

A P P E A R A N C E S

THE SOLE MEMBER: Mr. Justice Michael Moriarty

FOR TRIBUNAL: Mr. John Coughlan SC

Mr. Jerry Healy SC

Ms. Jacqueline O'Brien BL

Instructed by: John Davis

Solicitor

FOR THE DEPARTMENT OF

COMMUNICATIONS, MARINE &

NATURAL RESOURCES: Mr. John O'Donnell, BL

Mr. Diarmuid Rossa Phelan, BL

Mr. Conleth Bradley, BL.

Instructed by Matthew Shaw

Chief State Solicitors Office

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

Mr. Gerry Kelly, SC

Instructed by: Eoin O'Connell

William Fry Solicitors

FOR TELENOR: Mr. Eoghan Fitzsimons, SC

Ms. Blathna Ruane, BL

Instructed by: Kilroy Solicitors

FOR MICHAEL LOWRY: Kelly Noone & Co.

Solicitors

OFFICIAL REPORTERS: Mary McKeon SCOPIST: Ralph Sproxton.

I N D E X

WITNESS: EXAMINATION:Q. NO:

Sean Fitzgerald

Ms. O'Brien

1 - 375

THE TRIBUNAL RESUMED AS FOLLOWS ON FRIDAY,

28TH FEBRUARY, 2003 AT 11AM:

CONTINUATION OF EXAMINATION OF SEAN FITZGERALD BY

MS. O'BRIEN:

Q. MS. O'BRIEN: Good morning, Mr. Fitzgerald.

I think the only book I am going to need you to refer you to, at least this morning, is Book 35, so that's all you need with you in the witness-box. I think last evening we finished at question 9, so maybe we'll just take matters up at sorry, question 10, we'll take matters up at question 11 of your memorandum, and that's on page 9 of the internal pagination.

Question 11 and 12 you have also dealt with by way of a composite answer, and question 11 you were asked for your understanding of the purpose of the protocol adopted by the Project Group at its meeting on the 6th March 1995 for dealings with potential bidders during the tender process, and which protocol was notified to you by memo dated 6th March 1995 from Mr. Martin Brennan, bearing in mind that all civil servants are bound by duties of confidentiality.

And question 12, you were asked whether you discussed the protocol with the Minister or otherwise advised the Minister regarding contacts with members of

And what you stated in response to both those questions was that your understanding was that the protocol tried to ensure that all contacts with

bidders was in accordance with bidding rules and that

the contents of individual bids remained confidential.

You complied with those requirements, and you had no

discussion with the Minister or with anybody else.

A. That is correct. I would have taken it that Mr.

Loughrey, in his usual manner, would have spoken to

the Minister about it, because that's I think the

basis on which we operated as a rule, unless Mr.

Loughrey was not available for some reason or other.

Q. Yes, indeed. And I think Mr. Loughrey in his evidence

confirmed that he did bring the protocol to the

attention of the Minister, and I think he also stated

that he otherwise advised the Minister on how to deal

with consortia if he happened to meet members in the

course of his duties as Minister, or indeed in any

social context; and I think Mr. Loughrey gave that

evidence to the Tribunal.

A. Yes. So I understand.

Q. And you had no discussions yourself with the Minister?

A. No.

Q. That was a matter for Mr. Loughrey?

A. Yes.

Q. In relation to the protocol itself, can I take it

that, as Mr. Loughrey confirmed, you would have been

supportive of the protocol and

A. I think it was a very wise step to take to ensure that

there was no interference with the process outside of

the dealings between the evaluation group and the bidders.

Q. So that all dealings with consortia members would be in a formal context with members of the civil service within the Department itself and that a note would be kept?

A. Yes.

Q. And I suppose the way that you look at that is that it was very important that people could have confidence in the objectivity of the process?

A. That would include any contact with either myself or Mr. Loughrey, I think, outside of the evaluation group should not have taken place, and did not, as far as I know.

Q. Now, at question 13, you were asked for your role, direct or indirect, together with your knowledge of the involvement of any other person in the appointment of Andersen Consulting as consultants to the Project Group.

And you answered that you had no role in the selection of Andersen Consulting, but you confirm that the selection followed an open process by the Project Group.

A. I think that is correct. At an earlier stage, it had been agreed that consultants would be required, and the process of ensuring hiring consultants, selecting them was left to Mr. Brennan and the

evaluation group. They were, after all, their consultants.

Q. Yes, of course, and I suppose consultants were always going to be necessary to bring to the deliberations of the evaluation group the necessary expertise and experience in the field?

A. Quite so.

Q. And I think in fact we have seen from, I believe, some of the Project Group minutes that I think it was a subset of the Project Group that actually attended the selection of Andersen Consultants; I think it was Mr. Brennan, Mr. Towey, and perhaps Mr. McQuaid?

A. It was up to them to settle their own procedure as to how they would do it.

Q. Yes, of course.

Now, at question 14 you were asked for your precise understanding as to the services to be rendered by Andersen Consulting and the precise terms of their brief, and you answered that the Project Group set the terms of the brief and the contract entered into with Andersen Consulting?

A. That I believe was the case. I certainly wasn't involved in either of these two operations.

Q. And that of course would have accorded with your view as to the integrity of that process?

A. Yes.

Q. But in relation to Andersen Consulting, what I just

want to probe slightly with you here is what you understood their role would be as consultants to the group.

A. Yes. The responsibility for the result, if you like, was primarily the evaluation group, with the assistance of Andersen and the advice of Andersen and the skills of Andersen.

Q. Now, at question 15, you were asked for your knowledge, direct or indirect, at any time in the course of the evaluation process, of the weightings attached by the Project Group to the evaluation criteria.

And you answered that you were consulted at some stage by the Project Group Chairman about the weightings.

You considered them fair and reasonable, given that they were drawn up with the advice of experienced consultants.

A. Could I expand on that?

Q. Of course, Mr. Fitzgerald.

A. I would like to apologise to the Tribunal for the possibility that I may have misled them as to what actually happened. The consultation with Mr. Brennan occurred, as I now recollect it, before these weightings were determined, because I do remember him announcing or telling me that this had to be done before the date for submitting bids. And it was a general discussion as to how it might be approached,

and I think no more than that. He went off, and the group then settled the weightings. I never saw the weightings. He did not tell me subsequently what they were.

Now, the second sentence is "My conclusions" when I finally did see the weightings, when they were using in the first draft of the Evaluation Report for the following October.

Q. In fact what you are saying is that you were consulted prior to the presentation of the evaluation model; is that correct?

A. Yes, I didn't see the weightings at any stage until October.

Q. Until October. And I think you fairly say that you may have been mistaken in your recollection; is that correct?

A. Yes, thank you.

Q. At question 16, you were asked for your role in and knowledge, direct or indirect, of the intervention of the European Commission, including the manner in which the intervention was resolved, the capping of the licence fee at  $\frac{1}{2}$ 15 million, and the reweighting of the evaluation criteria in the light of the capping of the licence fee.

And you answered that the intervention by the European Commission did not come as a surprise. The solution of capping the fee came from Mr. Brennan, was endorsed

by you, and skilfully negotiated by him to a successful conclusion. The reweighting of the criteria was a natural consequence leading to more emphasis on market-related issues but did not make a significant change.

A. That I believe to be the case. Again, I was not I may have been informed that the weightings were adjusted to take account of the capping, but not the content of the weightings.

Q. Not the substance of the weightings, but just an adjustment by virtue of the fact that the licence fee, which I think was the fourth criteria, had been capped at €15 million?

A. It was obvious that a licence fee with a cap on it, which was probably at the lower end of probability, should not have the same weight as it had in the original weightings, whatever that had been.

Q. Yes, that seemed to make logical sense.

Can I just ask you there, you state in your answer that the intervention by the European Commission did not come as a surprise; and I suppose that's understandable, given that the European Commission had set its face against auction elements in an evaluation process and large sums being charged to new entrants in the market?

A. That is correct. They were aware of interventions that had been made by the Commission in Belgium and



Italy in particular. We had signalled, I think, in the various papers and memoranda that went to Government, that this was a possibility in running with an open auction fee. So when it did happen, it was not a surprise to me.

Q. It was no great surprise to you. Can I take it there, if it was no surprise to you because you were aware of the fact that the Commission had taken matters up with Belgium and Italy, that you must have had some concern or some expectation that this might have happened at the time of the issue of the RFP document on the 2nd March?

A. This was this was always, I think, one of our apprehensions, but we had to settle the issue of whether the fee was to be capped at a lower fee or a fixed fee or an open-ended fee. And this was an ongoing argument with the Department of Finance, and the outcome of that was that the open-ended fee remained on the list of criteria; but from our point of view, it was number 4, and not number 1, and we retained the other criteria and the order of priority.

Q. Right.

A. So that whatever weight might have had to be attached to a fee was significantly lower than it would be on a simple open auction.

Q. Yes, of course. So I suppose the way you saw it was that you had to come to the settlement with the

Department of Finance. This open-ended auction element was the fourth of eight criteria, so you effectively fixed it at that, and you hoped that there wouldn't be an intervention by the Commission; but you might have anticipated it at the time, or saw it as some risk?

A. We anticipated that it was a possibility. But it certainly wasn't welcome.

Q. Of course not. It doesn't surprise anybody.

Question 17, I think you were asked for details of all information provided to applicants at any time prior to the 14th July 1995 in connection with the suspension of the evaluation process including in particular regarding the following:

1. The manner in which the Department hoped to resolve the Commission's objection to the auction element of the competition.
2. The manner in which the Department hoped to resolve the Commission's concerns regarding the transparency of the evaluation process.
3. The date to which it was likely that the process would be deferred.
4. Any other matter relevant to or touching on the evaluation process.

And you answered that you had no contact or communication with any of the applicants. You would be surprised if any information along the lines of the

question was provided to applicants apart from a decision to defer the closing date until discussions with the European Commission were concluded. You add that in relation to the terms of the question, that the competition and not the evaluation process was suspended

A. Could I correct you there, please. The "not" is a mistake and should not have been included.

Q. Exactly was suspended as the only latter only began on receipt of bids after the competition was restarted.

Then at question 18 unless you want to expand on that in any way, Mr. Fitzgerald?

A. I think that is correct. As far as I know, there was no information conveyed to applicants other than a decision to postpone.

Q. Certainly, as far as you were concerned, you knew of no incidence of information being provided to applicants, and I think

A. Because I know that was the case.

Q. And as you have already stated, you had no contact whatsoever with applicants, so you couldn't have been the source of any information being furnished to them?

A. Certainly not.

Q. At question 18, you were asked for your understanding of the evaluation model adopted by the Project Group, and in particular:

A. The qualitative and quantitative approaches.

B. What these approaches entitled.

C. The distinction between the quantitative and qualitative approaches.

And you have answered that you had no involvement and that this was a matter for the group.

A. That's correct.

Q. And I think in fact we have already seen and Mr. Brennan pointed out that while you were copied with the Project Group minutes of meetings up to the commencement of the closed process, that you weren't in fact circulated with a copy of the report of the meeting on the 18th May when the evaluation model was presented?

A. No, I don't remember getting any copies of reports, and I think the reports indicated they were only circulated to members of the group.

Q. And could I just ask you this: Insofar as you were Mr. Brennan's superior, or direct superior, and so far as he might have wanted to keep you advised in any way, did he indicate to you at all during the course of the process what the general approach to the evaluation was going to be?

A. I don't believe he did, other than when things began to emerge with some degree of certainty as to what was likely to happen. Now, I think he did indicate they were making progress on time and on schedule and that

there were no problems emerging other than the one that related to the question of Andersen's fees, which was not a matter for the Project Group. It was a matter I had a right to be told as to what could be done about that particular problem.

Q. Yes. But insofar as the actual technicality of the evaluation model, the intention as we now know it, to evaluate quantitatively, to then conduct presentations, to evaluate qualitatively and then to feed back that qualitative evaluation into the quantitative figures, you weren't even given an outline of that what that approach was going to entail?

A. No. That was the case. And I may add, when I read the report, I had the same difficulties as other people had in understanding the process. It's only when you have gone through it, I think, bit by bit, when you are in the group, that you get a feel for what was really going on.

Q. Yes, of course. That's perfectly understandable.

Question 19, then, you were asked to provide full details of following:

1. Details of all inquiry raised by the Department in the course of the Esat Digifone presentation on the 12th September 1995 regarding the financing of the Esat Digifone consortium.
2. Details of all queries raised by the Department in

the course of the presentation addressed to the funding of Communicorp's equity participation in Esat Digifone.

3. Details of all queries raised by the Department in the course of the presentation regarding the letter of comfort provided by Advent dated 10th July 1995 and appended to the Esat Digifone application.

4. Details of all queries raised by the Department in the course of the presentation regarding the terms governing the offer of  $\text{€}1/230$  million to fund Communicorp's equity participation in Esat Digifone as referred to in the letter of the 10th July 1995 from Advent International to the Department, and

5. Details of all queries raised by the Department in the course of the presentation regarding the commitments provided by the institutional investors in the Esat Digifone bid.

And you answered that you were not present at the presentation by Esat Digifone. Any queries were made by the project evaluation team and not by the Department.

A. That is correct.

Q. Can I ask you this: Just again in relation to that, Mr. Fitzgerald, I take it that you weren't away during the month of September when these presentations were proceeding?

A. Sorry?

Q. You were in the Department, were you? You weren't on holidays or anything in September?

A. No, as far as I believe, I was.

Q. You were there?

A. There, but I did not participate in any of these meetings.

Q. No, of course. That's entirely accepted, and that's quite clear from the documentation and the reports, that you weren't present.

A. Nor, I think, was I told anything of what happened or what went on or what the general view of the group was following these presentations.

Q. Right. So you weren't given any indication by Mr. Brennan or anybody else in the group as to how the impression perhaps that they had formed based on the presentation or how particular consortia performed in the course of that those presentations?

A. No.

Q. You would have known, I presume, though, that the presentations were going on in that week commencing the Monday the 11th September, I think?

A. Well, I wasn't sure of the dates, but I knew this was going to be part of the process and that an opportunity was given to all bidders to come and state their case.

Q. Now, at question 20, you were asked to indicate the following:

1. Whether the Department requested the Esat Digifone consortium at any time prior to the 25th October 1995 to provide the Department with a copy of the offer of the 1/230 million facility to Communicorp by Advent International referred to in the letter dated 10th July 1995.

2. Whether a copy of the offer was provided to the Department, and if so, to indicate the date on which it was received and furnish the Tribunal with a copy of the document.

3. Whether any inquiries were made by the Department at any time prior to the 25th October 1995 as to the terms governing such offer, and if so, when and by whom, and kindly identify where such inquiries were recorded.

4. If such inquiries were made, please provide details of information provided regarding the terms of the Advent offer, and please also indicate when and by whom such information was provided, and kindly identify where such information was recorded.

And you have indicated that not surprisingly, given your response to the last query that you had no knowledge of what inquiries were made by the Project Group, the Department as such made no inquiries of such applicant?

A. That's correct.

Q. I think in fact we know, from the documents available



to us and from the evidence of Mr. Brennan, that in fact no such request was made of the Esat Digifone consortium.

At question 21 you were asked to please provide details of the supplementary analysis conducted in respect of Advent, Communicorp and Sigma, as referred to in the minutes of the 11th meeting of the GSM Project Group on the 14th September 1995, and the results of the analysis.

And you answered that you were not at the meeting of the 14th September. There was no mention of a supplementary analysis referred to in the question in the copy of the minutes supplied to you.

A. I would just, to clarify, that this copy of the minutes was supplied to me at the time I was writing this statement.

Q. I was about to ask you

A. And not at the time it took place.

Q. I was about to clarify that with you.

And of course you weren't supplied with the copies of those minutes; it was during the closed period, and you had no knowledge of the actual details of how matters were proceeding within the evaluation process?

A. That is correct.

Q. At question 22, you were asked for your knowledge, direct or indirect, of the progress of the actual evaluation process, to include the source of such

knowledge, and in particular, but not exclusively, in relation to the following:

CHAIRMAN: I suppose this one could be telescoped a little, Ms. O'Brien, because it is in conformity with the other answers.

MS. O'BRIEN: Indeed.

Q. And I think you also indicated that you had no knowledge of that, and those matters were not reported to you by Mr. Brennan?

A. That is correct.

Q. Now, at question 23 you were asked whether you were kept informed of the trends and/or ranking emerging from the evaluation process, during the course of that process, and if so, the precise matters of which you were informed, by whom you were so informed, and when you were so informed; and if you were so informed, the identities of all persons to whom you relayed any such information.

And you stated that you were informed by the Chairman in early September, as you recollect, that the initial evaluating of the group put three bids as qualifying for a licence and the other three as subject to reservations. There was clear water between the third and the first and second, who were close. You were told at that stage that Esat Digifone were the likely front runners, but more work was needed. You said that such a result, if upheld, was going to be

controversial, and the final decision of the group had better be well founded, as it would be open to attack. You asked if the Minister was aware of the situation, and you were told that he was and had not expressed any views.

You then raised the question of Communicorp's financial status, discussed in the next question. You discussed the situation with Mr. Loughrey, but not with the Minister or with anybody else.

Now, Mr. Fitzgerald, we'll come back and look at that in a little more detail, perhaps, with some of the documents

A. I would like to make a couple of comments on that. I now believe it was not early September, because the outcome was not known with sufficient clarity at that stage to form any view as to the outcome. It must have been in late September.

Secondly, about informing Mr. Loughrey or discussing with him, I made this statement on the basis that generally there was open communications with Mr. Loughrey about any aspects of things that came up across the board between us. And it was in that context I probably would have discussed the matter with him, except he I now know he was on annual leave at the time and did not come back until the 4th October, which I think would have been some time after this.

I would be surprised if I hadn't told him at that stage. He has no memory of it. And I have no memory of a specific occasion in which I did so, but there it is.

Q. You'd be surprised if you didn't tell Mr. Loughrey?

A. I would be surprised if I hadn't mentioned something like this to him.

Q. Well, it was a substantial matter, and obviously you are expressing there that you had some concerns, so it would be natural enough that you would want to discuss it with the Secretary?

A. Given the relationship between us, I think it was likely that I would have. I would be very surprised if I kept such knowledge totally to myself.

Q. Can I just ask you one other thing about that, because you were saying that you now realise that it must have been later in September, perhaps late September when Mr. Brennan so informed you.

Could I just ask you, what prompted you to change your view of that from when you furnished your responses to the Tribunal? I am not suggesting anything by that; I am just inquiring into what matters came to your attention that assisted you in clarifying your own recollection.

A. It was after I wrote this I was supplied with a great deal more documentation by the Tribunal, and it was when going through this that I realised, for the first

time, the progress of events within the group. And it now seems as if the ranking of bids emerged for the first time, I think, at a meeting in Copenhagen sometime in very late September.

Q. I think the 28th?

A. It would have been between that time and the drafting of the first Evaluation Report, which is dated 3rd October, which would have been given to me some days later. I certainly knew before I got that document.

Q. You knew before you got the report?

A. Yes.

Q. And you are quite clear on that?

A. Yes.

Q. And I think, in fact, Mr. Brennan in his evidence said that there were three occasions when he might have been in a position to tell you this. Either, firstly, it would have been after the presentations, which I think finished on the 14th September; secondly, it might have been after he and Mr. Towey, Ms. Nic Lochlainn and Mr. Riordan went to Copenhagen on the 19th and 20th September to finalise some of the qualitative evaluation, or indeed, after the 28th September?

A. I think the degree of fairness with which he told me would suggest that it was not after the presentation, where I think, before all the bits of the jigsaw were put together, one could only have a rather general

impression that such and such a bidder had done well at the presentation and had put in good documentation. And I don't think, you know, one could reach firm conclusions on that basis to say that a particular one was likely to be the front runner, but that more work had to be done.

Q. But you do have a clear recollection that this was prior to receiving the first draft report?

A. Yes.

Q. You state then 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. 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. That situation did not arise.

A. That's correct.

Q. Now, you say at or at question 24 you were asked for the date or approximate date on which and the person by whom you were informed of the final result of the evaluation process. And you state that you

were informed by either Mr. Loughrey or Mr. Brennan on the 25th October, sometime after the result was conveyed to Mr. Loughrey and the Minister. It was prior to the press conference which you attended. And is that the position?

A. That is the position. To the best of my knowledge, I was out of the Department on that morning. Otherwise I am sure I would have been very much involved in what went on. The strategic alliance process for Telecom was in the preliminary stages at an advanced stage on that occasion, and I was almost full-time engaged in that, and I did frequently have to go to Telecom's offices in Stephen's Green; and that I think is probably where I was that morning, when Mr. Brennan, not finding me in the office, went straight to Mr. Loughrey, as I think was his right.

Q. Yes, of course. So, as you say, you weren't in the Department on the 25th, and the first you knew that a result was available was after political clearance had been obtained and before the press conference had been arranged?

A. I would think I came back around lunch time. At that stage the Minister had been briefed, and I think I have a recollection of sitting around in Mr. Loughrey's office, and with Mr. Brennan, I think, as well, discussing the outcome. At that stage I think the Minister would have gone off to the Cabinet

Subcommittee, and as far as I can recollect

Q. As far as you can recollect?

A. Yes, but at that stage that process that stage of the process had been completed. I had not been involved in it, and of course, that was it; the die was cast.

Q. At question 25, you were asked for details of your concerns regarding the financial capability of the Esat Digifone consortium, and in particular the financial capability of Communicorp; the identity of all persons with whom you discussed your concerns, and details of assurances given to you regarding your concerns, i.e. the provision of cross-guarantees.

And you have answered that once the possibility of the Esat Digifone bid becoming a possible winner emerged, you were concerned with their financial capability to implement the project should be clearly established before a recommendation was made. You state that your concern related to the Communicorp partner, which was also heavily involved in developing a wire-based service in competition with Telecom Eireann. This service was still unprofitable and was requiring ever-increasing amounts of capital, resulting in increasing investment by venture capital funds and a dilution of Mr. O'Brien's shareholding. Even though the award of a licence would result in a bankable project for establishing the mobile service, the



Telecom business could put a strain on Communicorp's ability to fund their large 50% stake. Mr. Brennan said the group had been aware of the financial weakness of Communicorp and also that of some participants in other bids. They had required all bidding group members to cross-guarantee all other bid partners. This ensured that Telenor's financial strength would, if necessary, ensure the Esat Digifone group financial viability. It would not necessarily stabilise the shareholding, but neither would any other financial underpinning.

You were satisfied at that stage that steps were taken, but you see also your reply to questions 26 and 28, which we'll come to.

And just by way of clarification in relation to your answer there, Mr. Fitzgerald, you state just in the first sentence of your answer that you were concerned that Esat Digifone's financial capability to implement the project would be clearly established before a recommendation was made. And was that the position, and was that the nub of your concern?

A. Well, that was the nub of my concern, that the evaluation group should look at this problem before reaching a final conclusion.

Q. And before a recommendation, I take it, was made by the Minister to the Government?

A. That was a separate matter. I think I wasn't part

of that process, as I have explained earlier. All I wanted to make sure is that this problem was examined by the evaluation group, and let them decide on what weight should be attached to it and how it might be addressed before they came and put a final recommendation on the table.

Q. I see.

A. Now, when they did do it, I think they didn't attach any qualification to their recommendation that the Esat Digifone bid was the best one and should be the one selected for entering into exclusive negotiations with, but there was a very strong rider that this problem remained and should be addressed in the course of licence negotiations.

Q. Yes.

A. And that was a conclusion that I think I was happy with. In relation to the Cabinet and the Government, looking back on it with hindsight, and perhaps, if I had been there, I might have insisted that this be highlighted in the submission to the Minister and the Government.

Q. But of course you weren't there?

A. I wasn't there at this stage, and then there was a memorandum to the Government which didn't highlight it either. I regret that very much, but this was done in terrible haste, I think. Everybody was short-circuited, and it's not surprising that things

got overlooked which were going to be looked at in the course of the licence negotiations. And provided it was fixed, then I think the licence would be awarded.

If it was not fixed, then we would have to review the situation as to whether we could proceed or not.

Q. As you said, there things were being done in considerable haste at the time

A. There was a good reason for that.

Q. Yes, but they were being done in considerable haste, weren't they? And I suppose, as you said yourself, it's not surprising that one or two things got overlooked?

A. Well, that's what happened.

Q. Of course the memorandum for Government went the next day was purely for the purposes of the full Government noting the decision that had already been subject to political clearance?

A. Yes.

Q. You say at question 26 the approximate date on which Mr. Fitzgerald was furnished with a copy of the draft Evaluation Report. And I think you have dealt with 26, 27 and 28 by way of a composite answer, so I'll continue on with the three questions.

Question 27, details of your view regarding the draft Evaluation Report, together with details of your understanding of the contents of the report, and in particular, the following:

A. The manner in which the issue of financial capability had been addressed, and in particular, the financial capability of Esat Digifone, Persona and Irish Mobicall.

B. The manner in which the other aspects of the consortia had been addressed, i.e. the indicators of credibility and sensitivities.

C. The qualifications expressed by Andersen Consulting regarding the ranking of the top three entrants.

Question 28. Details of all of your discussions, if any, with any member of the Project Group or any departmental official regarding the contents of the draft report.

And you state in answer to those three questions that you were furnished by the group chairman with a copy of the draft report dated 3rd October 1995 soon after it was delivered.

You read the report carefully and made marginal notes on it. You discussed aspects with the Chairman only and handed him back the report. Nobody else saw your copy of the report. Overall, you were satisfied that a good job was being done, and you saw no reason to challenge the emerging result. You looked closely at the chapter and annex on risks and financial sensitivity. While this was a significant issue, it was applied in roughly equal measure to the first and

second consortia. This left a situation where, if Number 1 was eliminated on risk grounds, it would be difficult to justify accepting Number 2, which carried a similar degree of risk. This would put Number 3 into play, even though their bid was judged inferior in most respects to either of the first- and second-ranked bids. You carefully scrutinised the report's conclusions against the reported features of each bid in meeting the predetermined competition criteria and weighting system to check for consistency and objectivity. You saw no reason to ask for any review of the draft conclusions and the running order of bids at that stage, but you did ask for an elaboration of reasons and clarification of language in a number of places to ensure that the group's final conclusions were fully justified.

The group's final conclusions and recommendation was unchanged. You have no hesitation in standing over the group's final result as fully consistent with the content of the bids and such elaborations as were made to the group by the bidders during the process.

You state that the conclusion in annex 10 that the financial weakness of both be addressed and rectified in the licence negotiations was correct. At a later stage, following a refinancing of Communicorp, you made an intervention with the Department of Enterprise and Employment to ensure before clearance under the

Mergers and Acquisitions Act, that the control of Communicorp remained unchanged. You had no discussion with any group member, but you would have kept Mr. Loughrey informed.

You would like to stress that during the period from his appointment as Minister to the announcement of the winner, to your knowledge, no attempt was made by Minister Lowry or any other politician or representative to influence the outcome of the process. In particular, no representations were made outside of the process by or on behalf of Esat Digifone group, even though there were continuous contacts between the Department and Esat Telecom on regulatory matters.

A. I believe that to be a correct summary of the situation.

Q. There is just one or two matters, Mr. Fitzgerald, that you might just address with me. You say there that you looked closely at the chapter and annexes on risks and financial sensitivity, and you state that they applied in roughly equal measure to the first- and the second-ranked consortia. Now, there is just one matter I wanted you to consider for a moment, is that I suppose in the case of Esat Digifone, Communicorp was the member of that consortium that had the financial frailty?

A. Yes.

Q. And under the terms of the application, and as far as the makeup of the proposed licensee was concerned, Communicorp was to hold 40% of the shares ultimately in the licensed company when they were issued?

A. On the basis that the placing of 20% had proceeded, yes.

Q. And it was Communicorp that was the member of that consortium with the financial frailty?

A. Sorry?

Q. It was Communicorp that had the financial frailty in the Esat Digifone consortium?

A. Yes, that is so.

Q. Then the second-ranked consortium was the Persona consortium?

A. Yes.

Q. And I think the member of that consortium with the financial frailty was Sigma?

A. Yes.

Q. And I think, as regards the in fact agreed shareholding for the Persona, because Persona had already incorporated the company that intended to be the licensed company and had in fact already concluded a Shareholders' Agreement, that Sigma was to hold 26%

A. Yes.

Q. of the shares. So it was to be one of roughly four equal shareholders.

A. Yes.

Q. And I think also, under the terms of a Shareholders' Agreement, that that Shareholders' Agreement already provided for underwriting by each of the other three shareholders?

A. If there was sufficient underpinning of the shareholding of Sigma, then I think that would be a possible solution.

Q. I suppose what I was going to suggest to you, and I don't know if you'll agree with me, that perhaps in those circumstances, where there was such a significant difference in the relative shareholding of the member with the financial frailty and where, in the case of Persona, there was an existing Shareholders' Agreement fully concluded providing for full underpinning and underwriting, that perhaps you couldn't state as equivocally as that that the financial frailty of the first- and second-ranked applicants was the same?

A. I was relying, I think, on the kind of language that was on the draft of the report of the 3rd October, which may not have been as explicit as you have put it.

Q. So of course

A. I would accept that the scale of the problem was different because the shareholdings were different, and I wasn't aware of the degree of underpinning that



might have existed in the Persona consortium. I would still maintain, I think, that if we rejected the first bid on the or if the group did, sorry, not "we" on the grounds of the frailty of Communicorp, that we would have to be make very full sure that the acceptance of the second group was very securely underpinned.

Q. Of course.

A. I think I don't make it any more than that at this stage. I wrote this in the state of knowledge that I had at the time.

Q. Of course, Mr. Fitzgerald. I am not suggesting otherwise. And you wouldn't have had that detail of information available to you at the time, or indeed when you were preparing your replies to this question?

A. No. That is so.

If I may add something else, I think the second paragraph, where I refer to the intervention with the Department of Enterprise and Employment, when I saw the letter of Mr. O'Connell from Fry's to Regina Finn

Q. This is the letter of the 17th April?

A. 17th April, yes. It jogged my memory, because I had seen a copy of that letter in connection with this particular matter and the diagram that was in the folder as well, and so that this intervention must have taken place sometime in April, because I think it

arose out of the restructuring of the Communicorp Group into Esat Holdings and Esat Telecommunications and so forth, which required clearance.

Q. And that required clearance under the Mergers, Monopolies and Takeovers Act.

A. My problem when the Department of Enterprise and Employment wrote to us asking us if we had any views on this proposal, and we wrote back certainly saying we had, that this was an important shareholder in the consortium that won the mobile licence award with a view to issuing them with a licence. My concern was whether the restructuring, and coupled with the fundraising exercise that was going on at the time, could lead to a situation where Mr. O'Brien lost control of the company. And I think I required a good deal of extra information, which was supplied. And I am surprised it hasn't turned up somewhere in these papers, but be that as it may, the outcome was, I was satisfied that that situation would not arise. And therefore we told the I wrote back to the Department saying we had no objection to the proposed restructuring.

Q. Because your concern was that Mr. O'Brien's share or shareholding in Esat Telecom Holdings, the restructured company, wouldn't be diluted by the proposed private placement or by the restructuring?

A. Could I add one other thing: As well as the shares in

the shareholding of Advent in the Communicorp, they also had a large tranche of convertible loan stock which they were entitled to convert into shares, and the only thing that maintained, I think, control for Mr. O'Brien was that he had shares that had three times the voting of Advent's shares.

Q. Three times the voting power of Advent?

A. Yeah. There was the possibility that Advent could subscribe to the new offer.

Q. This would be the private placement by CS First Boston, which I think went ahead at the end of July?

A. Yeah, which would strengthen their financial involvement in the company, leading to the possibility of control emerging. Now, if that had happened, I think it is quite clear then that the weighting of that company, of the Esat Digifone consortium, if it wasn't counterbalanced by an increase in Telenor's shareholding, could tilt it to becoming an investment-dominated company rather than a telecommunications company. And that was something we would be concerned with.

Q. So your concern always was to ensure that the Advent shareholding in Esat Telecom Holdings was kept at such a level, either by virtue of the shares they held or by virtue the voting power that attached to those shares, that Mr. O'Brien was in control of those?

A. I would be less concerned about Mr. O'Brien's

situation. Our real concern was that Esat Digifone was a company that was effectively controlled by communication companies, not by investment companies.

Q. Or venture capital

A. Whether that was Telenor or Communicorp, or any combination of the two, I think, would be acceptable, but not one in which they became a minority. And I think subsequently this was written into the

Q. In which Telenor became a minority or in which Telenor and Communicorp combined?

A. Well, between them.

Could I put it another way: I think it was important that Communicorp, who had a large input into the bid, should be a substantial shareholder in the company that got the licence, to ensure that their particular skills were at the disposal of the company to ensure that the, if you like, promises and other criteria in the bid were going to be implemented and put into practice.

Q. And I suppose equally it was essential that Telenor should remain there also because they were bringing the technical skill and expertise, and indeed their financial clout, to the company?

A. That was absolutely true. The whole bid was predicated on the basis that Telenor, the combination of Telenor and Communicorp, would be the driving force behind implementing the proposals in the bid. And I

think always we maintained the view that this was the essential criteria in moving forward to awarding a licence with we accepted there was going to be a degree of financial involvement, but that should not under any circumstances become a dominating or a controlling force in the consortium.

Q. Now, at question 29, Mr. Fitzgerald, you were asked for your knowledge, direct or indirect, of the matters discussed and raised at the project meeting on the 9th October 1995, and in particular, statements made regarding the Minister's state of knowledge regarding the outcome of the competition and statements made regarding the Minister's views of the draft Evaluation Report and/or the approach which should be adopted in drafting the report, and the source of such knowledge, if any.

And you have stated in answer that you had no involvement in any of these issues. And again this was during the closed period, and you didn't receive copies of the GSM Project Group reports, but I just want to ask you there, Mr. Fitzgerald, would Mr. Brennan not have kept you informed of this or have indicated to you how matters had progressed at the meeting of the 9th October?

A. I don't believe he did. I don't think at any stage that Mr. Brennan conveyed to me that he was under any pressure from the Minister, and I certainly wasn't

aware that the Minister was exerting any pressure.

Q. I see.

At question 30, you were asked for your knowledge, direct or indirect, of the following requests made by certain members of the Project Group in the course of the meeting of the Project Group on the 9th October 1995, or prior or subsequent to the meeting.

A. That further time was required to consider the result;

B. That it was necessary to revisit the qualitative evaluation;

C. That consideration should be given to the appropriateness of awarding the licence to Esat Digifone, having regard to the Department's experience of Esat Telecom.

And again you have stated that you had no involvement in any of these issues, I take it that you can confirm that Mr. Brennan never indicated to you that these issues had arisen or briefed you in any way what transpired at the meeting of the 9th October.

A. No, he didn't.

Q. Question 31, you were asked for your knowledge, direct or indirect, of your involvement or the involvement of any other person in the decision made to accelerate the date on which the result of the evaluation was announced by the Minister.

And again you have answered that you had no

involvement in any of these issues.

A. I hadn't, and I don't believe that there was any decision to accelerate the announcement until the morning of the date on which the result became available.

Q. Until the morning of the 25th?

A. Yeah.

Q. And if there was, you had no knowledge of it?

A. I wasn't present at the stage where it was decided to proceed as soon as possible.

Q. Now, at question 32, you were asked to confirm that eight copies of the final draft report, dated 18th October, were received by the Department and were designated for Mr. Michael Lowry, Mr. John Loughrey, Mr. Sean Fitzgerald, Mr. Colin McCrea, Mr. Martin Brennan, Mr. Sean McMahon, Mr. John McQuaid, and Mr. Jimmy McMeel. And you say that you do not recollect personally receiving a copy of the final draft report.

A. That is correct.

Q. Can you recall when you would have received a copy of the final version of the report, which in fact is probably the correct way to refer to it?

A. I don't think it was a draft at this stage. It was a final report, of course.

Q. It would be a final version that we are talking about?

A. I am full sure that a copy was addressed to me, so I believe. I don't know whether it was delivered to me

or not. I don't remember receiving it, because quite frankly, at that stage

Q. You had far more on your plate?

A. It was history, and things had moved on, and the results had been announced, and that was it. So I had a pretty good idea what was in it so from the earlier draft.

Q. Yes, of course; so you don't recall at any stage sitting down and reading the final version of the report?

A. No.

Q. You wouldn't need to, because you looked at the draft. You knew it was gone on; as you said, it was history, and I think you were very much tied up in the strategic partner negotiations for Telecom Eireann?

A. Yes. And I don't think there was any major difference of substance between the first and the final draft, when I look at the two documents now. I didn't look at them completely, but I did dip into them here and there, just to make sure.

Q. Now, questions 33 and 34, again, you reply to in a composite response. At question 33, you were asked to provide details of the knowledge, direct or indirect, of departmental officials of all consideration given by the Project Group or by any member of the Project Group or by any other person, whether in conjunction with Andersen Management or otherwise, to the



qualification placed by Andersen on the financial capability of Esat Digifone and Persona as set out in the Evaluation Report and appendices and in particular, page 44 of the report and Appendices 9 and 10.

And question 23, you were asked for details of the knowledge, direct or indirect, of officials of any discussions with Andersen Consulting concerning further inquiries or investigations or other actions which would have been required to enable Andersen to provide a report with it should read "without" any qualification or rider regarding the financial capability of either Esat Digifone or of Persona.

And you state to see your answers to questions 21 to 23. And you state further that at one stage you asked about the group's inquiries into the financial capability 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.

And I think you have already dealt with that; you have already raised it earlier in your memorandum?

A. I believe I have.

I think there is a slight misprint in question 34 which I refer to.

Q. I think there was a slight misprint. It doesn't make any sense when you read it with the word "with" rather

than the word "without".

A. Also, I would just like to add, I think I have said so already, I didn't believe the final report or the draft report had any qualifications about the outcome of the evaluation process. They had this, if you like, risk analysis that turned on a red light that certain things had to be put right in the licence negotiations.

Q. And they were concerns that you shared in relation to financial capability?

A. Yes.

Q. Question 35, you were asked for your knowledge, direct or indirect, of or your involvement or the involvement of any other person in any approach made or request made by Mr. Sean McMahon, Mr. Martin Brennan, Mr. John McQuaid, or any other member of the Project Group to Mr. John Loughrey on or about the 23rd October 1995 for a further time in which to consider the draft Evaluation Report.

And you state that you had no involvement in any of these issues?

A. That was my state of knowledge at the time I wrote this. I still can't remember that I had any involvement in such a discussion, but I don't think it is that important, in the sense that I would have no problem with giving an extra week to consider any matter that they thought was necessary.

What does puzzle me is that if such an agreement or an extra week was given, that it wasn't in effect used, because the matter was wound up within a day or two.

Q. It is puzzling, in fact, because clearly there was a delegation from the Project Group to Mr. Loughrey on the 23rd October, and in fact that's noted by Mr. Sean McMahon in his own personal notebook, that he and Mr. John McQuaid and Mr. Martin Brennan went to Mr. Loughrey that day to look for extra time, and that they got it, and that Mr. Loughrey made it quite clear to them that extra time would be available. And I suppose it is puzzling that that time wasn't put well, wasn't taken up and wasn't utilised by the Project Group?

A. I have no recollection that I was present at this or knew about it. Now, that may seem strange. I don't want to be in a position where I am appearing to contradict my colleagues, and I fully accept if they say such a meeting took place, and if they say I was present, I accept that.

Q. I don't think they do say you were present there in fairness to you

A. I think Mr. McMahon, I think, did.

Q. Well, I think

A. He can speak for himself.

Q. I think his note doesn't record you as being there, in fairness to you. I think there is a subsequent

chronology that was prepared by Mr. O'Callaghan of the Regulatory Division in which I think he may have thought that you were at the meeting with Mr. Loughrey, but Mr. McMahon's note I think was a contemporaneous note that he was making at the time, and I don't think his note itself records you as having been there.

A. Okay. In regard to Mr. O'Callaghan's notes, I think he also stated that I was present at the time the result was announced or conveyed to the Minister, which is not correct.

Q. You were at the press conference, but no more?

A. I don't know that he would have any direct way of knowing whether I was or not.

Q. But you have, as far as you are concerned, based on your recollection of events, you weren't at the meeting of the 23rd or part of the delegation, or you don't remember it?

A. I have no recollection of being at the meeting, but I am quite satisfied that had I been there, the result would have been the same. They would have got a week's extension. I think it would be unreasonable to deny them that, because the whole process was well ahead of schedule and there was time to consider any issues that were outstanding.

Q. And you would have been anxious, I take it, for the evaluation group to have all the time they needed to

resolve any issues?

A. Of course. But I think I have been in many situations where, you know, a few hours before something happening, there wasn't a possibility of it happening; and then all of a sudden things fall into place quite readily at the end of negotiations, and agreement is reached or a consensus is reached which might not have appeared possible quite some time before that.

Q. Yes, of course. I can understand that.

At question 36 you were asked for details of your knowledge concerning any amendments to the first draft report of the 3rd October and the second draft report of the 18th October, and including their knowledge, direct or indirect, of the contents of the document entitled "Suggested Textual Amendments", which appears to have been faxed by Mr. Towey to Andersens on the 25th October and faxed back by Andersens to the Department at 2.07pm on the 25th October with his annotated comments.

And you say you had no knowledge of these matters?

A. That is correct.

Q. Question 37, you were asked to provide a full narrative account of any information, direct or indirect, which officials may have had concerning what prompted Mr. Billy Riordan to record his concerns regarding the ownership of the report on both page 6

of the final draft version of October 18th, 1995, and  
in his various handwritten notes.

And again you say that you had no knowledge of those  
matters?

A. That's correct.

Q. Question 38, you were asked to provide details of all  
inquiries which the knowledge, direct or indirect, of  
officials were conducted, either by those officials or  
by any other person, regarding the conclusion in the  
document suggested textual amendments as follows,  
having regard to the level of interest in the Irish  
competition for the GSM licence and the high  
profitability of mobile communications generally  
throughout Europe where the project was fundamentally  
robust, and after a licence has been awarded, an  
attractive opportunity for corporate debt financiers,  
together with a price results of such inquiries, if  
any.

And you state that you had no knowledge of these  
matters.

Question 39, you were asked for your knowledge, direct  
or indirect, of or the involvement or the involvement  
of any other person in any approach made by Mr.

Loughrey to the Minister seeking a postponement of the  
announcement of the result of the evaluation.

And you answer that you had no involvement in any of  
these issues?

A. That is correct. And I am not aware even now that Mr.

Loughrey made any such approach to the Minister.

Q. I don't think it's clear whether he did or didn't.

Question 40, you were asked for your knowledge, direct

or indirect, of or your involvement or the involvement

of any other person in the decision made by the

Minister on or about the 24th or 25th October that the

result of process would be announced on the 25th

October 1995.

You state that you had no involvement in any of these

issues?

A. I think I have explained the circumstances earlier.

Q. Yes.

Question 41, you were asked for your knowledge, direct

or indirect, of or your involvement or the involvement

of any other person in the discussions between Mr.

Brennan and Mr. Loughrey on the 25th October whereby

Mr. Brennan conveyed to Mr. Loughrey the result of the

evaluation process.

And you have already dealt with that in the course of

your evidence, and indeed in your memorandum.

Question 42 was your knowledge, direct or indirect, of

or your involvement or the involvement of any other

person in discussions between Mr. Loughrey and the

Minister on the 24 and 25th October whereby Mr.

Loughrey informed the Minister of the result of the

evaluation process.

And you have already indicated that you were out of the Department on that date?

A. That is so.

Q. Then you were asked for your role, if any, or your knowledge, direct or indirect, of the role of any other person in the preparation of following documents:

A. The recommendation by Mr. Loughrey to the Minister dated 25th October 1995.

B. The briefing note to the Minister regarding the outcome of the evaluation process.

And you state that you had no involvement in any of these issues.

A. That is correct. I would, just in full honesty, have to say that when I did see the briefing note to the Minister, some of the terms and the way it was written would suggest it might have been based on a script that I could have put together at some earlier stage in the process, but not in the form in which it was at this stage.

Q. I see.

A. It may have been at the time I got the Evaluation Report and was trying to satisfy myself as to why the Esat Digifone bid was better than the Persona one; I think that's as far as it goes. It was not in a format which should have been used to brief the Minister, because it only dealt with two of the



applicants.

Q. We understand, in fact, that that note may have been prepared by Ms. Nic Lochlainn.

A. If that is the case, I am the only thing that strikes me is that some of the way things are put is the way I might have done it, that she may have had some bits of paper I handed back to Mr. Brennan when I gave him back the Evaluation Report.

Q. Right. But you don't I mean, you don't recall preparing that particular briefing note yourself?

A. No, no.

Q. But there are certain elements of it that ring true to you or appear familiar to you?

A. Yes.

Q. Do you have any knowledge as to whether that briefing note was made available to the Minister?

A. I don't know.

Q. You don't know?

A. I don't know. Because I don't know what was given to the Minister on the date in question, because I wasn't there.

Q. Of course. And you weren't there before the Minister went to meet his Cabinet colleagues?

A. No.

Q. And the third document you were asked about was the memorandum to Government dated 26th October 1995, and you state that you saw and cleared the draft

memorandum for Government prior to submission to the Minister, but you do not remember any input into it.

A. That is so. As I recollect it, it was as I said earlier, the period of time to draft and circulate this memorandum was extremely short, and in order to get it out to the Government Secretary so that other Ministers could have copies of it, we had to more or less leave it there was no time, really, to go through it in any detail or make any substantial changes in it. I do regret that it didn't contain the health warning, if you like, in relation to the financing problems of Communicorp.

Q. Now, at question 45, you were asked to indicate whether the Department had in its possession a copy of it should have read the final version Evaluation Report as of the 25th October 1995, when the Minister met with members of the Cabinet and following such meeting announced result of the evaluation process, if the Department did not have a copy of the final Evaluation Report in its possession at that time, please indicate precisely what document or documents were in the possession of the Department. You say that you did not have a copy of the final Evaluation Report, nor are you able to say what documentation was in the Department at that time or in the possession of the Minister. You had no contact with the Minister on that occasion until the press

conference in the afternoon, which took place after Ministers had approved the winner. And I think you have already dealt with that fairly fully, Mr. Fitzgerald.

A. Yes.

Q. Question 46, you were asked for your understanding of the composition of the Esat Digifone consortium which won the evaluation process and the respective shareholdings of the participants.

And your answer is that at the time of the announcement of the winner of the evaluation process, your understanding was that the shareholding was as stated in bid; i.e., 50:50 between Telenor and Communicorp, with the proviso that on winning, 20% would be placed with the possibility of public flotation later. You had no knowledge that IIU was a shareholder at that stage?

A. No, I hadn't.

Q. Question 47, you were asked for your knowledge, direct or indirect, of or understanding of the role of the Cabinet or the Cabinet Subcommittee in the ultimate decision as to the outcome of the evaluation process. And you stated "Please see answer to question 9". I think that's where you were initially asked as to what your understanding was as to the Cabinet and the Cabinet Subcommittee and we dealt with it yesterday.

A. I remember that.

Q. You then went on to state that legally the power of decision was the Minister's. He would feel compelled politically to bring it before his colleagues prior to publication. In view of the highly sensitive nature of this decision, the Minister felt it wise to bring it as soon as possible for clearance. It would be difficult to keep the lid on this information for long. A meeting of the Cabinet Subcommittee attended by all three party leaders convened for other reasons provided an opportunity to secure clearance for immediate publication. This was granted. The submission to Cabinet the following day was to formally record the decision and bind the Government as a whole.

Just one or two matters arising out of that, Mr.

Fitzgerald, that I want to clarify with you.

You state that legally the power of the decision was the Minister's; that he would feel compelled politically to bring it before his colleagues prior to publication. Would I not be right in thinking that on the basis of the Government decision of the 2nd March, that the power of decision was in fact that of the Government rather than the Minister, but subject to the Minister's recommendation?

A. Yes. But that was a political decision, not a legal one.

Q. Yes, of course, but a political decision

A. He of course was bound by that, as a member of the Government.

Q. A political decision made on the 2nd March?

A. Yes.

Q. You then state that in view of the highly sensitive nature of his decision, the Minister felt it wise to bring it as soon as possible for clearance. It would be difficult to keep the lid on this information for long.

And I think, on the basis of what you have stated in evidence here this morning, that it would appear that you had no input into that decision?

A. That's correct.

Q. Now, at question 48, you were asked for details of all information provided by you to the Minister regarding the evaluation process during the course of the process, together with details of all communications by you to the Minister and all communications by the Minister to you during the course of the process.

And you state that following the formal start of the bid and evaluation process, to the best of your knowledge, you had no communication with or from the Minister on this subject.

A. I think that is correct.

Q. And that would have been from the 4th August, which was the postponed closing date, to the 25th October?

A. Yes.

Q. When the press conference was arranged?

A. Yes.

Q. Paragraph 49, you were asked for your knowledge, direct or indirect, of all dealings, meetings or communications between the Minister and any member of any consortium or any person associated with any member of any consortium during the course of the evaluation process.

And you have answered that you have no direct involvement or knowledge of any such meetings. You did hear some story that a meeting with one consortium had taken place.

A. I can't add any more to that, yeah. There is a certain amount of gossip or stories circulate, and usually I don't pay any attention to them.

Q. Tell me, did the gossip relate to a meeting within the Department in the form of a courtesy call of that nature, or did the gossip relate to a meeting otherwise within the Department?

A. I don't recall the exact nature of it. I had assumed it was a meeting within the Department, but I can't be certain. I don't know there must be a record of such meetings, if they did take place, within the Department. I know now there were certain meetings outside of the Department that we had no knowledge whatsoever of.

Q. Questions 50 to 55, again, you have dealt with

together, so I'll read the questions all together

first.

Question 50: The date on which and circumstances in which Mr. Fitzgerald first became aware of the involvement of IIU Limited or Mr. Dermot Desmond in the Esat Digifone consortium, Mr. Fitzgerald's understanding as to the precise nature of the involvement of IIU at that time, and the source of such knowledge and understanding.

Question 51: Mr. Fitzgerald's knowledge, direct or indirect, of a letter dated 29th September 1995 from Mr. Michael Walsh of IIU to Mr. Martin Brennan.

Question 52: Mr. Fitzgerald's knowledge, direct or indirect, of or his involvement or the involvement of any other person in the decision made to return the letter of the 29th September 1995 to Mr. Denis O'Brien of the 2nd October 1995 without retaining a copy of the letter on the departmental file.

Question 53: Whether Mr. Fitzgerald had any knowledge, direct or indirect, regarding any involvement or interest or any potential involvement or potential interest of IIU Limited or Mr. Dermot Desmond in the Esat Digifone consortium as of the 25th October 1995.

And question 54: Mr. Fitzgerald's knowledge, direct or indirect, of any dealings between Communicorp, Esat Telecom, Telenor and IIU Limited, Mr. Dermot Desmond,

regarding their respective liabilities to subscribe

for the capital of Esat Digifone Limited.

And finally question 55: The date on which and circumstances in which Mr. Fitzgerald first became aware that the 20% shareholding in Esat Digifone Limited held by IIU was to be held beneficially for Mr. Dermot Desmond.

And you answer as follows: "Please refer to answer number 46". That's where you have already stated that you had no knowledge of any IIU involvement as of the date of the announcement of the result.

You go on to state that any knowledge of these matters would have been given to you by Mr. Brennan or Mr. Loughrey and occurred sometime after the award announcement. You were first told that IIU were nominated to make the 20% placing, and later that it had taken up the equity on its own behalf. You are not aware when you are not aware then that IIU was beneficially owned personally by Mr. Desmond. When you did learn this, you did not regard it as a problem, as you could see no grounds for rejecting the award solely on that basis. The increase to 25% shareholding was a different matter and was put right.

You had no knowledge of the letter of the 29th September 1995 from Mr. Walsh or of its return. You had no knowledge of Mr. Desmond's or IIU's involvement in Esat Digifone as of the 25th October, or of any



internal dealings at any time within the company.

A. That is correct.

Q. Can I just clarify one or two things there, Mr.

Fitzgerald, because you have answered I think six

questions all in one answer.

You had already stated that you had no knowledge of

the IIU involvement as of the 25th October. Now, you

state in this answer that any knowledge of these

matters came to you from Mr. Brennan or Mr. Loughrey,

and they occurred sometime after the award

announcement, and that you were first told that IIU

was nominated to make the 20% placement which had been

provided for in the bid; and can you place in time at

all, or can you assist the Tribunal as to when you

might have been given that information?

A. All I can say is that as far as I can recollect, it

occurred some considerable time before we became aware

that IIU had taken up a shareholding in Esat Digifone.

Now, it is clear from previous hearings that there was

press reports sometime back in I don't know,

February, I think. It might have been at that time I

picked it up.

Q. In fact I think the press report that dealt with the

involvement of IIU as a placer of shares, I think that

dated back to the 18th November of 1995.

A. Was it? Okay. I stand corrected on that.

Q. I think

A. I didn't attach any great significance to that, as to who was given the job of placing the shares. It was not a critical matter, I thought, in the process.

Q. But your recollection is that you knew that some considerable time before you knew that IIU/Mr. Desmond was going to take up 25% of the shareholding directly?

A. Yes, that is my firm, I think, recollection.

Q. You say that you could see no grounds for rejecting the award solely on the basis that Mr. Desmond was going to take the shareholding, but you state that the increase to 20% shareholding was a different matter and that that was put right.

A. Yes.

Q. And I think we have heard Mr. Loughrey say very firmly that the Department, and Mr. Loughrey in particular, was not prepared to tolerate that, and that the shareholding had to be aligned back to the shareholding as set out or as proposed in the bid documents?

A. I think we would have been concerned with a dilution of the shareholding of the operating companies. There were other aspects to it as well, I suppose, that we wanted to signal very clearly to the consortium that changes in shareholdings were not to be undertaken without letting us know what was afoot, and not be presented with a fait accompli. I would fully subscribe to the view that was taken by Mr. Loughrey,

and as I think representing the views of everybody concerned in this particular process.

Q. I think Mr. Loughrey made it quite clear that the Department was determined that that shareholding would go back to 40:40:20.

A. Yes.

Q. Question 56, you were asked for your knowledge, direct or indirect, of or your involvement or the involvement of any other person in all steps taken by the Department, whether alone or in conjunction with the Department of Finance, to satisfy itself as to the financial capability of Esat Digifone Limited prior to the issue of the licence.

And you answer

CHAIRMAN: Ms. O'Brien, could I raise one short matter to interrupt you just before you move onto the licence negotiation phase.

I just wanted to inquire briefly with you, Mr. Fitzgerald, about your understanding of the line management system in the Department, in particular in the critical final days of 1995. I think Mr. Loughrey stated in the course of his evidence that he ran something of an open-door policy and was accessible to all Department staff, but obviously there must have still been a somewhat hierarchial system in a huge civil service department. And to give an extreme example, you wouldn't have contemplated a clerical

officer approaching the Minister, a junior Minister?

A. I think unless there was a personal reason for doing so.

CHAIRMAN: Of course. Now, on the occasion of the last day or so prior to the announcement of the result, the situation was you were the person who had effectively appointed Mr. Brennan as Chairman of the Project Group.

A. Yes.

CHAIRMAN: And so am I right in thinking that the norm would have been, all things being equal, that as regards such communications as announcing the result in the first instance, or of seeking an extra week, insofar as that was applicable, the normal thing would have been that Mr. Brennan or someone else from the Project Group would have gone to you in the first instance?

A. I would have been very open to any approach in relation to extra time, and I think that should have been the normal process.

CHAIRMAN: But I think you've also indicated you were enormously preoccupied with the strategic alliance aspect during this particular phase and may not have been available on the day; and accordingly, I think you stated that it was understandable that Mr. Brennan, accordingly, went to Mr. Loughrey since you weren't there.

A. I would, Mr. Chairman, I think make it clear, if you like, the line of command was certainly Mr. Loughrey, myself and then Mr. Brennan, Mr. McMahon, Mr. McQuaid.

I did have another division also dealing with the Telecom alliance specifically which I have not brought into these proceedings. But I think I operated an open-door policy insofar as if I am there, I expect to be told and involved. If I am not, the persons reporting to me were quite free to go the next step up the ladder and deal with the matter, and I accepted whatever came out of that process. I always made a point of not revisiting any decision that was taken while I wasn't there, whether it was on leave, whether I was on other business or abroad or away or whatever, which happened frequently. Otherwise I think the system would just get jammed up.

CHAIRMAN: Yes, if you were rigid about it.

Ms. O'Brien.

Q. MS. O'BRIEN: Question 56, Mr. Fitzgerald. You answered that there was no problem with the financial capability of Esat Digifone by the time the licence was issued. Communicorp had been restructured, and sufficient borrowings were in place.

A. I would add to that that there were also guarantees and underwriting in place by Telenor and IIU as regards the then Esat Holdings investment.

Q. And it was really the underpinning by way of the

underwriting that was in place that gave it financial solidity as of that date; isn't that right?

A. Yes, and I think we probably had arrived at a belt-and-braces situation by then in terms of underpinning the consortium.

Q. It was underpinned by the underwriting that was put in place?

A. Yes.

Q. But I think, in terms of the borrowings, it would appear that there was certainly borrowings in place in terms of the debt financing which was going to cover 60% of the roll-out costs, but I don't think that there was any borrowing in place to fund Esat Telecom's equity participation in Esat Digifone. I think that was going to be dependent on the CS First Boston bond placement?

A. To underpin the equity, no. I think, yes the CS Boston was the source, I presume, of Esat Holdings equity participation in the consortium, and until that was in place, which was subject to the licence being issued and the fundraising activities having been successfully concluded, which, as far as I remember, was sometime afterwards.

Q. I think it was the end of July that the bond issue was made.

A. Okay, but in the meantime, Telenor and IIU had to carry the potential responsibility of Esat Holdings.

Q. Yes. And that was, if you like

A. It also depended, I think, on the amount of capital that had to be called up. At that stage, I think it was sufficient to fund the licence fee and possibly

Q. I think at that stage it was sufficient well, we know at this stage, Mr. Fitzgerald, but you wouldn't have known at that stage, and you probably wouldn't have known until the Tribunal started investigating the matter and furnishing documents, that in fact Esat Telecom had not been able to contribute its capital call to fund the licence.

A. I believe now that that was the case, but I was not aware at the time.

Q. No, you couldn't have been aware of it.

Now, at question 57 you were asked for details of all dealings and discussions which you had with the Minister, with Mr. Brennan, with Mr. Loughrey or any other person arising from the involvement of Mr. Dermot Desmond in Esat Digifone, and you have said that you have given all the information at your disposal in answering all previous questions?

A. I believe I have.

Q. Question 59, you were asked whether and to what extent consideration was given to the change in composition of the Esat Digifone consortium to which the licence was issued from the Esat Digifone consortium which won the evaluation process, and if so, the outcome of such

consideration.

And you have answered that the shareholding in Esat Digifone at licence issue was consistent with the proposals in their bid?

A. I believe that to be the case.

Q. And that's on the basis, presumably, that the shareholding had been realigned to 40:40:20?

A. Yes, yes.

Q. Paragraph 60, you were asked the knowledge of officials, direct or indirect, of the date on which and the manner in which the Minister or the Department was informed by Mr. O'Brien, Communicorp, Esat Telecom and Esat Digifone or any other person on their behalf that Communicorp/Esat Telecom did not intend to fund its equity participation in Esat Digifone by drawing on finance to be provided by Advent International but intended to fund its participation by placements through CS First Boston, including details of the precise information provided to the Minister or to the Department, and kindly identify where such information was recorded.

And you state that you had no knowledge of this matter. However, it would not surprise you that a change of funding source was contemplated by Mr. O'Brien, as he was finding it difficult to maintain control of Communicorp in the light of the amount of Advent finance already in place in that company and



the shareholding arising from that.

And you have referred also to your replies to questions 26, 27 and 28 in relation to matters raised by the Department of Enterprise and Employment.

A. Yes. I believe, I suppose, that there was a certain amount of speculation in this reply which does not necessarily accord with the facts as they turned out.

Q. Well, I think we probably know, from information that you have provided at a later stage in your memorandum, that you may have been aware of that sometime in late 1995 or early 1996, but I don't think an awful lot turns on it.

A. Okay.

Q. At question 61 you were asked the knowledge of officials, direct or indirect, of a meeting which took place at the Department on the 3rd May 1996 attended by Mr. Knut Digerud, Mr. Arve Johansen, Mr. Peter O'Donoghue, Mr. Michael Walsh, Mr. Paul Connolly and Mr. Owen O'Connell and including the following:

1. Identity of all officials who attended the meeting.
2. The purpose for which the meeting was held.
3. The matters discussed.
4. The queries or issues raised by the Department.
5. The requirements of the Department.
6. The requests made by the Department to Telenor to underwrite the entire of the equity and operational

expenses of Esat Digifone and the reason or reasons for such request.

And in each instance please also indicate the source or sources of the officials knowledge of such a meeting.

And you state that you were not present at the meeting.

A. That's correct.

Q. I presume, or I should say, did you know that that meeting was taking place on that day?

A. I can't recollect that I did. Perhaps, if there is an absence of my involvement in the whole process dealing with the licensing, it is due entirely to my preoccupation with the Telecom alliance project, which was, I think, the highest priority at that stage.

Q. Yes. And I think, in fairness, at that stage, I think Mr. Loughrey accepts that he very much took up the reins of overall control as and from about the middle of April?

A. Yes. Well, a lot of the issues involved were financial ones in which his degree of knowledge and skill would have been a great deal more than mine.

Q. And I think, in fact, in fairness to you, it's completely borne out by copies of certain management committee meeting minutes that the Tribunal has been furnished with in the recent past relating to this period where it's quite clear that the strategic

alliance matter was something with which you were fully involved?

A. Yes.

Q. You state at question or question 62, you were asked for the knowledge of officials, direct or indirect, of the request/requirement of the Minister or the Department that the configuration of the issued share capital of Esat Digifone should be restored to the capital configuration of the consortium which had applied for the licence, i.e. restored to 40:40:20, and in particular:

1. All matters or considerations which prompted or contributed to such request or requirement.
2. The identity of all officials who had an input or involvement in the decision to make such request/requirement.
3. The input of the Minister in the decision to make such request/requirement.

You answered that at a late stage during the licence negotiations you were informed, presumably by Mr. Brennan, that the share of IIU was to be increased to 25% and the existing shareholdings reduced below 40% each. You do not remember being aware that a 25% shareholding was already in place. After discussion, it was agreed that the bid ratios of 40:40:20 should be adhered to so as to maintain conformity with the bid terms and to keep a maximum commitment by active

telecom operators. You did not discuss the matters with the Minister and the intention was to insist on conformity with bid proposals and would not represent a change requiring approval.

A. Well, if I could add to that, I think Mr. Loughrey dealt with the Minister, as was his normal thing, insofar as the matter was raised with the Minister. I would think that there were discussions between some discussions between Mr. Loughrey and myself in relation to this. There was between Mr. Brennan and myself, and I think we were all of the one mind, that this had to be changed.

Q. I see. And I suppose that would have arisen out of the letter of the 17th April of 1996 from Mr. Owen O'Connell, which you have already referred to, and which I think you then took up

A. That would have been the source of the information. And I think we had no information before that that the shareholding had been changed from 20% to 25.

Q. Well, certainly that was the first occasion on which it appears that the Department was formally notified that it had been changed from 40:40:20 to 37.5:37.5:25.

At question 63, you were asked the knowledge of officials, direct or indirect, of a meeting which took place in the Department on the 13th May 1996 attended by Mr. Knut Digerud, Mr. Owen O'Connell and including

in particular their knowledge of the following:

1. The identity of the officials who attended such meeting.
2. The purpose for which the meeting was held.
3. The matters under discussion.
4. The requests made by the Department that Esat Digifone identify key questions likely to be raised at the press conference to announce the issue of the licence, to draft answers to such questions, and to explain to the Department the reasons for such answers.
5. The request made by the Department that a meeting be arranged between the Minister and Mr. Digerud, together with one or two others, at which the press conference would be discussed/rehearsed. In each instance, please identify the source or sources of the official's knowledge.

In fact you have dealt with that and the two subsequent questions together, so I just go on and deal with the questions first.

Question 64, the knowledge of the officials, direct or indirect, of all steps taken by Esat Digifone or by any other person associated with Esat Digifone or by the Department on foot of a request the key questions be identified and draft answers prepared including

1. The questions identified.
2. The answers prepared.

3. The reasons for such answers.

4. The identity of all persons including departmental officials who had any input into the identification of questions and the preparation of draft answers.

And question 65: The knowledge of the officials, direct or indirect, of all meetings, discussion, or contacts of whatsoever nature between Esat Digifone or any person on its behalf and the Minister or the Department in connection with the key questions identified, the draft answers prepared, and the reasons for such answers or otherwise in connection with the announcement of the issue of the second GSM licence to Esat Digifone, and including meetings between Esat Digifone and the Department or the Minister on the 14th May, 15th May and 16th May 1996, and recorded in attendances of Mr. Owen O'Connell, solicitor for Esat Digifone.

And you answer that you did not attend the meetings in question. You were aware of the impending press conference and would probably have required staff to make careful advance preparation. It would be prudent and normal to ensure coordination with other parties of the planned joint press conference, to establish clear lines of responsibility and possible answers to anticipated controversial questions. This would have been done irrespective of which group won the competition.

A. Yes, that's correct.

Q. And of course, as you say, you were taken up very much with other matters at the time, so that you didn't attend those meetings?

A. I didn't attend any of those meetings. As far as I remember I did attend the press conference when it took place.

Q. The final press conference, on the 16th May?

A. Yes.

Q. Question 66, question 67 and question 68 you also dealt with by way of a single answer, so I'll deal with the question first, Mr. Fitzgerald.

Question 66:

1. The understanding of the officials of the terms on which IIU and Telenor provided funding to Esat Telecom to finance its obligation to contribute to the licence fee of  $\text{€}15$  million paid by Esat Digifone to the Department on the issue of the GSM licence to Esat Digifone, together with the source or sources of their understanding.

2. The understanding of the officials regarding the funding arrangements between IIU, Esat Telecom and Telenor for all aspects of the funding of Esat Digifone Limited, including the source or sources of their understanding.

Question 67: Kindly identify the following:

1. All documents furnished to the Department in

connection with the rights and obligations of the shareholders of Esat Digifone inter se, in advance of the issue of the licence to Esat Digifone on the 16th May 1996.

2. All documents furnished to the Department in connection with the project financing of Esat Digifone in advance of the issue of the licence on the 16th May 1996.

Question 68: The knowledge of the officials, direct or indirect, of the following:

1. All side letters entered into between the members of the consortia or any two or more of them in advance of the issue of the licence on the 16th May 1996.

2. All side letters entered into between Esat Digifone Limited or any shareholder of Esat Digifone Limited with the financial institutions which provided project funding to the company in advance of the issue of the licence on the 16th May 1996.

In each instance please identify the source of the official's knowledge.

And you have answered those three questions as follows:

You say that you have no knowledge of the internal funding arrangements between the shareholders of Esat Digifone other than that there were mutual cross-guarantees in place to ensure that the project would be implemented and completed in accordance with



the licence conditions in the event that any shareholder was unable to meet its due obligations at any stage. You were not aware of what the Project Team knew of Esat Digifone's internal financing arrangements. But in any event, it was not brought to your attention as a problem. In that situation, it was not relevant as to who funded the licence fee at the time of the payment as long as the fee was paid at the time the licence was issued, which was the case. Once that was done, and the licence issued, you assume the prearranged financing facilities became operational and would enable the parties between themselves to regularise any divergence from the agreed financial participation.

A. I believe that to be correct. As I have stated, I had no involvement

Q. You had no involvement.

A. in all the negotiations that preceded the awarding of the licence.

Q. And I take it also in the analysis undertaken into the financial capability and financial strength of the consortium and

A. Sorry.

Q. And also in relation to the financial analysis which was undertaken at Mr. Loughrey's direction by Mr. Buggy regarding the financial capability of IIU or Mr. Dermot Desmond to meet their equity participation and

also their underwriting obligations?

A. I may have been aware that such an analysis was carried out. I was not aware of the details. I would have been very reassured that Mr. Loughrey and Mr. Buggy, between them, would have done all the necessary spadework in relation to ensuring that the financial end of the business was in order.

Q. Of course, that's entirely understandable, that you would rely on their financial skills.

A. Yes.

Q. And their judgement.

Question 69, the knowledge of the officials, direct or indirect, of meeting between the Ministers and/or the Department and the financial institutions who provided project financing to Esat Digifone at any time prior to the issue of the licence.

And you have answered that you had no knowledge of any meeting between the Minister and any financial institution providing project finance to Esat Digifone. You were not involved in any departmental meetings, if any, that may have occurred.

A. That's correct.

Q. Question 70, you were asked whether, to your knowledge, direct or indirect, the consent of the Department of Finance was obtained to the issue of the licence, and if so, when, how and from whom such consent was obtained.

And you have answered that the Department of Finance were involved in all stages of the process. You cannot say at this stage whether a formal consent was necessary and how it was obtained. The Department of Finance accepted the licence fee of  $\text{€}15$  million and the corresponding fee of  $\text{€}10$  million from Telecom Eireann, so you assume that they were happy?

A. I would simply add to that, I think, that this was the practical situation, that in fact I now believe that there wasn't a necessity for the consent of the Minister for Finance under the amendment that was made of I think it's Section 111 of the Telecommunications Act by incorporating the provisions of an EU directive.

Q. So the formal consent wasn't required, but in any event, the Department of Finance was intimately involved in the evaluation process, and the Minister for Finance had been part of the group that had approved the recommendation?

A. Yes, but I think legally, that wouldn't necessarily amount to a Minister's approval or sanction, if that was statutorily required which was not the case, I now believe.

Q. I see.

At question again, questions 71 and 72 you have dealt with together.

Question 71, Mr. Fitzgerald's knowledge, direct or

indirect, of and his role or the role of any other person in advising the Minister regarding the letter dated 29th March 1996 from the Minister to the Chairman of the ESB.

And question 72: Mr. Fitzgerald's knowledge, direct or indirect, and role in or the role of any other person in advising the Minister regarding the Minister's dealings with the European Commission in early May 1996 regarding the complaint made to the Commission by the Persona consortium and the application by the consortium for provisional relief restraining the Government from issuing the licence to Esat Digifone.

And your answer is that you do not know what these questions are about; the Minister is free to seek advice from anybody he chooses to.

A. Perhaps can I add a little to that?

Q. Yes, of course.

A. I was rather puzzled by the terminology used in these questions. I took it the meaning, which may not have been intended, that this related to some advice coming from outside sources, that the Tribunal should have been well aware at this stage that civil servants would have been involved in providing advice to the Minister.

Q. I don't think there was any intention to suggest

A. I am sorry if I misunderstood the question in the

answer I have given. When I did find the documentation afterwards, I was well aware of the letter to the ESB Chairman, and I believe I had a hand in drafting the reply. Because this arose out of one of the few issues that I had been involved in during that time, and this was various problems that arose in relation to the location of masts and sites and so forth. And this was an attempt to rectify problems that arose between Esat and the ESB.

But I would reinforce, I think, the views given by Mr. Loughrey, that it was a non-discriminatory approach to ensure that as far as possible, the facilities that were already in place would be utilised, rather than erecting new facilities, almost very often on the same site. And going through the usual problems of planning and local objections and all this sort of thing.

Q. Yes.

A. The complaint to the Commission, the Department or the Minister was asked to supply observations, and I was very much concerned in the drafting of that, of the comments that were supplied, or I think the content of a letter which the Minister sent to Commissioner van Miert, so I was very much involved in that particular episode.

Q. I see. Thank you, Mr. Fitzgerald.

Question 73: Details of all dealings which Mr.

Fitzgerald had with the Minister in connection with the affairs of Esat Telecom Limited or of any associated company or of Mr. Denis O'Brien.

And you have said that the business of Esat Telecom was separate from the mobile business, and you did not wish to comment on any aspect of it, which is fair enough insofar as that goes; and I think in fact you deal with something further on which we will refer to.

A. Yes.

Q. Question 74: You were asked to furnish full details of your contacts with certain persons about whom the Tribunal has inquired.

You state that you had one meeting, directly at your request, with Mr. O'Brien, and you were present at four others when he met the Minister of the time and at the press conference held in connection with the announcement of the mobile competition winner at which he was present. The first two meetings were with Mr. Cowen in 1993. You state that the third meeting occurred in early 1995, when a date for a delegation for a potential GSM bidding consortium including Mr. O'Brien met Minister Lowry in a normal lobbying visit. Mr. O'Brien subsequently left that consortium. As far as you were aware, he had no further visibility in relation to the GSM process until the Esat Digifone group lodged their bid. You state that the next meeting was at your request in late 1995 or early 1996

sometime after the announcement of the competition winner. It was an off-the-record meeting, and you kept no notes. You had learned that Telecom Eireann were about to initiate High Court proceedings against Esat Telecom over recovery of monies withheld by Esat in a dispute over phone call billings. The amount was substantial. At the same time, you were aware that Mr. O'Brien was in the process of raising substantial capital to fund his share of developing the mobile system. You were concerned that a public dispute over bills might give the impression that Esat Telecom were in financial difficulty, could endanger the fundraising and put the tight timetable, or indeed the consortium to be granted the mobile licence, in jeopardy. You put this to Mr. O'Brien and asked him to take steps to avoid litigation and ensure the mobile process was not disrupted. Although the dispute was continued, the litigation never proceeded.

A. That's correct.

Q. So I suppose it would appear, Mr. Fitzgerald, that this was late 1995 or early 1996, so it would appear that on the basis of that conversation with Mr. O'Brien, that you must have known at that stage that he was going to fund his equity participation in Esat Telecom by a placement, possibly through CS First Boston, but certainly by some placement rather than borrowings?

A. I was aware certainly that he was in the process of raising funds. I don't know that I had any great detail of what was involved. But it was quite obvious, I think, that without extra funding, Mr. O'Brien or his company could not participate on the scale that was required in the Esat Digifone consortium.

Q. As a 40% shareholder, which would put a tremendous strain on the company's finances?

A. Of course.

Q. The dispute between Mr. O'Brien and Telecom Eireann, was that arising out of the provision of dial-in/dial-out lines on foot of the Communicorp value-added services licence?

A. Yes. Basically the effect of using this method of connecting calls between O'Brien's customers and their final destination was over telecom lines, and therefore it was telephone traffic which was billed in the normal way to Mr. O'Brien. I believe he disputed that he should have some preferential, if you like, wholesale rather than retail rates. And this was a matter he pursued in the Commission, I think, and subsequently found a ruling in his favour. But apart from that, while all this was going on, he did not pay the amount that he had been billed with; and therefore, as far as Telecom was concerned, he was in arrears, and they felt obliged to take steps to



recover this money. So this was I think what was behind all this.

Q. And you were concerned that if that got into the public domain, that it might undermine his fundraising activities?

A. Yes, insofar as it was a dispute between Telecom and Mr. O'Brien, I had at that stage had no complaint in relation to it from Mr. O'Brien or from Telecom, but I did not want a knock-on effect if this became a public issue.

Q. And I suppose as well, it might have caused some embarrassment in terms of a certain level of controversy within the public domain, and indeed questions that had been raised in the Dail regarding the financial capability of Esat Digifone consortium.

A. I am not aware of that aspect of it, but there was certainly concern in my mind that funding his share of the mobile operation was going to be extremely difficult in the best of circumstances, and I didn't want to see extra obstacles put in the way.

Q. I see.

You state then that in late 1996, possibly around October, you were asked to go to Minister Lowry's office immediately. Mr. O'Brien and Mr. Leslie Buckley were with the Minister discussing regulatory problems concerning Esat Telecom. You were not aware of this meeting. Strong concerns were put forward by

Esat that potential substantial damage to their business would arise from implementing a proposal by the Department to limit the provision of further dial-in/out lines provided by Telecom Eireann to Esat Telecom unless monitoring by the Department of the nature and volume of traffic in and out of their system justified a need for more capacity. This requirement also applied to all other licensed operators. The limitation of lines and monitoring of traffic had been approved by the Minister some months previously as a means of curbing suspected unauthorised voice telephony traffic on independent networks which was legally within the monopoly of Telecom Eireann.

And that was really the nub of the issue which had arisen, was it not, between the service providers and Telecom Eireann, and which had to be ruled upon and controlled by the Department's Regulatory Division?

A. That is correct.

Q. You then state that after the visitors had left, Mr. Lowry asked you to go easy on the monitoring, and if at all possible, not to do anything "until after Christmas". You had a knowledge of meetings with Mr. Buckley prior to and subsequent to the Ministerial meeting to find ways of ensuring that Esat's operations would be within their licence terms when monitoring took place, but you gave no but you gave

no indication of its timing.

Can I just ask you one or two questions arising from that paragraph of your reply, Mr. Fitzgerald.

You say that Mr. O'Brien and Mr. Buckley were with the Minister in his office in late 1996, when you were asked to attend his office immediately. Can you tell me whether there was anybody else present at that meeting, to your recollection?

A. No.

Q. So it was just the Minister, Mr. O'Brien and Mr. Leslie Buckley?

A. When I was called to his office, that was the case.

Q. And when you left his office, was that also the case?

A. I think Mr. O'Brien had left prior to the request from the Minister. Both Mr. O'Brien and Mr. Buckley had left. There was only the two of us left at that stage.

Q. And nobody else joined the meeting while you, Mr. Buckley and Mr. O'Brien and the Minister were together?

A. Not that I can remember.

Q. You say that the purpose of introducing this monitoring was to determine whether there had been unauthorised use of the dial-in/dial-out lines?

A. Yes.

Q. And you say that after the end of the meeting with Mr. O'Brien and with Mr. Buckley, that the Minister asked

you to go easy on the monitoring, and if at all possible not to do anything until "after Christmas"?

A. I assume this had something to do with the fundraising operations. And that was the reason why he asked me.

Q. I see. Because that might put further fundraising activities of Mr. O'Brien in jeopardy?

A. I think probably the reason for the meeting in the first place was that Mr. O'Brien wanted this extra capacity in order to develop the telephone business and to write into his prospectus that he had such and such a size of an operation.

Q. And you think the significance of "after Christmas" was to enable the placement to proceed?

A. I would think that that was probably the thinking behind it. Now, I am not sure whether this fitted the actual timetable of fundraising or not, but that's the way it was at the time.

Q. You say you had no contact whatever with Mr. O'Brien outside of the meeting as described. You say that during the bid process, you had no contact whatsoever with the following:

Mr. Denis O'Brien Senior,

Mr. A. Phelan,

Mr. D. Austin,

Any member of the Government of the Oireachtas other than Mr. Lowry.

Mr. E. Kelly,

Mr. E. Hardiman,

Mr. E. Cloonan,

Mr. J. Mitchell,

Mr. P. Connolly,

officials of ESB or any associated company,

Mr. O. O'Connell,

Mr. G. Halpenny,

Any member of the firms of W. Fry, Matheson Ormsby &

Prentice and Kilroy's,

Mr. A. Johansen, Mr. K. Digerud, or any other official

of Telenor outside of a possible casual meeting at the

announcement press conference.

Mr. M. Lowry; you had frequent meeting with Mr. Lowry

as your Minister throughout his period in office. It

is not possible to give a list of these. Most of them

related to matters other than the GSM licence. At no

stage did he intervene to influence the outcome or

give any indication of his preference prior to the

result. At the end it was obvious he was pleased with

the result and fully stood over it in the face of a

barrage of criticism.

Mr. PJ Mara; you say you received one or two phone

calls from Mr. Mara, but you cannot recall the dates

or context. You doubt if it was in connection with

GSM.

Mr. P. O'hUiginn; you say you met Mr. O'hUiginn

socially on two occasions during this period. He

mentioned that he was not dealing with issues involving the Department at the time, and you had no further discussion.

A. On that particular issue.

Q. Mr. J. Callaghan; you say that you met Mr. Callaghan at the announcement press conference; you had no discussion of substance?

A. No. I would simply add to that I knew Mr. O'Callaghan because he had done consultancy work for the Department some years earlier in relation to gas development.

Q. Mr. L. Buckley; you say that you had five or six meetings and several phone calls with Mr. Buckley in the course of 1996. All contacts were related to regulatory matters concerning Esat Telecom, and none involved Digifone or the GSM process?

A. That's correct.

Q. Mr. B. Moloney; you say that between the announcement and the issue of the licence, you had two phone calls with Mr. Moloney concerning the resolution of a dispute with Telecom and Cablelink over sharing facilities on a Cablelink mast in Sutton, County Dublin. In early 1996 you chaired two meetings involving Digifone led by Mr. Moloney, and the Department of Environment regarding changes in planning regulations to facilitate the completion in time of Digifone's network. Changes in regulations

concerning radio masts were subsequently made.

A. Yes, that is so.

Q. And finally, Telecom Eireann; you state that contact with officials of Telecom Eireann and its subsidiaries took place continuously. In relation to GSM, you had strong representations from Mr. A Kane, CEO, protesting against any suggestion that Eircell should pay a fee related to the GSM fee for their mobile licence. They eventually paid  $\text{€}10$  million.

A. Yes. Well, that would have occurred long before before the process started, when it was possibly

Q. In its infancy, and it was being discussed at an earlier stage?

A. Apart from that, I practically lived in Telecom Eireann at that stage.

CHAIRMAN: That seems a well-timed conclusion of the statement, Ms. O'Brien. We will resume at ten past two, if that suits.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF EXAMINATION OF SEAN FITZGERALD BY

MS. O'BRIEN:

Q. MS. O'BRIEN: Thank you, Mr. Fitzgerald.

Now, Mr. Fitzgerald, I think the genesis of the evaluation process and the development of the evaluation process was the decision of the Commission that the derogation from competition permitted in the

case of voice telephony did not apply to mobile telephony?

A. Certainly that changed the situation, in that it was no longer possible then just to have one company operating a mobile service.

Q. And I think around that time there was probably about 1993, around that time, Mr. Ryan, who was attached to the Department, he set about the early stages of looking at how a process could be developed and how a second operator could be licensed on the GSM side?

A. I am sure he did.

Q. I think, in fact, he ultimately sent to you a memo setting out his initial thoughts on the subject. And I think that was on the 10th May, 1993; and I don't propose opening that to you, Mr. Fitzgerald, but just a note that it set out, as an appendix to the memo, Mr. Ryan's thoughts on the principal elements of what might be incorporated into a proposed GSM licence?

A. Well, then, that would have been the start of the process in Ireland.

Q. Yes. And I think around that time there was a restructuring within the Department itself, and that included or involved or perhaps it was just incidental that at that time, Mr. Brennan returned from Brussels where he had been part of the Irish permanent representation; is that correct?



A. That is correct.

Q. And I think at that time the telecommunications side was divided in three divisions. There was the Development Division, the Regulatory Division, and the Technical Division, and that Mr. Brennan was appointed to the Development Division?

A. Yes. The Technical Division had been there all the time. I thought it was necessary to separate regulatory matters from policy and shareholding matters of Telecom within the Department because there is a potential conflict of interest there, that at least while it was still my joint responsibility for both, that I would have two separate voices dealing with both aspects.

Q. And you were Assistant Secretary in overall charge and responsibility for all three divisions?

A. Yes.

Q. And I think you were the one who appointed Mr. Brennan to take up the brief of developing this process and bringing it on to a stage where there could be an evaluation and ultimately the licensing of a second operator?

A. Yes, because it was a policy matter at that stage. I think the regulatory process would only come into play once there was a licensed operator or somebody selected to become a licensed operator, to be more precise.

Q. And I think around that time there was a workshop in the Commission, and Mr. Brennan has indicated to us that he attended this workshop. I think it was run by DG IV, and this was chaired by Mr. Ungerer within DG IV. And Mr. Brennan has indicated in his evidence that the outside consultant reports which were furnished in the course of that workshop from Mr. Pye, I think from Coopers & Lybrand also, that they were of considerable assistance to him in the initial stages of his work?

A. I am sure they were. We were at that stage on an information-gathering exercise.

Q. That's understandable. And I think then later in 1993, in October of 1993, a letter was received in fact addressed to you from DG IV, I think signed by Mr. Simonnet; that was a letter from the Commission?

A. Yes.

Q. And I don't propose to open it, but I think effectively what the Commission was bringing to your attention was that it had commenced proceedings against two other Member States that had not yet introduced competition or taken steps to introduce competition, and effectively calling upon the Department to furnish the Commission with an undertaking as to the steps that it intended to take in order to introduce competition, and I think gave you four weeks in which to respond?

A. Yes. That, I believe, is the substance of it was intended as a warning that if we did nothing, that there would be problems down the road.

Q. I think Mr. Brennan said in his evidence reference to requiring an undertaking within four weeks, that led you to believe or that would certainly have convinced you that the Commission meant business in relation to the matter?

A. I think when DG IV writes to a Government, or to, I am sure, any company, that they have good reason for doing so, and usually will follow it up effectively.

Q. I think Mr. Brennan then indicated to us that he really set about the work of trying to bring forward the evaluation process, that he was assisted in his work by Mr. Conan McKenna, also of the Department, and that he really operated an open-door policy. He took soundings from within the market place, and he developed his ideas in relation to a possible process?

A. Yes, that is correct. I think the Department wanted to hear everybody that might have anything to say on the subject before making up its own mind.

Q. And that was really the Department's initial research phase?

A. Yes.

Q. And then I think the Department of Finance also had an involvement and that it was the Department of Finance that proposed, I think in November of 1993, that a

small interdepartmental working group might be formed, and I think the Department of Finance was anxious that it would have representation on that working group?

A. Yes, I do remember that. And as it turned out, I think it was a very useful suggestion, because it meant that the Department of Finance were fully, if you like, absorbed into the process; and once they had accepted what was going on, then it prevented, I think, differences of opinion arising at departmental level afterwards.

Q. And the Department of Finance really were there from the very start of the substantive development of the process?

A. Yes, and as far as I understand, made a very valuable contribution to the process.

Q. I think in fact there were some issues that arose between the Department of Finance and your Department in relation to the initial thinking on how the issue of a licence fee should be approached?

A. Yes.

Q. I think your Department's view of it was that there should be as small as possible an up-front payment, so as not to burden the new operator, and then perhaps an open royalty payment that would be periodic from year to year; and I think the Department of Finance view was that both the entry fee and the royalty payments should be open-ended?

A. Yes. Well, I wouldn't say that our intention was not to burden the operator, as such. We weren't really that was not the objective of the exercise.

It was to put the operator in a position to offer the best tariff and service deal to the customers, and that was the interest we were concerned with.

Q. And to be the best possible position to compete at the same level with the incumbent operator?

A. Yes.

Q. I think there were certain interest groups that had to be accommodated, and there was quite a deal of work that had to be attended to at that stage?

A. Yes, that's correct.

Q. Now, I think then, around that time also, at I believe your instigation, probably supported by Mr. Loughrey or also at your joint instigation, that you proposed that Mr. Roger Pye, we have already heard about, that his services be retained through KPMG in London to provide expertise and experience to the thinking of Mr. Brennan and Mr. McKenna regarding the proposed tender documents?

A. I am not quite sure where the suggestion came from at this stage, but certainly it arose, and it was I think a very worthwhile one. We all had a very high regard for Mr. Pye from the contribution he made the previous year to the development of a strategy for the communications sector.

Q. I think we have seen from the documents, and I don't propose opening them, that the initial draft tender documents were forwarded to Mr. Pye?

A. Yeah.

Q. That he made his initial observations and comments, that those draft tender agreements were then refined by Mr. Brennan and Mr. Towey, they were sent again to Mr. Pye, and I think finally, then, the format of really the substantive input of Mr. Pye, which was the format of paragraph 19, was developed?

A. That is correct.

Q. I think then the first document that formally went to the Government was an aide-memoire of November of 1991. And if you have Book 41 with you in the box, Mr. Fitzgerald, it's at Flag 23. I'll get you a copy of that. Mr. Shaw is just arranging a copy for you now.

And I presume that document, in the ordinary course, probably would have been drafted perhaps by Mr. Fintan Towey and Mr. Martin Brennan and would then have come up to you to review it?

A. That would be the normal process. It might have been up and down a couple of times.

Q. Yes, with changes being made and typing, I suppose, being made to the drafting of it.

A. Yeah.

Q. I am not going to open it all to you at all, Mr.

Fitzgerald. I just want to refer you to paragraph 10, which is headed "Tender Competition".

And it says that "There will be a written tender procedure to select the licensee. The approach is to put an initial price of  $\text{€}1/3$  million on the licence and to let the market determine the full value of the licence in terms of ongoing payments. The amount and form of payment for the licence was devised by reference to the experience in other countries, making appropriate adjustment for criteria such as market size, relative wealth and other aspects of the business opportunity. On this basis it was estimated that possibly  $\text{€}1/20$  million could be secured if an up-front payment only was sought. However, this would represent an increase of about 50% in the capital investment required for the project. Feeding this into the project economics would lead to significantly higher tariffs and less real competition than would otherwise be the case."

I think that's the point you were just making to me when we were discussing the issue between your Department and the Department of Finance.

A. The only comment I would make is I think probably the numbers in there are probably conservative.

Q. "One of the key objectives of introducing competition to achieve high availability of services at comparatively low prices. The licence fee is

structured to support this objective while at the same time providing for a substantial State benefit. The tender document identifies a number of criteria, in descending order of importance, which will be used in evaluation of tenders. They are as follows:

" credibility of business plan and financial viability of applicant together with applicant's approach to market development technical experience and capability of applicant quality and viability of technical approach proposed and its compliance with the requirements set out herein

the approach to tariffing proposed by the applicant

the value of ongoing payments to the State for the licence over the licence period

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

the extent of the applicant's international roaming plan

the performance guarantee proposed by the applicant

efficiency of proposed use of frequency spectrum resources

"While the level of ongoing payments is one of the criteria, it is specifically stated that it is neither



the sole nor the most important criterion on which a decision will be made. The annual State take will be a royalty based on revenue rather than profit.

Tenderers will be asked to indicate, for information purposes only, the likely direct and indirect employment consequences of their proposals in Ireland.

Consultants will be required to assist with the evaluation. The perception of objectivity in our evaluation and comparison of tenders will be critical."

A. Yes.

Q. And that's a sentiment with which I think you would have been in full agreement?

A. At that stage, yes.

Q. And I think, just looking back at the criteria, at that time in November of 1994, there were nine criteria?

A. Pardon?

Q. There were nine evaluation criteria, if you just go to the previous page.

A. I hadn't noticed this change.

Q. And you will see there were nine criteria then, rather than eight; and at that stage, financial viability appears to have been part of the first evaluation criterion, and then the third was "quality and viability of technical approach proposed and its compliance with the requirements set out herein."

And then obviously the fifth changed slightly when it got to the final RFP, because at that stage, what was intended with regard to payments was that there be a \$3,000,000 up-front charge and then the provision for applicants to nominate the royalty or ongoing payments that they would make to the State.

A. I think at a subsequent stage, then, the technical experience was taken out and made a criteria to be established that it existed in sufficient state to enable the applicant to proceed.

Q. That's correct. Both that, I think, and financial viability payment, financial capability, and they were both extracted from the scoring evaluation criteria, and as you said, were, I think you agreed with me, were mandatory requirements under the RFP?

A. Yeah.

Q. Now, if I could just refer you to the next document in that book, which is at 41, 24. And that's a memorandum from Mr. Loughrey to you, and again I don't intend to open it fully. I think he was informing you that the matter had been discussed at the previous night's meeting of the Government and that the question of the second cellular phone licence was discussed at some length. No decision was taken. And he was asking you to prepare a revised aide-memoire, and he was asking you to expand it and to ensure that included a high produced a high comfort factor for

Telecom Eireann, that it should major on the inevitability of the introduction of the GSM, and it should stress that everybody would be a winner by the introduction of competition.

A. Yes. I think to make it more saleable at Government level.

Q. I think Mr. Brennan in his evidence indicated that he how thought that reflected political considerations at the time.

And then if you just turn to the next document, Mr. Fitzgerald, which is at Flag 25, and that records the Government decision of the 11th November.

It says "I am to refer to the aide-memoire dated 9th November submitted by the Minister for Transport, Energy and Communications and to inform you that at a meeting held today the Government.

noted the Minister's proposal to hold a tender competition leading to the award of a single licence for the operation of digital mobile telephony in competition with Telecom Eireann's Eircell and decided that the Minister should consult with the Cabinet Subcommittee on Telecommunications established on 4 May, 1994, before a decision is made on the award of the licence."

And that was copied to the Secretary, which would have been Mr. Loughrey; to yourself, Mr. Fitzgerald; to Mr. Brennan; and to Mr. F. Nolan.

I think the matter rested there, and in December of 1994, I think we know there was a change of Government, and there was

A. I think there was an election called shortly after this or not an election, sorry, a Government crisis which resulted in a change in Government.

Q. And there was a new Minister who took over from Mr. Cowen?

A. Yes.

Q. And Mr. Lowry I think was appointed towards the end of December, I think just before Christmas?

A. Sorry?

Q. I think Mr. Lowry was appointed Minister towards the end of December; I think it might have been just before Christmas. Would that be right?

A. I can't remember the exact date, but it was in or around that period.

Q. I think in your memorandum you refer to the fact that at either the first or second of the management committee meetings, that you would have advised him of the fact that you were working on a GSM competition and that he indicated to you that it was a political priority for him to licence a second operator as soon as possible?

A. This occurred at a special meeting which was called when he arrived at the Department on the first day he was there.

Q. Yes.

A. It wasn't the normal management meeting.

Q. I see. And who would have been present at that meeting?

A. The Secretary and all the Assistant Secretaries.

Probably I don't know whether there might have been other there, but I doubt it.

Q. I think Mr. Loughrey, in his memorandum, had indicated to us that the new Minister might have been furnished with a document called a compendium, setting out for him all of the major activities within each division of the Department?

A. He was. This would be the practice for all incoming Ministers. I am not quite sure when exactly that was done. It wasn't the basis on which he was briefed at this meeting. It was another briefing.

Q. This was a separate meeting?

A. Yes.

Q. I think then we have seen from the documents that in January and February, there was the fixing of the estimates by the Department of Finance, and we have seen that there was correspondence between the then Minister for Finance, Mr. Quinn, and Mr. Lowry, and the thrust of the correspondence appears to have been that the Department of Finance wanted a  $\frac{1}{25}$  million dividend to be built into the estimates from Telecom Eireann?

A. Can you refer to the document?

Q. I can certainly refer you to the correspondence.

A. I can remember the figure of  $\text{€}1/225$  million being pencilled into the budget arithmetic.

Q. I think it was in fact  $\text{€}1/225$  million. I'll just refer you to the letter from Mr. Quinn. It was a letter dated 25th January, and it's at Divider 30 of that book that we are working on at the moment. And I can open it for you to assist you.

A. Yes, I have it.

Q. It's dated the 25th January. It's addressed to Mr. Michael Lowry TD, Minister, Kildare Street, Dublin 2, re Telecom dividend second mobile telephony licence.

"Dear Michael,

"I am writing to you regarding the budgetary provisions.

"I have included in non-tax revenue forecast a figure of  $\text{€}1/225$  million for dividends from Telecom, and despite the case advanced by the management of the company, I believe that this is a reasonable expectation.

Payment could be by way of final dividend of  $\text{€}1/215$  million for the year 1994/5 and 10 million interim dividend for the year 1995/6.

"Obviously the level of dividend for the calendar year as a whole will depend on the financial performance of and outlook for the company, and payment will depend on the emerging position on this front.

"I note in this regard that the Chief Executive Officer has submitted a forecast of a  $\text{€}1$  million profit for the year with zero dividend payment, and that he has reiterated this view. I would like to make a number of points on this.

"Firstly, the Exchequer must continue to service accumulated telephone debt of more than  $\text{€}300,000,000$  retained at the establishment of Telecom Eireann. It is legitimate to expect direct return on that investment. The return to date has been extremely low.

"Secondly, the forecasts will have to be looked at in the light of the final picture on turnover and costs. On the basis of the performance to date, the outturn should be better than projected.

"Thirdly, an increase in depreciation from  $\text{€}170$  million last year to  $\text{€}250$  million this year seems excessive. A more moderate increase in the depreciation charge this year with further increases in the following two years should be sufficient.

"There is also the question of fee for the second mobile licence. We agreed at our bilateral estimate meeting recently to include  $\text{€}5$  million as a minimum up-front fee for this. It seems clear from discussions between our department, but we cannot be certain now of a stream of royalties in the year ahead, so the sensible thing to would be to leave it

to the market to bid on a basis which would allow a much larger up-front payment to be made. I understand on the basis of what has happened elsewhere that a payment in excess of  $\text{€}1\frac{1}{2}$  million could reasonably be expected. I would be glad to hear quickly what you think of this so that I can settle this part of my budget."

And there a postscript in Mr. Quinn's own hand: "I would be happy to discuss the" "I would be happy after the budget to have an in-depth discussion with you on how you see the future." With the initial "R".

And I think that was the correspondence received from the Minister for Finance in relation to the budget estimates for that year?

A. My view on that, I think at the time, and probably still would be, that it was presumptuous to expect a dividend of 25 million from a company that expected to make a profit of 1 million, and I think suggesting that the depreciation charges should be adjusted to make this probable was going beyond, I think, what kind of direction should be given to a State company, assuming that depreciation charges followed proper accounting principles and would be related to the capital assets and the investments made in them.

Q. And I think within the Department there was a concern as well, am I correct in this, not to overburden the balance sheet of Telecom Eireann at a time when you



were looking for a strategic partner?

A. Well, this was the start of it. Yes, we needed to build up the company. They had a huge debt, I think well over a billion pounds at that stage, and a marginal profit. So that was not a very saleable proposition.

Q. And I think the ultimate compromise that was reached was that the RFP, or the rules in relation to the competition for the GSM licence would be altered, and that the Department would fix a  $\pounds 1/25$  million licence fee at a minimum but would leave the balance of the licence fee open-ended, I think in the hope or expectation that  $\pounds 1/25$  million would be generated from that licence fee?

A. Ms. O'Brien, yes, that was the outcome of the situation. This was the squeeze we were in. We had to agree to that change in order to protect the financial interest of Telecom.

There was another reason, I think, behind it also. I had, at that stage, second thoughts about the wisdom of a royalty, for the simple reason that we would have had probably to apply a similar royalty to Eircell; and the effect of both is that the operating costs of the company would be higher because this royalty had to be taken into account. And therefore the degree of competition and the level of charges in prices would reflect this probably more explicitly even than an

up-front payment.

Q. And of course I suppose you'd have had to have an equivalent royalty charged to Eircell; otherwise you'd have had objections from DG IV and from the Commission?

A. That would be absolutely certain. There would be no question about it, if you could apply a royalty to one operator and not to the other.

Q. And I think in fact you confirmed the circumstances and the manner in which this was compromised in a letter to the Secretary of the Department of Finance.

And that's at Divider 38 of the book which is we are looking at at the moment, Mr. Fitzgerald, and I'll just refer you briefly to that.

A. I am aware of that letter.

Q. You are aware of the letter. You are saying "As conveyed orally to you, the Minister has decided the GSM licence fee should be determined by the markets subject a minimum fee of  $\text{€}1/25$  million in combination with an acceptable market development plan and tariff structure. The Minister reserves the right to determine which bidder best meets the requirements of the sector, giving due weighting to both the bidder's development plan and fee. It is estimated that the realisable fee should amount to an extra  $\text{€}1/220$  million in addition to the  $\text{€}1/25$  million fee already provided for.

"In view of the amount likely to be realised from the GSM fee and taking account of the challenge facing Telecom from the need to restructure its operations and particularly its financial base to meet competition and to secure a successful strategic alliance, the Minister considers that it would be most unwise to expect Telecom to pay dividends for some time. Accordingly, he advises that no provision for such income should be made in the 1995 budget. The Minister proposes to inform Telecom of this in due course.

"The Minister will circulate an aide-memoire on the GSM licence tomorrow, and as agreed orally, will record that the Minister for Finance agreed to his proposals."

That was really the compromise between the Department and between the Department of Finance, and I think it was that which is at the root of the decision to alter the payment structure and to provide for what amounted to an open-ended licence fee in the competition design, but subject to a minimum of  $\text{£}1\frac{1}{2}$  million?

A. I think there was a hope on our side that by retaining the criteria, and with the licence fee well down the list, that we might be able to resist the temptation of going for a poor bid with a large price tag attached.

Q. And also probably as well, you were hoping you might

escape the notice of the Commission, were you?

A. Well, that was something that was possible and likely to arise also.

Q. And then at Divider 41, I think, is the aide-memoire which was prepared for the Cabinet Subcommittee. And again I am just going to bring you straight away to paragraph 11 of that document. It is headed "The Selection Process."

And that says: "Consultants will be engaged to assist in the process of final selection and will also be on board in time to assist in the final stages of preparation of the Department's information memorandum mentioned in paragraph 10. The selection of the successful tender will be determined by reference to the following:

the quality and credibility of the business plans of applicants, with particular emphasis on a progressive approach to market development, a commitment to a high-quality nationwide service and an innovative approach to tariffs with a view to reducing costs to consumers.

the proposed fees for the licence.

"The highest bidder will not necessarily be successful, and this is clearly stated and emphasised in the tender documentation. The documentation indicates that 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 therein, and specifically with regard to the list of evaluation criteria set out below in descending order of priority".

And I don't intend to read those again, but they effectively mirror what was ultimately in the RFP document?

A. Yes.

Q. It goes on to say "Tenderers will be requested to specify the approach which will be adopted to the disposition of windfall gains following the award of licence. Such gains could materialise as a result of significant reductions in interconnection charges, or possibly through a legal requirement to return the licence fee."

I think that shows there a possible anticipation of intervention by the Commission?

A. I would hope that it covered a multitude of things that might arise.

Q. "The objective would be to ensure that the benefits are passed on to the consumer. Tenderers will also be asked to indicate, for information purposes only, the likely direct and indirect employment consequences of their proposals in Ireland. Consultants will be required to assist with the evaluation. The perception of objectivity in our evaluation and

comparison of tenders will be critical."

And just one matter I want to draw your attention to there, Mr. Fitzgerald, which to an extent I have already anticipated, and you can see that the number of criteria has been reduced to eight, and financial ability and technical capability have been removed from the scoring evaluation criteria and appear to have been dealt with as prerequisites within the competition design?

A. Yes.

Q. And I think you have already indicated to the Tribunal, in the course of your memorandum, your view that it was sensible to deal with these as prerequisites and as matters in which you had to be satisfied before a recommendation could be made; but I wonder, could you assist the Tribunal at all as to whether there were discussions relating to that between November, when it appeared that these matters were within the evaluation criteria, and February, when we see them as prerequisites, or how that change evolved or developed within the Department's thinking?

A. I cannot recollect precisely, but I am sure there were ongoing discussions between Mr. Brennan, myself, Mr. Loughrey at various stages, as to how to improve, if you like, our collective thinking on the approach to this. There was time between the previous November and when this memorandum was sent up to reflect on

some of the things that were in the earlier memoranda and do things differently. This did not, as far as I am aware, come from the Minister or from the political process. It would have been done solely within the Department.

Q. Within the Department. And I take it the Minister would have been briefed, however, or would have been kept up to date, because after all, it's effectively an aide-memoire?

A. Of course he was fully briefed on the content of the memorandum or the aide-memoire, and I don't think he had any problems whatsoever with it.

Q. And I take it he would have been fully briefed at the changes in the evaluation criteria and why those changes were made and what the thinking of the Department was with regard to those changes?

A. Yes.

Q. And then the only other matter I need to draw your attention to in terms of the evaluation criteria is that the fourth criterion has changed due to the alteration in the licence provision?

A. Yes.

Q. And that then now reads "The amount the applicant is prepared to pay for the right to the licence."

A. Yes. Well, that was a consequence of the deal, if you want to call it, done with the Department of Finance.

Q. Yes.

Now, the next document I want to refer you to is just at the next leaf, Mr. Fitzgerald, and it is a record of the deliberations of the Cabinet Subcommittee. It's at Leaf 42, and it states that "The Government decided on the 7 February that a Cabinet Committee consisting of the Taoiseach in the chair, Tanaiste and Ministers for Finance, Social Welfare, Transport, Energy and Communications and Enterprise and Employment should review the proposed financial terms, tendering procedures and proposed advertisements for the digital mobile cellular communications GSM licence.

"The Cabinet Committee met on the 16 February 1995 and "noted the discussions at programme manager level in relation to leased lines

agreed that these discussions should be completed within the next two weeks

agreed that the Minister for Transport, Energy and Communications would revert to the Minister for Enterprise and Employment for consultations before any decision is taken on tariffs

agreed to proceed with the proposed GSM tender competition as outlined in the Minister for Transport, Energy and Communications' aide-memoire for the Cabinet Committee and

agreed that the Minister for Transport, Energy and Communications would submit to the Government in



the near future outline proposals for the independent regulation of the telecommunications sector.

"The Cabinet Committee also had a brief discussion on Team Aer Lingus and on Irish Steel."

And that was just a record of the deliberations of the Cabinet Subcommittee.

Then the next step, I suppose, in the matter formally coming before Government and being approved was the memorandum for Government, which is at the next leaf, which is Leaf 43.

A. Mm-hmm.

Q. And that's dated the 17th February, 1995. And it records that "The decision was sought that the Minister for Transport, Energy and Communications seeks the approval of the Government that an open competitive bidding process be announced with a view to the granting of a licence to a second cellular phone operator. The bidding process will be promoted and controlled by Department of Transport, Energy and Communications, and it is expected that a recommendation will be put by the Minister to Government in time for a final decision by 31 October 1995.

"The general terms and conditions attaching to this licence are set out in the attached appendix."

And presumably what was attached to that was the RFP

document, the draft RFP document?

A. Yes.

Q. And then just it records the deliberations of the Cabinet Committee. Their considerations, it records that the Cabinet Committee referred to a decision S22048E, examined the Minister's proposal on the 16th February and concluded that in relation to this specific proposal, the proposal for Minister for Transport, Energy and Communications on the tender process for the award of the licence be agreed.

I think the balance of the matters don't relate to the licence.

A. Yes.

Q. And then over the page again, behind the next leaf, 44, is the formal Government decision that would have been taken on foot of the memorandum for Government.

A. Yes.

Q. And it's dated the 2nd March, and it says "I am to refer to the memorandum dated 17 February 1995 submitted by the Minister for Transport, Energy and Communications and to inform you that, at a meeting held today, the Government approved the announcement of an open competitive bidding process with a view to the granting of a licence to a second cellular phone operator on the basis that

"1. The bidding process would be promoted and controlled by the Department of Transport, Energy and

## Communications

"2. 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 31 October 1995, and

"3. The general terms and conditions attaching to the licence would be as set out in the appendix to the aide-memoire."

And presumably that's the aide-memoire for the Cabinet Subcommittee, which must have also been before the Government?

A. Yes.

Q. And that was CCed also to Mr. Loughrey; to yourself, Mr. Fitzgerald; to Mr. Brennan; and to Mr. Colin McCrea, who was Mr. Loughrey's programme manager?

A. That's correct.

Q. And I think on the basis of that decision, it would appear that while the bidding process was to be promoted and controlled by your Department and a recommendation was to be made by your Minister to Cabinet, that the actual decision was to be a Government decision?

A. That is the thrust of the of this decision.

Q. Can I just backtrack for a moment, Mr. Fitzgerald, to a matter dating from January of 1995, and if I could just ask you to turn to Flag 27(A) in the book which is before you, Book 41. It may not have been inserted

in your book

A. I have a document with a memorandum inserted in it.

Q. It's a handwritten note.

A. No.

Q. You don't well, we can hand you up a copy of it. I

can put it on the screen for you, Mr. Fitzgerald. I

think we have one there.

It's just a hard copy before you now, Mr. Fitzgerald.

And just before I open it, I can tell you that this

was a note furnished by the solicitor to the late Mr.

Jim Mitchell in which Mr. Mitchell recorded the

details of a conversation that he had with Mr. Lowry

on the 5th January of 1995.

A. Mm-hmm.

Q. And it states "I saw M. Lowry at 3.30 today and

informed him of my involvement with Esat.

Tenders to be sought by advertisements in next week or

two.

"A. DOB not favoured by Department.

"B. DOB FF !!

"He is available to meet principals of all contestants

in February including DOB not for lunch.

Check in 3 weeks to see if this has happened."

And I just want to ask you for your assistance in

relation to one aspect of this handwritten note. You

see, at point A, that it's recorded "DOB not favoured

by Department"; and although we can't be clear on it,

it does appear that Mr. Mitchell is recording there what Mr. Lowry told him at the time. And I just wonder whether you could assist the Tribunal as to whether you have any information as to the basis on which Mr. Lowry may have formed the impression that Mr. O'Brien was not favoured by the Department.

A. I don't know what the basis for this is. The first time I saw it was when going through these papers. Mr. O'Brien was in conflict with the Department on a number of issues relating to his value-added licence, but I don't think that could be construed as meaning he was out of favour with the Department. I think we tried to deal with all people on a totally objective basis.

Q. I can understand that.

A. And if somebody got the impression that he was out of favour, I think it would be incorrect, either at this stage or later.

Q. And on the basis of your own dealings with Mr. Lowry, either at the initial meeting with him or any subsequent dealings with him, can you recall anything that you might have said to him that might have led him to form that impression?

A. I cannot recall that I did. If I did say anything, it would have been relating to a specific issue, and I never discussed Mr. O'Brien in totality, if you like, with him.

Q. And presumably anything that you might have said that might have led the Minister to form that impression or draw that conclusion would have been in relation to regulatory matters?

A. That was the only dealings we had with Mr. O'Brien.

Q. Now, we know that the competition itself was announced on the 2nd March, and that I think ten applicants applied to the Department for tender documents; and I think each of them paid a fee of  $\text{€}25,000$  each?

A. That I believe is correct.

Q. And almost immediately after that, Mr. Fitzgerald, it appears on the 6th March that there was a meeting it was in fact only the second meeting of the Project Group. I think the first meeting had been back in April of 1994 and was probably just an informal meeting. But this seems to have really been the first substantive meeting of the Project Group.

And if I could just refer you to Divider 47 of that book, and you will see the report of this meeting, which was on the 6th March, just four days after the announcement of the competition.

A. Yes, I have it.

Q. I think, in fact, this report of the second meeting of the Project Group, in common with virtually, I think, all but one of the reports prior to the commencement of the closed session on the 4th August, was copied to you?

A. So I note at the second page.

Q. And I am just going to refer you to paragraph number 6, which is headed "Procedures for dealings with potential bidders during the tender process was agreed, no one-to-one meetings, no social outings, a record to be kept of any meetings/conversations between DTEC people and any of the bidders.

"DTEC should stress at any such meeting that it is an informal exploratory contact where any issue of the import does arise the matter will be referred to formal written procedures."

And I think that was the protocol which was proposed by Mr. Brennan and was adopted unanimously by all of the members of the Project Group?

A. Certainly it looks as if this was the basis for it.

Q. I think in fact you received from Mr. Brennan a memorandum of the same day, and that's on the following page, page 48, or Divider 48, and that's a memorandum of the same data addressed to Mr. Loughrey, to you, to Mr. McMahon, to Mr. McQuaid, and the staff in the Development Division.

It says "We had a meeting in our GSM II Project Group this morning for a preliminary run over the course.

"We agreed that as a matter of prudence, contacts with potential bidders should respect the following ground rules.

"1. Always at least two people present on our side.

"2. Always stress that discussion is by way of informal clarification subject to formulation in the written information round provided for in the competition.

"3. Always produce a brief record of attendance and discussion.

"4. As a general rule, contact to be "in the office", and thus avoiding social exchanges which, almost by definition, cannot be controlled."

And I presume that you would have agreed with Mr.

Brennan that this was a very prudent course to take?

A. I certainly would. I think it was essential that rules be prepared to maintain the objectivity of the process.

Q. I suppose not just the objectivity, but the perception of objectivity?

A. Yes.

Q. And the perception of fairness?

A. Yes.

Q. Because of course this was an adjudicative process which was being undertaken by the Project Group?

A. Yes.

Q. Now, I think I referred you earlier, Mr. Fitzgerald, to the fact that you were circulated, it appears, with the Project Group minutes that were issued up to the 4th August, which was the commencement of the closed



period, and I think the only exception to that were the minutes for the meeting on the 18th May, when the evaluation model was being presented by Mr. Andersen to the group for the first time. I think Mr. Brennan took the view that, although occurring prior to the closed process, was an intrinsic part of the closed process and constituted highly sensitive information?

A. I would agree with that.

Q. And it appears that you received the minutes for the second meeting, the third meeting, the fourth meeting, the fifth meeting, the eighth meeting, which was on the 9th June and then you ceased to receive minutes. And then I think you received minutes of the final meeting, on the 23rd October, that they weren't actually produced until the 12th December, so at that stage the entire process was at an end.

And the minutes from those early meetings deal with a number of matters. I suppose, most significantly, they dealt with the appointment of Andersens; they dealt with the preparation of responses to questions raised by applicants in the course of the information round which was provided for in the competition design?

A. Yes.

Q. They dealt with correspondence which had been received from the Department of Finance regarding its views. I think that was correspondence from Mr. McMeel

addressed to Mr. Brennan regarding the Department of Finance's views on the application of a weighting system, and I think they also dealt with the intervention of the European Commission, and I think also matters in relation to the critical path and the intended progress of the process?

A. Well, these were all matters that would be of interest to the management of the Department and did not, I think, constitute the closed process, because no bids had been in at that stage.

Q. Yes. And they formed no part of the actual closed process or the sensitive information?

A. No. It was the preparation, I think, for the closed process, if I may put it that way.

Q. Now, just arising out of those minutes and the matters they record, there are just three matters that I want to take up with you. And the first one is the weighting and evaluation model; the second one, briefly, is the issues which arose with the Department of Finance; and then finally I just want to refer you to the intervention of the Commission.

The first of those, as I said to you, was the weightings. And I think you now accept, and you have explained to the Tribunal, that although your initial impression might have been that Mr. Brennan informed you as to what was weightings were, that in fact you were incorrect in that view and that you did not

were never furnished with a list of the weighting model?

A. I think what I said was that he consulted me about the weightings. I didn't say at any stage that he informed me of what the weightings were, because I am quite convinced in my mind that he didn't. I am sorry that what I wrote that is given a different impression.

Q. There is no difficulty with that at all, Mr. Fitzgerald; I can understand that completely. But I suppose what I am getting at is this: I suppose you would agree with me that there be could have been no question of Mr. Brennan or the Project Group disclosing to you what the weightings were, because that would be the most highly sensitive of information in connection with the evaluation process?

A. I appreciate that. And it did not happen.

Q. Now, the second matter that I just want you refer you to, again arising out of those minutes with which you were circulated, is the issue that arose between the Department of Finance and your Department, or really within the Project Group, regarding the application of weightings. And I think that issue was initiated by a letter of the 31st March from Mr. McMeel, which was addressed to Mr. Brennan. And you'll find that, Mr. Fitzgerald, although I don't intend to open all of it, at Divider 51 of Book 41.

A. Yes, I have it.

Q. And I think the thrust of it if you wish me to open it all, I will, Mr. Fitzgerald, but I think the thrust of this letter was that the Department of Finance was concerned that the application of weightings and the publication of weightings might ultimately fetter the discretion of the cabinet or of the Government in making a final decision on the award of exclusive negotiation rights. And I think a lesser concern, I suppose, was that the RFP document which had been approved by the Government, and was essentially amounted to Government policy, did not provide for the application of a weighting matrix; would that be a fair summary of what was in that letter?

A. That would be a summary of the reasons why he wrote the letter, I think. I don't necessarily agree with all of that.

Q. I am not asking you to agree with it; I am just asking you for the moment to agree with me that that's a fair summary of what he stated in the letter.

A. I think the concern of the Department of Finance was that weightings might constrain or restrict the Government from choosing a bidder with a lower rather than a higher fee, and therefore circumscribe the choice open to Government.

Now, I don't know whether matters would have worked out in that direction or not. But as a general sort

of observation, I would say that once the Government brought into the process, their freedom of choice was quite limited thereafter.

Q. I think that seems to have been a matter which was discussed within the Project Group, or within the group, and you were circulated with those minutes, and I take it there would have been no reason for Mr. Brennan not to consult you in relation to that issue, because that issue

A. There would have been no reason why. I can't remember whether he did or not, but within the Department of Finance, I think I know now that it had been raised as a departmental issue, not as a project evaluation issue. So therefore I think he would have been within his rights to consult with me or Mr. Loughrey before he replied to it, and he may I don't know what Mr. Brennan's recollection is. The only thing is, I think it was different from any other communications within the group.

Q. That was a departmental issue rather than an individual issue between group members?

A. Yeah.

Q. And I think Mr. Brennan's response to that letter is at Divider 62, and it was dated the 3rd May, and I am just going to refer you to one or two paragraphs of it, Mr. Fitzgerald.

On the first page, the third paragraph, it's a letter

from Mr. Brennan to Mr. McMeel dated 3rd May. Third paragraph: "The primacy of Government in making the final decision on the second GSM operator is fully recognised. However, as mentioned in your letter of the 31 March, the Minister is obliged on foot of the Government decision of the 2 March 1995 to make a recommendation regarding the award of the licence. The proposed weighting of selection criteria is simply to ensure that this recommendation is made on a fair, objective, and transparent basis.

"The only alternative is to make a recommendation based on intuitive analysis of the relative merits of the application based on marks under each heading of the selection criteria. Such a process would, however, in my view introduce an element of subjectivity which does not meet the emerging EU requirements of objectivity and transparency and non-discrimination. It amounts in any event to an implicit weighting mechanism but also opens up the possibility of factors which are not included in the selection criteria at all being brought to bear on the final selection. The ultimate recommendation to Government will be supported by details of the weighting formula and the arguments in favour of the chosen formula. It will also include a short assessment of the conclusions reached on each of the applications for the GSM licence. I am satisfied that

this approach fully accords with the normal practice in submitting recommendations to Government and does not exceptionally limit the Government's discretion.

In these circumstances, I regret that I cannot accept your contention that the use of a weighting mechanism is a fundamental change to the selection process approved by Government. It is rather a logical extension of it, and this is clearly borne out by the approach to evaluation taken by the consultants who tendered for the evaluation job."

And can I take it, Mr. Fitzgerald, that that would have reflected what your thinking on the process was?

A. I think it would. Whether I was actually consulted or not about it, I cannot recollect.

Q. But that would have been your thinking on it as well?

A. More or less, yes.

Q. And then the final paragraph of the letter, Mr. Brennan tells Mr. McMeel that he is sure that Mr. McMeel will agree that an applicant who fails to score well on the requirement for financial and technical capability, or the first two criteria specified in the bullet points, should not get the licence, irrespective of a fee proposed. There is a clear trade-off between the applicant's approach to tariffing and the proposed licence fee. "I propose, therefore, that we agree that there be a reasonable balance between the weighting of the approach to

tariffs and the licence fee."

And I take it that would also reflect your views and your thinking on the matter?

A. Very much so.

Q. Now, the third matter that I wanted to take up with you briefly that occurred around this time was the intervention of the European Commission. And if I could refer you just firstly to Flag 59, which is a copy of the letter received in the Department to Commissioner van Miert, addressed to Mr. Lowry, dated 27th March 1995.

A. Yes, I have it now.

Q. And I think, as you said in your memorandum and as we discussed already, this came as no surprise to you?

A. No.

Q. It was no bolt out of the blue?

A. Well, it was not, no.

Q. If you could just assist me. The letter says

"Dear Mr. Lowry,

"Thank you for your letter dated 8th March 1995".

We are trying to get to the bottom of the letter of 8 March 1995. I don't know if you can be of assistance on it, Mr. Fitzgerald. I think what the Tribunal have assumed is that in the ordinary course, and perhaps that has also been confirmed by Mr. Loughrey, in the ordinary course it would have been prudent to forward a copy of the tender documents to the European



Commission, and that this would have been done shortly after the announcement of the competition, and that would have been on the 8th March. Do you recall that happening, or did you have any direct input into it?

A. I am quite certain that the documentation was forwarded to the Commission. Sometimes the process that might be used, that they would have been forwarded to the permanent representation in Brussels, and they would send them on to the Commission.

Q. And that would have been Mr. Cullen at the time?

A. It would.

Q. I think he was your Department's representative within the permanent representation?

A. That route may have been taken. If it's explained why there isn't a letter as such on the file, but normally I would have expected it would have been copied back to the Department.

Q. In fact, Mr. van Miert's letter which is addressed to Mr. Lowry seems to suggest that the letter of the 8th March was a letter from Mr. Lowry rather than a letter from Mr. Cullen or perhaps the Irish permanent representation?

A. If it was, I am surprised that there wasn't a copy of it somewhere.

Q. It would be fairly standard practice if somebody as significant as this, where you knew that the Commission had an interest, and that DG IV in

particular might well have an objection, that you

would forward them the tender documents?

A. Well, there was the earlier letter from them asking us

in effect to get on with the process, and I am sure we

would have told them, as soon as we were ready to go,

that this was being done.

Q. I am sure you were very anxious to assure the

Commission that you were going ahead with the

competition?

A. Yes.

Q. It's to Mr. Lowry, and it thanks him for his letter of

the 8th March 1995. Just going on to the next

paragraph: "The main issue is the amount the

applicant is invited to pay for the right to the

licence under Clause 19. As you are probably aware,

the Commission opened in December 1994 an infringement

procedure against Italy, which had also included such

an auction element as a selection criteria for the

second GSM licence. The Commission is of the opinion

that such an auction resulting in a fee which is only

imposed on the second operator and can significantly

distort competition and favour the extension of the

current dominant position of the incumbent

telecommunications organisation.

"In regard to this, it is not entirely clear to me

from the competition documentation whether Telecom

Eireann, which currently offers its own GSM service,

would also have to pay the same amount as the new competitor.

"In any event, such an initial payment would lead to higher tariffs to recoup the money paid, thus rendering the mobile service less affordable and restricting consumer access to the market contrary to the objective behind Council recommendation 87/371/EEC of swift GSM roll-out throughout the community.

"Moreover, this documentation does not appear fully transparent. Potential applicants are not aware of the weighting given to the different assessment criteria listed in Clause 19.

"I was somewhat surprised to note here that the amount the applicant is prepared to pay will have more importance than the qualitative criteria relating to coverage performance and efficiency of the service, which would appear to be difficult to reconcile with a coverage aim set out in Clause 7 and the more general objective of ensuring universal service in Ireland.

"Finally, I would be glad to receive confirmation that Clause 12 does not make any distinction between direct interconnection mobile telephony service within and outside Ireland.

"I would of course be happy to discuss these issues with you. My services are also ready to take part in a technical meeting with a view to exchange information and complete their assessment of the

situation.

"I look forward to your reply in due course.

"Yours sincerely.

"Karel van Miert."

So the two matters that the Commission DG IV were taking issue with was the open-ended licence fee, selection criterion, and also, to a lesser extent, I suppose, the lack of transparency due to the non-publication of the weighting matrix?

A. That seems to be the case. There was also, I think, some point about interconnection charges. And the question of I think they were, if I could put it, extending their remit about Clause 12 on the requirement that there would be no intervention, if you like, effectively, on international traffic.

Q. I think obviously the Department would have considered that this was a serious letter received from Mr. Van Miert?

A. Of course it was a serious letter.

Q. And I think Mr. van Miert's suggestion of a meeting between his services and the Department was taken up, and I think on the 2nd June, a delegation attended from the Department?

A. Yes.

Q. And I take that both you and Mr. Loughrey were fully aware of this situation which had arisen?

A. Yes.

Q. And that you were very much a party to discussions and deliberations as to how this potential challenge should be met?

A. Certainly. And I think there was also a lot of advice got from Andersens on how to handle this proposal.

Q. You are quite correct in that, and I think also ultimately from the Attorney General's office?

A. It was a serious issue, and the response was serious.

Q. And I think then the delegation went to Brussels and met with Mr. Ungerer on the 2nd June of 1995, and you will find the summary note of that meeting at page 68.

I don't propose opening it, Mr. Fitzgerald, except to ask you to note the final sentence of the report, which records "The collective view of the delegation after the meeting was that while the GSM fee issue would be followed through on a formal basis by the Commission, it could be resolved by the provision of adequate assurances in writing to the Commission."

So it seems that at least at that stage, the collective view was that it might not be necessary to amend or alter the design of the competition insofar as it provided for an open-ended licence fee, or that's what it appears to record?

A. I think the idea of a licence cap had been canvassed with them at that stage.

Q. I don't think so, Mr. Fitzgerald. I think the first time a cap on the licence fee was proposed was during

a teleconference on the 15th June.

A. I stand corrected.

Q. I think it was subsequent to that.

A. Yes, okay.

Q. All that I was just asking to draw to your attention to and assist with is that it appeared that the view of the Department delegation at that meeting is that sufficient assurances might be enough to satisfy the Commission, and I presume this would have been in the nature of asymmetric measures?

A. If the licence fee was to remain open, I think the solution found in Italy was the compensating measures had to be provided to the

Q. I think that might have been the solution in Italy in the end, was it?

A. Sorry?

Q. I think that might have been the solution that was imposed in the Italian case?

A. It was, in the end, yes. But I think the problem there was that the decision had been taken, an award made and the fee paid. So it would be difficult to unwind that.

Q. It would be. It would be difficult to recoup it. In any event, I think the proposal to resolve this issue was that the licence fee, rather than being open-ended, would be capped at €15 million, that a fee of €10 million would be paid by Telecom Eireann.

A. That is correct.

Q. And I think part of the Department's thinking with regard to that proposed solution was to preserve the  $\frac{1}{2}$ 25 million which had been provided for out of the telecommunications division in the budget estimates?

A. Yes, it was to neutralize the Department of Finance.

Q. And I think, as I said, that the proposal to solve the objection by the Commission was put by Mr. Brennan in the course of a teleconference. And I think you will find a record of that at Book 42, 72, and it was a teleconference between Mr. Hoceped and Mr. Ungerer and between and Mr. Brennan and Mr. Towey. And unless you wish me to open it, I don't think there is any need to. It's quite clear that the proposal was made and that it was received in a positive light.

A. I do remember Mr. Brennan coming to me on the occasion when I first heard about this idea, and from feelings he had made or some possibly at some meeting in Brussels, he had got the impression that this might be reasonably well received as a possible solution. And I encouraged him to follow up on it and see where we could get with it; that it was, I thought, quite a neat solution that couldn't be objected to by Finance because they would get 25 million one way or the other between the two, or they ran some risk in the winning bid offering 15 million, but I think that was unlikely.

Q. I think it limited the burden as well on Telecom Eireann in that it limited it to 10 million?

A. Yes.

Q. I think then there was an exchange of letters between the Commission and the Department, and I think that they were initially exchanged in draft form, which I understand wouldn't be in the least bit unusual?

A. Yes.

Q. And were effectively agreed, and that ultimately the deal was signed off, if you like, by receipt on the 20th July of Mr. van Miert's letter of the 14th July, which I think has been described as a nihil obstat?

A. That I believe is the sequence that occurred.

Q. And I think each of the letters, Mr. Fitzgerald, which emanated from the Department were marked "Confidential", and I take it that you would agree that the dealings between the Department and the Commission with regard to this issue were strictly confidential?

A. Of course.

Q. And in fact if I can refer you, at Flag 79, to the letter of the 22nd June 1995 from Mr. Michael Lowry to Commissioner Karl van Miert, which had I think initially been forwarded in draft form, and it had effectively been approved by the Commission Secretariat. You see that that is headed boldly with the word "Confidential"?



A. Yes.

Q. And in fact if I can refer you to the second page of that letter, you will see in the penultimate paragraph that notwithstanding that the top of the letter was marked "Confidential," when Mr. Lowry referred to the weighting of the licence fee element, he made it abundantly clear that a confidential decision had also been taken that "this element would get less than 15 percent of the overall marks in the quantitative assessment by our consultants."

So, if you like, he emphasised and stressed the confidentiality of even the reference to the level below which the weighting on the licence fee would be fixed?

A. Well, it was the only part of the weighting system that was being disclosed to the Commission, and seeing as the group had decided to attach the highest degree of confidentiality to the weightings, then of course this had to be

Q. It was appropriate, was it not, that Mr. Lowry should have reiterated in that letter that this element and this part of the letter was of the strictest confidentiality?

A. I see this was done, yes.

Q. Now, in the documents, Mr. Fitzgerald, that have been produced to the Tribunal, the Tribunal has no less than seven copies of different versions of Mr. Van

Miert's letter of the 14th July. Some of these copies have been furnished by the Department. I think one of the copies has been furnished by the European Commission, and one of the copies was discovered by the Tribunal shortly before the commencement of its sittings in the files of Mr. Jarlath Burke, whose title I think was regulatory counsel to Esat Telecom.

And I just want to bring the copies of this correspondence to your attention, and I want to draw your attention to certain aspects of these copies.

And I think we may have the seven copies which have been extracted from the books that I can hand up to you.

(Documents handed to witness.)

Now, the first document in front of you is a fax from Mr. Hocepied, of DG IV, to Mr. Martin Brennan. It's dated the 20th July, 1995. And he states "Dear Mr. Brennan,

"As agreed, I send you herewith and officially the draft closing letter drafted for Mr. Van Miert. This draft must still be reviewed as regards the English and cleared by the legal service of the Commission."

Then in manuscript "(Moreover the list should be reviewed on the basis of what your Minister could accept.)

"The last paragraph will probably be shortened. It aims only to remind the Commission's position that

mobile services should not is maybe too detailed but aims only to remind the position already expressed the Commission mobile Green Paper, no exclusive rights on mobile services are justified."

"Best regards"

"Christian Hoceped.""

And that encloses a draft of the proposed letter which was ultimately dated the 14th July, and I think we could refer to that as a working draft. And you will see and I just want to draw your attention to the following: that the letter is undated, and clearly, as a working draft, is unsigned.

A. Yes.

Q. Now, the second copy I want to bring to your attention is furnished with a fax cover sheet dated 29th June of 1995, also from Mr. Hoceped, to Mr. Fintan Towey.

And the message says "Dear Mr. Towey,

"As agreed, I send you herewith the unsigned copy of the closing letter which Mr. Van Miert will sign (I hope) tomorrow."

If you go over the page, you will see that the copy of that version is marked "Draft". And I just draw your attention to the fact that that copy is also undated and is unsigned, and I think the only significant change between that final draft and the working draft is that the reference to the weighting of the licence fee criterion refers to it being less than 15 percent,

whereas in the working draft, it was referred to as less than 20 percent. But I don't think, for our purpose, that anything of significance turns on that. And the only other matter I'd refer you to is the fax banner at the top of the fax cover sheet, and you'll see that it's faxed from number 3222969819

A. It's difficult to read it on this.

Q. It's the second line.

A. I see it, yes.

Q. It is difficult to read, but I think the number is, apart from the Bell General code, the Brussels code, the number appears to be 2969819?

A. Yeah.

Q. Now, the next version, the third version of that letter, Mr. Fitzgerald, I refer you firstly to the fax cover sheet. It's from Mr. Hoceped to Mr. Brennan. It's dated 14th July, 1995. And it reads "As agreed, I send you herewith (finally) an advanced copy of the closing letter signed by Mr. Van Miert."

Now, I just draw your attention to the fax banner.

You will see that the number appears to be the same number as the previous fax. It's 2969819, and the time appears to be 15.57 Brussels time, which would have been 14.57 Irish time, which would have been three minutes to three.

If you just look at the document that accompanied it.

It's the same as the final draft, except for the

following, which I draw your attention to.

There is no date on the document; do you see that?

And do you see that under the word "Brussels", there appears to be a legend printed "F/ft"?

A. Yes, I see that.

Q. If you turn over the page, you will see that the letter is signed?

A. Yeah.

Q. I just want to bring to your attention information which has been provided to the Tribunal by the Commission, that these letters which are ultimately issued over the name of the Commissioner are, in the ordinary course, drafted within the Secretariat. They would have been drafted by Mr. Hocepied or Mr. Ungerer?

A. Yes.

Q. They are then transmitted electronically to the Commissioner's office, and the Tribunal has been informed that on electronic receipt of these draft letters, the legend "F/ft" is printed on the face of the draft?

A. Within the Commissioner's office.

Q. Within the Commissioner's office. I think it's actually part of the electronic we don't know it, but on receipt within the Commissioner's office the legend "F/ft" is printed on the face of the draft letter and remains on it from then on.

Now, the next version of that document, the fourth, it's under a fax cover sheet from Mr. Brosnan, who was chef de cabinet to Commissioner Flynn, to Mr. Andy Cullen, who was the Department's representative in the Irish permanent representation. The message there is "Please find attached, as promised, copy of the above-mentioned letter".

If I just refer you then to the copy letter that was enclosed, you will see that it bears the legend "F/ft". It also bears the date "14th July, 1995 14/07/1995", and it's signed by Mr. Van Miert.

So the difference in that version of the letter to the version that had been faxed or received at three minutes to three from Mr. Hocepied is that the date is stamped on the face of that letter. And the Tribunal has again been informed by the European Commission that after the letter is signed by the Commissioner, it is then date-stamped; and once it is date-stamped, it then becomes the official communication.

A. I understand.

Q. And if I just refer you back to the fax sheet from Mr. Brosnan to Mr. Cullen, I can tell you that Mr. Brosnan has informed the Tribunal, and we know that he was contacted earlier that week by Mr. Loughrey, who asked him to use his good offices to try and speed up the issue of this letter, that he took the matter up with his opposite number in Mr. Van Miert's Cabinet, and

that he would have received from Mr. Van Miert's chef de cabinet a copy of this letter, and that he would then have forwarded it, in accordance with the usual procedures, to the Department's representative in the Irish permanent representation?

A. Yes.

Q. And from the time on that fax sheet, it appears that was at 16.15 Brussels time.

A. 16.15.

Q. Brussels time. And this copy these three documents were also within the Department's files, and in that regard, Mr. Cullen has informed the Tribunal that he would have received that letter. It was on a Friday.

If he received it in time to put it into the diplomatic bag, which closed at 5.30 on a Friday, he would have done so, and in that event it would have arrived at the Department by lunch time on Monday

A. I'm aware of the process, because I worked in the representation myself.

Q. But that if he didn't meet the Friday closing date, he'd have

A. Yes, he'd have to wait until Monday.

Q. And it would have been lunch time on Tuesday that it would have been received in the Department?

A. Yes.

Q. Now, the next version of the letter was also produced to the Tribunal by the Department, and this is a copy

of the official issued letter. It's a copy of the hard copy which was received, it appears from the stamping on it, by the Department on the 20th July of 1995?

A. Yes.

Q. And I think that would have come into the Minister's office, and I see that it would have been CCed it was CCed to the Secretary; to you, Mr. Fitzgerald; to Mr. Brennan; and again to Mr. McCrea.

A. Yes.

Q. Now, the next version of the letter which, as I said, is a copy of the sixth version, was produced to the Tribunal by the European Commission, and you will see that this copy bears the legend "F/ft". The letter is dated, but the letter is not signed. And the Tribunal has been informed that this is the official file copy produced by the Commission, and it is this document which would be returned to DG IV, to the Secretariat, and would be retained on their files.

A. It seems to also have a serial number on it.

Q. It's addressed to Mr. Lowry?

A. Pardon? It has a serial number on underneath the date.

Q. The serial number is the annex x 2. I think that's impressed by the Commission, and the number at the top the number underneath is a number that was placed on it by the Tribunal.



A. Oh, I see.

Q. And then the final version of this letter, Mr. Fitzgerald, was produced to the Tribunal within files provided by McCann Fitzgerald, solicitors to Esat group, and these were the files of Mr. Jarlath Burke, who was the regulatory officer of Esat Telecom. And I just draw your attention to the following aspects and features of that copy.

You'll see that it is marked with the legend "F/ft"?

A. Yes.

Q. You will see that it has no date?

A. Correct.

Q. And I think you will see as well that there is no fax banner apparent from the top of the page?

A. Is it clear that it was all copied? There is from the positioning of the heading, it looks as if the top part of the page is missing.

Q. Exactly. Exactly. In that regard, I should say to you, Mr. Fitzgerald, that the Tribunal has taken this up with McCann Fitzgerald to ascertain whether the document on the original file is the same as this document, and they have confirmed that it is. That the document on their file is also copied in exactly the same way.

A. Mmm.

Q. As we only have the front page of the letter, Mr. Fitzgerald, it's not clear whether that letter is

signed or not signed, because that's the only page we have of it. And I should tell you, from the same documents, it appears that Mr. Burke forwarded this document to a director of Esat Telecom, Mr. Mike Kedar, on the 24th July.

Now, what I wanted to just bring to your attention is the following, Mr. Fitzgerald: You have already noted that there is no date on this document, and in those circumstances, it appears that it can't be a copy of the official copy, because the official copy retained within DG IV and produced to the Tribunal by the Department is date-stamped.

A. Is that the only copy within DG IV?

Q. We are uncertain as to whether it's the only copy within DG IV, but it is the official copy, and the Tribunal is being told that it has been furnished with all documents by the Commission relating to the issue which arose with the Department.

A. Mmm.

Q. I think you will also agree with me that it cannot be a copy of the hard copy received into the Department on the 20th July, because again, it's not date-stamped, and there is no stamp "Received" on it.

A. Yes.

Q. Do you see that?

A. I understand.

Q. Again, I think you will agree with me that it cannot

be a copy of the letter that was faxed by Mr. Brosnan to Mr. Cullen and which in turn was in all probability forwarded in the diplomatic bag by Mr. Cullen to the Department. There was the copy on Mr. Burke's file does not bear any date stamp.

A. I am trying to find I have it now yes.

Q. That's date-stamped. I think you will also agree with me that it can't be a copy of either the working draft or the final draft, because it bears the legend "F/ft", whereas the working draft and the final draft did not bear that legend.

A. That would have been the two first drafts sent by Mr. Hoceped?

Q. Yes. You see they don't bear the legend "F/ft"?

A. Yes, okay.

Q. They are just the first two letters. Two versions of the letters.

A. Yes.

Q. And they don't bear that legend.

A. Yeah.

Q. And would you agree with me therefore, Mr. Fitzgerald, that on the basis of the versions of the letters available to the Tribunal, and it has been confirmed to the Tribunal that it has all of the documents from the Commission, and the Tribunal also understands it has and believes it has all of the documents from the Department, that this front page is identical to the

front page of the letter that was faxed by Mr.

Hocepiet at three minutes to three, Irish time, on the 14th July to Mr. Brennan and Mr. Towey? You will see that that bears the legend "F/ft" in the same way as the letter on Mr. Burke's file and that it bears no date. And

A. At three minutes to three Irish time, yes, yeah. It is possible that it is a copy of that.

Q. Yes, it's possible it's a copy.

A. Or a copy of the original document which was faxed.

Q. Or a copy of the original document that was faxed, yes. It could be a copy of the document faxed by Mr.

Hocepiet to Mr. Brennan and Mr. Towey, or it could be a copy of the document that was received by Mr.

Brennan and Mr. Towey; we don't know.

A. I can't cast any light on this either.

Q. Mr. Fitzgerald, I think you indicated a moment ago that you had worked in the Irish permanent representative?

A. I did, yes, at a much earlier time, from 1976 to 1979.

Q. And you would have had reasonably frequent contact with Commissioners' offices when you were working within the Irish permanent representative?

A. Yes, within the area in which I worked, which was the finance sector. I was a finance counsellor in the embassy, other representations

Q. Can I take it, from what I was telling you in your

response to it, that you didn't know what that legend

"F/ft" signified?

A. I am not sure whether that particular security system was in use at that stage, but

Q. As a civil servant that had worked within the Irish permanent representative, if you had received that letter, you wouldn't have known that that legend "F/ft" was applied when the draft was received within the Commissioner's office?

A. I think in the normal course of work, probably no.

Q. You'd really only expect to know that if you had worked very closely within a Commissioner's office?

A. In the normal course of events, yes.

Q. Can you assist the Tribunal at all, Mr. Fitzgerald, in this regard? It's clear that this letter, closing letter from Mr. Van Miert must have been patiently or impatiently awaited in the Department. It was important to get this letter in and to get to fix a new closing date and to get the competition up and running.

A. Of course it was.

Q. And I think we can even see from the message from Mr. Hoceped to Mr. Brennan, "As agreed, I send you herewith (finally) an advance copy of the closing letter signed by Mr. Van Miert."

A. Yes.

Q. So I presume, can I take it that everybody in the

Department must have been keenly awaiting the receipt of this letter?

A. Well, I think everything was at a standstill until this letter was formally received.

Q. Yes. And when this letter was received by Mr. Brennan and Mr. Towey, I take it that copies would have been made, and it would have been circulated immediately to all of the interested parties involved in the competition?

A. Certainly we would have been aware of it, that it was there. I haven't seen any circulation list that it was circulated.

Q. No, there is nothing on the face of it to suggest that it was circulated.

A. I think it's the kind of letter that would not be you know, sent floating around the office, if I may put it that way.

Q. Except that the final version, the formal version the final version which was received into the Minister's office, that clearly was copied, because it was circulated separate copies presumably circulated to the Secretary, to yourself, to Mr. Brennan and to Mr. McCrea?

A. Yes, because it was a completed business at that stage. But you could not presume from the earlier drafts that there would not be some problem before it got formally signed.

Q. Well, I don't think the letter I am referring to, Mr. Fitzgerald, just in case there is any confusion, it wasn't an earlier draft; this was the signed copy that was rushed over by fax to the Department by Mr. Hoceped. And obviously it was expected by Mr. Brennan and Mr. Towey, because in his message he says "As agreed, I send you herewith (finally) an advance copy." And that letter was addressed to the Minister, so presumably it would have been brought to the Minister's attention?

A. I expect it would.

Q. And presumably the Minister would have sight of a full copy of that letter?

A. I have no doubt that he would. But I think it is still too early to, you know, accept it as a definitive end to the process.

Q. Oh, nobody is suggesting that. In fact, we can see from the documents we can see from the documents that it wasn't until the official hard copy was received in on the 20th July that in fact, the applicants or persons who had shown interest were circulated and were informed of the new closing date.

A. Yes.

MS. O'BRIEN: I am just about to move on to another matter, Sir.

CHAIRMAN: Well, I think if you have completed that matter, Ms. O'Brien, we'll adjourn until eleven

o'clock on Tuesday, if you please, Mr. Fitzgerald.

Thank you very much.

THE TRIBUNAL THEN ADJOURNED UNTIL TUESDAY, 4TH MARCH,

2003 AT 11AM.