

A P P E A R A N C E S

THE SOLE MEMBER: Mr. Justice Michael Moriarty

FOR TRIBUNAL: Mr. John Coughlan SC

Mr. Jerry Healy SC

Ms. Jacqueline O'Brien BL

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Mr. John O'Donnell BL,

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

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FOR MICHAEL LOWRY: Kelly Noone & Co.

Solicitors

OFFICIAL REPORTERS: Mary McKeon and Viola Doyle.

I N D E X

WITNESS: EXAMINATION:Q. NO:

THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY, 20TH  
FEBRUARY, 2003, AT 11 A.M.:

CONTINUATION OF EXAMINATION OF JOHN LOUGHREY BY MR.  
COUGHLAN:

CHAIRMAN: Morning Mr. Loughrey, thank you.

A. Good morning, Sir.

Q. MR. COUGHLAN: Morning Mr. Loughrey.

I think yesterday evening, Mr. Loughrey, we had been considering the evaluation process and what had been considered by the Evaluation Team from the application and from the presentation, I think. And could I just ask you, because I suppose it is just to try to understand if it had any significance or purpose, if you go to Divider 119 of Book 42 and I will tell you what it is first. Ms. Nic Lochlainn is sending confidential information to the comptroller and auditor general?

A. Mm-hmm.

Q. And asked that it be kept under lock and key, and what it is is, it seems to be a summary in respect of each applicant. Have you seen these particular documents, Mr. Loughrey?

A. I can't say that I dwelt on them at all. I saw that in fact the Comptroller and Auditor General clearly had requested material, and he has powers.

Q. Yes, I understand.

A. Unlike other auditors perhaps in the private sector he can seek papers that is something like work in progress, so to speak, that would be very unusual in the private sector. I saw nothing unusual about it, but I didn't - I must say, haven't looked at those particular papers.

Q. I was just trying to understand how it would arise.

A. Well, the Comptroller General, actually, going back to the 1886 Act is as venerable as that, normally in times of is awaiting the appropriation accounts; in other words, looked at the actual, at the historical record. Increasingly with the increased vigilance of the Public Accounts Committee, and in the last, perhaps 20 years or so, this is my own impression, my sense of what has happened in the Comptroller and Auditor General's office, any item that might become, perhaps, that is unusual, challenging or perhaps contentious even, the Comptroller may look for the papers, even while the transaction is in progress or, for instance, an expenditure hasn't even been signed off yet, and I think this is excellent practice, and it is a plus in terms of the taxpayer from a watchdog point of view. I would have no problem whatsoever with that request.

Q. I don't think there can be any criticism, the Comptroller and Auditor General was entitled to seek information, as long as the Comptroller and Auditor

General dealt with it on the confidential basis, and it was furnished and was being dealt with in the Department perfectly all right?

A. And it goes without saying that that would be the case.

Q. Yes. And just in that regard you will see that what she does is she sets out a brief summary in respect of each of the applicants and sets out the members of the consortium and how they are going to be dealt with and?

A. I have to confess, I haven't read those summaries. That is what - on flicking them now, that is what it appears to be.

Q. Yes. Now, just on the covering letter, if I could just make a brief inquiry of you and it is something we can deal with Ms. Nic Lochlainn I suppose, but if you can assist us. The first line: "Please attach material on Government decision/aide-memoire as promised." I think would that just be work in progress that the Comptroller and Auditor General

A. I think she would say in the significant documents and I am quite sure there was some interaction with the Comptroller and Auditor General's office. So in other words, even though it is a very telegraphic letter, I am sure it is the result of some interaction.

Q. Yes.

A. And I think, Mr. Coughlan, just while you pointed

out, once again the one substantive point she makes is how highly confidential the document is, and you wouldn't expect otherwise; it was everything, the Project Team, that it was redolent of this confidentiality.

Q. I think there can be no doubt about it, it has to be kept under lock and key was the answer?

A. Quite.

Q. And of course that would be in conformity with your own view as to how this process should have and was to operate. It was confidential, and other than critical path matters, other matters were confidential, isn't that right?

A. Correct.

Q. Now, if I could just bear with me for a moment, Mr. Loughrey, there is so many books.

A. Of course.

Q. From the documents, at least anyway, and from what we have been informed by Mr. Desmond, Mr. Dermot Desmond and by Professor Michael Walsh, the commencement of his involvement in the affair, if I use the term broadly for the moment?

A. Yes.

Q. Appears to have been, I think either on the 8th or the 10th of August of 1995, that he went to a Glasgow Celtic football match?

A. A man of discernment.

Q. You weren't at that match yourself?

A. Sadly, no.

Q. And Mr. Denis O'Brien accompanied him. And resulting from what Mr. O'Brien said to him, that he had concerns on the financial side and I am paraphrasing this at the moment, and particularly a concern that he had about the commitment of the financial institutions and their, the fact that Telenor and Mr. O'Brien's side were carrying bid costs

A. Mm-hmm.

Q. at that time. And as a result of that particular conversation, Mr. Desmond indicated that he was prepared to get involved in the matter on the same terms as Mr. O'Brien's side and Telenor were involved: he wanted to be a third, effectively, of the operation. But that is as we understand when matters commenced or any sort of discussion commenced. And we are then informed that, I think it was around the 22nd of September, discussions took place and some negotiations took place, and ultimately there was an agreement or an agreement and a side letter on the 29th of September, 1995. Prior to that, I think around the 22nd of September, 1995, I think from the information which has been furnished to the Tribunal by Mr. Johansen I think in particular, Mr. O'Brien came to see him in Oslo and informed him that as a result of something he was told from very high

sources, meaning sources in the Ministry, and I use that term in its broadest sense, that they hadn't got sufficient strength or commitment from the financial institutions, and that they'd be there, in effect, to participate no matter who won, and that they needed somebody effectively to put their shoulder to the wheel in respect of this process, and that he had found this particular party and that was IIU. Now, in fairness to Mr. Johansen, he did not know who IIU were.

And again, from information which has been furnished to the Tribunal by Mr. Johansen, Mr. O'Brien informed him at that stage that the only problem was that that person wanted 30 percent, or this party wanted 30 percent and Mr. O'Brien indicated to Mr. Johansen, according to Mr. Johansen, that the best Mr. O'Brien could do would be to get him down to 25, him or it down to 25 percent, and then Mr. Johansen then describes that Mr. O'Brien was trying to get Telenor to carry 15 percent of that and Mr. O'Brien wanted to carry 10 percent.

Mr. Johansen has informed the Tribunal that then he reluctantly agreed to a dilution of their entitlement, that is Telenor's entitlement, which whilst not formalised at that particular time, it was intended that it would be 40:40:20, up to the 29th of September that it would be on the basis of a 40:40:20, in other

words, an equal proportion between Mr. O'Brien's side of the operation and Telenor's side.

And he accepted that that would be reduced to 37.5%:37.5%:25%. So, I just want to take you through a few of the documents, and I am not going to ask you

A. Fine.

Q. to interpret any legal document. I just want to take you through the documents?

A. Sure.

Q. Then I will inform you, or I will tell you of what various potential witnesses to the Tribunal have informed the Tribunal of their understanding or view of them.

A. That's fine, yes.

Q. Now, I think Book 48, 'Participant Documents'.

(Folder handed to witness.)

36, yes. Now, I think Tab 42, I am not quite sure.

Unless it is to go through the type of negotiation that was going on

A. Tab 42, I have it, yes.

Q. Tab 42. That's an attendance of Mr. Owen O'Connell.

A. The following page is a transcription, so-to-speak, is it?

Q. Yes.

A. Mine is very faint.

Q. It is, yes, I am sorry, it is.



And yes, we can take it from the transcription. It is dated the 18th of September, 1995. It is an attendance of Mr. O'Connell's on Mr. Denis O'Brien and Mr. Leslie Buckley.

It notes: "Dermot Desmond going ahead with financing transaction. Need "underwriting" letter for Department because finances are seen as the weakness.

"DD wants 30 percent of GSM.

AIB, Standard + IBI to be excluded.

DD - 30.

Advent - 5.

32.5 - Esat.

32.5 - Telenor."

That was the position under discussion at that particular time, or appears to have been at least anyway?

A. Quite.

Q. Now, I take it you have never heard of the Department requiring an underwriting letter in respect of this consortium, or any consortium?

A. Any such request would have broken both the letter and the spirit of the process, by definition.

Q. I suppose then, just to see how matters were progressing, there is other correspondence in between.

I am not going to ask you to deal with it necessarily, unless somebody wishes me to.

If you go to Tab 50, and that's another attendance of

Mr. O'Connell's. I am sorry there isn't a

transcription of it.

A. Okay.

Q. And that is on the 20th of September, 1995. Then it

has:

"DOB 20 percent plus 5 percent (exclude Advent or from Communicorp.)

"Fee of 375K but offset against IIU share of bid costs. (Ignore issue in agreement) that is 15 percent from institutions plus Communicorp and Telenor dilute by 5 percent or 10 percent (depending on "

A. "Advent outcome".

Q. "Advent outcome." Yes.

A. Just so, I might interpret this if I am to be helpful, is, this Mr. O'Connell of William Frys, a note in which it appears to say that Denis O'Brien was suggesting 20 percent plus 5 percent, presumably to go to Mr. Desmond or am I over-interpreting that?

Q. I don't think you are. I think that is quite right, yes?

A. This was still at a proposal stage, obviously?

Q. Well, the sequence of the documents appears to be that he was that 15 percent was going to be of no difficulty to begin with in that the Irish financial institutions would be excluded. It then goes to 20 percent and 25 percent, Mr. Desmond had started off looking for 30 percent?

A. Perhaps I am wrong, but the ball still seems to be hopping.

Q. Oh, yes, it is.

A. There is no lock in obviously as yet.

Q. No.

A. Right.

Q. The ball is hopping. I should perhaps just refer you to Tab 36, to see if you wish to see how matters commenced.

A. I see that now, yes.

Q. You see?

A. I haven't read this yet, but

Q. Yes.

"Outline agreement on  $\text{€}1\frac{1}{2}$  million guarantee for Communicorp Group Limited.

"1. Communicorp Group Limited will arrange for Dermot Desmond to have the right to take up at par 15 percent of the Ordinary Shares in Esat Digifone Limited replacing IBI, AIB and Standard Chartered."

You can see that.

Then it goes on to deal with the question of the GSM bid, "Costs, a total of 1.3 to 1.5 million, will have been expended on the bid by award of licence. It is as agreed that DD will pay his portion of the costs win or lose."

Then "Bank Guarantee":

"DD will provide a bank guarantee of  $\text{€}1\frac{1}{2}$  million in

order for Communicorp Group to draw down a \$1/23 million bank facility which will remain in place up to March 31, 1996.

"In exchange for this guarantee, DD will be paid a fee of \$300,000 no later than March 31, 1996. Should CGL complete its placing of equity through CS First Boston before March 31, 1996, the fee will be paid within ten days after completion of the placing.

"Security:

"If the \$1/23 million facility, including interest is not repaid by March 31, 1996, DD will have the right to purchase 33.3 percent of Radio 2000 Limited (Classic Hits 98FM) for \$1. CGL currently holds 76 percent of Radio 2000 Limited."

"Negative pledge:

"We understand that you will seek a negative pledge of the assets of CGL."

This appears to be an event which is evolving between Mr. O'Brien and Mr. Desmond in the first instance, and there was no

A. It is still an early proposal.

Q. This is quite at the beginning?

A. Quite.

Q. And the documents, and I don't think that there is any suggestion that Telenor were involved in this particular aspect of matters at this stage.

Then things evolved. As I indicated to you,

Mr. O'Connell on the 18th, his attendance on Mr. O'Brien and Mr. Buckley. Then we come to the 20th, as I have indicated, 20 percent plus 5 percent, and it is all a question of going to Mr. Desmond, if you understand how matters are unfolding or appears to be.

Now, just again to give you a kind of a snapshot from the documents of how things seemed to have been proceeding. If you go to Divider 46?

A. I have that now, yes.

Q. Yes. And you can see that this is on Esat Digifone notepaper and it is signed by Mr. O'Brien as Chairman.

Now, again, from the documents and from what the Tribunal has been informed by Telenor, this appears to have been something that Telenor had no knowledge of at this particular time.

And it is written to Mr. Walsh, as you can see, and it reads:

"Dear Michael,

"Thank you for your letter of this morning. I have reviewed its contents both commercially and legally.

As a result I have had own O'Connell prepare the enclosed draft of this document. The following points are relevant:

"1. We did not agree any underwriting fee. Your reward for underwriting is participation in Esat Digifone Limited.

"2. The letter level of participation which I can give you is Limited to 20 percent. Third party constraints make it impossible to commit to more. However, Advent's right to 5 percent of the project is (according to Owen O'Connell) doubtful. Subject to you taking responsibility for costs etc. involved in a challenge by Advent, I will try to secure that 5 percent for you.

"3. I have retained Owen O'Connell's format because I feel that it is more likely to achieve our common objective with the Department. I understand that Point 1 (subject to an increase to  $\frac{1}{2}$ 35 million) 3, 4 (subject to a decrease to 20 percent and Point 2 above) and 5 are reflected in this draft)."

This is just references to the draft. You needn't certain yourself necessarily about that.

Then "DD agreed to meet his proportion of the bid costs win or lose."

So this is again in the course of correspondence that leads to an agreement ultimately on the 29th of September, 1995.

A. Of course, Mr. Coughlan, once I see the Department in any document

Q. I understand

A. Clearly

Q. I beg your pardon, I should have stopped and asked you about that and allow you to comment on that.

A. I would just question that. From the documents you have opened for me or indicated this morning, I have only seen Mr. O'Brien's objective. I have seen no documentary evidence that would support IIU's objective with the Department, common objective. That informs that IIU had an objective with the Department.

I am not so aware well I am not familiar with all this documentation, but

Q. Of course.

A. But it appears to me from what we have opened this morning, at least actually, that it was an objective of Mr. O'Brien.

Q. Yes?

A. Yes. Now, I have no problem with Mr. O'Brien thinking commercially that he should strengthen any particular commercial transaction I am not making this by way of criticism, it is just that it seems to me that it was his objective and it is in his draft suggesting it is now a common objective.

Q. Yes, I understand that. Yes, sorry, the only reason I am opening this particular documentation is in case there was any confusion yesterday about Mr. Desmond's involvement.

A. Sure.

Q. I am just going through some documentation to lead to the 29th of September, 1995.

A. Right.

Q. But apart altogether from, and it is very helpful to have your comments on that particular document there, but as far as you are aware, I know you were not aware of anything at this particular time, but from anything you subsequently became aware of, as of this time, there was no indication coming from anyone in the Department to the best of your knowledge, which could have indicated either to Mr. O'Brien, Mr. Desmond, or anyone in the world, what would have been, what would be, what would be a good strategy to achieve an objective in the Department?

A. Absolutely not. I mean to say, Mr. O'Brien might have looked into his own heart and believed that to be the case, but nothing could have emanated from the Department that would give, that would reinforce any idea that something came from the Department.

Q. Yes. I think we will deal with that when I refer you to information which Mr. Johansen has given to the Tribunal. Now, of course, you see this letter of the 19th of September and the attendance which Mr. Owen O'Connell kept of his meeting with Mr. Buckley and Mr. O'Brien on the previous day, which was the 18th of September, 1995. We have already looked at that?

A. Yes, that is what we have already looked at.

Q. And, of course, you didn't know it, but the Minister had met with Denis O'Brien the day prior to that, on the 17th of September, 1995 in Hartigans public house



and there was no official present?

A. Quite.

Q. You didn't know that?

A. I had no such knowledge whatsoever.

Q. Now, if you go to Divider No. 53, and it is just it is not a matter for you to deal with really, I just want to draw your attention to one matter.

A. Mm-hmm.

Q. It's a memorandum from Mr. Walsh to Mr. O'Brien, and it appears to be a short CV of Mr. Desmond, and I am not going to ask you about these particular matters at all. If I just draw your attention to Item No. 6.

"In August 1995, he founded a new company, International Investment and Underwriting Limited (IIU) at the Financial Services Centre to specialise in corporate finance and funds management."

Were you aware I think this company, it may have been incorporated sometime previously, but we don't know, and what I am doing is trying to find some information about this. This is Mr. Walsh writing to Mr. O'Brien saying they definitely started from the Financial Services Centre in August of 19 they founded the company in 1995, according to Mr. Walsh.

Do you know anything about it?

A. It is once again it is something that I mentioned, I think, on the first day.

Q. Yes?

A. It is easy, based on one's current knowledge, to rationalise, so-to-speak, retrospectively. I would have I would have scanned the three Irish dailies every single morning, early in the morning.

Q. Yes?

A. Because obviously I would have particularly the business pages because we were a business department.

Q. Yes?

A. So undoubtedly the first time that IIU might have been mentioned in the press I would have obviously, and its relationship with Mr. Desmond.

Q. Yes?

A. It would, I would have sort of filed that straightaway in my mind.

Q. Yes.

A. Now, when it first appeared, I do not know.

Q. You can't recollect?

A. I can't recall actually.

Q. Yes.

A. But I think is because, you know, when one gets used to scanning papers, you know what to look for and where to look for and I imagine is, as soon as it hit the press, I probably would pick it up and even if I were out of the office, obviously the newspapers would always be stored for me.

Q. Yes.

A. So, I would say I wouldn't have missed it if it were

in the press, in the financial press, but I have no

idea when that was.

Q. All right. Well, from it is something I will come

to deal with it perhaps later.

A. Mr. Coughlan, even adding to that, that almost

suggests that I, you know, that I can sort of file

everything that is in the paper.

Q. I understand.

A. Naturally I would add to that because I knew Dermot

Desmond, because I was friendly with Michael Walsh and

because I had done business with NCB, so-to-speak, I

suppose in a sense a form of precursor to IIU, that's

the reason I would have recalled it, rather than just

on a random basis, clearly.

Q. I understand, and I wasn't, I wasn't going to suggest

that you or expect that you would remember everything

that you read in the newspaper, Mr. Loughrey.

Now, if I come then to I suppose if we go to

Divider No. 64.

A. Yes, I have that.

Q. Yes. And we have already looked at this document.

A. We have indeed.

Q. We will look at it in a moment. We know that this was

the document that was sent into the Department and you

have commented on it, that it's, first of all, clearly

an underwriting proposition, isn't that correct?

A. That's correct, yes.

Q. And then you say that one might infer a letter of comfort as well in respect of Communicorp's finances?

A. I believe so, yes.

Q. Whatever about the position as to whether this particular letter should have activated anything in the Department or not, I am not asking you to consider that at the moment.

A. Mm-hmm.

Q. at this time. If you go to Document No. 65?

A. Yes.

Q. This is a letter written by Mr. Michael Walsh to Mr. Denis O'Brien of Communicorp.

A. I don't believe I have seen this before.

Q. No?

A. No.

Q. I just bring it to your attention now. And it reads, and there is also, if you turn over two pages, a letter to Esat Digifone from Mr. Walsh, do you see that? Sorry not over the divider, in the same divider there are two well in mine anyway.

A. Yes, I see them. They almost look identical in layout.

Q. They do, yes indeed.

A. Yes, I have them now, yes.

Q. I will read the one to Mr. Denis O'Brien, Esat Digifone Limited first, if I may?

A. This is the top copy in the divider?

Q. The second one.

A. I beg your pardon, yes.

Q. And I appreciate they are all dated the 29th of September. That reads:

"Re Esat Digifone Limited (the Consortium)

"Dear Denis,

"I am writing to confirm the basis of our agreement with the consortium as consideration for us issuing the attached letter to the Department of Transport, Energy and Communications. Our agreement is based on the attached arrangement agreement (the agreement) document prepared by William Fry Solicitors, but is subject to this side letter.

"1. In the event that the consortium is awarded the second GSM licence then the consortium undertakes to place 25 percent of the equity in the consortium with IIU Limited or its nominees (together with the placees). IIU Limited (the arranger) will arrange underwriting for the 37.5 percent of the equity which Communicorp Group Limited (Communicorp) has committed to subscribe for. The maximum combined commitment under the placing and underwriting will be 37.5 million (the commitment.)

"3. The arranger has assigned the agreement in its entirety both benefits and obligations to Bottin (International) Investments Limited. The obligation of the arranger or its assignee under the agreement

are conditional on:

"(a) the terms of the grant of the GSM licence not being materially different from the request for proposals in connection therewith by the Department of Transport, Energy and Communications.

"(b) Communicorp and Telenor have signed a Shareholders' Agreement to which the arranger is also named as a party containing protections in favour of the arranger which would be reasonable for a shareholder subscribing for 25 percent of a private company.

"(c) GSM market conditions in the Irish telecommunications industry not having materially disimproved.

"In each such case, on or before the date of the first issue under the commitment.

"4. Placee will be entitled to nominate a representative (the placee representative) to representative their aggregate interest in the consortium and the placees representative will be a party to the Shareholders' Agreement which will be executed in a form substantially similar to the draft I supplied by the arranger by William Fry Solicitors on September 21st, 1996, and the placees representative will be deemed to hold the aggregate of all shares held by the placees for such purposes (all placees).

"5. In the event that Telenor fail to fully subscribe for their 37.5 share in the consortium, then all obligations of the arranger or its assignees or placees are void, save where Telenor and Communicorp collectively subscribe for their 75 percent share provided in such instances Telenor will retain 30 percent.

"6. The existing shareholders in the consortium represent and warrant that the consortium will, at the date of the award of the licence, be free of all debts and liabilities other than those bid costs properly incurred. The placees and arranger will be fully indemnified by Mr. O'Brien and the existing consortium shareholders, if this is not the position.

"7. The attached letter is strictly private and confidential for the Department to which it is addressed" that is the underwriting letter.

"It may not be used or taken as a commitment for any purpose other than for the Departmental submission.

Mr. O'Brien of Communicorp will fully indemnify the arranger and the placees in the event of any cost or obligation or liability arising as a result of the use of this letter or the attached letter for the Department other than for the purposes of submitting the attached letter to the Department to which it is addressed.

"8. The terms, other than the amount of any tranche

of the obligation governed by the agreement will be subject to the prior approval of the arranger.

"Please sign the enclosed copy of this letter in confirmation of your acceptance of the terms of this arrangement for the placing and underwriting agreement, and in confirmation of the consortium's undertaking to use IIU as its arranger.

Yours sincerely"

That is signed by Michael Walsh of IIU and you can see that it is signed by Mr. O'Brien, Communicorp Group Limited and Esat Digifone Limited.

Now, first of all, you had no knowledge of this particular agreement?

A. None whatsoever. It is the first time I have seen it.

Q. And I appreciate one might have to read it a number of times, but there can be little doubt but that it is different to what is contained in the underwriting letter which was sent to the Department?

A. Perhaps, Mr. Coughlan, could you repeat that question again? I am sorry.

Q. The situation which is created by this particular agreement is not the same as what is contained or being indicated to the Department in the letter of underwriting?

A. It is not, but reading the very last sentence is,

"Please sign the enclosed copy of the letter in confirmation of your acceptance of the terms of this



arrangement for a placing and underwriting agreement."

Now, let me put it this way: the two the letter that was opened by Fintan Towey is clearly a derivative of this; they are not at variance with one another but they are not the same.

Q. Well, first of all, the Department was not being informed that there was a company called Bottin now involved, was it?

A. That's correct.

Q. And the Department was not informed that Advent was gone on two fronts, that as the funder of Communicorp and as a subscriber to 5 percent of the shares under that portion of the 20 percent which was to be available for the third party investors?

A. Mr. Coughlan, I am not contesting for one moment what you are saying, but it still appears to me this is I am not a lawyer, but it is a highly conditional letter. There is conditionality virtually in every clause. And it also appears to me actually, never mind the Department, but it appears to me that perhaps the missing chair is Telenor because at least three of the clauses effectively, well two of them, mention Telenor, where agreement is clearly hasn't well, the inference is hasn't been arranged.

Q. I should just explain, and we will come to it. Mr. O'Brien signed this letter at Chairman of Esat Digifone. From the information furnished to us by

Telenor and from the documents it would appear that Telenor were unaware, as of this time, that this particular letter was being signed?

A. So could we call this letter, in effect, among either the existing consortium or the ultimate consortium as work in progress? And maybe this wasn't something you don't necessarily have to report work in progress to anybody, so-to-speak.

Q. I don't think so, Mr. Loughrey, and when but you may be right, because when I opened to you what the view of the participants in this particular arrangement agreement was, I don't think, but again you may be right, I don't think you could call it that.

What conditionalities now, and I appreciate, I appreciate you just have seen it for the first time, so I am not going to quote you, but what conditionalities would you wish to draw attention to or perhaps it is something you may wish to consider and come back?

A. There is the very obvious one, the obligations of the arranger. If you look at Clause 3 the obligation of its arranger or its assignee which was obviously Bottin in the previous clause "under the agreement are conditional on" and jump to (b) straightaway.

"Communicorp and Telenor having signed a Shareholders' Agreement." There was no Shareholders' Agreement in

place, obviously.

Q. There wasn't?

A. That's a very, that's a very obvious conditionality, clearly.

Q. Yes. Go on.

A. In a sense I am being, I am trying to be as helpful as possible, Mr. Coughlan, but just reading this for the first time. 5, again: "In the event that Telenor failed to fully subscribe for their 37.5 percent," in other words Telenor was seen by both, apparently by both parties to this letter as the effective ballast in the ship, because if there was any question Communicorp was going to be underwritten.

Q. Yes.

A. If we understand the intent of this letter.

Q. Yes.

A. But there is no question of Telenor being underwritten, fully underwritten, because Telenor was perceived to be the ballast in the ship, and that was a deal-breaker, so to speak, if Telenor were not to subscribe up to a certain limit.

Q. Yes. And those are two matters: the Shareholders' Agreement being signed, and Telenor being able to come up with their end of the equity?

A. Mm-hmm.

Q. Those were the conditionalities?

A. They are very obvious. I am sure if I go through it

in detail perhaps we will find more. They appear very obvious.

Q. Yes. Very good. This particular letter, or the contents of this letter, or the information contained in the letter was not brought to the attention of the Department at all?

A. Clearly not at all, Mr. Coughlan, no.

Q. Now, if you then look at a letter which was sent to the top portion of it here?

A. Are we in the same divider?

Q. Yes, the same divider, yes. It is to Mr. Denis O'Brien of Communicorp.

A. Yes, I see that now, yes.

Q. And it reads:

"Dear Denis" this is Mr. Denis O'Brien of Communicorp now as opposed to "I am writing to confirm the basis of our agreement with Communicorp Group Limited as consideration for us issuing attached letters to the consortium and to the Department of Transport, Energy and Communications. The definitions in this letter and in the letter to the consortium are the same.

"1. Communicorp has undertaken to subscribe for 37.5 percent of the consortium on the same terms and (the obligation) on the same terms and pari passu with the placees. IIU Limited has arranged underwriting for the obligation. As consideration for arranging for

the underwriting, Communicorp will pay to IIU Limited (the arranger) a fee of i¼219,000.

"2. All shares will be subscribed for on an absolutely pari passu basis, other than as specifically provided for in the agreement by all members of the consortium.

"3. In the event of the bid not being successful, the placees will pay 25 percent of the net bid costs, excluding the arrangement fee, of the GSM licence, incurred by the consortium. The aggregate of the bid costs will be a maximum of i¼1.6 million and will be independently verified as being properly incurred and paid. The placees obligation in relation to 25 percent of the net bid costs will be paid after deduction of the underwriting fee.

"4. In the event that Communicorp fails to meet the obligation in full and the arranger or its assignee is called upon to satisfy any of the obligation, the arranger will procure that for a period of four months Communicorp will have a right to meet the obligation or the balance not satisfied, as the case may be, by paying the amount of the balance of the obligation together with interest at a rate of DIBOR plus 2 percent on the amount of such balance.

"5. This letter, together with the attached letter, addressed to consortium and the agreement represents the full understanding between the parties and no

other commitment exists between the arranger or the placees on the one hand, and the consortium or its shareholders on the other hand.

"Please sign the enclosed copy of this letter in confirmation of your acceptance of the terms of this agreement and in confirmation of Communicorp's undertaking to use IIU as an arranger."

It is signed by Michael Walsh and then by Mr. Denis O'Brien as Chairman of Communicorp. Did you ever see that letter?

A. No.

Q. Or informed of the contents of it?

A. Absolutely not.

Q. Ever.

A. This, I might say, it appears to me more in the realm of almost a housekeeping letter in the sense that it is classic underwriting fee and it is related to the bid costs and the exposure to bid costs, and quite correctly from their point of view, IIU sort of, if I may put it this way, nailing down both their exposure and payments in the event of the bid not being successful.

Q. Yes. Yes. You see, it seems perfectly reasonable for anybody joining a venture doesn't it?

A. Perfectly reasonable.

Q. That they'd now, at Divider No. 66 there is the arrangement agreement, which of course was subject to

the side letter?

A. Quite.

Q. Addressed to Mr. O'Brien qua Esat Digifone?

A. Mm-hmm.

Q. And I think is this a document which you ever saw?

A. No, I have never seen this document. Or perhaps I could qualify this. I know there are a range of folders I haven't read. If it is in one of them, I haven't seen it yet, but I am not sure if my team have had access to it, is another matter altogether, but I certainly haven't seen it or read it.

Q. Sorry, I don't mean in the context of your involvement with the Tribunal.

A. Well, even that, Mr. Coughlan, I have neither seen it nor read it.

Q. I see. You haven't seen it or read it.

Now, unless My Friends want me to open the full arrangement agreement in full, I don't intend doing so. Do you wish me to open it? Do you wish me to open it in full?

MR. FITZSIMONS: I don't know why Mr. Coughlan is referring to us, Mr. Chairman. This witness this is an inquiry. The witness has said he has never seen the document. That's really the end of the inquiry on that point

CHAIRMAN: I think, in any event, it has been opened in the course of the opening. I don't think it is

necessary that we proceed through its quite technical terms.

Q. MR. COUGHLAN: Yes. You never recall seeing it?

A. Certainly not, Mr. Coughlan.

Q. Now, the one thing that appears to be clear from the documents is that as of the bid, which was the 4th the closing date for the bid which was the 4th of August, 1995, there had been no Shareholders' Agreement concluded between Telenor and Esat Digifone or anybody else, and what

A. That, of course, that wouldn't have been a requirement in the

Q. I am not suggesting it was, I am not suggesting it was.

A. Yes.

Q. And whilst matters had not been formalised, intentions had been formed

A. Mm-hmm.

Q. in respect of how this was to proceed, and of course it wasn't a requirement, but what was being submitted to the Department for evaluation was a consideration of the consortium which would be the consortium which would get the licence?

A. Correct.

Q. It was ownership which ownership had to be declared in respect of the entity which would end up with the licence, isn't that correct?



A. Yes. That is what Clause 3 was quite specific about.

Q. We are quite clear about that. Because the Government would want to know who is behind all of this.

A. Absolutely, yes.

Q. Everybody knows that it was going to be either Esat Digifone or Persona or one of the others. You had to know who was behind it to be evaluated and the Government had to be satisfied that it was appropriate that this licence or negotiating rights in the first instance, leading to a licence, would be given to somebody.

In the, I suppose first instance, I referred you yesterday to sworn evidence which was given by Mr. Denis O'Brien to this Tribunal on a previous occasion, where he indicated that as of the 2nd, 3rd, 4th of November, 1995, it was his understanding that he held he, through his vehicles, held 37.5 percent of the interest in this particular entity?

A. I don't know if it is correct at this stage, and I am sure you will let me know, Mr. Coughlan, but when there was an intervention from Mr. Fitzsimons

Q. Yes

A. he did point out that nothing had crystallised in a legal sense until April 1996.

Q. Sure we all knew that.

A. Yes.

Q. Everyone knew that, Mr. Loughrey, no shares had been

placed.

A. Okay.

Q. Everyone knew that.

A. Well perhaps from that, I am not trying to be difficult in any way, Mr. Coughlan, is that perhaps Mr. O'Brien, knowing of what the intention was at the time, though not the actuality, that is how he gave his evidence, but I find myself now already, forgive me, Chairman, straying into somebody else's territory, I am quite happy to retract that.

Q. I am sure you are not trying to advocate a position of Mr. Fitzsimons or

A. Of course not.

Q. Of course not. What was clear when Mr. O'Brien said to you 37.5 percent, nobody had shares allocated at that particular time?

A. That's correct.

Q. But they had an entitlement, Mr. O'Brien had an entitlement to 37.5 percent, Telenor had an entitlement to 37.5 percent, and IIU to 25 percent?

A. Mr. Coughlan, you are telling me that. Of course I accept your word. I haven't seen any documentary evidence that that was the case at the time.

Q. That's your impression, so?

A. Mr. Coughlan, I am what I am trying to say is that I accept, of course, what you are saying, but is I suppose it leads back to the general point you are

making, correct me, I am may be out of court in saying this, is that what you were saying yesterday was that the Department did not know.

Q. Yes?

A. Wasn't informed, you are quite correctly saying wasn't culpable because we weren't informed of what was happening in the engine room of the consortium, so to speak.

Q. Yes.

A. What you are telling me from what you quoted of Mr. O'Brien's sworn evidence I think, by saying that he clearly asserted his belief at the time that he had an entitlement to 37.5 percent. Now, it is up to the Tribunal to decide what the underlying facts are and what the situation was at the time. I find myself a little struggling as a witness, actually, in opining on this at all, frankly.

Q. I am not asking you to opine at all. I am asking you to look at the facts. That is all I am asking to you look at, Mr. Loughrey, as you say, with which were unknown to you.

A. Quite.

Q. Now, as of the 4th of August, there had been no allotment of shares. We know that.

A. Yes, that's quite clear.

Q. We all know that. And as you say, that wasn't something which would prohibit or inhibit an

evaluation, because you asked for ownership behind whoever is going to get the licence?

A. Yes.

Q. Isn't that right?

A. Yes. That is precisely right.

Q. Yes. That is what you want. And of course one is entitled to proceed on the basis that what you are being told in the evaluation is, this is who is behind this, the name of the company is X, Y or Z, it doesn't matter, but this is who is behind this company and that is what the Department needed to know, isn't that right? And that is what the Government needed to know?

A. That's right.

Q. What various people had were interests. Telenor had an interest, Mr. O'Brien had an interest, and they as declared in the evaluation that they were to be these four, four investors, third party investors, institutional investors, financial investors, whatever you like

A. Mr. Coughlan, it is the last thing I want to do is quibble, but at the time it was a 50 percent Telenor, 50 percent Communicorp and they had indicated that they would make space, so to speak, in the consortium for minority financial investors and that was the position as of the 4th of August.

Q. Mr. Loughrey, I don't want to join issue with you,

that is not what you said yesterday when the bid documents were opened to you. You agreed yesterday that when the bid documents were opened to you and you had only seen them for the first time

A. Mmm.

Q. and you agreed that what the evaluators were asked to evaluate was, Communicorp, Telenor, and four financial, named financial institutions, isn't that right? That is what the evaluators were asked to evaluate, is that right?

A. That's correct.

Q. Okay. I don't think there is need for us to join issue.

A. That is fine.

Q. As of the 29th of September when this process was still on-going

A. Mm-hmm.

Q. what the evaluators had been asked to evaluate had changed, isn't that correct, there is no doubt about it?

A. From the documentation we have opened this morning it was the intention to change. Whether the whether the four indicative participants that we have just spoken about actually, were so informed at the time, I do not know. It is axiomatic that they were either out at that stage or in at that stage from their point of view. If they were still in, and I am putting the

question rhetorically, and this arrangement had collapsed, Telenor had vetoed it for instance, would it not be the case that they would fall back on the original position?

Q. But you say this was conditional on Telenor vetoing itself?

A. I am saying from the letter that I have just read this morning, that it was open to Telenor to veto it if they so wished.

Q. Okay, if they so wished?

A. If I am a part of this consortium and I was playing a driving role, as Mr. O'Brien would be, I certainly would not burn my bridges until such time as I had total lock-in in the new situation.

Q. Interesting you should say that. Because on the 29th of August, sorry the 29th of September, 1995, having received similar type advice from his solicitor to be sure, because he was taking an irrevocable step in relation to informing Mr. McLaughlin that the financial institutions were out or asking him to step aside, and in taking a step in sending a letter to Advent, but he did that. Mr. Callaghan was sent, Mr. John Callaghan was sent to Mr. McLaughlin on the 29th financial institutions were asked to step aside. They were given an explanation which Mr. McLaughlin accepted, of course, and Advent were also out by reason of a letter which was sent to them.

That step had been taken. So as of the 29th of September those four institutions which the evaluators had been asked to evaluate were gone. There is no doubt about it.

Now, I had made reference to what Mr. O'Brien said in sworn evidence before this Tribunal, and I would just like to bring to your attention information which has been furnished to the Tribunal by Mr. Dermot Desmond in the Memorandum of Intended Evidence, Mr. Michael, Professor Michael Walsh in his Memorandum of Intended Evidence, Mr. Arve Johansen in the Memorandum of Intended Evidence. I also intend going back to an examination which was conducted by Mr. Fitzsimons of Mr. Desmond when he gave evidence here in relation to these matters previously.

A. Is this in this folder?

Q. No.

A. It is not.

Q. 36, yes.

(Folder handed to witness.)

Now, Mr. Dermot Desmond has informed the Tribunal, and I am referring here to a Memorandum of Intended Evidence dated the 22nd of February, 2002.

A. That is at Divider 5?

Q. I don't have it in the form that you have. I will just get it.

A. Mr. Desmond is at Divider 5, yes. There are a number

of documents of Mr. Desmond. Which particular one, Mr. Coughlan?

Q. 5A.

A. 5A, yes I have that now.

Q. And you can see there under the heading 'Background'

that "Mr. Desmond has informed the Tribunal that he

and Denis O'Brien attended a football match on the

10th of August, 1995. At the match there was

discussion on Denis's progress with the bid for the

second mobile licence. Denis indicated that they had

made a very good presentation and had a good team in

place, but were uncomfortable on the funding side.

They had no binding commitment from the financial

institutions and no indication on pricing. And no

willingness from the financial institutions to bear

any of the costs if the bid was not successful.

I offered to invest in Esat Digifone on the same basis

that Telenor were investing, to meet Denis's

proportionate share of the bid costs, and to Denis's

share of the investment. Following negotiations an

agreement was reached on the 29th September, 1995,

which is attached hereto at Appendix 1. No other

agreement was consummated between the parties prior to

that date.

Subsequent to the announcement of the award of the

licence, Denis sought to acquire a shareholding in

excess of 50 percent of Esat Digifone. I was prepared



to agree to the subject of Telenor being satisfied.

Telenor made it clear that they were not prepared to allow one shareholder to have over 50 percent of Esat Digifone. Consequentially no sale took place.

"In May, 1996, the Department of Public Enterprise required that the shareholding in Esat Digifone at the time of the award of the licence should be at the same level as in Esat Digifone's original proposal, that is both Telenor and Esat Telecom should own 40 percent each. Accordingly, I agreed to sell 2.5 percent to Esat Digifone to each of Telenor and Esat Telecom.

"As stated in Mr. Davis's letter, IIU disposed of the balance of its shareholding at various stages equally to Telenor and Esat Digifone, with the final percentage being sold to the British Telecom subsidiary."

You can see Mr. Desmond is telling us how he became informed about matters in August, how things proceeded to an agreement on the 29th of September?

A. It is extremely clear.

Q. It is extremely clear.

And the discussion that is taking place there is, he is offering to invest on the same basis as Telenor, that is what he wants to be in on.

A. And you will note the difference, and I am sure of course you have, Mr. Coughlan, is that in the opening paragraph Mr. O'Brien, quite correctly, sees the

weakness from, as he sees it himself, in the indicative letters of offer that he got from financial institutions.

Q. Yes.

A. And so, in a sense, that underlines the point is, where you have to make space for financial investors predicated on terms and conditions that are not yet agreed, to wit the licence. For instance, institutional investors could not possibly indicate the pricing and what they would require for that pricing. In other words, the terms and the conditions couldn't become available until such time as the crystal ball cleared on the licence, so to speak. And I think even though Mr. O'Brien seems to be of the opinion that this is a weakness, but by definition, and I am putting myself in the mind of the PT GSM, they wouldn't have expected anything more than what they got by way of the indicative offers, but Mr. O'Brien seemed to think that somehow that this was required.

Q. I see. I see. Well, I am sure Mr. O'Brien will be able to tell us that himself, Mr. Loughrey.

A. I am sure.

Q. But I am thankful for your assistance in that regard. But putting yourself in the mind of the PT GSM, they didn't see any difficulty about it?

A. None whatever, none.

Q. But, of course, there was one thing that perhaps financial institutions would not have been prepared to do, and that was to provide any underwriting for Mr. O'Brien's Communicorp?

A. You are quite right, yes.

Q. Because that wouldn't be their business?

A. It wouldn't be their business. They are bankers or institutional investors. Clearly he went to a source of finance that operated with a different template.

Q. Yes.

Now, if you turn over the page on this particular sorry, it is Divider C, I am told, in your book.

A. C?

Q. C.

A. Yes, I have that now.

Q. And what I would ask you to go to is Page 7. Sorry, perhaps I should commence on Page 6 - 19?

A. I have that, yes.

Q. Do you see that Mr. Desmond has been asked of his understanding of the following:

"1. The composition of the Esat Digifone consortium as of the 4th of August, 1995, being the date on which the Esat Digifone application was lodged with the Department.

"2. The composition of the Esat Digifone consortium as of the 25th of October, 1995, being the date on which the consortium won the licence competition.

"3. The capital configuration and beneficial ownership of the shares of Esat Digifone Limited as of the 12th of April, 1996, being the date of the board meeting at which the full complement of shares in Esat Digifone was issued.

"4. The capital configuration of the issued capital and beneficial ownership of the shares in Esat Digifone as of the 16th of May, 1996, being the date on which the GSM licence was granted to Esat Digifone.

'The Issue':

19(5) 1. "I have no recollection of having any knowledge of the Esat Digifone consortium on the 4th of August, 1995. Subsequently I understand that at the date the consortium was intended to be owned as to 40 percent by Telenor, 40 percent by Communicorp, and 20 percent institutions."

That seems to be in conformity with the bid document and what was being evaluated, isn't that correct?

A. Yes.

Q. "2. I understood that as and from the date of the execution of the agreement, namely September the 29th, 1995, the composition of the consortium was Telenor 37.5 percent, Esat Digifone 37.5 percent, and IIU Nominees 25 percent.

"3. I understood that as and from the date of the execution of the agreement, namely September the 29th, 1995, the composition of the consortium was Telenor

37.5 percent, Esat Digifone 37.5 percent and IIU

Nominees 35 percent."

A. Presumably that is intended to be October 25.

Q. October 25?

A. Yes.

Q. "I was the ultimate beneficial owner of the shares held by IIU Nominees.

"4. As of the 16th of May, 1996 the shares were owned as to Telenor 40 percent, Esat Digifone 40 percent, and IIU nominees 20 percent. I was the ultimate beneficial owner of the shares held by IIU Nominees."

So you can see that in the first instance, Mr. Desmond has informed the Tribunal of the position as of the 29th of September, 1995, by virtue of this particular agreement?

A. Yes, I can quite clearly see that and that was his understanding, but I would stress understanding, because just going back a little bit, Mr. Coughlan, until such time as we have seen did Telenor actually buy in by that date? I have no idea. Maybe they did or maybe they didn't.

Q. Telenor bought in within a few days.

A. As of the 29th of September?

Q. Yes. They never disputed this. I am going to bring to you Mr. Arve Johansen's they disputed Mr. O'Brien's signing various documents, and how they felt that they were brought into a situation, and I'll open

a memorandum bear with me.

A. I don't doubt you for a moment.

Q. I will open the memorandum from Mr. Arve Johansen in due course to you.

A. Sorry, Mr. Coughlan, I am being even more pedantic and I don't mean to be. The only point I was making was that was true, Mr. Desmond's understanding, a bona fide understanding obviously, that was true of September 29, that was the only point. It is not obvious to me that it is true as of that date.

Q. Why?

A. We haven't because we haven't opened any documents.

All I saw was the letter that Telenor had yet to buy in. I haven't seen any evidence of their buy-in as of that day. Now, if I am delaying

Q. Not at all.

A. the Tribunal, I really apologise.

Q. Not at all.

If you go to Divider 6, it is the third memorandum.

And if you go to Page 8 of the third memorandum of Professor Michael Walsh.

A. So this would be 8C.

Q. 8C, yes.

A. I have that document now.

Q. And you see

A. Any particular page?

Q. Sorry?

A. I am sorry, Mr. Coughlan.

Q. If you go to Page 8.

A. I should have picked that up, I am sorry, 8. Yes, I have that now.

Q. If you go to number 19?

A. I see, yes.

Q. He is asked the same questions as Mr. Desmond and I am not going to read them all out to you.

A. Of course.

Q. And his reply at 19A: Again he has no recollection of having any knowledge of the Esat Digifone Consortium as of the 4th of August, 1995. Subsequently he understands that the date that the consortium was to be funded by 40 percent by Telenor, 40 percent by Communicorp and 20 percent by institutions.

2. He understood that as and from the date of the execution of the agreement, namely September the 25th, 1995, the composition of the consortium was, Telenor 37.5 percent, Esat Digifone 37.5 percent, and IIU Nominees 25 percent.

He goes on then to deal in like manner with other dates.

A. Of course I accept that, yes.

Q. Now, if I might now ask you to look at the Memorandum of Intended Evidence furnished by Mr. Arve Johansen of Telenor. Divider 1.

A. Yes, I have that opened now.

Q. And if you go to Page 28 of that particular Memorandum of Intended Evidence.

A. I am having

Q. Page 28.

A. I am having a bit of difficulty on this one. Clearly I haven't got this. The document I have doesn't go to 28 pages.

Q. Divider B, I beg your pardon.

A. Yes, okay. I think I am going to need a little assistance here because I don't see in my

Q. It is question number 48, page 28.

A. I still can't locate it. I am sorry.

Q. I will get you a copy.

A. That is fine, thank you

(Document handed to witness.)

Thanks's fine.

Q. And if you

A. Now, just to be absolutely certain, because I have delayed the Tribunal already on this. It is I have in front of me now page 28 and question 48.

Q. Question 48, that's it.

A. Fine.

Q. You can see the question is precise detail of Telenor's understanding of the following:

"1. The composition of the Esat Digifone consortium as at the 4th of August, 1995?

"The date on which the Esat Digifone application was



lodged with the Department.

"2. The composition of Esat Digifone as of the 25th of October, 1995, being the date on which the consortium won the licence competition.

"3. The capital configuration and beneficial ownership of the shares of Esat Digifone Limited as of the 12th of April, 1996, being the date of the Board meeting in which the full complement of shares was issued in Esat Digifone."

Then the capital configuration of the 16th of May, 1996.

You can see the Tribunal was clearly asking questions in a manner which related to technically what was happening as, for example, as of the 12th of April, 1996, where there was the allotment of shares, and prior to that the Tribunal was asking for the composition of the consortium. You can see that.

This is the shareholders, this was a shareholder Telenor?

A. Yes, I see, but Mr. Johansen's answers are a little bit more qualified, in the sense that even starting with 1.

Q. I was going to open them now.

A. Oh, I beg your pardon, of course, I am sorry.

Q. The composition of Esat Digifone was not yet established as of the 4th of August, 1995.

The composition was intended to be 40:40:20. Arve

Johansen was not aware of this composition at the time and he is relying on knowledge subsequently received.

The source of this is the bid documents lodged with the Department on the 4th of August, 1995

2. Again the composition of the Esat Digifone

Consortium had not yet been established as of the 25th of the October, 1995. The intended composition was now as a result of the arrangement agreement of the 29th of September, 1995, to be 37.5 percent, 37.5 percent, 20 percent.

Then we go on to deal with the 12th of April the source of the information is the arrangement agreement of the 29th of September, 1995.

"As a result of the allotment made on the 12th and 13th April, 1996, the shareholdings were allotted as to 37.5:37.5:25. The allotment resolution and returns to the Companies Office are the source of this information."

"4. As a result of the share transfer formalised on the 16th of May, 1996, the capital configuration of the issued share capital of Esat Digifone was 40:40:20. The stock transfer forms from IIU to Esat Digifone's holding and Telenor, respectively, and the Share Register of Esat Digifone are the sources of this information."

So you can see the response that Mr. Johansen has furnished

A. Very precise.

Q. in his memorandum of intended evidence?

A. And very measured.

Q. Yes. When Memoranda of Intended Evidence are furnished to the Tribunal, the Tribunal does not accept them in the form of a statement taken by a policeman obviously and have that particular to be fair to Mr. Johansen, the tapes of the presentation were not available when this particular document was prepared by Mr. Johansen, no doubt with assistance and nobody can

A. Mr. Coughlan, they predated the arrangements of the 29th in any event.

Q. The tapes?

A. The tapes.

Q. Yes, but let me just explain to you: the tapes were lost for years.

A. Yes, I know.

Q. We couldn't find them, nobody could find them and they only turned up a few weeks before Christmas.

A. Yes, that must have been difficult for the Tribunal.

Q. Yes. And in fairness to Mr. Johansen, I think in light of what he said at the presentation, which I opened to you, I am not going to pursue this particular matter to any great extent at this stage, because Mr. Johansen must be afforded an opportunity, in respect of this, to assist the Tribunal?

A. Mr. Coughlan, the only reason I said "measured" and once again I am not harping on this whatsoever, I am still not clear in my mind when Telenor bought into the arrangement. That's the only thing. I am not being difficult, because even in the answer to 2 he said the intended composition was as of 25 October.

Q. Yes.

A. Even the source of information was the arrangement agreement. He was not party to that agreement or Telenor weren't, so it is just I am just puzzled.

Q. Yes, I understand, and I will try to clarify matters for you now, if I may.

But just to convene this particular sequence of matters. Of course I have referred you to obviously Mr. O'Brien's understanding from the evidence he gave?

A. Yes.

Q. Another shareholder. And I beg your pardon, as you are aware, or as I have told you anyway, this inquiry commenced looking at a donation of \$50,000 to Fine Gael?

A. Quite.

Q. And day 136 of the Tribunal's public sittings, My Friend, Mr. Fitzsimons, examined Mr. Dermot Desmond who was giving evidence. I will get you a copy.

(Document handed to witness.)

A. I am sure you will understand, Mr. Coughlan, this is totally new to me.

Q. Of course, of course.

A. I wouldn't have been aware of this.

Q. You see question 84?

A. I do, yes.

Q. "Mr. Fitzsimons: Mr. Desmond I am not sure whether it was a slip of the tongue, but when you were asked about the \$50,000 contribution you used the words 'that contribution was made on behalf of Telenor and later reimbursed by Esat Digifone'. You are aware of the fact that there is a dispute between Mr. O'Brien and Telenor as to the process or the basis for this contribution. Telenor contend that they made the contribution at Mr. O'Brien's behest on behalf of Esat Digifone.

Answer: I am aware of that, but as we were shareholders of Esat Digifone, I would have thought that Telenor would have also communicated with us that they were going to make the payment and ask for our approval that that payment be made.

Question: Do I take it then this was not a slip of the tongue when you said that the contribution was made on behalf of Telenor?

Answer: Well, in the first instance, it was Telenor took, made a statement themselves directly without communicating with the others, but all the other shareholders of Esat Digifone

Question: Were you aware of the fact that Telenor

made the payment, but your phrase was that 'the payment was made on behalf of Telenor', was that not a slip of the tongue?

Answer: No.

Question: In other words, you decided in your own mind the dispute between Mr. O'Brien and Telenor?

Answer: Well, the answer is yes.

Question: When did Mr. O'Brien first contact you as a fellow shareholder and tell you that he had procured this contribution from the Fine Gael Party?

Answer: I don't know when we were advised about this \$50,000 contribution. I think that it was the same period that we were advised October '97.

Question: You seem to have some complaint about Telenor not telling you about it. The evidence does establish that the initiator of this contribution was Mr. O'Brien. There is no doubt about that, on the evidence to date, no doubt whatsoever, and do you have any complaint over the fact that your fellow shareholder, Mr. O'Brien, did not tell you about this contribution?

Answer: I do, I have a complaint with Mr. Denis O'Brien

Question: Do you have a complaint with Denis O'Brien?

Answer: And with Telenor, yes.

Question: And Telenor. Why, therefore, if you have

a complaint in respect of each of the them, should your complaint about Telenor not telling you be a basis for your deciding that this payment was made on behalf of Telenor?

Answer: Because Telenor's I used the word because Telenor initially my understanding was they paid the funds directly from their own account. It was the Telenor account that paid the monies to Fine Gael in the first instance.

Question: That's quite a different thing from the payment being made on behalf of Telenor. They physically made the payment, but it's a different matter to say that that payment for that simple reason was made on behalf Telenor, isn't it?

Answer: Well...

Question: Isn't it?

Answer: No, no, I disagree.

Question: So you decided in your mind. I see. How much money did your company make out of this entire exercise?

Answer: Over 100 million.

Question: Who brought you into the project?

Answer: Denis O'Brien.

Question: So you are sticking by him?

Answer: Pardon? Yes, I am sticking by Denis O'Brien.

Chairman: Yes.

Mr. Hogan: Sorry, I thought Mr. Fitzsimons was finished.

Mr. Fitzsimons: Your complaint is that you weren't told about it as a shareholder at the time, isn't that so?

Answer: Yes.

Question: When did you become a shareholder?

Answer: In well, effectively we became we signed a Shareholders' Agreement probably in I think it was in 1996, but we were acting as shareholders in 1995, since August 1995 when we joined the consortium.

Question: So you weren't a shareholder until May 1995?

Answer: We were effectively all shareholders we had assumed the bidding liability, the bidding costs in 1995.

Question: But you weren't a shareholder till May 1996?

Answer: My understanding, nobody was a shareholder until May, 1996, because we didn't sign the Agreement until May, 1996, when the licence was granted.

Question: Yes. And you were aware that as a shareholder you had a duty of good faith to each other?

Answer: Yes.

Question: And you accept then, that Denis O'Brien



broke his duty of good faith to you when he did not tell you about this contribution and/or of the fact that he initiated it?

Answer: Well, I think

Question: Do you? Do you? Answer the question. It is a simple question.

Answer: I am going to answer it if you let me.

Question: Sorry.

Answer: If you let me, I'll answer.

Question: Well, its a very yes or no answer, Mr. Desmond.

Answer: No, it's as a shareholder in Esat Digifone, that payment of \$50,000 to Fine Gael was a sensitive issue, I would have considered, and I expect both shareholders to advise me of that.

Question: You accept that Mr. Denis O'Brien broke his duty of good faith to you when he failed to tell you of that as a fellow shareholder?

Answer: And in the same manner as Telenor.

Question: Don't worry about Telenor. Just deal with Mr. Denis O'Brien."

And then Mr. Hogan intervenes. Now, it is correct that the allotment of shares, in the first instance, took place on the 12th of April, 1996, when there was a resolution.

There was an agreement on the 29th of September, 1995?

A. By two of the three parties.

Q. By Esat Digifone Limited in the first instance?

A. Yes.

Q. And IJU, Mr. Desmond signed on behalf I will come to the problems that arose or how vexed Telenor may have felt about something. But that agreement took place, and as a result of that particular agreement, the understanding of Mr. Desmond and Professor Walsh was that they were entitled to 25 percent of the company which would be there when the licence was actually signed off, isn't that right?

A. That's right so far as it goes, Mr. Coughlan, but I still maintain from what we have seen this morning that it was subject to Telenor's agreement, Telenor effectively could have red carded the whole thing.

Q. Yes, well, they didn't?

A. Oh, I will be happy to be informed.

Q. Book 49, Divider 130.

(Folder handed to witness.)

Now, this is a document which has been of course great assistance to the Tribunal because until this was made available to the Tribunal by Telenor on behalf of Telenor, the Tribunal was unaware of many things which had occurred around May of 1996 and of which there appears to be no record in the Department of matters which occurred, and which no official from the Department informed the Tribunal and I include yourself in that Mr. Loughrey, had occurred. So we

will come to deal with those in due course?

A. Yes, of course.

Q. Now, this is a document which Mr. Johansen prepared himself on the 4th of May of 1996. He had been at a meeting in the Department on the 3rd of May. As a result of what had happened, Mr. Johansen has informed the Tribunal that he understood that there were apprehensions on the Department side about Communicorp's financial ability or capability, and the involvement of Dermot Desmond, IIU, in this particular matter, but I will come to that when I come to those dates. That was his understanding of what happened?

A. Well, the former would be natural, because it was already highlighted in the Evaluation Report, a concern about Communicorp.

Q. Yes.

A. That would have been a natural extension of the sensitivities in the Evaluation Report.

Q. We will come to deal with that.

Now, he made this memorandum, and he says:

"Re memo on shareholding in Esat Digifone.

"I have below summarised a few points that have become clear to me over the last 24 hours as a consequence of the information acquired regarding Communicorp's attempt to buy back 12.5 percent of the IIU shares.

"1. Denis O'Brien came personally over to me in Oslo probably sometime during September last year. He

informed me " I think we can pinpoint that around the 22nd of September, I think. It was the 22nd.

A. But before the 29th in any event?

Q. Yes.

A. Yes, okay.

Q. "He informed me that based on information from various very important sources, it was necessary to strengthen the Irish profile of the bid, and get on board people who would take a much more active role in fighting for Digifone than the "neutral" banks who basically would like to keep a good relation to all consortia.

"I accepted Denis's word for the necessity for a new move. Note: Underwriting was never used as an explanation."

You have seen the underwriting letter and

"2. IIU should, apparently, be the ideal choice for this function, the only string attached being that they had demanded a 30 percent equity participation 'for the job'. Denis had managed to reduce this to 25 percent, but it was absolutely impossible to move them further down. This was a disappointment to us, since everything we had said and done up to then had been focused on at least 40 percent ownership for the principal shareholders at the time of the issuing of the licence. But not only: Denis then pushed very hard for Telenor to swallow 15 percent of this and Communicorp only 10 percent to which I never agreed

but I accepted the principle of 'share the pain' and maintaining equal partnership (37.5 percent 37.5 percent) and it was also said that a too high Telenor ownership stake would be seen as aggressive and could be inhibiting to the award of the licence."

This is obviously again Mr. Johansen recording his thoughts about Mr. O'Brien, etc.

"This was the first time I experienced a real hard and very unpleasant push from Denis.

"3. Some days later the nature of the agreement with IIIU comes clearer into light as an underwriting agreement to guarantee for Communicorp's timely payment of its share of the capital into Digifone and including the right to place the shares with up to four nominees. This was unwillingly accepted by Telenor (since we understood it to be the right step to take from an 'official Irish standpoint' to secure the licence)"

I suppose I should use the term, when you use the term 'official Irish standpoint' you might read 'Department/Ministry' so nothing was coming from the Department, as far as you were concerned, or any official?

A. Both in paragraph 2 and in paragraph 3, nothing, absolutely nothing like that came from the Department, nor could it have come from the Department.

Q. As far as you were concerned?

A. As far as I am concerned, exactly.

Q. Then it goes on: "The agreement was drafted by Frys/OOC and signed in a hurry (basically in draft form) by Denis O'Brien alone on behalf of Communicorp and Digifone (even though we in the Joint Venture Agreement had made it clear that two authorised signatories are required one from each party).

"4. The agreement was never signed by Telenor, neither as authorised Digifone signature nor..."

So you can see there in paragraph 3, the agreement, although unhappy about it, was unwillingly accepted by Telenor, there is no doubt about it.

Now, I will read the whole memorandum. It is something that I will be coming back to in due course.

"4. The agreement was never signed by Telenor, neither as authorised Digifone signature nor as shareholder and a party to the agreement. Sometime shortly after this, the Advent commitment to invest US\$ 30 million into Communicorp disappears, as it was essentially not necessary anymore since the Communicorp liability to pay capital to Digifone was anyway underwritten by IIU.

A. Sorry, Mr. Coughlan, just in taking this on board actually, and it is not any criticism whatsoever of Mr. Johansen, it is remarkable that he had such clear insights when he drafted this, when it was in May of the following year, so to speak, we are talking about

events in the Autumn of 1995. But I still, and once again I there is no necessity I should be satisfied on this whatsoever I still have no clear indication of when they bought into it. They weren't there on the day and there is no indication so far when they bought into it.

Q. Bought into what?

A. Bought into the agreement was drafted by Frys/Owen O'Connell or OOC and signed in a hurry by Denis O'Brien alone on behalf of Communicorp, even though of course there had been agreement that there should be a joint signatory on that, but clearly they had no knowledge of it then on the 29th, so I am not still clear, maybe it will come up later when they actually bought in.

Q. Mr. Loughrey, you can rest assured the arrangement agreement, whilst it may not have been seen by Mr. Johansen on the 29th, was with the Telenor internal department in Oslo prior to it being executed. Now, it may not have been considered but that is what the facts, that is what the documentary trail discloses.

A. Of course, I am in your hands, I accept that.

Q. Yes. And Mr. Johansen here, as you say, we have had Mr. Johansen give evidence here and the Tribunal has met him on a number of occasions. As you say, he seems to have a good memory in relation to matters, and he has been he has had an opportunity to give

evidence here and we have all seen

A. God, I am not contesting anything he is saying, of course.

Q. We'll go on.

"5. In hindsight it is quite clear who benefited from this arrangement.

"I have good reasons to believe that the terms put forward by Advent for investing into Communicorp did not suit Denis O'Brien. With the above arrangement, that he orchestrated for all other sorts of reasons, he has actually achieved to bolster his/Communicorp's balance sheet and paid for it with Digifone shares at the cost of Telenor. He has done this in an atmosphere of trust, where Telenor even has agreed to bridge finance for Communicorp while he raises funds through a private placement in the US." This perhaps puts it into context.

"As we go along we learn more, but it all serves to disclose more details which again more and more prove the above scenario.

"In the meeting with the Department of Communications Friday, May 3rd, it became evidently clear that IIU was not a favourable name from a 'Irish public' point of view. On the contrary, the Ministry basically asked for help for how to explain why he had substituted Advent, Davy Stockbrokers and the other recognised, named institutional investors in the bid



(AIB, Investment Bank of Ireland, Standard Life Ireland.)

"Eventually the project coordinator from the Ministry

Mr. Martin Brennan actually appealed (off the record) to Telenor to write a letter of comfort that we would serve as a last resort for the Digifone company for funds an operational support. My feeling was that if Telenor had owned it alone, he had been more comfortable than with the current shareholders.

"I think it would be a very prudent thing for Telenor to do especially since we then effectively underwrite the whole project, both Communicorp and IIU after already having paid Communicorp's price for the first underwriting which now appears to be useless.

"7. But the story doesn't end there. Two days ago I was informed by Denis that he had entered into an agreement with IIU to buy back 12.5 percent of the shares now held by IIU. I found it absolutely unbelievable and made it clear that Telenor would not accept anything but equal partnership, either we buy 6.25 percent of the IIU held shares each, or Telenor should take the other 12.5 percent of the IIU held shares.

"I have also now seen the letter of the agreement between Communicorp and IIU which strongly supports the scenario outlined above.

"IIU apparently has no (or very little at least) money

and cannot afford more than 12.5%. The price agreed is a little cryptic, but it looks as though any advances IIU has to make for the disposed 12.5% before the transaction's effective date (31st May, 1996) is seen as cost (??). It will, if this is the case, serve as a moving target for IIU's eventual gain on the transaction, putting an immense pressure on Communicorp to delay capital calls in Digifone until the US placement is finalised.

"The return favour from Communicorp is to release IIU from all its underwriting obligations and Digifone.

Does Digifone have an opinion on this? And what about Telenor? This effectively gives Communicorp back its 12.5% of the shares at par (or close to) releases IIU from all of its underwriting liability (which Digifone 'paid' 25 percent for) and IIU ends up having delivered absolutely nothing, having done nothing but complicated the award of the licence (if we get it at all) but with (some cash) and 12.5% of the shares of Digifone which effectively have deprived from Telenor, at the same time as the Department and our honoured partners gently ask us to underwrite the whole project.

"Fortunately, IIU is at least realistic enough to see that this cannot take place unless Telenor continues to support the project. This fact, the time limit and the cooperative spirit shown (by disclosing the

letter) may signal a hope for a sensible solution to this mess.

Oslo 4th May 1996

Arve Johansen."

CHAIRMAN: Well, I think it is only fair to Mr.

Loughrey, it is

Q. MR. COUGHLAN: Have you any initial comment to make?

CHAIRMAN: It is quite a dense letter. I certainly

found that it took me time to read it and assimilate

it. At the very least you are entitled to some period

over lunch. We will resume at ten past two.

MR. McGONIGAL: Before you rise, Mr. Chairman. I

don't want to anticipate or interfere with what

Mr. Coughlan is doing. It does occur to me that since

that memo has been given to this witness, that he

might also be given some of the correspondence between

the parties, between Telenor and Esat because they in

fact help to give a fuller picture

CHAIRMAN: There was a vigorous, from Mr. O'Brien,

"yes".

MR. McGONIGAL: The only other matter, My Lord, the

only other matter Chairman, that I know that the

Tribunal has read and understands fully the

arrangement agreement, but perhaps for completeness it

might be of advantage that the conditions of that

arrangement agreement be shown to the witness, if he

has to give a picture if he is to give some view on

what he has been asked, because that was a conditional agreement and the conditions may be important in considering the overall result that one may be trying to achieve or not achieve.

CHAIRMAN: Yes.

MR. McGONIGAL: And they can be given to the witness over lunch.

CHAIRMAN: All right, I think that can be addressed in the afternoon. Very good. Ten past two.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF EXAMINATION OF JOHN LOUGHREY BY

MR. COUGHLAN:

Q. MR. COUGHLAN: I am not going to go into this particular memo in great detail at this stage, Mr. Loughrey. And I have had a look at the letters Mr. McGonigal had been suggesting before lunch, and I'll be taking you through those in due course, so there is no difficulty about that.

But this is Mr. Arve Johansen noting down his recollection and thoughts on various matters, and in fact, expressing a view about certain matters as well in this particular note. And I think you can see that in we now know it's the 22nd September of 1995

Mr. O'Brien came and made a certain pitch to

Mr. Johansen?

A. Quite.

Q. And as a result of that, Telenor accepted a dilution of their interest in the company?

A. Correct.

Q. We know the shares weren't placed at that time. I am not here parsing off, analysing this from the legal point of view but

A. May I apologise if I appeared to be nit-picking. It wasn't my intention.

Q. I know you weren't, and that's not our function here anyway. And I think there can't be any doubt from the documents as we proceed, because Mr. Johansen writes to Mr. O'Brien on the, I think it's the 2nd October.

I'll be opening that particular letter to you in a chain of correspondence at a later stage. Where he indicates, you know, sort of that they are accepting a dilution of their interest. And in Book 48, I think, the particular letter, I'll just make reference to it at the moment, at Divider 68, I am not going to open it to you at the moment. It was already opened to Mr. Brennan, and it was opened in the Opening Statement, but if you go to it's Divider 73 and Divider 74, Divider 73 first of all. I suppose Divider 74 perhaps commences at I can tell you what was happening at this time.

Telenor had gone to the firm of Matheson Ormsby Prentice to act for them as solicitors. And a Mr. Per Simonsen appears to be giving instructions to a

Mr. Arthur Moran of that firm. And then we have Mr. Moran's attendances. And it seems to relate to the preparation of the share agreement. And you can see there at Divider 74. Perhaps I will start, "Per Simonsen" I can't make that I can't make that out for the moment, but anyway "Michael Irvine", perhaps, I think. But in any event, you can see there, "Esat Digifone Limited." Then to the right, "Michael Walsh, Dermot Desmond, IIU International Investment will underwrite the Irish part of the bid." I think you can see that?

A. That's quite clear, yes.

Q. "Bid to Department in writing and verbal proposal. Communicorp political contacts." I don't know what that means, we'll ask Mr. Moran.

" Shareholders' Agreement Telenor drafted Motorola less jobs

William Fry

Gerry Halpenny.

1. Communicorp 37.5%.
2. Telenor 37.5%.
3. IIU, new party 25% plus underwrite Communicorp, that is a dual role." You can see that?

A. I can see that.

Q. I don't think if you go back to Divider No. 73, again it's a note of Mr. Moran's, "Telenor Invest AS, Shareholders' Agreement, IIU" then

arrow "Dermot Desmond." Then again it sets out the share the intended shareholders and the shares that they were going to take in the company. I think you can see that there, can't you?

A. I can see that very clearly, yes I can.

Q. So, I think from the documents, there can be little doubt, whatever about anything being formalised and shares being allotted and things of that nature, that what was intended here was that this consortium, as of now, and we can even see with the instructions being given, was Telenor, Communicorp and IIU?

A. Correct.

Q. And I think there can be no doubt but that that was the position as of the 25th October, as we now know. There is no doubt about that?

A. I would accept that, yes.

Q. The Department didn't know it?

A. We knew nothing about it.

Q. And in fairness to the Department, and the civil servants conducting this evaluation, they knew nothing about this either, and they hadn't evaluated that particular consortium in that configuration?

A. No, they hadn't. I am not sure, Mr. Coughlan, have we finished with Mr. Johansen's private and confidential note?

Q. Insofar as it relates to this period, September/October of 1995, but I intend definitely

coming back to it in all the events that unfolded, and

I'll be coming back to that in detail.

A. Because clearly there are, let's say, the Department is cited, so to speak, and that's something obviously I'd be happy to give an opinion on.

Q. Well, of course. And it's right and proper that you should, but for the moment all I wanted to deal with was this question of September/October, and bring to your attention various documents that were in the possession of the Tribunal?

A. I am happy to follow your sequence, Mr. Coughlan.

CHAIRMAN: I'll make note of the fact that you do mean to come back to that.

Q. MR. COUGHLAN: It's a matter that will be dealt with in great detail, because April/May may be a time in which you could assist the Tribunal in which you could have certain involvements yourself, therefore it's we'll go through all the documents in detail for that period.

A. I am very happy to follow your sequence, as I said.

Q. I think just perhaps, it might be of assistance to you, if you now had Book 49, which is Departmental documents, because I am coming back to the Department now again sorry, Book 43, I beg your pardon.

I am now coming to the period and the events surrounding the 25th October, 1995. And an announcement was made to the press on the 25th



October, 1995, in the evening I think, is that

correct?

A. That's right, yes.

Q. And the announcement was to the effect that this Esat Digifone, Esat Digifone, not using the formal language, had won the exclusive negotiating right, had won the competition I suppose was how it was announced?

A. Yes.

Q. And when do you believe was the first time that you became aware that there had been a decision or a result or a conclusion of the work of the Evaluation Team?

A. My mind isn't entirely clear on this, Mr. Coughlan. I think we may have touched on this before. While the definitive result, I am clear in my mind is when Martin Brennan came into my room and said words to "We have white smoke", so to speak, but it is possible, and even probable that some days before that, either through interaction in the corridor or perhaps directly from Sean Fitzgerald saying, "We are nearing the end game, it's looking like X, Y and Z." By way of explanation, that's why I am so hazy, by virtue of the fact that it was a very large Department, so much information would pour into my room or across my desk, I tended to, sort of, put things in, mentally, so to speak, not formally into

files, clearly, or into in-trays, ones that required action. If that there were the case I possibly noted is, we are coming near the end game, but my if in fact I were pushed to come to the probability, it's probable that I didn't focus on it as a definitive result until such time of whenever it was, the morning of the 25th or whatever.

Now, once again is, I understand that part what I might call key members of the PT GSM approached me looking for more time. I have to confess, as I said, I don't have a memory of that. It's scarcely credible that they could have spoken in a vacuum. It may be that I was informed, "Look, this is what's shaping up, but we want more time to look at the document", etc., I may that would have been two or three days earlier, I think from memory. So in other words, I can't say absolutely for certain, but we are talking about, you know, the probability of October 25 itself, certainly, as the definitive result, but earlier indications in the days leading up to it, but which I wouldn't have acted upon.

Q. Because as far as you were concerned, there was no result until you were told there was a result?

A. There was no result until such time, I am quite clear on that.

Q. Now, there was, I'll just explain I suppose, there was a first draft came into the Department, we think

around the 4th sorry, do we know the exact

date the 4th October. You were not aware of that?

A. I was not aware of that.

Q. A second draft came in on the 19th October of 1995.

Were you aware of that?

A. I don't believe I was aware of that either. But clearly, once again, if we are speaking about events, and I have taken this from the Tribunal documentation, if I was approached some days earlier looking for more time, it's inconceivable that the discussion wouldn't have centred around the fact that there were difficulties over the final draft Evaluation Report, etc.. So, by definition, I would have known then, but I am pretty sure whenever, I forget the date you mentioned for this.

Q. The 19th October?

A. The 19th. I have no memory whatsoever of being informed of that.

Q. And you have no recollection of reading it?

A. None whatsoever. I am quite sure I did not read the full document until at least the 26th October.

Q. And can I just ask you, just in the context of your own position and the process being at arm's length as far as you were concerned or a need-to-know basis, would you have sought a copy of the Evaluation Report yourself?

A. No, I wouldn't. It might even appear strange that in

fact the formal sign-off by the Minister and the Department was effectively done before, for instance, just talking personally, I had sight and time to study the last document, but I had been briefed by the Chairman of the group, I have a memory, and once again of reading a synopsis, a synopsis, but because I saw no basis whatsoever in, for instance, overturning or quibbling with the PT GSM, with the Project Group's assessment, it wasn't imperative for me to read the full documentation. Now, I know I did take time-out, probably read it on the night of the 26th at home or the 27th, I did take time-out, clearly because I was interested, but I did so out of a matter of interest, not that I should have read it earlier so that somehow I could overturn the result.

Q. Now, there was a meeting of the Project Team on the 23rd October of 1995. We know it's recorded. And the note of the meeting was prepared on the 12th December, 1995. That's the minute of the meeting. And it's a reasonably short note. The

A. Just to help you, do you have a reference there for it?

Q. I do. I beg your pardon. It's 132 in Book 43. Divider 132.

Now, it was on the 23rd that it would appear that Mr. McMahon and some of his colleagues went to see you for a time, and you accept that that probably

happened. You accept that it happened

A. No doubt it happened. No doubt it happened.

Q. And I suppose why the Tribunal is looking for everyone's assistance of matters surrounding this particular phase of the Project Team's work is that because the note appears to have been drawn up on the 12th December, 1995, from information available to the Tribunal. It would appear that the meeting just didn't occur on the 23rd, but may have gone into the 24th and overnight as well, if you understand?

A. Well, what I have read in the Tribunal documentation, and I suppose the folk memory of it was a continuous drafting session, and by definition, they tend to be, let's say, they are not as tight on time as a normal agenda would have it. Yes.

Q. So, Ms. Nic Lochlainn records in the minute, "Mr. Billy Riordan noted for the record that Jon Bruel of AMI stated at the previous meeting that he was sufficiently satisfied with the financial tables as evaluated were adequate and true."

"Reference to this statement had been omitted from the minutes of the previous meeting in error."

Then there was discussion on the draft report.

"The meeting then proceeded with the discussion on the draft AMI Evaluation Report. Views from regulatory, technology and D/Finance all indicated that, while there was a general satisfaction with the detailed

analysis and the final result, the presentation in the draft report of the analysis was not acceptable.

"Hence the discussion focused on the detail of the report. A re-ordering of certain sections of the report, together with some textual and typographical amendments, were agreed.

Future work plan:

Amendments to certain sections remained to be finally agreed. These were to be agreed with the Irish members of the group on the following day, and Mr. Brennan was then to be deputed to come to a final agreement with AMI with respect to the final text of the report."

In fairness, what Maev Nic Lochlainn is doing there is synopsising a meeting that may have taken place over a long period of time, and gone into a second day, and even an evening, so there is no criticism. We are just trying to understand exactly what happened and when it happened.

Now, Mr. McMahon prepared a document, it's at divider number 133. And this was not a document which was used, but this was a document which was prepared on, it appears, on the 23rd October of 1995. And it's to his colleague, Mr. O'Callaghan, "For GSM file."

"Apropos our conversation on the 23rd.

Telecommunications and Regulatory Division, GSM.

"Views of the Regulatory Division 23 October, 1995.

"On the basis of our readings of the applications, on our hearing of the presentations by the applicants, and on the logic of the AMI report, insofar as we follow it:

"1. We agree with the finding that A3 and A4 are the front runners.

"2. We also agree that A3 and A5 are very close.

"3. By reference to the report alone we are unable to come to the conclusions that which A3 or A5 is in fact ahead."

Then there is one deleted.

"5. We feel strongly that the qualitative assessment on the top two applicants should now be revisited."

Then it says: "To be signed if PT GSM insist on finalisation of existing draft." And it's signed by Mr. McMahon. I think you'd recognise his signature?

Now, Mr. McMahon will come to give his evidence, but that was a document, I suppose, which reflected the view of the regulatory side of the house

A. Notably Mr. McMahon himself, of course.

Q. Notably Mr. McMahon himself?

A. Yes.

Q. Which, of course, is a view which certain importance should be attached to, isn't it? He was the de facto regulator?

A. Oh, absolutely.

Q. He was a senior member

A. He would have been a senior member and a key player in the group, of course, yes.

Q. And if you turn over the divider, then, to 134. And these are transcriptions of Mr. McMahon's handwritten notes of the meeting on the 23rd. And it has, "GSM group:

" MB notes that we only just seen final draft report.

" That Minister wants a result today.

" That he hasn't been promised one."

Sorry, I beg your pardon, sorry, "That I have only just seen the final draft report.

" That Minister wants a result today.

" That he hasn't been promised one."

Did you know of any word coming from the Minister of wanting a report quickly?

A. I have no recollection of that whatsoever. I have a recollection of Mr. Lowry, and he wouldn't be unique in Ministers I have worked for, always wanted things done yesterday. But not in such a pointed way. For instance, on this, that I would recall it, because clearly busy Ministers will say, "Look, Secretary, let's get X, Y and Z off the table straight away", and for some, and perhaps for some who might have heard it or who might have been translated through its private



office, that might seem like a directive, but in his conversation with me certainly nothing like that ever occurred.

Q. That communication, as Mr. Brennan has dealt with it, but that communication that came to Mr. Brennan didn't come from you?

A. Oh, certainly not.

Q. And again, could I just ask you this; just in terms of the working of the Project Group, as far as you were concerned, they should be allowed do their work and do their work appropriately, they being on target?

A. Very clearly. I think I might have mentioned, was it yesterday? That you know, where occasion demanded, I acted as sort of a lightening conductor or mediator as between the Department and the Minister, and no Minister would hustle a Department unreasonably, but if it appeared like that, I would be the person who would obviously tell the Minister, "Look, we can do things, some things more quickly, some things more slowly", and clearly I wouldn't have allowed that to happen.

Q. And then Mr. McMahon's note continues: "M Andersen admits that award of marks could be different.

" discussion quite clear that people are still at odds about qualitative and qualitative evaluation, rating, ranking, grading points, etc..

" We (T&RR) can't justify the conclusion by

reference to the draft that we have seen. That is last one. It's too close, and report is not clear enough.

"4.1. More text needed to explain basis of Table 1.

" Agreed. I made point that bottom lines of tables don't explain the weightings, etc..

"3.2. I raised the EU procurement point. Much discussion of Appendix 11. I am not happy that we are using this in a relevant way.

"Much discussion about my point as to how explain result in

" Agreed that text will have to explain it.

" Note that it was concluded by Martin Brennan"

A. Conceded.

Q. "Note that it was conceded by Martin Brennan and Michael Andersen that different types of weightings were used, sometimes none, sometimes 'feel' to arrive at bottom line.

" Much discussion about bottom of summary.

"4. Different methods my point.

We didn't use four different methods, only one. The grading (i.e. AMI in Copenhagen) simply regrouped.

"Me: MB, Sean Fitzgerald, John McQuaid went to see sec at 3.30.

"Agreed that report not clear enough to support decision.

QED."

That's the note he made.

A. Just one small thing, and I am sure Mr. McMahon will be well able these are very valuable because thus contemporaneous notes and are written without any agenda, obviously they are of great value in terms of insight. Where it says, "We and T&RR", in other words the regulatory section, "can't justify the conclusion by reference to the draft we have seen, i.e. the last one", I am not quite sure whether that's the penultimate draft you spoke about or the final draft. Now, logic would dictate it was the last one, but I am not quite sure, but I am sure Mr. McMahon will be

Q. That's a fair point to make. And then if you turn over the page, sorry, I beg your pardon, "Reasons" I can't make out the "On our return agreed final decision should not be on Table 16. This resulting both from our meet with sec and independently by group in our absence. It should be Table 17 and 18. They can't agree on whether same weights went in. It seems MB dreamt them up during qualitative evaluation." Now, Mr. McMahon, of course, will speak for his own knowledge and memory of things, and his own note, but I suppose looking at it, just purely from a documentary point of view, it appears from this that there was a fairly robust discussion taking place in respect of this particular process?

A. Gosh, I'd be disappointed if it didn't get such

passionate treatment given the scale of the

transaction.

Q. Now, whilst you accept, of course, that people came to

see you, and the probability is that there must have

been some indication that there was discussion going

on?

A. Oh, I think it's very clear that they would have

explained what the problem was, yes.

Q. And if people came away thinking that they had the

week, I take it that a nod from the Secretary would be

as good as, that you have the week, that that would be

squared with the Minister?

A. I think I mentioned on occasions I would take,

obviously I take a decision unilaterally and square it

later with the Minister. My style would be, for

better or for worse, not necessarily always for

better, would be to say, "Look, if you feel you have

to have more time or you feel in certain circumstances

you need more resources or we feel we need another

expert position to get the right result, to get it

right, then that's what we'll do", so it probably was

in that spirit. But I have no memory of offering

another week, let me put it that way.

Q. Now, I think you have informed the Tribunal that you

remember Mr. Brennan coming to you, you believe, on

the morning of the 25th, would that be correct?

A. Yes, I believe that.

Q. And can you remember what he told you?

A. I remember once again my sense of the interaction was, we have got a result, and it probably and I am only, once again now this is this is merely speculation on my part, because I would have been aware that there were difficulties in coming to an agreed final draft. There may have been some interaction on that. But one thing he assured me on was, we have a unanimous verdict. I remember the unanimity bit very clearly. Now, it wouldn't have bothered me, frankly. It mightn't have even surprised me if it hadn't been a unanimous decision, I wasn't looking for a unanimous decision. I was just looking if there was a critical mass in the group that favoured one option, that would have been sufficient. But I remember, recalling him saying "we have unanimity", and that's what stuck in my mind.

Q. And can you remember what happened then?

A. Yes, once again, and this is something that I mentioned to the Chairman at the very outset actually, it's very easy to look at the Tribunal documentation and to rationalise. But to the best of my memory I did what I always do in circumstances like this: Carry a piece of paper. So in other words, I dictated a short note and brought it under my arm, so to speak, and went straight to the Minister's room.

Q. Perhaps we'll try and identify that particular note.

For the moment if you go to the Divider 141?

A. Would you believe, Mr. Coughlan, my photocopy is so thread bare I actually can't read it.

Q. It is poor. I will read it out. It's headed, "GSM Competition.

"Minister,

The process in selecting the most qualified application for exclusive negotiation with the intention of awarding a second licence for a mobile phone operation is now complete.

"I am fully satisfied that the process in selecting the potential holder of this licence was carried out in a scrupulously fair and professional way.

"The process was cleared by the EU Commission, and the independent Danish consultants acted at all times with expert professionalism and disinterest.

"The project steering group comprised senior officials of this Department and the Department of Finance.

Their selection was unanimous."

Is that the note you think you would have prepared?

A. This is the note.

Q. And then brought to the Minister?

A. Yes.

Q. And do you believe, or what do you understand sorry, what do you remember happening then?

A. I am trying to recall whether the Minister was surprised or not, but Michael Lowry, I am sure he

wouldn't forgive me saying so, doesn't show a range of, a great range of expression in terms of reaction. And once again this is, if this sounds personal it's not meant to be, he doesn't show either elation or disappointment in any great measure. So I am trying to recall whether he showed surprise or not, and I can't so recall. I don't believe I can say he showed surprise or any lack of surprise, because as I say, the range of his expression is admirably limited. So from that point of view, is but he said, I think my impression of the meeting was, let's get the show on the road. That's a colloquialism I know, but that would probably encapsulate his attitude.

Q. And what did you understand by that?

A. Oh, I understood that we would have had to have discussion how we would handle it. And how we would handle it would range from, I suppose, the kosher way of doing things, a full memorandum to Government, complete with the time period for every Minister and every Department to give their comments on it, right through to what eventually happened, effectively a quick political decision which would be copperfastened formally by a subsequent Government meeting.

Now, I imagine we discussed the range, but I knew what my advice was. Now, clearly Ministers don't always accept their civil servants' advice, but I knew what my advice was, and my advice was clearly to go for the

quickest possible route to formal decision.

Q. I think you furnished us with a document which was among your personal papers, and it's another memorandum which you prepared the same day, is that correct?

A. First of all, I actually would like to apologise to the Tribunal it's an omission perhaps three sentences on how this arose. Last Tuesday week night, Mr. Matthew Shaw on behalf of the Chief State Solicitors office got in touch with me and said it was probable that I would have to give evidence on this day last week, and while I had taken an interest in the Tribunal papers, this called for to focus on it, so I cleared the decks of everything the following day, which was Wednesday of last week, and I went down to the basement of my house to start off with the basic reports, published reports that we had of the everything from the Department's annual reports at the time, this sort of thing. And there was a box with that and there was a box with personal papers in it, and I got distracted by reading some of them, and low and behold this was misfiled in it, and I do apologise.

Q. That's okay. If we just look at this particular document. Again it's headed "GSM Competition." And it's: "Minister, "Following our conversation a couple of minutes ago,



we have reflected on how best the GSM decision should be positioned immediately.

"There might well be considerable merit in getting agreement of the Minister for Finance, and, of course, the Party leaders that you are announcing the decision immediately (today) following the meeting at 4 o'clock.

"Clearly this has the certainty that the decision and the process stay under your control and cannot be hijacked in any way.

"If a news item is sufficiently interesting, a successful press conference can be arranged at a half an hour's notice."

And the date. And I think it's your document?

A. Yes. Now, clearly while I did apologise, it's not the original of the document, obviously. I don't know where the original is, obviously. But it was a copy that should have been furnished to the Tribunal had it been correctly filed.

Q. Can I just ask you about that. The original would have gone to the Minister?

A. I think so, but he wasn't a Minister who retained paper. He often said, "Yeah, I know, I see what you are getting at", and would hand it back to me. So I can't in any way saddle the Minister with the blame for the fact that the original may not be on the file.

Q. I am not blaming anybody, I am just trying to find out

where it could have been or

A. I don't know. Sometimes I may have brought it back myself in the same way. Sometimes I might have left it with the Minister's private secretary. But it's so long ago, I just obviously can't recall.

Q. How would this have been prepared? Would you have dictated it?

A. I would have dictated it, yes.

Q. It would have been typed up by a secretary?

A. It would have been typed up in my office, yes.

Q. Now, if we turn to the document itself, did this document, this particular document, or the first document I have opened, which one came first in time?

A. Oh, clearly the announcement that the Project Team had come to a unanimous decision of the first document.

Clearly then we had interaction. I went back to my desk and probably felt that my advice to look for political clearance with the Minister for Finance and the Party leaders possibly needed to be reinforced, and that's probably why I dictated that note.

Q. Well, can you remember the discussion you had first of all, whose there is a reference to "We", is that just you and Mr. Lowry?

A. Almost certainly I can't guarantee nobody else was in the room, but I suspect it was only the Minister and I.

Q. And obviously there was a discussion, if this note

accurately reflects what occurred a few minutes

previously?

A. And there is no reason to believe that it didn't.

Q. Not at all, no. That, "How best the GSM decision should be positioned immediately."

A. Yes.

Q. What discussion took place about positioning it immediately, can you remember?

A. I think you can tie that in with the rather emotive phrase down below, "Cannot be hijacked in any way." I myself felt, I knew that this competition was one that many promoters had awaited for sometime. I knew that some of them had put in enormous effort, by hearsay.

Now, we know from the documentation we opened this morning that approximately there was a cap of 1.6 million on the Esat Digifone, but I understood from what I hearsay at the time, that others had put in much greater efforts resource wise, so it's possible that people had spent some millions mounting this.

Now, I myself felt, for some of the individuals concerned it might have been considerable. For some of the telecommunications companies, it would have been small change. But that wasn't the real problem.

The real problem as I saw it, this is from the applicants' point of view, I'll move to others in a moment, is that the opportunity cost. If what I might call, senior management in the Unisources of this

world representing Telefonica, Swiss Telecom, KPN and Telia, if they had put their heart and efforts behind this, I cite them as one example, we could go through all six examples, they were putting their reputations on the line by committing so many resources, but more to the point actually, they were foregoing valuable senior management resources that could have been devoted elsewhere or to a bid elsewhere. So in other words, I knew that the applicants, this was extremely important to the applicants, number one.

Number two is that the decision-taking mechanism was clearly going to be the Government, and it was going to be a political decision. Now, there were others who had a quite legitimate interest, I mean to say, we are talking politics here, and we are talking about what I call spheres of influence here, that had quite a legitimate interest. I recall, for instance, by way of example is, when a strategic partner for Telecom Eireann was first mooted in the early steps of liberalisation proposals for the fixed line business of Telecom Eireann actually, Cable and Wireless was the first horse, so to speak, declared as a possible runner, they themselves took an interest in it. Lord Young, I think was Chairman at the time, and they declared an interest and immediately, and quite correctly, and this is not a criticism in any way, Mr. David Begg and the CWU immediately launched what I

call a campaign, which effectively put a roadblock in any unilateral development of that idea. Now, I hasten to add, there was no way we would have granted a strategic position to Cable and Wireless unilaterally, but what I was that's not the issue.

The issue was that interest groups who have a legitimate interest could quite were quite within their rights to lobby, make their position known in the event of a winner emerging, but not yet accepted politically or no formal decision taken. In other words, the space in time argument for legitimate interest to express a view, thereby putting Ministers, my Minister in particular, but other Ministers, and the Government ultimately, under what I regarded as unnecessary pressure. Now, this might seem almost outside my own sphere of influence, but the politicians concerned are well able to look after themselves, all of them, all political heavyweights that were on that group actually, so they weren't going to be particularly perturbed about what my view was, so but I felt at least that option, that route should be followed, and it was no more, no less than that.

Now, I may have it to be honest, I may have had it in the back of my mind that Mr. O'Brien and Esat, having been the most vigorous competitors to Telecom Eireann in the field, mightn't have been the preferred

prototype for the employee interests of Telecom Eireann, as they would perceive it, as they would perceive it. That might have been in the back of my mind too as an added ingredient to look for an earlier decision and look for a political decision.

So in other words, the phrase that you asked me, "Should be positioned immediately and cannot be hijacked in any way", might have been seen in the light. I think they were my thought processes at the time.

Q. If you read the note, obviously there had been a discussion between you and the Minister, and it had been decided to position it immediately, because if you read the note it reads, "Following our conversation a couple of minutes ago we have reflected on how best the GSM decision should be positioned immediately." So what you went off and did was reflected on how to position it immediately, isn't that correct?

A. Yes.

Q. Did that involve you making inquiries as to whether there were any meetings of Ministers taking place that day?

A. I can't honestly recall, Mr. Coughlan. It may well be that the Minister himself informed me of a Cabinet Committee meeting, or I may have been aware of it. There is some hint from the documentation that it was

an aviation meeting, and Aer Lingus had a problem at the time. Now, I would have been once again intrinsically involved in that particular problem, but I am not trying to pretend to you now, and I know you wouldn't believe it of me, that somehow I now miraculously recall that I was fully aware that the Aviation Cabinet Committee was meeting that day, I probably was, but I can't say for certainty that I was.

Q. Could you have positioned it by getting, as you have explained to us, an incorporeal de facto decision of Government by making contact with the Secretary to the Government and asking him to make a communication with the various Ministers?

A. The answer to that is yes, of course I could, but I would have needed to have got the Taoiseach's approval to do that. Civil servants obviously couldn't do that unilaterally. But of course, I could have done that. In fact, as you know, there are a number of routes that we could have taken, but as this was in the realm of the Cabinet Committee, and the Cabinet Committee very accurately, almost uncannily accurately in this case, reflected the political balance of the parties making up Government. A phone-around or a get-together of that Cabinet Committee seemed to me to be the obvious way to go. But you are quite right. Equally it could have been an incorporeal meeting of

the Government by the Taoiseach approving of the Secretary of the Government to make the critical fifteen phone calls, that would have been a way to do it, but my advice didn't fall in that way.

Q. It was undoubted Government policy that this was to be a decision for Government, isn't that correct?

A. There is no doubt about that.

Q. And I understand the point you make that in the makeup of that particular Government, that the Taoiseach being the leader of one party, the Tanaiste being the leader of another, and Mr. De Rossa being a leader of another party, and perhaps Mr. Quinn maybe attending the meeting, Minister for Finance?

A. And I think his approval would have been essential, because the Minister for Finance always has a picture card to play in a situation like this.

Q. And I understand the point you make, that this, you felt, was a sufficient thing to do, and that once there was a political clearance from those, the matter was going to go through Government. I am not saying necessarily rubber stamped, but it was going to go through Government?

A. Copperfastened I'd prefer.

Q. There can be no doubt about that?

A. Yes.

Q. But to enable the Government to make a proper decision or an informed decision, which we accept the



Government must always do, equally so, I suppose it would be only proper that the Ministers, in giving the political clearance, which was in effect Government approval for the matter, would also have to be informed sufficiently to enable them to make an informed decision on the matter?

A. I wouldn't contest a word of what you said, but I think it's up to the then Taoiseach, Tanaiste, leader of the Democratic Left and the Minister for Finance to make up their mind whether they were sufficiently briefed on the day they accepted the input from Mr. Lowry. So as a civil servant, that was sufficient for me.

Q. Yes, I understand that. I understand about the decision-making side of things. I am asking you from the point of view as to enable somebody to make a decision. Do you know if Mr. Lowry was furnished with any document or briefing to enable him to attend that particular meeting?

A. I can't be certain of that. I know I had sight, I believe, on the day of a summary. Whether he was furnished with that summary, whether he brought it with him to use as a speaking note, I am not sure, I genuinely am not sure.

Q. There is a document, I think you referred to it in your Memorandum of Proposed Evidence, and it's a document it's at Tab 136. It's a briefing note for

the Minister, recommendation regarding the best application in the GSM competition. Have you seen that particular document?

A. Yeah.

Q. I think you already referred to that document as, you believed that was the briefing note you saw, or the summary?

A. Again I apologise, I am not sure that this is the note. It may well be the note.

Q. When did you have a second thought about this, Mr. Loughrey? Is it after you gave evidence in the witness-box when you were reviewing and discussing these documents anywhere?

A. No, certainly not, certainly not. What I want to go back is this is eight years ago. I knew I had seen a summary document. But hand on heart, I am not sure this is it, but it may well be this document, it may well be. I am not saying I am just not sure.

MR. O'DONNELL: I think it's inappropriate to suggest it's a second thought.

MR. COUGHLAN: I beg your pardon, I didn't hear My Friend.

MR. O'DONNELL: It's inappropriate to suggest it's a second thought. He said he may never have seen this document. I don't think he has given evidence in relation to it at all.

Q. MR. COUGHLAN: I think My Friend is incorrect. I am

not going to have an argument about it. I think you did refer to it in your Memorandum of Proposed Evidence. I am not holding

CHAIRMAN: It's the kind of thing, Mr. O'Donnell, it will take longer to debate it. I don't think there is any great gravamen in it, we'll just get on with it.

Q. MR. COUGHLAN: In the Department files, and we have been told we have received all papers, we can't see any other briefing note for the Minister?

A. Can I say, it's certainly possible, it may even be probable that this is the note I saw. In other words, all I am saying is that some of the events around that time, being whatever it is, seven and-a-half years ago actually, are not absolutely clear. And it's like the main Evaluation Report, I am not sure whether I read it on the 26th or the 27th, but I have a memory of having read a summary brief, and this may well be it, it's just I am saying I am not certain that this is the note.

Q. Very good. Well, whether the Minister had a document, he had to be briefed to attend this particular meeting, isn't that correct?

A. Yes, indeed.

Q. And can you recollect what briefing he was given?

A. I know, on the basis of the oral briefing that Martin Brennan gave me, I in turn, effectively, used that and briefed the Minister orally. Now, other than the two

telegraphic notes that we have just opened, I am not sure that I gave him any other document.

Q. What did you tell him?

A. I told him that now, clearly, Mr. Coughlan, I know you can't expect me to have a verbatim recall, but what I did tell him was, what I particularly stressed was, I jogged his memory more than anything else, of the milestones along the way you know, how this was set up at the outset. In other words, he had to speak all Ministers have to speak with conviction when they are talking to their colleagues around a Government table or a Cabinet table, or Cabinet Committee table of one kind or another. Clearly I would have wanted him to carry that conviction, so I suppose a lot of it was jogging his memory; how it started, how the Government had bought into it, how it was set up professionally, how it was genuinely arm's length, how it was a sealed process. I went through how, in fact, even though the Department's learning curve had started effectively from a blank sheet of paper, how Andersens were the leaders in this niche market, how in fact they had no connection with Ireland, how the advice would have been given in a most disinterested way, how the committee operated, and finally, coming through an iterative process, how they came to a unanimous result.

Now, a lot of it would have been to make sure that his

thoughts were marshalled. Now, this may seem somewhat slighting to Mr. Lowry, he is well capable, I am sure, of recalling all of this, but nonetheless, it bore I think there is merit in rehearsal, and I am sure I would have gone through all of that with him actually, and I possibly would have gone one further by saying, effectively, the Government do not have any alternative other than accepting this result, and the only alternative would be to reject the process, thereby losing a year, and I probably would have stressed, 'and if we have aspirations to be the location, the best location worldwide for FDI, this is an area we were then weak in, and to set back our infrastructure, our cellular telephone infrastructure by another year or so would be unthinkable'. It was that sounds like a pep talk, and I wouldn't have meant it that way, but I would have wanted to get across sufficient conviction, that in turn, which I am sure he would have done on his own without anything I said, but in any event just to emphasise, a) what the positive points were, b) the alternatives were horrific, and c) there is no question of that anyway because the process had been run in such a professional way.

Q. I just want to be clear. You could not, and I understand you would have been emphasising things and putting things forcefully to the Minister. And whilst

you did I hear you correctly when you said that you had advised the Minister that the Government had to go with this result, is that what you are saying?

A. I probably that might be at the outer edge of emphasis. What I probably said is perhaps a little bit more diplomatically is, because I was talking to my Minister, who ultimately had the discretion, that it would be very difficult to see how he or the Government could alter this decision by going to another applicant, that their only alternative would be to say they had decided not to go ahead on this basis actually, because I believe they didn't have an alternative, and that was my belief, clearly held belief. I possibly, obviously, spoke about the promoters as well, and I would have said, clearly, and this is no Slight on Mr. O'Brien, but I clearly regarded the ballast in this ship as Telenor, because we had gone through this before. I actually regarded Telenor at the time as the leading edge company in the world in cellular telephone. So in other words, I would have been emphasising that particular strong point. That's not to take away from Mr. O'Brien's efforts in pushing competition in Ireland. But I clearly regarded Telenor as I said, as the ballast in the ship. Now, I would have given him words like that. Now, he might have had much better words himself, but in terms of my input it would have been

along those lines.

Q. And when you so briefed the Minister, you had not seen the Evaluation Report?

A. I had not seen the Evaluation Report, no.

Q. So did you make any inquiries as to when it would be available?

A. I probably did, and I was probably told, once again

is, it's easy now, would be, now looking at the

Tribunal documentation I got, to rationalise it, but I

almost certainly asked, you know, can we have put

our hands on this report? And was told, "Yes, it is

agreed, it has been signed off, but it's going to take

time to produce copies because it's on a machine in

Copenhagen", but I sound almost facile in saying that

now, and it's not intentional, because that's what I

have read in the Tribunal. But I would have been

surprised had I not asked, "Can we not have sight of

this document?"

Q. Is it the invariable practice in Government that when

a major transaction is occurring, and this was one,

probably the second-most major transaction that ever

occurred

A. In retrospect it looked like that, but at the time we

are talking about a licence valuation that might have

been anything

Q. I understand that, but I am saying it was one of

the it was a major transaction?

A. It was a serious well, I would have, as I said earlier, it was below the pecking the strategic alliance in terms of our pecking order, but that's not to take away from the fact that it was a major transaction, clearly.

Q. And the this decision, or you say that you were advising the Minister and the Minister was running with this advice, that before the report was received, that the matter should be run through the political process and announced even before the report was received?

A. When you put it like that, Mr. Coughlan, it does sound somehow that, almost remiss that it happened on that basis, but let's look at it. This was a report, a unanimous report recommending a winner to a competition. Now, the report, while interesting, wouldn't subtract or add to anything from that conclusion. It wasn't a question of, "Here is a report with a menu of options", like so many reports to Government are. Like if you see a typical Memorandum to Government, there are options. This didn't have a menu, it was a single recommendation. So if I put it to you in that light, it wasn't essential that we had the backup documentation. We had a name, we had a winner.

Q. And that was your understanding of what the report was going to be?



A. Yes, it was.

Q. And is that your understanding of what the report is?

A. Yes, it is.

Q. I see. Did you note anything in the report which reserved or qualified or might have indicated that perhaps there should be further investigation of the top two ranked consortia?

A. Well, it's not to answer your question when I read the report I saw all six applicants had flaws, but not to focus on the top two, and I saw between the top two, and by the way, the top three, but particularly the top two, either was well qualified, according to the report, to undertake or to be the recipient of the licence, so we are talking about degrees of excellence here. We are not talking about flaws. But they did have flaws because no application was going to be perfect in any event. And the I didn't see qualifications, per se, because if there were qualifications, it would have been a conditional approval. The group did not come to a conditional approval. The group came to a clear approval of the winner. It also noted that the second and third were well qualified to be the recipients of the licence, but no qualifications. I did see, however, that in the context of weaknesses, that these would have to be addressed during the licence negotiations, but that to me wasn't a qualification or a reserve, that just was

prudence to address matters that should be addressed  
in licence negotiations.

Q. And did those matters, in your view, form part of the  
evaluation, the addressing of weaknesses and potential  
solutions which were suggested in the report?

A. No it's some time since I have read the report,  
Mr. Coughlan, but I don't believe that was the case.  
What I believed was that if we go back to now famous  
or infamous Clause 19, the prerequisites, so in other  
words, that for whatever the reason, and I can't  
determine or help you much in the determination,  
however that happened, how in other words, the  
transfer, do you remember we discussed in November  
'94 to

Q. What Mr. Brennan described as to the chapeau?

A. Yes. I can't be of help to you, but one thing is  
certain: There was a certain logic in that, in the  
sense that if you looked at strengths and weaknesses  
under this area, you come to can we focus on the  
financial rather than the technical for the moment?

Q. We can leave the technical side.

A. Okay. It appears to me, just as I say, I am speaking  
off-the-cuff, so to speak, but it appears to me what  
you'd be doing is you'd almost be adding up balance  
sheet aggregates of the promoters, in other words, ATT  
had, I wish I could remember what their balance sheet  
aggregate was at the time, but their shareholders'

funds would have run to maybe 50 billion. Should they have been declared the winner under this category because they had shareholders' funds that would dwarf Ireland's GDP almost? I don't believe that is the case, and I don't believe that is the meaning of financial capacity. So in other words, this wasn't something that you would put in as a best, if you were looking for the best application. And I believe that the eight categories, the eight criteria that eventually formed Clause 19 were criteria which you could legitimately seek in looking for a best application. I am not sure that the two that went into the so-called chapeau were so amenable. So there was a certain logic in dealing with it that way, and how it happened, perhaps I should know, but I don't know.

Q. Now, your view is very interesting, Mr. Loughrey, and your opinion on matters, but as to the question of financial capability and technical capability, and in fact the descending order of criteria thereunder, that was a matter that was to come to Government for decision, isn't that right?

A. It was a matter I think technically, and forgive me, and I am not quibbling with you at all, I think it was the Minister had to be satisfied.

Q. The Minister would compare on an equitable basis, but the Minister would make a recommendation to

Government, and Government had reserved on to itself the right to make the decision?

A. Absolutely. That is correct.

Q. Under clause in relation to Clause 19?

A. That's correct, yes.

Q. So I appreciate your view on it. But from the decision-making point of view, it was a matter for Government, isn't that right?

A. Correct.

Q. And to enable Government, of course the Minister would come with a recommendation and the case may be argued strongly, but in order to allow Government to arrive at that decision in an informed way, a Memorandum for Government would normally be prepared, and the significant aspects of the Evaluation Report would be circulated in resume form, or perhaps some departments might have been sent the whole Evaluation Report, so that the Government, in awarding an exclusive negotiating right to this particular licence, could be content that the person who was being awarded that exclusive negotiating right, had the financial capability, and we'll just stick to that for the moment to carry it out. Notwithstanding how they stood in the criteria, isn't that right? That was for the Government?

A. I am not sure I entirely agree with the premise, the procedure that's underlying your premise, Mr.

Coughlan. Can I say, in 99 percent of cases you would be right. So in other words, I am not taking away from your argument one whit, but clearly there is no question of getting notice of questions in a Tribunal, but had I been, had I anticipated this question I'd probably be better briefed to inform you, but I think in general is, if there is a major policy decision, the procedure you have just outlined, or a major transaction that involved discretion, I think what you have just outlined is impeccable. But where you have a winner of a competition, and can I cite, for instance, if for instance there was to be a new contract to be awarded for a new runway at Dublin Airport, for instance, my instinct is, and I think my experience is that the Memoranda to Government do not include the bid or competition documents, or even a description. They would just say, the following consortium comprising of A, B and C has won the competition, and this is how we will proceed.

Q. That's in public procurement?

A. That's in public procurement. And this is not far from public procurement.

Q. That's just what I wanted to ask you about. Am I correct in understanding, and of course you are the one who had experience in the Department of Finance, that in the area of public procurement, and you say this isn't far away from it, that in a tendering

process, that the Department of Finance would always need to satisfy themselves that the person who was being awarded the tender had the wherewithal to carry it through?

A. Not only that, but in terms of public procurement, it wouldn't be they would still have an element of a la carte in a decision like this, because the Department of Finance normally reserved itself the right, not necessarily to accept, so in other words but in this case

Q. Sorry, if we could just pause there for a moment. We will come back to this case now, and you can draw the distinction. The reason for that in public procurement is that while somebody might be very good, if they haven't got the wherewithal to carry it through, the Department of Finance or the Government are never allowed are never going to allow the project, for example, a new runway at Dublin Airport, to be the source of enriching the person to enable them to do it, because the State would be concerned that that particular person, company, consortium, whatever it might be, could fall flat on its face and the State would have an exposure, isn't that right?

A. I mightn't agree with the, some of the elements of that, but I agree with the central thrust of what you are saying is, that they would have to ensure that the delivery of the project wasn't jeopardised by the fact

that the promoter was inadequate in some way or other.

Q. Financial capability?

A. Financial capabilities. Yes, I agree with that.

Q. Sorry, you wanted to I said you said that this was not dissimilar to can you

A. It's not, indeed. And the only say, and I am not saying this by way of some sort of retrospective protection, but the fact of the matter is that the Department of Finance was an intrinsic part of this process and bought in from start now, they had differences with us, and we have gone through some of those already, but once they bought in on their terms, if I may put it that way, they saw the process through from start to finish, and the Minister for Finance was so advised accordingly. So in other words, this was a process that was unique, might be too strong a word for it, it's a singularity, but it was different. And while I would agree with you, both in terms of procurement and both in terms of general process to Government, that was a little different. That's my contention anyway, Mr. Coughlan.

Q. And I understand your contention, Mr. Loughrey. All I am asking about, and your view is very interesting and it's very helpful to the Tribunal, but this was a matter for Government?

A. It was, yes indeed.

Q. And Government were not afforded the opportunity of

considering it?

A. I believe that the Government got sufficient information to take both the political decision and the formal Government decision, and I can't believe for one second that politicians of the acknowledged stature of Mr. Bruton, Mr. Spring, Mr. De Rossa and Mr. Ruairi Quinn would ever allow themselves to be associated with the decision if they felt they weren't, they didn't have sufficient information on the day.

Q. Well, you say you briefed the Minister. The Minister went to the meeting of the other Ministers, and you have informed us of the type of briefing you gave him?

A. Yes.

Q. You hadn't read the report?

A. Of course not. I mean to say, that's quite clear.

Q. Now, if we just as far as you were concerned, there had been no leaking from the process?

A. Correct.

Q. It was air tight, as far as you were concerned?

A. Correct.

Q. And there was nobody calling into question the civil servants involved in this matter, even at the time when Mr. Brennan came to tell you that there was a result?

A. That's true, yes.



Q. And it was still at that stage in the group, the GSM group, yourself, perhaps Mr. Fitzgerald, perhaps not, I don't know, and you informed the Minister?

A. That's correct, yes.

Q. So that was the group

A. Yes.

Q. that knew?

A. And the group, through Mr. Fitzgerald and myself, would have been the logical chain to get to the Minister.

Q. What was wrong? I take it you were still not concerned at that stage that anyone could hijack it, if I might use your own expression, because it hadn't got out. What was wrong with waiting for the report?

A. I believe once there was a decision, the Minister was entitled, the Minister was entitled to have that decision right away.

Q. I understand that. I understand that.

A. Secondly, once the decision then got into the political realm, it was a matter then for this is not to infer for one moment that Mr. Lowry was going to blurt it out to anybody but once the decision was taken, it was my advice that it should move as quickly as possible. Now, I might well say in retrospect seven years later, perhaps it might have been preferable to wait 24 hours until we had copies of the document for everybody. But it was my opinion

at the time that the document came to one conclusion, it nominated one winner. It wasn't it wasn't a document that anybody could exercise any discretion over, Mr. Coughlan, as I saw it, whatsoever. So in that event, I didn't see the point in waiting.

Q. Again, your own view is very interesting, Mr. Loughrey, but of course this was a Cabinet matter?

A. Surely.

Q. And there had been correspondence at the early phase of this competition between the Department of Finance and your Department, where Mr. McMeel had been arguing the position of his Department and Mr. Brennan had responded to him setting out the position of your Department. And in the course of that correspondence, the Department of Finance had pointed out, through Mr. McMeel's correspondence, that this could not be a rubber-stamping decision by Government. The Government could not be bound by the process, and that there would have to be sufficient time to enable the Government to arrive at its decision. And in response, Mr. Brennan and I take it you would agree with what he said, has said, "We agree that it is not something that can bind the Government or it is not to be a rubber-stamping, but that our Minister must bring a recommendation to Government." Would you agree with that as being an understanding of what was involved here?

A. I would agree that that, broadly speaking I'd need to see the documentation again, but assuming it, just for a moment, I would agree with that, with every respect towards Mr. McMeel, and he is a formidable official, and Mr. Brennan, whom you have seen actually, they may not have taken fully into account the fact that there would be effectively no discretion left to anybody at the end of this other than to reject the whole process. Because the basis of moving away from the nominated winner from the group would leave the State so open and so vulnerable in terms of litigation that I don't believe that any Attorney General could have contemplated a move away, other than to move away from the whole competition. And now, they may not have taken that fully into account, and no disrespect towards them whatsoever. But in the event, Mr. Coughlan, events have shown that the Department of Finance bought into the end game, if not explicitly, implicitly, because the Minister for Finance, or his key officials at any stage, can say halt, and quite frankly that always applies. So even if they didn't explicitly go back and revise what they had said previously, implicitly in agreeing to the end game, they effectively went along with how this decision was taken.

Q. Andersens were retained as consultants. Mr. Andersen, himself, saw himself as an adviser or a consultant to

the Minister, but leaving that aside for the moment, he never met the Minister. They assisted in the Project Team in certain aspects of drawing up particular, a particular method of carrying out their activities. They assisted the Project Team by advising them, and we are unsure about this sometimes because it's very easy to slip from Andersens participating in an adjudicative process and advising those who were the ones who were rightly entitled to do that. But leave that aside for the moment. And it was always envisaged that they'd produce a report, isn't that right?

A. That's correct.

Q. And that was clear from the critical path?

A. That's correct again. And indeed, they effectively they were commissioned by the group to write the report.

Q. If you are correct in the views which you have expressed, or if they are the correct views, there seemed very little point in getting a report at all, isn't that right?

A. I am not sure I follow that logic, Mr. Coughlan.

Q. Well, if My Friend, Mr. Fitzsimons, would keep quiet for a while.

You have said that once you were told that there was a decision, it didn't matter what the report said?

A. If I put it as baldly as that, it certainly is less

than elegant, but the central thesis is there, is once the Project Team had come up with a winner on a fair, best endeavours, non-discriminatory basis, I personally, and don't forget it was I advising the Minister, I personally could not see a basis for rejecting that, unless the whole process was to be sets aside.

Q. Well, if you didn't see it necessary to read the report before advising the Minister to go the route he did, did you have any function in it at all so?

A. A limited function, Mr. Coughlan, in a sense is, I believe that Sean Fitzgerald and I had a very limited function, and I suppose we would be, to borrow a phrase from the world you are familiar with, I suppose as a last resort we would have been a court of appeal if something grave were to happen, but in terms of exercising discretion over the competition itself, once it was started I saw no role for myself whatsoever.

Q. You advised the Minister, you advised the Minister?

A. Of course I

Q. Bear with me for a moment, Mr. Loughrey. You advised the Minister that the report, or sorry, the result, I am unsure whether it was the result or the report, could not be changed?

A. Correct, yes.

Q. And this was a process that was to be culminated in a

Government decision?

A. Correct.

Q. Would you go to Divider 142?

A. Yes, I have that now.

Q. You can see these are it's a typescript of a verbatim of a manuscript of Mr. John Bruton's, who was then Taoiseach.

A. Yes.

Q. And I think this was prepared by Mr. Bruton, this transcription. And you can see there at the top of the left, "Spring 27 million." It looks as if there was some meeting on estimates or something of that nature going on at the time.

A. So it appears, yes. We are talking about October, and that's when the real battles the last battles are ones that become public, but the real battles over public expenditure are fought around this time. And I would agree with you, that appears to be the case.

Q. The note is then, "Albert" and Mr. Bruton has informed us that this is what Mr. Lowry said to him.

"Albert had promised it to Motorola. ML stayed out of the process.

Leased line issue Telecom's.

Account system can cost inadequately."

Then, "Minister Communications.

"It can't be given before it goes to Cabinet GSM.

Quinn should not be involved.

Loughlin is a participant in another one.

"It is a major decision.

"In Italy the Government did not accept the Government report and there was a consequential challenge.

European Commission took them to court because this change of policy.

2 (of the) Project Team are Department of Finance."

Do you see that?

A. Yes, I see that.

Q. Now, I take it you didn't advise Minister Lowry that Italy had rejected the report

A. No, I am actually puzzled by that because I couldn't stand over that.

Q. And you can see there that whatever was being said to Mr. Bruton, "European Commission took them to court because of this change of policy"

A. That's not how it panned out in Italy at all.

Q. I know.

A. I am unsure let me put it this way: I am puzzled how the basis for that. Presumably don't forget, Mr. Lowry would have gone out to Telecommunications Council meetings, and he would have met other Ministers, over lunch or on the fringe of meetings, and it could be that his receiving antennae just he wasn't a linguist, and perhaps he just picked it up incorrectly, but certainly that doesn't stand up to scrutiny.

Q. And of course, I understand and respect the opinion you have expressed about the process in the witness-box yourself, but of course, whether or not the Government accepted or rejected what was in the report, was a matter for them, and that was the policy of the Irish Government, wasn't it?

A. Of course ultimately it's a matter for them, and that was their policy. That's quite clear, yes.

Q. Can you have any understanding, and again I should preface here that reference to Albert. Again there is no suggestion that Mr. Reynolds was engaged in anything wrong here, but it seems to be a bit of politicking, doesn't it?

A. It could well be. I actually believe myself is and obviously I worked for Mr. Reynolds as well that he had, like all politicians have, talents, and as a close observer, I think they are undervalued. But for instance, Mr. Reynolds had this marvellous ability to open doors. And I was on the board of the IDA, for instance, for a number of years in the '80s, and I knew first-hand how he could open doors, notably with the North American chairmen, chief executives and major decision-takers. And he had this ability to develop a rapport, but it's certain, and people may have had some impression, the fact that he could do so, that somehow there was something in it for him, I see no basis for that whatsoever.



Q. Not at all?

A. Whatsoever.

Q. And that wasn't the basis on which I asked you at all,

Mr. Loughrey.

A. I am sorry.

Q. I am just saying it appears to be, as having the effect of putting Persona out of the equation anyway, from what's recorded here. There is some discussion going on, something is being said to Mr. Bruton, this was the person this was Motorola were part of the consortium that were ranked second, isn't that correct?

A. You might well read something like that into it, but from working closely with politicians over the years, they do talk about one another quite a lot, and it could mean nothing more harmless than that, Mr. Coughlan.

Q. It could, it could. And the only other reference, then, is to the consortium, which was third ranking, because there is a reference to Loughlin, and that's a reference to Mr. Loughlin Quinn, who was part of the Irish Mobicall Consortium, isn't that right?

A. Yes, it's curious they hit the top three, so to speak, by implication in that short discussion. I think that's purely a matter of coincidence.

Q. I see. Purely? That's your view?

A. That's my belief, yes.

Q. Now, if you wouldn't mind going back to Divider 137, please.

A. Yes, I have that now.

Q. This was a note, you can see there is a handwritten note behind it, that was furnished to the Tribunal by Mr. Ed O'Callaghan?

A. Yes.

Q. And he was an official in the Department and a member of the PT GSM?

A. Indeed, yes.

Q. And he says: "I learned that AMI had forwarded a first draft of final report in week ending 16/10/1995.

(Mark) I asked MB who they had recommended and he refused to tell me on the 4/10. The report was not concluded that week. Sean McMahon told me the order of preference later that day.

"2. Did not see copy of first draft final report until 9/10/95. I raised question of what happens if there is a disagreement and MB said that most of the Project Team had been involved in an assessment which led to the ranking. MB said that the Minister already knew the winner. "

Sorry, that's on the 9th October 1995. Do you see?

"3. Remainder of the week taken up entirely??"

"4. 17/10/95 informed by Fintan Towey that Minister wanted to announce winner by end October. Go to Government the following Tuesday with the winner.

Meeting of Project Team for 23/10 at 11:30.

"5. Went to Brussels 18.10. Returned 19.10. Read second draft report on 20.10 but no appendix.

"6. Informed a meeting of 23.10 that Minister wanted to go to Government 24.10 and get clearance for winner. Sean McMahon and I said that we couldn't sign off on it as the report was deficient and had not been fully read. Martin Brennan and Sean McMahon and John McQuaid met secretary and a further week was agreed to consider report. Meeting went on until 7.30pm.

"7. 23.10 informed that Taoiseach had requested secretary to expedite the position with a view to clearance of Government that following day. I went through drafting changes with MB 4-5. Meeting at 5:00pm. Left at 7.15 drafting changes still being discussed and to be fax today MA.

"8. Minister met Sean McMahon and Martin Brennan and secretary and Sean Fitzgerald. He was to meet Party Leader's re the winner. Heard at 4.45 that Minister of holding a press conference to announce the winner. He did. No signing off on report. We had no final report. No consensus asked for. No vote effectively. No decision by the Project Team." I think you have seen that note, haven't you?

A. I have seen that note already, yes.

Q. Now, first of all the reference to the 9th October, 1995, you knew nothing about what was going on, and in

fact while we went through the minutes of that particular meeting, you can't explain how the Minister's views could have been conveyed to that meeting, but you didn't know anything about it?

A. I didn't know anything about it. I did speculate, I think yesterday, because in my I was absent for some time. The Minister perhaps got used to talking to Mr. Brennan, and perhaps Mr. Towey, in my absence. And he probably he may have continued that route. But I don't know that for certain. I am just saying that's a possibility.

Q. I understand.

Now, on the 17th October, 1995, Mr. Callaghan records that he was informed by Fintan Towey that the "Minister wanted to announce winner by end of October. Go to Government the following Tuesday with the winner." You didn't know anything about that, did you?

A. This is not to say that Ministers might often hope to set deadlines. Mr. Lowry was a Minister who wasn't out of the public eye infrequently. And there were a number of storms brewing at the time, or he was in the middle of quite a few sagas at the time. I can recall two or three of them, and it may well be, and Ministers are entitled to do this, is he was looking for some good news, an effective antidote for some of the things that were happening at the time.

Q. Perfectly understandable?

A. There was a controversy in CIE at the time, there was a controversy in Aer Lingus at the time. I know the thing I was personally concerned about, the CCR; in other words, the new way forward for the ESB was being negotiated at the time, and it didn't succeed initially, so in other words, there was a lot of things happening, and God knows, Ministers are entitled in those circumstances, if there is perhaps good news, as they would see it, coming down to line to say, "Is there any way we can get this a move on this?" But I don't think it should be interpreted as either a directive or an imperative, even if that were the case.

Q. You didn't know anything about it?

A. No, I didn't, no.

Q. Now, and can I take it that in the normal administration of a Department, if the Minister wants good news, the normal route is through the Secretary of the Department?

A. Probably usual, not exclusive, but that would be broadly speaking correct, yes.

Q. In relation to one of the biggest projects, if not the biggest project at that particular time going on, and he wanted a quick that if he wanted good news about an announcement, would you have expected him to come to you?

A. Expected might be a bit strong, but if I may reply in a sense of the ways I am not conscious, looking back, that I was under any pressure at any stage from the Minister to accelerate the GSM process. Now, I may be wrong in that, but that's my belief, looking back at the time.

Q. Well, from the documents, it would look, if these other officials are making these records of matters, that you were being bypassed?

A. I was being bypassed, so it seems.

Q. And I don't mean that in any offensive manner?

A. No, I accept it in that spirit.

Q. Now, on the 23rd October, if you go to paragraph 6, informed that the Minister wanted to go to Government on the 24th. Again, you didn't know anything about that, did you?

A. Not to my recollection certainly. I presume, once again, just being I am trying to be helpful, Mr. Coughlan, that the 24th I don't know what day of the week it was, but I presume if the Dail was in session, the Government meeting was on Tuesday, presumably the 24th was a Tuesday. It's possible that the Minister said, "Can we not do it at this week's meeting?" In other words, is but once again is I personally wouldn't interpret that as pressure. Now, I have no memory of that, but I personally wouldn't interpret that as pressure.

Q. I am not talking about pressure. I am talking about, you didn't know because you were awaiting the outcome of the result, isn't that correct, yourself?

A. Correct.

Q. Just in that context, nobody the Minister wasn't talking to you, you were awaiting the outcome of the result, and you were quite happy because you knew things were within the critical path?

A. Yeah.

Q. Now, on the 23rd October there is a record here, quotes "Informed that the Taoiseach had requested Secretary to expedite the position with a view to clearance of Government the following day."

Do you remember receiving any communication from the Taoiseach?

A. If that had happened, I would remember it. Now, of course Mr. Bruton had spoken to me when I was Secretary of the Department, but if he had made a request like that to me, there is no way I was going I'd forget it. I am sure Mr. Callaghan wrote that in, clearly, and that is his recollection of somebody saying that to him, but it's quite inaccurate. It's not correct.

Q. Well, sorry, it may be accurate that it was said to him. You are saying that the Taoiseach the content is inaccurate. Do you understand?

A. The Taoiseach wasn't in touch with me over this issue

at all.

Q. That's just what I wanted to

A. The Taoiseach was not in touch with me over the GSM issue.

Q. Again, I don't wish to be in any way disrespectful, and of course you have stated that from some of the matters which are recorded, the Minister was in communication with people, you being bypassed?

A. I know you don't mean that in a pejorative sense actually.

Q. Not at all.

A. Mr. Lowry worked through me in his two years.

"Bypassed" seems to infer that somehow he was putting me on the sidelines. He wouldn't have consciously done that, I believe. And nor would I have let a situation like that grow in any way, because it wouldn't have been the correct way to do business.

But I am just saying it is possible, and I am being helpful in this event, when I was on leave, that because it was a live issue perhaps in his mind, he wanted to know how things were going, that he discovered, can I put it this way, he knew the telephone extension, perhaps discovered for Mr. Brennan or Mr. Towey.

Now, Mr. Brennan was a significant player in the Department, in any event, and would see the Minister from time to time. So in other words, this is



scarcely surprising, so if you find me slightly prickly on the bypass issue, it's only it wouldn't have happened in any sort of extensive way, let me put it that way.

Q. I just want to draw your attention to something else, and ask you does you obviously weren't aware Divider 135, in the same book. This is Mr. Jimmy McMeel of the Department of Finance sending a note to his Minister, you can see that?

A. Mm-hmm.

Q. "Subject: Competition for the award of the second mobile phone licence.

"David Doyle mentioned to you last week that the result of this was imminent. MTEC had intended to bring the matter to Government today, but will not now do so. The reason is that the Project Team, of which I am a member, has not finalised its work with respect to the consultant's report."

Again, could I take it that you had no knowledge of this?

A. I had no knowledge of this whatsoever, but I would draw two things from it; one is that regardless, perhaps if the Minister had either wished to or had intentions to bring the matter to Government sooner than the team was ready, that was not going to happen, number one. And number two is, Messrs. Doyle and McMeel, even though it's not explicitly stated on

this, could have blocked such a move in any event, in my opinion.

Q. I understand that. And the note is significant, and it doesn't say MTEC, it says MTEC, do you notice?

A. I notice, yes.

MR. COUGHLAN: I was just going to, for a moment, turn to just a portion of the Evaluation Report, but it's virtually four o'clock, Sir, and

CHAIRMAN: Yes, we won't start that, then, until eleven o'clock in the morning. While it's in my mind, something that's probably an obvious answer for you, Mr. Loughrey. I think you had referred to the collective period of your illness and the succeeding American holiday, and that you had your mobile phone, that only a very limited number of top colleagues could contact you only in a really critical situation. I take it Mr. Lowry would have had your mobile number, but from what you have said, may I take it he didn't contact you during your period away from the office?

A. Chairman, I didn't mean to mislead. When I was away, it's my fault for causing the confusion, I didn't even bring my GSM phone with me because it wouldn't have worked in the USA. There are phones that are actually very expensive, but will take all systems, but what I did do is, at my initiative, I would call my private office periodically to make sure. Now, even though we had a touring holiday, there were fixed points at

cities and hotels, they could have got in contact with me. But there would have been days I would have been out of contact all together until such time as I called the office back, so nobody but my office, through a fixed itinerary could have got in touch with me, and I am not aware that the Minister would have had an itinerary, but no doubt if it were urgent enough he could have got it through my office, but in the event it didn't occur.

CHAIRMAN: Very good. Eleven o'clock tomorrow.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,  
FRIDAY, 21ST FEBRUARY, 2003, AT 11AM.