

A P P E A R A N C E S

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I N D E X

WITNESS: EXAMINATION:Q. NO:

THE TRIBUNAL RESUMED AS FOLLOWS ON FRIDAY, 31ST
JANUARY, 2003 AT 11.50AM:

CHAIRMAN: Sorry for the somewhat late start, Mr.
Brennan. The other business that we had to do just
took a little time.

Mr. Healy.

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

A. Mr. Healy, before we start, there is just something I
thought I might mention very briefly. Now, I haven't
studied the transcript of last evening, or of
yesterday, but at some stage I think you were making
the suggestion that the important matter of the
financing of Communicorp and Esat Digifone wasn't
referred to in the first licence meeting. I think
that's what you were saying. And I just was having
another look at the documentation, and

Q. I think I was saying it was mentioned.

A. I thought you were saying the opposite. Okay.

Q. What I was saying is it was mentioned in the context I
think it's very close to where we are just so there
is no doubt about it, in case I didn't mention it. My
recollection is that it wasn't I didn't mention it
by reference to the formal minute, but I mentioned it
by reference to, I think, Mr. McMahon's note. But if
it's in the formal minute and I overlooked it, I'd be
happy

A. It's crystal clear in the follow-up letter to Denis O'Brien. I picked you up as saying it wasn't mentioned.

Q. I think what I may have said, it wasn't mentioned in the formal minute. It is expressly mentioned in Mr. McMahan's note, and it is mentioned in the letter, and in fact I think we referred back to Mr. McMahan's note, I think.

A. Okay. That's fine.

Q. I just want to go over one aspect of the speech that was drafted for the Minister and a portion of it which I think was delivered more or less in the terms in which it was drafted. That is the portion contained at I am not sure if there are numbers under the heading "Financial, Technical and Ownership Aspects". This is Leaf 156.

I think I understood you to agree with me yesterday that my impression of the state of the Department knowledge as of that time, in November of 1995, was that Communicorp and Telenor were the two main parts of the consortium and that, leaving aside for the moment, as I said, the degree of commitment or the views we might have about the degree of commitment made by the banks, that there were four financial institutions on board: Advent, IBI, Standard Life and AIB. But that on foot of the letter sent by Esat Digifone consortium to you shortly before the

applications were lodged, the names of those banks were not to be disclosed in the course of the process.

A. Mm-hmm.

Q. The involvement of those institutions was alluded to by Mr. Andersen in his proposals for incorporation into the licence, which he seems to have gone through at the meeting of the 9th. And in any case, you had heard nothing from anybody to the effect that these banks were off the scene; isn't that right?

A. That's correct.

Q. And you had no reason yourself, from any other information you had obtained, to believe or suspect that these institutions were not going to be members of the consortium?

A. I think that's correct.

Q. If you look at the response that was given to the question, "Were the ownership provisions in clause 3 or paragraph 3 of the RFP complied with, and who were the owners?" I think that was I am summarising the questions. The answer is, "Examination of these aspects was an 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 applicants."

Then it goes on to say in fact, "The majority of the applications contained indications of probable changes in the ownership of minority interests by way of

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

I was suggesting to you yesterday that I thought that that answer was less than complete, and that by referring to the expressed intentions of the majority of the applicants to float way down the road, that an evasive answer was being given instead of tackling the issue head on.

A. I would say that the answer was the answer we felt comfortable in giving at that time.

Q. Yes. I am suggesting there was a sensitivity to stating what the known facts were; leaving the names of the institutions aside, you had no reason to believe that the known facts, leaving the identity of the institutions aside, could not be stated, simply stating what was in the bid, something to the effect that "There are a number of institutions, even four financial institutions involved; their capacity to fund this is undoubted, and we don't wish to disclose their names because while they have expressed interest in committing themselves to this application, those commitments have not been tied down, and we don't want to disclose names until that's done".

Wasn't that your actual understanding, according to what you have told me in the witness-box?

A. I'd like to find the question, because I think the question was whether it was disclosed, not what the information was. Civil servants are very careful about parliamentary questions, so if you could point me

Q. Yes, I'll try and find the question. As you know, a number of questions were taken together.

A. Absolutely, yes.

Q. "Asked the Minister for Transport, Energy and Communications" this is page 2 of the 9 pages of the Internet report "if Article 3 of his Department's GSM licence competition documents were complied with in the awarding of the licence and the identity" and then a semi-colon "and the identity and ultimate beneficial ownership of the institutional investors who will own 20% of the successful bidding company."

A. Yeah. So...

Q. I think Mr. Molloy asked the Minister the identity and ultimate beneficial ownership of the institutional investors who will own 20% of the bidding company.

And I suggest to you that the answer was, well, everybody was going to go to the market here.

Everybody was going to float here, and I had no reason to believe that Esat Digifone didn't comply with Article 3. And their intentions were fully disclosed, and I suggest that betrays a sensitivity to stating

the simple facts.

A. We had some of this yesterday, in the sense that we had this confidentiality constraint about the names, so we couldn't disclose the names, and then we were trying to draft language which would go as far as possible to answering the question. I am not saying what I am saying is it wasn't a conscious decision; it was what we felt comfortable in saying at the time. It wasn't a decision to hide anything. It was just what we felt comfortable in saying at the time. And it wasn't the Minister's draft; it was a civil service draft.

Q. Further down the road we'll be coming to what the Minister called, in a letter to the newspapers, to the newspaper editors, a campaign of speculation being mounted in connection with this process. And the civil servants that is you, your colleagues, and Mr. Loughrey indicated that you, in an unprecedented move, wished to make a public statement to provide a basis for informed comment. But surely you must have been aware that by not providing the full facts, you were fuelling the speculation that you subsequently complained about?

A. I think the speculation was being fuelled from elsewhere, but I can't prove that.

Q. But weren't you fuelling it as well? You were asked a simple question: "Who are the owners? Please tell us

who they are". And the answer, as far as I can see from what you have told me, "We know who they are. They are institutions of undoubted financial strength. They are on board, but there are things to be tied down. This is understandable, because their commitment was not an absolutely concrete one. We don't want to name them. We have given an undertaking not to name them, but of course their names will ultimately be disclosed". Why not state those simple facts?

A. I don't know why we drafted the way we drafted, but what I am saying clearly is that it was the civil servants who were doing the drafting. It was not that we had a Minister asking us to cast the reply in a certain way. That's the only clarification I want you to have in your mind when we finish this discussion. It was what we felt comfortable saying at that time.

Q. Why would you have felt uncomfortable stating the true facts?

A. Part of the true facts of the disclosure of the names

Q. No, no, you didn't have to. You could have said "I am not disclosing the names". The Minister could have been told "I don't want to disclose the names, but this is a temporary thing".

A. I can't give you a better answer.

Q. I think yesterday I had gone up as far as almost as

far as the evaluation of the evaluation, but I may have overlooked a document just before it that I want to mention. And if you go to Leaf 162.

Do you remember, we mentioned yesterday that at the first meeting with the successful bidder on the 9th November, the question of masts was mentioned?

A. Mm-hmm.

Q. And you were being asked to see what you could do about it. And this is a note of Mr. McMahon's of the 13/2/1996 at which Mr. Fitzgerald was present, Mr. McMahon was present, you were present, Mr. John McQuaid was present, Mr. Ryan, I take it "AR" is probably Mr. Ryan?

A. It probably is, yeah.

Q. EM?

A. That could be Eamonn Molloy, I suspect.

Q. Mr. Eanna O'Conghaile and Ms. Regina Finn.

And Mr. Fitzgerald begins off saying that "Esat was in last week to see the Minister first we heard of it." That's obviously Mr. McMahon's note.

Underneath that, Mr. Fitzgerald goes on: "Wanted him to do something about co-location.

"What to do?

whatever we do, it should not put us at the forefront of this

Department of the Environment and Health have high ground leave it to them

we should respond to Department of the Environment's draft guidelines for planning permission and help them redraft.

agreed, MB to do it"

Do you recall that meeting, or a meeting on that issue?

A. A meeting of that type did take place, absolutely, yes.

Q. Mr. Fitzgerald says "Also, can we get the operators, Telecom Eireann, ESB, RTE, Esat together to knock heads on co-location

me to draft." Meaning Mr. McMahon.

Mr. McMahon says "Yes, but let Department of environment take the lead role too"

You are reported as saying, "Will tell Department of the Environment to set up a group to examine various issues on this."

This was a somewhat sensitive issue in one sense, wasn't it, because here you were trying to promote co-location, trying to respond to pressure from the successful bidder, where most of the people upon whom you'd be seeking to apply pressure or to encourage down the road of co-location, themselves had been applicants; isn't that right?

A. That's true, that they had been applicants. I am not accepting, for the moment at least, it was a very sensitive issue.

Q. Well, one of them, ESB, was in second position?

A. Yes.

Q. And therefore was waiting in the wings in the event of a hiccup; isn't that right?

A. Yes.

Q. And ESB were being asked to make their assets available to assist a competitor to get his licence negotiated with you; isn't that right?

A. I don't think we connected the question of masts directly with the licence negotiations. I mean, we had a strong policy on co-location which I think was articulated either in the memorandum for information for applicants, originally, or in the memorandum responding to questions. We had a strong policy on co-location for a variety of reasons, some of which I mentioned before, about advantages of the incumbent, some of which to do with environmental considerations, etc. We believed in co-location, like most other countries, like probably all other countries. So what we were trying to do was facilitate it actually happening.

Q. Did you say then that you didn't recognise any sensitivity here in view of the fact that ESB were being asked to co-locate although they didn't know they were in second position?

A. I think I knew from my contacts with ESB that in any event, no matter who won the licence, that the ESB or RTE

were interested in getting a share in the action for their facility.

Q. It follows that they were all bound to be interested in it. As I understand it from the presentations, and I didn't pick this up until I saw or listened to the presentations, one of the advantages being, if you like, promoted by the applicants that had Telecom Eireann, or that sorry, ESB, RTE or Bord na Mona or anyone like that on board, was that they had assets which would enable them to get a network up faster, to get a network up more readily, to avoid planning delays and so on; isn't that right?

A. Yes.

Q. And ESB was in second position; isn't that right?

A. Yes, that's correct.

Q. Am I right in saying that they didn't know it? You didn't tell them, anyway?

A. We didn't tell them, no. But I just say all of the people who had relevant facilities were nearly all in different consortia anyway, and I am saying that our policy and attitude to co-location was a separate policy that we had.

Q. I understand that. You know that we are going to come to correspondence subsequently in which the ESB were being put under pressure, and I think threatened with pressure if they didn't adopt a more cooperative attitude to co-location?

A. I mean, you are using the language "threatened with pressure". We'll wait until we see the documents.

Q. If you go to the end of that memorandum now, not the end of the documents, but the end of that note, which I think is about the fourth page of the section.

You see the first item: "GSM II licence, issue it, get it out!" Do you know what that's about? Do you recall? It's written with an exclamation mark after it, as if some fairly Draconian order is being given to this effect. I can understand the natural desire to get it out, but...

A. I can't say that I have a specific recall of it. Whether it was coming from Mr. Fitzgerald it probably was coming rather more from Mr. Fitzgerald than from me. But I think I said, in my very early days here, that I would be of the same mindset if I was the person after winning this licence, I'd be pressing any button I could press to try and accelerate it.

Q. Yes.

I don't think I need to dwell on the rest of the document. We need to hear what Mr. McMahon has to say about it.

We now come on to the document I mentioned yesterday, the evaluation of the evaluation, and I think you drew attention to it already, and I think for that reason I think we should read it into the record. I should say

that it is a document provided as part of the process, and it's not therefore a document the ultimate reception of which would evidence is going to give rise to any debate. It is in fact a document which existed as part of the process in which Mr. Andersen was involved.

A. Yes, it was promised in his original tender.

Q. Yes. We'll just ask the Registrar to read it into the record.

REGISTRAR: Memorandum on the evaluation of the evaluation of the GSM II tender in Ireland.

"Evaluation of the evaluation"

1. Introduction

This memorandum aims at describing the methodology and evaluation techniques applied in order to arrive at the results of the evaluation. Initially, a description is provided as to how the evaluators have laid down the work in such a way that the criteria of success concerning the project are met to a reasonable degree.

2. The success criteria

Focusing specifically on the evaluation phase of the GSM2 tender, the criteria of success have especially centralised around the following three categories:

Temporal effectiveness, i.e. timely deliveries.

In principle, the deliveries of the PT GSM should not be a critical path, although the Irish GSM2

tender has not been run as an EU tender.

Procedural effectiveness, i.e. compliance with the licensing principles of the best application method, according to which the procedures should be transparent, objective and non-discriminative.

By strictly following these general principles, it should also be ensured, to the highest extent possible, that no successful litigation or complaints could be pursued by the applicants ex post.

Substantial effectiveness, i.e. successful introduction of cellular competition (GSM).

Provided that the Irish GSM2 tender has been based on the method best application, it is unequally important to nominate and select a candidate that can compete efficiently and effectively in the market-place.

These areas of focus are commented below. Before the more specific comments are introduced, a general overview of the evaluation process is provided together with specific comments on how the best application method has been applied during the Irish GSM2 tender.

3. A general outline of the conduct of the competition process

The evaluation process outlined below covers the period from May 1995 to November 1995.

The organisation

The Department of Transport, Energy and Communications has had the overall responsibility for the conduct of the competition. The drafting of this evaluation's evaluation report has been the responsibility of Andersen Management International.

The Project Team on GSM (PT GSM) conducted the competition process. The PT GSM comprised members from the 3 telecom divisions of the Department of Transport, Energy and Communications, the Department of Finance, and affiliated consultants from Andersen Management International.

Selected milestones of the competition process

The competition process was announced on 2 March, 1995 with a closing date of 23 June. 12 interested parties purchased the tender documents.

A facility was provided in the competition process such that interested parties could pose questions in writing. 9 interested parties took advantage of this facility and posed 230 groups of questions of which several contained more than one question.

On the basis of these questions, the Department and Telecom Eireann (concerning technical matters of interconnection) promulgated 2 memoranda on 28 April, allowing all interested parties to work on the basis of the same, mainly regulatory, information. This was further strengthened by a subsequent memorandum,

comprising a number of tender specifications, including a number of mandatory tables, as well as a draft licence.

One of the interested parties claimed that the interconnection regime was not adequate in order to sustain and maintain a GSM2 business case in Ireland.

The Department, in conjunction with Andersen Management International, then decided to circulate supplementary information on the subject of interconnection stating that the indications in the RFP document on this issue were to be a matter for commercial negotiation within 6 months of commercial operations subject to arbitration by the Regulator.

The framing of the evaluation

In order to frame the evaluation work, the PT GSM completed a number of activities prior to the closing date, including, but not limited to, the following:

Agreement of division of responsibilities, according to which Andersen Management International was to lead the work during the evaluation.

Adoption of an evaluation model as to how a combined quantitative and qualitative evaluation should be performed.

Adoption of detailed work programmes in order to ensure timely deliveries.

Shortly before the original closing date of 23 June,

the European Commission expressed serious reservations concerning the inclusion in the selection criteria of an auction element in relation to the licence fee for the second operator without the imposition of any fee on Eircell.

It subsequently became clear through bilateral contact with the Commission that infringement procedures would, as in the Italian case, be initiated against Ireland, if the eventual licence fee discriminated against the second GSM operator relative to Eircell.

The Office of the Attorney General advised against proceeding with the competition in its then form because of the risk of further legal action by the Commission. The process was accordingly suspended. A revised licence fee requirement was negotiated with the Commission whereby the second GSM operator would volunteer a licence fee in the range of IRi½ 5 million to IRi½ 15 million and Eircell would pay a fee of IRi½ 10 million. This approach was endorsed by Commissioner van Miert on 14 July 1995.

In this way, Ireland became the first EU member state to receive a prior consent from the Commission on the agreed fee structure. The Department then re-opened the competition process with August 4, 1995 as the new closing date.

On the closing date, the Department received 6 applications plus a preliminary GSM business case

description from Eircell, which is already in commercial operation with a GSM (1) system. The Department and Eircell agreed that this description was insufficient to meet the need of the Department, and subsequently Eircell submitted, on 11 August, 1995, a more detailed business case description following the mandatory tables. Since this "application" is not mandatory, it has not been subject to a fully-fledged comparative evaluation.

However, the GSM business case information provided by Eircell has been used as a valuable reference point and served comparative purposes, when judged relevant.

All the GSM2 applications received were admitted to the evaluation, as none of the applications had such substantial deviations from the minimum requirements of the RFP document that they were to be rejected.

With a view to making comparative evaluations, it appeared at an early stage in the evaluation that some of the applications had prepared insufficient information.

In accordance with the provision made in paragraph 16 of the RFP document, it was thus decided to pose a number of tailor-made written questions to the applications, and these questions were forwarded to the applicants on 24 August. The answers received on 4 September revealed that this part of the process had resulted in valuable improvements of the basis for

comparisons. For example, a number of questions on metering and billing principles demonstrated that the different applications have used widely different assumptions concerning the charge units (time-true per second billing or billing in increments of, say, 10 seconds) and concerning initial call charge (ranging from no charge to 30 seconds independently of the actual duration of the call).

A large part of the quantifiable side of the applications was then compiled and put into graphics in order to serve as a background for the evaluation.

The marking of the best application

The nucleus of the evaluation was then commenced by the establishment of 10 sub-groups each dealing with one of the dimensions outlined in paragraph 19 of the RFP document, namely market development, coverage, tariffs, international roaming plans, radio network architecture, network capacity, frequency efficiency, performance guarantees, financial key figures, and experience. This approach was agreed prior to the closing date and was also part of the evaluation model adopted, except for the evaluation of the licence fee offered, which did not require sub-group meetings.

Each sub-group comprised members from the Department and consultants from Andersen Management International. In addition, the Department of Finance participated in the sub-groups on financial key

figures and performance guarantees. The sub-groups were staffed such that they comprised different members and affiliates of the PT GSM with specific expertise in relation to the subjects to be evaluated. An invitation was issued on 5 September to each of the six applicants to attend a presentation meeting with the PT GSM. The invitation incorporated an agenda for the presentation and a number of questions to be responded to. This was done on an equal basis to all such that one hour was reserved to a presentation of the business case behind the application, one hour was offered to answer questions, which were equally posed and worded to all applicants, and one hour was reserved for the PT GSM to pose questions to the applications. The presentation meetings were consecutively held as 6 separate meetings from 11 - 14 September 1995.

After the presentation, the remaining part of the evaluation was conducted, in particular on credibility, risks and sensitivities, as well as the overall evaluation and final marking of the applications were completed, leading forward to the conclusion that a comparatively clear winner had emerged.

An initial draft report was discussed by the PT GSM on 9 October. The incorporation of comments on the initial and a subsequent final draft by members of the

team in relation to the presentation of the results of the evaluation process has culminated in a final evaluation report, which was finished far ahead of the time schedule.

Status as per ultimo February 1996

The present status of the evaluation is that the evaluation report was finished on 25 October 1995, leading forward to the announcement of the winner.

This was more than a month ahead of the schedule announced by the Minister.

Prior to the closing date, the Andersen team drafted a detailed work schedule, which was approved by the PT GSM. The work with the evaluation appeared to be at least a couple of weeks ahead of the schedule during the last part of the evaluation. Part of the explanation for this outcome is the process management skills. Another part of the explanation is that one candidate emerged as a clear winner during the later stages of the evaluation process.

The work after the evaluation, i.e. the licence negotiations in particular, has not, however, followed the projected time schedule.

4. The overall evaluation model and techniques

Prior to the closing date, the PT GSM had discussions on how to evaluate the application. It was agreed to proceed as follows:

The general method to be used was the so-called

best application method, which is often dubbed "beauty contest." This method has been recommended repeatedly by the Commission and in its green paper on mobile communications as the best among several licensing methods. Basically, this method requires that the nominated and selected winner is the best application.

'Best' should be measured against the criteria outlined in paragraph 19 of the RFP document.

More specifically, each criterion was broken down into dimensions and indicators. In addition, the PT GSM adopted a weighting of the dimensions, which was in compliance with the descending order of priority by which the criteria of paragraph 19 of the RFP document were listed.

Essentially, the PT GSM decided that all the results of the evaluation should be presented in one comprehensive report, which should clearly reflect the evaluation criteria of paragraph 19 of the RFP document.

5. The nomination of the best application

The members of the sub-groups were drawn from the overall Project Group according to expertise relevant to the dimension under discussion in order to maximise the relevant qualifications behind each mark awarded and to qualify the nomination of the best application.

The process involved the award of marks to each

application under each of the evaluation criteria dimensions. The marks under each dimension were developed through an assessment of the marks for each of the relevant indicators, dimensions and aspects.

The process necessarily involved weightings consistent with the descending order of priority outlined in paragraph 19 of the RFP document. The result in each case was arrived at through a process of discussion and consensus within each sub-group.

In addition, also credibility, risks and sensitivities were taken into account. Therefore, apart from a detailed evaluation of marketing, technical, management and financial aspects of applications as presented by applications, the evaluation team also carried out an assessment of:

The overall credibility of the applications and the consistency of the business case presented with details and assumptions elsewhere in the applications.

Risk and sensitivity factors which could have the effect of derailing the business plan including, for example, failure to achieve coverage as planned or failure in the distribution channel, and

Identified weaknesses in specific applications including for example basic assumptions which were considered dubious, possible conflicts of interest

or financial weaknesses.

However, these factors were not directly awarded marks, because the major evaluation had already demonstrated significant differences among the applications, and because the ranking turned out to be the same as the ranking generated by the main evaluation.

The evaluation report aimed at nominating and ranking the 3 best applications. This was finally achieved through:

1. Qualitative award of marks to the six applications with respect to the 56 indicators closely linked to the evaluation criteria listed in paragraph 19 of the tender document.
2. Qualitative assessment of applications according to the various marketing, technical, management and financial aspects.
3. Validation and finalisation of the results through four different weighting and scoring techniques, which all generated the same results.

It emerged from this final part of the evaluation that a clear winner could/should be nominated.

6. Final remarks

Summarising, the PT GSM has tried to obtain a high degree of temporal, procedural and substantial

effectiveness by a number of means.

So far, the status as per mid February 1996 was that it can be concluded that the PT GSM in the Irish GSM2 tender has achieved a high degree of temporal and procedural effectiveness. Furthermore, a high substantial effectiveness should materialise when the nominated and selected candidate is based on the best application.

In this section, the evaluation is evaluated more closely in relation to the success criteria outlined in chapter 2 and on the basis of the present status of the project.

Temporal effectiveness

The PT GSM was never a real critical path during the GSM tender. Concerning the evaluation it can be concluded that the project has either been on schedule or even considerable ahead of schedule compared to the pre-adopted work plan. In particular, it can be concluded that the following important milestones were met:

Finalisation of the bulk of the admittance procedure after the first two weeks. The evaluators were rather quickly in position to conclude that all the applicants lacked some information. Such information was then quickly requested and provided within one week's notice.

On the basis of this procedure it could then be

concluded that all the applicants could be admitted to the evaluation.

Finalisation of the bulk of the quantitative evaluation after four weeks. During sub-group sessions, the evaluators managed to perform most of the work with the number crunching at an early stage such that the quantitative evaluation could constitute a fact base for the qualitative evaluation.

As foreseen, the presentations provided by the admitted applicants were conducted in the middle of September and the admitted applicants were given sufficient time to prepare their presentations.

The timetables concerning the main part of the evaluation, the qualitative evaluation, including the work in the 10 sub-groups were also met. The part of the qualitative evaluation during which marks were given to each application were in practice mainly organised as sub-group work with ballots during which the different views and marks were harmonised. Also in this respect, the output was finished within the adopted time limits.

The final documentation of the evaluation, i.e. the evaluation report, was delivered to the Department far ahead of the deadline.

Also the Minister managed to make the decisions within the time frame stipulated, in fact even quicker than the time allocated. Consequently, it was possible to reach 'celebration day'/the press conference/the licence award several weeks earlier than expected.

Taken all together, the tender has been conducted in conformance with the recommendations concerning EU tenders. It is also evident that e.g. the evaluation has met all the deadlines/critical paths of the work plan. It can therefore be concluded that the project including the evaluation, but excluding the issuance of the licence has been executed with a relatively high degree of temporal effectiveness.

Procedural effectiveness

The Department in general and the PT GSM in particular have taken a number of steps in order to structure the process and also a considerable number of specific procedures have been (pre-)adopted. Prime examples are: The formation of a PT GSM and the appointment of a chairman, the involvement of the Andersen team, the Attorney General, the early adoption of the evaluation model, procedures concerning security, and the work planning. These action points all support the target of obtaining objectivity, transparency and non-discrimination of the process.

This has further been supported by the fact that the

Minister has not interfered or tried to exert influence on the outcome of the evaluation, which has entirely been the responsibility of the PT GSM. This has also been supported by the fact that no political or arbitrary matters have been mixed up with the evaluation.

As another example of the applied procedure, the sequential deductive-inductive steps of the evaluation process should be underscored. The evaluation of different "areas" of the application has been consistently broken down into aspects (e.g. marketing, technical, management, financial and other aspects), dimensions, indicators and sub-indicators. In practice, this approach has turned out to be a helpful tool in the evaluation. Additionally, this tool has helped to increase the objectivity and the non-discrimination of the evaluation, because a new evaluation team with the given amount of resources and priorities would, in principle and in practice, come to the same end result as the results of the PT GSM.

The adopted approach of the evaluation has been further supported by the computer models applied, the document handling system, and the IT-facilities.

Summarising the performance on the procedural side, considerable importance has been attached to the following three areas:

The transparency, which is substantiated by the

fact that all the evaluation models and techniques were adopted even before the applications were received and that the adopted procedures - not limited to the work plan, but also including the iterative step-by-step approach to the conduct of the evaluation were subsequently followed. One of the ways, by which outside parties will be able to check the transparency to follow the consistency between paragraph 19 of the RFP document, the pre-adopted evaluation model, the final documentation of the results of the evaluation and the draft rejection letters.

The non-discrimination, which is substantiated by the fact that all applicants have received the same treatment on an equal footing. This was e.g. reflected during the questioning/answering-period where all the questions and answers were anonymised and circulated to all that had bought the tender material by means of information memoranda. This was also reflected in all communications with the applicants during the evaluation. As an example, all admitted applicants were asked the same questions and received the same agenda before their presentation, and the presentations were managed by the Department in such a way

that all applicants had the same time frame to work with.

The objectivity, which is substantiated by a number of facts. One is that a considerable amount of PT GSM members and consultants from the Andersen team participated in the evaluation and that no disagreements occurred during the voting, award of marks, and the final result of the evaluation. Another fact is that outside interests, political aspect or hidden links to outside parties never occurred.

Taken all together, it can be concluded that a high degree of objectivity, transparency and non-discrimination has been obtained and that a high degree of procedural effectiveness has thus been reached.

Substantial effectiveness

GSM is the first area of telecommunications, in which competition will be introduced by way of a strong operator with RPOA-status. Thus, it has been important to nominate a candidate that could compete efficiently and effectively with the incumbent.

The PT GSM and its advisors have e.g. taken the following steps to this end:

The nominated and chosen candidate has the highest marks of all applicants. Four different methods of calculation have been used in order

to reach a fully consolidated result. It has turned out, however, that all methods generate the same end result. Consequently, a clear winner emerged.

The nominated and selected candidate intends to introduce competition not only at the network level, but also at the service level and even at the terminal level. In total, the winner clearly has the strongest marketing concept.

The nominated candidate has a market leader strategy, which is satisfactorily evidenced in the application.

By suggesting to nominate the strongest competitor on the basis of the evaluations, the PT GSM has done as much as is in its power to successfully introduce competition within this new battlefield, and therefore made as much as possible to reach the highest obtainable level of substantial effectiveness. There are, of course, no guarantees as to how the competition will develop as this depends on a number of factors of which some are still unknown.

In addition, the Regulator will play an important role to ensure fair competition, e.g. by means of a level playing field, interconnection arrangements, the regulation of the scarce resource such as the frequencies and the numbers, and the avoidance of abuses of dominant positions, etc.

As there are unpredictable internal and external factors governing the prospective successful introduction of competition within the area of GSM, it cannot at present be concluded that this goal has been reached. However, it can be concluded that the evaluators have done everything in their power, e.g. to choose the strongest competitor to GSM1, in order to maximise the substantial effectiveness.

The success criteria revisited

As is evident from the outline above, it can be concluded that the PT GSM and its advisors have obtained a relatively high degree of temporal and procedural effectiveness, whereas it is more difficult to assess the so-called substantial effectiveness, in which area the PT GSM has done everything possible.

It has therefore been decided to close the project down and the Andersen team has consequently maculated the applications in agreement with the Department.

In accordance with the contract between the Department and the Andersen team, the Department can give Andersen Management International A/S a letter of consent in which it is expressed that the contractual obligations of the Andersen team have been fulfilled, when the final meeting concerning the conclusion of the licence negotiations has been held with the winner.

CHAIRMAN: Thank you, Ms. Hayes.

MR. HEALY: Thank you, Ms. Hayes.

Q. MR. HEALY: This document came to the Department from Michael Andersen under cover of a fax cover sheet of the 15th February of 1996. This is contained in Leaf 163. It's for the attention of Fintan Towey, Eanna O'Conghaile, from Michael Moesgaard Andersen, and it says

"This is the document which I have promised Fintan to draft and forward not later than February 15.

"I would appreciate a call from Martin concerning the close down of the GSM project, comments to the 'evaluation of the evaluation,' our participation in a final meeting with Esat Digifone, and other activities which he might envisage."

The document itself is a very upbeat account of the process, isn't it, a very positive account of the process?

A. It is indeed.

Q. Is it not a matter of concern to you that neither Andersen Management nor Michael Moesgaard Andersen, the person most closely associated with it in personal terms, is not prepared to stand over any of this by coming here to give evidence?

A. I said previously that it was a matter of disappointment to me and to the Department

Q. Not just disappointment

A. that that is the case. I thought I understood from

the Opening Statement that it was more a case of a very difficult business dilemma than an unwillingness, because I believe that he has co-operated to some degree up to a certain point. I don't know what more I can say about the matter.

MR. O'DONNELL: Sorry, I think the suggestion that he is not prepared to stand over the report is not necessarily consistent with his unwillingness to come and attend. And I think to suggest that he is unwilling to stand over the report is something that really can only be put to Mr. Andersen. But the fact that he is not coming here does not mean that he, now, that Mr. Andersen doesn't stand over this report. He has given his explanation in correspondence as to why he won't come.

CHAIRMAN: All right, noted, Mr. O'Donnell.

Q. MR. HEALY: I think you heard, in the opening comments of Mr. Coughlan, Mr. Coughlan referred to correspondence with Mr. Andersen. And in that correspondence, Mr. Coughlan made it clear that Mr. Andersen's non-attendance here could, at the end of the day, depend on what view is taken of the evidence, result in negative comments that might affect him, and notwithstanding that clear indication of what the consequences could be, he still hasn't come. And I just want to know, would you share my concern, not just my disappointment. I am not terribly interested

in the reasons given about some business problems.

Would you not share my concern that he is not prepared to come to stand over these this work he did in this process?

A. I don't know how many ways I can say this. I have no influence now over Mr. Andersen. I would prefer if he were here to give evidence, because I believe that his evidence is, in the round, very favourable to the process and so on. I can't bring any influence to bear on him, as far as I know. The Department went as far as it could in facilitating the contact between the Department

Q. That's absolutely correct

A. between the Tribunal and Mr. Andersen. So I really don't know what it is you are asking me to say or do at this point.

Q. I am just somewhat intrigued that you use the word "disappointed". It seems to me to go way beyond that. But if we are only quibbling about words, I will pass on.

What do you know about this promise to provide the evaluation of the evaluation?

A. I don't know much, if anything, about the contacts between Mr. Towey and Andersens. I am clear that because I rediscovered it in the context of this Tribunal reading the documentation, that it was part of their original plan. I think I myself had

forgotten about it until I saw it.

Q. Do you see where Mr. Andersen says "I'd appreciate a call from Martin"?

A. Yeah.

Q. Concerning firstly the close-down of the project, secondly comments on the "evaluation of the evaluation", thirdly "our participation in the final meeting with Esat Digifone and other activities which he might envisage".

Did you contact him after this?

A. I don't recall contacting him, but I couldn't rule it out, and it may be that Mr. Towey did whatever contact. I certainly don't remember giving any comments on the "evaluation of the evaluation".

Q. And I can certainly find no evidence that any comments were furnished to Mr. Andersen concerning it.

A. I don't believe they were. But it wouldn't have been at that point a document to which we would have attached a huge amount of importance, quite honestly.

CHAIRMAN: I think he was clearly in the market for further jobs in Ireland and got them.

A. He was, but not with the Department. Although it's fair to say that some of the people who were involved with us worked temporarily with the Regulator when the Regulator was first set up.

Q. MR. HEALY: It wasn't given to any other members of the project team for their comments, it was?

A. I just don't know.

Q. I don't think it was. Do you have any reason to think it was?

A. I suspect if it were circulated, there would be some indication on the files or markings on the front page or something.

Q. What was the purpose of it, in the sense of for whom was it prepared?

A. It seems to me, from looking back at the material, that it was simply a final step in the Andersen approach to evaluating competitions of this kind.

Q. You mean that he gave himself a pat on the back, is it?

A. You could use those words.

Q. I mean, this was most of this document is simply lifted from the evaluation report, apart from what I might call the slightly painful parts; isn't that all it is?

A. Apart from what you might call

Q. The somewhat painful parts he didn't refer to. I'll come to them in a minute. But most of the document is lifted from the evaluation report, isn't it?

A. I suppose that's in the nature of modern technology, really.

Q. But presumably did you read this document when you got it?

A. I think I did.

Q. But the proposition that an evaluator could produce an evaluation of his own evaluation is simply ludicrous, isn't it?

A. It would be ludicrous if anybody attached any significance to it.

Q. Well, I have only mentioned it I propose to pass over it, but you mentioned it the other day, and you attached some significance to it, and that's why

A. The only significance I was attaching was it was written closer to the time of the competition.

Q. And there are fairly stark differences between what's contained in this, aren't there, and the document that was read out by the Registrar on Wednesday?

A. There are. But I have no idea what were the terms of reference for the construction of that document or, I mean, I have now seen evidence of visits that Mr. Andersen paid here in private to the Tribunal and so on. But I have no idea what his terms of reference were in preparing that document.

Q. Sorry, I didn't quite follow what you said there, Mr. Brennan. You say you have now seen evidence of visits that Mr. Andersen paid here in private to the Tribunal. You mean the material that was

A. Attendances notice you gave us recently, yeah. So I mean, that's all the knowledge I have of the contact between the Tribunal and Mr. Andersen. So I don't know what his terms of reference were in preparing

this more recent report.

Q. Well, I think the State's legal team have been provided with all the relevant correspondence. I think he was simply asked for an account of the process.

MR. O'DONNELL: I don't think that's correct, My Lord. I don't think we have got the correspondence yet, although we have certainly asked for it, but I don't think we have got it yet.

Q. MR. HEALY: And I think the first two pages of that document devote a lot of time, as Mr. Andersen frequently does, to describing what it is he proposes to do and therefore, as I see it, gives an indication of what his terms of reference were, but there is that document, if you like, together with the other comments he has made, he is almost as negative as this is positive; isn't that right?

A. There certainly are some negative things in his other document, yes. And in fact I believe that our side should probably give you a written commentary at some stage in relation to the more recent document, just as a more efficient way of proceeding, rather than go through it paragraph by paragraph, which would take forever.

CHAIRMAN: Well, the contrasts, as Mr. Brennan has agreed, were pretty stark from the initial and longer evaluation, so I think perhaps you can go fairly

quickly through them, Mr. Healy.

Q. MR. HEALY: This document refers to the status as per ultimo February 1996 as page 3; do you see that?

"The present status of the evaluation is that the evaluation report is finished on the 25th October 1995 leading to the announcement of the winner and so on.

"It ends up "The work of the evaluation, i.e. the licence negotiations in particular, is not, however, followed the projected time schedule."

It makes no reference to the actual status as of that moment, in the sense that it makes no reference to the fact, which Mr. Andersen stressed in his report, that any dealings with the successful bidder would have to be based on the insertion of conditions to deal with financial weaknesses. How did he prepare the section of the report dealing with the status as per ultimo February 1996, and why does he make no reference to that?

A. I have no idea.

Q. Is this just nonsense, this report? I mean, it doesn't tell you anything, does it?

A. I mean, you are free to take that view. I didn't ever attach any significance to this document except the significance that it was prepared closer to the time of the evaluation.

Q. It makes no reference at all, does it, to the really quite serious difficulties that developed concerning

the quantitative evaluation; isn't that right?

A. To answer that, I would have to reread it more carefully.

Q. I think you could take it from me, it doesn't mention it. It doesn't mention it at all. It doesn't mention what he calls in the report the withering away, and it doesn't mention the fact that the entire planned evaluation model, the one that he set out in Appendixes 2 and 3 of the report, could never actually have been executed. Maybe it wouldn't have reflected too well on him if he said that, but it is a fact that he couldn't execute what he planned to, or set out to do?

A. I can only repeat that the Tribunal should make take whatever account the Tribunal sees fit of this document.

Q. I am not asking you to be responsible for it. You are you were a person involved in the process. I am just asking whether you agree with the impression I formed of it from my knowledge of the process from the documents. I don't want to go into it all in detail; I am prepared to do so if you want to.

Am I right in saying you couldn't place any reliance on this as an evaluation of the evaluation?

A. That's a matter for the Tribunal to determine, ultimately.

Q. Would you agree with that?

A. For example, from my point of view the statement in it about anybody else coming to the same conclusion based on the same applications, that's a statement Michael Andersen actually made to me at the end of the process and is only recycling now, and I think that's important.

Now, to put it another way, I think that if you took any six months of work by any group of individuals, and five years later you put a big team to find the flaws, it's inevitable that flaws will be found of some kind, if you work hard enough at finding them.

But I believe the process itself was, given that we had no template, I believe that it was a very serious attempt by a group of people to do a job well.

Q. I am not for one moment disputing that. I am only suggesting, in case it might reflect on you or any conclusion that might be reached might reflect on you, would you agree with me that this document is not one that anyone could place any real reliance on in evaluating the evaluation?

A. That's a matter for the Tribunal to decide.

Q. The only part of the document that you'd attach any significance to is Michael Andersen's statement, or the part of it that you'd attach significance to is Michael Andersen's statement that if other people had been asked to do the same job, using the same RFP and so forth and the same criteria, they'd have come up

with the same result?

A. That's a statement he made to me at an earlier stage.

I am not myself attaching any particular significance to this document. I cited it earlier in evidence simply because it existed and because of the time-frame within which it was written. I didn't attach any significance to it when I first read it.

Q. Could I just ask you about one last thing, and this is mentioned in the report as well. It causes some confusion to me. If you look at page 6 of the evaluation of the evaluation, Mr. Andersen says at point 3 he refers to the "Validation and finalisation of the results through four different weighting and scoring techniques which all generated the same results."

A. He says that twice, and I can't ground it.

Q. Neither can I.

The next document, in Leaf 164, involves correspondence between the ESB and Esat Digifone. I think that correspondence may have come into Department files, but there is other correspondence to which it relates. And I don't think there is any point in opening it without opening all of it, so I'll pass on from it.

Just to get a few other documents out of the way before the lunch-time adjournment, the next document, 168, is again something I don't think I need to

trouble you with unless you can throw any light on it.

It's a conversation, a note of a conversation with a parliamentary draftsman's and the Attorney General's Office on the 19th March, 1996, dealing with problems which were developing in connection with the legalities of the licence.

A. Sorry, your book must be out of sync with mine at this point.

Q. Did I say what number did I say to you?

A. You didn't say any number, but I was at 164, the letter to Billy McCann

Q. I have gone on from that and the related letters. If you go on to 167.

A. Sorry. Thank you.

Q. If you go on to 168, this is a note of Regina Finn's, simply recording the fact that you had contacted her.

And she notes:

"Mr. Martin Brennan rang this office today. He was with the Minister and the Secretary at the Telecommunications Council and the matter of the GSM licence was raised. The Minister directed that a final licence issue to Esat Digifone by Tuesday next at the latest. Following discussion, the Secretary agreed that instead of this, a draft version of the licence would be made available to Esat by Friday 22nd. Mr. Brennan was communicating the Secretary's instruction in this regard."

I think you had understandable pressure coming from the Esat Digifone side and on the State side. You had fairly significant legal problems including, I think, some the fact that you were being overtaken, I think, by some EU legislation at that time; is that right?

A. I have a feeling that in relation to that piece of paper, I was only the messenger.

Q. Yes

A. That I wasn't a party to the discussion surrounding it.

Q. I am asking you to recall what was happening in a general way. My impression of it is that there were problems in drafting this, and I think I am sure I'll be corrected if I am wrong that having drafted having conducted a competition, having identified a winner, having conducted or started your negotiations, there were EU developments which were occurring at the same time which were going to have to be incorporated in your licence and which you hadn't anticipated at the time the licence was first drafted in outline form in the course of the competition?

A. I would prefer to leave that to the people who were more directly involved to comment on.

I have a note here on the previous document. The fax from Ms. Finn to Mr. Towey and it may have no significance, but I must have picked up on the idea

that while the notes were written on the 13th February, they weren't sent to Mr. Towey until the 19th March. Now, I don't know why that was the case or what significance it has, but since I noted it, I said I'd pass it on.

Q. Maybe I am not following this, Mr. Brennan. What document are you referring me to?

A. The one in the previous leaf, 167, which you opened and passed over. I am just saying when I read it in preparation for this, I wrote on it "Why the gap from 13 February to the 19 March in sending this to Mr. Towey?" I don't know whether it has any significance or not.

Q. Why did you get the date the 13th February? Because I can't find it. It's a fax date, is it, I think?

A. I am not sure where I got it.

Q. I can see a fax dated 15th February. 3s are frequently like 5s.

A. It may have no significance, but just since it occurred to me.

Q. I think something like that is referred to in other documents further on.

I think, again, the next document is not one I feel you can throw any particular light on. It's in 169.

I think, unless you want to go on, Sir. I am happy to leave it there.

MR. FANNING: Sir, I'm anxious to intervene briefly at

this stage if it's not an inconvenient moment. I can withdraw until after lunch, but if it's a convenient moment.

As a matter of courtesy, I can say at the outset I appear for Mr. Lowry with Mr. Roderick O'Hanlon instructed by Kelly Noone Solicitors. I say that at the outset as a matter of courtesy because I haven't addressed the Tribunal in public hearing.

CHAIRMAN: Your leader is Mr. O'Hanlon.

MR. FANNING: Yes, Sir. And I might say whilst I am on the courtesy point, while counsel aren't appearing regularly at the moment during Mr. Brennan's evidence, both due to a resource difficulty that's been fully aired in correspondence with Mr. Davis and also because, I think it's fair to say, we share the sentiments expressed in Mr. McGonigal's submissions some days ago that not a scintilla of evidence of wrongdoing in respect to Mr. Lowry has yet been heard in the current module by the Tribunal. I do assure you, Sir, that we are following closely the transcripts of the daily proceedings. And I stand up at this stage, Sir, to draw your attention to an objection that I do wish to make in respect of the questioning of Mr. Brennan on Day 175, which is Wednesday. And if I could draw particular attention to Question 119 that was posed to Mr. Brennan in examination by counsel for the Tribunal on Wednesday.

And perhaps if I can read out the relevant paragraph that I, on behalf of Mr. Lowry, do have a significant difficulty with, Sir.

The paragraph is as follows:

"I am not suggesting to you that you or any civil servants were involved in deliberately massaging the process in favour of A3 or A5. What I am saying is that if you look at this document, notwithstanding the pressures under which, and perhaps because of the pressures under which it was being put together, that the Minister was being provided with a version of the process and a version of the report which he wanted. He wanted a quick result. And he wanted a result where financial issues could be disposed of by the bankability proposition, and he wanted that result, if you like, on the 24th, today, and he wanted to be able to bring that result to his colleagues in such a way that it left no doubt but that the recommendation was so clear-cut it had to be accepted."

Then he goes on: "Because I'll just ask you to ponder one other thing about it."

In relevant terms, Sir, my objection is that the terms of the question that I have read out presuppose that Mr. Lowry had a preferred outcome in the deliberation process of the Project Group. No evidence has been heard by this Tribunal to date that Mr. Lowry had any preferred outcome. The terms of the question

therefore, I would say, are entirely illegitimate, and moreover it raises a concern in the mind of my client that counsel for the Tribunal, in asking a question in such loaded terms, have strayed into the adjudicative side of the process that the Oireachtas have reserved solely for you, Sir, as the Sole Member in the Tribunal.

So I object to the question in its terms, because I think it's incorrect as a matter of fact. And I'll be inviting the Tribunal subsequently to find as a matter of fact that it has no evidence to support it. It's an illegitimate question at this stage, when no evidence has even possibly been tendered to support its conclusions, and it's illegitimate because it strays into the adjudicative role that is reserved for you, Sir.

So it's for those reasons that I ask that the terms of the question be withdrawn or satisfactorily qualified at this juncture to the advantage of my client.

CHAIRMAN: Well, I take account of your objection; but the task of counsel for the Tribunal in his lengthy examination of Mr. Brennan is to probe a number of possible hypothetical situations, including one referable to the terms of reference in the manner that you have stated.

I certainly have not made up my mind on any matter adverse to Mr. Lowry and will not remotely seek to do

so until all relevant evidence has been heard, at which stage I will seek to decide whether or not matters that justify findings pertaining to the terms of reference have been established or not. But I think it is incorrect on your part to criticise counsel for the Tribunal for, as it were, adopting some judgmental format.

It is necessary, in the course of the lengthy and far-reaching task of examining the prime and most important witness on the Department side, to canvass a number of situations. This has been done. It does not involve any predetermination adverse to Mr. Lowry, either on the part of counsel or on the part of the Tribunal itself.

So whilst I note your remarks, and I accept fully the basis upon which you propose with Mr. O'Hanlon and Mr. Kelly to make your future representations referable primarily to days that most directly relate to Mr. Lowry's ongoing interests, I do not accept that what was involved in the questioning involved any unfairness or adverse predetermination on the part of the Tribunal or otherwise.

Ten past 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: Mr. Brennan, if you could go to Leaf number 170; I am not sure if you can make any comment on this. It's a letter from Mr. McMahon to Mr.

Digerud dealing with pressures being applied by, and of course understandably, by Esat Digifone to try to get the licence issued.

The next document is a letter from you on the same issue. You say:

"I wish to acknowledge receipt of your recent letter regarding the critical path for the deployment of the Esat Digifone network.

"Regarding your concerns over possible delays in agreeing the licence, I confirm that the draft licence has now been forwarded to your office, and I am hopeful that the matter can be finalised to all our satisfaction in a reasonably short space of time."

Can you recall that letter?

A. Not particularly, no.

Q. Can you recall being involved in the Department side at a time when complaints were being received from Esat Digifone that the matter wasn't proceeding as quickly as they'd like?

A. I mean, I can recall once or twice, but I don't know when, being aware of problems, and I think I said before, being a little frustrated how long it was taking. But I don't have any specific recall of blow-by-blow accounts or anything like that.

Q. I suppose you must have been, as it were, stepping in and out of the process at this stage, even though you have already informed us that your involvement was slightly more detached, to think that you were signing a letter of no particular significance?

A. Yeah, I think I was staying broadly in touch with the process.

Q. Can you just describe for me at that time how the original project team was being deployed. We know that Mr. McMahon was doing, with his side of the Department, the work on the licence, the rather technical work. Do you know how the rest of the project team were being deployed, leaving aside the Department of Finance people who were at this stage out of it, I think?

A. I think Mr. Towey was interacting with Ms. Finn in relation to the licence. And it's probably the case that there was separate discussions with John McQuaid and/or Aidan Ryan and/or John Breen about radio aspects and other technical matters.

Q. And at that stage, can you tell me what Mr. Towey's function was compared to the function he was performing prior to the actual announcement of the winner of the competition on October 25th?

A. I don't believe I can do that in specific terms, no.

Q. Was he still reporting to you?

A. He was, yes.

Q. On a progress basis?

A. He was still on my staff.

Q. Did he still have a specific remit of keeping you up to speed in relation to the licence?

A. In a general way, I'd say, yes.

Q. The next document I want to come to is one that we mentioned already in the context of dealings with the ESB and the other utilities, and I'd mentioned that we'd look at all the correspondence at the same time.

It's Book 35, Leaf 6; and rather than have you juggle with books, I'll get you a separate copy.

It would appear that the other documentation that I mentioned came to hand in the Department as a result of an approach by Mr. Leslie Buckley, if you look at Leaf 166 you see a letter from Esat Digifone to Mr. Sean Fitzgerald; do you see that letter?

A. 166 in which book now?

Q. 166 in Book 43, the main book we are dealing with.

A. Yes, okay.

Q. You have that document?

A. I do, yes.

Q. I think it says "Mr. L. Buckley called today to" something "on lack of progress" is how I read it; do you see that? "To brief me on lack of progress. Sean Fitzgerald."

And we have this letter from Esat to Mr. Fitzgerald and the same date. In the previous document we have a

letter from Mr. Fitzgerald to Mr. Alfie Kane; it's in

Leaf 165. Do you see that?

A. Yeah, I do, yeah.

Q. And at Leaf 164 we have a letter which was presumably

brought to the attention of Mr. Fitzgerald, a letter

from Esat Digifone to Mr. William McCann, Chairman of

the Electricity Supply Board, of the 21st February of

1996. Now, in order to put these letters in context,

if I could just refer you to some of the other

documentation; but before do I so, could I just ask

you, were you aware of this if not this

correspondence, were you aware of these contacts being

made?

A. I'd say I was broadly aware that Mr. Fitzgerald was

interacting with various parties on this subject. I

may have, but I can't say for certain, sat in on one

such discussion with Mr. Leslie Buckley just by being

called in, but I don't know in what time-frame.

Q. Can you recall what Mr. Buckley was looking for?

A. I can't, really, no.

Q. The first document in the separate files of documents

I have given you is a file note of Mr. William McCann,

Chairman of the ESB, dated 7th February, of 1996 where

he says:

"I returned telephone call at 9 p.m. yesterday to Mr.

Padraig O'hUiginn, who was an acquaintance of mine.

"He had been looking for me earlier in the day.

"He told me that he was a director of Esat Digifone, and he said that they had approached ESB a good while ago in order to see if ESB would be willing to let them use their properties and masts for their telecommunications network. He said they were willing to pay for this.

"He said there'd been considerable delay in responding, and then it emerged that ESB were themselves bidding for the new digital telephone licence as part of a consortium, and he inferred that this explained the delay.

"He then went on to say that Esat Digifone had subsequently won the licence and that they had been in discussions recently with ESB (he thought the name of the person concerned was John McSweeney or John Sweeney, but he was not sure of this) again about using their locations". And we have heard Mr. John McSweeney's name in the context of the presentations we heard last week?

A. He is somebody I know well.

Q. He said that they did not appear to be making progress, and he then read to me what he said of a document about to be issued by the Minister for the Environment to the planning authorities. This document apparently encourages planning authorities to ensure that masts are, where possible, located together and apparently says that owners would be

expected to facilitate this.

"He said that it was Government policy that persons with appropriate sites should cooperate. He said that Esat Digifone believed there was an unreasonable reluctance on the part of ESB to cooperate and hence his telephone call to me. He said he would like me to raise this matter with the board. I responded by saying that I was not familiar with the issues involved and could not undertake to do this. However, I did say that I would look into the matter.

"He said that if the matter could not be resolved, then he would raise the matter with the Minister for Transport, Energy and Communications who was, he said, 'our joint bosses'.

"I again reiterated that I would look into the matter, but I was careful not to promise to revert to him, although it is probable that he expects me to do so.

"At the end of our conversation he said that he would send me a copy of the document to be issued by the Minister of the Environment referred to earlier. I have not received this at the time of dictation."

I think the next document is of no particular significance.

Mr. McCann then goes on to refer to his Chief Executive a copy of a letter he received from Mr. O'hUiginn on the 7th February. This is on the notepaper of Esat Telecom, a company of which Mr.

O'hUiginn was a director, as you can see from the footnote on the page.

It says "Dear Chairman

"I now enclose copy of the consultation guidelines to it is clearly Government policy for economic efficiency to provide better mobile phone facilities and that there is an obligation on bodies with existing support structures and masts to facilitate co-location.

"As I explained, our Seamus Lynch is in communication with your John McSweeney in regard to co-location.

Obviously there are commercial terms to be agreed, but subject to that, we would like to know if the ESB is, in principle or not, willing to consider co-location as advised by the Minister for the Environment.

The next document then is the Department of the Environment consultation guidelines which were enclosed, headed "Telecommunications antennae and support structures".

"Consultation draft of guidelines for planning authorities."

If you pass on from that to the next document, which is an ESB office copy of a letter of the 12th February 1996 from Mr. McCann to Mr. Pdraig O'hUiginn, in which Mr. McCann says:

"Dear Mr. O'hUiginn

"I refer to your letter of 7 February and our earlier

phone conversation in which you express an interest by Esat Digifone in the possible use of ESB sites for their telecommunications network.

"Interestingly, ESB had received a copy of the Department of the Environment consultation draft of guidelines for planning authorities relating to telecommunications antennae and will be responding in due course.

"I understand that Esat's project coordinator has also written to Mr. John McSweeney with an offer in relation to the sites, and this of course will be fully considered. You will be aware, however, that ESB is presently tied into the Persona consortium and unfortunately will not be free to conclude arrangements with any other parties until the licence has been issued by the Department. It is only fair to let you know that at present ESB is also in discussion with other parties.

"ESB has significant facilities of value in the telecoms area and it is our intention to make the widest possible use of and obtain maximum value from them in this regard which would be helpful to know if Esat has considered offering ESB a suitable level of equity participation in the company."

The next note is a confidential note from the Chief Executive of ESB to the Chairman, which says "The attached note from John McSweeney sets out the

position. The accompanying letter and option agreement from Esat has a remarkable tone.

"I am sure you will get further calls from P.

O'hUiginn. Could you tell him that we have an offer from Esat and are prepared to consider it. However, we are still tied to the Persona group until the licence is issued by the Department."

This obviously predated the letter that I just referred to and brought Mr. McCann up to speed.

"We are talking to more than one group. As you know, our intention is to get the maximum payback from our assets and the widest possible use of them. Esat proposals are very short-term and limited.

"It might be interesting to ask P O'hUiginn if they have considered a level of equity for ESB."

The next document then is a memorandum prepared by Mr. McSweeney, who was dealing with the GSM project on behalf of ESB. The memorandum is addressed to the Chief Executive and is dated 8th February.

It says: "Re ESB interaction with Esat Digifone".

"In the course of investigating potential partners for involvement in the GSM licence bid, ESB had discussions with Esat. It was evident from early on Esat viewed ESB purely as a vehicle to access infrastructure and would not contemplate either equity participation or a meaningful business relationship.

Esat did not make the short list of appropriate

consortia for ESB participation.

"In its agreement with Persona, ESB is free to negotiate terms with the successful bidder and/or Eircell once the licence is awarded. Although Esat have been awarded the competition, the licence has not yet been signed.

"During the course of the campaign Mr. Denis O'Brien of Esat repeatedly made public statements decrying the involvement of semi-state companies in the competition. His admission that he funded the EERA campaign against Persona because of ESB's involvement in the consortium is further proof of Esat's antagonism towards ESB.

"Shortly after the award of the competition I met with Esat representatives at their request on November 24th, 1995. Esat requested negotiations on the use of suitable sites for antennae.

"I pointed out that ESB were still involved with Persona, but once the licence was awarded, that ESB could enter into new arrangements.

"I stated that ESB would not be interested in a cherry-picking arrangement and that any relationship would have to include

"1. A significant number of sites.

"2. Use of the backbone microwave network

"3. Use of retail outlets

"on strictly commercial criteria.

"It was clear that Esat's interest was sites only, as they would want to build their own microwave system and could not easily agree to use the retail outlets after campaigning against their use by Persona.

"I suspected that what they wanted was either a downright refusal by ESB to work with them or agreement for sites only, so I insisted that ESB would want a composite agreement. On Monday, November 27th, a contact at DTEC informed Derek Kickham that Esat had complained to them that ESB were behaving unreasonably.

"Since the award of the competition to Esat, several meetings have been held with the new MD of Eircell, Mr. Stephen Brewer. He has indicated interest in

"i a number of sites

"ii use of the retail outlets

"iii possible limited use of the microwave network.

"These discussions are ongoing.

"On January 31 Esat wrote to me offering $\text{€}1/24,000$ per annum per site. In a subsequent telephone conversation I undertook to give the offer due consideration. In early January the Department of the Environment issued draft guidelines for the granting of planning permissions for the telecommunications masts. The guideline encouraged the sharing of sites and the aspiration that existing infrastructure be utilised where possible. It is widely believed that

these guidelines were issued as a result of significant lobbying by Esat.

"I would hope to reach agreement in principle with Eircell for the use of sites and retail outlets in the near future on a non-exclusive basis bearing in mind potential medium-term possibilities. In the meantime I will continue to give the Esat proposal due consideration.

"To protect our long-term use of assets it may be advisable to enter into an exclusive option arrangement with a suitable partner."

Then underneath that there are three points made by Mr. Michael Hayden, MD of ESB International. That is to say, as far as I can see, an associate of Mr. John McSweeney. He says:

"1. Above noted/agreed.

"2. Esat lobbying/publicity led by their directors certainly had an undermining effect on the Persona bid with ESB being deliberately targeted as the Achilles' heel. No apology was made at any stage.

"3. The ESB reputation for integrity is of considerable value and we must exercise caution in joint ventures, associations, etc. Given the known facts relating to Esat practices this issue would need to be very carefully considered."

The next document is a letter from Esat to Mr. McSweeney in which Esat sets out the terms under which

it was prepared to enter into an agreement with ESB in respect of sites, and there was a list of those sites, I gather, attached.

The next document is then a letter of the 21st February, 1996, from Esat Digifone dated 21st February, 1996. It's signed by Mr. Pádraig O'hUiginn, and he signs himself as a director of Esat Digifone.

It says "Dear Chairman,

"Thank you for your prompt reply to my letter of 12 February 1996 about co-location of GSM facilities.

"We are pleased to know that when the licence has been issued, the board are willing to discuss arrangements for use of your sites for our facilities in accordance with Government policy. In addition we understand from our meeting with the Minister for Transport, Energy and Communications which was attended by one of our directors that the ESB have said to the Minister that they are prepared to allow Esat Digifone to co-locate on their structures in accordance with Government policy.

"As you know, we did approach your board at a very early stage in connection with our proposed tender for the GSM licence, but in the event your board opted to join another consortium. All the equity in Esat Digifone is now allocated, so it would not be possible to give an equity share to ESB.

"Your Mr. McSweeney, in his letter of the 14 February

to our Mr. Lynch, mentions your interest in matters other than sites, i.e. infrastructure, retail, credit control. Our view is that these matters are separate from the issue of co-location, which is endorsed by public policy, and we are willing to pay direct commercial terms for the facilities you can make available in accordance with that policy.

"This does not exclude the possibility of our entering into a separate arrangement in regard to the matters you mention, according as our business arrangements develop. We would be very glad to explore these matters in due course.

"Note that you are having discussions with other interests. As regards public policy on co-location, it envisages location of a number of interests on the same site. We have no difficulty therefore in discussing such arrangements with you. If you make wider commercial arrangements with such other interests, we have no difficulty with that. In fact you can maximise your return which is a point you emphasise.

"We would glad in all circumstances if discussions between us could now proceed with all speed. Such discussion could, we suggest, be provisional pending the issue of the licence.

"We have kept the Department of Transport, Energy and Communications informed of our various discussions in

this matter in view of the Government policy on co-location. We have therefore sent copies of our correspondence to the Department with renewed thanks for your prompt attention."

Mr. O'hUiginn then replied on the 5th March, 1996

I beg your pardon, Mr. McCann replied on the 5th March 1996, saying "Dear Mr. O'hUiginn:

"Your letter of the 21 February concerning GSM facilities refers.

"The position regarding co-location of facilities is that the Department of the Environment have circulated a position paper for comment. ESB has responded to the paper, and at this stage there is no established Government policy. The suggestion contained in your letter that the ESB told the Minister for Transport, Energy and Communications that they were prepared to allow Esat Digifone to co-locate on their sites is not factually correct.

"The ESB approach to all GSM-related issues will be based solely on commercial considerations. It has come as a surprise that your company is now pressing for a significant level of co-operation, given our understanding that Esat Digifone had submitted a comprehensive technical plan to the Department of Transport, Energy and Communications which presumably did not include use of ESB sites.

"In my previous letter I indicated that pending formal

award of the licence, we were precluded by the terms of our agreement with Persona from agreeing arrangements with other parties. When this matter is resolved, we will be in a position to conclude agreements based on normal commercial considerations, and I anticipate speedy negotiations with Esat Digifone and other parties at that point."

And the next letter is one I have already referred to. It would appear that around this time Mr. Lowry, the Minister for Transport, Energy and Communications, wrote a letter after this correspondence to Mr. McCann, and that letter you will see in Leaf 172. It says:

"Dear Chairman,

"Esat Digifone have contacted me concerning difficulties in securing planning permission for mobile phone masts in key sites around the country.

Planning authorities are reluctant to consider multiple masts in sensitive locations unless it is clear that there are substantive reasons why co-location is not practicable and that every effort has been made by the relevant parties to reach agreement. It is Government policy to support co-location whenever feasible, and I am writing to all State companies and Government agencies who own or operate communication sites to urge maximum co-operation. Indeed, if this cannot be achieved by

voluntary means, I will have to consider whether there is a role for the regulatory and licensing process to address these issues in the overall interest of developing communications infrastructure.

"I understand that you feel precluded by your participation in the Persona consortium from agreeing arrangements with other parties. I cannot accept that this is a valid justification for not cooperating on matters which would overcome planning difficulties, possibly on a reciprocal basis. Indeed, many such arrangements would only come into play, in practical terms, in circumstances which released you from your Persona obligations, i.e. the formal issue of a licence to Esat Digifone.

"I trust that ESB can reconsider its position and adopt a constructive approach to the single issue of mast sharing with all interested parties."

Were you aware of that letter?

A. I was aware of that letter. I was aware of the intention to send similar letters to other State bodies. I may have drafted the letter, but I couldn't say that definitively.

Q. At that time, as we discussed this morning, Esat Digifone were trying to roll out or were preparing to roll out their network, were hoping to negotiate or conclude the negotiations of a licence with you, but things were taking rather longer than had been

anticipated; isn't that right?

A. Yeah.

Q. If, for whatever reason, for any reason at all, Esat Digifone couldn't conclude those negotiations, you would have had to turn to Persona; isn't that right?

A. Yes.

Q. And on down to Mobicall?

A. Yes.

Q. Would you agree that the ESB, and I think this letter suggests that the Department agreed that ESB were entitled to feel that this was a matter on which they should hold their hand until such time as the award of the licence had been completed?

A. I wouldn't particularly agree with that, no. I mean, clearly Esat Digifone weren't expecting to commit to anything or spend any money on until they had the licence in their hands in any event. And somebody somewhere along the documents you have opened talked about provisional discussions and so on. I wouldn't see anything strange about that.

Q. But this was a letter from the Minister who was in practical terms the chief shareholder in ESB; isn't that right?

A. That's right.

Q. And he was aware that that company had applied for the licence; isn't that right?

A. That's right.

Q. And he was aware that part of that company's play for the licence, if you like, was that it had a lot of assets which it could deploy in the interests of faster roll-out than other intended competitors; isn't that right?

A. We were certainly so aware. Whether the Minister was aware of that level of detail, I don't know.

Q. He seemed to be aware, to judge from some of the information we heard yesterday, if it's accepted in evidence; he seemed to be aware that you were impressed by Esat Digifone's approach to planning and acquisition of sites. If that's correct, he was aware that this was something that had been a major part of the Esat Digifone gambit, if you like, wouldn't that be right, if that evidence is accepted?

A. I would say technical excellence was part of the Esat Digifone application. And they had probably more and I am not an expert in the technical area, but I certainly read the applications certainly a more considered and planned approach to how they would propagate their signals and develop their traffic and so on. How critical was planning? They seemed to have options on land and stuff like that, but I am not so sure how critical that was to the marketing. I didn't myself engage in the marketing of the technical stuff.

Q. Didn't the evaluation report draw attention to the

fact that they had taken steps in relation to planning and so on which impressed the evaluators to a considerable degree?

A. There is certainly some language of that kind in the report.

Q. I think it's as express as that. It may not be in those precise terms.

A. Okay.

Q. And the Minister was asking another competitor to assist in deploying its assets in favour of Esat Digifone; isn't that right?

A. The Department was asking the Minister to interact with all of the agencies under his control that had relevant assets to make the mobile phone business more effective, more efficient and more

Q. Wasn't there a particular sensitivity in interacting with the man who had most to gain from Esat Digifone's failure to do this?

A. I don't accept that. I mean, that's your theory.

Q. You don't accept that there was a particular sensitivity in negotiating with the man in provisional second position who could go into first position if the man in first position couldn't succeed in his negotiations?

A. What I am saying is that the ESB were losing nothing to enter into provisional negotiations.

Q. You don't accept that there was a degree of

sensitivity? I would regard it as legitimate

sensitivity if it existed in dealing with ESB in these circumstances.

A. I wasn't conscious of that kind of sensitivity at the time.

Q. I see.

The letter contains a statement that the Minister cannot accept that ESB's participation in the Persona consortium was a valid justification for not cooperating, and it also states that the Minister took the view that if he could not achieve co-operation on co-location on a voluntary basis, he would have to consider effectively making regulations to that effect.

A. I don't see anything exceptional about that. In fact, it's curious, and I am only I mean, you opened a lot of documents. But it's curious that the ESB regarded at one point in the letter of the 8th February, their negotiations with Eircell were still ongoing, whereas their consistent effort was to shut out Esat Digifone.

That's just the sense I have picked up from seeing these documents for the first time. And there clearly is running through it, and I mean I am today holding the shareholder responsibility for ESB and I am not out to do any damage, and so on, but there is a clear sense of, I suppose in legal terms, extension of

dominance or abuse of dominance about trying to achieve a whole package, because somebody is interested in one little piece of the action and so on.

So I am not so sure that the sort of theory you are holding out if the ESB were treating Eircell more favourably, which it's possible to argue just on the face of turning over the pages, I don't think the thesis that you are advancing stands up.

CHAIRMAN: You are saying that whatever about the ESB situation, the Minister would have had an overriding duty to avert turf wars that might delay the issue of the licence, whoever the personnel involved were?

A. Yes, and I am saying that the Minister was acting on the advice on the initiative of civil servants rather than the advice of civil servants. We were of the view that this was the right thing to do.

Q. MR. HEALY: But did you not regard these assets of the ESB as having been in play at this time? They were already in play?

A. But we weren't I don't believe we were damaging that position by suggesting that there could be provisional negotiations, because they were no longer in play if the licence was issued. And clearly Esat Digifone couldn't make a firm commitment until the licence was issued, so I can't see where the issue is, really.

Q. I described the letter as containing a threat; would you agree with that?

A. You said that yesterday. It's a difficult one. I can see why you would read that into it. But I mean, what we were saying what we were saying was a practical situation; co-location was so important that if we couldn't achieve it by voluntary means, we'd have to look to other means.

Q. It wasn't a very friendly letter, was it?

A. I don't think friendship comes into it, quite honestly.

Q. I think that was the view the ESB took as well.

A. Well, the ESB weren't the Telecom side of ESB weren't terribly well disposed towards the Department or towards Esat Digifone at that point.

Q. The next document is a letter of the 3rd April, 1996.

It's not addressed to you, but I think you were involved in the response to it?

A. Are we finished with this bundle?

Q. Yes.

And therefore, although addressed to Mr. McMahon, I think I should ask you to deal with it.

It's a letter from Mr. Knut Digerud, I think, Chief Executive of Esat Digifone, on the 3rd April 1996 to Mr. Sean McMahon.

"Second GSM II mobile phone licence.

"Dear Mr. McMahon.

"Thank you for your letter of 22 March with an indicative draft of this licence. I note and acknowledge the basis of its preparation.

"As has been said by us in meetings and letters since October 1995, it is critically important that the licence be awarded forthwith. The prospect of our achieving a launch of the Esat Digifone service during the run-up to Christmas 1996 (which is essential if our business and service projections are to be met) is already under severe pressure. This is because we booked production capacity with equipment suppliers and have been unable to take up that capacity due to the non-availability of the licence. This has resulted in the postponement of the production and delivery of critical elements of the network.

"Esat Digifone has put in place a facility with AIB Bank and ABN-AMRO Bank to part fund the costs of purchasing, constructing and launching the Esat Digifone service. The drawdown of these funds is subject to the issue to us of the licence. Clearly financial institutions will not advance funds to a company which, to quote your indicative draft, may ultimately be granted the licence. Grant of the licence is one of the fundamental elements of our overall GSM project. The others being provision of finance, the production of equipment installation and commissioning of the network and the launch of the

service. The delay which has occurred in respect of the licence has created a bottleneck behind which other fundamental elements have lodged.

"It will be apparent from all of the above that we are in a situation where by reason of commercial duress we must accept whatever licence is offered regardless of its terms. I am aware that your draft licence does not contain the security provisions intended to be inserted at Article 11. I assume that the preparation of detailed security requirements and their approval by the numerous departments and agencies involved will take a great deal of time. Clearly such time is not available to us, and I accordingly propose that you insert at Article 11 a very general obligation along the following lines:

"The licensee shall at all times facilitate the Minister and such other departments, agencies and State bodies as shall be designated by him from time to time in providing access and other necessary facilities for purposes of or connected with national security, crime prevention and detection, and similar purposes. The licensee shall comply with all directions given by the Minister or persons authorised by him for the purpose in this regard and shall bear all reasonable costs required to do so."

"If it is desired at a later stage to insert more comprehensive provisions, this can of course be done

by means of amendment provisions in Article 4.

"Due to the extraordinary circumstances in which we have been placed, we have already indicated to accept your draft licence in the terms offered but wish to record prior to its grant the following:

"1. The licence must comply with Irish and EU law, and we have assumed that you and/or your advisers have taken and will continue to take steps to ensure that this is and will be the case.

"2. The principles of equivalent treatment and fair competition as between ourselves and both Eircell and Telecom Eireann should be preserved; accordingly, costs, restrictions and obligations imposed on Esat Digifone should be fairly applied on an equivalent basis to our competitors.

"3. We perceive the grant of a licence at this stage as an ongoing process and will seek to settle amendments to the licence immediately after its grant (we would have preferred to do so prior to grant, but the commercial duress applied to us has rendered this impossible.)

"As you aware from our bid, our network will be financed by a mixture of debt and equity. As indicated above, debt facilities are in place. These involve the grant of standard security over the company's assets, and clearly nothing in the licence can inhibit the grant or enforcement of this security,

and you might confirm accordingly for the benefit of our bankers.

"I would be obliged for the receipt of confirmation by return that the licence will immediately be granted as drafted. I will then arrange to draw down funds for the payment of licence fee."

Now, that letter appears to have been drawn to your attention, and you, on the 9th April 1996, sent a memo to Fintan Towey regarding the letter, and that's obtained in Leaf 174. Do you remember this letter now and the issues arising?

A. What I remember is that at that period, my travel schedule was such that I was grabbing stuff and taking it home at the weekend, bringing a dictaphone, dictating notes, and passing them on. As a result of that, I don't have strong recall of the events. But I do remember regarding this as litigation planning; "We'll take a licence, any old licence, and we'll see you in court afterwards".

Q. I think that's precisely the point you make in this memo: "I read the Esat Digifone letter at the weekend. At the risk of being accused of egg sucking, it appears to me that this is a classic piece of litigation planning and cannot be accepted. The rebuttal, and so far as it is possible reputation must be carefully handled and drafted with the aid of lawyers. I would not favour granting the licence in

the shadow of this letter.

"I could live with the security draft if we have nothing better. I would like the reply to issue as soon as possible. In relation to the final indent, I do not think the licence itself should be capable of being pledged in support of loans.

"The rebuttal should probably draw attention to the fact the preliminary draft licence gave clear advance indication of what the licence would contain. Most of the contents are drawn on this and on their bid document. The preparation of the current draft of what is after all a very important document took longer than we originally envisaged, but during the course of the work, the structure and detailed content was discussed with them in great detail on" and you have "dot dot dot" because this is a rough memorandum.

"We need to draw them out urgently on the parts that cause them problems. Any reserve on their part must be strictly limited. The full documentation was, as you know, fully cleared with the EU Commission. Having said all that, the reply should so far as possible avoid confrontation.

"Please convey these views to Sean McMahon. The secretary needs to be brought into the loop at an early stage."

When you say that you were sort of grabbing bundles of documents at the weekend or when you came off a plane

or dictating notes and so on, do I gather that you were still keeping in touch with milestones in the competition and with problems as they developed?

A. As best I could in the circumstances, yes. But having said that, I had complete trust in Mr. Towey's judgement.

Q. The next document is a memorandum from Mr. Towey to Regina Finn regarding a draft response. In that memorandum, Mr. Towey refers to your comments, which he faxed to Ms. Finn. I don't think we need to go into it. He more or less echoes what you were saying.

Then if you go on to the next document, it's a first draft of a response. And unless you want to refer to it, I am happy to go on to the actual letter itself.

A. That's fine.

Q. Just further on, I think. It's Leaf 179. It's as follows:.

"Dear Mr. Digerud, I refer to your letter of 3 April in response to Mr. McMahon's letter of the 22 March.

At the outset I must make it clear that if Esat Digifone has been put under any duress as stated in your letter, it is not due to any act or omission of this Department. I would refer you to this

Department's letter of the 13 November to Mr. Denis O'Brien, and in particular to the third paragraph of that letter, where the Department stated:

"I wish to make clear at the outset, however, that no

liability shall attach to the Minister or to 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."

"In relation to Esat Digifone's business and service projections, I received with your letter of 15 March your company's "critical path", which had been requested by this Department at a meeting on 26 January. I note that the overall project time schedule was only approved by the Esat Digifone board on 14 March, at which stage the board and the company would have been fully aware that your licence award target of the 31 January 1996 had not been met.

"I cannot accept that Esat Digifone's ability to participate fully in reaching agreement on licence terms should be compromised by commercial circumstances. It is clear from previous discussions that certain provisions in the present draft licence in respect of which you have voiced concerns are consistent both with Irish and EU law and the original GSM competition documentation and are not negotiable.

Apart from provisions which reflect these basic sources, the present draft licence is largely based on commitments given in your application. It has always been clear that such commitments would be incorporated

in the licence, and you have confirmed your acceptance of this.

"Secondly, with regard to Article 11 of the draft licence, this Department notes your suggested form of words, but a short text has already been prepared and will be included in the next revisions of the draft licence. On the basis of your suggested wording, it is not envisaged that there will be any major problem with the Department's draft.

"Thirdly, I would like to address the issues on which you base your proposed acceptance of the draft licence as set out on page 2 of your letter.

"Firstly, as stated in Mr. McMahon's letter of 22 March, this indicative draft has not yet been cleared by the Department's legal advisers but you can be assured that the clearance process will take account of Irish and EU law.

"I can state that the commitment given in the competition documentation in relation to a level playing field between the second GSM operator and Eircell will, subject to the terms of the competition, be fully expected.

"I note your request that the grant of a licence be treated as a stage in an ongoing process wherein you would seek to settle amendments immediately after its grant. I would refer you again to this Department's letter of the 13 November 1995, in which it was stated

that the award of the GSM licence is subject to the agreement of appropriate terms. Clearly the intention is that terms will be discussed and agreed prior to the grant of the licence. There is therefore absolutely no question that the status of this licence is in any way provisional or that there can be any significant renegotiation of terms and conditions after the licence may be granted.

The matter of security for any debt into which your company might enter is once again a commercial matter for the company. However, I would draw your attention to the provisions in relation to changes of ownership which are contained in Article 8 of the indicative draft of the licence.

"In conclusion, you may wish to reconsider your proposals to accept the draft licence in the form supplied to you on 22 March in the light of these points. I would suggest that your company table any queries about the licence now, while it is in draft form, and as already offered, an early meeting can be arranged to discuss these. I understand that a date of Wednesday 17 April has been agreed for a meeting, and I would suggest any matters that you might wish to raise be discussed at that stage."

Now, there were a number of meetings around this time, at one of which this letter was fact produced, I think in draft form, and shown to Mr. Digerud, in which, as

I understand it at which, as I understand it, he agreed to withdraw, I think, some of the if I can put it, assertions in his earlier letter that he was acting or his company was acting under duress. Is that a fair summary of the arrangements?

A. If I think it is, it's because I have read this file.

It's not because I particularly recollect it.

Q. I passed over Document 178, simply I think drafts of letters I am not sure if you had any involvement in them to disappointed applicants. Do you see those?

A. Is this 177?

Q. Yes. Were you involved in drafting those? It seems that Mr. O'Callaghan and Mr. McMahon were involved, from the documents we have in front of us.

A. They may have been drawing on material from drafts from AMI; I am not quite sure. I'll put it like this:

I don't recall having a close involvement. But I mean, I can't rule in or out whether I did or not.

I'll put it like that.

Q. I see. There is nothing I want to draw to your attention, in any case.

A. I mean, I know because I have a list here, for example, I was in Brussels on the 9th and 10th and the 17th and 18th. So clearly, you know, I was in and out of these affairs.

Q. Yeah.

The next document in Leaf 178 is a note of a meeting

of the 11 April 1996 at 44 Kildare Street attended on the Department side by the Secretary, Mr. Loughrey; by Mr. Colin McCrea, the programme manager; and Ms. Regina Finn from Mr. McMahon's section; and on the side of Esat Telecom and Esat Digifone, Mr. Denis O'Brien and Mr. Richard O'Toole.

And there were two items tabled at the meeting. One was the question of additional DDI, DDO; that's direct diallers?

A. Direct dial in and direct dial out.

Q. And secondly, the draft licence to operate the GSM mobile phone licence. The latter part of the minute deals with the licence. I think what it says is that there was no question of Esat Digifone having to sign any licence. That's common sense; it's a matter for them whether they sign it or not. I am not sure you will gain much from looking at that document.

If you go on to further on to, I think, Leaf 181, there was further discussion about the terms of the draft licence. This was a meeting again held at Kildare Street between Esat Digifone and the Department, and I think if you go to the second page of the note, you will see there is a conclusion at Item Number 3.

"Esat Digifone agreed to reply to the Department's letter in the terms discussed at the meeting, i.e., stating that

- "1. Esat was not signing the licence under duress
- "2. Esat accepted all the principles in the licence.
- "3. Esat accepted that it had no right to renegotiate the terms of the licence after its grant.

The Department agreed to reconsider the draft of Article 8 and to revert to Esat as soon as possible and to consider Esat's request for immediate signature of the licence and revert. A suggestion of signing by the end of next week, that would be the 19th April 1996, was made.

And it's from that minute that I formed the impression that the Department's letter was handed over, and I think from other documents that is in fact what happened.

The next document, in Leaf 182, is an extract from proceedings in Dail Eireann on the 16th April, 1996.

Can you recall having any involvement in this, or how did this how did these issues develop in the Dail, or how these issues developed in the Dail at that time?

A. Well, I suppose it's not for me to sort of read what goes on in Dail Eireann in the cynical way a civil servant might. There is a certain polemic about the way Dail operates, especially in private members' time and in adjournment debates, in the sense that the media sets the agenda; the agenda informs public opinion; public opinion fires up politicians, and

politicians raise it in the Dail. There is a certain sense of that about it.

At this stage the running was being made by Bobby Molloy. Now, Bobby Molloy worked with me as my Minister for a number of years, and I think he would recognise that I am as straight as an arrow anyway.

So that's why I say there is a lot of polemic about this. Sort of an element of weakest link. If you see somebody with a slight bruise and you are a boxer, you try to make it bleed. That's the sense in which I see it. But I mean, this was an attempt to, I think, in a long speech, for the Minister to put on the record where he stood. I think

Q. I don't want to you mix this up with another April '96 exchange, now.

A. Okay. Maybe I am wrong about it. I don't particularly know the context. I know there was one long speech which we discussed in private.

Q. That's not this

A. That's not this one, okay. Fair enough. So I don't particularly know. It's clearly an adjournment matter anyway, because that's what the Ceann Comhairle

Q. The Tribunal could find no drafts of it, and therefore I was wondering how it was

A. It would be very unusual for a Minister to speak on the adjournment without a civil service note.

Q. If you look there is only one aspect of it I want

to ask you to comment on. If you look at page 1, Mr. Molloy is on his feet. If you go to the last sentence in the second paragraph, he says "Is Dermot Desmond an investor in yet another Telecom Eireann venture? The public has a right to know the identity of the investors involved". Do you see that?

A. Yeah.

Q. That, I suppose, is consistent with the line he and one or two other Deputies were pursuing in the last extract from Dail proceedings we mentioned.

A. Yes.

Q. Who are the owners of the, if you like, the right to negotiate the licence?

A. Yeah, I should further say, I suppose, about adjournment matters in the Dail, that there is a sense in which the Minister has his mind made up going in what he is going to say, almost irrespective of what the other people raise in their opening statements.

Q. Maybe that explains it, then.

A. There is certainly an element of that about, in particular, adjournment debate matters.

Q. Well, if you go to the second page, and I won't delay you with it, there is simply no answer to that question.

A. Maybe what I've just said which I mean, I am just relaying what I feel

Q. Leaving that aside, whether there is an answer to it,

I can't see any answer to it.

Would you have been aware that these matters had been raised in the Dail and were now going to be coming at the Minister, as it were, maybe not

A. In a case like this we would get a number we get notice what happens is that at the order of business, which, depending on the day of the week, it's the start of business at half ten, say, on a Wednesday or half two on a Tuesday, the Taoiseach comes in to announce the business of the day, and Deputies get up and they ask the Ceann Comhairle for permission to raise matters on the adjournment. The Ceann Comhairle reflects on the variety of matters, and there is always lots of them, and there is decision criteria like urgent public importance and whatever, and he decides which ones to allow. And we would be told there is something on the adjournment, and then we are told some hours later it's going to be taken. When we hear it's going to be taken, we would then prepare I have forgotten how many minutes, a 7-minute script or a 10-minute script or whatever. And in most cases the Minister will read out the script almost no matter what the other side say first.

Q. I see. When you say you get so much time to prepare, does that mean that you'd be aware of the topic but not necessarily of the precise line likely to be taken by another Deputy?

A. Yeah. What you'd generally get is what's attributed to Ceann Comhairle in the opening part, "Deputy Molloy gave notice that he wished to ask the Minister for Transport, Energy and Communications the reasons for the delay", that sentence. That's probably as much as we would have got, if even that much.

Q. I see. And if that is the case is there any way the Tribunal can get access? Is that information available, what the Ceann Comhairle would have got?

A. What the

Q. Is the information the Ceann Comhairle would have got to enable him to decide what questions should be ordered in what priority, is that available?

A. I think, if you were to read the official report of the Dail for order of business that morning, you'd get an indication of what were the various matters that various Deputies were seeking to raise. I have forgotten how many items are accepted; it's either two or three. It's probably a half an hour's worth or 40 minutes worth of discussion in all.

I don't know precisely how the decision is taken as to which ones are taken on a particular day. What I do know is that the Minister's office would get a call to say "X and Y for your Minister have been raised in the order of business". That would be communicated to the division. The division wouldn't usually do a whole lot about that, unless it was something that required

information from outside the Department, say from a State agency or whatever; but if it's something where the Department has the knowledge, you generally speaking wouldn't do anything about it until you heard some hours later. And I have forgotten what the time-frame is within which that decision is taken, but you would be told at a certain stage, maybe at 1.30 or 2.30 or whatever, "The Ceann Comhairle has decided that your item is being taken". And at that stage you would start to write a script, seeking to anticipate what might come up, to the best of your ability, based on what limited knowledge you got from the Ceann Comhairle's office.

And in lots of cases now, it varies from Minister to Minister, but in lots of cases, the Minister will read out his prepared script almost irrespective of what comes up in the discussion.

Q. I see. After the debate, would you have any role in, as it were, reviewing what had transpired in the Dail, in order to see what might be coming down the tracks at in the future?

A. Certainly for questions time, I am not a hundred percent certain about a case like this, what are known as the blacks, which is the first printout of the Dail stenographer's take on the discussion, would be sent to the Department, and it would be somebody's job to read it. What you'd be particularly looking for is,

did the Minister promise to do anything that you should look out for? That's the sense in which you'd be reading it.

Q. You wouldn't be looking to see did he answer the question?

A. No, you wouldn't, no. But you would know you'd expect that if difficult issues arose in that discussion that they might come up the next time the Minister is on questions or something.

Q. It's on context that I was asking whether anyone would have reviewed it, because we know from exchanges in the Dail on later occasions, this issue of who the owners of the consortium were kept coming up; isn't that right?

A. I think that's right, yeah.

Q. In any case, that question was asked by Mr. Molloy, and perhaps for the reason you mentioned, perhaps for other reasons, there was no answer to it: Is Mr. Dermot Desmond an investor?

A. I think the reason I am giving is the most likely one.

Q. Yes.

A. And I can see signs of my own hand in lots of the stuff here in the Minister's words.

Q. That was on the 16th April. The next document is also a document of the 16th April, and it's a fax to you and to Fintan Towey from Regina Finn; do you see that?

A. Mm-hmm.

Q. Now, I presume that, as you say, you saw your hand in the Dail exchanges so far as Mr. Lowry was concerned; presumably you were in Kildare Street at the time that this fax came in from Ely Place?

A. Yeah, I think that's right, yeah.

Q. It says

A. By the way, when I say I see my hand in that, you must bear in mind, with modern technology, people lift paragraphs here and there, scissors and paste. And whilst I could see me own hand, it doesn't mean I recycled it this time around, but it could do. It could be that I wrote that de novo.

Q. Well, I take your point. It looks to me something that might have been written or plucked from something else. I agree with what you are saying about it.

The comments on this fax are "Attached is the latest information to come to light about the shareholdings in Esat Digifone. Owen O'Connell is to provide further detail in writing. You may wish to pursue further."

Do you see that document?

A. Yeah.

Q. And the next document, which is the information which came under cover of the fax sheet.

A. Yeah.

Q. Do you recall receiving it?

A. I haven't a specific recall, but

Q. If you look

A. It's not unlikely

Q. if you can read the box at the top.

A. I can see some of it.

Q. It's sort of an indication of the interests in Esat

Digifone on one side, on its own, you see Telenor

Invest with 37.5%. In the middle you see the Denis

O'Brien interests coming through Esat Telecom Holdings

at 37.5%. And then on the right-hand side you see

firstly institutional investors, underneath that

IIU/Dermot Desmond, underneath that 20% plus 5%.

A. Mm-hmm.

Q. Then underneath that it says "Owen O'Connell, William

Fry Solicitors, provided the following information on

behalf of Esat Digifone Limited. At present

Communicorp is the vehicle whereby Denis O'Brien holds

shares in Esat Digifone. Communicorp also has

ownership of Esat Telecom and radio interests of Denis

O'Brien. The objective is to uncouple the

telecommunications and the radio elements of

Communicorp because they are incompatible from the

point of view of investors. With this in mind,

Communicorp will retain their radio interests and

slide out of the current picture in relation to

telecommunications."

Then it describes how Esat Telecom Holdings had been

incorporated to take over the telecommunications

interests, and it gives the breakdown of ownership with Denis O'Brien 57%, Advent 31%, miscellaneous 12%.

And there is a breakdown of that between Denis O'Brien and employees of Esat.

"A flotation is currently underway by First Boston Bank which involves the placing of shares in Esat Telecommunications Holdings. It is not yet known what percentage of the company will finally be owned by American investors."

Esat Telecommunications Limited in turn owns Esat Telecom Limited 100% and Esat Digifone 37.5%.

"Telenor Invest owns 37.5% of Esat Digifone Limited", and then it says "IIU (a Dermot Desmond company) currently owns 20% of Esat Digifone which it intends placing with institutional investors. It also has the right to acquire a further 5% (by means of the 12% of Esat Telecom Holdings Limited which is held by miscellaneous.)"

"Owen O'Connell is provide further information in writing, including deadlines for this change in ownership."

Do you recall receiving this?

A. I would say, if you were to ask me, in the absence of this, when did I first become conscious of the emergence of IIU, I would have thought it was a little later. But I mean, the document is addressed to me and Mr. Towey. I don't specifically recall whether I

actually got it or not.

Q. Can I take it that you would have been surprised in any case to see that what you thought was a consortium of Communicorp and Telenor was now a consortium of we'll still use Communicorp for the short of Communicorp, Telenor and Dermot Desmond, or IIU?

A. Yeah, it would have been surprising.

Q. And what you thought was a 40:40:20 split was now a 37.5:37.5:25 or 20 plus a possible 5 split but that's not clear from the documents.

A. It's clear that later on we got that reversed. And I am not making that as any particular point. It's just that there is a long discussion about lining it up with the application and so on.

Q. The next page contains a letter from Mr. O'Connell to Ms. Regina Finn which says

"Dear Regina,

"I refer to our telephone conversation of yesterday regarding the ownership of Esat Digifone Limited and of Esat Telecommunications Holdings. The position is as follows:"

Then Mr. O'Connell describes the breakdown, and I think we have been through this many times.

In the first paragraph, he says that, and in the second paragraph I think he makes it clear that the company is effectively owned 37.5% by Telenor, 37.5% by Mr. O'Brien's interest, and 25 percent by IIU

Nominees. And clearly Regina Finn or somebody else has done the tot's to show that the actual shareholdings listed here constitute those percentage holdings.

It says "The 25% of Esat Digifone Limited held by IIU Nominees Limited effectively represents the institutional and investor shareholding referred to in Esat Digifone's bid for the licence. You will recall that this referred to an immediate institutional investor holding of 20%, with a further 20% in short- and medium-term stages. Of the anticipated 12%, 5% has been pre-placed with IIU Nominees Limited. It is understood that most or all of the shares held by IIU Nominees will in due course be disposed of by it, probably to private and institutional investors."

And I don't think the rest of the letter is of any significance. It simply describes how the how the Communicorp holdings are going to be held by Esat Telecommunications Holdings.

What did you understand that letter to mean concerning the state of play or the current status, if you like, of the winner of the consortium, or the winning consortium?

A. What did I understand, or what do you understand?

Q. What do you, or did you understand the letter to mean?

A. First and foremost, I am not so sure that I saw the letter at the time, but I don't know. But it seems to

be there in that paragraph talking about 25 percent IIU, which sort of loosely may be placed or some of which loosely may be placed, if that's the question you are asking me.

Q. Well, I don't I am not sure that I understand it, because I suppose I am burdened with the fact that I know this situation was in existence for a long, long time prior to this letter.

But it says "IIU Nominees effectively represents the institutional and investor shareholdings referred to in Esat Digifone's bid for the licence. You will recall that this referred to an immediate institutional investor holding of 20%."

That's a fair description of the bid?

A. It certainly is drafted in such a manner to seek to convince that there is no change from the bid.

Q. Yes. It suggests that there was an immediate institutional investor holding, and that that is held by IIU?

A. And it's saying there was a declared intention to have a flotation of 12% at some future date, two or three years down the line, but now we are bringing forward a bit of that and giving it to IIU. That's what the plain words are suggesting to me.

Q. Yes. If you see at the top that this is does that say "Referred to Mr. Towey" or

A. It says "Copy to Mr. Towey".

Q. "Copy to Mr. Towey"?

A. Yes.

Q. It says "18/4/96".

CHAIRMAN: The letter itself is the 17th.

A. Yeah, okay.

Q. MR. HEALY: Do you recall discussing it with Fintan Towey?

A. I don't particularly recall that, no.

Q. Would you not think, as I would, that it's something Fintan Towey might have brought to your attention immediately?

A. In the normal course, probably, yes, but I know, because I have that list up here, I was in Brussels on 18/4. And if he didn't do it that day, it's possible he didn't come back to it the next day. I just don't know.

Q. Other things were brought to your attention?

A. Lots of things were brought to my attention.

Q. But they don't seem

A. There is a sense I was focused on other priorities and trying to manage a busy section and stay in touch with this.

Q. I see. I would have regarded this, and would I be right in regarding this of perhaps more import than the other things?

A. This is a significant item.

Q. And Mr. Towey was in, I suppose, the unique position

that he knew that there might be some connection between this and a letter which he was the only one to have seen?

A. That's true.

Q. Over six months prior?

A. But he also knew, as I think I said earlier, that I trusted his judgement in lots of things, because at this stage I had been working with him for quite a while.

Q. This made one thing clear: that the answer to the question "Is Mr. Dermot Desmond an investor in this company", as of this date, based on the knowledge of the Department, was yes; isn't that right?

A. It looks like that, yeah.

Q. The next document is a letter to the Evening Herald.

I think this is simply an example of a letter which was sent to all of the various media interests.

It purports to come from the Minister.

"Dear Sir.

"I refer to recent political comment and media coverage generally on the award of the GSM licence to Esat Digifone in October 1995. That there should be disappointment among unsuccessful bidders is understandable, but that this should feed a six-month campaign of speculation and innuendos against all concerned in the process is unacceptable. As a politician, I have no difficulty in defending my role

and record in dealing with criticisms from either political or media sources, even when I believe these to be unfair and unfounded.

"The recent innuendo campaign has gone beyond the level of acceptability or fair comment and involves the questioning of the process of selection and the integrity of the civil servants and professional advisers who were directly or indirectly involved.

These are people who act with professional independence and integrity and, unlike me, are without a platform short of legal action to defend and clear their good name and reputation against smears and innuendo.

"I have already made numerous statements in Dail Eireann regarding the objectivity of the process which led to the selection of Esat Digifone as the second GSM operator. I have also pointed out the constraints on me in publishing the report on the evaluation because of confidentiality commitments sought by the applicants themselves before the closing date for the competition and the commercial damage such publication could do to the winner.

"Within these limitations and in order to further clarify the process and the role of participants leading to the decision I am now arranging that a number of key members of project team which conducted the evaluation will be available for a press briefing

tomorrow at 2.30 p.m. in the conference room at my Department at 44 Kildare Street.

"The briefing will clearly be of special interest to journalists in the communication and business areas, and I invite to you send a representative to the briefing."

Do you know what prompted that letter, or did you know of that letter at the time?

A. I know exactly what prompted that letter. I was myself extremely frustrated that we were shipping a lot of damage unfairly in the media and that the Minister was getting collateral damage from what I considered to be a clean process.

I first suggested to Mr. Loughrey that we hand over the consultants' report and all of the files to a senior counsel chosen by the defeated applicants or the disappointed applicants and paid for by them under a contract of confidentiality with a view to eliminating doubts. This solution was not found acceptable for whatever reason. Then I argued that we had to find a way of putting our case across.

I am conscious that the media have since several times used language like "Mr. Lowry fielded a team of civil servants to cover his backside", and stuff like that.

That is not what was happening at that time. I was frustrated. I was urging that something be done.

You will see in the next document, which was drafted

by me, that I wanted to personalise or the second-next document I wanted to personalise the press conference. Mr. Loughrey took a different view, and it became a more general civil service press conference. Now, that's what was going on at the time.

Q. What the press statement did was it described the competition, the involvement of Andersen, and so forth. But judging from some of the Dail proceedings we have seen, the one question that was being pursued in two sets of proceedings in the Dail up to this time was, who are the owners of this consortium? And whatever the situation may have been in November of 1995, on the day of this letter, on the 18th, and on the day of the press conference, or the press statement, which I think was the 19th, if I am right, no attempt was made to answer that question which kept coming up.

A. I'd have I think you'll have to canvass where we were in relation to disclosure of that information with several other witnesses before

Q. Mr. Brennan, are you seriously contending that after the letter from Mr. Owen O'Connell in which he set out the membership of the consortium, that in some way you were precluded as of the 18th?

A. No, I am not saying we were precluded, but I am fairly certain that you will find, maybe Mr. Loughrey

that's why I say you have to canvass other witnesses will say 'I will deal with that on the date we award the licence' or whatever. I am not sure exactly what was going on. That's why I am saying you'll have to canvass other witnesses.

Q. I think what was suggested in the letter is that "Mr. Lowry, speaking on behalf of the civil servants, was annoyed that there was a six-month campaign of speculation and innuendo against all concerned in the process."

Two days previously he had been asked a question in the Dail which he did not answer. The answer to that question, whatever it may have been two days previously, was undoubtedly in the possession of all the civil servants involved on the day of the press conference. And if that question, which did undoubtedly fuel speculation, was not answered, how can you say that any attempt was being made to dampen down this campaign?

A. I think the campaign was much wider than just the issue of ownership, in any event.

Q. If we look at the press statement for a minute. I'll pass over the draft, but I am mindful of the point you make that in the draft, you refer to your personal involvement in the project from September of 1993. And I think I won't put it on the overhead projector, because I don't need to go through it in detail.

But in your draft, you say "I have personally managed this project since September of 1993".

In the ultimate draft, I think the involvement of individuals is excised and the Department's role is put into higher profile?

A. Yeah.

Q. And the passive voice is used more, I think, than anything else?

A. That's because Mr. Loughrey at that stage thought that I was taking the matter too personally.

CHAIRMAN: I can readily understand, Mr. Brennan, that civil servants, just as much as politicians, lawyers, or anyone else, have reputations they wish to look after, and I can see why you were getting concerned at the time. My only question is, was it totally a civil service initiative with your Minister, or was Mr. McCrea or the other political staff in on this, the deliberations that gave rise to this?

A. They probably were aware that this was our mindset. But I am virtually certain that I was driving the idea.

Q. MR. HEALY: The press statement is as follows: "The Department of Transport, Energy and Communications has conducted a competition process for the GSM licence. Recent commentary and media coverage of this topic indicates a grave absence of relevant verifiable facts and has given rise to inappropriate innuendos and

assumptions. The Department wishes to put the facts of the situation on the public record in order to provide a basis for informed comment.

"In the preparatory stages for the competition process from late 1993, the Department had an open-door policy to representatives of potential bidders, consultants and other interested parties. Dozens of meetings took place in what was essentially a learning phase for the Department.

"When the actual competition was about to be launched, a broadly based project team was established to manage the process. It contained representatives of the relevant divisions of the Department of Transport, Energy and Communications as well as representatives of the Department of Finance together with Andersen Management International as consultants. The team contained within it all the disciplines necessary to conduct the competition professionally.

"The consultants were engaged on the recommendation of a smaller representative group following an international competition. Andersens are niche specialists in this area, and while it is for them to speak for themselves, the Department is confident that they would lend their name to a straightforward professional selection. Their contribution to the process was highly satisfactory.

" At the first meeting of the project team and

instruction was issued with the approval of the team setting formal ground rules in relation to contacts with interested parties.

"The Minister did not meet with the Project Group or with the consultants in relation to the GSM competition process.

"The competition was conducted fully in accordance with the rules which were approved in advance and known to all participants. The approach to the evaluation, including the weighting to be given to the published selection criteria, was settled before the closing date and was carried out to the letter. Each application was examined meticulously by appropriately qualified sub-groups of the project team, including consultants' representatives, and marked by the sub-groups. Consistency checks between different parts of the applications were carried out. When the marks from the various sub-groups were put together, there was a clear winner. Further supplementary analyses served to confirm the result. The project team unanimously made a single recommendation, based on the analyses and marking, which was quickly accepted by the Minister and approved by the Government. No factors other than those specified in the rules were taken into account.

"There has been speculation about the timing of the result. The Department was aware from the consultants

that in other countries there was intense political pressure coming up to decision time. There was a clear advantage to the process in avoiding that, but in fact the final report was presented to the Minister in exactly the week foreseen in planning documentation from an earlier stage.

"On the question of the licence fee, high licence fees in competitions of this type are not free money.

"They become part of the capital costs of the project which must be rewarded from the proceeds of the business and carry a high financial penalty because they are upfront money paid before traffic and revenues are developed. High fees therefore inevitably lead to higher prices than would otherwise be the case (any realistic financial model will support this). The opening documentation for the competition was formally referred to the European Commission which was quite normal. They raised serious concerns about the "auction" element of the rules as they had already done with other member states. The Commission has always insisted equivalent fees be raised from the incumbent operator, in our case Eircell, or that offsetting advantages of other kinds be given to the new entrant. A high fee on Eircell as well as on the new entrant could virtually guarantee high prices.

"The project team was concerned that finalising the

competition without a settlement with the Commission would give rise to serious legal and financial exposure if the rules had to be changed after the licence of awarded. It was decided based on our recommendation that we negotiate a reconciliation with the Commission. The Chairman of the project team led a small group in these negotiations. The proposal for a moderate fee of $\text{€}15$ million on the new entrants and $\text{€}10$ million on Eircell was made by him to the Commission and not the other way around in pitching for this level the Department was aware of the expectations in relation to income to the Exchequer. The outcome of the negotiations was approved by the relevant Ministers and the rules of the competition were amended accordingly before bids were submitted. The salient point is that this part of the business was conducted by the project team. Agreement in writing from the European Commission in advance of the closing date for the competition process was a first for any member state. The final subject which requires comment concerns commentary about the role of the competition for the GSM licence in relation to jobs in Cork. Neither these speculated jobs nor any other jobs were taken into account in the competition. They could not be under the rules. The speculation is that those jobs were directly related to the contracts likely to be

available upon the success of one applicant for the licence. The major procurement for a project in the telecommunications field which enjoys special rights from the State must be carried out by open competitive tender. It is expected that Motorola's prospects of winning such a tender competition would be equally good whether or not they were the licensee.

"The Department would be disappointed if reaction to the outcome of a clean competitive process was to result in the loss of any jobs or any potential jobs." There is one or two aspects of the factual elements of that statement.

If you look at paragraph 6 it says "The Minister did not meet with the Project Group or the consultants in relation to the GSM competition process."

Now I accept that you weren't aware of the suggestions that have been made to the Tribunal and which I have put to you in evidence that the Minister was talking about the competition and had information about the competition in the course of discussions he had with outsiders. But it's not quite correct to say the Minister did not meet the Project Group, is it? To suggest he had no involvement is overstating the position, isn't it?

A. I think the sense of that is that he never attended a meeting of the Project Group as such and never was introduced to or never got the telephone number or the

address of the consultants. I wouldn't read any more than that into it. And

Q. He did have an involvement to some extent, isn't that right?

A. Well, I have clearly acknowledged that a number of conversations between him and I. And there is I have suggested to you that you know, in terms of the management process of the Department processes of the Department, it is possible but I can't say one way or the other that he got general information, say at management committee meetings or whatever, I just don't know any more than that.

Q. He got more than general information. He got the ranking and he discussed

A. No what I am saying is I acknowledge a number of conversations with me and we have been through all that. I said he may have got general information, for example, an occasional update at a management committee meeting or something. I don't know because I wasn't present on nit sufficient occasion but in the sense that Mr. Fitzgerald of kept in the loop and I don't even know, at that stage, some Ministers regularly attend management committee meetings, some hardly ever do and some don't at all. So I don't know what the practice was.

Q. He didn't meet with the group as a whole, that's correct. He had met with you however, the Chairman of

the group?

A. And I am sure he met with Mr. McMahon and Mr. McQuaid in different context.

Q. I am talking about the context of the GSM competition?

A. Okay.

Q. He had met with you in the context of the GSM competition. He had met with you the Chairman?

A. We had discussions or whatever.

Q. It's not just whatever

A. Okay.

Q. He got fairly concrete information from you?

A. Okay.

Q. I am not criticising that. What I am saying is that it would have been more accurate either to have excised any reference to his, the Minister's absence of any dealings or to have stated them in full.

That's all.

You say competition of conducted fully in accordance with the rules which were approved in advance and known to all participants. The approach to the evaluation including the weighting to go given to the published selection criteria was settled before the closing date and was carried out to the letter."

That's a general description, I suppose, of the weighting of the 8 criteria that Mr. Andersen relied on?

A. Yeah, and it represents the state of our mind at that

time. Clearly the state of your mind is a little different after a lot of time going through the detail

Q. I am not as close to the competition as you were then but I do know from the documents that have been given and I think I am right unless you want to disagree with me, that a fairly serious difficulty arose in applying the criteria?

A. In the quantitative evaluation in any event.

Q. Yes?

A. Okay.

Q. Which was a major part of the evaluation methodology. It was the foundation of it?

A. Yeah, okay.

Q. This document identifies a number of areas where you believed it was necessary for you to state your position and it echoes, to a considerable extent, what was stated by the Minister in the Dail in November of 1995, isn't that right?

A. That's true.

Q. But it doesn't deal with the one issue which cropped up again no more than a few days earlier, i.e. the issue of ownership. Wasn't that a glaring omission from this statement if people were to be provided with, as you asserted, an informed basis upon which to make comment?

A. We can go round and round this. I mean, we discussed

it ten minutes ago. I told you what my feelings were.

I can't see that there is anything to be gained from repeating myself again. In fact I am getting quite tired now anyway.

Q. One last thing which has overtaken this statement I suppose. You say that it is a matter for Andersens to speak for themselves. And you say that you are confident that they would only lend their name to a straightforward professional selection process.

While we were discussing earlier the fact that Mr. Andersen is not prepared to make himself available, I should clarify that neither is AMI, the company, which carried out the evaluation?

A. I am aware of that from the Opening Statement. I don't think you can separate the two so easily since he was the project leader in any event.

CHAIRMAN: There are a few remaining documents

MR. HEALY: I think I can get over them without delaying too much.

CHAIRMAN: I don't think we will impose unduly on Mr. Brennan.

MR. HEALY: If you bear with me Mr. Brennan we might get rid of this book altogether and I can tell you where we'll be going.

MR. O'DONNELL: Mr. Brennan wouldn't normally say he is tired unless he was very tired, and

CHAIRMAN: No, well I mean if you urge that upon me

Mr. Brennan, I certainly don't envisage any, if you like, difficult or challenging questions. I think Mr. Healy is really only trying to get rid of a couple of make-weight documents and we can

MR. HEALY: There be may be one thing and if there is I am happy to leave it over until Tuesday. It's simply a housekeeping exercise, can we get one book out of the way.

A. I guess I am going to be back here on Tuesday in any event. Either way. If it's

CHAIRMAN: Look, if it's limited stuff, Mr. Healy and we can put it away, well and good. If anything remotely controversial arises, we will finish it now.

MR. HEALY: I think what I'll do, Sir, there are only one or two matters and I'd leave them till Tuesday and I'll get rid of any perfunctory stuff in four or five minutes on Tuesday morning.

CHAIRMAN: All right, Tuesday.

THE TRIBUNAL THEN ADJOURNED UNTIL TUESDAY, 4TH FEBRUARY, 2003 AT 11AM.