lowry as well. I seem to remember Mr. Loughrey welcoming the idea that we could get the result out within the deadline originally foreseen before the intervention the European Commission. I was not conscious of any outside stimulant towards an early announcement. It should be remembered that the originally envisaged announcement date was no more than an informed estimate and left ample room for any political decision-making process required."

CHAIRMAN: I think you in substance re-stated a good deal of that before Christmas.

A. I think I did, yeah.

Q. MR. HEALY: In the memorandum furnished by Mr. Andersen, dated January 2002, which was read I think

the day before yesterday by the Registrar, Mr.

Andersen referred to the same period, and he said:

"The evaluation report's finalisation on the 25th

October 1995 led to the announcement of the winner by

the Minister the same evening. The decision of the

winner of the GSM II licence was made ahead of

schedule. However, the Minister chose to make the

decision public immediately upon making the decision.

AMI does not know the reason for the swift

announcement prior to the estimated time of 'end of

November'. Based upon AMI's experience it is,

however, in general, best to quickly announce the

decision of who the winner is once the Minister has

made the decision, in order to avoid unintended

leakage and speculation, c.f. that the decision is

often crucial to the involved applicants, of which

many are publicly listed companies".

I just want to clarify one thing about the proposition

that waiting or taking your time, if you like, about

announcing the decision could lead to the risk of

political pressure being applied. I can understand

that once the Minister announced the decision to his

Cabinet colleagues, or certainly perhaps to the entire

Cabinet as opposed to a subcommittee, it was then in

the political arena; but before the Minister did that,

there was presumably no fear on your part of a

leakage?

A. No particular fear, no.

Q. And inasmuch as you were working on a result where the top three in the ranking were more or less known for the bones of three weeks before the announcement was made, you presumably couldn't have had any fear, judging from what you have said in evidence or in your memorandum, of a leak or political pressure?

A. That's fair comment, yeah. Having said that, there was intense media speculation as to what the result might be. There is no doubt that journalists can suck information out of anyone.

Q. There was intense media speculation, but I think that was being met by the response that the decision would not be made until the end of November, a response I think which was given to the press in or about the week in which the decision was made; I can't remember the precise date.

A. I remember some reference to that being made here, yeah.

Q. Pardon?

A. I remember some reference to certainly more time being made here.

Q. I think we have information from Mr. Jennings that he informed the press sometime it would have been around the 23rd, 24th, I am not sure that as far as he was concerned, that as far as the Department were concerned, the decision would not be made until

November until the end of November?

A. I have no idea at this stage who he might have sourced that information from. The press people in the Department would very seldom speak without consulting somebody, but I have no idea who he might have consulted at that point.

Q. In the ordinary way, when matters go to Government for decision, whether to a subcommittee of the Cabinet or to the Cabinet, the programme managers tend to become involved, isn't that right, more particularly in a coalition Government?

A. Yeah, practice varies.

Q. Am I right in thinking that in that particular coalition Government there was a very strong convention of involving the programme managers in maybe all decisions but certainly in all major decisions?

A. There was certainly a group of programme managers who stayed in touch with everything, yeah.

Q. And the political figures in the Government at that time, apart from the Taoiseach on the Fine Gael side, were Mr. Spring, on the Labour side, Mr. De Rossa on the Democratic Left side. And as I understand it, in order to ensure and I think we may have discussed this before that Cabinet meetings were conducted smoothly, major issues were at least flagged beforehand and technical issues were got out of the



way beforehand as a result of meetings or at meetings of the programme managers?

A. I don't think you discussed that with me before, but it sounds right. It sounds right for lots of Government business.

Q. I see. Yes.

At the time that this decision was made, I think Mr. Greg Sparks was the programme manager for the Tanaiste, Mr. Spring.

A. There were a few people around the Tanaiste's inner Cabinet. I am not sure what the relative positions were, but certainly he was one, and Fergus Finlay was another, and I think Willie Scally might have been the third. And I am not sure, it could well be that Greg Sparks was the one who led, but I am not sure of that.

Q. I think you are right in that. Whether they or he would all agree with the word, with the "expression the one who led", but I think he saw his role as coordinating the role of programme managers in Labour in the delivery of agreed Labour Party policy?

A. Yeah, okay.

Q. In his memorandum, he stated it's in Book 38, Leaf 11A.

(Document handed to witness.)

He was asked for an account of his role and functions, and he said: "I was appointed programme manager to Dick Spring, Tanaiste, on the formation of the Fianna

Fail/Labour Government and continued in that role during the period of the Rainbow Government between Fine Gael/Democratic Left/Labour.

"My role as programme manager to the Tanaiste was to ensure the delivery of the programmes for Government.

As I was attached to the Tanaiste's office, I had no line responsibility but coordinated the Labour programme managers and advisers in the delivery of agreed policy."

Then Mr. Sparks was asked for details of the manner in which the various programme managers operated and their involvement in or input to matters which went to Cabinet or to Cabinet subcommittees.

His response was "In the course of my work I would receive the Cabinet papers on the Friday before the scheduled Cabinet meeting the following Tuesday.

Having read the papers, I would meet the other Labour programme managers and advisers each Monday to ascertain whether the Labour Ministers and Ministers for State were happy with the recommendations for Cabinet. Any comments and observations were noted.

"Early on Tuesday morning, the Labour Ministers would meet with the Tanaiste. I would attend, along with the other advisers to the Tanaiste, to discuss the Cabinet agenda for later that day. A general discussion would take place, and I would inform the meeting of the comments from the previous day's

discussions. The Ministers would then decide the best course of action for the Cabinet.

"There were times that the Cabinet would refer issues to the programme managers. In such circumstances, it was the duty of the programme managers to resolve the technical aspects of public policy. This would be completed through in-depth discussion and negotiation. At times these discussions would involve personnel from their departments. It was the intention, as far as possible, to resolve the issues to the net political point for the Ministers to make the final decisions."

Would you agree with that as an overall description of the role of programme managers and Mr. Sparks' role, so far as you were aware of it at the time?

A. I wouldn't be closely aware of how the system worked at that level. My feeling is that most of the interactions between the Department and programme managers would have been conducted either through Colin McCrea, who was our own Minister's programme manager, or probably some contact over some issues, I can't say this issue or other issues, between Mr. Loughrey and Mr. Sparks. But that's an intuition I have rather than a recollection.

Q. Once this decision was reached in the Department on the 25th, the Department and the Minister took the advantage or took the opportunity to bring it to the

Cabinet subcommittee right away, without any prior delivery of papers; isn't that right?

A. I think that's correct, yeah.

Q. And at that meeting the Cabinet subcommittee were presumably informed by the Minister of what he was aware of the evaluation, and then it was agreed that the decision could be announced and that formally the matter would be put before Cabinet the next day, but effectively on a rubber-stamping basis?

A. I can't say for sure that those things happened. It could be there is a slight possibility that all of the business was done between the Minister and other Ministers by phone; I just don't know. But I mean, I will take whatever evidence is there as to whether the meeting took place.

Q. From the evidence that we have, there was certainly no offer round of papers. There was no circulation of any papers, no circulation of anything in the nature of a briefing note.

A. I think that's probably true.

Q. Mr. Jimmy McMeel obviously would have had an advantage in advising his Minister because his Minister because he had been involved in the process and therefore had, I suppose, an insight that other Ministers his Minister would therefore have an insight or be entitled to rely on an insight other Ministers wouldn't have available to them?

A. Okay.

Q. But this was nevertheless a fairly major Government decision, and was always seen to be so from right back in 1993. I think, to put it into some perspective, I gather that I don't know if you were involved in the third banking force; was your Department involved in that?

A. I don't even know what it's about at this moment.

Q. I think that some of the other major decisions, like the removal of rates, which is obviously a political decision, I suppose, of major consequences, and a number of other big decisions took many, many, many hours of negotiation or at least discussion or debate between programme managers, and that in general, debates between programme managers on major issues did take some time because the programme managers would have access to an amount of paperwork to enable them to advise their respective Ministers. Were you familiar with any of that process?

A. I have no insights into that at all.

Q. Mr. Sparks was asked a series of questions, Questions 3 to 9 in the questionnaire provided to him by the Tribunal. I am not going to go through all the questions unless you want me to, but I am going to give you his composite answer, and I think his answer will give you some indication of what the questions were.

The answer is on page 4 and is as follows:

"I will take all the questions listed here together.

Understanding the context in which the decisions were being made is important. The telecommunications industry was going through a period of massive investment due to technical breakthroughs and liberation (sic) of the European markets". That probably should read "liberalisation of the European markets through pressure from the EU Commission. These pressures were particularly acute within the mobile telephony area.

"The Government responded to these pressures through announcing a competition for the award of a single licence. This would have been in accordance with procedures adopted in other countries within the EU.

Due to the potential profits in the sector, there were discussions between the Departments of Finance and Transport, Energy and Communications regarding the possibility of fees being paid by the new operator.

The Department of Transport, Energy and Communications wished to develop the market as quickly and as efficiently as possible. They were of the view that any licence fee charged would be passed on to the consumers and might delay the timing of the capital investment required to fully develop the market. The Department of Finance wished to maximise the return to the Exchequer.

"On agreement to an open competitive process by Government on the 2nd March 1995 there would have been no further involvement in the tender process by the Tanaiste's office until a final decision was made.

"As I understand it, the decision of the subcommittee was made in an informal meeting. The party leaders were meeting in the Taoiseach's Office with the Minister for Finance when Mr. Lowry rang the Taoiseach to tell him that the Andersen recommendation had been received. As I understand it, the Minister was invited to the Tanaiste's office where the report and its recommendation were discussed. A decision to accept the Andersen recommendation was made.

"Sometime following that meeting, I met with the Tanaiste, who told me of the decision. I expressed surprise. I explained to the Tanaiste that the licence would, in my opinion, allow the recipient access to super profits. I understood that Esat Digifone at that time was not financially strong. I acknowledged that with the licence, it would have no problem raising the capital, but I would have thought that its current financial status was relevant. I went on to say that I also had heard rumours that Mr. Dermot Desmond was a shareholder and queried had his involvement been considered in the light of the Johnson Mooney and O'Brien report that had been issued earlier by Ruairi Quinn while Minister For Enterprise

and Employment. The Tanaiste was not aware of these points. However, in his opinion, the Andersen report had given a clear recommendation, and that recommendation had been accepted."

Mr. Andersen says that it was his view the way in which the report was couched would lead the Minister to require his response to queries, if you like, concerning the reservations he had expressed. Have you any comment to make on that view he has given to the Tribunal?

A. It's difficult to comment without the documents.

Having said that, the conclusion in the report was that there were things that should be looked out for or dealt with in the licence negotiations. I am not so sure what value can be placed on this kind of interaction between the Tribunal and Mr. Andersen in a number of senses.

What am I trying to say? I am a bit confused in my thinking at the moment

Q. I am not asking you comment completely on everything Mr. Andersen said. I am drawing it to your attention in the light of what Mr. Sparks says. It's clear from what Mr. Sparks says that if he had been provided with a copy either of the aide-memoire or sorry, the briefing note or certainly of the main final conclusions of the report, some of the ideas he had would have found an echo in some of the reservations



expressed by Mr. Andersen?

A. Yeah, but that's a conversation that seems to have taken place after the fact. And I think I said

Q. But he had no information, is my point. He didn't have the information he would normally have where large Government or major Government decisions were concerned, and he would expect to have been provided with relevant or circulated with relevant, you know, briefing papers?

A. Well, I actually think that if relevant briefing papers were put around in the normal course in a matter like this, it would have been impossible to protect the confidentiality of what was going on. Whether that's relevant or not, I don't know. But I think I said in evidence before Christmas that we did not engage consultants, at significant expense, to advise us in coded language. I always took the words to mean what the words meant, and I stand by that.

Q. Mm-hmm. Can I clarify one aspect of the final work that was done on the report in the period between the 19th September and the 25th October. From the report, we know that Mr. Andersen and the Department emphasise that the report or the evaluation is based on the eight criteria identified by the Government in paragraph 19?

A. Yeah.

Q. The report also emphasizes that weightings were

attached to these criteria?

A. Mm-hmm.

Q. It goes on to say that these criteria were broken down into indicators. I am not going to refer to the intervening classes because it always confuses me. We know that there was a set of baseline indicators which were weighted as well; isn't that right?

A. Yeah.

Q. And if you add up any number of indicators within any particular category of criterion, you can get the weighting that's applied to the intermediate aspect or dimension to which they relate.

A. Mm-hmm.

Q. And the report emphasizes that all of this work of applying a weighting to the main criteria and the subindicators was done before any application was received?

A. Yeah.

Q. With a view to emphasising that this was not done after the applications were received, when there might be an opportunity to or you might be open to criticism, and suggestions could be made that you framed the weighting to suit one particular application or another.

A. Mmm.

Q. In the course of the application, judging from the report and from Mr. Andersen's memorandum, and I think

from what you have been saying, the impression was formed that the quantitative analysis was not working out as had been originally envisaged?

A. Mm-hmm.

Q. Various figures have been given as to why it wasn't working out. Mr. Andersen says that I think you said 50% of the indicators; Mr. Andersen said that most of the indicators couldn't be weighted, I beg your pardon, couldn't be comparatively evaluated?

A. I don't remember me putting a figure of 50% on it. I think I was if I said that at all, it was drawing from the Opening Statement; but that is the idea, yeah.

Q. In fact the number of criteria or indicators that couldn't be weighted was not that large; if you take the licence payment out of it, I think it was only less than a third. But be that as it may, the impression was formed that you couldn't efficiently and fairly carry out a comparative evaluation on a quantitative basis; isn't that right?

A. Yeah. I'd say solely on a quantitative basis. A lot of the quantitative information fed its way to the qualitative evaluation.

Q. I just want to be clear about that. You never envisaged a solely quantitative evaluation?

A. Absolutely not. But what I am saying is the reverse of that, that the qualitative evaluation clearly had

to and did take account of a lot of quantitative information that was comparable.

Q. Of course. But the original plan as set out in the evaluation model was that you would have a quantitative evaluation and you would conduct a qualitative evaluation?

A. Yeah.

Q. And I think, although I am not sure it's contained in these express terms, I think it's implicit that the ultimate result would be the result of the qualitative evaluation?

A. Yeah, I think that's true.

Q. Although it's made clear in the evaluation report that the quantitative evaluation will be put at the end of the report?

A. Yeah.

Q. It is not contained there. That is stated in the evaluation model in Appendix 2. All of those weightings to which attention is drawn by Mr. Andersen in the report and by the whole evaluation team in the report, and which were fixed prior to the applications coming in, applied only to the indicators decided on with reference to the quantitative evaluation; isn't that right?

A. I don't know whether I could support that without further research, to be honest.

Q. Well, I think that if you look at the evaluation

report, you will see nowhere is there any indication that the qualitative evaluation, where the number of indicators I think expanded to 56, was based on any set of agreed weightings fixed before the applications came in.

A. You are getting into a level of detail I am uncomfortable without some research, to be honest.

Q. All right. I want to come back to you on it. I am not criticising that, by the way. I can see why there might be no other way of doing it, but I'd like to you look into it because so that you will understand what I am trying to find out. The report does not make it clear that the weightings of the qualitative evaluation, which ultimately became not the primary but effectively the only evaluation, was based on weightings which were developed as you went along, and as far as I can judge, correct me if I am wrong, some of them were in fact only worked up in Copenhagen on the 28th/29th September?

A. I don't believe we developed weightings as we went along.

Q. I see. You think they were all fixed in advance?

A. No. I think that we may have broken down weightings into subweightings because it was necessary to do so. But again, it's at a level of detail that would require some research.

Q. That's the question I am asking. It's the

sub-weightings, the weightings of the indicators that I am saying were developed as you went along. Whereas what the report says is that on the quantitative side of the evaluation, all of the indicators were fixed in advance. And this is described as a strength of the report or a strength of the evaluation. So if you could look into the point for me, it would be of assistance.

A. Okay.

CHAIRMAN: Just on the earlier and more tangible point, when you referred to coded language on the part of Andersens, what you are really saying to the Tribunal is that if the consultants had been substantially unhappy with a final result being decided upon without explicit reference to any questions of financial weakness, it was incumbent on Andersens to say so there and then, on the 25th, rather than in later meetings or deliberations.

A. Certainly rather than seven years later.

CHAIRMAN: Yes, and had they, in the course of the faxed exchanges, even of the hurried activities of that day, expressed dissatisfaction, I take it whatever pressures to expedite matters, you would have had to take this on board.

A. As I said yesterday, if I had clear communication from Andersen that any reservations about the quality of the result or the quality of the report that would

need further examination, I could not have and would not have ignored it. And I am also struck by, in a document which I referred to previously called the "evaluation of the evaluation", which I believe was done in February of 1996, at that stage, the same consultants said that they were quite satisfied, I believe, that if any other consultant was given the same application and the same criteria they would come to the same result.

Q. MR. HEALY: Having said all of that, which is absolutely correct, Mr. Andersen has now said something else.

A. That's what I am trying to struggle with up here.

Q. If Mr. Andersen had wanted to do more work, one assumes that he had been looking for more money?

A. Absolutely, that's correct, yeah.

Q. Had you ever made it clear to him that once you had agreed the fixed fee, there would be no more money?

A. I think, when we had a difference of opinion about the scope for the working fees earlier, he certainly was entitled to take negative conclusions about coming back for more money. But having said that, here was a consultant presenting himself as being a member of various regulatory bodies for quality assurance purposes, etc. If he had come to me with clear communication about work that critically needed to be done, I could not have ignored it.

Q. Is there some sort of pattern between the way Mr. Andersen has now expressed negative views about the evaluation and the way in which he expressed negative views about the work he had to do after you hired him, compared with the somewhat more positive views he gave you in his tender?

A. I don't know what you are asking me to say, to comment on the quality of the consultancy. That would be very unfair, for me to comment on the quality of consultancy in that sort of way.

Q. Were there tensions between the Department and Mr. Andersen?

A. There were certainly tensions during the week in which we had a contractual row, but my view is as soon as we solved that problem, there were no longer any tensions. I thought we worked well as a team.

Q. Before going on to look at a section of the documents in Book 43, I want to refer to one or two of the documents in what have been called the participants book. And the first document is in Book 48, Divider 74. I'll get you a copy of it so that you won't have to be juggling with the books.

The first document I want you to look at, these are two attendances of Matheson Ormsby Prentice Solicitors, who by this time were the solicitors for Telenor and had just become Telenor's solicitors. The two attendances are each of the attendances is



dated 10th October of 1995. I don't know which one is the earlier.

In the first attendance which is the one with the number 002426 on the top of it; have you got that one?

A. Yeah.

Q. Divider 73. I'll take you through it quickly just to put it in context, but I am only interested in one passage.

"Telenor Invest AS.

Shareholders agreement,

IIU Dermot Desmond.

"37.5, 37.5, Telenor and Communicorp. 25 IIU [arrow]

to partner shareholders agreement.

"IIU have written letter to the Department.

Joint venture.

In-house lawyer William Fry."

Underneath that, "Gerard Halpenny". Then arrow.

Underneath that, "98FM Denis O'Brien", and then a link up to Communicorp.

Underneath that, "Complete agreements [arrow] award of

licence [arrow] choose one for long term co-operation

[arrow] Communicorp arrow finalise within two weeks

Minister's decision within 2/3 weeks his

recommendation.

"Roof on bid is 15 million [arrow] ceiling so that

Telecom Eireann have to have that for first licence.

Business plan [arrow]".

The part of the document I want to draw your attention to is the note at the bottom of the first page which says "Minister's decision within 2/3 weeks."

If you go on to the next document, which is another attendance of Matheson Ormsby Prentice's, begins off it's an attendance of Mr. Arthur Moran. It begins "Per Simonsen" I can't read the next portion.

Underneath that, "Esat Digifone Limited.

Bid to Department in writing and verbal proposal Communicorp."

On the right-hand side:

"Michael Walsh

Dermot Desmond

International Investment and Underwriters will underwrite the Irish part of the bid.

"Political contacts.

"Motorola less jobs."

Then the next line:

"Shareholders agreement Telenor drafted: William Fry (Gerry Halpenny)

1. Communicorp 37.5 percent.
2. Telenor 37.5%
3. IIU new party 25% and underwrite Communicorp i.e. a dual role."

There is an asterisk after "Communicorp", and that probably refers to the top right-hand reference to Mr.

Walsh and Mr. Desmond.

"IIU letter to the Department and understanding between Telenor and IIU.

"Complete and negotiate agreements: On award of contract you would talk to 3 firms of lawyers.

"Schedule finalise agreement within 2 weeks.

"Decision end November 1995 in fact decision 2/3 weeks.

"Andersen Consulting Denmark

EU procurement rules observe.

"15 million ceiling.

"Fax Tuesday."

And I can't read the bottom of the document.

If you recall that the 10th October was one day after the meeting that you had with the Project Group on the 9th October, at that point you had the first draft version of the final report. I think you had a schedule as well, am I right, of how you planned to complete the work, and I think that you were aiming to get your work completed in or about the end of October; is that right?

A. Yeah, I think Andersens had a schedule for having the final report around the time they actually had it.

Q. And the Minister had indicated to you or conveyed to you that he wanted the process accelerated sometime prior to that meeting, and you noted that at the meeting.

If this attendance correctly notes what Mr. Simonsen said, Mr. Simonsen had very accurate information about what was actually happening, hadn't he?

A. That appears to be the case.

Q. In that he knew that the November deadline was one that could be ignored and that a two- to three-week deadline was the more likely one?

A. Yeah.

Q. In two weeks in fact he was more or less spot on, 24th October. And what that means is that if Mr. Simonsen got that information, it must have come out of the process, if I can put it as broadly as that?

A. Yeah.

Q. I take it that from what you have said, you didn't speak to Mr. Simonsen?

A. No.

Q. Had you ever met Mr. Simonsen by this time?

A. Was he at the presentation?

Q. He may have been, and I don't mean a meeting like that. I mean had you ever met him or met any Telenor people independently of the presentation?

A. I think I said before, we met them on an aeroplane the day after the presentation, but that's all.

Q. Yes.

After your meeting of the Project Group on the 9th October when you conveyed to the Project Group the Minister's views and then you had a fairly lengthy

discussion, to judge from the verbatim note of what was contained in the 3rd October version of the evaluation report, do you recall reporting back to the Minister?

A. I have no such recall, no.

Q. He asked you to he indicated to you he wanted the process speeded up. Can you recall whether you would have indicated to him, or to Mr. Fitzgerald for onward transmission to him, what sort of time-frame you had in mind?

A. I can't recall either, but it's quite possible that I might have reported to Mr. Fitzgerald, because clearly he was my boss and I was keeping him in the loop. I just don't have a specific recall about this.

Q. Do you remember that you had a discussion with the Minister in which you are recorded as having explained the shape of the evaluation?

A. We talked about that yesterday or the day before, yeah.

Q. Would that be the kind of expression that would embrace a discussion with the Minister in which you might have indicated where you were going or where you felt you might be going?

A. I don't really know. I mean...

Q. Could I put it this way: Would you have any reason in keeping the Minister informed, leaving aside details about the contents of the evaluation, would you have

any reason not to tell him what time-frame you had in mind?

A. I wouldn't rule out that I could have told him; I'll put it like that.

Q. If you were going to keep the Minister involved, and if you weren't going to involve him or countenance any involvement in what I call the substance of the work, I suppose it wouldn't be unreasonable to give some idea of the time-frame?

A. No, I could easily have said, but I can't say that I did or didn't, but I could easily have said, we might now have a report on time on the 25th October or whatever.

Q. I now want to refer you to a portion of Mr. Mark FitzGerald's statement, and while we are getting the statement up, I'll just put it in context for you. If you recall the Opening Statement, reference is made to a conversation Mr. Mark FitzGerald had with the Minister on the 16th October 1995. It's Book 50, Divider 6A.

(Document handed to witness.)

Sorry, it's Book 46A Book 40, stop 6A.

Mr. FitzGerald told the Tribunal that he was a member of the organising committee for a Fine Gael Golf Classic which was held at the K-Club on the 16th October 1995. I am not going to go into all of his statement, but in his statement he refers to a

conversation he had with Mr. Lowry. And if you go to paragraph 6 on the second page of his statement, you'll see where he says:

"I received a further telephone call from Mr. O'Brien around the middle of October 1995. My recollection is that this was after the Golf Classic, which was held on Monday, 16 October 1995, but it must have been before the end of that week because during much of the following week I was in the UK. Mr. O'Brien asked me to meet with him for coffee at a restaurant close to my office. I assumed that this might relate to a business matter about which I had shortly before spoken to Mr. O'Brien. I was surprised when I arrived to find Mr. O'Brien sitting at a table with Mr. Phil Hogan and Mr. Jim Mitchell. As I sat down, Mr. O'Brien asked me if I had heard any news on the licence. Mr. O'Brien had never previously asked me anything about the licence. I told that I had bumped into Mr. Michael Lowry at the Golf Classic at the K-Club and that Mr. Lowry had said to me that Denis O'Brien had made a good impression on the Department, that he had good sites and good marketing. I may also have said that Mr. Lowry had said that there would anyway be a third licence because I recall that Mr. Lowry said this to me. I do not recall any other significant matter arising in that brief conversation with Mr. Lowry. I was annoyed with myself as having

passed on the comments made to me by Mr. Lowry even though they had been gratuitous and I believed them unimportant. I had understood that Andersen Consulting were responsible for evaluating the bids in the competition and, shortly after that coffee meeting, I checked with Colin McCrea and Sean Donlon (respectively Mr. Lowry's and the Taoiseach's programme managers) who confirmed that the award itself would be a decision for the Government rather than the Minister alone."

Now, I should say that both Mr. O'Brien and Mr. Hogan do not accept that this conversation took place, that the meeting took place in which this conversation was retailed by Mr. FitzGerald.

Mr. Lowry acknowledges that he did meet Mr. FitzGerald at the K-Club, but asserts that they had a general conversation and that this conversation was initiated by Mr. Mark FitzGerald. He said that Mr. FitzGerald had raised in a general way the issue of the competition, and he says that he provided Mr. FitzGerald with a minimal amount of noncommittal information which was effectively already in the public domain. He says that he mentioned that the Department were impressed with Mr. O'Brien's commitment to the process which was underlined in their public declaration that they had already identified numerous sites for masts and equipment.



"Secondly, I suggested that even if they were unsuccessful, there would be a subsequent opportunity to apply for the third GSM licence."

I don't know what information was in the public domain in precise terms around that time, although one assumes that masts always make the news in any case, and issues like that. But from the evaluation report, it is clear that the evaluators were impressed with the approach taken by Esat Digifone to planning and the location and acquisition of sites for masts; isn't that right?

A. In a general way, yes, but I don't think it was something being specifically marked or anything.

Q. I think it was mentioned

A. It probably was, yeah.

Q. in express terms in the report?

A. It certainly was in Andersen's report, yeah. Well, sorry; Mr. Coughlan, you are distracting me a little no, what I am trying to say is that in one or other of the supplementary parts of the report, there is some kind of text along that, which I don't remember looking at critically.

Q. If what Mr. FitzGerald says is correct, it would suggest that Mr. Lowry if what Mr. FitzGerald says is correct, that Mr. O'Brien had made a good impression on the Department, that would suggest that he had had some discussions with somebody involved in

the process?

A. It's clear that if we accept what's in the report of the meeting of the 9th October, that the Minister knew that at that stage we were down to two, that differences among various people as to whether that was the rankings or whether it was that there were two, and clearly in that context, it would be relatively easy for him to know that the two were making a good impression, let's say.

Q. Yes. He went further to say, though, that, according to the account of Mr. FitzGerald, that Esat Digifone had good sites, which I suggest is a reference to the fact that the evaluators appear to have been impressed by their approach to planning.

A. Okay.

Q. And then he went further to say that they had good marketing and that that had also impressed the evaluators, which I think is something that is commented on in the report, isn't it?

A. If you are asking me have I specific recall of giving that much information to Mr. Lowry, I don't have specific recall of it.

Q. I am asking you whether, if Mr. Lowry was able to say that, you would agree with me that that must mean that he had access to fairly detailed information about the process.

A. I wouldn't say "fairly detailed". That's very general

information, in fact.

Q. Knowing that Esat Digifone had impressed the evaluators with their marketing?

A. In a general way, I wouldn't see that as particularly detailed information. But I mean

Q. You are not suggesting that anyone

A. I'll put it like this: I am not trying to engage in a semantic argument.

Q. You are not suggesting that anyone that you would have countenanced anyone on the evaluation team having discussions with the Minister or anyone else about whether they were impressed by somebody's sites, policy, or strategy, or whether they were impressed by somebody's marketing strategy?

A. What I am saying is I have no recollection of me doing that.

Q. I appreciate that. You knew about the process; you were involved in the process?

A. Yes.

Q. Is it reasonable to draw the inference that having that kind of information in your possession means that you must have had access to substantive to information about the substantive progress of the evaluation?

A. Again

Q. As opposed to, say, the timing of it or something like that?

A. Going back to the record of the meeting of the 9th October, the Minister was told something, and probably by me.

Q. Yes.

A. I don't believe that I discussed the details of the evaluation with the Minister then or at any time before it.

Q. If you didn't discuss them, and I am passing on from that, for the Minister to have that level of information involved or must have entailed that he had access I am not saying it was through you or anyone; I am not identifying anyone access to information which went beyond merely knowing what the time-frame was within which the competition was going to be finished?

A. Some degree of information. Where we differ is to its depth, its detail, its significance.

Q. I take it you'd agree with me that you wouldn't have countenanced the Minister or anyone else in breach of the protocol having discussions like that with people?

A. The Minister wasn't formally part of the protocol. The protocol was something I drew up to govern the relationship of the people within the team. Now I know, because it was said in the Opening Statement, that Mr. Loughrey said he brought it to the attention of the Minister, but I drew up the protocol myself to govern relationships of people surrounding me.

Q. But and I quite understand that civil servants can't control Ministers well, in general, anyway but you wouldn't countenance somebody disclosing any aspect of a confidential process which was supposed to lead to an adjudication as between a number of competitors to a third party or to one of those competitors?

A. I wouldn't think it's a good idea, no.

Q. In this case the Minister was the adjudicator, wasn't he, ultimately?

A. Yes.

Q. The recommendation was going to him?

A. Yes.

Q. And he was going to go to the Government with it, admittedly?

A. Yes. But legally the decision was his.

Q. Not only legally

A. With the consent of the Minister for Finance.

Q. The result of the work that you were doing was being brought to him, for the purpose of relaying to him to enable him to make that decision?

A. Yes.

Q. He was, in other words, the judge, if you like?

A. That's right. I think the idea was crystallising that once you had a consultants' report, that options around changing the result didn't really exist.

Q. Can I ask you to look at Book 43 now, please, Mr.

Brennan.

A. It may be of interest to comment that the reference to the third licence in this is very curious. I just don't understand why it comes where it does.

Q. Why do you say why is it curious to you? Because I also find it curious, but I'll tell you why in a minute.

A. It's almost if the Minister says "If you don't win this, there will be a consolation prize", which is not the mindset of somebody who already knew a definitive result. That's the only comment I'd make.

Q. And also at that stage weren't you putting a regulator in place?

A. Yes.

Q. So any more licences were going to be out of the Minister's hands?

A. The regulator wasn't ultimately in place until sometime in '97, I think.

Q. You were putting the regulator in place at that time?

A. We were certainly planning that way.

Q. Andersen Consulting had been involved in that, hadn't they?

A. Andersen Consulting did a brief report on the subject of regulation, which I didn't personally deal with, but I am aware of its existence.

Q. Am not I right in thinking

A. It didn't become a significant part of what was going

on in that part of the Department.

Q. Well, I wonder, is that correct, or can that be correct, Mr. Brennan, in that the whole point of liberalising the market, and one of the things that was going to be attractive to somebody coming in is that it was going to be taken out of the political domain and you were going to have a regulator?

A. Absolutely.

Q. You needed a regulator anyway. You didn't have to wait for a third licence; you needed a regulator for the two that you had?

A. Having an independent regulator was also critical to the value of any transaction involving Telecom Eireann, because regulatory certainty bears directly on valuations in that sort of sense. So we definitely were on track to have a regulator. The only point I am making is that the project for Andersens to be asked for an input into that agenda was conducted by somebody else, and my general recollection is that he wasn't particularly impressed with the input he got from Andersens and didn't make much use of it.

Q. I appreciate that. I mention that as a by-the-way to indicate that work on the regulator was in train at that time.

A. Yes.

Q. And the reason I am curious about the remark is that the Minister had to, or must have assumed at that

stage that the regulator would be taking over all these roles as quickly as possible, because Esat Digifone, the winner of the competition ultimately, were depending on a regulator. The EU had been told you were putting a regulator in place?

A. I think we said in the information memorandum that we would put a regulator in place.

Q. Yes. I don't want to detain you or delay too much on the first document unless you want to draw my attention to anything on it. It's a note of the incorporation of the A5 application into the final licence.

If you go on to the next document, which is a record of the 13th meeting of the GSM Project Group on the 23rd October, in which you had again virtually a full house with Mr. Andersen, either on I am sorry, I want to pass on from that document. We have referred to that document already. We don't need to delay on it.

I can't remember yesterday, Mr. Brennan, did we actually pass over the formal steps taken to obtain a decision from the Government. If you go to Leaf 145, you see that document, it's the aide-memoire for Government.

A. No, we didn't open that yesterday.

Q. This was prepared on the 26th October, or it may have been prepared prior to the 26th October, but it's



dated 26th October. And there is nothing of any significance to which I want to draw your attention apart from a reference in paragraph 5 on the second page, which says, in describing the process, "The evaluation was conducted about a project team led by the Department of Transport, Energy and Communications and incorporating representatives of the Department of Finance and independent advisers Andersen Management International. All applicants were treated equally both in relation to the provision of information before the closing date and afterwards in relation to clarification of aspects of the applications both in writing and in oral presentations. There is no question of any consortium having enjoyed any advantage in this respect."

Can I just ask you what prompted that last remark, which seems to be somewhat defensive, almost?

A. I have no idea.

Q. Were you involved in preparing this document?

A. I almost certainly had some hand in it.

Q. Can you understand why a remark like that would have been contained in an aide-memoire to Government without there having been any suggestion of advantage being enjoyed by any applicant?

A. I don't see the sentence having the same connotations as you do, quite honestly.

Q. It says "There is no question of any consortium having

enjoyed any advantage in this respect." I'd suggest that a remark like that is prompted by somebody having raised an issue or a question concerning an advantage enjoyed by one competitor over another.

A. I'd be more inclined to read it in the context of the sentence that goes before.

Q. Everybody was treated equally?

A. Yeah.

Q. The next document in Leaf 147 is a cover letter from Mr. Andersen to Fintan Towey and Maeve Nic Lochlainn enclosing the requested copies of the final report, in which Mr. Andersen says "Attached, please find the requested copies of the final report. As we have heard nothing from you after reviewing the faxed copy earlier this week, we take it that you agree on the way that we have worked it out."

And it seems to me that that would suggest that that was when you had a final copy about which there was no question in your possession.

A. But the reference to the faxed copy earlier in the week would seem to confirm something I mentioned earlier this morning.

Q. Yes. I appreciate that you might have had a faxed copy earlier in the week, but I don't think on the 25th you could have had a faxed copy by four o'clock, was my point.

A. As I said, I discussed that with a colleague yesterday

evening, and he thinks that we probably did.

Q. Well, we can come back to it, then.

The next document is the 12th meeting of the GSM group, on Monday, 9th October. It's Mr. McMahon's note on the document to which I have already drawn your attention in which he says that it's probably too late to change it, but that we did not subscribe to unanimity. He dates that, as you have pointed out, the 1st November; of course he didn't get the document itself

A. The most important words, I believe, are the words "At this meeting", which is referring to a meeting on the 9th October. I don't think anybody ever suggested that there was unanimity at that point.

Q. He did make that note after the process was over, however.

A. I know that.

Q. If he had agreed to the whole the final result, it seems odd to make that remark afterwards, doesn't it?

A. I don't know why he did it like that, but I mean, yesterday I said unequivocally my view is that there was unanimity. And you'll just have to wait for Mr. McMahon's evidence.

Q. Yes, we will.

The next document is a meeting of members of the Regulatory and Technology Division with Mr. Andersen in advance of preparing for dealing with Esat Digifone

with regard to the negotiation of the licence.

The next document is a minute of the initial meeting in the GSM licence discussions on the 9th November 1995, and again on this occasion, you had again a more or less full house from the Department. The Department of Finance have dropped out at this point?

A. Yeah.

Q. Mr. Andersen was represented, and he appears to have been present, I suspect, by fax or by conference phone. It's not clear. The word "Fax" is written next to his name again, but you think it might be by conference phone?

A. Or it could be just to fax him the report. I don't know.

Q. Then on the other side you had Mr. Denis O'Brien, chairperson of Esat Digifone; Mr. Richard O'Toole, formerly Chef de Cabinet for Peter Sutherland; Mr. Owen O'Connell, William Fry; Mr. Jarlath Burke, Regulatory Affairs, Esat Telecom; Mr. Hans Myre, Telenor technical expert; Mr. Knut Digerud, Telenor Invest; Mr. Ole Christian Skedsvig, Telenor; and Mr. Per Simonsen, GSM project coordinator on the Telenor side.

While Mr. Richard O'Toole is described as a former member of Mr. Sutherland's Cabinet, what was he doing at the meeting? What was his role at the meeting?

Can you remember?

A. I can't remember, but at that time I believe he was working with Denis O'Brien or consulting with him or something. I don't know. And I don't know why the reference to the Sutherland Cabinet is there either in the report.

Q. The meeting minutes begins as follows:

"Mr. Martin Brennan opened with a statement outlining the Department's position as formerly agreed at a departmental preparatory meeting. This position was clarified in a letter issued to Esat Digifone on the 13 November 1995. Copy attached for information.

"DTEC's legal representation was to be in place shortly.

"Mr. Denis O'Brien indicated that Esat Digifone was fully committed to fulfilling the promises in its application and was eager to complete the discussions this side of Christmas.

"Key points raised were:

technical discussions to be handled separately  
the impact of telecoms liberalisation as it developed in the EU/Ireland was discussed briefly  
it was noted that Esat Digifone had taken a no-reservation position regarding the draft licence at the presentation in September, but that Esat Digifone would now propose more specific recommendations for some of the more general terms in the draft licence.

"Mr. Michael Andersen outlined the elements of the Esat Digifone application which were to be included in the licence, based on the document prepared by AMI previously." That was the first document we looked at but passed over.

"Discussion of some length focused on the position of tariffs in the licence and the need for Esat Digifone to retain a certain amount of flexibility in this regard. It was agreed that the tariffs in the application were regarded as a ceiling, not a floor.

Mr. Iversen requested Esat Digifone to elaborate on the statement in their application which made a commitment to the tariff packages with certain provisos in relation to economic developments, etc.

"The meeting finished with a discussion on Esat Digifone's difficulties with planning permission and Denis O'Brien's proposal that the regulator intervene at this point. Martin Brennan said that DTEC would be as helpful as it could be at the appropriate time.

Michael Andersen later clarified that DTEC should come to a policy position on this.

"Martin Brennan and Denis O'Brien agreed in principle that the media should only be told that discussions were ongoing and that details of the matters being discussed should not be released to the public.

"It was agreed in principle that another meeting would be held within 10 days. DOB to contact Mr. Towey."

This was basically touching base with the Esat Digifone people to set up a process whereby you were going to negotiate the terms of the licence; would that be a fair way of the putting it?

A. That's fair comment.

Q. And one of the things that was obviously mentioned was that firstly you were putting down a marker; they had expressed a no-reservation position in relation to the licence at the negotiations. Now, in fact I think they sent you in an eight- or nine-page document subsequently expressing some reservations, but the other points that were made to them were that they would have to stick with what they had said in their licence application promises in relation to tariffs, although they clearly mention that they require some flexibility, but the flexibility they seem to be looking for was one that you'd welcome, was flexibility to go down rather than go up in price?

A. Yeah.

Q. There was a discussion on planning, on Esat Digifone's difficulty with planning permission and Mr. O'Brien's proposal that the regulator intervene at that point.

What was that about?

A. I guess he was telling beginning to tell us that planning was going to be an obstacle to roll-out. And it's clear from previous evidence that we had very strong views ourselves about facility-sharing and

about the disadvantages caused by the statutory advantage that Eircom had had, or Telecom Eireann had had for years, and so on. So I mean, it wasn't, I suppose, particularly germane to the licence negotiations, but not an unusual discussion to be commencing at that point.

Q. But wasn't one of the key points that Mr. O'Brien made in the course of his presentation, when we heard him here, that he was up and running in planning? He was way ahead of the posse, and he was going to he was going to be able to get his roll-out organised fairly quickly without planning difficulties?

A. I mean, what's the point you are making in relation to that?

Q. At the very first meeting, he is telling that you he wants the regulator to intervene. What's the regulator got to do with planning? That's not a matter for the Department of Transport, Energy and Communications.

A. I can't recall on my feet now what was the state of his planning in his application or in his presentation, but it could be that he had lots of planning applications made and had no results, and he was now beginning to find that public opposition to masts and various things was becoming a problem, and would have been a problem for anybody at that stage.

Q. "Mr. Andersen outlined the elements of the Esat



Digifone application which were included in the licence based on a document prepared by AMI." That was a document I mentioned to you in Leaf 131, as I understand it. It's the first document in the book.

A. Yeah, okay.

Q. Do you see that document? Do you recall Mr. Andersen going through that document?

A. Going through it at the meeting with Esat Digifone?

Q. Yes, well, judging from the notes, it says "Mr. Andersen outlined the elements of the Esat Digifone application which were included in the licence based on the document prepared by AMI previously."

And the document I have referred you to is headed "Note on the incorporation of information from the A5 application into the final licence." That seems to be an analysis by Mr. Andersen of the A5 application and an indication as to how the elements of the application would be incorporated in the licence. Can you remember a discussion of that?

A. I'd say it was, certainly, the meeting report shows that it was discussed. I can't recall at what level of detail.

Q. If you look at the second page of the document, it refers to the licensee; do you see that?

A. Yeah.

Q. And there is a proposed description of the licensee as Esat Digifone sorry, as Esat Digifone, and then the

composition of Esat Digifone as being Communicorp and Telenor Invest. And then it goes on to refer to 20% of the capital being available for third-party investors on the award of the licence, and it also describes the involvement of Advent and its commitment to fund up to IR£1230 million in support of Communicorp's 40% shareholding.

A. Mm-hmm.

Q. And can you recall if that was discussed?

A. I don't recall the level of detail that was discussed.

What I would say is, if it was discussed and there was change or contradiction mentioned, it would be recorded in the report.

Q. So that nobody alerted to you the fact that these figures couldn't be relied on any more?

A. No.

Q. And Mr. O'Brien didn't volunteer that Advent were not in fact going to be in the picture and that it wasn't a 50:50 or a 40:40:20 consortium?

A. I'd be fairly certain if that was said, it would be recorded.

Q. And nobody from Telenor said that to you either?

A. I don't believe

Q. Again, it would have been recorded

A. I don't believe they did. And I notice the next document is a manuscript by Mr. McMahon, and he certainly would have recorded it too, you know.

Q. Yes. If you go to Mr. McMahon's manuscript, the second page, the first entry, to judge by the left-hand margin, is contributed by Mr. McMahon. It says "Me"; do you see that?

A. Mm-hmm.

Q. The next entry is "MA", Michael Andersen, and it says:

"Stresses need for 40% minimum equity in Esat Digifone". That seems to be a reference to 40:60, I suppose, debt/equity ratio.

"Notes negative work of Communicorp.

Notes promises by Esat.

"Michael Andersen goes through his document note on incorporation of A5 promises/into the licence.

Mr. O'Brien says "We'll do what we said we'll do. We won't weasel out." And nobody seems to have taken the opportunity to refer to changes that had occurred.

A. I think if they had been referred to, whatever about the report of the meeting, Mr. McMahon would certainly have recorded it.

Q. The next document, in Leaf 154, I don't think need detain us. It was simply involving the Chief State Solicitors Office in the anticipated legal issues arising on the licence.

The next document is a letter from you to Mr. Denis O'Brien on the 13th November 1995.

A. Mm-hmm. I notice that there is references in that letter, in the second page, to "At yesterday's

meeting". I feel that was the meeting the previous

Thursday, and just the letter didn't get signed

Q. You may have drafted it, and it wasn't signed or typed up until the 13th?

A. I may not have drafted it at all. It may have been drafted by somebody else and I may have signed it.

Q. I understand.

A. What I am saying is I don't believe there was a second meeting.

Q. I had never understood there to be a second meeting.

I had assumed the letter was drafted or typed in

November, or dictated by somebody referring to

"yesterday", but he didn't get the document until the

following day.

It says "Re discussions on GSM licence.

"Dear Denis.

"As promised in our meeting, I wish to convey formally

the Department's position in relation to discussions

on the award of the licence for GSM mobile

communications to Esat Digifone Limited. In this

context and in the paragraphs that follow the word

'licence' should be interpreted to mean all regulatory

requirements to be imposed on Esat Digifone by way of

statutory instrument, licence or other instrument.

"You are aware that the Government has pronounced that

the award of the GSM licence is subject to agreement

on appropriate terms. In the event that discussions

with Esat Digifone Limited fail to lead to a satisfactory conclusion, the Government has given a clear mandate to open discussions with another of the six applicants.

"I am therefore directed by the Minister to enter into exclusive dialogue with Esat Digifone on a bona fide basis with the intention of clarifying issues to facilitate speedy progress to formal licence award. I wish to make clear at the outset, however, that no liability shall attach to the Minister or his agents for any expenses incurred by or on behalf of Esat Digifone Limited based on any assumption made by Esat Digifone Limited regarding the award of the licence or any terms of the licence that might ultimately be awarded.

"The Minister's primary objective for these discussions is to ensure that the licence provides for all the ordinary terms and conditions that are incidental to a mobile service of this kind with particular regard to the requirements of the GSM competition documentation and the commitments contained therein. The Minister also intends that the commitment made by Esat Digifone Limited in its application should similarly be converted into binding conditions. We would welcome any views you may wish to offer verbally or in writing, but of course without any commitment. The Minister is the licensor and

retains sole responsibility for the drafting of the licence.

"As I explained yesterday, the GSM licence documentation will necessarily contain specific conditions with regard to your financing arrangements for this project and in relation to effective control of the future licensee with particular reference to possible decision-making structures, voting rights, etc. Matters relating to security interception must also be satisfactorily resolved. Further issues, some of which were explored by our consultant Mr. Michael Andersen at yesterday's meeting, will also be included in the licence.

"The draft licence which I now enclose is essentially the same in content as that contained in the memorandum of the 12 May 1995, while representing a simple reorganisation in format. Please note that this text has not yet been cleared by our legal advisers and must therefore be accepted in good faith subject to the caveat on the cover sheet. A list of the Ministerial orders, regulations and licences which will govern the operations of the second GSM licence is also attached. We will table a more complete draft in due course.

"Finally would I like to thank you and your team for the initial open exchange of views at yesterday's meeting and look forward to receiving your views on

the enclosed in the near future."

At least you thought it was an open exchange of views?

A. Yeah. I suspect this letter was drafted by a number of people. There is a legal hand somewhere in it.

Q. It certainly has a legal hand in it, yes.

A. And I suspect Mr. Towey was controlling it. I know because I have a note up here of where I was at different times. I know I was in Brussels around those days, so I wasn't intimately involved. And I explained a little of this before, and I'd like to explain it a little bit more now.

At around this time, and I don't know the exact date, my responsibilities in the Department were changed fairly significantly in the sense that I for the first time took over responsibility for the postal sector, and I shed a certain amount of my telecommunications responsibility to allow me space to focus on the presidency which was coming up in 1996. And as well as that, Mr. McMahon rightly asserted that as the Regulatory Division, that primary responsibility for the licence negotiations and for the issue of the licence was in his bailiwick.

So I have said this, I know, before, but it's important to say it again. As I did participate in some of the discussions, I did sign some of the letters, but it was in the context of some degree of continuity back to the process, a kind of a figurehead

role. And while I am quite happy to discuss my involvement in it or any bits of it, I just want to put that background on the record.

Q. Yes.

The second page of the document looks like the Department page; would that be fair?

A. Yes.

Q. I'll come back to the letter later on when I have dealt with a few other documents.

The next document is in fact the list of issues raised by Esat Digifone. I think there is about 24 of them, and they seem to relate to specific parts of the licence, the draft licence. Do you see that?

A. Yeah.

Q. Now, for a moment I want to more than a moment, I suppose I want to pass on to Book 49.

MR. HEALY: Unless you rise now, Sir, and we start earlier in Book 49. I don't mind starting on Book 49 now.

CHAIRMAN: No, it's probably more satisfactory that we actually start a little earlier and aim to be definitely going by five to two.

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: Have you got Book 39, Mr. Brennan?



In Book 43, the last book we were looking at, I brought us up as far as the period shortly after the commencement of the Department's new engagement with Esat Digifone as the exclusive negotiations for the licence commenced, and what I want to do now is to look at some of the activities occurring, if you like, on the other side by referring to some of the what we have called the participant documents.

A. Mm-hmm.

Q. The first document I want to mention is at Leaf 81. You will recall that I mentioned yesterday, and I think on an earlier occasion, that Advent were being edged out, if they hadn't indeed been edged out of the Esat Digifone consortium?

A. Yeah.

Q. The first letter I want to refer to you is dated 30th October 1995 from Baker McKenzie, solicitors for Advent, to Communicorp, for the attention of Denis O'Brien. I don't want to go through the letter in any real detail, but if you look at the third paragraph, it says:

"We now understand that the GSM licence has been issued to Digifone, and we therefore require your immediate confirmation that within seven days of that issue date Digifone will issue 5% of its shares to the Advent funds nominated by our client in accordance with clause 2.1" of what they are referring to as the

agreement of the 12th July.

If you jump forward for a moment to Leaf 85, you will see a response to that letter from Mr. Owen O'Connell, solicitor, of William Fry Solicitors, by letter of 7th November 1995, in which, again without going into the letter in any detail, Mr. O'Connell asserts that any rights that the Digifone had under that agreement had been terminated.

And in the last line of the letter, he says "And accordingly there will be no question of your clients participating as of right in any proposed funding of Esat Digifone."

The matter didn't end there, of course. That was effectively the two sides of that particular controversy joining issue, and it did ultimately resolve itself in some way, but as of that moment, Esat Digifone and Communicorp in particular were asserting that Advent had no right to any participation and that they had no right stemming from the time of and just shortly before the time that the application was launched with your Department in August of 1995.

Again without going to the document, just to fill you in, to let you know what is happening, that dispute was compromised in I think December under an agreement whereby Advent ceased to have any right of direct participation in Esat Digifone but acquired a

compensating right, I think, of some kind to participate to acquire some interest through Communicorp. But I won't go into the detail of it.

The next document I want to refer you to is Leaf 83 Leaf 82, I beg your pardon. This is another document from the Telenor file in Matheson Ormsby Prentice.

It's an attendance of Mr. Arthur Moran of the 31st October 1995.

It says:

"Per Simonsen.

"1. Your fax of today.

"2. Re ESB threatened action: Expressed the view that from my knowledge of the facts, there is not a good cause of action against the consortium, whatever about against Esat itself." That seems to be a reference to the company.

"It would of course be damaging if there were to be any comment in relation to IIU and the side letter although it is hard to see how it would become public".

Did you know of any side letter at that point, by the way, relating to IIU?

A. No.

Q. At that time, which was the 31st October, did you know of any involvement of IIU?

A. No.

Q. The next document is a fax to Mr. Owen O'Connell from

Mr. Peter O'Donoghue dated 3rd November 1995, and it's regarding a draft reply. Mr. O'Connell was being asked to prepare a letter to Baker McKenzie which I mentioned earlier.

It says "Further to our conversation this morning, I now attach some handwritten notes of my telephone conversation with Massimo Prelz on the 3rd August 1995.

"He accused me of trying to mislead Telenor and stated that 'you guys' (reference to Denis and I) "have a way of playing with words." This would go back to our original discussions on the terms of the IRi<sub>1/2</sub>3.2 million facility that was agreed in respect of the 5% of Esat Digifone. He stated that the word "committed" was misleading and that the fact that there was no offer as no terms were agreed." That is a reference to the offer to put up funding, 30 million funding for Communicorp's investment in Esat Digifone.

"I reminded him that he had put outline terms to Denis, and even though these were not acceptable to ourselves, they were in themselves terms. He stated he would not be signing any letter. Letters require the approval of the investment committee and no letter would be forthcoming.

"I will leave it to yourself, Owen, as to how much, if any of the above, you wish to incorporate into your reply to Baker McKenzie."

The next document is a letter is an attendance of Mr. O'Connell's in William Fry Solicitors of the 3rd November of 1995. The client is Esat, the matter is GSM. It's an attendance on Denis O'Brien, LB, which I assume to be Leslie Buckley; PC, which I think is Mr. Paul Connolly; and J. Callaghan, which I think is Mr. John Callaghan.

It starts off as follows:

"IIU issue: Bullet points for press release. Problem re material change in shareholders versus bid. Group of institutional and other investors to be located by underwriters, IIU. Had to upgrade financing arrangements.

"Primary criterion from comfort to underwriting.

"IIU willing to give underwriting commitment and did so. Clearly gave control of 20% to underwriter.

Understanding is that underwriters will be placing shares with investors including institutions.

Michael Walsh call?

Phoned

Financing option confidential at present: Will be revealed in due course when finalised"

Around this time it appears that a press release was issued by the winners of the consortium indicating that IIU had come on board as a broker or as I am not sure if the word "underwriting" was used; I don't think it was, because I have yet to obtain a copy of

the press release, but it's being tracked down. And this seems to be related to the explanation that would be given in connection with IIU's involvement?

A. I don't recall any media attention to that effect at that time, but I could be wrong.

Q. But you didn't you don't recall being informed at that stage, which was before the meeting of the 7th, you know, the first meeting the 9th, the first meeting post October 25?

A. I have no recall of that. I'd be surprised if it happened.

Q. And if it had happened, it's something that surely would have been noted, isn't it?

A. I think so, yeah.

Q. We can pass over the letter to Baker McKenzie now because we have already dealt with that.

Go on to the next document, in Leaf 86, which is another Matheson Ormsby Prentice attendance, this time of the 9th November 1995. It's headed "Telenor".

Underneath that,

"Knut Haga/Per Simonsen/Knut D."

There are a number of matters mentioned.

" votes when transfer notice issued or deemed issued."

The next item is "share subscriptions when? how funded?

"Breach what penalty applies."

Then I think there is a reference to that  
presumably is a hotel and a room number maybe  
Davenport 126?

A. There is a hotel of that name near our offices.

Q. The next line is "Peter O'Donoghue, Richard O'Toole  
and Gerry Halpenny" which seems to refer to the  
individuals on the Esat side and the sorry, on the  
Communicorp side and the solicitor on the Communicorp  
side who were dealing with the Communicorp  
representation.

The next item is "Communicorp/? or Esat  
Telecom requested not conceded 88% Communicorp.  
12% executives of Communicorp and Esat".

I don't think that need trouble us. There were  
controversies within Communicorp which ultimately led  
to Communicorp reconfiguring their shareholdings and  
considering with the process as Esat Telecom, but  
nothing turns on it.

The next item: "IIU are Department aware?"

"Yes, 29/95 letter to Department. Department replied  
that letter not taken into account copy to be  
supplied to us.

" Business Plan: Is it that submitted to Department  
or the next one to be adopted? Budget to be adopted  
at the directors meeting.

"CEO will after 2 years there be a deputy CEO? Board?"

"Existing debts agreed by Esat or joint venture

account?"

A. It could be "incurred".

Q. "Incurred" I think you are quite right "By Esat or joint venture account.

"Use of capital and contributions." On the right-hand side, "Licence fee

"Article" they seem to be references maybe to articles in the licence or articles of a shareholders agreement; I am not sure. I can't make much out of the rest of it on that page.

On the next page, which is page 2 of this attendance:

"Articles provide for options/telephone board meetings.

"Board decisions" I am not quite sure what the entry means.

Underneath that: "Share option scheme refer business plan: Initial business plan and an arrow to "recite Article 4 funding.

"Auditors A/A" which I suppose is Arthur Andersen "/Coopers." And there are other references then I think to the articles.

"11.1. Majority is it correct?

"13 key to funding. Communicorp will need freedom to pledge some of the equity it holds in Digifone.

"Meet Per and Knut Tuesday 5:00pm, Wednesday 8 to 10am."

On the right-hand side there is a reference to



Communicorp, an arrow through AIB, then, into Digifone with AIB within that circle, and underneath that "project finance". I am not sure precisely what it means.

If you go to the first page of the attendance note, where it says "IIU are Department aware". As far as you were concerned, you were not aware in any case; isn't that right?

A. That's right, yeah.

Q. Now, the answer is given, "yes", and there is a reference to the 29/9 letter, and a copy was to be supplied. Neither Knut Haga nor Per Simonsen or Knut Digerud appear to have a copy at that point?

A. Yeah.

Q. They were aware that the letter had been sent, and they seem to have been aware that there had been a reply from the Department that the letter was not taken into account. The only person who would have known of the IIU involvement would have been Mr. Towey at that stage; isn't that right?

A. I think so, yeah. What's curious is that it says "Letter not taken into account." It doesn't say "letter returned".

Q. Yes. And I suppose I am not absolutely clear as to what is to be supplied, whether it's the Department letter or the letter of the 29th, but we may be able to find out what that means in due course.

A. Mmm.

Q. We pass briefly to Leaf 87, and you see an attendance note on the same date, the 9/11/1995, of William Fry Solicitors. It's an attendance note of Mr. Gerry Halpenny, in which the client is described as Esat and the matter is described as Telenor.

And I think at this point, Esat means not Esat Digifone but Esat Telecom, and I think that will become clear from the next line.

The attendance is given, Mr. O'Donoghue, Mr. O'Toole, Mr. Digerud, Mr. Haga, Mr. Per Simonsen, Mr. Arthur Moran, Mr. Gerry Halpenny.

Underneath that, "Esat Telecom rather than Communicorp", do you see that, suggesting that probably Esat Telecom are going to become the nominal partner rather than Communicorp.

Underneath that there is a reference to "Bottin IIU". I can't read the next word.

The next line is: "Telenor unhappy re Bottin. Letter for the Department re IIU. "

I don't want to go into the detail of the rest of the note.

Do you know what the reference to Bottin means?

A. I don't. It's a name that I think came up in the Opening Statement or somewhere else, but it means nothing at all to me.

Q. Had you ever heard of it in the course of the process?

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

Q. The next document is a letter from Mr. Halpenny to Mr.

Moran from, in other words, William Fry's to Matheson

Ormsby Prentice from the Mr. O'Brien side, whether you

call it Communicorp or Esat Telecom, to the Telenor

side. And it begins off:

"Dear Arthur,

"I refer to our meeting on 9 November 1995, and I now

set out a summary of our comments on the agreement.

You will recall that in a number of cases the lawyers

were asked to try and ensure that the wording fits the

bill, and I have put forward suggestions in this

regard. However, as you know, there are a number of

other issues of a commercial nature upon which

agreement has yet to be reached, and I have also set

out our present position on these matters".

If you look at the reference to parties, it says

"Although I missed the discussion at the start of the

meeting, I understand Telenor wish Communicorp Group

Limited to be the party to the agreement as opposed to

Esat Telecommunications Limited. I am awaiting

instructions on this point.

"In addition IIU will not specifically be named as a

party for the time being."

In the next line he says, referring to recital E, "I

would remove the word "institutional" as it may well

be that some of the investors will be private".

Now, I don't think I need to go into the details.

That seems to be a reference to how some other investors would be brought into the company. After that, most of the content of the letter is of a technical nature.

The next document, in Leaf 89, is simply an extract from a database of Companies Office information which gives the date of incorporation of IIU Nominees Limited as the 21/11/1995. Now, IIU Nominees is not IIU. IIU is the company which was involved from the 29/9/1995 with Telenor and Mr. Denis O'Brien's company. IIU I think had been incorporated sometime shortly before that in 1995. This was a company which held some of the shares ultimately obtained. But the directors of it I think are either all the same as or mainly the same as IIU, namely Dermot Desmond, Chris McHugh, Brian Michael O'Sullivan and Michael Walsh.

Now, before I come on to the next document, which is in Leaf 91, you will recall that, as we know from this morning's evidence, the first meeting, first post October 25 meeting with the successful bidders was on the 9th November. And I think you have confirmed to me that you heard that there was no mention at that meeting of any involvement of IIU?

A. I don't believe there was, no.

Q. The next document is an attendance of William Fry's of the 21st November 1995. Again, it's an attendance of

Mr. Halpenny's. And the client is Communicorp. And the matter is Esat Digifone.

The attendance is: "Mr. Richard O'Toole, Mr. Peter O'Donoghue, Mr. Knut Haga, Mr. Per Simonsen, Mr. Arthur Moran, and Mr. Gerry Halpenny".

The first entry is as follows: There is an arrow and "Position re the Department IIU not a problem for M. Brennan in the Department main concern that DOB and Telenor mainly involved on the operational side present the agreement to IIU ASAP

CSFB position paper now being marked good reaction so far

replace position between Denis O'Brien and Advent with new arrangement cleaner agreement all round carve out the radio division

40:40:20 issue should not be a problem

Telenor party could be Telenor Invest, a new Irish company or a new Irish company letter of support/comfort".

The new line then gives the funding arrangements, or at least there is a discussion of funding arrangements or capital configuration of Esat Holdings. CSFB 38%. Denis O'Brien 38%. Advent 18%. And I am not sure what the 6/7% means "miscellaneous", I think.

I don't think the rest of the attendance need delay us. It's mainly technical. But if you can go to the

front page of the attendance, you'll see that the people at the meeting who were from the Mr. O'Brien side and the Telenor side; there doesn't seem to have been anyone present from the IIU side and they were discussing the position re the Department. And the position appeared to involve the question of IIU, and then underneath that there is a note: "Not a problem for M. Brennan in the Department main concern that DOB and Telenor mainly involved on the operational side."

Now, can you remember, by this stage had you become aware of IIU's involvement?

A. I noted this statement in the Opening Statement, and I can't find any grounds for it. I mean, I just have no recollection at all of anybody asking me a question like that.

Q. Can I say two things about it. If somebody had drawn it to your attention, presumably it's something that would have stuck in your mind?

A. I think it probably is, yeah.

Q. There was some press controversy well, there was some press statements at that time; would I be right in thinking that if that had come to your attention, you'd have remembered it?

A. I think I probably would, yeah. I said a few minutes ago, I don't recall, you were speaking about a press release ten or fifteen minutes ago. I say I don't

recall any press controversy at that time.

Q. Now, I have described the IIU involvement in fairly ample terms in the course of the questions I have been putting to you. I don't think any press comment or any press statement would have described them in those terms. I think their role would have been described as in some way perhaps substituting for Davys. Do you think that's something that might have

A. That doesn't mean

Q. have rung a bell with you?

A. I mean, if I got a phone call from, say, Denis O'Brien or somebody, would it be a problem if we changed our underwriters, could I have responded like this? I really don't know. As presented there, it seems as if I did, but I have no recollection of it whatsoever.

Certainly IIU, I didn't actually know who IIU were for a long time after this, as far as I know.

Q. Maybe if you had been told that you had no problem with a change of brokers from Davys to IIU, you might have responded "I have no problem"?

A. Or it mightn't have registered with me at all.

Q. You might have assumed IIU were some firm of brokers in Dublin you hadn't heard about?

A. I wouldn't rule that out, but I have no recollection of it. I don't believe that any solicitor would make that note without somebody saying it, but I have no recollection of having heard the name IIU.

Q. Can you remember who you were dealing with at the time in relation to these matters? You have described that you were ultimately adopting a more remote role in relation to the process. But I suppose at this key point, where you were handing over from one part of the process to another, you were still in position.

Can you remember who you were dealing with?

A. I suspect if I got any phone call from the Digifone side it was more likely to have been from Denis O'Brien than anybody else, but I don't know that that happened.

Q. If you go to the third last line, it says "40/40/20 issue", and then says "should not be a problem." Now, that's not necessarily attributed to you or to anyone on the Department side, but can you remember that issue, which we know came up at the end of the negotiation process, whether that issue had arisen at that point for you?

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

Q. You became involved in that issue at the end of the process, inasmuch as you were less remotely involved with the technical detail of negotiating the licence; but when the process came to be tied down and when difficulties arose, you came back in towards the end. Isn't that right?

A. I was brought into the loop with Mr. Loughrey and I think Donal Buggy. I don't have a very clear



recollection, but I was involved, but not this early.

I mean, all of this is new to me except that I remember noticing the reference to me in the Opening Statement, and I thought about it and couldn't come up with any specific recollection, or any recollection.

Q. But I am right in thinking that there is no Department document around this time which records any suggestion that the 40/40/20 capital configuration was no longer in existence?

A. No.

Q. And you don't recall anyone discussing that with you as something that might have to be addressed?

A. Certainly not at that time, no.

Q. The next document in Leaf 91 is I think an office copy of a letter sent by Mr. Kyran McLaughlin of Davy Stockbrokers to Mr. Denis O'Brien dated 22nd November 1995. The 22nd November 1995 was a Wednesday, I gather.

On the 18th November, 1995, there had been newspaper publicity involving a statement that IIU was now involved in the placing of shares in the Esat Digifone consortium, and there was some suggestion that IIU might take up some of the shares themselves. And I need to tell you that so that you'll understand the letter.

It says:

"Dear Denis,

"Further to our telephone conversation last Friday and the subsequent announcement in Saturday's newspapers concerning the involvement of Dermot Desmond's company, International Investment Underwriters (IIU), in the financing of Esat Digifone, I thought I would write to you setting out my understanding of some of the issues which have been raised.

"When John Callaghan and yourself asked me last April if Davys could get some institutional investment interest to support your application, I said it would be difficult as the eventual financial terms of the licence were unknown and it would be difficult to put a precise financial proposal to potential investors.

"However, Tom Byrne and Paul Connolly prepared an information memorandum and an investment proposal, and we secured three institutional investors prepared to commit  $\frac{1}{2}$ 8.5 million in support of your licence application in early June. The commitment was conditional on your consortium acquiring the licence on financial terms acceptable to the institutions, but this condition was not seen by yourselves at the time as one which could make your application financially unacceptable. As you are aware, a large number of financial issues were not finalised when the institutions made their commitment, in particular the size of the bid by your consortium and the consequent debt/equity ratio of the consortium. Therefore it was

difficult to get a firm unqualified commitment in

early June from the investing group.

"When John came to see me on Friday 29th September, he

told me that you had been advised that the financial element of your package was not sufficiently strong to allow Esat Digifone to be awarded the licence and that you were negotiating with a financial party who could provide the stronger financial backing necessary to be awarded the contract. He did not tell me who had provided this advice nor the identity of the stronger financial party. He asked me if I would ask the three institutions who had made the previous commitment if they would step aside so that the 20% to which they would have been entitled would be available to the investor who was prepared to provide firmer financial support.

"Even though we both recognised that this was embarrassing, I did notify each of the three parties that you were asking them to step aside to make way for a financial party which was prepared to put forward a stronger financial commitment. It has now emerged that this investor was IIU, which appears also to have been appointed to handle the sale of the 20% stake.

"A number of questions are likely to arise from the institutions who had made a commitment to Esat Digifone in June:

"A. Why were the original investing group not asked to make a stronger financial commitment along the lines of that offered by IIU, if that was necessary, given that by 29th September a maximum price of  $i_{\zeta}^{1/2}15$  million had been established for the licence and discussions on the application had clearly taken place with the Department and possibly the assessors?

"B. Was information available to IIU that was not available to the original investing group at the time they were asked to step aside?

"C. At what stage were the Department of Communications and the assessors told of changes in the institutions providing finance to the consortium?

"In addition, the news media have asked us why Davy is not involved in raising funds, as it is common knowledge that Davy were involved in the original application. I do not discuss our clients with the media, but you will appreciate that the current media presentation may be damaging to our reputation.

"I believe it is important to reassure the financial institutions that made the original commitment that they were treated fairly. They will be particularly concerned if the 20% stake is resold to other investors at a significant profit over a short period of time.

"It would be helpful to me if you could let me know your response to the issues raised above so I can

provide them with reassurance."

If I can just make one point about this letter and ask you to comment on it. If you look at the fourth paragraph on the first page, in which Mr. McLaughlin is referring to a meeting he had with Mr. John Callaghan on Friday 19th September, in which Mr. Callaghan asked the three institutions who had made the previous commitment if they would step aside. It seems clear from that, bearing in mind that Mr. McLaughlin was acting for these institutions, that they were effectively out of the consortium, and not only out of it inasmuch as it might be suggested that they hadn't given an absolutely watertight commitment, but that they had no involvement in it any more?

A. Yeah it looks like that, yeah.

Q. And up to this time there is no record in the Department of you being told that these institutions were no longer involved?

A. I believe that's correct.

Q. And you recall that this morning I showed you a document Mr. Andersen had prepared in which he was, if you like, sort of making a first stab at collating the promises and/or representations contained in the bid that would have to be reflected in the licence; do you remember that?

A. Yeah.

Q. And he referred to the membership of Esat Digifone,

the membership of the consortium and the type of funding that would be involved?

A. Yeah.

Q. And at that time you were never informed that none of that funding would now apply or none of those funding arrangements would apply?

A. No, I don't believe we were told that at that meeting, no.

Q. So that at that stage you would still have been under the impression that it was Telenor, Communicorp, 50/50, and that there would be a placing of 20% but that the but that that would be with a number of high profile and institutions of undoubted financial strength?

A. Yes. I am a bit curious about the reference to Saturday's newspapers, because generally speaking the Department has an excellent press cutting service, but it wouldn't be the highest thing in your priorities to read them every day. But something of that sort I would have thought would have been brought to my attention if it was in the press cuttings. But I have no recall of it.

Q. I haven't seen the press cuttings, so I didn't know that there was a file of press cuttings.

A. I don't know that the file is kept forever, but I am saying there is a good press cutting service.

Q. Maybe the people who keep these documents don't in any

case keep the press cuttings. It's presumably the press office or something. But perhaps you'd have a look at them and see if there is.

A. I expect they are junked from time to time. It can easily be checked.

Q. The next document I think is part of the exchange between Baker McKenzie and Mr. O'Connell. Well, in fact it's yes, Baker McKenzie and Mr. O'Connell, concerning the role of Advent, if any, in the consortium.

Likewise the next document, I don't need to trouble you with it. The same goes for the next document, in Leaf 94, from Mr. Connolly.

I just draw one thing to your attention in relation to Mr. Connolly's document. It's really in the nature of a sort of position paper from Mr. Connolly to Mr. O'Brien setting out a number of proposals as to how Esat Holdings Esat Telecom and Esat Digifone well, I suppose as to how Mr. O'Brien would either expand or contract or otherwise deal with his investment in the project. You will see on the front page Mr. Connolly says I don't think I'll read the whole letter.

"My preferred option is number 3, the part buyout of the IIU stake.

"I have a call in to Michael Walsh, but it hasn't been returned yet will try again later."

That sort of thinking becomes relevant later on in connection with tensions between Telenor and Mr. O'Brien and involving Mr. O'Brien's strategy to seek to enlarge his stake. I take it that you were never aware of a strategy on the part of Mr. O'Brien to enlarge his stake?

A. No.

Q. And in light of the discussion that you had in the course of the presentation, it's something that would have interested you, presumably?

A. I think it may have done, yeah.

Q. If you go on to the second page of that document, Mr. Connolly is considering a particular option. I don't need to go into the details of it, but if you go to the bottom of the next page, you will see there are a set of considerations which Mr. Connolly appears to regard as relevant to the development of any such strategy. And he says:

"1. It's inconsistent with the bid in that Digifone ownership would be Esat 62.5% and Telenor 37.5%.

"2. Esat would not be an Irish controlled company and nor would Digifone.

"3. Esat would be able to consolidate Digifone."

Similar types of considerations then are considered in relation to the various options. But in each case Mr. Connolly considers whether a particular capital configuration would or would not be consistent with



the bid.

Now, I don't want to go too far ahead in 1995 on the participant documents, and I want to come back to where we stopped off on the Department documents, which is in Book 43.

Now, the last document that I mentioned when we were still in Book 43 was the letter dated the 13th November 1995, in which you referred to your earlier meeting on the 9th November with Mr. Denis O'Brien and his team, if you like, including the Telenor people, but not including anyone from IIU. I just want to clarify one aspect of what was going on at this point.

A licence competition had been conducted. A winner had been identified. In identifying that winner, the evaluation team had noted that because of certain financial frailties associated with the consortium, conditions should be incorporated in the course of the licence negotiations which would remedy those problems; isn't that right?

A. Yeah.

Q. I don't think I see anywhere in the documentation that this particular concern was brought to Mr. O'Brien's notice in those terms in the early exchanges, if indeed in any exchanges, but certainly in the early dealings with him.

A. I don't know without some research on that one.

Q. He was informed that if the negotiations with him

weren't successful, you had a mandate from the Government to take up with the next-ranked applicant; isn't that right?

A. Yeah.

Q. But wouldn't you think that you should have told Mr. O'Brien, "You have won the competition, but you didn't get a recommendation that was without a reservation, and there is a reservation that we have to tackle here"?

A. Yeah. I mean, you are jumping to the assumption that that wasn't said, and I am saying that I would need to look it up.

Q. Well, I can see no evidence of it having been said. You'll agree with me it's probably something that should have been said?

A. It probably should have been said, yeah.

Q. Could I go further for a moment and say that isn't it something that should not only have been said but should have been tackled there and then?

A. In what sense?

Q. Well, ultimately you were going to try to negotiate a licence with somebody who had a financial problem. As time went on, you became much more familiar with what these financial problems were; isn't that right?

"You" meaning the Department.

A. Yeah.

Q. Wouldn't I be right in thinking that the correct order

in which to deal with these things is to tackle, if you like, a precondition or a qualifications (meaning) first, so that you don't waste 6, 7, 8, 9, 10, or 11 months negotiating a licence with somebody and find out at the end of it that you cannot deal with these problems?

A. That's an interesting way of looking at it now, but at the time it seems that what was happening was, negotiate the licence on the basis that this would get settled before the licence would be issued.

Q. But it was one of the headline requirements and yet was put on the back burner, wasn't it?

A. I wouldn't say it was consciously put on the back burner, either.

Q. Well, maybe you look at the documents and see can you find a reference to it, because I can't, certainly.

A. Okay.

Q. The next document I want to come to is Leaf 156. This contains the Internet record presumably from the Dail website; I can't actually be sure from the documents, but I presume it's from the Dail website or the Government website of the Dail reports for the 22nd November 1995 in which the mobile phone licence issue was discussed. We looked at some of these questions already. It also contains the actual questions in the original form, and it contains the draft reply that was prepared in the Department, and also contains

responses to a number of anticipated possible supplementaries, and you have already dealt with the mechanism whereby these were prepared. And do you remember, you dealt with one issue where the Tribunal was under the impression that you were avoiding or not avoiding, but providing an answer that avoided answering a question.

A. Yeah.

Q. And I think it's fairly clear from what you told me that that isn't how it was put together. I don't know what prompted all of these questions or what issues were in the public domain at the time, other than that I have mentioned earlier that I was aware on the Saturday before this 22nd day of November 1995, there had apparently been some newspaper some media comment, or a statement issued to the media, indicating that IIU were involved in the consortium. The questions were presumably drafted much earlier than that?

A. In the normal course you'd have a total of about four working days' notice from when questions from the last date the questions can be put down to when they'll be answered. But they could be put down over a period. So did you have a date these were answered on the 22nd, was it?

Q. 22nd.

A. I don't know what day of the week that was either.

Q. I think that was a Wednesday. That brings you back really to the previous Friday, doesn't it?

A. We would have the questions the previous Friday, yeah. And we could have had some of them longer.

Q. Sorry?

A. We could have had some of them for longer than that.

And in saying that you don't know what prompted all those questions, it may be of interest, and I don't have the information, to see how much about the GSM licence was in the media up to that time, because it certainly was a media event at some period around then.

Q. In any case, I want to look firstly at the questions in the website format because it's simply easier and quicker to look at them in that format.

If you look at on the first page of that section of the documents, you see Question 41, Mr. Hughes "Asked the Minister for Transport, Energy and Communications the reason he made a decision five weeks in advance of the official date in relation to the allocation of the second mobile phone licence and if he will make a statement on the matter."

Can you see Mr. O'Dea's question at Number 42: "Asked the Minister for Transport, Energy and Communications the number of applicants for Ireland's second GSM mobile phone licence, the dates on which submissions were received, the number of time he met principals,

directors, consultants, or representatives on behalf of any of the applicant companies, the dates on which he met them and the locations where he met them and if he will make a statement on the matter."

If you go on to the next page, Question Number 84, Mr. Molloy asked the Minister "If he took account of the overriding conditions on technical and financial capability outlined in paragraph 9 of the bid document for the second GSM mobile phone licence. In addition to the criteria evaluated by the consultants at paragraph 19. He also asked if Article 3 of the Minister's Department GSM competition licence documents were complied with in the awarding of the licence and the identity and ultimate beneficial ownership of the institutional investors who will own 20% of the successful bidding company."

Now, we have already discussed in part Question 42, the question from Mr. O'Dea referring to meetings or contacts between the Minister and consultants, between the Minister and sorry, principals, directors, consultants or representatives on behalf of any of the applicant companies.

If I could just go on to Question 84, the first question I think asked by Mr. Molloy. The second question asked by Mr. Molloy, in which he questioned "whether the Minister took account of overriding conditions on technical and financial capability

outlined in paragraph 9 of the bid document for the second GSM mobile phone licence in addition to the criteria evaluated by the consultants at paragraph 19 of the document."

Now, I think this is a reference to the fact that in the RFP, you have a list of criteria in paragraph 19, the eight criteria we mentioned. You have what you call a chapeau, an overriding requirement for financial and technical capability in that paragraph. And then in paragraph 9, you have a requirement that the Minister be satisfied that the applicants have demonstrated financial and technical capability; isn't that right?

A. Mm-hmm.

Q. So that these questions were focusing on that question in particular was focusing on financial issues above all else and technical issues in a general way?

A. I think that's true, yeah.

Q. If you go on to the draft that you prepared sorry, in which in the preparation of which I think you indicated you were involved. The draft response. And it begins off: "I am pleased that Deputies have put down questions on the GSM competition because it gives me an opportunity to detail what I believe was a landmark competition in terms of process, its objectivity, its fairness, and the speed with which it

was carried out.

"When I announced the competition for this second GSM licence last March, I was determined to put in place a selection process that like the process for Telecom's strategic partner would be fair impartial and objective.

"This was done.

"Clear selection criteria were set, published to the interested parties, and rigidly adhered to.

"International consultants with specialist experience were engaged to advise.

"An evaluation team led by my Department was set up and included the consultants and officials from my Department and the Department of Finance.

"The terms of the competition were specifically approved by the EU Commission.

"The selection criteria included demonstrated financial and technical capability the credibility of the proposer's business plan and their approach to market development their pricing policy, which had to be competitive their timetable for achieving roll-out.

"The contenders were each required to supply an immense amount of detailed information in regard to financial matters, technical matters and business development matters.

"All this material was examined exhaustively by the



evaluation team, which worked intensively over a period of more than two months after the closing date.

The consultants and subsequently the full project team came unanimously to a single result.

"I am very pleased with the way the process worked out, and I am completely satisfied with its integrity".

If you look at the way the selection criteria were identified on that page, do you see that in addition to some of the specified criteria set out in paragraph 19, pride of place, if you like, or greater prominence was given to the requirements set out in paragraph 9, demonstrated financial and technical capability.

Would you agree with that? It has been accorded specific prominence?

A. In that draft, yes.

Q. Now, at that particular time, I don't know what information the Minister had concerning the process.

From the Department's documents it would appear that certainly a copy of the evaluation report has his name on it; isn't that right?

A. Yeah.

Q. The final evaluation report, which I think came on the 26th, it may have come earlier, you think?

A. 27th I think the final printed version arrived on the 27th.

Q. I beg your pardon, on the 27th?

A. There is some evidence that a faxed copy came on the 25th.

Q. I think it was the 26th, but we can check that.

He also had the briefing note that was prepared for him, presumably, to enable him to go to the Minister?

A. That's not a thing he would hold on to for very long.

Q. That's as may be, yes.

In preparing this speech, I take it that it was the Department prepared the speech?

A. Yes.

Q. And then presented it to the Minister?

A. Yes.

Q. You don't know whether the Minister, in fact, examined the report before he wrote before he read this speech?

A. I have no idea.

Q. His programme manager also had a copy of it, hadn't he?

A. He certainly his name is certainly on one copy, yeah.

Q. Do you know if his programme manager had any role in preparing this I'll call it a speech; it's a response to questions, but it's in the form of a speech?

A. I don't I don't know. He may have had he may have had a role in deciding whether to take them in smaller groups or take them all together, I think.

But I can't recall him having any other role.

Q. If you read the report, you certainly might have appreciated that there were reservations concerning demonstrated financial capability on the part of the winner, Esat Digifone; isn't that right?

A. Yes.

Q. From the briefing note, you wouldn't know anything about it?

A. Yeah, but I mean, again I keep coming back to the idea that in our state of knowledge, there was the Advent backing and the institutional backing in place. And despite that, the report still said there is an issue here to be dealt with in the licence negotiations. I mean, that's my perspective on it.

Q. What the report said was that notwithstanding the Advent backing, there is an issue?

A. Yeah, because in that appendix to the report, it dealt with worst-case scenarios. And this was a worst-case scenario that raised the issue in that particular case, if I am not greatly mistaken.

Q. You were aware also from Mr. Fitzgerald that he had concerns regarding Communicorp's financial capacity; isn't that right?

A. Yeah.

Q. You are not suggesting in any way that the report that the reservations concerning financial capacity or financial frailty, if I can put it that way, in the

report, were matters of no significance?

A. I am not, no.

Q. On the next page, under the heading "No other considerations", basically what is stated is that the process was a fair one and there were no extraneous considerations taken into account.

In the next heading, under "Role of Cabinet" sorry, I think this is as per the speeches delivered.

"No political or other extraneous considerations entered into the selection, which was made totally on the basis of the objective criteria laid down in advance and made known to all.

"This exhaustive and patently fair process can now serve as a model for future decisions of a similar kind in other areas.

Wit is an example of the standard of decision-making I wish to see become the norm across the whole spectrum of Irish public life.

"If the import of Deputy Kenneally's question is that I should have awarded the licence by reference to factors other than the selection criteria which were announced in advance and known to the applicants, then I reject that. It was not open to me to follow such a course, and I would have exposed myself and the Government to legal redress if I had done so.

"Esat Digifone won because the project team determined after meticulous comparative evaluation that they had

submitted the best application."

I suppose there is a little bit of self-praise in describing the process as "a model for future decisions". There had been problems, hadn't there, in evolving or developing the process?

A. You might elaborate a little.

Q. Well, the process had evolved in a somewhat less than ideal way, and a real problem developed in the course of carrying out the evaluation, in that the agreed evaluation model had to be significantly departed from?

A. Yeah.

Q. Which I'd suggest was a hiccup, one that was fairly significant. You couldn't carry out the evaluation you said you'd carry out.

A. Yeah, the information base for doing some of the quantitative evaluation didn't stand up.

Q. The quantitative evaluation was the headline one that was trumpeted in the report, which was the one where you had all the weightings fixed in advance; isn't that right?

A. Yeah.

Q. You couldn't really do what you said you'd do?

A. Yeah, that's right.

Q. "Role of Cabinet. No undue haste.

"The decision to grant the licence and to whom is statutorily that of the Minister with a consent of the

Minister for Finance under Section 111 of the Post and Telecommunications Services Act 1983. In view of the importance of this particular decision, I and the Minister for Finance discussed the result of the competition with the leaders of the parties in Government on the 25th October. The matter was put before the full Cabinet for noting on the following morning. I believe that in a case as sensitive as this, there is great advantage in announcing the result as soon as possible and thus put an end to speculation and media hype which grows around such matters, as was the case on this occasion. The formal decision makes it clear that the licence will be awarded to Esat Digifone subject to satisfactory conclusion of discussion leading to a licence which incorporates as binding commitments the relevant contents of the application which led to its selection.

"The Government agreed the detailed selection criteria and their order of priority in advance of the opening of the competition and agreed to the appointment of consultants to carry out the evaluation.

"It was clear to me and to the Minister for Finance, who was represented in the project team throughout the competition, that the thoroughness of the approach taken left no room for doubt as to the clear-cut result contained in the consultants' report.

"Bearing in mind the foregoing, the Government had no difficulty in agreeing to my recommendation in relation to the result.

"There was no undue haste. In fact a flow chart or GANNT diagram prepared by the consultants on the 14th July in the context of the relaunch of the competition following consultations with the European Commission shows clearly that the final report was to be submitted in the week beginning 22 October. The consultants are to be congratulated for achieving this target. My commitment was to announce the result not later than end November. If I had not allowed some interval in case of slippage, I would have been open to criticism for not meeting my deadline, and the media hype would certainly have been worse."

Just clarify one detail of that passage. Mr. Lowry says that he and the Minister for Finance discussed the result of the competition with the leaders of the parties in Government on the 25th October. That suggests, does it not, that Mr. Lowry and Mr. Quinn had a joint role in presenting the result to the party leaders; would I be right in that?

A. It's certainly, yeah, capable of that construction.

It could also be just recording that the Minister for Finance, who was representing the Project Group, was also present at the discussion. But these replies were written based on the state of our knowledge,

and

Q. Of course, of course they are based on the state of your knowledge, but it does say the Minister for Finance discussed the result. Now, did somebody tell you that they had discussed the result, or is there some evidence or document to suggest that?

A. We must have known that he was present, that's all.

Q. He was definitely present.

A. Yeah.

Q. But so was the Taoiseach. So was Mr. De Rossa.

A. But we have just said earlier the Minister for Finance had a statutory role in the issuing of the licence.

So it's in that sense that

Q. I know, but I don't think, simply because somebody had a statutory role in the granting of a licence and was present at a meeting at which a recommendation was put forward, that you can take the liberty of saying that it was discussed with him. Mr. Quinn has no knowledge of any such discussion.

A. I am struggling to understand what point you are trying to say.

Q. How can you say somebody discussed something with somebody unless you know they discussed it?

A. What we knew was the decision was discussed among a group of politicians of which the Minister for Finance was one. And linking that to the requirement for the Minister for Finance, the statutory function of the



Minister for Finance in the whole process, I think it's simply a drafting device to show that he was there.

Q. But the bottom of page, it says "In fact there was no undue haste. In fact a flow chart or Gantt diagram prepared by the consultants on the 14th July in the context of the relaunch of the competition following consultations with the European Commission shows clearly that the final report was to be submitted in the week beginning 22 October."

In fact wasn't it envisaged around that time that you would have a report by the end of October but that there would be a sufficient period of time for consideration by Government thereafter, including, if necessary, a built-in margin for slippage?

A. Yes, there is no doubt that that was a state of our minds in July. I think we have discussed this a couple of times before.

Q. We have discussed the timing, yes, but not this statement.

A. I mean, I have made it clear a number of times that Mr. Andersen strongly recommended that the decision should be announced as soon as it could be announced once it was arrived at.

Q. Why wouldn't you wait until the next day, if we go back to that issue. You didn't have a report. This is what the Minister says in the statement: "My

consultants are to be congratulated for achieving this target." The fact is, the consultants hadn't produced a final text of the report on the day the Minister went to speak to his colleagues. Isn't this overstating the issue by a mile, isn't it?

A. I said twice already today that there is some doubt as to when exactly the final report was faxed to the Department, and at least one of my colleagues believes it was faxed on the 25th. That can be checked.

Q. Isn't that in itself somewhat unsatisfactory, that there is some doubt, which there is, I am sure, as to when the report came to the Department? The Minister didn't we cannot be sure, am I not right in this, that there was a final report, a text, whether a hard text or a faxed text, in the Minister's hand when he went to the his Cabinet colleagues?

A. There is some doubt in my mind as to whether it was there or not, but it's something that should be capable of being verified.

Q. It should be capable of being verified but hasn't been; isn't that right?

A. I haven't tried recently to verify it.

Q. If you go to the next item, confidentiality: "At an early stage in the competition, four out of the six applicants requested and all were given assurances that the information in their bids would be kept confidential on a permanent basis. It would be

impossible to have detailed disclosure of the comparative analysis without breaching this confidentiality. This dilemma is one of the reasons why reputable independent consultants are engaged in competitions of this type. The consultants act as guarantors of objectivity.

"A question of detailed feedback to applicants as to the reasons why one applicant was successful and the others were not therefore presents me with a difficulty. Furthermore, disclosure by me at the time of significant elements of winning application would arise in any comparative feedback of public discussion of the outcome could be of considerable competitive advantage to Eircell. I would like to be as helpful as possible to the understandably disappointed applicants, but the constraints on me are severe. I want to state again the involvement of reputable consultants was intended to be a guarantee of fair play from the outset, and the clear-cut result from them was the one which I announced."

Is there a suggestion in this statement on the Minister's part that this was a process carried out by independent consultants and that neither he nor his Department had any role in it? He says "The clear-cut result from them was one which I announced."

A. It certainly wasn't intended to convey that idea, and I think earlier in text you read out that there was a

group representing the Department and the consultants and so on. The Department and the Department of Finance and consultants.

Q. If you go to the last item on that page, role of consultants: "I have been asked to elaborate specifically on the role played by the consultants. Andersen Management International, a highly experienced company who have a particular expertise and experience in the evaluation of GSM tenders, were retained by me following a competitive selection procedure which fully respects EU procurement rules. They, in close liaison with a project team led by my Department and which included representatives of the Department of Finance, designed and carried out a full comparative evaluation of all the applications. The consultants' report on the outcome of the evaluation makes it clear that the approach to the evaluation, including the relative weighting of the selection criteria, was settled in detail and documented before the closing date. It is clear that the consultants played a full role in the evaluation process, and their involvement was necessary to ensure that the process would be accepted as fair."

Now, I suggest to you that there is a little overstatement there, at least insofar as it's suggested that the project that the consultants were involved in the design and carrying out of a full

comparative evaluation. They were not involved in the original design of the RFP, sure they were not?

A. No.

Q. And isn't that how a problem arose ultimately, not necessarily a problem of your making, but a problem did arise ultimately in carrying out the evaluations; isn't that right?

A. Well, you are seeing problems with the carrying out of the evaluation which we didn't see at the time in the manner in which you are seeing them now.

Q. Well, Mr. Andersen has described what I think is perhaps a more ideal process where the person who evaluates is involved in designing the criteria and the weighting and the application form. And that guarantees ready comparability of the applications.

In this case you had a problem comparing the applications, and that was due to the fact, was it not, that Andersen had one method of carrying out the comparative evaluation and it didn't fit with your RFP?

A. But when he tendered to do the job, he was in full knowledge of what the RFP was looking for

Q. Of course.

A. and he tendered that he could do the evaluation against that background.

Q. I quite agree with you, and I made that point to you yesterday. He did say that but he wasn't able to do

it?

A. I really don't know where this conversation is going.

Q. You didn't have a proper quantitative evaluation at

any time, contrary to the promise contained in

Appendix 2 of the evaluation report.

A. Yes, we decided that the basis for a quantitative

evaluation withered away.

Q. The evaluation report states that it would be appended

to the report. It is not there.

A. That's true.

Q. This was a major limb of the evaluation.

A. But yesterday you were accepting that the qualitative

evaluation was always to be the dominant one.

Q. It was always to be the primary one?

A. Yeah.

Q. But it was part of a two-step or two-stage process;

isn't that right?

A. Yes.

Q. In fact there was no two-stage process of the kind

described in the evaluation model.

A. Except to the extent that the quantifiable data was

taken into account into the qualitative evaluation.

Q. What it says here, and I have already drawn this to

your attention, is that "The consultants' report on

the outcome of the evaluation makes it clear that the

approach to the evaluation, including the relative

weighting of the selection criteria, was settled in

detail and documented before the closing date." And Mr. Andersen has laid considerable emphasis on the fact that the weighting of the eight selection criteria was fixed in advance, which we all know, but that the weighting of all of the indicators used in the quantitative evaluation, so far as it was used at all, were settled in advance. But we know that none of the weightings, as far as I am aware, in the qualitative evaluation, as you now acknowledge is the main and only evaluation, at the end of the day, were never settled in advance.

A. I think I said this morning that I would need some research to deal with that particular issue.

Q. If you go on to the next page, there is a reference to the licence fee, and I don't need to I think trouble you with that. Underneath that there is a heading "Financial, technical and ownership aspects."

It begins "None of the six applications submitted were rejected because of absence of technical and financial ability to deliver the service. Examination of these aspects was integral part of the evaluation.

"Paragraph 3 of the bid document, which relates to full disclosure of ownership, was adequately dealt with in the evaluation of applications. In fact, the majority of the applications contained indications of probable changes in the ownership of minority interests by way of flotation, institutional

investment, etc., after licence award, and the level of such proposed changes was considered acceptable. The intentions of the winning applicant in this regard were fully disclosed."

Now, firstly it says "None of the applications was rejected because of absence of technical and financial ability to deliver the service." We have already been over some of this ground, in that you believe that there was at some point a discussion in which a substantive financial capability was treated as a kind of a filter or threshold test; isn't that right?

A. Yeah.

Q. And is that what you had in mind when you made this or when you drafted this statement?

A. What I said in the past was that I assumed that when Andersens came to the Project Group with a statement that all of the applications met the minimum requirements, I assumed, having read the applications and having no reasonable reason to doubt it, that that included financial and technical capability.

Q. Well, I'd suggest that I can't understand how you reached that conclusion, because he made it expressly clear in his documentation that he was dealing only with procedural requirements.

A. I am not so sure I was party to the documentation you are referring to at that time.

Q. Go on to the next page, paragraph 3 of the bid



document, which relates to full disclosure of ownership was adequately dealt with in the evaluation of applications. In fact the majority obtained indications of probable changes; do you see that?

A. Yeah.

Q. Was not this a reference to proposals on the part of applicants for the licence to share, as they put it, ownership by putting some of the equity on the market or leaving it out to the institutions after the businesses were established? Isn't that right?

A. Well, there were various proposals in the different applications.

Q. But let's be realistic. You couldn't get the licence and then float the company. Nobody would invest in it.

A. That's true.

Q. You had to have a company up and running, at the very least. You couldn't float till you had a network.

A. Yes, that sounds reasonable.

Q. And what the various contestants were saying when they refer to their proposals down the road to float is, firstly they were trying to they were trying to make their applications more attractive by suggesting they were going to widen ownership. But this was a reference to something they'd be doing when they got down the road and had their networks up and running. Presumably you didn't care, as an evaluator, what they

did once the networks were up and running. The job was done then. Isn't that right?

A. In the particular I keep coming back to this. In the particular application that won the right to negotiate a licence, the application was two parties at 50% each with a declared intention to float 20%, or not to float, to place 20% if they got the licence, and with well-documented support for that declared intention.

Q. Yes.

A. I can't see what the problem is with that.

Q. So well documented that they had described the actual institutions they proposed to bring on board?

A. I don't think that that was an exclusive declaration. That was an indication.

Q. Mr. Brennan, we heard the flotation. We heard the presentations. You were left in no doubt. It was the high point of the application by Mr. Johansen, and Mr. O'Brien: "We have Irish institutions on board". They couldn't have put it more highly. They couldn't have expressed it more trenchantly at the applications.

A. But you still can't get away from the fact that in the application itself, it was not exclusive.

Q. It was not what, sorry?

A. It was not exclusively those particular institutions.

Q. I see, I see. So am I to take it, then, that in reading the application, you took the view that it

mightn't be these institutions, it mightn't be institutions at all, it could be people of no financial worth or standing?

A. No, I think you are trying to put words into my mouth.

Q. I am trying to understand what you are saying, Mr. Brennan.

A. I am saying it consistently, since I first came in contact with the Tribunal, that the application we were dealing with was by two parties, 50% and 50%, with 20% to be placed with financial institutions with some with strong indications that the market was there for it and some commitment from particular institutions.

Q. When you say that the majority of the applications contained indications of probable changes in the ownership of minority interests

MR. O'DONNELL: He doesn't say. That's the Minister's answer.

Q. MR. HEALY: Did you draft this?

A. Between myself and Mr. Towey, we drafted it.

Q. The Minister didn't draft it. He didn't stand over it. You drafted it from the documentation?

A. Yes.

Q. In fact I am not reading at this point, for the sake of the record, not from what was stated at the Dail but a document that was drafted by you?

A. By the civil service.

Q. It states that the majority of applications contained indications of probable changes in the ownership of minority interests by way of flotation and so forth.

Could I suggest to you that those indications in the majority of applications, as you put it, I think all, bar one, were in no way comparable with the indications, or however you want to describe them, contained in the winning application as to what they intended to do, because the winning application told you precisely what they were going to do, as far as possible, in any case, with their 20%, and this was going to happen right away. It wasn't something that was down the road, as flotation was?

A. It's probably true it is true that there were different differences in the stated intention of different consortia, but I don't see what the issue is here.

Q. The issue as I see it, Mr. Brennan, is that there was a considerable sensitivity, either on your part or on the Minister's part, to disclosing the true nature of what had been stated concerning the ownership of the Esat Digifone consortium. Because it's wrong to say that the intentions of the Esat Digifone consortium were phrased or put in a similar way to those contained in the other applications.

A. But isn't it true to say that when the application was lodged, we were specifically asked to treat the names

of the institutional investors in confidence?

Q. You were.

A. And that that was still binding on us at this point.

Q. Could you not have described them?

A. I don't know

Q. In fact, at this point, why couldn't they have been described? Was this obligation of confidentiality to last forever, was it?

A. I don't believe it was to last forever, no.

Q. As of this moment, when this document was prepared and when this speech was given by the Minister, the State were negotiating to give to the winning consortium an enormously valuable privilege, isn't that right, which they had won the right to in the course of an open competition? When I say "open", I mean a competition that was conducted non-politically.

A. The concept of an enormously valuable document is something that I think I dealt with very early on.

The reality is that the market exploded dramatically, and the market changed shortly after this. The applications, when they were made, and they were made with input from significant international consultants in each case, saw a market that would take fifteen years to reach a volume of a million customers. What actually happened was that that volume was achieved an awful lot more speedily than anybody anticipated at the time, as a result of a number of changes.

Q. You were saying that at the time

A. The market exploded quite dramatically due to one or two factors, the main one being the arrival of the pay-as-you-go phone, which was not seen by any single applicant or any single consultant behind any applicant. The market changed. The company that won the licence created shareholder value in a dramatic way.

But to say that the licence at the time was worth a huge amount of money, and you said this again a couple of days ago in a little bit more disparaging way, I don't think that's an accurate reflection. I think the true value of the licence at the time the competition was held was the highest number that any consortium was prepared to bid for it. And there is no evidence that anybody was prepared to bid a number higher than somewhere in the 50, 60, 70 million area, and that's not of the order of what you are describing now.

Q. Are you saying it wasn't an enormously valuable privilege, then?

A. It turned out to be.

Q. But are you saying it wasn't at the time? I am trying to understand what you are saying.

A. What I am saying

Q. I know what happened since.

A. It's not on the scale that underlies some of your

remarks and questions.

Q. But are you saying it wasn't an enormously valuable privilege?

A. I am saying it wasn't a valuable privilege, on the scale that underlies your remarks and questions, as seen at the time.

Q. We went through before Christmas, I think, and some since Christmas, all the 1993, 1994 departmental documentation concerning this matter. Am I not right in concluding from reading all of that documentation, including the dialogue you had with Telecom Eireann and so forth, that this was we'll leave epithets out of it for the moment a valuable privilege?

A. There is no doubt it was an exciting, interesting and valuable business opportunity.

Q. It was a State asset; is that not right?

A. Yes.

Q. It was being given to somebody who succeeded in convincing the evaluators in the competition that they were most entitled to it, having regard to the rules of the competition; isn't that right?

A. Yes.

Q. What you are saying is that at this particular time, when you were dealing with the people who had won that right, you were obliged to keep the names of these people confidential?

A. I am saying that we were specifically asked when the

applications were submitted to keep the names of the institutional investors confidential. I mean, that's in evidence.

Q. Yes. But did that mean I certainly didn't read that as meaning and I'll be amazed if it meant that you subjected the Irish Government to the obligation to keep that information confidential forever.

A. No, I didn't.

Q. I suggest that it didn't become that you must implicitly have been released from that obligation once the competition result was known.

A. I suspect that we would have been released from that obligation at the time of issue of the licence, but I don't know.

Q. So that means that the process can I go back a step. Are you suggesting that if Mr. O'Brien's interest and the Telenor interest had said to you, "Look, we have a third party on board; we don't want his name mentioned", that you wouldn't have released that name until the licence was granted?

A. No, I don't think that's I don't think you can draw that from what I have been saying.

Q. You are saying that it was because the institutions weren't fully on board that you were prepared to agree with this?

A. I am saying that in the plain words of the application, you are dealing with 50% Communicorp, 50%



Telenor, with a declared intention to place 20% with institutional investors, backed up by letters from four particular institutions. That's all I am saying.

CHAIRMAN: Must we not, though, Mr. Brennan, have some regard to the original provision in the RFP which required that full particulars of ownership be given?

I am taking fully on board the responses you have given, but nonetheless, this basis of institutional placing ultimately led to a very significant third party of whose existence the preponderance of the Project Group were not aware at the time of the adjudication.

A. That's true, Chairman. But the Project Group accepted the application in the manner in which it was presented as giving adequate ownership details.

CHAIRMAN: I do feel, Mr. Healy, without in any way interfering with you, I would make some allowance for Mr. Brennan; undoubtedly he and his colleague prepared the speech, but in the context of an adversarial Dail situation and in the context of my own undertaking at the outset of Mr. Brennan's evidence that we would not pursue every conceivable avenue of approach, I think, within your discretion, not every aspect or potential marginal variance from the speech might need to be put.

Q. MR. HEALY: If you go on to the next page, Mr. Brennan, of the draft, we come to a portion of the

speech which, as we know from the Internet report and as we discussed before, was not delivered by the Minister; isn't that right?

A. That's correct.

Q. I just want to clarify one or two aspects of the actual report now. If you go to page 5 of the report, you see the second reference to Mr. Molloy?

A. Yeah.

Q. Mr. Molloy is responding to something Mr. Lowry has said in relation to full disclosure of ownership. And Mr. Lowry has just delivered the passage that we referred to a moment ago.

And then Mr. Molloy says "Were the names of the investors disclosed?" And Mr. Lowry says "The names of the investors were not disclosed in respect of a number of applications, but that did not contravene the criteria set down."

Let us clarify two aspects of that answer I know you didn't give that answer because we know the names of the investors were disclosed in the Esat Digifone application; isn't that right?

A. Yes.

Q. But they were disclosed, as you said a moment ago, on the basis they would be kept confidential?

A. Mm-hmm.

Q. Mr. Coughlan corrects me; they were not in fact submitted on a confidential basis. They were

submitted on an open basis, and then you asked could they be disclosed, and you were requested not to disclose them; isn't that right?

A. I thought what happened was before the closing date, we wrote to applicants asking them to permit us to publish a certain minimum amount of information, who the applicants were and stuff like that.

Q. I think you are right about the dating of that.

A. And in the response, this particular one said, not the institutional investors.

Q. It's on that basis you said you received it, subject to that?

A. Yes.

Q. In any case we know for a fact that the names were disclosed in the application of Esat Digifone, the winning application?

A. Mm-hmm.

Q. And while it is true to say that the names of investors were not disclosed in respect of a number of applications, I think that is true, if you are referring to the proposals of applicants to float their companies down the road or to place parts of the equity with institutions down the road; isn't that right?

A. By definition, that is true, yeah.

Q. And obviously you couldn't know who that was going to happen or when that was going to happen, if at all,

and who the individuals involved would be; so that answer is somewhat inaccurate, isn't it?

A. Evasive, maybe.

Q. If you go to the next if you go to the intervention by the Ceann Comhairle. Then the next response.

Mr. Lowry says "A number of investors stated that minority shareholdings would be available through various mechanisms such as by way of flotation or institutional investment. The winning applicant clearly stated that Esat would have a 40 percent ownership, Telenor 40 percent ownership, and the other 20 percent would be available to institutional investors or other interest groups. That was clearly stated publicly as well as privately."

I think I am right in thinking that there is no reference to interest groups anywhere; is that right?

A. No. I wouldn't have used those words.

Q. If you go on to page 8, Mr. Seamus Brennan says "First, Fianna Fail supports Deputy Molloy's request that a full explanation be given to those who did not succeed. Second, we wish the winners well. It is open to the Minister to tell the House who owns the 20 percent to which Deputy Molloy refers".

Mr. Lowry says "Discussions are ongoing in respect of finalising the award of the licence to the successful applicant, and I have no doubt that is part of the discussions. I have not been involved at any stage in

the discussions regarding this process. No doubt that matter will be made public in due course, but I am not aware of its precise details at present."

At that stage, on the 22nd November, from what you have said to me, you had no reason to believe that the situation was other than as had been represented to you at the presentations; isn't that right?

A. That's correct.

Q. Presumably the Minister knew those details, did he?

A. Almost certainly, yes. I mean, there would have been a briefing session with the Minister on foot of this.

Q. He must have known that Allied Irish Banks, Investment Bank of Ireland, Standard Life Ireland and Advent were the named institutions?

A. I'd say he probably did.

Q. Well, surely it would have been only prudent to at least give him that information?

A. He may well have had the information, but not necessarily on his person in the Dail at that moment.

Q. Yes, I appreciate that.

A. He probably did have that information at that time.

MR. HEALY: I don't know if there is a time constraint. There may be

CHAIRMAN: Well, four o'clock.

Q. MR. HEALY: The next document, Mr. Brennan, is in Leaf 157. And I think it's just part the continuing dialogue between the Department and Esat Digifone

concerning the terms of the licence.

The next document, in Leaf 158, is from Mr. McMahon's notebook, and unless there is something in it you want to draw to my attention, I don't think you can throw any particular light on any of it; I will pass on from it.

I will go over any of these documents and describe them, and if you think you can offer any comment, I won't hold to you omitting to offer a comment, but if you think there is any comment you can offer in the case of a document to which I don't refer you specifically, feel free to say so.

A. There is a comment I wanted to make a couple of days ago, just in terms of somebody reading the transcript.

There was one day you were reading out a typed version of a manuscript note of a meeting at length, and there were times when people's names, my name or other people's names, and then five or six bullet points.

It was obvious to me reading it that all of the bullet points weren't attributed to the speaker, but it wouldn't be obvious to somebody reading the transcript. And I meant to mention it at the time, but it slipped my mind.

Q. I hope you can rest assured that these documents in any case become exhibits, and you couldn't follow a lot of them without the transcript, and if you look at the exhibit, it's quite clear that the bullet points

refer perhaps to a remark made by the named person and then maybe a response coming from somebody else.

A. I just thought that somebody reading the transcript cold mightn't spot that.

Q. Yes.

The next document is a memorandum from Mr. Colin McCrea to Sean Fitzgerald and you. It's not dated. I think it relates perhaps to the Dail speech that we have just referred to.

It says "Re GSM competition. We need to be prepared to give good answers in relation to the GSM competition. Otherwise the excellent process that was adhered to would become discredited. I attach a list of some issues which we need to consider, but you are the people that would know in detail what information is more suitable. The information, however, is urgent, and I would appreciate if you could do something in this area immediately."

Then there is a list of issues:

"What countries issued GSM licences since the beginning of 1995.

"What information did they release to the losers in relation to the competitive process criteria.

"Which companies demanded confidentiality in relation to the Irish competition.

"What information could we release which

"A, does not break the confidentiality agreement

"B, will not open up the prospect of a challenge to the process by Persona.

"Austria.

"A, why was Austria allowed to charge \$400 million.

"B, what are the conditions attached, e.g. does their existing State operator have to pay an equivalent amount

"C, did they receive approval from the EU and/or the EU Commissioner for the deal."

A. I would caution against associating that with the parliamentary questions, simply because at the white heat with which parliamentary questions are dealt with in the Department, it wouldn't have been written down. There would have been a conversation.

Q. I see. We may ultimately find some document or some event to which it may be related.

The next document is from Mr. Fintan Towey, a letter from Mr. Towey to Mr. Denis McFadden, dealing with calls from unsuccessful applicants to provide detailed reasons for the selection of Esat Digifone.

The next document is an attendance of William Fry Solicitors. It says "Attendance re Esat". It's not clear who was present, but it seems to contain a number of points concerning the licence negotiations and perhaps referring to the actual licence itself.

There is nothing in it that I want you to comment on.

A. The copy that I have is virtually unreadable, so I



wouldn't be able to comment.

Q. I can understand that; I had to change my copy this morning. I couldn't find anything in it; it's very technical. But if you want a copy, I'll make one available. But in any case, there is a better copy; you can examine it, if you want, overnight.

I was now going to ask the Registrar to read out the evaluation of the evaluation, which I think may be of some interest, but I don't know if we are going to have time, at five to four, to deal with it.

CHAIRMAN: It's probably, if it's another Andersen document, one that's probably best deferred until eleven o'clock.

MR. COUGHLAN: Sorry, Sir, there is another matter at 10.30 it's at 11 o'clock in the morning. It's an issue that other people here may not need to be in attendance for if they don't wish, so perhaps, as regards taking up Mr. Brennan's evidence, it might be more appropriate to say about 11:30 or thereabouts.

CHAIRMAN: The other matter, has it been listed for half ten, or eleven?

MR. COUGHLAN: Eleven.

CHAIRMAN: Very good.

Half eleven, Mr. Brennan.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,  
FRIDAY, 31ST JANUARY, 2003 AT 11:00AM.