

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

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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

FOR MICHAEL LOWRY: Kelly Noone & Co.

Solicitors

OFFICIAL REPORTER: Mary McKeon SCOPIST: Viola Doyle

I N D E X

WITNESS: EXAMINATION:Q. NO:

THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY, 18TH FEBRUARY, 2003, AT 11 A.M.:

CONTINUATION OF EXAMINATION OF JOHN LOUGHREY BY MR. COUGHLAN:

Q. MR. COUGHLAN: I think, Mr. Loughrey, we were on page 47 of your memorandum?

A. If you'll excuse me, Mr. Coughlan, I'll just get out the page. Yes, I have 48 now.

Q. I think the next question is Question 53, I think?

A. 53.

Q. I beg your pardon, page 47. I beg your pardon, did I say

A. No, you are correct.

Q. Question 53, yes, I think that's next. And I think the Tribunal inquired as to your 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 you informed the Tribunal, "See the answer to 50 above."

"Once again, to the best of my recollection, I had 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 you knew both Michael Walsh and Dermot Desmond, it seems inconceivable that this would have escaped your attention had you known either directly or indirectly?

A. That's correct.

Q. I think you were then asked, your knowledge, direct or indirect, of the date on which, and the manner in which the Minister or the Department was informed by Mr. O'Brien, Communicorp, Esat Telecom and Esat Digifone, or any person on their behalf, that Communicorp/Esat Telecom did not intend to fund its equity participation in Esat Digifone by drawing on finance to be provided by Advent International, but intended to fund its participation by placements through CS First Boston, including details of the precise information provided to the Minister or the Department, and kindly identify where such information was recorded.

And you have informed the Tribunal that you have no memory of being informed specifically of the fact that Advent would not be a direct equity participant in the financing of a second GSM licence. Advent had been on the indicative list which was available to the Department at the time of the announcement of the sole negotiating rights to be granted to Esat Digifone on the 26th October, 1995. Your memory is not one of a gradual withdrawal or replacement of the financial

institutions which had been on the indicative list as minority financial participants, but rather the emergence of IIU as the arranger and ultimate investor, which crystallised in the lead up to the granting of the licence in May 1996, is that correct?

A. That's correct. Perhaps I could it's a little too succinct, because the role of arranger emerged far earlier than the role of investor. The role of investor only emerged in the last few weeks leading up. The role of arranger emerged as early as November 1995, but it's substantially correct.

Q. Yes, very good. Now, I think you were then asked for your knowledge, direct or indirect, of any dealings between Communicorp, Esat Telecom, Telenor and IIU Limited/Dermot Desmond regarding their respective liabilities to subscribe for the capital of Esat Digifone Limited.

And you have informed the Tribunal that you had no knowledge whatsoever of any dealings between Communicorp, Esat Telecom, Telenor and IIU Limited/Mr. Dermot Desmond about their respective liabilities to provide the capital of Esat Digifone until these matters crystallised in the week or so before the award of the licence on the 16th May, 1996.

In that week, approximately, in the lead up to the award of licence on the 16th May, 1996, you set out to satisfy yourself that the arrangements between the

three partners in the licence were such that the business plan would not be jeopardised in any way on the financing side. Such arrangements were put in place that were entirely satisfactory, is that correct?

A. That's correct, Mr. Coughlan.

Q. And then I think you were asked the date on which, and circumstances in which, you first became aware that the 20% shareholding in Esat Digifone held by IIU was to be held beneficially for Mr. Dermot Desmond.

And you have informed the Tribunal that your first awareness of IIU's involvement was, to the best of your recollection, their role in arranging the private placement of the minority shareholding to institutional investors. Clearly by mid-April 1996, IIU's role had then become that of a front-line investor in itself. You believe you knew at the same time that effectively shares would be held by IIU for Mr. Dermot Desmond, is that correct?

A. Correct.

Q. I think that you were then asked your knowledge, direct or indirect, or your involvement, or the involvement of any person in all steps taken by the Department, whether alone or in conjunction with the Department of Finance, to satisfy itself as to the financial capability of Esat Digifone Limited prior to the issue of the licence.

And you have informed the Tribunal, in the week or so before the award of the licence on the 16th May, 1996, you set out to satisfy yourself that the arrangements between the three partners in the licence were such that the business plan would not be jeopardised in any way on the financing side. Such arrangements were put in place that were entirely satisfactory. Your concern prior to the issue of the licence was that the business plan put forward by the consortium would be financed in such a way as to facilitate the rapid roll-out of the effective competition to Eircell, thereby benefiting both the economy and consumer at the same time. You believed that the steps taken by you and by the Department in general to assure yourselves that this would be so, were both sufficient and satisfactory.

In short, while a question-mark could be posed as to the then robustness of the financing ability of Communicorp Limited, the specific undertaking given by Telenor and IIU to take up any shortfall on a pro rata basis in the event of Communicorp being not in a position to finance fully its portion of the development cost was more than adequate. Equally, from a common-sense point of view, it is quite clear that Telenor on its own could have bankrolled the whole project quite comfortably so that the Department never felt that somehow the project was being

jeopardised in any way because Communicorp did not have a triple A finance rating. Similar arrangements and assurances would have, in all probability, been required in the event of licence negotiations with quite a number of other bidders, had they won the competition. Is that correct?

A. That's correct, Mr. Coughlan.

Q. You were then asked for details of all dealings and discussions that you had with the Minister, with Mr. Martin Brennan, with Mr. Sean Fitzgerald, or with any other person arising from the involvement of Mr. Dermot Desmond in Esat Digifone Limited.

And you informed the Tribunal, while you would have kept the Minister in the picture as to the emerging situation involving IIU and Mr. Dermot Desmond, you have no recollection of any kind of the Minister having any position on the matter, other than to note that the Department set out in the week prior to the award of the licence to assure itself that the financing arrangements would be satisfactory.

Certainly you have no memory of any kind of the Minister playing any role in this matter, nor are you conscious of him stating any preference of any kind as to the ultimate financing of the project, or of the involvement of IIU. While no doubt you may have discussed the matter with Martin Brennan, who for the most part was out of the loop at this point, as the

prime responsibility was passed to both Telecom's Regulatory Division, headed by Sean McMahon, and to Sean Fitzgerald. Your primary focus in resolving any outstanding issues was with Donal Buggy, who while an intrinsic part of the Project Group worked directly to you as key financial adviser and worked in the room alongside your office. It is

A. Mr. Coughlan, and I am sorry to break the narrative there. Once again, I think I prefaced all of these comments, written comments, by the fact that I wasn't in touch with any of my former colleagues, and I am wrong in my recollection here. Not wrong in any sense that it's going to disturb the central thrust of my reply, and if I could just take out a minute, therefore, to explain the role of Mr. Buggy.

When I started off as Secretary of the Department of Energy in 1988 I instigated this idea that I would try and recruit for the Department on a secondment basis, if I might call it the "creme de la creme" of the then big six, big five, and now sadly big four accountancy firms. I would have recruited them, even though I was offered people up to partner level, I would have recruited them at director level, that's immediately below partner level and these would be people, for the most part, involved in corporate finance. There were effectively two positions on offer to the city, if I may put it that way, to the big six, the then big six.

One was working directly to me as a sort of a chef de cabinet, I don't want I don't have any sort of folie de grandeur personally, but effectively would be working in the next room to me, and the other would work in the planning section, which also worked directly to me, but further down the corridor.

Now, I am mistaken. Mr. Buggy did move into the room in the former position, but at that time he was working to Mr. Tom Ferris in the Planning Division.

But just in case there is an issue that comes up later, he wasn't working to me on a day-to-day basis at that time. But I was mistaken. I didn't have an opportunity to contact the Department at the time.

Q. And was there anyone or was the other person who was recruited from the accountancy world working directly to you at that time?

A. Yes, he was.

Q. Who was that?

A. That was Paul Finnerty, who is now Corporate Finance Partner in KPMG.

Q. I think you have informed the Tribunal that, though it is with Donal Buggy you would have had most of the discussions on this matter, equally you would have consulted with Sean McMahon, who headed up the licence negotiations?

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

Q. Now, I think you were asked for details of all

previous dealings of yours, in both your personal and professional capacity, with Mr. Michael Walsh and Mr. Dermot Desmond, isn't that correct?

A. That's correct, yes.

Q. And I think you have informed the Tribunal that you have known Michael Walsh since the early to mid-1980s when he was a Non-Executive Director of Bord Gais Eireann. At the time you were working in the Department of Finance in charge of the Monetary Policy Division, which included responsibility for project finance. At that time Michael and you would have had business dealings on, to the best of your recollection, the financing of the initial Dublin/Cork pipeline, as well as the financing of Bord Gais Eireann from an aggregate corporate standpoint. In 1988/'89 Michael Walsh and you would have had intensive dealings over the sale of the State's minority sharing in Tara Mines. At that time you were Secretary to the Department of Energy and NCB were the Department's advisers on the disposal of the Tara shareholding. They had been appointed in your predecessor's time before you had any connection with the Department whatsoever. Michael was a keen adviser on the successful was key adviser on the successful disposal of the shares to Outokumpu of Finland. Over the years you retained friendly contact and have met from time to time socially.

I think you then informed the Tribunal that the milestone Irish bank strike of the early 1970s, that was your first encounter with Dermot Desmond. At that time he worked in City Bank Dublin, which was one of the few financial institutions to stay open during the bank strike. Naturally, they attracted a huge additional volume of business, and to cater for their customers they brought in additional staff from other City Bank operations. At that time your Swiss brother in law Roland Humbel, who was City Bank London at the time, came to Dublin to help out his colleagues. He and Dermot Desmond became good friends. He first met Dermot in your late parent-in-law's house in the context of social visits. Over the years you have encountered one another infrequently, mainly in the setting of the usual annual dinners, such as the Institute of Bankers, the Institute of Chartered Accountants in Ireland or equivalent annual functions. You have not had any direct business dealings with Mr. Desmond at any stage despite NCB being the Department's advisor on the sale of the Tara shareholding. The key advisory input for that particular transaction came from Michael Buckley and Michael Walsh, Dermot Desmond did not play a direct role.

I think that's Mr. Michael Buckley now of Allied Irish Banks?

A. It is surely.

Q. Formerly of NCB, and prior to that from the Department of Finance, is that correct?

A. Correct.

Q. Now, I think you were asked for your knowledge, direct or indirect, of a meeting which took place at the

Department on the 3rd May, 1996, attended by Mr. Knut

Digerud, Mr. Arve Johansen, Mr. Peter O'Donoghue,

Mr. Michael Walsh, Mr. Paul Connolly and Mr.

O'Connell, and to include the following:

1. Identity of all officials who attended the

meeting.

2. The purpose for which the meeting was held.

3. The matters discussed.

4. The queries or issues raised by the Department.

5. The requirement of the Department.

6. The request made by the Department to Telenor to

underwrite the entire of the equity and

operational expenses of Esat Digifone, and the

reason or reasons for such request.

In each instance you were asked to indicate the

source, sources of the officials' knowledge of such a

meeting.

And you have informed the Tribunal in the lead-up

period to the granting of the licence on the 16th May,

1996, you were, of course, aware of the tempo of

negotiations on outstanding items on the licence being

accelerated. You can't recall whether you were aware specifically of a meeting on the 3rd May, 1996, is that correct?

A. That's right, Mr. Coughlan.

Q. Now, you were then asked for your knowledge, direct or indirect, of the request requirement of the Minister or the Department that the configuration of the issue share capital of Esat Digifone should be restored to the capital configuration of the consortium which had applied for the license, that is restored to 40:40:20, and in particular:

1. All matters or considerations which prompted or contributed to such request or requirement.
2. The identity of all officials who had an input or involvement into the decision to make such request or requirement.
3. The input of the Minister in the decision to make such requirement or request.

And you have informed the Tribunal, that you can recall that you were particularly insistent that the capital configuration of the consortium to be granted the licence should be 40:40:20 at the launch of the licence. Under the terms of the licence the Minister had retained the flexibility to accede to a request as to certain changes in the capital structure of the consortium holding the licence, but your own view, and indeed that shared, to the best of your knowledge,

within the Department, was that nothing should jeopardise the essential engine room for delivery, which was the link-up between Esat's presence in the Irish market and their preplanning work and Telenor's very successful track record in the roll-out of the GSM in Norway.

While the minority institutional shareholder would bring valuable equity capital to the deal, it was not central to the successful management and execution of the project. Nevertheless, you were also keenly aware of the interest in the competition in the print media, and contentious and time-consuming comment could be avoided if the percentages were to remain the same.

Whether the Minister had this view in parallel to your recommendation on the matter, or indeed had developed a similar idea prior to your viewpoint, you cannot recall. Your clear memory was that the Minister certainly supported this viewpoint. While the events of seven years ago can be hazy, it is your belief that the key players in the Department at that time, notably Sean McMahon, Regina Finn, Martin Brennan, Sean Fitzgerald, and Donal Buggy, either wholly agreed with this standpoint or at the very minimum did not demur. You have no recollection of anyone in the Department suggesting a stance on the consortium make-up at the time of the granting of the licence which have been different to which you recommended.

Is that correct?

A. That's correct. Clearly I mentioned on Friday that it wasn't an autocratic management style, but I held that view extremely strongly. Some things stick out in one's memory, Mr. Coughlan, and I recall being extremely surprised, and perhaps a little annoyed, that in fact that the configuration had changed, not because I felt that 2.5% dilution of the main shareholding in itself somehow would cause the earth to stop turning on its axis, but on the other hand I wanted the minimum requirement of 40:40 to remain, and I do fall into colloquialisms easily, and I recall saying until at least the project had reached cruising altitude, and I suppose I made my views very clear, both upwards and downwards, to the Minister clearly, and within the Department's corridors. Now, as I say, whether Minister Lowry had the same viewpoint, he may well have had the same viewpoint, but quite clearly, I was insistent on this point.

Q. Why?

A. Because, as I said earlier, the 2.5% dilution on either side of the two what I you know, it's Esat provided the local rocket fuel. They had been the innovators. They had been the the pioneers in competition in the Irish telecommunications market. Not exclusively, but they had been the leading edge, so to speak. Telenor, arguably, pound-for-pound, were

the best GSM mobile company in the world. Now, people say oh no, Sonera might have nudged them in 1994, or Telia of Sweden, but nobody would contest they were in the top three, and I think a lot of people would say they were the leading company in the world. I didn't want any dilution from that original shareholding, because I wanted to make sure that regardless that, as I say, the twin thrust would be left undiluted, albeit that the dilution that had apparently happened was of a modest kind.

Now, the other dimension was more superficial. The other dimension of clearly there had been a lot of media interest, and even though the change that had apparently taken place was quite nominal, it was enough to cause comment, and I wanted that avoided.

Q. But

CHAIRMAN: Well, it brought, I suppose, IIU up to two-thirds of the holding of the big two?

A. You are absolutely right, Chairman, actually. Their 25% actually brought them right up to that relative to 37.5%, you are correct, yes.

Q. MR. COUGHLAN: But perhaps I'll come back to it. I'll take you through your statement because it's something we have to come back to.

A. Surely.

Q. I think you were then asked for your knowledge, direct or indirect, of a meeting which took place at the

Department on the 13th May, 1996, attended by Mr. Knut Digerud, Mr. Owen O'Connell, and including, in particular, your knowledge of the following:

1. The identity of the officials who attended such meeting.
2. The purpose for such meeting for which the meeting was held.
3. The matters under discussion.
4. The request made by the Department and Esat Digifone. Identify key questions likely to be raised at the press conference to announce the issue of the licence, to draft answers to such questions and to explain to the Department the reason for such answers.
5. The request made by the Department that the meeting be arranged between the Minister and Mr. Digerud, together with one or two others, at which the press conference would be discussed/rehearsed.

In each instance you were asked to identify the source/sources of your knowledge.

And you have informed the Tribunal, "While I wasn't a participant in the meeting that took place in the Department on the 13th May attended by Telenor and Frys, I would be very surprised if I had not been briefed about this meeting at the time given that the Department was coming to the very end of the licensing

process.

Do you not believe that it should be a surprise that not just Mr. Lowry, but many Ministers, approached set piece press conferences or press briefings in a way which requires considerable input to ensure that virtually any questions could be envisaged in advance?

At such press conferences, one of the key political objectives is always to minimise surprises. As a result, it would be perfectly normal for a Minister, either directly or through his private office and advisers, or through his line civil servants, to anticipate all questions which might arise, and notably those that might be potentially awkward.

This would normally be undertaken by discussion and briefing either within the Department, or in the event of a joint announcement, with the partners in such an announcement, is that correct?

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

Q. I think you were then asked for your knowledge, direct or indirect, of all steps taken by Esat Digifone, or by any person associated with Esat Digifone, or by the Department on foot of the request that the key question be identified and drafted prepared, including:

1. The questions identified.
2. The answers prepared.
3. The reasons for such answers.

4. Identify of all persons, including

Departmental officials who had any input into the identification of questions and the preparation of draft answers.

And you have informed the Tribunal, while set piece press conferences are not unusual, they are not as frequent as oral questions which are regulatory mandatory sessions in the Dail for each Minister in Government. It is a long established tradition in Government departments that any possible question or derivatives of possible questions arising from a specific oral parliamentary question is identified and answers prepared. That discipline would be put into action equally in preparing for Ministerial press conferences. It is probable that any briefing or list of questions would have been compiled by the key officials in both the Telecommunications Regulatory Division and the Telecommunications Development Division, presumably to the extent necessary. They would have linked up with Esat/Frys on questions/answers which were in the latter sphere of knowledge. Is that

A. I think that would probably, from theory, be a fair description of what probably happened.

Q. Yes.

A. I had no involvement directly whatsoever with the press conference, preparations or anything to do with

it, frankly.

Q. Did you know it was going on?

A. Of course I knew it was going on. When I had said to the earlier question, I probably would have been briefed, the briefing, in all probability, would have been very perfunctory, that yeah, there is going to be a press conference whenever the licence is signed, and we are lining up, you know, potential briefing questions and answers. It might have been as perfunctory as that. I had no involvement in the process itself, other than to attend ultimately.

Q. And how would you have been briefed?

A. I would have got a copy of the briefing material, presumably on the day, so to speak.

Q. I see.

A. But normally, this is the sort of thing I would perhaps not even read or scan, not out of any sense of complacency, but so much material would come over my desk I wouldn't spend a long time on something like that.

Q. You were then asked for your knowledge, direct or indirect, of all meetings, discussions or contacts of whatsoever nature between Esat Digifone, or any person on its behalf, and the Minister or the Department in connection with the key questions identified, the draft answers prepared, and the reasons for such answers, or otherwise, in connection with the

announcement of the issue of the second GSM licence to Esat Digifone, and including meetings between Esat Digifone and the Department or the Minister on the 14th May, 15th May or the 16th May, 1996, and recorded in attendances of Mr. Owen O'Connell, solicitor for Esat Digifone.

And you have informed the Tribunal that you have no recollection of being involved in any rehearsal between officials and Esat Digifone or their representatives on supposed key questions in connection with the announcement of the granting of the licence, is that correct?

A. That's correct, yes.

Q. And I think you were then asked for your understanding of the terms on which IIU and/or Telenor provided funding to Esat Telecom to finance its obligation to contribute to the licence fee of $\text{€}15$ million paid by Esat Digifone to the Department on the issue of the GSM licence to Esat Digifone, together with the source or sources of their understanding.

You were also asked for your understanding regarding the funding arrangements between IIU, Esat Telecom and Telenor for all aspects of the funding of Esat Digifone Limited, including the source or sources of their understanding.

And you have informed the Tribunal, that the Department was quite clear that in granting the

licence to the Esat Digifone Consortium, that the implementation of the requirements of the licence should be facilitated by a clear financing plan. In the lead-up to the granting of the licence you needed to satisfy yourselves as to the robustness of the financing plan. You had Donal Buggy research the financing of the implementation of the project. He produced a written assessment with supporting documentation. In particular, the agreement of Telenor and IIU to take up a pro rata on a pro rata basis any possible shortfall by Esat gave you sufficient comfort on this aspect, is that correct?

A. That's correct.

Q. You were then asked to identify the following:

1. All documents furnished to the Department in connection with the rights and obligations of the shareholders of Esat Digifone intersay in advance of the issue of the licence to Esat Digifone on the 16th May, 1996.

2. All documents furnished to the Department in connection with the project financing of the Esat Digifone in advance of the issue of the licence of the 16th May, 1996.

And you have informed the Tribunal, that to the best of your recollection and knowledge you are not aware of any documentation additional to that already supplied to the Tribunal already, starting with the

note of a meeting on the 12th April, 1996, between Departmental officials and Esat and Frys, and culminating between Owen O'Connell's/Fry's letter on the 16th May enclosing a copy of the Shareholders' Agreement.

Both project finance and necessary bridging finance were addressed satisfactorily in a letter dated 2nd May, 1996, from ABN-AMRO, which confirms that in conjunction with AIB they would be providing a $\text{€}125$ million bridging finance, and subject to normal due diligence, they would also be providing up to $\text{€}78$ million by way of longer term project finance. Is that correct?

A. Mr. Coughlan, perhaps clearly that's I wrote that, and that was on the basis of the documentation that was there at the time. I am not sure that I actually saw the Shareholders' Agreement itself. I think I took comfort, though the responsibility is mine, I am the decision taker, he is the adviser, from Mr. Buggy's note. To be honest, I am not sure I saw the Shareholders' Agreement.

Q. I think you were then asked for your knowledge, direct or indirect, of the following:

1. All side letters entered into between the members of the consortia or any two or more of them in advance of the issue of the licence on the 16th May, 1996.

2. All side letters entered into between Esat Digifone Limited or any shareholder of Esat Digifone Limited with the financial institutions which provided project financing to the company in advance of the issue of the licence on the 16th May, 1996.

In each instance you were asked to identify the source of your knowledge.

And you have informed the Tribunal that you had no knowledge of any side letters entered into between members of the consortium in advance of the issue of the licence. The Department did obtain a copy of the final version of the Shareholders' Agreement. While documentation on arrangements the consortia members had between themselves prior to the Shareholders' Agreement no doubt exist, you do not recall any knowledge of such documentation within the Department.

You have no knowledge of any side letter or any similar clarification, comfort or security underpinning the project financing terms between Esat Digifone or in any of its shareholdings?

A. I just might add to that, if there were I have no idea if there were side letters attached to the Shareholders' Agreement, I think that just "reinforce" is too strong a word, but perhaps suggests that if there were, and I have no idea, that I didn't actually have sight of the Shareholders' Agreement. I

knew it had been obtained, but I am not sure I had sight of it.

Q. You were then asked for your knowledge, direct or indirect, of meetings between the Minister and/or the Department and the financial institutions who provided project financing to Esat Digifone at any time prior to the issue of the licence.

And you have informed the Tribunal that you have no knowledge of any kind, either direct or indirect, of any meetings between the Minister and financial institutions who provided project financing to the Esat Digifone Consortium at any time prior to the issue of the licence. Equally, you have no knowledge of any such meetings with Departmental officials covering the same topic. Is that correct?

A. Correct.

Q. You were then asked whether, to your knowledge, direct or indirect, the consent of the Department of Finance was obtained to the issue of the licence, and if so, when, how and from whom such consent was obtained.

And you have informed the Tribunal, having had a direct involvement in the resolution of the fee structure in the period May, June and July of 1995, you were aware that the formal approval of the Minister for Finance of the revised fee structure, that was conveyed by way of letter dated 12th July, 1995. Following the transposition of the mobile

directive on the 16th May, 1996, the licence granted to Esat Digifone later on the same day was issued under a new section 111 (2)(b). The licence issued under these powers did not require any formal sign-off by the Minister for Finance, although his officials were kept in the picture of all matters of significance until the licence was granted, is that correct?

A. That's my belief, yes.

Q. And I think you were then asked for your knowledge, direct or indirect of, and the role of any other person in advising the Minister regarding the letter dated 29th March, 1996, from the Minister to the Chairman of the ESB. We'll come to deal with that in due course, but your response to that is:

"Both Sean Fitzgerald and I were involved in advising the Minister to sponsor the maximum cooperation concerning the location of masts for mobile telephones, as well indeed for other transmission facilities so as to minimise planning and environmental problems in general, and indeed, minimise local and political concerns about the location of such masts.

"The letter to the Chairman on the 29th March, 1996, was no more than to encourage the ESB to adopt a flexible and constructive attitude towards allowing mobile antennae to be attached to pylons and masts in

their ownership. While the letter of the 29th March, 1996, indeed arises from concerns expressed by Esat Digifone, who had already contacted the ESB on this matter, the Department would have encouraged the ESB equally to allow Eircell to locate such masts on ESB property.

"The policy was nondiscriminatory. The Department wanted to maximise co-location to the extent possible.

For the most part this would require co-operation between Telecom Eireann, Eircell and Esat Digifone.

Alfie Kane, Chief Executive of Telecom Eireann, was

also contacted by the Department to adopt a similar position of flexibility and creativity in addressing

this problem. While the Minister would have issued directions to could have issued directions to

Telecom Eireann and the ESB, the Department's stated preference at all times was for voluntary agreement between all parties, based on satisfactory commercial arrangements"

Is that correct?

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

Q. You were then asked for your knowledge, direct or indirect, of and your role, or the role of any other

person, in advising the Minister regarding the

Minister's dealings with the European Commission in

early May 1996 regarding the complaint made to the

Commission by the Persona Consortium, and the

application by the consortium for provisional relief restraining the Government from issuing the licence to Esat Digifone.

You have informed the Tribunal, at the time you were kept informed by either Sean Fitzgerald, Martin Brennan or Fintan Towey of the Persona complaint to the European Commission. Given your knowledge of the competition process, you did not believe that the Persona Consortium complaint would stand up to scrutiny, but advised, of course, that it should be taken very seriously and dealt with quickly and professionally. You were not aware of any particular intervention by the Minister. The Department, who had been responsible for running the competition, would have needed no encouragement to respond to DG IV in Brussels on the points raised by Persona. In the end the Commission found no basis to intervene on the basis of the Persona approach.

A. I am not sure that's an adequate answer at this stage, in the sense that now from reading papers in connection, obviously the Tribunal papers, it's clear that the Minister saw Commissioner Karel van Miert in that context, and in all probability I was almost certainly with him, because I normally accompanied Ministers. I would have known Commissioner van Miert going back over many meetings, going back to previous Ministries, etc.. So in all probability, and because

the Minister may have met only Commissioner van Miert on one previous occasion, I would be very surprised if I wasn't if I hadn't been at that meeting. I just didn't recall it, actually. As I say, I was writing, as I said, I suppose, from the heart, so to speak, when I wrote this. If I had gone through all the files it would have been evident to me that that, in fact, is the culmination of Commissioner van Miert clearing, so to speak, or deciding that the Persona, let me find the correct words for it, that the Persona complaint didn't require any further action by DG IV, was one that he took in the context following a meeting with Minister Lowry.

Q. Now, I think you were asked for details of all dealings which you had with the Minister in connection with the affairs of Esat Telecom Limited, or any associated company, or of Mr. Denis O'Brien.

And you have informed the Tribunal that in taking over administrative responsibility for the newly formed Department of Transport, Energy and Communications in January 1993 until the regulatory function for telecommunications became the responsibility of the ODTR in late June 1997, you had regular dealings on and off with Ministers Cowen, Lowry and Dukes on the definition of "telecommunications service" that were not confined to Telecom Eireann under legislation. In January 1993 Esat was present to extend the definition

of "value added services", and continued to do so until responsibility changed to the ODTR at the end of June 1997. In general, all three Ministers favoured the introduction of as much competition as possible permissible under the then existing legislation.

Because Esat Telecom continued to push the boundaries of eligibility as far as possible, it was necessary from time to time to restrict the availability of circuits to carry voice traffic, where there was a doubt they were acting within the law. Indeed, Minister Lowry, in getting the Government's agreement to the award of the GSM licence to Esat Digifone, by way of aide-memoire to the Cabinet, dated 26th October, 1995, at the same time also requested the Government to note his intention to enforce strictly the law and regulations concerning the provision of telecommunications services, particularly as they relate to the voice, telephony and infrastructural services reserved to Telecom Eireann until January 2000.

Disagreement between Esat Telecom and Telecom Eireann and the Department ebbed and flowed over this four and-a-half year period, with Esat Telecom, for the most part, viewing themselves as victims of an abuse of a dominant position by Telecom Eireann, and with Telecom Eireann viewing Esat Telecom as acting in areas which were rightly confined to them under the

Acts. In reality, there was a grey area where technology and legislation could not be as easily or clearly disentangled. In general, while the Department favoured as much competition as possible, they were often obliged to intervene to support Telecom Eireann's rights under the legislation. Equally, Ministers Lowry and Dukes were clearly acknowledging that Esat Telecom could not act outside the law, tended to be sympathetic to requests by Esat Telecom for facilities for value added services, for which they believed had an entitlement. These matters moved out of Departmental and Ministerial decision-taking powers with the setting up of the ODTR in 1997. Is that correct?

A. I think that's a summary of a very complex and detailed interaction between the two telecommunications companies and our Regulatory Division over perhaps four and-a-half years, actually.

Q. And would it be correct in summing it up this way: Telecom Eireann said that what Esat was doing was breaking the law, in that they were intervening in something intervening and providing a service which Telecom Eireann said was in their sole monopoly up to January 2000? Esat Telecom, on the other hand, as you said, liked to push out the boundaries in this regard and argued something different, isn't that correct?

A. That's absolutely right. Even at the time I think

Telecom's wish would have been to maintain their monopoly position to 2003. And not unsurprisingly. It was, as I say, a saga where Sean McMahon, in particular, had to play the role of Solomon with very limited resources, relative to the regulatory set-up that is there now.

Q. And there was a fair amount of contact between Esat Telecom, Telecom Eireann and Mr. McMahon's division over these matters, isn't that correct?

A. I don't think it really ever went off the boil.

Q. And as you have said, that whilst this was a monopoly position which was reserved to Telecom Eireann until 2000, and they'd have liked it to go on longer, probably, it was the view of your view and the Departmental view that you would like to encourage competition as much as possible, but nevertheless, the law had to be enforced as it was understood?

A. Clearly as civil servants, the law was the law, but the interpretation of the law was getting murky, in the sense

Q. That technology was creating that particular problem?

A. Yes. Can I borrow a phrase, perhaps, from sporting I believe that sort of technology then had the ability almost to bend the ball around any defensive wall that Telecom Eireann was putting up. Now, this was a matter that was, it was a moving kaleidoscope, and it was very, very difficult in some instances to come

down on one side or the other.

Q. And as you said in your response to the Tribunal, not only you, but you believed that Ministers Lowry and Dukes were clearly acknowledging that nobody could act outside the law, but they were anxious to encourage Esat in their competitive struggle with Telecom Eireann. Would that be a fair way of putting it?

A. I think that's 99% agreement. They would have equally they were encouraging any value added suppliers, not just Esat Digifone, to take up the cudgels.

Q. I think you were asked to furnish details of your contacts with certain persons, about whom the Tribunal has inquired. And the first thing you were asked, you make a general comment, contacts with Mr. Denis O'Brien, isn't that correct?

A. That's correct.

Q. And you informed the Tribunal that given Mr. O'Brien's robust pioneering efforts in sponsoring Esat Telecom, it's hardly surprising that as Secretary General of the Department you had contact with him from time to time. You have, of course, checked your official diaries, given the sheer volume of papers associated not only with the award of the GSM licence, but also with the problems associated with the opening up of the fixed line telecommunications market. You have also scanned some of the most obvious files for

contacts you had with Mr. Denis O'Brien. Denis O'Brien never attempted to influence you in any way during these contacts as to the outcome of the GSM competition.

You then set out under the heading, "Growing Pains of Esat Telecom":

While the rules of GSM competition were quite clear, different perceptions of what constituted the statutory monopoly services of the then Telecom Eireann resulted in constant contentiousness between the burgeoning Esat Telecom and the State company.

The Department, as regulator, acted as well as referee, peace-maker and facilitator until the Office of the Director of Telecommunications Registration, ODTR, was set up in 1997. Your personal recollection, and that seems to be supported by all the files

A. That's clearly a misprint.

Q. It must be "files"?

A. It has to be, otherwise I am sure the Chairman would have something to say about it.

Q. All the files you managed to scan, that is all Denis O'Brien's contacts with you, were about Esat Telecom and about his attempts to push out the frontiers of the company as a value added service licence, and to stretch the interpretation of the 1983 Postal and Telecommunications Act to the point where their services would be perceived as little different from

the operation for which Telecom Eireann still enjoyed a monopoly under the legislation.

You then deal with specific recorded meetings with Denis O'Brien. The record of the first formal meeting which you chaired with the Department on the 4th July, 1995, is attached for ease of reference.

You were accompanied by Paul Finnerty, Sean McMahon and Eugene Dillon, who took a note of the meeting.

Denis O'Brien was accompanied by Pdraig O'hUiginn.

The note speaks for itself. The meeting addressed Mr. O'Brien's preoccupation with the protected role of Telecom Eireann, as he saw it, and the problems it caused for his land-line business.

Some attempt was to be made at that meeting to touch on the GSM competition. O'Brien recorded as saying, 'We could not comment in any detail on the subject given the application for the licence as the subject of strict tendering procedures.'

"The message would have been delivered to anyone attempting to inquire on the progress of that competition. Even after the award of the exclusive negotiating rights which were to lead to the award of the licence had been granted to the Esat/Telenor Consortium, Denis O'Brien's contact with the Department remained exclusively bound up with his crusade to seek better terms for both capacity and its pricing from Telecom Eireann so far as land-line

telecommunications were concerned."

Your official diaries, and indeed Departmental files, record another meeting on the 11th April, 1996, which you chaired. You, accompanied by Colin McCrea, the Minister's Programme Manager, and Regina Finn of the Telecommunications Regulatory Division. Denis O'Brien was accompanied by a consultant, Richard O'Toole. The notes of the meeting are attached for ease of reference.

Paragraph 4 relates to the negotiations of the GSM licence. The file also shows that Denis O'Brien wrote to you on a personal basis from his home address on the 23rd April, 1996, but once again this relates to frustration about the development of conventional land-line business. There is absolutely no mention of the licence negotiations. And you attach a copy of the letter.

Your official diary has an entry on the 14th May, 1996, indicating a meeting between Minister Lowry, Denis O'Brien and yourself, but you can find no record of that meeting. You presume that if such a meeting took place it was in connection with the announcement two days later that the licence negotiations had been completed.

You also met Denis O'Brien at a number of ceremonial events, notably at the launch of Esat Digifone at The Point in March 1997. Nothing of substance was

discussed. You retired as Secretary General towards the end of January 2000. The last formal discussion on telecommunications matters which you had with Denis O'Brien was on the 11th January, 2000, when Minister Mary O'Rourke and I discussed the change of ownership and its possible impact on the Irish communications market with Mr. O'Brien and Sir Ian Valliance (sic)

A. That's a misprint. It's Vallance.

Q. That's as I understand then Chairman of British Telecom on the occasion of that company's take-over of Esat.

You have, of course, met Mr. Denis O'Brien from time to time in other social business settings, but you are also sure that you did not discuss Departmental business with him on any of those occasions.

CHAIRMAN: Mr. O'Donnell, it's clear you are feeling far from great. If it does get to a point that you need to get cover from one of your colleagues, do let me know.

A. Perhaps, Mr. Coughlan, if it's appropriate to say, that the last paragraph, there could be an inference that I am for instance, while I am personally acquainted on an affable friendly basis with Mr. O'Brien, I have never met him one-to-one socially. I have never met him in a, what I'll call a limited social setting, a dinner or anything like that. And once again, if I had met Mr. O'Brien, it would be sort

of at something like an IMI meeting or an IBEC meeting or a sort of a broad social setting where it's, if I may say so, a round-up of the usual suspects time. I have never had any social agreed social engagement with Mr. O'Brien.

Q. I understand. Then you were asked for contacts which you may have had during the bid process with listed categories of persons. The first one was, you were asked about was Mr. Denis O'Brien Snr.. And you have informed the Tribunal you met Mr. O'Brien Snr. very briefly on the margins of the press conference to announce Esat/Telenor as the winner of the GSM competition. This was the only occasion you met Mr. O'Brien Snr., is that correct?

A. That's correct.

Q. You were then asked if you had any contact with Mr. Aidan Phelan, and you have informed the Tribunal you had never met Mr. Phelan?

A. Correct.

Q. And then you were asked for your contacts with Mr. Michael Lowry. And you informed the Tribunal, for the duration of Mr. Lowry's tenure as Minister for Transport, Energy and Communications, you would have been in constant daily contact with him. While all senior officers in the Department have access to the Minister, in practice as Secretary General it's the pivotal interface between Minister and Department.

During the bid process either you or Martin Brennan would have kept the Minister informed as to the progress of the process, but there would have been no discussion whatsoever on individual applications.

A. Could you excuse me, Mr. Coughlan, and just to say, because at weekly management meetings it would have been Sean Fitzgerald as Assistant Secretary who would have had, who noted any particular milestone during the week or what was scanning the horizon, seeing what was coming up on all telecommunications matters, including the progress of the GSM licence. So that also would have been an avenue for the Minister to be kept informed by Sean Fitzgerald as Assistant Secretary.

Q. I take it MAC meetings are attended by the Minister

A. It depends on the each individual Department runs the MAC meetings, I don't like I never even liked the acronym MAC, the management committee meetings that we had traditionally always the Minister, Ministers of State were there as invitees, not in a sense that they were that in any sense they had their premier position in the pecking order, but because the agenda was set in a managerial sense, rather than a political sense they attended. Some Ministers attended over, and I am going back now right back ten years, some Ministers attended religiously and seldom missed it, unless there was a genuine force

majeure. Michael Lowry was not a regular attender at management meetings. His Minister for State, Emmett Stagg would have appeared at every meeting virtually.

Mr. Lowry would have attended when he was available or when it was convenient for him, but I couldn't say he was a regular attender.

So if we are looking at the weekly management meeting to be the focal point of information, it would be, in Mr. Lowry's case, it would have been more sporadic than that.

Q. I see. Would his Programme Manager have attended the meetings?

A. Invariably.

Q. I think that's Mr. McCrea, of course?

A. That's correct, yes.

Q. You said that the general note above, that is about the contacts with Mr. Lowry, also covers the political decisions taking events in more detail.

The Minister fully accepted his position and never attempted to elicit any information, other than on the adherence to the indicative critical path of the process, and on the negotiations with the European Commission of the competition policy dimension of the fees. The negotiations of the fee of $\text{€}15$ million for Esat Digifone and its counterpart fee of $\text{€}10$ million for Eircell was negotiated and agreed with the European Commission by Martin Brennan and key

Departmental officials. While all such negotiations would have been on an ad referendum basis, the Minister accepted the outcome of these negotiations.

A. Mr. Coughlan, it's strange that that sort of appears there, because the question is relationships between myself and Michael Lowry. It seems that sort of it seems an uncomfortable sort of crow footing of a specific example in there. Basically my relationship with Mr. Lowry was one of a day-to-day basis.

Ministers, if they are Dublin-based, tend to be in their offices, unless there is specific reason, every single day. Ministers who are based in rural constituencies, particularly ones of significant distance, and Mr. Lowry was over a hundred miles away from Dublin, tended to appear every day if it was genuinely required, but probably to slip into a sort of a four-day a week, coming up Monday evening and departing perhaps Friday, midday or Friday afternoon.

So in other words, typically I would have seen Mr. Lowry, say, four days out of five, and in each and sometimes many times a day, because issues boil over, and a Department with such a far-flung empire, so to speak, because we had touched on this before, it's only telecommunications is only well, Martin Brennan's empire is a small unit, relatively speaking, not in terms of importance, but relative to the administrative set-up. There would

have been issues every day, and typically in going to the Minister's room, because like 99 times out of a hundred I would go to his room rather than there was nothing taboo about dropping into my room, but typically that's the way the system worked.

I would have had a checklist of headings, points for discussion with him, and also equally to take on board concerns he might have had on the day. So, the interaction was day-to-day and continuous.

Q. I understand. The Tribunal asked you about any contacts you may have had with Mr. David Austin, and you informed the Tribunal that you had no contact with Mr. Austin, isn't that correct?

A. That's correct, yes.

Q. You were then asked about contacts with any member of the Government, any member of the Oireachtas, do you recall discussing expectations for the Exchequer I am sorry, (E) and (F), I better look at those. Yes, it's put into the answer.

Any member of Government, any member of the Oireachtas. You recall discussing expectations for the Exchequer, in terms of licence fees, with the Minister for Finance, Ruairi Quinn, in the context of meetings on the annual estimates. Such discussion would not, by definition, have alluded to any individual application for the licence. Your diary records such a meeting between Mr. Lowry, and then

Minister Ruairi Quinn and yourself on the 19th October, 1995. Given that you encountered members of the Oireachtas in Leinster House and elsewhere from time to time, it is possible that some inquiries as to the progress might have arisen. Your replies would have been polite, if not committal. Is that

A. I would hope so.

Q. You were then asked about any contacts with Mr. PJ Mara, and you informed the Tribunal that while you knew Mr. Mara from many official contacts, you had no dealings with him on the GSM process, is that correct?

A. Correct.

Q. You were then asked about any contacts with Mr. Eddie Kelly, and you have informed the Tribunal that you never met Mr. Kelly?

A. Correct.

Q. You were then asked about any contacts with Mr. Enda Hardiman, and you have informed the Tribunal that you have spoken to Mr. Hardiman in recent years, but not at any time during the business process?

A. And only on the telephone.

Q. You were then asked about any contacts with Mr. Edward Cloonan, and you have never met him.

You were asked about any contacts with Mr. Jim Mitchell. And you informed the Tribunal you knew Mr. Mitchell for many years, from his time as Minister and Chairman of the Public Accounts Committee. You

have no recollection of discussing the GSM licence

with him, is that correct?

A. Sadly, when I wrote to Mr. Mitchell he was still with us, but he was much liked by many senior civil servants, particularly in his role as the PAC for many years, but he never discussed the GSM licence with me at any stage.

Q. You were then asked about any contacts with Mr. Padraig O'hUiginn, and you have informed the Tribunal, as a former colleague you knew Padraig O'hUiginn for many years. You spoke to him on several occasions during the bid process, but did not nor you you would not have discussed the GSM competition with him?

A. That's correct.

Q. Your contacts with Mr. O'hUiginn were all in relation to the striving of Esat Telecom to gain market share in the fixed line communications as quickly as possible. Mr. O'hUiginn approached you at the Whitehouse conference in May 1995, and the follow-up meeting on the 4th July, 1995, has been described above?

A. That's correct.

Q. You then were asked about any contacts you had with Mr. Paul Connolly. And you have informed the Tribunal that you are not aware of having met Mr. Connolly?

A. Correct.

Q. I think you were then asked about any contacts with Mr. John Callaghan. And you informed the Tribunal that as Managing Partner of KPMG you met Mr. Callaghan on several occasions, but never in connection with the GSM licence. Is that right?

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

Q. I think you were then asked about any contacts with Mr. Leslie Buckley, and you informed the Tribunal that while you knew Mr. Buckley, you have never discussed the GSM licence with him, is that correct?

A. That's correct again.

Q. How did you know Mr. Buckley?

A. I knew Mr. Buckley because when Mr. Michael Smurfit, Dr. Michael Smurfit was appointed as Chairman of the embryonic An Bord Telecom in 1981, from memory he had a small office as Chairman out on Merrion Road, and clearly he needed somebody to hit the ground running for him, so to speak.

Now, Mr. Buckley won't mind my saying, he was, what, 22 or 23 years younger at that stage, and he made a very effective, if I may say so, one stop-shop manager/adviser for Mr. Smurfit at that time. Now, my role in the Department of Finance at the time was the financing of capital expenditure, among other things, and An Bord Telecom, before Telecom Eireann was incorporated in '83/'84, there was a two-year interim period where we went off balance sheet, so to speak.

There was, I'd say, an accelerated capital expenditure programme. So Mr. Buckley and I, from memory, and Mr. Paul McGowan of KPMG, would have been the drivers of that accelerated capital expenditure programme, so that's where I first encountered Mr. Buckley.

Q. I see. Had Mr. Buckley come from the public or the private

A. He was from the private sector actually.

Q. Where in the private sector had he come from, do you remember?

A. I can't recall to be honest, Mr. Coughlan.

Q. Now, was Mr. Buckley put into that position in Telecom Eireann by the public service or Mr. Smurfit?

A. Almost certainly, and my memory is, that it was a personal appointment made by Dr. Smurfit himself.

Q. I see.

I think you were then asked for any contacts you may have had with Mr. Barry Maloney. And you have informed the Tribunal that while you have some memory of Mr. Moloney, as Chief Executive designate of Esat Digifone, calling to your office as a courtesy call, you cannot find a diary entry for such a meeting.

In any event, you are quite sure that if it were before the result of the GSM competition, there would have been there would not have been any discussion of the process or individual applications. Is that

correct?

A. That's correct, yes.

Q. I think you were then asked about any contacts with any official of any State company. And you have informed the Tribunal that in your role in the Department, contact with officials from these companies was a normal feature of the job, in view of the fact that the Department was proxy shareholder and broad policy adviser for virtually all the major State commercial companies. Although contacts with Bord na Mona and RTE, a company reporting to other departments were frequent, you did not discuss the GSM process with them as they were members of one of the applicant consortia.

As regards Telecom Eireann, you have informed the Tribunal that Telecom Eireann operated the first mobile phone licence through its wholly-owned subsidiary, Eircell. It had, therefore, a legitimate and vital facilitating interest as operator of most of the State's communications infrastructure in the nature of the second licence and in the interconnect regime to apply. These issues were the subject of much discussions with the Department, as well as the continuing contentious issues arising from the interpretation and operation by VAS licence

A. Apologies. That's value added

Q. I know what it means. holders and noted by Esat

Telecom. As a result, you had frequent contact with Telecom Eireann, and some of these would have occurred during the bid process. By virtue of your role, these contacts were invariably with the Chairman, Mr. Ron Bolger, the Chief Executive, Mr. Alfie Kane, or both. While Telecom Eireann had an interest in the timing and outcomes of the new competition in the market place, as well as the counterpart fee to be imposed on Eircell, they had no particular interest in the bid process itself. There would have been no discussion on the content of the competition or on individual applications with Telecom Eireann in the course of the bid process.

Then as regards the ESB: Broadly speaking, any contacts with the ESB would have been similar to those with Telecom Eireann, except that the agenda would have been confined, for the most part, to energy issues. While the ESB had a growing interest in diversification into, among other things, telecommunications, by virtue of their interest through their subsidiary, ESBI, in the Persona applicant consortium, there would have been no question of any discussion with them on the prospects of the GSM competition?

A. In fact, Mr. Coughlan, the ESB sort of guarded their independence very fiercely. They regarded themselves as, perhaps correctly, they were certainly setup on a

different statutory basis than the 1927 legislation.

So there would have been a tradition, not based on any sort of lack of good personal relationships with the Department, that didn't come into it, but they tended to, as I say, guard their independence very fiercely.

So they made a point if, always always, if they were engaged in a departure, for instance, under the ESBI, they didn't necessarily take time even ever to let us know out of what you might politesse, out of courtesy this is not a criticism of the ESB it's just that we weren't their natural port of call for commercial confidences, let me put it that way. So I wouldn't have expected them to raise the issue with me, let me put it that way.

Q. Of course. They had sufficient self confidence, might be a way of putting it, had they?

A. I would have hoped all our State companies would have had that. But they had

Q. in entering such a competition?

A. They had it in abundance, Mr. Coughlan, yes.

Q. I think we can leave the we can pass over the legal personnel one. I think then the final one was Telenor.

You believe that you met Messrs. Johansen and Digerud at the press conference announcing the result of the GSM competition. You have, as well, some memory of a courtesy call meeting at the Department at a later

stage after the result of the competition where some additional personnel from Telenor may have attended. These contacts could not have affected the process in any way?

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

Q. I beg your pardon, perhaps it's my misunderstanding there. I think the legal personnel are references I think to people like Mr. Owen O'Connell and Mr. Arthur Moran. And I think that you have informed the Tribunal, and we'll come back to them given that the individuals cited and the companies in question are serious players in the legal scene it is possible you encountered them during the period of interest to the Tribunal. You can say equally that you are not aware of ever having a discussion of any kind germane to the GSM process?

A. You will understand when I say this, I don't mean this in any slighting way, but I don't believe I have ever met Mr. O'Connell.

MR. FITZSIMONS: Sorry, Mr. Chairman, just so that we are not left in the dark. Legal personnel: questions R, S, T, U and V, could we have the names of the legal personnel and the firms for transparency sake.

MR. COUGHLAN: Yes, I'll deal with that in a moment.

MR. FITZSIMONS: If we could have it now. It's in the list of questions.

Q. MR. COUGHLAN: I beg your pardon. Did you ever meet

Mr. Arthur Moran in connection with this particular process?

A. I have no recollection of ever meeting Mr. Arthur Moran.

Q. Did you meet Mr. Owen O'Connell?

A. No, I don't believe I have ever met Mr. Owen O'Connell.

Q. Did you meet Mr. Gerry Halpenny?

A. I certainly have no memory of ever meeting Mr. Halpenny.

Q. Did you meet Mr. Neville O'Byrne?

A. I may have met Mr. Neville O'Byrne that's of William 'Fry's I take it?

Q. Yes.

A. I believe I was responsible for the off balance sheet budget monies in '81, '82 and '83 and we were involved in some cross border leases involving state assets and I may well have met Mr. Neville O'Byrne in that context.

Q. Did you ever meet any Telenor legal personnel, I mean from Norway?

A. No, quite definitely not.

Q. Did you meet anybody from you obviously you have informed us you didn't meet Mr. Moran?

A. I am quite certain I have never met Mr. Moran.

Q. I take it you hadn't met any members of the firm of Kilroy solicitors?

A. Not to my knowledge.

MR. FITZSIMONS: Mr. Chairman, I only asked for the names of the list of persons that were put to the witness when he was asked questions. I don't want revenge taken because of my intervention.

CHAIRMAN: We seem to have satisfied your request.

MR. COUGHLAN: If Mr. Fitzsimons just calms down; that list includes asking about any legal representatives.

CHAIRMAN: Well we have it on the record so let's proceed.

MR. FITZSIMONS: It included a list of names, question R, S, T, U and V and the names were not given in the text, Chairman.

MR. COUGHLAN: Just to clarify the matter for Mr. Fitzsimons. R, Mr. Owen O'Connell; S, Mr. Gerry Halpenny; T, any member of the firm of William Fry Solicitors; U, any members of the firm of Messrs. Matheson Ormsby Prentice; Y, any member of the firm of Messrs. Kilroy's; W, Mr. Arve Johansen; X, Mr. Knut Digerud; Y, any other official or representative of Telenor or any of its associated companies, Telenor Invest or any of its associated companies.

CHAIRMAN: I think there is enough to be done without our dwelling further on it.

Q. MR. COUGHLAN: Now, the process leading to the ultimate award of a licence, the second GSM licence, effectively commenced way back in 1993 1993?

A. In Ireland it commenced, yes, that's right.

Q. And that was driven by, on the one hand, a view which prevailed within your own Department, and also a view which prevailed in Europe, isn't that correct?

A. That's correct. Mr. Coughlan, I don't want to delay in any sense, and I don't want to claim somehow that with a new management team in 1993 somehow we reinvented the wheel, because my predecessor and the Department of Communications, there would have been some early stirrings, if I may put it that way, first of all because they had their eye on the ball themselves going right back to 1987 when the pan-European GSM system was first adopted by the Council, and they would have been keenly aware of that, and secondly, because people, if I may say so, credit to Sigma, for instance, and some of the regional American companies, they had they saw the potential Europe wide, and notably Sigma saw the potential in Ireland. They would have approached the Department, and as advised by KPMG at the time. So in other words, it didn't and I know you didn't infer this all start when there is a new brew in the Department or when the Department was reconfigured in early 1993, clearly some limited amount of work had been done, but I suppose we took up the cudgels in 1993.

Q. And that commenced by Mr. Conan McKenna, in the first

instance, being assigned to carry out some work on

this particular project, isn't that correct?

A. Correct.

Q. And Mr. Martin Brennan then returned from Brussels in

1993, isn't that correct?

A. That's correct, yes.

Q. And he also commenced some work on this particular

project, at that time?

A. That's right, actually. He would have seen it as one

of his priorities in the Telecommunications

Development Division.

Q. And as we have heard from Mr. Brennan, and as the

documents have shown, in the first instance, he set

about trying to formulate a criteria whereby one could

assess anybody who was interested in the licence to

see if they were appropriate to be awarded such a

licence, isn't that correct?

A. That's fair, yes.

Q. And also in that context, he had available to him some

documentation from a workshop which had been held in

Brussels relating to the Green Paper which the

Commission intended publishing or were about to

publish on this whole question of liberalisation, is

the word used by them, of the telecommunications

market?

A. I recall that. That's absolutely right.

Q. And a Mr. Roger Pye, from KPMG, who had, of course,

made a contribution to the European aspect of this matter resulting in the Green Paper, but had also rendered some advice to the Department, I think, on other matters, isn't that correct, and the same time?

A. That's right. He was based in KPMG in London. Now, I don't believe I actually ever met, or perhaps just shook his hand once, Dr. Pye, but well, I am not sure he had a doctorate, but he certainly was very expert.

In the large accountancy practices, both here and obviously, notably, in as big as large as a city as London would have, by definition, have specialist partners, and clearly Mr. Pye was described to me as a specialist, both in telecommunications and in telecommunications regulation. With that sort of reputation, it is hardly surprising, given that the Thatcher agenda had moved both privatisation and liberalisation faster virtually than anybody in Europe, perhaps arguably not as fast as Finland, but certainly in our sort of sphere of sort of immediate interest.

Britain was a living laboratory of both successes and failures, and with it advisers in the city of London equally would have had to carry that sort of expertise. So I am not surprised that DG XIII would have recruited Mr. Pye, or his equivalent, to advise Helen Malone.

Q. And likewise the Department?

A. Absolutely. We saw this as once again is, if somebody has done it already in terms of thought processes, why not cotton onto it.

Q. Now, I think Mr. Brennan, in the course of his evidence, informed the Tribunal that he, himself, didn't necessarily see the need for Mr. Pye's involvement, that that came with your suggestion. Do you remember that?

A. If he says that, I am sure it's correct. I don't have a memory of that, but it doesn't particularly surprise me.

Q. Would that, and I don't believe you have ever suggested, but that wouldn't indicate any lack of confidence in Mr. Brennan's ability?

A. Oh, far from it actually. Far from it. He would still be sort of the mover and shaker, so to speak, in the telecommunications development. But taking on expertise where people had already had a track record of experience just seemed a prudent thing to do.

Q. Because whilst Mr. Brennan, you knew had ability, and you had every confidence in his ability, he didn't, of necessity, have any experience or expertise in this particular area?

A. I don't think any of us at the time would have claimed to have that expertise.

Q. Or experience?

A. Or experience, indeed.

Q. In any event, Mr. Brennan furnished to Mr. Pye, and we have had these documents opened to the Tribunal already, various drafts setting out his thinking of how you might set about arranging or designing a competitive framework for the ultimate award of a second GSM licence, and he received back certain suggestions or proposals from Mr. Pye. You are aware of that?

A. I am aware of that, yes.

Q. And that was the way matters began to evolve, isn't it?

A. I think when people are on a learning curve, by definition it's going to be an interactive process, and if it's not they have made up their minds too quickly.

Q. That ultimately culminated in the matter going to the Government, I think in November of 1995?

A. That's right.

Q. There had been previous interventions from Europe encouraging Ireland to move matters along?

A. Yes, both in terms of the fixed, and initially a nudge in the direction of the mobile.

Q. '94, I beg your pardon, November '94?

A. It's quite clear that you said '94, Mr. Coughlan. I was quite clear on that.

Q. And the way that went to Government in November '94, I

think that was just before the collapse of the Labour/Fianna Fail Government, isn't that correct?

A. It was, but it was, of course, let's say from the global political point of view, but it would have had no effect at that time.

Q. I understand that.

A. Yes, quite.

Q. But as a result of that particular collapse a new Government came in?

A. Absolutely correct, yes.

Q. And when the matter went to Government in 1994, paragraph what has become to be known as paragraph 19 of the RFP was incorporated into the memorandum that went to Government?

A. That's correct.

Q. In fact, we'll come back to the document, just to refer to that in a moment.

A. Sure.

Q. But correct me, I may be wrong about this, did it go to Government on that occasion by way of memorandum or aide-memoire, can you remember?

A. I can't recall actually. I can't recall.

Q. I think it may have been an aide-memoire. Perhaps for the assistance of the Tribunal, you might explain the difference between an aide-memoire and a memorandum going to Government?

A. Sure. I don't pretend to be, as I say, to hold the

official keys to the Department of Taoiseach's secretariat, but basically, if a Minister and a sponsoring Department, but only, obviously, with the sponsorship of the Minister, wishes to get a major policy change or any policy change that they want to bring to Government, or any transaction, or a major project, it is normal, and indeed preferable, that it be done by way of formal Memorandum to Government.

Because the essence of our democracy is one of the pillars of, on the executive side, so to speak, and as they reported legislature, is this notion of collective responsibility.

So when governments take decisions, they must be collective decisions making and maintaining, the maintenance of that is a cornerstone of our democracy.

So from that point of view, by definition, a memorandum is preferable because it gives every Minister a set period, a fourth-night, actually, in which they can take on board the essential thrust of what's being required of Government from the sponsoring Minister, and they, to the extent that they wished to do so, can comment. Now or make written observations which would be incorporated into the revised memorandums which would go back to Government for decision. Now, in practice, as you might imagine, Mr. Coughlan, it would be unusual for a line Minister, without any connection with the issue involved, to

make any comments. However, in a single-party Government, that would it would be only Ministries or Ministers that would be affected directly that would normally comment. But I suppose, in an Inter-Party Government it gets a little bit more complex because the Programme for Government agreed, you know, that didn't happen during the Inter-Party Government of '48 to '51 and '54 to '57, but in recent years Inter-Party Governments are based programmes for Government, and there may be a political dimension to a proposal which, while the Department involved, it mightn't warrant coming from them from an administrative point of view, it could might well warrant comment from a political point of view. So in other words, I am not taking too much time, Chairman, but basically, a Memorandum to Government is the preferred and usual way to get things decided at Government.

Now, an aide-memoire can have two roles.

It can have the role of bringing to the attention of members in the Cabinet of the full Government an issue of the day, but normally wouldn't require a decision.

There have been incidences where aide-memoires, decisions have been taken on the basis of an aide-memoire, but only where the political will was there, and that political will could start and stop with the Taoiseach of the day, because clearly the

Taoiseach of the day is Chairman of the Government, also has control of both the Government agenda and decisions to be taken.

In an Inter-Party Government, obviously where, for instance, at the time there was a triumvirate, while Mr. Bruton, Mr. Spring and Mr. De Rossa made up that, clearly there would have been necessity if such a political decision was taken to have a clear consensus between the three of them, and that would have been the practice, if, in fact, an aide-memoire was going to be used as, and I don't like to use the pejorative term, short-cut, but if such a short-cut were going to be taken.

I would imagine, if Mr. McCarthy, Dermot McCarthy, the current Secretary to the Government, were here, he would quite correctly say that aide-memoires should be only used in extraneous and not become a, if I may say so, a quick route to Government decision without going through the necessity of the full consultation which underpins collective responsibility.

Q. Would I be correct in understanding that what the purpose of a memorandum is, is to ensure that the convention of Cabinet collective responsibility is respected?

A. Absolutely correct.

Q. An aide-memoire, as you say, can be used, as you understand it, in two circumstances. Am I correct in

thinking that the more usual reason for an aide-memoire is an emergency has arisen or something has to be brought to Cabinet very quickly, and therefore the normal decision-making process wouldn't provide for it?

A. If, in fact, a decision was being sought. But aide-memoires should be used, I think I believe, and that's very sparingly that way. Normally it would be an issue of the day which would be, perhaps, very topical. Ministers would appreciate being briefed on it because of its topicality because no immediate decisions were being asked of them.

Q. Or that they may even be used where a decision is being sought where an emergency has arisen, would that be correct?

A. Quite correct.

Q. And the other situation which you have described, am I correct, is that it may be appropriate to use them where there has been political consensus achieved, particularly the agreement of the Taoiseach has been obtained, and therefore that there is no need to involve the normal decision-making process of Cabinet?

A. That's correct. But ultimately that's the decision for the Taoiseach as advised by, formally by the Secretary to Government.

Q. Now, in this period would I be correct in thinking that there was hardly a bigger change of policy about

to take place than the introduction of competition for Telecom Eireann, or for Eircell, in the first instance?

A. Within the sector you'd be correct. But there were bigger issues even, in terms of liberalisation. For instance, the liberalisation of electricity, albeit it was further back, would have been even more contentious, let me put it that way, but I am not contesting it was a large decision. It was a large decision.

Q. I understand that all, what is described as the liberalisation, is always going to be contentious, particularly from the point of view of the incumbent

A. It was important, Mr. Coughlan, quite right.

Q. And this was a matter which the Government had to decide, leave aside any licensing powers which resided in the Minister, isn't that correct? This involved a change of policy and only governments can decide that?

A. Quite.

Q. And that is why it went to Government in November 1994 in the first instance, isn't that right?

A. Correct. It is possible, Mr. Coughlan, and once again I am just reacting off-the-cuff, that Ministers who would be perhaps either wise or astute politically, might like to put an aide-memoire to Government in the form of a kite-flying exercise, particularly in an

Inter-Party Government, to see, you know, how it would be perceived, number one, what the strengths and the weaknesses of the case would be, so that when we return for a decision, they have already, let's say, done the reconnaissance politically.

Q. And is this why it went to Government in the form of an aide-memoire in November of 1994, that being an Inter-Party Government as well?

A. I'd love to think that I can recall, but I can't genuinely recall.

Q. But however it arrived at Government, there being no emergency to bring it to Government by way of aide-memoire, and perhaps it was by way of a kite flying, nevertheless what appeared to evolve was policy in relation to it, isn't that correct?

A. That's correct, yes.

Q. Now, the Government changed in December of that year. I think Mr. Lowry became your Minister?

A. That's right.

Q. And we have seen documents whereby it would appear that you advised him that, on this particular issue, that it was a matter for him, but that you didn't necessarily see the necessity to return to Government with this particular matter, it having already been agreed by the previous Government?

A. I don't recall that at all, Mr. Coughlan. I have no memory of that. And more to the point, I think I'd be

surprised if I gave that advice. So by the way, if I did, of course I stand corrected, but my instincts would have been don't go there Minister, get political clearance, that would have been my instinct at the time.

Q. Do you draw a distinction between political clearance and something else when the Government is dealing with matters, Mr. Loughrey?

A. Yes, I do. It would be foolish it would be foolish to ignore that if you want Departmental policy, for instance, and Departmental policy only becomes for real if it's sponsored by a Minister, by definition, but if you wanted a Departmental agenda furthered, once again is, in a modern Government set-up that we have now, we haven't had a single-party Government for a long time, is of course I must think of the political dimensions, and in fact each of the decisions along the line, you can see a redolent of a political compromise, and if I weren't aware of that, actually, I wouldn't be advising the Minister correctly.

Now, clearly this is politics with a small "p", with a vengeance, this is lower case, because as civil servants we would be absolutely apolitical and strictly and obviously apolitical when it came to party politics, obviously.

Q. In any event, and we can look at that particular

document, and perhaps nothing turns on it, whether you did give the advice or give that particular advice, the matter did go to Government again, isn't that correct?

A. The matter did go to Government again, and correctly I believe.

Q. Again I may be incorrect about this, but again I think by way of aide-memoire?

A. I believe you may be correct, yes. I don't have the documents in front of me.

Q. We'll come to look at them, because there is just a slight alteration in the aide-memoire which went to Government the second time, and I'd just like to ask you about it, because can I take it that a memorandum or an aid-memoire which is going to Government, particularly one involving a major policy issue, would be seen by you before it went to Government?

A. Yes, it would.

Q. And do I take it that you would advise your Minister that you were effectively signing off on this particular document before he brought it to Government?

A. Yes, I would, with qualification. Where it was, say, a compromise, say, with classically the Department of Finance, I would say to the Minister, "Look, I am signing off on this. It's the lesser of two evils, or

it's the best we can do at the moment actually. I am not happy with it, but if we want movement on this particular dossier, this is the way we have to go."

Signing off would be a practical signing off. It didn't mean I was, I bought in with conviction in everything that was in the document.

Q. I understand that, and particularly, as you say, every line Department dealing with the Department of Finance would have to reach its compromises or accept a situation?

A. That's right.

Q. But when the matter went back to Government, a Cabinet Subcommittee was set up to deal with, perhaps particularly, the financial side of this particular process, or project, can you remember?

A. Strangely I am sure you are right, Mr. Coughlan, I don't remember that emphasis. I just remembered it my clear recollection from Mr. Lowry directly was, and not so much from the words he uttered, perhaps, but from the way he described things, that this effectively was a political clearing house because some of the issues were tricky. I don't recall the emphasis on the financial. Now, clearly financial would be an intrinsic part of it, I am not denying that, but I don't remember an emphasis on the financial.

Q. But there continued to be the slight needle about the

Department of Finance wanting a high licence fee and the your Department

A. There was that. That was a central issue, but there was much more to it than that. Because clearly, and quite legitimately, for instance, the then Tanaiste, Mr. Spring, and the then leader of the Democratic Left, Mr. De Rossa, would have seen in their wider constituency, for instance, public sector workers, the whole question of ethos of public enterprise versus, which was they would have known quite directly the Department's view, which would have been more liberal.

Now, not necessarily better or worse, but certainly more liberal, and clearly that was an issue that would have come up time and time again.

Q. But just to be clear, that particular Cabinet Subcommittee was set up for one specific purpose, and it had to report back to the Government, isn't that correct?

A. That's correct.

Q. And I think that particular committee comprised of the Taoiseach, Mr. Bruton; the Tanaiste, Mr. Spring; I think Minister de Rossa; I think Minister Ruairi Quinn, as Minister for Finance, and if I am not mistaken, Minister Richard Bruton?

A. That's the precise line-up, yes.

Q. That was the precise line-up, wasn't it?

A. Yes.

Q. And that particular subcommittee, having deliberated, it reported back to the full Cabinet, and the decision was taken by the Government, then, to proceed with the process. The handling of the process, the actual competition, was in the charge of your Minister, or your Department, if I might put it that way, isn't that correct?

A. Correct.

Q. But the decision on the awarding of the licence or of the awarding of, if we call it, negotiating rights as the matter evolved, was one reserved onto the Government itself?

A. That's precisely correct, and without delaying you, Mr. Coughlan, just, I know you actually quite correctly telescoped it in there, but of course, when the Cabinet Subcommittee had satisfied themselves actually and gave effectively an imprimatur to go ahead, it's at that stage we certainly did and would have had to translate that effective political clearance into a formal Government memorandum where all Ministers would come into the picture.

Q. That is correct. A formal Government memorandum, and there is a formal decision of the Government, and the Secretary notifies all Departmental Secretaries, I think then, that is the way things proceed?

A. That is correct.

Q. That ended the work of that particular subcommittee,

isn't that right?

A. For the moment.

Q. For the moment. Did that subcommittee ever reconvene as a subcommittee of the Cabinet that you know of, as a result of a Cabinet decision?

A. I am trying to recall whether at the time of the EU intervention, I can't recall them meeting at that stage, but it is possible they did, and certainly the rapid clearance on October 25th was, in effect, cleared through the four of the five of the members of that committee.

Q. I understand that, Mr. Loughrey, but what I am trying to do is to understand, as you'll appreciate, you know, four Ministers can meet. A subcommittee of the Government is one which is set up by the Government, isn't that correct?

A. Mm-hmm.

Q. This subcommittee was set up by the Government for a specific purpose, it reported back to the Government, a formal memorandum to Government took place, or was submitted, a decision of the Government was taken and the Government reserved onto itself the right to be the decision-maker in this matter?

A. Correct.

Q. That ended the work of that subcommittee, or am I correct, or is there another decision of Government somewhere along the line setting up a Cabinet

Subcommittee or reconstituting that committee as being the Cabinet Subcommittee?

A. Clearly, Mr. Coughlan, I am sort of not keeper of the Cabinet Secretariat records. I don't even know if they have any sort of, what I might call, sunset process. Whether they ever stand down a Cabinet Committee, they may or they may not. I have no views on that whatsoever. But if you are asking me to say that effectively that somehow through, either Departmental actions or through Ministerial action, the Cabinet Committee was totally ignored, my answer to that would be, when it came to effective decision-taking time, the personnel who constituted, and they were all, if I may say so, the heavyweights of the Government actually, took the decision. Now, it's up to the Tribunal, if they so wish, to adjudicate on whether that constituted a committee decision or it constituted an ad hoc grouping of the decision takers of the Cabinet. I don't have a view on that, but politically I would say is, I certainly wouldn't have ignored in any way the stipulation that the members if it's, of that committee would have been ignored. I would have done so at my peril.

Q. I understand that, Mr. Loughrey. What I am looking for at the moment is your assistance on a factual level, as to whether you can point to any decision which you received from the Secretary to the

Government recording a Government decision that this Cabinet Subcommittee had been reconvened for the purpose of taking a decision about the award?

A. From a paperwork point of view, I know of no such record, Mr. Coughlan.

Q. Thank you.

Now, the next thing that happened and I'll be coming back to the documents, just to briefly refer to them, Mr. Loughrey. But the next thing that happened then was that, or around this time the Project Team was set up or was forming, isn't that correct?

A. Yeah.

Q. It seems to have come about, am I correct, as a result of the Department of Finance indicating that it might be no harm to set up a team which involved some of their officials?

A. Could I comment on that, Mr. Coughlan?

Q. Yes.

A. I am sorry, the record shows they beat me to the punch. Having

Q. I beg your pardon?

A. The Department of Finance beat me to the punch on this one, I having been on the books of the Department of Finance for nearly 20 years. Now, I wasn't there for a good deal of the time and greatly appreciating their role, is they would have been invitees, in any event, in any event, but Phil Furlong, the then Assistant

Secretary, and an old friend and acquaintance, we worked together for many years, put the good suggestion into play, but he met no resistance, for the simple reason I would have done the same thing had I been on my feet earlier, let me put it that way.

So there was a meeting of mind, and we were extraordinarily happy to work together on a joint basis on this particular transaction.

Q. I am not suggesting that there was anything mischief afoot in relation to this matter, Mr. Loughrey. I am just trying to recollect what did happen. But that's how the Project Team came together, isn't that correct?

A. That's correct, that's correct, yeah.

Q. And the Project Team then, looking at the matter, were of the view, and it may have been a view which prevailed in the Department, and the Department of Finance as well, perhaps, that there would be need for some assistance here?

A. Correct.

Q. That you'd have to get some sort of consultants to assist them, because nobody had any experience or expertise in relation to this type of project?

A. Every Member State of the Union that introduced it started from a blank sheet of paper actually.

Q. And it had only started a little time previously as well?

A. That's correct, yes.

Q. So everyone was looking for help, I suppose would be a fair way of putting it?

A. Yes, absolutely.

Q. And the matter went through the normal tendering process then, and we know that KPMG from London did tender for the thing, but they came in too expensively and

A. Not so much too expensively, because ultimately that would have been put to me. It was the structure, from memory, it was actually the structure of their bid that was more disconcerting than the indicative level of their bid, because I think they wanted it, first of all, related to volume of work. That alone actually can be a tricky concept because it can be open-ended, but they also wanted to be incentivised, I think, relatively speaking, by the size of the fee.

Now, I haven't read this in a long time, I am dredging this out of my memory, and as Accounting Officer I would have been particularly unhappy, effectively, to give an equity kicker to an advisory firm; that would have been a no-no as far as I was concerned.

Q. So if they came in if it appeared that they were more expensive than another consultant, but that you could measure their work compared to what another consultant was offering, the fact that they might have been the highest tender wouldn't necessarily have

excluded them?

A. Not in the slightest, and I have done so frequently in my career. To some extent you get what you pay for.

While always conscious of the taxpayer in a situation like this, in a major transaction, it's almost, it's the best advice you want. It's not necessarily the cheapest advice you want.

Q. I understand. In any event, out of that process emerged Andersen Management International of Copenhagen, isn't that correct?

A. Correct.

Q. And they were duly appointed consultants to the Project Group?

A. Correct.

Q. And am I correct in understanding that their function was to advise and assist the Project Group

A. Yes, it was.

Q. in the evaluation process?

A. I mean to say, I think I may have mentioned this on Friday, and if I didn't in this context, it was remiss of me. I mean to say, it was always quite clear in my mind that the ownership of all decisions of the process and all decisions was with the Project Group. But equally, the advisers would be an intrinsic part of the process, but the decision takers were the PT GSM.

Q. I just want to understand that now, Mr. Loughrey, what

you are saying now. The only ones who could take a decision here were the members of the Project Group, isn't that right?

A. Absolutely.

Q. They could be advised as to how you might approach something?

A. Correct.

Q. And then they would decide?

A. Yes.

Q. And that was how you understood it, the tender to work?

A. That's what I understood. And if there had been any uncertainty at the time, that's how I would have so decided.

Q. Yes.

CHAIRMAN: It's just on one o'clock, Mr. Coughlan, just as we adjourn.

The other innovation that you mentioned earlier, Mr. Loughrey, that you had been a protagonist of getting gifted young people just below partnership level from the top accountancy firms, like Mr. Buggy, for periods of secondment into the Department, had you actually pioneered that or had it been established before you became a Secretary in 1988?

A. What happened in the '70s it had been done once or twice, but infrequently, in the Department of Finance, but when I got my hands on the lever, so to speak, is

I instigated on a sustained and back-to-back basis so there was no gap whatsoever. In other words, the Department at any given stage had effectively what I might call $\frac{1}{2}$ a day advice in-house, so to speak, both in its Planning Division and directly to me.

CHAIRMAN: Thank you very much. We'll resume at ten past two.

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: Now, I think before lunch, Mr. Loughrey, we were discussing the various aide-memoire which went to Government, the first one which was in November of 1994. I just want to briefly refer to it, and then to the next aide-memoire which went to Government, just to ask for your views on certain aspects of it, if you can be of any assistance to the Tribunal?

A. Perhaps, Mr. Coughlan, I'd be more helpful to you if I could have sight of the documents.

Q. You will. The first document is in Book 41, Tab 23.

A. Mr. Coughlan, I don't want to delay, I am sure it will come in due course, I am happy to listen so...

Q. Indeed. I don't intend opening the whole aide-memoire, because we have been through all of these documents in detail in the opening, and with

Mr. Brennan. So, perhaps I can refer you to

A. I have it now.

Q. Item No. 10, the tender competition.

A. I have that now, yes.

Q. And then you can see it reads, "There will be a written tender procedure to select the competing licensee. The approach to put is an initial price of $\frac{1}{2}$ 3,000,000." This, of course, predated and was overtaken by events. " on the licence, and to let the market determine the full value of the licence in terms of ongoing payments. The amount in and form of payment for the licence was devised by reference to the experience in other countries, making appropriate adjustments for criteria such as market size, relative wealth and other aspects of the business opportunity. On this basis, it was estimated that possibly $\frac{1}{2}$ 20 million could be secured if an up-front payment, only, was sought. However, this would represent an increase of about 50% in the capital investment required for the project. Feeding this into the project negotiation would lead to significantly higher tariffs and less real competition than would otherwise be the case.

"One of the key objectives of introducing competition is to achieve high availability of services at comparatively low prices. The licence fee is structured to support this objective, while at the

same time providing for substantial State benefit.

The tender document identifies a number of criteria in descending order of importance which will be used in evaluation of tenders, and they are as follows:"

Then it's set out.

" Credibility of business plan and financial availability of applicant, together with applicant's approach to market development.

" Technical experience and capability of applicant.

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

" The approach to tariffing proposed by the applicant.

" The value of ongoing payments to the State for the licence."

What we are talking about here was a royalty aspect at this particular time?

A. Sure.

Q. "Timetable for achieving minimum coverage.

"The extent of the applicant's international roaming plan; the performance guarantee proposed by the applicant; efficiency of proposed use of frequency spectrum resources."

Then it goes on: "While the level of ongoing payment is one of the criteria, it is specifically stated that this is neither the sole nor the most important

criterion on which the decision will be made. The annual State-take will be a royalty based on revenue, rather than profits. Tenderers will be asked to indicate, for information purposes only, the likely direct and indirect employment consequences of proposals in Ireland. Consultants will be required to assist with the evaluation. The perception of objectivity in our evaluation and comparison of tenders will be critical."

Now, the criteria as set out there in this memorandum or this aide-memoire which went to Government, appears to reflect what had occurred between Mr. Brennan and KPMG, where they had discussed how you'd structure such a competition or process or evaluation or whatever word you may wish to use to describe it?

A. I think that's partly from memory and partly from reading documentation that's quite fair.

Q. That seems to be the position?

A. Yeah.

Q. That was incorporated in this particular aide-memoire, and it's something you'd have seen going to Government, I take it?

A. Undoubtedly.

Q. And it's something you would have agreed with?

A. Oh, absolutely, yes.

Q. I know there are other matters in relation to the finance side and licence fee side that you may not

necessarily have agreed with?

A. Oh quite, Mr. Coughlan. I think it's fair of you to say that. But even within 10, I would have reluctantly gone along with the fee structure for a number of reasons, because I had been involved in royalties, had been responsible for mining, for instance, in the past, and the difference between royalty based on revenue, which gives, I suppose, early certainty, because profits can be with capital expenditure, profits can be, for instance, deferred almost indefinitely in some cases. In any meaningful sense, as part of the Department of Finance, I would have been unhappy at any concept of auction, but recognised the ongoing sort of compromise between both departments. So when I say I approved it, I certainly approved it on the day before it went to Government. But my instinct was to have the least possible cost in position on the new entrant.

Q. I understand that, and you were arguing for that policy position all the time.

A. Quite.

Q. Now, I don't think anything much turns on this, but it is a document of yours, and it seems only right and fair to refer to it. And that's on the next divider, No. 24, and it's a note from you to Mr. Sean Fitzgerald. And I think it notes that obviously there had been a meeting of the Government the

previous night where this aide-memoire was presented, and it reads: "At last night's meeting of the Government, the question of the second cellular phone licence was discussed at some length. No decision was taken. The Minister did indicate to his colleagues that he would be returning to next week's Government meeting for a decision.

"The Minister for next week's meeting intends submitting an aide-memoire circulated a day or two, at most, before the meeting for information. The existing aide-memoire should be expanded on the following basis:-

"A. It should produce a high comfort factor for Telecom Eireann's future, and in particular for the agreement with Telecom Eireann following extensive discussion on Eircell's position in the new competitive framework.

"B. It should also major on the inevitability of the introduction of the GSM licence, stressing that DG IV are very serious on the challenge to the competition of the internal market in cellular phones, starting with Belgium, but they have already turned their guns on us.

"C. In particular, we should build on the element of the aide-memoire, that stresses, in effect, that everyone will be a winner and that the competition will grow the cellular phone market

in Ireland to the benefit of both companies, and that in particular the use of fixed toll phone networks are within Telecom Eireann's group position.

"In short the expanded aide-memoire should be as user friendly as possible, and as on..."

I think that is a document of yours, isn't it?

A. It is of course, yes.

Q. Now, I think what then happened obviously there must have been some reworking that may be the one that was reworked, I am unsure, but there was some reworking of the aide-memoire which did go to Government in due course. Could I just pause there for a moment and ask you; you say that it was your understanding that DG IV had turned their attention to Ireland or turned their guns towards you around this time?

A. That might have been erring on the side of perhaps exaggeration. They had, as you know, Mr. Coughlan, you had mentioned this morning, they had already written to us, and as I put it actually, placing a marker on progress in terms of the fixed line, but more particularly, nudging, giving us a nudge on the GSM. That's my memory of it. But I knew from the trade journals at the time as you know, in every sector where, let me put it this way, where margins are high, inevitably you will get trade magazines, and

there were trade magazines in Europe, for instance, for mobile telecommunications, and from those I knew that because Ireland hadn't put itself clearly on the side of the majority, the majority as you know, Member States charge no front-end fee at all. We were seen as both, to some extent, as bringing up the rear and by association with the Spanish, the Greeks and the Italians and the Belgians, and indeed Netherlands, up to September/October 1994, so the speculation, from memory, once again, of the trade journal is Ireland will be next on the list. So to the extent, there is no hard evidence that they were actually going to bring proceedings against us on the GSM then, it certainly was in the air, let me put it that way.

Q. Yes. Had you at any discussions with either obviously you did have discussions with DG XIII on an ongoing basis

A. Yes.

Q. concerning telecommunications?

A. Yes, I did, yes.

Q. Had you had any discussions with DG IV about the Irish position at this time?

A. I think if you were to push me on my memory, probably not. Subsequently I would have developed a relationship with John Temple-Layng, who was a very senior Irish official in DG IV, and I know I discussed telecommunications with him over many years. Whether

it started as early as that, possibly not, but possibly, but I'd err on the side of saying probably not as early as that.

In terms of DG XIII, I knew the Director General there, because when I worked in the Department of Finance he worked in DG II, I don't want to, Chairman, bog you down with acronyms, that's the economic and monetary side. So I happened to know the Director General, I had worked in Europe, I would have maintained a network, and certainly on the margin of every Telecommunications Council, I would have made it my business to talk to the Director General and/or some key officials in DG XIII.

Q. Would I be correct in thinking that if Europe had if the Commission had an interest in Ireland, it was in the context of disputes that were evolving between the Commission and, for example, Italy and Belgium over the question of the second mobile operator?

A. You'd be absolutely correct. There is an impression, the Commission in general will deny it, but there is little doubt that they use, let's say, less influential Member States. Now, I'd like to think that Ireland always boxed well above its weight, but we are still not among the top tier in terms of influence, and when it came to issues like this, as they would use a lesser Member State, and either do a

deal with them or make an example of them, pour encourager les autres, as they'd put it themselves, so inevitably for instance, I think we did a reasonable deal, for instance, on the Aer Lingus bailout, but there is little doubt about it that DG VII and DG IV wanted to make sure that the Aer Lingus example was going to provide a template for their dealings with Air France and Iberia and Al Italia that were coming down the line.

So in other words, just using I could fall into other examples, but just using that as an example, of course, they would hope that they would use, as they would see it, a sort of they didn't have any legal leverage over Ireland over and above any other Member State, but they knew that we were, first of all, we were good Europeans; we wanted, as best as possible, to keep on side, and they normally hoped they could do a deal with us. And that, you know, that was my impression then and it hasn't changed since then.

Q. Because, would it also be correct, or would it be correct to think that a view which may have prevailed in the Commission at that time was, perhaps they didn't understand how the Irish market might develop necessarily, but that they viewed the Irish market as being quite a small market, perhaps with Dublin being significant in that market, and they may not have viewed it as being any much more significant, for

example, Luxembourg, in terms of its market size?

A. Well, you are quite right, Mr. Coughlan. In a sense they might have doubted whether the Irish market had sufficient critical mass at that stage, because at the time, even though global even though the mobile phone, the GSM market was growing exponentially, nobody at that stage knew how rapidly it would grow.

And for instance, even though Luxembourg had higher disposal income per capita than any other Member State per Europe at the time, it wasn't with their, what, some 400,000 inhabitants, it wasn't seen as having sufficient critical mass to introduce competition there, in the sense of a national operator. So they may Ireland being next in size, they may well have had doubts whether we just had sufficient critical mass. In the event if they thought that, they were quite wrong. But having said that, that thought process must have occurred to them.

Q. Because I am just trying to tease out really the extent of the seriousness of the European view about competition in Ireland in the context of, as you say, having sufficient critical mass to introduce competition, as opposed to, perhaps, picking on Ireland in the context of a dispute that they thought they might have with Italy and Belgium?

A. It's very difficult to speculate what exactly was, for instance, in the key officials' minds, even though I

would have met them, or indeed Commissioner van Miert, though he was very open in discussion. But they would never have betrayed an attitude that somehow they were picking on Ireland.

Q. I understand that.

A. Clearly they had skills that would not have allowed them to actually utter any such sentiment, but having said that, DG IV still regarded itself as the key keeper of conscience, and anything that offended, notably, Articles 85 to 92 of the Treaty of Rome, I don't think there was any question of it getting away, and I don't believe any Member State, big or small, ever ultimately got away from, as they saw, the discipline and philosophy of the competition policy rules actually.

Q. Now, really what I am interested in, I suppose we'll come on to it, when the shot was fired on the 27th April, as to how it was viewed here in Ireland, or could have been viewed here in Ireland as to whether this was really serious or whether it was the Commission, and perhaps a stand could have been taken with the Commission on the matter, or whether it was something that was so serious that one had to acquiesce?

A. I think the latter, Mr. Coughlan. And I'd tell you why, perhaps from Peter Sutherland's time onwards, nobody took the Competition Policy Commissioner

lightly. In effect, the Mario Montis of this world, he is the current, as you know is arguably the most influential European, certainly in commercial and economic terms, and with an influence that stretches worldwide and right into America, as Jack Welch and Honeywell found to their cost, or AOL Time Warner; in other words, nothing all the biggest transactions in the US, if they have global reach, Mr. Mario Monti, as the successor to Karel van Miert, actually has that influence.

So in other words, I don't want to fall into colloquialisms, but you don't mess with the Competition Commissioner. So in other words, when he wrote that letter on the 27th April, and I had worked in Europe, we took that very seriously indeed.

Q. Well, I'll come to it in due course. But am I correct in understanding that to commence proceedings against a Member State, the Commission to commence proceedings against a Member State, they have to get the authority of the college of Commission?

A. Yes, they do. For a formal decision they have to go to the full college, yes, you are right.

Q. And again, can I take it, and you obviously have experience, I have no experience or knowledge of these matters, and that's why I am asking you; that is a place where one can get, as the Italians described it to Mr. Brennan, can get stuck in, hold the line, fight

your corner at that particular at that particular juncture?

A. That sounds impressive at that level. But in the event, as you know, Mr. Coughlan, the Italians didn't get away with it, and there was a formal decision of the college, effectively directing Italy to introduce a complete range of asymmetric measures to, as an offset against the original fee in Italy. So in other words, the Italians did not get away with it, despite the fighting talk, if I may put it that way.

Q. They introduced asymmetrical measures. They didn't give back the money?

A. One has to do is DG IV are not going to buy into, and nor, I suspect, I haven't studied in detail the Italian decision, of course I know of it, but I don't believe for one moment that the measures were just token measures, they would have been real measures as an offset.

Q. I understand. Asymmetrical measures were introduced. The competition itself wasn't unwound, the Italian competition?

A. Nor was ours. If we had ploughed ahead we wouldn't have been unwound, but we would have been extraordinarily vulnerable from a challenge from DG IV to start with, but we also could have involved ourselves with litigation that could have been time-consuming, and to us in the Department, we

weren't to know what was going to happen at the meeting, but a delay was as bad as a defeat for us.

We wanted to introduce competition as quickly as possible.

Q. I understand that. We'll deal with it in due course when we come to it.

Now, in the next divider, Divider No. 25, that records the decision of the Government, isn't that correct?

A. That's correct, yes.

Q. In fact what had happened; "Noted the Minister was supposed to hold a tender competition. Decided that the Minister would consultant with the Cabinet subcommittee on telecommunications established on the 4th May before decision is made on the award of licence." Isn't that correct?

A. That's correct, yes.

Q. Now, if you would, and this is just to ask you if you had any knowledge of any contact between Minister Lowry and Mr. Jim Mitchell about a matter which is a note made by Mr. Mitchell? If you go to the Divider 27(A), please.

A. Sure. Would you believe, Mr. Coughlan, I don't believe I have 27(A) in this particular book.

Q. Very well, I'll give you a hard copy.

(Document handed to witness.)

This was a note which was furnished to the Tribunal by Mr. Kevin O'Higgins, who was then solicitor to Fine

Gael, and Mr. Mitchell furnished this particular note,
the late Mr. Mitchell furnished this note to the
Tribunal. It's dated 5/1/95.

"I saw M. Lowry at 3.30 today and informed him of my
involvement with Esat.

"Tenders to be sought by advertisements in next week
or two.

"A. DOB not favoured by Department.

"B. DB FF !!

"He is available to meet principals of all contestants
in February, including DOB not for lunch.

"Check in three weeks to see if this has happened."

Now, I take it you had no knowledge of any such
contact between Mr. Lowry and Mr. Mitchell?

A. No, none whatsoever.

Q. Also, I am not going to ask you about (B), because I
am not going to ask you as a civil servant about the
perception of somebody's political support or
involvement, he not being a politician. About (A) if
I may ask you about that.

A. Sure.

Q. "DOB not favoured by Department."

A. I think that's an impression perhaps that, I can't
speak for Mr. O'Brien, clearly

Q. This is Mr. Lowry to Mr. Mitchell.

A. Exactly.

Q. Of Mr. Mitchell to Mr. O'Brien.

A. Am I to understand

Q. This is Mr. Mitchell to Mr. Lowry.

A. This is Mr. Mitchell giving, perhaps, an opinion of, a perception, and I mean to say, I am very far removed from that by several degrees, but if you want me to comment, I'll say it is possible. Any time I met Mr. O'Brien personally, I never had any complaint from him, that I can recall, of the Department being, operating in less than classic disinterest. But if within Esat they were trying to, let's say, get as much market share as possible within the value added services and were pushing against the Department as the referee, as the regulator, actually, it is possible like, I mean to say, if you play any sport, if you lose, sometimes you feel hard done by the referee. It is possible that they some people in Esat may have got the impression that by the Department giving firm rulings on what was in the law and what was outside the law in terms of definition of services, which were by definition of the '93 legislation reserved to Telecom Eireann, it is possible that they might have thought that, but of course clearly it would be wrong.

Q. I can understand, obviously, Mr. O'Brien and Esat, if rulings went against them on the regulatory side in relation to the fixed line business, feeling that and articulating such a feeling. But looking at this

note, it could be something that Mr. Mitchell said to Mr. Lowry or something Mr. Lowry said to Mr. Mitchell?

A. I hadn't thought of it that way no, but you are right, yes.

Q. If it was something Mr. Lowry said to Mr. Mitchell, and the second note would appear to be something, I am not going to ask you if that's on the political side, something that looks as if it was said by Mr. Lowry to Mr. Mitchell, but the first portion, could Mr. Lowry have had such a view? He was just in the Department about a month at that time.

A. It is possible. I mean to say, I am trying to be as helpful as possible. It could be in the discussions the Minister had, and clearly they would have been with me tentatively initially, but he would have gone to initial meetings of the Management Committee, for instance, and it is possible in a round table discussion that it would have been explained to him that Mr. O'Brien was, and from his point of view quite correctly, trying to push out the interpretation of the 1983 legislation as far as possible in his favour, and clearly he might have picked up words that might have said that, "Well, look, this is a thrusting young entrepreneur, but you know, he doesn't know when to stop", and that those sort of words may have been uttered, but they wouldn't have meant he could have interpreted them correctly, but I know myself from the

Department is, no matter how thrusting Mr. O'Brien was, we viewed all his applications or all his representations, you know, if I may say so, with the disinterest they wanted. There was no favour given or taken one way or the other, but and clearly if, in fact, Mr. O'Brien had been picking up the vibrations, the Department was pro-competition, so I am not sure if it really I am not sure where the impression could have come from.

Q. I see. If you go to the next divider I did ask you before lunch whether you had advised the Minister there was no need to submit the matter to Government because in fact, if you just look at this document, in fact it seems to be a memorandum to you and the Minister. You will see "Issues for Consideration."

So this is coming to you?

A. Oh, I see, yes. And what's the reference?

Q. I see. Divider 28.

A. 28, I see.

Q. The first, "Issues for Consideration", if you see that?

A. Yes, I see that.

Q. It's No. 1 really.

"Resubmission to Government.

"The Minister has the authority to issue a GSM licence under Section 111 of the Telecommunications Act, 1983.

The issue was brought to the notice of the former

Government. It is not necessary to resubmit the matter, unless the Minister wishes to do so for political reasons, and take account of the informal Government decision of the 21st December, 1994. It would delay an announcement."

Obviously this is coming from somebody to you?

A. Yes. It's highly improbable that would have been my advice to the Minister.

Q. I think you said that before lunch. Because

A. This was a new Government that had been set up on a tripartite basis, and given the trauma, I have no comment to make about it one way or the other, but the demise of the previous Government, I think I would have been very sensitive that a new Minister should not go on a solo run relative to the new partner, so to speak. Of course, we are all subject to making errors and mistakes, but I don't believe that would have been my advice.

Q. It's not what happened anyway?

A. No.

Q. Now, if you go to I don't think we need to refer to it really Divider 38. That's a letter from Mr. Fitzgerald to the Secretary of the Department of Finance, but it's being sent to Mr. Doyle. You can see that?

A. I do, yes.

Q. Unless you wish to comment, I think this, in effect,

reflects the position whereby the Department of Finance prevailed, to some extent, against your view as to how policy

A. Mr. Coughlan, I think you are being gentle with me.

We suffered a defeat, full-stop. My viewpoint did not prevail. The Department of Finance, and good luck to them, they won the argument, yes.

Q. So that brings us, then, to the Divider 39. There is another aide-memoire there. There are some notes on it. I don't know if it's of any great significance, unless you think so. But it seems to reflect this whole question of licence fees, and we are moving now to a position of the view of the Department of Finance prevailing?

A. I can't see anything that would be of help to you, but if it does later, I'll let you know.

Q. Very good.

Now, Divider 41, and this is the main aide-memoire, isn't that correct?

A. That's correct.

Q. And if you go to No. 11, the "Selection Process"?

A. I have it, yes.

Q. And the just, the "Selection Process" reads:

"Consultants will be engaged to assist in the process

of final selection, and will also be on board in time

to assist in the final stage of the Department's

information memorandum mentioned in paragraph 10. The

selection of the successful tender will be determined by reference to the following:-

" The quality and credibility of the business plans of the applicants, with particular emphasis on a progressive approach to market development. A commitment to a high quality nationwide service and an innovative approach to tariffs, with a view to reducing costs to consumers.

" The proposed fee for licence.

"The highest bidder will not, necessarily, be successful, and this is clearly stated and emphasised in the tender documentation. The documentation indicates that 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 therein, and specifically with regard to the list of evaluation criteria set out below in descending order of priority."

And they are there set out.

A. Quite.

Q. This document has been opened on a number of occasions. Can you be of any assistance to the Tribunal as to how what appears to be the financial and technical capability of the applicants seems to have moved from the descending order of criteria in the aide-memoire of November of 1994, and now, in this

aide-memoire to Government, and in the RFP document itself, of course, appears to be elevated to what I think Mr. Brennan has described as the "chapeau"? Can you be of any assistance there?

A. Let me put it this way: There is a real risk that I could rationalise now. I can't recall at the time that being an issue. Now, you may well say that, perhaps, something that should have been teased out further at the time. But of course I can offer reasons now why it's done. But I can't, hand on heart, say that I had thought it through on that basis at the time. Now

Q. Very good. You don't have any recollection?

A. No, I don't have any I can certainly set out a justification now, but whether I had that justification in mind at the time, I just couldn't say.

Q. All right. Document No. 43, then, is the memorandum seeking the actual decision, the decision sought. And I think we have been through this. And the next document at Divider 44 gives the decision.

Now, perhaps if you just yes, it may be of some assistance to you. If you go back to Divider 42, this relates to the famous Cabinet Subcommittee we were discussing before lunch.

A. Yes, I have that now.

Q. You can see it's the document is headed

"Confidential", and it records:-

"The Government decided on the 7th February, 1995, that a Cabinet Committee consisting of the Taoiseach in the Chair, Tanaiste, and Ministers for Finance, Social Welfare, Transport, Energy and Communications and Enterprise and Employment, should review the proposed financial terms regarding procedures and proposed advertisements for the digital mobile cellular communications GSM licence."

It records that the Cabinet Committee met on the 16th February.

"Noted the discussion at Programme Manager level in relation to these lines.

" Agreed that these discussions should be completed within two weeks.

" Agreed that the Minister for Transport, Energy and Communications would revert to the Minister for Enterprise and Employment for consultation before any decision is taken on tariffing."

And then noted here: "Agreed to proceed with the proposed GSM tender competition as outlined in the Minister for Transport, Energy and Communications' aide-memoire for the Cabinet Committee.

" Agreed that the Minister for Transport, Energy and Communications would submit to the Government in the near future outline proposals for an independent regulation of the telecommunications sector."

So that committee was set up that committee was set up, arrived at these decisions or conclusions, and then the matter went back to Cabinet by way of

A. Indeed, Mr. Coughlan, you are quite right. Actually, the first item is proposed financial terms and, when you asked me this morning, my impression in speaking to Mr. Lowry at the time, that he majored on this, where we have to shepard through the political dimensions, small P obviously, political dimensions, and it was clearly, and legitimately, trade union sensitivities; for instance, the other party's view of public enterprise, etc.. And I can recall, broadly recall that discussion with him, but when I see it in hard print the first item is proposed financial terms, you are quite correct.

Q. And all I am I bring these to your attention because I know you didn't have the document before lunch, and it wouldn't have been fair to you in those circumstances.

Now, I think the RFP was then there was the decision. The decision is at Divider No. 44.

A. I have that now, yes.

Q. And the decision of the Government is, "The secretary is writing to you

"I am to refer to the memorandum dated 17 February, 1995, submitted by the Minister for Transport, Energy and Communications, and to inform you that, at a

meeting held today, the Government approved the announcement of an open competitive bidding process, with a view to the granting of a licence to a second cellular phone operator on the basis that:

"1. That the bidding process would be promoted and controlled by the Department of Transport, Energy and Communications.

"2. A recommendation would 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, and

"3. The general terms and conditions attaching to the licence would be as set out in appendix to the aide-memoire."

That's just the decision we discussed before lunch.

Now, the RFP document then was there was an advertisement and it was available to anyone who paid $\text{€}5,000$, I think, wasn't that and that was the only way you could get you had to buy this first of all, you had to pay $\text{€}5,000$ for it?

A. And just as a footnote, actually, Government Departments do this fairly deliberately because unless you put and it depends, clearly, on proportionality. But bid documentation, if they are free, all sorts of people can request them, and it isn't appropriate because sometimes it opens up lines of inquiries that take up a lot of time when it's

quite evident that the people seeking the documentation actually could never be in a position to bid. So it was set i;½5,000 was nothing to a serious bidder for the GSM licence.

Q. I don't think anyone would criticise the Department.

A. Quite.

Q. And that was the bid document. That was you submitted your bid based on this particular document?

A. Correct.

Q. And that was and also these were the rules of the competition?

A. Absolutely.

Q. And these had been approved by the Government?

A. Correct.

Q. And I think you were asked and you have stated you were asked for your understanding of paragraph 3 of the document, which was that, "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 already informed the Tribunal, that your understanding of paragraph 3, that it 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 for 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 exclusively negotiation rights to Esat with the intention of granting the licence.

Is that your understanding of matters?

A. That's my understanding. In other words, this 20% for investors was to be earmarked for investors.

It was made clear at the outset, it was never hidden at any circumstances; in other words, is that it was being earmarked for future investors whose names, quite clearly, weren't available at the outset.

That's the nature of that kind of third party investment and, as I say, in the process, neither the advisers nor critically the PT GSM themselves, the Project Group themselves, nor at any stage was this hidden. It was taken for granted that this would be the case, and by definition, then, it didn't offend the canons of Clause 3.

Q. I see. Were you aware of the ownership details which had been submitted by Esat Digifone yourself?

A. I was first made aware of those, literally on October 25th, when I asked for them. I was not so aware before then.

Q. You knew nothing about what had transpired in the

intervening period?

A. Absolutely nothing.

Q. Now, I think you have already informed the Tribunal that your understanding of paragraph 19 of the bid document, that 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.

Now, the bid document was sent to Brussels, was it?

A. Yes, it was. All the documentation was sent to Brussels.

Q. Was that a requirement?

A. No, it wasn't a requirement at all. From once again, I am relying on my memory, but it was part of the Department's general policy of, let me put it, inclusiveness, when it came to Brussels. Much better to do the reconnaissance privately, rather than to be red carded subsequently in public. So in other words, there would have been a natural inclination to do that in all dossiers that might involve a Brussels dimension, to share information, and it would have come as second nature to Martin Brennan, who had just returned after over a three-years stint as the counsellor in the Irish representation in Brussels, so even though I wouldn't have been informed, probably, at the time, it doesn't surprise me that that was the case.

Q. Do you know how it was sent or to whom it was sent?

A. I imagine, and once again I don't want to waste the Tribunal's time speculating, but almost certainly it was either brought by somebody like Martin Brennan when attending a working party, and there were many such working parties, as you can imagine, building up to a constant roll-over of EU legislation, or perhaps, if there was no, let's say, peg to hang it on in that sense in terms of a meeting, it would have been sent, then, to the next counsellor, which would have been Andy Cullen, from memory. In other words, Andy Cullen would be the Department's counsellor in Brussels, would have been given the documentation to share with the relevant DGs, which would have been stop IV and XIII.

Q. If I might

A. I am trying to be as helpful as possible, but I am actually, I am surmising at this I have no documentary evidence, nor do I know this as a fact, but just in order to help you, that would have been our general approach.

Q. It's very helpful because we don't seem to have any documentary trail as to how it arrived in Brussels, I think. I may be incorrect in that, but I don't think we do. And I am just trying to understand this.

Your sister Department, if I could put it that way, in Brussels, would have been DG XIII?

A. That's right. Well, one of them because we had four or five of them.

Q. As regards telecommunications, DG XIII?

A. Exactly, yeah.

Q. And as a matter of, as you say, keeping them informed, trying to understand their views on things, would it have been to DG XIII that the bid document would have been

A. No, no. If you, in a sense if there was going to be a problem, it would be DG IV. I might have mentioned to you on Friday, Mr. Coughlan, that there were nuances of difference between DG XIII and DG IV, and quite self-evidently they had a different agenda. As I said, one was obviously the guardian of the Treaty in terms of competition policy. Telecommunications, DG XIII had a developmental role, and I am not saying they would be cavalier about the Treaty of Rome, but their objective, for instance, in this area, would be to get the pan-European competitive GSM system up and running and maintained as far as possible. They saw it as the great triumph of Europe; in fact, that we had leapfrogged over the US in terms of cellular phones, precisely because in '87 they had the foresight to seek a pan-European union uniformity, which both enhanced both the production side of handsets, and the technology, as well as presiding a market of over 300 million people. In other words,

and I don't want to labour this point, but this was the scene of their triumph in many ways. So in other words, they were much more interested in "Let's get the show on the road" in terms of competition, while DG IV, naturally, their touchstone always was their bible, Articles 85 to 92 of the Treaty of Rome. So in other words, there were those nuances, and you are quite correct, there was never going to be a roadblock in DG XIII. It was always going to be, if there was going to be one, in DG IV.

Q. I can understand that. And that's where a letter was written from. But I am just to try and understand, the Tribunal is trying to understand; there was no requirement to send the document to Brussels?

A. Not to my knowledge.

Q. A position was being argued in your Department to have no licence fee or a low licence fee, but something along those lines, isn't that correct?

A. That's correct, but they wouldn't have been aware of that.

Q. I understand that. I am just trying to understand how the matter ended up in Brussels.

A. Quite.

Q. You don't know how DG IV got this bid document, do you?

A. No, I don't.

Q. Did you have any discussions with the Minister about

the documents going to Brussels?

A. Absolutely not. As I said a minute ago, I wasn't even aware

Q. And you say you may not have even been aware yourself?

A. Yes, but I wouldn't have been surprised.

Q. So things were proceeding along and you were quite happy with how things were going; the Project Group was up and running, the tender process for consultants was

A. Not in terms of any self-importance, but just in terms of the span of the sort of work of the Department.

Once it was up and running it dropped off my radar screen, unless there was a blip, in other words. And I would have heard from Sean Fitzgerald on a weekly basis at the management meeting if there were any such blips, and it may even have had positive just Sean reporting every week, things are on track. But once again, once things were on track, there were so many things that weren't on track, so to speak, in the Department, that I moved on to other things.

Q. Of course. That's perfectly understandable. But do you remember Commissioner van Miert's letter of the 27th April, 1995, arriving in the Department?

A. No, I don't actually. I mean to say, in a sense I remember its impact on me when I read it, but I don't remember how it came into the Department. But it would have come, if it were addressed to the Minister,

it would have come to the Minister's office, simple as that.

Q. It wasn't a letter which had been signalled prior to its arrival that it was about to arrive, as we have seen in other documents subsequently?

A. Not in any way. This was a bolt from the blue, Mr. Coughlan, totally. And I feel in one sense, I am a little disappointed in my own network, that, in fact, it was a bolt from the blue, but in reality, this was one that I didn't anticipate and it was a bolt from the blue.

Q. Because, again correct me if I am wrong, that the only document which we seem to have uncovered in the Departmental files is the hard copy which, while it's dated 27th April, 1995, arrived in the Department, it's date stamped 3rd May, 1995. So it arrived in the normal way?

A. That's right. By post.

Q. By post?

A. Yeah.

Q. And it reads: "Thank you for your letter dated 8th March, 1995. I am very pleased to hear that you have now completed all the preparatory work for the opening up of the GSM market competition. And I appreciate, in particular, the possibility set out in Clause 15 for the further second mobile operator to use other infrastructure than that of the current monopoly

provider. However, at this stage of the analysis, I cannot exclude that some other conditions provided for within the framework of opening up the Irish market would appear to be discriminatory."

A. I haven't actually located the divider.

Q. I beg your pardon, it's at Divider 59. I beg your pardon.

A. Not at all. I have it now. Indeed, I recall the letter very well.

Q. The first paragraph seems to take the form of all letters coming from this particular Competition Directorate. They thank you and congratulate people, and then they say, "But we hold our position as to whether things are discriminatory or not." That seems to be the standard sort of opening paragraph they send to everyone?

A. You are absolutely right.

Q. And then it continues: "The main issue is the amount the applicant is invited to pay for the right to the licence under Clause 19.

"As you are probably aware, the Commission opened in December 1994 an infringement procedure against Italy, which had also included such an auction element as a selection criteria for the second GSM licensee. The Commission is of the opinion that such an auction, resulting in a fee which is only imposed on the second operator, can significantly distort competition, and

favour the extension of the current dominant position of the incumbent telecommunications organisation.

"With regard to this, it is not entirely clear to me from the competition documentation whether Telecom Eireann, which currently offers its own GSM service, would also have to pay the same amount as the new competitor.

"In any event, such an initial payment would lead to higher tariffs to recoup the money paid, thus rendering the mobile service less affordable, and restricting consumer access to the market, contrary to the objective behind Council recommendation" it gives the number "of swift GSM roll-out throughout the community.

"Moreover, this documentation does not appear fully transparent. Potential applicants are not aware of the weighting given to the different assessment criteria list in Clause 19."

So, what he is saying here is, what's the position about the fee? And what's the position about publishing the weightings in relation to the material?

Isn't that correct?

A. Correct.

Q. He then continues: "I was somewhat surprised to note here that the amount the applicant is prepared to pay will have more importance than the qualitative criteria relating to coverage, performance and

efficiency of the service, which would appear to me difficult to reconcile with the coverage aim set out in Clause 7, and the more general objective of ensuring universal service in Ireland.

"Finally, I would be glad to receive confirmation that Clause 12 does not make any distinction between direct interconnection mobile telephony service within and outside Ireland.

"I would, of course, be happy to discuss these issues with you. My Services are also ready to take part in the technical meeting with a view to the exchange of information and complete their assessment of the situation.

"I look forward to your reply in due course.

"Yours sincerely, Karel van Miert."

So that arrived in the Department and was brought to your attention?

A. It was.

Q. And what discussion ensued between you and the Minister about this?

A. Well, I recognise the even though, as you say, the opening is in almost conciliatory language, in fact underneath it there is the underlying threat of ultimately moving in the same way as they had already started, infringement process against Italy.

So knowing how DG IV operated in general, I would have advised the Minister now, once again, it's not

possible for me at this stage, eight years later, to piece together discussions I would have had with the Minister at the time, but quite clearly my advice would be to, I would say, "Look, Minister, this is a torpedo, it can't be ignored, and we are going to have to work on this. Look at the options, but one thing is certain, it can't be ignored. The Government may, at its discretion, have a number of options, they may decide at their discretion what to do, but there is no question that we can ignore this, and it must be brought into the reckoning." And I think that was it, the tenor of the discussion in the weeks after that, but I knew instantly that we were, so to speak, up against it once that letter came in.

Q. Now, around this time I think you knew the type of people who might be interested in applying for this licence, isn't that right?

A. We had a fair idea, and we were right in some cases, and wrong in some cases as well, but we had a fair idea.

Q. 12 people purchased the RFP?

A. Correct.

Q. And nobody had raised an issue with the Department about that content of the RFP about the licence fee?

A. I'd need to refer to documentation, because once again I wasn't close to it, but if you say so, Mr. Coughlan, I am quite happy to accept that.

Q. I think it doesn't appear that any of the people who were interested were complaining about it

A. Yeah.

Q. to the Department, at least anyway, from the documents?

A. I am not conscious of that.

Q. You are not conscious of that?

A. No.

Q. And

A. I think it's fair to say, Mr. Coughlan, as we were last into the field, and I don't say that with any sense of pride, we were last into the field, that Europe had divided into the majority no front-end fee, and the minority where people were charging a fee. Now, there was an element of that, the same names were cropping up in many of the competitions. In other words, if you look at the bigger players across Europe from France Telecom, Deutsche Telecom, obviously the British, but Telenor had already been successful, Telia, Sonera, Tele Denmark, Telefonica, and of course KPN, who seemed to enter virtually for every competition. So in other words, for the key drivers behind, associated with many of these, this wasn't strange territory to them. Ireland had fallen into the category of somebody who was going to charge a fee. So, I don't think, seeing as I say we were the last

effective competition in the field, I don't think it would have been a surprise particularly.

Q. I know it was the view of the Commission, and perhaps a view shared by yourself, and obviously a view which was honestly held by them, that as they were stating here that if you have a large licence fee, that this could have an effect on the consumer?

A. I think that's a truism.

Q. I know you do. There is a contrary view, isn't there, that as you say, all of these people who you knew might be interested in applying for this particular licence, they also knew what the market would bear, in that to the extent that, if you just bear with me for a moment

A. Of course, I didn't mean to anticipate

Q. People are prepared to pay a certain amount and a certain amount only, and that is something which would be known to every businessman in making up his mind, his or her mind, whether they were going to apply for a licence and pay a fee, isn't that right?

A. First of all apologies, I didn't mean to cut across the question, it's just sort of in my eagerness to respond. Of course you are right. I mean to say, nobody was entering this competition under duress, and of course no matter what the fee was, once they included a voluntary fee front-end, they had factored it into their calculations, and of course I accept

that argument, it's undoubtedly correct. On the other hand, objectively, if in fact is, and it's different from all sectors; I mean to say, a person selling ice cream might want to have a pay-back within three months, but a person who was building dams might want a pay-back in 30 years. But in this game, presumably, there was a pay-back period of maybe five to seven years, typically, and if the front-end fee was very significant, actually, in terms of normal pay-back calculations, it would have to be factored in, and by definition there are a couple of variables, but one of them would be the tariffs to be charged. So it could, or would, fall on higher tariffs which would be required if the pay-back period was to remain the same, for instance.

Q. But of course tariffs were a matter to be evaluated in the process as well?

A. Of course, of course.

Q. So that's where the balance would be struck?

A. Okay.

Q. Would you agree?

A. I would agree of course, yes.

Q. Now, at the time this letter arrived in the Department, I think you had already been furnished in March of 1995 with a note from Martin Brennan about the protocol that had been drawn up in the PT GSM?

A. I had, of course, and perhaps I missed the reference.

Q. It's Divider 48.

A. I have that, yes.

Q. And I think this has been opened on a number of occasions, and I think everybody is familiar with what was involved in it. But and I think you informed the Tribunal that notwithstanding the fact that civil servants would never knowingly disclose anything and were bound by State Secrets Acts anyway, that this was good from your point of view, and that it helped to emphasise not only the actuality of prejudice or advantage being conferred on somebody, but to ensure that the perception was also properly maintained, isn't that correct?

A. That's correct, yes.

Q. Now, did you have any hands-on involvement in the dealings with the Commission on the question of this letter of the 27th April?

A. I wasn't directly involved in any the drafting of any response.

Q. I understand that.

A. But I would be surprised, and once again I say this not out of any sense of self-importance, but if my influence to some extent wasn't on didn't somehow work its way into how it was handled, because I would have spoken to Sean Fitzgerald, I clearly would have spoken to the Minister, I clearly would have spoken to Sean Fitzgerald and Martin Brennan, but I didn't have

any hands-on in terms of, directly in terms of shepherding any element of it until such time it seemed to be stuck in Karel van Miert's "In Tray", and at that stage I took a personal initiative. But other than that but as to the approach, I think I would have been part and parcel of the decisions that went into formulating the approach and drafting the approach, but not I didn't have any hands-on on the actual drafting of the letter.

Q. Well, I think Mr. Brennan has informed us that the idea there was a budgetary requirement as well, of course, here, the Department of Finance

A. I can't tell you how important that was in some ways in how the saga was eventually resolved, because having worked in the Department of Finance, having been involved in the financing of the Exchequer borrowing requirement, knowing the budgetary situation is, once this was pencilled in as non-tax revenue, the 25 million, it was absolutely essential for political buy-in that that target would be met, because no Minister for Finance wants to see a short it's bad enough to have a shortfall in receipts over which you don't have direct control; for instance, consumption, VAT requires consumption, etc., you don't have direct control, to some extent you are in the hands of the gods in terms of tax income, but in terms of non-tax income where the Government, in fact, can effectively

shape the result, any shortfall there actually would be viewed much more seriously. So I knew always that it had to meet at least match the budget target.

Q. The Department of Finance wanted 25 million out of your Department in the first instance, perhaps by way of dividend out of Telecom Eireann, I think, isn't that right?

A. That's correct, but

Q. They also wanted money out of this licensing process?

A. And while I always believed, even though we lost the argument, that they should get their 25 million, certainly not by way of a dividend from Telecom Eireann, which would have been quite inappropriate in the year.

Q. But that's what they were looking for?

A. Oh, that's what they were looking for clearly, yes.

Q. And the 25 million anyway came up because of the budgetary arithmetic?

A. That's correct, absolutely correct.

Q. And a solution had to be found?

A. Correct.

Q. Now, was there any discussion in your Department about matters other than the licence fee, because we know that when the letter ultimately went, and in discussions that some of your colleagues had in Brussels when Mr. Andersen attended, that questions of asymmetrical measures were discussed?

A. That's true. I was not involved myself directly, obviously, in these discussions, but I knew various options had been looked at, but the reality was that Minister Quinn at the time actually was relying on 25 million. So it was always apparent to me that unless the answer gave succour to the Minister for Finance, and on that element of his budget, albeit a small element, but was one under his control effectively, it was not going to be a runner. So I think my thinking at the time was, well asymmetrical regulation is all very well, but it does nothing for the Exchequer borrowing requirement, for instance, so that probably that was my thinking, and I am trying to see how much did I put that into play in any sort of forceful way at the time. But it certainly would have been my mindset at the time.

Q. Now, I will come to the documents, but if I could just take it for the moment then in, just in narrative form.

Regarding this particular problem which had arisen, the closing date for the competition had been previously announced, isn't that correct?

A. Correct.

Q. It was on the advice, I think, of Mr. Brennan, and perhaps yourself, but Mr. Brennan has informed him on his advice, that it would need to be postponed to sort out this particular matter, and I think the period of

a month, or thereabouts, was what was thought it might take to sort it out?

A. I am quite sure that's correct, but it would have been self-evident. If we had to resolve the issue raised by Karel van Miert it was going to take time because, you know, DG IV have never been rushed by anybody, frankly. And that includes the heaviest hitters in the commercial world, and it includes Member States much larger than Ireland, actually. So in other words, there would have been an inevitability about the deferral to create the time and the space to come to an agreement with DG IV.

Q. And I think Mr. Brennan and Mr. Andersen attended a meeting with Mr. Ungerer, and I think Mr. Hocepiod of DG IV, where they teased out various issues, and we'll come to the document in due course?

A. Correct.

Q. And this eventually resulted in a letter being sent by the Minister to the Commissioner, isn't that right?

A. That's correct.

Q. Now, I think in the first instance, I am not sure about this, but a draft may have been sent in the first instance?

A. In a situation like this is, that it would be high risk policy to send a letter that would be refuted in any way actually, because it would be one step forward, two steps backwards. So in other words, we

would have done the reconnaissance in advance actually. It doesn't guarantee acceptance, but it certainly gave it a sporting chance of acceptance.

Q. And that discussion, which resulted in the letter, all took place between Department officials and Mr. Andersen, as a consultant to the Department, and Commission officials?

A. Correct.

Q. These were sensitive discussions, isn't that correct?

A. Extraordinarily sensitive discussions, yeah.

Q. And when the Minister wrote to the Commissioner, he set out Ireland's position and asked the Commission to consider the position of Ireland, and that he hoped that, you know, they would find approval?

A. That's right.

Q. And in the letter which was sent by the Minister, he made reference to a weighting which was to be attached to the licence fee in the competition, isn't that right?

A. Correct.

Q. And that had come out of the most sensitive area of the corral of confidentiality which surrounded the competition and the process?

A. That's absolutely correct. I don't have the letter in front of me.

Q. I'll come to it.

A. Indeed, but just perhaps that my assent, I don't mean

to be in any way pedantic, I am not sure he gave the actual specific weighting but gave a ceiling to the weighting that would apply.

Q. That would be less than 15 percent?

A. That's fine, yes, I accept that.

Q. In any event, it came out of that corral, isn't that correct?

A. And you are quite right, it did.

Q. And in responding to the Minister, the Commission made reference to this particular confidential sensitive information, isn't that correct?

A. Yes, he did.

Q. And I think there can't be any doubt that those not involved in the process, or the Minister or senior members of your Department obviously in advising the Minister in how to deal with the Commission, and those at that senior level in the Commission, nobody else had any business having that particular document or information in their possession?

A. I quite agree. Not only that's underlined by the fact that the only time I myself, but much more importantly the Minister, saw any reference to any weighting whatsoever was in that exchange of letters. Neither of us, for instance, knew what the other weightings were, for instance.

Q. And I don't think you dispute that this was a breach of the process. As to what significance you attach to

it is another matter, but you have no doubt but that was a breach of the process?

A. I accept actually that it was a potential breach of the process number one, and question of proportionality is a matter obviously that it ultimately will come to the Tribunal to decide.

Q. Yes, I understand, and I wasn't going to ask you because it's hypothetical, you didn't know about it.

I am not asking to you surplant the Sole Member.

A. Quite.

Q. But what I am interested in and the Tribunal is interested in, the type of thought processes that prevailed in the Department at the time

A. Sure.

Q. surrounding this confidential process.

A. We believed it, that that exchange of letters with DG IV would be totally confidential.

Q. And just to be clear about it, over and above the overriding consideration of State secrets or State Secret Acts, there was also a huge question of fairness here as well, wasn't it, because this was an adjudicative process which was being adjudicated on certain criteria and one had to ensure that nobody got an advantage, isn't that right?

A. That's correct.

Q. But more importantly, wouldn't you agree with me that one also is to ensure that there was no perception

that anyone got an advantage?

A. Absolutely.

Q. Because could I suggest to you that if you had been made aware of this at the time that it had happened, it would not have been possible to draft a statement for the Minister to go into the house with and say "This has happened now, the process has continued. We are now arrived at a stage where we are going to say that this person that is any person has been ranked first in this process, although they had confidential information relating to the process in their possession, but that doesn't make any difference, I am proceeding with the matter." You couldn't have drafted such a speech for the Minister, could you?

A. Couldn't have possibly done so. In the event, it didn't arise

Q. I appreciate that, Mr. Loughrey. But the Tribunal is very thankful for your assistance in this regard because you were a Secretary General of the Department. And again likewise, and again I understand you knew nothing about this; once the particular period arose on the 25th October, 1995, and we'll come to discuss that in another context, and if you had been told after the Minister had made his announcement of what had happened, it would not have been possible to write to the other competitors, and I

am using this in the context of the fairness aspect now, and say, "Look, this has happened, but it doesn't matter." Because the perception would have been defeated immediately?

A. I believe myself I couldn't possibly, nor could any reasonable person, say that it didn't matter because that would have been cavalier in the extreme. One would have to consider very carefully, though, the impact of such knowledge being granted to one applicant over and above the other five.

Q. That's the issue, isn't it?

A. Yes.

Q. And I am not asking you to comment on whether it did confer an advantage, that's a matter for the Sole Member to consider

A. Quite.

Q. in this Tribunal. But while it's on the Calpurnia side of things, I am asking you, has to be above suspicion, isn't that right?

A. Correct.

Q. And the Irish State, like Calpurnia, has to be above suspicion?

A. Absolutely.

Q. Now, in any event, you believed you got the green light from Brussels, or as you describe it yourself, a nihil obstat, isn't that correct?

A. Correct.

Q. Although Brussels will be very careful to say they didn't consent to anything before it happened?

A. Absolutely. And that's why it's described in the jargon as the so-called "negative clearance". They would quite clearly deny any approval.

Q. Of course.

A. But from our point of view is, once the Commissioner had written that letter, it was quite clear that no proceedings, if we proceeded with the competition on the lines agreed and indicated, that in other words, it wouldn't, in any event, if I may use injected in any way by DG IV.

Q. Well, it gave you sufficient comfort, would that be a fair way?

A. That's a very fair way of putting it.

Q. Perhaps similar to an indicative letter one might receive from a financial institution at some stage, I suppose. Would it be that level of comfort?

A. I am afraid that is, perhaps, a step too far for me this afternoon. In the sense it was

Q. I was just wondering.

A. I think we may be mixing apples and pears here, Mr. Coughlan.

Q. Very good.

Now, after the Commission's involvement, and I don't necessarily want to go through the actual documents with you, but I may have to, because a number of

copies came into the Department, and it's

A. I dropped my concentration, Mr. Coughlan, for a moment, which copies?

Q. A number of Commissioner van Miert's letter?

A. I see, yes, of course.

Q. And perhaps tomorrow morning I'll just take you through them, but before I should explain.

A draft came some weeks before the final letter was signed off. And that was a draft that I think

Mr. Brennan and Mr. Towey were working on with Mr. Hoceped on the DG IV side.

A. Mm-hmm.

Q. Nothing wrong with that. In fact, as I understand it, Mr. Hoceped at that early stage thought that he had Commissioner van Miert ready to sign the letter, and things got a bit slow. Do you remember that?

A. I recall very well, and frustrating.

Q. And it's hard to figure out, because we don't have any documents to show us what was causing the holdup in Commissioner van Miert's office.

A. There is a simple explanation because I know I knew from, indirectly from his chef de cabinet, is that Commissioner van Miert took very close personal interest, he was zealous, he never came across personally because he was a very affable man, but he actually took a very close professional interest in everything that went out, obviously under his name,

and was always master of a brief when one got in touch with him, and he had a huge amount DG IV had a huge load, and it travelled very light administratively speaking, so it's just possible, and I think even at the time, I understood, that while he was burning midnight oil, it was a matter of just catching up with these things.

Q. Also My Friends just draw to my attention, it may well be he wanted to be very careful about this because he didn't want to give the Italians and the Belgians perhaps a certain comfort as well. That may be one of the reasons?

A. I think Mr. Healy is perhaps even ahead of me there.

I think that's perhaps correct.

Q. He was proceeding cautiously?

A. I think that's helpful, yes.

Q. Now, I think to move things along, and appropriately, you made contact with Mr. Brosnan, didn't you?

A. I did by telephone initially, yes.

Q. And again, that is the way things work.

A. I mean to say, networks are there to be used, so long as there is nothing improper in the influence.

Q. There is nothing improper in you making contact with Mr. Brosnan, asking him if he could do something which might hurry things up?

A. And I would stress that Mr. Brosnan and all Irish Commissioners' chef de cabinet never ever overstepped

the mark. People often say they played with a green jersey on, and I know from the inside, they played with a European jersey, but all things else being equal, if they could be helpful, they tended to be helpful.

Q. In fairness to you as well, Mr. Loughrey, would it be fair to say, all that you were looking for was a little bit of speed?

A. That's it exactly.

Q. And as Mr. Healy said, they provided road maps?

A. Quite. And I was a little worried at the time too, that the full weight of the decisions that the successive Irish governments had taken, because the decision, in principle, effectively was agreed by Mr. Brian Cowen. These weren't easy decisions to make. It's all very well for the Department and civil servants, like myself, to volunteer a Minister for pain, in other words, because liberalisation always involved taking on the status quo, and that was always politically uncomfortable, so it was all I wasn't up for re-election. It's all very fine for me to recommend to Ministers to do that. So I wanted to make sure that Joe Brosnan understood as well, actually, that I had given the set-up here in Ireland, given the role that the for instance, quite correctly, the trade unions had in social partnership going back to the PNR in 1987, that these weren't easy

decisions for Irish Ministers to take, and that Commissioner van Miert, or in the first place Michel Van den Abeele, his chef de cabinet would understand that we had come a long way, and I am sure the Commissioner would understand that. This was additional stuff over and above, and please hurry up the letter, obviously.

Q. Yes. Now, when the letter we know there was a draft in the Department which had been worked on. We know that on the day the letter was signed by Commissioner van Miert, that a fax arrived into the Department from Mr. Ungerer's fax machine into the arrived into the Department. And that particular fax that arrived in did not have a date stamp on it, but on the second page, had Mr. Van Miert's signature.

A. I see, I didn't know this.

Q. I am just explaining, I'll go through these documents tomorrow, but I just want you to consider them overnight to see if you can be of assistance to the Tribunal in this regard.

A. Of course.

Q. There then arrived in the hard copy of the letter a few days later, it's date stamped. It's date stamped as being received, your date stamp is on it, having received it.

A. Of course.

Q. But significantly, it is also date stamped in Brussels, a big black date stamp, as you will see on the letter which was sent on the 27th April, if you look at it, there is a big black date stamp?

A. Do you wish me to look at it now?

Q. Yes, indeed.

A. Which reference is that?

Q. 59, I think.

A. I have it. You are correct.

Q. Do you see that? Do you see that black date stamp the way

A. Yes, I do, 27/04/1995.

Q. That's a date stamp you will see on documents coming from the Commission when they are officially it's in that form all the time?

A. Always, yes.

Q. It is. So the hard copy that came into the Department had that date stamp on it and it had Mr. Van Miert's signature on it. It was the official letter?

A. Yes.

Q. The Tribunal understands from the Commission that what happens then is that the file copy, which is retained in Brussels in DG IV, has the date stamp on it that you see there.

A. Mm-hmm.

Q. But doesn't have the Commissioner's signature on it.

A. I see.

Q. So that's the file copy. Now, what we are concerned to know here is this: What the Tribunal discovered in Mr. Jarlath Burke's files was the first page of the letter, which has no date stamp on it, and it appears to correspond to the first communication to the Department on the day it was signed, and that is a document which came into the Department with no date stamp on it, but signed by Mr. Van Miert.

A. Quite.

CHAIRMAN: Is that the one that was sent by Mr. Ungerer?

Q. MR. COUGHLAN: No, it was sent from Mr. Ungerer's fax machine.

A. Quite.

Q. And it appears to be the front page of that that Mr. Burke had in his possession.

A. Just so I can be of help and consider it overnight, if you ask me to. Am I to understand

Q. And I'll give you a set, as we have made one up for you to examine overnight, so that you don't have to go through the

A. Of course that's very helpful, thank you. But, Mr. Coughlan, am I, just to be clear, am I to understand that therefore the possibility is, I am not saying, obviously there are no facts established, it's up to the Tribunal actually to come to a determination, but the possibility exists that the

letter this first page found on Mr. Jarlath Burke's papers could equally come from DG IV services level or from the first page of the same letter that came into the Department?

Q. The Tribunal doesn't know. Yes, that's what the inquiry is at the moment.

A. I see, yes. I will certainly reflect on it.

Q. I'll give you the documents so you can study them. I am not going to ask you to do it in the box. I'd like you to do it overnight.

A. Yes, I'll do that.

Q. You are the Secretary General of the Department. Now, am I correct in thinking that after the involvement of the Commission, and your involvement in having matters sorted out with Mr. Brosnan, that matters just proceeded and you had no involvement in them?

A. I had no involvement whatsoever. I knew the competition was in good hands.

Q. It was relaunched, of course?

A. It was relaunched.

Q. In that a letter was sent to the twelve people who had bought the document. I think that's the way

A. I think one of them may have withdrawn by then, or one or two of them. But you are quite correct, to the people who still expressed an interest and hadn't withdrawn. It was sent to that number of people, and

a new date, the 4th August, from memory, was set.

Q. That's right. And a new completion date.

A. And once again it went off my radar screen at that stage, yes.

Q. And were you getting any progress reports I know you said you only ever got reports on the critical path?

A. Other than, you will recall actually is that it was set for the 4th. And clearly I can remember some bru-ha-ha, particularly in one or two, and notably the Esat Digifone was delivered to the front door with a great flourish, with sort of viking pageantry, if I may put it that way.

I can remember a few things crossed my mind, but I didn't have any involvement whatsoever, and then, as you know, from mid-August to the 4th October, I wasn't there, for one reason or another. So in other words, up to mid-August, to the extent that I inquired, I would have had got progress reports saying, "Look, we are still on schedule", but no more than that, I imagine. And I am not conscious of anything else, Mr. Coughlan.

Q. I think Mr. Brennan was away on annual leave in August too, do you remember that?

A. I don't remember that. But therefore, I would have spoken to, almost certainly, Mr. Towey at that stage, to the extent in the first three weeks in August I

wanted to be kept in the picture. He may have, and it's only a may have, because I had no reason to believe that it was other than foursquare on a course.

Q. Now, you have already told us that you informed the Minister, perhaps you didn't need to, but you did inform the Minister, and you advised him about the protocol that had been drawn up, perhaps not the protocol, but you advised him in the terms of the protocol, about to be careful to ensure that the process itself remained uncompromised in itself, and that there was no perception of compromise, isn't that right?

A. Absolutely, and I did so, obviously, for two reasons.

Not in any sense to infer for one moment that Mr. Lowry wouldn't do the right thing, that wasn't but for his own protection, and the view of the fact is we are still talking here about April 1995. He wasn't yet in Government six months, because he had never held any Ministry before then, actually, so this was somebody without long parliamentary experience and with no Ministerial experience, and it would come, and I don't mean I adopted a sort of an old soldier, for instance, tactics, but I would have been careful to advise him for his own protection not to be seen or that perception could arise that somehow with one consortia or one group or and in this case the consortia weren't even formally put in place at this

stage, but I knew there was a lot of interest, so that he should be careful, notably with people who were likely to be in the line-up or who had expressed an interest to be in the line-up.

Q. You were doing your duty. There can be no criticism of that, can there?

Now, I think Mr. Healy just brings to my attention, I think, and I think you covered it, that after the competition was relaunched, there was a new closing date of the 4th August, and the completion date was put back a month as well to the end of November, isn't that right? The completion date, I mean, for the matter to go to Government

A. That's correct, and it's logical, and Mr. Healy is right.

Q. Now, I think you have seen a correspondence My Friend just asked me to deal with this. There was correspondence at one stage between Mr. Brennan and Mr. McMeel where they were arguing the toss about such things as licence fees, publication of weightings, matters of that nature. And I think it everyone understood and agreed, am I right, that this was a Government decision. It wasn't a Government rubber-stamping because this dispute had gone on between Mr. Brennan and Mr. McMeel, and there had to be time allowed for the Government to make its decision. That's how the time-frame was drawn up,

isn't that right?

A. Mr. Coughlan, absolutely that was the intention, but it's up to Governments, Governments there is no, if I may put this way, statutory underpinning to that decision. There was a discretionary decision by Government, and Governments at their discretion can unpick a decision like that.

Q. I understand. As it was envisaged, time was to be allowed for the Government to make its decision when the matter was when the competition or the process was complete?

A. In the classic phrase, that seemed like a good idea at the time.

MR. COUGHLAN: I am going to come on to something new now, Sir, and it relates to Minister Lowry, and perhaps it's something I should take up in the morning instead of just let hanging.

CHAIRMAN: It's only a few minutes. It's not desirable to take up a fresh topic. Eleven o'clock in the morning. Thank you very much.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
WEDNESDAY, 19TH FEBRUARY, 2003, AT 11 A.M..