

A P P E A R A N C E S

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Mr. Jerry Healy SC

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I N D E X

WITNESS: EXAMINATION:Q. NO:

THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY, 12TH MARCH, 2003, AT 11AM:

CONTINUATION OF EXAMINATION OF SEAN MCMAHON BY MR. HEALY AS FOLLOWS:

Q. MR. HEALY: If you go to Query Number 57 on Page 29.

A. Yes, I have that.

Q. You were asked for an explanation of the contents of the Regulatory Division document dated 23rd October, the purpose for which the document was prepared, whether the document was circulated and if not, why it was not circulated, and details of any action taken on foot of the document.

This is a reference to the document that has been discussed in the last few days, prepared by you and described as a document to be used in the event of no additional time being made available.

And you say: in fact to be, I think, used in the event of you being obliged to run with the report as it then was. We'll come to the detail of it later.

You say, "It is presumed that the question refers to the document entitled 'GSM views of the Regulatory Division, 23rd October, 1995.' This document appears to be an internal divisional document prepared 'for the file' to show that we had adopted a particular stance at that time in relation to the draft as tabled on the 23rd October. It appears that it was intended

to encapsulate my own and Mr. O'Callaghan's views following a discussion between us. This leads me to believe that that discussion took place on the morning of the 23rd following the Project Team meeting, but before the meeting with the Secretary at which it was agreed to change the draft. Mr. O'Callaghan was absent from the final stages of the Project Team meeting of the 23rd. From my handwritten notes on the document, it seems to me that we intended that it would be signed and circulated to the Project Team members in the event that I failed to get the necessary changes made to the draft. However, it did not prove necessary to circulate the document because it was agreed changes would be made."

Next 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 you say: "My understanding of Esat Digifone's composition at the time of the final decision in October of 1995 was as set out in the final report, i.e. 50% of the consortium was to be held by each participant, Esat Digifone and Telenor. I understood that each would relinquish 10% for flotation in the run up to a commercial launch. I further understood that Esat Digifone was owned by Denis O'Brien's Esat Telecom Holdings Limited, and that there was some

upstream involvement by Communicorp and other Denis O'Brien holdings company. I cannot recall the respective shares. I was also aware that Advent International had a holding of some sort in one or other of those companies. Advent was to receive 5% of the 20% floated as above."

A. Perhaps I could stop you there, Mr. Healy. That was as I wrote it in response to your question at the time, and relying largely on memory, and it's obvious now that "Esat Digifone" should have read "Communicorp Group Limited". And I think

Q. At what point?

A. In the third and fourth lines of my answer, where it says that, "50% of the consortium to be held by each participant, Esat Digifone" that should read Communicorp Group Limited.

Q. Yes. Query Number 59, you were asked for your knowledge, direct or indirect, of, or your 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 say: "My understanding then, as now, was that the Minister would put the decision of the Project Team before the Cabinet as his own recommendation, and that the Cabinet would approve the decision, unless there was some fundamental objection."

Question 60 sought details of all information, if any,

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 your response is: "I believe I had no communication at all with the Minister during the evaluation process concerning the process. It is entirely possible that I communicated with him and he with me on other topics. However, I do not recall any such meetings."

Just to be clear about that. You are saying you had no communication with the Minister during the evaluation process concerning the process. You had some discussion with Mr. Brennan about the use of the word "process", because of course in one sense, the process was going on for quite a while, but by "process" do I take it that you mean from the time that the RFP was sent out to interested parties, or do you think you are referring to the period from the time that the completed applications came in on the closing date on the 4th August?

A. No, I am referring to the GSM process in its entirety from start to finish.

Q. And when you say that it is entirely possible that you communicated with the Minister and he with you on other topics, what other avenues of likely contact

would you have had, if any?

A. It could have been one of a large number of affairs that I was involved with at the time, including ordinary regulation of the value added service licensees, the telecoms industry; it could have been the deflector issue which was live at the time. There was pending litigation, as I remember it. It could have been anything to do with the regulation of the radio spectrum. Any of those things. But I honestly don't remember any communication at all. There may also have been communication about parliamentary questions, but once again, I don't remember it.

Q. 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.

You say: "I am not aware of any such meetings. Had I known of any, I should have advised strongly against them."

You were asked for the date on which, and the circumstances in which, you first became aware of the involvement of IIU Limited or Mr. Dermot Desmond in the Esat Digifone consortium. And your understanding as to the precise nature of the involvement of IIU at that time and the source of such knowledge and understanding.

You say: "I cannot recall when I first heard of this involvement. I became aware from meetings on other topics and from my staff of what the latest financial proposals were from time to time. However, Ms. Regina Finn, who was assisting me on the licences aspect, was aware by the 16th April, 1996, that IIU were involved and, in fact, held 25%." And you refer to her fax of the 16th May of 1996 to Martin Brennan and Fintan Towey.

"I would have known from that point onwards. My notes refer to a meeting with Denis O'Brien on or about the 26th April, 1996, during which I quizzed him on this matter. There should be a note of this meeting on the Regulatory Division files. In my own note of that meeting he told me that IIU had between 10% and 12.5%."

You were asked for your knowledge, direct or indirect, of a letter dated 29th September, 1995, from Michael Walsh of IIU to Mr. Martin Brennan.

You say: "I cannot recall having heard of this letter at that time or subsequently."

You were asked for your knowledge, direct or indirect, of, or your involvement or the involvement of any other person in the decision made to return the letter of the 29th without retaining a copy of the letter on the Departmental file.

Again you say you have no knowledge whatsoever of this

decision, except from recent publicity.

You were asked whether you 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.

And you say you had no such knowledge.

You were asked for your 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.

And you say you had no such knowledge until April of 1996, as stated in response to Query Number 62.

You were asked for details of the date on which and circumstances in which you first became aware that the 20% shareholding in Esat Digifone Limited held by IIU was to be beneficially held for Mr. Dermot Desmond.

And your response is: "I cannot recall when this information came to me, except that it was well after October of 1995 and probably well into 1996. I did, however, associate the name of Dermot Desmond with that of IIU, so I would have been aware of a link by April of 1996."

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 say: "From November of 1995 onwards, I became more closely involved with other pressing matters, including the drafting of the GSM licence itself. I believe that by May of 1996, Mr. Brennan's division was handling all outstanding matters regarding progress towards a commercial launch. My division was involved up to the time the licence was awarded, but I do not recall any further detail concerning the ownership issue except that it continued to concern me, in that Esat Telecom's activities to expand their business seemed to be driven by the financing requirements of Esat Digifone. I must stress that following the announcement of the winner, "follow-up" in the financing and other areas was shared to an increasingly lesser extent with my own Regulatory Division. I cannot recall any further treatment of the matter in which I was involved in this. I consulted to check my recollection with Mr. O'Callaghan."

Just so I can understand that. Do I understand you to be saying that following the announcement of the winner, being October of 1995, the financing and other areas, I suppose you mean independently of the

drafting of the licence and getting it technically

correct, was taken up mainly by other people or to an increasing degree by Mr. Brennan's division?

A. That was my understanding, yes. I had intended to make that point to you there, that yes, the drafting of the licence must have involved me with some concern about this, because I knew that at the time we began to draft the licence, that this was one of the areas which we had resolved to try and take care of. So that what I have written here, I would like to put down a marker that subject to whatever I read in other Departmental files from that time on, my memory may improve, it may not, I don't know. But certainly the state of my memory at the time that I wrote this was that I was not involved in any of the discussions trying to nail down who owned what, and the discussions involved in getting IIU out of the equation at the time and having it reverted to the status quo ante the time that the bid was made.

Q. You say that, or you were asked rather, for your knowledge, 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 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 the Department, "and kindly identify where such information was recorded."

You say: "I am unable to help in this regard. I believe I was not involved with the matter by this time."

I think in fact, from your own journals which subsequently became available, there is a reference to, shall I think there is a reference to the involvement of CS First Boston in taking over the financing of Mr. O'Brien's side, and I think you allude to it, at least in the context of drawing a conclusion in your journals, to the effect that, as you have already mentioned in one of your answers here, the requirements of the people who were providing finance to Mr. O'Brien were driving his desire to expand capacity on the routers side, on the fixed side, sorry, and that this was having an impact on his ability to finance or to come to grips with the financing of his obligations to Esat Digifone. Do you recall I think I am right in saying that there is a reference to CS First Boston somewhere in your journal?

A. You could be right there.

Q. We'll be looking at them in detail. Question 70, you

were asked for details of all dealings and discussions which Mr. McMahon had with the Minister, with Mr. Martin Brennan, with Mr. John Loughrey, with Mr. Sean Fitzgerald or with any other persona arising from the involvement of Mr. Dermot Desmond in Esat Digifone Limited.

You say: "I am not aware of any such meetings, although I am aware from personal notes of two phone conversations around end April, beginning of May, 1996, with Denis O'Brien, in which shareholdings were discussed. It may, however, have been in the context of Mr. O'Brien's financing campaign and his efforts to get more line capacity from Telecom Eireann. As far as I can recall, I regarded the compliance of Esat Digifone with the licence terms as a matter for Mr. Brennan's side by this time."

You were asked for details of all previous dealings you had, in both your personal and professional capacities, with Mr. Michael Walsh and with Mr. Dermot Desmond.

And you say: "My only dealings were with Mr. Walsh during the 1980s in the Department of Energy. We had employed him as a financial consultant on the Natural Gas Programme. I was unaware of any involvement by him in the GSM business until I met him coming out of No. 44 Kildare Street sometime in mid-1996."

You were then asked for your knowledge of, direct or

indirect, of a meeting in 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. O'Connell.

CHAIRMAN: The answer is in the negative.

Q. MR. HEALY: Yes. You say you know nothing of the meeting.

You were then asked for your knowledge of requests or requirements of the Minister or the Department that the issue share capital in Esat Digifone should be restored to the capital configuration of the consortium which had applied for the licence, i.e.

40:40:20. And you say that you seem to know nothing about that.

You were then asked for your knowledge of a meeting which took place at the Department on the 13th May, 1996, attended by Mr. Knut Digerud, Mr. Owen O'Connell.

You say that again it appears that you know nothing about that meeting either.

Again you say you know nothing of any steps taken by Esat Digifone or any other person associated with Esat Digifone, or by the Department on foot of a request that key questions and draft answers would be prepared to enable I think I am summarising what happened to enable the Department and Esat and the Esat consortium to have a common approach to press

conferences anticipated to be held after the launch of the licence holder.

You say you know nothing about that and you were not involved in the preparations of the press conference.

Next question, Question 76, is essentially dealing with the same thing. And again you know nothing about it.

You were asked for your knowledge, or your understanding, of the terms in which IIU and/or Telenor provided funding to Esat Telecom to finance its obligation to contribute to the licence fee of 15 million paid by Esat Digifone to the Department on the issue of the GSM licence.

And again you say you know nothing about this, and you were not involved in it.

You were asked to identify documents furnished to the Department in connection with the rights and obligations of the shareholders in Esat Digifone in advance of the issue of the licence, the Shareholders' Agreement and related documents. And you say you knew nothing about those either.

A. I think beyond those which accompanied the bids, yeah.

Q. These are the documents this is the Shareholders' Agreement which was furnished I think more or less on the same day that the licence was signed, together with side letters

A. The only thing to be added is that, from following the

proceedings here, I gather that I asked about a Shareholders' Agreement when Esat Digifone made their presentation.

Q. That's right. Well, did you ask about a Shareholders' Agreement? You certainly asked about other agreements, but you may have asked about a Shareholders' Agreement, I'd have to check that?

A. My understanding from just listening to somebody give evidence here, is that I did actually ask if there was a Shareholders' Agreement in existence. I wouldn't have remembered that otherwise.

Q. But in any case, I think we can take it from your answers to these questions that you had no involvement in the fairly frenetic activity which surrounded the ultimate formal granting of the licence on the 16th May, and you had no knowledge, as I understand from answers did any other members of the team on the Department side, of the arrangements made to enable Esat Telecom/Communicorp/Denis O'Brien come up with their share of the licence fee money?

A. That's correct.

Q. You were asked for your knowledge, direct or indirect, of, or your role, or details of your role or the role of any other person in advising the Minister regarding a letter dated 29th March, 1996, from the Minister to the Chairman of the ESB. That was in connection with co-location.

And you say: "I cannot recall drafting or advising on the issue of this letter, although it is typical of the many GSM-related matters that could have come to my division for advice/drafting. The Minister's office files should show whether it came via my own or Mr. Brennan's division."

You were asked for your knowledge, direct or indirect, of, or your role or the role of any other person in advising the Minister regarding the Minister's dealings with the European Commission in early May of 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 you say: "I recall only discussion of these matters with Mr. Brennan's division. Any knowledge I had would have come via that channel. I was not directly involved."

You were then asked for details of your contacts with certain persons about whom the Tribunal has inquired.

And you say: "Regarding contacts with particular persons about which the Tribunal has inquired, given my position in 1995/'96 as Principal Officer in charge of the then Regulatory Division, I almost certainly had contacts with Denis O'Brien, but at this remove I cannot say when or about what exactly, apart from the major regulatory issues of the day, including the use



of routers, auto dialers, etc.. There were, of course, the meetings of the GSM group of bidders, i.e. the formal meetings. I would certainly have had meetings with Mr. Lowry, probably with members of the Oireachtas and possibly, but I cannot recall again, with members of the Government. I recall at least one conversation with Mr. O'hUiginn, but I think that was after May of 1996. Much of my work involved contact at many levels with officials in Telecom Eireann, and there would have been contact with other State bodies interested in telecommunications."

Now, you also provided a Supplemental Memorandum, and that memorandum was in response to a further query from the Tribunal concerning handwritten notes you made of an interdivisional meeting of the 9th sorry, of the 3rd October of 1995. You know the document I am talking about. It's an extract from your notebook of your notes of a meeting which appears to have been an interdivisional meeting of the 3rd October of 1995.

And you say: "I have looked at the copy of my handwritten notes furnished to me by the Tribunal, the originals are with the Tribunal, and in particular at Item 4 on GSM as directed. It appears to me that this note" sorry, "It appears to me, that this is a note of one of our regular interdivisional meetings at which we updated ourselves on developments in the

telecoms area. The numbered answers below follow the questions in Mr. Davis's letter:-

"Question 1, who conveyed the message to Mr. McMahon that the Minister wanted to accelerate the process?"

I am just going to let you have a copy of the Supplemental Memorandum to add to the lengthier one you already have.

A. And this is the handwritten note that I am looking at here?

Q. Yes. See where you have recorded, "Minister wants to accelerate the process." It was in that context that Mr. Davis wrote to you with a number of questions. The first question is, "Who conveyed the message to you that the Minister wanted to accelerate the process?"

Your answer is: "I did not put any initials in the margin, so I can't be sure to whom the statement should be attributed, but it is a safe bet that I was recording the latest news from Mr. Brennan's side, i.e. with either himself or Mr. Towey speaking.

Mr. Brennan's division with responsibility for 'development' had the lead role, and his staff provided the secretarial function of the GSM group.

Updates, for example, on progress by and communications from AMI came via him or his staff.

Accordingly, I am quite certain that this information did not come through myself or through my division."

Question 2 was: "What discussions, if any, did the Minister have with either Mr. Sean McMahon or Mr. Martin Brennan, or any other person which led him to give this instruction, or which resulted in any statement indicating that the Minister wished to accelerate the process?"

And you say: "As stated in reply in my earlier answers, I believe I had no communications whatever from or with the Minister on the GSM assessment from start to finish. I am unable to answer the question insofar as it relates to Mr. Brennan, but if the Minister had chosen to communicate his anxiety for progress in the matter, I believe he would have communicated it downwards to Mr. Brennan's division, as he seems to have done on the 23rd October. I do not know by what means or via what channels he did this."

You were asked what was meant by "accelerating the process". You say: "I believe the note speaks for itself. The Minister wanted the process speeded up. It seems he wanted a result. I do not know what the Minister's understanding was of the process of assessment or its time-frame at that time."

And you were asked what was meant by "legalities more complicated"?

And your answer is: "The reference to the 'legality', I think it is fact 'legalities more complicated' is

likely to reflect the views of all present, i.e. that it was not as simple as the Minister seemed to be suggesting. I believe we were all highly conscious of the need for secrecy at that stage and, furthermore, of the requirement that we give due consideration to all and any issues arising. There was furthermore, at least in my view, the requirement to take whatever time was necessary to get it right. If the reference to the legalities does not indicate that there was general agreement on the matter, then it is likely that I made the point myself in reply to the news that the Minister wanted an accelerated process. I certainly made the point later when the draft report came from AMI and when we met the Secretary. I noted that there was agreement to review AMI's results in confidence at one location, i.e. in Kildare Street."

Could you just explain to me firstly I am going to go back to the start of your questionnaire now, your response. Could you just explain to me how the Regulatory Division was set up and what the role of that division was from the time it was set up? What role were you given?

A. I think prior to 1993 there had been a division within the Department of Communications, as it then was, called the, I think it was called the radio I have forgotten the exact terminology now, but it was a division which dealt with telecommunications, and

there was a separate division dealing with radio and broadcasting. Presumably under two Principal Officers. The functions of those divisions at the time, as I understood them, had been to look after all matters in relation to the Minister's responsibilities for those areas. Now, in or around that time, the open market provisions of the European Community began to gather momentum, and it became clear to the Government that that state of affairs could not last, that competition was on the way in both of those areas, telecommunications and in radio and broadcasting. And so it was decided that we should review what to do with these two divisions.

You may know, that Mr. Brennan and I, and several others, were members of a strategic review group which was established to look at the future of telecommunications and radio, by which I mean more the use of the radio frequency spectrum rather than radio broadcasting content, which had disappeared to another Department, being the new Department of Arts, Culture and the Gaeltacht. By now we had a Department of Transport, Energy and Communications, and it was decided that these two divisions, of which I spoke earlier, telecommunications and radio and broadcasting, should be put in the hotchpotch, so to speak, mixed up and then devised vertically, rather than horizontally, into a division which dealt with,

on the one hand, the development of policy in both telecommunications and the use of the radio frequency spectrum, and on the other hand, regulatory policy and regulatory affairs in relation to both telecommunications and radio frequency use.

The idea being that we would park all of those functions of the Minister which related to the pure regulation of those industries to one side, and gradually distance it from those of his functions which related to ownership and other residual policy matters. And so Mr. Brennan was put in charge of that area which dealt with policy and development of both telecommunications and the use of the radio frequency spectrum, and I was put in charge of the regulatory areas, development of regulatory policy, and with the additional function of working towards the establishment of purely independent regulation of both the telecommunications industry and the radio frequency spectrum.

And Mr. Brennan kept all the residual policy areas relating to those affairs. That was how my division came to be known as the Radio and Telecommunications Regulatory Division.

Q. And while you were responsible for that division, and discharging functions which you have described as those of a de facto regulator, did you enjoy or was it envisaged that you would enjoy the same type of

independence that a regulator would enjoy?

A. I don't think that would have been possible as a civil servant in those days prior to the enactment of, let's say, the Public Service Management Act, 1997. What my task was, was to try and put those functions, as far as possible, to one side, and as far as possible within the law as it stood, to distance them from the Minister. At least that's the impression that I got from the time of my appointment. And from lengthy discussions about this role with my superiors, I resolved to try and do this insofar as I could.

Now, from the start it would have involved things like perhaps removing this decision to another premises, perhaps styling it differently to the Department, perhaps creating a new name and logo for it, things of that nature. But we remained locked within the Ministers and Secretaries Act in the law as it stood at the time from the point of view of de jure responsibility.

Q. In the course of the evidence here, I think a distinction has been made between the evaluation process, which has been called a sealed process, and the role of the Regulator, which has been described as a somewhat more open process. So that while the evaluation of applicants for the second GSM licence was to be conducted in a sealed way and in a way as independent, independently as possible of the

Minister, one has the impression that the work of the Regulatory Division was not quite so independent of the Minister. Would that be right?

A. I am not sure that I follow the proposition you are putting to me. No.

Q. I am not sure I understand it either, because I have heard it mentioned in evidence that one was a sealed process and the other was not quite so sealed from Ministerial intervention or even political intervention. Would you accept that the evaluation process was a sealed process? Would you say that's a fair way to describe it?

A. If you are talking about if you are talking about the GSM process, in which we were all involved here, the selection of a body to whom we would give the licence, yes, the clear understanding that we had was that we, as a body, were not going to be interfered with, that we would choose a candidate, and that we would put it to the Minister and that the Minister would put it to the Cabinet Subcommittee and so on.

Q. Or reject it?

A. Or reject it, yes. And even then, I mean, it has certainly been my understanding, as I think I have said here, that such a rejection would only occur for very good reasons. In that sense, both Mr. Brennan and I, and Mr. McQuaid indeed, were given the authority, although I don't know that there was any



written delegation of such authority, we were given the authority to do this free from Ministerial interference. Much as I would have wished that that had been the case for everything that was done in the Regulatory Division, you are quite right, if what you are suggesting is that the Regulatory Division was not under the continued purview of the Minister, it was always, although I tried my best to walk a tightrope on it and to keep it as independent as I could.

Q. If you go to the beginning of your memorandum.

A. The beginning of which, sorry?

Q. Your Memorandum of Intended Evidence. If you just go to Query Number 8, where you say that where you were asked about the establishment of the Project Group and how the various officials were appointed.

And you say that Mr. Brennan and you would have agreed that he, you and Mr. McQuaid would lead and would nominate your respective assistants and delegates. Do I understand by that, that you would nominate an individual or individuals to serve with you on the Project Group and you might also, in addition, nominate individuals to deputise for you, is that right?

A. Yes.

Q. And do I understand that you nominated yourself and Mr. O'Callaghan to

A. That would be correct.

Q. to serve, and I think you may have had a deputy, I have forgotten the name. Do you remember did you have any deputies?

A. Yes, Mr. O'Callaghan was out sick, as I recall at the time at which we got to work, and I think I would have had Mr. Dillon, Mr. Eugene Dillon, who was a very experienced officer in this area.

Q. And that was the extent of the deputising, if you like, that occurred?

A. Yes.

Q. If you go to Query Number 10. You were asked about your understanding of the RFP. And in particular, a number of provisions of the RFP, paragraphs 3, 9 and 19.

In relation to paragraph 3 you said, you understood that to mean that applicants would disclose all material facts regarding who was to own what, whatever body was in turn ultimately to own and operate the GSM licence.

Do I understand you to mean that you envisaged that this required applicants to disclose what the composition of the entity that was to take the licence would be?

A. Yes.

Q. Now, the way the Project Team was to work was that you were to assess the applications in accordance with these published criteria, and only these criteria,

isn't that right?

A. Yes.

Q. And that you were to come up at the end with a recommendation, a reasoned recommendation, whether a formal report or not, I am not sure that was fully understood at the beginning, but you were to come up with a reasoned recommendation for the Minister?

A. Yes.

Q. And as we said earlier, that the assessment was to be conducted independently of the Minister?

A. Yes.

Q. Who was neither to be involved I think, as we agreed earlier, or seen to be involved?

A. Yes.

Q. Now, do you remember how you described your impression of how the evaluation would be conducted, and you played, or you put particular emphasis on something that I think you were never fully able to convince everybody else of, and that was the need for round table or plenary discussions, as you put it, of the results of number-crunching and sub-groups and so forth?

A. Yes, that would be that would have been my feeling then and now, that it would have been desirable.

Q. In describing your view of how the assessment would evolve, you were dealing with the nitty-gritty of getting the applications in and evaluating them. I

want to just go back a step. I am using that expression you used of a plenary group or a plenary discussion. As far as I can see, there doesn't appear to have been any plenary discussion of what the RFP actually meant or was looking for. Am I right in that?

A. No, I don't think that would be right.

Q. You think I am wrong?

A. In what you say, yes, I think that would be wrong. I felt that at the time that the RFP was prepared, I stress I am going on my memory here, that, yes, we would have sat around the table and discussed what was going into it and why.

Q. Yes, I understand that. I think in fairness, your involvement in the design of it was quite limited, if indeed you had any real involvement in designing it, but I am talking not about the design of it, but the situation, that it did evolve where you are all sitting around the table, you now have an RFP, it's drafted, finished, published even, and you have got to conduct an evaluation in accordance with the criteria and the other provisions of the RFP. We are focusing on the criteria because they are listed, particularised if you like. Was there any plenary discussion at that point as to 'What does this document mean for us now? What do the provisions of it mean?' I am not talking about all the minute

rather technical provisions of this, that and the other part, but the main body of it, the meat of it.

Was there any discussion of what that meant and what it was you were, all of you as a group, supposed to be looking for?

A. Yes, there would have been discussion of that kind, yes.

Q. When do you think that happened?

A. Why?

Q. When? Why I can understand?

A. At the earlier stages I think we would certainly have discussed this sort of thing, and I do seem to recall people from time to time bringing us back to basics, so to speak, and saying, 'Well, look, what is it we are looking for here?'

Q. Can you remember when that was? The reason I am asking you is, I could find no reference to it in any minute of any Project Group meeting or I think even in your own notes.

A. I don't recall any instance accurately. In fact, I really couldn't say, Mr. Healy, when that sort of thing took place, but I would just simply point out that having devised this sort of thing, or having played a part in devising this sort of thing, I think everybody around the table was familiar with the general thrust of it and what it was that we were looking for. In other words, it was not the sort of

thing which we were going to discuss regularly after that, unless there was some good reason why somebody wanted to bring us back to basics. If, for instance, we were losing sight of something. So that honestly, I can't help you there by recalling any particular instance.

Q. If you go on now to, I think it's query number queries numbered 15 and 16 on page 8. You were asked about the weightings, and the first thing you say in answer number 15 is, "As far as I am aware the only persons involved with the setting of the weightings were those on the project management team and Andersens." And you go on in 16 to say, "I believe that the weightings were devised by group discussions and consultation. However, I believe that when Andersens came in we changed the weightings following their advice."

You also point out that the weightings were changed following the cap, and you say, "This may or may not be the same issues that Andersens recommended changing."

So let's try and look at this in two stages. Firstly, after the cap was put on, obviously the weightings had to be changed, because now with a cap, the licence payment was going to have to have a lower order of priority. So a number of marks were taken off it and added on to tariffs. I think that's the way it was

done. That way you didn't have to change the list of criteria. There was no need to go back to Government, which was a possible scenario that might have been facing you and which would have delayed the entire project, isn't that right?

A. I think you are probably right there, Mr. Healy.

Q. We'll leave that aside, that had to be done. Apart from that, you say that there may have been, and it is your asking this that has prompted me to do some work last night. There may have been another change of the weightings?

A. No, I don't think that's quite what I am saying. What I am saying is that this instance of changing the weightings following the removal of the cap may or may not be the same issue that Andersens recommend changing. In other words, I cannot be sure. If you want me to speculate on it, I really couldn't.

Q. I won't ask you to speculate now, in any case. I'll look at some of the documents. We know that in the course of the evaluation carried out by the Project Group, and in particular, insofar as Andersens were concerned, we know that they generated information based on the wrong weightings, in that they failed to adjust for the cap and then they had to redo their weightings. That's, perhaps, an understandable mistake?

A. Are you referring to the famous 103?

Q. No, I am not. I am not referring to that. Then we also know about the fact that at one point it was noticed that the weighting percentages were adding up to 103. And indeed if you look at the evaluation model in the draft report of the 3rd October, the weightings add up to 103.

Now, I have pulled out from your file the copies of the evaluation model, because you will recall that early on in the process the evaluation model was produced by Andersens, discussed at Project Group meetings, and I think Mr. Andersen has always been careful to point out, and I think that has been also asserted by civil servants and by the Minister in the Dail, that the weightings were fixed in advance of the treatment of the applications.

Now, I am just handing you two copies of the evaluation model.

(Document handed to witness.)

Now, so that we can put this in context, I am going to look at the evaluation model as a whole, because there has been a lot said about it up to now, and it seems it might be of value to look at it in more detail than we have done to date.

If you look at the first of these documents, which is dated the 8th June, 1995. It says, "From AMI" sorry, I beg your pardon, the first is dated 18th May, 1995 the date it's received. The top of



the document, it's dated "From Andersens, 18th May, 1995." Do you see that?

A. Yeah.

Q. It says, "This is one of the three documents left by them." And it's produced by them on the 17th May of 1995. Do you see that?

A. Yes.

Q. There was a meeting of the Project Group on the 18th May at which these were handed out. They were, of course, highly sensitive because they contained the weightings.

Now, I don't want to talk about the actual weightings for a minute, I just want to look at how the quantitative and qualitative approach to the evaluation was to be worked out. Although these documents look quite long, most of it is just calculations. It's not that much text in it.

In the introduction, on page 1, it states: "It has been decided to apply both a quantitative and a qualitative evaluation model to the eligible applications. This document contains information concerning the quantitative and qualitative evaluation models and intends to give a complete description of these."

That accords with your own recollection and your own view. There was to be a twofold process, isn't that right?

A. Yes.

Q. It says: "The document comprises two parts: The first part describes the quantitative evaluation procedure, including the selection of dimensions/indicators and the scoring model. The second part is a description of the qualitative evaluation model, including the evaluation process and a guide to the award of the marks.

"As both the quantitative and qualitative evaluation will be performed, the guiding principle will be to work with a manageable set of aspects, which is essentially identical, i.e. marketing aspects, technical aspects, management aspects and financial aspects."

I think what this means is that you have the same aspects in the quantitative and the qualitative. And these are what I think Andersens regarded as the prism to which you would look at all the applications and into which he ultimately slotted the criteria which were fixed by the Government.

He says: "In addition to these aspects which form a common denominator in both evaluations, the qualitative evaluation also deals with the risks, i.e. the sensitivities of the business cases in relation to the evaluation criteria outlined in paragraph 19 of the RFP document."

There was this additional factor in the qualitative

evaluation. Seems perfectly sensible?

A. Yes.

Q. "Each aspect is broken down into dimensions and each dimension is subsequently broken down into indicators.

The interplay between the quantitative and the qualitative evaluation is described in Section 7.

"Section 2 deals with the procedure for the quantitative evaluation process." And he describes six steps which are to be taken.

He says: "A set of dimensions and indicators has been selected for the quantitative evaluation process."

And he says: "An assessment, including a points scoring method, will be defined for all indicators.

The same set of dimensions, indicators and point scoring must be used for all eligible applications.

Second step: "All the selected indicators will be assigned a weighting factor.

Third step: "The score for each indicator will be a value between 5 and 1 (both included) with 5 being the biggest score. All scores should be rounded to the nearest integer.

"Uncertainties regarding the scoring of points may be dealt with in the qualitative evaluation.

"5. The result of the quantitative evaluation should be considered with due respect to the significance of the differences in the total sum of the points assigned." I think that's Danish for the man with the

most points is deemed to be top of the result.

"6. A memorandum comprising the salient issues of the quantitative evaluation will be annexed to the Evaluation Report."

Then on the next page you have a list of the dimensions assessed in the quantitative evaluation.

What you have on the left-hand side is a list of the particularised criteria in paragraph 19. In the middle you have the dimensions linked to each of those evaluation criteria, and then you have a further breakdown of those dimensions into indicators.

If you then go on to the second, next page, page 5, the evaluation model sets out how you would approach the various dimensions and how you'd score the indicators which went to

A. Can you hold for just one moment till I find where you are at exactly.

Q. Sorry, I am at page 5.

A. Page 5 of 19, is that right?

Q. Page 5 of 21 or page 5 of 19, yes, because I am looking at a slightly different one. I'll just make sure we are sorry, I beg your pardon, I am looking at a slightly different the next version where there was some changes made. If you go to page 6, sorry, page 6 sets out ways of scoring

A. This is the one which is headed "Dimensions and Indicators"?

Q. Correct. And the same on the following pages right up to I think, right up to page 15, up to and including page 15.

A. Yes.

Q. I'll just make one point in relation to page 15. Do you remember that when Mr. Brennan was giving evidence, he mentioned a debate or a discussion in the Project Group concerning a value that would be attributed to the optimum IRR? Do you remember any discussion about that?

A. I certainly remember a discussion about a value being attributed to an optimum IRR. I don't recall that it was Mr. Brennan, although it may have been. I don't recall reading that part of the transcript which related to his evidence. I may have done, but I don't recall it particularly. But casting my mind back, I do recall the difficulty, and I believe it was Andersens who were attempting to explain it, that when you were trying to compare IRR, which for anybody who doesn't know, is an internal rate of return, you had to try and normalise what you were being given to one within an acceptable range; in other words, it would be difficult to compare on a real basis an internal rate of return which was projected by somebody at 50% to something which was projected to be just one. And you also had to strike a realistic note, in that a particular internal rate of return, now, I am going

on I am going into the deep recesses of my memory,

Mr. Healy

Q. I am not going to trouble you with it, if you have a problem with the technicalities?

A. I have no problem with the technicalities of this sort of thing, but when you have an IRR which is typical of a particular industry, then if somebody suggests to you that their projected internal rate of return is going to vary from that significantly, one way of treating that kind of thing from a qualitative point of view is to take an industry benchmark and then treat the variance from that benchmark as being a measure of the realism of the projection. I hope I am making sense.

Q. I understand what you are saying. If you have a benchmark figure of, we'll say for argument's sake, an IRR of 10% we'll say, and somebody comes in with an IRR of 15%, that's 5 above what you regard as the benchmark or optimum figure?

A. Yes.

Q. If somebody comes in and he gets a score of a, a low score, therefore, he gets a score of 1. If a person comes in with 10%, he gets a score of 5. If somebody comes in with 5%, he also gets a score of 1, isn't that right, using the five point

A. What you would do is the closer that the person was to the 10% benchmark, the higher the score they should

achieve.

Q. That's what I mean. If he gets 10%, he gets 5. If he gets 15%, he gets 1. If he is 5%, he is 5 off it, so he also gets 1?

A. That's correct. In general that's the way mathematicians or statisticians would treat this sort of thing.

Q. Well, might. Could I suggest to you that it's a somewhat unrealistic way to approach IRR, because knowing what has allowed somebody to propose an IRR of 15%, he may be the most efficient telecoms operator in the planet and that's why he is able to arrive at 15%, so it's is it not somewhat artificial to have an optimum or benchmark figure and thereby to punish somebody who has a higher figure because he is so terribly efficient, and if you like to reward somebody who has a lower figure because he is maybe not so efficient or not so ambitious?

A. In general I expect so. I am not an expert in this area, but what I would guess is, and I do stress that, is that if somebody was able to show that there was a good reason why a benchmark figure was not applicable in their case and if their projections showed that, then I think then one would have to reset that benchmark figure or make due allowance for it or hire experts to tell you.

Q. Yes. But I think the process was the process that

was envisaged here was a rather crude one. You had a benchmark, if you were at it you got 5, if you were above or below it you got less?

A. All I can say to you again, and I am at the outer limits of my memory capability here, is that I was generally impressed, as I think I said in my memorandum, with the efficacy of Andersens' model, and I don't know, I haven't yet read these pen marks which I have put on this draft. I don't know whether I raised anything about it.

Q. I don't think you did, no. Again, if you are not fully up to speed on this, I don't want to trouble you on it, but I don't think, if you look at the rate of return if you look at the approach to IRR in the 18th May, 1995, evaluation model, you'll see that a score of 5 or higher I beg your pardon, a score of 5 is available to anyone with an IRR of 13% or higher. So if a benchmark was being suggested at that point, it was leaving plenty of room to compensate a very efficient

A. Can you direct me to where exactly you are looking?

Q. On the same page, 15 of 19. Do you see that?

A. Yes.

Q. So if you had an IRR of, equal to or greater than 13%, you'd get 5, do you see that?

A. Not on my page 15. What

Q. Is that 15 of 19?



A. Yes, it is.

Q. You see the top of the page, "Dimension, financial key figures." Underneath that, "Indicators, solvency and IRR"?

A. Right.

Q. We can actually point it out to you, if necessary, on the screen. Underneath that you have two boxes, the first box is, "Average solvency over year, 2, 3, 4 and 5." The next box

A. Yes, I have got you.

Q. On the left-hand column you have IRR and on the right-hand you have the score. Where you have an IRR equal to or greater than 13% you get a score of 5.

A. Yes.

Q. And an IRR of 11% or greater a score of 4. Between 11% and 9% a score of 3, and so on. Do you see that?

A. That would seem to suggest that the greater the IRR

Q. Above a benchmark as you put it?

A. Exactly. But that doesn't seem to make an allowance for somebody who projects 50%, for example.

Q. Well, you might have to perhaps make the adjustment you and I were canvassing a moment ago. You might say that 50% is that somebody is going to have ferocious tariffs and that's no good to us, or it might be that somebody is absolutely hyper efficient. But you have to examine all the rest of their plan.

A. Yes.

Q. But if you look at this is just a small point but if you look at for a moment, just take into your hand the next iteration of the evaluation model, the one dated 8th June, 1995. And if you go to page 16 of that. Do you see that?

A. Yes.

Q. Now, again you have the two boxes, "Average solvency," do you see that, dealing with solvency, and underneath that you have the box dealing with internal rate of return?

A. Yes.

Q. Now, you have a different approach to it. Firstly "V" is given a numeric value of an internal rate of return of 11%. And this is along the lines I was canvassing with you, where a person where the applicant producing an internal rate of return, the value of which is only 1% greater than V, 11% in other words, that person gets a 5?

A. Right.

Q. If he produces a value that is 2% greater, that is between 1 and 2% sorry, greater than the value, then he gets a 4. Do you see that?

A. I see that, yes. What it means I think, is greater or equal than 1% or less than or equal to 2%.

Q. If you go down through the scoring model, if somebody has 11%, or even 12%, he gets 5, isn't that right ?

A. Yes.

Q. If he has 10%, or 12%, he gets 4, is that right?

A. Yes.

Q. If he has 9% or 13%, he gets 3, and so on?

A. Yes.

Q. So it's the variation from the numeric value of 11% up or down that dictates your score?

A. Yes, that's the sort of thing that I was describing a few moments ago.

Q. Yes, but on this occasion there is no allowance for how you might or might not have achieved or proposed that level of IRR, so that the person who is greater than 11% is always penalised, do you follow me?

A. Yes.

Q. Whereas in the originally proposed model, as Mr. Andersen had it in his first evaluation model, the person who was greater was not penalised?

A. This may be the reason I say to you I remember a discussion.

Q. Yes, there was a discussion, there may be other people who remember it in more detail.

Now, if you go onto the next page on the on page 16 of 19 you see

A. This is on the first draft, is that right?

Q. Yes, 16 of 19, yes. You see the vote casting and weight matrix?

A. Yes.

Q. And there is a there is the weights to be

attributed to each indicator on the right-hand side,

and all the indicators on the left-hand side.

A. Right.

Q. These are in decimal points, but in fact you can take

them as 10, 10, 15, 5 15, 5, 25 in fact I think

it's 2.5 and 2.5, 5, 10, 10, 5, 5. Do you see that?

A. Yes.

Q. That seems to be the vote casting and weight matrix

that was used ultimately in the calculation of the

marks at the conclusion of the evaluation process and,

indeed, during the evaluation process.

A. Right.

Q. If you go onto the next page, in Section 5, the

evaluation model describes the procedure for the

qualitative evaluation process. And it says:

"Despite the 'hard' data of the quantitative

evaluation, it is necessary to include the broader

holistic view of the qualitative analysis. Other

aspects, such as risk and the effect on the Irish

economy, may also be included in the qualitative

evaluation by allowing for a critical discussion of

the realism behind the figures from the quantitative

analysis.

"The following describes some of the major steps in

the qualitative evaluation process:

"1. The eligible applications are read and analysed

by the evaluators.

"2. The eligible applications are evaluated by way of discussions and analyses.

"3. When deemed adequate and necessary, in-depth supplementary analyses will be carried out.

"4. Initially the marks will be given dimension by dimension. Afterwards, marks will be given aspect by aspect (subtotals) and finally to the entire applications (grand total).

"5. When the dimensions are being assessed, the evaluators should, as far as possible, use the same indicators as used during the quantitative evaluation. New indicators may be defined, however, if the existing indicators are not sufficiently representative for the dimensions to be evaluated.

"6. During the qualitative evaluation, the evaluators must take the results from the quantitative evaluation into account, and only compensate when necessary in order to make fair comparisons between the applications.

"7. If major uncertainties arise in accordance with Step 4 of the quantitative evaluation or due to incomparable information, supplementary analyses might be carried out by Andersen Management International in order to solve the matter.

"8. The results of the qualitative evaluation will be contained in the main body of the Evaluation

Report. The results of the supplementary

analyses will be annexed to the report."

Then the last section gives a guide to the award of marks. It says: "In order to guide the mark, giving a matrix has been elaborated below. The dimensions and indicators are not weighted ex ante. The marks will be awarded according to a 'Soft' 5-point scale, (A, B, C, D, E), with A being the best mark.

Averaging will be made after consensus among the evaluators."

Then you have a table, and in that table the criteria are broken down into the aspects, and they are broken down in a way which reflects, again, the original criteria. But the way of giving marks is described as follows: As being according to a "'Soft' 5-point scale." What do you understand that to mean, a "'Soft' 5-point scale"?

A. I mean that I understand that to mean that as we are dealing with qualitative parameters rather than ones which easily quantified, that to a certain extent one has to rely on the feel of the persons present as to how you would regard the particular parameter being measured, i.e. do you feel it warrants and E or just a C, for example? In much the same way as one sees on these large questionnaires contrived by psychologists who ask you to score something as between 1 and 5: do you strongly agree or strongly disagree? That I

expect, or that was my understanding at the time of why the words "'Soft' 5-point scale" was used.

Q. The idea being there was a fair range in the various grades?

A. Yes, but more importantly, you are dealing with something which is difficult to quantify. One could have chosen to use the number 1 to 5, and I think if I was doing it, that's what I would prefer to do.

Q. I think it doesn't matter whether you use the numbers 1 to 5 or A, B, C, D, E?

A. It does, because at a later stage using 1 to 5 is more easily added to previous 1 to 5s.

Q. I accept that, but when you are using a "'soft' 5-point scale", whether it's a soft 1, 2, 3, 4 or 5 or a soft A, B, C, D or E, it's the same judgement in each case; you are saying 'I'll give it a 5 or I'll give it an A.' Somebody else says, 'I think it should only get a B'. Eventually they might both agree to give it an A because a 5 covers a fairly wide range of achievements of what's being evaluated, isn't that right?

A. I expect that's correct, yeah.

Q. Now, reading this it seems reading this model, it seems clear that it's the pulling together in some way of the process that enables you to arrive at a result, isn't that right? The pulling together of the evaluation?

A. In the final analysis?

Q. Yes.

A. Yes.

Q. And it may be because you or somebody else felt that that hadn't been adequately articulated in this draft, that when you come to the next draft you see a number of minor and one or two major changes, one I have already mentioned, the one on IRR, but there are two other important changes. And just one of them I'll refer to right away. And if you go to the second draft, the draft of the 8th June of 1995, and to the final second-last page it could be the third-last page. It's page 19. Do you see that?

A. Yes.

Q. There is an additional step mentioned. There are a number of other smaller not terribly significant changes, but in the list of steps involved in the procedure for the qualitative evaluation approach, there is an additional step mentioned, Step 9, and it's as follows: "The draft report is to be presented and discussed among the 'Essential persons' identified by the Department. On this basis, Andersen Management will be asked to propose a final report."

Now, I'll just ask you about two things. What do you understand "Essential persons" to mean?

A. The persons who were on the project management team, and presumably their deputies.



Q. It says, "On this basis," the basis that a draft report would be presented and discussed, "Hands would be asked to propose it." That in other words, Andersen would take the initiative to produce a document, and that document would then become the subject of discussion?

A. Correct.

Q. Amongst the whole group?

A. Yes.

Q. Now, if I could just ask you to turn to the very last page of that second, and I think final draft evaluation model. There is a section which I couldn't find in the first draft

A. Are we on the last page of it?

Q. It's Section 7. And it deals with the interplay between the quantitative and the qualitative evaluation.

It says: "Initially the quantitative evaluation is conducted in order to score the applications. This initial score will be given during the first three weeks after 23 June." This is when you had the original closing date. "This initial score together with number-crunching performed on the basis of excel spreadsheets will then form the basis for the presentation meetings and the qualitative evaluation.

"When the bulk of the qualitative evaluation has been

performed, however, this evaluation will conversely form the basis for a recalculation of scoring applied initially if mistakes, wrong information or similar incidentals can be documented.

"The results of both the quantitative and the qualitative evaluation will be contained in the draft report with annexes to be prepared by the Andersen team."

I think this seems to reflect what, indeed if I am right in it without the benefit of my documents, you were able to recall you could have a quantitative evaluation followed by a qualitative evaluation, and then you'd revisit your quantitative using the information from your qualitative, and ultimately you would produce a report which contained both?

A. Yes.

Q. That is the evaluation model with one major change which I think ultimately was annexed to the final report. And I just want you to turn for a moment to page 17 of this document.

A. That is the second draft?

Q. Yes.

A. And page 17, do you see that?

Q. Page 17, correct. Page 17 of 21, and it contains a table.

A. Yeah.

Q. This is essentially the same table as on page, I think

it was, 16 of the first draft.

A. Right.

Q. This has a set of weightings, do you see them, on the right-hand side, corresponding with a set of indicators on the left-hand side?

A. Yes.

Q. Those indicators again correspond with dimensions, which in turn correspond with the evaluation criteria on the, in the RFP document. Now, from even a quick glance, you will see that it's different to the weightings you saw a moment ago in the first draft, because it has half marks, do you see that, which the other one I think doesn't have or doesn't have to the same degree? In any case, if you follow if you add up the marks here, they come to 103. That in itself

A. That is in the second document, is it?

Q. That in itself is not a matter of major concern. But the weightings attached to individual indicators are quite different. And if you look at the if you go back for a moment to page 3 of that draft again, the final draft, you see page 3 of 21 you see a table setting out in three columns the paragraph 19 evaluation criteria, the dimensions and the indicators?

A. Yes.

Q. If you apply or translate across to that table the

weightings that we saw on page 17, then under the heading, "Credibility of business plan and applicant's approach to market development" you get 32.5. You get a score of 7.5 for "Market development". 10 for "Experience of the applicant". And 15 for "Financial key figures". Do you see that?

A. Can you take me through that process just once more, please? Starting with page 3.

Q. Yes. On page 3, you have a list of the evaluation criteria in the order in which they appear in paragraph 19.

A. Right.

Q. Then you have a list of the dimensions identified by Mr. Andersen.

A. Right.

Q. And then a list of the indicators for each of those dimensions?

A. Yes, I see that.

Q. Now, fixing the weightings in advance is one thing.

Mr. Andersen also fixed the weightings by reference to

the indicators in advance. And if you go to the page

I asked you to go to, page 17.1, you see all of the

indicators weighted. Can you go to that page?

A. I can see that, yes.

Q. Now, I'll just give you an example. The first indicator weighted is, "Market penetration, score 1", "Market penetration, score 2"; do you see that?

A. I do.

Q. I think that relates to forecasted demand on page 3.

Do you see that?

A. I do. It could be so, yes.

Q. If you go to, "Number of network occurrences in the mobile field"?

A. Yeah.

Q. That relates to "Experience of the applicant".

A. Yes.

Q. That's given a mark of 10 on page 17.

A. I see that, yeah.

Q. Do you see that? And the next item is, "Solvency" and "IRR", they're the last two items on page 17. Do you see that?

A. I see that.

Q. And they each have a mark of 7.5. Making a total of 15?

A. Right.

Q. So that "Solvency" and "IRR" now have a mark or a weighting twice that of "Forecasted demand". Do you see that?

A. "Forecasted demand" is

Q. On page 3. And if you just translate "Forecasted demand" across to "Market development", do you see that?

A. Yes.

Q. And translate "Solvency" and "IRR" across to

"Financial key figures"?

A. Okay.

Q. Now, in the course of the evidence we have mainly discussed the dimensions, because it gets too complex to discuss the indicators, and we have mainly spoken about "Financial key figures" or "Market development", and you see that "Financial key figures", that point had a weighting of 15%, and "Market development" had a weighting of 7.5%. Do you see that?

A. Are you referring to the first document now or the second one?

Q. The second document, I am still looking at the second document?

A. Okay.

Q. So that the "Financial key figures" had a weighting twice that of "Market development"?

A. So it would appear, yes.

Q. Right. When the Evaluation Report was if you could just stay with that page when the Evaluation Report was eventually presented, the final version of it, "Market development", "Experience of the applicant" and "Financial key figures" each had a score of 10?

A. Had a score of 10?

Q. 10, 10, 10. Now, there are two things to be addressed here.

A. I am sorry, did you say a score or a weighting?

Q. A weighting, a weighting of 10, giving a total

weighting for that first criterion of "Creditability and business plan and applicant's approach to business development" of 30?

A. Right.

Q. I want to draw your attention to two things to get one of them out of the way quickly. The total here is 32.5. The total in the final version was 30. That's not a problem, because Mr. Andersen simply applied what he called a renormalisation factor. He simply converted everything in percentages. What is significant is that "Financial key figures" started off with a weighting which was twice that of "Market development". Do you understand?

A. Yes.

Q. And ended up with a weighting which was the same as "Market development". Do you understand that?

A. Yes. So that you are saying that, as I understand it, that "Solvency" and "IRR" together started out with a weight of 15, and ended up with, what did you say?

Q. A weight of 10. What is important is that they ended up with the same weight as "Market development".

A. Yes, okay.

Q. From a position in which they had a weighting of twice that of "Market development"?

A. I am just hazarding a guess now. Is that because "Market development" was given a role of its own, so to speak, and accumulated with "Experience of the

applicant" and "Financial capability"?

Q. I am sure that may have been the reason, yes. What I am trying to find out is when did this occur and where is it documented?

A. It's a very interesting exercise, but I doubt if I can help you there, Mr. Healy, when it occurred. My guess is it occurred during the date of this document and the date of the second document. I don't wish to sound flippant in saying that.

Q. It's your reference you can now see I am interested in your statement when you say "when Andersens came in, we exchanged the weights following their advice."

I was trying to find out when were the weightings changed, because this is what seems to have happened: If we take the evaluation model of the 17th May of 1995, the first one, that had the weightings, as I have outlined to you a while ago, if you top them up, they come out at exactly the same as the weightings that were eventually in the Evaluation Report at the end of the day.

A. Right.

Q. So that in the first evaluation model you have of the same weightings, I think one person around me says I am right, one person says I might be wrong. I think I am right. You have the same weightings, and certainly you have the same weightings in the example I gave you as you have in the final version of the



Evaluation Report. Later on, on the 8th June, you have a different set. That set of weightings is also reflected in the weightings in the evaluation model appended to the October the 3rd version of the Evaluation Report, the first draft version. What I am trying to find out is, how and when did you go from the first version to the second version and then back to the first version? And can you recall any discussion about that, which does seem to me to be a fairly significant move?

A. The first question you asked me, the answer is no, I don't recall any discussion of this. And I don't know whether you are just putting it to me or not, but I am not sure that I see the significance of it in the context of where, let's say somebody had spotted there had been an error, or may have pointed this out.

Q. Not so much that. That's, I think, to some extent, incidental. Somebody did spot an error. But the response to that error doesn't seem to have been that you are using the wrong evaluation model, am I right in that?

A. No, I am not with you

Q. Sorry?

A. I am not with you there, I am not following you.

Q. If somebody raised a query about, that adds up to 103, the fact that it adds up to 103 is to some extent beside the point?

A. Yes.

Q. If something was produced at a Project Group meeting which added up to 103, then presumably it can only have been the second version of the evaluation model.

Do you understand me?

A. I am not so sure I see why that has to be the case.

Q. Well, it would suggest that the second version of the evaluation model was then being used or relied upon, and if that is the case, how come that in the report you are back to the first version?

A. I can see that there is a difficulty in what you are presenting. Unfortunately I simply can't recall any of this. And I am not sure that I see the significance of what you are pointing out. It depends on when this 103 first entered onto the stage, and I don't recall when that was.

Q. Well, I am only going by the documents we found in your files. And the date we have of the 103 first entering on the stage is the 8th June. That seems to be the first record we have of that coming onto the stage?

A. Of the 103. So the 103, you are saying, comes from the addition of the weights on the right-hand column on page 17 of 21, is it?

Q. Correct.

A. Okay. Well...

Q. Do you follow that for a moment?

A. Yes. What you seem to be saying, and correct me if I am wrong, is that an error occurred somewhere between the 17th May and the 8th June, is it, in the attribution of these weights?

Q. I don't know whether it's an error, Mr. McMahon. What I am saying to you is, that you start off with a weighting, a set of weightings. I suppose you could hardly say it was an error. By the time you get to the 8th June, you have a new set of weightings, a revised set of weightings?

A. Yes.

Q. So the weightings were changed. Now, that set of weightings appears to have been used at various points, certainly it seems to have been used in the quantitative evaluation right through. It seems to have been mentioned

A. This is the second set, is it?

Q. Yes.

A. I see.

Q. It seems to have been mentioned in the course of some meeting by Mr. O'Callaghan. Ms. Nic Lochlainn recalls somebody mentioning it, it may have been Mr. O'Callaghan. It's not that somebody did a tot and found that the answer was 103 that interests me. It's the fact that if he found the answer was 103, then it must have been the second set of weightings he was totting up?

A. All right, I follow that.

Q. So that set of weightings was still in play, if you like, at that point.

A. Right.

Q. That set of weightings was also whether erroneously or otherwise contained in the appendix of the evaluation model in the first draft Evaluation Report.

And what I am trying to find out is, how did it go from the first evaluation model, to the second evaluation model, and then to judge by the final Evaluation Report, back to the same weightings as were in the first evaluation model?

A. I am unable to help you there. I am sorry.

CHAIRMAN: It's also I think, right, Mr. Healy, as Mr. McMahon infers, that perhaps you set in context the possible repercussions of this, lest anyone might say the Tribunal was engaged in an excessively obstruse analysis to no significant end product.

Q. MR. HEALY: Well, if you were marking "Financial key figures" at the end of the day, and you had twice as many marks to give it as "Market development," that would obviously affect the final result, or may affect the final result if the person who came in in poll-position was not as good on "Financial key figures" as he was on "Market development", and the person who came in in second position was better on "Financial key figures" than he was on "Market

development", do you follow?

A. I follow, yes.

Q. And I drew this up with Ms. Nic Lochlainn as well. It would appear that Mr. Billy Riordan, in his marginal notes on what I think was the 18th October version, i.e. the final draft version of the Evaluation Report, recorded, I suppose what you'd call some unhappiness with the fact that the weightings, as he noted, had been changed. And he seemed to think, from his marginal notes, that the 7.5% as against the 15% were the correct weightings. Do you follow?

A. Yes, I follow.

Q. So that would suggest that there was a degree of confusion going right up, perhaps until the very final report was produced, and that's of interest to the Tribunal, because there seems to have been considerable pressure of time on at that time, and maybe not enough time was devoted to some of these matters, but we'll come to that when we come to the 23rd, just so you'll understand the context in which I am drawing these things to your attention.

A. I understand, yes.

Q. Ms. O'Brien just draws something else to my attention, and I think it's the last thing I could mention to you before lunch. This is if you go to Book 46, I think Book 41, Tab 17 70, 7-0.

A. Yes, I have got that note.

Q. This is a minute of Ms. Nic Lochlainn's of the eighth meeting of the GSM Project Group on the 9th June, 1995, at which I think you had a more or less full complement. You were present, Mr. Dillon was present, deputising for Mr. O'Callaghan, Andersens were present and the other divisions were all represented as far as I can see. Do you see that?

A. I do.

Q. And the Department of Finance was also represented. Now, if you go to the last page of that minute?

A. Yeah.

Q. You see there is a heading, "Evaluation model"?

A. Yes.

Q. It says: "This was approved as presented with correction of one minor typo on page 6 of 21." Do you see that?

A. Yes.

Q. Now, from the date of the meeting of the 9th June, one assumes it was the 8th June version that was being referred to, and in any case, inasmuch as Ms. Nic Lochlainn refers to page 6 of 21, she had to be referring to the 8th June again, version?

A. Yes.

Q. Now, that suggests that the evaluation model was approved as presented at that date. Now, in fairness, she does go on to say "Further comments, if any, are to be forwarded to Maev Nic Lochlainn within a few

days of the meeting." I am not suggesting any of these things were writ in stone. Obviously somebody could have found a real problem and could have come back to her, but one would have expected it to be documented, is my point. Am I right, there is nothing here that jogs your memory to think there was any further consideration of this?

A. No, I don't recall. It is quite possible, indeed it is more likely than not, that somebody spotting a difficulty would have raised it at the meeting of the 8th

Q. Or the following meeting?

A. Or indeed, or even during the intervening time, and picked up the phone and called someone on the development side or

Q. Yes, well in any case, it's food for thought for you.

It's one o'clock, Sir,

CHAIRMAN: It is, ten past two. Thank you.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF EXAMINATION OF SEAN McMAHON BY MR.

HEALY:

Q. MR. HEALY: Thank you Mr. McMahon.

I just want recap a little on some of the stuff we were talking about before lunch. I have had another opportunity to have a look at what I call version 1 of the evaluation model dated the 17th of May, 1995, and

version 2, dated the 18th the 8th of June, 1995.

And this morning I was, I think I was saying that the set of weightings in version 1 is changed and you have a new set in version 2, and I was saying that the ultimate set of weightings used in the final Evaluation Report was the same as in version 1; I am wrong in that. What you in fact do have is, version 1 on the 17th of May, 1995, version 2 on the 8th of June, 1995, and version 3 in the final Evaluation Report. So it gets slightly worse. So in any case, the discussion we were having focusing on the question of the "credibility of business plan" and "market development" is exactly as we or is a discussion which is in no way affected by that. As we said this morning, the change where that was concerned was that you had a weighting of 7.5 for "market development" and a weighting of 15 for "financial key figures", so that "financial key figures" was twice "market development", and eventually they ended up as equal weightings.

Now, just something else to clarify. Changes in the narrative of the evaluation model, which I think, subject to what you have to say, bear out your own view and which do appear to be consistent with the changes that were made in the second version of the evaluation model. If you could open or turn to the minute of the 7th meeting of the GSM Project Group on



the 18th of May, 1995 at Book 41 64.

A. 64?

Q. Yes.

A. Yes, I believe I have that here.

Q. You have it now?

A. Yes. That's the 18th of May, is that correct?

Q. The 18th of May.

A. Yes.

Q. You were at this meeting discussing the first version of the evaluation model?

A. All right.

Q. All right? And it seems to have been discussed at some length. If you go to the second page, you see five bullet points. Then after the five bullet points you see a minute that reads "The qualitative evaluation was to provide a common sense check on the quantitative model." Do you see that?

A. Yes.

Q. It goes on: "This part of the model would need to be clarified further before evaluation begins. If a later challenge were to reveal that any two persons among the evaluators proceeded with a different understanding of the process, then the entire evaluation process could be put in question."

I suspect that that is what may have resulted in the final page of the 8th June version in which specific attention is devoted to the interplay between the

qualitative and the quantitative, and the fact that they contemplated ultimately the whole group coming together and, as it were, not just be a cross-check on the work but a cross-check that everybody was on the same wavelengths with regard to the work.

Now, there is one further matter which I am mentioning at this point on the basis that you may have something to say about it, but I am mentioning it because it is relevant to the things we have been discussing, and it may have been touched on I think by Maev Nic Lochlainn in her evidence when she was giving her evidence. It seems that she may have had a better appreciation of what was involved than anyone else did in the room in this room, Mr. Coughlan corrects me.

Now, I am going to give you a copy of a fax cover sheet to Michael Andersen from Maev Nic Lochlainn of the 6th of October, 1995.

(Document handed to witness.)

Now, you recall that Maev Nic Lochlainn was responsible for document management as well as her other work on the project evaluation or Project Team?

A. Mm-hmm.

Q. This is a fax dated the 6th of October, and therefore as it will appear from the narrative, after the 3rd of October version had appeared, but I think before you may have got a copy of it yourself. It says, "Michael, two items for your attention please..."

The first is as follows: "Please see qualitative scoring for technical aspect as recorded by John McQuaid, which follows (Annex A). This does not correspond with the technical aspect subtotal detail on page 44 of the draft evaluating report - I believe it is a typo, marketing aspect scores having been duplicated by mistake." That needn't concern us. She is simply asking him to substitute a page to correct a typo.

Item 2: "Please see attached list of criteria and weighting as agreed by the Project Group prior to the 4th of August, 1995." That is Annex B. If you turn to Annex B you see the eight particularised criteria, and then you see the weightings adding up to 100 but with 30, 20, 18, 11 for the licence fee, therefore after the licence fee adjustment was taken into account, 7, 6, 5, 4, 3. Now, I don't know if you can see faintly to the right of the 30 for "credibility of business plan/approach to market development" you see 32.5, do you see that?

A. Yes.

Q. Underneath that it says "Weighting agreed by the group prior to the 4th of August, 1995."

A. Yeah.

Q. Now, just firstly if I could ask you, do you recall, because we can see no minute of any meeting recording this, but do you recall any agreement, specific

agreement to this weighting?

A. I can't recall a specific agreement at a specific time, but I suppose by process of elimination, my memory is that we did agree a set of weightings at some time.

Q. Well, certainly we can see that you agreed a set on the 8th of June?

A. Yes.

Q. But that's the set that, if you like, has caused the trouble?

A. Yes.

Q. We know that Maev Nic Lochlainn went to considerable trouble after the EU intervention to ensure that everybody was in agreement with the adjustment to the weightings and she has a full and complete record of it, showing who she wrote to, which people signed off and she rang people or whatever?

A. That's right.

Q. And she eventually filed a statement of her own recording that she had been in touch with everybody and had adjusted the weightings?

A. Yes.

Q. In any case, she is here referring to what she clearly regards as the agreed adjusted weightings. Then she goes on: "Could you please clarify how these relate to the weights as detailed on page 17/21 of the document of the 8th of June, 1995, which were to be

the weights underlying the quantitative evaluation? "

Do you see that?

A. Yes.

Q. "(Page 17 is also attached at Annex C)." And she goes on: "And to page 7 of the draft quantitative report (see section on Weights at Annex D) e.g. OECD - basket is weighted 15.96%. Does this correspond to 18% for competitive tariffing, as agreed by the group?"

If we look at the documents this should become clearer. Annex C is the reference to page 17/21 of the document we have been discussing this morning.

And clearly what Maev Nic Lochlainn is asking is, how do these weightings relate to the weightings in the handwritten note that I just mentioned to you a moment ago?

A. Yes.

Q. And then she asks a further question, which is: How do the weightings in the Annex C relate not just to the list of weightings we discussed a minute ago, but to the weightings in the draft quantitative report of the 20th September of 1995, where you will see on page 7 a list of weightings, do you see that?

A. You are talking of the second half of her second paragraph under bullet Point 2?

Q. Correct, yes.

A. And your question to me is?

Q. Well, firstly I am drawing to your attention the fact

that some of the questions I am asking were asked by her.

A. Yes.

Q. After she had received a copy of the October 3rd version of the report, and I am asking you, I have already asked you whether you recall any meeting to formally agree the weightings, and you have given me your answer on that. I am asking you now do you recall any meeting to discuss these issues and the apparent discrepancy between the weightings used in different documents, and in particular, do you recall any steps taken to

A. To rectify it?

Q. Yes.

A. The answer would have to be no, I don't recall any meetings specifically addressed to that point. It may be, in fact I think it is likely that we did address this point at some stage considering the volume of paper that is seen to be generated by it here. I would be surprised if the issue hadn't come up, but in all honesty I cannot recall it coming up.

Q. Okay.

MR. FITZSIMONS: If Mr. Healy is moving on to something else, could I just intervene just briefly to make a suggestion, that these new documents obviously have some significance. Would it be possible for them all to be given numbers because

clearly they will have to be referred to other

witnesses and for you yourself?

CHAIRMAN: Oh, I agree entirely.

MR. FITZSIMONS: In the fullness of time it will be

impossible if they don't have numbers to find them

again.

MR. HEALY: We will put them in a book.

MR. FITZSIMONS: No. Numbers; we are not worrying

about a book, but numbers.

MR. HEALY: From the Tribunal's point of view

MR. FITZSIMONS: That they have individual numbers

when they are introduced into evidence and they are

marked and we will know them as Document 156 or 158

from then on. Then they won't get on

CHAIRMAN: I think that is eminently sensible,

Mr. Fitzsimons. We will certainly do that.

Q. MR. HEALY: Mr. Coughlan reminds me that Ms. Nic

Lochlainn herself is looking into this as well. At

the time we drew it to her attention we hadn't

highlighted additional documents, but needless to say

once they are put into book form they will also be

conveyed to her.

A. It seems obvious, but a perusal of the files might

show if there was a reply to Maev.

Q. No, unfortunately it doesn't.

A. Oh right.

Q. You are quite right, it was an obvious question and we

looked at it. There doesn't seem to have been a reply, but of course we could be wrong, but there doesn't seem to be one.

A. From looking at Tribunal papers, I do seem to recall seeing the reply from our own division to Maev Nic Lochlainn or Mr. Dillon I think, so that would indicate that we in our division did look at whatever it was that she sent us.

Q. Yes.

A. But I am not sure of the date of that document.

Q. Could I just ask you to turn to another one of your answers to clarify one of the documents. Page 10 answer 22. You are referring to your understanding of the evaluation model. You say: "When the evaluation model was first proposed by AMI, it was discussed at a Project Team meeting. It was proposed that the various criteria would be quantified insofar as they could be and compared on as close a basis as possible. This would entail some mathematical treatment of the various data. I was generally impressed with the efficacy of the methodology and I was satisfied that it would produce a true and fair ranking of the bids. "That was to be the quantitative assessment. I felt confident that AMI would be competent to execute this aspect.

"There was also to be a qualitative assessment and I formed the impression that this meant that insofar as



the bids were not susceptible to close quantitative analysis, we were to review our results and qualify them as necessary in light of the best qualitative information available to us." And so on.

And it is clear that your appreciation of it was more or less not in line with the more detailed view of the document that we have now just had an opportunity of having.

If you go to the last paragraph on page 11. You say:

"I recall considerable discussion on this. I also recall reading the evaluation model again." I am sorry, I should say, maybe I should read out the final sentence, the final two sentences in the previous paragraph.

"I then expected a round table on the qualitative assessment. It emerged on the return of the Project Team from Copenhagen that they regarded the qualitative assessment as having been done. I recall considerable discussion of this. I also recall reading the evaluation model again. From all of this I formed the view that the other members of the team could legitimately take the view that they had rolled up certain qualitative aspects of the individual criteria and the various dimensions thereof. While this certainly took account of some of the matters I expected to be the subject of qualitative assessment, it did not meet my expectation of other matters. I

understood from my colleagues that they and AMI regarded the matter as res judicata and I acknowledged that to some extent I might have misunderstood the purpose of the qualitative assessment."

Now, you say that you understood from your colleagues that they and AMI regarded the matter as res judicata.

From what colleagues did you understand that to be the position?

A. I believe it would have been from Martin Brennan and/or Fintan Towey.

Q. By your use of the expression "res judicata", do take it that you mean to say that it was done and dusted, as it were, it was all done, all of this work was done, qualitative and quantitative?

A. Exactly.

Q. When you say "there was considerable discussion on this," do I take it that your contributions to the discussion were prompted by what you had read in the evaluation model?

A. Prompted by both a feeling about how it ought to be done and by, yes, I expect, and by reference back to the, although I can't recall that with any certainty now that I would have gone right back to that, because I may not have had it on the occasion in front of me.

Q. Yes, well you did say: "I also recall reading the evaluation model again."

A. Yes, I certainly would have done that, but whether I

did that at the time that the discussion took place or afterwards is another matter, I can't be certain of that, but certainly there was discussion of it.

Q. And can you recall what the discussion was in the sense of what was being asserted or contended by those who felt that the work was being done in accordance with the evaluation model, and by those who contend that had they were at liberty to reach all these conclusions in Copenhagen and to come back to you with them?

A. In simple terms they were putting just that to me, that yes, the qualitative evaluation had been done; that they had gone into these dimensions and I am loath to put words at this remove into the mouths of the people who were talking at the time, but that is what they were saying, and for my part, I was certainly saying things like, "Hang on, we really have to sit around the table and discuss how exactly this was done."

Q. Yes.

A. And what sort of feelings were brought to bear and why? And as I think I have stated elsewhere, that there ought to be a round table discussion bringing everything, so to speak, to bear on it. The word "holistic" springs to mind. I think it appears elsewhere.

Q. It appears in the evaluation model and it appears very

repeatedly in Mr. Andersen's various written

statements to the Tribunal.

A. Yes.

Q. And by "holistic" you mean pulling everything together?

A. I do.

Q. Now, I am going to look at some documents before I go to look at any other aspects of your statement.

The way the process was conducted, you had expressions

of interest, you gave out the RFP, you invited

questions, you provided answers, you got applications

in, you raised some general specific written

questions, and then you prepared for a presentation

which was to involve a set of similar questions for, I

think, every applicant and a set of applicant specific

questions for individual applicants?

A. Yes.

Q. And these presentations were to involve, I think, all

of the members of the Project Team forming their

impressions, in a general way, of the various

consortia, and how they dealt with the questions they

were asked and what information they provided?

A. Yes.

Q. So this was in that sense, this was certainly

taking place on a plenary basis, if you like?

A. Yes.

Q. Now, I want to go to the minutes of the meeting of the

4th September, which are in Book 42 at, I think it is

Leaf 95. Do you have that document?

A. I do, yeah.

Q. The first heading refers to the quantitative evaluation and it says: "Prior to presenting the initial draft report of the quantitative evaluation, Mr. Andersen acknowledged certain shortcomings in the results gleaned so far from the quantitative scoring."

But he in any case had an initial draft and I think you were provided with a draft, is that right?

A. I don't recall exactly.

Q. I see, I think there is a draft, there may be a draft in your file, so presumably you must have been given a draft. I think you did get a copy of the draft quantitative report.

You will see that on the top of the next page there is a record that "the meeting discussed each dimension of the scoring document in turn. The consensus was that the quantitative analysis was not sufficient on its own and that it would be returned to after both the presentations and the qualitative assessment."

Whether that was being worked out from first principles or not, I don't know, but that was in any case what the evaluation model envisaged, isn't that right?

A. Yes, it did.

Q. "It was also agreed that the figures used by the

applicants could not be taken at face value and needed to be scrutinised. Responsibility for such scrutiny has not yet been decided.

"The need to reflect a change in the weighting for the licence fee was highlighted. AMI committed to correct the model in this respect."

"The first draft of the quantitative report was based on the wrong weightings for the licence payment."

It then refers to the presentations and how you would approach them. Then finally it deals with the future framework of the project. And it refers to ten sub-group meetings for the qualitative evaluations, mentions that five had already taken place, and then in the second paragraph I beg your pardon, in the first paragraph it says: "AMI committed to provide the Department with documentation on these earlier sub-group meetings. Project Group members were welcome to contribute/suggest amendments to the scoring."

A. I have lost where you are exactly, Mr. Healy.

Q. Sorry, the first paragraph.

A. Of? Of the last page, is it?

Q. I will read it again. "Ten sub-group meetings for the qualitative evaluation had been proposed by AMI. Five had already taken place. AMI committed to provide the Department with documentation on these earlier sub-group meetings. Project Group members were

welcome to contribute/suggest amendments to the scoring."

This would be because Project Group members wouldn't have taken part in the scoring, and it was now suggested that they would get the documentation and they could then come back on it.

A. Right.

Q. Were you aware that in fact at that stage there appeared to have been some rather heated discussions with Mr. Andersen concerning contractual matters?

A. I was not aware at that time. In fact I was not aware of that until very recently.

Q. I see. And that in the course of those discussions, either Mr. Andersen had been informed, or it is not clear, the Project Group themselves, the Project Group members involved in the discussions with Mr. Andersen formed the view that there had been a departure from and agreed methodology or procedure in that some of the Project Group discussions had already taken place without any Departmental involvement. Were you aware of that?

A. No, I wasn't. I actually looked at some of that documentation last night and I believe that was the first time I had ever seen it.

Q. Yes. It goes on: "Andersens outlined a timetable for the remaining five sessions and personnel were nominated to attend. Mr. Towey and Mr. Riordan are to

attend the financial performance guarantee meetings.

Mr. McQuaid and Mr. Ryan are to attend the radio network capacity of the network and frequency efficiency sessions."

Could I just ask you a question about your role, or potential role, if any, in the sub-groups, in that I formed the impression from Mr. O'Callaghan's evidence that it was left up to you whether you wished to attend these sub-groups or not, and that in a sense it was almost casual, and went on to say that neither he nor you attended because you were, you had too many other commitments. Was it as casual as that?

A. Casual is a pejorative reference to that. I wouldn't use that word.

Q. I would intend to use it critically if it was the case that you decide whether you would or wouldn't turn up. This doesn't suggest that mind you, this suggests that there were people specifically deputed to do certain things?

A. Yes, that would have been the case. As far as I can recall Andersen would have proposed that such-and-such a sub-group was to meet and look at something. The question would have been posed: who is specifically available or who feels they have appropriate expertise in that? Now, that would have been an easy question to answer in the case of the technical stuff because some of Mr. McQuaid's people would have naturally



fallen into that slot. For the other matters it could have been anybody, and it would have been a question of looking at your diary to see who was available.

Now, Mr. O'Callaghan was right that both of us were heavily preoccupied at the time and I think that is the main reason why we didn't attend the sub-groups.

Q. I see. You had one more meeting of the Project Group on the 11th September. I won't ask you to turn it up because it simply outlined the sort of arrangements you proposed to make on a practical basis as to how you would deal with each of the individual consortia in the course of presentations. Then you had the presentations following the 11th, I think between the 11th and the 14th.

In the course of the presentations questions were asked of the Esat Digifone consortium concerning, I think, a number of technical matters but specifically a number of financial matters. During the presentations do you recall that the Evaluation Group received, I suppose, if I can put it, certain assurances or at least certain representations were made to you to the effect that this consortium was going to be 40% Telenor, 40% Mr. Denis O'Brien, and we won't say whether it was Esat Telecom or Communicorp because it is confusing, and that there were four institutions who were going to take up the other 20%, all of whom were named: AIB, IBI, Standard Life and

Advent. And that the Irish group, that is Standard Life, IBI and AIB were going to bank together to form a little co-op, as it were, of Irish interests. You remember that, those representations being made?

A. Yes, I do. I can't attribute my memory of it to whether it's live as of the time of the presentation or whether it is a reflection on my notes afterwards, but yes, that is my clear recollection.

Q. Were you present here when the presentations were played, were you?

A. No.

Q. I see. Have you seen the transcript of them?

A. I have not, I am afraid, no.

Q. I see. Well, you are, to some extent, at a disadvantage; I wasn't aware of that.

A. But my notes of the day do, I think, recall that that pitch was made to us and that has lodged in my memory and that is the case. So the last part of your question there, whether there was to be a banding together of the three Irish interests there, I don't recall that specifically.

Q. Well, I am simply summarising something that I heard here and that I have seen in the transcript.

A. Right.

Q. You could be referred to it. It was not a major part of the presentation, the major part was the identification of them, I think?

A. Just to correct the 40% ownership, it was represented to us, as I recall, as a 50:50, but with this 20% to be made available to these institutional investors.

Q. Yes. And that must have been a comfort to you, because these were all absolutely Advent might have been a somewhat unusual name, but these, the others were all rock solid?

A. Yes.

Q. And then that left, that was dealt with, that was fine, but it left the question of Communicorp's own finances which did engender a degree of debate, and what you were told about Communicorp was that there was to be 30 million provided by Advent, that 30 million was to go into Communicorp and it was to be dedicated towards funding Communicorp's shareholding in Digifone. You were told that Advent had other investments in Communicorp, but this was over and above those other investments and was exclusively to be appropriated towards the investment in Esat Digifone.

I am going to get you a copy of a transcript now. It is in one of the books as well, I think. Book 51. So that you won't have to go through the entire of Book 51, I am going to give you the extract I want to refer you to.

A. Okay.

(Document handed to witness.)

Now, I think the first document, just for the benefit of those who don't have the extracts, the first document contains the Esat Digifone presentation, and the page I want to refer you is page 105.

Now, you have a number of pages which are simply intended to put the matter in context. The page I want to refer you to is page 105. That page involves the culmination of a discussion between Mr. O'Brien and Mr. Billy Riordan and Mr. Michael Andersen, which was intended to and Mr. O'Donoghue, I think, intended to relay some of the facts that I outlined to you a moment ago, and on the part of the Department, to canvass some of the issues arising from those facts.

Now, if you go to page 105, you will see Mr. Billy Riordan Mr. Billy Riordan says: "So you have a little bit of fat in that, you have in fact from the point of view, you have seven and a half thousand, in fact, in that particular commitment." In other words the suggestion

A. 8 and a half million I think.

Q. 8 and a half million, I beg your pardon. The suggestion is that in having 30 million, Communicorp had actually more than they needed.

Mr. O'Brien says: "Yes, but it is an irrevocable commitment of fat, if you know what I mean.

"Billy Riordan: I used the term first."

Then it says "Speaker" the transcriber didn't know who it was, but I can assure it is your voice.

A. Right.

Q. And I don't think anyone who heard it disputes that.

You say: "Sorry, just one question on that, Denis.

Do I understand there is already an agreement in place between Communicorp and Advent on that?"

And the answer is: "Yes."

Then Mr. Brennan says: "That is not the same as the Letter of Commitment we have seen in the application."

Mr. O'Brien says: "Well, we thought that you would want to hear that directly from Advent, hence they wrote you a letter to say that."

Then Michael Andersen says: "Okay, I think that is all for the financial part, okay."

Now, you were asking a question, as I understand it, to inquire whether there was an agreement in place with regard to the 30 million to go from Advent to Communicorp, isn't that right?

A. I think that's correct, yes.

Q. Yes, and Mr. O'Brien said, yes, there was an agreement. And then Mr. Brennan says: "That is not the same thing as the letter, is it?" That was a reference to the letter, I think, of the 10th of July.

And it is not quite clear what the answer means.

Did you recall any discussion after that, or was there any discussion after that meeting about getting access

to this agreement or seeing whether it was within the documents that had been provided to you by the, by the Esat Digifone consortium?

A. I can't recall any specific discussion on it, no.

Q. Yes.

A. I would be surprised if there wasn't one, but.

Q. Wasn't a discussion?

A. Yes.

Q. Because there was no agreement?

A. There was no agreement. I yes, I would be surprised if we didn't discuss it afterwards.

Q. Yes. Because it is a very pointed question on your part, 'it is all very well somebody telling you they have 30 million, it sounds great, but can we see the black and white proof that you have this 30 million?'

A. Mm-hmm.

Q. And as far as I know, there is no document to that effect in the paperwork you had?

A. It may well be that I raise it myself afterwards but I honestly can't recall.

Q. Yes.

A. I mean, one obvious line of inquiry for you, I suppose, would be to check and see what exactly that Advent letter did say, because I don't recall that either now as I sit here.

Q. Well, that letter was with the documentation?

A. Yeah.

Q. And it did purport to contain certain commitments that what you sought was an actual agreement?

A. Right.

Q. You said: "Do I understand there is already an agreement in place?" And you were told "yes."

And I think you have indicated in your narrative statement, or in your response to the questionnaire, that you had concerns about financial capability and that was presumably one of the things that prompted you to ask this rather pointed question?

A. Yes, it probably was. I had concerns, I suppose, probably from my knowledge of dealing with Esat itself.

Q. I appreciate that, yes. Mr. O'Brien wasn't hiding his involvement with Esat Telecom, in fairness to him, I think he was trumpeting it, if anything?

A. Oh, certainly not.

Q. For the record, I just want to clarify whether you discussed your dealings with the consortium in the course of the presentations, or any aspect of the presentations with any third party, meaning anyone not in the group?

A. Absolutely not.

Q. Yes. And are you aware of anyone else having done so?

And I will leave out of that, for the moment, discussions with the Minister directly because we are aware from the minutes of discussions between Mr.

Brennan and the Minister, leaving that aside?

A. No, I am not aware of anybody else having done it.

Q. You are aware, I take it, from the evidence, that Mr.

Lowry, according to Mr. AJF O'Reilly, was able to tell

Mr. O'Reilly how his consortium had managed to do at

the presentations, or not do, as the case may be?

A. I have certainly seen the allusions to that, yes.

Q. Now, if you go to the next leaf in Book 42, Leaf 144.

This deals with the meeting of Thursday the 14th

September, '95.

A. Which divider?

Q. It is Divider 104.

A. 104, I beg your pardon.

Q. Yes.

A. Okay, I have that.

Q. Yes. That's a minute of the meeting of the Project

Group that took place after the last of the

presentations. And I think what you did was you

discussed to some extent that last presentation, that

was the A4 one. Then you went on to review the

current position and went on to decide how you would

progress matters. Do you see that, if you look

through the headings?

A. I see that.

Q. There doesn't seem to have been any extensive

discussion of the result or the impressions you all

formed from the four presentations. Now they are



mentioned, the impressions you formed, but there doesn't seem to have been any lengthy discussion of the impressions you formed, the details, the detailed impressions you formed following the presentations.

Am I right in that?

CHAIRMAN: You said four, I think you said four presentations.

Q. MR. HEALY: From six presentations. Is that right?

A. As I sit here now, I certainly cannot recall a detailed discussion in the round immediately following them. I would say this, that having sat in on each of the six, your mind was left in a welter of information at the end of each of them.

Q. I understand that.

A. And one was left with the feeling that no matter how much information you had taken down, that apart from the applicant-specific questions and the other hard data we sought to get from them, the answers really lay in the data they had supplied with their applications. And that it was really just an impression that you might have formed from the demeanor of the witnesses, so to speak, and so it mightn't have served any useful purpose at this stage to have a round table discussion about the various applicants without having first gone through the data or some sort of a quantitative assessment. That may be why. I am just suggesting to you that we didn't or

that there isn't evidence of such a discussion.

Q. There is a reference to the presentation you just had, the A4 presentation?

A. Yes.

Q. But nowhere in the minutes is there a reference, even in a similarly sort of brief way, to any of the other presentations anywhere. Maybe it is not a matter of any huge importance. Maybe you were all able to carry your impressions away with you and ultimately could have brought them to bear if there had been a round table discussion at the end of the day?

A. That may be the case.

Q. You made your own notes, I think, of that meeting as well. I will just find it. They are in Leaf 105. Can you see them?

A. Yes.

Q. Yes.

A. I have got that.

Q. You start off: "AMI Michael Andersen," you have a note about "1. Capital funding of some applicants to be reassessed."

It could be a reference to the very issue we discussed a moment ago?

A. Indeed it could.

Q. The O'Brien/Advent issue. Then you have, "Martin Brennan short-listing? Can we do it now?"

Michael Andersen says okay. And divides the

proposes a twofold division between A1, A3, A5. Maybe a threefold division. He says three groups anyway, A1, A3, A5. You have that as one group. Then you have, "A2, A6 not waste too much resources." Then you have, "A4". Is it on a different line or in a different group?

A. I am just guessing from my own writing style that A2 and A4 are actually part of the one group.

Q. I see. Then it goes on, "MB, Wednesday, probably" is it?

A. I think what it is is: "We probably still look at some of the second group."

Q. Yes.

A. Which indeed we did, I think.

Q. Then it goes: "All agreed process is still intact and not compromised." What does that mean?

A. It doesn't ring any bell with me as to why I would have written that down there if somebody hadn't actually said it. I would suppose that I am actually repeating what someone said there.

Q. In fairness it does say "all". Am I right that looks like "all," is it?

A. That is what is there, yes.

Q. "All agreed process still intact and not compromised."

Does that suggest that there was some bit of a discussion about it? I don't think you needed to have a sort of a formal voting but

A. I would expect if I could remember it, if somebody had supposed or put to the group the possibility that there had been some compromisation of the group, but it seems to me, on reflection here, that somebody must have put forward the proposal that, well everything still seems to be on track and we don't have any evidence to suggest that anything that we are doing has been compromised at this stage or are we all in agreement with that?

Q. Yes.

A. That is all I can suggest to you, and the reason I say that is if there had been some other reason for writing it, I would probably remember it.

Q. I see. If you look, if you go back for a moment to the printed note?

A. At 10?

Q. The previous leaf.

A. Yes.

Q. If you go to the second page, under the heading "Review of Current Position" you see a note that says "Mr. Brennan also stated, and the group agreed, that no further contact between the evaluation people and the applicants was possible, although access to the Minister could not be stopped." Now, that is not in your note?

A. No.

Q. But it is in Maev Nic Lochlainn's handwritten note and

it is positioned near but not necessarily connected

to, it is not entirely clear, the reference to the process being intact and not compromised.

A. Okay.

Q. I am just wondering, is there a connection between the two or do you remember a connection between the two?

A. No, I don't remember a connection between the two. I see where you are coming from, but I can't really assist you there.

Q. Can you remember what would have prompted anyone to say or to discuss the need for there being no further contact and recording, or in some way alluding to the fact that access to the Minister couldn't be stopped?

Why would there be any reference to the Minister?

A. If I can divide your question into two for a moment.

The first part of it, yes there may have been reasons why we would have taken stock of the situation. I seem to recall, and I am sure it is documented, that somebody had discovered somebody from Esat Telecom wandering abroad in the premises.

Q. Now that you remind me of it, that is possibly what the compromise might have been about. There was a suggestion that some, and I don't think there was any, I don't think there is any I think it may have happened accidentally?

A. I think so, yes.

Q. That somebody in Esat Digifone had been in the

premises beforehand?

A. Correct. For some time, but we took it seriously at the time.

Q. You did?

A. And I think we satisfied ourselves

Q. And you had the place debugged or whatever else, swept. Not that I am suggesting there was a bug?

A. We instituted the sweeping of the premises after that, yes.

The second part of your question, if I can return to it, as to why the Minister might have been referred to in such terms, I am guessing, as I look at the words used here, "access to the Minister could not be stopped", and by that perhaps what is meant is that access to the Minister by, to the Minister by outsiders, in other words we could have no effect on, we couldn't prevent people coming to the Minister and interceding with him. What we do is, you know, advise against that and

Q. Conceal, you conceal yourselves off but you were saying he couldn't conceal himself off?

A. Yes.

Q. Do you understand why I would ask, why I ask why would that topic of conversation arise at all unless there had been some, maybe somebody had speculated or expressed the view that there may have been some access or some indication of access to the Minister?

A. Yes, I can see why you would ask that. Perhaps I can help you by asking you a question in turn. You are probably more familiar with the chronology than I am at this stage.

Q. Yes.

A. Was this, for example, after one of these alleged incidents where the Minister met somebody in a pub or something?

Q. Well, it would have been the same day sorry, the alleged incidents in the pub, I beg your pardon, would have been before that.

A. It would have been before that?

Q. Yes, it would have been three days before that.

A. I see.

Q. Yes. Though only three days before it.

A. Right. I see. Well, it could be that something of that ilk had come to somebody's attention, but I certainly don't recall, but if there had been some incident and if it had been discussed, I think it would have been important enough for me to remember it.

Q. Yes. It was after as well, there had been a meeting which I think is not denied, so I don't have to refer to it as an alleged meeting of Mr. Tony O'Boyle of the Persona Group in a hotel in Killiney and the Minister, I think that had occurred in August. Had you heard anything about that?

A. Not until I came to the Tribunal.

Q. Yes. Now, after that you have a note: "A3 Persona, Esat Digifone, Eurofone."

A. We are now back with my own note, is that right?

Q. Yes. "Where Mobical, Irish Cellular, A2 Cellstar."

They are the six was that an attempt at a ranking by you or was that a ranking that the Project Group were

A. Can you point to exactly where in my own note

Q. If you go to your own note, the bottom left-hand corner of the front, the first page?

A. Yes, I see it. It looks to me as if I was taking down something being said by someone and that I wasn't fast enough to take it down.

Q. I see.

A. I may have finished writing after the speaker had finished.

Q. As if there was a discussion of a ranking. I am not saying anyone was committing themselves to it, you were only discussing a ranking and you were writing it down and maybe wondered where Mobical would fit into it or that you hadn't taken down the Mobical ranking accurately maybe?

A. Something like that, yes.

Q. Could you go to the second and last page of your handwritten note where in a box you have: "Question 1: What is the end result? Question 2: Do we deal



with goodies?" I think "goodies" is attempting deal with all of the applicants telling you that you were going to bring millions of jobs to Ireland, etc.?

A. Exactly.

Q. If you look at your first question: "What is the end result? A report and recommendation, a recommendation only." I think is that was your own thinking or is it a reference to a discussion?

A. Yes, you may take it that usually when you see a box written around something in my notes, that they were memoranda to myself to ask something, either that or some question, some hypothetical question arising in my mind as a result of what was said, but yes, I suppose I was adverting to what was the end result to be.

Q. Maybe you made that note because there is a note in the formal minute which seems to deal with a similar issue, so if you go back to the formal minute and Leaf 104 and to final page, it says: "The scoring of the marketing financial" do you see that paragraph?

A. Yes.

Q. "The scoring of the marketing financial management dimensions would take place in Copenhagen next week. DTEC to appoint the appropriate personnel to attend. AMI would provide the first draft Evaluation Report on the 3rd October. This would be discussed by the group on Monday the 9th October. The three DTEC divisions

would supply any written comments prior to that meeting. Following that, AMI would produce a second draft report by the 17th October."

Do you see that?

A. I do.

Q. Right. So would I be right in thinking what was envisaged was along the lines: that the evaluation model, that a draft report would be produced; that you would all get it in time to make written comments; you would make your written comments you would discuss it at a meeting and then they would go off and try again and have another draft report?

A. Yes.

Q. I would be right in thinking that looking at that you had or one would be left with the impression that none of these reports were going to be written in stone?

A. Yes.

Q. Could you go to Leaf 111 of Book 42, please.

This is a memorandum from Michael Andersen to Martin Brennan, Fintan Towey. And I think it is a memorandum that followed a meeting that took place in Copenhagen on the 19th/20th September, and indicates what, in the view of Andersens, needed to be done and what work programme they proposed to adopt for the following approximately ten days.

Firstly they deal with the remaining awarding of the marks for the ten dimensions. Then they go onto the

awarding of the marketing aspect, financial aspect and the other aspects. Do you see that?

A. Yes.

Q. It says: "It is suggested that the award of marks to the remaining aspects is decided at a meeting Thursday the 28th. The meeting may either be a conference call or a meeting in Copenhagen.

"The scoring of the financing aspect will be self-explanatory, whereas we need to consult each other concerning the scoring of the marketing aspect.

"Concerning the award of the marks to the other aspects we suggest to proceed as follows:

"1. We need to make some risk investigations, of which the following are proposed:

"A1. No major risks are identified yet, except for the

DETECON issue and the potential conflict in decision-making among the three operators."

I don't want to go into A2 because I think they weren't a runner.

"A3. The equity of Sigma (and ESB) to be documented by JB and FT, and the potential abuse of dominant positions or lack of competition due to the relationships between, on the one hand, Motorola and Sigma, and on the other hand, Telecom Eireann have been identified as risks (TI)". I suppose that is somebody to deal with it.

Then you go on to A5. "Three years of negative solvency combined with a comparatively weak financial strength of Communicorp Group is identified as a risk (JB/BR/MT). In addition, it might be a risk factor that A5 is to establish its own radio (backbone) network (OCF), and the approach to planning permissions (OCF?) are some of the identified risks."

It goes down to the end then. "Other risks might be identified and dealt with later in the process."

It goes on: "If there is a clear understanding between the Department and AMI of the classification of the two best applications, it is suggested not to score 'other aspects', the risk dimensions and other dimensions, such as the effect on the Irish economy.

In this case, the risk factor will be addressed verbally in the report.

"If there is no immediate unanimity, it is suggested to score the other aspects and the dimensions under this heading."

I think you were asked about that in your statement as well and I think it is only fair to turn to your statement, but while we are turning up the portion of your, the relevant portion of your statement, firstly do you recall being asked to give any consideration to this?

A. Do you mean to the document?

Q. Yes.

A. I actually can't remember receiving this document.

Q. Can you remember being asked this question, because it doesn't seem to be referred to in any minute?

A. And the question being?

Q. "If there is a clear understanding between the Department and AMI of the classification of the two best applications, it is suggested not score 'other aspects', the risk dimensions and other dimensions, such as the effect on the Irish economy. In this case, the risk factor will be addressed verbally in the report.

If there is no immediate unanimity, it is suggested to score the other aspects and the dimensions under this heading.

A decision has to be taken at the meeting of the 28th September."

I think you say in your response to Question 27D, that you know nothing about this or any such decision to this effect?

A. 27B.

Q. You needn't worry about it. You say: "I know nothing of a decision not to score 'other aspects'."

A. Yes, but I would need to look at this in the context that I now know you have written the question in.

Q. Oh, yes, yes. Take all the time you want.

A. Certainly when I addressed the question

Q. I am not trying to catch you out. I am just telling

you your answer. Take all the time in the world.

A. But it still seems to be the case that the document which we now have before us, being the one of the 21st September, I think, I cannot recall having seen that document until I went through the Tribunal's books.

Q. Yes.

A. It may be that it is actually on Regulatory section's files. It may be that I have seen it, but I just don't recall it.

Q. I don't think it is.

A. All right. In that case, all I would say is, that it seems to be suggesting that if there was unanimity among the group, including AMI, that there was no need to go and score a certain 'other aspects', then we could save time by proceeding.

Q. By not scoring?

A. By not scoring them, yes. And that "unanimity", I expect they mean unanimity about clear water between the first and second applicant. But if there was not such immediate unanimity, that the 'other aspects' would be scored.

Q. Well, I think it says if there is a clear understanding of the classification of the two best, in other words you take the two best and you say which is first and which is second?

A. Yes.

Q. And if you have a clear understanding of that, and you

don't score the 'other aspects', that he wanted to know was there unanimity? Basically what the Department were being asked was to give a clear indication at this stage of their understanding of the ranking between the top two. That would have been a fairly serious question, wouldn't it?

A. It would be, given that the, at that stage, 21st September, you can correct me if I am wrong, would the visit to Copenhagen have taken place at that stage?

Q. It would have, yes, the first visit to Copenhagen, the first of two major visits.

A. Yes.

Q. Yes.

A. But the result of that visit to Copenhagen would not have been discussed round table, would it?

Q. No.

A. So that therefore it would have been a brave assumption that there could be any such unanimity about

Q. I am not suggesting for a moment that anybody was doing this in order to favour one candidate or the other?

A. There doesn't seem to be.

Q. There is other dynamics. People might want to get the job done quickly and therefore would take shortcuts.

I think that is what it is actually, not proposing to take a shortcut, but somebody was suggesting we really

need to get on with this and if there was any possibility of unanimity about who a winner was, we could it mightn't be the wisest or even the proper thing to do, but I can understand why somebody would decide let's get on with this.

A. I will make no comment whether it was wise or not. We were always alert to the possibility of saving time by not doing needless work.

Q. But this, a decision not to do needless work here was predicated on a fairly major decision about the process, isn't that right?

A. Yes.

Q. And you did have, I think, plenty of time at this stage, this was the 21st of September, you had the bones of two months?

A. Yes.

Q. In fact you had more than two months, hadn't you, you had nine weeks?

A. To return now to the question that you put to me after that.

Q. Yes.

A. As to my answer to whatever it is, 27B.

Q. D.

A. D, I beg your pardon. And my answer was: "I know nothing of this decision." I am still not aware that there was any decision not to score.

Q. I don't think there is. But there is one recorded in



the Evaluation Report but none that I can see in the minutes of the meeting.

Could we now go to Leaf 116 of Book 42.

A. Okay.

Q. This is your note of the interdivisional meeting we mentioned in passing yesterday.

A. Yes.

Q. Have you got it?

A. I have got it.

Q. Do you recognise it? It has a meeting with T&RT, T&RR, T&RD, do you see that?

A. Yes.

Q. You are dealing with a number of items, not just the GSM item?

A. Indeed it is indicative of the kind of thing we had on our plate at the time.

Q. Yes. What kind of meetings were these, maybe just

A. These were meetings which were originally intended to be chaired by Sean Fitzgerald as Assistant Secretary, with myself, Martin Brennan and John McQuaid, and Assistant Principals, when we would take a quick run through the major items of joint interest because we were virtually hand and glove, the three divisions, on most of these things.

Q. Yes. Perhaps for the reasons you mentioned at the outset, you were dealing with very narrow focus on these issues, but similar issues were being dealt by

the development division on a totally different basis?

A. Correct. I mean, there was a good deal of input from each division acquired for anything. Of course if, for instance, we were drafting a regulation on our side of the house, we would have needed technical input and we would have needed input from Martin Brennan's division.

Q. And are interdivisional meetings common in all sections or all departments in the Civil Service?

A. I would like to think so.

Q. Yes. And apart from seeking inputs from one another, are they in some way in the form of progress meetings as well?

A. Yes, they would certainly be informative so that we would be brought up to speed on what the development division were doing, and likewise

Q. Or what priority to be afforded to this, that and the other on your list of tasks?

A. At that would be Sean Fitzgerald's call.

Q. I see, it would be his call?

A. Yes, as our boss, so to speak.

Q. Yes. Can you tell from your note who was at the meeting? We can see some names.

A. Yes, it is usually my custom to scribble down the initials on the top left-hand corner somewhere or maybe in the margin, but either the copying has obliterated it, there or I neglected to do it on that

occasion.

Q. Well, we certainly see "FT"?

A. You have Fintan Towey, you have myself, you have John McQuaid, obviously.

Q. If you go over the first page you have "Meet and discuss in something committee."

A. "Sub-Committee."

Q. "Sub-Committee" and you have a number of names. Is that of the Sub-Committee?

A. Yes.

Q. "Submit paper to rest of us and Sean Fitzgerald."

A. That's right, yes.

Q. Is that a date for the paper, the 24th of

A. Whatever it is, yes, about spectrum pricing policy.

Q. Yes. Then if you go on: "GSM" there is no actual names there that I can see. Martin Brennan's name is mentioned at the bottom of the page, do you see that?

A. I do, yes. So he was present.

Q. Yes. Can you recall if Sean Fitzgerald was present?

A. It is unlikely he was present or he would have had something to say and I would have noted his attendance there.

Q. I see.

A. And on many occasions he couldn't be present and we simply held these meetings ourselves.

Q. I don't think he thought he was there either. He couldn't be absolutely sure.

A. Yes, that makes sense.

Q. Your note is, under the heading "GSM" "Minister wants to accelerate process, legalities more complicated.

Draft report now imminent. We need to discuss and to digest agreed one copy. Let it stay here and discuss it in confidence." Is that right?

A. Yes, that's it.

Q. And "here" is a reference to Ely Place or Kildare Street?

A. It is 44 Kildare Street.

Q. Oh it says "44"?

A. Yes, these meetings were always held in 44 Kildare Street.

Q. Right. Can you let me have your view of, you have already referred to it in your narrative now that we are looking at the actual document, how you would have come to make those notes and who would have said what, to the best of your recollection. You have already dealt with the major issue, from whom you received the intelligence that the Minister wanted to accelerate the process?

A. Yes, right. It would have to have been from either Martin Brennan or Fintan Towey, I would guess. And I think that I said in my replies there, which I have here somewhere, that it certainly wouldn't have come via our division if it had come from the Minister. It is inconceivable that it would have come through

anybody but the Development Division.

Q. I think this is a Monday morning, is that right? It is a Tuesday in fact. I am told it is a Tuesday.

A. The 3rd October, was it? Okay.

Q. And it was the Tuesday after the second of the Copenhagen meetings.

A. Okay.

Q. Martin Brennan and Mr. Fintan Towey had been at those, at that meeting. Was there any discussion of those meetings? There is no note of it anyway. Maybe there was?

A. There would have been a discussion at those meetings but perhaps not here. This was an interdivisional meeting to take a run over the main items affecting us.

Q. Can you throw any light on why the Minister would have wanted to accelerate the process, bearing in mind that you were well on schedule, you had time to spare in fact, hadn't you?

A. We had, yes.

Q. Maybe you envisaged having time to spare?

A. We had practically until the end of November.

Q. Yes. Was there any reason why the process should have been accelerated?

A. I can think of none.

Q. When you say the legalities are now more complicated, you have given a number of possible interpretations as

to what that meant; the one you were canvassing in your response to the questionnaire was that you had to give everything proper scrutiny?

A. Yes.

Q. Proper scrutiny requires time?

A. Yes.

Q. No shortcuts.

A. Yes.

Q. You say: "A draft report was the now imminent". Then you have a note: "We need to discuss and digest."

Again, are you recording a consensus at the meeting that you needed to discuss and digest it or your own view?

A. I am probably recording my own view as stated to the meeting.

Q. Yes.

A. In fact I do seem to recall this incident I can't remember whether it was, this is the first time or the second time on which I have recorded a statement attributed to the Minister. I think there were two occasions.

Q. Yes. This is the first time.

A. This is the first time, okay. I believe it was Martin Brennan made the statement, but I stand to be corrected if that is not the case.

Q. I think he may, I think I put your supplemental statement to him. I don't think he demurred on the

basis that it seemed reasonable speculation, if you

like?

A. I am reasonably sure that I made the second bullet point there, "the legalities are more complicated" in the sense that the legality in coming to a decision like this is a bit more complicated than the Minister seems to think. And that it is not simply a matter of letting these guys know that we need a quick decision.

Q. Yes.

A. I think that's it, it is as simple as that.

Q. Now, when you refer to the report being imminent and the need to discuss and digest it, you were in fact simply reflecting what had been in the evaluation model and what had been discussed as we now know at the meeting that took place following the presentations when you were to get the report, written comments were to be, I think, submitted and then you were to have a big meeting to discuss it, isn't that right?

A. I think that's probably right, yes, either that or somebody said in my presence on that occasion, "Well the draft report will be here soon" and I was probably making the point that if that was the case, then we certainly needed time to deal with it.

Q. And at that stage nobody told you that the process was over?

A. No, no, there was no question of that as far as I

know.

Q. Okay. I think you were present during the evidence given by Mr. Ed O'Callaghan?

A. Yes, for most of it, I think, not all of it.

Q. And you will be familiar from the documentation I think that was provided to you, and in any case you will be familiar from his evidence, with the document which he describes as his chronology?

A. Yes.

Q. Do you recall ever having seen that document before you became involved in this inquiry?

A. No.

Q. I am not going to ask you to look at the whole chronology now because I will be coming back to it. I am just dealing with one aspect of it. In the first paragraph of his chronology which is on, which is in Leaf 137 of Book 43, he says: "I learned that AMI had forwarded a first draft of final report in week ending "

A. If you could wait for just one minute, Mr. Healy, while we get that.

Q. I am not going to go through the whole thing. You could just look at the section on the monitor I want to refer you to. I am only dealing with the first paragraph. It is simply to date something in fact. You will see that it says: "I learned that AMI had forwarded a first draft of final report in week



ending" that should be "6th" the manuscript says the "16th". You will see the next sentence makes that clear. "I asked MB who they had recommended and he refused to tell me on the 6/10. The report was not circulated that week." That is another typographical error. "Sean McMahon told me the order of preference later that day."

A. Right.

Q. Now, my understanding from your note of the first, sorry of the GSM meeting of the 9th of October which was the next GSM meeting, and it is in Book 42, Leaf 122, that you noted that you had not had a chance to read the report in full. You, meaning the Regulatory Division?

A. Yes.

Q. Have you got that note for a moment?

A. This is a note dated the 9th October, is that right?

Q. Yes. If you go to Leaf 122 of Book 42.

A. Yes. It is just headed "GSM Group"?

Q. Correct.

A. Right.

Q. It is not clear from that whether you are saying you have only just got the report or whether you had it for some time but hadn't an opportunity of reading it?

A. Yes, I see the, I see my note to the right-hand side there.

Q. Yes.

A. "Only limited number of copies. We've" that is T&RR "have not had a chance to read in full."

Q. Now, can you recall if you got that report in advance of the meeting which was I think, on a Monday, you would have got it at the end of the if you had it in advance, you would have got it in the week that you had the interdivisional meeting?

A. Yes, and we would have presumably had it following that interdivisional meeting since we

Q. Not that day. I think you wouldn't have had it until the following day if you got it immediately from the Department?

A. I am making the point that we didn't have it on the day of the interdivisional

Q. It would be mentioned quite obviously?

A. We must have got it sometime during that week, either that or it was distributed on the morning of this meeting on the 9th October. It is more likely, on reflection, that it was distributed sometime during the week preceding this, and that we hadn't had a chance to read it fully.

Q. Do you see the note that you made on the 3rd where you indicate that it was going to be kept in 44, do you see that?

A. That's right, yes.

Q. Is it possible that you didn't get it, although it may have gone to 44?

A. Yes, it is possible.

Q. Yes.

A. I can't say with any certainty.

Q. You know the way the reports were produced with shadow type on the pages to indicate to whom each report was handed?

A. Yes.

Q. To Sean McMahon, Fintan Towey, Martin Brennan, Minister Michael Lowry and so on. I don't think any report was produced explicitly with your or for your attention or with your name shadow typed onto it, where the report of the 3rd of October was concerned?

A. That could be. So the only way I can answer that would be to check the files of the Regulatory Division.

Q. Yes. Well, it might be no harm to check it, but I think I am right, or perhaps Mr. Shaw can arrange to have it checked. I think we may be able to save ourselves and

Mr. Shaw the trouble of trying to find it, because I will just read out Leaf, the contents of a letter at Leaf 117 of Book 42 which is as follows:

"Dear Martin and Fintan,

"Attached to this letter you will find two hard copies

of the draft evaluation report. One is made

personally for you each with shadow text. We suggest

that PT GSM members wishing to read the document do so

on the 5th floor in your offices, as the document is a sensitive document."

That was sent on the 3rd, received on the 4th. Do you see that?

A. Yes, I do.

Q. So obviously that meant that if you were to have access to it, you would have had to go over to Kildare Street?

A. I think so, yes.

Q. It is not necessarily what was envisaged earlier on either in the evaluation model or at the meeting, but be that as it may, maybe it was a way of dealing with the sensitivity of the document; it would have meant you going over there and making time to be there?

A. Yes.

Q. And to completely absent yourself from your work, isn't that right?

A. Yes. In fairness to the people of the Development Division, and to Maev and Fintan, I don't think it would ever have been their intention to leave us bereft of an up-to-date copy.

Q. I am not suggesting that. I am simply trying to find out what happened and if what this letter says is correct, then what happened may not have been what was envisaged or certainly wasn't what was envisaged, but be that as it may, to read it you would have had to absent yourself completely from your work, wouldn't

you?

A. Yes.

Q. Now, if we could just go back on the overhead

projector again to the first paragraph of

Mr. O'Callaghan's note.

He says: "The report was not circulated that week."

Well he was obviously correct in that and the report

was not available for circularisation. And he says

you told him the order of preference later on the 6th.

A. Right.

Q. Do you recall being told the order of preference

contained in that report as of that week?

A. I have a vague recollection of hearing firsthand from

Martin Brennan what the outcome of that had been. I

can't place that in time or space either.

Q. Well, it wasn't on the 3rd anyway?

A. No. I expect that honestly I can't recall, Mr.

Healy.

Q. I see. Do you recall being told by Mr. O'Callaghan

that he had asked Mr. McMahan

A. Mr. Brennan.

Q. Mr. Brennan for the result and that Mr. Brennan had

refused to tell him?

A. Yes, I think he told me that.

Q. Yes. I don't want to draw you into any painful

conflict with colleagues, but what did you make of

that, or at least without asking you a question as

blank as that, or as blankly as that. Did that suggest in some way some degree of tension between two sides of the house in relation to this?

A. No. To come back to the first part of your question, I think Mr. O'Callaghan did inform me that he had asked and hadn't been told by Martin Brennan. I don't recall him saying that exactly, but when he asked me did I know, he would almost certainly have said to me that he had asked Martin Brennan and had been refused. It would be inconceivable to my mind that Ed O'Callaghan would do anything else, given that he is a man of the utmost integrity, and I do seem to remember him asking me and I do seem to remember my conveying the information to him and I do seem to recall that we were being highly, I won't say secretive at the time, but this was the first draft report. This was the first document which arrived, had arrived at any tentative conclusion. We were highly conscious of the need for confidentiality and indeed AMI, as you can see here, had emphasised that too. We were certainly concerned that it shouldn't become something that was to be talked about in the corridors. And I can only guess that it was some sort of perhaps misguided

Q. Adherence?

A. apprehension or adherence to those principles which lead Martin Brennan not to tell Ed O'Callaghan in the circumstances.

Q. Yes, I can understand that.

A. I had no trouble telling Ed O'Callaghan because he was my, I assure you, my lieutenant in all of this.

Q. But what is more, leaving aside perhaps an over-attachment to notions of confidentiality,

Mr. O'Callaghan was a member of the Evaluation Team?

A. Inasmuch as any of us were.

Q. Yes, and he had a job to do?

A. Yes.

Q. And you had a schedule to keep to?

A. Yes.

Q. And you had a meeting to attend on the 9th where you were going to have to discuss this and either stand over it or not, as the case may be.

I think I am going to move on to something else in another document, I think it might be no harm to leave it until tomorrow morning.

CHAIRMAN: Well, there is nothing further on Mr. O'Callaghan's chronology in that. All right 11 o'clock in the morning then. Thank you very much.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,  
THURSDAY, 13TH MARCH, 2003, AT 11 A.M..