

A P P E A R A N C E S

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I N D E X

WITNESS: EXAMINATION:Q. NO:

JOHN LOUGHREY Mr. Coughlan 1 - 389

THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY, 19TH

FEBRUARY, 2003, AT 11 A.M.:

CONTINUATION OF EXAMINATION OF JOHN LOUGHREY BY
MR. COUGHLAN:

Q. MR. COUGHLAN: Now, Mr. Loughrey, we might as well start with the bundle of documents I gave you yesterday, the various communications from DG IV.

A. Mr. Coughlan, they are in my bag, but on the other hand, and I've left it upstairs. I am familiar with them because I read them carefully last night.

Q. We'll be putting them up on the screen anyway, and I'll just go through them I can, in fact, give you another set. It might be easier to have a hard copy.

(Documents handed to witness.)

The first document is a fax cover sheet, and attached to that is a draft letter which was sent by Mr. Hocepied of DG IV to Mr. Brennan on the 20th June, 1995. Now, that was the working draft?

A. That's correct.

Q. And you needn't concern yourself with that. That can be set aside for a moment.

Then on the 29th, you then the next series of documents, you have again a draft which was sent to Mr. Brennan on the 29th June, 1995. You can see that, I think, isn't that correct, from Mr. Hocepied? And that was the again it's a draft, and that was the draft that Mr. Hocepied anticipated would be in the form of the final letter which would be issued by

Mr. van Miert. He was sending it to

Mr. Brennan. Again, nothing turns on it, and you needn't concern yourself with it for the moment.

A. Fine.

Q. Other than to note that you can see that there is

"Draft" written on the top of it. It's got a fax

banner head.

A. Quite.

Q. It's got "Brussels", and it's got nothing else on the top of it, if you can see that?

A. Yes, I noted that, yes.

Q. The next series of documents, then, is a fax cover sheet. It's from Mr. Hoceped. It's to Mr. Brennan

and Mr. Towey. And you can see from the fax banner head, and we have been informed by the Commission

which machine that would have come from in DG IV. And it's timed at 15.57 on the 14th July?

A. That would be Brussels time.

Q. That would be Brussels time?

A. Yes.

Q. And if you turn over, then, and you look at the actual what's attached to the fax cover sheet, it is again

at 15.57, it's from the same fax machine?

A. Correct.

Q. If you turn over you can see that it's signed by Commissioner van Miert?

A. Yes, that's correct.

Q. If you go to the top of it, then, of the document, you will see "Brussels", and then you see under that capital "F" stroke, I think they call it a slash nowadays, and then small "ft", you see that?

A. Correct.

Q. Now, we are advised by the Commission that the draft would be prepared in Mr. Hocepiet's section, and it would be in the form of the document which has "Draft" written on it and was sent to Mr. Brennan?

A. Quite.

Q. It would then be transmitted electronically, we are advised, to Mr. van Miert's Cabinet office?

A. Yes.

Q. And what indicates that it is in Mr. van Miert's office is the putting on the document of the "F/ft."

That is how

A. Do I gather, Mr. Coughlan, that's automatic or it's a discretionary at the discretion of the PA or the typist?

Q. We understand we are advised it's automatic.

A. Fine, okay.

Q. Now, if you then go to the next bundle of documents, you will see a fax cover sheet and it's Mr. Brosnan's fax cover sheet?

A. Quite.

Q. And he is sending it to Mr. Cullen, the Irish Permanent representative. Do you see that?

A. Correct.

Q. And you see the fax banner head on the top. And Mr. Brosnan has informed the Tribunal that that is the fax number of a machine which was close to his office.

A. Quite.

Q. And that he, in the normal course, would send it to Mr. Cullen?

A. Correct.

Q. Mr. Cullen has informed the Tribunal that as the document doesn't have any other fax banner head on it, that the probability is that he would have put it in the diplomatic bag to be sent back to Dublin?

A. The overnight delivery.

Q. Yes. I'll just explain: If he had it before the bag left on a Friday evening, he would include it in that bag, and he would expect that it would arrive in Dublin around lunchtime on the Monday. If he wasn't in time to make that bag, it would go into Monday's bag and arrive in Dublin around lunchtime on Tuesday.

Would that sound correct?

A. That sounds perfectly correct, yes.

Q. And what was sent to Mr. Cullen by Mr. Brosnan by fax, you will see, has the "Brussels", under that it has "F/ft", it has the date stamped on it, you can see, and it is signed by Commissioner van Miert.

A. Correct.

Q. And we are advised by the Commission that the

document, once signed by Commissioner van Miert, takes on the status of an official document being issued by the Commissioner when the date stamp is put on it. If you follow me?

A. From a procedural point of view that makes sense.

Q. It makes sense as well, does it?

A. Yes.

Q. And then the final, or sorry, the next document you will see, is the hard copy which arrived in the Department, and it's date stamped in the Department on the 20th July, 1995. That was the hard copy that arrived in. And again, it is, of course, in the official form. It has "Brussels, F/ft, 14/07/1995."

And it was signed by the Commissioner. So that was the official communication arriving?

A. Yes.

Q. Then if you go to the next two documents, you will see that again it has "Brussels, F/ft", the date stamp on it, but there is no signature of Commissioner van Miert on it, and we are advised that by the Commission, that that would be the file copy, and it comes back down to Mr. Hocepied's section from the Commissioner's office in that form, and that forms the official file copy in the Commission.

A. And the discretionary date stamp is sufficient evidence that, in fact, it effectively had completed, including the top copies to be signed by van Miert.

Q. That would make administrative sense to me.

A. Perfect administrative sense to me. Having worked over there, it makes perfect sense.

Q. Now, if you go to the final document then, and this is the document which was on the, in the files of Mr. Jarlath Burke, and you will see that there is no fax banner head on it.

The Tribunal, when it discovered this document, made further inquiries of Messrs. McCann Fitzgerald, who are the solicitors for British Telecom, or whatever their title is now, O2, and asked Helen Malone was the copy which was submitted to the Tribunal the document, or in error had they failed to photocopy the whole document. And the Tribunal again was advised by Messrs. McCann Fitzgerald, and I think furnished with the copy that was the actual form of the document which was on the file. And as you can see, it was copied and the fax banner head does not appear on it.

A. I noted that, yes.

Q. But you will see that it has the word "Brussels" and it has "F/ft" on it. I think you can see that?

A. Quite.

Q. It does not have the date stamp on it. And the Tribunal is just inquiring at this stage it would, therefore, appear to exclude the that is a copy of the official file copy, if you understand me, which would have the date stamp on it, but no signature. It

would appear to exclude that it is a copy of the hard copy official document which arrived in the Department on the 20th July, 1995?

A. Correct.

Q. And it would appear to exclude that it is a copy of the fax sent by Mr. Brosnan to Mr. Cullen which was transmitted back to Dublin in the diplomatic bag?

A. That's logical, yes.

Q. And it also appears to exclude the draft which was sent

A. The first draft.

Q. The first and second draft, but it clearly excludes the first draft because it's in different form, but the first draft of the official letter.

A. And the second draft is not monogrammed "F/ft".

Q. So, prima facie it appears to be the top page of the document sent to the Department on the 14th July, 1995, at 15.57 Brussels time, doesn't that appear to be the situation?

A. Sorry, it would be helpful if you were to repeat that question again.

Q. It appears at first sight to be the top page of the document sent by fax to Mr. Brennan and Mr. Towey on the 14th July, 1995, at 15.57 Brussels time?

A. Oh gosh, no. I wouldn't come to that conclusion at all, in the sense it's the same as, but I was listening carefully to your question, maybe my

receiving antennae are poor. I thought the inference of what you said is, it seems to be a copy of what was sent. Sorry, perhaps it's too early in the morning for me. I am used to coffee by now.

No, you are quite correct. It is a copy of what was sent, but you are not inferring from that conclusively, so therefore, it was transmitted subsequently to Mr. Burke from the Department. You are not inferring that.

Q. I am only inquiring. That's what I want

A. Quite. Sorry I am sorry for the confusion.

Q. Perhaps we'll clarify our Terms of Reference so.

I think you do agree that it is, at first sight, that it appears to be the top page of that document that was sent to Mr. Towey and Mr. Brennan at 15.57 in the first instance?

A. Yes, I agree. But equally I am sure you could put to me that it is the original came clearly from Mr. van Miert's office, because the legend on top clearly could come from nowhere but Mr. van Miert's office.

So equally you could have put to me it's a top the letter that was found in Mr. Burke's dossier was one which originated in Mr. van Miert's office.

Q. Exactly. And we'll approach it that way. It originated in Mr. van Miert's office?

A. Quite.

Q. It was faxed by Mr. Hocepied to Mr. Brennan and

Mr. Towey in the Department at 15.57?

A. Correct.

Q. Brussels time?

A. Correct.

Q. There can be no doubt about that. Now,

A. I am uncomfortable when you use the impersonal pronoun

"It", because there is an inference there that there

is only one document, and of course there is only one

document. But equally one could construct any amount

of theories, and not related to the copy that was

faxed to the Department, obviously.

Q. Yes, I agree with you, and I am going to inquire into

that and see if you can be of assistance to the

Tribunal, because the Tribunal is inquiring into this.

A. Of course, and I will be happy to do so.

Q. Now, of course we have to be very careful in our

inquiries here, because not only is the question of

the competition itself been a matter that is being

looked at in the course of this Tribunal's work.

A. Of course.

Q. But we also have to be very careful about the

integrity and the good administration of the

Commission of the European Union, and we must also be

very careful in considering the integrity and good

administration of public administration in Ireland,

isn't that correct?

A. And of the individuals concerned.

Q. And of the individuals involved.

A. Quite.

Q. So, in the first instance could I ask you; do you have any knowledge as to what happened to this particular document, and I am referring, of course, to the document which was faxed to Mr. Brennan and Mr. Towey at 15.57 on the 14th July, 1995?

A. Mr. Coughlan, obviously to identify a particular document would be difficult, but I am quite sure I'd be very surprised, given that this was already a cause celeb in the Department, that they wouldn't have shown it to me right away. By definition I would have scanned it for content, but not to identify it in the way we are talking about now, clearly. But by definition, I would have had sight of that document as soon as it landed in the Department, and its significance obviously was known and we were awaiting such a document, let me put it that way.

Q. Yes.

A. So, by definition I think I believe even though I don't have a direct recall, I would have seen it, full stop.

Q. You would have seen it?

A. Yes.

Q. Would it have been copied in the Department?

A. Once again, I think automatically. I'd be surprised it hadn't been copied because we had there was a

chain of obviously there was a chain coming from the section and middle management up through the senior management, the Principal Officers involved, and ultimately to Sean Fitzgerald and myself. It's hardly likely that a single copy was hawked around the corridors one-to-one. So I would say it's logical to conclude that copies were made.

Q. Would a copy have been furnished to the Minister?

A. Certainly he would have been involved. He wasn't a man for taking much paper. I think you'll have seen on the file actually, there is very little evidence that Mr. Lowry was interested in files, and in fact his working style at most, never to take a file, only to take a very, what I might call, ad hoc folder, and even that was on a limited basis. Now, that's not to say he didn't see this letter or have a copy of this letter, but what I call his administrative style was to be informed by me, or perhaps somebody else in management, rather than to take paperwork.

So once again, what I am saying is, he may well have seen it, but in general, his style was such to be briefed orally, rather than with paper.

Q. Could you assist the Tribunal I know it's difficult but could you assist the Tribunal as to how many copies of this particular document might have been made?

A. I would be really speculating, Mr. Coughlan. I have

gone as far as I can. It's not that I am reluctant to do anything, but to say that I reckon it was photocopied, because common sense tells me, but to put a number on it would be speculating, and I am not sure that would be helpful to the Tribunal.

Q. Very good. Now, if you look at the document which was found in the papers of Mr. Jarlath Burke. Again, and I preface this by saying prima facie, or at first sight, it would appear that this particular document was copied so as to exclude the fax banner head from it?

A. You are inviting me to comment on that?

Q. Would you agree?

A. It's difficult. I mean to say, clearly in the we have all had a memory of using photocopying machines where accidentally you top and tail a document, but and that may well have happened. On the other hand, given that perhaps somebody might have been uncomfortable with the provenance of the document being noted, it is possible it was done deliberately.

Q. But what was not excluded was "Brussels F/ft". You can see that?

A. If somebody was uncomfortable with the revelation of the provenance of the document, they clearly overlooked that. We are in the realms of theory here, rather there are no facts, presumably, unless you can put them to me, Mr. Coughlan.

Q. As I say, we have been advised by the Commission that that, to somebody in the Commission, would enable somebody in the Commission to note that it had been in Mr. van Miert's office?

A. Anybody who was, let's say I think it's only people I know the system in Brussels fairly well. Even though I worked in another of the European institutions with a European investment bank for five years, I had contact all the time with the European Commission, and obviously I knew the system, how they worked, but that I think people would have to work closely with the Commissioner's office to realise that, closely.

Q. Closely. And it's not necessarily a piece of information that would be known to people in the Department in the first case?

A. Oh absolutely, not actually.

Q. Or to the Minister in the second

A. By the way, no more than Brussels officials would be used to the idiosyncrasies we have in denoting the significance of certain copies, no more than they would, unless they knew the administrative system in Dublin closely.

Q. And to the best of your knowledge, it's not something that would have been known to the Minister either?

A. The Minister never showed the slightest interest in the details of administration.

CHAIRMAN: You are referring to the form the nuance as a form rather than the content of the letter.

MR. COUGHLAN: Yes, sorry, Sir, I am talking about the actual the placing on the document "F/ft", not the contents of the letter, obviously.

A. Right. Chairman, I am glad you intervened, because I may have left the impression that somehow the Minister was some way cavalier in his approach. I am just saying the Minister focused on main issues. One didn't bother Ministers with the details of administration.

Q. MR. COUGHLAN: Thank you for your assistance in the Tribunal's inquiries into this particular matter for the moment, Mr. Loughrey.

A. Thank you Mr. Coughlan.

MR. MCGONIGAL: Mr. Chairman, before Mr. Coughlan leaves that, I notice in addressing his questions to the witness that he referred to a lot of information which the Tribunal has from the European Commission.

Can I inquire as to whether that information is going to be made available to the other parties, and the statements upon which they may be based, because we don't seem to have received them at this time?

MR. COUGHLAN: The Commission has advised that a witness will be attending the Tribunal.

CHAIRMAN: That is so.

Q. MR. COUGHLAN: Now, I was going to move on to

something at the completion of yesterday's business.

And I just want to bring to your attention something which occurred, it appears, on the 16th August of 1995. I think you are aware that bear with me for a moment till I find it that Mr. Tony Boyle headed up the application on behalf of the Persona consortium, isn't that correct?

A. I was so aware, yes.

Q. And that he, I think, was the Managing Director or Chief Executive of Sigma, one of the members of that consortium?

A. I was equally aware of that, yes.

Q. And Mr. Boyle informed the Tribunal that his firm did insurance business through a firm of insurance brokers, and that a Mr. Frank Conroy was involved in that particular firm of brokers. And that through that firm he asked that a meeting could be arranged with Minister Lowry. Were you aware of that at the time?

A. Absolutely not. I was aware that Mr. Conroy was a friend/acquaintance of the Minister. But I wasn't aware of such a meeting at the time, obviously.

Q. And I think Mr. Boyle informed the Tribunal that on the 16th August, it appears to be the 16th August, he had a meeting with Mr. Lowry and Mr. Frank Conroy at the Killiney Castle Hotel. Were you aware of that?

A. Absolutely not.

Q. The meeting had been arranged by Mr. Conroy. And that at that meeting, which took place in the public bar of Fitzpatrick's Castle Hotel, Mr. Conroy introduced Mr. Boyle to Mr. Lowry, and the meeting lasted for approximately 30 minutes. Were you aware of that?

A. I clearly wasn't aware at the time, but from the documents the Tribunal furnished, of course I have read that recently, in fact in the last week or so, yes.

Q. And I think from the documents which have been furnished by the Tribunal, you will now be aware that Mr. Boyle has informed the Tribunal that he effectively made a presentation in respect of the Persona bid to Mr. Lowry?

A. I don't have the documents in front of me, Mr. Coughlan, but could I ask, this is not to in any sense cast a scintilla of doubt on what Mr. Boyle said I can't recall, has Mr. Lowry been asked for his evidence on this?

Q. Mr. Lowry accepts that the meeting took place. It was arranged by Mr. Conroy. They did have a discussion. Mr. Lowry has said, and Mr. Boyle also said, that it was by way of a general presentation, if you understand?

A. Okay, all right. I accept

Q. I'll just

A. And perhaps so I can help the Tribunal, Mr. Coughlan,

Mr. Lowry agreed that, broadly speaking, that the content that Mr. Boyle says passed between them is agreed by both parties?

Q. Perhaps I'll just paraphrase for the moment.

Mr. Doyle informed the Tribunal that he introduced himself, and explained that the purpose was that the Minister heard directly of their interest in the bid and the strength of their team. They prepared publicity material which was to be shared with each member of the Oireachtas, and with the various interested parties, which outlined the key elements of the bid. Among other things it identified the members of their consortium and their credentials, the approach to marketing, their environmental approach, their proposed tariffing philosophy, their stated preparation for early launch, their funding and various other items of information on their bid.

Mr. Boyle informed the Tribunal that Mr. Lowry listened intently to these proposals and said he was aware that their consortium was a very strong contender.

Now, you weren't aware of this meeting. Mr. Brennan wasn't aware of this meeting. And from many documents that we have seen from the Department, it doesn't appear that there was any record of this meeting. And I am proceeding on the basis that maybe that some other official will say that they were aware or

informed of the meeting, but so far, in all the information we have received from officials and from the documents, it looks as if there was no knowledge in the Department amongst officials about this meeting.

A. I would feel sure, Mr. Coughlan, that that was the case.

Q. Because I take it, if anyone became aware, it's something that would have been brought to your attention or should have been brought to your attention?

A. Oh, yes, I would have acted on that.

Q. Now, I am not asking you to comment on what transpired between Mr. Conroy and Mr. Boyle or Mr. Boyle and Mr. Lowry. But it does appear that this was not in conformity with the advice which you had given the Minister and which you understood the Minister to accept, isn't that correct?

A. It's up to Mr. Lowry to interpret that for the Tribunal himself. But prima facie, I am quite sure that the Minister, given all my interaction with him, would not have, can I fall back on the phrase, conferred any advantage on Sigma, but I would be less than happy with the perception of a meeting during the closed period of any one of the applicants at all, full stop.

Q. You would have been

A. I would have been less than happy.

Q. Yes, that's what I understood. You would have been less than happy, because you were as concerned about the perception of this as you were about the actuality?

A. Indeed. I gather too from what you read out too, from Mr. Boyle's record, is that the alleged statement, and I don't mean the word "alleged" pejoratively, I don't mean it in any pejorative sense, that the statement as written by Mr. Boyle is that the Minister noted or reinforced the idea that they were a strong, not strong contender, but they had put in a strong application. I forego the exact words, I was just listening to it.

Q. A strong contender?

A. A strong contender that could be just standard politeness rather than based on any information whatsoever, because at that stage I would contend that Mr. Lowry had no information of any kind to either offer reassurance or any other to be used for any other intent, and I am not inferring for any moment that any intent would be proper, but just in the normal, what I might call, affable social exchanges that may have been uttered purely in that sense, because I don't believe Mr. Lowry could have had any information of any kind that would be useful at that stage.

Q. As far as you knew?

A. As far as I knew.

Q. Now, I think you have informed us that you went on sick leave a few days after this, on the 21st September, was it?

A. Yeah, I remember going home the 21st and visiting the doctor on the way home, and I was immediately what I had at the time was an attack of shingles, and I was immediately put on heavy antibiotics and sent to bed, so to speak. So, I wouldn't have been in a position to have any interaction with Mr. Lowry in any meaningful sense, and I don't recall any telephone conversation between then and until my return.

Q. And you then went on annual leave, and you didn't return to your office until, I think, the 4th October?

A. 4th October, yes.

Q. Now, I presume, as Secretary General of the Department, there would have been some contact kept with you over the telephone?

A. My private office would have been in touch with me while I was at home on any matter, on any matter that they thought would absolutely require my attention.

Now, this these would have been very limited in number, because my private secretary, the head of my office at the time, and indeed all of her successors and predecessors, would have had, if I may put it like this, a Fort ^Nox-like attitude to what I would be

bothered with if genuinely I was laid low. So of course, I am sure they were in touch with me over one or two important matters, but I don't recall anything whatsoever to do with the GSM licence.

Q. That's what I was just going to ask you. You had a large Department, and there may have been matters that you needed to be contacted about, but you don't have any recollection during the period you were ill or during the period of your annual leave when you were contacted about the GSM?

A. No, I don't have any recollection of that whatsoever.

In fact, the sort of vacation we tend to take in the United States is one of touring, road touring on the road, and even though I would call the office from time to time, I didn't have one of these expensive all-purpose all-singing phones that you can be contacted. I just had a normal GSM phone, so they were relying on me to contact them rather than the other way around. And once again, there was no call to me during that period about the GSM licence.

Q. And would you have had any contact with the Minister during that period?

A. None whatsoever.

Q. We should bear in mind, of course, the Dail wasn't sitting as well, so as regards political pressure, it wasn't there.

A. Quite. It was sort of a quiet period, yes.

Q. Now, I know you were on annual leave, but were you informed on your return from annual leave, or to your knowledge did anyone in the Department know that the Minister had met with Denis O'Brien on the evening, first of all at the All Ireland Football Final that day, and subsequently the evening of the All Ireland Final in Hartigan's pub in Leeson Street?

A. Until such time as the Tribunal unearthed this particular item, I had no knowledge whatsoever.

Q. You had no knowledge whatsoever. And if I might just track back for a moment just on another matter. The Minister attended the opening of Galmoy Mines on the 15th September, which was a Friday, of 1995. Were you aware of that?

A. I had an association with Irish mining going back a long way, and I'd have been involved in, I am not saying played any particular spectacular role, but I had been involved in unblocking items that, to do with the mining licence. It became there were issues involved which I think I helped to resolve. And I would have, perhaps, normally have accompanied the Minister, given that I had a longstanding interest in all mining matters in Ireland. In the event I wasn't there at the time, but I was aware that the opening was going to take place. But that's all the light I can throw on that, Mr. Coughlan.

Q. And I just want to draw a distinction between that

particular function which the Minister attended in an official capacity, and the meeting which we have just discussed with Mr. Boyle in the Killiney Castle Hotel. This was in the category of contact which you would have understood and foreseen that the Minister may have come into contact with certain matters of certain consortia in fulfilling official functions involving other aspects of the Department's business?

A. That's precisely right, Mr. Coughlan. I mean to say, there is no way an active busy front-line Minister in charge of, I suppose, the biggest business Department I suppose the Department of Enterprise, Trade and Employment is part of our business, but we were the biggest business Department, could have sort of insulated himself away from the world and the rest of business. And events like this would have inevitably happened during the closed period. And the Minister and I had discussed this in advance in any not this particular event, but the possibility of this kind of event.

Q. That's just what I want to come back to. It was one of the things you had discussed. You had pointed out to him he would probably come into contact with people, and you had cautioned him that other than uttering a few pleasantries, that was it, and just leave it be?

A. Absolutely, and he had no problem with that advice

whatsoever. In fact, it may well be that he had devised a better protective shell around himself in any event, but certainly he didn't disagree with anything I said.

Q. I take it when a Minister is attending something like the opening of, for example, a mine or a factory, or there is a major political and public consideration, jobs are being provided, it's important that Ministers are seen to attend these things. And can I take it that the Minister would receive, maybe, some sort of a short written briefing or an oral briefing, perhaps, about mining or what was going on in Galmoy, that that would be a normal thing to happen?

A. Almost certainly the mining division would have prepared what I call, and it would depend on some Ministers can absorb endless amounts of paper and like to get it. Others might require a page or two at most, actually, and just saying who will be there, who are the key players, what were the main issues, what does the licence mean, and what was the Department's role, no more than that. And I suspect it was the latter for Mr. Lowry.

Q. Enough to enable them to have a conversation and perhaps say a few words, if needs be?

A. Exactly. And it may well be that a short some Ministers like prompts for speaking notes, and they spoke very well off-the-cuff. Other Ministers would

like actually speaking notes or a formal speech. Once again, it depended on Ministerial style.

Q. Again, just normal business of the

A. Normal business, yeah.

Q. Now, there is an issue between Mr. Anthony J. F. O'Reilly and Mr. Lowry as to what was said at the opening of Galmoy on the 15th September, 1995. But if Mr. Anthony J. F. O'Reilly is correct in his recollection of what was said, which was words to the effect, "Your fellas didn't do too well today or yesterday", and there had been presentations that week, and I know you weren't in the country, but that would appear to suggest that the Minister had some knowledge of what was going on, isn't that correct?

A. And could I be reminded not that for one moment I am doubting the recollection of Mr. O'Reilly, but could one once again could you remind me of what Mr. Lowry's recollection was of the same meeting.

Q. Mr. Lowry says that he didn't say it and that he couldn't have said it. That's an issue.

A. Okay. Clearly that's up for the Tribunal.

Q. Oh, of course, of course. But if Mr. O'Reilly's recollection is the correct one, that would seem to indicate that the Minister did have some knowledge of what was going on in the process?

A. If you are inviting me to speculate on that, it does pose a difficulty for me.

Q. Very good. What is the difficulty?

A. The difficulty is clearly working from the basic facts, I only have knowledge of this now, number one.

And I did see, obviously, this issue being raised in the newspaper reports, so I have only recently discovered that there is an issue here. And secondly, is that I am being invited I know you are not inviting me, nor are you pressing me in any way, Mr. Coughlan, but if I were to respond, I would be inviting myself into comment on the Minister's position, and I am not clearly in a position to do that.

Q. Well, if if, and I am saying "if", this was said, and if you had been informed at the time it was said and understood it to be correct, there is no doubt that you would have been concerned that there was a leak in the process, wouldn't you?

A. Yes, I would. But I wouldn't have necessarily automatically concluded that somehow it was a Departmental leak, for instance. Given the fact, and I am not for one moment thinking that any person associated with, for instance, the shall we call it, that particular consortium, intentionally uttered any words outside after their presentation, but it is possible that the information came from either side of the table, if I may say so, after the presentation, so I wouldn't necessarily draw from that, that somehow it

was, what I call an official Departmental leak of any kind.

Q. If it didn't come from there and it came from somebody in the consortium

A. And I am not saying that either, obviously, Mr. Coughlan.

Q. It had to get to the Minister, if it's correct?

A. Correct. And this is working on the hypothesis that, in fact it is as you stated in your question, but I think but it's up to you to judge, Mr. Coughlan, I could get into the realm of wasting the Tribunal's good time by speculating further.

Q. Very good.

CHAIRMAN: I think you have dealt fairly with the issue, Mr. Loughrey, on what I accept is a difficult range of issues involving hypothetical factors for you.

A. Thank you, Chairman.

Q. MR. COUGHLAN: But if you had been made aware of such a conversation, if it took place

A. Or its equivalent.

Q. Or its equivalent.

A. I'd be more comfortable with that.

Q. Or its equivalent, you'd have to make inquiries in the first instance on your side of the house, wouldn't you, to make sure that nothing got out?

A. Certainly, certainly.

Q. And if you were dissatisfied, it's something that you'd have had to consider carefully?

A. Correct.

Q. As to what steps you might have taken. One doesn't know, but it's something you'd have to give serious consideration to?

A. Yes.

Q. And if you were if you were concerned about a leak from the process, and that the Minister had imparted information about the process, it's even something you might have to take to a higher level than your own Minister, I mean the Government or the Taoiseach?

A. Well, I know you didn't intend to sort of rush the hurdle, so to speak, Mr. Coughlan. The first person I'd take it up with is obviously the Minister, by definition, and then I would have to establish whether it was a minor peccadillo, but wasn't good for the image of the process, or whether there was any substance behind it.

Q. Leave aside the substance aspect. On the perception side of things, it's something that would have concerned you?

A. Absolutely.

Q. And depending on what response you received from the Minister, it's something that you may have had to consider taking further if there was any doubt or dissatisfaction in your mind?

A. I think if there was any major challenge to a transaction of this scale in the Department which, and we are talking purely theoretically here now, I stress that, is that and if, in fact, I couldn't resolve it satisfactorily with the Minister of the day, this is not pointedly this is not Mr. Lowry, I am not being pointed in any way. My immediate style would be to discuss it with the Secretary of the Department of Finance, because by definition, either directly or indirectly, there'd be a resource allocation impact or, and with the Secretary of the Department, Secretary to the Government. And if I may say so, with that kind of combined wisdom, I suppose then I would take, decide how far it would have to be taken.

Q. Okay. Now, turning to the contact the Minister had with Mr. Denis O'Brien on the 17th September, the day of the All Ireland. I suppose in the first instance one can readily understand how somebody would bump into somebody at a football match?

A. It happens to all of us all the time, yes.

Q. And how a few pleasantries may be exchanged at such an event. Would you have been happy with the Minister arranging to meet a member of the consortium for a member of a consortium for drinks after a football match? First of all, assuming that there would be no discussion about the GSM process?

A. I suppose if you were to construct a sort of a Richter

Scale of impact, having a drink after, in the context of a crowd, whether it would be after an All Ireland day in Croke Park, a rugby international in Landsdowne Road, or whatever, would certainly register less on a Richter Scale of priority, if that's the correct word, than, for instance, a meeting with the Minister in his office, or in any sort of formally designated place, but nonetheless, once again, given that the Minister and I had discussed the protocol, and once again I am assuming that absolutely nothing improper took place in any conversation, once again from a perception point of view, perhaps less than ideal.

Q. And if you had been then present and saw the Minister and a member of a consortium going together into another public house, what would your words of advice have been, Mr. Loughrey?

A. Well, had I been there at the time actually, I believe that now, once again, Ministers appointed by the Oireachtas, having taken their seal of office, are not there to be sheparded by civil servants, but having said that, nonetheless I would have found an opportunity to say to, you know, "Minister, it's perfectly understandable after a match you should want to have a little refreshment, but, you know, think of the perception and can we either widen the circle or move out?"

Q. Again the perception would have been a matter of

concern?

A. Quite. And if the circle had been widened to a dozen people, clearly that would dilute it by many, many fold. Either widen the circle or move out. Quite.

Q. Now, you returned to work on the 4th October?

A. Correct.

Q. Now, the Tribunal has been informed by a Mr. Per Simonsen of Telenor that he was informed by Mr. O'Brien at a meeting, and I'll tell you what Mr. O'Brien has said in response to this as well.

That he had met, that he, Mr. Denis O'Brien, had met the Minister in a public house in or about the last two weeks of September 1995, and that Per Simonsen was informed by Denis O'Brien that the Minister suggested that IIU should be involved in the consortium.

Mr. O'Brien has informed the Tribunal that, to the effect that he couldn't have had such a conversation with Mr. Simonsen, that he had no meeting with Mr. Simonsen in that period where such a conversation or an exchange could have taken place. So I just want to put both positions to you.

A. Quite.

Q. If that was what was said to Mr. Simonsen, and if such a conversation took place between Mr. Lowry and Mr. O'Brien, and if it had come to your attention, can I take it that it is a matter that would have caused you huge concern?

A. By definition.

Q. And can I suggest that you'd have had to take extraordinary action in relation to the matter?

A. Based on a triple ifs, that is the case, yes.

Q. When you returned to your office I know you probably had to catch up on a lot of work

A. Quite.

Q. Dealing with all divisions in your Department, I presume. Did you receive any particular briefing, to the best of your knowledge, about the GSM process other than knowledge regarding the critical path?

A. I can't recall anything other than that. It's likely that, and I don't know what day of the week the 4th October is, but it's likely I would have called an informal meeting of the management team if it were after Wednesday; or if it were Wednesday or before Wednesday I would have awaited for a formal round-up between all the Assistant Secretaries to see what was happening. In other words, sort of a round-the-table headcount of what was happening in all the divisions. I am not aware, other than being I am not aware of anything other than it was steady as she goes, so to speak, with the competition.

Q. I think that conforms with the evidence that you have given the Tribunal. You didn't know anything about the substantive aspect of the process yourself, and all you knew was the critical path aspect of it?

A. Quite.

Q. Now, on the 3rd October of 1995, of course you weren't in the office, there is a note made by Mr. McMahon.

He was attending, I think it's described as an interdivisional meeting. Does that seem correct?

A. Each Assistant Secretary tended to have meetings organised with the Principal Officers, and perhaps leading professionals in the division; in other words, it was if you can think of a management meeting, it was a cascade-effect management meeting, so each division would have meetings and in turn but there would be periodic interdivisional meetings, and different Assistant Secretaries had different styles.

Some held them more frequently than others.

Q. Now, again this is a document which has been opened a number of times, but I think it's on the screen there.

It's Book 42, 196 116, I beg your pardon. Book 42, 116.

Now, I have for the moment, of course, passed over the letter which arrived in the Department on the 29th September. I'll come back to deal with that on the whole question of ownership, and keep that as exact as I can.

A. That's fine.

Q. If you see the document, and it's dealing with a number of matters which are not part of the GSM, obviously. So it seems to be that type of meeting as

I have described. Is that correct?

A. Yes.

Q. And then if you go to the Item No. 4 on the second page you see "GSM". And you see the note: "Minister wants to accelerate process.

" Legalities more complicated.

" Draft report now imminent.

"Do we need to discuss and digest?

"Agreed one copy will stay at 44, and discuss it in confidence."

That's the note on the GSM.

A. Yes.

Q. Obviously you could not have conveyed to anyone in the Department that the Minister wanted to accelerate the process, is that correct?

A. That's correct, yes.

Q. And did you know, or did anyone inform you of this around this time?

A. Absolutely not, no. Mr. Coughlan, forgive me if I am out of order in commenting gratuitously, but it does underline, once again, that right down even to, even when they were at the stage where most of the assessment was done, apparently, they were still so conscious of confidentiality: only one copy, in other words, the protocol that the group had insisted for themselves as a discipline, they maintained their shape on that discipline right to the end.

Q. I think there may have been I understand the point you are making, and I do agree that the note shows that confidentiality was foremost in the mind of people there. But I think there may have been more than one copy, but one copy was being kept. Where is 44?

A. 44 is headquarters in Kildare Street.

Q. Yes. Now, were you aware of anything taking place in the process between your return to work and, as you say, sometime around the 25th, give or take a couple of days?

A. No. Clearly I knew from the critical path actually that they were that October was going to be the decision month, and I suppose I would have picked up from Sean Fitzgerald at management meetings, or directly from him, and perhaps from Martin Brennan, that the tempo of the work had increased or they were coming near decision taking, but I am not conscious of anything else other than that.

Q. Other than that?

A. Yes.

Q. So can I take it, as the Secretary of the Department it was your understanding that things were proceeding on time?

A. Things were proceeding on time. And once again, I am not sheltering behind this whatsoever, is that, you can imagine if you have an open office, and as I say

Martin Brennan had 21 other equivalents, and there were another 10 or so professionals, and of course I might have been informed of things more specific than I have indicated, and I can't recall any of them, but they wouldn't have registered in such a way that I thought I had to allocate time to do anything about them.

Q. Very good. And that it was your understanding that things were proceeding on time. If you got any information, things were coming along, and they were getting close to making a decision. That's your understanding of how things evolved in that period?

A. Correct, yes.

Q. Up to sometime, say, a day or two around the 25th, there or thereabouts?

A. Or thereabouts, yes.

Q. Now, do you remember any member of the any members of the Project Group coming to you and asking for time?

A. I am now aware that, from the papers that the Tribunal have once again unearthed, that that is the case. And my only explanation I can't recall, to be absolutely honest, but I know my style would be, and perhaps it might be helpful at this stage to put this in context.

Q. Yes.

A. A Secretary General of a Government Department plays

many roles, I suppose. I am not going to rehearse a management textbook at this stage, but one of the roles actually is to be a mediator between Ministerial demands and what the machinery of the Department can deliver. Now, that's not in any sense that I am pulling a brake lever all the time, from far it.

Sometimes you tell a Minister, "Minister, we can actually do that in a tighter time schedule", but sometimes when a Minister, quite correctly, makes demands of the administrative machine or the Department, or wants outcomes faster than the machine can deliver, and throughout my career I am conscious of that, but at Secretary General level, I would be the person who would have to say, "Minister, I know you have sought this, but in fact, like, this grant, we need a statutory instrument for this", or "it can't be done for the following reasons", etc.. So that is a mediating sort of role of mediator that one would naturally play between legitimate demands by the Ministerial Head of the Department and myself as the sort of management Head of the Department.

So just in that context, if somebody had asked me for additional time, and I was convinced that it was required immediately, and I would have done this on many, many occasions, I mean this is not unusual, I'd say "Well, leave it with me." I'll go back to the Minister and make sure, if it were warranted, and I

would do that. Now, I can't recall it happening on this occasion. But it wouldn't be unusual for me to do that.

Q. Right. And I understand, and I think has always been your position with the Tribunal, that whilst you don't have any specific recollection of this, you do accept that if Mr. McMahon says that he did go to you, and I think that is confirmed by other members of the Project Group as well, you have no difficulty in accepting that?

A. Mr. McMahon was a very serious player. I valued his judgement extremely highly. He played a most difficult role in pioneering circumstances as being the effective regulator for the whole sector. As I say, with very little resources actually. And if he had asked me for more time, and he was he was the man of prodigious output himself, I would have granted that time, yes.

Q. And do you believe that, and again I suppose it is difficult, because you don't have a specific recollection, but that in the ordinary sequence of events you would have informed the Minister of that?

A. If it had been required, I would have informed the Minister of it, yes. Sometimes, for instance, this is a matter of, once again, of style and opportunity. I would have taken the decision unilaterally myself and I'd say is "I'll square it later with the Minister."

That might have been an occasion, but as I say, as I can't recall the specific incident, this is something I would do sometimes from day-to-day. It wasn't unusual. Because quite honestly, and I can only speak of my own experiences, but I have worked directly to seven different Ministers as Secretary General, all of them want to, let's say, press on with the Government's agenda as quickly as possible. And as I say, this mediating role that I have spoken about came into play many times.

Q. Yes. I wonder if you might just look at Divider 120 in Book 42.

A. Yes, I have that now. This is the meeting of the 9th October?

Q. The meeting of the 9th October of the Project Group.

A. Yeah.

Q. And we'll go on then to deal with the verbatim notes made by Ms. O'Keefe of that meeting, but just, if we just look at it for a moment. The minute of the meeting, which I think was perhaps typed up, I think on the 17th October, 1995. But in any event, if we just proceed for the moment with it. And you can see that in attendance are members of the Project Group, as well as the advisers, Messrs. Andersen Management International. And then the meeting.

"Opening:

"The Chairman opened the meeting by stressing the

confidentiality of the Evaluation Report and

discussion re same."

That's something you have underlined yourself.

"He also informed the group that the Minister had been

informed of the progression of the evaluation

procedure and of the ranking of the top 2 applicants.

The Minister is disposed towards announcing the result

of the competition quickly after finalisation of the

Evaluation Report."

Then there follows a discussion of the Evaluation

Report, as you can see, and a future work programme is

set out.

Now, I think I am correct in understanding that you,

yourself, were unaware of the progress of the

evaluation procedure or of the rankings or emerging

rankings of anyone at this time, isn't that correct?

A. That's my recollection. That's my recollection. Or,

and I keep stressing this is, that it is possible that

Martin Brennan or Sean Fitzgerald may have brought me

more up to date, but once again, I wouldn't have put

it I would have filed it, so to speak, mentally as

something to be brought forward, but I have no

recollection of knowing it definitively until the last

moments of the competition, that is on the 25th, or

the day before it, or thereabouts.

Q. Very good. Now, I know there is always a question of

professional pride, and I don't want to seem in any

way offensive, but doesn't it appear that, if your recollection is correct, that the Minister had some other contact with the Project Group which was unknown to you?

A. I have reflected on this, Mr. Coughlan. And I think once again it might be helpful. The Minister's first port of call the Minister, effectively, had a two-year career with us as Minister, and his first and normal port of call would have been to do business through me. Now, not exclusively through me because I wouldn't have been there all the time, etc.. I hadn't realised until you said so yesterday that Martin Brennan was on holidays in August. And it could be that the chain, the normal chain was disturbed by my being away for a total of seven weeks and Martin Brennan being away. So in other words, the Minister had every right to know, you know, how things were progressing. I mean to say, if you put it in the negative, had the Minister of course he had every right to know how the project in general was progressing. And so in my absence, I don't know if Sean Fitzgerald was on leave or not, I have no idea, but from what you said, I didn't realise Martin Brennan was on leave in August, because we tend to stagger the holidays from May through to September, I didn't know. But it is possible the Minister then, which would be, you know, not unique, but unusual,

dipped down the management chain as far as Mr. Towey, and once he got used to having information and he knew in other words, he had a road map, so to speak, of the individuals in the Department dealing with it it is possible that he continued that after, on that particular dossier, even after my return. That's possible.

Q. We know from information furnished by Mr. Towey to the Tribunal that he did receive a phone call from the Minister at one stage asking him, you know, sort of, about the outcome or what was going on, or words to that effect.

A. Well, they are slightly different, Mr. Coughlan. What was going on and what was the outcome is

Q. What was the outcome.

A. I didn't realise that.

Q. And Mr. Towey has informed the Tribunal that he informed the Minister that work was still in progress, and that it would be, or words to the effect, "It would be better for the Minister not to know".

A. That was wise of Mr. Towey.

Q. That is the sort of thing you'd expect a civil servant to say?

A. Yes.

Q. So I am just coming on to the question of, and trying to understand the concept of the Minister's right to know. It's a matter which was taken up by Mr.

Brennan, and it's a matter which was just taken up by you. In all public utterances by way of the Dail or press release or anything of that nature, the official position was that this whole process was conducted at arm's length from the Minister, isn't that correct?

A. Correct.

Q. I can understand entirely the Minister's right to know in relation to the critical path, of course. But as this process was designed, that was all the Minister was entitled to know about, wasn't it, as the process was designed? I know if the Minister brought you into the room and hit you over the head and said "I am the Minister, you are the Secretary, now tell me everything" one might have a position where the Secretary and the Minister had a stand-off and the Secretary might have to consider his position vis-a-vis the Minister?

A. Quite.

Q. I can understand that. But it was designed as, insofar as it was practicable, to be a sealed process. That's how it was designed?

A. Yes.

Q. Not only from the point of view of the conduct of the process and the actuality of the process, but from the perception which attached to the process?

A. All of which is right, yes.

Q. So apart from his right to know the critical path as

the whole matter had been designed, what else do you think that the Minister had a right to know?

A. Ultimately as the process was designed you are absolutely right, and you are also right in saying that ultimately it's the Minister who is responsible to the Oireachtas, to the Dail in particular actually. And if he so insists he could break that protocol, if he so insists. Now, clearly that would be a serious matter as far as I was concerned as Secretary General, or any senior civil servant, that is. But as to what the Minister was entitled to know, clearly he was entitled to know the progress that was being made, and as a subset of that he was equally entitled to say, "Could you not get a move on?", because that would be non-discriminatory as between any applicant.

Q. Correct, I understand, yes.

A. But he wouldn't, or shouldn't, be entitled under protocol to have information that would be specific to an applicant in such a way as it was effectively breaking the arm's length nature of the process.

Q. I understand. I think we both understand and are in agreement in relation to the process, the design of it, and the function of the evaluators, and the role of you and the Minister in the whole matter.

And from what you have just said, I think you wouldn't disagree that if things were still under consideration by the Project Team, for example, that there were two

strong or three strong teams emerging out of the process, and they were involved in discussing them or even discussing the report and how one might deal with risks or difficulties that might arise and what advice would be given, that it would not be appropriate for you or for the Minister to say, "Hurry on there, lads, now before you are finished your work."?

A. Not if the pressure was such that it would compromise the process, the evaluation process. But asking civil servants to burn midnight oil or work through a weekend, provided it was done on a non-discriminatory basis as between all the applicants, I wouldn't regard that as inappropriate pressure.

Q. There was no rush here though. They were well within the critical path?

A. Yes and no, Mr. Coughlan. In one sense, Ministers can decide to bring things forward as well as defer them, and they are within their entitlements to do so.

Q. I understand that. But in the normal course of design of this particular process and the critical path which had been set out for it, there was no

A. In those circumstances, they were actually right on the button, so to speak, in terms of the critical path.

Q. They were well ahead of it, weren't they?

A. Well, it depends, once again, if you take the Andersen statement of intent from August onwards, they were

just right on the critical path. If you take the extra month that was given, effectively, and promulgated subsequently, then they were ahead of schedule.

Q. They were well ahead of schedule.

Now, if you just turn over the divider there to 121, if you wouldn't mind, Mr. Loughrey, and if you just these are these were typed up and approved by Ms. O'Keeffe as being the typed version of her handwritten note.

A. Quite.

Q. If you just look at the note there. "Confidentiality"

I only want you to deal with the top portion.

"Minister knows.

Shape of evaluation in order of top two.

Minister of State does not know.

Quick announcement."

Then it really, perhaps, is just in slightly more detail than that which is contained in the minute.

But the one thing is for certain, you didn't know the shape of the evaluation or the order of the top two at this stage?

A. No. I know, Mr. Coughlan, because I have seen some of the transcript, that obviously you have covered this area with Mr. Brennan, and once again is, that as I wasn't involved directly myself, and it's not in any sense distancing myself from responsibility, is of

course I accept that these are the bona fide notes of Ms. O'Keeffe, and I am sure they are accurate. But it is that was her impression at the time, and I can't second-guess that, and nor am I attempting to do so, but it is possible that the Minister was told in such a way as not to provide him with useful information, for instance. Now, that's there is an inference that he would use, I am not saying he would use the information, but information that would be of use.

Q. You have lost me, Mr. Loughrey.

A. Perhaps we could scrap that actually or if you would

Q. I am sorry. First of all, could we just be clear.

Mr. Brennan, who chaired this Project Team, accepts this as being accurate.

A. That's fine.

Q. So can I say first of all, nobody is calling into question the accuracy of Ms. O'Keeffe's note or what she has recorded.

A. Indeed, nor am I.

Q. And I don't think for one moment you were?

A. Not at all.

Q. The Minister knows the order of the top two. It seems to be recording what was said, doesn't it?

A. Absolutely.

Q. Something that wasn't known to you as Secretary?

A. Not to my recollection at that time.

Q. And it's not something that should have been known to you as Secretary, because the process was still under evaluation?

A. Ongoing. It's only when there was a clear result that people should have had information.

Q. Now, if you just bear with me for a moment, Mr. Loughrey. Now, again I know, you weren't in the Department and you were not aware of a letter that was sent to the Department on the 29th September, 1995, and that's at Divider 113 of that book.

A. And this is something you had touched upon with me on Friday, I think, Mr. Coughlan.

Q. Sorry, perhaps I should just I beg your pardon, Mr. Loughrey, I moved on too quickly there from the last document, which is the verbatim note.

A. No, I still have it open, Mr. Coughlan.

Q. I beg your pardon. If you continue on down under the heading "Agenda". And you go to the final paragraph under or the penultimate paragraph there under the heading "Agenda".

"Different groups examined dealing with commissions, etc..

Relevance of annex dealing with conflict.

Full discussion needed on Annex 10.

Minister does not want the report to undermine itself, e.g. either a project is bankable.

Should be balanced arguments."

Now, I just want to ask you, of course you didn't convey that particular view of the Minister to the Project Group because you didn't know?

A. In no way.

Q. And you, yourself, would not have conveyed such I am asking you as Secretary, would you have conveyed such information to the group or attempted in any way to suggest how the group might continue with their work and produce what you considered to be an arm's length result, isn't that correct?

A. I wouldn't have interfered in any way.

Q. Now, if we just again, if we go back to Divider 113. I know we looked at it on Friday.

Now, you didn't know about it. And in fact am I correct in thinking that you first became aware of it at the time that it was brought to your attention by the Tribunal, would that be correct?

A. That's correct, yes.

Q. Now, we now know it's from Professor Michael Walsh of IIU Limited. And it's sent to the Department. And it's:

"Re Esat Digifone Limited, the Consortium."

"Dear Sirs,

"We refer to the recent oral presentation made by the consortium to the Department in relation to their proposal for the second GSM cellular mobile phone licence. During the course of the presentation there

was a detailed discussion in relation to the availability of equity finance to the consortium from Communicorp and a number of institutions.

"We confirm that we have arranged underwriting on behalf of the consortium for all of the equity (i.e. circa 60%) not intended to be subscribed for by Telenor. In aggregate the consortium now has available equity finance in excess of $\text{N} \frac{1}{2}$ 58 million.

"We do not foresee any additional need for equity.

However, we are confident that if such equity is required we will not have a difficulty in arranging it.

"Yours faithfully, Professor Michael Walsh."

Now, I suppose we need to go back to the lodging of the application on the 4th August of 1995, and just to ask you; had you any knowledge of the makeup of any consortium as of the 4th August, 1995, yourself?

A. Other than what was in the press statement at the time.

Q. Other than what was in the press statement?

A. Absolutely not.

Q. You

A. I never saw the applications.

Q. You never saw the applications, that's the first thing

I want to ask you?

A. No.

Q. And nobody informed you, perhaps correctly

A. Nor did I inquire.

Q. from within the Project Group of the makeup of the consortium?

A. Nor did I inquire, and quite frankly I would have been that would have been at variance at everything I had said at a management meeting, that it was a need-to-know basis actually. I did not need to know, so I didn't know. Other than the press statement that accompanied, that coincided with the application for final the date for final bids which was, what, the 4th August?

Q. Yes.

A. I had no knowledge. Of course, I had knowledge that seeped into the system, going back Sigma's interest and SPC's interest was signalled as far early back as 1990 or 1991, and of course I had a general knowledge and a guess who might apply. And from my knowledge of other European telecoms, I knew that some of them would almost certainly apply. For instance, I had forecast that Tele Danmark and KPN would in one form or another. But as to the specific question, until such time I read that press release I had no idea of the makeup of the consortia, and it finished at that because I didn't have any sight whatsoever of the applications.

Q. You didn't see the bid documents at all?

A. No.

Q. And any information, can I take it so, that you have or had about the makeup of the consortia, we'll take we have only been considering those which were ranked 1, 2, and 3 here for the purpose of discussion.

A. Fine.

Q. That that information only came to you after you were informed by Martin Brennan that there was a result?

A. I am sorry, could you just rephrase that again because I didn't catch the last part?

Q. The makeup of the various consortia would only have been disclosed to you after Martin Brennan had disclosed the result, that there was a result to you?

A. I am sorry to be so dim. I am not quite sure, are we talking about August 5 or October 25?

Q. I beg your pardon, I am talking about around 25 October.

A. Yes, that's correct.

Q. That's the first time?

A. Of course, of course, I am sorry not to pick it up.

Q. And I accept your evidence, what you are saying, you knew nothing as of 4th or 5th August, and you didn't know anything until around the 25th?

A. And if we are talking about the makeup of the consortium, in that context, I actually don't believe that I knew of the third-party investors until literally October 25 actually.

Q. Now, in the first instance, when we discussed this on

Friday, and we discussed what was done with this particular letter, and we know it was sent to Mr. Denis O'Brien by Mr. Towey, having informed Mr. Brennan that it had come in. In the first instance, Mr. Brennan seemed to be of the view sorry, I beg your pardon, Mr. Brennan is of the view that the content of the letter was not disclosed to him, but we only learned during the course of Mr. Brennan's evidence that Mr. Towey may state that whilst the content wasn't disclosed to him, he would have been informed it was something about finances, Communicorp's finances or finances.

A. Fine.

Q. So that appears to be the two positions, if there are two positions.

A. Yes.

Q. And you expressed a view on Friday that you thought that Mr. Towey did the right thing in sending it back, or sending it to Denis O'Brien?

A. I think Mr. Towey took absolutely I am convinced he took the right decision actually not to allow it to a wider audience than he himself actually, and I think he was absolutely correct in that, and thereby, if I may say so, I am not saved the process I am not saying from being compromised, might be too strong, but in other words, saved the wider PT GSM group from having to concoct Chinese walls in their own minds and

not to have to deal with information that they should not have had, let me put it that way.

So I believe he took absolutely the correct decision in sealing off that information and limiting it to himself. And I don't want to delay I won't rehearse the arguments that I put forward, because clearly from the meetings of the 11th to the 14th, clearly from what was said at the presentations themselves, and notably to Mr. Scanlon of Irish Mobicall, as Mr. Towey was present and an intrinsic part of all that decision-taking process is, I don't think he had an option other than to do what he did.

Q. And without even there could be an alternative view, couldn't there, to that, Mr. Loughrey? That leave aside the content of the letter for the moment, that it is the fact that it was sent should have been brought to the attention of the Project Group to enable the Project Group themselves to consider that particular little piece of information?

A. It's possible that in the context of protocol, that that might have merited a mention. But I don't think it was the the impact was never going to be decisive once it was sealed off. So that was an option, but I don't think it was an option it was an option on protocol, but I don't think it was an option that would have affected the evaluation process as such.

Q. And then, turning to the question of the content of this particular document, I think you, yourself, described it, that it could be viewed as, first of all, being a letter of underwriting, which it clearly is. But that you also took the view that it could also be viewed as a letter of comfort, in that it may have indicated that there was a weakness or problem with Communicorp's financial capability, isn't that correct?

A. Yes, I can't put myself into the mindset of Professor Walsh in drafting the letter, but it wouldn't be surprising if that was the intent.

Q. Yes. I am not asking you to put yourself in the mindset of the person receiving the letter, as you have yourself, that you interpret it that way?

A. Yes.

Q. And it could also, I suggest, be interpreted that it indicated some degree of desperation, in that all applicants knew that they could not submit documents to the Department. It was on the basis, "We'll call you, don't call us." That was how it had been designed. This had been made clear, as you have correctly pointed out, to everybody at the presentation, and accepted by everybody

A. Mm-hmm.

Q. at the presentation. It could be viewed as an act of desperation, couldn't it?

A. It might well be, but equally it could be viewed as an attempt of enhancement only.

Q. But it was for the it was for the Project Team, I suggest, to make that particular call and not for any particular individual?

A. Well, this is something, with great respect, Mr. Coughlan, perhaps we'll agree to disagree on, because I am actually I hold the conviction very strongly that Mr. Towey did the correct thing.

Q. Very good.

A. And he did, if nothing else, he avoided angst in the minds of each one of the other members of the group.

Q. Or perhaps avoided a proper evaluation of the application which had been submitted and what had been stated by members of this particular consortium at the presentation?

A. Clearly you may well assert that, but there is an inference there, for instance, that they didn't pursue a correct evaluation. I wasn't part of the team. I can't I can't stand over, so to speak, directly, but all I know is the evaluation that he carried out definitely was carried out in a non-discriminatory way. So in other words, you may, for instance, say, infer that they if they had drilled down so far into each application they might have discovered more, but my reply would be that the professional treatment they gave to each application was undoubtedly the

same, as much as one can in a subjective assessment, and so I would say to you, whatever the evaluation was, and I believe it was highly professional, it certainly was non-discriminatory.

Q. I am not suggesting for a moment that the members of the Evaluation Team were not, to the best of their ability, attempting to evaluate that which had been submitted to them. Of course that is so. But by being deprived of this particular piece of information, the mere fact of the communication, they were, in effect, excluded from ascertaining the truth, the correct position of an opportunity of establishing the truth as regards this particular application?

A. I think I have read the Evaluation Report. I think they did discover the truth. The truth was that in each of the top three, we are only concerned with the top three, there was a question-mark, whether it be against Communicorp, whether it was against Sigma, or whether it was against how real the commitment Deutsche had to Detecon for a 30% subsidiary. In each case there was a question-mark, and the question-marks could be more serious in one case than the other but quite they were flagged in the top three. Obviously we won't go into the bottom three because there were further weaknesses there. In other words, nobody had the perfect application in and under the bidding

system and the compartmentalisation of each of the factors, quite clearly A5, as it was then known, was marked down in this area. So they didn't look at this, the financials of Digifone, with rose tinted glasses. In fact, they marked them down as evidence of the weakness, the relative weakness of Communicorp.

Q. Therein lies the problem, Mr. Loughrey, and I know you weren't involved in the process. That's not what happened. It was dealt with in a different way in the Evaluation Report, the financial frailty or weakness of Communicorp.

A. We'll go back to Clause 19, then, at that stage.

Q. We'll deal with the report in a moment. In the first instance, there are two issues here. One is ownership, one is financial capacity.

A. Sure.

Q. When this letter arrived in the Department on the 29th September, 1995, and there is no need to pussyfoot around this now at the moment. There is the Department were not aware that as of that day the consortium was not either 50:50

A. Right.

Q. and we'll come to deal with the financial institutions in a moment. And was not 40:40:20 percent either financial institutions in the future or named financial institutions. But as of the 29th September, 1995, that consortium was 37.5% Telenor,

37.5% Esat/Communicorp, Mr. O'Brien's vehicle, and 25% IIU, and over and above that, on the very same day, all the benefits and liabilities which IIU had under their agreement had been transferred to a company called Bottin, a private vehicle for Mr. Dermot Desmond, which was offshore, and that that was the makeup of the consortium as of that day.

A. I accept that, Mr. Coughlan. But could I say, and I don't say this in any cavalier way, be that as it may, the assessment was done on the basis of what was submitted, number one.

Q. I agree with you entirely.

A. And number two, when we found that out, and in particular I had a particular role in this, when this came to light, when the licence was about to be signed is, at my insistence perhaps, it reverted back to the 40:40:20, the basis of the submission.

Q. That's not the issue at all, Mr. Loughrey. The consortium which applied, and this is very important, the consortium which applied, and which was being evaluated was, and we can discuss and agree to disagree, or whatever, in relation to what the matter is, but it was certainly either a 50:50 consortium or a 40:40:20 consortium, would you agree?

A. I would agree. I suppose legally it was 50:50 until such time as the private placements were made.

Q. Even legally, you needn't I understand what you are

saying. But there wasn't even a Shareholders' Agreement in position between these people at this stage, there was a joint venture. But leave that aside, I am not getting down to such legal niceties in relation to matters.

But there can be no doubt about it, on the 29th September, 1995, this consortium was a three-man consortium, no doubt about it?

A. The evidence shows that the change was effected on the 29th September.

Q. No, no, there is no doubt about it, this was a three-man consortium on the 29th September.

A. I am not denying that, Mr. Coughlan.

Q. And was the ownership of this consortium on the 29th September.

A. That's undeniable.

Q. And that is not the ownership that was declared in the application?

A. That's correct.

Q. And the Declaration of True Ownership was a mandatory requirement, isn't that correct?

A. But

Q. "Shall."

A. Of course, but at the time of the receipt of the application on the 4th August is, I have no reason to believe whatsoever that the Declaration of Ownership was the true declaration at that stage.

Q. Yes, well I'll come to that in a moment.

A. That to me is the only milestone that counts,
Mr. Coughlan.

Q. Oh, I see. I am just trying to understand,
Mr. Loughrey. On day one, when you submit your
application, you can put in the ownership which
applies on that day?

A. Mm-hmm.

Q. You go through the evaluation process. And before the
process is complete, you can change it and inform
nobody, is that what you are saying?

A. I am not saying that. What I am saying is from the
Departmental point of view is, the application we got,
it was received, was the application that was judged,
and ultimately it was the makeup that got the licence.

Q. That is not so, Mr. Loughrey, and you know it.

A. I am sorry, Mr. Coughlan, I am not in the habit, in
being a witness to a Tribunal, to deliberately try and
mislead or misstate any fact.

Q. I understand that. I'll go through the presentation
process in great detail.

A. Fine.

Q. But the ownership of the consortium which applied for
this licence was not the consortium which went through
the evaluation process, and was not the consortium
which was granted the exclusive negotiating rights on
the 25th October, 1995, isn't that so?

A. I don't see it quite in that light, Mr. Coughlan. I see it the date of the application on the 4th August, it definitely was the consortium. I don't think we are disagreeing on that actually.

Q. No.

A. The evaluation any contact made by the Department by way of, and it mainly revolved around the presentation actually, was done in mid-September; so in other words, the Department, when it last had contact, when the evaluation last had contact, the team I am talking about, the PT GSM that made the decision worked on no other basis than the 50:50 with 20% allowance for private placement. So, in other words, from a Departmental point of view is, I can't see, under any set of circumstances, how the evaluation wasn't that based on the application of 4th August.

Q. I agree with you 100 percent. From the Department point of view, they understood they were evaluating either a 50:50 or a 40:40:20. That's what the Department understood?

A. Correct.

Q. And that's what was disclosed in the application and that was what was disclosed in the presentation, isn't that correct?

A. Correct.

Q. What I am saying is this: And I accept that members

of the Evaluation Team were some members of the Evaluation Team were unaware that anything had arrived into the Department, this particular letter.

A. Can we agree the clear majority?

Q. The clear majority.

A. Yes.

Q. And what that clear majority then proceeded to evaluate was what was contained in the application and what had been presented to them at the oral presentation?

A. Fine.

Q. They were excluded from establishing the true ownership of this consortium by the time the evaluation process was completed, which was, as you say, the 25th October, 1995. Would you agree with that?

A. I would agree with that.

Q. And what I am trying to understand, therefore, is this: And perhaps we don't disagree at all?

A. I hope not.

Q. That as of the 25th October this was a three-man consortium, unknown to the Department?

A. Unknown to the Department.

Q. That's yes. And what had been evaluated by Evaluation Team, the advice as given to the Minister and to the Taoiseach and the other Ministers, and eventually to the Government, related to the

consortium which had been as declared in the application, isn't that correct?

A. Correct.

Q. And it was to that consortium that the, as declared in the application, the Government understood that they were giving, in the first instance, exclusive negotiating rights, isn't that right?

A. Correct. And indeed, it was to that consortium that the licence was eventually awarded.

Q. We'll come to discuss that in due course, Mr. Loughrey. I am just trying to keep it in time sequence for the moment.

The Department, I mean you and the Project Team, did not know that, on the 25th October, this was a different consortium to the one that was declared in the application?

A. Correct.

Q. And they did not know that as of the 25th October that as of the 25th October, 1995, through no fault of their own, because they weren't told, they had evaluated a consortium which did not exist?

A. Which existed on August 4, but had been changed on September 29.

Q. And the decision was arrived at on the 25 October?

A. Yes.

Q. Again, I am not criticising anyone in the Department about this, but because they weren't told they had not

evaluated a three-man consortium?

A. Correct.

Q. And more importantly, they had not evaluated this three-man consortium?

A. Correct.

Q. Now, after lunch I'll have to come back, and I think you have been furnished with the transcripts of the presentation, the presentations?

A. Yes, I have. Actually, I may well to be absolutely honest, actually, I scanned some of them, looked up references, so if there is a specific item, and I haven't, what you call, knowledge of it, I'd be very happy, without delaying the Tribunal, to opine, if I can, on any area, but I won't pretend as of now to have detailed knowledge of the presentations.

Q. And I understand that. And I'll only be opening a few passages, just for your assistance and observations.

A. Fine.

CHAIRMAN: It's probably the right time, then, to defer until a quarter past two. Thank you, Mr. Loughrey.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF EXAMINATION OF MR. LOUGHREY BY MR.

COUGHLAN LAND AS FOLLOWS:

MR. McGONIGAL: Just before Mr. Coughlan resumes his examination, Mr. Chairman. Just one matter that is of

interest to me slightly which arose before lunch and that is in relation to the consortium, as to whether it was what it was on the 4th of August and what it may have been on the 29th of September and what it might have been on the 25th of October.

CHAIRMAN: Yes.

MR. McGONIGAL: Mr. Coughlan seems to be making a suggestion that what was 50:50 on the 4th of August had changed to something different on the 29th of September of '95. It is not clear to me on what basis Mr. Coughlan is drawing that conclusion, from the documents that have been furnished to us.

Now, it may well be that he is relying on documents which have not been furnished to us, but certainly on foot of the documentation which has been given to us, it doesn't seem to me that the consortia of 50:50 had changed on the 29th of September, or indeed on the 25th of October. Whatever might have been the intention of the parties to an arrangement agreement which may have been entered into on the 29th of September, but if the arrangement agreement is what Mr. Coughlan is referring to, clearly the ownership did not change on that date, though it might change in the future if certain conditions in that agreement were met, some of which may have been, some of which may not have been. And therefore, I am concerned at the suggestion which seemed to be put to this witness,

as a definitive fact, that ownership had changed, and on the face of the documents so far being given to the parties, it had not.

CHAIRMAN: Well, my understanding Mr. McGonigal.

MR. FITZSIMONS: Just for the record, I would like to say, on behalf of my client, that I agree with Mr. McGonigal's submission. Matters were being put to the witness before lunch as if they were definitive concluded propositions of law. And we do not understand that to be the position.

CHAIRMAN: Well, whether definitive conclusions of law or fact, I would have thought, gentlemen, that the documents that were introduced by Mr. Coughlan in the course of his extended opening, made relatively clear to interested persons the general evolution, to use no more a word than that, in the composition of the consortium over the particular period in question, and these are matters which counsel will have an ample opportunity to examine with Mr. Loughrey in due course, and I think no firm conclusions have been formed any more than on any other aspect pertinent to the Terms of Reference as regards definitive situations having arisen. But it seems to me from what has been conveyed in the opening, there is nothing further or clandestine or over and above that that is being examined upon by Mr. Coughlan. Am I correct in that?

MR. COUGHLAN: That's correct.

CHAIRMAN: Well, I propose we should proceed.

Q. MR. COUGHLAN: I should perhaps just indicate at this time as well, Mr. Loughrey, you see this is an inquiry, and in the course of an inquiry people are asked if they are prepared to furnish a statement or a memorandum of proposed evidence in relation to matters. There is no obligation on anybody to do so?

A. Right.

Q. There is only an obligation to turn up and give evidence in the witness-box, if summonsed to do so, or by agreement.

I am, to some extent, reliant on the documents, because the Tribunal does not know from, for example, Mr. McGonigal's client what the position is about this.

A. Quite.

MR. McGONIGAL: I am not sure where that arises either from the examination before lunch or arises from what I have said to you, Chairman, or you have said to us which concerns this witness, that Mr. Coughlan should make a speech to him. In the first stance

MR. COUGHLAN: I am explaining to the witness, Sir.

MR. McGONIGAL: The second incidence, as I understand it, all documents that were in Esat Digifone possession were supplied to this Tribunal by BT solicitors McCann Fitzgerald, and I am not clear what

that has to do with any statement from Mr. O'Brien or why Mr. Coughlan should consider it necessary to raise it at this stage in the way that he has raised it. It seems to me an attempt by him to create a slight, for no good reasons other than that he has been ticked off for getting the ownership wrong.

MR. COUGHLAN: If I have the ownership point wrong, I would like to be corrected on it now so that I can proceed with the witness. Perhaps My Friends it is quite significant at this stage, Sir. Perhaps My Friends could indicate what the ownership was and when it changed. That would be of huge assistance to the Tribunal at this stage.

MR. McGONIGAL: Well, I think it would be very improper for me to give evidence at this stage in answer to Mr. Coughlan. My correction to Mr. Coughlan was because he had got it wrong from his own documents.

MR. COUGHLAN: If I am wrong, I stand corrected. If My Friend will tell me how I am wrong and what the state was as of the 29th of September and if and when ownership changed, that is all I want. I stand corrected, of course.

MR. McGONIGAL: There is no need, there is no need for me to go through the documents. If he has gone through them and got it wrong, if he reads the arrangement agreement which he furnished to us, it is

quite clear that the ownership had not changed.

CHAIRMAN: Well, Mr. McGonigal, a lot of the documents were indeed furnished properly so by your solicitor.

MR. MCGONIGAL: Absolutely, and they showed that the ownership had not changed in the way that Mr. Coughlan is suggesting.

CHAIRMAN: Well, let's proceed to explore that and put the Tribunal in a better position to make an appropriate finding on it.

MR. MCGONIGAL: But the Tribunal has the document.

MR. COUGHLAN: I am asking for assistance now, if My Friend can assist me, the Tribunal welcomes any assistance, or if Mr. Fitzsimons I do not want to proceed on any erroneous basis or try to guess anything. If the ownership had not changed on the 29th of September, did it ever change? And when did it change, if it so changed? That is all I am asking. It doesn't seem like much to ask.

MR. MCGONIGAL: The documents are before Mr. Coughlan which he says he has read. He has read them in the light in which he says the ownership has changed, let him show that to us, because we are relying on his documents. We are not relying on anybody else's documents and it is quite clear from those documents, that the application went in on a 50:50 basis and that remained the position unless or until a licence was granted and if there is something wrong in that, let

him show it to us because it is not in any of the documents he has so far produced.

MR. COUGHLAN: Very good. I am glad for that clarification from My Friend. Perhaps it is something I can take up with you.

MR. McGONIGAL: Well, certainly a relevant witness.

Q. MR. COUGHLAN: Mr. Loughrey, because I take it that that is now the position as enuciated by Mr. O'Brien's counsel, that the ownership didn't change until a licence was granted.

A. That is as I understand it.

MR. NESBITT: I would have to be concerned about that question. My witness has been sitting listening to this interchange, he is in a position to give evidence about things he was involved in. It doesn't seem to me, with the greatest of respect, he should be asked to comment about documents that he isn't privy to.

CHAIRMAN: There is a danger of this whole exchange leading to matters becoming simply more difficult for Mr. Loughrey to deal with. I have indicated that counsel on all sides will have a completely adequate opportunity to explore or canvass any relevant matters in due course with Mr. Loughrey or any other witness in addition to the obvious additional facility of making submissions in the manner that they consider most appropriate and I think it is probably preferable that we do not protract this exchange and that we

continue with evidence.

Q. MR. COUGHLAN: Very good, Mr. Loughrey. Before lunch I think it was your understanding from the documents you had seen that the ownership had changed, isn't that right?

A. Mr. Coughlan, and I am finding it difficult thank you, Chairman, in the sense that I was listening to you very carefully. I am finding it difficult now to disengage my mind from what I have just heard from the four learned counsel, but if I could try and switch my mind back to before lunch, Mr. Coughlan, for you, it is as follows: that the only document that we had opened up before lunch was the document from Professor Michael Walsh.

Q. Mm-hmm.

A. And quite clearly that was what appeared to be in an irrevocable letter of underwriting.

Q. Yes.

A. Now, underwriting in itself doesn't change ownership.

Q. Yes.

A. It is a facility a third party can bring to any arrangement in any normal major commercial transaction, but you put to me before lunch and I I am only thinking on my feet now because I haven't thought about it until I heard this interchange.

Q. Yes.

A. You put to me before that the, what appeared to be

that the Department, quite correctly, took in good faith the submission made on behalf of all the applicants, including Esat Digifone, and that was the 50:50, with a 10% on either side of the 50:50 to be allowed for private placement of one kind or another.

Q. Yes.

A. Now, what you were putting to me was that even though the Department has, as scrupulously as they could, in a non-discriminatory way looked at all these applications, they had stopped any interchange with the applicants, including, of course, Esat Digifone after the presentations. This letter came along, it was a letter of underwriting, and we can park that because we have been through that.

Q. Indeed.

A. It was a letter of underwriting and it in itself didn't change any ownership. Now, I you asked me to consider out of my knowledge, but not from any of the documentation I had in front of me, did the ownership change. Undoubtedly, when I took myself I can only talk definitely in terms of fact on what I did myself. When it was brought to my attention from mid-April onwards that there was a change in ownership, as I understood it to be a change of ownership

Q. Yes.

A. I set about regularising if it was irregular,

correcting it, whatever terms you might chose, but set about reverting that to 40:40:20, but I think is that where we left it before lunch?

Q. It was. And My Friend then intervened, as did Mr. Fitzsimons.

They have raised this question, and as I understand Mr. O'Brien to be saying, that there was no change of ownership until a licence was granted. If it be a change of ownership, it was only at that time. That is as I understand what Mr. O'Brien is saying?

A. Well, I can't speak for that, clearly.

Q. It has just been said on his behalf?

A. Yes.

Q. So, if that be so, and if Mr. O'Brien is saying through his counsel that there was no change of ownership until the time of the signing off of the licence, it continued to be 50:50 up to the 16th of May or there or thereabouts, or the 16th sorry, the 16th of May, 16th of May. That is as I understand.

A. Based on that premise.

Q. The assistance that we have just been rendered.

A. Absolutely, yes.

Q. Yes. Now, looking at the letter itself in the first instance, that is the letter that we see of the Department. That in fact provided for a situation where it was possible that 60 percent of that company could have been owned by IIU or IIU Nominees or Dermot

Desmond, isn't that correct?

A. That is if in fact is, any underwriting agreement, it is possible in certain circumstances that the underwriter would actually the ownership would be assigned to an underwriter in certain circumstances, but it depends on the agreement, but it is certainly possible, Mr. Coughlan, yes. But that letter in itself, as I say, is only an underwriting engagement, a commitment in itself, it doesn't change anything.

Q. Right. Now, I am going to first of all draw your attention to sworn evidence which was given to this Tribunal by Mr. Denis O'Brien previously, and then because My Friend says we should look at the documents, I am going to bring you back to the letter of arrangement agreement.

A. Fine.

Q. Very good.

A. Fine.

Q. Now, on Day 116 in sworn evidence before this Tribunal

A. Oh I see, I beg your pardon.

Q. In sworn evidence before this Tribunal on page 53, do you remember this Tribunal commenced its inquiries into matters which arose as a result of a donation being made to the Fine Gael Party through Mr. David Austin?

A. I understood that to be the case, yes.

Q. I was inquiring of Mr. O'Brien as to why he had gone to Telenor in respect of that, and he had informed us that in the first instance he thought about the 2nd or 3rd of November of 1995 he had been approached by Mr. David Austin, qua Esat Telecom?

A. Quite.

Q. And he didn't think it was appropriate that Esat Telecom should make the donation, in fact he felt they shouldn't have been asked to make the donation, because he felt that it was too proximate to the events. And if you look at Question 157, sorry I will get you a copy.

(Document handed to witness.)

Which was the very last question at the bottom of the page?

A. Yes.

Q. He is asked: "Now, if you just bear with me for a moment, to explore that stage through Esat Telecom what 40 percent of the shares?" That was in Esat Digifone.

"Answer: 37.5."

A. Yes, I see it now, that is halfway down the page, is it? I am on page 53, Mr. Coughlan.

Q. I beg your pardon. I beg your pardon. If you commence first of all, Question 152 at the top of the page.

A. I have it here, yes.

Q. "Question: Can you assist the Tribunal as to the circumstances of that particular approach?

Answer: He telephoned me one day, I believe it was early November, 2nd, 3rd, 4th November, about a Fine Gael fundraising dinner in the 21 Club where An Taoiseach would be present. He asked me would I take two places."

A. I have that, yes.

Q. "Question: And that was you, that was Denis O'Brien?

Answer: No, no it was Esat.

Question: Esat?

Answer: Esat Telecom was the fixed line business that owned, at that time, 37.5 percent of Esat Digifone."

That is as of the 2nd or 3rd of November of 1995, do you understand?

A. I understand.

Q. "Question: Do you remember Mr. Austin asking you specifically that the donation would be made by Esat Telecom?

Answer: He was ringing me in my capacity as Chairman or Chief Executive of Esat Telecom, that's my understanding, my recollection.

Question: Why is that your recollection?

Answer: Because it wasn't he was calling me in my capacity as Chairman of Esat Telecom, that is what I recall. He didn't say, 'Mr. O'Brien' or 'Denis, will you make a donation personally?' He said, 'Will Esat

make a donation?'

Question: Now, if you just bear with me for a moment to explore that stage" it doesn't follow.

Then if you go yes, if you then I have given you two other

A. Sure.

Q. two other questions, pages 62 and 63?

A. Yes. (Documents handed to witness.) Yes, I have 62 and 63 now, yes.

Q. We start with the question at the top at 209:

"Why not, Mr. O'Brien?

Answer: If it wasn't appropriate for Esat Telecom, then certainly, you know, I didn't even think that is suggesting Esat Digifone.

Question: It would have been in your mind at least, equally and appropriate for Esat Digifone to go to the dinner or make a donation?

Answer: Well, Mr. Coughlan....it hadn't any staff. I had only people who worked on the licence.

Question: And I understand that, Mr. O'Brien. It was, as you say, a project, maybe a few people working around at that time, would that be correct?

Answer: This was two weeks or so after winning the licence, so there was a lot of chaos.

Question: And I accept that it didn't enter your mind at that stage...Esat Digifone as a separate entity for the purpose of taking up the invitation or

request from Mr. Austin, but can I take it if it was inappropriate for Esat Telecom in your mind, it would have been...to attend the dinner or make a donation?

Answer: I didn't give any thought to it at that time.

Question: I am asking you to give some thought to it now?

Answer: It is hard to relate the circumstances of six years ago, Mr. Coughlan, in the context of Esat Digifone.

Question: I am just asking you, Mr. O'Brien, you were a significant participant in Esat Digifone Holdings at that stage through Esat Telecom what, 40 percent of the shares?

Answer: 37 and-a-half.

Question: 37 and-a-half. And I am asking you to look at it now, Mr. O'Brien. And if in your view was this just a project, but nevertheless a separate company?

Answer: I couldn't make a commitment on behalf of Esat Digifone because I had other shareholders."

Now, I think that's all that appears to be relevant from the transcripts?

A. Quite.

Q. I just ask you to bear that in mind. That is sworn evidence which Mr. O'Brien has already given to the Tribunal?

A. Absolutely.

MR. FITZSIMONS: Mr. Chairman, Mr. Coughlan had asked for assistance, and just so that one can be aware of the exact legal position, in view of the fact that the witness before lunch was being pressed very hard to agree with the propositions that Mr. Coughlan was putting to him.

IIU Nominees first became a shareholder in Esat Digifone Limited on the 12th and 13th of April, 1996, as a result of a combination of allotments made on those two dates. Initially the allotment was indeed for 25 percent, but then that was altered back to 20 percent legally to enable the licence to be granted. So that is the legal position, and I just thought I would put that on the record, lest what Mr. O'Brien might say in evidence might be taken as a statement of the legal position.

CHAIRMAN: Thanks, Mr. Fitzsimons.

Q. MR. COUGHLAN: I take on board My Friend's assistance, and it is a matter I will go into with you.

All shares were allotted on that day?

A. Quite.

Q. Prior to that it was a joint venture with a right to an allotment of shares. And the allotment was of 25 percent as of the 12th of April. And it I would appear from the documents available from the Tribunal, that there was never an allotment of 20 percent, there was a sale by IIU to the other two consortium members,

that appears to be the position, from the documents.

I am very thankful for any assistance.

But just to be very clear, Mr. Denis O'Brien has given sworn evidence, and there were no shares allotted in this company until April of 1996, that by using the term that he had 37.5 percent shares, that that was his entitlement, and that Telenor had a 37.5 percent entitlement, and that Mr. Dermot Desmond had a 25 percent entitlement.

Now, I am going to come back to deal with the arrangement agreement, but before I do I want to deal with other matters

A. Sure.

Q. relating to the application.

A. Of course.

Q. You, of course, were unaware of the actual make-up of the consortium as of the 4th of August, isn't that correct, other than what you gleaned from a press release?

A. Other than what I gleaned from a press release, yes.

Q. And did you not see either the executive summary or the financial section of the bid documents?

A. I did not see them at any stage. In fact, I only read the executive summary as an extract from your excellent comprehensive opening statement. That was the first time I had seen it, the very first time.

Q. And I am just trying to understand the mindframe of

the evaluators and the mindset of the applicants in this inquiry. The executive summary, I think, and I can get you a copy and we will put it up.

(Document handed to witness.)

If you see the executive summary?

A. I have that now, yes.

Q. And

A. This is the first time I have ever seen it in this form.

Q. Very good. I am just bringing it to your attention, because I understand that your knowledge of the make-up of the consortium was gleaned subsequent to the decision?

A. That's right.

Q. And you can see under the heading "A Strong Ownership Structure", it sets out the who the operating partners are, Communicorp Telenor, invest and then at 2.2 the company's ownership structure, do you see that?

A. Yes.

Q. And that reads "Esat Digifone, an Irish incorporated company. Currently, 50 percent of the shares are held by Commission of the European Union and the other 50 percent by Telenor. On award of the license, 20 percent of the equity in the company (10 percent each from Communicorp and Telenor) will be made available to third party investors. This allocation has been placed by Davy Stockbrokers (Ireland's largest

stockbrokering firm) with:

"Allied Irish Bank.

Investment Bank of Ireland.

Standard Life Ireland.

Advent International.

"Confirmation letters from all equity partners are contained in the financing Appendix.

"The shareholders plan to make a percentage of the company's shares publicly available on the Irish Stock Exchange some two to three years after license award."

And then if you turn over the page there is a graphic,

and it has "Esat Digifone Limited", and that shows

"Telenor Invest - 40 percent to 50 percent; Commission of the European Union Group - 40 percent to 50 percent. Up to 20 percent institutional investors...

AIB and Advent International."

I think you see that.

So that was the first matter in the bid documents?

A. That is what the evaluators got, yes.

Q. Yes. Then if you turn to the financial section, or the finance section of the bid documents in the body under the heading "Financing", and you can see there that at 8.3, "Financing strategy: The total project finance requirement would be raised in the following proportions." And it deals with equity debt 40:60, that was fairly standard in all applicants?

A. It would be.

Q. "From the year 2000 onwards cashflow from operations is capable of funding instalments on loans, on-going operations and capital expenditures."

And then 8.4, "Equity":

"The maximum equity requirement would be $\text{€}152$ million.

The Business Plan envisages that $\text{€}26$ million will be invested upon award of the license to fund the upfront licensee and to cover initial capital investment and operating costs. A further $\text{€}26$ million will be injected in 1996 when the first debt finance will also be drawn down. The $\text{€}26$ million in 1996 contains $\text{€}4$ million for performance guarantees penalties.

"The Shareholders' Agreement states that Communicorp and Telenor will each initially hold 50 percent of the equity of Esat Digifone. In the period leading up to the award of the license, 20 percent of the equity (10 percent from each of the partners) will be formally placed by Davy Stockbrokers, (Ireland largest stockbroking firm.)

"As a submission of this application, Davy Stockbrokers has received written commitment for 21.35 percent of the equity from AIB to make an investment of $\text{€}3$ million (5.77 percent of the total equity).

"Investment Bank of Ireland, to make an equity investment of the $\text{€}3$ million (5.77 of the total equity).

"Standard Life of Ireland, to make an equity

investment of approximately 2.5 million.

"The payment of share capital will be activated immediately after the award of the license (Letters of Commitment are presented in finance Appendix C).

"Within three years of launch, the Communicorp Group and Telenor will each make a further share of their equity available for independent investors in order to reach the position whereby the equity in Esat Digifone is shared between Communicorp, Telenor and institutional investors on a 34:34:32."

So you can see a slight difference between the ownership structure as set out in the executive summary, and that which is set out in the finance section of the bid document, in that the executive summary states that these had been placed with these institutions and the other ones will be placed?

A. Not only that, there is some other minor inconsistencies as well. For instance, if they have an IPO, while it is possible to have an IPO and placed only with institutional investors, the general spirit of that would be to have a wider share ownership, so the split wouldn't be 34:34:32 institutional, it would be a wider dispersal of the shares. I am not cavilling, there are minor inconsistencies all along.

Q. That was something that was going to happen years down the road

A. In any event down the road, but broadly speaking, I

understand. As I said. I am seeing this for the first time.

Q. I understand that. That was what was presented to the evaluators, as you can understand.

Now, I think Mr. Brennan has informed the Tribunal that in terms of evaluating Allied Irish Bank, Investment Bank of Ireland, Standard Life, it was hardly necessary; they were well-known in Ireland as being substantial financial institutions, managing pension funds and investing money on behalf of people?

A. Taken as read.

Q. Taken as read. And in any event, a mere reference to something like Standard & Poor or Moody's or one of these like that would solve that problem?

A. Absolutely.

Q. And as regards Advent International, in fact inquiries were made, not of them directly, but Mr. Billy Riordan did conduct some queries in relation to find out who they were, what type of company they were, what size of company they were, what type of funds they had under their control and matters of that nature and he appears to have been satisfied enough in relation to those matters?

A. I have no idea, but

Q. At least in the mindset of the evaluators, these particular institutions, and of course one accepts that the shares had not been placed at that time, they

had undergone the evaluation process along with

Communicorp and Telenor?

A. Yes, they had.

Q. And there can be little doubt that, and I will come to

a situation where one might replace a blue chip

financial institution like Investment Bank of Ireland

by, say, I don't know, National Westminster Bank or

somebody of that nature, that mightn't alter anything,

but what was clear here is that these blue chip

institutions stood up to scrutiny, there is no doubt

about that; as you said, you take it as read. And

that was what was being presented to the evaluators

for evaluation, isn't that correct?

A. Correct.

Q. And nobody had any shares in Esat Digifone at this

time we have just heard My Friend explain when the

allotment of shares occurred?

A. It was a JV until such time as they allocated shares.

Q. What they had was an entitlement, Telenor and

Communicorp had their entitlement by reason of their

joint venture to these shares, and what they were

saying in this particular submission to the evaluators

was that 'we will forego our entitlement, as of 10

percent each, to these particular institutions', isn't

that right, that is what they are saying to the

evaluators?

A. That is what they are saying to the evaluators. Mr.

Coughlan, it may be helpful though, in case you were to if we were to just leave it at that.

Q. I am not.

A. I am sure it is, clearly I am here to help or whatever you want to put to me, but I would like to say that as at all stages the evaluators, perhaps they did, I can't get into their mindset, but certainly the institutional 20 percent could have very little meaningful significance relative to the global evaluation other than it was bringing valuable equity capital, no more than that. So in other words, I accept straightaway your point on substitution, for instance, you said if National Westminster at the time had been substituted for IBI, clearly in terms of proportionality, that would, could be taken as read as well.

Q. Yes, I understand that. And I suppose one could also read from it that the institutions, they are not coming as a player, they are just coming as investors in this company?

A. There may be an nuance here, for instance, that might be worthwhile saying at this stage, that I think perhaps the evaluators were wrong, and this is not a criticism, I think the Department was wrong, and perhaps myself in particular wrong, at a press conference in calling them this sort of all embracing term as institutional investors, because institutional

investors, after all, were conventionally seen as holders of life funds, pension funds, etc., not exclusively but this was the popular notion. Now, clearly at the very outset, I think was it Mr. Lynch the coordinator for Esat Digifone, he submitted to the Department what basically was an incorrect description, he called them institutional investors in the - for the press release of 4 August. In fact, looking at this, if he had looked at this, he would have seen quite clearly it doesn't say "institutional investors", it says "third party investors", because as a holdall that was far more accurate, because Advent was a private equity house, and a private equity house now, I could be Jesuitical and make the point that a private equity house is a private institution, therefore they are institutional investors, but in popular language a private equity house wouldn't regard itself as an institutional investor. They would regard institutional investors as distant, pale, pallid cousins, because the rate of return they would seek would be perhaps of the order of perhaps three times that which a normal institutional shareholder would be happy with. In other words, we are mixing apples and oranges here, so I would think, I am not into blame culture but

Q. I beg your pardon?

A. I am not into blame culture.

Q. Of course not.

A. But everybody in a minor way is at fault. The only accurate description is what I have just read now in the, where Esat Digifone, in their submission, say it will be made available to third party investors.

Q. Yes.

A. All of the people, and notably myself, because I think I actually put the term blue chip into play first at the press conference on the 25th of October, so all of us, to some extent, are guilty in a minor way of creating semantic confusion because in reality the only global term that you could use was the one that was correctly used by Esat Digifone, that of third party investors.

Q. Mm-hmm. I will come to the presentation in a moment. But does that create some major problem?

A. Oh not for me it doesn't, no, Mr. Coughlan, no.

Q. What we had here was blue chip investors, isn't that right?

A. No private equity house, even the best in the world at present, from KKR in America, to Sinven in Europe, I don't think they would be regarded as a blue chip as such because they are into the high risk, even though they minimise risk they are, they are not by definition positioning themselves in the market in a different place to conventional blue chip.

Q. What about Allied Irish Banks?

A. Oh I have no problem with describing them as blue chip.

Q. Investment Bank of Ireland?

A. No problem, well part of the Bank of Ireland Group clearly, but I have no problem in nominating them as blue chip.

Q. Standard Life Ireland?

A. Standard Life is first class middle of the road institutional fund holder, no problem whatsoever.

Q. So to use your own phrase, on a question of proportionality, this was blue chip?

A. I still feel myself in three out of four, Advent's role to be described - whether it is blue chip or not, we can perhaps agree or disagree, certainly in conventional terms it wasn't an institutional investor nor would it regard itself as an institutional investor.

Q. Perhaps that is what prompted Mr. Riordan in the evaluation process to carry out specific inquiries about Advent International, whereas he didn't see the need to carry out such specific inquiries about the other three?

A. I think he was very wise to do so, because quite a few private equity houses have taken a dreadful knock in the last three years.

Q. There can be no doubt that you would agree thoroughly with the approach that was adopted, therefore, that

one didn't have to make specific inquiries in relation to AIB, IBI or Standard Life, but one did have to look at Advent?

A. Correct.

Q. And that is what happened?

A. Yes.

Q. Now, so that was what was contained in the application, and that is what - I don't think that you were aware until now of how specific that was

A. I am just seeing it just here in the

Q. of the people or the institutions which were involved?

A. Perhaps could you put that to me again, Mr. Coughlan?

Q. Were you ever aware of the institutions that were involved?

A. Oh, I was.

Q. When?

A. Because I was given a sheet of paper, I think now, this is to the best of my recollection, I asked for who the institutional - who were these investors, institutional investors as described to me on the 25th of October. And to the best of my memory I was either on a sheet of paper or orally by Martin Brennan, perhaps the latter, he described, and he was I was under the impression, because I think he was under the impression, that it was a straight 5:5:5 breakdown. Now, it is a little bit more it is a

little slightly off, it is 5.7, 5.7, you know, 4.8 and 5; in other words, it came to more than 20 percent from what we see here now and I have just seen that, but I was given the information, I believe, on the 25th of October, even before I saw the Minister, that it was a breakdown of 5:5:5:5, as between these four candidates.

Q. You believe that you were given that information orally?

A. Yes, I do. They may have been on a sheet of paper. I asked for it, my memory is I asked for it, so-to-speak, I won't say at the last minute but I was only being informed at that stage. I said, "Look, we would like to get a fix on who are these investors," and this sort of was, this was what was produced. And subsequently, and I am trying now to recall, I believe either that day or the following day, and I am working from memory now, is that I saw the letters, they were draft letters. I think, I am not sure it was at that stage or later, but I know looking back 7 or 8 years ago I know I was shown the letters because whenever I saw them, Mr. Coughlan, I knew I wasn't a bit surprised I knew they weren't commitments of any kind. They were merely indicative letters of interest for the simple reason is, like all good institutional investors, and we will park the private equity house for a moment, like all good institutional investors

they couldn't possibly have given a commitment without seeing the colour of the licence, so-to-speak. And so they were, you know, they were qualified indicative letters of interest, and I remember now - when exactly I saw them I will try and refresh my memory, but it is certainly, it certainly isn't in the last year. I saw them in, at the time. Whether - I am trying to recall exactly when I saw them but I am telling the Tribunal that I certainly saw those letters and I knew them for what they were worth, interesting indicative letters of interest, but so conditional that they were meaningless in some ways.

Q. I see. Well, would that have been around the time that Mr. Brennan told you that there was a decision or would it have been around the time of April or May of 1996, do you think?

A. Could you excuse me to take a little time out on that, because I genuinely now you know when you are trying to recall 7 years, and I know - I am quite certain I saw the letters, had sight of the letters, I am trying to think when I saw them, I can't give you a definitive reply right now. I may never be able to give you a definitive reply but if I had to err on the side of when I saw them, it was in October of '95, rather than April/May, '96, but that is only an impression at this stage.

Q. I see. And it was your view, when you saw the

letters, that they were merely indicative letters and

had no real value, as I think I

A. Having spent, I suppose, five years in corporate and

project finance actually, in a sense I wasn't looking

at letters like this as a total neophyte, and I did

see them as I saw what they were worth, that Davys did

a good job of canvassing anybody at all, given that

there was no certainty a) first of all, as to whether

Esat Digifone actually would be the winning bid, there

was a noted certainty and they weren't in betting

terms they weren't even short odds at that stage, by

what I call opinion in the street so-to-speak, and

secondly, even if they had been odds-on favourite,

there was no question of there is a long way to go to

see the terms and conditions of the licence. So I

think Davys did remarkably well to muster up that kind

of interest given where we were at the time in 1995.

Q. And I appreciate that you have stated, and I accept

that you are not in the business of attaching blame to

anybody, so therefore these particular letters, when

they went through the evaluation process should, in

your view, just have been rejected of being of no real

value?

A. Oh gosh, now rejected for the simple reason it was the

50:50 application with the intent to place, have a

private placement for 20 percent which would kick in

when the licence was awarded. I don't see that at all

as anything other than the correct handling by the Evaluation Group.

Q. Do you think that would have been the type of matter which would have exercised the mind of the members of the Evaluation Group, perhaps so?

A. Perhaps, perhaps that would be so, yes.

Q. And perhaps exercise the minds of the members of the consortium as well, I presume?

A. Could you put that to me again, Mr. Coughlan, because I am not sure that I get the drift of that question.

Q. Well, you see, the Tribunal is looking for your assistance here, Mr. Loughrey, and you have seen this for the first time, as to why somebody should go to the trouble of, in fact, involving Davys, and asking Davys to go to these financial institutions not Advent now, that arose in a different way, and included in its bid, I suppose, would lead one to the belief that they understood that there was some value in this?

A. I think they may have thought there was some value in it. This is pure speculation now and I am sure it will be discounted entirely as speculation, that perhaps they may have felt being a young company with cashflow problems that had been noted in the market-place already, they may have felt that an extra prop coming from Irish, particularly from Irish institutional investors would be seen both as a vote

of confidence and a source of finance, but this is pure speculation on my part, Mr. Coughlan.

Q. Well, can I take it that if you saw the letters, I know you need to come back to me on this, around the time that Martin Brennan informed you of a decision, that it must have caused you concern?

A. No, no, I hope the logic of my position, it is not a contrived position, I hope the logic of my position, I knew quite well if you reserve a position for private placement that would be predicated on a licence, that Davys couldn't have done any better than that at that time.

Q. Well, if you now were of the view that these were of no real value, did that cause any concern in your mind as to how this project was going to be financed or funded?

A. No, it didn't, because I understood always if the licence negotiations were to be successful, the licence in itself was so long as it was in competent hands, the licence itself would have been a source of 100 percent non-recourse finance, if it was so required, because it was a value.

Q. That is a different issue for the moment. That is - and I will deal with that in due course. But, can I just bring to your attention something which arose during the course of the presentation. And if you have available the transcript of the presentation of

this particular consortium?

A. Mr. Coughlan, would they be outside the five pages I already have?

Q. Oh, they would, I think, yes. I am sorry. I will get you - it is Book 51, I think, of, the documents.

CHAIRMAN: Just whilst that is being obtained, Mr. Loughrey, I mean, you have indicated your view, and of course you have a background in corporate finance, that these letters of interest on the part of the three Irish institutions were really of no enforceable effect, and that you considered Davys did well to ring them from the Irish financial community. We did hear in the opening that the three institutions were annoyed and got Mr. McLaughlin of Davys to go and remonstrate on a number of occasions with the consortium.

A. Chairman, well I think you have summarised very well what I was saying. I am sure if you are asking me for a comment on that, I am not a bit surprised they would be annoyed actually, because clearly they went out and hussled up indicative investors, and then to be subsequently jocked off, if I can use that colloquial phrase actually, would be a source of annoyance; by definition it would be.

CHAIRMAN: It wasn't an ex gratia act of charity on behalf, on the part of any of the institutions.

A. Certainly not. All of the institutions would have

been, I believe, if the terms were right, would have been happy to have associated themselves with any of the six applicants, had they won the licence. Major financial institutions can't be, can't afford to be that, if I may so, selective when there are six horses in the race, so-to-speak.

CHAIRMAN: Yes.

Q. MR. COUGHLAN: There were two jocking-offs; Davys were jocked off, in the first instance, as the placers.

The institutions, as you have said to the Sole Member, were jocked off as well, isn't that right?

A. That's correct.

Q. On the presentation made by the Esat Digifone Consortium, I think you have been furnished with a transcript of that, haven't you? And if you could turn to Page 9 of it, there is, first of all,

Mr. Brennan sets out the procedure.

A. I am sorry, perhaps I dropped my concentration, Mr. Coughlan, but I am not sure

Q. I will get it for you.

A. I apologise.

Q. Okay. (Document handed to witness.)

A. Thank you. That's great.

Q. Mr. Brennan, the first number of pages sets out how things are going to proceed. Then there is a brief introduction from Mr. Denis O'Brien, and then Mr. Arve Johansen. If you go to Page 9?

A. I have that, yes.

Q. And I don't think there is any suggestion that Telenor were a young company with any known difficulties in raising money in financial houses in the streets of Dublin?

A. They would have had no problem whatsoever. It may not have been a household name but the fact that a State owned telecommunications company which was seen as having virtually higher margins than anybody else would have had no problem in raising finance, none.

Q. And Mr. Johansen commences:

"Ladies and gentlemen, Esat Digifone has the right partnership in place to succeed. I will explain this to you this afternoon by highlighting five points.

Esat Digifone is an Irish company. We have sufficient financial capacity to meet and even succeed the funding requirements. The partners have complementary skills and experiences and we have a very high level of commitment and we have the freedom to chose the best quality infrastructure.

"Esat Digifone is an Irish company. Its evidenced first of all by the Communicorp Group holding 40 percent as we get going, and we have institutional investors holding 20 percent, and they are" again reading as we get going "and they are: The Allied Irish Bank, the Investment Bank of Ireland, Standard Life Ireland and Advent International. In addition,

we have Telenor, through its subsidiary, Telenor Invest, and Telenor is the major telecommunications operating company in Norway, having last year an operating Revenue of $\text{N}1.8$ billion and a profit of $\text{N}190$ million.

"We already have the funding in place. The total funding requirements seen from the Business Plan is $\text{N}124$ million. "

So, you can see there that Mr. Johansen is informing the PT GSM that as the company gets going, it will be placed 40 percent as to Telenor and Communicorp or whatever company is going to take it there, and 20 percent, and that they are to be placed with the Allied Irish Bank, the Investment Bank of Ireland, Standard Life and Advent International and that they already have the funding in place.

So it would appear, and nobody is suggesting that Mr. Johansen was in any way misleading the PT GSM, that it was the view of Telenor, at least, that whatever the nature of the letter from the financial institutions, that that was the sufficient comfort to them to participate on that basis, to make a presentation on that basis, and to honestly inform the PT GSM that these would be placed with these institutions.

Doesn't that appear to be the situation?

A. So it seems, Mr. Coughlan.

Q. And from an examination of the documents which have

been furnished to the Tribunal by the Department, there doesn't seem to be any comment in any of the documents about the strength of the letter which was furnished by the financial institutions, by the PT GSM, I think you would agree with that?

A. Once again so it seems.

Q. So it would appear that there did not appear to be a concern about the commitment, the level of commitment which was coming from the financial institutions, either with members of the Project Team, or at least on the part of Telenor, would you agree, as of this time?

A. Perhaps I could nuance that slightly is, the Project Team was the Project Team but it had its key advisers in Andersen. Now, Andersen were very streetwise advisers with very considerable financing expertise. Presumably they, and I can't speak for the Project Team, but I am surmising, presumably they felt that once a licence was awarded, and don't forget this effectively was the last second, it was to have been a seven-year duopoly the last, if I may say so, significant second GSM licence where dupoloies were applying in Europe, they probably may well have felt, and once again I am speculating and you can discount it, discount this to zero if you so wish, Mr. Coughlan, that the indicative interest or even if it hadn't been copper fastened, the interest hadn't

been copper fastened, that the project was so attractive that in fact there would be very little difficulty in the follow-through and the successful execution of this placement.

Q. That seems right, doesn't it, and that seems to be the view that prevail, as you say you don't know, but possibly with Andersen. There is no caveat from the Project Team about the quality of the letter of commitment, and Mr. Johansen is informing them of the position, obviously again not conscious that there should be any caveat in relation to these particular letters of commitment?

A. Sure.

Q. So it would appear from that particular presentation, and from all, a consideration of all of the documents, that there was no concern about the letters that were submitted by these institutions?

A. So it seems, yes.

Q. And we also know that in relation to Advent, as you said very wisely, Mr. Billy Riordan carried out some inquiries and an analysis of them as well, which again would be the right thing to do?

A. But I, Mr. Coughlan, I think it might be helpful if I were to say this: I wouldn't infer from that, there is many a company that has an S&P nihil obstat, if I may put it that way, or Moody's approval that has gone to the wall. I would say that of course as Advent

International wasn't a household name they should look and find out what it was look at it and find out what it was, but in my opinion the Advent's, the fact that Advent was there when I saw it gave me great comfort rather than an institutional holder, because a private equity house actually is a much greater vote of confidence than any institutional funds, no matter how professional and due diligent institutional funds is, it is not life and death to them like it is to a private equity house and it's - it is a bit like, I don't mean to be facetious, like the whole story of ham and eggs, that the hen is involved but the pig is committed. Well, I would put it like that is, if you have a private equity house in, they are committed, while institutional investor, no matter how professional they are, are only involved and it by definition, it will be a small part of their portfolio. For a private equity house it could be a major part of their portfolio. To me, Advent was the real strength in that indicative list of four.

Q. I see. If you go to I beg your pardon, again, to page 43 of the presentation.

A. Yes, I have that now, yes.

Q. And again just to indicate the state of mind of Mr. O'Brien as conveyed to the Project Team at this presentation.

A. Yes, I recall that.

Q. And you can see the second paragraph:

"So Esat Digifone was ready to go." You see that?

A. I see that, yes.

Q. If you go down to then, "The Business Plan is sound"?

A. Yes, I have that.

Q. "No blue skies, no dreaming, it is a Business Plan

that makes sense, and as Arve has mentioned, both

Communicorp and the financial institutions are going

to share in this investment, and I think this is

important because for the first time a utility will

make available shares to financial institutions.

There is a hell of lot of money, pension money leaving

this country, and this is way of tapping that vast

resource. So we have two operating partners and

financial institutions, so that is done."

You can see that?

A. Yes.

Q. Again there can be no doubt about what is being

conveyed?

A. As a fait accompli.

Q. As a fait accompli, or as we all know, and on reading

the letters, it wasn't actually placed, but there was

a commitment to place, isn't that it?

A. Yes. But one would expect, obviously, any applicant

to put the best foot forward and clearly they did so.

Q. Well, I presume that is so, and whilst one might plead

one's own case strongly, the Tribunal - sorry, sorry,

I understand that somebody would plead one's case strongly, but one had to plead one's case truthfully, isn't that correct?

A. Of course.

Q. And one had to plead one's case which was consistent with the bid documents which have been submitted?

A. Of course.

Q. And the evaluators, the evaluators, in asking questions and in accepting answers based both on the presentation and on the bid documentation, were entitled to, in respect of all consortia, to expect that what they were being told of the situation?

A. I quite agree, yes.

Q. And if that were not to be the case, it would have serious consequences, isn't that correct?

A. It would have impacted on the process, yes.

Q. Now, I think you have said that the presence of Advent, when you saw or knew, if I could put it that way, when you knew that Advent were involved, I think you also - were you aware that Advent were also involved in the funding of Communicorp, is that explained?

A. I am not sure, to be honest. I may or may not have been, and I am sorry that I can't be so helpful.

You will understand that Martin Brennan briefed me on the process and the outcome, etc.. I may have asked some questions. My memory is that I asked about the

investors, the third party investors, but whether I looked for the Communicorp shareholding or not, I may well have but I have no memory of it, so

Q. I am not asking in terms of Communicorp's shareholding specifically, but it was known in the Department, it was known in the Department that Communicorp had financial difficulties and had financial problems?

A. Certainly it was. Certainly that is the case. I have a clearer memory perhaps of '96 rather than '95 but even at that then it wouldn't have been a surprise to me, let me put it that way.

Q. I suppose it wouldn't be a surprise if you were to ask a question "how are they going to keep their end of things up?"

A. I think that is a fair comment.

Q. Wouldn't that be a way that you might ask the question?

A. Yes.

Q. And what were you told?

A. I can't honestly recall now, it is so long ago. My interaction with Esat Telecom, I know the Tribunal has some documentation on that, was one where a crisis bubbled up as between Sean McMahon as the de facto regulator and the whole question of what was eligible under the '83 legislation. And it clearly at that stage either between Sean McMahon or Sean Fitzgerald, they would have said, "Well look, you know, Denis

O'Brien actually wants quick resolution on this. The positive side would be Esat trying to build market share. The negative side is he will run into cashflow difficulties because he is rolling out his fixed line market quicker than he can get capacity from Telecom Eireann." So certainly at one side there would be a hint of challenge on the cashflow side, undoubtedly.

Q. Well, Mr. Fitzgerald seemed to have been aware that Esat Telecom were having difficulties on the financial side and were having to dilute their equity in favour of Advent?

A. I am not aware that I was so aware but Sean Fitzgerald, being in charge of telecommunications, would have been much closer to the action than I would have been at the time.

Q. Would you go to Page 98 of the presentation, please?

A. I have it now, yes.

Q. And you can see there that at Page 98, you see Mr. Michael Andersen, the meeting was effectively or the presentation was effectively handed over to him at that stage?

A. Okay.

Q. And he conducted the, or he was in charge of the conduct of the most of the rest of the meeting. And you can see

"MR. MICHAEL ANDERSEN: Okay. I think given the time we have allocated to the remaining questions, I will

leave out some questions concerning value added services and distribution etc. and then move to financial, some financial questions we have. Is that okay, Chairman?

"So now you will have a financial question if that's okay. And it is on solvency and we have remarked that in your business case or in your application, you are presenting yourself as having a solvency degree less than zero percent for three years and we would like you to elaborate on that.

"MR. DENIS O'BRIEN: You mean to say we are going to be making losses in the first three years?

"MR. PETER O'DONOGHUE: You see, you look at the Business Plan, you see that we have actually negative capital for a period of about three years and so what we have looked at, this is an operation and how it can be funded and it's funded through equity and through debt finance and that's from a business plan point of view and we are quite confident that this type of business can carry that ratio of debt to equity. Now that's on a business plan point of view.

"On the other hand, if you look at it from statutory point of view, because it's illegal to have an insolvent company trading, so we would see this as a technical issue. What we would technically from a statutory point of view in complying with Irish Company Law, what we would do in this situation, we

would receive parent company guarantees to support the Esat Digifone over this period of time which would satisfy the legal requirements here in Ireland so that the, any liabilities undertaken by Esat Digifone would be underwritten by Telenor and Communicorp. So if that required a quasi injection of capital or a capital to be put in a separate account, we'd be willing to do that.

"So really in our Business Plan, we have looked at, from a point of view of just a commercial entity, how much debt and how much equity we have to put in but from a statutory point of view, we would put procedures in place to ensure that we are not breaking the law.

"MR. ARVE JOHANNSON: I would like to say that it's pretty certain that we can finance this on a project finance basis on the equity debt ratio 40 to 60 so the question is more of a technical nature regarding the company law.

"MR. BILLY RIORDAN: You are saying that operationally you can actually get over this hurdle but technically you are going to have to take steps to regress the balance so it will never be that way.

"MR. PETER O'DONOGHUE: Exactly.

"MR. MICHAEL ANDERSEN: So, okay, you have assurances that you will not go bankrupt. Thank you for that.

We will now move on to the next question which is a

combined financial and management question and it will be posed by Billy Riordan from the Department of Finance.

"MR. BILLY RIORDAN: Sorry, this question relates really to the letters of financial support and particularly the ones from Advent. Advent, in that letter, say that they have invested $\text{€}10$ million for 25 percent of the company and then at some stage in the proposal it says that they have $\text{€}19.5$ million invested for 34 percent. I just want to clarify, have they, in the interim, invested an extra $\text{€}9.5$ million for the extra 9 percent equity?

"MR. DENIS O'BRIEN: They have invested a total of $\text{€}19,500,000$ since last October, which is completely apart from this new investment which will come and is guaranteed if we receive this licence.

"MR. BILLY RIORDAN: Okay. The reason that was throwing me off was the letter said something different. This was a letter that was addressed to Martin on the 10th July. And it says that certainly the funds managed by Advent International invested a total approximately $\text{€}10$ million in Communicorp and it leaves it at that. They are committed to investing an extra $\text{€}9.5$ million.

"MR. DENIS O'BRIEN: They have actually done it.

"MR. BILLY RIORDAN: That's the clarification I was looking for really.

"Then really a follow-on from that was that Advent have said they are providing up to $\frac{1}{2}$ 30 million to Communicorp.

"MR. DENIS O'BRIEN: 30 million, I think it's pounds.

"MR. BILLY RIORDAN: Sorry, you are right, IR $\frac{1}{2}$ 30 million. I am wondering in what form will that funding be put into Communicorp? Will it be loans or will it be equity?

"MR. DENIS O'BRIEN: It will be equity. That's what we have negotiated on. So in other words, at the moment, Advent will probably go up to about 47, 48 percent if we win this licence. So the business will be, remain Irish controlled.

"There is also a second thing and that is that there is a three to one voting ratio to the Irish investors.

"MR. BILLY RIORDAN: So every one of their shares is worth three of yours

"MR. DENIS O'BRIEN: No. In fact the Irish content, we have three times their votes. It's a three to one so and that really protects the Irish content and that has been there from the very, very beginning of the relationship with Advent.

"MR. MARTIN BRENNAN: I'd just like to ask, in the sense of Advent having 47 percent of Communicorp and if I remember correctly also one of the institutional investors for the 20 percent. That still doesn't give them anything like leverage.

"MR. DENIS O'BRIEN: No, absolutely not. Because that's one of the things that we have raised the finance on. In other words, like as in Irish indigenous companies, you can not raise that kind of capital in this country. It's extremely difficult unless you go to the public markets. So we have raised it privately and indeed all of the money has come from European pension funds. So what we have tried to do all along, and it's been our goal, is that the company would remain Irish and that's the reason why, you know, we have insisted on these voting requirements for the Irish investors, that they have three times the number of votes Advent have. It's also likely that the Irish institutions will probably go into a vehicle together just for simplicity that there would be that 20 percent block so the Irish institutions again would control that block effectively in terms of equity terms.

"I don't know whether we mentioned this in the presentation, but it is our aim to drop down to 32 percent, in other words, to share the ownership through a capital markets entry here in the country now. We are not saying that we are going to do that immediately because it's totally unfeasible to believe we'd do it immediately, but we have an agreement with the institutions whereby they would assist in marketing, taking in the shares in Dublin and I think

that's a tremendous advantage to our proposal.

"MR. BILLY RIORDAN: When you say dropping to 32 percent, who is dropping?

"MR. DENIS O'BRIEN: In other words, Telenor AS would be dropping down to 32, so they would lose 8 percent.

Communicorp would lose 8 percent as well. That would mean that the Irish investors, institutional investors and the public would go up to, I think it's 31. So, you know, you have even a greater Irish content going forward. Sorry, it's 6 percent.

"MR. BILLY RIORDAN: You will drop each of your interests by 6 percent, to 34 percent? Very magnanimous of you. So basically Advent essentially ends up with roughly 20 percent of the licence if you take the 5 ballpark percent that they have through their

"MR. DENIS O'BRIEN: Yeah, 20 will be right.

"MR. BILLY RIORDAN: Plus the 47 percent.

"MR. DENIS O'BRIEN: As I stress, the main thing from our point of view is that the company maintains is an Irish company. Okay.

"MR. MICHAEL ANDERSEN I'd just like you to repeat for me the Advent's interest in Communicorp. You say that is going to be up to, was it 47 percent voting power wise or

"MR. DENIS O'BRIEN: Equity. It's going to be up to 47 percent equity but in terms of voting, the other 53

percent has three times the votes of Advent. So we, you know, the Irish shareholders in Communicorp will always have control of Communicorp.

"MR. MICHAEL ANDERSEN: Okay. But that also means that if you have what they have right now up to 46 and that escalates up to $\frac{1}{2}$ 30 million, then you have to have some other capital in from some other side as far as I can see.

"MR. DENIS O'BRIEN: No, no, because the full capital requirement for the investment is initially 21.6, I think it is, plus a line up to 30, so they have said day one, they are guaranteeing $\frac{1}{2}$ 30 million.

"MR. BILLY RIORDAN: So you have a little bit of fat in that. You have, in fact, from the point of view you have about $\frac{1}{2}$ 8,500,000 of fat in that particular commitment.

"MR. DENIS O'BRIEN: Yes, but it's an irrevocable commitment of fat, if you know what I mean.

"MR. BILLY RIORDAN: I used the term first.

"*SPEAKER: Sorry, just one question on that, Denis, do I understand there is already an agreement in place between Communicorp and Advent on that?"

That speaker is Sean McMahan.

"MR. DENIS O'BRIEN: Yes.

"MR. MARTIN BRENNAN: That is not the same as the letter of the commitment we have seen in the application?"

"MR. DENIS O'BRIEN: Well, we thought that you'd want to hear that directly from Advent, hence they wrote you a letter to say that.

"MR. MICHAEL ANDERSEN: Okay. I think that that's all for the financial part, okay."

Now, did anyone inform you at any stage that Mr. Denis O'Brien had informed the members of the PT GSM at the presentation that he had an actual agreement in place which guaranteed $\frac{1}{2}$ 30-million coming in from Advent as equity into his company.

A. Mr. Coughlan, I think it would save you an awful lot if I were to say that I knew absolutely nothing about any of the presentations at any stage and until now - no I don't say now, because I actually scanned some of the transcripts earlier, I didn't read them, I said to you before lunch I don't claim any knowledge of them, but I hit them in places just to get the flavour of them.

Q. Yes.

A. But that is the very first time, literally Martin Brennan's transcripts which I only read last week is the very first time I knew anything at all about the presentations, whatsoever.

Q. Yes. And nobody ever informed you that Communicorp had such an agreement, had they?

A. I had no knowledge of that whatsoever.

Q. Now from the first of all deal with the question

of, in the first instance, I think Mr. O'Brien again seemed to be - have informed the PT GSM, similar to the presentation made by Mr. Johansen about the financial institutions, I think you'd accept it was in light spirit?

A. I accept that. What seemed to be, from just listening to you now, what seemed to be uppermost in Mr. O'Brien's mind was this emphasis on that it was an Irish company, and I know I think it was last Friday I described anybody who came to my door in the open period, much as I'd loved to see Irish companies do well, there was no such requirement whatsoever nor could there have been nor would it have got EU approval had we put such an emphasis even if we wanted to. He seems to have this preoccupation in demonstrating or in proving at all stages no matter how much it was diluted financially, that it would still be in in Irish hands so to speak. Now perhaps an admirable preoccupation on his part but that seemed to be his primary preoccupation in that presentation.

Q. Yes. Well, I suppose you can't blame somebody for pleading a case in that way if they think that it might give them some advantage?

A. Certainly not. It may have been ill founded but you certainly can't blame him for trying.

Q. Yes. From the papers available to the Tribunal

A. Mm-hmm.

Q. it would appear that there was no agreement between Advent and Mr. O'Brien whereby Advent had guaranteed to invest 1/230-million in Communicorp?

A. I accept what you say, of course, Mr. Coughlan.

Q. And furthermore, in respect of what was the Letter of Commitment or sorry, the Letter of Comfort or the Letter of Commitment sent by Advent to the Department, that is in respect of the 5 percent aspect of the shareholding, there was no agreement between Communicorp or Telenor or Advent in respect of Advent's entitlement to that particular 5 percent either?

A. I accept what you say, Mr. Coughlan. I am not in a position to deny it. I am quite sure you are quite right. I am quite sure you are right.

Q. What was happening here, Advent had to write a letter that was acceptable to the Department and had to write a letter which was acceptable to Telenor?

A. Sorry, perhaps we could qualify that. Which they thought might be acceptable to the Department, because the Department didn't express any such view.

Q. Of course. Of course. And they also had to write one which was acceptable to Telenor. And in fact, at the time of this presentation, prior to this presentation, what was being actively engaged in was a fairly major dispute going on between Advent and Mr. O'Brien, in particular, about this whole matter, or were you aware

of that?

A. I am from both some knowledge of the transcripts and the newspapers, I am now so aware, but I had no, clearly had no awareness at the time.

Q. Now, just asking you for your views.

A. Mm-hmm.

Q. If a major dispute was going on between Advent and Telenor or Advent and Communicorp about this matter, and if also there was difficulty on the Telenor/Communicorp side about such matters, these of course were all matters which could have affected the minds of the evaluators, isn't that correct?

A. Could have, yes. Had they known it.

Q. Yes, I understand that.

A. I would be astonished, Mr. Coughlan, if in all six applicants there weren't this jockeying for position in terms of equity for exposure in every one of the applicants. I would be amazed they were all put together at relatively short notice, they all had a gestation period of roughly six weeks, and by definition they if they were in the real commercial world each one of the applicants' consortia would have had this, how much exposure? How much equity? How much are you bringing to the party? I dare say, and I am only guessing now, in each one of the applicants that might have been generating white heat right up to literally the 11th hour, literally.

Q. Whilst that may be the case, would you ever expect the Evaluation Group to be told that there was an agreement in place guaranteeing £30-million to Communicorp, if that was not the case?

A. If that was not the case, clearly I would be less than happy with that situation.

Q. Ah, it is a little bit more than less than happy, isn't that correct, Mr. Loughrey?

A. Well, I don't want to be taking on an adjudicative role here, clearly that is for the Sole Member, but clearly I would not be happy.

Q. You would not be happy. And could I suggest that you would not be happy, perhaps on two levels. First of all, in allowing the evaluators do their work properly they must proceed on the basis that all information that is being given to them is above board, isn't that correct?

A. To the

Q. That they can take into account?

A. That they can take into account, provided the applicants, once again, have done so in good faith.

I'am quite certain if we looked at all six applications for instance, on reading that this morning it was quite evident, or this afternoon, it was quite evident to you and to me that there were even inconsistencies in the three pages we looked at.

If to the best all applications, I am sure, if they

were examined forensically I am sure would throw up errors, etc., but to the extent that people were acting in good faith I accept exactly what you are saying.

Q. Yes. But first of all, the evaluators must operate on the information and are entitled to expect that

A. And entitled to quite, yes.

Q. that the information that comes to them is given to them in good faith, to enable them to do their work properly, and also, if this be the case, here, credibility is an issue that an evaluator must consider as well, isn't it?

A. It is indeed.

Q. And if it be the case that the evaluators were mislead, or that there was a misrepresentation made to them, if that be the case, notwithstanding how somebody might pan out in the actual marking and evaluation process, it is the type of matter that if the evaluators couldn't deal with it themselves, or if you couldn't deal with it, that it is a matter that the Government would have to consider in arriving at their decision whether they were going to award sole negotiating rights, for, as you have said yourself, a major project, a scarce resource of the State, and that is a matter that might properly have to be brought to the attention of Government in such an event?

A. It is a hypothetical question, and I would like to feel, and I am quite confident that the make-up of that Evaluation Team would have both the competencies and the confidence to deal with that within the group.

Q. In the first instance?

A. I would be horrified I know clearly that they had both, as I say, they had both the competencies and the confidence to deal with any issue like that.

Q. Yes.

A. In fact, I shouldn't say this, but Governments wouldn't thank civil servants not to bring such an issue like that right to the Cabinet table. It should be capable of resolution at a lower level.

Q. Absolutely. And one would have to consider many matters, but on a key issue, because this was a key matter in the evaluation process of the financial capacity or capability of applicants?

A. It was one of the two prerequisites.

Q. Prerequisites?

A. Yes.

Q. And if an Evaluation Team felt that a misrepresentation had been made to them in respect of that, it was as you say, they were all competent, confident people, they would have had to take the most serious view of the matter?

A. I think that's correct.

Q. And just one other matter regarding the financial

institutions or third party investors, or however you may wish to describe them?

A. Mm-hmm.

Q. On the 29th of September of 1995, I am aware you were out of the country, but to the best of your knowledge, as of that time nobody had voiced any concerns to you about any financial institutions or any letters which had been furnished in respect of this particular consortium?

A. Even if I had been in the country, I am not sure I would have even allowed anybody to do that, because it would have broken my own rule of a need-to-know basis.

Q. Yes.

A. At that stage I would not need to know. The only approach I think that could be made to Sean Fitzgerald or to myself, would be effectively a declaration by PT GSM itself, the Project Team itself actually. They had come across an obstacle so grave that they felt that the competition should be set aside, for instance. I don't believe there was any other basis that they could come to us during the closed period.

Q. Yes. And likewise, as you have already informed us, after the competition there was no record or nobody informed you that there was any frailty in respect of these financial institutions or the letters which had been sent in with the application?

A. Absolutely none whatsoever. The only time frailty

came into it was, I think that Mr. O'Brien, quite correctly from his point of view, in 1996, and you can stop me straightaway because

Q. Please do.

A. because it is 1996. When he was approaching Credit Suisse First Boston or when he was in negotiations with them, or he had appointed them, actually.

Q. He was in negotiations with them at this time.

A. Well, I had no idea. But at the time when he was, in 1996, as I recall it actually. He, from a corporate strategy point of view, which I fully understood, I would probably have done exactly the same had I been he, was he had grouped both his Esat Telecom fixed line requirements and the bank rolling of an element of the GSM licence together in the CFSB mandate. Now, I think I am on record, and I think I had spoken to him at least once about that, that it was quite within his authority and competence and his professional his commercial judgement to do so. My slight concern was, if this were a delaying factor in him raising money actually, would it have jeopardised the roll-out of the GSM. That was and that is my only, I think my only memory of ever mentioning anything about financing with Denis O'Brien. But that, from memory, Mr. Coughlan, I am trying to be as helpful as possible

Q. Yes, indeed.

A. was, I would think, oh, in 1996 sometime. And it would have been in the context of his problems on the fixed line side.

Q. Would that be in April or May of 1996?

A. Probably around that time, yes. It was certainly before I think the licence was signed, but I am not sure, I am not sure. I think it was, but but it is only to reinforce it, that any memory I have is not in 1995 or at the time that you had asked me about.

Q. Yes. Now, both Mr. John Callaghan, whom you knew?

A. I know Mr. Callaghan, yes.

Q. And Mr. Kyran McLaughlin, who you probably knew as well?

A. Yes, I do. In fact, he is my second cousin.

Q. Yes. Have informed the Tribunal that on the 29th of September, 1995, Mr. Callaghan called to see Mr. McLaughlin, and told Mr. McLaughlin that the Esat Digifone Consortium had been advised that the financial element of the bid was not sufficiently as strong to allow Esat Digifone to be awarded the licence, and that Esat Digifone were negotiating with a financial party which would provide the stronger financial backing necessary to be awarded the licence.

That didn't come from you?

A. Certainly not.

Q. To the best of your knowledge it didn't come from any civil servant?

A. Oh, I feel as certain as certain can be that it couldn't have come from the Department or from any civil servant. Can I have the reference page, please, Mr. Coughlan?

Q. This is in what we have been informed by Mr. McLaughlin and Mr. Callaghan.

A. I see. There is no question of that whatsoever is, that that may well have been an interpretation that Mr. O'Brien, or Mr. Callaghan on behalf of Mr. O'Brien, may have put on it, but it certainly didn't emanate from the Department.

Q. No.

A. Nor could it. It almost sounds like if somebody were coaching, in other words, one applicant to see how they could strengthen or enhance their bid, and nothing could be further from the truth.

Q. Yes. And from the presentation, the portions of the presentation dealing with finances, as we have opened. Nobody ever asked a question about the financial institutions?

A. From what if that is the full extent of the evaluation?

Q. Yes, the financial

A. The directions on financials, clearly that is the case, yes.

Q. And nobody could have gleaned from anything that was said there, that there was something weak about the

commitment or the strength of the financial

institutions or anything like that?

A. No, it didn't arise.

Q. In fact, any questions that were asked were related directly to Communicorp. There was no question asked about Telenor's finances either?

A. Correct.

Q. Now, I think you have informed us that from your understanding of matters, and your experience in capital financing, and matters of that nature, that the involvement of, you describe them as a private finance house?

A. Private equity.

Q. A private equity house. That is a big strong indicator that they are committed?

A. Private equity houses don't make many mistakes. If they make mistakes is, it hits them a lot harder, let me put it this way, because their portfolios, by definition, are narrower, so they are, by definition, much more rigorous in their assessment than just an institutional investor. This is not a criticism of the good people who manage institutional funds, but it is just a fact of life.

Q. Right. And just to be clear about this, this particular project getting, as you say, a duopoly for seven years, this wasn't a venture capital project, this wasn't one, one that was sort of a, a venture

capitalist might think, "I will make an investment, one out of five might succeed." This was perceived to be a fairly good investment, isn't that right?

A. This would have been perceived in the light you have just said actually. It wouldn't have been classic venture capital territory.

Q. And from the point of view of the evaluators, if you had been involved around this time that Advent were out, would that have caused you concern?

A. I am sorry, Mr. Coughlan, just if you could repeat that question again.

Q. If you had been informed around the time of the process leading up to the granting of the exclusive negotiating rights that Advent were out, would that have caused you concern?

A. That Advent were?

Q. Out?

A. Out. It wouldn't in a sense I am once again we are talking in hypothetical. I remember noting being pleased that a private equity house was in, so-to-speak, actually, but had they been out it wouldn't have perturbed me because the 20 percent from start to finish was about a minority equity interest.

It wasn't bringing anything to the strategic positioning of Esat Digifone. So in other words is, so long as the money was forthcoming and it was patient capital, so-to-speak, I would have been quite

happy.

Q. What do you mean by "patient capital"?

A. Well, patient in a sense to some extent patient would mean that it wasn't, people weren't going to take shares and flip them straightaway within a matter of months so-to-speak.

Q. Or years even?

A. No, I am sorry, I understood my understanding of this project always that while I didn't have a graph that would show break-even point, I knew that in fact it would reach a plateau of profitability pretty quickly. Now, typically private equity houses look to exit opportunistically as soon as they can, but typically within three and five years. So, I would still have regarded is, Advent in that context as patient capital. The only thing that would worry me, and it wouldn't have arisen, but theoretically, would be somebody who literally wanted to take a get in at bargain basement at the outset in terms of investment and then move to exit very soon thereafter after the licence was awarded. That would have been my only concern.

Q. Well, I suppose why I asked you was, would it have caused you concern that they were out at this stage?

A. And I am finding it quite hard to get my head around it in the sense that I have to actually put myself in the sense that I only knew afterwards that they were

in, so I have to put myself in the position now had I known then they were in and then they were out excuse me.

Q. Sorry, you may have known I beg your pardon you may have known around the 25th of October that they were in?

A. Yes, I believe I did so. I believe I did so.

Q. Although they weren't, as the case may be, that's the reality.

A. I see what you mean, yes.

Q. Yes.

A. If, in fact, it had been if the list had comprised four institutional fundholders, I would have looked at it and seen it for what it was worth, that four worthy institutional funds had indicated, all things as being equal, if the terms of the licence come out, as we hope it will, we will sign on for our amounts, actually; in other words, an indicative, qualified indicative offer. So that would have been sufficient for me. I just made the point earlier, and I hope I didn't, I hope it wasn't a red herring, Mr. Coughlan, that when I saw the list I regarded Advent as a positive plus, that's all, the only point I have making.

Q. I see.

CHAIRMAN: I think we will leave it there,

Mr. Coughlan. It is just a little after four. Eleven

in the morning. Thank you very much, Mr. Loughrey.

Thank you.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,

THURSDAY, THE 20TH OF FEBRUARY, 2003, AT 11 A.M..