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I N D E X

WITNESS: EXAMINATION:Q. NO:

Mr. Healy

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THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY, 13TH
FEBRUARY, 2003 AT 11AM:

CHAIRMAN: My apologies to persons present for starting a shade late. It took a couple of extra minutes to finalise the preparation and service of the extra documents that were alluded to yesterday.

Thanks, Mr. Brennan.

MR. NESBITT: May it please Mr. Chairman.

Before I start, there is one matter of housekeeping I thought I should attend to. It's a small matter. In relation to the final evaluations that have been spoken about, they eventually end up in a condition which has been described in Mr. Healy's opening as the final version, and there is a final version of evaluation and a final version of the appendices to that evaluation. It seemed to me, given they were mentioned in the opening, it might be appropriate if we delivered to the Tribunal copies. We have already given to the Tribunal, at an earlier stage in the discovery process, those documents, but it does seem to me to be appropriate to have them available lest somebody wished to refer to them later.

They are just what is the final version of the document that was prepared on the 25th October that we have heard about so much. So rather than bring a

witness through them, I'll hand them in, with permission.

CHAIRMAN: Certainly, Mr. Nesbitt. That seems proper.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. NESBITT:

Q. MR. NESBITT: Good morning, Mr. Brennan. I am not going to be very long with you, so hopefully today is the day you'll go home.

I wanted to cover a number of topics, and the first I wanted to deal with was the role that the Minister for Finance had to play in the process that eventually led to the selection of a winner of the competition, and then the exclusive negotiation with that winner leading to the grant of a licence in due course.

And as I understand it, and Mr. Healy pointed out in his opening, the licence that was being granted here was one granted under the Postal and Telecommunications Services Act of 1983?

A. That's correct.

Q. And as I understand, it was the Minister that you answered to who had the grant of the licence under that particular provision, but he had to do it subject to the with the consent of the Minister for Finance?

A. Which is pretty standard legislative measure.

Q. I think that's one of the reasons the Minister for Finance would have an interest in what was taking place in relation to the process for selecting

somebody who would eventually be given a grant of a licence?

A. Yes.

Q. I think, at a much earlier stage, and again it was noted on the first day of the opening, that as early as November of 1993, the Assistant Secretary of the Department of Finance contacted your boss, John Loughrey, the Secretary of the Department of Transport, Energy and Communications at that time, and the suggestion was made that in view of the significance of the granting of the licence and in view of recent contacts and statements by the Minister in the Dail of his intention soon to launch a competition, it was desirable that the Department of Finance should be closely associated with the project at all stages?

A. Yes, that's correct.

Q. So effectively, if we were to position the Department of Finance, they weren't running the process, they weren't going to be making the grant, but there would be a consent at an appropriate time, and they would also be there to see what was taking place?

A. Yes.

Q. And in respect of the Department of Finance personnel who eventually were on the team that you were leading to lead to the selection of a winner, that was the role they played; was that right?

A. Yes, but they integrated well into the team at the same time.

Q. Indeed.

Now, I wanted to just deal with a number of issues in relation to what I am going to describe, in shorthand terms, as the job you were given, because I want to be absolutely certain that we are all going to be talking the same language when we look back over the process and try and work out what part the process had to play, if anything, in the work that this Tribunal is doing at the moment.

And as I understand it, hearing the evidence and listening to you, it's appropriate to describe what happened in the following way: There was the work to design the competition that was going to lead to selecting a winner; is that right?

A. Yes.

Q. And once the competition was put in place, there had to be advertising, the seeking of somebody who was interested in entering the competition, receipt of their applications, and then the assessment of those applications?

A. Yeah, there was clearly a political sign-off on the original launch, that it was an approval process.

Q. Indeed. And you were basically the person at the top of the tree in relation to running the process through to the selection of a winner; is that right?

A. Yes.

Q. And I think there is a distinction in your mind and a distinction you have made in evidence, there is the point you arrive at, the winner of the competition and what happened after that?

A. Yeah.

Q. Now, as I understand it, the selection of the winner, once your process had arrived at it, had to be communicated to your Minister; wasn't that right?

A. Yes.

Q. And that was the one piece of information you had to communicate: "Here is the winner we have"?

A. Yes.

Q. Now, I don't think you were the person who made the communication; another civil servant was responsible for that?

A. I believe that was Mr. Loughrey.

Q. Indeed. Now, once the winner had been selected and the Minister made his decision to go with that winner, I think it's probably fair to describe what happened then as an exclusive negotiation right that the winner had for the purposes of negotiating the grant of a licence?

A. Yes, that was the outcome of the selection phase.

Q. Now, would I be right in thinking that once the winner had been selected and the appropriate decision had been made to give the exclusive negotiating rights to

the winner, the process became much more mechanical; one knew what the business plan of the winner was and one knew what the aspirations of the Department were, to have a licence in terms that they found acceptable.

Is that right?

A. Yes, and there had been a draft licence as part of the competition documentation, and it was a question I suppose of amending that to take account of things that arose in the competition and things that arose in the offer. And that was a process that was led by Mr. McMahan's division, which I think I have said that in evidence before, that he was, I suppose, the de facto telecoms regulator at that time, when we didn't have an independent regulator as such, and he led that process.

Q. And I know you have said in evidence that you weren't as closely involved in the negotiations in relation to the licence grant, but you would have known something about what was taking place?

A. Yes. Mr. Towey continued to work for me, and he represented my interests or my division's continuing involvement, and he interacted closely with the people in Mr. McMahan's division who conducted the negotiations.

Q. Now, in relation to that negotiation, do you think it's fair to describe the position of the Department in that as seeking to get a licence in terms that they

believed was to protect the interests of the State in granting the licence and to ensure that the licence conditions ensured that the person that was going to run the licence was doing what was expected of them?

A. Was doing what was expected of them both in terms of the general running of the telecommunications sector and in terms of what they offered to do in their bid.

Q. So in fairness to the two sides to that negotiation, it was at all times the State who was effectively driving what the licence was going to look like; they were protecting the interests of the Minister in granting the licence?

A. Yes.

Q. Now, in the course of your evidence, you have been asked about what was the position at various times, and it seems to me, looking back over the transcript, we see three words that sometimes get confused and used out of context, depending upon when they are asked. The three words are "winner", "grant", and "award".

Now, as I understand it from what you have said so far, in relation to the concept of "winner", that was the person that was selected as the winner of the competition?

A. Yes.

Q. And in relation to "grant/award", I understand those two words to relate to the granting of the licence

after the period of exclusive negotiation?

A. I think that's reasonable.

Q. And if we see in the transcripts of your evidence where there is any incongruity in relation to that position, we should take it in the context. If you are looking at a time up to the selection of the winner, you are talking about that period, and if you are looking at a time after the selection of the winner, you are talking about the exclusive negotiation period, and that's what you intend to do; is that right?

A. I mean, I am very clear in my own mind that you know, up to whatever date it was, 25th October, that was selecting a winner; and after that it was the awarding of a licence. And I suppose we all tend to use words like that interchangeably. I am sure Mr. Healy probably did.

Q. I am not being critical. You have been in the witness-box so long it's amazing there wasn't more of it. I just wanted to make sure there was no doubt about that.

Now, in relation to getting to the process of selecting a winner, do you have any particular view as to what the people who entered the competition believed was happening? Is that what they all understood to be happening: There will be a winner who is likely to get exclusive negotiating rights, not

certain but likely to?

A. I can't see how it could have been otherwise. They entered a race where there could only be one winner.

Q. Yes. And I think, in fairness to everybody, nobody has ever suggested to the contrary.

A. No.

Q. Now, there is a number of distinct matters I'd like you to deal with, and they won't take long. And the first is the question of coming up with some analogy to allow one to understand the distinction in some respects and the relationship between the question of quantitative and qualitative analysis of people who entered into the competition. And I think somebody from the Andersen team suggested that in conceptual terms, it could be likened to an athlete jumping a high jump. And you were asked about that by the Chairman, what you thought of Andersen's view, and I think you said you weren't happy with that analogy, and I wanted to tease out why that's so.

As I understand your likely concern, it's this, that in relation to a high jump, you jump the jump; you know how high you jumped. That's really the quality of the event that took place. There is nothing else to it. It doesn't matter how good you looked; if you didn't get over, it wasn't good enough. In those circumstances you are not really seeing a distinction between quantitative and qualitative, and for the

purposes of understanding some of your evidence and for the purpose of understanding how the process worked, and without wishing to be facetious, perhaps a different type of competitive event might be a better analogy, a diving competition, something like that, where you are going to be marked for style and other things.

A. Yeah.

Q. Does that help you more if you look at it like that?

A. Well, I suppose diving is probably a better analogy, all right, in the sense that you have to have the strength to climb up there, you have got to jump off, and you are going to hit the water; but you get marks for style, and for smoothness of entry and so on. So there is certainly more in than kind of an analogy than there is in the high-jump one.

Q. And this was, in the sort of terminology or the parlance of these competitions, a beauty parade. This wasn't just the person with the biggest purse, the person with the most clout; this was somebody who was also going to have a good idea, who was going to be looked at in conceptual terms, there was going to be the ability to quantify what they were bringing to it, and there was going to be the requirement to consider the quality of what they brought to it?

A. Yes, there had to be a balance across all the critical ingredients.

Q. As I understand it, you personally were of the view that a competition which encouraged the broadest spectrum of applicants, so you really got the best result, as opposed to leaving it to the people who had the reputation because they had been big enough to get there, was something that you felt was important to get what was best for Ireland Inc.

A. Yeah, I think that it was always clear, that this was going to be judged in relation to the quality contained in the applications, and the confidence that the people who were there could do it. There could clearly be only one outcome, or only one winner. And a lot of the selection process, as we went through yesterday with Mr. McGonigal, was very structured, technical, systematic; I think those are the words I was using yesterday as well.

Q. Now, the reason I mentioned this to you at all is I just wanted to tease out another issue about you personally. It's clear from the evidence you have given that you had a very large interest in how telecommunications in Ireland could be brought into a sort of a modern state of preparedness and to assist in the Irish economy growing and helping everybody. And would it be fair to say, or to describe you as somebody who was well motivated in that regard? You believed you understood what the issues were, you believed you understood what was the right thing to

do, and you were concerned to do your job to make it work; is that right?

A. Yes. We have mentioned several times now telecommunications strategy document the Department had generated and I said yesterday that I thought it had been or was about to be put into evidence. And that had a very clear headline that we wanted to put Ireland as quickly as possible into the top quartile of all relevant indicators in the OECD of quality, availability, and price. That was the driving headline of the Department's policy in relation to telecommunications. And out of that flowed all of the things that happened: strategic partnership in Telecom Eireann to strengthen the company, the notion of independent regulation, and opening up the market.

Q. Well, the reason I again mention this to you is I wish to suggest that given your particular state of knowledge and your state of mind in relation to what you felt had to be done, I'd wish to suggest to you that any suggestion that the process might have been moved in a direction or massaged in another direction which was outside your understanding of what required to be done to do it properly and get the right winner would have conflicted with your disposition to get this right, your disposition to get it right for Ireland Inc.; is that right?

A. Absolutely. I would say, if I had any reservation at

all, it is if I was starting a process and there wasn't a political background, I would have preferred to issue two licences rather than one.

Q. To avoid a duopoly, I presume?

A. Yeah.

Q. Now, I want to come back to another element of the competition which appears to have excited some comment, and that's the issue of grades turning to numbers. Now, as I understand the evaluation, there is this point in time where, for the purposes of marking it, letter grades turned into numbers. And I just wanted to ask you to tell the Tribunal a little bit about when that happened and what you draw from that fact.

A. All of the marking of all of the sub-groups was done in letters throughout the process, and when we were in Copenhagen on the 28th, it occurred to me that you couldn't actually validly come out with a result based on letters, and I raised that as a topic for discussion. And I sought to persuade the people around that there had to be a better way, because I couldn't stand over a result based on letters. You couldn't apply weightings scientifically to letters, and so on.

And we discussed that, and we I think we got to consensus some formula had to be found. And this problem, by the way, only struck me at the meeting; it

wasn't something I had planned or even thought out.

And when we had taken it that far, then we started to say "Well, how are we going to do this?"

And just in reacting to the conversation as it unfolded, I thought that the system formula, 5, 4, 3, 2, 1, representing the numbers, would give me at least a clear result, numbers that I could grapple with.

And I took what was Table 16 or Table 17 or whatever it was, and I stood up in the room with a flip chart or a whiteboard, I have forgotten which, and I just started doing it.

Now, it only occurred to me a long time after the event that once I started that process, that when I got to the bottom of the page and added up the numbers, that was going to be the result. Now, that's a simple, devastatingly simple way of presenting it, but that's what actually happened. The solution came to me on the day. I carried it out in public. Nobody could have anticipated it. And that's where it came out of.

Q. And it stayed the solution in relation to the concern you had in translating letters into numbers; is that right?

A. It

Q. It stayed as the solution for the problem you had identified?

A. Yes.

Q. So there was never a time when anybody could have sought to influence you in approaching it in that way; it was thought up, discussed, and it became the answer?

A. This is something that all happened in a short space of time well, when I say "a short space of time", in a morning. And I suppose it took me 20 minutes to draw up this matrix, and that effectively became the result.

Q. And when you see the formula, I can't remember the exact numbers, but you will see a letter and a number; and you have to know what the letter is in numeral terms, you multiply, and you get a descending series of figures which add up to the large figure?

A. You apply the weightings across them as well.

Q. I think the first was 362; I can't remember.

Now, to conclude, Mr. Brennan, I want to ask you a series of simple questions, but I want you to think before you give the answer, because I think they are important in relation to your role, at any rate, in this process that's under examination.

And the first question I want to ask you is this: At any time during your involvement of the development of the competition process, the evaluation of entries, the selection of a winner and the communication of the fact and/or identity of the winner to the Minister, during that part of the process were you ever subject

to any influences that you considered were intended to divert or compromise your independence and so affect your independence in playing a role appointed to you?

A. I don't believe I was subject to any such influence.

Q. After the selection of a winner and the phase of the process concerned with the negotiation of a licence and the grant of the licence, were you ever subjected to any influences that you consider intended to divert or compromise your independence so as to affect your independence in playing the role appointed to you?

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

Q. Insofar as you were concerned, is your independence or will to implement the process carried out to the best of your abilities, or was it ever overborne?

A. Or was it

Q. Was it carried out to the best of your ability?

A. Yes.

Q. And do you believe that your ability to act independently and arrive at an independent result was overborne by any third party?

A. It wasn't overborne by any third party, no.

Q. And finally, were all the decisions you had to make, and did make, your own decisions?

A. All the decisions that were made were by me; where relevant, by the Project Group. Now, clearly as we have discussed before, there were decisions like the capping of the fee and so on, which clearly had

political connotations and had to be taken through the political system and so on.

Q. Thank you.

THE WITNESS WAS FURTHER EXAMINED AS FOLLOWS BY

MR. HEALY:

Q. MR. HEALY: I want to go through some of the extra documents. Before I do, I'll take up that last point that Mr. Nesbitt threw up with you, and that's that question of decisions. And I want to make it clear, as I think I have made clear before, while I may criticise or I may suggest, rather, that decisions that were reached were decisions that are open to critical comment, I am not suggesting on your part you were engaged in any deliberate massaging of this system.

However, the decision to turn the grades into marks was one that was made in Copenhagen; is that right?

A. Yes.

Q. And it had a significant effect on the overall process and I think was relied on at the end of the day as a validation of the process; is that right?

A. Well, I think Mr. Andersen would describe it as validation of the process. I would see it as a finishing of the process.

Q. But the decision to convert grades into marks was made by a few people in Copenhagen at the end of the process?

A. Yes.

Q. It wasn't a decision that was made by the entire Project Group at the beginning?

A. It wasn't.

Q. Or at any time. The system of marking relied on by Mr. Andersen was a twofold system. In the quantitative evaluation, he used a numbering system, not a grading system; isn't that right?

A. Yeah.

Q. A numbering system first, and then that generated a grade?

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

Q. And the grades that were generated actually had numbers on a five-point scale, but they were in fact grades; isn't that right?

A. Yeah.

Q. When you came to look at the qualitative evaluation, you couldn't at any point rely on that evaluation to generate numbers, because it was all based on judgements, the consensus of a group of people large or small, as the case may be as to whether so-and-so had the best roll-out plan, so-and-so had the second-best roll-out plan, somebody else had the third-best, the fourth-best, and so on, and you graded them as A, B, C, D, E as the case may be, or if two had equally good roll-out plans, they both got As; isn't that right?

A. I am not 100% sure that I follow quite

Q. I can take an example, if you like. But aren't I right in thinking that making judgements we had examples of them from Mr. McGonigal's examination of you yesterday. In the course of the qualitative evaluation, members of the supply groups were supposed to sit around, look at the applications, and say, "This application is the best application in relation to this indicator and therefore deserves an A", and I think I am more or less paraphrasing what the report says about various indicators.

A. Yeah, but you are suggesting I thought in your first question you were suggesting that a lot of it was subjective, whereas in very many cases, it was calculated, so to speak.

Q. There were calculations, but the ultimate awarding of that mark couldn't be the ultimate awarding of the grade couldn't be based on calculations; it had to be based on and I am going to suggest this to you a completely subjective evaluation of one or a number of individuals. But as I understand it from what Mr. Andersen has said, in the evaluation and elsewhere, there was a guarantee of objectivity by having a consensus of subjective evaluations; is that right?

A. There clearly were parts of some of the indicators were more subjective, and there were lots of them I believe objective; but since I didn't participate in a

lot of groups, I can't clarify it beyond that. I mean, I am fairly certain that when you come to the technical evaluation, it's things like numbers of base stations, how calls are delivered, and so on. These are the things that were calculated rather than subjective judgements.

Q. Could you show me one? Because I couldn't find one judgement to that effect in the qualitative I think I am right in that I am not criticising you.

Could you look at page 18 of the final evaluation report. Maybe we can look at this volume; we might get it more quickly. If you look at that, there is market development. I think were you not involved in that sub-group?

A. I am not sure. The one I have clearest recollection of being involved in was tariffs.

Q. Tariffs?

A. Yeah.

Q. Well, maybe we can go to the tariffs. I think you were involved in market development, but I could be wrong.

A. I am not sure either.

Q. Could we just stick with market development for a minute while I'll turn up tariffs. Do you see the ten indicators there, "market penetration" down to "customer care and churn"? Take "customer care and churn", and look at the marking: C, C, B, E, A, B.

There was nothing measured there. That was based, presumably, on the way you looked at how the various consortia dealt with these aspects.

If you look the narrative. Do you see the narrative underneath it?

A. Yeah.

Q. If you look at the first one: "The marks awarded under each indicator are summarised in Table 2.

Projections reflected in the first two indicators were not only the long-term ambitions but also the

development during the early years. In particular,

Year 4 has been taken into consideration (in

accordance with the evaluation model outlined in

appendix 3.) The third indicator is the relative

consumer penetration as expressed by the

consumer/business subscriber partition. In the long

run, A2 plans to take the largest proportion of

private consumers (77%), followed equally by A5 and A6

(67%), and swiftly by A3 (comfortably above 50%.)

Consequently these applicants have been awarded high

marks concerning this indicator."

Do you see that?

A. I do, yeah.

Q. If you look at it, A2 gets A, A5 gets a B, A6 gets a

B, A3 gets a B, on the basis that they are all above

50%; do you see that? But there is no direct number

relationship; do you see that?

A. I think I am making the connection that you are making, but I need a moment.

Q. I am not criticising this, but if you go on to the next one

A. Wait a second. A2 gets an A because it's at 77%.

Q. Yes.

A. And then, let's see, A5, A6, 67%, and they get Bs.

Yeah, that's what it looks like, yeah.

Q. But A5 and A6 and A3 are all above 50%, and they get a B.

A. Yeah.

Q. But they weren't all on 67%. Do you understand me?

A. Yeah.

Q. So it's not a direct numerical relationship, although it's clear numbers were used in making this evaluation?

A. Yeah.

Q. But it's a judgement.

If you go to the next one: "The fourth indicator, market research, has been found relevant insofar as the applicants have been requested to evidence and document their applications as much as possible. A4 and A5 have both carried out several types of market studies in Ireland which warrants an A. A6, on the contrary, has explicitly disassociated itself from market analysis in the Irish market prior to the licence award."

Do you see that?

A. I do.

Q. So they get an E on the basis that they thought this was of no relevance, so they got an E. A4 and A5 thought it was very important, and they both got an A.

A. Yeah.

Q. Do you see that?

A. I do, yeah.

Q. Well, obviously what somebody was looking at there, or what the group, the sub-groups were looking at is they were looking at narrative accounts by the various applicants of how they proposed to approach market research, plus presumably actual market research they have already produced, and/or market research they had planned. And judgements were made about that, but there were no you couldn't you weren't asking anybody for a set of numbers that you could mark out of a hundred, say.

A. Yeah, okay.

Q. You were making an element of judgement?

A. There was an element of judgement.

Q. What I am saying is that judgement was, in the case of each individual member of the evaluation group, evaluation sub-group, a subjective judgement; it was his judgement. As I understand it, the protection you had against the judgement being one person's judgement, and therefore a wholly subjective

judgement, was that you aimed to get a consensus, and that made it that didn't make it a personal judgement; it made it a judgement which you hoped and Mr. Andersen hoped would be the same judgement reached by any number of people who applied themselves without any prejudice to the same task.

A. Yeah, okay.

Q. That was the major difference between the quantitative and the qualitative.

A. In the case of the examples you have cited, that's fairly clear. Now, I don't know the extent, for example, to which there was more quantification and less subjectivity in other groups; you would have to go back to all the various documents that were opened yesterday.

Q. If you go and I mean, I can do it if you want me to, but I am fairly certain if you go through all of the subindicators, even in the technical area, the judgements reached in all of those cases might have been informed by a vast amount of numbers, but the ultimate judgements were based on the application of a grade to a particular application based on the way that application was presented by whoever that applicant was. But the judgement was, like the judgement Mr. Nesbitt described a moment ago using the diving analogy, or I suppose the best analogy, the one that we are all used to, although we no longer see it

on T.V., is the ice-skating analogy, where everyone the judgement says 5.1 or 5.2 or whatever. Do you remember those?

A. A little, yeah.

Q. You could go too far in these analogies, but what I am trying to get at is to try to judge them, the supply groups were applying grades to them; they weren't left with the they weren't in a situation where they had a number in front of them and they say "Well, that's an A, that's a B".

What they did was they had an application. They had a set of documents, or they had a presentation, or a combination of all three, and they said "That is an A; we think that's the best one here. This man has got the best plans and the best market research in this area ,and we are going to give him an A".

A. Yeah, okay.

Q. And ultimately that aspect of the entire evaluation became more dominant than it had ever been envisaged it should become from the outset; isn't that right?

A. You have to run that by me again.

Q. The qualitative aspect of the evaluation as opposed to the quantitative ultimately became the dominant, but more dominant than was ever envisaged at the outset?

A. I am not so sure I'd go so far as to "more dominant than was ever envisaged". I think it was always clear that the qualitative evaluation would be the dominant

one.

Q. But it was going to be based on a quantitative evaluation which was going to be completed, concluded, and produce a concrete result?

A. Yeah, that was certainly the original plan, yeah.

Q. Now, when you decided that the result wasn't what you envisaged it wasn't a hard result, as you put it and you were thinking about how you might how you might present it in a way that, as I see it, made more sense to you. I think what you said initially was you couldn't see the result as it was contended for by Mr. Andersen, and that what you did

A. As far as I was concerned, there wasn't any result until you could see it clearly in numbers.

Q. And the exercise you conducted was the one you have described. You say you think it was devastatingly simple, and you said "I conducted it in public". I assume that you meant that you did your thinking in front of the people who were there in front of you in the room?

A. Yes, and actually did the calculations in front of the people in the room, yeah not calculations; translations, I suppose.

Q. But you did that with the group who were in Copenhagen, and that would have been yourself, Mr. Towey isn't that right?

A. Yeah.

Q. Was that on the 28th?

A. 28th.

Q. Was Mr. Andersen there? He must have been, obviously.

A. Yes, and I think a number of his people were there.

Q. But the rest of the Project Group weren't there?

A. No.

Q. And I have done the calculation as well, and I think

that I have done it the way you must have done it.

But just to be absolutely sure that I am right, if you

take that list of gradings which go from A to E;

isn't that right?

A. Yeah.

Q. And taking that to be a five-point scale, out of 100%,

or 100 marks, you attribute 100 to A, 80 to B, 60 to

C, and so on. If you want to put it another way, take

a five-point scale; you apply 5 to A, 4 to B, 3 to C,

2 to D, and 1 to E?

A. Yeah.

Q. If you do that and then you apply the weightings, you

get the result contained on the next table?

A. Yeah.

Q. Isn't that right?

A. Yeah.

Q. And that's what you did, and I got the same result as

you got.

A. Yeah.

Q. So if we had our flip chart here now, we would put up

if we go back to the previous table for a moment,
we put up in the case of A1, market development, C;
that's a 3?

A. Mm-hmm.

Q. And you apply the weighting, and it becomes a 30?

A. Yeah.

Q. And the same with the next, if we can go back to the
previous one, the same with the next one: That A, you
apply a 5 to that, apply the weighting, and it becomes
a 50?

A. Yeah.

Q. The next C is a 30; the next C is a 30; the next C is
a 30; the next C, then, the 18, that becomes a 54?

A. Yeah.

Q. The licence fee at A becomes 55, and they all get
that. The coverage, which is a B, that's a 4; you
apply the weighting of 7, and you get 28.

The next one, international roaming, is weighted 6;
the grade is A. That's a 5. Apply the weighting, you
get 30.

The next one is 20, and the last one is 15, isn't that
right?

A. Mm-hmm. Yeah.

Q. Now, we are used to grades in this country, since the
leaving cert has for many, many years been certified
as a graded exam; isn't that right?

A. Yeah.

Q. But what actually happens in the marking of papers is people get marks, which are then, because they fall within a certain range, translated into a grade?

A. Yeah.

Q. So if you get 90, you get an A?

A. Yeah.

Q. So 90 equals A. And it's very easy if you are marking the leaving cert. Everybody who gets a 90 gets an A, because you know 90 is within the appropriate range.

Maybe A plus or A minus; I am not sure.

A. Yeah.

Q. But if you had a set of results that were originally in graded form, not in marked form, you couldn't say that A was equal to 90, sure you couldn't?

A. If you had

Q. It could be 100. It could be anywhere between 80 and 100, couldn't it?

A. In the leaving cert?

Q. If you had if I put this proposition to you firstly in very simple, crude terms, and then we'll look at it again.

If you have a set of exam papers with numbers on them and they are marked in numbers

A. Yeah.

Q. and on the five-point scale we are looking at here, every one of the five candidates gets the first of the five candidates gets 90; he gets an A grade.

Isn't that right?

A. Yeah, that's right.

Q. The second of the five candidates gets 70; he gets a B grade?

A. Yeah.

Q. And so on. But if you had five sets of exam papers and they had not been marked in numbers but had been marked in grades, and the first candidate had an A and the second candidate had a B, and so on, you wouldn't be able to say what marks those candidates had or should get, sure you wouldn't?

A. If A represented all the marks between, say, 90 and 100, you wouldn't know yeah, I'll accept that.

Q. And I am just suggesting that that is what happened here. How can you tell whether the person who had an A had 99% of the marks or 81% of the marks?

A. You clearly can't.

Q. You can't. And isn't there a danger, then, in translating what is a graded marking system into a numerical system, that you can distort the differences?

A. I don't understand how you can distort the differences.

Q. You don't know what they are.

A. Yeah, but I mean, it depends on how many layers of complexity went into the original marking. I mean

Q. Precisely.

A. We had an approach which was agreed which produced a complete set of results across all the indicators.

That table was the end result of it. And I took the view, and I persuaded the people there, that there had to be a way of modelling this in numbers.

Q. Can we just go over to the numbers for a minute. I think you have, in a way, answered my question by saying that you had no way of knowing the layers of complexity that went into arriving at the gradings.

A. That's right.

Q. And translating them into crude numbers was to ignore all that complexity?

A. But the gradings given were the outcome of all that complexity.

Q. Yes. Well, if somebody if two people got a B, for instance, and the B stands for everything between 60% and 80%, everybody is given a 4, aren't they?

Everybody is given 80%, if you like.

A. But I mean, that's an approach that you are putting in.

Q. That's what you did.

A. That's what we did at the end. At the end we took a matrix with graded letters, let's say, and

Q. With grades?

A. Okay, with grades.

Q. Where you couldn't see a winner. You decided the only way to make a winner out of it

A. It was impossible to see a winner, I thought, without finding a mathematical model that would fit.

Q. So arriving at the winner was a decision that you arrived at in Copenhagen after you converted the grades into marks?

A. I think once we agreed that that was an approach, I mean, we had a discussion about it; we agreed on that approach, and we carried it out. And I think

Q. "We" meaning three people?

A. There was more than Michael Andersen. There was a number of

Q. All right. In terms of the Project Group, it was three from Ireland two from Ireland, sorry?

A. Yeah, two from Ireland.

Q. So the two from Ireland, I presume Mr. Towey was probably of the same view, couldn't see a winner until you translated these grades into marks?

A. Yeah.

Q. And what I am suggesting to you and maybe I'm not making myself clear; maybe I'm failing in making myself clear, but I can't see how you did anything here other than give everybody who got an A a 5, everybody who got a B a 4?

A. That's exactly what I did, yeah.

Q. But the 5 represented everywhere between 80 and 100%, approximately; isn't that right?

A. Yeah, you can certainly present it that way. But what

I am saying is that the grades that were there were the grades that were arrived at by groups of people. And I was looking for a way of modelling them mathematically. I have never made any other claim than that.

Q. What I am simply saying, to model grades numerically.

I wouldn't accept that these are modelled mathematically at all. To say they are modelled numerically is the best you can do, and that you are translating a very complex grading system into a very crude numbering system.

A. I don't know. I mean, it's clear that we did what we did.

Q. Of course; we can all see that. Anyone can carry out the calculation themselves. There is absolutely no science in it. Everywhere you see an A, you put in 5.

Everywhere you see a B, you put in 4.

A. Yeah.

Q. But those 5s and 4s represent a much more complex and much more nuanced judgement reached by people in the course of a qualitative evaluation.

A. Yes.

Q. And you can't tell whether any two As actually represent the same 80 the same 100%?

A. I am struggling to understand I mean, I understand the mathematical point you are making. I am struggling to understand the relevance of it or what

you are trying to establish.

Q. If you look at the if you look at what happened here, you came back, I think as Mr. McGonigal said, from Copenhagen with a result; isn't that right?

A. I think what I said was I came back with a result, but there was still some checking to be done and the result had to be explained to the Project Group.

Q. I think you used the term "provisional."

A. I probably did, but it's still I think I said, too, that it needed to be explained to the Project Group.

Q. Explained to the Project Group, but wasn't it supposed to be the result of the deliberations of the Project Group?

A. And of course they could have disagreed.

Q. I understood you to say to Mr. McGonigal yesterday that once you came back from Copenhagen with the qualification you mentioned just now, you had a result, and there was no way the Minister or anyone else could change it?

A. I think if the Project Group had found serious flaws in our methodology, then we would have had to revisit it.

Q. The difference between the first three candidates was I think respectively the difference between 432 and 410, which is 22; isn't that right?

A. Yeah.

Q. And the difference between the second and the third

was 62 and 410, which is 58, is it 48, 48, isn't

it. 60 from 400 is 40, 38 if you take off the 2 and then add 10, that's 40?

A. Okay.

Q. The difference between 1 and 2 at 22 is I think 5%, is that right, 4 percent?

A. Four point something percent.

Q. Four point something percent. And this is on a grading marking system; isn't that right?

A. Yeah.

Q. So therefore, if you ignore the arithmetic for a moment, in a graded system up or down 5 or 10 percent, it usually doesn't mean very much; isn't that right?

A. In a graded system as you are presenting it, yeah.

Q. Well, in the graded system that you used here. You had gaps of 20 percent between each grade.

A. Well, that's the point I have difficulty with your presentation on. What I am saying is that each of the groups came to a grade for each of the indicators.

They came to a single grade, whatever it might be. In fact, I think where we differ is I see the conversion to numbers as a strength in the process and you see it as a weakness.

Q. I understood that they reached grades because a grade is a way of applying a non-specific mark to something.

A. I would rather say they used grades because that's what Andersens moved them to do.

Q. But Andersen was suggesting, as I understand the way he worked, the use of grades because grades reflect a more nuanced, slightly impressionistic mark, not a specific mark; and when you give somebody an A and you give somebody else a B and give somebody else a C, you are suggesting that there are, you know, impressionistic differences between them. You are not giving them specific numbers. You are not giving somebody 28, somebody else 82 and somebody else 100 percent. You are applying grades because you are making a qualitative judgement?

A. But when I looked at that table in Copenhagen, and I am looking for a result to which I can certify that I have applied the weightings agreed in advance, how else can I do it without importing the concept of numbers?

Q. You have all my sympathy, Mr. Brennan; I fully understand the problem you had. All I am suggesting and I am not criticising the way you approached it. I am suggesting that, if I can borrow something you said, that it was not just devastatingly simple, but slightly, or perhaps even more than slightly, simplistic; that it was a useful thing to do, but that it obscured the extent to which the top two certainly were close?

A. You are concluding that now. You are suggesting that now.

Q. That they were very, very close, but if you converted to numbers, at first sight they mightn't appear to be so close.

A. But I mean, I keep coming back to you couldn't declare a result based on that table up there. We had to find a different solution and bring it to numbers.

Q. If the problem was as significant or as fundamental as that, why wasn't the entire group involved in it?

A. I don't have an answer to that. We were the people who were there, and we were the people who were finalising it.

Q. You were finalising a most significant part of the whole process?

A. Yes.

Q. You were over in Copenhagen. There was two of you there, and you couldn't see the winner. It was impossible to see it, you said, and by conducting what I would suggest is perhaps a useful but very simplistic exercise, you came up with what you believed was a clear winner which you couldn't see before?

A. Yeah.

Q. That was something that should have involved much, much wider canvassing of the approach you took?

A. You'd have to your starting point would have to be that we were doing this for out of a wrong motivation.

Q. Not at all.

A. We were doing this simply to get to the bottom line, if you like.

Q. Yes. To get a result. "Let's get a result that looks like a clear result, we have something to run with"?

A. No. I think to get the result. At least sorry, in our mindset on the day, in my mindset on the day, I was getting the result.

Q. Applying the process as originally envisaged by the evaluation methodology and as envisaged by Mr. Andersen, you couldn't get the result. You were stuck without a result?

A. Well, to me

Q. You had a dilemma?

A. To me, the solution we came up with on the day got us a result. And not that we were searching for any old result. It got us the result.

MR. NESBITT: Mr. Chairman, I have already earlier in this Tribunal said that it seems to me that what's actually under attack by much of the cross-examination and the examination of this witness is the process, and I would ask, Mr. Chairman, that there be some attempt made to indicate why what appears to be criticism of a thing that Mr. Brennan has explained clearly has any relevance to any of the terms of reference that are currently being looked into, if this line of examination is to continue.

It has already been said by My Friend, when he stood up to do the final re-examination, that there was no allegation being made against Mr. Brennan personally. He has explained beyond any doubt as to how matters were achieved, and the continued questioning of what is self-apparent doesn't appear to have any end that I respectfully can see can connect to the work of this Tribunal.

And I am sorry to have to get to my feet, but it seems to be unfair to Mr. Brennan to continually harp away at something that, as must be clear to anybody who has been sitting here, is matters that Mr. Brennan has explained fully.

CHAIRMAN: Mr. Nesbitt, I am satisfied that an adequate assessment and examination of the actual process deployed is necessary information to be obtained by the Tribunal to enable it to discharge its remit under the terms of reference. What Mr. Healy is seeking now to finalise does not seem to me to offend against any of the proper canons of what falls within the Tribunal's duties.

Q. MR. HEALY: I think what you said was you got the result when you conducted this exercise, a result which you couldn't see beforehand; is that a fair way of putting it?

A. I can't see how anybody could look at a table of letters and discern a result from it.

Q. But wasn't that what the entire group envisaged from the outset? That's all I want to clarify.

A. I am not actually sure that the entire group had crystallised how this was going to pan out in the end. What I am explaining is that we came up with this formula on the day, and we carried it out. And I said, long before we had this discussion, I said, and then that was a provisional result; the methodology had to be explained to the Project Group when we came back.

Now, if I just want to repeat, if the Project Group had found flaws with the methodology, then the Project Group would take over and decide an alternative methodology. But that didn't arise.

Q. The reason that I have, I think as Mr. Nesbitt put it, been harping on about this is I notice, from the documentation the Tribunal had, that certainly Mr. McMahon recorded that as he saw it, the two front runners were too close and needed to be separated. Now, didn't that sort of record, to some extent, reflect the situation in which you found yourself before these numerical this numerical translation was made? You couldn't see a clear result?

A. I couldn't see a clear result; that's right.

Q. Before I go through the documents, I will go briefly through some of the material mentioned by Mr. Shipsey and one or two things you said which may add to some

of the knowledge the Tribunal has.

Mr. Shipsey was asking you about the letter from IIU of the 29/9/1995, and I think he was suggesting to you that that letter indicated that Mr. Dermot Desmond was the same as IIU, and that it showed that Mr. Dermot Desmond had no interest in not mentioning his involvement or the involvement of IIU in this consortium. Would that be a fair way of summarising it?

A. Yeah, he certainly was presenting, as I understood it, the case of whatever was the Department's position, that Mr. Desmond or IIU had no problem with the Department being aware of their arrival.

Q. And that I think he went so far as to say that as soon as the IIU agreement of the 29/9 was made, IIU announced to the Department that they they announced to the Department their interest in and involvement in the consortium?

A. That seems to be an accurate reflection of what Mr. Shipsey said.

Q. That's what Mr. Shipsey said, but I just want to be clear about how you viewed it, because I do recall putting to you, or suggesting to you, that the Department might have taken a certain course if they had received a letter saying, in the blankest and the most express terms, "Dear Sirs, this consortium does not consist of IBI, Standard Life, etc., etc., Advent,

but consists of Mr. Dermot Desmond, Mr. O'Brien and Telenor."

Do you remember I suggested that

A. You put that to me a long time ago.

Q. If you were informed of that, you might have a job to do. I think you might have said at one point you may have had to go to the Attorney General's Office?

A. I think I might have said that. I probably said.

Q. We disagreed to some extent on what you might have been prompted to do on receipt of this letter, but I think, in fairness to you, am I right in saying that that letter did not tell you that IIU was a new member of the consortium and did not tell you that Mr. Dermot Desmond was the consortium member?

You can have a look at it if you like.

A. Yeah, well, what it's saying is that "We have arranged underwriting on behalf of the consortium", yeah.

CHAIRMAN: In fairness to Mr. Brennan, the portion that's not visible does set out that Mr. Desmond is chairman.

MR. HEALY: I appreciate that, but if I could just have it for a moment.

Q. I want to be fair to you, Mr. Brennan. I think I made it absolutely clear to you that I took the view that that letter should have prompted further inquiries.

You were hampered, in that according to your evidence, you didn't know the content of it. But I do want to

say that I drew a distinction between what was contained in that letter and what perhaps somebody ought to have done on receipt of that letter, and the situation in which you or Mr. Towey might have found yourself if you had received a letter which had said "Dear Sirs, Mr. Dermot Desmond is a member of the consortium; the rest of the people you were told about are out."

Now that letter, am I right in saying, does not say that?

A. It doesn't.

Q. It doesn't tell you Mr. Dermot Desmond was an investor. It doesn't even tell you IIU was an investor; is that right?

A. That's true, yeah.

Q. And am I not right in thinking that again, because this is something that is of interest to the Tribunal, that while there were newspaper references to Mr. Desmond's involvement, which you think may have been at one point in early November, suggesting that he was taking over the Davy's role, you did not become aware of the Dermot Desmond involvement as a concrete investor, if you like, until the 16th April, maybe the 17th you were contacted on the 16th and the letter came in on the 17th?

A. About then, yeah.

Q. And nobody had said to you up to then, either from

IIU, Mr. Desmond himself, or from the consortium, that the banks are out, Advent are out, it's now Mr. Dermot Desmond?

A. No.

Q. And I think I did canvass with you that there was a meeting, sort of the first post announcement of the winner meeting, sometime around the 11th November I could be wrong about the precise date; it might have been the 9th at which Mr. Andersen went through the consortia and various concerns he had about finances and so forth, and nobody troubled to mention at that point that all of this was all nonsense; it's not Allied Irish Banks, it's not IBI, it's not Standard Life. Nobody informed you of any of those things; isn't that right?

A. That's right, yeah.

Q. Now, we touched on this again in the context of the questions that were raised in the Dail in November, and we touched on it again in the context of the adjournment proceedings on the 16th April.

A. Yeah.

Q. And more specifically in connection with the Dail statement of the 30th April.

A. Yeah.

Q. And your own press conference of the 19th. If we just concentrate for a moment on the 30th April.

A. Yeah.

Q. Which was after the information had come to the Department on the 16th, 17th April and after the 19th April press conference. And do you recall that I suggested that in that Dail statement, the Minister, in a Dail statement drafted for him, so far as the substantive part was concerned, by civil servants, the Minister avoided any reference to describing the true ownership of the consortium that had won the licence?

A. Yeah.

Q. We'd better stick with the nomenclature. I think we all know what we are saying, I don't think anyone is confused, that had won the competition accorded the exclusive right to negotiate the licence - that's a bit of a mouthful.

A. Yes.

Q. I think we've used the expression winning consortium, that's the easiest one to use?

A. Okay.

Q. On that day, in the course of exchanges, the Minister, I suggest, avoided describing a consortium which he must have known to have announced itself as containing Mr. Dermot Desmond.

A. We have had this several times now. And I mean, what I have said from the beginning, I think, is that we got in a letter telling us of a change, and the change required us to make inquiries as to whether it was acceptable to us or not, and that those inquiries,

including legal inquiries were still ongoing.

Q. I fully understand all of that. I fully understand all of that. What I want to try to understand is why that couldn't have been stated.

A. I really don't know why it wasn't stated or it couldn't have been stated.

Q. And do you remember I asked you why it couldn't have been stated by the civil servants either?

A. Yeah.

Q. When they were seeking to, I think, as I understand it, put out the flames of confusion, innuendo, speculation that were being fanned, according to the civil servants and the Minister, by people with agendas, bad motives, and so on. None of those true facts were stated, either that the consortium had announced itself it's containing Mr. Desmond or that the Department were now considering this?

A. That's right.

Q. And then we had this discussion about how the Minister responded to some of the supplementaries

A. Mm-hmm.

Q. in which references were made specifically to Desmond?

A. Yeah.

Q. And then, as a result of I think it may be a helpful suggestion from Mr. Shaw when we couldn't presumably he couldn't find the notes or the

preparatory answers to anticipated questions, he suggested we look at some of the transcripts of the disks of, if you like, discarded material and so forth provided by the Department. And those disks did show one or two things that appear to be related to that speech, but not everything that would correspond to statements by the Minister in the course of the speech or in the course of the questions which followed the speech.

A. Okay.

Q. If you look at the extra book you have got, Divider 1.

It says PQ Supplementary. Now, I don't think there was a parliamentary question, but you can see from the question that it's one that couldn't have been envisaged until after the 19th April in any case.

It says "Why did the Minister parade a troupe of civil servants to defend his actions over the GSM licence?"

And the suggested answer: "My actions over the GSM licence were limited to getting Government approval to launch of the competition and approval of the results.

In between I reluctantly agreed to the inevitable postponement of a closing date. I formalised the outcome of the discussions with the Commission and announced the relaunch.

"The rest of the job was carried out by the project team. Innuendo was directed at them and their integrity. I allowed them to defend themselves in

public. There was no parading involved. I stand over that position fully."

A. I would suggest the key word in that is "I allowed them". As I have said before, it was our initiative.

Q. The next document I want to refer you to is Divider 2.

It's a note from you to the Secretary. I don't know whether it was sent or not. You'll be able to remind me if you look at it.

A. I don't seem to have the same dividers as you do.

Q. It says, "Secretary,
"It imposes unacceptable pressures on individuals when there is not better coordination in relation to who does what and when coming up to major speaking occasions such as the GSM speech on 30/4/96. The events of the final 24 hours are the worst but not by any means the only examples of the kind of chaos to which I refer.

"I found myself adapting the preliminary draft following oral inputs from the Minister and from you while others were chopping and changing from earlier drafts in parallel. We joined the Minister at 1.35 with two different final versions. 1.35 is too late in such circumstances anyway. The panic which sets in in the final hour is intolerable for those who have to sort out the mess. Fintan Towey did Trojan work in very difficult circumstances on this occasion.

"There is a clear need for some order to be put on the

chaos. For example, only one person should be amend the text at any one time, and the Minister has to be persuaded to make his hands-on intervention a bit earlier in the time-frame.

"There were relatively trivial mistakes made on this occasion which could easily have been avoided. They could have been more serious.

"We must learn from our experience."

And you CCed it to the Minister's secretary, Mr. Colin McCrea, and Mr. Richard Moore. Was Richard Moore a political adviser?

A. A press officer.

Q. Now, firstly, can you tell me, did you send it, or it was a letter you were proposing to send, or a note?

A. I think I sent that.

Q. You think you sent it.

Now, this speech I think elsewhere is described in some of these documents as "the big speech". Have you seen that?

A. I have seen that reference in manuscript in this book this morning, and I presume that's shorthand for finding it in the computer, but I don't know.

Q. Maybe you are right. In any case, it's referred to as a major speaking occasion by you, isn't that right?

A. Yeah.

Q. It was the attempt by the Minister to put an end to controversy by putting the facts on the public record;

isn't that right?

A. Yeah.

Q. What it does show is that considerable effort was put into this speech; isn't that right?

A. Yes.

Q. A number of people seem to have been involved. Certainly the Minister was involved, and the Secretary was involved?

A. Yeah.

Q. They were involved either in they were involved perhaps in making written contributions through either Mr. Colin McCrea or Mr. Richard Moore or others, but they were also involved in making oral inputs up to the very end; isn't that right?

A. Yeah.

Q. So can we take it from that that, as I think I may suggest, this was an "all hands on deck" speech?

A. That's what this note was certainly suggesting, yeah.

Q. And there must have been considerable discussion then of how to deal with the issues that were arising and that the Minister wanted to quell public controversy about, namely, the issue of ownership, the issue of financial capability, and so on?

A. I would say there was a degree of discussion about various aspects of the speech.

Q. Most of the speech wrote itself, didn't it? Because you had given this type of information before in your

own press statements, and in the speech earlier on in April and in the speech in November. A lot of it wrote itself. We have seen a lot of it coming up time and again.

A. Yeah, okay.

Q. Could I suggest that the discussion must have been not about what you had put into the speech but what you'd leave out of it, or what the Minister would avoid asking if he was asked the supplementary questions.

A. I mean, you are saying "Could you suggest?" Of course you can suggest. I don't have that specific a recall.

And there will be other witnesses, as you know. And they will all have their say. There was discussion about this speech. There is no doubt about it.

Q. There was chaos, wasn't there?

A. That's what my note is saying. Now, the chaos I am referring to, I think, is more organisational chaos, because I think when I say some mistakes were made, I think things were either put into the speech that somebody had decided should be taken out or vice versa. That's what I mean by mistakes, given borne out of chaos, if you like.

Q. I accept that, but this was serious enough for you to this was serious enough for you to write a letter to the Secretary in fairly strong terms.

A. I wanted everybody to be aware that I think we should learn lessons from things like that, yeah.

Q. This speech took three days to put together?

A. I can't confirm that now. I don't know.

Q. If you go on to the next page, Divider 4 Divider 3.

If you look, this is a letter to Maev Nic Lochlainn.

"Maev,

"We have no intention to buckle at this stage in the face of Council Secretary pressure about the September Council." This was I think EU. "Bangemann wants it.

It will be decided on its merits later."

The letter is of no consequence until you come to the final paragraph.

"Sorry I could not respond earlier. There was ridiculous pressure in the last 3 working days about the Dail speech on GSM."

Now, the degree of effort that must have gone into this speech over three days suggests that with chaos at the end, suggests that a vast amount of thinking must have gone into how you were going to avoid referring to what you now knew was a highly a red-hot piece of information: the fact that Mr.

Dermot Desmond was the third member of the consortium and that he had 25% of the shares?

A. Well, you see, you are reading a lot into the three days. I suspect that the first two of those days were about putting together a competent draft, and it probably was only the last day that the discussion of how it might be finalised took place.

Q. I think what you said was it was ridiculous pressure, and if you combine those two letters, what's contained in them, I think what they seem to indicate is more than the pressure that would be entailed in simply cobbling together a draft based on a lot of information you already had. There wasn't a single thing in that statement which I am sure at that time you couldn't have put in off the top of your head?

A. I would say that the early draft of it, a fair amount of it was either me or Mr. Towey, or both either recycling material or writing off the top of our heads.

Q. The one thing about that statement that marks it out is the fact that you don't say what you are then doing about ownership, and you don't say what you had done about ownership in the previous two weeks.

A. But I have said several times that there was a legal analysis going on as to whether we could accept the information coming to us about ownership or what impact it would have on the process at this point.

Q. I am just reminded that following on something you informed the Tribunal of last week, and following on the Tribunal's checking of the actual official Dail report, this speech or the subject matter of this speech, this statement was noted on the order of business for the 30th May 30th April, sorry, 1996, and was announced by the Taoiseach as being on the

order of business for that day. Does that mean it was something of which there was considerable notice?

A. Sorry, what you started saying was it was

Q. Announced on the order of business by the Taoiseach on the 30th May.

A. That's the same day it was delivered?

Q. Yes.

A. No, all that indicates is that it was going to be delivered that day.

Q. I see.

A. As far as I know. I mean, the Taoiseach announces the order of business about the Taoiseach coming in and saying "This is what we are doing today, chaps".

Q. Presumably the Taoiseach, because you were preparing for it, the Taoiseach knows in advance that this is what you have been working on?

A. I think I was asked about this maybe last week, and I said I don't actually recall whether this was done this was being done as a political move decided by the Government, "You better go in and make a statement", or whether it was a response to something from the opposition. I don't know what was the genesis of the speech. If I did know, I might get a better clue as to how long notice we had to do it.

I think I said before that I am fairly certain that I knew on the Friday. Now, I don't know what the dates

were, but I am certain I knew on the previous Friday that a speech was required. That's something I know from something that's in the speech, actually, which I could explain, but it's only anecdotal.

Q. I think Mr. Lowry's counsel canvassed with you yesterday, as I think I may have done on an earlier occasion, what you would have done if you couldn't have given the licence out to this consortium around this time, and whether there wouldn't have been some political pressure to give it out regardless of the consequences. Do you remember that point being raised?

A. That was canvassed yesterday, yeah.

Q. And I think it was suggested to you that if the Minister was under political pressure to do something, i.e. to get a licence out, that it would have been legitimate for him to get the licence out regardless of the propriety or otherwise of allowing it to be given to the consortium involving, in this case, Mr. Dermot Desmond, who hadn't been evaluated. And I think your response was, if there was some impropriety in it, you couldn't have advised the Minister to do it; would that be right?

A. I actually believe that at this stage it was clear Mr. Loughrey was calling the shots. If Mr. Loughrey had any reservations about the issuing of the licence in those circumstances, he would certainly have written a

note to the Minister, and the starting line would have been "In my capacity as accounting officer, I must advise..." That's the defence mechanism of the civil service when the civil service at the highest level believes that a Minister is doing something inadvisable. And there is no indication of anything like that, but Mr. Loughrey is the one to be asked.

Q. Do you recall if at that time you had any discussion with Mr. Loughrey or with Mr. Fitzgerald or with Mr. Lowry or anyone, I suppose, really on the question of what you would do if the two issues you felt had to be tackled in relation to Mr. Desmond couldn't be answered positively, if you like?

A. I don't remember having such a discussion, no.

Q. It must have been something that was in your mind, mustn't it? Otherwise surely you'd have mentioned

A. Certainly in the situation where you have somebody has got an exclusive negotiation position and there is a fall-back position, if it became impossible to licence the first one, you would have to go on to the second one.

Q. Yes.

A. Now, whether I was actively canvassing that idea at that time, I think it's relatively unlikely.

Q. If you go to Tab 5, please, there are a number of supplementaries which appear to relate to that speech.

The first one is anticipating a question along the

following lines: "Answer the question about funding and ownership."

And I think I was suggesting to you those were the two issues, and it's clear that's what the civil servants saw as the two issues as well; isn't that right?

A. Yes.

Q. "The Communicorp funding requirement was underwritten by an acceptable party."

Where did that expression actually come from?

A. I can't say. Not I can't say, I am unable to say.

Q. It's not anywhere in the application, sure it's not?

A. No.

Q. Could I suggest that that betrays a sensitivity on the part of the civil servants as to Communicorp's financial problems, and that the way you saw it was that it was underwritten?

A. Well, in terms of the application, I think we saw the Advent support for Communicorp as a commitment, if you like. How it got expressed in these particular words, I don't know.

Q. It's just that "underwriting" is the expression that was ultimately used, I think on the 29th of the 9th, by IIU to describe their involvement; do you remember that?

A. Yeah.

Q. It goes on: "The intention of the consortium partners to arrange a private placement with what can only be

described as blue-chip institutional investors was disclosed. The stockbrokers were named and letters of commitment from the investors for specified amounts were submitted. In addition to this, very strong expressions of interest in loan and equity participation in the consortium were available from other leading international institutions".

That's the second issue, the question of ownership; isn't that right?

A. Mm-hmm.

Q. You were told that or you were saying that the owners were, of the 20%, as you saw it then, were to be blue-chip institutional investors, and that this was a disclosed arrangement; isn't that right?

A. Mm-hmm.

Q. Then there is the anticipated answer, or the proposed answer goes on: "That was the situation when the decision was made. Of course I am aware of recent speculation; I cannot manage in response to speculation. I see my duty as making sure that the substance and the quality of the financial side of the application is fully reflected in the licence. I would not be unduly concerned if one blue-chip investor took the place of another, for example. "I also want to reiterate that there was nothing unusual about the Esat Digifone application in this area compared with most of the others."

Now, what this says is, that was the situation when the decision was made. That must be a reference to the decision in favour of the winning consortium, as we put it?

A. Yes.

Q. "I cannot manage in response to speculation", "I am aware of recent speculation." Now, could I suggest that the only speculation that civil servants, or the Minister, for that matter, if he had any role in this, could have been involved in was speculation concerning Mr. Dermot Desmond?

A. I think that's probably true, yeah.

Q. And to suggest, or even to contemplate stating that you were aware of recent speculation and that you couldn't manage in response to it would have been an inaccurate thing to say in the Dail, wouldn't it?

A. What I am saying is, and I have said it consistently from the first time this subject came up, we had new information; we were taking awaiting advice as to whether it was acceptable or not, and there was nothing to be gained from I believe, anyway nothing to be gained from airing that dilemma in public until we got to the end of it, and the end was nigh.

Q. How did you know the end of it was nigh?

A. Once you go for legal and financial analysis and support, it's not going to take forever.

Q. But what you were what was being proposed here is that you would say you are aware of recent speculation. "I cannot manage in response to speculation".

And when I asked to you comment on that, you said you had information. There is a huge difference between information and speculation. What was the sensitivity about putting that information in the public domain?

A. It was still possible that we would get legal advice to say "You can't proceed with this".

Q. Exactly.

A. And we had to leave open that possibility.

Q. It goes on: "I see my duty as making sure that the substance and quality of the financial side of the application is fully reflected in the licence. I would not be unduly concerned if one blue-chip investor took the place of another for example."

Was that the position or the thinking in the Department?

A. You are trying to separate it between the Department and the Minister, is it?

Q. Whichever. I am asking you about the Department first.

A. Obviously if we wrote it that way, it was the way they were thinking, yeah.

Q. I think we canvassed this already, that if you replaced one of the big major financial institutions

with another, the application would be more or less, in substance, the same?

A. Yeah.

Q. On the basis that you hadn't conducted a formal evaluation of any of the three Irish institutions in the course of the competition?

A. Yeah.

Q. It wouldn't have been necessary, because it was possible at that time either to form your own judgement that these were creditworthy and substantial institutions without resorting to any inquiry, or you could have made what I'll call public, virtually public objective inquiries by checking with Moody's or Standard & Poors and so on?

A. Yeah.

Q. One of those institutions you were able to check out fairly quickly and confirm by inquiries in New York and elsewhere that they were a major institution; isn't that right?

A. Yeah.

Q. So the three blue-chip Irish financial institutions could have been replaced, if you like, on the same basis as they had originally been evaluated, without you having to conduct any evaluation over and above that which you had conducted in the course of the process; isn't that right?

A. I think that's true, yeah.

Q. If an English institution with an Irish presence Bank of Scotland, Westminster Bank had come in to replace IBI, you'd have said, "Fine, it's on the same basis"?

A. Yeah.

Q. We have evaluated that involvement already, in a sense.

A. Yeah.

Q. And I don't think you needed legal advice, or if you did, it might have been along the lines I am suggesting?

A. Yeah, I think that's fair comment.

Q. Do you remember when we were discussing the representations that were being made by Esat Digifone both to the Department and to ESB, mainly via Mr. Pdraig O'hUiginn? Do you remember that?

A. Yeah.

Q. I suggested that the Department were being I think I may have said unfair to ESB not to have told them that they were in second position when they were being asked to accommodate the person who was in first position.

A. Yeah.

Q. And it's in that context I want to come to the document in Leaf Number 8, which is a letter to Mr. Tony Boyle, a draft letter to Mr. Tony Boyle of October 1995. If you look at Leaf Number 10, you will

see another letter I beg your pardon, did I refer

you to Number 8 first, did I?

A. Yes, you did.

Q. If you look at Number 9, you will see another letter

to Mr. Tony Doyle, again in October of 1995. Now, the

letter in Leaf Number 10 is, as I understand it from

the other documentation made available by the

Department, the letter which was actually sent.

It says "Dear Mr. Boyle,

"Esat Digifone has won the competition. Thank you

very much for your interest", in simple terms.

If you go to the previous letter, it says

"Dear Mr. Boyle.

"I refer to your application for a licence to provide

and operate a GSM mobile phone licence service within

Ireland in accordance with the competition process

announced on 2 March 1995.

"The Esat Digifone application has been selected to

become the second operator of GSM mobile telephony

within Ireland. This application of selected because

of its strength detailed planning in relation to all

elements of the evaluation criteria prescribed in the

competition documentation.

"In the event, however, that it is not possible to

agree appropriate licence terms with the Esat Digifone

consortium, it is my intention to invite your

consortium to enter into licence negotiations.

Some consideration, I take it, must have been given to informing the person who had come second in the competition, and maybe even third, that they failed to come in first but that they were lying in second position?

A. That's what these drafts, or this draft is showing, yeah.

Q. Can you tell me whether you were involved in that?

A. I can't say that I was or wasn't.

Q. It's from Mr. Towey's disk, and I take it that Mr. Towey would have been working presumably under your instruction?

A. Oh, absolutely, yeah.

Q. And that suggests that some consideration was given to this, and it was decided not to inform the people in second place that they had come second or those in third that they had come third?

A. Yeah, somebody along the line, either myself or Mr. Fitzgerald or Mr. Loughrey, took the judgement that it wasn't necessary to include that paragraph.

Q. Do you remember making that decision yourself?

A. I don't remember.

Q. Or a decision to that effect being made by anybody else?

A. I just don't remember.

Q. I suppose it would have when you say you don't remember making a decision like that, are you

suggesting it must have been made above Mr. Towey,
above you, rather than

A. No, I am suggesting that I don't remember positively
that I did or did not, but in the normal course, a
letter of that kind going up through the hierarchy, it
could be amended at any level in the hierarchy, and I
expect whoever made the decision was based on, "Do we
need to say that?" Something as simple as that.

Q. Did you need to say it?

A. I don't have a strong view one way or the other.

Q. Even when it came to asking the ESB in the friendliest
way, coupled with a little threat to make their sites
available, nobody troubled to tell them "You realise
of course that you are in second position"; isn't that
right?

A. That's right.

Q. Now, I am passing over a lot of this material. It was
put in in case other parties, as it were, wanted to
canvass anything of it.

I want you to turn for a moment to Leaf Number 14.

This is a note of a telephone conversation with Mr.

Michael Andersen. A note made by Mr. Towey on his
disk on the and it's dated the 3rd April, 1996.

This is a conversation between Mr. Towey and Mr.

Andersen on the 3rd April concerning the draft

licence, on the one hand, and what might be put into
it, and secondly, what information should be given to

disappointed applicants. And am I right in thinking that Mr. Andersen was therefore to some degree still involved in the process, even on a remote basis?

A. A very remote basis, yeah.

Q. I think, if memory, maybe an imperfect memory, serves me correctly, there is a suggestion somewhere in the post 16th, 17th April documentation that Michael Andersen might have been brought in on the evaluation of the introduction of Mr. Desmond's company; do you recall that?

A. A suggestion from?

Q. I saw a suggestion in a document I can't remember where, I am simply relying on my memory, I wonder can you help me a suggestion that Mr. Andersen might be brought in on the evaluation of Mr. Desmond's role or introduction into the consortium?

A. I have an even more hazy recollection than you have that something came up here in these precincts to that effect, but I don't have any better recall than yourself.

Q. He was the person who had raised concerns about the finances of Esat Digifone first day and suggested that the licence fee issued subject only to conditions dealing with those concerns; isn't that right?

A. Yeah.

Q. And he wasn't involved on a day-to-day basis with the licence apart from his initial involvement at the

first meeting, where he flagged these concerns once again?

A. That's right.

Q. But as this document makes clear, he was involved, at least even on a remote basis, with the project team around this time; isn't that right?

A. Yeah.

Q. And wouldn't it have been useful to have brought him in on the deliberations that were taking place concerning a) Mr. Desmond's involvement and b) Communicorp's financial problems in the period leading up to the granting of the licence, the formal granting of the licence?

A. I suppose it's not unreasonable for you at this stage to make that as one suggested thing that could have been done. And it might have been beneficial to do so.

Q. He was, after all, in the Department on the day this work was being done, wasn't he, the 15th April 15th May, 1996? That was the day you had your meetings with the disappointed

A. I mean, I wouldn't have recall that that was the day now. I don't know.

Q. That was the day you had a meeting, I think, with Persona; you had meetings with the others on the same day, or the day after, or the day before?

A. Yeah, okay.

Q. And Mr. Andersen was at those meetings?

A. Yes.

Q. So that Mr. Andersen was in the Department the same time that Mr. Buggy was conducting his analysis?

A. Yeah.

Q. Under some pressure?

A. Mm-hmm.

Q. And it just strikes me as rather odd that seeing as he was the person that had expressed these two reservations sorry, expressed the reservation concerning conditions, and was now surely somebody who could have contributed something to a discussion concerning a new entrant, that he wasn't asked to contribute?

A. I can see why you are now suggesting that, but I mean, it didn't happen at the time, and I don't know whether any thought was given. I presume it just didn't occur to somebody to put it that way.

MR. HEALY: I want to go onto the later documents, I think, after lunch, Sir, the documents concerning

CHAIRMAN: We are not far off the two hours. It's probably preferable that we break now until ten past two.

Thank you.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF FURTHER EXAMINATION OF MARTIN BRENNAN

BY MR. HEALY:

Q. MR. HEALY: Mr. Brennan, could you go to Leaf 21 of the latest book that you were given. I think that's book it's now called Book 52.

A. Yeah.

Q. It's your document headed "Meeting of 4 September 1995 re AMI contractual matters". Do you see that?

A. Yeah.

Q. This was a meeting attended by you, Mr. Towey, Ms. Nic Lochlainn and Mr. Andersen. And it dealt with something that I think you may have mentioned in passing in the course of your earlier evidence concerning disputes with Mr. Andersen on contractual and financial matters. And I suppose I'd better put the whole document in context, even though I don't want to refer to all of it.

"The meeting was conducted following correspondence between Michael Andersen and Martin Brennan re contractual matters.

"Michael Andersen had claimed that certain elements of the evaluation were additional to that foreseen in the original contract and would be separately invoiced under "139". DTEC's view was that these tasks were included in the main contract and should be invoiced under "109" and subject to a ceiling of $\frac{1}{2}$ 297,450.

"MMA responded with a letter disagreeing strongly with the DTEC position and suggesting a meeting to discuss:

critical paths and deliveries from AMI team for the remainder of the evaluation and to clear the air.

"The meeting took place after the main GSM Project Group meeting on the Monday 4 September.

"MMA outlined his position that.

the Department seemed totally unaware of all the extra work which needed in the evaluation.

Fintan Towey and Maev Nic Lochlainn had already indicated approval of many of the tasks outlined.

Fintan Towey/Maev Nic Lochlainn countered that they had never made clear that this "approval" meant approval of invoicing under "139".

that the nature of the work made it very difficult to establish at this point the cost which would be associated with a full analysis.

"Martin Brennan stated his extreme dissatisfaction that

a contractual negotiating meeting had already taken place and agreement had been reached this agreement accepted that certain tasks were ancillary to the main contract and these could be separately invoiced and not subject to the ceiling of 293,000.

that procedures for such invoicing had been signed off with reference to the letter of the 14 June

1995

that the central task tendered for by AMI would be completed according to contract and subject to the agreed ceiling.

that AMI had already conducted many GSM evaluations in other countries and would therefore be expected to be able to estimate associated costs in a reasonably reliable fashion

that the agreement reached as regards a ceiling for the main tasks was now being completely disregarded by Michael Andersen and

that the Government budget procedures could never allow for an open cheque consultancy and that this had already been made clear to Michael Andersen.

"Michael Andersen responded that it was impossible for him to say in June whether the work could or could not be completed under the ceiling as he had not yet seen the tenders.

"Martin Brennan pointed that this made a farce of the agreement reached and signed by both parties in June.

"Michael Andersen then proposed that he would invoice all activities under 109 as requested by DTEC

that he would complete a report within the agreed ceiling but that he may not be able to stand fully over its contents and

that AMI would adhere rigidly to the letter of the AMI tender.

"Later, however, Michael Andersen threatened not to complete Phase D of the process i.e. licence negotiation if his budget ran out.

"Martin Brennan then clarified that Michael Andersen meant that he would submit a report with reservations, and that there would be no quantification of the difference between Candidates 1 and 2. Michael Andersen confirmed that this could be the case, if he was not allowed the budget to use adequate resources. He also pointed out that resources had already been removed from the AMI "Irish GSM" team, e.g. Jon Buel had not attended the meeting on the 4 September.

"Note: The lesser quality of recent AMI work had become apparent in the meantime.

"1. Graphical comparisons of the applicants/spreadsheets had not been distributed to Project Group on 4 September as earlier promised by AMI

"2. On the 4 September, Jon Buel had been replaced by Michael Vinter, a more junior colleague.

"3. Sub-groups (quality evaluation) had already taken place, although the AMI tender says that the evaluation would proceed as follows: Quantitative evaluation, presentations, qualitative evaluation.

"4. Very poor notes of the sub-group meetings, which AMI had conducted without DTEC participation, were handed to Maev Nic Lochlainn for distribution to

Project Group.

"5. The initial phase of review/re-evaluation after the presentations would take place on Thursday 14 September when all evaluators would be exhausted after 4 days of solid meetings.

"6. No other evaluation meeting has been suggested by AMI.

"Martin Brennan made it clear that his primary objective in meeting was to resolve the dispute and have the report and follow-up completed to the highest standard. Ideally he would like, he said, to be able to give AMI a clean bill of health in all respects, if he were approached by another administration for a reference after the event.

"Fintan Towey pointed out that while the nomination of a single winner was not actually stated in the AMI tender, the term "Evaluation" would be understood to lead to a ranking of applicants. Other exchanges occurred re the language, expected work tasks and actual commitments in the AMI tender.

"Later Maev Nic Lochlainn suggested that the problem may lie in communications AMI had never stipulated clearly to DTEC that approval was being sought for specific additional expenditure. Michael Andersen insisted that DTEC was not allowing for the amount of additional work needed.

"Maev Nic Lochlainn then requested that Michael

Andersen quantify the overrun on budget in some fashion since DTEC was currently faced with a suggestion of large overruns without any clear figures to review.

"The meeting concluded as follows:

Michael Andersen to return to the Department with estimates for the "Additional" amount of work envisaged.

DTEC to revisit items list in Michael Andersen's earlier letters to see which tasks could be regarded as 139, in other words, extra. Maev Nic Lochlainn to liaise with Jon Bruel re details of work tasks, if necessary."

In that that note, Mr. Brennan, seems to suggest that there were disputes with Mr. Andersen concerning, firstly, the amount of money that he was claiming to be entitled to on his construction of the contract terms; is that right?

A. Yeah.

Q. He was saying that there was extra work, and your side was saying "It's not extra; it's within the agreed terms"?

A. Yeah.

Q. He also seemed to be saying, however, that he had finished the work he was asked to do, he wouldn't charge any extras, but that he wouldn't be able to fully stand over the contents of the work. Did you

see that?

A. I heard that when you were reading it out, yeah.

Q. And then if you go on to the next, second-next paragraph, he said: "You clarified that Michael Andersen meant that he would submit a report with reservations and that there would be no quantification of the difference between Candidates 1 and 2. Michael Andersen confirmed that this could be the case if he was not allowed the budget to use adequate resources." And later on there is a discussion involving whether Mr. Andersen was obliged to produce three top candidates or whether he had to produce a ranking of 1, 2, 3 candidates; isn't that right?

A. Yeah.

Q. Do I understand from that that up to that time, and this was the 4th September, just before the presentations, it wasn't clear that there wasn't a consensus then between Andersen and the Irish side of the Project Group that what you were seeking to do was to produce a ranking rather than merely a recommendation of three people who would all have the requisite skills and capacity to carry out the project?

A. I don't think there was ever any doubt that the evaluation process was designed to produce a result with a winner.

Q. In your mind?

A. Yes.

Q. But I am saying that there was a lack of consensus about that.

A. I think what you are seeing in this document is an attempt by the consultant to maximise his revenue.

And then when you turn over the page, it said "I made it clear that what I wanted was to resolve the dispute and to have a report and follow-up completed to the highest standard."

Q. Up to that date you were complaining that some of his recent work hadn't been of the appropriate quality or the appropriate standard; isn't that right?

A. Yeah.

Q. And in particular you drew attention to the fact that at the Project Group meeting, which you had just finished on the 4th September, graphical comparisons of applicants' spreadsheets had not been distributed as promised and that sub-groups, qualitative evaluation groups had already taken place, although the AMI tender says that the evaluation would proceed in a different way, that you'd have quantitative presentation and qualitative.

A. Yeah.

Q. So that means that does that not mean that already there were significant divergences between your side and the Andersen side as to how this process would be conducted and that they had already gone some way down

the road, according to their own lights without any recourse or resort to you?

A. It has always been clear that in all of the sub-groups they were driven, I think there was maybe one exception where Maev was doing some of the initial research, but nearly in all cases it was Andersens were examining the applications and coming forward with their proposals for the markings, and then they were discussed in the groups.

Q. But sure if you look at the next point here, isn't the very criticism you are making to the contrary.

You are saying "Very poor notes of sub-group meetings which Andersen had conducted without DTEC participation" were only there and then handed to Maev Nic Lochlainn for distribution to the Project Group; isn't that right?

A. I am trying to figure out what the issue is, because there is no doubt that from the stuff we were going through yesterday, that there were sub-group meetings and then there were follow-up meetings in Andersens, which I took yesterday to be meetings of the Andersen team to take stock of what happened in the sub-group and so on.

Q. If you look at the notes of the ninth meeting of the GSM Project Group, which are in Book 42. You see, yesterday I think we operated on the basis that the documents produced were the result of the

deliberations of the sub-group, but from what this document is suggesting, some of the work appears to have been done without any involvement on your part, and that that is a complaint that you are now making?

A. I don't believe that marks were finalised in any area of the competition without the participation of people in the Irish side.

Q. I see. But what's the point in getting the result of the Andersen deliberations on something if that's going to be handed to you in the form of "poor notes", as you are suggesting here, in a critical comment?

A. But you are assuming that that's the final result on any heading. I don't think you can make that assumption. But I don't know, either.

Q. Well, can we just turn to the formal meeting of the ninth meeting of the Project Group, held on that day, which is in Leaf 95 of Book 4. It's on the overhead projector. I just want to go to the last heading, "Future framework of the project", on the second page.

You see, the first paragraph says "10 sub-group meetings for the qualitative evaluation has been proposed by AMI. 5 had already taken place. AMI committed to provide the Department with the documentation on these earlier sub-group meetings.

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

Now, that note of the then status of the process does

not tell you, as the other document that I just opened tells you, that the 10 sub-groups which had taken place had taken place without DTEC involvement, that there were no satisfactory notes of those sub-group meetings, and that they had taken place out of sequence contrary to what had been promised by Andersen. Isn't that right?

A. Sorry, you are saying that meetings of sub-groups

Q. According to this document here, had taken place without DTEC involvement, Andersens did it themselves, that they did it out of sequence, and that they produced very poor notes of it.

Now, if you read the formal minute of the meeting, you couldn't if you read the formal note of this meeting, this is what presumably transpired at the meeting?

A. Yeah, okay.

Q. This is what transpired at the meeting, we are told: "10 sub-group meetings for the qualitative evaluations have been proposed by AMI, 5 had already taken place."

Now, what had in fact happened was that what was described in the note of the other meeting of the 4th September of 1995, do you follow me?

A. I follow what you are saying. I am trying to think this one through. I said before that any civil servant who went to Copenhagen, the date of the travel etc. can be established as a matter of fact. Now, I

would be fairly I'd be quite confident that several of the groups we are talking about, or sub-groups we are talking about, were in the technical area, and that Mr. McQuaid and/or some of his team had been in Copenhagen before this date and had participated in such meetings.

Q. I don't quite follow what you are saying. Maybe I am it's my own fault, but as I understand it are we clear on this? in the note of the meeting of the 4th September that took place after the meeting of the Project Group, you were critical of a number of aspects of the way in which the process was being done?

A. Yeah.

Q. And you are telling me that you are confident that the process was conducted in a particular way. I have been able to find no documentation to support that. If I look at the documentation which purports to show how the process was conducted, I look, for example, at the letter or the document of the 4th September recording the ninth meeting of the GSM Project Group, and it doesn't tell me anything of what's contained in this other note.

A. Yeah, okay.

Q. How reliable, then, is the documentary trail of what actually happened? It doesn't show me where the process broke down; even if it only broke down

temporarily, it doesn't show me that the evaluation that the Irish evaluators were at odds with Andersen about the overall project, and it doesn't tell me that the project was out of sequence, and it doesn't tell me that some of the qualitative evaluation had been conducted by somebody else without DTEC participation and that the notes of that evaluation were poor.

A. I can't I can't account for who was at what sub-group meeting. I don't have that information. I am saying clearly that it is my belief that the technical some technical sub-groups took place before this date. And it's my belief that some of our technical people were at those meetings. And I am going on to say that the fact of whether or not Irish civil servants went to Copenhagen on business during August or the early days of September will be a matter of record in the Department's financial area.

Q. Well, what is a matter of record in the Department is what's contained in the document I am asking you to comment on, and what I am suggesting to you is that the only, I think, reasonable impression you can be left with from this document is that the process was not a smooth one and that there were significant differences of opinion between the evaluators as to how it should be conducted. That's the first comment I would make. And the second one, that none of this is reflected in the official minute of the process at

that time. What would you say to that?

A. I think that in the documents opened yesterday by Mr. McGonigal, which show a sort of an audit trail of AMI in relation to sub-groups, that there are a number of cases where it's clearly on the record that a sub-group took place on such a date, and on the next line it's saying post sub-group Andersens whatever meeting.

Q. Yes, I fully accept all of that. That's what the evidence

A. What I am trying to understand, then, is that what this note is telling us?

Q. This note is telling us the opposite, Mr. Brennan, as I see it. The reason I have drawn this to your attention and I think I have been very clear that the parts of the process upon which I have focused are the financial aspects. Mr. McGonigal yesterday drew up other aspects of it in much greater detail. It was in light of what he mentioned that when I saw this document last night it hadn't been drawn to my attention till before then, though I may have actually seen it it occurred to me that what's contained in this document is the direct opposite of what was being described yesterday.

A. And the question is, which do you rely upon?

Q. Well, I am offering you an opportunity of commenting on it. If you don't want to take the opportunity to

comment on it, I'll move on.

A. I am kind of running out of comments at this stage.

Q. Well, I think what you suggest to me is that that document is consistent with what we heard yesterday.

A. I am saying, sitting here without having yesterday's documents, that I seem to recall that in yesterday's documents, there were references to sub-group meetings, and in the subheading of the documents, even, follow-up meetings among the Andersens group, or the AMI group, and I am saying that this may be that that's what this note is about. But I am not sure.

Q. Do you agree this note is critical of Andersens and their role?

A. Yes, I agree that this is and I think we have been open about a contractual dispute with Andersens with this Tribunal for a long time.

Q. I understand that.

A. And this note is showing the depth of the contractual dispute for the period it went on.

Q. Yes, but what it shows is that the contractual dispute was conducted in an atmosphere in which you were critical of the substantive work being done, and what I am also saying is that the official note of events taking place at the same time does not reflect those substantive complaints. In other words, it's not an accurate account of the process?

A. I don't ever recall claiming, in fact I am admitting

the opposite, that the official minutes of the Project Group are comprehensive or verbatim or anything like that. It's clear that they are not, in fact. They are short reports of very long meetings.

Q. I suppose what I would have expected it to say is this: I'd have expected it to say "Andersen have proceeded with the qualitative evaluation without telling us. They have already conducted evaluations in 5 groups where we had no involvement. They have produced notes, but these are not satisfactory, and we are going to have to review them. They have conducted the qualitative evaluation out of sequence".

And I would also have expected that note to say "There is a difference or a divergence of opinion between Andersen and the Project Group as to whether he is to arrive at a ranking or whether he is to arrive at a recommendation of two or three qualified candidates."

None of those issues are reflected in that note of the selfsame day.

A. Yeah, okay.

Q. Well, as I said, I am drawing it to your attention because I think I have to give you an opportunity of commenting on it. And as I said, my impression, and I think a reasonable impression, is that the record of the process is not an accurate one. I don't expect it to be completely comprehensive, but it's not accurate?

A. But if it's not completely comprehensive, it's bound

to leave out stuff.

Q. I accept that. I think we have already had a lot of "emphasise the positive, ignore the negative". This was a formal process, an extremely formal process, one over which you were obliged to stand and on which you have staked your reputation, your professional reputation. I am not suggesting in any way or questioning your integrity, but surely the record should record substantive milestones and substantive problems, whether they were solved or not?

A. Yeah, I think that's reasonable for you to say.

Q. Now, on the if you just go on to the next page, it might have a number. Does it say "Journal of AMI contractual litany"?

A. Yeah.

Q. Number 22. I don't have a book with numbers. I have left that there in case you want to refer to it. It's all part of the same thing. Likewise the next page

A. Well, what's clear in that page is that following our discussions with AMI, we then set about making sure that absence of funding wasn't going to be allowed to be a constraint, where I obviously had discussion with Jimmy McMeel, and we agreed that whatever resources were necessary would be provided. But at the same time, as civil servants, we weren't of a mindset to have an "open cheque-book" approach. We wanted to have control over it.

Q. I fully understand that.

The documents, as you go on, do deal with that issue, the issue of money. I don't see the same degree of attention or narrative attention to the issue of how you would proceed to arrive at an evaluation, but we'll pass on.

If you go to the document which says "What Michael Andersen said". Have you got that?

A. Yeah.

Q. 4th September Project Group meeting.

A. Yeah.

Q. Now, again that relates to the 4th September. It says "Good idea having the Project Group approving the whole procedure means there will be no doubt later on..."

That seems to be a good point, and it's a point he has made elsewhere, I think, in other meetings, where he is recorded and the Project Group are recorded, as far as I can see, as having agreed with the notion that everybody should be on the same wavelength. In particular, where, as I suggested to you this morning, you were engaged in what I call a subjective, qualitative, or interpretative exercise, in the way in which I outlined it. In fact those three words I am quoting from a Project Group meeting.

In the context of what was done in Copenhagen, would you not agree with me that the whole Project Group

didn't approve that procedure?

A. Which procedure?

Q. Translation of grades to marks.

A. They didn't approve it on the day, by definition.

Q. I just want to bring something to your attention here,

as it's in fairness to you, but it's also, I think,

because I want to contrast it to some degree with a

later approach.

It seems that there was a discussion at this point;

from the note, I assume that it's Michael Andersen who

is reported as speaking. If you go to the second-last

item on the page.

"Releasing names yes as a general practice.

"Applicants will go public themselves anyway. I say

no reason why not.

"Suggest that we do publish the names but will check

and get back."

I presume that must have been with reference to

publishing the names of applicants, was it?

A. I think so, yeah. And this note was obviously

generated very early in August. I was reading it up

to a moment ago as a note, contemporaneous note of the

4th September or thereabouts.

Q. I agree with you, it can't be, and in fact it must

have been sometime after the applications came in?

A. Not even that. Before, possibly.

Q. Even before they came in?

A. Because if you look "AMI would like at least four copies prefer five could have Esat much the more the merrier. AMI are in Dublin for a meeting 3/4 August and will collect the tenders then."

So this is a very early note.

Q. If you go to the last document sorry, I think it's in that leaf it's Document 26. This is just to clarify something in my own mind.

This is a document containing a record of the approval of the weightings for the quantitative evaluation of the selection criteria; do you see that?

A. Yeah.

Q. They are down as fractions of a single unit, but you can read them at 30, 20, 15 and so on. I am just concerned about one thing. This was obviously on somebody's disk?

A. Yeah.

Q. Were all these computers were there encrypted passwords for these computers, or other methods of avoiding access to them?

A. When you say "encrypted passwords"

Q. It's just that this information is on a computer, which presumably it was, on a word processor, and if it was made available to the Tribunal recently, or indeed in fact I think nearly eight or nine months ago, it was still on the computer up to then.

Therefore, when it was put on a computer, it stayed on

the computer after that was done, one assumes.

A. I assume it did, yeah. Some people say you can never get rid of anything off a computer.

Q. That's true, but I don't have the impression that this material was taken off the shadow disks or whatever they call it; I am not up to speed on these things, but like you, I understand that you can retrieve material which hasn't been fully or in some very special way deleted from a computer but I understand this material was simply on the hard disk and was made available to the Tribunal on a floppy disk, I think, or on a CD.

A. I'd even go further and say that in pure technical terms that everything in the system is probably backed up twice a week so you can retrieve it. But it's backed up by technicians who wouldn't have the slightest interest what's in it.

Q. I appreciate that, but I am just a little concerned on the security front, because you will recall that a lot of attention was paid to the question of the confidentiality of these weightings. And I think it was you drew to my attention the fact that the meeting at which the weightings were approved was one where the minutes were only circulated to a few people.

A. Mm-hmm.

Q. Even though the minutes didn't actually contain the weightings. They simply indicated that the weightings

had been agreed. And I think that they had been kept under lock and key, or something like that. But putting them under lock and key wouldn't matter if they were on a computer hard disk to which people could have access.

A. I'd be least technically competent in the Department to describe the sort of network architecture the or the IT system or whatever. I mean, if they were in under Maev's password and she kept her password to herself, I don't know who then would have the competence to get past that.

Q. It was networked, wasn't it, you say, the system in your Department?

A. I think it was networked by then, yeah.

Q. And do I understand

A. But you'd have your individual account.

Q. Yes. But correct me if I am wrong that this is my own experience, the use of computers here, that in the civil service, all civil service networked computers, and indeed even those that aren't, laptops, are subject to overriding administrator control by the civil service?

A. Yeah, I think the head of the IT unit could get access to anybody's account.

Q. Well, I want to be fair to you. I think that is true only if he had their individual password, but that's all

A. No, I think he can actually I don't know, this is an academic discussion, I don't know, but it seems to me if I forgot my password coming back off holidays, the head of the IT unit can go into my account and tell me what my password is; therefore I assume he can access my account.

CHAIRMAN: I don't see much risk on this aspect, Mr. Healy.

Q. MR. HEALY: It does mean, of course, that anyone who got into the computer could get at them?

A. Yeah.

Q. Putting them under lock and key wasn't much good.

I was interested in something you said to Mr.

McGonigal yesterday, Mr. Brennan, about your meetings in Copenhagen on the 19th/20th, I think, and on the 28th/29 September. When Mr. McGonigal was taking you through it, he was relying on the documents which suggested that you were there on the 18th/19th; but do you remember, we corrected the documents, and in fact I think it was the 19th/20th the meetings took place?

A. Yeah, I am not sure.

Q. I'll just remind you of it for a minute. You were always concerned that you probably had only gone for one day of the meetings that took place on the 19th and the 20th. You weren't sure about it, but I think in your dealings in private with the Tribunal you thought you had been in Brussels, and therefore you

couldn't have been there. And the confusion arose from the fact that Mr. Andersen's document referring to that meeting describes it as having occurred on the 18th/19th. But then it refers to two days I think it's Wednesday and Thursday or something like that Tuesday and Wednesday, 18th/19th September; but I think those days were in fact 19th/20th September.

A. Okay.

Q. Just for the record, I am clarifying that's when it happened, that I think that is consistent with your own memory.

A. Okay.

Q. I think you were there for both days on each occasion; is that right?

A. I think I probably was.

Q. When you went to Copenhagen on that day, or for that meeting on the 19th/20th, you were there to conduct some sub-group meetings and also to decide how next the how the process would go forward; isn't that right?

A. Yes.

Q. Now, at that point, as far as I can see, you had a ranking on the quantitative evaluation only; isn't that right?

A. I'd say that's right, yeah.

Q. And I think that ranking was referred to yesterday by

Mr. McGonigal; it was in it's in Leaf 110 of Book 42, and the ranking at that time was A6 sorry, I beg your pardon; the ranking was A3, A6, A5, A1.

A. Yeah.

Q. On the quantitative evaluation. That ranking was based, I think as Mr. McGonigal pointed out, on I think a corrected figure for the licence fee element of the overall evaluation.

Now, at that point, an amount of work would have been done on the qualitative side also; wasn't that right?

A. Yeah.

Q. Wouldn't that be correct?

A. Yeah.

Q. So that presumably you would have been working towards some figure or some not necessarily ranking, but to the point where you could identify who the top three might be, who the top two might be, without knowing their precise positions; isn't that right?

A. That's fair enough, yeah.

Q. And if you go to Document 111 in Book 42, it's clear that you had identified a number of problems concerning each of the applications and in respect of which risk investigations would at least be identified; isn't that right?

A. Mm-hmm, yeah.

Q. And if you have that particular document, which is dated 21st September, and presumably therefore is the

result, as it were, of your meeting the previous day, if you look at the text after the six applications are described.

It goes on: "If there is a clear understanding between the Department and AMI of the classification of the two best applications, it is suggested not to score other aspects, the risk dimensions and other dimensions such as the effect on the Irish economy, in this case the risk factor will be addressed verbally in the report."

Does that suggest that you had in fact reached the point where you at least were looking at two front runners without knowing their ranking?

A. I don't think the text limits the possibilities to that, let's say.

Q. Pardon?

A. I don't think the text limits the possibilities to that at this point. We are saying "If there is a clear understanding".

Q. Yes. Of the classification of the two front runners?

A. It's not there is; it's saying "if there is".

Q. Of course. That's precisely my point. At that point, what I understand that document to be conveying is that there were two front runners, maybe, but that you couldn't say who was in pole position and who was second. I am reading the word "Classification" as perhaps "ranking".

A. It's open to interpretation. It's at least equally valid to say, you know, if the time comes when there is, rather than I mean, it's very cumbersome English, if what's actually happening is that there is a clear understanding.

Q. When you came back from that meeting, do you recall having an impression of who the front runners were?

A. I'd say I was certainly forming an impression.

Q. Yes, that's all I mean.

A. I am not actually sure whether I did or not, to be honest. At this stage I don't hardly remember anything.

Q. If we just look at the documentation. You had the quantitative evaluation, and I am not suggesting you were going to take that as writ in stone, but it had identified a ranking of some kind, and you had a number. One thing about it, whatever criticisms may be made about it, I think the same the three people who were eventually ranked 1, 2, and 3 were always in the top 4; isn't that right?

A. Yeah, but I think, I mean if you are asking me for a precise did I have an impression at this stage? I think I said very early in evidence, and have always said in evidence, that when I had read all of the applications through, and did no more than that, that the Minister asked me did I think that we had quality applications that would lead to a good licensee; and I

talked about yes, I thought the better of them would be very good.

Well, clearly I had to have formed some kind of an impression at that stage. Now, did that impression change or develop as I went through, and in what stages, I just don't have a recall of.

Q. I am trying to date your discussion with Mr. Fitzgerald in the light of aspects of this document that came to my attention yesterday when Mr. McGonigal was examining you, and I was trying to date it.

Whether it's in fact something that happened early in September, late in September, or in mid-September, one thing is clear : You had no draft of an evaluation report until late in September; isn't that right?

A. That's right.

Q. On this day you had a number of attempts at a quantitative evaluation, you had a ranking in that, and you had a significant amount of work done. And the fact that Mr. Andersen is identifying a need to, as he sees it, make a decision on scoring other aspects based on the classification of the two best applications, made me wonder whether at that stage you weren't approaching the point where you could say, "Well, we know the following are in the top three, definitely, at this point, even if we can't separate them."

And I wonder, could you have had a discussion with Mr.

Fitzgerald after that meeting?

A. I really can't help you. I mean, as I said, when I read the applications at the very beginning, I could see quality differences between them, and I would have formed a fair idea in my head as to where the split came; let's put it like that.

Q. The second time you came back from Copenhagen, after the 28th/29th meeting, I think you indicated to Mr. McGonigal yesterday that as far as you were concerned, you came back with a result; isn't that right?

A. Yeah.

Q. I think you said in answer to Mr. McGonigal that that was a result that couldn't be changed without there being some transparent, objective basis for changing it?

A. Mmm.

Q. But isn't it in fact the case that when you came back to Dublin, there was certain unhappiness in the PT evaluation group concerning the way the process was evolving, and there were a number of people not satisfied with the result?

A. There were a number of people certainly not satisfied with the report. There is one note by Mr. McMahan, and I have forgotten what date it is now, where he talks about the top two and very close. I have forgotten the date of that now, but it's there.

I think I amplified this morning to you, in relation

to yesterday's discussion with Mr. McGonigal, that of course we had to come back and explain to the Project Group how we got from letters to numbers; and if the Project Group I said this to you this morning if the Project Group found fault with the methodology, then we would have to do something else.

Now, that would be I think you used the expression "transparent and objective". If the Project Group came up with an argument and said "This is a faulty methodology; we'll have to find a new methodology", I think that would be transparent and objective.

Q. Doesn't it look like you came back to Dublin and you had the meeting with the Project Group on the 9th, and that the Project Group were being told, "Actually we have made the decision. Forgo the Project Group. We have made the decision over in Copenhagen, myself, Fintan Towey and Michael Andersen, and now we are telling you what the decision is". That's what it looks like to me.

A. I think that's overstating it.

Q. I see.

Do you remember, I drew your attention before to a note Mr. McMahon put on, a minute of the meeting of the 9th October?

A. Yeah.

Q. And that note was not put on in fact until the 1st November; do you remember that?

A. Yeah.

Q. And in that note he said that he did not subscribe to unanimity at the meeting of the 9th?

A. Yeah.

Q. At some point was it suggested to him, do you recall, or by anybody else, that he had subscribed to unanimity at that meeting?

A. No, I don't think so.

Q. He seems to have felt strongly enough about it to make a note about it, even after the event.

A. I have never argued that unanimity was achieved that early in the process. What I think is clear is, even at that stage, he was more concerned about the report than about the result. I think unanimity arrived at 23rd/24th October. I mean, I know unanimity arrived. I think it was on the 23/24th.

Q. Therefore you didn't have a result until the 23/24th?

A. You didn't have a result that the Project Group had signed off on. I have to emphasise that my understanding, and Mr. McMahon will come here and speak for himself, is that his concerns were far more about the report than about the outcome. But Mr. McMahon will come here and talk about that.

Q. Well, I am just concerned about two aspects of it. If we just take the first one, which I think you have clarified for me. I understood yesterday, and perhaps I misunderstood you to be saying that a result had

been achieved at the meeting that couldn't have been changed. But do I understand you now to be saying that there was no unanimity on a result until the 23rd, and that the Project Group were not being presented with a fait accompli as of the 9th and told "This is it, we have got the report, all you can do is change the dot the Is and cross the Ts now"?

A. I don't know how many ways to say this.

Q. I am simply saying am I right in my understanding that there was no result agreed on by the members of the project team until the 23rd?

A. Mr. McMahon is going to have to account for when.

Q. It's your language I am interested in. Forget Mr. McMahon for a moment. Maybe I was confused yesterday from your answers to Mr. McGonigal. It's very important to me to understand whether there was a result that couldn't be changed as of the 9th October meeting when the report of the 3rd October was brought in, or whether, as you have as I understand it, now confirmed to me that there was no result until the project team signed off on it, the 23rd, call it any time around that date?

A. I think in referring to the transcript of yesterday, you yourself used the words "Unless there were transparent and objective reasons to change it."

That's the status that the result of the 28th September had. Now, I don't know at this moment at

what stage Mr. McMahon's concerns stopped being about the markings and the outcome and became exclusively about the report.

Q. Well, can I leave that out of it and clarify this, then. Are you saying now that as of the 3rd October, in fact as of the 29th September, there was a result which was not going to be changed; all that was going to happen was the report, supporting it or not, was going to be changed? Because if that was the case, so that you'll understand what I am driving at, nobody except you and Mr. Towey and Mr. Andersen's team were involved in arriving at it.

A. But I have said sorry, that's not a fair description anyway, because most of the markings were done by people other than us, and we were collating them, pulling them together.

Q. What is this holistic approach to the job, where everybody is supposed to be involved in arriving at the conclusion?

A. "Holistic" is not my word, anyway.

Q. It's Mr. Andersen's word.

A. I have said a number of times that it was coming back to the Project Group to be explained to the Project Group, and if they queried the methodology, then we were we had to find another solution.

Q. But isn't that again downgrading their role, if they queried the methodology? You came back with something

to explain to them. My understanding is that this was to be the result of the deliberation of the entire group. The one note that I have seen, that I think we will agree on, is that Mr. McMahon thought the qualitative assessment should proceed, he thought, from the 9th October. From that meeting onwards.

A. Yeah.

Q. And that he would revisit the top two applicants, the top two ranked applicants?

A. I am becoming confused at the moment. I don't really understand what more you are looking for from me in assisting you with this, because I mean, I have been over this particular piece of it now an awful lot.

Q. You see, when I was looking into this last week, Mr. Brennan, it had never occurred to me from anything you said that this process was effectively over on the 29th September. I thought the process, for the first time, resulted in some concrete document which could become the subject of real discussion. But from what you said to Mr. McGonigal yesterday, you were told you had a result; nobody could interfere with it unless there was some transparently objective, and as I understood it, some fairly major matter brought into the account.

Now, what was happening between, in the entire month between the 28th 29th September and the 3rd October 23rd October?

A. What was happening?

Q. What was Mr. Billy Riordan doing? What was he doing, checking things? Carrying out analysis? What's the point in all of that if it wasn't going to have any impact on the result?

A. But it would have an impact on the result if it threw up a need to revisit the marks.

Q. Doesn't that suggest that the project team were merely looking at the result you had arrived at to see whether they would agree with it or whether they could find anything wrong with it? They hadn't arrived at any result as a result of the deliberations of the entire Project Group?

A. But individuals among them had participated in arriving at the marks for various parts of the evaluation, and the 28th October or the 28th September was about pulling it together.

Q. Okay.

A. We didn't change any marks done by Mr. McQuaid or Mr. Riordan or anybody.

Q. I think Mr. Riordan was suggesting changes. They weren't nobody ran with them. Mr. Buggy and Mr. Riordan were suggesting changes. They had correspondence with Mr. Thrane; do you remember that?

A. I remember seeing documents with manuscript notes and so on. I don't

Q. Could I be forgiven for forming the impression that

after the 29th September, you were bringing back a document, and it was up to people to support it or not, find support for it, get it done quickly, wrap it up?

A. I think that's overstating the position. The process had to be brought to a conclusion at some stage. The marks were done by different groups. We went to Copenhagen; we pulled them together. The methodology by which we did it had to be explained and understood. But the marks themselves, the grades, they didn't change as such. They didn't change at all.

Q. I take it that you'll agree with me, as I understood you to do, I think, when last we discussed this, that had the project team found out that the consortium was now a three-man consortium, Mr. Desmond, Mr. O'Brien and Telenor, had you found out that sometime after the 29th September and before the 25th October, that would have given you pause for thought in a fairly serious way, wouldn't it?

A. We were certainly what I have said before, we would certainly have had to consider the matter, yes.

Q. You would have had to consider the fact that you had conducted an evaluation on a consortium which didn't exist?

A. Yes.

Q. And which hadn't applied?

A. Yes, we'd have to consider the degree of change and

what it meant.

Q. And do you remember that we discussed this the last time, I think, I was examining you, that if you speed up a process, you run the risk that scrutiny may be less deep or not as deep as it should be; you run that risk?

A. Yes.

Q. And if at this time somebody had decided to look at Communicorp a little more deeply, for whatever reason, whether on foot of the letter of the 29th or for any other reason, it might have affected your overall consideration of their place in the competition because you might have you might have found out that they were a different consortium; isn't that right?

A. Yeah.

Q. Now, yesterday I think you were asked by Mr. Fanning whether you were staking your professional reputation on a finding that there was no interference in the process. And I think that that was in the course of questioning where you were asked whether you were aware of any interference; isn't that right?

A. Mmm.

Q. But I think you'll agree with me that your professional reputation, including your reputation for integrity, would be unaffected if the process had been interfered with in a way that you couldn't have been

alerted to, or couldn't have been alive to?

A. Yeah .

Q. And I think yesterday Mr. Lowry, through his counsel, told us that he was the kind of man to whom speed was a top priority?

A. Yeah.

Q. And he was, I think, presumably, according to his counsel, anxious to push on in October of '95 and I think in May of 1996?

A. Yeah.

Q. And while I think you weren't prepared to be absolutely clear about where the pressure was coming from on the 25th October, 1995

A. Yeah.

Q. if somebody was armed with information concerning the true nature of the consortium at that stage, then obviously the quicker the final whistle was drawn, the better, before any further scrutiny revealed the true nature of the consortium; wouldn't that be right?

A. Sorry, if somebody

Q. If somebody was armed with the information concerning the true nature of the consortium, at some time after the 29th September or at any time, indeed, even before it, but prior to the 25th October then if the process could be brought to a conclusion quickly, before any further scrutiny resulted in the disclosure of that fact, it's something that could have been done

without you, as it were, suspecting that there was any improper interference; isn't that right?

A. I suppose it could, but it would depend on the significance in the change in the consortium, I presume.

Q. Yes. This would have been a very significant change, wouldn't it, because it wouldn't have been the consortium that had made the presentation to you?

A. Yeah.

Q. It wouldn't have been the consortium that had applied, either; isn't that right?

A. I don't want to re-open the dialogue we had before 50/50, 20 to be placed, who would get the 20.

Q. It wouldn't have been a 50/50 consortium. It wasn't the consortium of Mr. Denis O'Brien, Mr. Dermot Desmond and Telenor.

A. That's not who applied for the licence.

Q. It wasn't that consortium?

A. No.

Q. One of the things that came up in this context in the course of Mr. McGonigal's examination was, I think your response in relation to what happened when the letter of the 29th was drawn to your attention, when you said I don't recall that you said it on an earlier occasion, in fact I am fairly certain that Fintan Towey may have mentioned to you that it was a

letter about finances. Do you remember saying that yesterday?

A. I remember saying that yesterday. And I am quite happy to clarify it.

Q. Yes.

A. I think that it would be it should be a source of extraordinary worry to this Tribunal if a group of civil servants came in and they all had identical recollections. At some discussion that you and I had about this subject, Mr. Towey said to me in the precincts of this building that there

Q. I am not complaining about that

A. That there may be a nuance of difference between our positions on this. And I said, "so be it." So he is going to come with some nuance of difference, and I mean, that's the way it is, and that's what I had in mind yesterday in answering Mr. McGonigal.

Q. That's fair enough, that he may have said that his recollection is that he may have said it's something to do with finance?

A. I am not even sure we took the conversation that far, because I am a bit hesitant about discussing evidence with people, to be honest.

Q. I have no difficulty, by the way, if you want to discuss evidence with people, as long as you tell me about the discussions.

A. I know there were different phases in my relationship

with the legal team for the Tribunal. At one time nobody was to talk to anybody. At another time you lifted that blockade a little bit, and so on.

CHAIRMAN: Can I just touch for a moment, without interrupting Mr. Healy. Again, I know you have been through it a long number of times, the letter of the 29th September, but just that I can be clear in my own mind as regards your own mindset.

It seems, whilst it's not absolutely clear, that the conversation with Mr. Towey may have entailed a couple of elements that a letter had come in contrary to the rules from one of the contenders, you think it may be that he may have said something to the effect that "You may not want to hear this", and he may also have said something to the effect that "It touches upon the finances of the Esat application".

A. I think he may say something in relation to the latter part of that.

CHAIRMAN: Yes, but just so that I am clear about your own mindset in this, Mr. Brennan. It seems to me that even putting a hypothetical person in your shoes, you were the Chairman of the Project Group; it was obviously the most momentous undertaking of your career to date, and there was some information coming in that touched upon perhaps a critical aspect of the front runner. And it just occurs to me that there would have been a natural human temptation to ask Mr.

Towey, "Well, Fintan, what's it about?" Did you make a conscious, legal decision to shut off, or just tell me what was in your mind? Because it's something that has caused me to reflect.

A. Chairman, Mr. Towey is while he's lot younger than me, he is a very experienced guy on whose judgement I would put an awful lot of reliance, and when he would make a recommendation to me, I wouldn't likely overrule it. And that's the context in which I dealt with the matter.

CHAIRMAN: So he stated what he did, and then said his recommendation was that a letter that you duly signed on return to Dublin returning it and reminding Mr. O'Brien, as it transpired, of the rules, would be the approach.

A. I think he was clearly of the view that we had made a number of statements at the presentations about no further documentation, and against that background, he was recommending that it be sent back.

CHAIRMAN: Yes, but can I take it that it is your absolutely convinced sworn evidence that you didn't get an inkling of IIU or Mr. Desmond on that occasion? And I am not doubting your previous evidence; I just want to be absolutely clear.

A. That is my position.

Q. MR. HEALY: It was a lot to put on the shoulders of an Assistant Principal at that time?

A. I didn't think of it in those terms, to be honest.

Q. You had just been discussing finance in Copenhagen?

A. Mm-hmm.

Q. And you had identified it as a risk factor?

A. Yeah.

Q. Was there any, perhaps understandable, feeling on your part: "Look, we have a result, we don't want to be going back over things now, I don't want to know anything more about this"?

A. I don't think that was a factor in the way I considered it.

Q. I think yesterday you were asked about what's been described as a very long question by me that I put to you on Day 182, and then a very short question to which you answered yes, and whether you had answered yes to the long question or the short question. I just want to be clear about it, and I am certainly more interested in the long question.

In October of 1995, you had had a meeting with the Minister at which or you had a meeting you had a number of meetings with the Minister; certainly at one of those meetings, the Minister was told the ranking of the top two. I think you said yesterday, in response to Mr. McGonigal, that he was entitled to know the ranking of the top two; is that right?

A. Well, Mr. McGonigal was putting it to me that the Minister, as a licensor, I couldn't refuse the

information if he asked for it. I think that was the sense of it. I think that's fair comment, yeah.

Q. And not only could you not refuse him the information, you didn't refuse him the information, I think you told him?

A. No.

Q. And not only that, he indicated to you or conveyed to you that he wished to accelerate the process?

A. Yeah.

Q. And also at some point he indicated to you that he didn't want the report to undermine itself, and he didn't want or rather, that the project was bankable?

A. Yeah.

Q. And I think I suggested to you that at that point, and right up until the very frenzied days of the 24th and 25th October, the Minister wanted a result and he wanted it quickly?

A. Yeah.

Q. At that time he knew the result that he wanted?

A. Sorry

Q. He knew the result, he knew the ranking?

A. He knew the ranking subject to whatever health warnings were on it at that point, yeah.

Q. Well, had he been told in any way that the ranking was going to change, or could change?

A. You are asking me at a level of detail that we

discussed before, which I have no further recall.

Q. I understand. He knew that there were certain aspects of the report that had, whatever they were, prompted his suggestion that it shouldn't undermine itself, so he wanted a report that wouldn't undermine itself?

A. Yeah.

Q. And he made that suggestion in the context, as far as I can judge, in which financial problems were being discussed, and how they could be solved?

A. I think I have previously suggested the possibility of a link between Mr. Fitzgerald's state of mind in relation to the finances of Esat Telecom and the Minister's state of mind, but I don't know whether there is such a link or not. It's clear that Mr. Fitzgerald was expressing himself in that manner.

Q. I am sure that's correct, but the note suggests that the two remarks as conveyed to the project meeting by you were linked. I am suggesting to you that the Minister, without in any way alerting you to any other thinking he may have had, wanted a report; he had a report at that stage, according to you, and a result he had, according to you?

A. Mmm.

Q. He wanted that report quickly; he wanted the process speeded up. Isn't that right?

A. Yeah.

Q. And he suggested that the report could deal with

problems concerning financial difficulties of consortia on the basis that the project was a bankable one?

A. I mean, we have opened these texts, and I don't recall them any more. But there is there was something of that type to it, yes, of course there was.

Q. Now, just to finish up, when you came to the when you came to the 16th April and the 16th May, rather, of 1996, you had considerable public controversy and pressure in the Dail regarding the process, and specifically the ownership issue?

A. Yeah.

Q. And the true facts concerning the ownership issue, although known, as far as I can see, to the Department and to the Minister, at least as of the 30th where the Minister was concerned, if not indeed earlier, were not revealed until the 16th May of 1996?

A. Yeah.

Q. And again, as in October, there was considerable pressure I think you say that I should talk to other witnesses about where all that pressure was coming from considerable pressure to bring the process to a close. You had a deadline fixed by the Minister for the 16th; isn't that right?

A. I don't recall whether the deadline was set by the Minister or not or how it got set. I am not sure now. I don't think I said that, either.

Q. I think you said yourself if you don't fix deadlines

A. I definitely said that a lot of big projects are brought to a head by fixing a deadline, yeah.

Q. And the financial evaluation of and any other evaluation of the right of Mr. Desmond to become a member of the consortium was conducted over two days, leaving aside the legal aspect of it, over two days; isn't that right?

A. You have canvassed that with me before, and I said the record shows only that amount of it. I don't know how much more there was, if any.

Q. Well, there was considerable pressure then, as well, to bring this matter to a conclusion, and pressure to keep the lid on the ownership aspect?

A. I think what the Minister said a number of times in public was, he would ensure that there was full transparency at or about the award of the licence.

Q. But as I understand it, at the meetings recorded by Mr. O'Connell, it was clear that the ownership issue was regarded as a very hot one and from which attention should be deflected?

A. Yeah.

Q. And I suggest that civil servants were reflecting a political desire, the same one that was reflected in the meeting of the 30th, to avoid referring to the details of the ownership issue, because the fact was

going to come out on the 16th, but what you were avoiding was the details of it. And again, in November of 1996, the fact of ownership changes was brought to the attention of Mr. Dukes and Mr. Molloy, but the details were avoided.

A. Mmm.

Q. And isn't it true that if you had access to the details of the ownership issue, one of the things you might ask is, when did Mr. Desmond acquire his interest and what was the size of it; wouldn't that be a fair question one might ask?

A. It's a question one could ask. Whether it's necessary to ask, I don't know.

Q. And if you knew the details, or if you ask questions prompted by knowing the details of Mr. Desmond's involvement, that could lead to your finding out that his involvement went right back to the 29th September; isn't that right?

A. Yeah.

Q. Now, I'd suggest that at the very least, that could cause embarrassment for the administrators, without any suggestion of impropriety.

A. Embarrassment about 29th September?

Q. For administrators about the fact that a person who was a member of the this consortium right through to the 29th September and administrators were not told about it or did not find out about it, you'd have to

explain why you didn't find out about it until the 16th April; isn't that right?

A. This is revisiting the question of the judgement made about sending back the letter. But the reality is, it's the judgement that was made at the time.

Q. I am not revisiting that. I am going on to the point I am ignoring that judgement for a moment, and I am going on to April, May and November of 1996, and I'm saying if the true facts and all of the facts concerning Mr. Desmond's involvement were to become public, then a question that might be asked which would have implications for politicians, but also, on a much lower scale, for administrators would be, was Mr. Desmond a member of this consortium way back in September, when the evaluation process was being conducted?

A. That's a question that could have arisen, yeah.

Q. And am I not right in thinking that that could have caused at least, for administrators, a degree of professional embarrassment? I am not suggesting any impropriety.

A. What exactly could have caused

Q. The embarrassment that administrators were not anxious to disclose the true facts in case their actions were examined as administrators.

A. I am not so sure that people making those judgements in April/May of '96 were even then aware of the letter

of the 29th September, but I can't be definitive about that.

Q. If they weren't, wouldn't the embarrassment be even greater, Mr. Brennan? Because Mr. Buggy, in the conduct of his evaluation, actually refers to the agreement of the 29th September.

A. I can't follow the connection you are making.

Q. The agreement of the 29th September makes it clear that Mr. Desmond was involved

A. It does indeed.

Q. as of that date, not just the letter?

A. Yeah.

Q. We have argued about the letter might have prompted an inquiry; the agreement would have made the position clear. And that agreement is referred to by Mr. Buggy.

A. Okay.

Q. You see, what I can't understand is why these facts were never put in the public domain. And I can think of or I can suggest that there might have been a degree of professional embarrassment, but over and above that, I can think that there would be political embarrassment at perhaps defects or flaws or glitches in a process that may have been presented as a wonderful process. But I go further and suggest it may have been to deflect attention from a process that was massaged, even unknownst to the administrators

involved, and I ask, who would have a motive to do

that?

A. I can't help you with who would have a motive.

Q. No, I am only asking you was there a desire on the

part of civil servants to avoid the embarrassment that

might attach to them if they were seen to have been

aware that Mr. Desmond was involved in this process

and not to have disclosed the true details of his

involvement?

A. I am maybe it's the hour of the day, or whatever; I

am struggling with this one now. And we have had it

so many times.

Q. We haven't had it in these terms. I want to be

absolutely clear about it. You never disclosed on the

16th May 1996 that Mr. Desmond was a 25% shareholder

in this consortium?

A. What date?

Q. On the 16th May of 1996.

A. Wasn't it back to 20% at that stage?

Q. It was, but you never disclosed on that day it was,

of course, but you never disclosed that he had been a

25% holder.

A. I mean, I have said a lot that when we were informed

of 25:37.5:37.5, we went about getting advice as to

that matter. I think we were all of a mindset that

said "It's not in accordance with the application.

That will have to be unwound, but let's get the legal

advice first".

And when the legal advice came in, it was back to

40:40:20.

Q. I see no legal advice to suggest that. I have looked everywhere, and I can't find it, and the Attorney General has confirmed to us there was no such legal advice.

I did see a lot of consideration of it, but can I come back to my question: It was never stated, and it was never stated in the course of your discussions with Mr. Dukes; isn't that right?

A. I don't know that. Sorry, I didn't acknowledge that yesterday. I said Mr. Dukes was saying to the best of his recollection it wasn't. I have to take that into account. He said that he had a number of discussions with a number of people. So I don't actually know what was actually said to him.

Q. So we have to assume for the moment that let's assume that you did tell Mr. Dukes about the 25%. Are you suggesting to me that it would have been legitimate and appropriate for Mr. Dukes not to tell Mr. Robert Molloy the true facts concerning Mr. Desmond's involvement in that consortium and that it was appropriate to give the sanitised version that was contained in the letter of the 9th November or the 12th December, sorry?

A. I don't know. The letter was obviously drafted to

show, presumably deliberately so, 40:40:20, 40:40:20 at the application stage, and I am using the shorthand for the application again, and at the licensing stage.

Q. If the letter had stated or if you had stated on the 16th May 1996 that Mr. Dermot Desmond had a 20% had a 25% holding in this consortium and that it had been reduced to 20%, then that might have set up a whole load of queries about when did he acquire this? It might have drawn a whole load of unwelcome attention to the ownership issue from which attention was being deflected; isn't that right?

A. I think we saw it in simpler terms than that, that we saw it in terms of the application was based on 40:40:20 and the licence should be granted on a basis of 40:40:20.

Q. Well, then, maybe somebody else wanted to deflect attention from the ownership issue. Did you? Did you want to deflect attention from the ownership issue, or was it somebody else was asking you to do it? Had you any reason to deflect attention from the ownership issue?

A. I mean, I think I was happy enough at 40:40:20.

Q. No, no, Mr. Brennan. I want to know were you happy were you happy that attention should be deflected from the ownership issue, or were you yourself determined to deflect attention from the ownership issue?

A. I don't believe I was determined to deflect attention from the ownership issue.

Q. What was the ownership issue on the 16th May 1996 from which you wanted attention deflected or from which, sorry, from which it was desired to deflect attention?

A. I presume it was the evolution of the ownership issue over the period.

Q. Did you want to deflect attention from the evolution of the ownership issue?

A. I don't know for sure whether I did or not.

Q. Did you want to deflect attention from the evolution of the ownership issue in December of 1996?

A. December of no, I don't believe so.

Q. Well, then, why wasn't the evolution of the ownership issue being correctly and truthfully set out in the letter that was drafted for Mr. Dukes?

A. I suspect that at that stage, that level of detail had just been overlooked, forgotten about.

Q. Do you agree that when you went to a meeting or when you sorry, attended a meeting in your offices in Kildare Street with Mr. O'Connell and a number of other representatives of the winning consortium, that you identified a number of issues upon which you wanted the Esat Digifone people to devote to do some thinking?

A. I agree that as we normally would approach public occasions, we wanted to have thought through our

position on various issues, and we asked them to do

likewise.

Q. And you identified those issues as issues which the entire process had thrown up: The ownership issue, did Esat Digifone have the money? And did Communicorp specifically have the money? Is that right?

A. Yeah, I think so.

Q. Until the Tribunal saw that document in the course of seeking discovery from Esat Digifone until the Tribunal got that information either initially directly as a result of discovery from Digifone and/or as a result of information provided by Telenor, firstly, and then subsequently used by the Tribunal to get discovery from Esat Digifone, but until that information came to the Tribunal, quite late in the day, the Tribunal was completely unaware of the fact that these issues had attracted such enormous attention in the Department, so that even three days were devoted to crafting a speech around them.

And when the Tribunal isn't that so?

A. Well, three days were devoted to crafting a speech covering the whole event.

Q. Yes, but didn't we agree, Mr. Brennan, that most of that speech you could have written there and then off the top of your head? It was the major problems of how do you avoid dealing with the ownership issue that was

A. I don't think I agreed to that. It was a very long speech and therefore took a lot of writing.

Q. It was an issue that in any case was, as we have agreed, a hot issue during all of the Dail exchanges?

A. Yes.

Q. But it was one that didn't come to the Tribunal's attention, notwithstanding meetings with you and other civil servants, until the documents that I have mentioned were delivered to the Tribunal?

A. Are you saying that it wasn't in the Department's files?

Q. No, it wasn't in the Department's files. There was no way the Tribunal could have realised that the Department had identified, as Mr. O'Connell has recorded, the issue of ownership, the financing of Communicorp, as issues that were prioritised as sensitive.

A. I had thought the Department gave you all of the documentation that existed.

Q. And in meetings with the Tribunal, nobody confided to the Tribunal that there were these huge problems with the process. That surely should have stuck in your memory, notwithstanding the passage of a few years.

A. I would say, the time I came in contact with the Tribunal, that very little of what had happened in 1995 or 1996 had stuck in my memory, because I always believed we had conducted a good process, and it was

involvement with the Tribunal that caused me to revisit and relearn and become familiarised with a lot of the stuff.

Q. Thank you, Mr. Brennan.

A. Thank you.

CHAIRMAN: Well, Mr. Fitzsimons, I had indicated that you'd have a chance to reconsider your options at the end of the substantive evidence in case anything arose.

MR. FITZSIMONS: Chairman, I don't wish to ask any questions of the witness.

CHAIRMAN: Very good.

In those circumstances, then, Mr. Brennan, I appreciate you have been in the witness-box for as long a period as anybody in any process I have been connected with in my career; that it's been stressful and difficult for you and I thank you for courtesy, attention and co-operation.

A. Thank you.

CHAIRMAN: We'll be in a position to take another witness at eleven o'clock in the morning.

Very good. Thank you.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
FRIDAY, 14TH FEBRUARY, 2003 AT 11AM.