

A P P E A R A N C E S

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FOR TRIBUNAL: Mr. John Coughlan SC

Mr. Jerry Healy SC

Ms. Jacqueline O'Brien BL

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I N D E X

WITNESS: EXAMINATION:Q. NO:

JOHN LOUGHREY Mr. Coughlan 1 - 277

Mr. Shipsey 278 - 333

Mr. Fitzsimons 334 - 387

THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY, 26TH

FEBRUARY, 2003, AT 11AM:

CONTINUATION OF EXAMINATION OF JOHN LOUGHREY BY MR.

COUGHLAN:

Q. MR. COUGHLAN: If we might go to Book 44 again,

Mr. Loughrey, if that's all right. There are just a

few further documents I'd like to ask you about. And

I think if you go to Tab 228 of the book, please,

Mr. Loughrey.

A. Yes, Mr. Coughlan.

Q. Now, you'll see that Tab 228 is a letter from

Mr. O'Connell in William Frys to Mr. Brennan in the

Department. And what it does is, it encloses a copy of

the Shareholders' Agreement, as signed, and with it is

the Shareholders' Agreement. I think you'll see that

at the tab?

A. I do.

Q. I am not going to go into the Shareholders' Agreement

with you. You only saw it recently, isn't that

correct?

A. Correct.

Q. I think you said that in the witness-box yesterday?

A. Correct.

Q. I take it you would have been generally aware that the Shareholders' Agreement may have been received in the Department?

A. Yes, I was, and I knew from, at least the previous day, the shape that the rearrangements were taking within the Shareholders' Agreement and now, I can't recall on the 16th, but it's clear to me in my discussions with officials in the Department, had the Shareholders' Agreement, when it arrived on the 16th, deviated from that understanding, they would have let me know.

Q. Now, it's just in that context, perhaps, if you go to Tab 230 in the same book.

A. Yes, I have that now.

Q. You will see that that is these things are described as "side letters". We have reference to side letters quite a lot. Their actual status I am unsure of at the moment, but this is a side letter addressed to the Department. And what it does is, it is a side letter to the Department really providing for the Telenor and IIU effective underwriting of the position of Communicorp?

A. On a 2:1 basis.

Q. On a 2:1 basis.

A. I was clear that that, in fact, was the emerging underpinning of the arrangements.

Q. Now, the only matter I draw to your attention is that

that was done in a side letter to the Department, and it doesn't appear in the Shareholders' Agreement itself?

A. I see. I was not aware of that. The "assurances" might be too strong a word for it, but the information I had on the 15th, that it would be an intrinsic part of the agreement, that was my recollection. Now, clearly once things were signed and sealed, I suppose myself and the Department moved on. As I say, I didn't see the Shareholders' Agreement, I just took it at face value.

Q. And I can understand from the Department's point of view perhaps receiving it in the form of a side letter may have made no difference to the Department. It's just that in the context of it not appearing in the Shareholders' Agreement, I did ask you to bear in mind, do you remember the project debt financing, the letter that was received from, I think ABN-AMRO, or

A. Yes, I do.

Q. That there was the commitment to the  $i_{\frac{1}{2}}$ 25 million bridging which was in place and then subject to due diligence. I suppose I better be careful about using the word "commitment", but an indication that there'd be 78 million

A. That 78 million would be available.

Q. And I suppose, it's a matter for the participants really, but on a due diligence, of course the side

letter to the Department from Telenor and IIU may not necessarily have been thrown up in any Shareholders' Agreement within Esat Digifone, if you understand the point

A. I think it's an interesting point, and it would be up to the legal advisers, or the project finance suppliers to test that if they so wished.

Q. As to what effect it may have had on them is another day's work, but I just draw that to your attention that, that appears to be the position?

A. That would appear to be the position, yes.

Q. Just something drawn to my attention, but I believe we considered this particular document yesterday, Mr. Loughrey. You can tell me if I am wrong about that. It's at 227 perhaps.

A. I see that now. Mr. Coughlan, it might be helpful, I think a Thursday the date there there is no date. I am just looking at this now actually. I take it that was the 16th or perhaps was it the 15th? I am not sure because I don't relate the days and the dates, unfortunately.

Q. Sorry, perhaps I should go back, I beg your pardon, because I think Mr. O'Donnell actually confirms that we didn't refer to that yesterday. My apologies. Perhaps if we go back to Document 223.

This is another one of Mr. O'Connell's attendances, you can see that, and it's 15th of May, 1996, and it's

in the matter of licence negotiations.

"Department Communications: Martin Brennan, Fintan Towey, Donal Buggy.

"Friday, if necessary" it is reconstituted on the next page.

"Friday, if necessary, 3:30 Thursday."

A. I am somewhat relieved to see that, it's the first indication that there wasn't an automaticity.

Presumably Thursday is the 16th, and I still can't relay dates and days, and if it is, there is the first time, there isn't apparently an assumed automaticity about the signature.

Q. I think you are right about Thursday being the I think you are right about Thursday being the 16th, Mr. Loughrey.

"Friday, if necessary, 3:30, Thursday - yes.

"TE big price decrease tomorrow (off record)."

I don't know what's that about.

A. This is oh, yes, there was the question I think the question of rebalancing some of Telecom Eireann's charges at the time and involving leased lines.

That's my memory of it at the time. And once again, it sometimes has to be seen as part of an elaborate, if I may say so, trade-off, politically perhaps with a small "p", in terms of that every time there was a move to open up markets actually, summary assurance in some form or other had to be given to the existing

placers, notably mainly public enterprises. Now, that's absolutely understandable politically, and I think that's possibly, once again, an indication of that happening.

Q. Very good. And then, "World Communications Day 17 May." Does anything turn on that, or do you know?

A. That probably was seen as a milestone day by people interested in sort of giving extra significance to a launch, but I don't think it would be anything more than that.

Q. But perhaps it is, that it would be in time for the launch?

A. I think you are probably right.

Q. It seems to be, "Bill O'Herlihy per Minister."

A. Mr. O'Herlihy worked very closely with the then Minister in terms of public relations at the time.

Q. Right. And then, something "attributed" underneath then seems to be attributed to Martin Brennan. "When" did Telenor?" it seems, when did Telenor get involved? I suppose, which would be the continuation of that question, and then it seems to be a response, doesn't it?

"Late April/early May.

KD phone calls late April, meeting Oslo early May.

"Parties talking second half of April. Double dealing re Southwestern Bell."

Then if you turn over the page, "Pain in the ass

comment.

"Company owned 50/50 intention to place/float throat 20%. Strong supporting letters were available from a lot of blue-chip investors. In normal course when project became real. Negotiated, but deal available which we now have. IIU not in original.

"Comfort Minister favourably disposed re letter.

"Ref P1 Shareholders' Agreement Recital D.

Ref 4 shareholders.

"Dress rehearsal with Minister sometime after 1, some our side."

Did you know anything about what was going on between representatives of Esat Digifone and members of your Department at this particular time?

A. To say I wouldn't have known, almost certainly I would have been informed that they were that the press people were aligning themselves, in a sense, because it was going to be sort of a composite-type presentation. But I wasn't involved in it at all, and I am almost certain I had no connection with it good, bad or indifferent, or with any of the meetings or get-togethers.

Q. Very good.

Now, if you go to document sorry, there is another page of that. This is, "45:45:10 Cruising altitude."

I think everybody attributes that particular phrase to



you your type of phrase.

A. I am guilty, as you might you are very charitable, Mr. Coughlan. I am guilty of falling into the colloquialisms very easily, but I am not denying that because I felt myself that, as I say is, that the two key drivers of this particular consortium should stay in place and should be bound to stay in place, and Article 8 should provide that sort of protection for the Minister's discretion until such time as it was launched. I did not want, under any set of circumstances, for either of the two main players seen somehow to flip their shareholding at an early stage into the market place, because that was not the spirit of the competition as I saw it.

Q. Then the note continues:

"In normal trading circumstances, debt equity around 50%? Start-up phase, more fluctuation because of capital suspended, will tend a little towards equity, especially in early phase."

That seems to be some discussion

A. That seems to make sense. And providers in a new project, in a green field-type project always like to see a significant amount of equity going up front.

It's a form of protection for them as much as for anyone else. So that makes sense, yes.

Q. If we continue on with the rest of the note: "Martin Brennan save Minister, needs our help, whether same

project is one competition."

Now, I have been over all of that ground with you yesterday afternoon, and I don't intend revisiting it, but I think you would agree that it seems to be a matter of concern, and seems to be a matter of concern as being conveyed by Martin Brennan, a concern which the Minister had as well?

A. I readily concede that there is an apparent sensitivity about it, yes.

Q. And then, "Martin Brennan not keen on Denis as speaker. Not attribution." I am not going to ask you for your view about that.

"First conference DOB, we'll be lowering price 25% in three years. Focus of attack, couldn't have won competition on that basis. Application was stronger than that."

That again seems to be just a matter of discussion that was going on, or did you have any knowledge about this?

A. No, I had no knowledge about that.

Q. What do you think it might mean?

A. I think it might mean that in a press conference, I presume that the Esat dimension, in particular, wanted to, if I may say so, catch the eye of the media on the launch, that they were bringing something really competitive and innovative, and if I may say so, realistic journalists are going to say "That's all

very well, but what it will mean to the consumer?"

And that he was signalling straight away, because mobile telephony was seen as almost a luxury, and quite expensive if we cast our minds back nearly eight years, and we'll be competitive to the extent that we'll be lowering other prices 25% in three years I suppose was meant to be, if I may say so, a media loss leader in the presentation. I am only guessing because I wasn't part of this.

Q. If you go over then, it seems to be, "Prepare better answer. Get correction in launch commitment per bid.

Good presentation on price area. Consider (although not in application) 10 sec billing units, oral presentation, Denis O'Brien 1 sec billing by end year 1. Different packages, different consumers, 25% simplistic, more complex exciting things to shake up market, e.g. per sec billing early on (if Esat Telecom). Attempt to

correct complaint/innuendo 25% in three years.

He couldn't have won the competition on the basis not enough another consortia reducing 30 - 33% within a year of launch."

Would you agree with me, there was some type of discussion taking place here again about how to present the thing in the best possible light for Esat

A. Though Mr. O'Connell's note seems to be, I am only

inferring, that it seems to be pretty one-sided. This almost seems to be a stream of consciousness from Esat saying, "Look, we may be slightly vulnerable, if there is word out there that we weren't the cheapest in terms of price", because even though the Department and the Department's officials were bound by confidentiality, for instance, a losing applicant wasn't so bound, so there may have been an Esat, not a Departmental, an Esat sensitivity on that. On the other hand, too, you can see is that when it was announced on the 25th October, all Esat could do was react, react as surprise winners, but here, this is also a platform for their first commercial launch, so to speak, so they seem to be, I am only interpreting this now as an outsider seven and a half years later, they seem to be saying, "This is a platform for getting across exciting news that we are going to shake up the market", but they also seem to be signalling, as I say, in this stream of consciousness, "We could be perhaps a little vulnerable on the question of how did we win because we weren't the keenest, nominally speaking at least, in terms of reduction in tariffs." And I think that paragraph seems to encompass both these ideas.

Q. I take your point that again this is Mr. O'Connell's note, and we don't have a corresponding note in the Department, but I have to try and keep the balance and

put the position in fairness to Mr. O'Connell as well

here.

A. Of course.

Q. Mr. O'Connell, or acting on behalf of Esat, would not have been aware of the tariff package that would have been put forward by any other consortium?

A. He couldn't have been directly, so to speak.

Q. He would have had to have got that information from

A. In the market place it could well be. I am not saying it happened, but it could well be any one of the five losing applicants could have said, "We can't see how we could have been beaten, we were prepared to reduce prices by 33% on the incumbent", and it's possible that was in the market place. By the way, I hasten to say, Mr. Coughlan, I am only, as I say, trying to be of help in guesswork, sort of seven years later, and I may be completely wrong.

CHAIRMAN: I think Mr. Brennan agreed with me a week or so ago that had, in fact, Esat been the cheapest on tariffs, that would have been trumpeted and put as headline news in the press conference, and understandably so.

A. I think you are absolutely right, Chairman, yes.

Q. MR. COUGHLAN: Then if we continue over the attendance: "Why only signed now? Was licence delayed to put money in place? Leslie as speaker?"

We don't know who that is, but people here are

surmising that it's Mr. Leslie Buckley who was associated. We may be all wrong about that when matters evolve.

A. Maybe.

Q. "Department delay all on our side." That seems to be some sort of a conversation or a discussion as to, if questions are asked, "Why is it only being signed now? Is it because there was a shortage of money on the side of the Esat consortium?" And a solution or a suggestion is being made that the delay was all on the side of the Department.

A. Well, if you are asking me to comment on that, Mr. Coughlan, it depends on what angle you are looking for in this whole period between October 25 and May 16. And in one sense, the Department had to ensure that this very valuable licence, that we had to get it right. So in other words, the job Mr. McMahon's team had to do, in conjunction with the Attorney General's office, and outside counsel if required, would have to be done in a very careful, measured way, not in any delaying way, and it did take time. On the other hand, as we have seen in the last fortnight, and from some of the documents you have opened, is had the Department said "snap" say two months earlier in March, I am not sure, from what the documents opened, that the consortium would have been ready to sign. So in other words, is, I can't accept that the delay was

all on the Department's side.

Q. Sorry, that's fine.

Then the question, "What is impact of delay on launch?

"Will there be delay especially if different, geographical and quality coverage stress this.

Everyone knows Christmas market critical and intend to demonstrate seriousness for that. Question 16

June defer: 23rd June original closing if no deferment, could we have bid."

I don't know what the I don't know if you can be of any assistance as to what the final sentence or paragraph relates to?

A. Well, once again, it may be of no help to the Tribunal, it may be linked to two pages earlier, in the sense of, or three pages earlier perhaps, in the sense that there may have been in fact at the very beginning there may have been some sense that the consortium, and I imagine, like all the consortia is, were very busy once the RFP went out, that they were very busy in aligning up partnerships. Now, people may have been reading into it was, for instance, did the deus ex machina, in the form of the form of Karel van Miert, did that favour one consortium over the other, and I suppose is, because there might have been word in the market place, and once again I am only guessing that and I am only looking at the Esat now. One could look at all the consortia saying what

difficulties had they got coming together in what was effectively a very close period; in other words, after the questions were answered, everybody was entitled to pay 5,000 to get the documentation, but after the second round of questions were answered, and from memory was that not April the 28th? They had approximately a six-week period to align up everything in terms of consortium. That was tight for everybody.

Now, if there was word in the market place that Mr. O'Brien had perhaps an earlier possible understanding with Southwest Bell, people may now be asking questions, did Commissioner van Miert's intervention somehow, and therefore the deferral, favour them? I'd say it may have done any amount of the consortia a favour on a non-discriminatory basis, but I presume the question there is more pointed, is around that, and I'd say it would be pointedly around that for Esat's consortium.

Q. And then if you go to the final page, "Comfort now as to how Minister will act in given circumstances in the future."

Again that seems to be some discussion perhaps relating to Article 8?

A. I think that's definitely Article 8. I think that's definitely Mr. O'Connell recording for Digifone actually that the Minister, the usual, what I might call, statutory phrase, such consent would not be



unreasonably withheld. But nonetheless the, in aggregate the two main partners would have to be in there in a majority position, but they wouldn't be tied in such a way that would make it uncommercial for them.

Q. I think you can then go to Tab 226, Mr. Loughrey. And this is Mr. O'Connell, on the 16th May, 1996, his record.

"Martin Brennan/FT/Donal Buggy, 11.55.

"Knut has to be there. Michael Walsh "ought" to be there.

"Have told you a lot about this company more" I don't know what the next word is "Answer re 500 K.

"Seamus Brennan Dail Minister to guarantee re coverage geographically and quality. Dail tonight.

Wants formal press release.

Still looking at letter.

Very urgent re Shareholders' Agreement." I think is the note.

"Still on for 3:30.

Printing stage.

Minister's press release need now.

Accountant, Department of Finance, i;½15 million."

Just to deal with the last line first. I think

Mr. Brennan has told us that that probably is a reference to ringing up the Department of Finance and finding out to whom the cheque should be made payable

for the 15 million for the licence fee?

A. And more importantly, I would say that it would have to be a same day value cheque. So it's for a cheque that size, the Exchequer should not be put at a loss, at a clearing loss, whatever that would be.

Q. That's perfectly understandable.

I think it was a solicitor's cheque. It probably came from Frys, from the client account, but I take your point; arrangements would have to be made that there'd be same day value given for this cheque?

A. The Department of Finance has discovered in the past, particularly where there might be a currency exposure, but in an era of high interest rates, a weekend for a very high cheque can cost the taxpayer.

Q. There is a reference there to "Dail tonight", and some reference to Mr. Seamus Brennan. Do you know anything about the Dail on that particular night?

A. Clearly I have no memory of that whatsoever, but it is possible actually, that Mr. Brennan had put down put in his motion for an adjournment debate, or a debate on the adjournment, and didn't draw it on the night, in effect. That's the only sort of solution I can offer.

Q. Mr. Brennan has explained to us that on the that there is a lottery system regarding those

A. That can be checked actually, but that's the only solution I can offer, that he had put it in, into the

pot, but on the day it wasn't drawn, so to speak.

Q. If you then go to Tab 227. I suppose if we just go back to that. My Friend, Mr. Healy, just draws to my attention, do you see the "loves answer re 500,000", I don't know what the reference is, but it seems to be the Minister expressing satisfaction or

A. I can't interpret that. The only thing

Q. I think what it is, it's a reference that there may have been 500,000 costs additional to the delay as a result of the European intervention.

A. I think you would be right in that.

Either possibly either the delay at the time, because Mr. O'Brien, like all other consortia leaders, would have assembled a team, and that clearly doesn't come cheaply, or possibly in the delay in the licence, but that would hardly be right if you were going to go public on that in the day the Minister was sitting beside him in a ceremonial capacity. So I imagine it's the former rather than the latter.

Q. Did you ever hear the Minister express satisfaction about such a response?

A. No, it means nothing to me.

Q. If you go if you go to Tab 227. This is a handwritten note of Mr. Denis O'Brien's.

A. Mm-hmm.

Q. And it's, "12.00 noon Thursday, 11:30.

Michael Walsh talk to J Loughrey.

Seen enough to satisfy.

"Letter finance place from underwriter.

"40:40:20 don't discuss 5%:5%."

I suppose if we deal with the first portion with the line under it, because there is a reference to yourself there.

A. It seems clear now, I knew I had a conversation with Michael Walsh, and as I said to you yesterday, I honestly wasn't sure whether it was the 15th or 16th, and equally I am not sure whether it was before or after the second Farrell Grant Sparks' letter, whether it was before it, and I was more insistent on a better letter, or whether it was after it, and I was using the letter as an agenda to probe the individual items in the letter, I am not sure, but I think now I have no reason to doubt this, therefore, it seems that I spoke to Michael Walsh on the Thursday morning.

Q. If this note is correct?

A. If this note is correct. If that note is correct.

Q. So therefore, you believe, if this assists your memory that, it probably was the Thursday morning, which was the 16th?

A. I think that's reasonable, yes.

Q. And you would have had the second Farrell Grant Sparks' letter?

A. I would have had the second Farrell Grant Sparks' letter.

Q. And can you tell us what conversation, so, you would have had with Mr. Michael Walsh, again if this note is accurate? First of all could I ask you: Did you have any discussion with Mr. O'Brien to enable him to make this note, that

A. None whatsoever. In fact, I am not conscious of having discussed finances at all with Mr. O'Brien at that stage at that stage.

Q. So it would appear, therefore, that that note was made as a result of information you received from Michael Walsh?

A. Yes, it does.

Q. And what Mr. O'Brien is recording here is that, he is obviously being told that you have seen enough to be satisfied?

A. That's correct, yes, that's what it appears to say.

Q. What discussion did you have now, that you are in a position now to know that you had received or you probably had in your possession the second Farrell Grant Sparks' letter? Do you remember what discussion you had with Michael Walsh?

A. Could I reconstruct it from first principles, but that would be it wouldn't be a deliberate intent to mislead the Tribunal, but I would only be constructing it from first principles. I mean to say, I am not claiming to be an expert in finance, but my career had been aligned towards finance. I had spent five years

with the European Investment Bank, I had been in this area before, I wasn't a stranger to it. So of course I could rationalise now the sort of questions I would have asked them, and they would be typical questions like, "Okay, so you put in, for instance, assets which he had at historic costs. What does the market view, for instance, the value of London City Airport right now?" And I am quite certain the reply I can't I am reconstructing this from first principles, but I am quite satisfied that the reassurances he gave me on a) the asset value, but much more particularly, on the liquidity of what was on offer in the letter, because I would have probed that. I am quite certain my preoccupation was on liquidity, and we had touched on this yesterday, Mr. Coughlan, in the sense is, there was sufficient liquidity straight away to cover IIU's investing position 100 percent, and there was sufficient liquidity straight away in cash or near cash form to cover a good proportion, if their underwriting was called in right away. So I think that's the nature of the conversation I would have had with him.

Q. We have been over all of this yesterday, about IIU being the underwriters, and I don't want to go through it all again with you. But you were not appraised of any liabilities which either IIU or Mr. Desmond had?

A. I would love to be able to say to you that on the day,

because I should have on the day, because once again without claiming great expertise, I certainly wasn't an neophyte in this area, that I would have asked this question, and I can't say that I didn't ask that question. It's just that I can't recall that I did so ask that question.

Q. All right. And then, "Letter finance place from underwriter.

"40:40:20 don't discuss 5%:5%."

Did you have any conversation along those lines with Mr. Michael Walsh?

A. Neither with Mr. Michael Walsh, and clearly not with Mr. O'Brien. But what I would have done is, I almost certainly would have had that discussion possibly with Mr. Lowry, in the sense that when this whole issue came up, my strongly held view was, once again, on the necessity to hold the strategic and operational partners together in this deal and, I would have expressed my view of the dilution, we touched on this before I was so strongly opposed to it. On the other hand, the logic that is, I would have been much more relaxed about both of the, what I call the senior and operational partners increasing their shareholding. And almost certainly I would have given I would have informed Mr. Lowry of that in a discussion. Now, I can't say I recollect totally, but I'd be surprised if I didn't do so. So there may be

indirectly a reflection of that there.

Q. But what I am trying to ascertain at this stage, that particular notion wasn't something you conveyed to Mr. Michael Walsh?

A. No, it wasn't. Not to my memory certainly.

Q. I am just trying to understand this note for the moment.

A. I see, yes.

Q. Now, if you go to the next portion of the note.

"3. Worst possible questions.

"Number 37 competition for GSM licence.

"William Fry to play devil's advocate."

This is all something apparently outside any discussion you had with Michael Walsh, or did you discuss matters of preparations for

A. Oh, absolutely not. My sole focus was on, did we have sufficient on IIU for me to inform the Minister that it was an acceptable financial investor. I don't believe I discussed anything else with Mr. Walsh.

Q. Then, "William Fry to play devil's advocate.

"Legal adviser will" I can't understand what the next word is "Attach" or "attack Davy."

A. I can't imagine anybody doing that, Mr. Coughlan.

Q. "Solicitor to attend.

"1. Ownership."

You can see that this is foremost in the mind of people preparing for this presentation.



"2. Deflect attention away more business info"

sorry, I think "more business to give them." On the left, "Infrastructure", I think, I don't know.

"Don't"

A. Well, the essential good news, if I could be of help, and I am just interpreting this as I see it. The essential good news, and if I may say so, the obvious comparative advantage that this consortium had over all the others is that it could its infrastructure was such that it could hit the ground running faster than anybody else. So they could get the good news, in terms of 90 percent coverage faster than anybody else. So in other words, if it is a deflection of attention away, what better than to use the strength of the consortium.

Q. That was how they presented it, of course, isn't that right? That wasn't the actuality of the situation as matters emerged, because they were having planning difficulties anyway, and there had to be the intervention, as we saw?

A. Their state of preparedness, as I understand it, but I wasn't one of the PT GSM

Q. It's just an aside

A. As I understand it, on the assessment, as I recall the evaluation, they got the top category marks for that, so clearly they were, relatively speaking, strong.

But of course, they didn't have sufficient cell phone

bases, so in other words the co-location policy would have suited them, as it would have suited anybody else right down to the incumbent, because once Telecom Eireann's automatic right to have cell stations without planning permission, once that was gone, Mr. Kane and Eircell were in exactly the same position relative to

Q. I understand that. I am just pointing out as of sort of it's an aside, but the situation is, you are quite right that this was how it was presented, this was how it was viewed, but the reality was the reality as would have been faced perhaps by any consortium which won the licence?

A. That's true.

Q. That's all I am saying. Now, if you turn over the page, you can see there that is, "DDO/DDO" I think there. "31 DDI/DO" that's direct dial in, direct dial out?

A. I take it this is still Mr. O'Brien's note?

Q. Yes.

"Matrix

"need them

quality

backup

VAS.

"Justify requests.

" quality existing leases

deficiency modem traffic.

VAS future: Additional value added.

1 week."

A. And once again, Mr. Coughlan, I had said, I think either yesterday or during my evidence, that Mr. O'Brien's preoccupation with the fixed line side, even in at the, if I may say so, at the end of the negotiations of the GSM, doesn't surprise me, because he was still if I may I guess, putting the finishing touches to his prospectus for his bond launch with Credit Suisse First Boston, and as I say, the GSM was the good news, and if there was any area that he would have liked to have tightened up or strengthened, it is in this area. So that preoccupation doesn't surprise me.

Q. Now, I think and this is just a general question on this whole question of the fixed line, and the dispute that was going on between Mr. O'Brien's side of the business on the fixed line, and Telecom Eireann. I think we touched on it some days ago?

A. Yes, we did.

Q. And what was happening here was, as we know, technology was improving, and I suppose it could be viewed this way: Mr. O'Brien was prepared to push at the boundaries of what Telecom Eireann perceived to be their exclusive monopoly, and the law, and we know it was even a matter that went to Government, and as you

say, had to be, I suppose "packaged" might be too strong a word, but it had to be combined with the noting of the GSM competition result, isn't that right?

A. That's correct, yes.

Q. That the law would be strictly enforced?

A. Absolutely.

Q. And Mr. O'Brien was pushing against the Regulator, Mr. McMahon, I suppose, in those circumstances?

A. Correct.

Q. Mr. McMahon was taking a position as he understood the law to be?

A. It created a genuine dilemma for Mr. McMahon, but for everybody, because if there was a black and white answer to this question, what surprises me is that the courts ultimately didn't decide this issue, because I was expecting sometime during that, if I may say, period, possibly from, was it '94 through to '97, I had a sort of general feeling that this could only be resolved by the courts. Because there genuinely was a grey area, it just wasn't in Ireland, because when it went to Brussels both DG IV and DG XIII, it almost depended on, I won't say the official one spoke to, because this the merging of there was certainty in the technology when the legislation was drafted, no such certainty technology had moved the goalposts, so to speak, but how far had those goalposts moved?

And this was an issue that created a constant dilemma for the Department in general, and Mr. McMahon in particular, but I suppose the sympathy of the Department would be towards the introduction of competition, if at all possible. But we were also quite clear as civil servants, that the law could not be broken, and if it were absolutely black and white, we would never have had, if I may say so, a four-year wrangle. But because it was so uncertain, and indeed successive Ministers found it when they were briefed to be uncertain, I still reckon we erred on the side of keeping both the letter of the law and the spirit of the law of the '83 legislation. Now, that's my general impression.

Q. That's all I am asking for at the moment. And would I be correct in thinking that that might have been the type of view the Minister had, that he was sympathetic to the position of Mr. O'Brien's company, although, as we know, he brought a matter to Government and assured the Government that the law would be enforced?

A. I think successive Ministers, because

Q. I am just asking about this Minister.

A. Of course, all right. This Minister had an instinct to favour competition, and it would have applied in this area, certainly, Mr. Coughlan.

Q. Now, I now want to come to something that centres around the, a rehearsal for a press conference, and a

press conference for the 16th May of 1996, just to see if you can be of any assistance to the Tribunal.

If you go to Mr. O'Connell's memorandum, the one we were looking at yesterday

A. Just its reference again, Mr. Coughlan?

Q. It's in Book 38, Divider 1(B). If you go to, I suppose, page 7 I think.

A. Page 7, yes, I am there.

Q. I think we dealt with other matters. Paragraph number

19: "On the 15th May I met Martin Brennan, Fintan

Towey and Donal Buggy of the Department. A note of

the meeting is enclosed." I think we have already

referred to that particular then he says, "On the

15th May, 1996, I received from Ms. Eileen Gleeson of

the public relations firm, a draft press release,

together with a covering letter and a series of

questions which she had prepared. I wrote draft

answers on the page bearing the questions, but cannot

recall how or whether I communicated these draft

answers, or to whom, although I may have done so at

the rehearsal meeting on the 16th May referred to

below."

If I just go to that, that's at in that particular

book of documents, you have there, it would be behind

Tab 18.

A. I see it now, yes.

Q. And the reason I am opening this there is a

reference to you in the letter, you will see now in a moment, and it's from Ms. Eileen Gleeson to Mr. Owen O'Connell, and it reads: "Attached is a draft press release which would be sent out today if we get agreement from the Department to do so, which is not at all definite. The Minister's advisers thought it a good idea, but I think that Loughrey did not. Anyway regardless of whether it is today or tomorrow, we need to agree the details for publication on ownership and funding anyway.

"Could you look through the attached. I also prepared questions which might be asked on the issue.

"Denis asked me to go to your office at 1 p.m. to discuss the release and the questions which will be asked of Esat Digifone people at the press conference. In the interests of everyone being on the same line, it is very important that this practice session is undertaken.

"See you in a while then.

"Eileen."

Do you see the reference there to you? Did you know anything about any sort of rehearsal or the releasing of any press statements?

A. No. Ms. Gleeson's information wouldn't have obviously come from me directly, because I have no memory of being in touch with her, and I don't believe I was second-guessing the expertise of FCC or Ms. Gleeson in

any way I am not into public relations. I think it is self-evident if that's the 15th, there is no way I wanted a press release to go out that presumed that, in fact, that everything was going to fall into place, because I had no presumption at the time. My mind was still open at that time. Possibly too, if there is another dimension to it, but I think that would be the reason, but if there was another dimension to it, I mightn't have been instinctively in favour of a two tier sort of press release, in a sense that it allows, if I may say so, questions to be asked, and I don't mean in a defensive or a sensitive way, I just mean in a news management way, it allows questions to be asked arising from a first press release or a first press conference to be used as a form of sort of leverage in a second event.

Now, I mean to say, I would defer to the experts on this, you know. As I say, I am not going to second-guess FCC, but I think the first reason I gave you would be the outstanding and only significant reason, and that is, I hadn't decided I hadn't yet decided, and I certainly didn't want anybody to presume in any way of what the Department's decision would be.

Q. I understand your answer, Mr. Loughrey. The second sorry, you can see that reference to you, but, "The Minister's advisers thought it a good idea."



Now, what advisers were you aware of? Obviously Ms. Gleeson will be able to come and tell us which particular advisers of the Minister she was in contact with who informed her that it would be a good idea, because I understand your position and your response, but it looks from the information available to Ms. Gleeson, that the Minister, through his advisers at least, may not have had necessarily the same view as yourself?

A. That's possible. And there is possibly I mean to say, I am not here to sort of go through a range of explanations for that.

Q. I am not asking you to.

A. I imagine first of all that, that was Bill O'Herlihy, or Bill O'Herlihy's part of Bill O'Herlihy's then team, so I don't want to put it down to an individual, but I am sure Mr. O'Herlihy, who was the leader of that particular public relations firm, won't mind me saying so, but I imagine that came directly from Bill O'Herlihy who may not have been aware, who may have been given the impression that somehow it was all done and dusted at that stage, when it wasn't, of course.

So

Q. As far as you were concerned?

A. As far as I was concerned.

Q. As far as you were concerned?

A. Yes, but I don't recall speaking to Mr. O'Herlihy on

it, and certainly I had no contact with Eileen Gleeson or FCC on the matter.

Q. But I suppose the reality of the situation, and I understand your position, and it related effectively to a form of administrative decision that was being taken, as far as you were concerned?

A. Correct.

Q. And that you had to take all matters into account.

But the reality of this situation was, from the political point of view, wasn't it, that it had been announced that the Minister was going to award the licence in the near future, do you remember that

A. That's correct, and a date had been set, in fact.

Q. And a date had been set. And from the Minister's point of view, there could be no going back from this.

It was done and dusted?

A. I am sorry, I would have held a different view. And

it's my let me put it this way: It's my clear

understanding of my position, what would have been my

position at the time. Had I not been satisfied as to

the adequacy of the IIU position in terms of both as

investor and underwriter, I can't be certain. I could

have got a written direction from my Minister, so I

can't be certain, but I am pretty sure that that press

conference would have been deferred.

Q. Well, it had been announced.

A. Oh, yeah.

Q. I just want you to bear with me. This isn't a criticism of you, Mr. Loughrey.

To go back, we saw the note from a few days previously, "Save the Minister" or "The Minister needs our help", we saw that particular note of a conversation of something which, for the moment, we are assuming Mr. O'Connell did not make up, it was something that was said to him. And I understand what you have said about your consideration of the IIU position, but in reality, wasn't the reality of this situation that it was done and dusted, and for whatever reason, civil servants were, in effect, carrying out the political will of the Minister at this time?

A. I couldn't accept that for one moment, Mr. Coughlan.

What it would then be, it would be a negation of what the Department stood for in terms of impartial administration, but more particularly, and I can say personally, it would be a setting aside of my role, and it had a dual function, and ultimately, I had, if I may say so, the nuclear deterrent of addressing the Minister in my role as Accounting Officer if I were not so if I were not so satisfied, and that, I assure you, in my experience, that would have been sufficient to defer any press conference.

Q. Yes, I understand that, if you had taken a stand as Accounting Officer in relation to the matter, of

course that's so, Mr. Loughrey. But you see, things can work in a, I suppose, a subtle way. And you found yourself in a conversation with Michael Walsh on the 16th, when you were armed with the second letter from Mr. Pearse Farrell. I am not suggesting that there is any mala fides on your part, but it was a situation where a Minister, and as you have told us, he was having bad publicity on other fronts, and this would be bad news if the licence could not be signed off?

A. I am not sure it depends how it would be handled, but it certainly wouldn't be good news, let me put it that way.

Q. And as you have informed us, you satisfied yourself on that question of liquidity. And you can't assist us that you satisfied yourself on the question of any liabilities; in other words, the net worth of Mr. Desmond or of IIU?

A. I could have accepted at face value, I don't believe so, but I could have Mr. Buggy's note that the assets were unencumbered, but I am not going to hide behind that.

Q. And I know you are not, Mr. Loughrey. And all I am suggesting to you at this stage, that a member of the public looking at it, could well form the view that it was going one way and it couldn't be stopped, because the effect of that would have been disastrous for the Minister?

A. If I could respond to that directly, but slightly indirectly as well is: Deadlines, in themselves, are not bad things. Deadlines create focus. They may also create flurry, but they certainly create focus. But the deadline of the 16th, in my mind, wasn't going to somehow cause me to somehow regard my judgement as somehow being overawed by the fact that a press conference was called. I have seen press conferences cancelled. So I would put it to you, Mr. Coughlan, that the fact that the press conference was pencilled in for whatever time, 3:30 of that afternoon, did not cloud my judgement.

Q. I wouldn't expect you to respond in any other form, Mr. Loughrey. But it's where you started from in this whole process. You started, if I am correct, in seeing a problem which needed a solution as and from about the mid-April or

A. Originally from mid-April, yes, you are right.

Q. This was a problem, and I suppose one, as you have readily accepted yourself, you didn't look at the history of this. You didn't try to get to the bottom of it. So I suppose, in trying to form a judgement, one has to try and gather as much information about a situation to enable one to come to that judgement, but you were operating on just one of the two tracks. You weren't or you were only looking at the track going forward. You didn't try to understand what had

brought this about?

A. Once again, yes, my focus was to ensure that the Department's agenda of aligning the consortium to the bid, that was where our energy was going to go.

Q. And that was the Minister's that was what the Minister's requirement was as well?

A. When I explained what the situation was to the Minister, I have no recollection of him demurring at any stage.

Q. I don't want to go all over that again, but as you said, it was to try and align the aligning the consortium to the bid. That was the focus?

A. Mm-hmm.

Q. I am not going to go over what we went over yesterday, all about what happened on the 4th August, and what the position was.

A. Okay. Fine.

Q. We agree that that was the focus?

A. It was.

Q. Now, if we just look at what was prepared by Ms. Gleeson, and I suppose, just before I do, if these particular issues had been addressed, say, around the time of the first meeting of the licensing group, if I could explain it that the meeting which Mr. O'Brien attended and which Mr. Andersen attended back in November of 1995, where Mr. Andersen had nailed it down, the type of thing he wanted sorted out and

nailed down?

A. Indeed he was at that first meeting.

Q. He was at the first meeting, and it was his proposition that the financial the financials be nailed down at that time?

A. He flagged it, yes.

Q. If it had occurred then one could readily understand, if you weren't satisfied or that you could say, 'Well, this is so close to the call as to who would get the exclusive negotiation rights, that not too much time had been lost and we could go to number 2 or number 3', as the case may be, but once it had now gone this far, from a political point of view, there could be no turning back, I suggest?

A. No, the inference in your question is I would have reacted differently or the Department would have reacted differently. If, for instance, in mid-November, just to take a date, it had been brought to your attention actually that the consortia percentages, shareholding percentages, whether by we'll talk about intent because that was the effective intent, was changed I don't believe, and I can only say this, we won't know, Mr. Coughlan, but I don't believe I would have reacted any differently, whether it was mid-November or mid-April.

Q. Very good.

Now, Ms. Gleeson prepared this document, you can

see this is the proposed press release, I think.

15th May, 1996.

"Esat Digifone shareholding details.

"In advance of the formal signing of licence to operate Ireland's second mobile phone licence network tomorrow, Esat Digifone has confirmed details of its shareholding structure as follows:

"Esat Telecommunications Holdings Limited (a wholly-owned subsidiary Communicorp) holds 40% of the shares; Telenor Invest, the Norwegian telecommunications operator, hold 40% of the shares; and International Investment and Underwriting Limited, (IIU), holds the remaining 20% of the shares. The owner and Chairman of IIU, and therefore the beneficial owner of the 20% shareholding at this time is Mr. Dermot Desmond.

"IIU has stated that the shareholding, or part thereof, may be placed with additional investors at some future time. This will be reviewed when Esat Digifone is operational towards the end of this year.

"The shareholders, as listed above, have each contributed to the investment made in the network to date, and each will discharge its financial responsibilities to the entire investment required for the project, which is in the order of  $\text{€}120$  million. This capital will be provided by equity from the shareholders and by debt financing



which is being arranged by" and then there is

the ABN-AMRO.

"Each shareholder has given to the Department of Transport, Energy and Communications, details of its ability to provide all of the necessary funding. The Department has stated that it is satisfied with the details of the ownership and funding which it has received."

And you never saw that, did you?

A. I never saw that.

Q. It wasn't discussed with you at all?

A. At all.

Q. Well, if you had seen it

A. Oh clearly, I would the last paragraph is and this is no reflection on FCC, but it

Q. I don't imagine for a moment Ms. Gleeson was familiar with all of these matters, no of course not?

A. No question of that actually. It's nothing to do with Ms. Gleeson. But that would have been an outrageous presumption at the time.

Q. Now, a version of this was faxed to the Department on the 16th. It's in if we go back to Book 44. It's not the same, you can see the version 233.

A. 233, okay. Yes, I see that now.

Q. Now, I think the reason, I think, Mr. O'Connell you can see it's Mr. O'Connell's fax sheet, and he said in his memorandum he faxed it to the Department?

A. Yes, I see that.

Q. And you can see it's, "Dear Martin,

"Press release follows as requested." And it's from

Owen.

And it reads:

"The Minister for Transport, Energy and

Communications, Michael Lowry TD, and the Chairman of

Esat Digifone, Denis O'Brien, have signed the licence

giving Esat Digifone the go-ahead to operate

Ireland's second mobile telephone service. And Esat

Digifone announced that it is well on target to

launch the new service in the last quarter of this

year.

"Esat Digifone also confirmed details of its

shareholding structure. Esat Telecom Holdings

Limited (a wholly-owned subsidiary of Communicorp

Group Limited) holds 40% of the shares; Telenor

Invest AS (a wholly-owned subsidiary of Telenor, the

Norwegian telecommunications operator) owns 40% of

the shares; and IIU Nominees Limited (a wholly-owned

subsidiary of International Investment and

Underwriting Limited) holds the remaining 20% of the

shares on behalf of Mr. Dermot Desmond.

"IIU has stated that this shareholding or part thereof

may be placed with additional investors at some

future time. This will be reviewed when Esat

Digifone is operational towards the end of the year.

"The shareholders listed above have each contributed to the investment made in the network to date and will each discharge its financial responsibilities to the entire investment required for the project, which is in the order of €120 million. This funding will be provided by equity from the shareholders and by debt financing. ABN and AIB have been appointed lead bankers to arrange the project financing.

"Esat Digifone has been proceeding with the development of its network since October last year and is on target to launch the service to the public during the last quarter of this year. The service will from day 1 reach 80% population coverage, rising to 95% population coverage within a further nine months of launch. These levels will exceed the quality and population coverage requirements as required within the tender.

"There are nearly 100 people already working on the launch programme, including network roll-out, establishment of the customer care centre, sales and marketing plans and on service and product development. The company will employ over 300 people at launch stage, rising to over 500 at maturity.

About half of these jobs will be based at the Esat Digifone National Customer Care Centre in Limerick, with the remainder at headquarters in Dublin, with a small number in regional centres.

"Esat Digifone intends to locate its national Customer Care Centre at Plassey National Technology Park in Limerick, while the company has also taken three floors of the former Bord na Mona headquarters, being in Dublin's Baggot Street, to serve as its national headquarters.

"Esat Digifone has joint chief executives, Mr. Barry Maloney, Mr. Knut Digerud. Mr. Moloney has just recently joined Esat Digifone, having been" then a profile of Mr. Moloney is suggested.

"Mr. Digerud has been with Esat Digifone through the preparation of the bid and the initial establishment of the company. He was previously with Telenor in Norway.

"Significant contracts have been awarded by Esat Digifone for the infrastructure and equipment required for the network. Nortel will supply and install all radio and switching equipment required for sites around the country. Nortel were awarded this significant contract following a comprehensive tender process. Irish software and services company, Aldiscon have been contracted to supply, in conjunction with Nortel, messages and security platforms for the network. And Siemens Limited have been awarded the contract to provide the radio transmission network, which comprises a high capacity backbone network enabling Esat Digifone to connect

every base station in the country back to its main exchange."

Now, were you aware that that arrived into the Department?

A. I was not so aware. Mr. Coughlan, if this is the final version of a press release that Esat put out, as I attended the press conference, I am quite sure

Q. It's not.

A. Oh, it's not.

Q. It's a draft sent by Esat to Martin Brennan, it appears.

A. I see. Because I am certain if I walked into a press conference, I would have been handed a package like everybody else, but I am not aware of having seen it, let me put it that way.

Q. The final version is at the preceding tab, 232.

Now, if you go to the preceding one, this was what was put out.

"The Minister for Transport, Energy and Communications, Michael Lowry TD, has signed the licence giving Esat Digifone the go-ahead to operate Ireland's second mobile telephone service, and Esat Digifone's Chairman, Denis O'Brien, announced that the company is well on target to launch the new service in the last quarter of this year.

"Esat Digifone also confirmed details of its shareholding structure. Esat Telecom Holdings

Limited (a wholly-owned subsidiary of Communicorp Group Limited) holds 40% of the shares; Telenor Invest AS (a wholly-owned subsidiary of Telenor, the Norwegian telecommunications operator) owns 40% of the shares; and IIU Nominees Limited (a wholly-owned subsidiary of International Investment and Underwriting Limited) holds the remaining 20% of the shares on behalf of Mr. Dermot Desmond.

"The shareholders listed above have each contributed to the investment made in the network to date. The entire investment required for the project is in the order of  $\text{€}120$  million, with the total commitments to date exceeding  $\text{€}150$  million. This funding will be provided by equity from the shareholders and by debt financing. ABN-AMRO Bank NV and AIB Corporate Banking have been appointed as joint lead bankers to arrange the project financing."

A. And the rest, I presume, is the same?

Q. No. Because what has been if you go to the draft, do you see the draft sent to the Department, that is now at 233.

A. Yes, I have that now.

Q. The third paragraph, do you see in the draft submitted to the Department, "IIU has stated that its shareholding, or part thereof, may be placed with additional investors at some future time. This will be reviewed when Esat Digifone is operational towards

the end of the year."?

A. I picked that up.

Q. That had been canvassed in the course of discussions between Departmental officials and people on behalf of Esat?

A. Sure.

Q. That's omitted from the press statement, that is the one released.

A. Yes.

Q. Then if you go on to the draft.

"The shareholders listed above have each contributed to the investment made in the network to date and" and that is the same in the more or less, in the final press statement.

And then you see what then continues in the draft,

"And will each discharge its financial responsibilities to the entire investment required for the project." That is omitted from the released statement.

A. I can't think why, Mr. Coughlan.

Q. Well, in light of the facts as you now know them, and the requirement of the Department to have underwriting, in effect, in position, it could have raised questions, isn't that correct?

A. But it's in the context of looking at a project with an all-in cost of estimated 120 million. I don't think any of the three promoters, regardless of even

if Communicorp had some temporary difficulties, were in any doubt that, in fact, that it would be met and it would be met by all three shareholders. There is no need to return to Mr. Buggy's note, but you can see that the cash calls were spread over mathematically discrete 18 months or so actually, and there was the expectation that we discounted it to zero, that Communicorp would have access to funds in the capital market. There is no reason to believe they wouldn't ultimately. It might have been a matter, once again, of pricing or how much they cede by way of equity, but the idea they wouldn't have access to capital markets, it's not a tenable proposition, and it wasn't even at that time. So in other words, I can't see why they left it out, because it's almost a truism, if three people are going in as shareholders, to, as I say, to finance a project of this order, that even if one of them had to have an underwriting cover, as they see it, for a short period of time, until such time as their bond/private placement in the US was going to come home to roost, I still think they could have stood over the original paragraph.

Q. But I understand all you have told us about that, Mr. Loughrey. But it would not have been possible, I suggest, to state that publicly for the Minister

A. Not the detail of what I said in public, of course not.



Q. If the Minister or, through this press release, which we know a draft was sent to the Department there were discussions took place, so it seems to have, I don't know whether it had negative clearance or the actual imprimatur of the Minister or somebody in the Department, but let's deal with it

A. I am not aware of that, but that is a possibility certainly.

Q. That on this day this is the whole question of deflecting matters away from ownership and the finances of Communicorp, because on this day, the Department sorry, from the analysis being carried out, the Department were aware that Communicorp didn't have any money?

A. Correct. Well, didn't have any money is perhaps but didn't have sufficient, didn't have sufficient to meet its immediate requirements.

Q. Didn't have any money, they were the analysis was being done that there was to be a placement which was meant to be about two months hence, I think, or there or thereabouts?

A. No, I think it was much closer than that, from the KPMG letter.

Q. Well, on Mr. Buggy's analysis, and of course his analysis as the accountant was, we can't be sure about that. This was something that was to happen in the future.

A. And wasn't he prudent to so say.

Q. Yes. Now, on the day that this was happening, this is that the licence was being signed, the Minister, I suggest, could not have stood up in public and disclosed or answer in the Dail the true situation which applied here?

A. Mr. Coughlan, I am so reluctant in a sense to sound a note of contentiousness, but we are back to, almost back to the concept of deep pockets, so long as and this is true going right back to the evaluation so long as the Department was satisfied, and which ultimately it was, that the project wasn't being jeopardised by the relative weakness of one of its shareholders, that went right back to the, to Andersens' input into the design of the competition.

Q. Now, I discussed the question of "deep pockets" or big pockets, as we see it, in the Evaluation Report, and that, I suggest to you, as it was envisaged initially in the evaluation was that the company, that's Esat Digifone, would be supported by its members?

A. Granted, yes.

Q. Members of the consortia, and that they would be in position to support or give deep pocket support to the company?

A. Oh gosh no, that is not my understanding.

Q. Let me just explain to you, Mr. Loughrey. That's how it emerges in evaluations, the concept of the term

used, "big pockets", this whole new thing of the deep pocket, that there is one person there bankrolling the whole operation is one that emerged quite late in the process, and it emerged in the context of finding a solution to a problem which was identified about the finances of this particular consortium, not so much the consortium that was said, but one member:

Communicorp. That's how it evolved, Mr. Loughrey.

A. I don't think you are being unfair intentionally, Mr. Coughlan.

Q. I am not at all, Mr. Loughrey, I am being accurate.

A. No, no. Well, perhaps we could put in context. There were six applicants. The bottom three had weaknesses, we needn't deal with.

Q. Absolutely.

A. So we were into the three that had the characteristics, that all three would be able to deliver on the requirements of the licence. All three of them had issues to be addressed in the deep pockets sense, and I don't want to cite go back to Detecon and Sigma, but to isolate it that it was a solution somehow just for the nominee in the first place, I think would be unfair.

Q. Well, correct me if I am wrong, Mr. Loughrey, but let's just take it on the question of Irish Mobicall.

I don't see any reference to any question of deep pockets being necessary in relation to the financing

of Irish Mobicall in the report. Correct me if I am wrong?

A. You may well be. Unless we have no intention, I am sure, of opening pages, but my impression was Detecon was only 30% owned by Deutsche Telecom to there were issues on whether Deutsche Telecom, in the event of an additional capital call, would go all the way with a 30% subsidiary. There may have been slight misgivings or may have been deep misgivings, I don't know, but the issue at least was raised. But for the top two, undoubtedly, both Sigma and Communicorp had issues to deal with an inadequate capital base relative to the requirements of this project. That's quite clear in my mind.

Q. The point you raised there is an interesting one, you are right. Deutsche Telecom, behind Detecon.

Deutsche Telecom was the deep pocket behind a member of the consortium participating in Irish Mobicall, it wasn't the deep pocket behind Irish Mobicall, do you understand the distinction?

A. I accept that totally, if one accepts that a deep pocket promoter will automatically back a 30% minority interest. I will accept it on that basis.

Q. The deep pocket behind Telenor Invest was Telenor?

A. Granted.

Q. Isn't that

A. You are right.

Q. As you look at it. So I don't think anyone had any concern about Telenor Invest coming up with their end of the thing?

A. Absolutely not.

Q. Distinguish that from the actual project. Of course you are correct that everyone is of the view that this particular project was going to make money for people for the company. In fact, this had been identified way, way back by Telecom Eireann in initial dealings with the Department, way back I think in 1994?

A. They had no doubt that it would be a commercial success.

Q. And this is before anyone understood or knew that there would be the explosion in the market, even on the very conservative market projections that were

A. And they were approximately one-fifth of what happened.

Q. And even at that stage, I think Telecom Eireann had been advising the Department that there was the potential for sort of a 30% return or

A. In the context, of course, of special pleading to load the new incumbent with a high licence fee.

Q. I agree with you, but everyone knew that this type of company could make money.

A. Mmm.

Q. It could that wasn't the issue either. The

question here was that Communicorp had no deep pocket behind it. Isn't that right?

A. You are absolutely right, Mr. Coughlan, but that's not that wasn't my understanding of the deep pockets formula. My understanding of the deep pockets formula, and once again, I may be wrong, but my understanding of the deep pockets formula, so long as one or more, and ideally more, one or more of the promoters of any particular consortium could act as the financial anchor for the consortium, and that in other words, that the business and commercial plan would not be jeopardised by a frailty of finance in one of its members. That was my view of the deep pockets formula.

Q. That's what evolved in identifying problems, together with the concept of the bankability of the project, the ability of the project to raise debt financing.

A. And that wasn't in doubt.

Q. But what Mr. Buggy was looking at here was the position of Communicorp, or whatever they were being called at this stage, Esat Telecom Holdings?

A. That's right.

Q. That they had no money. They were dependent on a bond a private bond placing in the future?

A. Yes.

Q. And you couldn't be sure, when you were handing out a licence, you could not be sure as of that day that it

would necessarily be successful?

A. You couldn't be sure it wasn't successful, and that's why he discounted it, as I say, to zero, and he was prudent to do so. And I had that in mind when I ran my own slide rule over Mr. Buggy's work.

Q. Because in the history of the finances of this particular country, even on an IPO, we have seen one of the biggest companies collapse, effectively, in relation to seeking funds in the market place, isn't that right?

A. The history of going to the capital markets is littered with last minute failures, of course, and I accept that.

Q. And of course Mr. Buggy was totally right to be cautious about that?

A. He was indeed.

Q. And all I am asking you is that, on this day, that that was the position on the 16th May, 1996, Esat Telecom Holdings or Communicorp did not have any money. It was they were going to the market, they had been involved with the market, and they were going to have a private bond placing through CSFB?

A. Can I agree with that 99%. The only thing I am slightly unhappy with is the assertion, "Did not have any money." As I didn't know, nor did Mr. Buggy know because we didn't have their last monthly accounts, but all we knew for sure is they didn't have

sufficient resources to bankroll this project, and they needed to be underpinned by the other two.

Q. Yes.

A. And I accept that, of course.

Q. I am using "didn't have any money" in that context.

A. Yes.

Q. And what I am now asking you is that, the Minister

I suggest to you, you could not have drafted a statement for the Minister to enable him to go into the Dail to disclose the true position which existed on the 16th May, 1996?

A. Why not, Mr. Coughlan?

Q. Well, could you have gone in and said, "The position

is this: this licence has been signed today and conferred on Esat Digifone. The funding for this we are satisfied as to the funding for this" the Minister is saying, 'I am satisfied'. "I know

Communicorp are good for the money. I am told that Mr. Dermot Desmond is good for his side of the money.

I am told that Esat Telecommunications Holdings are not good for the money as of now, but that they will be," or you couldn't say "they will be, but it is hoped they will be when the private placing takes place. And I have required Telenor and IIU to underwrite the position of Communicorp or Esat Telecom Holdings to the extent of 2:1."

Do you think you could have drafted such a statement



and allowed your Minister to go into it in the House?

A. I don't think any Minister would have volunteered the statement because it would have reiterated, I suppose, if I may say so, an unnecessary stir. But if the Minister had been asked a straight parliamentary question put down, say, for written answer, not to wait even until the placement was as we know in the event, the money was put in place very shortly afterwards, but had he been asked a written statement for a written question on the 17th May, I would have been first of all, there is no question, he would have been obliged, and the Department would have drafted an answer exactly on the lines that you have just given now, and I believe we would have been fully justified in that position and would be able to stand over, not just the reply, the veracity of the reply, that goes without saying. But we would have been quite happy to strongly defend that the licence was given out on the day on that basis.

Q. You see, Mr. Loughrey, wouldn't the first supplementary you'd have to consider preparing a response to, would be paragraph 19 of the RFP required you, required you, as Minister, to be satisfied as to the financial and technical capacity or capability of the person or persons you were giving this licence to. That's what you had to satisfy yourself on

A. Correct.

Q. in the evaluation process. Sorry, subject to the criteria?

A. Correct.

Q. But that you, as Minister, had to satisfy yourself. And how how could you say that on the information you were now presenting to the House, that you could be satisfied because of the position of one member of that consortia?

A. Well, Mr. Coughlan, pushed ad absurdum, there would have been no competition, because other than Eurofone, Millicom, there was a weakness of that sort virtually in every one of the other five applicants. In other words, A5, so-called A5 and A3, in other words, the two top applicants on a strict interpretation, the interpretation I believe that you are putting behind the question, would not have qualified. In other words, ad absurdum, we wouldn't have had a competition, but in the design of the competition, and in its operation, and bearing in mind that this is second-hand obviously, because I wasn't a member is, on the application of 19 as I understand it, first of all, Andersens, the niche specialist said, "everybody is in, everybody has qualified". Now, I understand that they did so on a more limited technical basis. They weren't actually certifying that they had gone through it on the basis they were, but we are dealing both Andersens and a group here

that had a range of professional competencies, and implicit in their moving to the second stage, so to speak, implicit in that is, they took they had, in effect, agreed, albeit perhaps tacitly, because I wasn't aware of this, that, in fact, all the six applicants qualified, because you have to ask yourself, if they didn't, what were they all about if they didn't? And I believe myself, given the seriousness in which they approached the job, given the expertise of Andersens, if there had been an application which stood out for its provocatively capricious inability to bankroll their proposals actually, they wouldn't have qualified under the so-called prerequisite of Clause 19.

Q. Well, I think you would be aware from matters which have occurred at the Tribunal, that Mr. Andersen furnished the Tribunal with certain information, and I think you are aware that that was dealt with with Mr. Martin Brennan, and I don't necessarily want to go through

A. That's fair enough, Mr. Coughlan.

Q. And he has informed the Tribunal that when he put the matter into the report, that he would have expected to have been consulted by the Minister, and he would have expected to have been asked to get to the bottom of the financial position, problem, question, whatever it is, which hung over this particular consortium?

A. I read that on the website, because this is the report that the Tribunal has put up on the website. I found that I was going to use a pejorative term, and it's not polite, because obviously Andersens are a first class firm, but it almost sounded like a retrospective wish by Mr. Andersen. But given Mr. Andersen's experience, given that his team included former public servants, given that they had advised already, at high profile level, the Dutch and the Danish, and at least three or four other ministries before they came to us, why didn't he put up his hand? Where were the ogres in the Department? Why didn't he knock on my door? Why is he telling us seven and a half years later that he would have wished to have been consulted by the Minister? I mean to say, he is I don't think my reputation was so fearsome that he couldn't have knocked on my door, nor do I think is, he couldn't equally have approached the Minister. So I find is, just a little difficult to accept that seven years later.

Q. I think that's fair for you to respond as you have, Mr. Loughrey. And it could be viewed as fair comment, and the points you do make. It then raises a further problem for the Tribunal in relation to the process itself, because if Mr. Andersen is expressing such a view now, it seems to indicate an identification by him of some frailty in the matters as presented or

distance himself from the matter, doesn't it?

A. It would, but if it's seen in the context of the report he wrote in February '96, which I have seen actually, I can almost say can I say, pass almost to this question, because it will be up to the Tribunal how much weight they would attach to the February '96 report and the February 2002 report. I couldn't possibly judge on that.

Q. Did you and again I am not here to take up the cause on behalf of any other consortium, or any single consortium or any of the other consortia, but you have made a statement there that virtually every other consortium had similar or same financial frailties or difficulties or question-marks. Now, I think that's an issue that you know there has been a communication to the Tribunal, that issue is taken with you in relation to that, particularly on the part of the Persona consortium, but I think Mr. Doyle will be coming to give evidence just in relation to the financial evidence, and he will give his evidence about that.

A. Of course.

Q. Now, can I just ask you, you wanted the configuration at the time the licence was signed to be 40:40:20?

A. Yes, I did.

Q. And you knew that you had been informed that the shareholding in this company was 37.5:37.5:25. What

did you understand happened to the 5% which IIU had, and the addition of 2.5% each to Communicorp and Telenor?

A. The answer is: I didn't know what happened. The answer is: So long as they came back to me in one form or another, that they had restored the shareholding in line with the bid application, is I regarded as a matter for their internal arrangement. I didn't seek to find their internal arrangement, had it, as I now know, been effectively a matter of trade rather than a matter of rearrangement? I didn't know that till later.

Q. Because I think you are aware now, that this State asset, this licence, was being traded before it was awarded, isn't that right?

A. I don't find anything, I think, on reflection, particularly shocking about that, Mr. Coughlan, because I believe once you draw a line in the sand for any entitlement, either in the private or public sector, a grey market of one kind or other can be formed. So while it might, first glance, seem somehow, as I say, a little shocking, I don't believe it is such. And I believe the whole concept of grey market is one that people may have mixed feelings about, but is a reality.

Q. Whatever about a grey market existing, from the point of view of the Irish State, this was its asset being

traded, isn't that correct?

A. In anticipation.

Q. No, being traded, being traded before it was actually given to these people?

A. They could have been very unwise, because I say in anticipation, advisedly, we still hadn't bought in, so they are still, perhaps not in their minds because they were presumptuous, but there was still, at least a theoretical risk, that they were trading in anticipation.

Q. I agree there was a theoretical risk, and that it was theoretical. And it was being traded on this basis that Mr. Dermot Desmond set the price whereby he'd sell to Telenor and Mr. O'Brien's company, and all the money changed hands. So at the time that the actual transaction itself took place, all the money changed hands. The money for the licence, the loan into Esat Digifone, as you now know about, which you didn't know at the time; that Mr. O'Brien didn't even have the money to come up for his contribution to pay for the licence on the day. And how that was achieved was that Telenor and Mr. Desmond, or IIU, I think you know sort of, it's quite confusing, and you, yourself, just identified is as being Mr. Desmond, but they came up with a loan to Esat Digifone in 2:1 to allow the licence fee to be paid. Did you know that was happening?

A. Clearly, Mr. Coughlan, I had no knowledge of that whatsoever.

Q. And they also had traded the licence, Mr. Desmond having set the price as the man in the market place, and I suppose there was very little Telenor, or perhaps Mr. O'Brien, could have done about that. That was the price, and that was it, and the Department wanted a certain share configuration, so it was a rock in a hard place, I suppose, in those circumstances. But in any event, the value, the value of the licence on that day, in the minds of the market was 55 million, and that was based on what was paid for a 5% stake?

A. Albeit a limited market. It was a market, yes, I accept that.

Q. And again all unknown to the Department?

A. Totally unknown to the Department.

Q. And again I suppose, in fairness to all sides, you didn't inquire as to how this was going to be managed, the 20% the 25% back to 20%?

A. No, we did not. No, I did not. I suppose we were focused on a result, so to speak.

Q. You know, just around this period, would it be fair to suggest that the Department behaved more like a commercial facilitator rather than the administrators of a State asset which was going to be

A. I'd prefer to rephrase that, Mr. Coughlan. I would



say is, we saw ourselves as guardians of the licence,  
but with an awareness of commercial reality.

MR. COUGHLAN: Well, I will be going on to something  
else now, Sir. Perhaps it might be a good time.

CHAIRMAN: Ten past 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: Thank you Mr. Loughrey.

If I could just ask you to look briefly at Book 38,  
please. Book 38. It is the easiest place to find.

Divider 1B, Tab 18.

A. Yes, I have that now.

Q. We have already dealt with it, it is Ms. Gleeson's  
letter to Mr. O'Connell and the enclosed draft press  
statement

A. Yes, indeed, yes.

Q. for that period. If you just turn over the page  
then she also encloses certain questions. I presume  
these are the type of questions that were anticipated  
might be asked at a press conference. And then there  
are what appear to be answers written in or proposed  
answers written in. We know from Mr. O'Connell's memo  
and/or memorandum furnished to the Tribunal, and a  
note of his I am going to refer you to in a moment,  
that he says that he attended a rehearsal for a press

conference on the 16th of May of 1996. First of all

did you participate at all in that rehearsal?

A. No, I did not.

Q. Just looking, I won't ask you to deal with this particular document if you don't know anything about it. Did you ever see these, this list of proposed or indicative questions?

A. No, I did not, certainly.

Q. Or the type of answers which were being discussed being given, you didn't

A. I had no involvement with that part of the process.

Q. Very good. I don't suppose anyone brought that particular matter to your attention, did they?

A. Not to my recollection.

Q. Then I think we can go, then, to Mr. O'Connell's note I think if you go to Book 44. It is in that, it is in that book as well, but you will find it easier, perhaps in yes, it is in 234 in Book 44. It is also in Book 38, but we can deal with it easier here, I think. And it is reconstituted as well.

A. Oh I see that, the following page, yes.

Q. And it is: "A rehearsal for a press conference. When did Telenor and Esat get together re delay? April 1995.

"Were they ready to put in bid? Certain 9 May. April is answer. Were ready 23rd June. Felt penalised. Better prepared. Team disappointed.

Added 500K to cost. Keeping them together. One new competitor. Arve.

"Delay in licence. Government/State.

"Denis O'Brien contribution. I wish to scotch the persistent rumours on this. The licence fee has been paid, millions have been spent by the company to date, almost certainly out of the shareholders' fund.

Little or no bank funding to date. All of Esat Telecom Holdings' share of the funds have been paid.

Arrangements among the shareholders have been concluded to everyone's satisfaction and are working.

Is this the same consortium as that which applied?"

Again, you can see the same issues concentrating the mind, I think, can't you: ownership, the funding, particularly the funding in relation to Mr. O'Brien's side?

A. And an apparent sensitivity as well as to when they got together initially, I can't see why, because I can't see any reason for it, but an apparent sensitivity on that as well.

Q. Yes, an apparent sensitivity in relation to that. I suppose as to probably around whether they were ready for the 23rd of June which was the original time, and as you correctly said before lunch, made reference to whether the intervention of the European Union

A. Exactly.

Q. gave an advantage to anyone in a discriminatory

manner, is the way you described it?

A. Yes, exactly, yes.

Q. Now, were you aware that this rehearsal was going on?

A. I was I am sure I was aware that in the corridors, so to speak, that something was, that whether a specific or precise rehearsal but preparations were being, I was aware or fully aware that preparations were being made for a press conference, but I had no direct involvement in it myself but there again I wouldn't have been surprised, Mr. Coughlan, because, and this may have come up already is, that not every it depends on the ministerial side, but some Ministers put such a high premium on performing at press conferences that they put a great deal into planning preparation, and that could, might or might not include a rehearsal. So whether I was specifically aware that there was a rehearsal of this type going on, I don't know, but I wouldn't have been surprised by detailed planning and briefing for such, for such an event, let me put it that way.

Q. And can I distinguish it, that that is the political side of the house as far, as you would be concerned, preparing itself?

A. Quite clearly the political side but to the extent that the administrative side could be asked legitimately to provide, you know, information on policies or factual information, of course they would

do so. But in terms of positioning, a political slant to a press conference, that would be in the realm for the Minister himself and his or her advisers.

Q. Now, I think you will then find that Mr. O'Connell prepared a note, as he informs us in his memorandum, of the actual press conference, and I think that is in Book 38. I am sorry about this, 26. It is Tab 26 of 1B?

A. I have it now.

Q. Now, just on the question of rehearsal, I can understand the Minister and his political advisers, if I can describe it like that, being concerned as to how one might pitch something, but we had the situation here, or it would appear that we had the situation here that Martin Brennan and Fintan Towey were very much hands-on, we have no we know Mr. Brennan accepts that these things happen, again there is no note, there is no record in the Department of these events happening, but accepting the content of the note, it would appear that you had civil servants lending assistance to how the matter might be presented politically?

A. Mr. Coughlan, could I take the first something you said by way of almost as a preamble to the question?

Q. Yes.

A. Is, I think I accepted yesterday that it is a matter of regret that some minutes, some meetings weren't

minuted. But I wouldn't have expected the sort of interaction before a press conferences to be written, let me put it that way, if, and you may not have been, if you were inferring that perhaps the, as I say, the interaction before a press conference would be somehow documented, I don't believe that would be reasonable to expect that.

Q. No, no

A. But having said that is, the second part, or the substantive part of your question was, as I understand it was, were civil servants involved in the political slant in presenting a press conference? I really don't believe so, for two reasons: one is the grant of a licence as such, may have been seen as a signal success or triumph for the Minister of the day, because it was a milestone in the direction of something positive, but there is nothing wrong with that per se, but it wasn't, I don't believe slanted politically, other than to be associated with this success. I don't believe that officers of the experience and solidity of Martin Brennan and Fintan Towey would allow themselves to be get involved in any work that was overtly political. They are far too experienced and far too level headed to let that happen.

Q. Yes. I understand what you say and of course you would appropriately defend the position of, and

rightly so, of civil servants. Mr. Brennan did say in evidence that things could be happening, and I understood him to mean that they could be political positions or manoeuvrings taking place that he might not have been so conscious of when he was, in these final days, involved in matters?

A. I think that is possible. I think that is possible. But I am certain none of the officials involved and notably the two that we have spoken about and that are mentioned in the spatches here, I am quite certain they wouldn't allow themselves to be used consciously as pawns, either unknowingly or not, in any sort of political game.

Q. You see Mr. O'Connell's note, it is the only record we seem to have of the press conference, and obviously there is something being attributed to the Minister.

"ML" seems to be at the top, "unanimous decision.

" Question conclusively responded to.

"Competition fully respected.

"Signed, dated, timed.

"Top table Loughrey, Lowry, DOB, Arve Johansen, Michael Walsh." "JC" seems to be a reference to Mr. Callaghan, I think. "KD", Mr. Digerud. It looks like Mr. Barry Maloney, I think, and I can't make out the other

A. Could I interject for a moment, Mr. Coughlan, please?

Q. Yes, please.

A. The fact my name is mentioned first is a matter that, not that I was of any significance at the press conference, but looking at the top table from left to right.

Q. Yes

A. It is not that I had any lead role in it whatsoever.

Q. No, I don't think there is any suggestion, I wasn't even inquiring along those lines, I think,

Mr. Loughrey, but then you go under:

"Question: Why so long? First kind, very comprehensive. Complex process. Prudent and cautious process.

"DOB, whether 120 million has changed from previous 100.

"Plan said 124 million. Total invest" it looks like "invest" something. "50 million.

"Question: Re money planning?

"Looking good. Not an easy" I don't know what that is.

"Will need objective 80% by population at start-up.

"Introduced KD, BM"

That's the only note we have of the press conference.

Do you have any recollection, first of all?

A. Sadly, I I have a general recollection of being there. If I were to really dredge deeply, I have an impression that some of the journalists did ask searching questions and it didn't surprise me



actually, and it is possibly towards the end Mr.

O'Connell I am just reading it now says,

"looking good not an easy ride" I think that is.

Q. Yes, that looks like that, yes, you are right.

A. I believe I have a memory, my sense of the press conference was some extremely searching and pointed questions and quite correctly so, mainly from the business correspondents.

Q. Yes, and would it be your recollection that again that the type of questions that were being asked were the type of questions that were identified as likely to be asked concerning things like, I suppose, in the first instance, the postponement of the competition, initially?

A. I am pushing my memory at this stage.

Q. Very good.

A. Because I could easily lapse into that that was logical that they should do so, but my general sense was one of that business correspondents certainly asked demanding and searching questions.

Q. Do you remember if they centred around things like ownership and the finances?

A. Undoubtedly ownership, but the issues of, you know, what was so special about this consortium, still, and what can they bring to the party? Those type of questions arose as well. I am quite certain ownership did arise. That is my sense of the press conference.

Q. Yes. I am going to ask you to go back to Book 44 again now, please, Mr. Loughrey.

And would you mind turning to Tab 239, please, Mr.

Loughrey, of the book. And Mr. Dukes had by now

become your Minister, I think. Mr. Lowry had

resigned, and we all know the circumstances whereby he

resigned and they were controversial, let me put it

that way, and we have searched through all the

documents and we can't find a letter coming in from

Mr. Molloy to Mr. Dukes, so it may have been that it

was a query which was raised by Mr. Molloy with Mr.

Dukes?

A. I think looking at this, the likelihood is they

possibly bumped into one another in Leinster House,

because there is no reference to previous

correspondence or anything, yes.

Q. Yes. And we know that Mr. Molloy was one of the TDs

who had raised questions about this process from the

Dail reports we have looked at already?

A. From memory both in November and in April.

Q. Both in November and in April?

A. Yes.

Q. And he was the one who had raised questions about

ownership and that was in November of '95 he had

raised the question?

A. On Article 3.

Q. On Article 3.

A. Yes, he did, yes.

Q. And I think we also saw that when he, in April when the Minister made the statement, and I think

Mr. Seamus Brennan was asking some questions of the

Minister and referred to who owns the 20%? And

Mr. Molloy interjected "25%", do you remember that?

A. I remember that now, but I don't really believe that I

looked at the Dail debate. Certainly I wouldn't have

seen the blacks because they never came my way and I

don't believe I read the Dail debate. I am now

conscious that that seemed to be a very informed

interaction but I wasn't so conscious of it at the

time.

Q. But it becomes apparent, from the first paragraph of

this letter anyway, that the issue of ownership and

investment or ownership and financing was still a

matter which obviously was of some concern to Mr.

Molloy, because he obviously raised them with the

Minister?

A. I think that's correct, yes.

Q. And of course by now this is December of 1996

but as and from May of 1996, Mr. Dermot Desmond's

identity was now known?

A. Yes.

Q. And I think Mr. Dukes has informed us that he carried

out, I might describe it as an inquiry, not that he

went through the papers or anything, but that he was

briefed fully by you and Martin Brennan and the officials, the senior officials involved in this process; would that be your recollection of events?

A. I have to say, Mr. Coughlan, is that until I had seen this letter in the Tribunal papers, of course I recognised it the minute I saw it, I am not denying that, but had you asked me, like, a couple of weeks ago, did I recall it? I wouldn't have been able to recall it.

Q. Right.

A. But that is having said, the minute I saw it I recognised it, so clearly I am not, I am not it did come back to me, but only as a hazy recollection it came back to me.

Q. Very good. Now, Mr. Dukes of course this letter was prepared for Mr. Dukes, as one would expect in these circumstances, but it was prepared in the context of him trying to, I suppose, deal with Mr. Molloy's's query but also to try and get to the bottom of this matter. After all, there was still some, I suppose, controversy surrounding this matter. The Minister, the previous Minister had left office in controversial circumstances?

A. But not clearly related to this obviously.

Q. Not clearly related to this, but a new Minister coming in would want to get as full an explanation or information or briefing on the matter so that he could

deal with it, if there was anything controversial surrounding it, but he certainly, I suppose everyone would accept, would not want to find himself involved in any controversy as a result of any inquiries he made?

A. I think particularly the latter point is valid.

Q. I think that would be fair. And this letter is then written to Mr. Molloy.

"Dear Bobby,

"There appears to be considerable confusion abroad about the precise situation regarding ownership and investment in Esat Digifone. I hope the following information will clarify the matter for you.

"The Esat Digifone application was on behalf of a consortium owned as to 50% each by Telenor Invest AS and Communicorp Group Limited (the holding company for Esat Telecom). The application disclosed that, if it was successful, 20% would be placed with financial investors. A list of potential investors was submitted, all of whom are blue-chip institutions.

The Minister and Department are specifically precluded from name these, but there was no room for doubt as to either their bona fides or their financial capacity.

"I can, however, confirm that the names being speculated upon in the last few days were not on this list.

"At the licensing stage, several months later, Esat

Digifone was in a position to announce that it had placed the 20% with IIU Nominees Limited, and it was certified to the Department at that time that Mr.

Dermot Desmond was the sole beneficial owner of the 20%. Adequate evidence of his capacity was disclosed.

Mr. Desmond is still the exclusive beneficiary of the IIU shareholding.

"On 19th April, when the Department had a press briefing, the fact that it was not in a position to give final definitive information on the placement of the 20% minority shareholding may have reduced the clarity of the exchanges. My information is that when the licence was issued shortly thereafter the precise situation was clearly stated.

"If I can be of any further assistance to you, within the constraints of the binding confidentiality arrangements, I would be delighted to do so."

"Yours sincerely

Alan Dukes."

Now, first of all, I suppose any TD and former Minister himself receiving a private letter like this from a Minister is entitled to accept the contents of it as being the full truth of the situation?

A. And I believe Mr. Molloy would have looked at it as such, yes.

Q. Because we know that

A. There was no subsequent

Q. there was no subsequent follow-up to that?

A. Yes.

Q. And of course Mr. Dukes was a politician who enjoyed a high reputation amongst his colleagues?

A. Correct.

Q. And in signing a letter like this, he was putting his reputation on the line as well to his colleagues, there is no doubt about that?

A. In general terms, you are correct.

Q. In general terms?

A. Yes.

Q. Now, I don't think we need to parse or analyse the letter to any great extent, but it is less than the full truth, isn't it?

A. I have been reflecting on this letter when I saw it.

Q. I know you would.

A. And you are correct in one thing you said: Mr. Dukes was held in the highest of esteem, and that is not just a general statement. Both Sean Fitzgerald and myself, and Sean obviously was Assistant Secretary in charge of telecommunications, we had both worked for Mr. Dukes in the Department of Finance, and he would have known us from then. And even for, if I may say so, the very pragmatic reason that we knew Mr. Dukes to be a man of the highest intelligence, but beyond that, a man of penetrating logic, that why I ask myself, because this is a letter actually where you

raise valid questions, so would we have somehow deliberately set out to mislead Mr. Dukes? And there is no question that we would have done that consciously, certainly. I believe myself is, that from my own viewpoint now, I didn't draft the letter, but I would, I certainly would have seen the letter, I think I probably would have put it under the, under sort of the generic heading of that was business that was then yes, we ran the competition, we had a winner. I may have said to myself mentally, yeah, there was a hiccup but the reality was, that's how it was dealt with and that was the final outcome. Now, on reflection, that might be less than wholly satisfactory, but there was absolutely no intention of any kind, and least of all with a Minister that we knew we had worked with before, there was no percentage in it for us whatsoever. Now, even if there were, it wouldn't be an excuse to mislead any Minister. So I don't believe there was anything consciously done somehow not to put Mr. Dukes in the picture. Now, I have I have seen a copy of Mr. Dukes' evidence.

Q. Yes?

A. And he does say to the best of his recollection. Now his recollection is much stronger than mine, much stronger by a multiple of many factors, so I am not putting in in any possible recollection I would have



against his, his written statement.

Q. Yes.

A. But it is possible, and it is only this may be only on the realms of an outside possibility, that between myself or Sean Fitzgerald or Martin, we may have mentioned it, but I think it is less likely than we did, given that Mr. Dukes seems to have quite a clear recollection of what happened and what he felt was required of us, let me put it that way. So all I can say, Mr. Coughlan, is this is a letter where there was no question, and I can't speak for Sean Fitzgerald, but I knowing Sean Fitzgerald, I know he is a man, as I say, of palpable integrity, I know he certainly wouldn't have intended it, that we had known and worked and were very comfortable with Mr. Dukes in the past and knew his form, so to speak, I don't think it would have crossed our minds to mislead him. But there is little doubt it had the effect of reassuring Mr. Molloy as to the story, so to speak, when he might have had or worked off the possibility of a different story but was sufficiently reassured by Mr. Dukes' letter. But, as I say is, had I been, had I read the Dail debate, had I been conscious of Mr. Molloy's's pointed and possibly informed knowledge of the ownership issue as of the end of April, I clearly would have drafted another letter, or would have so informed the Minister.

Q. Yes.

A. Now, it is easy with 20/20 hindsight to say that that is what would have happened, but I can only offer that by way of an explanation in December '96. I think implicit too, in Mr. Dukes' statement, is the fact that he had to come in at very short notice without anything, and he was coming into, I don't think it is realised now, the most controversial end to Ireland's Presidency, we had three consuls, but notably one which was on the postal side which was falling apart, Francois Mitterand, this is just the facts of the matter, regarded La Poste in France as almost part of France's patrimoine, and was changing the nature of our consul and demanding another consul of us in the Presidency during the month of the December. Now, Mr. Dukes stepped in and did brilliantly, but there was so much to cover in that time. It is possibly that the time we took out to brief him was necessarily truncated. It is not an excuse, but it is by way of explanation.

Q. Yes, I understand the point you make. But there can be little doubt but that Mr. Molloy was on the right track?

A. So it seems. So it seems.

Q. And

A. And I would regret that personally as well, because I worked as Secretary or Secretary General directly to

Mr. Molloy and equally held him in the highest esteem and it wouldn't have been my intention to mislead either minister, both of whom I had worked with.

Q. Yes. I understand the explanation that you have offered, Mr. Loughrey. And I am not trying to make things difficult or painful for you by pursuing this line of inquiry, but I am afraid it has to be done. I think that there is no doubt but that the letter did not convey the truth of the situation, isn't that correct?

A. Mr. Coughlan, I am not rowing back in the slightest. There is no untruth in the letter.

Q. I know that.

A. Whatsoever.

Q. That's correct.

A. The letter

Q. It is by its omission, isn't it?

A. In terms of general sweep, it is absolutely correct.

Q. Yes.

A. And it is possible, with the GSM being at that stage in, not in calendar terms but in administrative terms but almost a distant memory, and a hiccup that was resolved, it wasn't seen in the correct light.

Q. There is, of course, one stated, I think we will have to refer to it as being an 'untruth' in the letter?

A. Well, I would certainly be concerned about that.

Q. I would just draw your attention to that.

You see the penultimate paragraph?

A. Yes.

Q. "On the 19th of April when the Department held a press briefing the fact that it was not in a position to give final definitive information on the placement of the 20% minority shareholding may have reduced the clarity of the exchanges."

A. There is certainly nothing untruthful in that, Mr. Coughlan.

Q. Mr. Loughrey, on the 19th of April the Department knew what the shareholding in that company was?

A. But had already resolved to change it, in other words can I refer back to my description of work in progress? And it was already our intention if that didn't work, we would have had to take a total look at the whole situation again, so in other words, as of the 19th of April, we saw that we were not in a position to get, to be definitive on how the 20% would pan out, because we did not accept what was put in front of us.

Q. Look, Mr. Loughrey, I am not going to get into a long and detailed discussion or debate with you about this. You were told on the 17th of April by the consortium that this is what the consortium is, isn't that right?

A. Perhaps we go on Mr. Coughlan, I am happy to stay here as long as it takes

Q. Yes.

A. to convince you.

Q. Yes.

A. That whatever about the full story of this letter, I would not have stood over any sense of untruth in a letter between anybody, least of all between two ministers and least of all between two ministers I knew and respected. So please take as long as you like.

Q. I will so, Mr. Loughrey.

A. And I will stay as long as you like.

Q. Because on the 19th of April the Department knew the makeup of the consortium?

A. As proposed.

Q. No, no, no as stated by the consortium, Mr. Loughrey?

A. As stated by the consortium, Mr. Coughlan, but as

Q. Isn't this

MR. O'DONNELL: Let him.

MR. COUGHLAN: Excuse me, isn't that what the Department knew; you were told that this is the consortium and this its make-up, that is what they told you?

A. Mr. Coughlan, that infers that somehow this licence was up for negotiation. We were granting the licence, it was proposed to us that this would be the consortium, but we never bought into it.

Q. No, Mr. Loughrey. You were told that what the make-up of the consortium and you were quite right, Mr.

Loughrey, because what happened there on in was negotiation. That's what happened, Mr. Loughrey.

A. It seems to be

Q. Sorry, if you bear with me, and I will put it fully to you. It was not a situation where these people were brought in and told to, "We will not give you the licence." You were told that they were told that it had to be, the Minister's preference was for 40:40:20, that is what they were told.

A. Why do you think, Mr. Coughlan we now know that they went to such lengths to construct this new and Telenor were so reluctant to go on with it why would they change if we were only talking about preferences? They changed because there was no alternative but to change to 40:40:20.

Q. Mr. Loughrey, no, Mr. Loughrey, there is no record of that, there is no record of that.

A. That is what happened.

Q. No, Mr. Loughrey.

A. Let's not get into this. This is what happened.

Q. No, Mr. Loughrey, what happened was, the whole system was effectively got inside your whole system was effectively got inside and you were told about it by this consortium 'this is the position'. You never examined it, you never tried to come to terms with what it was, and you proceeded on the basis that you were going to get a result.

A. That is an incredible outburst, Mr. Coughlan, and I couldn't agree with one iota of what you have said.

Q. Very good. On the 19th of April the Department knew that it wasn't 20% ?

A. We knew that the shareholders had come to an agreement between themselves, but that didn't bind the Department, Mr. Coughlan, and history has shown that it didn't bind the Department. If it was a question of black and white, Department versus the consortium, there was only one winner and that was the Department.

Q. Well, Mr. Loughrey, is that the case? Because you didn't even inquire as to how they were going to put back the position to 40:40:20, you didn't even know there had been trading in the licence before it was issued?

A. Is there anything illegal in trading

Q. Sorry, you didn't know this?

A. I know I didn't, but it wasn't what was only significant is that we got the result that we determined we were going to get and we got it, Mr. Coughlan. Mr. Coughlan, can I apologise that I seemed to get a little exercised there. But I just want to stress so much, whatever peccadillos may have arisen in this process, I don't believe myself, and I believe I can speak with 100% confidence for Sean Fitzgerald or Martin Brennan, would have deliberately mislead Minister Dukes or any other minister, whatever

about omissions that you quite validly point out, but there was certainly nothing conscious about it.

Q. I understand your explanation. Is an omission misleading somebody?

A. If the letter was possibly drafted don't forget there was no piece of paper in front of the Department, this is what we would reply to. Minister Dukes, quite correctly, wanted to be briefed, he wanted to know the story so he could reply to Minister Molloy. This was the letter that emerged. Now, if I could turn back the clock, and particularly with the knowledge that I have now gleaned reading the Dail reports, this is not a letter that would have issued, this is definitely not. At that stage we weren't hiding anything, Mr. Coughlan. I mean to say, the world had moved on, there may have been a flurry in terms of the press speculation about the IIU involvement, but it was no longer a contentious issue. There was no percentage in us, if I may put it in crude immoral terms, in us to keep anything back from Mr. Dukes. He was the sort of Minister, in any event, that normally if he had time actually, you wouldn't have had to press any buttons because by definition he would be between us we would have had, let's say, exposed the full story. So, what I am saying is: whatever the pressures at the time, whatever our mindset was at the time, and had we the knowledge that



certainly I now have, we would have drafted a different letter, but we didn't set out to mislead.

Q. If you go to Tab 241, I think you wrote a letter to the Registrar of the to Mr. Justice McCracken's Registrar?

A. I did indeed, yes.

Q. Or to his solicitor. And the letter reads:

"I refer further to your inquiries in relation to the award of the GSM licence by Minister Lowry last year.

"I wish to confirm that the competition process leading to the award of the licence was carried out at arms's length from the Minister and the Government and on an objective basis by reference to predefined selection criteria which were published to all interested parties."

I pause there. That was your state of knowledge as of that time, isn't that correct?

A. Yes, it was indeed, yes.

Q. "These criteria were designed to ensure that the successful applicants would have a progressive approach to market development, a commitment to a high quality nationwide service and an innovative approach to tariffs. The original criteria included a cash bid element.

"The detailed evaluation of the six applications received was carried out by a project team comprising civil servants of this Department, the Department of

Finance, (including secondees on loan from accountancy houses) and consultants from Andersen Management International (Copenhagen based telecommunications consultants with specialist expertise in this area who were recruited following an international tendering procedure). There was no political influence of any kind in relation to any aspect of the detailed evaluation and ranking of the applications. Indeed, the process was fully sealed both to ensure the impartiality of the evaluation and to protect the confidentiality of the information received from the applicants. The confidentiality of this information was specifically guaranteed in response to requests from prospective applicants."

Again that was all the state of your knowledge at the time?

A. As of the time.

Q. As of that time. That is all I am concerned about.

A. Yes.

Q. "The competition documentation was provided to the European Commission in order to ensure that the process and parameters for the introduction of competition in mobile telephony were in accordance with the EU Competition Rules. The Commission raised objections in relation to the cash bid element for the licence as a barrier to market entry. Informal negotiations between representatives of the Project

Team and the Commission led to a compromise proposed by the Project Team representatives on an ad referendum basis. The essence of the compromise was to replace an open-ended auction-style fee for the licence with a fee in the " sorry "at the option of applicants subject to a maximum of €15 million while Telecom Eireann mobile subsidiary, Eircell, would be required to pay €10 million. This ensured that the Commission's requirement that no unfair burden should be placed on the new market entrant vis-a-vis Eircell was satisfied while respecting Exchequer requirements in relation to Revenue receipts. After ministerial approval, the compromise was formally put to the Commission who then endorsed the competition parameters on this basis."

Again all in accordance with matters we have looked at and your understanding of matters.

"Apart from his approval of the revised licence fee proposal, the role of Minister Lowry in relation to the GSM competition process was limited to approval of the original competition documentation, including the evaluation criteria also approved by Government.

Approval for the approach to the evaluation process and in acceptance of the documented recommendation of the GSM Project Team, in relation to the award of the licence to the winning applicant. The final decision was communicated to the Minister by me, and I

understand subsequently by him to the leaders of the Government parties, and as statutorially required, to the Minister for Finance before being publicly announced on the same day. The decision was subsequently noted by Government.

"I can also confirm that none of the applications received, including the winning application, indicates that Mr. Ben Dunne, or any company with which he is known to be or have been associated, would be a beneficiary of the award of the licence. I should point out however, that while the competition documentation required full disclosure of ownership proposals, the proposed involvement of financial investors was not in itself a negative factor under the predefined evaluation criteria. Indeed, a number of the applicants disclosed an intention to make shares available through a public offering, while the winning applicant disclosed an intention to place 20% of the equity with institutional shareholders. The destiny of such equity participation could not obviously be guaranteed at the time of the evaluation. In the case of the successful applicant, Esat Digifone, it has been confirmed to me that Mr. Ben Dunne is not an investor in any of the parent companies, including IIU Nominees Limited, which is wholly-owned by Mr. Dermot Desmond. "I hope this clarifies the position."

Now, we know what Judge McCracken's Terms of Reference and they related to Mr. Dunne, Dunnes Stores' companies and matters of that nature. And we know that it was in circumstances of controversy surrounding Minister Lowry and Mr. Dunne or Dunnes Stores that Mr. Lowry left office?

A. Right.

Q. And the inquiry, obviously, made of you by that Tribunal, was for, I suppose, what had happened in the GSM process and whether Mr. Dunne had any involvement?

A. That's correct.

Q. Would probably be the way to summarise it?

A. That's correct, yes.

Q. And you are setting out the information which is available to you, and there is no criticism, these are all matters as you understood the situation to be?

A. At the time.

Q. You haven't been through all these documents?

A. Yes.

Q. And perfectly understandable. And just coming to the final paragraph there, could I just ask you when you say that "It has been confirmed to me that Mr. Ben Dunne is not an investor of any of the parent companies including IIU Nominees Limited, which is wholly-owned by Mr. Dermot Desmond."

What was that confirmation you received, could you just assist us there?

A. I am virtually certain that I picked up the phone to Michael Walsh.

Q. Right.

A. Rang Michael, and I asked him, 'this is what has been put to me. I need, you know, a crystal clear statement or affirmation from you' because this is, I regard I regard this as a very serious letter.

Q. Of course.

A. Being written from a Registrar of a Tribunal set up by the Oireachtas. I wanted to make sure that it was absolutely correct. Michael Walsh my memory of it is that Michael Walsh confirmed to me that there was no way, directly or indirectly, that Mr. Dunne was associated in any way with the bid at any stage, so in other words that there could be no subsequent shadow coming back to say at an earlier stage or a later stage that Mr. Dunne had no association whatsoever, and on the basis of that phone call and I trusted Michael Walsh 100%.

Q. Yes, of course.

A. I wrote it on that basis, that is my memory.

Q. If I might just very briefly just to take up, just if I may, very briefly

A. Of course.

Q. the Department's position in do you know the letter of the 17th of April that came in from Mr. O'Connell?

A. Yes, I recall that, yes.

Q. And the Department's response, I know that

MR. O'DONNELL: That's fine. What book is that?

Q. MR. COUGHLAN: Sorry I was bringing it to his attention. 203.

A. 203. Yes, I have that Mr. Coughlan.

Q. "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 requirement of the GSM competition document Esat Digifone provided ownership details which indicated that at the licence award the ownership would be as follows:

"Communicorp Group limited - 40%.

Telenor Invest - 40%.

Institutional investors - 20%.

"The application also provided details of the ownership of the operational partners, and identified the probable institutional investors and the brokers who would be responsible for placement of the equity with institutional investors. In the case of Communicorp, it was indicated that it was 66% owned by Irish investors, Mr. O'Brien, and 34% by Advent International.

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

the following could be clarified:

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

"2. Full details of the ownership or 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 changes in the effective ownership (both direct or indirect) of Esat since the time of the 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.

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

"The identity or financial commitment of providers of debt financing. It is essential that these matters be cleared up before the 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."

And it is signed by Mr. Brennan.

Now, that's own the 1st of May. Sorry, I beg your



pardon?

A. The 1st of May it is, yes.

Q. The response: it is on the 1st May to the letter of the 17th April?

A. Quite.

Q. And what? About ten days or so had passed?

A. Correct.

Q. Now, I know you say matters which were in your mind and matters which you were considering and we know that a letter went from Mr. Towey to the Attorney General's office seeking legal advice on the ownership issue?

A. And that in turn was predated by a meeting, I believe I think it was Monday the 22nd. In other words, the first working day when this was brought to our attention we raised the ownership issue with the Attorney General's office.

Q. Now, in fairness to the consortium

A. Yes, of course.

Q. I have to be here to be fair as well. Can you point out to me, because it is your evidence that it was your view that it had to go back to 40:40:20 immediately. That's not stated in this letter at all?

A. No, it is not.

Q. And it is not stated in any document in the Department, on the records of the Department, there is no file there is no memorandum in the Department or

anything of that nature which states that, as far as we can see.

A. But yet Mr. O'Connell would have recorded, for instance, in his notes, things like ministerial preference for 40:40:20, etc.

Q. Yes. Ministerial preference, a ministerial preference, not a direction or anything by the Department, but a ministerial preference. I saw that reference?

A. No, I only mention that, but it doesn't there is no what you are saying is there is no documentary trail to show that this was pursued in writing. Now, albeit that this is the one letter, but it is not evident from the letter. But it is clearly evident from, or the approach we made or can I just repeat. Mr. O'Connell's letter, I don't know the dates, but I suspect Friday the 17th was, it was either late in the week, I suspect it was late in the week.

Q. I think you could be right.

A. So the following Monday we were straightaway onto the Attorney General's office, followed up with a formal letter from Mr. Towey on the 24th. So, in other words is, ownership had immediately loomed large in our minds in terms of, in terms of this, the knowledge that emerged from Mr. O'Connell's letter. But what you are putting to me is, that the one letter, formal letter of response.

Q. The official response?

A. The official response actually. Now, I am responsible or was responsible for everything and am still responsible for everything that happened in the Department at that stage.

Q. Yes.

A. That is both the legal position, but it is also the moral position and management position. Having said that, so I accept responsibility. But I had no knowledge of this letter that went out under Mr. Brennan's name. And it is a matter now of conjecture; would I have agreed with it? Given how strongly I felt about things at the time, it is unlikely that I would, if it were under my name it wouldn't have issued, not that I have any problem with anything that Martin Brennan has put in the letter, far from it, but I think it would have been stated a lot more explicitly what was acceptable and what wasn't acceptable. But you are absolutely correct, as the Department's official reply, while it covers a good deal of the ground, it is silent at that stage on the ownership issue.

Q. Yes. And I suppose, in fairness I should ask you a question because it is a question a member of the public might ask. That if that view was implicit in this letter, in other words that it would be

A. Mm-hmm.

Q. was this because there was a desire that the Department files would not contain any reference to 25%?

A. Oh certainly not. I don't think there could have been any question of that whatsoever. That's far too nuanced for a busy department beset with practical problems. I couldn't accept that for one moment, Mr. Coughlan.

Q. Now, it is for that reason that I want to come back, very briefly, to Mr. Dukes' letter to Mr. Molloy?

A. Sure.

Q. And to look at Mr. O'Connell's letter of the 17th of April, which is in Book 43. It is Tab 184.

A. Apologies Mr. Coughlan, I have lost sight of that reference again, if you

Q. It is Tab 184.

A. Tab 184, yes.

Q. You can see that Mr. O'Connell commences by saying to Ms. Finn:

"Dear Regina,

"I refer to our telephone conversation of yesterday regarding the ownership of Esat Digifone Limited and of Esat Telecommunications Holdings Limited. The position is as follows:

"The Esat Digifone Limited..." And then he sets out what Esat Digifone, he states that is the position,

that there are three million Ordinary Shares and they were held as to 37.5%: 37.5%:25%. He is stating that is the position, isn't that correct?

A. It is not a proposal, it is clearly.

Q. That is the point I am making.

A. Oh I fully concede it is not a proposal, but equally this is a consortium applying for a licence.

Q. I understand the point you make. I just want to be clear, Mr. O'Connell wasn't proposing?

A. Oh, not at all.

Q. But the only thing that Mr. O'Connell did in the final paragraph of that first page, is that he is proposing an explanation as to how the 25% could be described?

A. And what does that tell us, Mr. Coughlan? It tells us that he is not certain that he has to sell the idea, that there has to be Departmental buy-in, so already there are seeds of uncertainty in his own mind; that is what I read from that.

Q. No maybe you are correct, maybe you are correct Mr. Loughrey, maybe you are correct.

But we know that from subsequent meetings which Mr. O'Connell has noted, which he attended with officials from the Department, that there was a lot of discussion around this particular issue as to how it could be presented and how they could be you could accentuate the positives and deflect matters away from this ownership, isn't that the record?

A. That was his attempt. If I may say so, I want to be absolutely fair to Mr. O'Connell, but I found it, when I read it, totally unconvincing. The idea that they would, what I call it, lift an advance 5% from an IPO that was meant to be three years down the line, I found wholly unconvincing. But I don't want to be unfair to Mr. O'Connell.

Q. Yes, okay. But to be fair to him, in relation to his note of subsequent meetings, if you look at Mr. Brennan's letter of the 1st of May?

A. Yes.

Q. The official response to him on the final page, where he goes through certain matters, he says: "It is essential that these matters be cleared up before issue of licence. We also need to discuss the public presentation of these matters."

Now to be fair to Mr. O'Connell

A. You are quite right. I can only say is that perhaps there was a failure of communication on my part. I mean to say, I knew in my own mind. Perhaps I should have gone this is not a criticism of any of the officials but perhaps I should have gone hands-on at an earlier stage, but all I could say is, you are correct that both Mr. O'Connell's letter is put as a proposal and effectively as a fait accompli, and Mr. Brennan's official response, though it sets the scheme for what has to be done, isn't explicit on the

percentage terms, I would agree with that, yes.

Q. Now, those are the facts now as we have seen them and if we go back to the Dukes letter I only draw your attention where you have offered an explanation in the context of a proposal that had not been accepted by the Department?

A. And I think what I said, Mr. Coughlan, is, or perhaps I could paraphrase it.

Q. Yes.

A. That six months further on when we were beset with other priorities, it is possible, while there is an outside chance that either myself or Sean Fitzgerald or Martin Brennan may have mentioned what I would have called the interim difficulties to Mr. Dukes, it is much more likely that we didn't, given the clear recollection he seems to have of the briefing. Even if we were to accept that as what happened, I still believe is, that the letter and the paragraphs that comprise the letter actually were put together in a way that how we saw the general sweep of how the problem, of how the GSM competition was run, and how and how, what the outcome was, and I must, and perhaps I will put this, now that I have regained sort of a more measured approach to your question and apologies for the earlier outburst, but I must say is, there was never ever the slightest intention to mislead Mr. Dukes or any other minister. I have to

state that with the clearest of convictions. Even though in retrospect if I had known what the Dail exchanges had been, I certainly would have ensured that the letter would have been different.

Q. I take your point. You want to stress to the Tribunal you didn't set out to consciously mislead Mr. Dukes or Mr. Molloy. Looking at the matter now you would have drafted the letter differently, you believe?

A. I think that's fair.

CHAIRMAN: I suppose given the old adage that all politics is local means, to some extent, that even though you stated some minutes ago that matters moved on, nonetheless this was still a potential banana skin for a new minister, perhaps even a bigger one than the less parochial difficulties with postal matters and French politicians?

A. In the event, Mr. Chairman, you are quite right and so it turned out to be.

Q. MR. COUGHLAN: Thank you, Mr. Loughrey.

A. Thank you, Mr. Coughlan

CHAIRMAN: Thanks very much. Well, there will be some counsel to question you, Mr. Loughrey. I think, gentlemen, we will keep the same order as was observed in the instance of Mr. Brennan, that is to say, Mr. Shipsey to be entitled to commence, followed at their election by Mr. Fitzsimons, Mr. McGonigal, it seems Mr. Fanning isn't intending to exercise his



entitlement on behalf of Mr. Lowry. Very good. Then Mr. O'Donnell, and then any final clarification questions from Mr. Coughlan. Because of the time that we will lose, to a limited extent, tomorrow, we might go a trifle later today, not beyond half past four because I am conscious that is quite a stressful experience for you, Mr. Loughrey. In those circumstances, would it be of assistance if we took a ten minute break now, would you welcome that or would you just be as keen to get on with it?

A. Given the spirit of, and given the sad, obviously the sad news of the death of Mr. O'Higgins and that the Tribunal will lose sometime now, I am quite happy to go straight ahead now if that is okay with you, Mr. Chairman.

CHAIRMAN: We will go to half four then, Mr. Shipsey,

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. SHIPSEY:

Q. MR. SHIPSEY: Mr. Loughrey, I appear for Mr. Dermot Desmond and IUU, and there are a number of questions that I would like to put to you.

You have, in the course of your evidence to this Tribunal and I have to confess I haven't been here for all of it, but I have had the benefit of the transcripts for those days when I haven't been here, been at pains as it were, to stress and to explain the nature of the competition that was run for the award of the second GSM licence, isn't that correct?

A. Correct, yes.

Q. And the nature of the competition and the seriousness with which you and your Department put your energies and your efforts into that competition was, if I might describe it, along the lines of the types of public procurement procedures and contracts that are now a requirement as a result of our membership of the European Community and the European Union, isn't that correct?

A. That is broadly correct, Mr. Shipsey, yes.

Q. And the object of Public Procurement Law in general, and the Public Procurement Code of the European Union, is to ensure that in the award of public contracts, and there are a very wide range of contracts that are being awarded by the public administrations of the Member States of the European Union, that there would be transparency insofar as the award procedure is concerned. Would you agree with that?

A. I would agree fully with that, Mr. Shipsey, yes.

Q. That there would be objectivity in relation to the award of a contract, in other words that those who decide to enter a particular competition from the arguably most trivial to the most serious, will know the criteria against which their application will be judged. Would you agree with that?

A. Not only that, but I think they are entitled to the objectivity that should be brought with public

servants always acting with disinterest. They would be entitled to that objectivity.

Q. And the third possible general over-arching criteria that applies to all public procurement-type competitions would be fairness, Mr. Loughrey, would you agree that everybody who enters that competition, regardless of their identity, their nationality are entitled to be treated fairly in that procedure?

A. I would agree fully with that, Mr. Shipsey, but I wouldn't like somehow that the Tribunal to think that these qualities were invented just as a result of our membership of the European Union. I think procurement policies, even predating the foundation of the State, go back a very long way, but they were taken up enthusiastically from the foundation of this State with the Department of Finance being the keeper of conscious, so to speak, and they were very well delineated but they were further enhanced and opened out further, as you have just described, with the alignment of public procurement policies with the emerging EU Directives. But in broad terms, I couldn't disagree with anything you have said.

Q. Yes. And be it in terms of Nation Public Procurement Law or Public Procurement Law, that is informed by the jurisprudence of the membership of the European Community and the judgements of the court, they ensure, insofar as applicants for public competitions

are concerned, that it matters not whether you come from Athlone or Athens, in the case of European competitions, you are entitled to be treated fairly and equitably, isn't that correct?

A. I would like to think, Mr. Shipsey, to the extent that I was involved during the open door policy myself personally, I would have emphasised the latter point. Because is, it was not necessary to have any, either Irish involvement or even EU involvement, that in fact all comers to this competition could be assured that there was no bias of one kind or other; it was on the merit of the application, not on the provenance of the promoters or anything else of that like.

Q. And just as one would not be entitled to discriminate against foreign applicants for a competition such as this, equally you wouldn't be entitled to discriminate against national applicants for this competition, it goes without saying?

A. Clearly not, clearly not, that would not be the case. As I say is, strictly in accordance with predetermined criteria and the origins of the bid or the make-up of the promoters should not and was not an issue.

Q. Just to, I suppose, put it more specifically, and an Irishman's  $\frac{1}{2}$ 10 million as part of a consortium was as good as Deutsch Telecom's  $\frac{1}{2}$ 10 million as part of a consortium?

A. Absolutely. And I think this point did come up in

Mr. Coughlan's examination, that it just wasn't a matter of some sort of crude look at balance sheet aggregates or net worth of the individuals. If there was financing which was sufficient, an Irishman's 10 million was worth a citizen of any other Member State's 10 million. Of course.

Q. And equally, does it not always follow that insofar as the assessment of the financial wherewithal of a consortium or the constituent components of that consortium, that it would be impermissible, as a matter of Irish or European Public Procurement Law or the rules of this competition, to have regard to any subjective view that the adjudicators might have had or might have been expected to have in relation to a particular consortium or a component part of that consortium?

A. I would like to think that human kind could eliminate all subjectivity, but that in fact would they would have been the implicit riding orders to public procurement in general and this competition in particular is yes, objectivity would always have been the buy word of this competition, but anything that involves discretionary decision by a group of people, it is possible, though not intentional, they could stray into the realm of subjectivity, but one thing is certain, is, it's strictly it should be seen that the criteria were laid out to, so that the group would

assess under these criteria in an objective fashion.

Q. And it is not just that that is good governance, Mr. Loughrey, it would also be the case that, would it not, that if a particular applicant for a public procurement competition discovered that they were excluded from the competition on a wholly subjective basis on the whim of the adjudicator, that that would expose the particular awarding authority to an exposure in damages or to prevent the particular award of the contract in question, isn't that correct?

A. That's quite correct, Mr. Shipsey, yes.

Q. In other words, when you set up a competition, and when you set rules for that competition, you have got to run the race in accordance with those rules?

A. That is absolutely correct.

Q. Now, in the case of Mr. Desmond and the case of IIU, it is clear, and it is of course for the Chairman of the Tribunal to assess firstly the relevance of the letter of the 29th of September to the Terms of Reference, and I will just comment, it may be difficult to see the relevance to the Terms of Reference to the Tribunal. As far it is relevant, it at least discloses a lack of concern on the part of IIU or Mr. Desmond to disclose their involvement, whatever that involvement, was disclosed in the letter as of the 29th of September of 1995, isn't at that correct?

A. Correct.

Q. Now, we know what happened with the letter and we know that Mr. Towey considered it correct and appropriate that it would be sent back, but at least as far as IIU and Mr. Desmond was concerned, they weren't in any sense slinging violets in relation to their willingness to participate, albeit as underwriters as disclosed in that letter?

A. Correct.

Q. And there is nothing that you were aware of at the time or that you have since become aware of that would suggest that at any time either Mr. Desmond or IIU, through Mr. Desmond or Mr. Walsh, were engaged in any sense in trying to conceal their involvement in the Esat Digifone consortium?

A. I don't believe so, no.

Q. Now, if we just come on to the critical period from late April and into May of 1996, when it was coming to crunch time, if I might describe it as such, in relation to the award of this licence and you and the Department need to be satisfied that if you were going to award a licence to this consortium, that they would have the financial wherewithal to roll-out the second mobile phone operation in this country, isn't that correct?

A. That's correct, yes.

Q. You needed, firstly, to be assured that the, as it

were, entrance fee of 15 million to the process would be paid on the date of the award of the licence; that was the first amount that would have to be paid and that would come straight to the State and you needed to be assured that that was going to be possible?

A. There would have been no licence on the day without a cheque for 15 million.

Q. And you were aware from the proposal that the amount of equity that was stated to be required for this particular consortium was of the order of 50 million?

A. In fact I think the original bid had an amount of 52 million, but I am open to correction on that, but when they focused exactly on what was required, it had diminished by about 6 million or so, but of the order of 50 million, I think.

Q. It came to about 46-odd million, is that correct?

A. Yes, that's correct.

Q. Insofar as this consortium was concerned, it was two, what I might describe as, senior active partners and one less active, more in the nature of a financial partner, if you can use the term "partnership" for shareholders in a limited liability company. Would that be a fair description of your understanding?

A. Ultimately it was our assessment that there were two partners who could effectively underpin the roll-out of the operation while one may well have been able to do so, but it, we regarded it as prudent not to make



that assumption at the time, but certainly broadly speaking, you are correct.

Q. Yes. And insofar as the award of the licence was concerned, if it was to be awarded to the Esat Digifone consortium, you have been, again if I can use the expression, at pains to stress to Mr. Coughlan, that if it was to be awarded, as far as you were concerned, it would have to be on the basis of a 40:40:20 split between Communicorp, Telenor and IIU?

A. Once

Q. Isn't that correct?

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

Q. And again, not only you, but the Department officials who were working with you had to be satisfied and had to satisfy themselves insofar as financial criteria were concerned, that the licence fee would be paid and that there would be enough capital initially to ensure a roll-out of the second mobile phone operation, isn't that correct?

A. Yes, I think during Mr. Coughlan's examination, I hope I got across the emphasis, the preoccupation I had that there would be sufficient liquidity so that wouldn't in the critical earlier year, first year, there would be no question that not only in investing terms but in underwriting terms that the roll-out as planned could be assured.

Q. And insofar as the equity participation of the three

participants was concerned, on the assumption that it was, we will say in rough terms, about 50 million, it had reduced I think to 46, the split would be 20 million required by Communicorp, 20 million by Telenor, and 10 million by IIU, isn't that correct?

A. Broadly speaking they were the percentages.

Q. If they were to subscribe

A. Straightaway you are quite right, it was based on 50 by definition. I was working on different amounts because I was working both on 52 and 46, but based on 50, you are absolutely right, it would have been 20/20/10.

Q. So in the case of IIU at least, 10 million would have more than covered their equity contribution based on it being 46 million that was required for equity.

That follows, doesn't it?

A. Not only that, Mr. Shipsey, but that is for the totality of the capital expenditure. Over, you know, basically at least two years and perhaps getting into the third year, as I recall it, but for the first year they clearly could meet the requirements effortlessly in the first year.

Q. And if I can just not address or not deal with the situation in relation to Communicorp's position and in relation to the fundraising efforts which it was engaged in, but insofar as IIU was concerned, you took steps, and your officials took steps to ensure that

you had sufficient comfort in relation to its financial wherewithal to contribute what it was required to contribute to this consortium, isn't that correct?

A. Apologies, Mr. Shipsey, could you put that to me again. This was in relation to Communicorp you were saying.

Q. No, in relation to IIU?

A. I beg your pardon. I picked it up incorrectly. I picked it up incorrectly. My apologies. But perhaps it might be wise to put it to me afresh again.

Q. Very good. In so far as IIU were concerned, if we take the period from late April into May onwards, and again insofar as the Chairperson of the Tribunal might determine it to be relevant, you wanted to be satisfied that IIU had the liquidity to ensure that it could meet its obligations and to an extent, its underwriting obligations for Communicorp, isn't that correct?

A. And this was based on the most conservative assumptions that Communicorp could not bring, effectively, a penny to the project and, yes, is the answer to your question on that.

Q. And what you wanted to see, and obviously you were interested in the net worth or an indication of the worth of the principal behind IIU, Mr. Dermot Desmond, isn't that correct?

A. Well, let's be clear about this. I was not looking for Mr. Desmond's net worth. I was looking for sufficient evidence, and in the manner I required it, that there would be sufficient cover for this project. If Mr. Desmond had other assets over and above that, that was of no interest to me. I wasn't looking for due diligence, so to speak, of all Mr. Desmond's assets. I was just looking for sufficient evidence so I could say to the Minister, 'Minister, I have determined that IIU are in a position to give the necessary underpinning to this project.' that was my only objective.

Q. And insofar as the liquidity of IIU or Mr. Desmond was concerned, you got it in two forms: you got it in the form of two letters, one from what you describe as a very reputable firm of chartered accountants in Dublin, and also from a reputable bank in Dublin, isn't that correct?

A. Correct.

Q. And if one compares what you sought from Mr. Desmond on the one hand with what was sought in respect of Telenor, for example, on the other hand, you were prepared to accept, on the basis of their accounts, that they had the financial wherewithal based upon what had been disclosed to you, but without, as it were, independent bank guarantees or a letter from their accountants?

A. I was more I was more demanding of IIU by definition because IIU as an entity clearly had just been set up and there wasn't any financial track record. So I had to look through IIU through to the beneficial owner, but clearly Telenor was a corporation of such standing that I wouldn't have required to look at, for instance, the liquidity question as far as Telenor was concerned, given the fact that their free cashflow, looking at their accounts, was such as not to warrant such an exercise because it would have been futile because clearly they were in a position to meet the requirements.

Q. And insofar as the second letter from Messrs. Farrell Grant Sparks was concerned, and I think we are now satisfied or you are at least satisfied that by the time you speak to Mr. Walsh on the morning of the 16th of May, you have that second letter, more detailed letter from Farrell Grant Sparks?

A. Yes, so it would appear, so it appears. I know, for instance, in speaking to Mr. Coughlan or during Mr. Coughlan's examination, I couldn't recall what the sequence was, but it is now clear to me from the documents that Mr. Coughlan opened up in the course of the examination, that that would have been the sequence. So, yes, is the answer to your question. Yes, the second letter would have provided the insights I required for my probing with Mr. Walsh.

Q. And insofar as, if we forget the valuations that were placed upon certain of the assets of Mr. Desmond, there is reference to 20 million cash at bank, isn't that correct?

A. That's correct, yes.

Q. And there is reference in it to a sum of 5 million being in the client account of Messrs. William Fry?

A. Correct, but just remind me, Mr. Shipsey, we don't want to double count

Q. Yes.

A. a 5 million.

Q. I think the 5 million is included in that 20?

A. Is included. There is a risk that we could count, on the double, that 5 million.

Q. I am not suggesting that there was 25 but there was a total of 20 cash at bank disclosed?

A. Yes.

Q. And certified by Mr. Desmond's personal auditors and accountants.

MR. COUGHLAN: Not certified. Confirmed.

A. It was a confirmation.

Q. MR. SHIPSEY: Yes.

A. But a confirmation written by the managing partner of clearly, arguably, the free up and coming Irish, Dublin-based accountancy house at the time with already a very formidable reputation.

Q. And secondly insofar as the letter from Anglo Irish

Bank is concerned, that wasn't, Mr. Coughlan quibbles with my use.

MR. COUGHLAN: I didn't quibble. I think Mr. Loughrey goes onto the point. It was confirmation, it wasn't a certification.

Q. MR. SHIPSEY: Insofar as Anglo Irish Bank were concerned, it was a Letter of Undertaking from that bank that a sum of 10 million would be available throughout 1996 and included in that 10 million was the 5 million, that was the 5 million that was already in the William Fry client account and, as it were, earmarked for part payment of the licence that?

A. Gave me very considerable reassurance because this was a no quibble letter written by a very reputable bank, that that cash would be available, as I say, on a no quibble basis to the end of 1996.

Q. And that was the bank?

A. That was the sort of liquidity I had been pushing for, if I may put it, evidence of liquidity that I had been pushing for, yes.

Q. And therefore, if we just take that letter on its own, that letter was providing you with an undertaking in excess of 100% of IIU's own capital contribution to this project?

A. Correct.

Q. And it was providing you with something of the Order of 60%, maybe a little bit less than 60%, but of the

order of 60% of IIU's total obligations in the event that it had to pick up one-third of the Communicorp capital contribution?

A. Once again, correct. There was there was, once again, a considerable comfort for me in that, if in fact the worst scenario had arisen straightaway, that already in excess of IIU's own investment requirement, they were, there was immediate liquidity to meet a considerable percentage in the very unlikely event of Communicorp effectively imploding on itself. I saw no prospect of that, but in that very unlikely event.

And this is over and above the asset availability in the letter of Mr. Pearse Farrell.

Q. Now, in the course of his examination of you, Mr. Coughlan has used the expression, I think it is "trading in the licence", and I think it was by reference to a suggestion that there was trading in the licence before it was awarded in relation to the agreement between the shareholders in this consortium to bring the shareholding into line with what the Department required. Isn't that correct? You recall the questions and the reference to

A. I do indeed, Mr. Shipsey. I am just reflecting on your question. As you put it that way, it seemed to me to be a trade that was necessitated by the Department's insistence.

Q. Absolutely. I wonder would you also agree with me



that it is not only somewhat but quite a misnomer to suggest that it was trading in the licence because the licence had not yet been awarded. It was trading in the shares in the company that was formed for the purpose of making the bid for the consortium?

A. I believe I can agree with you, Mr. Shipsey, but equally I understand Mr. Coughlan's approach.

Q. Mr. Loughrey, there has also been quite considerable reference by Mr. Coughlan in the course of his questioning of you and he has asked and prefaced many questions for you with the expression "a question that a member of the public might ask" and I, on behalf of Mr. Desmond, have a number of questions that might also fall into that category insofar as the terms of reference of this Tribunal are concerned, because as you fully appreciate, I am sure you understand this is not a Tribunal of Inquiry into the award of the licence to Esat Digifone, but it is concerned with whether the particular Minister in question had any hand, act or part, as it were, in influencing the award of the second GSM licence. You are, I suppose better than most of us here, aware of that distinction?

A. Yes I am quite clear on that Mr. Shipsey, yes.

Q. And what I ask you, if you can assist us, Mr. Loughrey, and you were, I think from 1988, in the position of what is now described as a Secretary

General, but was then a Secretary of a Department, from '88 onwards, of Energy, and then owing to changes in Government there were an a number of other portfolio that was added to the Department that you were in, isn't that correct?

A. Correct, yes.

Q. Would I be correct in my understanding that insofar as ministerial contact is concerned, that the Secretary of the Department is the person who has most contact with a given minister for their particular department?

A. That's correct. I suppose Secretary General has many roles and I am certainly not going to delay the Tribunal in rehearsing the sort of that scenario.

But the Secretary General of the Department would be regarded as the Minister's principal advisor, among many other roles, but the Minister's principal advisor, yes.

Q. And throughout the period from the decision to set up a competition for the award of the second GSM licence through to its award, you were the Secretary of the Department, and for a substantial period of that time Mr. Lowry was the Minister, isn't that correct?

A. Yes, Mr. Lowry, while it depends on how one pinpoints the very origin of the GSM licence, but if you take it logically in terms of full ministerial awareness from January, 1993, which would mean Mr. Cowen being, at the time being responsible at the

time for the Department, Mr. Lowry would have been Minister, broadly speaking, for two years, but it covered the critical, I suppose, and conclusive two years of the whole move towards opening up the cellular phone market, yes, that would be correct.

Q. And can you tell us whether Mr. Lowry was supportive of the process that was set in train for the competition for the award of the second GSM licence?

A. To the extent that he took an interest in the detail and when I say 'to some extent', that he wouldn't have had that great an involvement. It wasn't in any sense a criticism of Mr. Lowry; ministers are hugely busy, and they couldn't be expected to get into the nuts and bolts of administration, but to the extent that he expressed an interest, it was on the lines of that he had no problem whatsoever either with the policies that had evolved prior to his coming into Government, or and on the execution of those particular policies by way of the competition. In short, in my capacity as principal advisor to the Minister, I am not conscious of him at any time taking a stance which would have been at variance with my advice.

Q. Can I ask you again in the general for the moment, and I will come to the specific after that, whether Minister Lowry, to your knowledge, expressed view or preference, good, bad or indifferent, in relation to the consortia, the consortium which eventually was

awarded the licence or any of the other consortia who made applications for the licence?

A. He never expressed any preference of any kind. Now, can I qualify that by saying is, after the award of after the competition result was announced, and perhaps I am not conscious after the award of the licence, in the Dail and perhaps elsewhere that I am not conscious of, but certainly in the Dail, in his statements he would have, may have opined to the extent that, you know, an up-and-coming young Irish company, allied to the experience of Telenor, triumphed. Now, to the extent that might be seen by people as expressing some sort of preference, it was only an expression of perhaps justification but nothing to do with the competition itself because I am not conscious on any occasion he expressed any preference whatsoever.

And if I may say so, Mr. Shipsey, I would be recalled it because it would have been incumbent on me, I would have been obliged to say, 'Well, whatever about that, Minister, it will not be put into the mix, because this competition will be run on wholly objective lines.' So in other words, but that is hypothetical because it didn't arise, because to my recollection, and indeed I hope to my knowledge, because I would have recalled it, he never expressed any preference whatsoever.

Q. And I suppose that answers my next question, in a sense, coming to the specific: did he ever express a view, good, bad or indifferent, directly or indirectly, in relation to the involvement of Mr. Dermot Desmond or IIU in a consortia?

A. I have no recollection to that effect whatsoever and I believe I would have recalled it had it so happened.

So in short, the answer is, no, he didn't express any preference whatsoever as to IIU or Mr. Desmond's involvement one way or the other.

Q. To the best of your knowledge and recollection, Mr. Loughrey, did Mr. Lowry seek to influence the process for the evaluation of the proposals?

A. Oh, I can say categorically that did not happen. That is to my knowledge or my recollection. Clearly, to the extent that members of the team itself would have to answer to that to the Tribunal.

Q. No, I am only asking for your knowledge and recollection.

A. Well, to my knowledge, you can take that as a categoric affirmation that under no circumstances did he try to influence me at any stage.

Q. Now, obviously with the benefit of hindsight in certain circumstances we are all aware in life that we may approach things differently or do things differently. Insofar as the award of the second GSM licence is concerned, and so far as your knowledge and

awareness is concerned, are you as satisfied today in relation to the integrity of that process as you were in May of 1996?

A. Yes, I am, I am conscious of the fact that the Tribunal has raised matters, Mr. Shipsey, but you can take it that I am happy to stand over this competition, and I am as happy today as I was at the time.

MR. SHIPSEY: Thank you.

A. Thank you, Mr. Shipsey.

CHAIRMAN: Mr. Fitzsimons?

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. FITZSIMONS:

Q. MR. FITZSIMONS: Mr. Loughrey, I have some questions to ask, the purpose or object of them will be to seek to support the process.

Are you aware of the fact that Persona have issued High Court proceedings against the State claiming damages and effectively attacking the process?

A. Mr. Fitzsimons, as you know is, I left the Department in January, 2000, but I was, I think I was made aware of that through a former colleague and I am certainly, since I have arrived at the Tribunal, I know this to be the case, yes.

Q. Yes. Now, that case, when it ultimately comes to the High Court, may cover a great deal of the ground that has been covered here, and the same case will be made against the licence as has been made by Mr. Healy and

Mr. Coughlan

MR. COUGHLAN: Sorry, I object to that question, Sir.

It is an almost inappropriate question. The Tribunal

makes no case and My Friend Mr. Fitzsimons,

Mr. Fitzsimons, sorry, knows that the Tribunal makes

no case. It is calling this Tribunal into question if

he is suggesting that the Tribunal is making a case.

The Tribunal inquires.

CHAIRMAN: It certainly is, Mr. Fitzsimons, I consider

it a most regretful observation from somebody of your

seniority.

MR. FITZSIMONS: Mr. Chairman, I have absolutely no

doubt whatsoever that Tribunal counsel subjectively

consider themselves to be engaging in an inquiry. I

have absolutely no doubt that they are doing their

absolute best in this regard. No doubt whatsoever.

But regrettably, Sir, objectively what we have

witnessed here and when I say "we", I am referring to

experienced counsel for all parties, is an attack on

aspects of the process. Now, I am not speaking of the

entirety of the questioning of Mr. Healy and

Mr. Coughlan, but we have seen just within the past

hour, Mr. Coughlan making a case using pejorative

terminology to this witness to attack part of the

process.

We heard Mr. Healy, over a lengthy period of time,

raising his voice at Mr. Brennan, and making a strong

case on various aspects, telling the witness he was wrong from time to time in relation to what he had done from time to time during the process.

Now, Sir, the object of these lines of questioning was to show up or to attempt to show up what Tribunal counsel appear to consider or are defects in the process and in my submission, there can be absolutely no other construction placed upon the way in which the questioning at issue was conducted.

CHAIRMAN: Well, Mr. Fitzsimons

MR. FITZSIMONS: Now, Sir, as I say, I have no doubt that both Mr. Healy and Mr. Coughlan believe that they are engaging in an inquiry, but the fact of the matter is, that they have put propositions to witnesses relating to alleged they have alleged defects in the process to witnesses, which is putting a case, and that case will be the same case we can anticipate that Persona will make against the State in the High Court when that claim ultimately comes on to hearing.

Sir, I appreciate that you may obviously I will obey any direction you give but, Sir, we have sat through what has happened here, listened to it, observed it, and we are experienced counsel, and what happened is a case has been made against the integrity of the process, and civil servants have been attacked, both openly and by implication in relation to the manner in which they have conducted their duties. And



most unfairly, in my submission, in some instances.

MR. McGONIGAL: Mr. Chairman, I want to fully support what Mr. Fitzsimons has just said. I think it is right and proper and it is about time that it was said.

CHAIRMAN: I am not going to be drawn into a row that serves no useful purpose at this time. I consider that these concerted applications being made in this manner are exceedingly unhelpful to the process. I am not going to make any intemperate observations, much as I might be tempted to do so. I am satisfied that the form of this Tribunal which I have been required by the Oireachtas to undertake requires a most painstaking and detailed examination of this immensely large licence award. Because of the circumstances that have appeared, it has proved necessary for the Tribunal, in its confidential process of inquiry, to examine in great detail both the evolving stages of the process and all stages of any possible involvement or connection on the part of Mr. Lowry with that process. In devising a procedure that will implement the will of the Oireachtas in attending to those matters, I am satisfied that the format that has been decided upon by me is an appropriate one. Namely, that the Tribunal counsel who takes a particular witness and obviously Mr. Loughrey, and his colleague Mr. Brennan, are very much the most substantial and

important witnesses, will undertake what, in effect, is a multiple task.

First of all, they will be required to take the witness through the detailed statements of intended evidence that will be prepared in the course of many protracted meetings held in the course of confidential inquiries. Then it will be the task of counsel for the Tribunal to take up possible matters that may appear in the public interest to require examination in the discharge of that remit. This has proved a protracted process and I am not going to comment upon all the elements that may have added to the protraction of that process at this stage, but I consider a remark by any eminent counsel such as Mr. Fitzsimons to the effect that there has, to some extent, been an, effectively, prosecution, that in some sense is a forerunner of the proceedings brought by a disappointed aspirant is regrettable, unfounded and utterly incorrect. It has been long, it has been painstaking and tedious, but in the context of the facts that had to be inquired into, I believe what has been done has been the only adequate and acceptable way of discharging the onerous task that was entrusted in me by the Oireachtas, and I greatly regret the suggestions which appear to be made on a concerted basis that there is some unwarranted or improper motive on the part of me or of Tribunal counsel.

MR. SHIPSEY: Sir, I reject and resent any suggestion of a concerted effort on behalf of any counsel before this Tribunal. I was completely and totally unaware, before Mr. Fitzsimons got to his feet, that he was going to make any reference to a perception of a particular line being adopted by Tribunal lawyers.

CHAIRMAN: I haven't in the slightest sought to impugn you, Mr. Shipsey, in those remarks.

MR. SHIPSEY: Sorry, Sir, I would like to say that I would wish to associate myself and agree with what Mr. Fitzsimons had said, but I was unaware that he was going to say it. I would like, for the record, on behalf of Mr. Desmond and IIU to say that similar concerns have been expressed by Mr. Desmond in relation to the procedure.

CHAIRMAN: As he has in many instances directed to me in person, as you are aware, Mr. Shipsey. Am I correct in that?

MR. SHIPSEY: That is so, Sir, yes.

MR. FITZSIMONS: Mr. Chairman, please

MR. COUGHLAN: No

CHAIRMAN: Sorry, Mr. Fitzsimons, I am sorry. Sorry, Mr. Fitzsimons

MR. FITZSIMONS: Sorry, Sir

CHAIRMAN: this is a gross discourtesy to the witness.

MR. FITZSIMONS: The word 'concerted' was used by you

in the course of your previous remarks twice. That is a most unfair and personal comment to make, and I must ask you, Sir, to withdraw it. It is quite unwarranted. I stood up in response to Mr. Coughlan and made my application. And you, Sir, have suggested that somehow or another some sort of concerted action was taking place here which is absolutely not the case and I must ask you, Sir, in fairness, and in justice, to please withdraw that comment.

CHAIRMAN: Mr. Fitzsimons, does it remain the essence of your observations to the Tribunal, that Tribunal counsel is engaging in some form of unwarranted and unacceptable attempts to impugn the interests of persons involved in the successful consortium that are in a sense a forerunner to High Court proceedings yet to be brought? Because I consider that grossly reprehensible and regrettable.

MR. FITZSIMONS: Sorry, Sir, that is an absolute, with the greatest of respect, that is an absolute mischaracterisation of what I have stated and I would ask the record to be looked at if necessary for that purpose. And I think, Sir, it is an unfair characterisation. I was simply making the point that, and I did say that a case was made against the witnesses. That is my view, Sir, objectively, rightly or wrongly, but I have said that the counsel subjectively, I have no doubt, believe that they are

simply engaging in an inquiry, and I made the point that the case as made is, in all probability, going to be along the same lines in the Persona action. That is all I have said, Sir. And I was leading into the follow-on from that when Mr. Coughlan objected and this unfortunate exchange commenced. But I must ask you, Sir, the word 'concerted' is very offensive and unfair. I have had no consultation with any counsel or party before making these points and I would

CHAIRMAN: If you tell me that, Mr. Fitzsimons, I utterly accept it.

MR. FITZSIMONS: Thank you, Chairman.

CHAIRMAN: I am only anxious to lower the temperature and to proceed on what will be hopefully getting close to the final stages of Mr. Loughrey's long period in the witness-box.

MR. FITZSIMONS: Absolutely, Sir.

CHAIRMAN: I believe it is in all our interests that we try and proceed. And as ever, in any situation if I have over-reacted or if I have expressed anything that appears to reflect on the integrity of able and senior counsel, such as appear on all sides here, I certainly would never wish that to be the case. And I hope in that vein we can proceed, please, with the evidence.

MR. FITZSIMONS: Thank you, Sir.

MR. COUGHLAN: Perhaps if I could just assist

My Friend and calm matters down as well. When Mr. Healy completed his examination of Mr. Brennan, I think in fairness to Mr. Fitzsimons, he did say that, "Mr. Chairman, Mr. Healy is engaged in the most thorough and comprehensive examination of the witness for the purpose of ascertaining and testing the facts, both examination and cross-examination, insofar as any arises any issues arise vis-a-vis my clients on this witness, it would probably arise primarily in relation to the meeting of the 3rd of May and Mr. Johansen's memo of that date.

"Now, Mr. Healy has put to the witness the content of the memorandum and having regard reviewed the evidence, and indeed other matters which concern my client, it doesn't seem to me that it would assist the Tribunal if I were to attempt to go over the ground again, it seems to me that Mr. Healy has covered the ground both from the point of view of my client and the Tribunal."

So, I think that that's clear reflection and I think perhaps we could calm matters down.

CHAIRMAN: I hope we can. Mr. Fitzsimons.

Q. MR. FITZSIMONS: Now, one of the it is difficult now to, how does one phrase it? I will just phrase it in the abstract. One of the attacks on the process relates to the ownership issue?

A. Quite.

Q. Now, I think you would agree with me that this is a mixed question of fact and law, because it involves any decision on it involves a consideration of contractual and legal issues?

A. I believe I understand what you are saying, Mr. Fitzsimons, yes.

Q. Now, the questions put to you in relation to this topic by Tribunal counsel have confined themselves, I would suggest, to areas of fact and have not taken into account any legal principles or indeed any contractual principles that may be relevant, isn't that so?

A. To the extent that the latter were touched, would only have been very tangentially I believe, yes.

Q. Yes. And in dealing with the topic in general, which of course involves or has involved, on the basis of the evidence, a great deal of technical evidence in the area of banking and corporate finance, you have given your evidence on the basis and informed by your vast experience and manifest top class expertise in that field?

A. I think, Mr. Fitzsimons, you flatter both my expertise and my use of it, but I, I suppose by the time the competition arrived I was a civil servant of some experience. I had been a Secretary General for, since 1988. So, in colloquial terms, I had been around the block more than once, yes.

Q. But it appears to be the case that the Tribunal is itself not going to call any expert evidence in the area to take issue with you, so your expertise, in a sense, is the your expert evidence is the expert evidence that the Tribunal has before it?

A. Well, if that is the case, Mr. Fitzsimons, I accept that. I would like to feel myself it was in many cases my informed judgement, but that could be another definition for expertise.

Q. Yes. Now, just I am not going to, in case you were worried, going to go into the law, contract law, company law, banking law, competition law; that would be relevant to this issue, if a court was to decide it?

A. Indeed yes.

Q. But I am just going to mention two aspects. Do you have a I know you have a number of degrees, do you have a law degree?

A. No, I did a module of contract law, but I wouldn't claim any legal expertise.

Q. But I think you would be in a position to confirm that, as a matter of law, IIU had no interest in the, no legal interest in the consortium until shares issued to it on the 13th of April of 1995?

A. Yes, I believe that's the legal position, yes.

Q. Yes. Now, just the second legal matter that I want to just air, just to get your views upon it. There were



rules for the competition and these are at Book 41, 46, Condition 23 of those rules, could I just read it out, it is very short.

It states: "Each application should contain a statement that it will be valid as to its contents for a period of 180 days from the closing date of receipt of applications."

Now, I think you could agree with me that lawyers could spend a long time arguing over what that exactly means?

A. I was aware, of course, of that clause. But I would leave it to your expertise, Mr. Fitzsimons, actually, to interpret that. But broadly speaking, I knew what it meant. That effectively the frame was frozen for 180 days in terms of broad commitments. I don't think anybody in the Department was going to haggle over something that didn't have material significance, but we would have expected the bids actually to remain, in substance, the same for 180 days.

Q. In substance?

A. Yes.

Q. And presumably the word "valid" was chosen for that purpose; it is, if you like, it is a more general word than one might have expected to find if the parties were to be confined to every dot and comma of their application?

A. Yes, I would have been horrified if we had locked  
ourselves into such an impossible situation.

Q. And indeed Clause 3, just a third legal item, where it  
provides that "Applicants must give full ownership  
details for the proposed licensee." etc..

The proposed licensee, of course, could have a  
different name and there could be differences between  
it and the applicants.

A. Yes, I believe that's correct, yes.

Q. Now, it may be that Mr. Coughlan will not think it is  
correct on re-examination, but could I suggest to you  
that the wording of the clauses opens up legal issues  
that would have to be determined on a legal basis in  
the light of legal and contractual principles and  
following full discovery evidence from Mr. Andersen,  
evidence from other parties, etc.

A. I would defer to your opinion, of course,  
Mr. Fitzsimons. All I know is we always we  
interpreted Article 3 in a common sense way.

Q. Yes. Now, just to move on to another matter. The  
rules, could I suggest to you they were formulated by  
the Department and effectively policed by the  
Department?

A. Yes, that's correct.

Q. Could I suggest to you that if the Department was  
unhappy in law or in fact with the ownership situation  
in May, 1996, it could have directed the consortium to

revert to its original state if it wished?

A. It could have so requested, yes, you are quite right.

Q. And I think in that context, you have already expressed the view that if there was a defect in the process, that that would have been the end of the competition, in the sense that no party could claim an entitlement if the process had gone wrong?

A. I believe if there had been a fundamental flaw or a material flaw in the process, I think, and I expressed the opinion, you are right, that I didn't see that just affecting the consortium that had been given the exclusive negotiating rights, that would have affected the whole competition and that meant that we would have to start from a blank sheet of paper again.

Q. Yes. Now, I want to move to the Persona meeting with the Minister on the 16th of August, 1995, at the Fitzpatrick Castle hotel. Mr. Frank Conroy, who will be giving evidence, his statement at Book 38, Section 9, described this meeting as a lobbying exercise.

Now, before I ask you questions on that, could I ask you a general question, and I think you have told us already, you have served seven ministers, and I take it during the course of your lengthy experience, that you have come across many public representatives from time to time in the course of your duties, obviously incidentally?

A. Yes, it is axiomatic, anybody long enough in the

service that would be the experience, yes.

Q. I don't know whether you would like to answer this question, but could I suggest to you that politicians, including ministers, have a difficulty in saying no to supplicants?

A. There are exceptions to that rule, Mr. Fitzsimons.

Q. I am quite sure there are some.

A. Ones I am conscious of personally. But in general, if and particularly in Ireland, I have long experience of meeting politicians in the European Union, so I am putting this in by way as of a proviso, but none of them operate in our multiple seat constituency system, so ingrained in Irish politicians is an additional awareness that, of stakeholder issues, the complexity of which is not faced by politicians in any other Member State of the Community with which I am familiar, so this is not a criticism of our Irish politicians, it is a just the extent under our political system where they come face-to-face with stakeholders and where they are equally dependant on our proportional representative, multi seat constituency. So in other words, it is an apologia in some senses that I understand the pressures that they come under, yes.

Q. I know this is another difficult question: Have you come across public representatives, and if I could put it this way; who do not seem to have a problem with

leaving people, when I say "people" I mean  
supplicants, people making representations, etc.,  
under the impression that they can do things for them  
when they know that they cannot? I am not speaking  
about everyone, but are there some like that?

A. It is a difficult question for me, Mr. Fitzsimons, but  
it is you know, original sin is alive and well in  
all of us and I understand the pressures politicians  
come under, and yes, that temptation would be there  
for politicians.

Q. Yes.

A. But clearly this is not directed against any one  
politician.

Q. No, no, absolutely.

A. Exactly.

Q. But that temptation is there for politicians. Now, I  
think you have given us your views on the meeting  
between Minister Lowry and Mr. Boyle for Persona, the  
meeting you have mentioned you had advised the  
Minister very precisely and definitely against doing  
anything of this type. You were unhappy with the fact  
of the meeting for reasons of perception, because the  
perception of such a meeting taking place, even if it  
was harmless, would be wrong, and I think on the basis  
of the description of the meeting that was given to  
you, you expressed the view that on the basis of that  
description, nothing wrong happened as such, bar the

fact, of course, that the meeting should not have taken place?

A. Yes. I have no idea, it is up to the principals concerned at that meeting to explain what that meeting was about. But I was concerned about the perception when I learned of the meeting, obviously this was knowledge long after the fact, but yes, I did express that view.

Q. Now, there is nothing in the competition rules that informed applicants that they should not lobby or engage in the type of lobbying exercise that Mr. Conroy so colourfully describes, no phrase such as "canvassing will disqualify"?

A. That was an omission.

Q. But it is not there anyhow, and we have to live with that.

A. It is not there.

Q. It is possible, of course, for all we I am sure we will hear in due course when we hear about the other three applicants, it is possible that the Minister may have met all the applicants, we don't know at this point in time, but no doubt evidence will be lead to deal with that in due course?

A. We don't know, Mr. Fitzsimons, that's correct.

Q. Now, is it possible or could I suggest to you, just to consider this, that it is just about possible that the Minister, notwithstanding your advice, may have taken

his own decision to meet Mr. Boyle because he considered the process to be sealed and airtight, in other words he was safe to meet him?

A. That would have been an unwise assumption just from the perception viewpoint alone but it is certainly possible, yes.

Q. It is possible that in the Minister's own mind he was not breaking a rule if he believed that?

A. Well, the rules were self imposed rules, in that sense, Mr. Fitzsimons. And ministers have the discretion within the law to do as they please, but you are quite right. If, in the Minister's own mind, that he had so convinced himself that the process was run on such a sealed basis, yes, he could have taken that viewpoint. Though had he discussed the matter with me, I would have advised against it, clearly.

Q. Of course, I have no doubt whatsoever that you would.

Now, there has been a previous phase of this, associated phase of this inquiry, and I am not sure whether you are aware of the fact, just a couple of relevant ones I will bring to your attention.

But first of all can I ask you, are you aware just from just from reading the newspapers and no more that, that Mr. Lowry made a very active role as a fundraising for the Fine Gael Party, particularly when he was Minister? He was trustee, if not Chairman of the trustees, and again according to newspapers,

raised a great deal of money or is credited with raising a great deal of money for the Fine Gael Party?

A. Mr. Fitzsimons, there is no secret about this. Mr. Lowry's fundraising capacity was legendary, both for the GAA in Tipperary and subsequently for Fine Gael. It was reported widely and I was so aware, yes.

Q. Okay. Well, we heard when we were here before in relation to the \$50,000, that in July 1995, Mr. David Austin wrote to Mr. Lowry to inform him of that big fundraiser that he was setting up for New York later that year, in fact on the 9th of November of that same year. And he forwarded to Mr. Lowry a list of the individuals who it was hoped could be tapped, or sorry the companies with their CEOs whom it was hoped could be tapped for that dinner in the US. Now, one of these companies was Motorola and the list, I should say, is contained in the first exhibit to Mr. Lowry's statement in relation to the previous phase.

Now, I just want to, and it appears that the Minister was deputed, from the documentation exhibited, to get Motorola to attend or be involved or make a contribution whatsoever.

Now, I suppose I have to ask you this question: to put aside your Secretary General hat and become a normal citizen, to put this question to you, or sorry an ordinary citizen, from the fundraising point of view, the Minister in August 1995 could hardly refuse to



meet Tony Boyle and then press Motorola to attend the dinner and make a contribution? I mean, isn't that the reality of isn't that so?

A. It is a very difficult question when you put it like that, Mr. Fitzsimons.

Q. Well, if you prefer not to

A. I would prefer not to.

Q. If you would prefer, I won't press you on it.

A. In defence of all politicians and all ministers is, clearly there has been debate over how political parties are funded, but there was nothing improper or clearly illegal by drawing up such a list, but having names on it that might be associated with current major public procurement might be seen by some people as not to be entirely wise, but that is the only comment perhaps I would make.

Q. Absolutely no doubt about that, but just to finish on this little bit. It is possible, I suggest, that the Minister believing that the process was airtight now he can of course answer this himself in due course saw nothing wrong in meeting this Mr. Boyle in order not to offend Motorola in the hope that Motorola would either subscribe or attend the November dinner?

A. That may well be possible, Mr. Fitzsimons, but once again I would say that if the Minister, the then Minister, Mr. Lowry, had entirely convinced himself that he effectively did not and could not have any

influence on the process, maybe that was part of his reasoning that lead to that conviction.

Q. Well, exactly. Now, there is another angle: Mr. Conroy, who has told us on Day 119, Questions 41 to 45, Question 67, was a Fine Gael fundraiser for many years, a good friend of David Austin, a member of the capital branch of Fine Gael, in other words the big money branch for fundraising. He has told us about the competition between fundraisers to get the big sums. And could I suggest to you that if Persona had got the licence, that Mr. Conroy, with that background, it is inconceivable that he would not have approached for a subscription if they had got the licence, that it is inconceivable that such a target would have been left slip by?

A. Returning to the fundamentals, Mr. Fitzsimons, is, clearly that all of this consideration didn't encroach into the process whatsoever clearly. There is no need for me to say that. I understand the point you are making fully, but once again is, perhaps it is difficult for me to leave aside my civil servant's hat

Q. I appreciate that.

A. and to speculate on that basis.

Q. But Minister Lowry, at the time, as the big party fundraiser, had to think in terms of the possibility that Persona might get the licence and it would be the

target, subscription target with the tears of gratitude in his eyes and possibly very willing to give a major subscription after the licence was awarded?

A. I mightn't be

Q. As it would be perfectly entitled to as a matter of law?

A. Indeed.

Q. Yes. And, of course, we do know that within days of getting the licence, in the sense of the award of the licence, that Denis O'Brien was asked by David Austin for \$50,000 contribution to the New York dinner:

Denis O'Brien's evidence Day 116, Question 152, where he says that he was approached on the 2nd or 3rd or 4th of November. And again whilst of course entirely inappropriate in the circumstances, nothing illegal about a request for a political party subscription?

A. Quite clearly nothing illegal, yes.

Q. Now, I want to move onto the final issue I want to ask you about: the auto dialers. Because Mr. O'Brien, wearing his Esat Telecom hat, or sorry Esat Holdings hat had a very intense issue in the topic of auto dialers and routers, isn't that so?

A. That's correct, yes.

Q. And he was giving Mr. McMahon a lot of trouble, as we can see from some of the documentation, but I am not going to go into that, but he needed help from Mr.

Lowry, isn't that so, to get over this problem?

A. He had every right to appeal, as any value added service licence holder, to appeal to the Minister because an independent regulatory setup hadn't been set up and even though I regarded Sean McMahon as the de facto regulator, and encouraged he didn't need encouragement, he is well capable of playing that role, it didn't have any statutory underpinning and legally effectively the Minister was the regulator, so all value added service providers, including of course Mr. O'Brien, had every entitlement to approach the Minister on difficulties, as they saw it.

Q. Yes. And this was not a sealed process, an airtight process, there were no rules applicable to it that would insulate it from factors that perhaps should not enter into play?

A. Absolutely not, which made Mr. McMahon's task, and indeed that of the Department, all the more difficult, yes.

Q. Now, Mr. O'Brien was ultimately successful with the Minister, isn't that so, with the Minister?

A. Well, perhaps could you prompt my memory on that, Mr. Fitzsimons, because clearly the Minister, and indeed successive ministers, including Mr. Dukes, I mean in terms of succession, were sympathetic to allowing as much competition as possible into the market place consistent with the 1983 legislation. So

there would have been, not a bias, but at least a sympathetic ear to a hearing and on occasions decisions were taken which increased the capacity, for instance, of Esat Telecom, but I am not sure possibly I would phrase it the way you phrased it.

Q. I will rephrase it. To put it another way, were decisions taken prior to the flotation, or the fundraising, Credit Suisse First Boston?

A. Yes, there were decisions taken.

Q. There were decisions. And were those decisions taken by Minister Lowry?

A. Those decisions I think Mr. McMahon will have to answer for himself some of the decisions would be taken at official level, but some, yes, would have been taken certainly with the sponsorship of Mr. Lowry.

Q. With the sponsorship of Mr. Lowry. And those decisions, I suggest to you, were of critical assistance to Mr. O'Brien, because I am instructed now, Mr. McGonigal can take issue, but I am instructed that I am instructed that Esat Telecom would have collapsed if it did not get those authorisations?

A. It would never appear to me quite as dramatic as that.

It always appeared to me, Mr. Fitzsimons, and this is from I have no inside knowledge of Telecom, but from my reading of the situation, that Esat Telecom could not have matched what it purported to do so to

likely investors because of a limitation on capacity,  
but it was never put to me that it was on the verge of  
collapse, as such.

Q. Very well, of course. That is my instructions.

A. Yes.

Q. But could I suggest to you that the fundraising would  
not have been successful without those decisions?

A. The fundraising.

Q. Could not have proceeded even?

A. Once again is, the there is no doubting what you  
are saying, Mr. Fitzsimons, that there was there  
was linkage, clear linkage between Mr. O'Brien's  
presentation of the fixed line business in the  
marketplace and I mean in the capital markets; that is  
why I am saying in the marketplace, in the capital  
markets and his ability to be able to garner in more  
capacity from Telecom Eireann through the offices  
either of the Department or the Minister, there was a  
clear linkage there.

Q. Yes. Now, finally, Mr. Loughrey, this Tribunal,  
amongst the issues it has to try, it has to determine,  
has to determine, on the evidence before it, one,  
whether funds passed directly or indirectly from Mr.  
O'Brien to Mr. Lowry; and two, whether Mr. Lowry did  
anything in return? That is putting it in a very  
general way. But I think you can confirm to me, I  
think you may have already have done so, that Mr.

O'Brien needed Mr. Lowry's assistance on the auto dialers and routers issue, this assistance was of a critical nature to him and he got assistance?

A. One again, Mr. Fitzsimons, perhaps

Q. I am not linking the two by the way.

A. You might like to accept my impression or my description of it. His assistance is, I am sure, in the Oxford dictionary sense, correct at one level, but the way I would like to phrase it is, requests for additional capacity for auto dialers wasn't dependant on the Department's decision or ultimately on the Minister's decision, but all value added service providers were entitled to request either leased line capacity or other technology assisted capacity is, so you had put your question in a wider context, I couldn't possibly adjudicate on the wider context.

Q. Very well. Well, presumably the Tribunal will be investigating that area in due course.

A. Indeed.

Q. And we can come back to it then. Thank you, Mr. Loughrey.

A. Thank you, Mr. Fitzsimons.

CHAIRMAN: Well, in the context of it now being twenty to five, I think from the point of view of Mr. Loughrey and the stenographers, it is desirable that the remaining examination be deferred until half one tomorrow. I will be hopeful that we will conclude

then. Thank you very much, Mr. Loughrey.

MR. McGONIGAL: Chairman, could I just ask one

question before you rise in relation to

Mr. Fitzsimons' last few questions. I am not aware of any documentation from Telenor or indeed anyone else

in relation to auto dialers. I am just wondering

whether the Tribunal has material in relation to this

from Telenor in the light of Mr. Fitzsimons' last

question or whether this is a new allegation being

made by Telenor now at this stage?

MR. COUGHLAN: First of all, I suppose I should

MR. FITZSIMONS: If I could answer that.

MR. COUGHLAN: It is not a matter

MR. FITZSIMONS: Telenor, Sir, has no documents, has

no interest in Mr. O'Brien's activities in relation to

auto dialers or routers. This is an inquiry.

MR. COUGHLAN: The Tribunal will take up the inquiry.

MR. McGONIGAL: Simply if Mr. Fitzsimons said that he

had instructions, I presume those are instructions

that are capable of being produced. Since he has now,

for the first time, made an allegation publicly which

he warrants the Tribunal to take up, I would like to

see that information to see whether I should, in any

way, deal with, ask Mr. Loughrey any questions in

relation to it.

MR. COUGHLAN: Well, in the first instance, the

Tribunal should try and ascertain what information is



available in relation to this matter and to deal with,  
in fairness to everybody and to in fairness to Mr.  
O'Brien and to Mr. Lowry that we get this information,  
and if needs be, if Mr. Loughrey has to be brought  
back to deal with that particular aspect, so be it,  
but at the moment the Tribunal will conduct its  
investigation into the matter.

CHAIRMAN: Half one tomorrow. Thank you.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,  
THURSDAY, 27TH FEBRUARY, 2003 AT 1:30PM.