

A P P E A R A N C E S

THE SOLE MEMBER: Mr. Justice Michael Moriarty

FOR TRIBUNAL: Mr. John Coughlan SC

Mr. Jerry Healy SC

Ms. Jacqueline O'Brien BL

Instructed by: John Davis

Solicitor

FOR THE DEPARTMENT OF

COMMUNICATIONS, MARINE &

NATURAL RESOURCES: Mr. Richard Law-Nesbitt, SC

Mr. John O'Donnell, BL

Mr. Conleth Bradley, BL

Mr. Diarmuid Rossa Phelan, BL

Instructed by Matthew Shaw

Chief State Solicitors Office

FOR DENIS O'BRIEN: Mr. Eoin McGonigal, SC

Mr. Gerry Kelly, SC

Instructed by: Eoin O'Connell

William Fry Solicitors

FOR TELENOR: Mr. Eoghan Fitzsimons, SC

Ms. Blathna Ruane, BL

Instructed by: Kilroy Solicitors

OFFICIAL REPORTER: Mary McKeon SCOPIST: Ralph Sproxton

I N D E X

WITNESS: EXAMINATION:Q. NO:

JOHN LOUGHREY Mr. Coughlan 1 - 327

THE TRIBUNAL RESUMED AS FOLLOWS ON FRIDAY, 14TH

FEBRUARY, 2003 AT 11AM:

MR. COUGHLAN: Mr. John Loughrey.

JOHN LOUGHREY, HAVING BEEN SWORN, WAS EXAMINED AS  
FOLLOWS BY MR. COUGHLAN:

CHAIRMAN: Good morning, Mr. Loughrey. Thank you for  
your attendance and assistance thus far to the  
Tribunal.

Q. MR. COUGHLAN: Mr. Loughrey, I think you have approved  
of a memorandum of intended evidence which you have  
prepared for the assistance of the Tribunal?

A. That's correct, Mr. Coughlan.

Q. And what I intend doing, Mr. Loughrey, in the first  
instance is just taking you through that particular  
memorandum, and then we can come back and deal with  
specific matters later.

A. That's fine. Thank you.

Q. Now, do you have the memorandum with you in the  
witness-box?

A. I don't.

Q. We'll get you a copy now, and in fact I'll read it,  
and you can correct me if anything needs to be  
corrected as I go along. We have one here.

(Document handed to witness.)

Now, I think, Mr. Loughrey, in your memorandum you  
have informed the Tribunal that while you had access  
to departmental files and papers, many of the  
replies I should explain: It's in the form of a

question and answer?

A. It is, yes.

Q. And you stated that many of the replies set out below are based on your collection of events, notably in 1995 and 1996. Inevitably, some details would have faded from memory. You do not therefore assume that your recollection is not open to different recall by others; is that correct?

A. That's right, yes.

Q. I think you have informed the Tribunal that any of your former colleagues sorry, you have not informed any of your former colleagues of these questions, nor are you aware of any questions put to them. This is at the time?

A. At that time, yes.

Q. At that time, of course. And that your replies therefore are based on memory, the relevant papers identified by the Tribunal and supplemented by access to departmental files?

A. That's correct, yes.

Q. Now, I think you were asked for your involvement, direct or indirect, together with your knowledge of the involvement of any other person, in the selection of Mr. Martin Brennan to spearhead the second GSM licensing process in the Department. And you have informed the Tribunal that you were appointed the Secretary of the Department of Energy in 1988. The

structure of the Government was changed at the beginning of 1993, when the role of the Department was expanded to include responsibility for transport and communications; is that correct?

A. That's right, Mr. Coughlan.

Q. After the change of Government in 1997, the machinery of government was again altered, and Transport, Energy and Communications became, after adjustment with other departments, the Department of Public Enterprise; is that correct?

A. Right.

Q. And throughout the period, you were Secretary of each Department and Secretary General laterally after the Public Service Management Act 1997?

A. That's right.

Q. I think you have informed the Tribunal that prior to your appointment as Secretary of the Department of Energy, you had no responsibility for any of the elements that made up that department or any of its successors; is that right?

A. Correct.

Q. I think you have informed the Tribunal that Martin Brennan was a top performing Principal Officer in the Department of Energy, and in 1990 he was appointed councillor to Ireland's permanent representation in the European Community to represent the Department's interests in Brussels, and in particular, to play the

lead front-line role for the Department during Ireland's presidency of the EU in that year; is that correct?

A. Correct.

Q. While legally a member of the Department of Foreign Affairs staff for his stint in Brussels, he was in effect the Department's interface with the Commission in Brussels and with other European institutions?

A. Right.

Q. The post of councillor normally changes every three years or so, and on Martin's return in 1993, he was appointed to head up the new telecommunications development section in the Department of Transport, Energy and Communications. And you informed the Tribunal that while all middle and senior management appointments would normally be discussed at the meeting of the Department's management team, the final say, where it was required, would rest with you as Secretary of the Department; is that right?

A. That's correct.

Q. You approved the appointment of Martin to head up the new section, as it promised to be and turned out subsequently to be one of the most challenging leadership positions in the Department?

A. Right.

Q. Responsibility for the second GSM licensing process was an intrinsic part of the role of the

telecommunications development division; is that

right?

A. A major priority.

Q. Now, I think you were asked for your involvement,

direct or indirect, together with your knowledge of

the involvement of any other person at the early stage

of the process in the devising of the evaluation

criteria.

A. Right.

Q. And I think you informed the Tribunal that the process

of devising evaluation criteria for the award of the

second GSM licence was not conducted in a vacuum. The

general context was one of moving cellular telephony

away from the analogue technology, where it had

started and had been introduced in Ireland in the

mid-1980s, to the new pan-European GSM standard; is

that correct?

A. Correct.

Q. Equally, but quite correctly, and in line with

emerging departmental policy, the European Commission

was, for the first time since the signing of the

Treaty of Rome, asserting itself in terms of the

introduction of competition into a range of activities

such as aviation, gas, electricity, post and

telecommunications, all of which, up to that point

that is, the mid-1980s had been left, for the most

part, to State-owned monopoly utilities across Europe?

A. That's right.

Q. In general, there was a clear departmental policy stance which favoured, where appropriate, the introduction of competition into areas which had been catered for, for the most part, by statutory monopolies; is that correct?

A. Right.

Q. The opening of the telecommunications market was just one element of this general policy stance?

A. Right.

Q. Naturally, only policies which were agreed and sponsored by the relevant Minister and, where necessary, by the Government, were also pursued by the Department were those pursued by the Department; and while Ministers should and do receive a full menu of policy options, the Department's view on the introduction and enhancement of competition were well recognised at that time, and notably by the telecommunications sector in general and Telecom Eireann in particular?

A. That's a fair summary.

Q. In the Department in general, and for yourself in particular, there was a clear recognition that as Ireland had arguably the most open economy within the most open trading block in the world, national competitiveness in its many forms was absolutely vital for Ireland?

A. Yes.

Q. This single attitude dominated your policy approach to many such developments, and notably those in telecommunications; is that correct?

A. Correct.

Q. The emergence of this overriding policy prerogative can be traced publicly in various documents and laterally in successive departmental statements of strategy. This emphasis on competitiveness would be a continuous theme at weekly management meetings as well as day-to-day interaction on the problems and prospects of all sectors for which you were responsible. More specifically, your own interaction with Sean Fitzgerald, who was the Assistant Secretary in charge of the telecommunications area, would have covered this general philosophy, and the emergence of evaluation criteria for the upcoming GSM licence would have been aligned with the overriding departmental priorities?

A. That's right.

Q. The award of the second GSM mobile licence was always seen by the Department as a milestone event. Great care went into planning and designing a competitive framework so that most importantly, it would produce the optimum benefit for the sector, the economy and telephone consumers, but at the same time be seen to be scrupulously professional and fair?



A. Correct.

Q. Sean Fitzgerald's overall management of the telecommunications area, which encompassed not only the development area but the regulatory area as well, worked to this general guideline; is that correct?

Your own direct dealings with Martin Brennan, and the occasional formal or informal think-tank-type discussions which included Martin Brennan, have reflected these values as well.

In short, Martin Brennan, Sean Fitzgerald and you formed a triumvirate in the chain of responsibility which prompted and guided the approach to the second GSM licence; is that right?

A. That's right.

Q. That, in turn, was the same management chain from which the actual process itself emerged, and sectional head, Martin Brennan, the key driver in managing and formulating the process, is that correct?

A. Right, that's right.

Q. Now, you were asked for your involvement, direct or indirect, together with your knowledge of the involvement of any other person in the preparation of the initial draft tender documents.

And you have informed the Tribunal that you had no direct involvement in the initial drafting of documents. From time to time, however, you kept in touch with Sean Fitzgerald and Martin Brennan, in the

normal way of management, to ensure that if there were any facilitations they required in driving the GSM agenda forward, you would be happy to do so.

In the event, Martin Brennan conducted a common-sense and professional campaign in the preparation of the necessary documentation?

A. That's right.

Q. I think you were then asked for your knowledge of or involvement, direct or indirect, together with your knowledge of any involvement of any other person, in the retention of KPMG as consultants to the Department in relation to the initial competition design and of the advice rendered by KPMG.

I think you have informed the Tribunal that the retention of Roger Pye as consultant to the Department was undertaken after consultation with you and with your approval. Roger Pye was an obvious first port of call for any such consultancy, for two reasons:

Firstly, Dr. Pye was well known to the Department, in that he had been appointed a member of the telecommunications strategy group. This group was set up in line with the strategic management initiative to scan the horizon nationally and internationally and to identify the critical success factors which would underpin the development of telecommunications in Ireland. The group, chaired by Sean Fitzgerald, comprised the key players in the Department dealing

with telecommunications, i.e. Martin Brennan, Sean McMahon, Conan McKenna and Eamonn Molloy, together with distinguished private sector participants John Daly, Chairman of ICL Ireland; Dr. T. P. Hardiman, Chairman of IBM Ireland; Dr. Jimmy Joyce, actuarial consultant; Dr. Edmond Molloy, consultant; and Dr. Roger Pye, a partner of KPMG London who had specialised in the area of telecommunications development.

Dr. Pye had been a key adviser to the European Commission on mobile phone development and was an acknowledged key influence in this area; is that correct?

A. That's right.

Q. I think you were then asked for details of all considerations which to your knowledge, direct or indirect, prompted or contributed to the Department's movement from its initial position of, first of all, favouring the publication of weightings attached to the evaluation criteria as specified in paragraph 19 of the RFP, or RFP document, to its ultimate position of non-publication of the weightings attached to the relevant criteria, as recorded in a memorandum of Mr. Jimmy McMeel dated 19th April 1995 and a note to the Minister from Mr. David Doyle.

And secondly, favouring the placing of the emphasis on the evaluation criteria on the criterion of tariffs to

its ultimate position, in which the first priority was given to the credibility of the business plan and the applicant's approach to market development, as also recorded in the memorandum of Mr. McMeel and note to the Minister. We'll come back to deal with the documents, if we need to, at a later stage, but

A. That's fine, Mr. Coughlan.

Q. I think you have informed the Tribunal that you were completely unaware of the existence of the cited notes in the Department of Finance until you read the supplemental schedule attached to the Tribunal's letter of the 28th June 2002. You were not closely involved in the determination of this issue?

A. That's correct.

Q. I think then you were asked for details of all of your dealings as Secretary General perhaps we'll just continue to use the term "Secretary General"; I know that designation didn't occur until 1997 of the Department with Mr. Lowry on his appointment as Minister in relation to the GSM licensing process.

I think you have informed the Tribunal that any incoming Minister is briefed comprehensively by the Secretary General. From his first day in office, you had many sessions with Mr. Lowry on all aspects of his brief; clearly items frequently of ephemeral but of immediate interest or items which looked like developing into an early crisis would also have been

discussed. Normally an incoming Minister would give some indication of his or her priorities, much of which might be self-evident from party manifestos, a personal declared position as an Opposition spokesman, or of clear interest to the Taoiseach of the day. You have no recollection of Mr. Lowry having any particular interest in GSM developments.

At the same time, a major compendium, although mainly descriptive of all the sectors for which the Minister was responsible, was assembled in anticipation of the Ministerial appointment and was available to Minister Lowry on his appointment. This compendium signalled in outline the requirements to move ahead with the award of a second GSM licence.

The early days of a new Minister usually require intensive support from the Department, and as Mr. Lowry was new to Ministerial office, you spent a lot of time with him in the early days briefing on day-to-day issues and planning for the implementation of Government priorities. You do recall, however, that Mr. Lowry had no problem in aligning his Ministerial agenda to the Department's drive towards introducing competition wherever possible; is that correct?

A. That's correct, yes.

Q. It's something I'll come back to later, Mr. Loughrey, but I'll just pause for a moment. Can we take it that

the Minister of course could have his own agenda

A. Of course.

Q. and inform you of the priorities he wished identified?

A. Of course. I think civil servants in general always prefer to have a Minister with a clear Ministerial agenda.

Q. Did the Minister at this stage I appreciate he had just come into office, and you were briefing him on all aspects of the Department's affairs did he have his own agenda or view about telecoms, for example, at this time?

A. He had a general philosophy, Mr. Coughlan, which we are all creatures of our background, and he was a successful businessman and entrepreneur, so his slant on activities generally came from that viewpoint. It would have come in relationship to Telecom Eireann, he would have therefore had no difficulties in seeing that the Department's agenda, often characterised at the time as anti-Telecom Eireann which it wasn't, clearly but it was that change was necessary so that Telecom Eireann could become a successful Irish-based telecommunications unit in a competitive world. He had no problem aligning himself with that, and his experience as a businessman saw the necessity for it.

Q. Well, I take it that again, it's something we can

come back to, but just a Minister coming into office might appreciate that he might have a period of time in that particular Ministry. This was a Minister who came to office half-way through that Dail?

A. Absolutely.

Q. And can you remember whether Mr. Lowry indicated that there were he might need to pick out a number of items which he would give priority to in his period as Minister in that Department?

A. As you put the question, I am trying to recall as best I can. I know he had particular concerns, as indeed or continuing concerns of Minister, on transport in general and CIE in particular; and if I were to pick out, from memory, and I am just working just directly from memory, to the extent that he seemed to put an emphasis on things, CIE probably would have been the top of the list.

Q. Now, I think you were asked by the Tribunal for your knowledge, direct or indirect, or involvement, together with your knowledge of the of the involvement of any other person, in the finalisation of the evaluation criteria, and in particular, a) the selection of an open-ended licence fee structure.

Now, I think you have informed the Tribunal that the saga of the licence fee structure is well documented.

This story really took off in 1994, differences appearing between the Department and the Department of

Finance. The latter Department, quite understandably, was preoccupied with maximising the take for the Exchequer, while the Department of Transport, Energy and Communications, working at all times to the broad guidelines of maximising competitiveness, favoured a less demanding fee structure.

At the same time, that's 1994, Karel van Miert, the Commissioner responsible for competition policy, fired the first shot across the bows of the Irish administration in a letter dated 4th May 1994, pointing out that it considered that Ireland had failed to fulfil its obligations under Article 90 of the Treaty by not initiating the procedure for granting at least a second GSM licence within a reasonable time. Is that correct?

A. That's correct.

Could I just make one small interjection. It's a trivial matter, but it shows that I have lost touch with change, perhaps, because I know that Article 90 is no longer Article 90. They have all shifted by a few degrees. But if you'd excuse me, working on it was Article 90 at the time. Similarly for Article 84, it's now I think Article 81. But my familiarity with them was with those particular

Q. These were the appropriate articles at the time?

A. At the time, yeah.

Q. I think you continue to inform the Tribunal that while



communications in itself did not refer to the fee structure, the Department was well aware of the fact that DG IV that's changed as well now, but that was the competition directorate responsible for competition policy and DG XIII, that was the Director General responsible for telecommunications; isn't that correct?

A. That's correct, yes.

Q. Had already taken a position which opposed maximising, by means of auction or otherwise, receipts to Government on the allocation of radio spectrum for a second or more GSM licence. In addition, the Commission also posed the imposition of such high entry fee on a new entrant to the GSM market place which did not have a corresponding imposition on the incumbent monopoly?

A. If I could rephrase that, on reflection. I think, from memory at the time is, that suggests that if we had loaded the new entrant with, say, a fee I was going to say with telephone numbers, but say of a hundred million, for instance, so long as we imposed a hundred million on Eircell, that would be acceptable. That's the inference there. That would be incorrect. In fact is basically they were opposed to any high entry fee, even if it were imposed on the incumbent. But exceptionally, as the saga unrolled, if I may put it that way, they found that it was a lesser evil to

impose a corresponding fee on the incumbent. But I think it would be fairer to say, even at the time, in 1994, that they were just opposed to high entry fees, full stop.

Q. Yes, okay.

CHAIRMAN: Presumably the primary rationale being that consumers would have to make good?

A. Absolutely, Chairman.

Q. MR. COUGHLAN: Perhaps it's something I'll be coming back to, Mr. Loughrey, but that is a sequence that seemed to develop rather than be a stated position of the Commission?

A. Absolutely.

Q. Or even an appreciation, I think, by the Department at that time. Because what was happening, I think, around this time was that the Commission were engaged in discussions with the Italians and the Belgians; things had not evolved fully at that time. We'll come back to it.

A. Perhaps whatever you wish, Mr. Coughlan, but perhaps I could distinguish, then, between DG IV and DG XIII, because the Green Paper was the creature of DG XIII, while the keeper of conscience in terms of competition was always going to be DG IV. And even then I detected nuance difference between them at that time.

But you are quite right in DG IV's crusade against, as

they saw it, errant states, Belgium, Italy, even the Netherlands who backed down in September 1994, in their crusade against, as they saw it, errant States and Ireland was also in that sin bin at the time is they perhaps didn't see through the policy prism of DG

XIII. And this is something we can tease out, if you so wish, but only if you so wish.

Q. It's something we may need to come back and tease out at a later stage.

I think you continue that to the best of your recollection, the then Minister's preoccupations in the matter of a second GSM licence, as he explained to you, were political. In his discussions with his Cabinet colleagues, he was aware that any breakthrough for the early introduction of competition in the telecommunications area which he favoured required giving Telecom Eireann, in an institutional sense, and its employees, through their trade unions, continuing assurance that whatever the outcome, their interests and misgivings would be addressed. Indeed, in your recollection of your dealings with Minister Lowry, the dominant topic in the opening-up of the telecommunications sector, and notably the GSM sector, was the question of the shepherding, from a political standpoint, the interest of Telecom Eireann, Eircell and their employees. Is that correct?

A. That was the realpolitik of the time. It was a

changed government, with different emphasis and different constituent members, and clearly, to get any movement through on any change, which many people would have thought radical change, actually, required that sort of comfort and assurance, notably to colleagues in other parties in Government.

Q. I think you have informed the Tribunal that the Government was first notified of the proposed approach to awarding a second GSM licence by way of aide-memoire on the 9th November 1994. That was of course before Minister Lowry came into office?

A. Correct.

Q. And I think Mr. Cowen was the Minister at that time?

A. Correct.

Q. In bringing this document to Cabinet, the then Minister, Mr. Brian Cowen, already supported the Department's position of not attempting to burden any new entrant with a high front-end fee which would lead to higher tariffs and less real competition?

A. Perhaps, Mr. Coughlan, once again and I am sorry, Chairman once, again, in re-reading this, the inference there is that somehow Mr. Cowen was a creature in our hands. Far from it, actually. He would have had his own strong agenda as well. So if there is an inference that somehow he just buys in automatically to what the Department or what I would say by way of advice, that's clearly not the case.

And I just wanted to mention that by way if that inference is there.

Q. Of course.

It was your position as Secretary General to advise your Minister it was the Minister's position to take the matter to Cabinet, run with the advice if he accepted it and reject it if he didn't accept it?

A. Absolutely.

Q. And that was so in respect of all Matters?

A. Of all Ministers.

Q. Now, I think you have informed the Tribunal that the same aide-memoire listed the draft tender document criteria in descending order of importance, and even at that stage the value of the fee, either by front-end or ongoing payment, was ranked only fifth in terms of significance.

The issue of fees became an early topic of discussion between Michael Lowry, the new Minister for Transport, Energy and Communications, and Mr. Ruairi Quinn, Minister for Finance, in the context of public expenditure.

Estimates for the year 1995 sorry, I beg your pardon, in the context, of course, of the public expenditure estimates for the year 1995.

You attended the bilateral meetings between Minister Lowry and Minister Quinn on the issues arising. Your recollection of it was that both Ministers set out

their stalls in a friendly but forceful way, and no agreement was reached on the level or structures of the GSM. Even though there was no media agreement between the two Ministers and their Departments on the issue of licence fee, it was quite clear that the Department of Finance calculations and ultimately, therefore, the budget arithmetic was predicated on the expectation of  $\text{€}25$  million from the GSM process.

The arguments of the Minister, Department of Finance, in favour of an open-ended fee structure prevailed, and in February 1995, the Cabinet committee set up by way of Government decision on the 7th February with a view to overseeing the issue of the GSM licence agreed effectively to such a fee structure.

A. Perhaps, Mr. Coughlan, again, rather than disturb the narrative, but just it might be helpful for the Tribunal is, first of all, something that everybody is aware of, that the fiscal cycle was different then. The budget was usually perhaps the last day in January, first day so this was in the critical two weeks before the budget arithmetic was settled. And that's I worked in the Department of Finance for many years. That's high-drama stuff. And so the settling of non-tax income at that stage was one of the items that had been focus from Government, and obviously the Minister for Finance in particular. So it's something that had to be resolved quickly.

There wasn't time to put one's foot on the ball, so to speak, and look around. And this is perhaps it's not clear there, but there was quite a lot of pressure to resolve this issue very quickly.

Q. And as you say, it was, and it was resolved on the terms the Department of Finance were proposing at that stage?

A. To my regret, Mr. Coughlan.

Q. Now, I think the narrative continues: The decision was taken on the basis of an aide-memoire brought by Minister Lowry as the sponsoring Minister. It might be noted, however, that even where the Government agreed to proceed on the basis of an open-ended fee structure, the priority attached to the fee element was not raised above the fourth rank in terms of determining the eventual winner of the competition.

A subsequent Government decision on the 2nd March 1995 included the Government's agreement that the bidding process would be promoted and controlled by the Department of Transport, Energy and Communications. It also agreed that a recommendation would be put by the Minister to the Government in time for a final decision to be made by the 31st October 1995 for the granting of a licence.

The competition itself was announced in early March 1995, and a process involving the provision of information on a formal and measured basis was also

provided for, culminating in the final cutoff for applications of the 23rd June, 1995".

You have informed the Tribunal that the policy was further modified in discussions with the Commission of the European Union that's DG IV which insisted that, broadly speaking, the same fee should apply to the incumbent mobile phone operator, Eircell, and the subsequent winner of the competition.

A. Mr. Coughlan, I don't want to criticise anybody for editing whatsoever, because I know how hard it is to get continuous narrative when you have set questions.

But, Chairman, the run of this particular perhaps it was by way of elision, eliding answers into one another, but it doesn't run very elegantly, not that I am interested in the elegance of it, but it's something that had been covered further up, actually.

If I were editing again, and I don't mean this in any way critical, I would have dropped that paragraph there.

Q. You would remove that paragraph?

A. Exactly.

Q. Continuing: As to the fee structure, events took a different turn arising from a letter of the 27th April 1995 from Commissioner van Miert to Minister Michael Lowry. The Commissioner pointed out that an open auction resulting in a fee which is imposed only on the new entrant can significantly distort competition



and favour the extension of the existing dominant position of the incumbent telecommunications organisation. The Commissioner also pointed out that infringement procedures had already been opened against Italy on this very point. This warning from Commissioner van Miert had two effects. One was to stop the meter ticking in terms of the GSM competition's critical path, and second was the requirement to resolve the issue before a new timetable for the competition could be finalised. The resolution of the fee structure problem was discussed with the GSM Project Group within the GSM Project Group, discussed by yourself, Sean Fitzgerald and Martin Brennan, and in turn discussed by the Minister and by you. The sequence of events concluded with contacts between the Department and the Department of Finance and the Commission in Brussels and the engagement of a senior counsel to opine on the possible exposure of the Minister in the event of a challenge to the original open-ended fee structure. The solution that emerged, which gained the approval of both the Minister, Ruairi Quinn, Mr. Michael Lowry and of course, by definition, their respective Departments and which subsequently, in effect, received a written nihil obstat from Commissioner van Miert, was one by which everybody could exist with honour?

A. Could exit, I hope.

Q. I beg your pardon, you are right; "we could exit with honour". Probably "exist" as well?

A. Yes, quite.

Q. The Minister for Finance expectation of 25 million was met. The longstanding preoccupation of the Department of Transport, Energy and Communications in keeping the entry fee as low as possible was, broadly speaking, met, and the suppression of an open-ended auction and the imposition of a comparable fee on the incumbent as required by DG IV in Brussels was also met. A new closing date of the 4 August 1995 was agreed, and the applicants were involved of the changed circumstances.

A. And I think I should give credit, Mr. Coughlan, to Martin Brennan, because to have negotiated such an outcome with a sign-off from the Competition Commissioner was unprecedented, and I think it was a remarkable achievement, a) to his ingenuity and b) to knowing his way around the corridors in Brussels.

Q. Perhaps you are being a little too modest there, Mr. Loughrey. You yourself were somewhat familiar with your ways around the corridors?

A. No, no, it was his idea.

Q. Perhaps you are being a little bit too modest, and it's in praise of you that your own involvement perhaps moved things along as well?

A. It was his idea, clearly, Mr. Coughlan.

Q. I'll be coming back to deal with this in detail with the documents, Mr. Loughrey.

A. Okay.

Q. Now, I think you were asked then, at B, for your knowledge, direct or indirect, of the involvement, together with your knowledge of the involvement of any other person, in the finalisation of the evaluation criteria, and in particular, in relation to B, the deletion of financial capability from the evaluation criteria.

And I think your response to that is: While the words "financial capability" appear on the original proposed checklist as submitted to Government in November 1994, they do not appear in the final version as signed off by the Government three months later on the 2nd March, 1995. It should be noted, however, that there are wording changes to all of the top five criteria as specified in the original 1994 aide-memoire.

A. Mr. Coughlan, once again and once again I don't believe, when I am reading this now I am not sure that that will stand up to scrutiny, or perhaps that it should carry that assertion should carry much weight, because wording changes can be trivial, so I am not actually making a major point at this stage on that particular issue.

Q. Neither am I, Mr. Loughrey.

A. Thank you.

Q. I think you say that these changes did not affect the thrust and continuity of intent of the Government through the whole period of decision taking. Implicit in any credible business plan is sustained financial viability, and the subsequent evaluation process addressed the issue of financial capability.

I appreciate what you say, Mr. Loughrey. I'll come back to deal with it in the context of the actual documents themselves and ask for your views as a Secretary General about policy, as it unfolded from the decision of the Government in November of 1994, to this policy as enunciated by the decision, or the decision of Cabinet as of this date?

A. That's fine, Mr. Coughlan, yes.

Q. Now, I think you were then asked for your role in the establishment of the Project Group and in the appointment of departmental and other officials to the Project Group.

And I think you have informed the Tribunal that the Department set up a project team to manage the process and to assess the applications for the second GSM licence. A group of key officials were assembled under the chairmanship of Martin Brennan, then Principal Officer, and under the general guidance of Sean Fitzgerald, Assistant Secretary, Department of Finance officials as representatives of the Minister for Finance, who has overarching responsibilities for

public procurement issues, were also an intrinsic part of the project team, together with Andersen as consultancy's input, the team had a full range of the disciplines required for the task of assessing the applicants.

While the Government decision of the 2nd March 1995 authorised that the bidding process would be promoted and controlled by the Department of Transport, Energy and Communications, in practice, the Project Group was also going to be a joint approach by the Department and the Department of Finance. Indeed, the Department of Finance representatives on the group participated in the detailed assessment sub-groups dealing with the financial aspects. While as Secretary of the Department I could have selected the personnel or indeed vetoed any possible participants in the group, in practice, the Project Group effectively selected itself. It required all three strands of the telecommunications division that is, development, regulatory and technical areas as well as senior representation from the Department of Finance. Within the representation, there would have to be significant expertise, both technical and financial, to ensure that the group had the competence to make a proper assessment. In addition, it was stated at the outset, and with government authorisation, that the outside consultants appointed to assist in the process

would be an intrinsic part of the project team. The only matter which I recall being decided was whether the group would be headed by Sean Fitzgerald, the Assistant Secretary in charge of all telecommunications, or by Martin Brennan, who had the immediate management responsibility for the process.

In the event, Sean Fitzgerald decided that Martin Brennan should chair the group. I was informed of all these developments at the time, and the composition of the group had my full approval.

Now, again, it's something we should come back to, but perhaps a little question that might be posed at this stage. Obviously there was some consideration given to the question of whether Mr. Sean Fitzgerald, the Assistant Secretary, should chair the GSM project team; isn't that correct?

A. I think that consideration would have been between more between Sean and Martin. My only personal style was to let Assistant Secretaries decide, for the most part, unless there were contentious matters, personnel matters, organisational matters, and I think my role would have been more passive in this, actually. So I don't recall having any real hands-on input into that particular decision.

Q. Did you have any discussion with Mr. Fitzgerald, for example, about it that you can remember?

A. To be honest, I can't remember at this stage, Mr.

Coughlan.

Q. I just wonder, this was a fairly major undertaking, wasn't it, for the Department?

A. It was a very major undertaking, but in a sense, this was a very it was a huge Department, since it has been split up, it was a huge Department, and there were many issues requiring sort of guidance, and in each of the sections there were I looked at the organigram the other day, actually there were 22 equivalents, direct administrative equivalents of Martin Brennan, plus with professionals, chief technical advisers, there were perhaps 38 people of Martin Brennan's stature or equivalence in the Department. So

Q. That's at the rank of Principal Officer?

A. With the rank of Principal or upwards. Rank of Principal or upwards. In terms of principal and professional equivalent would have been about 28 or 30 or thereabouts. So in a sense, Assistant Secretaries had very sort of great span of discretion.

And I also knew and perhaps it's difficult here, Chairman, actually, because it's very easy when reflecting backwards eight years to rationalise something which I may not have rationalised at the time; but probably my thinking at the time was that even an issue requiring even more discretion was the strategic alliance required for Telecom Eireann.

Now, this would have been this would have outpeaked the GSM competition in terms of priority and in terms of requiring discretionary treatment, and I think I may have reserved put Sean Fitzgerald, so to speak, as the four-star general in reserve to handle that particular one. And it had already predated that you may recall, actually, that it was back in the previous administration, I mean Mr. Reynolds' Government as Taoiseach, that Cable and Wireless first came a tentative show of interest to become a partner for Telecom Eireann.

So the strategic partnership for Telecom Eireann was a live and ongoing and major issue. And it was probably on that basis though it is possible that I am conveniently rationalising something now that I may not have thought of at the time but even given that, my thinking was probably that Sean should be reserved for to lead the strategic-partner issue for Telecom Eireann.

That possibly was my thinking at the time. But as I say, I can't guarantee that.

Q. It's something we can come back to.

A. Sure.

Q. In due course.

CHAIRMAN: I think you have already said that you did perceive, Mr. Brennan, as a rising star in the Department, so presumably, whilst you may not have



directly conceived the move, it was one that had to have your blessing, and that valued judgement may have played a part?

A. Absolutely, Chairman. And not only a rising star, but equally importantly, because there was a lot of work involved, he was a heavy lifter as well. So from that point of view, that probably influenced my judgement.

Q. MR. COUGHLAN: Well, was consideration given I appreciate what you have said about Mr. Fitzgerald, and I think you probably understand why I ask the question; this was a fairly major undertaking by its Department, and Mr. Fitzgerald was an Assistant Secretary. He was a man of proven ability, ran this particular telecommunications division of the Department; isn't that correct?

A. There is no doubting Mr. Fitzgerald's credentials; they were outstanding. But I still have I still believe that Martin Brennan was the right choice to lead

Q. I understand that. But what I am really inquiring is what consideration was given by you to the appointment of chairman of this particular group or perhaps not chairman at the time, but the person to head the group or lead the group?

A. I think, Mr. Coughlan and once again I'd be dipping into memory, which could be faulty at this stage but I think I have explained, to the best that I can

recall at the time, how I judged the issue.

Q. Very good.

Was any consideration given to appointing Mr. McMahon to that position? After all, he was the de facto Regulator in the Department, wasn't he?

A. Yes, and had huge responsibilities, as the ODTR found out when they took over his mantle. There is no doubting Sean McMahon was a man of great ability as well. But I felt in particular that Martin had a broader range of experience, including front-line experience in Brussels in the emerging liberalisation issue. We had, in 1990, the we drove through successfully the directives on both electricity and gas liberalisation during his watch in Brussels, so that probably influenced me.

Q. Now, I think you were asked by the Tribunal for your understanding of the role of the Cabinet or Cabinet subcommittee in the GSM process, and in particular in light of paragraph 2 of the Government decision on the 2nd March 1995. And it outlined, namely: "A recommendation will be put by the Minister to Government in time for a final decision on the granting of the licence to be made by the 31st October 1995."

Of course that got pushed back by a month as a result of European intervention. And I think you have informed the Tribunal "I understood that the role of

the Cabinet committee in the GSM process was that of effective political clearing house for decision that is needed to be taken during the process, thus avoiding full formal Cabinet process for decisions that had to be taken quickly or interim decisions that wouldn't warrant full Cabinet discussion. The Government decision on the 2nd March 1995 did indeed specify 'a recommendation would be put by the Minister to the Government in time for a final decision on the granting of the licence to be made by the 31 October 1995.'

"This is what happened, and the Government decision on the 26th October 1995 records precisely that. The decision does not record that four out of the five Cabinet committee had been consulted on the evening of the 24th October and had, in effect, given a de facto incorporeal decision in favour of the outcome as proposed by the Project Group?

A. Might I correct that: It wasn't my intention, obviously, to mislead the Tribunal, but clearly the date of 24 October now, on reflection, is incorrect. And, once again on reflection, it was not a de facto incorporeal decision, because that would require the Secretary to the Government formally getting in touch with all members, the full Cabinet. What it was is a de facto political sign-off because the three heads of the then comprising the heads of the political

parties which comprised the Government and the Minister for Finance were part of the decision.

So that's not very good drafting on my part, Mr.

Coughlan.

Q. Very good. But there can be little doubt but that you had a clear understanding of what Government policy was in relation to this matter, that this was a decision to be made by the Government, of course with the recommendation being brought to it by your Minister?

A. Absolutely.

Q. Now, I think you were then asked for your understanding of the it's referred to as the RFT.

It's also referred to RFP in the course of this Tribunal; we'll stick to RFT for the moment.

A. Okay.

Q. I think your understanding of the RFT document issued by the Department in March 1995, and in particular paragraphs 3, 9 and 19, which provided as follows, and then paragraph 3 is set out: "Applicants must give full ownership details for proposed licensee and will be expected to deal with the matters referred to in the following paragraphs in their submissions".

And I think you have informed the Tribunal that your understanding of the RFP document issued in March 1995 is that it was a carefully worded and measured invitation to bid document which reflected accurately

the Government's decision on the 7th March, and notably the process to be followed by potential applicants and the detailed requirements of the competition. Paragraph 3 requested applicants to give full ownership details of proposed licensing. The winning bid did so, including reserving a minority position for certain institutional investors. Such an approach was not at variance with paragraph 3 of the document. It clearly was not deemed as such by the Project Group. More importantly, the ownership profile submitted by Esat Digifone was known to the Cabinet committee and accompanied the aide-memoire to Government on the 26th October 1995, when the Government decided formally to grant exclusive negotiation rights to Esat with the intention of granting of licence.

Then paragraph 9 of the RFP document you were asked about, and it's set out: "Applicants must demonstrate their financial capacity and technical experience and capability to implement the system, if successful, and must include a business plan for at least the first five years in a complete technical proposal."

And your response to that is that, with reference to paragraph 9, your understanding of the RFP document issued in March 1995 is that each consortium applicant had to demonstrate a clear capacity to deliver, and that the submitted business plan should be such so as

to convince that this would be the case. The assessment process was structured in such a way so as to assure delivery by the qualified consortia of the GSM requirements.

Paragraph 19 was then set out, and you were asked for your understanding. And quotation from paragraph 19 is: "The Minister intends to compare the applications on an equitable basis, subject to being satisfied as to the financial and technical capability of the applicant in accordance with the information required herein, and specifically with regard to the list of evaluation criteria set out below in descending order of priority.

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

"2. Quality and viability of technical approach proposed and its compliance with requirements set out herein.

"3. The approach to tariffing proposed by the applicant, which must be competitive.

"4. The amounts the applicant is prepared to pay for the right to the licence.

"5. Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded.

"6. The extent of applicant's international roaming plan.

"7. The performance guarantee proposed by the applicants.

"8. Efficiency for a post used frequency spectrum resource."

And your response is: "As to paragraph 19, the wording reflects clearly the Government's intent as to how the competition would be run, and the subsequent process leading to the award of the licence did just that."

I think you were then asked for your understanding of the purpose of the protocol adopted by the Project Group at its meeting on the 6th March 1995 for dealing with potential bidders during the tender process and which protocol was notified to Mr. Loughrey by memo dated 6th March 1995 from Mr. Martin Brennan, bearing in mind that all civil servants are bound by duties of confidentiality.

And you inform the Tribunal that you believe the Project Group, chaired by Martin Brennan, was both prudent and astute to agree on procedures for dealing with potential bidders during the time before the closed period of the competition.

You were informed of these procedures and approved of them. While by definition all civil servants operate under the State Secrets Act and would not knowingly confer an advantage on any potential participant in any bidding process, the protocol was, nonetheless,

valuable in that it brought to the front of the agenda the necessity not only to ensure that this didn't happen, but perhaps more importantly that there would be no perception of advantage being conferred on any potential participant.

Just perhaps you might elaborate briefly on that, Mr. Loughrey. The concept of perception was foremost in your mind as actually conferring an advantage on somebody; isn't that correct?

A. I think what I had in mind, Mr. Coughlan, was that there is a grey area in between. There is the public sector and there is the private sector. I don't say for one moment that one is better than the other. But they are different, and they have different operating methods.

I was conscious of the private sector that any private sector promoters would do their very best to make sure that their particular agenda, their particular project, was positioned in a way that they would see themselves in let me put it this way, in the centre of the market, and that they wouldn't at all think it improper, for instance, to network, for instance, with the decision takers.

That's the way they would operate in the private sector, and they would be right in the private sector.

But for something that, where the State was allocating a scarce resource in one form or another, starting



with radio spectrum, that I felt because this was a major transaction for the State, Martin Brennan's own initiative in bringing up this I thought was absolutely correct. And I remember commending him at the time for so introducing it in such a specific way.

Now, implicitly civil servants would know what to do, so to speak; but on the fringes there could often be entertainment which might have been accepted traditionally, the sort of things like tickets for football matches, things like that. Now, civil servants would be in horror that somehow a match ticket somehow would affect their judgement, but the perception of perhaps part of a decision-taking team being seen, whether it was by way of hospitality or football match or its equivalent, I thought was absolutely correct, to reinforce that we had to be, so to speak, like Calpurnia's wife; above suspicion in a process like this.

And this was Martin's initiative, and I certainly approved it and stood over it. And it was mentioned, I can recall, at one I can't recall precisely the day, but it would have been mentioned at one of the management meetings that we had, which would be the clearing house from the Ministers, myself, the Assistant Secretary, the head of corporate finance, the programme manager, etc., who would normally attend the weekly management meeting. So it was made

explicit to everybody at the time.

Q. Yes. I think you come to deal with that, in fact, you yourself then raising it perhaps at a MAC meeting or with the Minister directly?

A. Yes.

Q. Because I think you were asked by the Tribunal whether you discussed what has been described as a protocol with the Minister or otherwise advised the Minister regarding contacts with members of consortia, and if so, the import of the advice which you gave to the Minister.

And you have informed the Tribunal that not only did you discuss the protocol with the Minister, but on several occasions advised the Minister about contacts with members of declared consortia, or indeed with potential participants in the competition. Clearly the Minister would have to exercise discretion, as, for example, the ESB was a participant in one of the consortia.

A. Perhaps I could stop you there. Once again I would have to recall it, when this first arose, most consortia hadn't been declared, so to speak, but we knew that there were people who had expressed interest, and we knew at least up to a half-dozen State companies, most of them were reporting directly to the Department, actually had either assets or lands or facilities that could be an intrinsic part of any

particular bid. But we didn't have any hard and fast information on what the consortia were at the time, but on a basis of a precautionary principle, I would have advised the Minister.

I knew, for instance, it was almost a racing certainty that the ESB's, for instance, high-voltage grid would be an obvious candidate, the use of its assets, for instance. So it's in that context. I wouldn't have been saying to the Minister, "Here is a checklist of people you should not meet".

Q. Of course.

A. But given that the fact that most consortia, we felt instinctively from earlier open-door policies, felt it necessary that they should have feet on the street, so to speak, in Dublin; in other words, an Irish dimension. And by the way, any time I was asked personally about that, I completely rejected that, because a) it would have been incorrect, b) it would have been against the open market, internal market, and EU policy; but nonetheless, they felt psychologically, many of the people in the open-door sessions, for instance, that they had to have, so to speak, a Dublin dimension.

So but knowing that, that was the backdrop in advising the Minister.

Q. And just touching on that point for a moment, if I may, your own view was that there did not have to be

an Irish dimension?

A. Absolutely not, actually. Now, in the event, only one

Q. Leave aside your European aspects; your own personal view is there did not have to be?

A. Absolutely, absolutely. And in many cases I might have felt, and I have no sense whatsoever, having worked in Europe, of any national inferiority complex, far from it; Irish companies can compete with the best and better. But in this particular area, I felt sometimes that an Irish dimension might even be a dilution of the impact of what was being imported into Ireland by way of best practice elsewhere.

Q. And would that view of yours have come up in discussions perhaps with Mr. Brennan and Fitzgerald before the design of any of this, when you had an open-door policy, you would have had a general discussion?

A. Yes, it would have, Mr. Coughlan, and it would have come up notably in the strategic alliance discussions as well. For instance, that I can recall, for instance, as many as five or six of the regional American Baby Bells, so to speak, who had come to visit my office probably in 1994 or earlier, is they all initially felt that they had to have somehow an Irish equity partner in terms of strategic alliance. And I felt at the time, I wouldn't have put it so

forcefully, I discouraged them from thinking like that. There was no question of having to have an Irish dimension, and in fact, having an Irish dimension may not, as I say, may have diluted the impact of full frontal competition on Telecom Eireann.

Q. And your view, in discussion with your colleagues in the Department, senior management, Assistant Secretaries, and with Mr. Brennan, perhaps, your view would have been known?

A. My view would have been known. But I don't want to overexaggerate this. This might have come up only once or twice in a year's period. I wasn't carrying a sandwich board saying, "Thou shalt operate only with an overseas operator". Far from it, actually. And there were circumstances where having an Irish dimension would be a benefit, but I felt that any time I was contacted directly, that it wasn't necessary for any bidder or consortium necessarily to have an Irish dimension.

In the event, from memory, there was only one of the six applicants for the GSM licence that actually did not have some Irish dimension.

Q. And may I ask you this: Would your view have been known to the Minister, for example?

A. I can't guarantee that, but I am sure it would have come up. Actually, I am sure it would have come up, because the Minister equally would have had courtesy

calls from time to time. So from that point of view, I am sure it would have come up. But once again, it's not a point that I might have emphasised time and time again. But my view would have been known, nonetheless.

Q. And I am not suggesting that it's something it's a view which you expressed. It's a view which you discussed with colleagues. I am not suggesting that it needed to be something that had to be repeated over and over again. You had expressed that view?

A. I had expressed that view.

Q. And you believe it's a view you may well have expressed to the Minister as well?

A. I believe so, yes.

Q. And was there any contrary view being proposed within the Department to that view, that there must be an Irish, or a strong Irish dimension?

A. I am not conscious that I heard any contrary view.

And certainly but I can't be certain of that, Mr.

Coughlan, because in a wider session, if somebody raised and lots contested my viewpoint; it wasn't an autocratic Department, and I would have invited contrary comment all the time.

But I would have recalled had the Minister opposed that view, and I don't recall the Minister ever so insisting that there should be an Irish dimension to any particular bid.

Q. So if somebody were to attribute a view being expressed by the Ministry and I use the term "Ministry" to mean Department/Minister, or the administration, or the bureaucracy that one needed to strengthen the Irish side in order to have a successful application, that wouldn't be your understanding of matters?

A. That would not have been my understanding.

Q. And such a view would not have come from you?

A. Certainly not.

CHAIRMAN: You have already alluded to the realpolitik underlying some of these matters. I suppose, whilst taking fully the point you have made, it would be understandable that any incoming new Minister, not necessarily Mr. Lowry, might still have felt a certain reluctance to award such a valuable licence to something utterly outside of these shores in the context of realpolitik.

A. I think, Chairman, you are absolutely right. And I might add to that, too, is that the Irish Business sector, quite correctly, would have seen it as an opportunity, and they would be quite right to have thought so. And there is no question of discouraging them, but what I wanted to do was to scotch the assertion or perhaps the idea that somehow it was absolutely essential to have an Irish dimension.

Q. MR. COUGHLAN: If I may continue so with the text.

And this is the period when you were bringing the Minister the attention of the Minister to the views of the Project Group of the protocol, which you agreed with. And I think you informed the Tribunal that clearly the Minister would have to exercise discretion as, for example, the ESB was a participant in one of the consortia. And I take your point: Even before you knew the make-up of the consortia, you had a general idea of the sort of people who might be interested in applying for this matter who had had informal discussions

A. Absolutely.

Q. Or even using your nose, you might anticipate

A. They weren't under formal starter's orders, but they had there were long-term declarations of intent which we were aware of.

Q. And even from that far out, you were informing the Minister: "Be careful"?

A. Yes, absolutely.

Q. Now, I think you have informed the Tribunal that the Minister readily accepted at all times your advice on those matters, and while he met some participants on issues outside the closed period of the GSM competition or if that competition were to arise during a meeting of another issue, the Minister handled it on no more than a courtesy basis and did not, to your knowledge, ever discuss content which



would be perceived to be an advantage to any such participant.

That's

A. That's my recall.

Q. That's your recall. Naturally, the Minister accepted and fully respected the position that there could be no discussions on the competition with anybody who was a participant in the competition, and notably during the closed period between bid entry and result. In any event, he was not, along with yourself or any other person outside the Project Group, in a position to impart any information of significance.

Now, just if I might pause there for a moment. Leave aside the question for the moment whether you or the Minister was in any position to impart any information which was of significance or benefit to anybody; it was your advice to the Minister, apart from the pleasantries that he might engage in when he met a participant or a potential participant, not to discuss the subject of the GSM project; isn't that correct?

A. That's absolutely correct.

Q. And that was from the moment perhaps before it, even, but from the moment at least that Martin Brennan informed you of the protocol which arose from the meeting of the project team, and that was before the closed period of the competition?

A. It was before the closed period. I can't recall, but

it was sometime clearly it was after we had gotten the green light from Government, so to speak, and the group had to set out their modus operandi, etc.

Now, by definition, that was at least some weeks if not some months well, it couldn't be many months, but maybe, 6, 7, 8 weeks; I can't recall but it was around that time. And as I say, it's that but I was particularly conscious of the perception because this was a competition that was being conducted to some extent in the full limelight of, quite correctly, media interest.

So I was conscious of the fact that I had a Minister who was a relatively new Minister, that somehow he might be somewhat compromised by finding himself in a situation where, while he may not have put a foot wrong in reality, the perception might have been there that he did so.

Q. And can I take it that and it being you understood it and perhaps was your duty to advise and protect your Minister in that regard that not only had you advised him so, and you understood that he accepted your advice wholeheartedly, but this was before the closed period and during the closed period and up to the time the Government announced a decision; isn't that correct?

A. That's my recall.

Q. And can I take it that as the Government decision was

to permit negotiations to commence with Esat

Digifone

A. Mm-hmm.

Q. that, or can I ask you, what would be your view or what was your view about any contact with people until the licence was actually awarded?

A. I didn't feel the Minister was particularly held at that stage. No issue arose, from my viewpoint, right up until the close to certainly within weeks of the licence being signed in 1996, where the Minister became involved in any way, to my knowledge, to licence negotiations.

This licence perhaps just rather than divert in any way, actually, so but I didn't feel, Mr. Coughlan, that once the Government had taken a decision, that somehow was the Minister's prerogative, once the winner of the competition, which was given exclusive negotiating rights to negotiating with, in law, the Minister.

Now, in practice, it was going to be the Department with advice from the Attorney General's Office; but I wouldn't have felt that the Minister, beyond formal Government decision time, was held by that protocol any longer. In practice, as far as I know it didn't arise; but in principle, I would have said, had he wished to do so, and involved himself more directly in licence negotiations, he would have been quite within

his rights to do so.

Q. In licence negotiations?

A. Yes.

Q. But in the strict context of licence negotiation?

A. Absolutely, yes.

Q. And of course even from a perception point of view, it

was in the strict context of licence negotiations;

there could be no danger of, first of all, a favour

being done or a favour the perception that a favour

was being done. Isn't that correct? It was kept

within the strict context of licence negotiations?

A. Absolutely.

Q. Now

A. I might say there by way of codicil of sorts, is that

I saw the Department's role, to the extent that I was

involved in it, which would have been very limited,

but I saw the Department's role in licence negotiation

is to look at this was an allocation of a scarce

resource. This was giving a privileged seven-year,

effectively, duopoly position, and it's something that

the State's position had to be guarded ferociously in

negotiations, which Sean McMahon, I believe, did an

excellent job. So it was the State's interest that

should be guarded. I am not conscious of Mr. Lowry

showing the slightest interest at any stage in these

licence negotiations.

Q. Until

A. Perhaps the very end, at the very end, yes.

Q. And we'll discuss that at a later stage, as to whether it was in the context of licence negotiations he had an involvement, Mr. Loughrey. But that's something we'll come to.

A. Fine.

Q. Now, I think you were asked by the Tribunal for your role, direct or indirect, together with your knowledge of the involvement of any other person, in the appointment of Andersen Consulting as consultants to the Project Group.

And I think you have informed the Tribunal that you had no direct role, or indeed indirect influence, in the appointment of Andersen Consulting of Copenhagen as consultants to the Project Group. This appointment was left to the discretion of the group, but because of the scale of the consultancy, would have required the approval of the Department of Finance.

You can recall that you were informed at the time that Andersen had already established an acknowledged track record in the area of competitive processes for the award of mobile phone licences. The appointment of Andersen followed the formal competition under the supervision of the Project Group and subsequently signed off by the Department of Finance.

They went through the procurement

A. They went through the procurement process, yes.

Q. Now, I think you were asked by the Tribunal for your precise understanding as to the services to be rendered by Andersen Consulting and the precise terms of their brief.

And you have informed the Tribunal that your understanding of Andersen's role is that they would provide independent expertise so as to assist the Project Group in the selection process from start to finish. While there had been outside advice already taken from Dr. Roger Pye, partner in KPMG London, in the initial design and approach to the competition, Andersen's expertise added their experience and finesse to understanding process design issues.

In addition, their being intrinsic members of the full Project Group enhanced greatly the evaluation process.

The particular competencies in the quantitative/qualitative evaluation of the participants clearly enhanced the professionalism of the bid process, but the final say-so as to the recommendation should go to the Minister, and Government would of course rest with the Project Group. Andersens had the role of drafting the final report, which would record the detailed assessments of the various individual sub-groups.

In summary, design advice on the process was taken on board from a senior London-based consultant. That's Mr. Pye.

A. That's right.

Q. A subsequent competition for process consultants led to the appointment of Andersens of Copenhagen, who had expertise in this area.

So, if I might just am I correct in understanding your understanding of matters as of that time was that the decision, or sorry, the evaluation was to be carried out by the Project Group with the assistance of these consultants in Copenhagen?

A. I was always quite clear that the ownership of the final decision recommendation had to rest with the Project Group.

Q. With the Project Group.

Now, I think you were asked for your knowledge, direct or indirect, at any time in the course of the evaluation process, of the weightings attached by the Project Group to the evaluation criteria and the source of your knowledge, if any.

And I think you have informed the Tribunal that during 1993/1994, as Secretary of the Department, you would have influenced the emergence of the priority criteria which would have been put to Government in late 1994 as appropriate for the selection of the second GSM operator. In November 1994, you would have approved of the criteria and the order of their relative importance which was submitted to Government at that time.

It is important to stress that information on the competition, and notably on the assessment criteria and their weightings, as well as the submissions of the applicants, was kept to a minimum and strictly on a need-to-know basis. This need-to-know basis applied to everybody. There was even compartmentalisation within the project team. As Secretary General, you were of course kept informed of progress in line with the planned critical path and did not seek any information other than that which would be appropriate to keep the Minister and ultimately the Government informed that the process was making satisfactory progress.

"I was not therefore in a position and nor would have been in any way appropriate to report on the prospects of individual applications. In devising this competitive framework, the Minister at all times agreed with the Department's proposal, and this blackout of specific information applied equally in the Department of Finance and to all Ministers and their programme managers and other advisers."

"With Assistant Secretary Sean Fitzgerald and Project Group Chairman Martin Brennan, I had emphasised the necessity of confidentiality and that vital information to be used in the assessment of the applications should be confined to people on a need-to-know basis. With this in mind, I quite



deliberately did not seek to find out the precise weightings that were attributed to the desired criteria, but to the best of my recollection, I was assured that the weightings did reflect the order of priority as set out in the memorandum to Government."

To the best of your knowledge, you did not know of the precise weightings until you had sight of the final report of the group in late October 1995. As to the subsequent reweighting of the evaluation criteria, "I can recall being informed that as the original weighting given to the fee was relatively modest, the subsequent adjustment in percentage terms would be such as not to disturb in any meaningful way the major emphasis of the declared priorities."

A. Mr. Coughlan, that's rather wordy, and a hint almost of "holier than thou" in it, and it's certainly not intended to come across that way. I just meant in a practical way at the time. I can hardly recall any set of information that the inner management group, in other words myself and the Assistant Secretaries, did not share freely with one another; but I very deliberately made sure that that information was withheld, not because I wouldn't have trusted my colleagues with my last ounce of gold, so to speak, but because once again the perception, if staff on the corridors know and they are all good staff, but they know that information is freely available by

definition, in the exchange of information, whether it's casually in the corridor, at coffee time, etc., I felt there was always a risk that somehow, indirectly, something could escape.

So that's why I wanted to emphasise, not in any sense of self-importance, that I didn't want to be informed.

So the message was loud and clear.

Q. If we might just pause there for a moment. It was your view that, as regards this process, information which all information about the process was to be dealt with on a confidential basis?

A. Absolutely.

Q. That's the first thing. Secondly, there were certain matters such as the critical path. We might just explain for the public, that was a path as to set out what has to be done at specific times, or by specific times?

A. That gets it perfectly. The textbook says it's a logical sequence of events to make sure that you get the optimum result in the shortest possible time.

Q. And that is the type of information which would not be, in the context of you knowing it or informing your Minister, be so confidential that it should not be imparted, that

A. And I can't think of any circumstance, Mr. Coughlan, where he would not be entitled to so know how the process was going, but without any breaking of

confidentiality.

Q. That they have reached a certain stage or they intend reaching a certain stage by such and such a date?

A. Correct.

Q. But all other information about the process was to be confidential, as you understood, or as you wanted it to be?

A. As I want it had to be.

Q. And within that corral of confidentiality, there may even have been what might be considered to be more sensitive information?

A. That's right.

Q. For example, the weightings?

A. Well, the weightings would have been absolutely critical.

Q. And you would not have wished that information to have got out at all?

A. I think it would have as accounting officer, I may have had to cancel the competition, if any critical knowledge emerged, I think I would have had to now, it's not something I haven't reflected on, I haven't thought about it at all, but you are into really serious territory here. And as accounting officer, given the scale of the transaction, is I would have had to call a halt.

Q. If any piece of that sensitive information

A. If any piece significant piece.

Q. any piece of that information had leaked?

A. Well, I don't want to sound in any way Jesuitical, Mr.

Coughlan, but in a sense, if something escaped of such

minor consequence, like a grain of sand in the beach

at Dollymount, something like that, clearly one would

have to operate on a common-sense basis; but if it

were such that would give advantage to any particular

applicant, then I think this would be quite serious.

Q. Well, let's not get into the detail, because I can't

ask you in a vacuum to make a judgement. But if it

came to your attention that what was in the category

of sensitive information became available to somebody,

it is at least something, as accounting officer, that

you would have to consider and make a judgement about?

A. Oh, absolutely.

Q. And so advise your Minister?

A. Of course.

Q. And the Government?

A. If it came to that, yes.

Q. Now, as you have said, and you have informed the

Tribunal in your response to the question about

weightings, you considered weightings to be a

sensitive matter?

A. Absolutely.

Q. And of the highest degree of sensitivity, perhaps?

A. I think access to the weightings table would have been

I can't think of anything that would have had a

more damaging effect on the competition.

Q. And as we know, and as you have emphasised here, about how the weightings were, as regards the licence fee, were revised or after the figure of the cap of  $\frac{1}{2}$ 15 million was placed on the matter, you were satisfied that there was no distortion because matters were still in descending order as published, the criteria

A. So I was informed, but like anybody, I am not claiming any particular mastery over mathematics, but it's not a difficult sum to construct, broadly speaking a descending order that will tot up to 100. It's not a difficult matter. But I didn't inquire, but I was assured

Q. I appreciate that, and I am not asking to you inquire. You were keeping yourself out of that particular area?

A. Absolutely.

Q. For good reasons, as you saw it. But if and as we have a situation which arose in the course of this particular competition, the Tribunal, and it's something I'll come back to with the document, the Tribunal, in the course of going through documents which were the documents of a Mr. Jarlath Burke, who described himself as chief regulatory counsellor to Esat Telecom, sent by fax the front page of one version of Mr. Van Miert's letter to a director of Esat Telecom which contained a reference to the actual

weighting which then prevailed. Is that a matter which you would have had to consider and make a judgement about?

A. That's certainly a matter I would have had to consider and make a judgement, yes, Mr. Coughlan. I am aware, I must say, in a sense, because I have read the documentation on this. I have read the documentation on this. Of course I am so aware of what was discovered by the Tribunal. It's hypothetical, clearly, because it wasn't put to me at the time.

Q. Of course.

A. But clearly it's a matter, had it been brought to my attention at the time, I would have had to consider, of course.

Q. And on the basis of what you have just informed us, I am not asking you to make the judgement, because it's hypothetical, but at the time, it is one which could have caused you to arrive at the view that you would have to advise the Minister that the competition would have to be cancelled?

A. No, I don't believe so, Mr. Coughlan.

Q. You don't believe so? Why is that? When did you make this judgement, now, Mr. Loughrey?

A. I suppose it's the first time it's been put to me. It's just been put to me now.

Q. These documents bear with me these documents

MR. NESBITT: Perhaps Mr. Coughlan would let Mr.

Coughlan answer the question instead of badgering him.

CHAIRMAN: I don't think, Mr. Nesbitt, we really require that intervention. I am not conscious of anything other than a very civilised exchange between witness and counsel to date.

MR. NESBITT: I am sorry, Mr. Chairman. I withdraw the remark.

MR. COUGHLAN: If I am badgering him, I apologise.

A. I recognise the spirit of help I am getting from counsel, but equally, Mr. Coughlan, I don't feel in any way badgered. But I recognise the concern of my counsel.

Q. MR. COUGHLAN: Very good. Perhaps you will explain to us, if it had brought to your attention, we'll take it step by step.

First of all, is it a matter which, if known to anybody, should have been brought to your attention?

A. Absolutely.

Q. Very good. Now, there can be no doubt that it was definitely a category of in the category of confidentiality?

A. Yes, I would see that.

Q. And not only in the category of confidentiality, but at the higher level of sensitivity in relation to confidentiality, isn't that correct, as you have just informed us?

A. Yes, I have said quite clearly to you that I would

regard access to the table of weightings as the most I can't think of anything more damaging. But I would put the information in that letter as, I have had access to, not in that category, because it was just one, let me say, one hint at one item in a descending order. And what I would say to you is I am not a statistician by training, but I imagine that any one of the six applicants would have had their own probability table set out as to the weightings.

Actually, frankly, they wouldn't have been competent bidders had they not done so. So I don't believe that one hint at one of the lesser weightings actually would have holed the process before the water line.

Now, it is a hypothetical question you are putting, and I accept it in that spirit, Mr. Coughlan. But in the same spirit, I can't say precisely how I would have judged at the time. But if you are asking me to say had I been there at the time, had I been so advised at the time, I do not believe that the process, as I say, would have holed below the water line.

Q. What considerations would you have given to this matter in arriving at a view?

A. In arriving at a view like that, I would have to say is, would it confer such an advantage, would it confer such an advantage as to give any one of the applicants sufficient information that they could use by way of



leverage in their application? And I do not believe

that that would have been the case.

Q. Would you have considered as to, first of all, how an applicant could have such information in their possession? Is that a matter which you would have taken into account?

A. Of course I would have certainly looked, to the best of my ability, at the trail which might have led to, as I understand it, DG IV allowing such a letter to leave their files, actually.

Q. How do you know that?

A. Well, from my reading, I perhaps, Chairman, can I apologise to you anybody if I have so wronged them, but that was my scanning, I thought, of the information that was available and was reported in the newspapers.

Q. That is not the information which is available to the Tribunal.

A. Well, apologies. I have just taken it as an impression. Perhaps, Mr. Coughlan, you can put me in the picture and I could help you further.

Q. First of all, you'd have had to assess how an applicant had such sensitive, at the highest level of sensitivity, isn't that correct, in the confidential workings of the Project Group, how they had it in their possession; isn't that right?

A. From what I have learnt from the Tribunal papers, yes.

Q. You had have had to consider that?

A. Pardon?

Q. You had have to consider that?

A. Of course.

Q. You would have had to consider the question whether the project or the whole process was compromised and as to whether there was other information in the possession of the applicant, wouldn't you?

A. No, I would have had to consider the basis that I would have to, on the basis that there was evidence that some information was available to one of the bidders, but I am not sure I could immediately deduce from that that somehow more information was available to them. I fail to see the logic.

Q. Isn't credibility a major issue when an applicant has what you have described as being at the higher level the highest level of sensitivity in the project, or in the process, an applicant has that in their possession; not just a situation and not just in a situation where one person has it, but is sending it to a member of the board of that company. Now, would you have taken that into account?

A. I would have taken all factors into account.

Q. Would you have considered the credibility of somebody who had such information in their possession?

A. No, I would not, Mr. Coughlan. Credibility would not have been my first port of call. My first port of

call would have been is, would this information have given a significant unfair advantage to a bidder? And that would have been my only that would have been my touchstone.

Q. Explain that to me.

A. My primary consideration would have been is the availability of information, did it confer an advantage of such proportions that would have rendered the competition effectively null and void?

Q. I see. And what was your view about the weightings?

A. Perhaps you could help me with that question. I am not quite sure what you mean.

Q. Well, you see, you have given two answers, if you maybe I am wrong, Mr. Loughrey. You have informed the Tribunal that you considered access to the weightings table as to be of such a level of sensitivity, and if that was available to somebody, you, as accounting officer, would have to consider as to whether you'd advise calling a halt to the whole competition?

A. That's correct.

Q. You have then informed the Tribunal that it's not a very difficult thing to do, I think you said, for people to have a guess when they look at something in descending order and try to work out, or they'd all have their own rough idea of what they think the weighting

A. I think it would probably be more scientific than that. I actually would be surprised if most bidders didn't a statistical probability table of what the weightings were. I'd be amazed if they hadn't, frankly.

Q. So if that be so, if it was being approached so scientifically, any one piece of information in relation to the weightings would be of assistance to the statisticians assisting the scientific approach to the weightings as being considered by each applicant; is that right?

A. That would be correct, yes.

CHAIRMAN: Mr. Coughlan, I am a little concerned; I think this is something that is there are a number of issues that you'll be coming back to, and I think, in fairness to the witness, when we actually have the documents and the detailed circumstances that have been inquired into, it might

MR. COUGHLAN: I'll be coming back in great detail to it, indeed, Sir.

Q. If I might, just for your assistance, when you are considering the matter, I think you may have described it, and I know perhaps inadvertently, as being a minor weighting. I don't think it was at the time, it had the same significance as tariffing at the time, but it's something we can look at at a later stage.

A. Absolutely.

Q. Now, I think you were asked by the Tribunal of your role in and knowledge, direct or indirect, of the intervention of the European Commission, including the manner in which the intervention was resolved, the capping of the licence fee at 15 million, and the reweighting of the evaluation criteria in the light of the capping of the licence fee.

I think you have informed the Tribunal that your role and knowledge of the intervention of the Commission as to the structure of the licence fee is set out in your reply to 7A. As to the subsequent reweighting of the evaluation criteria, you can recall being informed that as the original weighting given to the fee was relatively modest, the subsequent adjustment in percentage terms would be such as not to disturb in any meaningful way the major emphasis on the declared priorities.

I think you were then asked for your detail of all information provided to the applicants at any time prior to the 14th July 1995 in conjunction with the suspension of the evaluation process, including in particular regarding the following:

1. The manner in which the Department hoped to resolve the Commission's objection to the auction element of the competition.
2. The manner in which the Department hoped to resolve the Commission's concerns regarding the

transparency of the evaluation process.

3. The date to/or which it was likely that the process would be deferred.

4. Any other matter relevant to our touching on the evaluation process.

And your answer: You were not aware of any information provided to the applicants prior to the 14th July 1995 on the suspension of the evaluation process and the deferral of the final date on which bids were to be received.

Then you were asked your understanding of the evaluation model adopted by the Project Group and in particular, a) the qualitative and quantitative approaches

B. What these approaches entitled.

C. The distinction between the quantitative and qualitative approach.

And you have informed the Tribunal that Martin Brennan, as Chairman of the Project Group, kept you informed from time to time as to the progress of the GSM licence process. Before Andersens had formulated their evaluation model, you can recollect that both Martin Brennan and you had agreed the evaluation process should be self-evidently non-discriminatory, as well as being robust, so as to stand up to possible subsequent litigation by disappointed bidders.

In any event, Andersens, in your opinion, designed

such a model. It may be helpful to point out that any competitor framework which involved the exercise of discretion or qualitative judgements is inevitably more open to query than a straight option. The decision to run a so-called beauty contest, based on criteria other than maximising cash receipts for the Exchequer, was sponsored by the Department in line with its declared policy of facilitating the rapid opening up of the Irish telecoms market at the least possible burden on the consumer.

The Department was very aware of the probable pay-back calculations of applicants and that a straight auction which elicited high fees would, all things else being equal, lead to higher charges for consumers.

While we could not have possibly foreseen the 3G debacle, the underlying auction business model is essentially the same. Successful bidders find themselves attempting to recover very high licence fees at the expense of the consumer.

A. Mr. Coughlan, once again it might be helpful because it's sort of a throwaway small paragraph there. What I say is that the exercise of discretion is inevitably more open to query than a straight auction.

I can say that, from experience over the years, that nobody ever contests a straight auction, whether it's by way of opposition in the Oireachtas or in the media. It's almost as good, if I may say so, as a

High Court judgement. It's no longer open to criticism. But the minute, if I may say so, one runs a competition on discretionary criteria, everybody becomes an expert, and inevitably one is wrong. I don't see that with any sense of I don't say that with, by the way, any sense of feeling wronged or in any way that is life, actually. But having said that, nonetheless, the Department felt it was correct to go for a beauty contest.

Q. I understand. I understand. Now, I think you continue that your recollection of the model as explained to you at the time by Martin Brennan was one which involved both a) qualitative and quantitative approaches.

In short, quantitative measures were to be used as far as possible where precise mathematical measures could be used. These were identified and isolated. Clearly many elements of comparing bids would be qualitative, and an aggregate judgement could therefore rely on overall qualitative assessment. This qualitative assessment would of course use the quantitative comparisons to the extent possible. The question of credibility and other sensitivities was explained to you by Martin Brennan when informing you of the Project Group's unanimously agreed result.

In particular, you can recall him explaining to you that certain aspects other than catered for in the



agreed evaluation model could be addressed in licence negotiations. The Project Group adhered strictly to the agreed evaluation model. To preserve objectivity and fairness, the evaluation model had to be designed, discussed and agreed before the closing date for bids.

This was essentially not just from the point of view of correctness, but also to prevent any possibility of consciously or otherwise of changing the rules as the work of assessments progressed.

Then you were asked to provide details of the following: Firstly, details of all queries raised by the Department in the course of the Esat Digifone presentation on the 12th September 1995 regarding the financing of the Esat Digifone consortium.

2. Details of all queries raised by the Department in the course of the presentation addressed to the funding of Communicorp's equity participation in Esat Digifone.

3. Details of all queries raised by the Department in the course of the presentation regarding the letter of comfort provided by Advent dated 10th July 1995 and appended to the Esat Digifone application.

4. Details of all queries raised by the Department in the course of the presentation regarding the terms governing the offer of £30 million to fund Communicorp's equity participation in Esat Digifone as referred to in the letter of 10th July 1995 from

Advent International to the Department.

5. Details of all queries raised by the Department in the course of the presentation regarding the commitments provided by the institutional investors in the Esat Digifone bid.

And you have informed the Tribunal, "While I have a general awareness of the series of meetings to be held with the applicants in September 1995, I had no direct involvement in any of these meetings. As a result, I have no knowledge, either directly or indirectly, of any of the details sought in Question 3.

Can I take it, therefore, that you were aware that these meetings were going on, in general terms only, the presentation meetings?

A. I was aware that they had been planned, yes.

Q. And nobody had spoken to you after each one, or after all of them, to say "Meetings have finished now"?

A. Perhaps I should explain now. I was on holidays during that September, so I wasn't there in the event.

But I wouldn't have expected to be so informed, because that was part of the spirit of need-to-know basis. But in the event, I wasn't there in any event.

Q. When were you on holidays in that period, Mr. Loughrey?

A. Perhaps it might be

Q. If I can help me?

A. It might be helpful. I actually went to the trouble.

My own diary went missing, but my wife keeps a very good diary too, so I checked with her, and I discovered that it may be germane to something that may come along later, actually, but I'll leave that clearly to your discretion, Mr. Coughlan. But I was ill during August, and I tend to save all my leave for one major vacation. So we flew to the US on the 2nd September and didn't return to the office until the 4th October. I flew back on the 3rd October.

But prior to that, I had been ill from the 22nd August. So in other words, not that my presence was required in this particular transaction, because it was during the closed period; but I would have been missing from my desk from the 21st August to the 4th October.

Q. Thank you very much.

CHAIRMAN: It's probably as good a time, Mr. Coughlan, to break if that suits you. Five past two, if that's convenient to you.

Mr. Loughrey, thank you very much.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF EXAMINATION OF JOHN LOUGHREY BY

MR. COUGHLAN:

Q. MR. COUGHLAN: I think we had arrived at about Question 20, I think, in the memorandum, Mr. Loughrey, before lunch. And I think you were asked to indicate

the following:

1. Whether the Department requested the Esat Digifone consortium at any time prior to the 25th October 1995 to provide the Department with a copy of the offer of  $\text{€}1230$  million Irish facility to Communicorp by Advent International referred to in the letter dated 10th July 1995.

2. Whether a copy of the offer was provided to the Department, and if so, please indicate the date on which it was received, and please furnish the Tribunal with a copy of the document.

3. Whether any inquiries were made by the Department at any time prior to the 25th October 1995 as to the terms governing such offer, and if so, when, and by whom, and kindly identify where such inquiries were recorded.

4. If such inquiries were made, please provide details of the information provided regarding the terms of the Advent offer, and please also indicate when and by whom such information was provided, and kindly identify where such information was recorded.

And you have informed the Tribunal that you had no involvement or knowledge in the reported offer by the private equity company Advent to Esat, so as a result, you have no knowledge of any of the information sought by the Tribunal in this regard; is that correct?

A. That's correct, Mr. Coughlan.

Q. I think, then, Mr. Loughrey, you were asked for your knowledge, direct or indirect, of the progress of the actual evaluation process (direct or indirect) to include the sources of such knowledge, and in particular but not exclusively in relation to the following: And I think you then commence your response to this particular query.

"Once the process was underway, I had no hands-on dealings with the work of the Project Group. I confined my inquiries as to the process given the indicative critical path mapped out for the process culminating in a decision of the 31 October 1995. At no stage did I inquire as to the relative merits of any of the competition participants, and held this line quite deliberately so that the Department's policy of information only being available on a need-to-know basis would be upheld. As a result, I was not, nor could I have been in a position to inform the Minister as to any possible outcome of the competition until the Project Group had completed their assessment.

A. Mr. Coughlan, perhaps just to intervene, just if I could clarify that when I reread that. Once the process was underway, I think when I was drafting that I had in mind literally, going back to March, because if one was to read it, once the process was underway from the 4th August, which was the revised starting

date, in practice, I was hardly there any of the time.

It's not any great merit on my part because I scarcely was there during that time, but it's not clear, but I had intended I didn't participate in any way until I had some involvement in the DG IV van Miert letter.

Q. I understand that.

A. Other than that, that stands.

Q. That stands. And I'll just continue on, and we can clarify as we go along.

A. Of course.

Q. What you wish to convey is that once the process began around March, let's say, of 1995, apart from your involvement, appropriate involvement dealing with the Commission and Mr. Brosnan and matters of that nature, to move things along, you had no hands-on involvement in the process?

A. Absolutely.

Q. And am I correct in understanding that your only information or interest related to the indicative critical path are things moving along

A. That gets it perfectly, Mr. Coughlan, yes.

Q. I think you have informed the Tribunal that on the 25th October 1995, the project team came to their clear conclusion, and that is Esat/Telenor consortium should be granted exclusive negotiation rights with the intention of leading to the award of the second mobile phone licence. And can I take it that was the

first you knew of the outcome of the deliberations of the project team?

A. That is my recall, Mr. Coughlan. It is possible, it is possible, and I am saying this, that I could have known a little earlier. It is possible I might have known in a day or two leading to, because somebody might have said to me, Sean Fitzgerald might have said to me, "Look, it's looking like A, B and C", but

Q. I understand, but what you were or am I correct in understanding you that and I am not holding you to the 25th October 1995, but I am talking about a few days around that time; would that be a fairer way of

A. Absolutely.

Q. I am not holding you to that, but a few days around that time was the first time that you had an awareness that there was an outcome or a likely outcome?

A. That was the first time.

Q. Would that be

A. That would be fair. That would be fair.

Q. Now, I think you have informed the Tribunal that when you were informed of the result by the Chairman, Martin Brennan, you proceeded to the Minister's room where you informed him of the result and suggested to him that he should attempt there and then to get Government political acceptance of this result which could be confirmed at a subsequent meeting of the

Government. You suggested that he clear the decision with the Taoiseach, the Tanaiste and the Minister for Social Welfare, as leaders of the parties making up the then Government, and of course, the then Minister for Finance as well.

I think you have informed the Tribunal that you were with the Minister in his room when he made some of these calls, although it wasn't possible to contact all Ministers right away. The same evening, the Minister informed you that he had political approval of the result and that it would be taken at a Government meeting the following morning.

On the 26th October, the Government endorsed the effectively political decision which had been taken the previous evening.

In allowing the least time between the project team's conclusion and formal political and Cabinet approval, you were conscious that there were no shrinking violets among the six consortia seeking the licence.

For senior executives in these consortia who had committed significant resources, both cash and time, to the GSM process, the opportunity cost was very high, and a natural inclination might have been to lobby for an alternative result if there was sufficient time lapse between the project team's analysis and political approval. That lobbying would have been understandable because of the high stakes



involved.

"While I was quite sure this lobbying would not in all probability have been based on any attempt to use improper influence." You were not prepared to let any decision vacuum to develop as a basis for possible mischief. You were in a position, however, at all stages, to inform the Minister as to the progress of the process. He would have been of course fully aware of the required deferral of the original closing date due to the Commission's intervention, and notably that a Commissioner Karel van Miert on the 27th April 1995.

I think specifically then you deal with matters raised by the Tribunal.

Before I go on to that, it's something we can come back to again

A. Sure.

Q. Mr. Loughrey, but just the 25th October, as a result of what you were told by Martin Brennan, you went to the Minister?

A. That's right.

Q. And you advised your Minister, as was your duty, that there had been an outcome of the project team's evaluation; is that correct?

A. That's right, Mr. Coughlan. I may have, because if there was any significant decision required, I often dictated a very short note. I seldom went to the Minister's office without some piece of paper in my

hand.

Q. We'll come back to that when we're dealing with documents, Mr. Loughrey. That is correct, there is a document, there is a short note of yours, and we'll come back to deal with it.

But just to get the sequence of it, you received information from Martin Brennan. You went to see the Minister?

A. Yes, I did.

Q. And you informed the Minister of the outcome of the evaluation of the project team?

A. Yes, I did.

Q. And you then advised him, is that correct, that he should seek I am not quite sure what; is it the political approval of the leaders of the three parties? Would that be

A. I wanted him to get political buy-in as quickly as possible. I felt that, for instance, if it were going to be a formal memorandum to Government, which would be usual for major policy issues, for instance, and even for major transactions, but if there were to be subjected to the normal Government memorandum system, which would effectively allow two weeks for all Ministers, for instance, to comment on it, would be circulated, for instance, typically on a Thursday for a Tuesday's Cabinet meeting or perhaps a Friday for a Wednesday's Cabinet meeting, the normal rules

applying. I felt there were risks in that.

Now, one might say it's ultimately up to Ministers and Government to decide what political risks were there, but I felt, in advising the Minister, that there would be risks. I don't want to and I am sure you will understand, to be drawn into but my experience in the past had demonstrated where such a vacuum exists between an emerging result and a political decision, there can often be room for manoeuvre, let me put it this way, so I am not happy to be drawn into my experience as an Irish civil servant.

But for instance, I knew from my counterparts in Whitehall, they'd often discuss things with me. For instance, classically, the well-documented Westland Helicopters case, which showed Michael Hesseltine and Margaret Thatcher and the British Tory government nearly tearing themselves apart in public. Leon Britton went, Michael Hesseltine went. In fact, they nearly imploded on an issue like this.

So what I wanted to do in advising the Minister was to make sure that it was cleared politically as quickly as possible. Now, it might well be that that clearance mightn't have been forthcoming for whatever reason. But the Minister and the Government had every entitlement to take whatever decision they wished to do so, but I wanted to make sure it was presented to them as quickly as possible.

Q. Just to understand the decision-making process, as I think there isn't any doubt about it. This was to be this had been it was Government policy that the decision was to be taken by the Government; isn't that right?

A. Absolutely correct.

Q. No doubt about that?

A. Yes.

Q. And only the Government could alter that policy or take the decision?

A. That's absolutely correct.

Q. And the policy had not been altered?

A. The policy had not been altered, no.

Q. And now of course I understand that your Department was the Department which had been given the authority by the Government to handle the evaluation process, or the competition?

A. That's correct.

Q. With members of the Department of Finance sitting on the project team as well. That was the way it

A. They were valued partners.

Q. Yes. And am I correct in understanding, then, that once that particular project team had finished work,

they were all civil servants, and we'll include Mr.

Buggy and Mr. Riordan in the category of civil

servants; they were seconded to the departments at

that time.

A. Yes.

Q. That they would advise their Minister; isn't that correct?

A. That's correct.

Q. And you of course I suppose in the first instance, of course, advise you as the head of the Department, and the matter will be brought to the Minister?

A. Correct.

Q. And they would make a recommendation; you would probably endorse the recommendation, unless you thought it was a capricious recommendation or something of that nature?

A. It would have needed to have been provocatively capricious, because otherwise I would have no basis to oppose it.

Q. Absolutely. Then the civil servants, with you as the head of that Department, would advise the Minister that "We advise you, Minister, that you should go to Government and recommend to Government that the Government should decide to enter into exclusive negotiations for the licence with, in the first instance, Esat Digifone".

And I think the way it actually went to Government, and then if there is a failure there, with the next person?

A. Yes.

Q. But the decision ultimately was a political decision;

isn't that correct?

A. Yes, it was a political decision.

Q. And notwithstanding that your Minister statutorily was the person who was going to sign the licence with the consent of the Minister for Finance, this decision had to pass Government first; isn't that correct?

A. The Government itself had bound themselves to that, even though you are quite right, in law, the Minister for Transport, Energy and Communications, with the approval of the Minister for Finance, could have taken the decision unilaterally, legally speaking.

Q. Yes. It couldn't have happened in this instance; this had to be a Government decision?

A. That's correct.

Q. And the reason you were advising your Minister to, as I think you used the expression, get it bought into politically in other words, get the three leaders of the political parties in Government involved in this matter is that you were concerned that, if it went through the normal process, that there was room for, I suppose, "mischief" might be too strong a word to describe

A. There was certainly space and time for people to exercise whatever leverage they thought they might have on politicians and Ministers. Now, in my experience, very often that doesn't amount to a lot; but people have a perception that they have such

leverage.

Q. Of course, of course, and I understand that. But in the normal decision-making process, particularly for a major decision of Government, or a major project, if I can put it that way, it would be normal to have a memorandum for Government drafted; isn't that right?

A. Yes, it would, yes.

Q. And in the normal course of events, that would be circulated with all appropriate information to all departments of State; isn't that correct?

A. Yes, it would.

Q. There would be an opportunity for each Department to examine what was happening?

A. Yes.

Q. And for that Department to advise their Minister in respect of any contribution that they thought that their Minister should make to the matter going to Government; isn't that right?

A. Correct.

Q. In this particular Government, because it was a three-party coalition Government, am I correct in understanding that the project managers, particularly the project managers for Mr. Spring and the Taoiseach

A. I am sorry; I missed

Q. The project manager for Mr. Spring

A. The programme manager.

Q. I beg your pardon; the programme manager.

A. For the then Tanaiste, Mr. Spring, yes.

Q. Mr. Sparks, wasn't it?

A. Greg Sparks, yeah.

Q. Mr. Sparks was the programme manager, and Mr. Donlon of the Taoiseach

A. Sean Donlon would have been the Taoiseach's programme manager.

Q. And was it or am I correct in understanding that it was the practice of that Government that matters going to Government would be also given to the programme managers so that they could sort out or minimise political conflict and allow matters proceed to Government and allow Government to progress its work speedily with as few obstacles in the way as possible?

A. That's not incorrect. But the inference might be there is almost that they were a shadow Cabinet, and it didn't operate on that basis, clearly.

Q. No.

A. But issues that might be contentious were very often cleared through the programme manager system, which was an excellent system, but the GSM licence wasn't one of those items.

Q. I know that, Mr. Loughrey. I know that. It didn't even go through the normal decision-making process of Government.

A. Well



Q. Sorry, it went through the decision-making process; it didn't go through the normal decision-making procedure of Government?

A. In both cases you are correct, but if I could deal with them sequentially. In terms of the programme managers, I can't reconstruct the history of that, so to speak, but I imagine there were two forces at work. One is that the programme managers would have known instinctively themselves, and Mr. Sparks, for instance, who you cited, and Sean Donlon, both extremely experienced, and indeed Mr. Sparks was always accompanied by in these instances by William Scally, equally experienced; they would have known automatically that it would have been inappropriate to interfere.

Possibly, if it's a pull/push arrangement, I equally, while I had I held the programme managers and the ones cited particularly in the highest esteem, did not want anything to do with this competition to be shared on any basis whatsoever. So that's probably the reason why the programme managers didn't feature in this.

In terms of Government procedure, yes, clearly I recommended to Mr. Lowry that effectively he should go the political rather than the procedural route. But bearing in mind that the quartet we are talking about comprised the Taoiseach, the Tanaiste, the leader of

the then Democratic Left Party and the Minister for Finance is I didn't feel I was overstepping the mark, because the Taoiseach for instance, purely procedural, as the keeper of conscience and the guardian and the sole decision-taker of how the Government conducted its business and what went on a Government agenda, if he was happy and willing to go along with this process, that was fine. Equally my suggestion could have been rebuffed, and I would have been quite happy to go in the normal way.

Q. Did Mr. McCrea know that you were advising the Minister to proceed along these lines?

A. Mr. McCrea would have known at the outset that I would not have shared this process with programme managers as well. And not to infer in any way that somehow that this was a reason, anything based on lack of trust; nothing could have been further from the truth.

It was just in the general principle of keeping the wagons circled up as tightly as possible. He would have been aware of that.

Equally, whether on the day of the 25th October he would have been so aware that I was urging this particular approach, I am not sure.

Q. Well, it's something we'll come back to anyway when we go through the documents and when we come to those dates again. I was just interested to just get some indication from you of exactly what did happen, as far

as you recollect.

It's something when we do come back to it I'll ask you to bear in mind and perhaps consider Mr. Colin McCrea appears to have got the evaluation report, and Mr. McCrea was of course Mr. Lowry's programme manager; isn't that correct?

A. Oh, he was, of course, yes.

Q. Just on that point, am I correct in understanding the position to be that civil servants by their nature tend to be cautious, and that's probably a good thing in a civil servant; isn't that correct?

A. It is, of course.

Q. Double-check things if necessary, make sure that everything is correct before it proceeds for decision; isn't that right?

A. In this day and age it doesn't sound like a virtue, but in practice, it is.

Q. Of course, this isn't necessarily a criticism, Mr. Loughrey, but would you agree that by advising your Minister as you did, the procedure for matters to be circulated amongst other departments meant that civil servants in other departments, in advising their Minister "We are going to Cabinet to decide on a major issue" were effectively excluded from scrutinising what had happened here?

A. In general terms that would be fair comment, but in this case I don't believe it's warranted, for the

simple reason is that the key players involved were all in the Cabinet committee, number one, and the key players who took the decision, I didn't see many Government departments that somehow would be excluded from what I call a significant interest.

For instance, if we had taken a decision, for instance, on something that had wide social connotations, for instance, free transport policies for instance, that social departments, economic departments would all have been involved of course there is no question, but I would have been quite cavalier in the treatment if it had come to something like that, but in the tight and the very specific interest that there was in this particular transaction, I don't believe I overstepped the mark.

Q. Now, I think the Tribunal asked you of your knowledge of the outcome of the quantitative evaluation; isn't that correct? This is on page 28.

A. I have it, yes.

Q. I think you have informed the Tribunal that you had no knowledge of the outcome of the quantitative evaluation at any stage of the process, and indeed were not so aware of the details of the quantitative evaluation until you had read the final report; is that correct?

A. That's correct.

Q. You were then asked about your knowledge of the

difficulties encountered in scoring certain indicators in the course of the quantitative evaluation, and you have informed the Tribunal that you had no knowledge of any difficulties encountered in scoring certain indicators in the course of the quantitative evaluation; is that correct?

A. That's correct.

Q. Then you were asked for your knowledge of the decision that the qualitative evaluation should be decisive and should take in precedence to the quantitative evaluation, and your response to that is that you were always aware from your discussion with Martin Brennan that the evaluation model could not have been designed in such a way as to confine comparisons to criteria that could be measured precisely and on a comparative basis by quantitative measures.

In the circumstances, there were so many of the key elements of the bidding in the circumstances, where so many of the key elements of the bidding requirements called for qualitative assessment, it followed that in aggregate the qualitative assessment could be decisive.

You were then asked for your knowledge of the decision not to score "Other aspects" and in particular the indicators of credibility and sensitivities.

And you have informed the Tribunal that you had no prior knowledge of the decision not to score the other

aspects, and in particular the indicators of credibility and sensitivities. The question of credibility and other sensitivities was explained to you by Martin Brennan when informing you of the Project Group's unanimously agreed result. In particular you can recall him explaining to you that certain aspects other than catered for in the agreed evaluation model could be addressed in licence negotiations. The Project Group adhered strictly to the agreed evaluation model.

Can I take it so, Mr. Loughrey, that your responses here are in conformity with what you have already informed the Tribunal, that you had no involvement or knowledge of the work the day-to-day workings of this project team?

A. That's correct, Mr. Coughlan, yes.

Q. You would have known on what date something might have been achieved or that they were on track to, for example, have meetings with the presentation meetings; you might have known that?

A. I now know there were far more meetings of the PT GSM, or whatever the acronym is, than I was aware of. So in other words, is I think I was only aware of Martin Brennan informing me from time to time, both before and after. And bearing in mind I wasn't there for a six- or seven-week period that yes, we are broadly on track, we'll be disappointed if we don't come in

before the end of October. No more than that.

Q. That sort of general type of information?

A. Yeah.

Q. And then I think the Tribunal asked you whether you were kept informed of the trends and/or rankings for the evaluation from the evaluation process during the course of that process, and if so, the precise matters of which you were informed, by whom you were informed and when you were informed. If you were so informed, the identities of all persons to whom you relayed any such information.

And you have informed the Tribunal, "See answer to Question 17 above. As I was not informed as to the rankings of any of the bidders during the course of the evaluation", you were not in a position, even if you had wished to do so, to inform anyone else as to the emerging trends in the competition.

A. Correct.

Q. And again, is that in line with your thinking as to how this competition should have been run and was indeed progressing?

A. Precisely.

Q. Now, I think the Tribunal asked you, Mr. Loughrey, the date or approximate date on which any person by whom you were informed of the final result of the evaluation process.

And we have touched on this already, so I'll just deal

with it to the best of your recollection, you were informed of the final result of the evaluation process by Martin Brennan on the morning of the 24th October 1995. Now, you believe that within a day or so or two of that, you may have had some

A. That's not a typographical error. At the time when I drafted this, I hadn't consulted with anybody else.

And that was my recollection. In fact, I was wrong.

Q. You think that it was within a day or so of this?

A. Yeah, exactly.

Q. It was around that time?

A. Around that time.

Q. And that was the first time that you were aware of the result, or the emerging result; is that correct?

A. That's the first time that I can recall. It may well be I got an inkling, but it didn't stay with me. In other words, I once again I would say this, Mr.

Coughlan, and it's not Chairman, I want to be very careful what I say here, in the sense I am not trying to wash my hands of anything. I take full responsibility for the evaluation and for the outcome.

And that's as it should be. I was involved in all times when there was perhaps a critical issue involved or when there was a major decision.

As I might have indicated this morning, actually, with the equivalent of 22 sections headed by a Principal Officer and another perhaps nine or ten headed by



professional head of staff, I am not making a mathematical sort of decision: "Therefore I can only spend 3 percent of my time". That's not quite true.

When things were important, I devoted my attention to them. But by definition, every day, all one has to look at the elements that made up Transport, Energy and Communications, and there was more, natural resources and other things as well. As I say, there were pots boiling over at all stages, every day, any day. So even if I had an inkling a day or two earlier, it didn't really register on my radar screen.

The time I remember is when Martin told me; let me put it that way.

Q. And from the time you came back from your annual leave, as you say, and you were back in the office around the 4th October or thereabouts?

A. Yes.

Q. Nobody had indicated anything to you until a day or two prior to that?

A. That's my recollection, Mr. Coughlan.

Q. And the first time you knew that a decision had been made was around this time?

A. Absolutely.

Q. And the decision was made, as you understood it, at this time?

A. Yes. Absolutely. And it might be helpful, and I don't see this gratuitously, all my officials and

colleagues were important to me; but by definition, as Secretary General not out of any sense of importance, but the Secretary General happens to be the interface between the political and the administrative clearly I had only I had one Minister, and well, I had at the time two Ministers of State, but so their interaction with me obviously registered, by definition, obviously, because that was my job. Certainly I had no top-down, either from any Minister or either of the two Ministers of State, any inkling of what was happening in the GSM competition.

Q. Now, I think the Tribunal asked you for the approximate date on which you were furnished with a copy of the first draft evaluation report.

And you have informed the Tribunal, given that it's nearly seven years ago, you can't be precise as to when you first were furnished with a copy of the evaluation report. You have no memory of reading a draft report, but you did of course read the final report when it was available. You also read a summary briefing note prepared for the Minister in which the key finding assessments and conclusions were set out. It was explained to you by Martin Brennan that the Project Group had agreed unanimously to the text of the final report, and the final amendments to the report were completed on the morning of the 24th October. You cannot recall at this stage when you had

actual sight of the final document, though you know it was to hand I will read that again it was to hand in the Department on that day. As Martin Brennan had cleared the final draft with Andersens in Copenhagen, he was in a position to brief you in detail as to the outcome of the Project Group's assessment with the full consensus between himself and Chairman, Sean McMahon, who headed the Regulatory Division; John McQuaid, who headed the technical division; and the Department, and with the full agreement of the Department of Finance representatives and the consultants.

A. I think, Mr. Coughlan, that should read "as Chairman".

I mean to say it's my fault. I am responsible for this draft, but it should read that.

Q. Sorry, you are right.

A. Perhaps I could add, clearly I had been briefed by Martin. It's easy to reconstruct and rationalise, but I imagine and this may be no help, but I don't want to waste the Tribunal's time, Chairman that I said is "When are we going to get this report?" And Martin might have said, to put it colloquially, "It's on the way. But here is what it says. Here's what we have signed off on," and I treated it on that basis.

But I do recall taking time out, and usually one puts it I am not trying to sort of invoke any particular zeal on my part, but normally you take home reports to

read at night, and I know I read the report at that time. But when I read it, it may have been a day or two afterwards.

Q. Very good. I think you say, and you subsequently examined the final report, and it conformed precisely with Martin Brennan's earlier oral briefing and the summary of the final report prepared in the Department for briefing the Minister; is that correct?

A. That's correct, yes.

Q. Now, I think you were asked for your view regarding the draft evaluation report together with your details of the understanding of the contents of the report.

And you have informed the Tribunal, as you have just been informing the Tribunal, your view on the draft evaluation report does not arise, as to the best of your recollection, your understanding of the contents of the report were based on your reading of the final report?

A. Perhaps I could sort of underline that. I am as certain as certain can be that there was no question of seeing a draft report. I didn't see any draft report.

Q. Now, I think you were asked so we'd better base it on the final report, and I think you have responded to them on the basis of your understanding of the final report the manner in which the issue of financial capability had been addressed, and in particular the

financial capability of Esat Digifone, Persona and

Irish Mobicall.

And you have informed the Tribunal that following your

then reading of the final report, "My view was that

the issue of the financial capability had been

addressed in the appropriate and common-sense way".

You were asked the manner in which other aspects of

the consortia had been addressed, i.e. the indicators

of credibility and sensitivities, and you informed the

Tribunal that you also noted and agreed the evaluation

process included that the other aspects were outside

the strict mandatory part of the evaluation and could

be set aside from the formal evaluation process

provided the risk was such that they did not distort

in any meaningful way the rankings arrived at through

the mandatory process. The credibility of the

proposals and the sensitivities of the top three

proposals were such as not to warrant any change in

aggregate result. It was also assumed that the risks

identified for the top three bids could be dealt with

satisfactorily in the context of the licence

negotiations.

You were asked the qualifications expressed by

Andersen Consulting regarding the ranking of the top

three entrants, and you have informed the Tribunal

that your understanding of any qualifications

expressed by Andersen Consulting on the rank of the

top three entrants did not take away from their clear recommendation as to the winner, runner-up and third-place bid.

You are then asked the overall presentation of the material, and you have informed the Tribunal that your view of the overall presentation material was one that the report and the appendices to the report represented a first-class professional process which you believed then and still believe could stand up to any scrutiny.

I think you were then asked details of all your discussions, if any, with any members of the Project Group or any departmental officials regarding the content of the draft report. And you have said that at this stage you cannot recall discussions you had with members of the Project Group, or indeed any departmental officials, on the content of the final report other than those with Martin Brennan cited above. As previously stated, to the best of your recollection, you did not have sight of any draft report.

I think you were then asked about a meeting of the Project Group on the 9th October. And you were asked for your knowledge of the matters discussed and raised at the Project Group meeting on the 9th October 1995, and in particular, statements made regarding the Minister's state of knowledge regarding the outcome of

the competition and statements made regarding the Minister's view of the draft evaluation report and/or the approach which should be adopted in drafting the report, and the source of such knowledge, if any.

And you have informed the Tribunal that you have no knowledge, direct or indirect, of any matters raised in the Project Group meeting of the 9th October 1995.

You have no recollection of any statement made regarding the Minister's state of knowledge on the outcome of the competition, and you can see no basis for any knowledge the Minister could have had at that time.

So I'll come back there are documents, and we have been through these with Mr. Brennan, but I'll come back to some minutes of the meeting in due course.

But as far as you were concerned, you are at a loss as to how the Minister could have had any knowledge at this time?

A. That's correct, yes.

Q. Now, I think you were asked for your knowledge, direct or indirect, of the following requests made by certain members of the Project Group in the course of the meeting of the Project Group on the 9th October 1995 or prior or subsequent to the meeting.

A. That further time was required to consider the result.

B. That it was necessary to revisit the qualitative

evaluation.

C. The consideration which should be given to the appropriateness of awarding the licence to Esat Digifone, having regard to the Department's experience of Esat Telecom.

And I think you have informed the Tribunal that you have no knowledge, direct or indirect, of any matters raised in Question 24.

Having overall responsibility for all administrative decisions in the Department, you believe that you would have acted differently if there was any serious request for further time to consider the result or if it were deemed necessary to revisit the qualitative evaluation. Equally you are quite clear that no request was made to you on the appropriateness of awarding the licence to Esat Digifone, having regard to the Department's experience of Esat Telecom.

You were personally very well aware of the Department's experience with Esat Telecom. "It would have been an abuse of the GSM selection process to bring to bear the outcome on the competition of the extraneous matters such as the Department's dealings with Esat Telecom. Had such a request been made to me, I would have deemed it quite inappropriate".

I think you were then asked the identity of all persons to whom access was given to the draft evaluation report dated 3rd October, 1995, between the



4th October 1995, when the draft report was received by the Department, and the 9th October 1995, when the report was discussed at a meeting of the GSM Project Group.

And you have informed the Tribunal that you were not a recipient of the draft evaluation report dated 3rd October 1995, and equally you were not a participant at the meeting of the 9th October 1995.

I think you were then asked for details of all meetings and discussions which to your knowledge, direct or indirect, of the officials took place between officials or between officials and other persons or any other discussions regarding the contents of the first draft evaluation report of the presentation of the material comprised in the report or any other aspects of the report between the 4th October 1995, when the report was received, and the 9th October 1995, when the report was discussed by the Project Group for the first time.

And you have informed the Tribunal that you had no involvement in any meetings or discussions which took place between officials or other persons on the contents of the first draft evaluation report.

And I think you were asked to provide details of the supplementary analysis conducted in respect of Advent, Communicorp and Sigma, as referred to in the minutes of the 11th meeting of the GSM Project Group on the

14th September 1995, and the result of such analysis.

And you have said that you have no knowledge, and of course you were, as you said, away on annual leave, but that you had no knowledge whatsoever of the details of supplementary analysis conducted in respect of Advent, Communicorp and Sigma as referred to in the minutes of the 11th meeting of the GSM Project Group on the 14th September 1995. Equally, you have no knowledge of the results of any such analysis.

You were then asked to confirm that eight copies of the first draft report, dated 18th October 1995, were received by the Department and were designated for Mr. Michael Lowry, Mr. John Loughrey, Mr. Sean Fitzgerald, Mr. Colin McCrea, Mr. Martin Brennan, Mr. Sean McMahan, Mr. John McQuaid and Mr. Jimmy McMeel. And you have informed the Tribunal the file shows that we asked Andersens to provide eight copies for the named individuals, including yourself.

Am I correct in understanding what you have informed the Tribunal previously, that notwithstanding that, you didn't see this particular document?

A. Precisely, Mr. Coughlan.

Q. Now, I think you were asked by the Tribunal to provide details of the knowledge, direct or indirect, of the departmental officials of all contributions given by the Project Group or any member of the Project Group or by any other person, whether in conjunction with

Andersen Management or otherwise, to the qualifications placed by Andersen on the financial capability of Esat Digifone and Persona as set out in the evaluation report and appendices, and in particular, page 44 of the report, and Appendices 9 and 10.

And you have informed the Tribunal that you have no knowledge, direct or indirect, of the consideration given by the Project Group or by any member of the Project Group, or indeed by any person, on the financial capability of Esat Digifone or Persona as set out in the evaluation report, and in particular, on page 44 of the report and in Appendices 9 and 10.

A. Correct, yes.

Q. You were then asked for details of the knowledge, direct or indirect, of officials, of any discussions with Andersen Consulting concerning further inquiries or investigations or other actions which would have been required to enable Andersens to provide a report without any qualification or rider regarding the financial capability of either Esat Digifone or Persona.

And you have informed the Tribunal that you had no involvement in the discussions with Andersen Consulting about further inquiries or investigations or other actions which would have been required to enable Andersens to provide a report without any

qualifications or riders regarding the financial capability of either Esat Digifone or Persona.

A. Correct.

Q. You were then asked about details of the knowledge, direct or indirect, of the officials concerning any amendment to the first draft report of the 3rd October 1995 and the second draft report of the 18th October 1995, and including their knowledge, direct or indirect, of the contents of the documents entitled "Suggested textual amendments" which appear to have been faxed by Mr. Fintan Towey to Andersens at 10.05am on the 25th October 1995 and faxed back by Mr. Andersen to the Department at 2.07 on the 25th October 1995 with his annotated comments.

And you have informed the Tribunal that you had no knowledge, direct or indirect, of any amendments to the first draft, dated 3rd October 1995. You were aware, however, that drafting changes were being suggested to the draft report dated 18th October 1995, and this knowledge would have been conveyed to you by Martin Brennan.

A. Mr. Coughlan, would it be possible to once again, there's some spurious accuracy there. I have put in, "where the drafting changes had been suggested to the draft report dated 18 October." I had no knowledge of any draft dated 18 October. What I wished to convey was that Martin Brennan would say "We're working on

this final report but we're working on drafting amendments." That assumes that I was aware that there was a draft of the 18th October. And that's incorrect.

Q. I understand it. And I read it in that context as well, Mr. Loughrey.

A. Thank you.

Q. Your sense that these amendments were of a drafting nature and it did not in any way affect the overall thrust of the evaluation of the tenders?

A. That was my sense at the time.

Q. That was your understanding, that these were just normal, ordinary drafting matters?

A. Absolutely.

Q. Now, I think you were asked to provide a full narrative account of any information, direct or indirect, which you may have had concerning what prompted Mr. Billy Riordan to record his concerns regarding "The ownership" of the report on both page 6 of the final draft version of the 18th October 1995 and in his various handwritten notes.

I think you have informed the Tribunal that you had absolutely no knowledge of any kind of the issues raised. You had no idea until reading this question that Billy Riordan had any concerns of the ownership issues. "I was not aware of any misgivings Mr. Riordan had. I am not aware of the existence of any

handwritten notes".

I should explain those notes relate to Mr. Riordan's concern that Andersens should accept ownership of the report.

A. I see. I see.

Q. And I think you were asked to provide details of all inquiries which, to the knowledge, direct or indirect, of you, were conducted either by those officials or by any other persons regarding the conclusion, and the documents suggested textual amendments as follows:

"Having regard to the level of interest in the Irish competition for the GSM licence and the high profitability of mobile communications generally throughout Europe that the project is fundamentally robust and after licence has been awarded, an attractive opportunity for corporate debt financiers."

Together with precise details of such inquiries, if any.

And you have informed the Tribunal that you were not aware that this had been a textual change suggested by the Department.

A. That's correct.

Q. When was the first time you became aware? Was it when the Tribunal raised the issue?

A. The first time, the very first time, yes, though it appears to be a truism, but I wasn't aware that the Department had suggested it.

Q. I think you were then asked for your knowledge, direct or indirect, of your involvement or the involvement of any other person in the decision made to accelerate the date in which the result of the evaluation was announced by the Minister.

And you have informed the Tribunal that no particular date had been selected on which the result of the evaluation was to be announced by the Minister. The original target set by Government was to announce the result before the 31 October. As no date had been chosen, the question of accelerating a date on which the result would be announced did not arise. You were, however, responsible for advising the Minister to move rapidly and decisively in copper-fastening the Project Group's assessment by a political and Government decision as quickly as possible so as to avoid a period in which the results of the competition were known before the Ministerial approval was given.

"I did so on the basis that given the cost, and more importantly for any of the bidders, the very high opportunity cost of bidding for the second GSM licence, there would naturally be a temptation for any of the losing bidders to attempt to lobby or influence a change of the result. I believe leaving such a period would not be helpful for any of the stakeholders, as there were no grounds of any kind to have the result other than that thrown up by the

process. Public lobbying or public contentiousness arising after such a scenario would not have been in anyone's interest, and notably the interest of the Minister and the Government".

I think we have discussed or touched on this already, and it's something we'll come back to when we return to the documents.

A. Of course.

Q. I think you were asked for your recollection of any approach made or request made to you by Sean McMahon, Martin Brennan, John McQuaid, or any of the members of the Project Group on or about the 23rd October 1995 for further time in which to consider the draft evaluation report.

And you have informed the Tribunal that you have no recollection of any approach or request made to you by Sean McMahon, Martin Brennan, John McQuaid or any other member of the Project Group on or about the 23rd October 1995 for further time to consider the draft evaluation report.

"On the contrary, I have a very clear recollection of being informed by Martin Brennan on the 24th October that the Project Group had agreed unanimously not only on the result but on the wording of the final report, which was so clear-cut in its recommendation".

A. I think we have agreed already, Mr. Coughlan, that I am a day out there.



Q. Yes, okay.

Then you were asked for details of any discussions, dealings, or contacts or approach made by you to the Minister on about the 23rd October 1995 seeking a postponement of the announcement of the result of the evaluation.

And you have informed the Tribunal that no such contacts or approaches arose at that time, as you did not seek the Minister's agreement to postpone announcement of the result of the evaluation.

You were then asked for your knowledge, direct or indirect, of your involvement or the involvement of any other person in the decision made by the Minister on or about the 24/25 October 1995 that the result of the process would be announced on the 25th October 1995.

And you have informed the Tribunal you have no knowledge, direct or indirect, of any other person in the decision made by the Minister on the 24 October 1995 that the result of the process would be announced the following day. From your discussions with the Minister, you believe you can recall the Minister's stating that once there had been a Ministerial and political agreement on the outcome of the competition, there was little merit in allowing losing bidders time and space to mount possible campaigns to contest the outcome of the evaluation. In the circumstances, it

would be appropriate and important that the media should be briefed as to the result as soon as possible.

You were then asked for details of the discussions between Martin Brennan and you on the 24 and 25 October 1995, whereby Mr. Brennan conveyed to you the result of the evaluation process, together with the involvement of any other persons at such discussion or meeting, and you refer to the answer above, and you cannot recall anyone other than Martin Brennan conveying the result of the evaluation process; is that correct?

A. That's correct.

Q. You were asked for details of your discussion or meetings with the Minister on the 24/25 October 1995 whereby you informed the Minister of the result of the evaluation process, together with details of the involvement of any other person in such discussions or meetings.

And you have informed the Tribunal that after the full briefing by Martin Brennan, you made an appointment to see the Minister as soon as possible. You cannot recall whether Martin Brennan accompanied you or not, but you are quite clear in your mind that you briefed the Minister in some detail along the lines of Martin Brennan's earlier detailed briefing to you. Prior to the meeting, you had dictated a short note to the

Minister. You do not recall whether anything other than Mr. Lowry's ready assent to all proposals you had made to him on handling the matter.

As you were not informed as to the ranking of any of the bidders during the course of the evaluation, you were not in a position, even if you had wished to do so, to inform anyone else as to the emerging trends in the competition.

So again, if I might pause there for a moment, Mr. Loughrey, up to, as we have discussed, a day or two around this time, you had not even been aware of the emerging trends?

A. That is my recollection.

Q. Now, I think you were then asked for your role and your knowledge, direct or indirect, or the role of any other person in the preparation of the following documents:

A. Your recommendation to the Minister dated 25th October 1995.

And you have informed us already that following Martin Brennan's detailed explanation to you of the result of the process, you dictated a short note to the Minister dated 25 October. We'll deal with those, but I think that is correct, and we have discussed that.

You were then asked your knowledge or your knowledge or role in the briefing note to the Minister regarding the outcome of the evaluation process, and your

recollection of the briefing note for the Minister was that it was prepared by Fintan Towey. It would have been cleared by Martin Brennan or by you before submission to the Minister; is that correct?

A. That is correct. I don't recall Fintan Towey or Martin Brennan's name or anybody's name being on a document. But I can remember reading a crisp, succinct document, and I suppose I am attributing it to Fintan Towey.

Q. We'll come to deal with it in due course. And just in that regard, was this a briefing note which was prepared for the Minister before he went to see the Taoiseach, the Tanaiste and the Minister for Social Welfare?

A. From memory, I would say it was drafted in a way that was meant to be used in that way.

Q. You were then asked for your knowledge of the memorandum to Government dated 26th October 1995, and we have been through this, and we'll come back to it again; but your knowledge is that the memorandum to Government, to the best of your recollection, had been prepared by telecommunications development division, but would have required substantial input from the Telecommunications Regulatory Division headed by Sean McMahon; the memorandum would have been vetted and approved by you before going to the Minister.

A. This wasn't, as you know, Mr. Coughlan, confined to

the GSM competition alone.

Q. I appreciate that. There were other issues.

A. It required a balance for ultimate sale through the Government system. And there were regulatory matters; a tightening up on the regulatory side was also proposed at the same time.

Q. These were other matters which the Department on its regulatory side had been involved with fixed-line users?

A. That's right, that's right.

Q. Again, we'll come back to it when we have a look at the document, Mr. Loughrey, but you are the expert in this area. The way the memorandum is drafted, is that normal? The Government was asked to note the decision; is that

A. I wouldn't claim to be an expert in Government procedure, but you are correct in that.

Q. Is that a term is that the normal way

A. That can it's in a sense, it happens frequently, but it wouldn't be the usual run-of-the-mill, actually, but it does happen sufficiently frequently for it's not unusual; let me put it that way.

Q. Now, I think you were asked to indicate whether the Department had in its possession a copy of the final draft evaluation report as of the 25th October 1995, when the Minister met with members of the Cabinet, and following such meeting announced the result of the

evaluation process. If the Department did not have a copy of the final evaluation report in its possession at that time, please indicate presumably what document or documents were in the possession of the Department. And you have informed the Tribunal that the Department was in possession of the final draft evaluation report when the Minister was in contact with members of the Department Cabinet committee.

"My memory of the day in question is that we awaited the final amended version of the evaluation report to be faxed from Copenhagen and available to the Department before seeking Ministerial and Government clearance".

I think you then informed the Tribunal or, sorry, you were then asked by the Tribunal for your understanding of the composition of the Esat Digifone consortium which won the evaluation process and the respective shareholdings of the participants.

And you have informed the Tribunal that your understanding of the composition of the Esat Digifone consortium which won the evaluation process was precisely that as announced at the outset of receipt of second mobile phone applications. The Minister's press release of the 4th August 1995 stated that Esat Digifone was a consortium consisting of Communicorp Limited and Telenor, together with some institutional investors.

"When I was informed the result of the process by Martin Brennan, my understanding was that Communicorp would hold 40% of the equity. Telenor equally would hold a further 40%, and the remaining 20% of the equity was available for third-party investors. At the time of the Government decision, the Department had been informed of indicative commitments by a range of blue-chip investors being arranged by Davy Stockbrokers".

A. That's not very elegant.

Q. I understand. I think, perhaps, do you mean to say "to be arranged", or "being arranged"?

A. Yes, quite.

Q. These indicative declarations came from AIB, Investment Bank of Ireland, Standard Life and Advent International, who had agreed to participate in the 20% placing of Esat Digifone equity after the licence award. At all stages in the process the Esat Digifone consortium had signalled their intention to place a minority shareholding with investors.

I might just pause there for a moment. Was that your understanding, that 20 percent was to be placed after licence award?

A. No, once again, perhaps I could once again, on re-reading this. I have answered that question almost in the conditional sense. I suppose, strictly speaking, actually, when the decision was taken to

grant the exclusive licensing negotiations, the consortium comprised 50 percent Communicorp and 50 percent Telenor with a declared intention that 20 percent was available for investors.

I suppose that actually was the precise position.

It's not really any different from what I am saying there, but only I am saying it, I had written it in the conditional sense. But after the award, I think my problem perhaps in drafting that was based on common sense, that I didn't know any institutional investor who would actually put out a significant outlay without being certain of what the licence terms what the licence terms would be.

So in other words is, it would almost have to be work at the same time or immediately after the licence. I am not sure how accurate I am being there, but I think you gather what I am saying, Mr. Coughlan.

Q. I do.

A. Institutional investors may always give you express and indicative interests in an investment opportunity, but they would be imprudent in the extreme, and they would no longer be institutional investors in the common sense of the term, if they were to take the role of purely speculative capital or a venture capital approach.

So in other words, by definition, it would have to be at the same time as the licence was awarded.



Q. Now, I'll just and I understand the difficulty, of course, when one is trying to rationalise a situation or apply common sense with hindsight in relation to matters, but I suppose what I am just seeking to clarify, for the moment, from you is, can you remember what you were told by Martin Brennan? That's really, I suppose, the query that's being raised here. What were you told at that time?

A. I was told at the time, actually, that it was going to and I think I don't want to somehow develop amazing memory words that it would pan out 40:40, with 20 percent being reserved for institutional investors, and they already had interested offers for that 20 percent.

Q. That's the way it was said to you, you think?

A. Yeah.

Q. It was never said to you I suppose I should ask you the question, because it's something that might occur to a member of the public, might he not have said to you, "Look, this is grand; there is Communicorp, or Esat, there is Telenor, and then there is Allied Irish Banks, Bank of Ireland, Standard Life"; he didn't say that to you?

A. No, and if he had, I would have treated it with caution, because I have a background in investment banking. I was with the European Investment Bank for five years, so it's not totally unfamiliar territory

to me.

Q. I see. What caution would you have treated it with, Mr. Loughrey?

A. Simply what I explained to you a minute ago. Institutional investors will not allow themselves to somehow engage outlay in investment without absolutely knowing what they are buying into, and that couldn't be certain until the licence was available to be signed.

Q. This is something I'll come back to in great detail, Mr. Loughrey.

A. Of course, yes.

Q. Because perhaps you should understand what was presented by this particular consortium at the oral presentation.

Now, you were then asked for your knowledge, direct or indirect, of or understanding of the role of the Cabinet or the Cabinet subcommittee in the ultimate decision as to the outcome of the sorry, I beg your pardon, as to the outcome of the evaluation process.

And you have informed the Tribunal that your knowledge of the role of the Cabinet committee was that such a committee was required as a quick clearing house for decisions which might be required at times in circumstances that wouldn't warrant a full Cabinet treatment involving formal paperwork. While such a Cabinet committee could and did play a valuable role

in the process, you do not recall at any stage any view emanating from any of the members of the Cabinet committee or their departmental staff ever indicating that the Cabinet committee would second-guess the evaluation of the Project Group.

In advising the Minister to proceed quickly and decisively with the Project Group's result, you stressed the importance of consulting with the members of the Cabinet committee that comprised the then Party Leaders of three parties in Government together with the Minister for Finance and the Minister for Enterprise, Trade and Employment. That's a matter we've been we know.

Now, you were asked for details of all information provided by Mr. Loughrey by you, to the Minister regarding the evaluation process during the course of the process, together with details of all the communications by you to the Minister, and of all communications by the Minister to Mr. Loughrey during the course of the process.

And you have informed the Tribunal that your interaction with the Minister on the GSM process did not warrant at any stage written communications in that except for the hiccup on the fee structure.

"My reports, which would have been all very much on the line as steady as she goes". That's progress matters?

A. More or less, yes.

Q. You can recall the Minister expressing satisfaction that the Project Group was satisfied that it could almost certainly meet the original deadline of 31 October despite the six weeks' loss on resolving the fee structure problem. These communications tended to be the one way, and you had no recollection of any communications by the Minister to you on the second GSM licence during the course of the process.

There was at no stage during the whole GSM process, from start to finish, that you did not have the Minister's whole-hearted support to any proposals you made to ensure that the competitive process that we had put in place be professional, fair, and as watertight as possible?

A. Correct.

Q. And that was your aim, that the whole thing would be professional, fair, and as watertight as possible?

A. Absolutely.

Q. You were then asked for your knowledge, direct or indirect, of all dealings, meetings or communications between the Minister and any member of any consortium or any person associated with any member of any consortium during the course of the evaluation process.

And you informed the Tribunal that you were not aware of any dealings, or meeting or communications between

Minister Lowry and any person associated with any member of any consortium during the course of the evaluation process. No doubt, however, given the small size of the Irish Business community, that Mr. Lowry may have encountered such persons during the course of the evaluation process. Given that there were four to five State companies associated with different bids, and that many key figures in the Irish Business community were also involved in the fact were also involved, the fact that you were not aware of any such contacts does not mean that they did not happen. You are, however, satisfied that Minister Lowry accepted the advice you gave him, not under the circumstances to be pulled into discussion on the GSM licence with anybody, associated with the bid process or not, to give the appearance of being in discussion on the same topic. The fact that you state "the Minister accepted this advice" does not infer that Minister Lowry would have acted otherwise in the absence of this advice. He clearly saw the wisdom of such a stance, based on his own business experience and common sense.

Once again, but it bears repetition that given the sealed nature of the process, no one other than the participants in the Project Group had any information of value to impart during the closed process, nor was there any way Minister Lowry could influence it.

You advised the Minister not to discuss the process.

Obviously he was going to bump into people who may have been involved in it?

A. Yes, quite.

Q. "Talk about something else", or would have been the type of advice you'd give him?

A. Or say, "Well, we'll have to await the result, won't we?"

Q. Words to that effect?

A. Yeah.

Q. Because not only were you concerned about the actual process itself, but you were also concerned about the appearance of the situation?

A. Yeah. In a small community, perception can be equally damaging.

Q. I suppose we are all this was to some extent an adjudicative process?

A. Yes, it was.

Q. It was as simple as this: Not only had justice to be done, but it had to be seen to be done. It was important to be seen to be done?

A. I believe so, Mr. Coughlan, yes.

Q. I think you were then asked the date on which and circumstances in which Mr. Loughrey first became aware of the involvement of IIU Limited or Mr. Dermot Desmond in the Esat Digifone consortium, your understanding as to the precise nature of the

involvement of IIU at that time, and the source of such knowledge and understanding.

And I think you inform the Tribunal that you are not sure when you first became aware of some involvement by IIU Limited or Dermot Desmond in the Esat Digifone consortium. First of all, you had no such knowledge at the time, 24/25 October 1995, the decision was taken to award the Esat Digifone consortium the initial sole negotiating rights leading to the award of the licence. At that time, and indeed at the very outset of the competition, the Esat Digifone consortium had always maintained that they would reserve a minority position for financial investors.

Is that strictly correct? Or was it institutional investors? Financial investors?

A. I'd have to refer back to documentation. I wrote this, in a sense, from the heart, so to speak, but and I can't precisely say, but if you'd allow me refer back to papers.

Q. No, we'll come back to it.

A. That's fine.

Q. At the time of the decision by the Project Group, the indicative investors were all front-ranked financial names. That is, the two major Irish banks, Standard Life, and a major private equity company, Advent. The placement of the shares was to have been arranged by Davy Stockbrokers. Quite frankly, the delivery of the

business plan which was formulated by the winning consortium was predicated on aggregate experience and competencies of Communicorp and Telenor as demonstrated by the competitive process. The minority financial investors, while bringing equity capital to the party, did not have any special significance in the delivery of the project.

"My first recollection of IIU" perhaps, before I move on there, did you convey that particular view to Martin Brennan before he commenced this project, this process?

A. No, I did not.

Q. Your first recollection of IIU's involvement was gleaned, you believe, from a newspaper report to the effect that IIU were apparently to take over the arrangements of the placement of the minority shares reserved for Irish investors.

As of yet, you haven't had time to revisit the files of the Irish newspapers at that time, but given your personal friendship with Michael Walsh of IIU "We would have had lunch on a social occasion from time to time" you would have no doubt raised this emerging role for IIU with him. Whether this was done by way of phone call or social occasion you cannot recall, but to the best of your recollection, IIU's role grew gradually from one of arranger to one of primary investor on behalf of Mr. Dermot Desmond.



As far as you were aware, there was no definite agreed confirmation of IIU becoming the minority shareholder until approximately mid-April, when Regina Finn of the Telecommunications Regulatory Division had confirmation of the IIU intentions from William Fry Solicitors on behalf of the consortium.

A. Mr. Coughlan, might I clarify something there.

Q. Yes, of course, indeed.

A. The penultimate or the last sentence there: "As far as I am aware, there was no definite agreed confirmation", there is an inference there that I knew they were going to become investors, but it wasn't really confirmed. Frankly, until I got a copy perhaps a day or two later, perhaps, but let's say the date of Regina Finn's I had no idea whatsoever they were going to become investors. I had, until that moment, assumed that they had taken Davy's place as arrangers and nothing but that role.

Q. And that was always your understanding?

A. That was up to that point

Q. Up to and I think we can date that mid-April; it's about the 16th or 17th April, or there or thereabouts?

A. Exactly. Because there could be an inference there that there was no definite agreed confirmation, as if I sort of half knew they were thinking of it, but in fact, that's badly drafted on my part. I had no idea until mid-April.

Q. Very good. I want to be clear about this, because I was going to ask you to clarify some matters in this particular paragraph.

Now, as far as you were concerned, the first you knew that IIU/Dermot Desmond and I'll use it as loosely as that for the moment were going to be investors in this consortium was when Ms. Regina Finn received information on the 16th April

A. Absolutely.

Q. of 1996.

I think that was then followed by a letter the next day from Mr. Owen O'Connell, solicitor to Esat Digifone?

A. I don't mean to be pedantic. I do recall Regina Finn's note. I am sure I recall the enclosure, as well, that came with it. But I probably got them a day or two later, given that. But there is no doubt about it; I was informed at the time.

Q. I understand that. Well, on the documents, there is a note of Ms. Finn's on the 16th April. Mr. Owen O'Connell had been in contact with her and given her certain information, and she I think was on that day bringing it to the attention of Mr. Brennan or Mr. Towey, or both of them?

A. Yes.

Q. The next day, I think by letter dated 17th, Mr. O'Connell wrote to the Department, because I think Ms.

Finn told him put it in writing and send it in. That came into the Department, and it set out a position. And you think, then, that you would have perhaps received those the next day, or

A. Both of them together, I imagine, yes.

Q. And that's the first time that you knew that IIU/Mr. Desmond were going to be investors

A. As opposed to arrangers.

Q. as opposed to arrangers?

A. Yes.

Q. And am I correct in understanding, therefore, that as appears to have been the situation for Mr. Brennan when he gave evidence, that up to that date, if you were aware of an IIU involvement and you had some awareness, that it was purely in the context that they were taking over from Davy's, merely to place shares?

A. That's right. I actually was while recognising that Davys are indeed a blue-blood brokerage, and they have a recognised position in placing Irish, both publicly and in terms of private placement, they have a pre-eminent position, and I wasn't doubting that for one moment. But along came IIU, and my thought process was probably, "Well, here is a new kid on the block".

Dermot Desmond had done this in 1981 with NCB by the way, I was responsible for monetary policy in the Department of Finance at the time, so I would have a

familiarity. He came along as money brokers in 1981, developed the business as a challenge to the then leading brokering houses. And here was IIU, a sort of sort of the next wave, so to speak, coming along and taking over the arrangement. It didn't particularly perturb me.

Q. Understandably, of course. And you knew Michael Walsh?

A. I did indeed.

Q. You knew him I think he had in fact given some or did some consultancy work for the Department at some stage, did he?

A. Before my time. I came to the Department in 1988. There was a folk memory that they had done work for the Department before then, but I hadn't encountered him in that context.

Q. But you knew him?

A. I did, of course. Strangely, I knew him partly in that context because I was responsible for project finance, so to speak, in the Department of Finance, and on the BGE Dublin/Cork pipeline, I think he was an adviser, and I first met him in that context.

Q. And you knew him well enough that you might have met him for lunch occasionally?

A. That's precisely right, yes.

Q. And once a month, or

A. Gosh, nothing as frequent as that. You know, I

imagine three times a year would be an average,  
actually.

Q. But would it be fair to say that you might have met  
him, say, twice since the previous October?

A. It's possible, but equally we were on the phone  
occasionally about things of mutual interest, from  
Glasgow Celtic Football Club. So in other words, we  
have interests other than business interests.

Q. And I understand that. Both busy men, but you might  
have lunched two or three times a year with him.

You'd have telephone conversations with him?

A. Yes.

Q. You had interest in the same sporting

A. Exactly.

Q. And you would have had some discussion with him about  
IIU's involvement here and your understanding that  
they were taking over from Davys?

A. Absolutely. I might have said, "Imagine I am sure  
Davys weren't pleased", or words to that effect, but I  
can't recall that we had any conversation in depth  
other than a recognition that they were taking this  
arranging interest, other than that.

Q. And it's the sort of thing, as friends, you might even  
crack a joke about it?

A. Absolutely.

Q. And it was never conveyed to you by Michael Walsh that  
in fact, there was an agreement in place between IIU,

Mr. Dermot Desmond, Mr. Denis O'Brien and Esat

Digifone about Mr. Desmond's participation as a partner in this consortium?

A. No, that did not pass that did not pass between us.

Obviously in the last week or two and I can't

recall the dates prior to the signing of the

licence, that became crystal clear, and it became

clear, obviously, from Regina Finn's note. But as

between myself and Michael, meeting on a friendly

basis, that did not arise.

But this is not in any sense of defensive sense

whatsoever. Many of our conversations didn't touch on

business at all. But I am confirming that it didn't

arise.

Q. And can I take it that again, you did have discussions

about and I am not saying in-depth discussions, but

you had discussions with Michael Walsh where you were

left in no doubt but that what they were doing and

I am talking about IIU was just taking over Davy's

role?

A. I am not sure it was even as specific as that, Mr.

Coughlan. I am trying to be as helpful as possible.

I think it to be more in it that "Here you are,

barely incorporated and muscling in on the territory

in terms of arranging". I am not sure it went any

further than that, actually. And I certainly but

certainly I can confirm what I did a moment ago,

actually. There was no in-depth conversation where the matter of any previous interest was registered; let me put it that way.

Q. Not only was there no in-depth conversation, there was no conversation?

A. That's right, that's right.

Q. Are you a fan of Glasgow Celtic?

A. Yes, I am, going all the way back to the fifties. I am old enough, God bless us, to remember the days of Bertie Peacock & Company.

CHAIRMAN: Scottish names.

Q. MR. COUGHLAN: You are not an investor in Glasgow Celtic, are you?

A. No, I am not. Good ball clubs are not for the faint-hearted, Mr. Coughlan, and certainly not for cautious civil servants.

Q. I'll have to come back to deal with these matters, as you know, in detail, because there are documents we just have to look at.

Now, I think you were then asked by the Tribunal your knowledge, direct or indirect, of a letter dated 29th September 1995 from Michael Walsh of IIU to Martin Brennan. And we'll deal with this letter, but I think you are familiar in general terms.

And you have informed the Tribunal that to the best of your recollection, you have no knowledge whatsoever of a letter dated 29th September 1995 from Michael

Walsh/IIU to Martin Brennan. You believe you would have remembered such a letter, given that you knew Michael Walsh personally.

A. That's fair, yes.

Q. I think you were then asked by the Tribunal your knowledge, direct or indirect, of or your involvement or the involvement of any other person in the decision made to return the letter of the 29th September 1995 to Denis O'Brien on the 2nd October 1995 without retaining a copy of the letter on the departmental file.

And you have informed the Tribunal that equally, to the best of your recollection, you have no knowledge of the decision to return the letter of the 29th September 1995 to Denis O'Brien on the 2nd October 1995 without retaining a copy of the letter on the departmental file.

"Had I known of such a letter ,I would have approved entirely of the action taken by Martin Brennan."

A. I should if I were redrafting that, I would have said taken, effectively, by Fintan Towey rather than by so much Martin Brennan. But having said that, I am not walking away from that. I believe that they collectively did the correct thing.

Q. Why?

A. I don't believe they had a choice, Mr. Coughlan.

Q. But why do you think you said they did the correct



thing; why did they why do you say they did the correct thing, Mr. Loughrey?

A. Well, as I said, I don't believe they had a choice.

In the sense that clearly I am here I was going to put a rhetorical question. I am here to answer your questions, clearly. I believe, myself, had they done so, this was something which the promoters felt would have enhanced presumably would have enhanced their bid. Had they accepted information that could be demonstrated or even the perception of enhancing the bid of one of the members after, in fact, it was effectively a closed period for receiving any further information, and this is where this is not addressed to you, but I am just asking you the question rhetorically: Could one imagine, could you imagine how vulnerable the Department would be to a judicial review on the whole process if that were to happen?

Q. That of course is a matter which one would have to consider, as one might have to consider why somebody was breaking the agreed rules of the competition, and as to whether the content of the letter could have alerted the project team to an issue which had been raised at the presentations and to which certain answers had been given to by this particular consortium.

A. I believe, myself, Mr. Coughlan, that the and I

only know this from hindsight knowledge now, and you will tell me or, Chairman, you'll tell me actually if this is outside if it's proper for me to answer in this way. But from my reading of the documents I have now got from the Tribunal, for the first time I have read the minutes of the Project Group, of the PT GSM, it's quite clear for me and I have only read them recently for the very first time in the last day or two is that both on the 11th and the 14th of September, the pre and post presentation the group and very specifically, because the minutes say the group agreed that there could be no further presentation of any further material, number one.

And number two is, that was spelt out in no uncertain way once again, thanks to the excellent transcripts that I have had sight of when Mr. Brennan Mr. Andersen and Mr. Brennan replied sequentially to an inquiry, if that were possible, from Mr. Gerry Scanlon of Irish Mobicall.

In other words, there was at all stages, it was crystal clear that the group could not accept any further and Fintan Towey, as the, if I may put it, the de facto engine room, received this letter, and I don't think he had any other option but to send it back, Mr. Coughlan.

Q. There are two matters which arise, perhaps. You are correct that all consortia were informed "No further

documents, we'll contact, don't contact us". In fact, if you look at the transcript and listen to the tape, even, of the Esat Digifone presentation, this is acknowledged by Mr. O'Brien, that he understood that at the very end.

Nevertheless, addressed to the Chairman of the Project Group, coming from nevertheless, this was sent in, and could only have been sent in on behalf of Esat Digifone?

A. Though it was a third party.

Q. It was treated by the Department as coming from Esat Digifone?

A. Yes, quite. No, I accept that.

Q. And in fact coming from Mr. Denis O'Brien, because it's not even sent back to the people who are named in the competition documents as liaison, sent back to Mr. Denis O'Brien?

A. That's quite clear, yes.

Q. Of course the call isn't yours, but your assistance is helpful on this. This decision was taken by Fintan Towey and Martin Brennan without reference to the Project Group?

A. Correct.

Q. Fintan Towey knew it, that it had been sent in?

A. Correct.

Q. And he knew the content of that letter?

A. Presumably. He would have had to have known, quite.

Q. Now, as you say, he took the correct decision in sending it back?

A. Quite.

Q. And informing Denis O'Brien that it would not be taken into account?

A. I wouldn't necessarily stand over the process of return, and I'd have to reflect on that, Mr. Coughlan, but certainly I agree with you so far, is that it was a correct decision to send it back. I would need to reflect, presumably, on how it was handled.

Q. Perhaps you would.

It was appropriate for Fintan Towey to have that particular information and to continue on the project team, wasn't it? Or was it not?

A. He took a decision based on the fact that the letter arrived, but I don't think there is any hint whatsoever that that information ever crept into any discretionary decision taken by the totality of the team, Mr. Coughlan.

Q. I am not suggesting for a moment that. I am saying that or even into Mr. Towey's consideration. Mr. Towey knew the content of that letter. He continued in the project team?

A. Yes, he did.

Q. As far as you are concerned and there is no suggestion that Mr. Towey behaved in any prejudiced or capricious manner in the carrying out of his duties in

the project team thereafter?

A. I would accept that.

Q. Why, then, was it, in your view, or are you saying this, inappropriate to bring it to the attention of the whole team that this letter had been received?

The team could say, "Out it goes, send it back, tell them we are not receiving it"?

A. I believe in exercising discretion. As a group, the group were better off not knowing. Because it's difficult, given the human condition, to have Chinese walls in one's own mind; but the fact that only one member of the group saw this letter, and its perhaps intended enhancing value wasn't known to anybody but this one single person, and they in turn, there is no evidence that they put it into play, I think that the group collectively wasn't compromised in any way, Mr. Coughlan.

Q. I'll come to, in May of 1996, if you will pardon me jumping for a minute.

A. By all means, yes.

Q. And it's something we'll have to return to, and perhaps you'll consider it over the weekend?

A. Of course.

Q. When Mr. Donal Buggy, on your instructions, carried out an evaluation of IIU/Dermot Desmond, he was made aware of an agreement dated 29th September, 1995; do you know that?

A. I accept that, but clearly he'd have to answer for himself.

Q. It's documented.

A. Okay, that's fine, of course.

Q. But he was not aware that a letter had been sent in to the Department on the 29th September 1995 from this particular entity, IIU, on behalf of

A. Mr. Coughlan, I am sure you'll explain to me, but I had Mr. Buggy I commissioned him, so to speak, to do a particular exercise at that time. I am failing to make the connection between what you have just said and the whether in fact IIU had the financial robustness to stand up to the role that was intended for them in the consortium.

Q. You fail to make the connection. That's precisely the point

A. I am happy to help you do it.

Q. That's precisely the point I am making, Mr. Loughrey, because all the information wasn't there. You didn't have all the information, and Mr. Buggy didn't have all the information.

A. No, I am sorry, perhaps you may think I am blinkered, Mr. Coughlan, but I had sufficient information to make a judgement call on the basis of what Mr. Buggy gave to me.

Q. We'll deal with that in due course, Mr. Loughrey, don't worry about that. But all information was not

available to Mr. Buggy or to you at the time?

A. I don't accept that.

Q. Very good.

Now, in any event, if we may just return and clarify certain matters. Mr. Walsh never told you a) that there was an agreement or b) that a letter had been sent in to the Department in September?

A. I am confirming that, yes.

Q. And I think you were then asked whether you had any knowledge, direct or indirect, regarding any involvement or interest or any potential involvement or potential interest of IIU Limited or Mr. Dermot Desmond in the Esat Digifone consortium as of the 25th October 1995.

And your response is "See the answer to 50 above.

Once again, to the best of my recollection, I'd absolutely no knowledge of the potential involvement or potential interest of IIU Limited or Dermot Desmond in the Esat Digifone consortium as of the 25th October 1995. Once again, given that I knew both Michael Walsh and Dermot Desmond, it seems inconceivable that somehow this would have escaped my attention, had I known either directly or indirectly."

So you also knew Mr. Dermot Desmond; isn't that correct?

A. I also knew Chairman, if you could excuse me, because I am new to the process, Mr. Coughlan. Could

I be excused and revert back to the answer I gave to the previous one? This is on 52, and if I could be excused.

I may and this is only a proposition, and I have no idea what the answer is; it may well be that Michael Walsh assumed that I knew that IIU had written in to the Department. I don't know that.

Now, I can't it's just possible. We had a relationship, actually, that is not focused on solely on business, or anything like it, and it is possible he had no reason to know what the protocol suggested by Martin Brennan and I had instituted. I never mentioned it to him, clearly. Never. So it's possible that he may well have said, "We sent a letter to the Department", even though it was returned he may or may not have known it was returned; I presume he did, that it was returned. But he may not have known this, if I may say so, compartmentalisation that I had instigated. So unless I told him, he may have assumed that I had known of the letter.

Q. Fair enough. If and I take your point that Mr. Walsh, or Professor Walsh, as he is referred to in this Tribunal in correspondence, assumed that you had received the letter of the Department, what is your understanding of what that letter meant?

A. Would it be possible just to refresh my mind, if there is a copy of the letter, actually.



Q. Yes indeed. We'll put it up on the screen, and I'll get you a hard copy.

A. That's fine.

Q. You can see it's addressed to the Department, and we'll just move it up. Dated 29th September.

"Dear Sirs,

"We refer to the recent oral presentation made by the consortium" and the Esat Digifone consortium "To the Department in relation to their proposal for the second GSM cellular mobile phone licence. During the course of the presentation, there was a detailed discussion in relation to the availability of equity finance to the consortium from Communicorp and a number of institutions.

"We confirm that we have arranged underwriting on behalf of the consortium for all of the equity (i.e. circa 60%) not intended to be subscribed for by Telenor. In aggregate, the consortium now has available equity finance in excess of  $\text{€}1/258$  million.

"We do not foresee any additional need for equity; however, we are confident that if such equity is required, we will not have a difficulty in arranging it.

"Yours faithfully,

"Professor Michael Walsh."

A. I had read it before; I just didn't recollect. You asked me what did I take from that letter?

Q. Yes, what do you take from that letter?

A. I take from that letter, while formally and legally it's a letter that says "We will underwrite the non-Telenor requirements, in effect, at the same time, it's a letter of comfort, to the extent that Communicorp was not seen as, let's say, the stronger side from a financial point of view. In fact, there must have been some doubt about Communicorp's ability to bankroll the capital expenditure. And this provides, as well as being a formal legal undertaking, it actually provides comfort and succour as well.

Q. And that is because it's underwriting Communicorp?

A. Yes, absolutely.

Q. And underwriting the Irish institutions?

A. Yes, it is. By definition, the non-Telenor element, yes. And once again, even though this is a letter I have only seen recently and I had no knowledge of it whatsoever, actually, that letter would not have been, I suppose, inconsistent with the arranging role as well that eked out through the newspapers later.

MR. COUGHLAN: Perhaps now might be a good time.

CHAIRMAN: I think it's not that short a day, Mr.

Loughrey. Inevitably there is an amount to be covered still. I think at five to four, we'll break until Tuesday morning at eleven, if that's suitable for you.

Thank you very much.

THE TRIBUNAL THEN ADJOURNED UNTIL TUESDAY, 18TH

FEBRUARY, 2003 AT 11AM.