

A P P E A R A N C E S

THE SOLE MEMBER: Mr. Justice Michael Moriarty

FOR TRIBUNAL: Mr. John Coughlan SC

Mr. Jerry Healy SC

Ms. Jacqueline O'Brien BL

Instructed by: John Davis

Solicitor

FOR THE DEPARTMENT OF

COMMUNICATIONS, MARINE &

NATURAL RESOURCES: Mr. John O'Donnell BL

Mr. Diarmuid Rossa Phelan BL.

Instructed by Matthew Shaw

Chief State Solicitors Office

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

Mr. Gerry Kelly, SC

Instructed by: Eoin O'Connell

William Fry Solicitors

FOR TELENOR: Mr. Eoghan Fitzsimons, SC

Ms. Blathna Ruane, BL

Instructed by: Kilroy Solicitors

FOR MICHAEL LOWRY: Kelly Noone & Co.

Solicitors

OFFICIAL REPORTERS: Mary McKeon and Viola Doyle.

I N D E X

WITNESS: EXAMINATION:Q. NO:

JOHN LOUGHREY Mr. Coughlan 1 - 265

THE TRIBUNAL RESUMED AS FOLLOWS ON FRIDAY, 21ST

FEBRUARY, 2003, AT 11AM:

CONTINUATION OF EXAMINATION OF JOHN LOUGHREY BY
MR. COUGHLAN:

Q. MR. COUGHLAN: Now, Mr. Loughrey, I think you told us yesterday that you read the Evaluation Report perhaps a day or two after the matter had concluded in terms of the announcement of the result and the matter going to Government?

A. That's correct, Mr. Coughlan.

Q. And I just want to bring you to the, to that particular Evaluation Report, and just refer you to a small portion of it really.

A. By all means.

Q. And I think if you go to Book 46 at Tab 50.

A. Yes, I have that now.

Q. And if you then go to page 44 of the report.

A. Yes, I have 44 now, Mr. Coughlan. Mr. Coughlan, perhaps I could preface this by saying, I know from yesterday you understand that I had obviously no direct responsibility for this report, no input into it, and while I am happy to respond as best I can to any question, clearly it's one that, where I was effectively an outsider to this report.

Q. I understand that, Mr. Loughrey. I am not going to ask you to interpret or give an opinion in relation to the report at all. What I just really, and perhaps I don't need to read all of this out to you, but what I

really am bringing to your attention is that what you would have gleaned from the report was that certain matters had to be put in place in the licence negotiations affecting the financial position regarding this particular position consortium, insofar as it related to the weakness or the lack of financial capability or capacity of Communicorp?

A. That's fair, because that would be looking into the future.

Q. Isn't that is that what you would have gleaned from

A. That's what I would have gleaned, yes.

Q. If we just so then go to Appendix 10 of the report.

A. Yes, I have that now.

Q. And you see, "Supplementary analysis on financial risks", and I'll read the first

A. Which page?

Q. Sorry, I beg your pardon, it's page 1 of Appendix 10.

It's at Tab 51.

A. Yes, I have that.

Q. And "Introduction":

"As stated in the main Evaluation Report, the two top ranked consortia have members who presently do not have the capital required to finance the GSM II network.

"The consortia members who thus need capital for the funding of the GSM II consortium have 'secured' this

capital by various instruments, including the Shareholders' Agreement and letters of commitment from investors.

"This analysis discusses the risks due to lack of funding. It further suggests means to close the uncertainty related to financing.

"The risk analysis includes a brief assessment of A2, A4 and A6, and a more detailed assessment of the top three ranked consortia, A1, A3 and A5."

So, if you then go to page 5, and this is the assessment of A5, I think, isn't that correct?

A. That's correct, yes.

Q. And the consortia members of A5 and their share distribution of the existing corporation, Esat Digifone, is as follows:

"50% Telenor Invest.

"50% Communicorp."

And then 34% of Communicorp held by Advent International.

"At present Telenor has the current assets of 550 million. The financial strength to provide the necessary financial backing of its wholly-owned subsidiary of Telenor Invest.

"Communicorp is a new company which has invested heavily in telecommunications infrastructure, and has a very weak balance sheet which needs capital injection before it can support the shareholders'

equity commitments stated in the Shareholders'

Agreement."

And then if you go over, there is a box, do you see that? "Note on the Shareholders' Agreement", and it sets out various notes from the Shareholders' Agreement, and then I'll continue on down under the box, if I may.

"In the period after a licence award, Communicorp will have between 40% and 50% of the shares. This may be diluted to 34% at a later stage, where up to 32% of Esat Digifone's equity is made available to public or institutional investors. Even with only 34% shareholding, the financial commitment of the two original partners will be high. The applications did not include a sensitivity analysis regarding these figures, but the sensitivity analysis regarding the cashflow shows that the minimum accumulated cashflow increases numerically from minus $\text{€}108$ million to minus $\text{€}156$ million in the event of that two-year delay of subscriber up-take. Although this figure represents a possibly unrealistic event, a combined set of events influencing the business case in a negative direction could lead to a situation where the need for finance is 50% higher than the base case. $\text{€}52$ million is used as the base case requirement, and if 1.5×52 million is used as the worst case equity requirement the individual equity commitment for Telenor or

Communicorp amounts to" and then it sets out, having conducted that particular test, what the requirement is.

A. I think that page actually shows very clearly that the and while this was drafted by Andersen, it was considered and bought in by the PT GSM, that in aggregate, there was no pulling back from a very rigorous assessment. It showed, for instance, that Esat Digifone, it showed in terms of sensitivity analysis, for instance, had been a delay and they take a possibly, as they say unrealistic one, but they show how much the solvency crisis would arise and how quickly. So in other words, they didn't pull back from a very rigorous assessment, and equally in the box, I think just in scanning the page, just to be of help, is perhaps it might be helpful just to say that in that context they didn't perhaps regard the lock-in of the so-called four financial investors quite in the same light as perhaps it might have been portrayed later. In other words, they are saying here, Telenor and Communicorp have agreed to choose two or more of the following four companies, and further up they say the "inclusion of new shareholders", plural, and then in parenthesis, "where four are mentioned by name". Once again, all of that carries, I believe, that of course financial investors are vital, because the second half of the page shows just how vital they are.

But the actually the actual identity of the financial investors doesn't seem to be quite locked in in the box above, let me put it that way.

Q. I understand that. That's in relation to an assessment of financial matters and financial capacity, it's not an ownership issue?

A. No, of course I agree.

Q. We have been through that before and I don't think we need to go over it.

A. Yes, quite.

Q. Now, in fact I can tell you that that particular information in that box comes from the draft Shareholders' Agreement which accompanied the bid document, and they were named in that draft Shareholders' Agreement. I just tell you that.

A. I was unaware of that. I had never seen that document.

Q. And of course, we know what was said at the presentation because we have seen what was said at the presentation.

A. I accept that.

Q. Now, if I continue, "The equity commitment cannot be met by Communicorp today. According to Letter of Commitment to the Department of Transport, Energy and Communications, dated 10th July, Advent has committed to fund up to £230 million in support for Communicorp's 40% shareholding. The Letter of Commitment does not

clearly state what the 'price' would be if the commitment should be brought into life, but according to the presentation the price would be close to a 75% stake in Communicorp.

"Furthermore, according to the information given in the presentation, the control will still be in the hands of Irish investor (Denis O'Brien) as his share bear a three times higher voting power.

"The legal basis for this commitment has not been included as the part of the applications supporting material. Taking into account the very high proportion of Communicorp's intangible assets most of this is goodwill. The risk of a dispute about the share ratio between O'Brien and Advent seems evident.

"This may result in a situation of instability or a situation where the control of Communicorp is transferred to Advent. It could also lead to a situation where the commitment of Advent cannot be fulfilled.

"The size of the commitment by Advent does not cover the worse case estimate of the equity requirements at a cost of 50% ownership for Communicorp. In a worst case scenario the requirement for further funding is expected to arise two to three years into the project.

At this stage, Advent will already have invested the committed figure, and it is judged to be very unlikely that Advent will retreat, as this could lead to a 100%

loss of the invested funds. Therefore, it can be concluded that the major risk is related to possible instability of Communicorp or to the transfer of power to a non-telecommunications investor.

"This uncertainty can be limited by an appropriate set of licence conditions, as example the following types of conditions are suggested:

" Requirements regarding the share of ownership and voting powers in Communicorp.

" Requirements regarding the equity of Communicorp."

So you can see there that, as you say, the report, whilst prepared by Andersens, carries out this particular analysis, which is the analysis of the Project Group in relation to the financial position of Communicorp?

A. It shows, I think in short, that they were wide awake to all the potential difficulties.

Q. They were looking at it?

A. Yes.

Q. But there can be little doubt about that, from your reading of that and your acceptance of its contents, that these evaluators had taken on board what had been submitted in the bid to them, namely the institutional investors and Communicorp receiving funds from Advent, isn't that correct?

A. I think crystallises in one sentence at the bottom page, "This equity commitment cannot be met by

Communicorp today." Nothing could be clearer, that they were totally aware of what the essential weakness was, but Andersens and the group fell back on the so-called "deep pockets" theory, and that applied to everybody it. It equally applied to the second placed consortium as well.

Q. First of all, if we look at this particular analysis, the analysis that is being carried out here sorry, it's just something that has been brought to my attention that I should bring to your attention.

If you go to the box, which is an analysis of the draft Shareholders' Agreement, and if you go to Point 4, "A condition for the inclusion of new investors is the need to agree with the principles of the Shareholders' Agreement." And I think the note that I am asked to consider your view as to whether that relates to financial rather than ownership or a new investor?

A. Perhaps you'd put that to me again, Mr. Coughlan, to make sure I fully understand.

Q. I am trying to fully understand it as well. "A condition for the inclusion of a new investor is the need to agree with the principles with the principles of the Shareholders' Agreement."

A. I think that would be almost self-evident.

Q. I think what the question that I am asked to pose, that that envisages new investors?

A. Yes, of course. I think that's I think the box, therefore, is redolent of an openness to say that while four had been good enough to come along and give this indicative report for the 20%, this was not the end of the matter, and it wasn't exclusive, because clearly there are three indents there that would suggest that there was no particular lock-in in the four institutional investors.

Q. I understand your point. The Tribunal is aware, of course, that there was no this was a draft Shareholders' Agreement. It was not a Shareholders' Agreement. It was submitted with the bid. The presentations were made as well.

A. Of course.

Q. And we know what was said at the presentation.

A. So, am I to understand that this was a document that accompanied the bid on the 4th August?

Q. It accompanied the bid on the 4th August. It being, perhaps to use your own term, an indicative Shareholders' Agreement, might be the way one might describe it?

A. Fine.

Q. What I really wanted to ask you about was what was being considered sorry, what was considered was the information that was put before the evaluators. There is no doubt about that, and you can see the type of analysis they are carrying out, and they are

considering the situation of Communicorp in the context of what they understood to be the commitment of Advent to invest in Communicorp. That's the analysis

A. They understood that, but equally they understood actually that the Advent from my reading of it, I haven't discussed it with anybody in that sense, but it's clear from this draft, and this is the final document, obviously, it's not a draft. It's clear that they understood that there was there were elements, at least elements of possible conditionality, because a private equity house, while it may give an indication of support, if pricing isn't agreed, in other words, what does our money what shareholding do we buy in at and for what price actually? There must be, by definition, an element of conditionality. And they go on to say the risk of dispute. I think that might sound pejorative there, but I can't imagine any such, if I may say so, negotiation between a private equity house and an entrepreneur that doesn't involve, let's say, to-ing and fro-ing that could be regarded as a dispute. So what I take from that is that the committee are recognising, or Andersens on behalf of the committee, and agreed by the committee, are understanding that even then the comfort supplied by the Advent letter has to be looked at in a circumscribed way.

Q. Well, we know what was said at the presentation, don't we?

A. I am not sure I recall I am not trying to delay the Tribunal.

Q. I will just paraphrase so.

Mr. Denis O'Brien informed the evaluators at the presentation that there was an irrevocable commitment from Advent to fund up to $\$230$ million in relation to this particular project, that had participation to enable Communicorp to participate in its equity participation in the project. He gave a long explanation to the evaluators, that notwithstanding the amount of money they were putting in, that there was, in fact, an agreement as to what their shareholding would be in Communicorp and what the voting rights would be in Communicorp vis-a-vis himself and Advent, and that they had a three-to-one, he had a three-to-one voting superiority.

A. I recall that, you jogged my memory.

Q. You recall?

A. Yes.

Q. And then the evaluators were receiving this information and Mr. McMahon interjected and said, "Is there an agreement?"

A. I recall that now, yes.

Q. And Mr. Denis O'Brien said, "Yes". Do you remember that?

A. I do, I do indeed.

Q. So am I not correct, then, in understanding that what is being referred to sorry, that it would be a correct understanding of what is being referred to here, is that that would be tied down in the licence itself?

A. Yes, that's fair.

Q. I think I think that's the situation anyway, as I understand it. So the analysis is being conducted on the basis of the information that was made available to the evaluators?

A. Correct.

Q. And of course, they did not know it, but unfortunately that was not the true or correct position as of the time this analysis was conducted?

A. I take your word for it, Mr. Coughlan. I am not sure when this analysis was done, but it would have been done post presentation.

Q. Post presentation.

A. Yes.

Q. Now, I don't want to ask you to deal with any other aspect of the Evaluation Report at the moment, Mr. Loughrey. But after the matter had gone to Government, I think that there was a meeting, and I'll just Book 43. Tab 150, I think. And it's the initial meeting on the GSM licence discussions

A. Yes.

Q. held on the 9th November. You can see who is in attendance, people on behalf of the Department, and Mr. Andersen is also present, and then you can see Mr. O'Brien and members of his team, and people from Telenor as well, and I think

A. It's pretty much a full line-up.

Q. Yes. "Mr. Brennan opened with a statement outlining the Department's position as formally agreed at a Departmental preparatory meeting. The position was clarified in a letter issued to Esat Digifone on the 13 November, 1995.

"2. DTEC's legal representation was to be in place shortly.

"3. Mr. Denis O'Brien indicated that Esat Digifone had fully committed to fulfilling the promises in its application and was eager to complete the discussions this side of Christmas 1995.

"4. Key points raised were:

" Technical discussions to be handled separately.

The impact of telecoms liberalisation as it developed in the EU. Ireland was discussed briefly.

It was noted that Esat Digifone had taken a no reservation position regarding the draft licence at the presentation in September, but that Esat Digifone would now propose more specific recommendations for some of the more general terms

in the draft licence.

"5. Mr. Michael Andersen outlined the elements of the Esat Digifone application which were to be included in the licence, based on the document prepared by AMI previously.

"6. Discussions at some length focused on the question of tariffs in the licence, and for Esat Digifone to retain a certain amount of flexibility in this regard. It was agreed that the tariffs in the application were regarded as a ceiling, not a floor. Mr. Andersen requested Esat Digifone to elaborate on this statement in their application which made a commitment to tariff packages, with certain provisos in relation to economic developments, etc..

"7. The meeting finished with a discussion on Esat Digifone's difficulties with planning permission and Denis O'Brien proposed that the Regulator intervene at this point. Martin Brennan said that DTEC would be as helpful as it could be at the appropriate time.

Michael Andersen later clarified that DTEC should come to a policy position on this.

"8. Martin Brennan and Denis O'Brien agreed in principle that the media should only be told that the discussions were ongoing, and that details of the matter being discussed should not be released to the public.

"9. It was agreed in principle that another meeting

would be held in ten days. Denis O'Brien to contact Communicorp."

Now, if you go to No. 5 there, "Mr. Michael Andersen outlined the elements of the Esat Digifone application which were to be included in the licence, based on the document prepared by AMI previously."

Now, that particular document seems to be, according to Mr. Brennan, the document at Tab 131.

Now, again we have been through this particular document with Mr. Brennan, so I'll just this particular document of Mr. Andersen's describes the consortium at that stage as being 50:50, and then on the award of licence, what the situation would be.

Now, the only question that I want to ask you, because Mr. Brennan didn't know it, but that at the time of this meeting Mr. Brennan had no knowledge that the true composition of this consortium was now 37.5:37.5:25% as of the date of this meeting?

A. Can you help me because I can't read when this document I can't find a date

Q. I have explained to you the situation, Mr. Loughrey. What I am asking you is, the question is this:

Mr. Brennan did not know as of the 9th November, 1995?

A. Oh, the 9th November, I beg your pardon. I thought it was the date of this document, sorry.

Q. That as of the 9th November, 1995, that the true composition of this consortium was 37.5:37.5, and 25%.

Can I take it that you didn't know of it as of 9th

November, 1995, either?

A. I had no such knowledge.

Q. And it is

MR. McGONIGAL: Mr. Chairman, I think that should be

put on the basis of the true intended composition once

the licence was granted, because all of the

MR. COUGHLAN: I spent all yesterday morning dealing

with that particular situation. We know when the

shares were allotted, and we know what the true

position was as indicated by all of the shareholders

in this particular matter.

CHAIRMAN: I think I have your point, Mr. McGonigal,

and I won't neglect it, that you have alluded to the

element of conditionality, and obviously the overall

position must be assessed in that regard.

MR. McGONIGAL: No, I fully appreciate that. I am not

trying to be difficult, Mr. Chairman, it's just that I

think that to put it on the basis that the true

position, implying that the ownership had actually

changed, is incorrect, and I think the proper position

has to be put on the basis in which existed. In other

words, there was a conditional agreement in place at

that time which intended that if certain other things

took place, the share ownership would change in the

way in which the documents indicate, because there are

a number of caveats to all of those, the major one

being the fact that the licence had to issue. And we must remember that at this stage of the process, all that the consortia were entitled to was the right to negotiate. So if those negotiations weren't concluded successfully, the arrangements would not come into being. That would be one of the first conditional problems that we have to recognise. And the other conditional problems are problems which arise within the documents themselves, which the Tribunal is aware of, because they have read it.

So that to my way of thinking, I may be being over-cautious, my concern is simply that no one should get fixed in their minds the idea that the ownership had actually changed in any way other than in a conditional way if certain events took place. And I think that's important. Because clearly the Department were recognising all the way through here, and it's clear from the documents, that it was a 50:50 ownership at that time.

CHAIRMAN: Well, I will certainly take those points on board, Mr. McGonigal. And indeed Mr. Loughrey has alluded to elements of conditionality at various stages, but I suppose it is fair comment from the information that has been made available, including that made available from your solicitor, that the principal persons involved in their discussions in correspondence at that time were scarcely talking in

terms of 50:50 or 40:40:20, but it's all part of the

overall matter continued. It won't be neglected.

Q. MR. COUGHLAN: If we can proceed from that, Mr. Loughrey.

You had no knowledge as of the 9th November of the 37.5%:37.5%:25% nature

A. Until April 1996 I hadn't any inkling of any kind.

Q. And you were not told as of this time that, in fact, there was no agreement which committed Advent to funding Communicorp's equity participation in Esat Digifone either. You were not told that at this time?

A. Once again, Mr. Coughlan, apologies. Perhaps you can put that to me again so I can be absolutely clear in my answer.

Q. We know what was said at the presentation that, there was an agreement?

A. Yes.

Q. You were not told as of the 9th November that there was no such agreement?

A. I had no such knowledge. I had no such knowledge of the presentation, I had no such knowledge my only knowledge of Advent was, I think, a sheet of paper at the time, at October 25, that it was one of the so-called institutional investors, that they had a role. Other than that, I had no idea whatsoever.

Q. Now, did you have any hands-on involvement in relation to these matters at this time?

A. Absolutely none. When I had when the announcement was made, when the Government memorandum went through on the 26th, when I got my copy of the decision from the Cabinet Secretariat, I did read the report at that time. I saw there was, to some extent, I won't say a road map, but there were sign-postings in the report, what had to be done, broadly speaking, to conclude successful licence negotiations, if not with, on a satisfactory basis with the Digifone consortium, then you know, it would cascade down to the number 2 on the list and number 3. I saw, in fact there was a broad road map. There was signposts required, particularly for the first one, and I read that at the time. And then I moved on to other things. I had I am trying to say had I any? I had a general awareness, I think in, and I have now since found that was on the, I think it was the 18th November, there were press reports that IIU had taken over the role of Davys as arranger. I may have spoken to somebody at the time, but once again I just it was something that I had just noted more than anything else, and I don't believe I had any role whatsoever until April

Q. April/May?

A. April/May of 1996.

Q. Because I was just going to come on to those press reports now. And I think you are correct, they are both on the 18th November, one was in the Irish

Independent, it was a Saturday, and the other was in

the Irish Times

A. I knew there were two, but I actually only saw the

Irish Times' one.

Q. I'll give you a copy. I think we'll deal with the

Irish Independent one first. And then under the

heading, "Desmond firm advising Esat Digifone on share

placing."

And it reads:

"A financial services company owned by financier

Dermot Desmond is advising Esat Digifone on the

placing of 20 percent of the consortium's shares with

institutions and other investors, it emerged

yesterday.

"A statement from Esat Digifone the winner of the

second GSM (global system mobile) phone

licence said Dr. Michael Walsh of the IFSC-based

International Investment and Underwriting has been

appointed to advise the consortium on this aspect of

its financing.

"A spokeswoman said that IIU would arrange the placing

of 20% of the group's shares, but she declined to

comment on reports that Mr. Desmond's company would be

underwriting this sale.

"There was speculation last night that Mr. Desmond

himself, or some of his companies, was likely to take

up some of these shares.

"IIU was established by Mr. Desmond to deal with a limited number of clients in selected investments, and probably trade its own capital. The spokeswoman said the identity of the investors would be revealed in a few weeks time.

"The day after winning the GSM licence, Esat Telecom Chairman, Denis O'Brien, said the shareholding in Esat Digifone was 40:40:20 between Esat Digifone, the Norwegian State phone company Telenor, and unnamed investors.

"He said that overall investment was underwritten by Esat and Telenor.

"Mr. O'Brien has consistently refused to be drawn on the identity of the other investors in Esat Digifone. He said on winning the licence that the funding was there, but that 'Institutional investors don't write cheques until they see the terms of the licence.'

"It is not clear that the present market value what the present market value of the 20 percent stake in the consortium would be worth.

"Mr. O'Brien has said the group will invest around 100 million in building a network.

"Given that he also said the debt equity ratios in the business usually ranged between 50:50 and 40:60, a 20 percent stakeholder might be expected to invest a minimum of $\frac{1}{2}$ 10 million in the group.

"Any investor is likely to have to pay a premium to

reflect the expected revenue generating potential of the licence.

"The consortium has also said that it would consider floating 20 percent of its shareholding in about three-years time, depending on the state of the market, giving investors an opportunity to cash in their gains if the licence proves as successful as expected.

"The news that IIU will be advising Esat Digifone comes only a couple of weeks after the announcement that Mr. Desmond had purchased London City Airport in a 23.5 million Sterling deal. He has also made a $\frac{1}{2}$ million investment in Glasgow Celtic for a 10 percent shareholding."

That was the Irish Independent article.

The Irish Times article is on the second it's on the lower half of that Business and Finance page. And the heading is, "Desmond company to handle Esat sale."

"Mr. Dermot Desmond's financial services company has been appointed to handle the sale of a 20 percent stake in Esat Digifone, the company which won the second mobile phone licence.

"The Chairman of Esat, Mr. Denis O'Brien, last night confirmed that Mr. Desmond's company, International Investment and Underwriting Limited (IIU, had been appointed as advisors for the sale of the stake.

However, he would not comment on industry sources'

belief that Mr. Desmond or one of his companies has purchased a portion of those shares.

"When the 20 percent stake is placed, Mr. Denis O'Brien's holding company, Communicorp, will have a 40% stake in the company. The remainder will be held by the Norwegian telecommunications company, Telenor.

"Esat Digifone is estimated to be valued at $\text{€}100$ million.

"Last month Mr. Desmond paid 14.5 million for London City Airport. Given that the airport was originally on the market for 30 million, Mr. Desmond is seen to have driven a hard bargain in the deal.

"Mr. Desmond is perhaps best known as the man behind NCB Stockbrokers. He sold his stake last year. He has since invested $\text{€}4$ million in Glasgow Celtic Football Club. Esat expects to begin providing a Nationwide mobile phone service by the end of next year."

Do you recall those articles?

A. When I sort of wanted to jog my memory, the Department got out for me boxes of press cuttings, and I had tracked down the Irish Times one, but equally ^Shane Coleman has written an insightful article as well.

But I am familiar with the Irish Times one because I read it only in the last week or so.

Q. I think you did inform us, I think you did inform us that because you were a business Department, it was

your practice to particularly scan business pages of the papers

A. I would have seen the Irish Independent at the time, clearly, oh clearly. And by way of comment, if you look

CHAIRMAN: I would say the top of the page shows it wasn't the only item on your menu.

A. Quite, and American Airlines coming into Dublin as well at the time. In other words, if it didn't require media attention I presumed it was being looked after further down the Department. I mean to say, we did have a policy of delegation in the Department. I am not sure, to be honest, whether I discussed those news cuttings that I would have seen at the time with anybody. I may well have done so, but I am not sure, to be honest, at this stage. But I think, in essence what I am saying, Mr. Coughlan, is that they didn't particularly perturb me at the time, because I knew the negotiations were going on. They were in good hands, and I presumed that the change, the only definite change in that is that IIU had replaced Davys as arrangers. They would arrange the placing. I didn't particularly think that it required follow-up on my part at that time.

Q. MR. COUGHLAN: There is no record in the Department of the Department ever being informed that IIU were to replace Davys for the purpose of placing the shares

with the institutional investors.

A. I think I am aware of that now from the Tribunal papers, but I wasn't so aware at the time. I might have presumed at the time by definition, because there were ongoing contacts with Esat Digifone over the licence, that this would have been perhaps a normal courtesy to even let the Department have that information. But

Q. We are not talking about normal courtesies here, Mr. Loughrey. This was a process. This was conducting public business. This was a serious matter. This wasn't some private little operation.

What was involved here was the process leading to a situation where somebody was entitled to enter into exclusive negotiations leading to the award of a licence for the second GSM, isn't that right?

A. Mr. Coughlan, I agree entirely, it was a serious transaction, but I am sorry if that carries the inference that that newspaper report was a show stopper, I am afraid I can't agree with that. For the simple reason, Davys, or IIU, simply as arrangers, carried no role whatsoever in the licence other than as a facilitator for the third party finance.

Q. I wasn't talking about that aspect of it being a show stopper, Mr. Loughrey. What I was asking you about is, it's not a question just of a normal courtesy.

The Department should have been advised of a change

even in that?

A. I think I could even if that didn't happen, I think even with hindsight, Mr. Coughlan, I could overlook that, because people could well believe that an arranger of third party finance would be, if I may say so, it's a professional service. If, in fact, they had changed to Arthur Cox and A&L Goodbody, for instance, as their solicitors, I am not sure, once again, that's of sufficient import to make it something of a federal case, if I may put it that way.

Q. What did you understand IIU to be? We know from Mr. Walsh that the company was set up in August of 1995.

A. I had understood IIU, because once again I have no record of this, but I'd be surprised if I didn't know that IIU was going to be an investment vehicle; it was going to be a hybrid vehicle, as I understood it, and it would have to feel its way along what particular emphasis it would give to its role. I presume straight away because, for instance now, I never put this to Michael Walsh, but as he was an esteemed professor of banking in UCD and an expert on regulatory matters, that by definition it would have had a Central Bank licence, presumably an intermediary or investment licence. So in other words, I didn't go into the investigation of an arranger as such. Somebody who could act as a facilitator for a private

placement was a professional service, but I wouldn't have ranked it as anything that was fundamental to the licence negotiations.

Q. Right. You must have had some discussion with Mr. Walsh or Professor Walsh after these particular articles, although the Department wasn't notified officially?

A. As I said, from time to time I may have been in touch with Michael Walsh, either by way of lunch or by way of phone call, or I might have encountered him on a Saturday in a shopping centre, and we would have had words. But I can't remember anything of significance passing between us about the licence negotiations or IIU's role. And perhaps because I just saw it as a facilitation role. I didn't I had no reason to believe that IIU were as involved as you have pointed out to me now. I had no reason to ask him because I didn't know.

Q. Although there is speculation in these particular articles, isn't there, that there was a greater involvement than that of just an arranger or a placer. There is speculation in these articles as to whether Mr. Dermot Desmond is an investor, isn't that right?

A. Mr. Desmond is not a dull figure in the world of finance, and his very presence in any deal gives it a certain colour and provides good copy, if I may say so, for newspapers. So I would have seen it in that

light I think, but I am so I am not I didn't presume that that speculation was based on fact. I am not so aware that I pursued it on that basis with Michael Walsh, let me put it that way.

CHAIRMAN: I think you referred some days ago, Mr. Loughrey, to your surmised conversation with Mr. Walsh being on the lines of you making a somewhat whimsical observation, that while the new kids on the block seemed to have wiped the eye of the old establishment in Davys. I think that may have taken place?

A. Mr. Chairman, I think it would have been along those lines. That is my sense of any contact I had at the time.

CHAIRMAN: But Professor Walsh didn't expand the picture in the course of that?

A. No, he didn't. He did not, no.

Q. MR. COUGHLAN: Would it have not, if one was of the view, or understood that this was changing the placer or the arranger, given you cause for thought that there may be some difficulty in arranging the finance, or did that occur to you?

A. When I saw the when I saw once again, it's my impression at the time around October 25 that I was informed of who the investors were. I knew, I suppose from experience, that they could have only given indicative offers at that time, and it may have

occurred to me, and this is not a slight on Davys in any way because they are a premier brokerage in every sense of the term, but that perhaps IIU might have brought fresh thinking to the placement. I didn't perhaps now in retrospect it's remiss of me. Perhaps from first principles I might have devised something, but at the time it didn't occur to me, Mr. Coughlan.

Q. Okay. That's fair.

Now, if you go to Book 49, Tab 91, please.

A. I am as far as Book 49, Mr. Coughlan, I didn't catch

Q. Tab 91. This is a letter that Mr. Kyran McLaughlin wrote to Mr. Denis O'Brien on the 22nd November. It's after the articles appear.

A. I see.

Q. And the letter reads:

"Dear Denis,

"Further to our telephone conversation last Friday and the subsequent announcement in Saturday's newspapers concerning the involvement of Dermot Desmond's company, International Investment and Underwriting Limited, in the financing of Esat Digifone, I thought I would write to you setting out my understanding of some of the issues which have been raised.

"When John Callaghan and yourself asked me last April if Davys would get some institutional investment

interests to support your application, I said it would be difficult, as the eventual financial terms of the licence were unknown, and it would be difficult to put a precise financial proposal to potential investors." That was, of course, before the cap emerged in respect of the licence.

A. Yes.

Q. "However, Tom Byrne and Paul Connolly prepared an information memorandum and an investment proposal, and we secured three institutional investors prepared to commit $\frac{1}{2}$ 8.5 million in support of your licence application in early June. The commitment was conditional on your consortium acquiring the licence on financial terms acceptable to the institutions" that is acquiring the licence. We now know it was a cap of $\frac{1}{2}$ 15 million "But this condition was not seen by yourselves at the time as one which could make your application financially unacceptable. As you are aware, a large number of financial issues were not finalised when the institutions made their commitment, in particular the size of the bid by your consortium and the consequent debt/equity ratio of the consortium. Therefore, it was difficult to get a firm, unqualified commitment from early June from the investing group.

"When John came to see me on Friday 29th September, he told me that you had advised about the financial

element of your package was not sufficiently strong to allow Esat Digifone to be awarded the licence. That you were negotiating with a financial party who could provide the stronger financial backing necessary to be awarded the contract. He did not tell me who had provided this advice, nor the identity of the stronger financial party. He asked me if I would ask the three institutions who had made the previous commitment if they would step aside so that the 20% to which they would have been entitled would be available to the investor who was prepared to provide firmer financial support.

"Even though we both recognised that this was embarrassing, I did notify each of the three parties that you were asking them to step aside to make way for a financial party which was prepared to put forward a stronger financial commitment. It has now emerged that this investor was IIU, which appears also to have been appointed to handle the sale of the 20% stake.

"A number of questions are likely to arise from the institutions who had made a commitment to Esat Digifone in June:

"A. Why were the original investing group not asked to make a stronger financial commitment along the lines that have been offered by IIU, if that was necessary, given that by 29th September, a maximum

price of €15 million had been established for the licence and discussions on the application had clearly taken place with the Department, and possibly the assessors.

"B. Was information available to IIU that was not available to the original investing group at the time they were asked to step aside?

"C. At what stage were the Department of Communications and the assessors told of the changes in the institutions providing finance to the consortium?

"In addition, the news media have asked us why Davys is not involved in raising funds, as it is common knowledge that Davys were involved in the original application. I do not discuss our clients with the media, but you will appreciate that the current media presentation may be damaging to our reputation.

"I believe it is important to reassure the financial institutions that made the original commitment that they were treated fairly. They will be particularly concerned if the 20% stake is resold to other investors at a significant profit over a short period of time.

"It would be helpful to me if you could let me know your response to the issues raised above, so I can provide them with reassurance."

So you can see that Mr. O'Brien had a conversation

with Mr. McLaughlin on the Friday, the articles appear on the Saturday. And I suppose the significant aspect is the three questions posed by Mr. McLaughlin on the second page.

A. Clearly Mr. McLaughlin was put in a very difficult position.

Q. Yes, but fairly pertinent questions, you would agree, and particularly (C), "At what stage were the Department of Communications and the assessors told of the changes in the institutions providing finance to the consortium?"

Of course the Department was never told, isn't that correct?

A. The Department was never so informed. I think equally on (A) and (B), I wouldn't like to I am sure it's not in your mind, but I wouldn't like the Tribunal just to think that the 15 million, once that the cap had been, so-called cap had been imposed that that would have cleared the way for financial institutions to sign on, because there were a myriad of other uncertainties

Q. Mr. Loughrey, I am sure other people can advocate or give their views about their understanding of their financial position. All I am asking you is, as Secretary of the Department at the time, you were not informed of the question raised by Mr. McLaughlin in (C) there, "At what stage were the Department of

Communications and the assessors told of the changes in the institutions providing finance to the consortium?"

MR. O'DONNELL: He is entitled to comment on the questions that are raised in the three questions, (A), (B) and (C), and he is entitled to comment on them.

And the Tribunal can attach such weight as it sees fit to his answers, but he has been asked to comment on the pertinence of these questions, and he is entitled to give his answers. He has been treated courteously to date, and I hope this isn't going to change in any way. He has given helpful, what I hope is helpful advice, and the Tribunal may choose to ignore it, of course, but he is entitled to answer without being effectively stopped or gated in some way.

CHAIRMAN: All right. Complete your answer as you think fit, Mr. Loughrey, if there is something you wish to impart.

A. No, and I would sort of recognise the concern of my Council, but equally, Mr. Coughlan, you quite correctly had directed me to see, and perhaps I shouldn't have strayed outside that. But Just to confirm, nobody in the Department knew until mid-April what the underlying situation was. But as the Chairman has asked me, I would just very briefly finish the comment, that clearly for any institutional investors, while the cap on the actual licence fee

was, certainly, a consideration, I am sure you appreciate it wouldn't have been the sole consideration. That's the only point I was making.

Q. MR. COUGHLAN: I accept that, and I think Mr. McLaughlin is pointing out in the first page of the letter, matters that had to be considered, like the debt/equity ratio and the cost of the thing?

A. Indeed, yes.

Q. Now, again from the records of the Department, it would appear that following these newspaper articles, the publication of these newspaper articles, that no query along the lines as the one raised by Mr. McLaughlin there, were raised by the Department?

A. No, and perhaps I should have prompted a query, but once again, it's not in any sense, but I tended to delegate and focus on the things that were literally at white heat at any particular time, but from what we appear to know, there was no particular follow-up on that press release, and perhaps it was read in the same light as I viewed it myself, but I can't answer for other people.

Q. Very good. Now, the Minister answered questions, and if we go to back to Book 43 for a moment, and it's Tab 156. This is the Dail answering parliamentary questions on the 22nd November of 1995.

We have been through these particular Dail debates in great detail with Mr. Brennan, and they were opened in

full, so I am not going to go through the whole thing with you. But there were a number of questions down. There was a question from Mr. O'Dea, asking the Minister what contacts he had with various members of the applicant consortia or members of the or sorry, consortia members of the various applicants. And I think there were questions down from Mr. Bobby Molloy about the question of ownership. And in the preparation of these answers in the Department, I'll first of all deal with the question of contact with members of the consortia. As I read it, it appears to be fairly standard and appropriate and in conformity with the protocol, the advice you had given the Minister, your understanding of the acceptance, and complying with that advice, and nobody in the Department being aware that the Minister had met with Mr. O'Boyle in the circumstances he had or with Mr. Denis O'Brien in Hartigan's pub, or if something was said by the Minister to Mr. O'Reilly at the opening of Galmoy. The Department, of course, knew that he had been there, appropriately, for the purpose of the opening of the mine?

A. Quite correct. Civil servants draft answers, but Ministers take ownership of the replies. And many Ministers, and of course, adjust or amend or correct PQs in the final form, for the simple reason is, they have to take ownership of reply.

Q. Now, I don't think we need to go into it in detail.

That was how it was prepared. That was the understanding of the Department I think, isn't that correct? The Minister didn't use it, didn't answer the particular question in the House?

A. So it appears.

Q. Now, again the questions from Mr. Molloy about ownership and the follow-up exchange in the Dail, where the Minister was being pressed to name the institutional investors?

A. Is there a reference that may be

Q. You needn't I am not concerned about that at the moment. I just want to

A. Okay.

Q. The Minister is being pressed. He doesn't inform the Dail who the institutional investors are, but he is pressed was ownership in compliance with Clause 3 disclosed to the assessors? And he answered that it was. And we have now seen the bid document itself, isn't that correct? And you had seen the executive summary on the financing section for the first time, in fact, here in the witness-box?

A. Mm-hmm.

Q. So it had all been disclosed in the bid document. And the Minister, in the response which was prepared for him, and used, was correct in saying, the ownership, in conformity with Clause 3, was declared.

A. Correct.

Q. Now, maybe I am wrong, but you can see that these questions are being answered on the 22nd November, 1995, in the House?

A. Yes.

Q. And you can see the articles, the newspaper articles we have just looked at, and there was speculation of some form going on in the public domain?

A. But we, as civil servants, would have worked on the presumption that, if there had been a change, we would have been informed. So on that basis we would have drafted the reply. And it is also, even though this wouldn't be an excuse in any way ultimately, because it would be wrong to mislead the House of the Oireachtas, even if it were short notice, but I feel fairly sure that the initial draft was probably drafted on the Friday, so to speak, and if people hadn't picked it up, even the speculation, even if they had picked up the speculation, they'd have no basis to change it, by the way, and if they hadn't, which may be likely at perhaps middle management level, people mightn't be so aware. But I would say, once again working on the presumption that we would have been so informed if there had been any change, this was not an unreasonable reply to draft for the Minister.

Q. I agree with you, that the reply in the first

instance, the ownership was declared. That was correct. We now see from the bid documents what was contained, and we even see from the presentation what was contained. But you can see that one has to look at the question of why, when the Minister was pressed to announce who the institutional investors were, why this wasn't answered. I am not suggesting there was anything sinister in it, but you can see, because the speculation that was going on at the time, how the matter was being pushed by members of the House, we have to try and find out was there anything was there any specific reason that you can tell us about?

A. Perhaps to put it in context, there was no specific reason that I am aware of, but oppositions who must oppose, and it's a fundamental of our democracy, can do so on the basis of factual information or on the basis, and I use the word advisedly, in a way that all oppositions must do, and anywhere in any democracy in the world do so opportunistically as well, in the best sense of the term, because they are to put pressure on the Government, on the executive. And once again, as civil servants, as we had nothing to be suspicious about, we probably would have seen it on the basis of good opposition opportunism.

Q. I should perhaps clarify matters. When the bid was coming in, the Department made inquiries of the various applicants about questions of confidentiality

attaching to members of various consortia. And they did receive a response from this particular consortium about the institutional investors that, that that was to be kept confidential. Now, of course, that phase of the process was over, you were now into a negotiating phase. As to whether it was viewed by the Department that the confidentiality continued or not, I don't know, or maybe the explanation is as simple as you have just outlined there?

A. I am not sure to be honest myself, but it could have been one, other or both.

Q. But as far as you were concerned, you would have had no difficulty?

A. None whatsoever. To the extent I was involved in parliamentary questions, and I had delegated that clearing to Assistant Secretaries, so typically I was not involved in parliamentary questions in detail.

Now, that's not to say that a tricky one mightn't have come my way, it may well be that this one fell into that category, but in general this is something that was delegated further down the line, and but all my instincts say is, one operates on the basis of, I suppose, and this is not to infer anybody operating in bad faith, but we were in good faith at the time.

There was no reason for us to believe that there was anything untoward not to infer there was subsequently was anything untoward but we operated

on the basis of the information we had, and that's how the parliamentary question would have been answered.

Mr. Coughlan, could I perhaps correct something there?

It just occurred to me on recollection. There was always a tradition that parliamentary questions, Dail questions would come through the then so-called Secretary General's office, and there came a stage where, and this was tradition, and maybe the tradition in many departments, but I did away with that because I found my office became, if I wasn't there, for instance, became a stalling point, and I believe that Ministers should see parliamentary questions as early as possible in the process so to give them every chance to amend. I am not sure when I instituted that, and so to be I believe it was well in advance of the time we are speaking of, but just in case it wasn't, it may well be that nominally all parliamentary questions came through me, but I still would have, for the most part only, looked at ones where I thought or where I was requested to look at ones that might have been tricky, but it is possible that that process still was in place, and that nominally everything came through my office. So just to be fair, I actually can't recall when I instituted the change. I believe it was before then. But it might have been after that. So in other words, it is possible that in my earlier reply I described the

delegation to Assistant Secretaries, and I am not sure when that dated from.

Q. But as far as you were concerned, leaving aside the question of whether confidentiality still applied, you would have had no difficulty in advising the Minister, "Look, go in there and tell them, if needs be, that what we are talking about here is Esat Digifone is Communicorp, Telenor, and they have told us that they are going to place these shares with these four institutional investors. That's what we were told"?

A. I have no problem whatsoever with the names. The names were all names one could be proud to be associated with. I think I would have checked, probably with Martin Brennan, to make sure where exactly the confidentiality clause started and ended. But it just didn't occur to me at the time.

Q. But you didn't have a you wouldn't have had a difficulty?

A. I would have had no problem whatsoever, no.

Q. Now, I think you have informed us that you didn't have any further involvement in this matter until April/May of 1996, is that correct?

A. There is, and I have read in the papers, I didn't recall I have no recollection of it. I read in the papers that the Tribunal supplied actually, that there was some question when I was with Mr. Lowry at a Telecommunications Council in March when apparently, I

mean I probably wasn't there at the particular time

when he wanted

Q. To issue a direction to Mr. McMahon?

A. And the Department contacted me in Brussels at the

Communications Council. And once again it was

probably on the basis, "Look, what's the

very what's the most ambitious target we can do on

this for a draft licence?" Is that your very best?"

And then "we'll go ahead on that basis and I'll square

it with Minister later." It probably was on that

basis. By the way, I had no recollection of that

whatsoever until such time as I picked it up in one of

the documents here.

Q. I don't think we need to go through the documents in

detail. The Minister wanted to the documents show,

anyway that the Minister wanted to direct it to Mr.

McMahon to issue the licence?

A. He had every entitlement to try and hurry up the

licence. Just for completeness, whence you put the

question to me I had no contact whatsoever. There was

a very small and nominal contact, but a substantive

contact I didn't have until mid-April.

Q. Yes. I suppose there was one other intervening

matter, and that was the question of the ESB and the

use of the masts?

A. You are right, you are absolutely right, Mr. Coughlan.

Q. Again, those documents were opened and the letter

which ultimately we know how the matter evolved. I think Mr. O'Uiginn contacted Mr. McCann, as Chairman of the ESB, he having been in contact with the Department. We have looked at the correspondence. It's at 172, I think, in this book.

A. Mr. Coughlan, very briefly, this is something that perhaps the political context isn't fully understood, because I have seen these letters. The underlying politics behind this was one of extraordinary sensitivity, by politicians on both sides of the House, to what I might call people power, bottom up power, in the sense there was a genuine there were two issues. There was a genuine controversy over so-called illegal defectors, in other words, people wanting to get all channels where they couldn't get it through conventional digital terrestrial, but the other much more important one Were communities misgivings about potential health impact of cellular phone masts. Now, this was the people power, so to speak, issue behind all of this controversy, and all politicians on both sides of the House were quite clear that the number of base stations, in other words, so-called cellular phone masts, technically base stations, should be kept as at a minimum, and I don't remember any controversy from any politician, all 166 Deputies, that co-location was a good thing, but the context was that everybody in the Oireachtas

knew that communities were concerned, and no matter who was involved in the award of the licence or the roll-out of the licence, that policy of co-location would have been driven by the realpolitik of the time.

Q. Now, I understand. But we know how it evolved.

Mr. O'hUiginn contacted the Department, contacted Mr. McCann. The ESB took a position in relation to this, and ultimately the Minister the letter is dated, I think is it, the 22nd March? 27th March of 1996.

And, "Dear Chairman,

"Esat Digifone has contacted me concerning"

A. Sorry, Mr. Coughlan.

Q. It's Tab 172, sorry. There is no need for us to go through all of the correspondence.

A. Yes.

Q. "Esat Digifone has contacted me concerning difficulties in securing planning permission for mobile phone masts in key sites around the country.

Planning Authorities are reluctant to consider multiple masts in sensitive locations unless it is clear that there are substantive reasons why co-location is not practicable and every effort has been made by the relevant parties to reach agreement.

It is Government policy to support co-location wherever feasible, and I am writing to all State companies and Government agencies who own or operate

communication sites to urge maximum co-operation.

Indeed, if this cannot be achieved by voluntary means,

I will have to consider whether there is a role for

the regulatory and licensing process to address these

issues in the overall interest of developing

communications infrastructure.

"I understand that you feel precluded by your

participation in the Persona consortium from agreeing

arrangements with other parties. I cannot accept that

this is a valid justification for not cooperating on

matters which would overcome planning difficulties,

possibly on a reciprocal basis. Indeed, many such

arrangements would only come into play in practical

terms in circumstances which released you from your

Persona obligations, i.e., the formal issue of a

licence to Esat Digifone.

"I trust that ESB can reconsider its position and

adopt a constructive approach to the single issue of

mast sharing with all interested parties."

A. Mr. Coughlan, I think the critical phrase there is

actually, "With all interested parties", the last four

words, because they would have been requested to share

them with Eircell, even if they had won the

competition themselves. Co-location wasn't, if I may

say so, company specific, it was Government policy,

and I am sure the ESB would have fully understood

this, even if they had won the competition is, if

Mr. Kane, on behalf of Telecom Eireann, had wanted a co-location at one of their sites, he would have been entitled to a reasonable reception, let me put it that way.

Q. I can understand that, Mr. Loughrey. I suppose the issue that kind of evolved here was this; the ESB and Persona didn't know that they were waiting in the wings if Esat Digifone didn't conclude a satisfactory licence negotiations, isn't that correct?

A. Correct.

Q. They didn't know that?

A. They didn't know that.

Q. And what they were saying to Esat Digifone at this stage, and they were still a competitor in that context perhaps, was, "Look, you fellas have been going around here talking about your great preparation in terms of your sites and planning matters and all this sort of thing, and now you are coming to us and looking to use our sites because you are running into difficulties in planning matters." That's the way the row was evolving?

A. Let's be honest about it, there was a history of contentiousness between Esat and the ESB, and it's not up to me to regard who was right or wrong. Let's just know there was a contentiousness which culminated in an unhappy, regarded as unhappy by some, advertising campaign at the very end which, by the way, was

entirely worthless because it would have had no impact whatsoever, but it might have piquancy to the relationship, subsequent relationship for one reason or another, but coming back to the essential point, we know that now, but regardless is that the ESB had a valuable asset, and they had a legitimate agenda themselves outside the GSM competition, in developing their national grid and their sites for telecommunications. So in other words, is they were not going to release any asset, and nor should they, but in anything to the best advantage of ESB, and that's understandable, but nonetheless, the point I am making, and I shouldn't labour it any more, Mr. Chairman, is that co-location would have applied to anybody in any set of circumstances, including both State companies involved.

CHAIRMAN: No party politician was going to run in the next election on a basis of an indeterminate further number of base stations, and as it transpired some independents did rather well taking the opposite approach?

A. You are absolutely right, Mr. Chairman, yes.

Q. MR. COUGHLAN: I suppose you could look at it as well, without them knowing the true position, that they were waiting in the wings, that they were being asked to deploy their assets to assist their competitor who may not have been in a position to conclude successful

licence negotiations if they hadn't

A. It was a nasty dilemma for them, I will admit that, yes.

Q. And it could hardly, I suggest, be viewed as the friendliest of letters from the Minister, could it?

A. I think perhaps, let me put it this way, of course you are entitled to take that view, but I think it might be a little too judgmental. If you had seen first-hand the pressure on all politicians on these issues, you would well readily understand that the Minister is, in fact, a little restrained in that letter. I mean, there may have been people asking him to use his powers of direction under the various ESB acts to do that, and so of course, prima facie

Q. Threatening the regulator is a little below that?

A. It is a little below that, and prima facie you are absolutely right, Mr. Coughlan, but the pressure on Ministers then from, as I say this bottom up community concern, was one that it's easy to forget about now.

Q. I understand the politics of it, and the Communicorp aspect of it. But this was instigated by Mr. O'hUiginn who had intervened through the Department to get the Department involved on behalf of Esat Digifone in communicating with the ESB?

A. Perhaps a good initiative by Mr. O'hUiginn, but the Department shouldn't have needed prompting to ensure that the Government's policy on co-location was

adhered to, let me put it that way.

Q. Well, I suppose a member of the public looking at it, could well form a view that here was the Minister, as a result of the intervention of Mr. O'hUiginn on behalf of Esat Digifone, doing something which would benefit Esat Digifone at the expense of the person who was waiting in the wing, namely Persona?

A. That's true. But I still maintain had the prompting come from Mr. Kane in Telecom Eireann, the Minister would have taken the same line.

Q. Well, I suppose the difference there is that Mr. Kane wasn't waiting in the wings, and he was not a competitor of Esat Digifone in that context?

A. That's true, yes, that's true.

Q. Now, I think and before I do go on to the period April/May of 1996, I would just like to go back for a moment again to the 25th October, just for a moment, and briefly to take up something with you.

I reviewed your Memorandum of Proposed Evidence again, and I reviewed the evidence you gave in accordance with that. And it seems to me that you were of the view that there was a briefing document?

A. That is my memory. That's my memory.

Q. I am correct in that, isn't that

A. Absolutely. I have a memory that I saw this telegraphic note of a page or two that summarised things for me. Now, once again, it's a bit like when

did I read it? I am not absolutely certain, but if you were to press me on it, I would say the probability is I saw it before I went to the Minister, but I am not certain.

Q. And again, we see the two short notes whereby you communicated with the Minister, and I think yourself and Mr. Brennan have informed us that he was the type of Minister who liked to be well prepared when he was doing anything. And do you think that, bearing in mind that you communicated with him in writing on sort of small enough matters or on short enough matters, that you wouldn't have made available to him a briefing note of some sort so that he could go and see the well, in the first instance, perhaps the Ministers, and if not that, to have one for the Cabinet meeting the next morning? That's what I am really trying

A. That's an absolutely fair question. I have I am not sure that I can give a good answer to the former. The latter would look after itself, because the Memorandum to Government would be self-contained, self-explanatory, and going over well-known territory and Governments, if you like, at Cabinet procedures, they don't want other documents with Cabinet papers. So the latter problem, the latter of briefing the Government as such, that's, I don't believe is an issue.

But you are saying, would it not have been if I had the dictating machine in my hand, would I have not put that on paper? It's not unreasonable to put that to me. I can only say as of now, I believe that time was of the essence, and perhaps that belief actually led me to sort of advise orally and advise the Minister to act as swiftly as possible. That's the only explanation I can give now, Mr. Coughlan.

Q. Well, you see, you know the document there is a document "Briefing notes for Minister, you have seen that?

A. I have seen it actually, and as I said, I think it was yesterday or the day before, it is probable that that's the one, but once again my memory is hazy on that, but as you have put it to me right now is, if it had been available, and as I say, as I said I would tilt the balance in favour of probability that I had read it, why wouldn't I have given it to the Minister? And the answer is: I can't recall, and perhaps it was that I saw it afterwards rather than beforehand because it was a snapshot, so to speak, of the competition in one or two pages, or whatever it was.

Q. Or could you have given it to the Minister?

A. Oh, of course. If it had been in my hand I think I would have given it to the Minister.

Q. You see, My Friend, Mr. Healy, has gone through the document in detail with Mr. Brennan, who was obviously

Chairman of the group, and it was the evidence of Mr. Brennan that again that this particular document is causing some concern for the Tribunal, because it is not, if I can put it as neutrally as I can, it does not appear to conform with the information which is in the Evaluation Report, or even in the draft, drafts of the Evaluation Report. So it is a matter of concern.

And it is we have been informed, through Mr. Brennan, that it may have been, it may have been prepared by Ms. Nic Lochlainn, I am only saying may, and there is a suggested purpose that it may have been prepared perhaps for a press conference or a press briefing. Looking at it again, and I am just bringing it to your attention, that appears to be unlikely because it contains fairly confidential information, and the report was never published. So

A. You are absolutely right, yes.

Q. So it seems unlikely that it was for that purpose.

And we are trying to find out when this document came into being, who saw it, and who used it, because it also seems to be advocating a position, if I might suggest as well?

A. I am trying to be as helpful as possible. If it appears to be a document, whether inadvertently or consciously is biased in a particular direction, let's say, you know, if I had read it and I had read the final report, I think I might have picked that up.

I'd like to think I would have picked that up, no matter how quickly I scanned. So I am trying to pick out the sequence. So it is probable that, if not certain, that I would have it's certainly probable that I read it before I had read the final document.

So I would have had no reason to dispute it. In fact, and not to take away from Ms. Nic Lochlainn's talents, when I read it I thought it had been drafted by Fintan Towey because it was very snappy, and he is a good drafter, so I had presumed and as he had been, as I say, at the nerve centre of the process at all stages, if I had read that at the time, and thought its provenance was Mr. Towey, I would have taken it as gospel, so to speak.

Q. I understand that.

A. But like, I had no reason to challenge it at the time because I don't believe I had read the final document.

Now, all this is to the best of my recollection, Mr. Coughlan, but as to the precise timing, I just can't be definite.

Q. No, I can understand. If you read it after you read the Evaluation Report, you would have picked up the problems that we have identified with this document.

If you read it beforehand, obviously you wouldn't have. You would have taken it, and of course you were entitled to take it, as being a correct statement of the position.

But you can't help us as to whether you gave it to the Minister?

A. I can't absolutely be certain. I would suggest one thing is that regardless of the fact that Mr. Lowry liked to be briefed orally, on reflection, if I had it either in my hand or I had access to it, I think definitely, definitely I would have given it to him on the way to see his colleagues in Government that afternoon, for the simple reason, we spoke earlier, all officials on a key issue like their Minister to speak with as much conviction, or to make a case with as much conviction as possible, and that particular document, you know, had conviction by the spade load. So in other words, if that were now, for instance we are all subject to aberration, and I may just have overlooked it, but perhaps on reflection, if I had it or had it to hand or had access to it, I certainly would have given it to Mr. Lowry. There is no question, let me put it this way, as the final report hadn't come in, there is no question of, I believe, that Mr. Lowry could have drafted it himself, for instance. So in other words, it had to come from the service machine, and it's the timing that we are uncertain about.

Q. Yes, that's what I am trying to
I suppose the next matter is at Divider 183.

A. Yes, I have that now.

Q. I think I have asked you, my colleagues have said, I have asked you about any involvement you had, and you said from November up to this time, apart from the question of the Minister wanting to issue a direction to Mr. McMahon and the ESB matter, you had no other involvement?

A. None whatsoever actually.

Q. Now, 183 is

A. Just I beg your pardon, do it.

Q. Please do.

A. I just notice in looking at 183, is that underneath this diagram at the very end it says, "IIU, a Dermot Desmond company, currently holds 20% of Esat Digifone, which it intends placing with institutional investors."

One could be forgiven almost reading that quickly, so that I that was still almost the role of a de facto arranger still at that stage. Just reading this document here.

Q. Sorry, I am going to deal with it first of all, what I want to do is go through and what your understanding of the communications. You see the diagram?

A. I do.

Q. This is Ms. Regina Finn is sending a

CHAIRMAN: I think there is something to be said, Mr. Coughlan, you are just starting the last

substantial phase of Mr. Loughrey's evidence now, and rather than doing five minutes of it now we might resume a little early at five to two. Thank you.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF EXAMINATION OF JOHN LOUGHREY BY MR.

COUGHLAN:

Q. MR. COUGHLAN: Things will probably be slightly slower now because we have to open some of the documents because I think you did have an involvement from April up to May, yourself?

A. Yes, I did and notably in the last few days.

Q. In the last few days.

Now, just before lunch we had just referred to the fax which Ms. Finn sent to Mr. Brennan and Mr. Towey, resulting from a communication she had had from Mr. Owen O'Connell, I think, and if we just go to the document. I am interested in the point you immediately made and I will come to that, because you see the diagram?

A. Yes, I do, yes.

Q. On the top?

A. Yes.

Q. Then it goes: "OOC William Fry Solicitors provided the following information on behalf of Esat Digifone Limited:

At present Communicorp is the vehicle whereby Denis

O'Brien holds shares in Esat Digifone. Communicorp also has ownership of Esat Telecom and the radio interests of Denis O'Brien. The objective is to uncouple the telecommunications and the radio elements of Communicorp because they are incompatible from the point of view of investors. With this in mind, Communicorp will retain the radio interests and the 'slide out' of the current picture in relation to telecommunications."

Then it has, "Esat Telecommunications Holdings Limited has been incorporated to take over the telecommunications interest of Communicorp. Ownership comprises: Denis O'Brien - 57 percent; Advent - 31 percent; miscellaneous - 12 percent, Denis O'Brien - 6 percent, employees of Esat - 6 percent." That is the miscellaneous?

A. Mm-hmm.

Q. "If flotation is currently underway by First Boston Bank, which involves the placing of shares of Esat Telecommunications Holdings Limited, it is not yet known what percentage of the company will finally be owned by American investors."

Then it has: "Esat Telecommunications Holdings Limited in turn owns Esat Telecommunications Limited 100%; Esat Digifone Limited 37.5%; Telenor Invest AS owned 37.5% of Esat Digifone Limited. IIU (a Dermot Desmond company) currently holds 20% of Esat Digifone

which it intends placing with institutional investors.

It also has the right to acquire a further 5% (by means of the 12% of Esat Telecom Holdings Limited which is held by miscellaneous).

"Owen O'Connell is to provide further information in writing, including deadlines for this change in ownership."

Can you remember when you were first informed of this particular communication?

A. I believe that Regina Finn, possibly directly, sent me that. My memory is that I got that particular diagram with the explanation and the subsequent letter of explanation from Owen O'Connell together, so to speak, in one folder.

Q. I see.

A. So I would have seen them both at the same time. Now, given the fact that they were in a different building, you could add perhaps 24 hours, but I would have seen them at about that time, a little after.

Q. Yes. And again the point you have raised yourself just before lunch, the reference to "IIU, a Dermot Desmond company, currently holds 20 percent of Esat Digifone which it intends placing with institutional investors, it also has the rights to acquire a further 5 percent by means of the 12 percent Esat Telecom Holdings Limited which is held by miscellaneous" and I think you were pointing out that one could reasonably

infer from that that they were still in the category
of arranger, placer or

A. It would have been, let me put this way, I still would
have seen it in a different light to arranger, in the
sense that they apparently held ownership at that
stage.

Q. Yes.

A. Classically an arranger doesn't have to have
ownership, is a facilitator, but still that the broad
attention would have been at the time, had I read that
in isolation, that they were acting as arranger, but
in fact is that the shares were being sort of held
almost in an Escrow account so to speak, until such
time as they were moved out.

Q. I understand the distinction you are making.

A. Yes.

Q. But one could not be concerned or criticised for
forming such a view that that was, that was that
seemed to be the type of information which was being
conveyed to the Department and what one might infer
from it?

A. Yes.

Q. Now, if we just go to Mr. O'Connell's letter then
which is at the next divider, 184. And it is
addressed to Ms. Finn and it reads:

"Dear Regina,

"I refer to your telephone conversation of yesterday

regarding the ownership of Esat Digifone Limited and of Esat Telecommunications Holdings Limited. The position is as follows:

"Esat Digifone Limited:

"There are 3 million Ordinary Shares of ₺1 each in issue in this company. They are held as to 1,125,000 shares each by Esat Telecommunications Holdings Limited and Telenor Invest AS, and as to 750,000 shares by IIU Nominees Limited.

"It is intended that by the time notification is received from you that the second GSM licence is available for issue, the issued share capital will have increased by ₺15 million to ₺18 million (all comprising shares of ₺1 each) held as to 6,750,000 by each of the Esat Telecommunications Holdings Limited and Telenor Invest AS as to 4,500,000 by IIU Nominees Limited.

"The 25 percent of Esat Digifone Limited held by IIU Nominees Limited effectively represents the institutional and investor shareholdings referred to in Esat Digifone's bid for the license. You will recall that this referred to an immediate institutional/investor shareholding of 20 percent, with a further 12 percent in short and medium term stages. Of the anticipated 12 percent, 5 percent has been preplaced with IIU Nominees Limited. It is understood that most or all of the shares held by IIU

Nominees Limited will in due course be disposed of by it, probably to private and institutional investors.

"Esat Telecommunications Holdings Limited:

"The company is owned, either directly or indirectly, as to approximately 57 percent of its issued share capital by Denis O'Brien and as to approximately 31 percent thereof by a group of investment funds managed and controlled by Advent International. The remaining 12.5 percent is owned (again directly or indirectly) by a number of individuals, (including Denis O'Brien) who are primarily present or former directors, employees, advisers or shareholders in Esat Telecom Limited. These percentages assume that the full conversion of all existing issued convertible debentures in the company, that is they are expressed on a fully diluted basis.

"A placing of shares is near to completion in the United States, whereby the effective ownership of Esat Telecom Holdings Limited will be altered by the subscription for a substantial number of shares by a number of US financial institutions (Esat Telecommunications Limited). The US institutions are likely to hold approximately one-third of Esat Telecommunications Holdings Limited after the placing, (although Mr. O'Brien will retain a majority of voting shares). In addition Advent International may increase its holding somewhat by participating in the

placing.

"Other Group Companies:

"You asked me about a number of other companies of which you were aware, including Esat GSM Holdings Limited and Communicorp Limited. While these companies remain in being they are of the overall group structure they will not have a direct role in the licence.

"I believe that the foregoing accurately summarises the effective and beneficial own shareholdings of the parties concerned, although the full shareholding structure is somewhat more complex as outlined, and as I told you on the telephone, many of the effective shareholdings are held indirectly through other companies. If you wish, a full briefing can be given as to the exact shareholdings of all parties in and through all companies, but I am not sure that this will serve any productive purpose. Please contact me if you would like such a briefing.

"At the risk of labouring the point, I must reiterate that the anxiety of Esat Digifone to procure a grant of the second GSM licence as soon as possible, since significant damage to its plans and prospects is already being incurred and could largely be avoided by the grant of the licence.

"I look forward to hearing from you.

"Yours sincerely

Owen O'Connell."

So, that's the brief that you received?

A. Yes.

Q. Ms. Finn's memo to Messrs. Brennan and Towey?

A. Even though there doesn't appear to be a paper trail, I know I did receive them, yes.

Q. First of all, I suppose, could I ask you what did you understand the situation to be by these communications?

A. Well, I must confess I was very surprised when I got them in the first place.

Q. Yes.

A. And what Owen O'Connell's letter, as opposed to the earlier one page, was absolutely quite clear; it said what the existing shareholding would be, and then it said how that that would be ramped up by issues of share on a same day exchange, so to speak, for the licence, and was crystal clear that is what it was. I was surprised, because, and not best pleased, if I may put it that way, not because I didn't I don't think for one moment that private enterprise companies doing, setting about their business can't arrange their affairs normally in whatever way they wish, and there is no hint of interventionism in me whatsoever, but that here we had a competition which was predicated on an equal shareholding between a 40 percent, in fact starting at 50 percent, but to be

diluted by 10 percent. But I think I mentioned the other day is, that it wasn't that the further dilution to 37.5 percent, that the two and a half percent was something, was fatal or in any way significantly injurious to the delivery of the project, in other words to introduce the competition in the mobile phone licence sector. But I just didn't like the signal it gave in the sense is, I was conscious that the licence, there would be issues about ownership and I wanted to make sure that people fully understood that we wanted perhaps I am speaking for myself, but the Department would have wanted the consortium to be launched on the basis of a minimum 40:40 holding by both Telenor and Esat, and there was, and I freely confess it as well, it crossed my mind straightaway, but because we were now dealing with an issue where Mr. O'Brien and Mr. Desmond, in conjunction with Telenor, but neither Mr. O'Brien nor Mr. Desmond could be regarded as anonymous figures in Irish business, and they both attracted a lot of media attention. I wanted to make sure is, that there would be no additional contentiousness, or embarrassment, if I may put it that way, for the Minister in particular and for the Government in general. That would have been my thought process at the time, and so straightaway I don't know whether I am telescoping from, say, let's say the 20th of April

Q. Yes.

A. the next week, but I was in whether I resolved on the day or, but I was increasingly resolved that that would not be acceptable to us, and I suppose that would have communicated itself down the corridor.

Now, equally I am quite sure that the people involved which would have been Sean McMahon on the legal side, Martin Brennan, as in a sense the continuity in terms of the project decision taking, and Fintan Towey, equally they may have come to the same conclusions themselves. I know I was quite clear in my own mind that that wouldn't have been acceptable to me or the Department.

Q. So I take it the Minister was appraised of the situation?

A. Once again, is, I don't recall striding into his room and informing him, but as we would have met virtually on a daily basis with a checklist of items, you know, scanning the horizon, what is happening, undoubtedly I would have informed him.

Q. Yes. Now, did you contact Michael Walsh?

A. No, I had no contact with Michael Walsh at that time.

Q. In fairness to you, I think Mr. Walsh has informed the Tribunal that, and just so to enable to you comment on it, I think I just want to clarify before I come to Mr. Walsh, are you informing the Tribunal that your only concern was the share distribution, as to opposed

to, maybe I am being a little bit too refined there, I think you did mention there was a question of ownership, there was an ownership issue arising here?

A. There was an ownership arising here. Though I did explain that the two and a half percent in itself wasn't prima facie damaging, you could say that for every discrete step I wanted it to be at 40 percent even, or more, if that is the case. Because let's be honest about it, financial investors were not going to bring anything to the party, let's be clear about it, other than their equity. I wanted to make sure that the twin operating elements of this consortium, in other words, Telenor as the company who hadn't done it, the leading edge, they had the greatest penetration worldwide of any nation state in the world, Norway; that they and, if I may say so, the hunger that Mr. O'Brien had displayed in acquiring a market share in the fixed line business, that that I didn't want that diluted in any way, albeit two and a half percent, 5 percent in total didn't seem I didn't want the headline to be accepted that somehow that further dilution was up for grabs. I felt the Department had to make a stand.

Q. Yes. But can I I suppose first question I would ask you, why did the Department have to make a stand on that particular issue, in your view?

A. I think it must have been unconsciously tied in, or

subconsciously tied in with the fact is, I knew that a departure from what had been subject to the evaluation, actually, was not a good idea, fullstop.

Q. Wouldn't be a good idea and it wouldn't be in conformity with the whole process anyway?

A. It wouldn't have been in conformity with the whole process, yes.

Q. Now, just in case and of course Mr. Walsh, Professor Walsh hasn't given his evidence yet. It is Book 36, Divider 6C, page 11 sorry, paragraph 21, yes.

A. This is C, is it?

MR. O'DONNELL: It may not be C in his book.

Q. MR. COUGHLAN: I beg your pardon, I didn't give you one.

(Folder handed to witness.)

A. That's fine. Thank you.

Q. Just if you go to paragraph 21 there, the question: "Mr. Walsh's or IIU's knowledge direct or indirect of the queries and issues raised by the Department regarding the ownership of Esat Digifone consortium and the information furnished to the Department by or on behalf of Esat Digifone regarding such issues and queries, including a letter dated the 17th of April, 1996, from Mr. Owen O'Connell, solicitor, addressed to Ms. Regina Finn of the Department. His reply is, to the best of my recollection, on two occasions

following media publicity stating that IIU Nominees shares were held for parties other than Dermot Desmond. I was contacted by phone by the Secretary of the Department and on each occasion I confirmed to him that Dermot Desmond was the beneficial owner. I don't recall any detailed discussions in relation to the letter from William Fry Solicitors dated the 17th of April, 1996. However this letter confirms an intent that on the date of the issue of the licence IIU would hold 25 percent of the shares in the consortium."

Now

A. Mr. Coughlan

Q. Do you recollect any such conversation?

A. If Michael Walsh has that recollection, then of course it is correct. It is just that I don't have the recollection.

Q. Be fair to yourself first of all, Mr. Loughrey

A. I have a recollection if keeping in touch with Michael Walsh on an intermittent basis over the years, which would either be by way of contact on things of interest jointly or by way of a social meeting, typically a lunch.

Q. Right.

A. Now, of course if this sounds more pro-active that I actually contacted him. I did phone him from time to time, I might well have phoned him from time to time on issues that we had an interest in, whether it

was, for instance, the typically for instance one might be for instance is his involvement or my involvement in the off balance sheet financing of the BG pipeline, and I don't want to rehearse the sort of things we would talk about.

Q. Yes.

A. But that seems to say that I contacted him quite specifically on these issues.

Q. Yes.

A. And if he has that recollection, that's right, but I don't, I don't recall it that way. But on the other hand, I might well have done that, of course.

Q. You don't have a recollection

A. No, I don't have a recollection of

Q. of making contact?

A. Of specific calls like that, I don't have a recollection.

Q. They seem to be specific?

A. They do. It seems to me, I read it I picked up the phone and I picked up the phone and said 'Michael, what is all this about?' I might have well have done that, but I don't recollect it.

Q. It is hardly something, I suggest, that you wouldn't recollect. It was a fairly significant matter?

A. Gosh, Mr. Coughlan, I

Q. I want to

A. The range

Q. I wanted to be fair I want you to be fair to yourself, Mr. Loughrey.

A. I appreciate that.

Q. You have said, "Because if Professor Walsh says it, it must be correct."

A. Well, no

Q. I want your recollection. I want your recollection.

He will come do give his evidence as well. I want your recollection in so far as you can assist us?

A. I have clear recollections of keeping in touch with

Michael Walsh over the years. I also have a

recollection of being maybe surprised, for instance,

that they had taken over the role from Davys. And

talking to Michael Walsh, I am not I don't recall

that I took the initiative to do that, but equally, I

am as quick to pick up the phone as he would be, so at

least there is a 50:50 chance, on average, that I

would have done that in terms of having that contact.

I don't recall the second contact specifically at all.

I can recall the contact which would have been

probably around November of '95, when I say is and

we spoke of this before.

Q. Yes.

A. I don't recall, I have a recollection of meeting

perhaps Michael Walsh or being in touch with him in

literally at the eleventh hour

Q. Yes.

A. when we were fine-tuning what was required by the Department. But I am not sure if there is, if there is a phone call following the letters from William Fry of the 17th of April.

Q. Or around that time?

A. I don't I didn't have any knowledge that would have prompted me to take an initiative, unless it was after the William Fry letter and I just don't have a recollection of that.

Q. All right. You believe sorry, when do you believe you would have seen Ms. Finn's document and Mr. O'Connell's letter? When do you think?

A. I reckon that clearly if I am not sure where they whether Mr. O'Connell delivered it by hand or was it posted for instance. I would say I would have seen it within 24 hours of its arrival in the Department.

Q. Right.

A. Given that the Regulatory Division at that stage, from memory, were working in Ely Place. You know, I, depending on the time of the day, I would say within 24 hours of its receipt in the Department I would have had it.

Q. Yes.

A. Perhaps earlier, I might have had it literally by fax, for instance, in the hour literally, but around that time.

Q. Around that time. Now, if you go to the I want to now I want to put this matter to you for your consideration. You have received Ms. Finn's communication and the letter, and they are slightly different in terms of content?

A. Yes they are, yes.

Q. And what you were being told in the letter, and we'll take it that the letter supersedes the communication which was the day previous?

A. Yes. The minute I would have read the letter the diagram and its contents were only for illustration.

I once you read the letter you moved on, so to speak.

Q. And if you go to the first page of the letter ,the last paragraph on the first page of the letter

A. Yes, I have that now.

Q. There can be no doubt that if you go to Ms. Finn's document, in the first instance, that which is stated in relation to IIU at the bottom of Ms. Finn's document, as you pointed out yourself before lunch and we discussed after lunch is different to what is being stated in the final paragraph on the first page of Mr. O'Connell's letter, I think?

A. Yes. I am not quite I am surprised, I am sure Mr. O'Connell was just trying to be helpful, but I am almost surprised now with the knowledge that is in the letter of the 17th, that explanation occurs at all as

a footnote on this fax note of the 16th.

Q. Ms. Finn will be coming to give evidence, but we are operating on the basis that she kept an accurate account of what she was informed?

A. Exactly, yes.

Q. But when you go to the letter then, the final paragraph on the first page:

"The 25 percent of Esat Digifone held by IIU Nominees Limited effectively represents the institutional and investor shareholding referred to in Esat Digifone's bid for the licence. You will recall that this referred to an immediate institutional/investor holding of 20 percent with a further 12 percent in short and medium term stages. Of the anticipated 12 percent, 5 percent has been replaced with IIU Nominees Limited. It is understood that most or all of the shares held by IIU Nominees Limited will in due course be disposed of by it, probably to private and institutional investors."

Now, we know from matters that we have reviewed that, of course, that is an incorrect statement?

A. I wouldn't have known it at the time.

Q. I understand that.

A. But I did find that paragraph a little contrived in any event.

Q. Yes. Yes.

And apart from your natural, I suppose, annoyance and

I use that in the I use that in a professional sense as opposed to any sort of personal sense that you felt that you should at least be on your guard as well moving forward on this matter?

A. Yes, I did, yes.

Q. And be cautious and careful about what was being told to you and the Department?

A. I suppose the word that best captures it, it is not to say things were irregular, but, well, the logic is I think I set out to regularise the situation which meant I wanted to be in conformity with the application.

Q. Yes. Now, the next thing that happened and I am going to go through the documents and we can come back and discuss things, I just want to, first of all, find out what your knowledge was at various stages of matters.

The next day, the 18th of April, there is a letter sent to the editor of the Evening Herald. And I presume it was drafted for the Minister, was it?

A. I am sure it was, yes.

Q. And it is: "Re the GSM licence.

"I refer to recent political comments and media coverage generally on the award of the GSM licence to Esat Digifone in October 1995. That there should be disappointment among unsuccessful bidders is understandable but that this should feed a six months campaign of speculation and innuendoes against all

concerned in the processes unacceptable. As a politician, I have no difficulty in defending my role and record and dealing with criticisms from either political or media sources, even when I believe those to be unfair and unfounded.

"The recent innuendo campaign has gone beyond the level of acceptability or fair comment and involves the questioning of the process of selection and the integrity of the civil servants and professional advisers who were directly or indirectly involved.

These are people who act with professional independence and integrity and unlike me, are without a platform, short of legal action to defend and to clear their good name and reputation against smears and innuendo.

"I have already made numerous statements in Dail Eireann regarding the objectivity of the process which lead to the selection of Esat Digifone as the second GSM operator.

"I have also pointed out the constraints on me in publishing the report on the evaluation because of confidentiality commitments sought by the applicants themselves before the closing date for the competition and the commercial damage such publication could do to the winner.

"Within these limitations and in order to further clarify the process and the role of the participants

leading to the decision, I am now arranging that a number of key members of the Project Team which conducted the evaluation will be available for a press briefing tomorrow at 2:30 p.m. in the Conference Room in my Department at 44 Kildare Street.

"The briefing will clearly be of special interest to journalists in the communications and business area and invite you to send a representative to the briefing.

"Yours sincerely
Michael Lowry"

I presume that gone to all the different papers?

A. It would have gone to all the papers, yes.

Q. Now, Divider 187 is a press statement, it is Martin Brennan's, and Mr. Brennan has dealt with that particular matter in the course of his evidence.

Sorry the draft is in the did you see this particular draft?

A. Yes, I believe I did at the time, yes. I was unhappy that Martin was effectively going to put himself in the front-line as almost the sole lightening conductor even though clearly he felt very strongly about it at the time. I think it might be helpful just to recall the context.

The Tribunal has unearthed many, many things which I obviously can't comment on, it is up to the Tribunal to decide upon. But at the time so much of the

criticism was directed, not at the Minister, but at the process. In other words, people were saying, and can I put it colloquially, the word on the street was saying, not entirely consistent with one either, they could say is ATT McCaul, North Americas's leading company, how could they not have won? Or Unisource, the new grouping, pan-European grouping? This was going to be the counterparty to the great North American companies, how could they possibly not have won? And how come and can I borrow a phrase from the time 'Johnny come lately' in Ireland which they identified Mr. O'Brien's people, they never focused on Telenor, and the critics were almost silent on Telenor because if at they did their research they would have know how good Telenor was, it was directed against Mr. O'Brien how could this, you know, entrepreneur who was still so young, etc., how could they have won? There must have been something wrong with the process. This was current comment and particularly I know we don't have chatter in classes in Dublin, but if we had, it was among and at professional level, this is not, we are not talking here about pub talk, we are talking here about I knew from feedback among many professionals, typically the big accountancy companies, etc. Now I don't think any of them knew or the Department doubted for a moment that it wasn't done on a fair non-discriminatory basis. They in turn

were picking up this sort of adverse comment. It was directed against the process, therefore the civil servants.

Clearly Martin Brennan, as Chairman, and the effective primas interpartes in that group, felt it very badly personally, and so he should if I was in his shoes I would have clearly it was probably easier for me to take a more relaxed view about it personally, but I felt very strongly about it as, I suppose, if I was seen as, well, as the guardian angel for the Department, so to speak, I had to look after the interests of my officials. So very unusually is, through a combination of Martin Brennan's, I suppose you could call them protestations at the time and my own feelings of being rankled, that it was the Department, but more particularly a group of first class officials who I knew had integrity, palpable integrity, that somehow this was happening, perhaps against, in retrospect against my better instincts, certainly against the instincts of a civil a dyed-in-the-wool civil servant, to allow ourselves to go into the front-line in this way, but that basically was the context, Mr. Coughlan.

Q. Well now, I just want to be clear, and it is very helpful that you can put things in context for us. There was, maybe disquiet is too strong a word for it, but in serious business circles, as you said, major

accountancy firms and the business community, there was speculation and concern about this particular competition, and that was finding its way back to you?

A. Yes.

Q. And in the exchanges, as we have seen, in the Dail from the 30th of November of 1995 I didn't open a short one on the 16th of April, 1995 but the concern that was being raised in the Dail related to the question of ownership, I think you would agree with that?

A. I think that's correct, yes.

Q. I beg your pardon. The press conference took place on the 19th of April, I think, of 1995?

A. Yes.

Q. Of 1996, I beg your pardon. When would that have been planned, do you think?

A. I think ahead of steam was building up in the Department. I know this is my evidence, I am not sure if Martin Brennan said anything about it, but my sense of it, that a head of steam had been building up in the Department because of this, you know, implicit criticism from serious quarters, I would say.

Q. Yes.

A. What I have to say, and I it's quite plainly what got to me was not that there was certain pressure perhaps in political circles, but I can recall, and I felt some of it might well have been not prompted but

facilitated by people who were naturally disappointed in losing. I can recall, for instance, there was an interview with Professor Tom of UCD, I remember listening to it, and while I have the greatest of respect for Professor Tom, it certainly supported a line of 'how did this process arrive at such a result?' I think that's my recall of it. It may have been namely about, still about the fee or the fact that it was given away so cheaply, but nonetheless is, from serious quarters, business quarters, I was getting feedback which I thought was very hurtful for the Department, unusually so. That is why I acted.

So you have asked me specifically when did it start?

I think it was a gradual realisation that something should be done.

When it started, it could have been going back to January, literally, but I know the head of steam built up in April culminating in this press conference.

Now, the Minister would have been aware of this, obviously, we didn't operate in a vacuum clearly. I don't think the Minister was displeased that this bottom-up protestation was coming up in the Department, clearly if he had signed that letter, for instance, he was happy that it was going along, but I don't you haven't put the question to me, perhaps I shouldn't have said anything, I started perhaps I don't believe the initiative came from the Minister,

though at no stage did he discourage us, let me put it that way.

Q. Now, if we just look at the draft perhaps we will go to the actual press statement itself which is at the next divide.

And paragraph 1: "The Department of Transport, Energy and Communications conducted the competition process for the GSM licence. Recent commentary and media coverage of this topic indicates a grave absence of relevant verifiable facts and has given rise to inappropriate innuendos and assumption. The Department wishes to put the facts of the situation on the public record in order to provide a basis for informed comment.

"2. In the preparatory stages for the competition process, from late 1993, the Department had an open door policy to representatives of potential bidders, consultants, and other interested parties. Dozens of meetings took place in what was essentially a learning phase for the Department.

"3. When the actual competition was about to be launched, a broadly based Project Group team was established to manage the process. It contained representatives of the relevant divisions of the Department of Transport, Energy and Communications, as well as representatives of the Department of Finance, together with Andersen Management International, as

consultants. The team contained within it all the disciplines necessary to conduct the competition professionally.

"4. The consultants were engaged on the recommendation of a smaller representative group following an international competition. Andersen are niche specialists in this area. While it is for them to speak for themselves, the Department is confident that they would only lend their name to a straightforward selection process. Their competition to the process was highly satisfactory.

"5. At the first meeting of the Project Team an instruction was issued with the approval of the team setting formal ground rules in relation to contacts with interested parties.

"6. The Minister did not meet with the Project Group or with the consultants in relation to the GSM competition process.

"7. The competition was conducted fully in accordance with the rules which were approved in advance and known to all participants. The approach to the evaluation including the weighting to be given to the published selection criteria was settled before the closing date and was carried out to the letter. Each application was examined meticulously by appropriate qualified sub-groups of the Project Team, including consultants representatives and marked by the

sub-groups. Consistency checks between different parts of applications were carried out. When the marks for the various sub-groups were put together, there was a clear winner. Further supplementary analyses served to confirm the result. The Project Team unanimously made a single recommendation based on the analyses and marking which was quickly accepted by the Minister and approved by the Government. No factors other than those specified in the rules were taken into account.

"8. There has been speculation about the timing of the result. The Department was aware from the consultants that in other countries there was intense political pressure coming up to the decision time. There was a clear advantage to the process in avoiding that, but in fact the final report was presented to the Minister in exactly the week foreseen in planning documentation from an earlier stage.

"9. On the question of the licence fee for high licence fees in competitions of this type are not free money.

"They became part of the capital cost of the project which must be rewarded from the proceeds of the business and carry a high financial penalty because they are upfront money paid before traffic and revenues are developed. High fees, therefore, inevitably lead to higher prices than would otherwise

be the case and any realistic financial model will support this. The opening documentation for the competition was normally referred to by the European Commission which is quite normal. They raised serious concerns about the "auction" element of the rules, as they had already done with the Member States. The Commission has always insisted that equivalent fees be raised from the incumbent operator, in our case Eircell, or that offsetting advantages of other kinds be given to the new entrant. A high fee on Eircell as well as on the new entrant would virtually guarantee high prices.

"The Project Team was certain that finalising the competition without a settlement with the Commission would give rise to serious legal and financial exposure if the rules had to be changed after the licence was awarded. It was decided, based on our recommendation, that we negotiate a reconciliation with the Commission. The chairman of the Project Team lead a small group in these negotiations. The proposal for a moderate fee of $\text{€}15$ million on the new entrant and $\text{€}10$ million on Eircell was made by him to the Commission and not the other way around. In pitching for this level the Department was aware of the expectations in relation to income to the Exchequer. The outcome of the negotiations was approved by the relevant Ministers and the results of

the competition were amended accordingly before bids were submitted. The salient point is that this part of the business was conducted by the Project Team.

Agreement in writing from the European Commission in advance of the closing date for the competition process was a first for any Member State.

"10. The final subject which requires comment concerns commentary about the role of the competition for the GSM licence in relation to jobs in Cork.

Neither those speculated jobs nor any other jobs were taken into account in the competition. They could not be under the rules. The speculation is that those jobs were directly related to contracts likely to be available upon the success of the one applicant for the licence. The major procurement for a project in the telecommunications field which enjoys special rights from the State must be carried out by open competitive tender. It is expected that Motorola's prospects of winning such a tender competition would be equally good whether or not they were the licensee.

"The Department would be disappointed if reaction to the outcome of a clean competitive process was to result in the loss of any jobs or potential jobs."

Now, as you have said, the purpose of this, with the benefit of hindsight, whether it was the correct thing to do or not, or whether, I won't use the word 'correct', whether you would go down that road again

with the benefit of hindsight is another matter.

A. I have a certain regret now, but at the time it seemed almost imperative.

Q. Yes. And the purpose of this was to not just dampen down idle or spurious speculation, but serious speculation that was going on in the business community in Dublin, isn't that right?

A. That's true.

Q. And the purpose was to put the facts on the public record?

A. Mm-hmm.

Q. Insofar as was possible to so do?

A. Correct.

Q. And the issue of ownership was a live issue, isn't that right?

A. It was one of, it was a live issue among others, it was a live issue. In fact I was reminded, I think what was raging at the time, because it seems almost out of place, were the Motorola jobs. They were perhaps, if I may put it this way: the latest atrocity. In fact, in reading it now, it looks as if it is almost out of place because it had little to do with the competition process as such, but you are right, ownership was an issue, yes, I don't deny that.

Q. And wasn't there the opportunity at that stage to put on record the ownership as disclosed in the bid?

A. I can only conclude first of all is, while this

would have been drafted perhaps by Martin or Fintan Towey or both together, I know I didn't draft it myself, I would have seen it, so therefore approved it.

Q. Yes.

A. So but I I am, it is probable, if not certain, that all of us knew at that time that the ownership, there was a difficulty with the ownership issue. Given that is, we probably, I have no recollection of this, but it is equally logical to say therefore we took a decision that we wouldn't address the issue, not because we wouldn't have liked to do so, but because at this stage is, we knew that, if I may borrow a phrase from the other day, it was still work in progress, we had no agreement that the consortium was going to revert to the 40:40:20, so we would have had to come out, so to speak, with our hands up and saying this is quite fluid at the moment, and that would have only added to speculation and uncertainty.

Q. Well, surely it wouldn't add to speculation because if the facts were being put on the record, it would have been totally transparent, isn't that so?

A. The way I would have looked at it at the time, and the way I still look at it, Mr. Coughlan, is that in Government, as in business, agencies, indeed maybe in family affairs, there are difficulties that arise, and until such time as you have a resolution of those

difficulties, you don't call a press conference and blurt out those difficulties. I don't think it is called for.

Q. I know, and I understand that, and I accept that entirely. But you had called a press conference?

A. Yes, we had.

Q. And I understood that this had been building up a head of steam over a period of time and I perfectly understand that, but you now were, uniquely so, civil servants going public on something like this I know civil servants, in press conferences we see people from the Department of Finance every year when the estimates are being discussed

A. This was a little unusual.

Q. This was unusual?

A. Yes.

Q. And I suppose you could have, or did you consider not having the press conference when this information became available to you on the 17th, 18th or whatever of April?

A. That may have arisen but I have no recall. I have no recollection of that arising. I think that the sense of indignation that we had collectively, and that Martin would have had in particular, I can't say that because he is any more sensitive than anybody, because in many of the stories coming back, his name might have been featured because he was known to be the

Chairman. So in other words is, there was a certain inevitability, once the head of the team was built up, that we would do something about it. It may be well with the ownership issue thrown into a state of flux, that we might have considered that, but I have no recollection of that. My recollection is that once we decided to go for it, that was it.

Q. Yes. Okay. And I understand what you are saying.

But and again I understand the difference and I know you understand the difference between the information which was given to Ms. Finn on the 16th and that final paragraph on page 1 of Mr. O'Connell's letter of the 17th?

A. Yes, quite.

Q. But the one clear, and again I understand that you had a difficulty and you saw it as a difficulty in terms of ownership, the one clear fact you had was that the financial institutions were out as of that time?

A. Certainly I knew the financial institutions were out.

And but both perhaps, I mean it is perhaps, I can only assume going through my mind at the time, and once again is, clearly I am just trying to recall.

But I knew I knew that the footnote on the communication of the 16th was superseded by Mr. O'Connell's letter, but still Mr. O'Connell's letter that we have just opened, if I recall.

Q. Yes.

A. There was still at least, at the very least, a suggestion that a placement would be made by IIU, even though one could have views whether that would happen or not. So, in other words is, I think allied to my determination, I was absolutely determined that the percentages would revert to 40:40:20 and allied to that was probably the reason why I am using the term now, 'work in progress', so it was an issue therefore. We couldn't give a final resolution or certainty that would be required, quite correctly, of expert journalists that came along, in other words, is you either have a story for them or you don't. The story then would become the uncertainty, if you were uncertain.

Q. I understand what you are saying, Mr. Loughrey. The Minister knew you were going to have this press conference, or the civil service were going to have this press conference?

A. Yes, he did.

Q. And I take it he knew the, in general terms, the content of that particular press conference?

A. Well, the press conference was a genuine press conference. The statement he would know.

Q. The statement?

A. But there was sustained interaction between, I suppose myself, and Martin Brennan in particular, and I think a full muster both of economic and business

correspondence, it was a full role, so in other words,
the press statement was taken as read. It was a full
sorry if I may call it, a meat eating press
conference.

Q. Yes, can I take it that as you have just said, the
decision was taken to make no reference to IIU or Mr.
Dermot Desmond, is that correct?

A. I don't think its absence would be by chance. I think
it was by design.

Q. And the Minister knew of this involvement?

A. I think the Minister would have got a copy.

Q. You believe he must have known of this involvement by
reason of the communication of the 16th and 17th?

A. Unless his diary showed him, that he was away or
something like that. I can't think of any in
day-to-day contact I can't think of any reason why I
wouldn't have told him, let me put it that way, so
yes, I believe he knew, but and of course I would
stand corrected, if he were away or something like
that, I can't recall telling him, but in the nature of
things, I would have told him.

Q. Yes. Now, I, of course and I appreciate what you
said, that when you look back now, perhaps it wasn't
the right thing to do, to have this particular press
conference?

A. I suppose indignation is not the best, is not the
wisest counsel at times, and I think indignation

perhaps got it slightly better the upper hand over what I would call perhaps measured judgement, if I were to play it again.

Q. And I suppose, just to explain to you, the concern and why the Tribunal is looking at this particular matter at the moment, is that a member of the public, and remember this is of course public business that was being conducted, not some sort of private commercial transaction?

A. Oh, we are quite clear about that.

Q. Public business. And a member of the public looking at this particular press conference in light of now knowing what was communicated in the previous two days could well form the view that it was not a transparent process; that in other words that the true facts, that a member of the public looking at the press conference in light of the information which had come to light in the Department in the previous two days, that is the involvement of IIU, Mr. Desmond, could well and that the institutions were gone could well form the view that the process was not a transparent process, in that the true facts, although it was stated that the true facts were being stated, were not being stated?

A. I am not sure I could go along with that, Mr. Coughlan. I understand what you are saying, but the way I judged it at the time actually, is clearly

nobody would tell a deliberate untruth, firstly. But secondly, there is no obligation to reveal all at a press conference, fullstop.

Q. Oh, no, I understand that, Mr. Loughrey, and perhaps I have to formulate this question on behalf of the public.

A. Sure.

Q. And this was, this whole process was premised on transparency, isn't that correct, the process itself?

A. I am sorry, Mr. Coughlan, that process effectively in terms of the transparency, and I am going perhaps to a narrower definition, ended on the 25th of October.

The negotiation fees which was in the control of the Minister, no transparency was guaranteed for that process. Of course it should be done correctly. Of course the outcome should be correct, but I don't think anybody is suggesting, actually, that licence negotiations should be transparent.

Q. No, the process was one which commenced with a competition, which lead to an exclusive negotiating right to a particular consortium which had declared itself in the bid. It was a matter of concern to yourself when you received this letter is this in conformity with the bid?

A. Yes, sure.

Q. That is what I am saying. And so the transparency continued to that extent, that things were in

conformity with the bid, that's what the competition was about and people had to disclose who was going to hold this licence, who was behind the licence?

A. I can understand your concern, Mr. Coughlan, but I suppose my rationalisation at the time was based on my determination that the, it should end up as it started and how it should have been at all times, 40:40:20, and I suppose that is how I rationalised it at the time.

Q. I understand your explanation, that is how you rationalised it. The public, looking at this particular process, knew that bids had to be submitted whilst one had to pay €5,000 to get the RFT, in other words, it is a public document and that in Clause 3, as we know, made it it was a mandatory requirement that you disclosed who the owners were behind this leading to the licence?

A. Yes.

Q. We are not talking about any private transaction here, this is the public's business being conducted, isn't that right? And can I also suggest to you, that as and from this moment, negotiations were continuing with a consortium which was different from the consortium which had declared itself in the bid documents?

A. You are absolutely correct, but with the rider that perhaps, myself in particular, and the Department in

general, were fully intent that would be put right, so to speak.

Q. It is perhaps a small point, maybe it isn't, but I should just draw it to your attention, it just came to my attention as I was reading the press statement, I think the press statement states that the Minister had the report?

A. "Quickly accepted by the Minister, a single recommendation as expressed by the analysis" I am sure you are right. I just don't see the paragraph.

Q. It was just as I read it that

A. No, well if nothing turns on it...

Q. Yes, nothing does turn on it. We have been through your evidence about what actually happened.

A. Yes

CHAIRMAN: Isn't it also the case, Mr. Loughrey, that whatever about the word on the streets, that you recall, which understandably incensed Mr. Brennan and others of your colleagues, as regards the actual exchanges in the Dail to date, they hadn't sought to criticise the public servants or the nature of the process, the emphasis from Mr. Molloy and Mr. O'Dea and others had been very much on the ownership question?

A. You are absolutely right. And indeed they were, they could have, they could have under privilege, for instance, reflected what the opinion on the street

was, and they were scrupulously avoided doing that.

CHAIRMAN: That would be convention not to, wouldn't it?

A. Indeed.

Q. MR. COUGHLAN: It is paragraph 8, I think, just

MR. O'DONNELL: In fact the final portion.

MR. COUGHLAN: Yes.

A. I don't think there was any.

Q. "There was a clear advantage in the process of avoiding that in fact the final report was presented to the Minister in actually the week foreseen with planning documentation."

I am just drawing it to your attention. It was only as I read it.

A. I don't think on either side there was an intention to mislead.

Q. Now, I think you yourself issued a statement as well, which is at the next divider.

"We believe that the competition for the second GSM licence was a model of its type. Civil servants are not thin skinned and we are not taking any press comments in a personal way. Our objective here today is to present the facts on the process so that a fully informed view can be taken.

"The Department believes that the process was professionally handled, was objective and comprehensive in its operation and identified the

consortium with the best proposal and with the ability to implement the proposal. The decision was taken without any outside inference whatsoever.

"When setting up the process for the competition our objective was to select the consortium which would offer the best GSM service to the people of Ireland at the most competitive cost. We had no other considerations. We did not take into account any factors (such as jobs, sale of products, location of HQ, etc.) other than telecommunications.

"The comments which have been made do not do justice to the process and if left unanswered would do damage to Ireland's reputation. This is something which we cannot tolerate and the purpose of this briefing is to present the true facts.

"It is our intention to answer all your questions in as open and comprehensive a manner as possible and the only restraints on us will be where confidentiality is imposed on us or political questions."

I don't suppose I need to ask you anything particularly about it.

A. No.

Q. Now, did you I should ask you this: what did do you next?

A. After the press conference?

Q. Yes.

A. I think what I would have almost certainly have done

is sit down with Sean Fitzgerald, probably as the first port of call, but I have no direct recollection, certainly with perhaps Martin Brennan or Sean McMahon, in other words is, to make sure that whatever we did on the licence was now done in a very careful way. In other words, we would have had to say is, how where do we stand from, say, a legal standpoint? if it hadn't been done already, it may well have been done already, because all the people were talking about from Mr. Towey to Mr. Brennan, were people well able to act on their own initiative. If it hadn't, I would have said let's clear our lines with the Attorney General's Office, for instance, in other words to see how we are fixed and to get advice on moving forward in such a way that we could regularise the situation, but that we wouldn't be open to challenge either from the consortium for whatever reason, for instance, or ultimately, I suppose, to fireproof ourselves against possible litigation down the road. I would have had that in mind, surely.

Q. That seems perfectly logical as to did you turn your attention to the question of when this, what has been described by Mr. O'Connell as the change of ownership, occurred or when it dated from?

A. I didn't, and perhaps I should have, Mr. Coughlan, but I didn't I may have, and this is by sort of spatching at two documents, almost imagine that it was

happening at that time, because looking at Document number 1, it still seemed to be that things were happening, they had the diagram, but the IIU role wasn't exactly nailed down, and then the certainty of Mr. O'Connell's letter, that may have perhaps given me the impression it was happening around that time, but I have no recollection of saying "let's get to the bottom of this and find out what happened on the far side of the counter." Perhaps I might have done that, but I didn't in the event.

Q. Okay.

A. I suppose, just a rider to that, in addition to that, obviously once I read Mr. O'Connell's letter, it was clear that these were the facts we had to deal with, so I suppose I was looking forward, in a sense, how do we plan to get around this problem? rather than looking backwards to how did it happen? I suppose, in the classic phrase I was saying 'we are where we are, let's fix this problem now'. But it might well have been a wise thing to do at the time to look back to see how it happened.

Q. There was a meeting with members of the Attorney General's Office, I think on the 22nd of April, 1996. And you see the note, I think it is at Divider 192. There is a note of the meeting.

A. I have no recollection of that meeting. I am sure I was told about it at the time, you know, we have stuff

underway with the AG's office, but really, I only read this for the first time when it was brought to my attention now for the Tribunal.

Q. Yes. And really I think I can bring you straight to paragraph 5 of the note of the meeting. And it says:

"The Department also gave to the Office of the Attorney General a copy of an extract from Esat Digifone's application outlining the ownership of the company, together with an internal Departmental document and a letter from William Fry and Co. solicitors, concerning restructuring the Esat element. The Department indicated that clarification would be necessary of any change in the ownership structure of Esat Digifone relative to that outlined in the application."

So that's Mr. Towey's note of the particular meeting, and that was copied to Mr. Brennan and Mr. McMahon and Ms. Finn?

A. I suppose paragraph 5, in the circumstances, might sound almost, almost a little neutral, but in fact I would say all the information I am just interpreting this now as I stand was being sent to the AG's office and no doubt, as they had been an intrinsic part of the whole process, would understand the significance of it, and I am sure they did.

Q. Of course, the Attorney General's office was not being told how all of this had happened and what had

occurred during the process I am sure?

A. I am sure that's correct's.

Q. Because?

A. Because we didn't know ourselves. We hadn't our, I suppose just to repeat myself, our emphasis was on putting it right rather than to see how it happened in the first place.

Q. Yes. And that was the view of the Minister as well?

A. I am not sure how involved he was. Clearly I would have said, I would have expressed in no uncertain terms to him what I had thought of the events, and my determination. Let me put this way, if he had opposed anything I was proposing to do, I would have recalled.

Q. And I suppose that's the answer on the 24th of April, 1996, Mr. Towey wrote to the officials in the Attorney General's office. And he refers to the meeting, their meetings and he enclosed a report on the Department's assessment of the compatibility of the conditions of the draft GSM licence with Directive 96/2, and a consolidated text of Section 111 of the PTSA 1983, incorporating amendments contained in Section 145 of the 1992, and amendments proposed in the transposition of Commission Directive 96/2.

"I have also, as requested, consulted internally on the question of consulting the European Commission in relation to the terms of the licence. The Department is of the view that apart from the time constraints,

it may not be prudent to invite the Commission's scrutiny at this point. The question of compliance with the provisions of the Directive 96/2 will no doubt fall to be examined in detail by the licence in due course possibly in consultation with the Commission.

"I would also like to reiterate our requirement for a legal opinion on the restructuring of the ownership of Esat Digifone (relevant papers were provided at our meeting on the 22nd of April). In particular the question of whether recent correspondence suggests any change in the identity of the beneficial owners of the company which could be considered incompatible with the ownership proposals outlined in the company's application must be addressed. Before the ultimate award of the licence it is now considered that it would be preferable to seek warranties in relation both to the beneficial ownership of Esat Digifone and the financing package for the project. This is considered prudent given the nature of the concessions being given to the company. Perhaps you would advise, however, whether such a requirement could be challenged by Esat Digifone as an imposition not envisaged in the competition process or otherwise unreasonable on legal grounds."

That is the relevant portion of the letter.

A. Once again is, I don't believe I have ever seen this

letter. As I say, in the last two weeks or so I was informed, obviously, that in tackling this problem obviously that would be an intrinsic part of it, to make sure our lines were cleared legally, so to speak.

Q. Yes. Now, that particular issue was not addressed in any legal advice which was furnished to the Department?

A. It is clear, in perusal of the papers actually, that that appears to be the case, Mr. Coughlan. However, at the time we took, or personally I took the decision I was not so aware. Let me put it this way: nobody had informed me that there was any problem on the legal side. I assumed, therefore, that I would have been let's say if a problem had arisen I would have been informed. So I am now aware, clearly from the papers here, that I don't see any evidence of that actually, so that must be the case.

Q. Yes.

A. But having said that

Q. And I can assure you it is because the Attorney General himself has informed the Tribunal so?

A. Of course I would accept that.

Q. Just bear with me for a moment?

A. Of course.

Q. I just want to see if I can skip over some of these documents.

There is, at Divider 196, I think these are notes of

Mr. McMahon, and I am only opening it this is just that you refer to, I think it starts "secretary called", do you see that there?

A. Mm-hmm.

Q. "1. Denis O'Brien Esat fax of letter." I can't make that out.

"2. Denis O'Brien not"

MR. O'DONNELL: "On file".

Q. MR. COUGHLAN: I beg your pardon, "letter on file".

"Denis O'Brien now "

A. "Terrified".

Q. "Terrified he won't get money"

A. Yes.

Q. "because of routers. Secretary doesn't think there is much we can do. Minister can't go back on

Government decision. I explained legal uncertainty.

Paul Gallagher advised" etc.. That relates to

routers, and we know the matter, that when it went to

Government on the 25th or the 26th of October, the

whole question of enforcing the law in relation to

those matters, I think had also

A. And it was an intrinsic part of the careful political balance at the time, yes.

Q. I don't think anything particular turns on the note, unless you wish to comment on it yourself, Mr.

Loughrey?

A. Other than to say that Mr. O'Brien had, and he was

quite entitled to do so, had always, let's say, bundled up his fixed line proposal for the capital markets together with his proposal for the cellular phone licence. Clearly he may have seen that as an Achilles heel in the prospectus which would have been issued by Credit Suisse First Boston, in that he didn't have the availability of lines that he would like to. That would I suppose, that would be consistent with his market share projections, and I suppose that may have been a difficulty for him. It is up to Mr. O'Brien, obviously, but that's the interpretation I would put on that.

Q. Of course Credit Suisse, First Boston was a new finance package arrangement which had not been proposed to the evaluators at the time, I think you would agree with that?

A. Yes, I would agree with that, but to be honest, Mr. Coughlan, I don't think an alternative source of finance would have been critical, actually, because

Q. Oh, no, I understand that point, Mr. Loughrey. But I suppose one might have to look at it in the context as I am going to have to ask you to look at it when we finish up dealing with the documents for this period?

A. Of course.

Q. No matter what concerns one might have about litigation holding up a process, if the evaluators or people who make administrative decisions, or

Governments come to the view that what has been represented to them is not the truth, they are quite entitled in those circumstances to say 'we will not deal with you'. I think you would agree with that proposition?

A. Clearly there would be some concept of proportionality there. I wouldn't disagree if there were a fundamental issue that underpinned the whole proposition, that would be one thing. Clearly if there were minor peccadilloes

Q. Oh, yes

A. proportionality would apply.

Q. I appreciate that. If somebody is slightly puffing their case or something of that nature and might just have just overstepped the mark, yes I agree.

There is a document at 199 which is Mr. McMahon's's note. Do you know if that was given to you at the time? If it wasn't, I won't ask you to

A. No, I don't believe that was given to me at the time.

In fact I don't believe I have seen it before.

Q. Right.

A. At all.

Q. Right.

A. No. I can confirm that is quite new to me.

Q. Right. I think I think perhaps if we move to then the Dail on the 30th of April, of 1996. It is book

You can see the way that we have prepared the documents in that at Divider 201 is the script prepared for the Minister. Then we've, at 202 is the extract from the

A. Dail report.

Q. From the Dail report from the Internet. But we have looked at the official Dail reports and this was a statement which was made by the Minister in the House, it is announced by the Taoiseach in the order of business. So can you be of any assistance to the Tribunal how the Minister came to make such a statement?

A. No, I once again, I didn't anticipate this question. You know, understanding orders, I forget the numbers, while I think 31 and 32 I think it is, there are various methods whereby either members of the House can make personal statements or clearly ministers can make statements and we need to go back to standing orders because there are a few methods in which it may be done. I can't recall right now, but it would depend on a political it might have come from within Government as a political decision to clear up matters if, in fact, there is something topic of public concern, etc.. Equally it might have stemmed from an agreement among the whips, for instance, that this is something would it be put into private members times or would the Minister make a statement? I have

no idea at this stage, seven and a half years later.

Q. Right.

A. But clearly is, the Minister, either through agreement, political agreement or, as they saw it, political requirement, obviously made this statement to the House. I would need to research it to recall how it arose.

Q. Am I correct in understanding then that the initiative for the making of the statement would have come from the Minister rather than from the civil servants?

There was no PQ done?

A. Oh God no, we would never volunteer our Minister, any Minister to make, to put himself in the firing line or herself as the case may be, in the firing line unless it was requested elsewhere.

Q. Very good. I am just trying to clarify. The initiative was a political initiative?

A. Oh absolutely.

Q. And even though it would arise in that manner, it would be normal for a speech to be prepared?

A. Oh quite clearly.

Q. Now, I think you had an involvement in the preparation of the speech?

A. A statement like this wouldn't, if I were in the office, it would certainly have come over my desk, yes.

Q. Well, I think you had a more direct involvement?

A. Oh, I am sure if I am reminded, I am sure I will.

Q. I am not trying to catch you out.

A. No, no.

Q. Because I and the Minister himself seemed to have an involvement as well?

A. Sure. Mr. Coughlan, I wasn't trying to distance myself in any way.

Q. I am not trying to catch you out, that is why I want to bring this to your attention, first of all, before we deal with it.

A. Sure.

Q. It is Book 52, Divider 2, I think, Divider A2. These are documents which are prepared as a result of disks being cleared out

A. I see.

Q. in the Department?

A. Mr. Coughlan, I am not sure we have that to hand.

Q. I will give you one.

MR. O'DONNELL: A2?

MR. COUGHLAN: It is Mr. Brennan's have we got a copy of it?

(Document handed to witness.)

Q. It comes from Mr. Brennan's disk and it is for the 1st of May, 1996. And you can see it is:

"Secretary,

"It imposes unacceptable pressures on individuals when there is not better coordination in relation to who

does what and when coming up to a major speaking occasion such as the GSM speech on the 30/4/1996. The events of the final 24 hours are the worst, but not by any means the only example of the kind of chaos to which I refer.

"I found myself adapting the preliminary draft following oral inputs from the Minister and from you while others were chopping and changing from earlier drafts in parallel. We joined the Minister at 1:35 with two different final versions. 1:35 is too late in such circumstances anyway. The panic which sets in in the final hour is intolerable for those who have to sort out the mess. Fintan Towey did Trojan work in very difficult circumstances on this occasion.

"There is a clear need for some order to be put on the chaos. For example, only one person should be amending the text at any one time and the Minister has to be persuaded to make his hands-on intervention a bit earlier in the timeframe.

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

"We must learn from our experience.

"Martin Brennan"

That is copied to Colin McCrea and Richard Moore. And I think we understand from Mr. Brennan that it must have been that there was political involvement going

on here as well as civil service involvement?

A. I am sure, I am sure, yes.

Q. And on the draft as prepared, and we understand from Mr. Brennan that on page 14 of the draft speech under the subheading "Ownership" Miss O'Brien draws to my attention, if you go to page 1, the second paragraph, first of all, I suppose defining the Terms of Reference.

"I want to use this occasion to say on the record all that can be said about the issue. I ask your indulgence if it is necessary for this statement to be long in the interests of being comprehensive within the limits of confidentiality. I will answer any questions which arise at the end of this statement.

"I want to say at the outset that I want an urgent need to put an end to the monopoly supply", and he continues on then.

If we come to page 14 the subheading "Ownership":

"I would like to dwell for a moment here on the requirement that applicants provide full ownership details. The ownership structure of all of the applicant consortia was examined by the Project Team. Four others, along with Esat Digifone, envisaged that the project would be financed, apart from debt financing, through equity participation going beyond the original consortia members. This wider equity participation involved unidentified stakeholders

arising either through private placement or through a stock market flotation.

"The consultants in the Project Team saw nothing exceptional in this for a project of this size.

Andersens had clearly been down this road before. It is impossible to expect that something envisaged by five of the six applications in some way damaged their applications.

"These equity arrangements were not considered, and rightly so, to be a negative factor in relation to any application. Indeed, if the evaluation process had marked down any application on these grounds, it would be impossible to defend and I have already made it clear that the process can be fully defended.

"In the case of Esat Digifone, the intention of the consortium partners to arrange a private placement with blue chip institutional investors was disclosed.

Letters of commitment from the investors for specified amounts were submitted. In addition to this, very strong expressions of interest in loan and equity participation in the consortium were available from other leading international institutions. Because of the confidentiality constraint, I cannot name any of the institutions concerned. The situation would be no different if any other consortium house won. The Project Team established that all of the consortia were capable of funding the project."

Now insofar as it goes, what was disclosed, it is a correct statement of what was disclosed at the time of the bid, isn't it? But I just have to suggest to you, Mr. Loughrey, that it becomes a little bit disingenuous as it proceeds?

A. Well, my response to that, Mr. Coughlan, would be is the same as I gave earlier for the press conference; the Department was moving with intent to make sure that it was, the licence would only issue with the same proportions as had been indicated at the time, so that's a historic note of the intent at the time.

Q. Yes.

A. And it could well have been on my advice now I am not saying it could well have been at my advice on the same sort of reasoning to say is, until such time as we bring back this consortium to what was in the application, there will be no licence and that was my determination. So whether that rationalisation would be sufficient for you now, as you put the question that is for the Tribunal to decide, clearly.

Q. But there can be no doubt but that the Minister was content to run with this?

A. If he weren't, he would have changed it. Because this would have been a considered document. A statement the House made unilaterally by a Minister is not something, just a text one reads out. I have to say it would have been a considered document.

Q. Yes. Yes.

Now, if you go to what was delivered in the Dail,
that's at the next tab.

A. This is the Dail statement?

Q. The Dail statement. I suppose what, if I could just
bring you to if you go to the second last page of
the report?

A. This is the one where Mr. Dermot Ahern, 'Mr. D Ahern'
is at the top, is it?

Q. Yes.

A. Okay.

Q. Just before I do, I will just ask you to bear in mind
something, because it is an issue that I will be
asking you to consider later. If you go to the fourth
last page, which has a portion of a paragraph, a 'Mr.
Stafford Brennan', you see that?

A. Yes.

Q. Mr. Loughrey, Mr. Stafford Brennan is asking then "why
were the names not disclosed on the 22nd of November
when the letters were submitted before the Minister
made the award? Did he know who owned the 20 percent
before awarding the licence? Did he mislead the Dail
on this issue? Will he tell the House who are the
beneficial owners of the remaining 20 percent of the
winning consortium?"

It is Mr. Molloy's interjection that I would ask you
to bear in mind when we come to deal with something.

"Mr. Molloy: 25 percent."

Mr. Molloy seemed to be on to something or had some sort of information at least, because of course as of this date there was 25 percent out there, isn't that right?

A. I understand, yes, yes.

Q. If you go again, I beg your pardon, to the second last page with 'Mr. D Ahern' at the top as correctly identify. If you go down you see 'Mr. B O'Keeffe'.

A. I am sorry this folder actually has been broken on me. I will be with you in one moment Mr. Coughlan.

Q. Yes.

A. Yes, I see 'Mr. B O'Keeffe', yes.

Q. "Why, when the Tanaiste was having discussions with one of the groups the day before the announcement was made, did he indicate that this decision would not be announced for a month? Given the Taoiseach's's espousal of openness and transparency and the fact that this was the sale of a public asset, why did he not insist that matters pertaining to ownership would be in public view? Would the Minister accept that perhaps it was a mistake given that we now have press speculation that 20 percent could be owned by people such as Mr. Desmond and others? The confidentiality has now lead to speculation throughout the press. Will the Minister make public the full ownership of Esat Digifone before the licence is signed?"

"Mr. Hogan: He said that.

"Mr. Lowry: I will not speculate on what the Tanaiste said.

"Mrs. Geoghegan-Quinn: The it is safer.

"Mr. Lowry: The deputy has missed the point. I stated clearly that all five participants in this competition had various ways and means of raising funds to fund the project. I will not speculate at this stage or cast aspersions on the credibility of the others. The deputy mentioned Mr. Desmond. If Mr. Desmond or any other company is in a position to fund this Project Group and is acceptable to Esat Digifone, and if it means that this Project Group is up and running, so-be-it that is their business. It is not my business to determine who should participate in a consortium of this kind. My only priority is to ensure that the funds are in place to fund the project an get it to roll-out on time. It is very simple."

Now, it does not appear that any draft of that nature was prepared for the Minister. But you can see that Mr. O'Keefe had raised the issue with of Mr. Desmond here?

A. Yes.

Q. It was known to the Minister about Mr. Desmond's involvement at this time?

A. Yes.

Q. And of course it was entirely the Ministers's business

and not Esat Digifone's business to be sure of who he was granting the, awarding the licence to, isn't that right?

A. You are absolutely right, yes.

Q. Now, Mr. Brennan has referred to us, has told us about that when any Minister has spoken in the Dail, the blacks come back, are reviewed in the Department to see if anything has to be done or if one needs to correct matters or matters of that nature?

A. I remember doing that, I don't want to sound that I am very old but I haven't looked at blacks, I would say, for 30 years. Lately, yes, but that is that is the process.

Q. Do you remember any discussion with the Minister after this statement?

A. No, I don't; no, I don't, and you did point out just there that Mr. Molloy seemed well-informed.

Q. Yes.

A. I don't believe that I was informed of that or picked it up or anybody informed me at the time. Now, I may be wrong, but I have no recollection, but seeing it there is Mr. Molloy was either by chance or remarkably well-informed.

Q. Yes, yes. Now, at Divider 203 of this book, of Volume 44, Mr. Martin Brennan wrote to Mr. Owen O'Connell:

"Dear Mr. O'Connell,

"I refer to your letter dated the 17th of April, 1996 concerning the restructuring of certain ownership interests in Esat Digifone. In accordance with the requirements of the GSM competition documentation, Esat Digifone provided ownership details which indicated that at licence award the ownership would be as follows:

Communicorp Limited 40 percent;

Telenor Invest AS 40 percent;

Institutional investors 20 percent.

The application also provide dead tails of the ownership of the operational partners and identified the probable institutional investors and the brokers who would be responsible for placement of equity with institutional investors.

"In the case of Communicorp, it was indicated that it was 66 percent owned by the Irish investor Mr. Desmond and 34 percent by Advent International.

"In view of the information contained in your letter of the 17th of April, 1996 it would be appreciated if the following could be clarified.

"1. The nature of any differences between Communicorp Limited and Esat Telecommunications Holdings Limited in relation in particular to expertise or asset strength and;

"2. Full details of the ownership and categories of all shares of Esat Telecommunications Holdings

Limited, including in particular by persons other than the owners of Communicorp.

"It is essential that the Department can identify precisely any change in the effective ownership (both direct or indirect) of Esat Digifone since the time of submission of the application.

"Finally, it would be appreciated if you could confirm that full certification of the following matters will be provided before the award of the licence:

"1. The precise equity ownership of Esat Digifone including the identity of all institutional investors.

"2. The identity and financial commitment of providers of debt financing.

"It is essential that these matters be cleared up before issue of the licence. We also need to discuss the public presentation of these matters.

"I am available for any discussion you may require of the foregoing.

"Yours sincerely."

I take it you were aware of this particular correspondence, were you?

A. No, I wasn't.

Q. You were not?

A. No. When I say I feel sure I wasn't. My memory of it is being kept informed of, in general, of, you know, the licence negotiations: we're making the right inquiries, we're pressing very hard, sort of a

general. I have no real memory until I took a direct active role probably in the last three days. In other words, the spirit and practice of delegation applied in the market. We had first class people like Martin Brennan, Sean McMahon, Fintan Towey, Regina Finn looking after these things, so even though of course I would approve of that letter, I don't see any of course I approve of it, I am not aware I was so informed at the time. But this, once again, isn't that I mean I am distancing myself from anything, it's just that you put the question to me, strikes me that letter at the time, almost certainly I did not, but that is not to say that I wasn't unaware in general that they were moving towards what I wanted to happen, the, let me put it, the restoration of the 40:40:20.

Q. That's the first yes, the first. Now, the I was going to come on to the whole question of the meeting of the 3rd of May and it would be fairly lengthy, Sir, because we have to open Mr. Johansen's memorandum and Mr. Loughrey wants an opportunity to deal with it and if I just start it by opening it now, we might well not have time and Mr. Loughrey wouldn't have an opportunity of responding to it, so it might seem

CHAIRMAN: Well, we have made reasonable progress.

We are approaching the last lap, so to speak, Mr. Loughrey. And whilst inevitably you are going to be detained a certain amount of next week, I don't see

you matching the longevity of Mr. Brennan in the

witness-box. Eleven o'clock on Tuesday.

THE TRIBUNAL THEN ADJOURNED UNTIL TUESDAY, 25TH

FEBRUARY, 2003 AT 11AM.