

A P P E A R A N C E S

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I N D E X

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THE TRIBUNAL RESUMED AS FOLLOWS ON THE 27TH OF
FEBRUARY, 2003, AT 1:40 P.M.:

CHAIRMAN: Thank you, Mr. Loughrey. Thanks, Mr.

Loughrey, from such indications as I have been able to
get, I am reasonably confident we will be able to
finish your evidence this afternoon and I would
propose that perhaps after approximately 75 minutes,
in ease of everybody, not least the stenographers, we
take a short 20 minute break and then proceed to try
and make up something of such time as may have been
lost. Mr. McGonigal, I think you have questions.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. McGONIGAL:

Q. MR. McGONIGAL: I hope not to detain you too long,

Mr. Loughrey. There are just a few things I want to
try and clarify, from everyone's point of view.

First of all, if I could just touch on the letter of
the 27th of April, 1995, from the European Commission
to Michael Lowry in relation to how and when the RPT
document may have got to Brussels. That letter, in

fact, refers to a letter of the 8th of March of 1995, which would have gone from Mr. Lowry to the Commission. And it would seem from the reply that the probability may be that the RPT document was sent with that letter of the 8th of March. I don't know if you are in a position to comment on that. We haven't include it, but it seems to read that way?

A. No, you are right, Mr. McGonigal. I can't actually comment on that, but from what you say, that appears to be probable, but clearly in I couldn't be definitive on that. If I were to see the documentation, I may be able perhaps to help you further.

Q. Well, I could only show you the letter of the 27th and it is clear from that, Mr. Loughrey, that that was responding to clauses from a document which had previously been sent to the Commission, and it does, in its first sentence, refer to a letter of the 8th of March of 1995, which has not yet been made available, probably the Tribunal don't have it, which may be the answer to that slight conundrum?

A. If I may say so by way of, I suppose, additional help to set it in context, I think are aware, Mr. McGonigal, that there had been, may I put it this way, professional networking between the Department in 1993 right through to the point in time you are mentioning there, in terms of both DG IV and DG XIII, an

inclusive sort of process, sharing information to ensure that ultimately when Ireland launched its particular, the opening up of the market, that we would be "on side" with the European Commission, so in that context, it wouldn't be, it would surprise me that you are absolutely correct in that assumption.

Q. The next matter I just want to go back to, though it doesn't particularly concern me, but I just want to try and make sure that we have it right, is the Alan Dukes letter, which is Book 44, Document 239. And my reason for bringing you back to that letter, Mr.

Loughrey, at all, is because you will recollect in that letter that there is a sentence in the middle which says, "I can, however, confirm the names that were speculated upon in the last few days were not on this list."

Now it seemed to me that there was an assumption that the names which were being speculated upon, people may have thought that that was IIU and Dermot Desmond. In actual fact, I think it may well be Ben Dunne and some of his companies. I am not sure whether you are aware or not, but at that time there was, in the press and about, the significant publicity concerning Ben Dunne and whether or not he had been involved in the winning consortium?

A. You are correct, and I was so aware and there are further echoes of that in my letter to the Registrar

of the McCracken Tribunal.

Q. Yes. So that the probability may well be that the names being speculated upon in fact does refer to Ben Dunne and his companies?

A. Yes, and did not refer to Mr. Desmond or IIU.

Q. Yes. And I think, Mr. Chairman, just for clarity, Esat Digifone did at that time put out a statement denying that, and I will make that available to the Tribunal for completeness purposes, which seems to tie-in with the same, at the same time.

CHAIRMAN: Do you, in fact, Mr. McGonigal, just not that I remotely doubt you, do you have any press cuttings relating to that that?

MR. McGONIGAL: I will give you we do have press cuttings, Mr. Chairman, and I will make such of them as are relevant to that issue and any other issue that you require available to you.

CHAIRMAN: That would be helpful, thank you.

Q. MR. McGONIGAL: The next matter, Mr. Loughrey, that I just want to touch upon, is in relation to the ESB.

You will recollect that Mr. Coughlan drew our attention to a number of letters which passed between Mr. O'hUiginn and others to Mr. McCann in relation to trying to get the sites from ESB. Now, the ESB were in a peculiar position, in the sense that they were a member of a consortia and had about 20%. Now, it is clear from the documents that the policy of the

Department, and it is referred to at Document 107 in Book 42, that the policy of the Department would be that the ESB would be making their sites and facilities available.

Now, it seemed to be a suggestion in some of the questions, or an innuendo, put it like that, that by reason of the fact that the ESB were part of a consortia, that that of itself might be a reason for delaying or holding up negotiations with another consortia in relation to the giving of sites. Now, I want to suggest to you that in relation to that aspect of it, it does appear to be a conflict of interest situation for the ESB?

A. Clearly it would be up to the ESB actually to address that, but I believe in Mr. McCann's, at least in one of Mr. McCann's, then Chairman, letters, he believed, and he may well, I am sure he is right, that the consortium, that they were an intrinsic member of the Persona consortium, that they were held together, certainly from an alignment of potential shareholders, until such time as the licence was granted, and perhaps that he felt that that in itself actually precluded the ESB from moving ahead with a policy of co-location and cooperation. Now, I didn't share that view. Of course I respected the Chairman's view, but I didn't share that view, I didn't believe that either the ESB or any of the other, both State companies

explicitly listed or in fact in the background, for instance, with CIE had an option, for instance, in the Eurofone, this in the Millicom/Kinnevek bid, I didn't believe any of them were so held, and I believe that the policy of co-location, as I explained earlier, was correct, and without delaying the Tribunal, it is quite easy now to forget the pressures on the political system from what I might call the bottom up people-power crusade in terms of these issues at the time. And that gave an added urgency and piquancy to the Department's request to the ESB, but it would have been the same we would have put the same pressure, perhaps not documented on the file, certainly in our interaction with Telecom Eireann or any other repository of potential sites. It wasn't discriminatory against the ESB. Far from it.

Q. I am not trying to suggest that, I am just interested in the, in effectively the principle, in the sense that when one looks at the consortia which ESB was a part of, it is clear that their main contribution was the sites, and in fact they are identified as being 137 at that time when the applications go in. If one follows on, if one takes that as a piece of information, the Department's position would be, I presume, would have been that those 137 sites would have been, should have been available to all of the consortia, regardless of the result, and regardless of

where the ESB were positioned?

A. The only qualification I would put to that, Mr. McGonigal, of course they should have been available, to the extent that was technically feasible. There might have been reasons from an electric magnetic point of view, that it mightn't have been feasible. One other thing for fear, because clearly I have a great respect for the ESB, you may be a little unfair, unconsciously on these, I am sure it is not intentional, they did bring more to the party, I am sure, rather than the sites alone; they brought a vast experience as a network utility as well, and I am quite sure

Q. I was slightly underestimating their strength, and I accept that, Mr. Loughrey.

A. Thank you, Mr. McGonigal.

Q. I was trying to focus in on what I thought was a significant part, simply from the point of view of the argument of a conflict of interests, which does seem to me to exist.

Moving on from that then, the next matter that I want to touch upon is the question of the ownership issue which seems to be relevant, and I just want to run through some of the documents that we have already touched upon, purely for the point of isolating them and demonstrating what seems to have been happening at that time, what was happening at that time. And if

one goes to Book 43, where most of these documents are.

The first one that I just want to draw attention to and ask you about is Document 150, which is the initial meeting on the GSM licence discussions on the 9th of November, of 1995, where there was a full team from both sides present.

A. Yes, I have that now.

Q. And if you just go to point number 3 there: "Denis O'Brien indicated that ED was fully committed to fulfilling the promises in its applications and was eager to complete the discussion this side of Christmas '95."

Now, what I am actually interested here is, was it realistic at that time to see Christmas '95 as the time when the licence would issue?

A. At the time, the date of this meeting, had I be so involved, I would have been as disappointed as Mr. O'Brien had it not been possible to complete by Christmas. Now, we now know in retrospect, we now know with hindsight, in fact, that the drafting of the licence turned out to be far more complex than we thought, and did involve successive interaction with the AG's Office, and indeed with outside counsel.

Q. Absolutely. That's really what I want to try and draw. Because one of the things that, in a sense, that must feature in a competition is that having won

the right to negotiate, one anticipates that within a short time after winning, that the licence or whatever it is that you were in for, would be achieved?

A. I think that would have been a practical assumption by everybody concerned in the licence, albeit there was nothing explicit in the competition rules to tie the Minister down to a specific date. I imagine, and this isn't in the realm of law, I am only speculating, had the delay become inordinate, is that, Esat, your clients could have had a basis, perhaps, I am not saying to seek damages for an inordinate delay but the Department ultimately would be vulnerable if we didn't, if it was our fault entirely in not delivering a licence in reasonably timely circumstances.

Q. And in actual fact, I think if one reads some of that correspondence which has already been opened by Mr. Coughlan, you can see, certainly in one letter, where Esat Digifone or Mr. O'Connell seemed to have been setting up the possibility which was immediately recognised by the Department, and a very careful response was given to kill that before it started, and also a very fruitful meeting took place, I think, at the same time?

A. I believe I recall that sequence of events, yes.

Q. Yes. But in reality it would be incorrect to assume that, looking at the RFP document, for example, that one of the, one of the theories behind the 180 days,

for example, was that it was anticipated that the entire process plus the negotiations might be finished within that period of time?

A. I think looking from the far side of the counter, one could reasonably draw that inference, yes.

Q. Now, it is clear, Mr. Loughrey, that as one looks at the documentation, beyond the 9th of November, '95, that a number of issues were beginning to surface; one of those is, as appears in Document 153, is the issue of Persona?

A. Yes, I have that now, yes.

Q. And the fact that they were beginning to articulate an argument that they were entitled to be given reasons for their being unsuccessful in the competition?

A. That's correct, yes.

Q. And that seems to have dated around about that time and ultimately culminated in a complaint being made by them to Brussels in April of 1996, the 23rd of April, 1996?

A. Once again that's correct, yes.

Q. And that complaint which was made to Brussels, as I understand it, though I haven't seen the documents, was on the basis that they were trying to get Brussels to interfere with the issuing of the licence in some way?

A. That was my belief, yes, at the time, yes.

Q. And as that crystallised over that period, it was clear

that the, it seems to be clear that the

Minister/Department were deeply concerned as to how they should respond to that?

A. Yes, we were.

Q. And involved the Chief State Solicitor/Attorney General's Office in consultation in relation to that issue as well?

A. Yes, we took careful advice on that, for the simple reason is, there was, we believed that we were tied by the requests for confidentiality in the iterative process and then the reassurances we gave to all six applicants on confidentiality. So we wanted to make absolutely sure that whatever measures we took for whatever limited feedback we were giving, that we were doing so with the best of advice.

Q. Yes. Now, the other aspect of the Persona complaint was, of course, that they also appeared to be threatening proceedings within this jurisdiction?

A. That's correct.

Q. And again, proceedings along the line that would prohibit the issuing of the licence for whatever reason?

A. There was, I suppose, I am not sure, and perhaps some of my colleagues would be closer to the action than I, but clearly there was some concern that the issuing of the licence might have been enjoined at that time.

Q. Yes. Again that was a concern of the Department and

also the Minister at this time?

A. Yes, it was, though I am not sure how involved the Minister was at that time.

Q. No, I should probably indicate; I think when I use "Minister/Department" I am sort of bringing the two together, because in some instances they are one. At the same time. In fairness, one of the main concerns of the Minister at this time was to get the licence issued?

A. Correct.

Q. And in fact, it is clear from a document of the 12th of April of 1996, which is Document Number 180, Esat Digifone was writing to Mr. Brennan hoping that the licence would be issued within a week of that date.

It is in the last paragraph of that letter?

A. Yes, that's right, I have that too.

Q. And what was really happening, as I understand it here, Mr. Loughrey, is that on the one side, on the one hand you have Esat pushing for the licence?

A. Mm-hmm.

Q. On the Department's side, on the Department side you have them trying to get the licence negotiated, but the significant part of the negotiations was at that time with the Attorney General's Office?

A. Yes, we had to devote time and resources to ensure that we didn't run into, if I may say so, a hiccup at very least on the Persona complaint.

Q. That's right, but also in relation to the issuing of this licence for Esat Digifone, the Department's position couldn't be advanced until the Attorney General had given his advices?

A. That's correct once again. We wanted to make sure that we got the best advice, that we were moving as quickly as possible consistent with prudence not to be out flanked, if I may put it that way, by the parallel issue of Persona's complaints.

Q. Yes, so that when one looks at that period from sort of the 9th of November until the issuing of the licence, you have all these different groups pursuing their different agendas but trying to arrive at the same result?

A. Yes, it was a balancing act.

Q. Yes. Now, in relation to the licence and the issuing of it, the concern in relation to it is, in fact, further demonstrated by looking at Document 181, page 3 of that document.

And you will see there, that "Pressure to award the final licence to Esat is now very strong from a number of quarters, including political pressure from the Taoiseach, the Tanaiste and the Minister."

A. Could you excuse me until I actually find the particular spot, that is page 3?

Q. The top of the page?

A. I see the top of the page 3, "Comments". Can I remind

myself again of the provenance of this document?

Q. Yes, absolutely.

A. Yes.

Q. This is

A. This is an internal document in the Department actually, almost certainly probably drafted presumably by Eanna O'Conghaile. I am just this would appear to be no I am sorry to take up time, just to understand.

Q. No, it is perfectly correct.

A. "Pressure to award" "political pressure from the Taoiseach, Tanaiste and the Minister." I have to say is, I am not so aware that that, that there were pressures of that kind, maybe they escaped me, but I must say I can't recall the Taoiseach or the Tanaiste having any involvement whatsoever at this stage, or at any stage during the licence negotiations. So that's why I am a little puzzled by that first indent.

Q. Yes. Well, I am interested in your view certainly. Then it seems to suggest that you were hoping that it could be expedited?

A. Oh, yes. I mean, once again we must think, keep remembering the context. The Department wanted to get the competition up and running as quickly as possible. So in other words is, to the extent that it came up for mention, say, at a weekly management meeting, we would want the Assistant Secretary, Sean Fitzgerald

and I, would have wanted things to move as quickly as possible, but without at any stage abandoning the most prudent options from a day-to-day basis.

Q. Yes. What appears to be clear though, that from the documents, is that the issue which seems to have been concerning everybody, was the issue of ownership which was one which could only be drafted by the Attorney General's Office?

A. I want to make absolutely sure I understand the

Q. If we go

A. the content of that question.

Q. If you go to Document 168, Mr. Loughrey.

A. Yes, I have that now.

Q. And that is a fax of Sean's note of his conversation with Denis McFadden. Denis McFadden was in the Attorney General's Office?

A. Correct, yes.

Q. And this document, I think, identifies the problem that the Attorney General was, Attorney General's Department was trying to deal with?

A. Correct, yes.

Q. Isn't that right?

A. Correct, yes.

Q. Just for, so as we know what we are talking about; it is, "Following the Minister's instructions, the issue of the draft licence to Digifone is to be expedited. I rang the Parliamentary Draftsman's Office, Mr. Bacon,

and our draft has been with them since shortly before Christmas."

MR. COUGHLAN: It is 167.

A. Yes, sorry for

MR. MCGONIGAL: Sorry, it is my mistake, Mr. Loughrey.

A. No, not at all actually. It is just jumping from April to a later date in April that had me confused for just a moment.

Q. "Following the Minister's instruction, the issue of a draft licence to Esat Digifone was to be expedited. I rang the Parliamentary Draftsman's Office. Mr. Bacon.

Our draft has been with them since shortly before Christmas, and a considerable amount of work has been done at this end in typing it up in the meantime.

Mr. Bacon undertook to let us have his amended draft immediately. I explained the circumstances to him, and told him that we were hoping for a meeting to work through those areas that he might have changed, and to keep up the outstanding substantive issue. He agreed, but said that he would be out next week commencing the 19th of February. I told him we were anxious to issue a draft to Esat Digifone. I proposed if I made and inserted his legal amendments I would issue the draft to them under cover of the usual legal caveats.

Mr. Bacon was conscious about this emphasising the importance of the document, and saying that Mr. Gorman and Mr. McFadden in the Attorney General's Office

would wish to discuss some of the substantive issues and that they anticipated putting it to counsel before submitting it to the Attorney General himself."

One immediately gets a flavour of the concerns that were in the Attorney General's Office at that time in relation to the licence which had to be issued, and to ensure that the drafting of it was got right for the circumstances?

A. I would agree with that totally, yes.

Q. The next paragraph simply is: "I called Denis McFadden. He was particularly cautious about my suggestion. He stated that the latest draft was still preliminary in his view. A fair bit of work was still needed and the matter was of such importance that they in the Attorney General's would wish to have counsel's opinion. He emphasised to me the complexities of the subject matter, the monetary value of the licence and the possibilities for dispute arising out of it. In short, he said any shortcut taken..." That all speaks for itself.

A. Right.

Q. "I pressed him on the need to have Esat Digifone informed. I explained that they had a critical path to service roll-out, and that borrowing requirements would necessitate some evidence of a successful outcome. Mr. McFadden understands all of this, and finally agreed that Mr. Bacon's draft might be issued

to Esat Digifone, subject to the kind of legal reservation and exception expressed in the covering note of the original draft given to Esat Digifone. He went on to say that he felt that we were sufficiently advanced to produce a final draft within a couple of weeks. He felt it was worth putting this to Esat. It was preferably felt giving something that was not in final draft form."

And that, in fact, I think is what happened, that another, which I think would have been the third, certainly the second draft licence incomplete and not to be accepted, etc. etc., was given to Esat Digifone at this time, although still quite an amount of work had still to be done?

A. That's my general recollection, Mr. McGonigal. I would stress that I wasn't involved on a day-to-day basis at this stage and indeed this is the first time that I have ever seen that particular note. Clearly I don't disagree with anything that is said, but on the other hand, I am not sure the value of my opinion is only a general one. I was aware that this was this ebb and flow at this time between the Department and the Attorney General's Office but I wasn't involved in the detail.

Q. Yes. The significance really in one sense, Mr. Loughrey, is simply to demonstrate that the drafting of the licence and the issuing of a licence upon which

negotiations could be concluded, was not so much with the Department at this period of time but was with the Attorney General's Office?

A. Between the Parliamentary Draftsman and the Attorney General's Office, absolutely.

Q. And that they were trying to satisfy themselves in relation to issues which they had identified and because they considered that the sum of money involved in relation to this licence was so significant that care should be taken over it?

A. Quite correct.

Q. And that any licence before it was signed would have to come out of that office duly approved by the Attorney General himself, if one is to judge from some of that documentation?

A. I don't have sufficient information right now to confirm that, but certainly with the approval of the Attorney General's Office, I can confirm that, yes.

Q. Yes. Now, moving on from that, Mr. Loughrey, the next documents I think I will just bring you to are 192, which are meetings with the, meetings in the Attorney General's Office.

This is a meeting attended by Regina Finn and Fintan Towey, who were meeting Mr. McFadden, Mr. Gormley and Mr. Bacon. It was a meeting on the 22nd of April, '96. And its purpose in as set out in Indent 1 is:

"The disclosure of information to unsuccessful

applicants for the GSM licence and the transposition of Directive 96/2 and its impact on the award of the GSM licence to Esat Digifone."

Could you just explain that to me, the impact the significance of Directive 96/2, or do you understand it?

A. Yes. Once again drawing this is a long recollection at this stage. 96/2 was the directive which replaced an earlier directive in this area which was dated from 1990, that is my recollection of it. In fact, the 96/2 Directive, and once again relying on memory from seven years ago, was the one which reflected counsel's adoption in 1994, among other things, and we just focus on the GSM here, of the main thrust of the EU Commission's Green Paper on mobile phones, to the extent that that required a directive underpinning. So it came it clearly given how the machinery of Brussels doesn't work that quickly, it took from then until 1996, actually, to put this into directive form and this was to provide the framework, from a Brussels's point of view, of the issue of licences in this area from now on. In other words, is, licences that predated the transposition and implementation of this directive in Ireland, I suppose would come under its trawl retrospectively, but clearly there are legal issues there that I am not competent to deal with. But certainly licences that

would issue from then onwards following the transposition, clearly had to adhere both to the letter and the spirit of the new directive.

Q. Absolutely. So that in actual fact what we have here is an identification of a problem, another problem which was surfacing which would have to be dealt with by the Attorney General's Office in its consideration?

A. Oh, yes, there was a huge amount of legal work to be shoehorned into a very short time. Correct, yes.

Q. Yes. Now, so far as those issues are developed in paragraphs 2, 3 and 4, and going over the page, what I want to draw your attention to and seek some help in relation to, is paragraph 5, No. 5 where it says:

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

Now, as I understand that, Mr. Loughrey, what the Department appear to be doing with the Attorney General's Office there is, they were giving them Esat Digifone's application in relation to ownership,

together with an internal Department document. Would you be able to identify what document that was?

A. Not offhand, but I do recall, because we touched on this during Mr. Coughlan's examination, that clearly Mr. O'Connell's letter dated the 17th and presumed, I think received in the Department on the 17th, clearly raised issues that had to be addressed, and I understood that the first telephone conversation had been almost straightaway the next full working day, which I think was the 22nd. And this meeting, and paragraph 5, actually, even though it is not noted as such, was presumably a follow-up from the first contact by telephone or whatever way the contact was made.

Q. This meeting was on the 22nd?

A. I see, yes.

Q. It is dated the 24th. In fact it was on the 22nd?

A. I am sorry to confuse you at this stage.

Q. No, no.

A. I think I was making the point to Mr. Coughlan during his examination is, that the Department recognised the changed circumstances following Mr. O'Connell's letter, and I believe we moved as swiftly as possible to start addressing the issues that had so arisen.

Q. But am I right to understand that what the Department is there seeking from the Attorney General is advice in relation to what was perceived as being changed

circumstances of the ownership and consortia?

A. I believe that is quite clear from that paragraph and it is clear in substance as well, I believe.

Q. Yes. So that even though you yourself had a view in relation to it, you were seeking confirmation/clarification, or to have the way pointed for you as to what the correct answer was?

A. Well, the Department was doing so, yes.

Q. The Department, I beg your pardon.

Now, the next letter, then is the 24th of April and is one to Mr. McFadden and Mr. Gormley. And it is two days later from the meeting of the 22nd. It is the middle paragraph I would draw your attention to, simply where it says: "I would also like to reiterate our requirement for legal opinion on the restructuring of the ownership of Esat Digifone. (Relevant papers were provided at our meeting on the 22nd of April.)

In particular, the question of whether recent correspondence suggests any change in the identity of the beneficial owners of the company which could be considered incompatible with the ownership proposals outlined in the company's application must be addressed. Before the ultimate award of the licence, it is now considered that it would be preferable to seek warranties in relation to both the beneficial ownership of Esat Digifone and the financing package for the project. This is considered prudent given the

nature of the concession being given to the company.

Perhaps you would advise, however, whether such a requirement could be challenged by Esat Digifone as an imposition not envisaged in the competition process or otherwise unreasonable on legal grounds."

And that says what your position was in relation to what you were trying to do and what you were trying to achieve?

A. I think that is quite clear, yes.

Q. And what is absolutely clear, Mr. Loughrey, is that this was the Department seeking advice and information in relation to an issue which they considered relevant, and upon which they felt they should get advice?

A. That's correct, yes.

Q. And am I right in understanding that so far as this aspect of matters is concerned, that Minister Lowry was not involved?

A. Minister Lowry wasn't involved

Q. At all

A. in any way other than I am sure I advised him of the issue that had arisen.

Q. Absolutely.

A. But he showed, he wasn't, hadn't any involvement in this, what I call interaction between ourselves and the Attorney General's Office, none whatsoever.

Q. He allowed you to get on with it, in effect?

A. That gets it well, yes.

Q. Absolutely. The next document which I suppose is 198?

A. Yes, I have that now.

Q. And you will see there it deals with Article 8 ownership in the second paragraph. And it simply says, "That as discussed, Denis McFadden advised us the revised draft should not go out to Esat Digifone until the ownership issue is resolved. He will consider this further and may request a meeting to clarify the Department's request on this issue. I have informed that Peter O'Donoghue has asked for the article in the sense of the revised draft, but that until some questions about ownership are resolved, I am not in a position to let him have the revised article."

That again speaks for itself in relation to the position that had been arrived at?

A. I believe so, yes.

Q. Now, following on that is the end of that book, and I just turn to Book 4 for a second.

MR. COUGHLAN: Book 44.

MR. MCGONIGAL: Book, whatever it is. Book 44.

Q. Just one or two thing there. Document 203 is a letter which Mr. Coughlan has already opened in depth with you and that is a letter sent by Mr. Brennan which may have been drafted by Ms. Regina Finn. And which, as I

understand it, is one which if you had seen, you might have drafted it differently, if I can put it that way?

A. Well, it is not a criticism specifically of any of the officials who were working under great pressure at the time.

Q. I appreciate that. I am not suggesting

A. Yes, I did say to Mr. Coughlan during his examination that it appears to be silent on the key issue of the percentage shareholdings.

Q. And I think what then the document that the next one that I just want to draw your attention is at 207, which appears to be a memorandum prepared in relation to a meeting which was to be held with Commissioner van Miert in relation to a number of matters, including the Persona complaint, and in particular, the points for the van Miert meeting that I would draw your attention to is the last two.

"Failure to sign could create a legal exposure on the Minister in favour of Esat Digifone according to our lawyers." That is a point you had made earlier this afternoon in relation to the possibility that a protracted delay was beginning to take place?

A. Yes, there would need to be very persuasive reasons why the Minister would withhold granting the licence and in the end there were no such persuasive reasons.

Q. And then the next one: "The licence is ready for signature this week. We would like to sign but not at

the expense of a rift with the Commission."

And I think what that is talking about is that the licence was close to signature, but by reason of the Persona complaint, you were anxious to have that sorted, if possible, before the licence was signed and that's why you wanted to discuss it with the Commission?

A. Yes, it was, but it probably also takes cognisance of something that I might have mentioned a little earlier during, or during Mr. Coughlan's examination, that I had, I personally, and I was at that meeting, had the healthiest respect for Mr. van Miert's clout. He was a very modest man personally, but his clout was extremely far reaching. We had other issues in the Department that came within the trawl of DG IV and I certainly wouldn't have wanted to go offside with Mr. van Miert.

Q. No, I fully understand that. And I appreciate that there were many other issues that one would have been concerned with, but equally one was also concerned that you wouldn't be issuing a licence and then find yourself with an injunction or other kind of

A. Of course it goes without saying that would be the principal reason, Mr. McGonigal, yes.

Q. The other matter I just want to draw your attention to, because it seems to me to be relevant as a line of inquiry, is the advices which were given to the

Department, the office of the Attorney General by Richard Nesbitt, who is counsel for the Department I know, but he was advising the Department at this time.

A. Correct.

Q. I don't know if you have a copy of it, it is dated the 9th of May, 1996?

A. I've had sight of that very recently, but I don't have a copy in front of me right now, but if a copy could be provided.

Q. Certainly.

A. There is one thing, Mr. Chairman, I just in case there is just in case there is in a very, very outside chance, there is I'm quite happy to assist the Tribunal in any way, but in fact as Mr. Nesbitt is a very valued member of the State's team and by extension right now, a member of my team, there is nothing untoward in expressing an opinion?

CHAIRMAN: It is my understanding that Mr. McGonigal may have mentioned this to the other counsel in the case, and would I be correct in summarising that although it may not be an aspect over which you enthuse, that you accept that Mr. McGonigal is entitled to broach the matter?

MR. O'DONNELL: Mr. McGonigal raised this with me before. I don't think Mr. Loughrey will be able to add very much, but certainly I am not objecting to the opinion .

CHAIRMAN: I don't think you should feel inhibited,
Mr. Loughrey.

MR. MCGONIGAL: Sorry, in fairness to Mr. Loughrey, My
Lord, Mr. Chairman, I am not in the least bit trying
to infiltrate in relation to Mr. Nesbitt's opinion or
question it in any way. The document speaks for
itself. But what I am suggesting is, that there are
aspects of the document which open lines of inquiry
for the Tribunal, more so than Mr. Loughrey, but they
give a flavour, in so far as Mr. Nesbitt was briefed,
as to the concerns which were happening in the
Department at that time, and insofar as that is
relevant as a line of inquiry, it seems to me that it
should be brought to the Tribunal's attention in
public session. It is for no reason other than that.

CHAIRMAN: Yes, I accept that Mr. McGonigal.

MR. MCGONIGAL: I am not trying to have Mr. Nesbitt
change his seat for another seat or to leave us
prematurely either.

MR. COUGHLAN: I should perhaps just bring it to
people's attention, I have mentioned it on a number of
occasions, I think My Friend, Mr. Healy the
Attorney General has communicated directly with the
Tribunal. It is a letter from the Attorney General
himself. It's a document which I would suggest that
the best way to handle it, Sir, would be in the first
instance that counsel involved for the various

interested parties before the Tribunal might have sight of the particular information which the Attorney General and the view the Attorney General has given to the Tribunal.

CHAIRMAN: Yes, and if it arises, it is probably more appropriate when Mr. Towey comes to give evidence.

Very good.

Q. MR. McGONIGAL: Mr. Loughrey, the only bits that I want to draw your attention to is the second paragraph of the letter itself, where he explains aspects of what his advices are concerned with, and he says:

"I am sending my views on the complaint made to the Commission under separate cover. However, I remain of the view that the Minister should not drag his feet in issuing the licence. If there was to be litigation, so be it, but delaying does not achieve any end.

Before issuing the licence you should make it clear to Persona's solicitors that he is not holding his hand on the issue of the licence. Formal draft letter has already been discussed with you. My reasoning in this regard is that the Minister is committed to grant the licence. He is now in between two competing interests. One, Esat, they say they are entitled to the licence and the other, Persona, are indicating that the licence should not issue. Delay in issuing the licence would clearly damage Esat.

If Persona wish to stop Esat getting the licence they

should be required to take appropriate legal action to restrain the issue. They will then be required to give undertakings to the parties affected, particularly Esat. This will concentrate their minds, particularly in circumstances where the Commission are likely to be making unsympathetic noises in relation to their complaint."

Now, that encapsulates, Mr. Mr. Loughrey, I would suggest, the concern in the Department in relation to the issues that had arisen arising out of the Persona complaint?

A. Yes, Mr. McGonigal, I believe you are correct, but just to state is, I believe I got the thrust of that advice at the time, I don't believe that I actually saw Mr. Nesbitt's letter or the accompanying advice at the time, but I believe I was briefed on the thrust of the advice at the time .

Q. The other bit I want to draw your attention to is the advice itself. It is advice as opposed to an opinion, I acknowledge that, and page 2, in particular the second paragraph there. "If one analyses why the Minister is concerned about the ownership of shares in the licensee, the only legitimate concern he can have is that if there is a change of ownership, a service that has to be provided will in some way be compromised. I do not think it is tenable to suggest that the licensee has been awarded the licence because

of the parties who own the licensee, rather the licensee has been awarded the licence because its plans and proposals were the most meritorious and provided a funding plan which looked feasible. There is no reason why any of these matters have to be compromised by a change in ownership. However, I do accept that there is a possibility that this might occur. It is also a real issue in the mind of the public."

In actual fact, I think that mirrors a lot of the views that you had yourself in relation to the licence and the consortia?

A. Not quite, Mr. McGonigal. No, I I am afraid I couldn't go along entirely with that paragraph, because in theory it's possible to decouple the licence in the form of the entity, and of the so the business plan that the entity had put forward. In practice it is not possible, I think, certainly not in my mind, to decouple ownership entirely. Can I put it in a very practical way is, while I was I think I made quite clear I was quite relaxed about the ownership of the financial investors, I didn't think that that amounted to any made any serious impact on the strategic or operational effect of rolling out competition in this area. I would have been extraordinarily loath, and I wouldn't have found it acceptable that, if I may put it this way, that the

pioneering umph of Esat and the leading edge and demonstrated capacity of Telenor would be assigned elsewhere. It may well be that Esat Digifone as an entity would adhere to the business plan, but if, for instance, without being in any way derogatory, if in fact is, Esat's 40 percent shareholding had been assigned, for instance, to some traditional utility like France Telecom or British Telecom, whose standing would not be in question, I doubt if they would bring the same drive or hunger as background promoters as Esat would have. So, while I can agree, broadly speaking, with this paragraph, and notably where it applies to financial or third party investors, I couldn't I think if I am reading Mr. Nesbitt correctly, agree with the totality of the paragraph.

Q. The next paragraph simply deals with the exchanging of Article 8 which was in fact causing quite a lot of difficulties?

A. Could you repeat that again Mr. McGonigal, pardon?

Q. The next paragraph deals with a change in Article 8 which related to ownership I think?

A. Correct, yes.

Q. An that was causing significant difficulties in relation to getting it right for different reasons?

A. Yes, it was.

Q. Now, following that as far as I can make out, Mr. Coughlan directed our attention to Mr. O'Connell's

note of the 7th of October, which is Book 38, Tab 1B

and I just want to draw one

A. I have the book now, Mr. McGonigal.

Q. Thanks. It is Book 38, Tab 1B, I am told?

A. Yes, I am at 1B now.

Q. And it is paragraph 16 that I just want to draw

attention to?

A. Okay. And is this a handwritten note? I am at the right page, am I? .

Q. No, I think it is the typewritten. I have a funny feeling when Mr. Coughlan came to this you didn't have one then and we had to hand one into you.

(Document handed to witness.)

It is the memorandum of Mr. O'Connell of the 7th of October, 2000?

A. I didn't have that at the time. Yes. I have it now, yes.

Q. It is just paragraph 16. We are talking about a period of the 13th May of 1996. Mr. Nesbitt's advices were on the 9th. And just in relation to bringing it together, he has a recollection that, "At or about this time I engaged in extensive negotiations with the Department, and especially with Richard Nesbitt, SC, who had been retained by the Department to advise on the terms of the licence as to the outstanding amendments being sought by me, notably in relation to Article 8 and Article 18, and my recollection of our

principal concerns is that they were" and he then sets those out.

I think it was following, not necessarily immediately but it was following on that meeting that a final draft was effectively arrived at in relation to this particular article in circumstances which then allowed the licence to be actually signed?

A. I think that's correct, yes.

Q. And that was having regard to all of the concerns which had been put into the melting pot in the Department, the Persona, the possibility of proceedings and injunctions, the Directive 96/2, and everything else?

A. And on Article 8 itself.

Q. Yes.

A. Both the Department's concern to maintain the continuity of the main promoters and indeed in fairness to the promoters, that they wouldn't be artificially constrained in a matter of, say, private placements for financial reasons, actually, that they wouldn't be unnecessarily restrained. So there was quite an agenda to get through.

Q. But I suppose in one sense what one sees here, Mr. Loughrey, is an argument which you were articulating the other day in relation to your own position, that regardless of the political perception as to when or whether the licence should issue, what actually

happens is, that the officials, civil servants and the Attorney General's Office who have been given important functions in relation to this, do not allow the political to interfere with them completing their job to its fullest extent?

A. Oh, there is no question of political interference.

Q. Yes. And that the result of those discussions through November, 1995 to May of 1996 in the Attorney General's Office and in your own Department, the result of all of that was the licence which was ultimately signed?

A. Correct.

Q. By the parties?

A. Correct.

Q. Now, there are just two other matters that I want to have a quick word with you, Mr. Loughrey. One is, as Mr. Chairman during the, when we when we were looking at the December '96 material, Mr. Chairman, we came across another newspaper article of February, '96, the 28th of February, 1996.

CHAIRMAN: Yes.

MR. McGONIGAL: I only got sight of this this morning, Mr. Chairman. I brought it to Mr. Coughlan's attention when I came up this afternoon. It is a matter, a newspaper of itself is not evidence of anything, but it may open a line of inquiry which the Tribunal should, may be concerned with. And because

of its contents, I feel it was only proper that it should be drawn to the Tribunal's attention and I gave a copy to Mr. O'Donnell to allow Mr. Loughrey have a very quick look at it, and I have to accept that this article appears to be based on documents which I don't have and haven't seen, but I will, if the Tribunal requires it, see if I can find them, if they haven't already got them.

CHAIRMAN: Yes.

MR. McGONIGAL: But it is on that basis that I introduce this material.

CHAIRMAN: Well, de bene esse, on the usual basis, Mr. McGonigal.

MR. McGONIGAL: May it please you, Chairman.

Q. Mr. Loughrey, this is simply a newspaper report from John McManus headed, "Esat seeks 30 million in debt to fund the mobile phone network launch." And what it says is: "Communicorp, the parent of Esat Telecom, is seeking to raise 30 million in debt to fund its shares of 100 million, the cost of launching the second mobile phone network. The company is hoping to raise the bulk of the money in the United States. Its Chief Executive, Mr. Denis O'Brien, is understood to have been making a presentation to US investors over the last two weeks. Communicorp is a 37.5% shareholder and the winner of the second licence, Esat Digifone through its holding in Esat Telecom. The Norwegian

State company, Telenor, owns another 37.5%, while Mr. Dermot Desmond's company, International Investment and Underwriting, holds the remaining 25%.

"Under the terms of the planned fundraising, Communicorp will be reorganised, and a new company, Esat Holdings, will be created as the holding company for Esat Telecom and for the Group's stake in Esat Digifone.

"Communicorp's other interests, including the Dublin radio station, 98FM, and radio stations in Prague and Stockholm will be held separately. Esat Holdings will be 88% owned by Communicorp and 12% by outside investors on Esat's board, including the former Secretary of the Department of the Taoiseach, Mr. Pdraig O'hUiginn, the former senior partner of KPMG/Stokes Kennedy Crowley, Mr. John Callaghan, and the management consultant Mr. Leslie Buckley.

"Communicorp is 65% owned by Mr. O'Brien and 35% by the US venture capital company, Advent. The 30 million in debt will be raised through Esat Holdings, and will be mainly used to fund its share of the cost of starting up the new network. However, some of the money may be used to fund Esat Telecom's planned expansion. It is understood that Esat holding wants to raise the 30 million through loan notes. The notes will be split into 15 million of loan notes with convertible stock warrants and 15 million convertible

into second preference shares. The US bank CS First Boston is advising the company.

"A spokeswoman for Esat Digifone said last night the project would be financed through a mixture of equity put up by consortium members and debt raised by Esat Digifone itself. 'The equity finance was committed and underwritten,' she said. 'AIB and ABN-AMRO Banks were organising the debt portion and had already committed 25 million in bridging finance at this stage,' she said.

"Esat Digifone won the competition to operate the second mobile phone system in October last year. However, the company has not yet been officially awarded the licence. The Department of Transport, Energy and Communications said yesterday that the negotiations were at an advanced stage. Esat Digifone plans to spend 100 million over the next five years developing its plans. The investment will include an upfront payment of a 15 million licence fee to the Government"

Now, I know you have only seen this this afternoon, Mr. Loughrey, and first of all, I suppose I should ask you: have you seen it before this afternoon?

A. No, I believe I have never seen it before, but I am surprised, I am surprised in the sense of when during Mr. Coughlan's examination I maintained that the Department had pretty good antennae. I myself said I

scanned the three Irish dailies, among others, every morning. Now, I haven't had a chance to look at my diary, I may have been abroad at the time, but I believe had I seen that at the time, I wouldn't have taken it like any other article. I mean to say, John McManus is a very serious journalist. Any article carrying his by-line I would have taken very seriously, and even if there had been no by-line, it is not just the 37.5 the 37.5, but clearly the breakdown of the 30 million placement into stock warrants and convertible second preference, this just wouldn't happen by chance, that is a seriously informed article. I don't believe I have ever seen it before, and I believed had I seen it, I would have at least I would have regarded as some sort of earlier warning system as some sort of early warning light to be investigated. I am surprised and somewhat disappointed actually this is the first time I am seeing it.

Q. Yes. I can well understand that, Mr. Loughrey. It is clear, though, it does appear to be a very well informed article. It is in the Irish Times, it was the 28th of February of 1996, which was in advance of the letter of the 17th April of '96?

A. Quite clearly, quite clearly, yes.

Q. And clearly at that stage, whatever the reasons, the implication clearly must, would be, not necessarily

the only implication, is that Esat were comfortable with publicity in relation to a change which either had taken place or was in the process of taking place?

A. I think you could draw that inference, yes.

Q. Yes. And in fairness to the Department, it may well be that when they were contacted they were not told the detail of the article but merely asked what was the position in relation to the issuing of the licence?

A. I think that is possible. Because I think anybody involved with the process had the, had they been so contacted, either by way of background or to give an opinion, I think they would have immediately seen the potential significance of the information.

Q. The only other matter now that I just want to draw your attention to, again it is newspaper cuttings about the 24th, 25th of October, 1995, Mr. Loughrey, and unfortunately these are the only copies we have, but it is more the headlines than the actual contents of the articles. I am really drawing them to your attention, Mr. Loughrey, because they seem to me to demonstrate unusually that a point which the Department had been making consistently, which was that the process in relation to information was very tight. And there the Cork Examiner, on the 24th of October of I am afraid, Mr. Chairman, we only have a couple of copies of them, and we will make them

available to

CHAIRMAN: Well, we will do the best we can,
Mr. McGonigal.

A. Yes, I can't read this time afraid. Would it be possible, Mr. McGonigal, to have a spare copy because I am unable to read it on the screen. In fact it is clearer on the large screen, yes, it is much better now, thank you.

Q. MR. MCGONIGAL: The first one, Mr. Loughrey, is the Cork Examiner of the 24th of October, '95.

"Two mobile phone bid groups short-listed. Two of the consortium's contention for the second mobile franchise, is Brian O'Mahony, have been short-listed by the Department of Transport, Energy and Communications. According to our sources, one of the groups is Persona, the Motorola lead group, which includes the ESB and Unisource, the trans-European mobile operator. The second group in the running for the lucrative franchise is understood to be Irish Mobicall, involving Deutsch Telecom, Southwestern Bell, and well-known Irish businessman Martin Naughton."

Now, Mr. Coughlan in fact drew our attention to this one in particular, because there were other aspects of it that he wanted to draw our attention to, and in particular on the second line a reference to "A spokesman for Michael Lowry confirmed that the final

decision would be made by the end of the November. He wouldn't comment on the short-list."

Now, I am simply drawing attention to this for the purpose of showing that at this stage the 24th of October, insofar as the media had any information, it was completely wrong and not near as to the result of the competition?

A. It proved to be completely wrong.

Q. Absolutely, yes. And the next one then is: "The decision soon on GSM as consortia await fate" and that is a similar?

A. Mr. McGonigal, I beg your pardon, to cut across, but could I just add to my last comment then, just in case, because what I had meant to say is, it proved in the event to be completely wrong, but it was the only public statement available and therefore it is quite clear to me from that, that the spokesperson, in other words almost certainly one of our two press officers, would have thought that to be the case at the time because the result was not confirmed, to myself indeed, or to the Minister until the following day.

Q. Absolutely. The point I am trying to make, Mr. Loughrey, is, it is not relating in a sense, what it is relating to the fact that nobody knew the result of this competition until the result was announced?

A. I quite agree with that, yes.

Q. And the reason for that was because the way in which the team which you had picked kept their silence in relation to the result which had been arrived at?

A. I think that's right again, yes.

Q. This in circumstances where we know that, put it at its mildest, a tentative result was, people were aware of a tentative result within the team from, certainly not later than the 3rd of October or 4th of October?

A. Not only that, taking it with what is in the second column of Mr. O'Mahony's article there, it is quite clear that something we spoke about that occurred, that came up during Mr. Coughlan's examination, this concept of a need-to-know basis.

Now, bear in mind that the press office would be represented at the management meeting every week when virtually everything would be aired in confidence in private, sort of chatham house rules applying, that kind of confidentiality, but I am quite certain from this, that even at that, that the that was information given to The Examiner in good faith, that they expected the result by the 30th of November. And if I am correct in assuming that, actually, it just adds to the notion of we were adhering to the need-to-know basis right to the very end.

Q. Yes. Now, I understand that. I appreciate that. The other ones that I just want to draw attention to for the purpose of demonstrating the similar point, I

won't open them in depth, but just refer the Tribunal to them, is one of the 25th of October, 1995, by Shane Coleman. "Decision soon on GSM as consortia await fate. Again, the Department in the third paragraph declined to comment on a report in the Cork Examiner which said that the Motorola lead Persona group and Irish Mobical had been short-list for the lucrative GSM licence to the exclusion of most of the other contenders."

And the next one is one by John McManus, again in the Irish Times, 25th of October, the headline is, "The decision on phone licence may ultimately rest on politics. The awarding of the second mobile phone licence looks set to enter the political arena following reports that a shortlist has been drawn up."

Then he details that and again talks about Persona and Mobical.

And they clearly demonstrate not only and it has to be said, Mr. Loughrey, that apart altogether from the Department, the other person who has been attributed with knowledge in relation to this decision is the Minister?

A. Correct.

Q. And one has to include him within that wall of silence that is demonstrated by these headlines in the press and the media?

A. Yes, I believe so.

Q. And then the one of the 26th of October, which is announcing the result of an article by Shane Coleman, I think it is, where he says "A stunned silence as aggressive outside bidder is surprise package." And that, of course, is Telenor and Communicorp known as Esat Digifone?

A. And I don't believe he was expressing it in any sense by way of hyperbole. In fact, I was there and others, and it genuinely was a stunned silence. It came as a bolt out of the blue as far as the press gathering were concerned at the time. I have a very clear recollection of that.

Q. And we all know, Mr. Loughrey, how in this country we pride ourselves in being able to find out information before the information is supposed to be available, and yet here in relation to one of the biggest contracts of the State, no information, no correct information was available to anyone?

A. I believe that to be correct, yes.

MR. MCGONIGAL: Thanks, Mr. Loughrey.

CHAIRMAN: Thanks, Mr. McGonigal. Well, Mr. Fanning, may I take it from your attendance that, although I think your solicitor may have intimated yesterday that you mightn't be proposing to cross-examine, that you may have decided to ask some questions, which you are entitled to.

MR. FANNING: With your leave, Chairman. Just to

explain, that I would seek to just put a couple of propositions very briefly to Mr. Loughrey. I certainly won't even be five minutes. To the extent that a contrary indication was given, it is to a certain extent been overtaken by events, because one of the points I was going to put was only put by Mr. Fitzsimons at half past four. In a sense the earlier indication has been slightly superseded by a subsequent examination.

THE WITNESS WAS THEN EXAMINED BY MR. FANNING AS FOLLOWS:

Q. MR. FANNING: Briefly, Mr. Loughrey, I just want to say to you that I represent Mr. Lowry. And I just want to put in very broad terms Mr. Lowry's position to you and see if you accept it.

Mr. Lowry's position, in general terms, in respect of the GSM licence, is that he relied on the advice of the Project Group and on his civil servants, including you, to announce the result and to award the licence.

In general terms I take it that you accept that position to be correct?

A. I accept that position to be correct, yes I do.

Q. And Mr. Lowry's position is that he didn't interfere in any way with the result or the outcome of the process. And I think further, that he couldn't have interfered with the outcome or the result of the process. Do you accept that to be the case?

A. I can confirm both of those propositions are correct, yes.

Q. Thank you indeed. Now, Mr. Fitzsimons, in particular, raised an issue yesterday evening, a parallel issue to the GSM licence matter, I think in connection with Mr. O'Brien's fixed line business, and he raised issues that were contentious at the time I think in connection with matters such as auto dialers and routers. I wonder could you confirm for me whether you believe Mr. Lowry's position on that to be correct, which is at all times he acted in accordance with Departmental policy, and that he didn't at any stage commit any improper acts in favour of Mr. O'Brien in respect of his fixed line business?

A. Broadly speaking, Mr. Fanning, I can agree with that, but I would say but I would put the qualification, not qualifying the position on behalf of your client, but by saying is, any comparison with the GSM process actually would be, and you haven't put it to me in those terms there are no parallels.

Q. Indeed.

A. One was a sealed procurement process, the other was where the Minister at the time was acting as the political, effectively, regulator for the telecommunications industry. And it might be no harm to take out just one second in saying what a difficulty that was, both for the Department and for

the Minister. Speaking, I say this in an organisational sense, purely, it lead almost to a form of administrative schizophrenia, in the sense that the Department was the policy formulator, as the Minister was clearly, the shareholder in the incumbent operator, and the regulator at the same time. So, in other words is, there were complex issues here with this particular so-called router, auto dialler issues, where the Minister had a legitimate involvement, but on occasions he did exercise that involvement, quite clearly.

Q. Well, I certainly accept all of that, and I suppose we are all aware that the schizophrenia that you speak of was subsequently cured by the appointment and establishment of an office of an independent regulator, but just for the present, Mr. Loughrey, am I correct in saying that you are not offering any evidence to the Tribunal that Mr. Lowry behaved improperly in this connection?

A. No, I am not, but I am saying is, he had a vigorous sense of the value of enhanced competition in the value added services market, and didn't hesitate to show that, but there is nothing improper in that.

Q. Again that was broadly in line with the policy of his Departmental officials and the Department at the time?

A. Well, we had adopted that policy before he became Minister.

Q. Quite so. Finally, Mr. Loughrey, if I could just ask you, that certainly accepting that you weren't involved in the GSM process on a day-to-day basis, but from the knowledge you have of it, and from the knowledge that you now have of it, and from the involvement you did have in it at the time, am I correct in saying that you are standing over the integrity of this process cumulatively in the effect of your evidence to the Tribunal?

A. Yes, I am totally standing over this process, yes.

MR. FANNING: Thank you indeed. Thank you, Chairman.

CHAIRMAN: Thanks, Mr. Fanning. Well, I think, Mr. O'Donnell, you would be next, and if we are to have a break for the stenographers, I think 15 minutes now, and we will then seek to at least conclude Mr. Loughrey's evidence. And I take it your anticipated timespan pretty comfortably permits of that?

MR. O'DONNELL: Absolutely. 15 minutes I would have thought.

CHAIRMAN: A quarter past.

THE TRIBUNAL THEN ADJOURNED FOR A SHORT BREAK AND RESUMED AT 3:15 P.M. AS FOLLOWS:

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. O'DONNELL:

Q. MR. O'DONNELL: Mr. Loughrey, can I just deal with firstly, your role and your responsibilities within the Department as Secretary? I know that the title

now is Secretary General as a result of the Public Service Management Act of 1997, but I think that's a statutory statement of what your responsibilities were, in any event, certainly at the time of this process, isn't that correct?

A. Yes, the 1997 legislation sets out very clearly the role of the Secretary General. I don't think the Tribunal want to be delayed in any way to sort of have a full rehearsal of what the role was. It's quite complex, in the sense that a broad parallel would be Chief Executive of a fairly large organisation where the Board and the policy decisions at Board level roughly equate to the Ministerial. But certainly the Secretary General would be responsible for assisting a Minister/Board in policy formulation, but you have clear responsibility for delivery of outputs as decided by the political system.

I think perhaps to assist you, or to assist the Tribunal, I would just, rather than going into a sort of a full list of sort of leadership vision and all managerial competencies, just to mention two particular roles which I think would be relevant to the Tribunal's consideration. That would be the role of a Secretary General as, say, principal adviser to the Minister, and a much smaller and lesser-known role, and not often acknowledged, but I mentioned earlier during Mr. Coughlan's examination, that's the

sort of role as effective mediator between the Minister and the Department. I think the Secretary General would be responsible for parcelling up political decisions into reasonable management outputs and targets, actually agreeing them with the Minister, and when there was any deviation, for instance in delivery times or execution, I, in my own capacity as Secretary General would be the mediator between the Department and the Minister.

Q. And I think in your role as, if you like, the person responsible for the management of the Department, you are also responsible for the assignment of responsibilities within that Department to other people working within that Department, and to assign the roles and functions required to various people within that Department, isn't that correct?

A. That's absolutely correct. I suppose ultimately, in many cases, I think I might have mentioned earlier, roles sometimes became almost self-selection, and we had an inclusive style of management. But if it ever came to a decision to be taken in a sense unilaterally, the decision would rest with me.

Q. And just in relation to the role, the assignment of roles. Mr. Lowry, we know, was new to Ministerial office of any sort and by definition, therefore, was new to this particular Department. So he would have not known any of the officials who were, if I can put

it this way, selected for the Project Team?

A. You are absolutely correct. Indeed, when he came into office he would have had to be, I think without exception, introduced to every single official he met in the Department, yes.

Q. So in your role at Secretary General, you were responsible and accountable for the selection of the Project Team and for its performance?

A. Ultimately that is the case, yes.

Q. And that relates both in relation to the evaluation process and also in relation to the licence negotiations?

A. Yes, it was, and I suppose the ultimate demonstration of that is, my personal responsibility as Accounting Officer to the PAC, the Public Accounts Committee, because Secretary Generals, besides being responsible to Ministers and the Government of the day, have a clearly identified direct responsibility for resources, the allocations of resources, and therefore everything that moves in the Department, so to speak, to the Public Accounts Committee.

Q. Now, when you say when you talk about the "team", the team, you say, was in effect self-selecting. Can I make it absolutely clear, Minister Lowry made no effort to influence, to select who was to be on this team?

A. Not only that, but technically, indeed legally, under

the 1997, he could have powers to assign people up to the down to the level of officer. Mr. Lowry never, in his two years, made any approach to me or had any influence on any management matter of any kind other than the selection or advice on the selection of the staff for his personal office, which is naturally entirely understandable, but as for line functions in the Department, he never expressed any view over his two-year tenure.

Q. All right. Now, the team itself, and I know that the work of the team, I suppose, is divided firstly in relation firstly into the evaluation process, and thereafter the team becomes involved in licence negotiations. There are two different parts two different roles which the team played, and it seems fair that, to say that different members of the team played more prominent roles in one part than in other parts?

A. Yes, and that would be understandable. Once again without delaying the Tribunal, the team that was put together that comprised the so-called Project Team, the PT GSM, had to maintain a collegiality and a coherence throughout the evaluation process. That was an intrinsic part of the process. Once the decision was taken to give the exclusive negotiating rights to Esat Digifone, while the continuity is there on paper and in reality, it broke down into functional line

responsibilities; for instance, notably for instance, Sean McMahon taking over the legal and licensing side, you know, that would have fallen into his bailiwick naturally. But

Q. Mr. Brennan appeared to play a less prominent role after the evaluation process?

A. Mr. Brennan would still have had a role, because the development of the telecommunications market was part and parcel of it, and if the GSM competition were to slide, it would impact on his policy area, the area for which he had policy, but not clearly is what I am saying is the continuity was there by reason of function rather than by reason of the fact that they were members of the Evaluation Team as such.

Q. Now, the team itself, and while you weren't on the team, given your overall responsibility, it may be fair to describe you, and if you are wary of these sporting analogies I am sure you will tell us, that you were, in effect, the non-playing captain of the team?

A. I think if that's somehow an honorary role I think that would fall probably on Sean Fitzgerald, whose wisdom I would defer to on these things. But clearly between myself and Sean Fitzgerald, there would have been a, I suppose, a mentoring role in the broadest sense, but nothing to do with the specifics of the evaluation itself.

Q. Yes. Now, can we just look at the team. The team appears to have four components. There is firstly the AMI component. Now, you didn't meet Mr. Andersen, and I don't know whether you ever met any of the other AMI team members?

A. It's my belief I have never met any of them, but given how busy the corridor could be at a time, it is possible that I met somebody en passant, but I have no memory whatsoever of meeting any of the AMI team.

Q. But they had won the competition for this role, and they clearly had very considerable expertise in the role for which they were assigned?

A. Oh, yes. They brought with them a track record actually, which I don't think was equalled or since been equalled in Europe for this kind of specialisation, yes.

Q. And you had no reason of any sort, then, to doubt their integrity or their ability to participate in a role like this, entirely appropriate manner?

A. Oh good gosh no, it's quite clear that anybody who would get successive votes of confidence from governments like the Danish Government, like the Netherlands Government, like the Norwegian Government, clearly they had a track record that was impeccable, and you know, would prima facie be beyond reproach.

Q. Now, the other members of the team were known to you, there was firstly the two members seconded from the

private sector, Mr. Riordan and Mr. Buggy, who were working in the civil service but had been seconded from the private sector, they were known to you?

A. Mr. Buggy would have been well-known to me. In fact, I took a hands-on interest in this, and I used to interview the potential candidates from the accountancy firms. So in other words, I would have been I would have known Mr. Buggy even before he joined the Department, as part of a selection process. So in other words, I knew him, I knew the calibre of his work, and I knew it to be first class. I didn't know Mr. Riordan, but I knew he had been recruited on a broadly similar sort of platform, so I was very confident that if the Department of Finance placed that kind of trust in him, he was of an equal calibre.

Q. And then there were the Departmental officials, there were representatives from the Department of Finance and representatives from your own Department, Transport, Energy and Communications.

Now, you had previously served in the Department of Finance, and you had been Secretary General of the Department of Energy, as it previously was, and Transport, Energy and Communications since 1988?

A. Correct.

Q. And you therefore, is it fair to say, knew these officials well?

A. I knew all of them, and I knew some obviously better

than others, and that tended, in general, to be based on seniority because Principal Officers, no sense of self importance whatsoever, would probably have more access to Assistant Secretaries and Secretary Generals than somebody further down the line, but I knew all of the people involved, every one of them, and without exception they had the competencies and more than in excess of competencies to do the job that was offered to them.

Q. You would be looking for people who were hard-working, team players, of course they were looking at something that hadn't been looked at before, in that the granting of a second mobile licence, but they were they had the requisite expertise in your view to carry out this role?

A. Not only that, every one of them, without exception, had the skill-set and the characteristics to perform at higher levels than their nominal job titles given to them at the time actually.

Q. And is it fair to say, Mr. Loughrey, that you had absolutely no doubt as to the utmost integrity and honesty of each and every one of these civil servants?

A. That goes without saying actually. Not only that, it's easy to fall into superlatives here, but it's only because I want to express that I had total confidence in their integrity first of all, but in their competency and their devotion. It's not obvious

from the file here, but on many occasions actually, they had to work late nights, through weekends, etc., and I believe they delivered for the Department and for the State a first class job, of which I am proud of the work they have done.

Q. Did you ever get the impression that any of them could have been hoodwinked?

A. Certainly not. I don't believe, and the Tribunal obviously I think will have an opportunity to see, at the Tribunal's discretion, some or all of the people involved. And I don't believe when the Tribunal has that opportunity, they could believe that any one of the group, and clearly the group in aggregate, could be hoodwinked by anybody.

Q. Did you feel that did you ever think that any of them, if they felt they were under pressure, inappropriate pressure, that they would have kept silent?

A. Absolutely not. I mean to say, all of them, at whatever level, had a full range of experience. They had an exposure, every one of them, and I am talking right down to Assistant Principal, and no doubt perhaps the Tribunal will see Mr. Towey, for instance, or HEO level, they all had a solidity about them that they could have taken pressure effortlessly, and if there were inappropriate pressure, it would have come back to me.

Q. And of course, no complaints of inappropriate pressure were ever made to you?

A. Were ever made to me.

Q. So, is it fair to say, you were satisfied not simply with the team as selected, but the performance of the team?

A. I was completely satisfied with the performance of the team, yes.

Q. Do you regard the competition as having been a success?

A. Just put in a wider context: I think perhaps I have said perhaps once too often, just to refer to, what our objective was, was to open up the market, to move away from a producer-led telecommunications service to a consumer-led telecommunications service, and so we have quite correctly, and in the course of Mr. Coughlan's examination, has, clearly my opinion doesn't matter, but I believe quite correctly, has focused on the inputs that came to this decision, but the outcome too was truly spectacular in what we set out to do. For instance, in the for instance, from '96 to '99, and as you know the ownership at the end of '99, effectively, of this consortium changed. What happened: Mobile phone market here was galvanised, we came from behind European averages to go ahead of European averages, and just in case perhaps there is an idea that somehow the rising tide lifted all boats,

let's look at the performance of this consortium that was selected. In the two and a half years that they were in existence as the consortium that was awarded the licence, they grew from zero to nearly a half million customers, and at the time, were the fastest growing mobile phone company in Europe. So even though, quite correctly, the Tribunal is focusing on the inputs that came to the decision, I think from the Department's point of view the outcome and the performance delivered by the consortium that was awarded the licence was exceptional.

Q. The judgement of the Project Team has been vindicated?

A. I believe so.

Q. Now, just turn to some of the decisions that have been referred to and the steps taken, because I want to understand your the role played by you and by the Department vis-a-vis the role played by the Minister. And as I understand it, firstly, in relation to the carrying out of the evaluation process, your view is that the Minister was aware of the carrying out of the evaluation process, but at no stage intervened or sought to intervene?

A. That's absolutely correct. He quite correctly was informed of progress, because he had the responsibility to his colleagues in Government, he had responsibility to the Oireachtas for the delivery of this very important departure and initiative, but that

was his only involvement. His involvement was one that he quite correctly should be in a position at any stage to know the progress of the evaluation, but he never asked, or was never informed at any stage of anything that would effectively break the seal of the assessment, if I may put it that way.

Q. And that applies also to the selection of the winner by the Project Team, that again he was made aware of it but didn't intervene or never sought to intervene?

A. He never intervened or never sought to intervene.

Q. Now, when we come to the announcement of the winner, when it was decided to announce the winner, it seems to me that that initiative to announce the winner, when the announcement took place, came from you and from the Department, as informed by other members of the Department, not from the Minister, although he did not disagree with the initiative suggested by you?

A. I can't I can't know or certainly can't be certain of what the Minister's own, if I may say so, stand-alone attitude towards an early announcement of the decision, but I know for certain that what my own attitude was, and I think that's documented, and my own attitude was: To move as quickly as possible. That was at my initiative. I urged the Minister to act as quickly as possible.

Q. And he did?

A. And he did, yes. Now, he may well have had that in

his own heart himself, but clearly my recall is, and I think the documentary evidence shows that it was my initiative to accelerate the decision-taking process.

Q. And when we come to the negotiation of the terms of the licence, which began after the announcement of the winner took place, that was a process that was undertaken by the Departmental team, albeit slightly different roles, slightly changed roles, and again the Minister was made aware of these negotiations, but never sought to intervene and never intervened?

A. I don't recall even expressing a, certainly any concern whatsoever about the negotiations. He left it entirely to the Department until, perhaps, sometime early in the new year, and I think Mr. Coughlan once again, there was reference to a meeting at the Telecommunications Council in Europe where the Minister was anxious to get things going, but this was six months after Esat had got the exclusive negotiating rights, and a Minister was quite entitled to say, "What's happening? Can we move this dossier ahead." But as for content, as for the Department's positioning in looking after the State's interest, he never interfered in any way.

Q. When we come to then in April, the press conference which was held on behalf of, if I can put it that way, of the Department officials. The initiative for that, and the impetus for that again came from within the

Department, not from the Minister?

A. It came clearly from within the Department, and I think Mr. Brennan has cited how perhaps incensed he felt himself, because I suppose, if there were any innuendos floating around, he, as the effective primus inter partes of the group, actually he could feel that he might well have been the target of such innuendo, and it certainly was, if I may say so, a bottom up revolt in the Department and did not come from the Minister, but equally, when we had decided on such a proposed move, he didn't demur, clearly.

Q. I know you felt that maybe with hindsight a press conference might not be the chosen route, if you were to do it again. But the civil servants in question were civil servants who had been in the service of the State for a considerable period of time, very considerable experience, and had devoted huge working hours and outside working hours to this project and to trying to get it right. Did you understand their sense of concern and upset at the speculation that was taking place?

A. I thought their chagrin at the time was absolutely understandable, and I shared in that sense of both frustration and unfairness by inference. But when I said at the time to Mr. Coughlan that I expressed some regret, it wasn't a regret in a sense of that the Department's frustrations perhaps should be known. It

was just an innate, I feel, innately that civil servants in general, it shouldn't be a press conference or a press briefing shouldn't be the first port of call for civil servants. It was unusual, to say the least.

Q. But understandable, perhaps, in the light of their preoccupation with the allegations made against them, as opposed to against anybody else?

A. And indeed, I shared in that myself actually, I shared in that myself.

Q. Shared in their concern?

A. I shared in their concern, quite.

Q. And then when we come to the ultimate, the approval of the makeup of the consortium and the ultimate award of the licence, that again was a role that was undertaken by the Department, where you came closer to the centre of the stage. And again the Minister was aware of all this taking place, but did not seek to intervene or to steer it in one way or another?

A. He did not seek to intervene in any way. Once again, I might preface that by saying, it may well be that Mr. Lowry's views and ours coincided, but my recollection, clear recollection is when informing him of what the Department's position was, and notably on our determination that the percentages should remain as in the bid, he did not raise any objections whatsoever.

Q. There was a statement made yesterday, Mr. Loughrey, looking at this in the overall, there was a statement made that your whole system had been gotten inside by this consortium. Could I just ask you to comment on what your views are in relation to that statement?

A. Well, I would regard that as quite incorrect, and I believe I could, without taking any much time of the Tribunal, refute it very effectively. I think both the personnel concerned were sufficiently experienced, and would not have been in any way awestruck somehow by businessmen coming in to see them. Bear in mind, that civil servants, I believe, have no sense of self-importance, but senior civil servants are used to seeing players, from Prime Ministers in a European context, or PT GSM in a US context, they are used to seeing players of world significance or serious European significance. The fact that, no matter how worthy professionals on behalf of business people, or business people themselves, would somehow affect their judgement or have them awestruck in any way is clearly nonsensical.

Q. And it's presumably equally nonsensical to suggest that the system, your system, your Department was in some way infiltrated in an improper manner by this consortium?

A. There is no question of that from start to finish. That wouldn't have arisen, and did not happen,

Mr. O'Donnell.

Q. It was also suggested to you that the Department never examined the position set out by the consortium in their letter of the 17th April, and never tried to come to terms with it. This is the letter about the shareholding.

A. I think we touched upon this this morning in the context or this afternoon, I should say in the context of Mr. McGonigal's examination, is it was quite clear from the first available working day, that is the 22nd April, it's quite clear we set out in a measured way, both in terms of advice and in terms of stance, to ensure that ultimately that the licence signed was in conformity with the bid that was made, and I am satisfied that's what happened.

Q. Now, the decision to approve of the break-up of the shareholding and the way it was, 40:40:20, and in particular, to approve of the involvement of IIU, was, I think you described it as a judgement call made by yourself?

A. Yes, it was, yes.

Q. And just to look at your own background, you have been Assistant Principal Officer and later Principal Officer in the Department of Finance?

A. And more particularly on the banking, investment and monetary side.

Q. You had been a member of the National Pensions Board?

A. Correct.

Q. You had been a senior executive for five years in the European Investment Bank?

A. Yes, where the emphasis would have been on corporate finance and project lending.

Q. You'd also been a member of the IDA Authority and the Board of the IDA?

A. Yes, during the '80s, yes I was.

Q. And in addition to that, you had been a member of the NESAC and the TLAC, that's the National Economic and Social Council, and the Top Levels Appointment Committee?

A. And that might sound vaguely impressive, but I am not sure that that would have brought anything to my deliberations on this particular issue. I prefer to rely on my Department of Finance banking and monetary policy experience, and clearly on my experience in the European Investment Bank.

Q. And you'd also, of course, been Assistant Secretary within the Department of Agriculture, Secretary General of the Department of Energy, and you were the serving Secretary General of Transport, Energy and Communications?

A. One would hope that after some time one would learn a little, Mr. O'Donnell, and yes, I hope I did, yes.

Q. And can I put it this way, Mr. Loughrey: Did you think you had learned enough to make a judgement call

of this sort?

A. Without sounding I don't want to sound in any way

complacent is: Yes, I believe I had sufficient

experience to make that judgement call.

Q. And you stand over that judgement call now?

A. Oh totally.

Q. Now, finally, can I just deal with your own position.

Obviously you have considerable experience within the

Department and outside the Department. You have also,

I think, very considerable experience of dealing with

Ministers. It seems reasonable to suggest that you'd

have reasonably well-tuned antennae, that if something

was happening in the Department that shouldn't have

been happening, it's likely that you'd have been aware

of it?

A. I believe I would have if there was any disquiet in

the corridors, I believe either personally or through

what I might call a management team that was both

inclusive and had a lot of empathy with staff at all

levels, I am certain we would have picked up if there

was any disquiet in the corridors.

Q. You see, it was suggested, I think to Mr. Brennan,

that his and he has put his integrity on the line

in relation to this process that, his integrity

wouldn't be affected if something was happening that

was happening without his knowledge. What I am asking

you is, how likely is it that something untoward would

have been happening without your knowledge or your awareness?

A. As far as the Department is concerned, as far as the process is concerned, I think it would be nigh impossible for something untoward to happen that wouldn't have come to the management's notice in general, or mine in particular.

Q. You'd have if somebody came to see you about this, you'd have no difficulty in seeing them if they had a problem about what was happening?

A. Without sounding in any sense self-laudatory, I think it's common knowledge that I had an open-door policy all my career. So people would have been could have come at any stage to see me, and did regularly. So this wouldn't it wouldn't have been unique, if anybody had a problem. I believe that if people want to examine, they would find that I had always maintained this open-door policy to staff at any level.

Q. Finally, can I just ask you these two questions: At any stage during your involvement in the drawing up of the evaluation process, the selection and subsequent announcement of the winner, were you ever subjected to influences which were intended to compromise your independence or overpower your will?

A. In no way, Mr. O'Donnell.

Q. And similarly, after the announcement of the winner

and during the negotiation of the licence, up to and including the award of the licence in May of 1996, again, were you subjected to any influences which were intended to compromise your independence or overpower your will?

A. It didn't arise in any way, Mr. O'Donnell.

Q. And you are not aware of any other person within the Department being subjected to any such influences?

A. I am not so aware, and I am as certain as certain can be it didn't arise.

MR. O'DONNELL: Thank you very much.

THE WITNESS WAS FURTHER EXAMINED AS FOLLOWS BY

MR. COUGHLAN:

Q. MR. COUGHLAN: Just one small matter, Mr. Loughrey. I am not going to go over matters we have touched on, and that is the whole question of the advice which was being sought from the Attorney General's Office and the nature of that. We have discussed that already, and I don't think we need to return to it at all.

But just to be clear about one thing, and I don't think there will be any disagreement. I think you'd agree with me that the advice which the Department, your Department was looking for, and the advice which was given through the Attorney General's Office, whatever that may have been, neither your Department, nor the officials in the Attorney General's Office, or counsel furnishing advices, would have been aware of

many of the matters which we have been considering in the course of your evidence and the evidence of Mr. Brennan in the Tribunal, isn't that correct?

Specifically the historical origins of the consortium?

A. Just to be absolutely sure, and maybe it's the end of an interesting but long process, to be sure that I am answering your question precisely, could you put it to me again briefly, Mr. Coughlan.

Q. Indeed. You furnished certain documents to the Attorney General's Office, and we know from Mr. Towey's letter, the advices that were being sought.

A. Yes, that's true.

Q. We know the advices which were furnished, and you weren't shown them at the time, but you were made aware of the general thrust?

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

Q. And we have those. We don't need to open them.

A. Yes.

Q. But in seeking advices in the first instance, in the assimilation of the advice being sought in the Attorney General's Office, and in the furnishing of advices by counsel, those three entities were not aware of matters which we have been discussing in the course of your evidence and Mr. Brennan's evidence, namely, the historical origins of the historical origins of the IIU involvement?

A. I believe you are correct.

MR. O'DONNELL: Just before that point is dealt with.

Of course, it will be a matter for the Attorney General's staff to deal with as to what information was provided to them. All Mr. Loughrey can say is what information was provided when information was sought.

Q. MR. COUGHLAN: That's Mr. Loughrey understands I think we understand from the point of view

A. Mr. Coughlan, you are absolutely right, and one might ask rhetorically, how could they know? I didn't know myself, and the Department didn't know, and I would say, and perhaps let me be the lightning conductor on this, because I was the decision-taker ultimately on the makeup of the licence holders, that quite incorrectly on my part, I assumed that the team in the Attorney General's Office, and a first class team they were too, and counsel were part and parcel of the negotiations principals, just take one item alone, on Article 8 right to the last minute, including the proofed copies to be signed by the Minister, I, incorrectly, took that as tacit approval of the advice we sought on the 24th April.

Q. I understand, and you have told us that before. I understand exactly your position on that. Thank you, Mr. Loughrey.

CHAIRMAN: Mr. Loughrey, thank you very much for your

quite protracted attention and undertaking over the last two weeks. Of course, you are now free to get back to your other commitments. Thank you for your assistance.

A. Thank you, Chairman.

THE WITNESS THEN WITHDREW

CHAIRMAN: Well, I think, Ms. O'Brien, that we probably should make a start on the intended next witness, because I understand he has attended for a number of days at some personal inconvenience, and if perhaps we could get some half hour underway, it may be helpful from everyone's point of view.

MS. O'BRIEN: Mr. Sean Fitzgerald please.

SEAN FITZGERALD, HAVING BEEN SWORN, WAS EXAMINED AS FOLLOWS BY MS. O'BRIEN:

Q. MS. O'BRIEN: Good afternoon, Mr. Fitzgerald, and thank you very much.

Before starting your evidence, I thought I might indicate to you, for your assistance, how I propose approaching it. What I intend doing firstly, Mr. Fitzgerald, is just taking you through your Memorandum of Intended Evidence. Now, I should say that when I am doing that, if there is any aspect of the responses that you furnished to the Tribunal that you wish to amplify or you wish to clarify, please feel free to stop me during the course of reading it out and you can proceed to do so.

And similarly, there may be one or two matters in the course of opening the memorandum that I may wish to clarify with you, and if I do, I'll stop and do so, if that's agreeable. And having done that, what I then anticipate doing, Mr. Fitzgerald, is going back over some areas of the process and your involvement or knowledge of them, and discussing them with you in a little bit more detail, and in doing that, I anticipate that I'll be opening a small subset of the documents that have already been opened at length in the course of both Mr. Brennan's evidence, and Mr. Loughrey's evidence, and indeed in the course of the Opening Statement. And unless you have any objection to it, how I propose approaching that is referring you to the relevant portions of the particular documents, unless there is aspects of the documents that you want me to open in full, in which case I'd be happy to do it.

A. Thank you, Ms. O'Brien.

Q. Maybe we'll make a start on the Memorandum of Intended Evidence, Mr. Fitzgerald. And just to indicate, that memorandum was compiled by the Tribunal based on responses which you have furnished to various queries raised by the Tribunal in the course of its inquiries. And the Tribunal, as best it could, sought to fuse those into a chronological memorandum of your knowledge and involvement of the process.

A. That's correct.

Q. And I wonder, do you have a hard copy of that with you in the witness-box?

A. Yes, I have.

Q. And just for the assistance of everybody else, it's in Book 35 and it's at Divider 1(A).

You state in your memorandum: "This statement is prepared from memory and is subject to correction, depending on evidence that may emerge. It is a combination of information previously made available to me in other guises and follows the Tribunal's preferred format for its assistance.

"Many of the questions that have been asked relate to matters within the deliberations of the Project Group and their consultants. Many questions relate to meetings and events at which I was not present, and I cannot add anything to information coming from other sources. Some questions refer to documents which have not been copied to me."

You do not consider it proper to in effect, re-evaluate the work of the Project Group beyond establishing there was no improper pressure or influence from any quarter was brought to bear on how they arrived at a recommendation. Their judgement must be respected.

And I just should point out there, Mr. Fitzgerald, that lest you have any misapprehension, the Tribunal

is endeavouring to do no more than what you suggest, and in endeavouring to do that, there are aspects of the Project Group's work which the Tribunal may have to inquire into, but it is in no sense seeking to re-evaluate the work of the Project Group.

A. I accept that, Ms. O'Brien.

Q. You say that you had no involvement in the group's deliberations. It was your responsibility to ensure that they followed the preset process, which you are satisfied they did. And once you had studied the draft report, that the result was consistent with the terms of the bids made.

Where judgements had to be made by the group and rankings determined, you are clear that this must be respected and not reopened. In the event that the Secretary General or you disagreed with the finding, which was not the case, you had no right to change it. The only course open was to advise the Minister not to accept the recommendation and to terminate the process without an award. The decision as to which course to follow would be the Minister's, and that situation did not arise. Is that correct?

A. That is correct. If there was a case where I was satisfied that the procedure had not been properly followed, or that something was missing, I would, of course, have drawn attention to it. That was not the case.

Q. I see.

You then go on to state that, from January 1993 until your retirement in March 1997, you were responsible for all communication activities in the Department.

This included all aspects of the GSM licence process.

You reported to Mr. John Loughrey, Secretary General, Mr. Martin Brennan, Mr. Sean McMahon, Mr. John McQuaid, who were members of the Project Group Evaluation reported to you in relation to their normal work.

You state that from late 1993 onwards, Government policy in the communications sector moved towards the gradual liberalisation of the market and the simultaneous restructuring of Telecom Eireann, a fully owned company enjoying a legal monopoly on all telecommunications services, to enable it to face emerging competition and maximise its value in the event of a partial or a complete privatisation.

You say that technological events, in any event, were breaking down the concept of maintaining a monopoly market share, and there was a growing realisation that a vibrant and efficient telecom infrastructure was a necessity to underpin economic development and create jobs.

You have informed the Tribunal that around the same time the European Commission moved to liberalise the telecom market in the European Union and bring about

the ending of the derogation from EU competition law?

A. That's correct.

Q. I think, in fact, that derogation comes to an end this year, is that correct, in 2003?

A. I am not sure of that at this stage.

Q. I see. You further state

A. My understanding is we got a longer derogation that was actually used, and that was, by process, short-circuited eventually.

Q. I see. You state that the Commission ruled that the emerging mobile phone business of a new and distinct service and not covered by the fixed line derogation from competition law. You state that all Member States were required to introduce competition in their mobile markets?

A. That, I believe, was correct.

Q. Now, at Question 1 you were asked for your involvement, direct or indirect, together with your knowledge of the involvement of any other person in the selection of Mr. Martin Brennan to spearhead the second GSM licensing process in the Department.

And you answered as follows: You stated that you were responsible for setting up a Project Group to run the bidding process and evaluation, and to arrive at a recommendation. You state that you would have taken into account suggestions for membership from your immediate staff. It had to have a wide range of

skills, including policy, regulation, technical and financial. The Department of Finance wished to participate and nominated their own representatives. You decided not to participate yourself and to appoint Mr. Martin Brennan as Chairman. You cleared this with Mr. Loughrey, and you recollect mentioning it at the next weekly Departmental Management Committee meeting.

Is that correct?

A. That, I believe, is correct.

Q. And I suppose it would be fair to say that in taking the view that all of the skills of both policy regulation, technical and financial were required is because all of these skills would be necessary to have an input into the ultimate evaluation process. Would that be correct?

A. I was satisfied that the group, as it was constructed, had the necessary skills when supplemented by the consultants which they themselves took on board.

Q. Now, the next four questions, Mr. Fitzgerald, are Questions 2, 3, 4 and 5, you dealt with in a composite answer, so I'll just read out the questions first.

Question 2: Your role in the establishment of the Project Group, and in the appointment of Departmental and other officials to the Project Group.

Question 3: Your involvement, direct or indirect, together with your knowledge of the involvement of any other person at the early stages of the process in the

devising of evaluation criteria.

Question 4: Your knowledge, direct or indirect, together with your knowledge of the involvement of any other person in the preparation of the initial draft tender documents.

Question 5: Your knowledge of the, or involvement, direct or indirect, together with your knowledge of the involvement of any other person in the retention of KPMG as consultants to the Department in relation to the initial competition design, and of the advice rendered by KPMG.

And your composite answer to those four questions is as follows:

You state that there was considerable discussion and interaction over a period between the Policy Division, which was represented primarily by Mr. Brennan, the Regulatory Division, and that was Mr. McMahon, and the Technical Division, Mr. McQuaid, their staff, and yourself, on devising evaluation criteria and draft tender documents.

You further inform the Tribunal that discussions with the Department of Finance also went on in relation to the overall process, and especially the question of a licence fee.

You state that a realisation emerged that the Department was not experience in this area, and special assistance was required. You state that the

Department knew from earlier work that Mr. Roger Pye of KPMG, London, had advised on similar tender process and advised the EU Commission on mobile phone policy development.

And I think, in fact, at the time, am I correct,

Mr. Fitzgerald, that Mr. Pye was assisting the Department in relation to its strategic planning on the telecommunications front?

A. He had assisted us, I think in the previous year, in forming a strategic view of the, what was needed in the communications sector. If I could say, we were all new to the business at that stage, following the restructuring of the Department in, I think early '93, or the end of '92, when the Government changed. And I inherited a situation where there was very few staff in the communications section of the Department. There was a vacancy at Assistant Secretary level. I had no predecessor for a number years, and I had to build it up from scratch and learn what this was all about.

At the same time, there was this tragic management initiative being brought into the public sector, and we all had to do a lot of rethinking of what we should be going about. So I set up a group, an advisory group with external advisers within the Department to try and get around all of this stuff and see where we should be heading for. Mr. Pye was, I think, a very

important member of that group, so we knew that he had a very deep knowledge of this area. He had actually also worked in assisting the Commission in Brussels in drawing up the European policy in this area, and we thought his advice would be very valuable and useful, which it was.

Q. Of course

A. I could add just one other thing, I think. I think Mr. Brennan's division, and Mr. Brennan himself, had the lead role in doing all the research and background and knowledge-collecting that was necessary in this process. But it did spread around, and there was a sort of a round table about it. I wasn't any better or any worse than anybody else, I suppose, and things evolved gradually.

Q. Yes. And Mr. Pye of course, as you say, he had already assisted the Department, and he had quite a representation in this field, and I think had furnished reports to the European Commission at the time which I think Mr. Brennan, in his evidence, indicated was a very useful source of information for him when he took up this brief and was assigned the brief by you?

A. So we took all the steps I think we thought were necessary to prepare ourselves well for this process.

Q. In your memorandum you continue, that Mr. Pye's assistance was obtained, and was of considerable value

in confirming the Department's basic approach, and in tightening up on the criteria and the overall process.

And again we'll come and look at it in the course of discussing it, Mr. Fitzgerald, but I think probably Mr. Pye's particular input was in restructuring the criteria into paragraph 19 and into descending order?

A. Basically, yes. I think all the ideas were there, but perhaps not in the best of order, and perhaps not in the sequence that they should be. And the order of importance, in particular, to get a good result. And I think he was very valuable in guiding us in the right direction.

Q. I am sure there can be no doubt about that. You continue, then again, in your composite reply. You state a broadly based Project Team supported by competitively selected experienced consultants was selected to run the process, evaluate the bids and make a recommendation for approval by the Minister and Government. You appointed Mr. Martin Brennan as Chairman of the Project Group. A key step in ensuring objectivity was that a weighting and marking system was adopted by the group before any bids were received. You state that having set up the group, you had no active role in its operation or deliberations. You had no contact with any of the bidders. You did get progress reports from the Chairman from time to time, and you were satisfied that progress was being

made on target and such problems as arose were being resolved.

At one stage you asked about the group's inquiries into the financial capacity of bidders to implement the project if awarded the licence, and you were told that all consortia members were required to mutually guarantee and underwrite all other consortium members.

A. That, I believe, is correct. The inquiry about the financial capability of bidders would have arisen when I learnt that the Esat Digifone consortium was, if you like, in the front running, in a position where they might, and it wasn't certain at that stage, become the winners.

Q. So it was the positioning of Esat Digifone as a front runner which prompted you to make that inquiry?

A. Yes, yeah.

Q. It wasn't a general inquiry that you made vis-a-vis all of the various applicants?

A. I would have assumed that the group would have looked into that, and if there were particular problems, that I would have been told. I was concerned about the financial strength of the Communicorp element of the Esat Digifone group for because I was dealing with them in relation to the fixed line telephone business, and the issues that arose there.

Q. That was the issues that arose on the regulatory side, is that right?

A. Yes, well a whole end of issues.

Q. So that wasn't a general inquiry that you made. It was one that you made specifically on being informed that Esat Digifone might be out in front or might be doing well?

A. Yes, I wanted to make sure that this issue would be looked at by the group. I didn't give them any directions or say what any particular solutions or anything, that was left to themselves.

Q. It was purely an inquiry which you raised?

A. Yes.

Q. I think, in fact, you deal with that at some considerable length further in your memorandum?

A. Okay.

Q. You were then asked at Question 6: Details of all of your dealings as Head of the Telecoms Division in the Department with Mr. Michael Lowry on his appointment as Minister in relation to the GSM licensing process.

And you have informed the Tribunal that you assume the question relates to the first meeting with Mr. Lowry immediately following his appointment as Minister, that at that meeting with the Management Committee each Assistant Secretary gave a brief summary of the main issues in his area. You outlined the state of the GSM competition which had been approved by the outgoing Government, but put on hold pending an affirmation by the incoming Minister.

You have informed the Tribunal that Mr. Lowry expressed satisfaction with the approach being taken, and stated that it was a matter of the highest priority to him to achieve a result as quickly as possible.

Mr. Lowry's general approach was to promote competition in the sector.

And was it your impression, Mr. Fitzgerald, just to clarify, that when Mr. Lowry expressed to you his satisfaction with the approach, and that it was a matter of his highest priority, that that was a political priority for Mr. Lowry?

A. Yes, I took that meaning from it. That we should get the show on the road and get a result. I didn't, you know, take this as any kind of pressure to produce a result before it could be done in the proper manner.

Q. Yes. But it's quite clear that he was anxious to get a second operator licensed, and that it was one of his priorities, as expressed to you on this first occasion when you met him at the Management Committee meeting and outlined the activities on your side of the house, so to speak?

A. Yes, that is so.

Q. Now, at Question 7 you were asked for your knowledge, direct or indirect, of, or involvement, together with your knowledge of the involvement of any other person in the finalisation of the evaluation criteria and in

particular, a) the selection of an open-ended licence

fee structure.

You have informed the Tribunal that an agreement on an

open-ended fee structure was a compromise between the

Department of Finance, in return for which the

Department of Transport, Energy and Communications

retained the list in descending order of criteria in

paragraph 19 of the information document.

You state that many mobile licences at the time were

issued largely on the basis of the highest cash fee.

The effect of a large licence fee was to greatly

increase the up-front capital cost of a project, and

must be reflected in higher tariff costs or poorer

service quality. The Department proposed that because

of the underdeveloped state and limited size of the

market in Ireland, the best interests of the user

would be served by requiring from bidders a

competitive tariff and a high quality service as more

important criteria than the level of fee offered.

It also proposed an arm's length independent process,

which was necessary to evaluate different proposals

and choose the best. The recommended approach was

adopted by the Government, with some modifications in

relation to the fee. This later had to be changed

following intervention by the EU Competition

Commissioner, and the fee was capped at $\text{€}1/250$ million,

based on a proposal from the Department. It has been

suggested that the cap and the delay that it gave rise to was intended to benefit the Esat Digifone bid, and that others were prepared to bid more. The reality is that the Department was not aware of who was going to bid, and the fee cap had the same effect on all bidders. The delay was unavoidable once an objection from the Commission was received, and was kept as short as possible.

You state that as far as you know, the Esat consortium was not formed at the time, and could not be the intended beneficiary of special adaptation, even if anybody so wished. Is that correct?

A. I can't be certain that the last part of it was correct.

Q. I think maybe you were incorrect in that assumption, because certainly I think on the basis of the documents available to the Tribunal and information available, that the various members of that consortium well, Telenor and Communicorp, in any event, were in communication with each other either in late April or May, and they certainly had concluded, I think, a Joint Venture Agreement by the 2nd June?

A. I wasn't in possession of that information at the time I wrote this.

Q. That is perfectly understandable, Mr. Fitzgerald.

A. I just want to emphasise that what happened over the fee was not intended to benefit any particular

consortium or to disadvantage any particular

consortium either. It was something that happened

that we had to deal with and find a solution to.

Q. And I think, in fact, it meant that the closing date

for the competitive part of the process was deferred

from the 23rd June to the 4th August?

A. That's correct.

Q. To enable that to be resolved, the issue that had

arisen with the Commission?

A. Yes.

Q. 7(B), you were asked for your knowledge, direct or

indirect, of or involvement, together with the

knowledge of any other person in the finalisation and

evaluation criteria, and in particular 7(B), the

deletion of financial capability from the evaluation

criteria.

And you state in response, financial capability was

not appropriate as a criteria in ranking bidders in

order of merit. It was, of course, an issue to be

investigated and satisfactorily resolved prior to

determination of the winner and the issue of the

licence.

A. I believe that to be correct. The question there was

that there wasn't going to be a comparative evaluation

in relation to financial matters. There was to be an

examination and a pass or a fail.

Q. Absolutely. That's perfectly understandable. I can

see that if you have financial capabilities simpliciter, you don't need to have it in spades. But it is a requirement, and that, I think, was reflected in the RFP document?

A. Well, we didn't want a project that would fail.

Q. Of course. So as far as you were concerned, it made eminent sense to remove it from the evaluation criteria because it was an in or out requirement. You either had it or you didn't have it?

A. Yes.

Q. Now, at Question 8 you were asked for details of all considerations which, to your knowledge, direct or indirect, prompted or contributed to the Department's movement from its initial position of:

1. Favours the publication of the weightings attached to the evaluation criteria as specified in paragraph 19 of the RFP document to its ultimate position of non-publication of the weightings attached to the relevant criteria as recorded in a memorandum of Mr. Jimmy McMeel, dated 19th April, 1995, and a note to the Minister from Mr. David Doyle;
2. Favours the placing of the emphasis of the evaluation criteria on the criterion of tariffs to its ultimate position in which the first priority was given to the credibility of the business plan and the applicant's approach to market development, as also recorded in the memorandum of Mr. McMeel and the note

to the Minister.

And you have informed the Tribunal that you have not seen the memo of Mr. Jimmy McMeel or Mr. David Doyle.

You have seen Mr. McMeel's letter of the 31st March, 1995, on the subject of weightings and Mr. Brennan's reply of the 3rd May, 1995. That reply sets out the Department's position at the time, and is one with which you are in agreement. At the start of the process the state of the knowledge of the Department was far from adequate and early positions and understandings were developed as more information was acquired. The position finally adopted in relation to weightings and criteria emerged as a result of ongoing discussions and advice from consultants, including KPMG and Andersen.

You state the publication of weightings would have ruled out qualitative assessment of the capability of a weightings winner to deliver what was promised and would ignore possible risks to achieving a successful process by a winner determined by weightings alone.

You state that setting out criteria in order of importance, but without published weightings, encouraged bidders to put forward more imaginative proposals than a marks driven score sheet would have.

You state that the same reasons a successful and credible business plan was given a higher level of importance than very competitive tariffs, desirable as

they were, but which might not be sustainable if low tariffs drove a project to severe financial losses.

In any event, a credible business plan had to have due regard to the role of competitive tariffs in developing a significant market share and optimising consumer benefits, while sustaining a longer term viable business.

A. I believe that that would still be my view even now, that I have seen all the correspondence referred to in the questions, I would not have changed my view.

Q. Just in relation to the publication of the weightings, Mr. Fitzgerald, I think we may have understood from Mr. Brennan's evidence, and I think indeed Mr. Towey makes the same point in his Memorandum of Intended Evidence, that it had been your Department's preference, not only to apply weightings, but to actually publish those weightings. We know from that correspondence, which again we'll refer to and perhaps look at some portions of it, that the Department of Finance took the view that in applying and publishing weightings, the Government's discretion might be fettered, and that ultimately there was, in effect, a deal done between your Department and the Department of Finance, that weightings would be applied, numerical weightings, to the eight ranked criteria, but that they wouldn't be published, and that that agreement on the part of DTEC or on the part of the

representatives in the Project Group, not to publish them was the compromise with the Department of Finance?

A. I can't be sure of that. But I think I don't know whether Andersens had arrived on the scene at that stage.

Q. I think they might have. I think they might have just arrived.

A. I think their view might have been decisive in arriving

Q. We will look at it, in any event

A. With the benefit of hindsight, I think it was probably as well that the weightings were not published because as things worked out, they were not used to any great extent in evaluating the bids, except as a crosscheck at the very end.

Q. I see. And I suppose, again, the weightings had to be changed after the capping of the licence fee, they would have had to have been republished?

A. If the original weightings had to be published had been published, yes, an amendment or change would have had to have been published. But that would have been before bids were submitted. So I don't think it would have changed the situation.

Q. Now, Question 9, you were asked for your understanding of the role of the Cabinet or Cabinet Subcommittee in the GSM process, and in particular, in the light of

paragraph 2 of the Government decision of the 2nd March, 1995, namely a recommendation would be put by the Minister to Government in time for a final decision on the granting of the licence to be made by the 31st October, 1995.

And you have informed the Tribunal that Cabinet subcommittees are rare in the Government structure.

They may be set up to deal with exceptional issues.

In this Government your understanding was that subcommittees were a clearing house between the Party leaders prior to submitting a matter for formal decision by Cabinet. This was the procedure followed in this case. The only significance of the date was to put down a marker by which the process of selecting a winner should be complete.

A. Yes, I think that would be my view.

Q. Just in relation, I suppose, to the wording there of the Cabinet decision recorded on the 2nd March. I think we also fell into the danger of using loose language until we were corrected by Mr. Nesbitt, but of course, would be the granting not the granting of the licence by the 31st October, but the granting of the exclusive right to negotiate for the licence?

A. Yes, of course. I will accept that amendment. I think, as I have put it, that selecting a winner should be complete, and what I meant by that is

Q. A winner of the competitive process?

A. A competitive element winner, in which you then entered into the exclusive negotiations with a view to granting a licence. There was no question I think of the licence being issued by

Q. By that time?

A. By that date.

Q. And of course the date there, as you say, that was the significance of the date was to put down a marker by which time the process of selecting the winner would be achieved. That date in fact was, I think, subsequently revised to the end of November following the postponement of the closing date of the competitive part of the evaluation process.

A. Well that was to allow the same length of time for submitting applications and processing them as had been originally envisaged. In fact, that extra month was not used.

Q. Yes. But I think it was contemplated that the time limit would be extended till the end of the month of November.

At question 10, you were asked for your understanding of the RFT we said RFT, but we now all agree it should probably be referred to as RFP, document issued by the Department in March 1995 and in particular paragraphs 3, 9 and 19 which provided as follows:

A. Paragraph 3: "Applicants must give full ownership details for proposed licensee and will be expected to

deal with the matters referred to in the following paragraphs in their submissions."

B. Paragraph 9: "Applicants must demonstrate their financial capacity and technical experience and capability to implement the system as successful and must include a business plan for at least the first five years in a complete technical proposal."

C. Paragraph 19: "The Minister intends to compare the applications on an equitable basis subject to being satisfied as to the financial and technical capability of the applicant in accordance with the information required herein and specifically with regard to the list of evaluation criteria set out below in descending order of priority:

credibility of business plan and applicant's approach to market development, quality and viability of technical approach proposed and its compliance with requirements set out herein.

the approach to tariffing proposed by the applicant which must be competitive.

the amount the applicant is prepared to pay for the right to the licence.

timetable for achieving minimum coverage requirements and the extent to which they may be acceded.

the extent of the applicants international

roaming plans.

the performance guarantee proposed by the applicants.

efficiency for a most used frequency spectrum resources.

And you have informed the Tribunal that your understanding was that the document was to guide applicants as to what was required. It's meaning is clear. Paragraph 19 is the key to the process, and if you may say so, was better understood and adhered to by the winner than by others.

You state further that this should not be interpreted as applying that the winner was given better information or guidance than the others.

If we could just look briefly in a little bit more detail at the three paragraphs, Mr. Fitzgerald, if you don't mind.

A. Yes.

Q. I think you have said that the purpose of the document was to guide applicants as to what was required, and if we just look at paragraph 3: "Applicants must give full ownership details for proposed licensee, and will be expected to deal with the matters referred to in the following paragraphs."

I suppose you'd agree with me that there was no doubt but that that part of the RFP was a mandatory direction and a mandatory requirement for applicants?

A. Yes. But I don't think it ruled out changes in the composition of the various consortia. Because it was my understanding at the time, and I think still is, that for various reasons there could be changes from the beginning of a process until the end. And subsequently in a parallel process to this, in which I was very much involved, the finding of a strategy, I think, partner for Telecom Eireann, there was such a change in the consortium that was finally accepted.

Q. I see.

A. But one must do that in the knowledge that this could have an effect on the quality of the bid and the weighting of the criteria in paragraph 19. My understanding was that at the state of application, that the consortium, or the applicant was Telenor and Esat on a 50/50 basis, and that there was a suggestion, or a proposal, I am not quite sure how firm it was because I never saw the bid documents, that 20% on winning if they were successful in winning the licence, could or would, I am not sure, be offered to financial institutions.

Now, as far as we were concerned, the real criteria was the technical and financial competence of the movers, or the main movers in the consortium. And there would be scope, we had no problem with scope for a degree of financial involvement, provided it was not excessive. And I think at all stages, we did not

regard a change in a consortium of the nature that occurred here as being, converting it into a new consortium. That intention was there from the beginning.

Q. What I might do, Mr. Fitzgerald, I think you deal with that later in your memorandum, and we'll come back and tease it out and discuss it. I suppose all I was just trying to establish is whether you agreed with me that it appears from the plain language of paragraph 3, that it was a mandatory requirement?

A. Oh, I would accept that.

Q. That they had to give full ownership details?

A. Yes. I would go a bit further, I think I would say that they should have given information on changes within the consortium as they occurred.

Q. As those changes occurred?

A. Yes. Whether that happened or not is another debatable issue, but

Q. That would be absolutely necessary, wouldn't it, if you were running an evaluation process, and there were changes taking place in the course of that evaluation as to the composition of the consortium. In order to be absolutely certain that the Department or the Project Group fully evaluated the consortium that won the competition, you'd have to be notified as time progressed, of any changes in that makeup?

A. I would put this that that was different from the

information supplied as part of the bid. That was totally different. I would like to draw a clear distinction between the bid and the ownership and capability of the consortium that were making the bid.

Q. Yes. And just going then to (B), paragraph 9:

"Applicants must demonstrate their financial capacity and technical experience, capability to implement the system as successful, and must include a business plan for at least the first five years in a complete technical proposal."

And I think from what you have said already, that there is no doubt that you'd agree with me that that was also a mandatory requirement in the RFP?

A. Yes, and again it was one that, at the very least, applicants had to get to a pass level

Q. Absolutely. They had to get over the bar, so to speak?

A. which was not, I would think, a competitive element in it. The fact that this might be better than the minimum didn't give them a better ranking in the evaluation.

Q. Absolutely. Once they had it in clubs, they didn't need to have it in spades?

A. Yes.

Q. And then finally, paragraph 19, "The Minister intends to compare the applications on an equitable basis, subject to being satisfied to the financial criteria,

financial and technical capability of the applicant in accordance with the information required herein and specifically with regard to the list of evaluating criteria set out below in descending order of priority." And then the eight criteria, evaluation criteria that were going to be assessed were set out. And I think again you'd agree with me that paragraph 19 reiterates the mandatory requirement of paragraph 9 that, it is subject to being satisfied as to the financial and technical capability of the applicant?

A. Yes, if that was not met, then I think it didn't matter what kind of a bid they put in.

Q. I see. I think it's

CHAIRMAN: Well, I notice you are getting near to the stage of moving on to perhaps a different phase of the entire process, Ms. O'Brien, and I think having made a start, we may leave it there tonight, Mr. Fitzgerald, if it suits you. We'll get on to the balance of your evidence at eleven o'clock tomorrow morning. Thank you very much.

A. Thank you very much, Mr. Chairman.

MS. O'BRIEN: Thank you very much, Mr. Fitzgerald.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
FRIDAY, 28TH FEBRUARY, 2003, AT 11AM.