

A P P E A R A N C E S

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I N D E X

WITNESS: EXAMINATION:Q. NO:

Sean McMahon

Mr. Healy

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THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY, 13TH

MARCH, 2003, AT 11 A.M.:

CONTINUATION OF EXAMINATION OF SEAN McMAHON BY MR.

HEALY:

Q. MR. HEALY: I think yesterday we were dealing with the period following the interdivisional meeting on the 3rd October leading on to the Project Group meeting on the 9th of October. I think the last thing we were talking about was Mr. O'Callaghan's record, and indeed his evidence, of having met Mr. Brennan and Mr. Brennan refusing to tell him what the ranking was, and then he asking you, you think, or he says he asked you, and you told him what the ranking was, of course?

A. Yes. If I might just add something to that.

Q. Yes?

A. Looking at the transcript of this there this morning, I do recall Ed O'Callaghan saying and I think perhaps Martin Brennan as well, that that encounter between them occurred either in the canteen in 44 Kildare Street or in a corridor.

Q. Yes?

A. And I wouldn't be inclined, although this is your call, to attribute any more to it than either of Mr. Brennan or Mr. O'Callaghan would. It does sound like a chance encounter, and one can understand why Mr. Brennan would have been reticent about discussing something like that in the canteen or in the corridor.

I am certainly not conscious of, at the time or since, that there was any attempt at any time to deliberately exclude the regulatory side from anything. So...

Q. What aspect of Mr. Brennan's evidence makes you think that as a matter of interest?

A. I don't I am going on, perhaps, a reading of his evidence from a computer disk.

Q. Yes?

A. Either that now, or I am going on what I understand he said from having spoken to others, but certainly from Mr. O'Callaghan's evidence, I think the encounter took place in either a corridor or in the canteen.

Q. I think it took place in a canteen?

A. It was outside of an office setting.

Q. Yes, it was.

A. I think that was the point.

Q. I don't know that Mr. Brennan had a clear recollection of it, because he indicated in the first instance, I think when being examined by me, that it wouldn't have been appropriate to tell Mr. O'Callaghan?

A. Yes.

Q. And in fact he took the view that Mr. O'Callaghan was merely a deputy, and that it would have been appropriate to tell you, as the person responsible for that section and as the person whose deputy Mr. O'Callaghan was. But of course it is clear from all of the documentation, that Mr. O'Callaghan was not in

fact a deputy?

A. Yes.

Q. And it was subsequently then, I think, Mr. Brennan indicated that it might have been in a canteen and he did, I think, suggest that a canteen was a fairly public place, and you couldn't have, you know, the transmission of sensitive information like that in a public place, but Mr. O'Callaghan did make it absolutely clear that he too was conscious of the fact that a canteen is a public place, but he made it clear that they were in a very quiet part of the canteen and he would not there was nobody else there and he wouldn't have, he wouldn't have exposed Mr. Brennan to the risk of having to, having even to refuse to hand over or to give confidential information in a place that wasn't discreet or appropriate?

A. Okay.

Q. And in those circumstances, it does seem to me that there was a reluctance, for whatever reason, to ensure there may have been a reason, I am not suggesting in any way it was a mala fides reason, and there may have been a desire to keep this thing as quiet as possible and not even to breathe a word about it, outside of a closed room but be that as it may, Mr. O'Callaghan was not in the loop at as early a time as he could have been in a process that was being accelerated, isn't that right?

A. That's correct.

Q. And if you are going to accelerate the process, then you have to accelerate the transmission of information as part of that process, don't you?

A. I accept that.

Q. Of course, you want to accelerate it and one way of accelerating a process, as we all know, just to drive through regardless of how much information people who are supposed to be involved in that process actually have to enable them to make an appropriate contribution, isn't that right?

A. That's correct. It hadn't been my attention to labour this point as I wasn't a direct witness other than what Mr. O'Callaghan told me it, does seem in the light of what you just said that Mr. Brennan may have been particularly sensitive to letting this information come to me via my deputy and maybe he wished to impart it directly himself.

Q. I understand that. I don't think he said that. I think what he meant was that it was for Mr. O'Callaghan to get it from you?

A. Right.

Q. Not from Mr. Brennan. And that it was Mr. Brennan's duty to give it to you only. Which is a slightly different thing, isn't it, to telling Mr. O'Callaghan he was to get it from you?

A. Mmm.

CHAIRMAN: Well, I think perhaps we can

Q. MR. HEALY: You didn't have, it is not clear, it seems to me that you didn't have that report until either the Monday, the 9th October, or sometime shortly before the Monday the 9th October, is that right?

A. That would seem to be the case, yes.

Q. The note of that meeting of the 9th October is contained at Leaf 120 of Book 42.

A. Yes, I believe I have that now.

Q. Yes. Now, at Leaf 121 you will find a verbatim handwritten note of the meeting kept by Margaret O'Keefe and it would appear that it is from that note that the formal minute of the meeting was produced.

A. Now, unfortunately the note in question is missing from between the

Q. It is missing from Leaf 121, is it? I think you are getting it now.

(Document handed to witness.)

A. Yes, I have that now, Mr. Healy.

Q. You will see that it begins with the Chairman opening the meeting by stressing the confidentiality of the Evaluation Report and the discussions regarding same.

It says he also informed the group that the Minister had been informed of the progress of the evaluation procedure and the ranking of the top two applicants.

And he went on to note that the Minister was disposed to announcing the result of the competition quickly

after the finalisation of the Evaluation Report.

A. Yes.

Q. Then it goes on to refer to "Discussions of the Evaluation Report, and says the draft evaluation report put forward by AMI was examined in detail. A range of discussions/suggestions in relation to the manner of presentation of the results was put forward by the group and AMI undertook to incorporate these in the second draft. The agreement amendments included..." Then there is a list of them in bullet points.

" inclusion in the body of the main report of the proposed appendix in relation to the evaluation methodology."

Secondly, an expansion generally of the justification of the award of marks for the various indicators.

Thirdly, the revision of the financing conformance appendix to a more explanatory format.

Fourthly, the inclusion of an executive summary an annex explaining

A. You have gone a little bit passed where I am, Mr. Healy. You are still on the first page of this, is it?

Q. Yes. You slow me down to where you are.

A. You bring me down from where it reads the word "agenda" there.

Q. "Agenda"? Are we at the same document? Oh, I am

asking to you look at the formal note first.

A. I beg your pardon.

Q. I am just telling you we have the other note behind it.

A. Yes, okay, okay.

Q. If you just familiarise yourself with what is on the first page for a moment.

A. Yes.

Q. Then I was saying of the bullet points, the fourth bullet point is as follows: "Inclusion of an executive summary and an annex explaining some of the terminology."

Fifthly, "elaboration of the reasons as to why the quantitative analysis could not be presented as an output of the evaluation process.

"AMI also indicated that the supplementary analysis in relation to interconnection and tariffs which had yet to be provided did not suggest that it would be necessary to revise the award of marks.

"Future work programme".

"It was agreed that AMI would provide the first draft of parts of the report which had not been included in the first draft of the overall report for comment before submission of a complete second draft the following week."

Now, the next document which I want to just mention briefly, I'll come back to it in a minute, is a very

lengthy transcription of a handwritten note of

Margaret O'Keeffe of the same meeting.

A. This is the one which is on the next divider entitled

"Verbatim".

Q. Divider 121, do you have that? I am not going to go

through it just at this minute. You can see it is a

lengthy document?

A. What is the heading on that document?

Q. "Verbatim note of handwritten meeting of Project Group

on the 9th October, 1995, as approved by Margaret

O'Keeffe on the 1st of February, 2002."

A. Yes, I have got that.

Q. That is a lengthy document. It contains notes of

contributions of various persons present at the

meeting with reference to parts of the report and so

forth.

Then the next document in Leaf 122 is your entry in

your journal concerning the same meeting, do you see

that?

A. I do, yes.

Q. Now, this was, it would appear, a fairly lengthy

meeting. The verbatim note is quite lengthy?

A. Mm-hmm.

Q. The formal minute is fairly short, but your own note

is even shorter, isn't that right?

A. Yes.

Q. And I think we see the reason, or am I right that we

see the reason in the section in brackets on the

right-hand side of the your note, where you say:

"Only limited number of copies we have not had a chance to read in full." Do you see that?

A. That's correct, yes.

Q. Yesterday when we looked at the evaluation model, we saw that what was actually envisaged at this time, and I think this may have been alluded to to some extent in your interdivisional meeting on the 3rd, was that the report would be made available in advance of the meeting of the 9th, there would be written comments invited and then there would be a meeting, and I suppose judging from the evaluation model, that meeting was to be the first meeting to examine what was being proposed by

A. Yes.

Q. AMI. Now, in fact, there were only two copies of the report, that particular version of the report made available. There were quite a number of people at the meeting, Andersen presumably had a copy as well. But the attendance at that meeting, which was relatively full, I think, it wasn't, it may not have been an absolutely full attendance, don't seem to have had access to the report in advance, or if they did, there would have been very little time in which to examine it, isn't that right?

A. That would seem to be the case, yes.

Q. And if you go through the longer verbatim note you see that people are looking at sections of the report, but presumably looking at the report for the first time or if not for the first time, within a short time of having first seen the document. I wonder is that what accounts for your note being so short? I think it is why, that you were trying to read the documents instead of note the meeting?

A. We were trying to read the document at the same time as making a meaningful contribution to it. I think probably the telling point of my own written note is the one which says "they are not easy to read."

Q. Yes, and you go on to say at the bottom, "Report reflects quantitative and qualitative evaluation."

A. Yes.

Q. And I think that is a point that you have mentioned before in evidence and in your handwritten memorandum?

A. Yes.

Q. If you look at the verbatim handwritten note?

A. Yes.

Q. It says, "Minister knows" do you see that? "Shape of evaluation and order of top two."

A. Yes.

Q. "Minister of State does not know.

"Quick announcement."

Were you surprised or were you in any way concerned that the Minister was already aware of the ranking?

A. Yes, I was.

Q. What do you understand by the expression "shape of the evaluation"?

A. The ranking, I guess.

Q. Well, it says "shape of evaluation and order of top two."

A. Yes, but I think if the words "shape of evaluation" had actually been used

Q. Yes?

A. It conveys something more, obviously, than just the order of the top two.

Q. Yes, that is my impression as well.

A. Yes, I can only speculate as to what it meant.

Q. Well, I am suggesting that a reasonable interpretation is that it means that the Minister knows not just the order of the two top, but the way the evaluation was going, perhaps what the main features of the evaluation were?

A. Yes, you may be right, Mr. Healy, I don't know.

Q. You go on underneath that to "Agenda" and it says:

"Draft report.

Future work programme:

A. Producing draft number 2."

Then it goes on: "Good working draft produced on time.

"Annex should be part of the main report.

Object if" I suppose that probably should be "is"

"to get feedback on content, style of report,

content accuracy.

"Report too brisk."

These are obviously contributions by individuals?

A. Yes.

Q. "Critically needs more elaboration and reasoning more

significantly. Few lay readers but they were be

critical terminology needs to be explained.

"Michael Andersen brought appendix on supply on

tariffs and interconnections.

"Description of methodology still missing.

"Different groups examined dealing with Commission

commissions etc.

"Relevance of annex dealing with conflict.

"Full discussion needed on Annex 10."

Do you know what that annex is? I can be reminded

that it is the annex on financial capability.

A. Yes, I think so.

Q. "Minister does not want the report to undermine

itself, e.g. either a project is bankable."

I have suggested that that sentence probably went on

or not?

A. Yes, I would think so.

Q. "Should be balanced arguments."

Now, the reference to the Minister not wanting the

report to undermine itself, suggests to me I think,

and I think it is a reasonable suggestion, that the

Minister had had a discussion about the report which went beyond the order of the top two, and may have gone beyond the shape of order or the main features of the evaluation and may have gone into a little more detail to prompt the Minister to make a remark like "I do not want the report to undermine itself" or words to that effect, "either a project is bankable or not."

Would you agree with that interpretation?

A. Its certainly within the realms of possibility, yes.

Q. Would it not be a reasonable interpretation that to prompt the Minister to say that meant that I am not saying he was given the report, but that he must have been given more than a flavour of it?

A. It is a reasonable interpretation, yes.

Q. Now, if you look at that, that entry in the verbatim note follows on the reference to Annex 10?

A. Mm-hmm.

Q. And Annex 10 is the annex that deals with financial problems?

A. Yes.

Q. And I suggest that it seems reasonable to conclude that the reference to the report not undermining itself and a project being bankable or not, is something that was said in the context of Annex 10 or the contents of Annex 10. I am not suggesting that anyone went to the trouble of telling the Minister Annex 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 but the contents

may have been brought to his attention particularly since they contained serious matters on financial capability perhaps and reservations the Project Group was expressing and that it was in that context that he indicated that he didn't want a report to undermine itself?

A. Yes.

Q. Do you think that is a reasonable interpretation?

A. Yes, it is a reasonable interpretation, yes.

MR. FITZSIMONS: Mr. Chairman, I wonder could I just make a comment here and could I ask you, Mr. Chairman, to remind the witness that his answers as given here in response to Mr. Healy's's questions will constitute evidence upon which you can make findings, and that his responsibility is a very serious one in those circumstances. The questions that Mr. Healy has put, he is perfectly entitled to in the course of the inquiry, but the witness should realise that his answers are very serious answers and he should think very carefully over them, particularly since he is being offered as the member of the Regulatory section of the Department, and he is being asked to comment on very far-reaching speculative theories advanced by Mr. Healy. So I would ask you, Mr. Chairman, to ask the witness to be very careful in his answers to these very far-reaching questions that are being put to him. Sorry to intervene in this way, but the witness has

gone along with the last couple of theories advanced by Mr. Healy that are very far-reaching indeed.

CHAIRMAN: Well, I take heed of what you say, Mr. Fitzsimons, but I have to say that whatever findings or whatever interpretations must be put, my appraisal of the manner of the witness's evidence is that he has been meticulously careful and scrupulous in applying himself to the matters posed to him. You will, of course, have an opportunity to put any other aspects, but it certainly hasn't been my impression that Mr. McMahon is approaching the important matters he is dealing with other than with the appropriate gravity and seriousness.

MR. FITZSIMONS: You will appreciate my concern in view of the nature of the last few questions, Mr. Chairman.

CHAIRMAN: Very good.

Q. MR. HEALY: I don't think you have any doubt, Mr. McMahon, of how seriously this matter has to be taken in view of your role and the fact that you have sworn to tell the truth here in this witness-box?

A. Precisely.

Q. Now, if you go onto the next section then, you see "Michael Andersen changes." Then there are references to page numbers, page 3, page 44, and in relation to page 3 it is suggested that a 'B' should be an 'A'. There is references to value, to scoring on page 44.

Do you see that?

A. Yes.

Q. "Supplementary analysis. Tarrif analysis almost prepared when report was done. A5 and A3 almost equal." Do you see that?

A. Yes.

Q. "Interconnection no changes." I think these are references to actual individual portions of the report?

A. Yes.

Q. "Quantitative evaluation. View is quantitative evaluation should not be performed separately but are taken into account in the main report."

A. Yes.

Q. There is a contribution from you under the heading "Sean McMahon" do you see that? "Would like to see more a user friendly overview. Confidence should ooze out of the report. The document would be read by Secretary and Assistant Secretary. The Minister's programme manager (no technical)" or "not technical" I suppose "Department of Finance."

A. Yes.

Q. The next if you go on two pages or two headings, sorry, to the heading "Weighting". "Table 17 different from agreed weighting," do you see that?

A. I do.

Q. I think that must be a reference to the fact in Table

17 the weighting used is the one that was used in the final version of the report, where the first three elements are weighted 10, 10, 10 with a total weighting of 30 and I suspect that that may have something to do with issues we canvassed yesterday, but obviously somebody drew attention to it at this point.

If you go to the bottom of that page, Mr. Fintan Towey is apparently attributed with the remarks "should we not include quantitative analysis upfront?" Do you see that?

A. I do.

Q. And then either he or somebody else says, "quantitative analysis too simplistic to give results."

A. Yes.

Q. On the next page there are two numbered items:

"1. The scoring,
2. Would like to stick to the evaluation model."

There seems to have been some discussion at this stage about whether the evaluation model was being complied with or whether you were departing from it. I am not criticising that, things like this do happen, but they obviously need to be explained, but it is clear that there was some discussion about this, isn't that right?

A. Yes.

Q. Then again some contribution to the effect that "should quantitative analysis be shown? Would have to open discussion again. Quantitative evaluation unfair and impossible. Figure impossible to compare. Chain of events, evaluation model 80% deals with quantitative evaluation."

Obviously somebody drawing attention to the fact that the evaluation model put the quantitative evaluation in a much more important position than it was now assuming in the final report?

A. Yes.

Q. Then there is a contribution to the effect that "the results of the quantitative evaluation not reliable.

"Quantitative analysis became less and less."

I suspect that meant less and less important or less and less significant?

A. I am not sure what that line means at all.

Q. Maybe not. "Should be explained in methodology report and wording is important."

Now, we know that in the final report, although there is an assertion that there would be an appendix containing the quantitative report, there was no quantitative report appended to the final report, isn't that right, or even a quantitative analysis as opposed to a quantitative report, isn't that right?

A. I can't be sure of that until I read that final report once again.

Q. Yes?

A. But insofar

Q. I think you can take my word for it?

A. Insofar as I have read it, what purports to be the final report, several times, yes, I think you are correct.

Q. Yes. Mr. Riordan has a contribution to the following effect: "Are Andersen happy to go forward with the position as it is now?"

Somebody says, "they are sufficiently happy.

"AMI is conducting the evaluation in such a way that ten more people would come up with the same results.

"Because of uncertainty cannot trust quantitative."

Under the heading "Quantitative" "ranking is probably different now.

"50% of the weight" something "loss due to scoring that cannot be used and quantitative analysis has been undermined.

It is it is not necessary to publish the original."

Then Mr. Riordan says, "do we carry out any further assessment of the validity of the assessment presented?"

It seems that Mr. Brennan is answering, "Some validation has been done." Then there is a contribution, "A3 and A5 have much evident information and are satisfied with what they have. Michael Andersen advises not to carry out extra analysis

without risk to the process.

"Elaborate reasoning more.

"Holistic taken a subjective and interpretive skills.

"Number of dimensions, indicators should be given."

And so on.

If you look at page 20 there is a suggestion that the weightings should be given and are the indicators weighted is a question raised by somebody.

I am just going to go to the end of this by referring to one or two other passages. If you go to page 6, it says at the bottom under the heading "Page 40,"

"Should be presented in a more balanced way.

"Financial risks. No doubt that A5 will survive. A3 have agreement that if one shareholder does not come up the others will pay.

"Put in requirements in licence conditions.

"If things don't go as planned a lot more expenditure may be required.

"Problem not unique to anyone.

"More balanced statement. The project will survive.

No one consortium is weak in itself. Each member of consortium brings different elements." And so on.

Would I be right in suggesting that that note indicates not just that, as I said, people were perhaps looking at this document for the first time or within a short time of getting it, but that there was

still considerable debate and maybe even confusion regarding the evaluation model, the distinction between the quantitative and the qualitative report and how the weightings would be deployed?

A. With the exception of the word "considerable", yes, there was confusion.

Q. Yes.

A. I don't want to give the impression that that confusion traversed the entire process.

Q. I am not suggesting that, no. But what I am trying to get at is, this meeting seemed to reflect I will avoid the word "confusion" a degree of significant deviations of opinion, or differences of opinion as to whether the report complied with the evaluation model and as to whether the process was being conducted as it had originally been envisaged, and if not, whether this had been properly explained or whether it could be properly explained. Would that be a fairer way of putting it?

A. That would probably be a fairer interpretation of what took place, I think, and I want to chose my words carefully here; I think my experience of that meeting was that it displayed that virtually everyone accepted that the report, as it stood then, could not, taken on its own, substantiate a decision.

Q. Yes?

A. There was much more to be done. I think that's,

that's clear from what we agreed, but that the claims being made and even though then those are not the right words, but that it was way too early, to my mind, to pick as between A3 and A5 at that stage.

Q. That, in other words, you wanted to, you felt that you wanted to examine the applications to see who should be in poll position amongst the first three or the first two at least?

A. Well, not really. I think that my feelings at the time were that the draft report should be capable of showing in a clear way what had transpired, how the analysis had been done and what the results were.

Now, I would not have been surprised had A3 or A5 been ahead at that stage and I would not have come to the conclusion that that was final. I think we all were agreed that more work needed to be done, but I did feel that whatever had been done, the report should be clear enough as to stand on its feet in that regard and that somebody who had not been in Copenhagen should be able to pick it up, and from one or two readings should be satisfied as to the thrust of it and as to what more needed to be done. That wasn't leaping out of the report at me. That's all I am saying at this stage.

Q. Yes.

A. And I mean, the words there that, if indeed they are the Minister's words at the beginning of it about it

shouldn't undermine itself, that is correct. Like a good rooted title, it shouldn't cast doubt on itself and I hasten to add I did not put those words in the Minister's mouth.

Q. Yes. Do I understand, in any case, that it was your position that no decision could be finalised at that point until you

A. Absolutely.

Q. until you re-examined the bids, perhaps maybe the top two or three, and that in any event, as a separate and subsidiary matter, the report wasn't sufficient to convince anybody of the rightness of any conclusion that had been tentatively even reached at that point?

A. I would agree with you on your second point certainly.

It might not have been necessary to examine the bids themselves in close detail, because much of the data had been

Q. Sorry, if I used the word "bids" I am not suggesting that you would start at the beginning again?

A. Yes.

Q. I think I was trying to quote, and I didn't quote correctly, what you said in your statement: "I expressed the view that the decision should not be finalised until we revisited the qualitative aspect of the bids." Isn't that right?

A. Yes.

Q. And that: "In any event, the report was not

sufficiently well drafted to support its findings."

A. Correct.

Q. So at that point you felt that you couldn't finalise a report; that you had more work on the qualitative side to do, you couldn't finalise a decision sorry, that you had more work on the qualitative side to do, and that in any event, any report would have to be better presented, better than this report was presented?

A. Yes.

Q. Do you know what or was there I suppose what I should say is, how would you have expressed view of the meeting at that point?

A. The mood of the meeting, is that what you mean?

Q. How would you have expressed the view of the meeting?

You finished the meeting, what was the view of the people who were at the meeting? I have, I think, summarised what I think your view was or what you expressed as your view. What was the view of the meeting?

A. I think that insofar as I can capture a collective view of the meeting, it was that more work needed to be done, and I don't believe that any one had really formed a final view at that stage, maybe some had, but collectively we hadn't, I think, formed a final view.

We knew, for example, that there were two clear front runners.

Q. Yes?

A. We knew that they were close. We I certainly had made the point strongly, I think, that as you say yourself, further attention needed to be paid to the qualitative examination, and that the report itself would have to be strengthened so as to show the steps involved and how it had arrived at its conclusions. I think that it would be fair to say that most people would have agreed with that at the end of the meeting.

Q. The note or the minute of that meeting was not in fact circulated until the 17th of October, and we know from your own files that you filed your copy with a note on it. It is contained in Book 43, Leaf 148.

A. Yes, that was sometime afterwards, I think, wasn't it?

Q. Yes.

A. And it was after in fact

Q. And I think it was the 1st of November you wrote it?

A. Yes.

Q. (Documents handed to witness.)

A. Okay, I have got that, Mr. Healy.

Q. You said this is a note to Mr. O'Callaghan, I think. "Mr. O'Callaghan, it is probably too late to change that report or record."

A. Yes, it is "report".

Q. "Report". And by that do you mean the whole report or do you mean the

A. No, I meant the report itself.

Q. The report itself?

A. Yes.

Q. "But our intervention at subsequent meetings made clear that:

"1. We did not subscribe to unanimity at this meeting.

"2. We expected the qualitative assessment to continue from that time.

"3. The report, while it had probably highlighted the best two candidates, had a long way to go."

A. Yes.

Q. Now, I think that items 2 and 3 merely echo what you have just said in evidence a moment ago?

A. Mm-hmm.

Q. You say, "it is probably too late to change this report but our intervention at subsequent meetings made clear that we did not subscribe to unanimity at this meeting."

A. Yes.

Q. Do I understand that to mean that at subsequent meetings, claims for unanimity at that meeting were made or that at least you indicated at subsequent meetings that there had been no unanimity at the meeting of the 9th?

A. I am not sure which of those answers is the correct one, Mr. Healy, but I guess it would be one or the other. I would need to read this report here again.

Is there, for example, a claim, a retrospective claim

of unanimity in this report?

Q. I don't think so.

A. Well, then it may be that my reference to unanimity did arise, as you suggest, out of references back at following meetings, or it may indeed have referred to the there had been several references later on to the unanimous decision of the civil servants and Project Team, and it may have been that I was reflecting on that.

Q. It is also possible that you were saying the note shows that there was no unanimity at that meeting or no record of it. Do you follow me?

A. Yes.

Q. That you read the note for the first time and you note or you observe that it doesn't contain any reference to unanimity?

A. Yes, that may be it indeed, that because there had been, let's say, a robust discussion.

Q. Of that at a later point?

A. Of that, and maybe perhaps at the meeting itself at the, whatever it was, the 9th October that perhaps the note should have reflected that.

Q. Yes.

A. And I was probably surprised to find that it didn't.

Q. When you wrote that on the 1st of November, if you like, everything was over and done?

A. Yes, it was.

Q. The winner of the competition had been announced and in fact you were now onto the second phase of trying to get the licence out. And as a civil servant you had a job to do. But what I am wondering is why you were nevertheless prompted to make this note on the 1st November after, as you say yourself, it is probably too late to change anything, what prompted you to make that note? Was there some relatively strong feeling on your part that claims were being made that were not justified by the facts?

A. I certainly felt that our contributions about the quality of the report were being, I won't say air-brushed, but were not being given the attention which we felt was due to them. And was also concerned, I suppose, about the speeding up of the process.

Q. I see. You sent that to Mr. O'Callaghan for filing?

A. Yes.

Q. And in it you say "we", does that mean that you were reflecting a discussion yee had had or your impression of what your joint views were?

A. Probably the latter.

Q. Right. In giving it to him to file, he didn't do you recall whether he expressed any view or demurred in any way?

A. I don't recall, but I think you are right, he did not demur. I think he would have shared my view about

that.

Q. Yes. In any case, if we go back to the 9th October, after that meeting you expected the qualitative assessment to continue, at least so far as the top two were concerned?

A. Yes.

Q. To see if you could divide them?

A. Yes.

Q. You may or may not have been aware of this, but I think that one of the steps envisaged at one point by Mr. Andersen, and this was discussed at a meeting of the 4th September at which you were not in attendance, a meeting concerning a contractual row, at that meeting Mr. Andersen did indicate that a process of separating the top two or revisiting the top two with a view to separating them properly, if that could be done. If it couldn't be done, it couldn't be done.

Were you ever aware of any view to that effect, that this was a further step in the process that might be a useful one to take?

A. It was more or less what I was advocating.

Q. Yes, I appreciate that.

A. I wasn't aware that Mr. Andersen had said that.

Q. Yes. And what how do you think that that further assessment would take place or that revisiting, if you like, work take place?

A. I felt that the project management team would sit

around the table in plenary session, so to speak.

Q. Yes?

A. And would take the top two almost from first principles. That would be an exposition by AMI, for example, using visual aids or whatever.

Q. Yes. Using the information, presumably, that had been gathered before the first draft of the report?

A. Yes, presumably, and this they would bring us through and that everybody who had participated would chip in as necessary. That we would backtrack, revisit everything we had done collectively or in some groups and establish where we had gotten and how the qualitative treatment of the dimensions etc., and the indicators had been reintegrated into the quantitative assessment, etc., and that we would then look and see whether the gap was large enough or whether it needed to be closely examined anymore from a qualitative point of view. And if the gap was still very close, that we would proceed until such time as we had exhausted every means of separating them.

I suppose that a lot of that perhaps might have been wishful thing and in the circumstances that we found ourselves, it might not have been readily achievable, but I felt that we should attempt something of the sort.

Q. I think, as we know, there were no further meetings of the Project Group until the 23rd?

A. The 23rd, yes. Even though, I think, I referred to 'meetings' plural, in that note of mine on the 1st of November. There may only have been the one, as you say.

Q. Did you think that what you were advocating or what you contemplated was going to happen in some way following the meeting of the 9th, or did you think that the meeting of the 9th was all that there was going to be where that particular version of the report was concerned?

A. No, I expected something to happen. I wasn't quite sure what, and I wasn't in the chair, so to speak, but I felt that we had the time and the resources to do what we were, what I was suggesting. And from a reading, even now, of the reports of that meeting of the 9th, I think it is reasonable to assume that we were in fact going to do quite a lot of work.

Q. I suppose you weren't aware, as you said yesterday, of contractual rows with Mr. Andersen. Were you aware that Mr. Andersen was seeking additional money and that he had sought additional fees at various points in the course of the process?

A. No, I was not aware of that. I did become aware subsequently of some difficulty, unpleasantness, shall we say.

Q. Tensions, I suppose, that might understandably have meant that extending the scrutiny or extending the

process could have caused more tensions with Mr.

Andersen?

A. But I cannot say when I became aware of that and I did not become aware of it in such a way that I might have linked that in any way to the quality of the service we were getting. So I really can't say anymore than that. It wasn't until I came to the Tribunal documents that I was aware of the difficulty.

Q. If we go on now to Book 43, to Leaf 132, we come to the 13th meeting of the GSM Project Group.

This is on the 23rd October. Do you see that?

A. Yes.

Q. Now, just before I come to that, you can stay with Book 143. I want to refer to a portion of Mr. Ed O'Callaghan's's chronology. The final meeting was, well, whether it is the final or not we will have to discuss in a moment, but in any case, there was a meeting on the 23rd October and as far as we can judge, no meeting between the 9th and that meeting, but if you look at Mr. O'Callaghan's chronology at Leaf 137, have you got that?

A. I have, yes.

Q. He says that, "On the 17th of October he was informed by Fintan Towey that the Minister wanted to" if you ignore the part in brackets because that was crossed out "go to Government the following Tuesday with the winner. Meeting of Project Team for 23rd of

October at 11:30."

The 17th would have been the previous if Tuesday

was the 23rd, then the 17th was the previous

Wednesday, is that right?

A. I think the 23rd was a Monday, was it not, which would make

Q. I beg your pardon Tuesday was the 24th, yes, so therefore the 17th was the Tuesday as well?

A. The 24th was a Tuesday, yes, yes, that's correct, yes.

Q. Were you aware of that conversation between Mr. Towey and Mr. O'Callaghan?

A. I don't believe I was. I certainly cannot recall it.

Q. Yes?

A. But Mr. O'Callaghan would certainly have told me.

Q. That is what I was going to say. Is it likely that you would have been made aware of it?

A. It is likely that I would have been made aware of it, yes.

Q. If you had been aware of that on the 17th, of course as far as you were concerned the only report in play was the report of the 3rd?

A. Yes.

Q. What I am trying to work out is when you got a copy of the second version of the report, the one dated the 18th which arrived on the 19th, and which therefore couldn't have been made available until either the 19th or thereafter. I think Ms. Nic Lochlainn had the

impression she got her copy or got a copy into her

hands on the 20th?

A. Which was a Friday, was it?

Q. A Friday, precisely.

A. Yes.

Q. Though if you look at Mr. O'Callaghan's note, he says,

"Went to Brussels on the 18th, returned 19th. Read

second draft report on 20th but no appendix."

A. Mm-hmm.

Q. Now, I think at one point Mr. O'Callaghan felt he may

have read the report on the plane?

A. I heard him say that, yes.

Q. But I don't think that is possible because he couldn't

have had it. Because it only, if he returned on the

19th, that's when the report arrived?

A. The 20th, did we say, was a Friday?

Q. Yes. In evidence he referred to possibly having read

it. I think Mr. Coughlan may have taken it up with

him. His record is probably more consistent with the

facts in that it didn't arrive, as far as we know,

until the 19th, and was presumably only available on

that day or on the following day?

A. Yes, the reason I mentioned the Friday is that if Mr.

O'Callaghan was going to a meeting in Brussels

scheduled for the Friday, the latest he would have

travelled out would have been Friday morning. It is

conceivable he could have had the report on the Friday

morning, the morning of the 20th.

Q. His meeting would have been for the previous Wednesday and Thursday?

A. Sorry, on the 18/10.

Q. Do you follow?

A. Yes, I understand that. Well, it may be safe to assume that if Ms. Nic Lochlainn saw the report for the first time, did you say on the 20th?

Q. The 20th, she said, yes.

A. That she would have copied it straightaway to myself or Ed O'Callaghan.

Q. I think I may have got actual copies, you know, shadow printed copies?

A. Yes.

Q. And there may have been, I don't think, I think I can clarify this but I don't think there were copies for you and Mr. O'Callaghan, maybe it was just the one copy?

A. There may have been just the one, yes.

Q. The reason I say that is if you look at your own note of the meeting of the 23rd, which is contained in Leaf 134?

A. Yeah.

Q. The first record is "MB notes that we have only just seen final draft." Do you see that?

A. Yes, I do.

Q. That presumably is noting something you had said?

A. Correct. I think he would probably have been aware anyway that

Q. Yes, maybe that you had only just seen it?

A. That it had only just become available.

Q. In fact I am just checking now. The report was shadow printed. Shadow printed copies were available for Mr. Brennan, yourself, Mr. McMahon, Mr. McQuaid, Mr. McMeel, Mr. McCrea, Mr. Sean Fitzgerald and Mr. Loughrey and Mr. Lowry, so there was one for Mr. Brennan's division, one for Mr. McQuaid's division, one for your division, one for the Department of Finance?

A. Yes.

Q. As I said, the other ones that were available for the programme manager, for the Minister, and so forth?

A. Yes.

Q. So perhaps that explains why Mr. O'Callaghan may have had an opportunity to read it, while you may not have?

A. That's entirely possible, yes.

Q. Yes.

MR. FITZSIMONS: Mr. Chairman, just a small point.

Mr. Healy, in reading out that sentence on the screen at the moment said, "notes that we've only seen final draft". I think it is "I've only seen". With respect, I am not sure that it makes such of a difference.

MR. HEALY: It may make more sense. Because if you

say you had only seen it?

A. Yes.

Q. That might be consistent with Mr. O'Callaghan having

had an opportunity to have a look at it. Mr.

O'Callaghan felt that if he read something on the

plane it must have been the report of the 3rd?

A. Yes.

Q. So there may be some confusion?

A. Right. Well once again it is entirely possible that

if something came over and that Ed O'Callaghan was

expecting it, he would have had my full authority to

read it and bring me up to speed on it while we were

walking to Kildare Street, for example.

Q. There wasn't a lot of time, in any case, to read it?

A. No, indeed there was not.

Q. Certainly not a lot of time for both of you to read it

because of the way the confidentiality protocol was

operating. I am not suggesting there wasn't a lot of

time. At this point you had plenty of time still in

terms of the overall schedule, you were well within

schedule in

A. Terms of reading it

Q. There wasn't a lot of time before the meeting of the

23rd?

A. That's correct

Q. Now, before we look at the notes of the meeting of the

23rd, I just want to mention one thing from your

statement, just to clarify the dating of another document. It may take me a while to find this. I am trying to find out when the note headed "GSM views of the Regulatory Division" do you know that note? It is contained in Leaf 133 of Book 43. I am trying to find out when that was written, and I am just I will just direct you for a moment to if you go to page well, I won't refer to you a page in your statement because I don't want to you have to juggle two books. What you say in your statement is: "It is presumed that the question refers to the document entitled" this, by the way, for the benefit of counsel, is question 57, the answer to question 57 on page 30 of your narrative. You say: "It is presumed that the question refers to the document entitled "GSM views of the Regulatory Division 23rd of 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 the 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." Do you see that?

A. Yes.

Q. That was my own impression as well when I looked at it first but thinking about it, what makes me wonder whether that can be correct is that this is a printed document, or a typed document, and looking at your note of the meeting, you record that, you know, the meeting "went to see the Secretary at 3: 30" then came back. Can you recall would you have gone to the trouble of firstly going to your own office or going somewhere else and typing something up?

A. I've just been thinking the same thing exactly. The meeting of the Project Group on the 23rd was in 44 Kildare Street.

Q. Yes.

A. Presumably at around about 10:30/11 o'clock.

Q. Yes?

A. Myself and Mr. O'Callaghan would have gone there.

Q. I think we had a time for Mr. O'Callaghan a moment ago, didn't I say it was 11 o'clock, I think?

A. Right. I think you are almost certainly right that I would not have gone back to Ely Place just to log on to my own computer and produce that note. But reflecting on what you read from my statement there, did I say that the meeting if you don't mind, Mr. Healy, I will just get my own copy of my statement.

Q. Do, of course. Take your time.

A. Unfortunately now I have left that upstairs.

Q. I will get you a copy of it. Does your own have maybe some notes on it that are of assistance to you?

A. No, it doesn't. It is just that I want to see what exactly it was that I wrote.

Q. I will get you a copy.

(Document handed to witness.)

A. Thanks very much.

Q. Oh, you have one.

A. Now what I say there in answer is that

Q. I hasten to add, I am not trying to catch you out. I could put any number of propositions to you. I am just trying to

A. All right, likewise, since we are all here to help the Tribunal I just want to clear my own mind on it.

Q. Yes.

A. What I say at answer 57, in fact is: "It appears that" that is my note there "was intended to encapsulate my own and Mr. O'Callaghan's views following a discussion between us."

Q. Yes.

A. "This leads me to believe that that discussion took place on the morning."

Q. Yes?

A. Now, you are almost certainly right that I did not go back over to Ely Place.

Q. Unless you did it at lunchtime maybe?

A. Unless I did it at lunchtime. I think it is unlikely.

It is quite possible, of course, Ely Place is not that far away from 44 Kildare Street, but I may well have typed this up either that evening sometime following the meeting or on the following day at which time I believe I was expecting a final draft report from Copenhagen.

Q. Could I make this suggestion: you think therefore that you finished the 23rd, anticipated a report coming the following day, is that right?

A. Yes.

Q. That would be the third version in other words?

A. It would have been a third version, yes, yes.

Q. And you didn't want that draft to be signed off on without an opportunity of considering it?

A. To look at it, yes.

Q. If that were the case, and maybe we'll just pursue that for a minute, if that were the case, you are saying that the meeting on the 23rd took place and at the outset of the meeting you must have expressed some dissatisfaction about timing?

A. Yes.

Q. Well, maybe not dissatisfaction, but certainly put down a marker that so far as your contributions were concerned, were going to be based on just having seen the report?

A. Mm-hmm.

Q. During the course of that day you felt any suggestion

of finishing everything was out of the question, you went to the Secretary and you got what you thought was a week or extra time in any case?

A. Yes.

Q. At the end of whatever proceedings took place thereafter on the 23rd, you feel that you had an apprehension it may have been intended to go ahead with a tidying up of that existing draft or running with it?

A. Yes.

Q. And that still wasn't to your satisfaction. But does that mean that notwithstanding the extra, as it were, time that you got, the extra time was being withdrawn and you were now in a situation you were back in the same situation again or am I misunderstanding you?

You got extra time at the meeting at 3:30, or whatever time you were to get?

A. Yes.

Q. I think you thought a week, I think Mr. Brennan may have indicated that may have been correct?

A. I don't know if it helps you, Mr. Healy, maybe it doesn't serve any purpose to go down that particular track, because I think my note refers to the existing draft somewhere, doesn't it?

Q. It says "existing draft."

A. And that existing draft is almost certainly the one that was being tabled as the final draft on the

morning of that meeting so I am really at a loss to know when I did this. I think I said at my answer to you at 57 there, that it reflects a discussion between myself and Mr. O'Callaghan.

Q. Yes?

A. 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. Now, I am afraid that doesn't make you any wiser as to when I actually did the note itself, nor does it make me any wiser, but

Q. Can we just take it in stages. It is almost certain you would have had a discussion. It is likely that that discussion was either prompted by or took account of the information that Mr. Towey had relayed to Mr. O'Callaghan that the Minister wanted to go to Government on what was the 24th, the following day, that would almost certainly have been an indication of time pressure?

A. Yes.

Q. Because here you were having your meeting on the 23rd at 11:30, with the Minister's intention to proceed on the following day to Government. Obviously you aired those views to some extent or something prompted by those views at the outset of the meeting, because you record that Mr. Brennan noted that?

A. Yes.

Q. If you look at the report of the 9th and the report of the 18th, there is very little difference between them, a small bit of typographical improvement and so forth, no significant differences, well, not too many significant differences anyway. There had been no meeting between the 9th and the 23rd. My impression, and you can agree with me or disagree with me if you like, that you were now faced with a situation that if the Minister wished to go to Government the following day, there had been no discussion of the draft of the 3rd, and the draft of the 18th was going to be discuss for a few hours?

A. Mm-hmm.

Q. I take that to be an indication of pressure from somewhere, I think Mr. Brennan himself agreed that there was considerable pressure but he wasn't in a position to say where it was coming from; he said it wasn't coming from him?

A. What you may be canvassing here is the possibility that my note, albeit that refers to our views on the 23rd of October

Q. Yes?

A. deals with the draft which had been available at the previous meeting.

Q. I.e. the draft of the 3rd?

A. Yes. I can't exclude that possibility as I sit here now.

Q. What I think I'll do is, if we go through the meeting of the 23rd and the events of the 23rd and the 24th.

Then we will revisit this document?

A. All right.

Q. One thing is clear, having said I am going to revisit it, I am just going to make one more remark and suggest something to you: that it seems to me that one thing is clear from

A. I beg your pardon?

Q. It seems to me that one thing that is clear from it, you can agree with me or disagree with me, you and Mr. O'Callaghan were of the view that the result, the decision, the result, the decision, if you like, was still a close one, and you had two people who were front runners, but you were unable, by reference to the report alone, to say or to come to a conclusion as to which was in fact ahead?

A. That's correct. I would just emphasise that we both may have begun to form views as to who was actually ahead, as indeed I think the group had at this stage. What concerned me most was that these views were not being properly articulated in the report.

Q. Yes?

A. And that to make, to call for a decision by the Minister on the basis of such a report would be very, very risky.

Q. Or if you had views, your views or the views of

anybody else hadn't been tested in any form of meeting of the group as a group?

A. Yes, that's quite correct, yes.

Q. And if you look at the final point that you make up there, which I think is simply echoing again a point you had made on an earlier occasion, you felt strongly that the qualitative assessment of the top two should be revisited?

A. Yes.

Q. Could I suggest to you that that indicates that you hadn't yet reached or weren't satisfied with whatever decision was being proposed in relation to the ranking of the top two?

A. I think it is fair to say I wasn't satisfied that the report as it stood could justify that.

Q. Yes. I am concerned. You will see that I want to clarify one thing because there is references by a number of witnesses to the report and the decision?

A. Yes.

Q. And this distinction has been made. And am I right in thinking that paragraph of the five points there, one of them has been discarded but of the five numbered points, points 1, 2, and 5 relate to the decision and point 3 relates to the report as well, something that you had always mentioned from the outset

A. Yes.

Q. In your own notes from

A. Correct.

Q. But that there is a distinction made there between the report and the decision and that you have, you were not satisfied with the decision that it was one that you could stand over and not satisfied that the report itself could be relied on to stand over the decision, the report proposed?

A. I think it is fair to say that no, assuming that I had convinced myself at this stage that A5 were the winners, I would still have been unhappy that the report could demonstrate this.

Q. That is my point. So therefore there were two live issues for you then?

A. Yes.

Q. One, the decision and two, even if you were satisfied as to what the result was, and if you were satisfied the result was the one proposed in the report, A5, this wasn't clear from the report?

A. I would like the report to have exhausted the possibilities, in other words, I would like to see my own thinking and everybody else's thinking encapsulated in such a way in the report that there could be no doubt.

Q. If we could look now at Leaf 132 of Book 43 for a moment.

A. Leaf 143, is it?

Q. Leaf 132, Book 143, I beg your pardon. Things aren't

that bad yet.

A. That's the actual report of the meeting, is that right?

Q. Yes. The formal minute of the meeting?

A. Right.

Q. And this was a fairly lengthy meeting, one that involved a break. Do you want to pour yourself some water?

A. That sounds like I am going to need it, Mr. Healy?

Q. Pardon?

A. Am I going to need it?

Q. I am prompted to do this because what I saw you doing.

Now, that is a very short report. I don't know when you got it but it is dated the 12th December, 1995, which was well beyond any point when it would have been of any use to you in any case.

It contains a corrigendum at the first heading, then a very short paragraph saying: "The meeting then proceeded with a discussion of the draft AMI evaluation report. Views from Regulatory, Technology and Department of Finance all indicated that while there was general satisfaction with the detailed analysis and the final result, the presentation in the draft report of that analysis was not acceptable.

"Hence the discussion focused on the detail of the report. A reordering of certain sections of the report, together with some textual typographical

amendments was agreed."

Then it goes on under the heading "Future Work Plan" to say: "Amendments to certain sections remained to be finally agreed. These were to be agreed within the Irish members of the group on the following day, and Mr. Brennan was then to be deputed to come to final agreement with AMI with respect to the final text of the report."

I think that is one of the shortest notes in the record of the whole process, whereas from the different versions of the meeting we've heard in evidence, it seems this was one of the longest meetings. Am I right in that?

A. Mmm.

Q. Now, can I just clarify one thing to begin with. In the middle of this meeting or at some point in this meeting, some four hours into the meeting with a break for lunch, you went off to see the Secretary?

A. Yes.

Q. Yourself and Mr. McQuaid, Mr. Brennan, Mr. Sean Fitzgerald, I don't think Mr. Fitzgerald has any recollection of it but you certainly have a notes of it in any case?

A. I have a note of his presence, I believe he doesn't recall it, it is possible that I am mistaken, but

Q. In any case, the three heads of division?

A. Yes.

Q. left the meeting?

A. Yes.

Q. And you were away for sometime. Can you recall how long you were away?

A. What my note I think my note says we went up at, was it 3 o'clock?

Q. 3:30. It doesn't give a time for your return.

A. It was a relatively short meeting compared to the length of the Project Group meeting.

Q. Yes?

A. But it would have been well over an hour, I believe, and possibly two.

Q. I see.

A. I think somewhere on my note there it says when we reconvened.

Q. Yes, but it doesn't give the time.

A. Oh, right. Well, yeah, I think that Project Management Team was still going on when we left the room to see the Secretary, which implies that we had taken perhaps our lunch in the room or a short break for lunch or something, and had worked

Q. But you say your meeting with the Secretary was a lengthy meeting?

A. Well, it was at least an hour, possibly an hour and a half, maybe two.

Q. I see. Does that mean that there was some debate at least then?

A. Yes, there was.

Q. Can you recall what the positions taken or what the exchanges were?

A. Well, basically I was arguing that the report could not justify the conclusion in it, and that we needed more time to do, as I said, a revisit of

Q. The qualitative?

A. The qualitative analysis. I felt that more needed to be done there. Now, I think that we discussed a few moments ago that once again this was a report which we had not a lot of time to digest. I would have liked to take this report home, get my calculator out, and go through it painstakingly. It was being argued that this was the final report, that we had all we needed and that there was nothing now to stop us letting the Minister go ahead.

Q. When you say "letting the Minister go ahead", do you mean that you were being told the Minister wanted to go ahead?

A. Well, I think, am I not right in assuming that the opening statements of the meeting of the 23rd said that the Minister wanted a decision of that day?

Q. Yes?

A. But hadn't been promised one. Now I was mindful that this was the case.

Q. Yes.

A. And I felt that it was I felt that it was dangerous

to let him loose with a report like that.

Q. Why did it take so long to argue this point out? Was the Minister involved at any point?

A. No, I don't believe the Minister there was at all.

Q. Or did anyone seek his views?

A. I don't believe that happened during the period I was in the secretary's office, no.

Q. Yes.

A. I think some people were arguing that, 'well, look, we have a report which is clear enough. It can't alter the decision if we go any further' and I do admit that I was more or less coming to that conclusion myself at the time. Now, while I was aiming for a better report, I knew that I was going to have to trade something off and that we were going to end up with a report which wouldn't meet all of my requirements, but then you can never get exactly what you want unless you sit down and write it yourself; then it may not be acceptable to others.

Q. To quote Mick Jagger, yes.

A. And my view was if I could at least get this report into some shape I could probably be happy with it.

Q. Yes?

A. Given the preponderance of the view, in fact there was a very strong view that we did somewhere have a clear winner and no matter how much further analysis we did, it was not going to alter the result. Now, once again

let me just reiterate that I felt that that was probably correct. But that taking all things together, it was far preferable to have a report which could substantiate that.

Q. Yes.

A. Now, it wasn't easy to argue this point given that the Minister wanted a decision that day. And that we were arguing the point in front of John Loughrey, who in fairness to him, did have an open door policy, as everyone has told you, and who wouldn't have been able to have read the report himself at that stage and was trying to adjudicate between us. Now, at the end of that meeting I think my answers record that, yes, it was important that the report should be able to support the decision in it. And that we should go and get it right. And I think, although I don't say this in my answers to you, I think others have said to you that John Loughrey would then go and see if the Minister could stay his hand until such time as this had been done.

Q. And do you recall him coming back from the Minister?

Oh I am sorry

A. Yes, go ahead.

Q. I must have make picked you up wrong there for a minute. I see. You say that your impression is that others have said that John Loughrey would go and see if the Minister could be per persuaded to stay his

hand?

A. Yes, I think I have picked that up from the evidence of others here, but I don't believe my answers to your questions 57 and 58, whatever it is, convey that.

Q. But do you recall at some point, in any case, being told that you had the time?

A. Yes, I do recall being told that we had more time to do this. The figure of a week, which is often used, I can't recall exactly, but I have tended to rely on Ed O'Callaghan's memory there and he says to me that when I came back and discussed it with him, that a week was what we had been given. That would not have surprised me because given that we were well ahead of the critical path at this stage.

Q. You were three weeks ahead anyway?

A. We would have been three weeks ahead.

Q. What do you recall of the meeting itself and the part of the meeting at which it became clear that if you were going to resolve this, seeing as you didn't have the ear of the Minister at the meeting, you were going to have to go to the Secretary. Ms. Nic Lochlainn has no recall of this at all. How did it arise at the meeting?

A. I seem to remember little about it other than this: that when I made my views clear, discussion followed, during which I tested other people on the issue, and formed the view that when put to it, most of them

would agree with me that the report couldn't substantiate itself to the extent that was necessary for a decision of this kind at this stage. And that insofar as a qualitative assessment could help to further separate the top two, and insofar as it was provided for adequately in the methodology, that it should be done. Now, there was again a strong discussion about well, it has been done, and arguments by myself, well what exactly was done? And is that a real qualitative assessment and have we sat around and discussed it? etc., etc., and from that exchange, and I think I have included this in my replies to you, I formed the view that yes, people did feel that there should be more of a qualitative assessment, although they may have been at this stage unwilling to go ahead with it, given that they felt in their own minds that we had a clear decision, and given that the Minister wanted a decision that day. Now, I am not I don't want to impute to people present that they were in some case cowed by this remark that the Minister wanted a decision by this day, but nonetheless that spectre was there in the air. I think that at some break for coffee or tea perhaps, I went to Martin Brennan in the room and said, "Look, we are not going to resolve this." I think it was Martin Brennan, in fairness to him, who said, "Well look, we better go and see the Secretary on this one." And then we went

upstairs, myself and John McQuaid and Martin Brennan.

Q. Presumably you must have told somebody what you were doing, you must have told the rest of the

A. Oh, I think we did, yes, I think we did.

Q. I am just going to go through your own notes of the meeting, then we'll come back and look at that again?

A. Yes, okay.

Q. They are contained in Leaf 134 of Book 43.

It starts off as we have already indicated: "MB notes that we have only just seen the final draft report.

"That Minister wants a result today.

"That he hasn't been promised one."

"Michael Andersen: Admits that award of marks could be different." Do you recall what that was about?

A. Vaguely, yes. It may, and I am it may have been in response to questioning by me about what if? supposing that... would it affect the result? And I am quite sure others contributed.

Q. Yes. And a discussion that would only be relevant where you had two people who were very close, obviously?

A. I beg your pardon?

Q. A discussion that would only really be relevant where you had two applicants that were very close?

A. Yes, I understand, yes.

Q. "Discussion quite clear that people here are still at odds about quantitative v. qualitative evaluation.

Weighting, ranking, grading points etc." This reflects to some extent something we saw at the previous meeting of the 9th October, isn't that right?

A. Yes.

Q. I used the word "confusion". This seems a better way of putting it: "people still at odds". Does that mean there were people with different views as to what the quantitative and qualitative evaluations entailed, and different views about the weighting, ranking and grading?

A. Yes, that was my view. And I do wish to add that whatever misapprehension there may have been about the qualitative versus the quantitative assessment, I mean my own view wasn't the definitive one.

Q. Of course.

A. I am not claiming that mine was absolutely correct. In fact I think I have admitted as much in my answers to you.

Q. Yes.

A. But it was clear to me that there were some who felt that additional qualitative evaluation was necessary.

Q. Did Mr. Andersen contribute to the debate on one side or the other of that issue?

A. I don't record him as having done so.

Q. Apart from saying here "admits that award of marks could be different"?

A. Well, the only thing I can say, I suppose, is that if

he had come down in favour one way or the other, it would have made quite a difference to my view and I would have recorded it.

Q. Yes. He has expressed a view in written documents, and as you know, he has not made himself available

A. Yes.

Q. to the Tribunal. That he felt that more work needed to be done, as he put it, to get to the bottom of the Communicorp financial problem?

A. Yes.

Q. Do you recall any contributions from him that might have been germane to that issue?

A. Not at that stage, no.

Q. Yes. I don't want to regress for too long were there contributions from him at other stages?

A. At earlier stages I think it had been clear to us all that there were issues in relation to that matter which would need to be dealt with in one way or another.

Q. Yes. All right. I think that when somebody uses an expression like "I want to get to the bottom of something", it means a little more than

A. It does.

Q. than flagging an issue?

A. It is similar, if you like, to what I was saying to you a moment ago about exhausting all of the possibilities for differentiating candidates.

Q. Yes. You were obviously on one side of that argument.

Was Mr. O'Callaghan on the same side as you or who were on the same even if people weren't on the same side as you, I suppose, can you give me a breakdown of where the different views on qualitative versus quantitative weighting and so forth were coming from?

A. Yes, but subject I think it would be important that anything I would say would be put to others for their own views.

Q. Of course.

A. I don't want to misquote anyone here or Mr. O'Callaghan, I believe, would have sided with me.

Q. Yes.

A. Whatever views he had about the qualitative assessment, he certainly shared my views that the report needed to be written and Ed O'Callaghan was a hard task master when it came to writing reports, he was good at it. On the other side, certainly Martin Brennan and I believe Fintan would have been of the view that we could proceed.

Q. Yes.

A. I felt that Jimmy McMeel would have supported my view. I cannot say about Donal Buggy, Billy Riordan, or any one else for that matter, or John McQuaid I think would have supported my view, and I think he did support my view when we went to meet the Secretary.

Q. I see. You go on and you say: "We would" meaning

yourself "We and T&RR can't justify the conclusion by reference to the draft that we have seen, i.e. the last one."

I think you probably mean the draft of the 3rd?

A. I probably do, yes.

Q. "It is too close and report is not clear enough."

Then there is a reference to individual passages of the text.

"4.1. More text needed to explain agreed.

I made point that bottom lines of tables doesn't explain the weighting etc..

"3.2. I raised the EU procurement point. Much discussion of Appendix 11. I am not happy that we are using this in a relevant way.

"Much discussion as to how to explain result in question-mark" I don't know what that means?

A. Sub totals.

Q. I see. "Much discussion about my point as to how to explain result in sub totals.

"Agreed that text will have to explain it.

"Note that it was conceded by Martin Brennan and Michael Andersen that different types of weighting were used, sometimes none, sometimes feel to arrive at bottom line."

What do you understand by that, that passage to mean?

A. It was under questioning by me as to what exactly they had done in some particular case. Now, in fairness to

them both, I have to say that the more I read the methodology, what is the word, the evaluation model.

Q. The evaluation model.

A. The more convinced I am that they were actually right there. There was provision for people sitting around the table at the evaluation, qualitative evaluation, and applying the appropriate type of weightings if they were necessary in appropriate cases and in some cases they wouldn't be necessary. So that insofar as they were describing or attempting describe to me what they had done, I feel now that they were probably correct, and I would be anxious that you shouldn't take an unduly pejorative view of what they had done from what I have got in those two little brackets there.

Q. Yes, I think that's right. The weighting, the applying of weightings did involve using the subjective views?

A. Yes, it did.

Q. Of a number of people around a table, or around in a sub-group and that you had some protection from the fact that you had a number of different subjective views, that in that way that guaranteed a degree of objectivity?

A. Yes. Once again

Q. I don't think any of those weights are contained in the report, is that right?

A. I beg your pardon, Mr. Healy?

Q. Those weightings aren't contained in the report, amn't I right in that?

A. I think that was probably the basis of my questioning of them at the time, that I wanted to know. Once again, it is important to point out that myself and Mr. O'Callaghan had not been to Copenhagen, we had not actively participated in that kind of qualitative analysis. I suppose the point that I have been coming from all along on this, even if we had, we should still have wanted to see a report which reflected as closely as possible what we had actually done, and that did so in clear terms.

Q. That you would have wanted to see

A. Yes, even if we had gone to Copenhagen.

Q. You would have wanted to see the weightings, in other words?

A. Whatever about seeing the weightings, that would not necessarily have been necessary in every case, but that we would have wanted the report to be clear enough on what had been done.

Q. But you couldn't actually judge a report without knowing the weightings, could you, if you think about it for a minute?

A. Not entirely, but if a report was quite clear as to the fact that this type of analysis had been done and appropriate weightings had been added, then it might

have been able to explain it in such a way that readers would not deem it necessary to go into that kind of detail.

Q. Well, maybe I just put to you a point that has caused me some trouble. Great emphasis has been laid on the fact that the evaluation criteria were weighted in advance of the competition, in fact in advance of the applications being received, and that is obviously very important, that before any applications were received, the weights to be applied to the criteria should be fixed.

Now, the criteria were then broken down into further sub criteria, we won't go into the different language used in the evaluation model, and these then were given weightings, as we discussed yesterday, isn't that right?

A. Yes.

Q. And obviously the weightings you give to the sub criteria are just as important, could even be more important than the weightings you give to the top line of the list of criteria, isn't that right?

A. They can be, yes.

Q. And if you go further down into the sub criteria, again it is only by knowing what weightings people have applied to different criteria that you can make a judgement about how, about a view that is achieved or a view that is expressed or a result that is achieved

in a report, isn't that right?

A. Yes. Subject, however, that if you are dealing with something which has been initially weighted in a minimal way, and in turn that a dimension of that has been weighted lowly, then further weightings are unlikely to affect the result.

Q. Of course, but if you have something that is weighted, as we discussed the other day, 30 in total, and that weighting is broken down into six elements of 5 each or three elements of 10 each or one element, as we said of 7.5, one of 15 and one of 10, well then you can get very significant changes or fluctuations up and down, isn't that right?

A. Yes, that is quite right.

CHAIRMAN: It is a little after five to one. Probably time to break until ten past two. Thank you.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF EXAMINATION OF SEAN McMAHON BY

MR. HEALY:

CHAIRMAN: Before resuming Mr. McMahan's evidence, I should say something briefly in relation to next week's proposed sittings.

Two difficulties have arisen. The first being the logistics and availability of some of the remaining witnesses in this phase of the Tribunal hearings.

Certain of the persons who are proposed to testify are

either no longer in the Irish Civil Service and/or may be based overseas and require a certain degree of notice, and it has not proved immediately possible to assemble all that may have been initially sought for the coming week.

Secondly, there is the clear necessity that the Tribunal has to devote a certain amount of quite urgent further work into aspects of its work not directly related to the present licence matters.

In these circumstances, and bearing in mind that next week, in any event, is a foreshortened week because of the obvious run of the public holiday, it appears to me that the more satisfactory course is to suspend sittings for the course of next week and to resume the following week on the usual basis.

I hope these arrangements will not inconvenience anyone unduly.

Q. MR. HEALY: We were looking at Document 134, your handwritten note of the meeting of the 23rd. We were discussing the discussions you were having about the weightings, do you remember that?

A. Yes, indeed.

Q. And then you go on the next point you made was, "Much discussion about bottom of summary. 4 different methods. My point. We didn't use 4 different methods, only one. The grading (i.e. AMI in Copenhagen) simply regrouped."

A. The group I believe, "The group"

Q. Sorry, I beg your pardon. "The group (i.e. AMI in Copenhagen) simply regrouped."

Do I understand you to be referring there to the suggestion, I think made by Andersen, that there were four different methods of evaluation? There was only one method, and what happened at the end of the day was you had no quantitative, because it had to be subsumed ultimately in a qualitative. You had a qualitative. You then had a number of sub-groups which did their work. That was pulled together and you got a total in grades of that, and that total in grades was translated into numbers, is that right?

A. I think that may have been it. I don't think the point there relates to any quibble with what was done, but rather simply the way in which it was described in the report.

Q. Exactly. I think Mr. Brennan was of the same view. I don't think anyone could understand how Andersen arrived at the four different methods, one of which included simply the translation of grades to numbers. That's hardly a method of evaluation.

Then it goes "Me, MB, Sean McMahon, John McQuaid went to see Sec at 3:30. Agreed that report not clear enough to support decision. QED."

Then on the next page, you have "On our return", but before that, you have a note that says something which

I can't understand to begin with

A. It's "Add" and then

Q. Then "Leased lines

A. Yes, that's my shorthand for leased lines. "End voice telephony and enforcement of the licences." And "decisions' in each case."

Q. "Decisions", yes. Now, that's on the same page as your other notes, but in the portion that deals or in the portion at least that seems to be coincident with your visit to the Secretary. Is it possible that this in some way records some part of the discussion you had with the Secretary?

A. I think you are right, yes. I think it did.

Q. And we know, looking ahead for a moment, but I don't want to go forward in the books, that the ultimate decision of Government included not just the GSM issue, but a number of other communications/broadcasting issues, and of those communications issues, certainly the leased lines ending voice telephony and enforcement of licence seemed to be connected?

A. They were major issues of the day, and each one of those would have lain within my area of responsibility.

Q. And do I detect therefore, that in the course of that meeting with the Secretary, you took the opportunity to drive home a few points that you thought might be

reflected in the decision for Government in addition

to the GSM issue?

A. Yes. Either that or the Secretary himself suggested it, I can't remember. But I wasn't going to pass up an opportunity to have these matters placed before the Government.

Q. Then you go on: "On our return

Agreed: Final decision should not be on Table 16

this resulting from both our meeting with Sec and, independently by group in our absence.

"It should be Table 17 and 18. They can't agree on whether same weights went in. It seems MB dreamt them up during qualitative evaluation."

A. Can I make the same point there to you, Mr. Healy, as I did this morning in relation to an earlier reference somewhere to weights. Once again, on reading back through the evaluation model, I am satisfied that there were indeed places where it was quite legitimate for the people sitting around the table to apply weightings, particularly when it came, I think, to a qualitative assessment of the dimensions, to apply what weights they felt were necessary.

Q. Do you mean we better, I suppose, make sure we are ad idem on this, and it may entail to some degree going back to the evaluation model.

A. Yes.

Q. Do you recall that the evaluation model listed,

firstly, the criteria in the order in which they were contained in the Government decision and in paragraph 19?

A. Yes, that's correct.

Q. Those are then broken down into dimensions?

A. Yes.

Q. And then the dimensions further broken down into indicators, and as we know the indicator even broken down into sub-indicators?

A. Yes.

Q. Now, obviously it was important that the weightings attached to the main criteria should have been agreed?

A. Yes.

Q. And it seems, judging from the documentation we have seen, that importance was attached also to agreeing the weightings as they applied to the dimensions?

A. Yes.

Q. Because that's a fairly important breakdown, obviously. Many of the dimensions lined up with indicators, many of them didn't and you needed to break down the weightings further, and then when you get to sub-indicators, obviously you'd have to have further weightings?

A. Yes.

Q. Now, I can understand why when you get down to the sub-indicator level, you are talking about a fraction of a fraction of a weighting, you have got to let the

people dealing with hands-on, as it were, with the flesh and blood of the evaluation at that stage to come up with a weighting. But importance does seem to have been attached to fixing the other weightings in the quantitative, at least to the point where the entire group agreed with not just the headline weightings, but also the dimensions. Do you follow that?

A. Yes, indeed. I was referring more to the qualitative assessment.

Q. Yes, but on the qualitative, what I have not been able to find out is where there is a set of agreed weightings anywhere?

A. I think it was that's the point I am making really. I think that on my last perusal of the evaluation model, there seemed to me to be a place for the allocation of, shall I say, weighting to dimensions or to sub-dimensions indeed, which would rely on the, how shall I say, the feeling of those doing it at the time, and if you bear with me a moment I can reach and get my model of that.

I am sorry to hold you, I can't put my hand on it just now, but if you look, for example, at the assessment model dated 17th May, which is the first of the two that we discussed yesterday, and on the very last page of it, at the top on the number 6, 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, etc.. Averaging will be made after consensus among the evaluators."

Now, I think that that is probably, in revisiting my notes there some time ago, I think that's probably what took place, and once again, I would not want undue importance attached to my scribblings there at the bottom of the page. They may have been written at the time in puzzlement at what people said they did. But on reflection, it may be that they were simply trying to describe what they did as being perfectly well within the terms of the model.

Q. Yes, of what had been agreed would be the evaluation model?

A. Yes.

Q. But did you ever see a list of weightings for the qualitative evaluation?

A. No, I believe I did not.

Q. And you see ultimately there is a weighting, a set of weightings were produced, and weightings are applied across the table to the scores given under each of the headings. And we know that ultimately, for reasons which the Evaluation Team thought, or at least some of them, certainly Mr. Andersen thought were valid, the qualitative evaluation became the precedent or primary tool of evaluation. And it seems, though it is far

from clear, that the weightings used must have been the weightings that also applied to the quantitative, but this is not clear because we know that we don't know when they were fixed. But if you go by the final report, there was a set of weightings and they were used to arrive at a result which Mr. Andersen says was primarily qualitative. Am I not right in concluding from that, that those are the weightings that applied to the qualitative evaluation?

A. It would seem from that, that way, what you say.

Q. There is no record or no minute that they were adopted as such. And leaving that aside, am I right in saying that there was no process whereby those weightings were articulated in the way you have just mentioned so that they could be applied to the dimensions? Do you follow me?

A. There seems to be no record of that, no.

Q. Now, what you say is, right, the dimensions and indicators are not weighted ex ante, but at some point you must have a list of them, surely?

A. I would guess that what happened there is that when the people went to Copenhagen and looking at what they were doing, devised weightings to suit the occasion and applied them. Now, what doesn't seem to have happened is that those weightings were catalogued.

Q. Well, not just not catalogued, it doesn't appear that the group as a whole formed any view as to 'look, are

we going to give the bulk of the weightings in Criteria Number 1 to market development? Are we going to give the bulk of the weightings to financial key figures? Are we going to give the bulk of the weightings to experience?' If you go into the technical aspects, 'Are we going to give the bulk of the weightings to this or that or the other or are we going to give them all equal weightings?' That's not clear to me from the documentation to have been, or from anything I have heard, to have been done systematically or to have involved any consensus of the entire group?

A. My feeling is it didn't involve the consensus of the entire group, but I couldn't answer your question finally without now taking home a final report and going backwards through it, so to speak.

Q. For the moment assume that I am right, that it wasn't done. I am quite happy to be corrected by you or anyone else who has read the final report, but I couldn't find it in the final report, and it seems clear from what we discussed yesterday, that there was confusion right up until after the first version of the 3rd October was produced as to what were the appropriate weightings, because Maev Nic Lochlainn was certainly raising issues about them, and I think she asked many of the questions that I was asking you.

A. Right.

Q. So it's not surprising, I am saying, that you would have been asking these questions. I agree with you, it doesn't necessarily mean you didn't get answers or that the answers you didn't get aren't the ones you have now speculated upon, namely that you were told this was done in Copenhagen?

A. Mmm. Another way of putting this perhaps might be that the thrust of my questioning, and the results, were more that the report didn't show what had been done.

Q. It certainly didn't, yes.

A. Than it hadn't been done or it had been done in some way that wasn't proper.

Q. If it had been done it certainly hadn't involved you?

A. That's correct.

Q. And it hadn't involved Mr. O'Callaghan?

A. Yes.

Q. And it doesn't seem to have involved anyone who wasn't in Copenhagen?

A. Yes.

Q. And it doesn't seem to have involved the whole group ever sitting around together and you, say, putting in your three ha'pence worth on the technical side, and you probably put it in with a qualification, 'Look, I may not be a technician, but I think X is more important than Y'?

A. Yes.

Q. And I don't think there is any suggestion that it was done by, as it were, a circular letter or a circular memorandum, by sending everyone a memorandum suggesting the following weightings would be approved, as was done, I think, after the EU intervention?

A. Yes.

Q. Now, in fairness, it seems that the same overall weightings were intended to be applied to quantitative as to qualitative, but what they were what the agreed weightings were is not clear, because the documentation shows the 103 as the agreed weightings.

That's the end of your note of that meeting.

A. Mm-hmm.

Q. Is that because you left, because the meeting finished or why do you think that's the end of your note?

A. My recollection is that the meeting went on for some considerable time into the evening. We arrived at a stage eventually where we were more or less agreed that there was, in fact, sufficient clear water between A5 and A3; that the report now needed to reflect this, and that if it could, and if a final report arrived dealing with issues that had been raised, that I would subscribe to it. I believe Ed O'Callaghan had gone by this time, and I went home at some stage in the evening, I think leaving the unfortunate Fintan Towey to get this data off to Copenhagen. Now, I think he did fax material that

night to Copenhagen, and I gather that there was a meeting the following day in which further amendments were discussed.

Q. Can I just take the attendance at the meeting and those points one by one.

You remained on at the meeting after Mr. Ed O'Callaghan left?

A. Yes, that's my recollection.

Q. Was everybody else who had come to the meeting in attendance at that point?

A. I think most were. It's possible that some others had left.

Q. Was Mr. Andersen there?

A. I can't be certain of his presence in the afternoon. He was there in the morning. I think this issue came up yesterday or the day before. And my note records him being present in the morning. But I cannot recall that he was there in the afternoon.

Q. Your note doesn't record what you have now told me, that you kept on working and that you decided there was sufficient clear water between A5 and A3, and that you agree that as long as the report was revamped to reflect this, that would be fine?

A. That's correct, it doesn't.

Q. Now, in fairness, the minute the formal minute says something not unlike that. There was general satisfaction with the detailed analysis sorry, "All

indicated that while there was general satisfaction with the detailed analysis the presentation in the draft report of that analysis was not acceptable." Then it goes on to say, jumping to the end of the formal minute: "Amendments to certain sections remained to be finally agreed. These were to be agreed within the Irish members of the group on the following day, and Mr. Brennan was then to be deputed to come to final agreement with AMI with respect to the final text of the report."

A. Right.

Q. Is that something along the lines of what you think?

A. Let me just throw my eye over that report again, which is at divider what?

Q. If you just go back two leaves. It's Leaf 132.

A. Yes, I think that captures it. I am not disagreeing with that.

Q. Does it follow from that that, as you I think were intimating this morning, you compromised on your earlier position that you wanted the qualitative evaluation revisited? I think you intimated that at your meeting at the debate with the Secretary, I think you said that you focused on getting the report right.

I think you say that in fact you had to compromise, you had to compromise on something I am not criticising that but you had to compromise on something to get on, and that at the very least you

wanted to make sure that the report supported the result which was then being contended for?

A. Yeah.

Q. Does that mean, therefore, that would I be summarising what is going on in your head as follows:

'I am not going to convince everybody to revisit the qualitative evaluation, but at the very least, we must take sure that the report makes clear the ranking of the top two'?

A. Well, that the report makes clear what was done insofar as it is possible. I had abandoned hope of getting an intra-ocular report, by which I mean one that hits you between the eyes. I knew that I would have to compromise on the form of the report. I continued to hope that we would complete the report in such a way that it cast more light, at least, on the qualitative analysis that had been done, but from there on, I think that the discussion on that evening centred around satisfying myself and some others that no matter what further analysis were done, whether in pursuit of a qualitative analysis or otherwise, would not alter the result. Now, having arrived at that conclusion, I said, well fine, if the report, when it does eventually arrive in its final form, can show that, so be it.

Now, I won't speculate as to what signal that gave to people or what happened as a result.

Q. Well, does that mean then that you remained to be convinced, in other words that you had abandoned as you say, your hope of a formal revisiting of the qualitative evaluation, but that you said you could be convinced of the existing situation if the report was altered in such a way that it was more conclusive or better presented, is that

A. Yes, that would be fair enough. Bearing in mind of course I should add this that if in fact the final report, when it arrived, was not able to show to my satisfaction that sufficient qualitative analysis had been done to back up the decision, that people then knew that I would not subscribe to it.

Q. Well, just jumping ahead for one minute, and we'll come back. You never got a final report, did you?

A. That's correct.

Q. Well, you may want to have a look at it now or read it over the weekend, but I don't think there is any major difference, other than the ones that we have highlighted in the course of evidence, between the version of the 18th and the version of the 23rd, apart mainly from typographical changes and the addition of one or two passages here and there, but there are some changes of significance that I may ask you about later on. They are small, but I'll come to them later on.

A. That's fine.

Q. In the course of his evidence here, Mr. Brennan was

asked about the extent to which there was consensus or unanimity between members of the Project Team coming up to the 23rd/24th, and I think I was asking Mr. Brennan about your note to the effect that it was too late to change the report, your note on unanimity, on the lack of unanimity on your part at the meeting of the 9th, your desire to revisit the qualitative evaluation of the top two and your additional desire, absolute fall-back desire to have the report better presented. And Mr. Brennan said this is at book this is Day 175, Page 104, answer 240: "While it's clear that he wrote this on the report of the meeting of the 9th October, and he wrote this on the 1/11 and he was careful to say, 'We did not subscribe to unanimity at this meeting' I am emphasising those words because I think that's what Mr. Brennan emphasised. "Now, I am saying unequivocally that it is my view that he did subscribe to unanimity at a later meeting."

Then I asked him: "Unanimity presumably not as to the final form of the report because he couldn't have seen that." The point we have just made.

And Mr. Brennan said: "As to the result, now you'll have to ask him did he arrive at that position as a result of conviction or as a result of the fact that everybody else already had that view? That's something only he can answer, but I am absolutely

unequivocal that Mr. McMahon joined his division in the result of the competition."

Now, there are two things there, and I think in some way they reflect maybe what happened on the 23rd in or around the time you went to the Secretary for am I right in thinking that Mr. Brennan distinguishes, as you have, between the report and the result, that you may have abandoned your hope of having the qualitative evaluation revisited, and as he says, you may have done this not out of conviction, but because, as he put it, everybody else was going along with it, maybe as you put it because you wanted to achieve at least something else, i.e. a good report?

A. It would be it would be wrong to characterise it as something which I had agreed to simply because it was a preponderance of people on the group wanted it.

Given all of the circumstances, that we did not have a report that I liked, that the Minister was looking for a decision that day, my instincts were to say 'No, stop, let's hold on here and let's I am just not going to sign up here.' So that a decision on my part to agree that we did in fact have a clear winner was an indication of the fact that having listened to all the argument, and having, in as far as I could, go back over what was in front of me, and from my insider's knowledge of it, that I was in fact happy on that day that A5 was ahead, and that remains my view

today.

I think though, that it's clear from what even is written here in the report, the official report of the meeting, that amendments to certain sections remained to be finally agreed. These were to be agreed with the Irish members of the group on the following day.

My position was, provided the report can show this, that and the other, then you can take it that I agree with this result.

Q. I see. So if we could just go back to the timing then. The meeting on the 23rd finished. You went home. Do I take it you assumed I am now going to get a report to enable me to test the further work that was to be done, to see whether you agreed with the way the result was presented?

A. Yes, I confidently expected to see another draft, hopefully a final draft on the following day. And not only that, but I expected to know almost what was going to be in it, because on that evening of the 23rd, we had been involved in redrafting, so to speak.

We agreed forms of language, as I recall, in certain areas. What they were I can't remember now.

Q. And when did you realise that you weren't going to get the report?

A. Unfortunately my memory of the following day is a complete blank, and it seemed that when this press conference was called on the Wednesday, I think, that

I then realised that a full decision was already in effect. Now, I assumed at that time that a final draft report was in fact whizzing around the ether somewhere, or winging its way to us.

Q. When you say a "final draft report", what do you mean by that?

A. I mean a report reflecting all that had been agreed on the Monday night, and whatever else emanated from the following Tuesday. Now, I can't recall being present at any of these sessions on Tuesday, but I think Mr. O'Callaghan does.

Q. Yes, he does. But the next you would have heard of anything was on the 24th, isn't that right 25th, I beg your pardon?

A. 25th, yes.

Q. And what did you hear on the 25th?

A. I believe I was discussing the matter with Ed O'Callaghan when some news came through, either that or some request, I have expressed this in better terms in my answers to your questions, about a press conference, and that I think I then called the Departmental press officer and said 'What's going on?' and I was told that there was a press conference about to start.

Q. And as far as you were concerned, for you to be satisfied, the only step that needed to be taken was to get you the report and give you an opportunity to

read it, take a day or two or whatever?

A. Yes, at that stage I had come to the conclusion that perfection would be the enemy of the possible, and if we had a report that reflected all that we agreed on the Monday night, plus together with whatever further corrections were to be agreed on the following day, then yes, I could live with it. For some reason I had some confidence that what was to happen on the following day was not material to the decision.

Q. And I presume if you were going to have to read it, and it was going to have to be read quickly, you were prepared to read it quickly?

A. Oh, yes.

Q. But all of those things were overtaken by the announcement?

A. They were overtaken by events, yes.

Q. Did you raise that with anyone, the fact that you never got the report or this was all finalised without your say-so?

A. I did not, no. I suppose I discussed it with people, yes, but it seemed rather pointless, when you are surrounded by photographers and press men, the Minister making an announcement.

Q. If you could just go back a moment now to the presentations. At the presentations you raised the question we discussed yesterday of where was the agreement that backed up the Communicorp claim to have

access to the Denis O'Brien claim that Communicorp

had access to $\frac{1}{2}$ 30 million from Advent?

A. Mmm.

Q. You weren't to know that there was no such agreement?

A. He had told me expressly in answer to that question I think that there was.

Q. But there was no such agreement in the documentation in any case, we know that in the documentation that accompanied the application, and there was no further attempt to pursue your question, isn't that right?

A. Mm-hmm.

Q. I think you have said in your answer that you weren't aware that a letter had been sent on the 29th and had been sent back?

A. Yes, that's right.

Q. On the basis that it was additional information which they weren't entitled to make available?

A. This is the letter which Fintan Towey received, is that right?

Q. Yes.

A. I wasn't aware of that at the time, no.

Q. You weren't aware that it had been sent and sent back. You weren't aware of the contents of it, I know that?

A. I wasn't aware that a letter had arrived and was sent back. I don't think, from what you know now, that letter didn't oh, yes, that was connected with the Advent funding.

Q. Well, arguably, you could take that view?

A. Yes, you are quite right, I did not know of the existence of that letter.

Q. You might have asked for that letter, if you got the letter, you might have said 'What does this mean about the Advent funding?'

A. I suppose if I had seen that letter I would have said, 'Oh, this has got something to do with that question I asked at the presentation.'

Q. Well, you might have, yes. A number of questions might have been asked on receipt of that letter.

A. Well, leaving aside those questions which relate to the propriety of receiving it.

Q. It was of course improper to send it because an agreement or an undertaking had been received that there would be no such documentation?

A. That's correct, yes.

Q. But leave that aside, the letter was a fact and purported to state certain other things as a fact. If somebody had told you, for instance, that if somebody had actually told you for instance, that the consortium in question was not Denis O'Brien and Telenor and Advent and a number of banks, but was in fact something else all together, you couldn't have received that information and treated it as part of the evaluation, because it would have been new information, but you couldn't of course have ignored

it if it was the fact?

A. I couldn't have ignored it, yes.

Q. If it was the fact, because if it was the fact it would have meant that things had been misrepresented at the presentation, and it would have meant that you were evaluating something that didn't exist, isn't that right?

A. It certainly would have meant, I think, that one of the important representations made to us had been misrepresented.

Q. Well, maybe we'll just go into it in a little more detail. If you had been told that the consortium was a consortium of Telenor, Denis O'Brien/Communicorp, and Dermot Desmond, that was not the consortium you understood to have been behind the bid?

A. Right.

Q. You couldn't have evaluated that consortium, because it would have been new information, isn't that right?

A. I think that if you take this for a moment outside of the terms of a strict invitation to tender for a public contract, and let's put it in the context, for a moment please bear with me of something that somebody asks someone else to do, formation of a contract, and you realise that the three persons, shall we say, who are to perform the work for you are not quite the three persons that were originally represented to you, I think that in ordinary

circumstances, you would take a proportional view of it all and you would you'd say to yourself, for example, 'Well, how important are the people who are actually going to do it?' And if a person has dropped out or been replaced by another, what is the relative importance of that? And would you take a measured approach, as opposed to a strictly legal one and say that, 'Well, yes, we will accept that' or 'No, we won't.' These were different circumstances, and to the extent that you say that the consortium that we were evaluating was the one which had originally approached us and which we believed to be 50:50, Communicorp Group Limited and Telenor, I suppose there is a legal issue as to whether it had changed or not, it either had or hadn't, and I have heard arguments in this room about whether it had changed at that time or whether there was merely an intention to change it.

Q. I think Mr. Brennan said he'd have had to get the Attorney General's advice at that stage?

A. Well, I think I would too.

Q. But you know that at that time, for instance, Mr. Riordan was conducting a little inquiry of his own into Advent?

A. Yes, he said he would.

Q. That was, of course, an inquiry that was completely moot because Advent were no longer involved?

A. At the time at which

Q. Yeah. So it seems to me only reasonable that if you are asked to evaluate a proposition put to you by certain individuals, and that includes the financial capability, credibility of those individuals and what they have told you at a presentation, that if the individuals change, that's going to be a fairly major change. You are going to have to consider it as a fundamental or major change, no more than that?

A. At least that, yes. The only point I might make is that it wouldn't, I think, invalidate the analysis that you were actually doing, given that you had no notice of this.

Q. Oh no, it wouldn't invalidate anything you were doing, of course.

A. And that it wouldn't come to be decided until such time as you are

Q. Sorry, I am not suggesting for one moment Mr. Riordan was behaving in any way improperly.

A. I didn't take that implication from what you said. I am just saying internally speaking, nothing that had happened outside was capable of affecting what we were doing within the group.

Q. Of course.

A. Because that wouldn't come to be decided until we had finished our deliberations and until such time as the knowledge would come to us that the form of the group outside had changed, the form of the bidder had

changed. And then there would have to be a major decision about whether you were to go ahead and agree to enter into discussion with them or not.

Q. But the whole point of the exercise, wasn't it, was to identify a winner who would then enjoy the right of exclusive negotiation?

A. Yes, that's correct.

Q. Of the licence, isn't that right?

A. An exclusive dialogue I believe was the way we put it.

Q. Yes, an exclusive dialogue. I am not suggesting that anyone knew this, and while I may say that, or it may be suggested that the Department, when they received that letter of the 29th, should have said, 'Well, this is a fact.' We must look at this as a fact, ignoring the attempt to add to the evaluation. Leaving that aside, it may have been perfectly reasonable to say, 'Look, we have got to shut our eyes to everything that we are told here, in case it's an attempt to improve an evaluation.' And it seems to me that that was the view that was taken, this is an attempt to improve, not an evaluation, sorry, this is an attempt to improve an application, and we can't allow people to improve applications after the bids have gone in. In other words, we cannot allow people to change their applications after the bids have gone in.

But that must surely, or from that it must surely follow that if people can't be allowed to change their

applications after the bids have gone in, that if a person is to receive the prize, it can only be on the basis of the application he put in, and if a consortium put in an application, it can only be that consortium that can win the prize. Do you follow me?

A. Yes, subject to the pragmatic view that, if I go back to my example again, that if this was a de minimus change, one would take a pragmatic view.

Q. Of course if it was a de minimus, of course I quite agree with you.

CHAIRMAN: You have a little bit of knowledge on that because I think you are a barrister.

A. Yes.

Q. MR. HEALY: What I want to ask you about is a number of things that were happening outside of the process, and of which the people involved in the process were not aware. That's the first thing.

We know that Mr. Martin Brennan had discussions with the Minister at various times, in the course of which he relayed information to the Minister not just regarding the progress of the evaluation, i.e. whether it was on time or not on time. One might argue that the Minister wasn't entitled to that information, but at least if it was on time, it seems reasonable that he should be entitled to know that or it seems reasonable that there was nothing, no harm in telling him that it was on time. But he seems to have got a

little more information concerning the nature of the applications, the breakdown as between quality and high quality applications and low quality applications. Ultimately a breakdown as between front runners and people who were bringing up the vanguard, or bringing up the rear, sorry, and on top of that, he then received information concerning the ranking of the first two, the shape of the evaluation, and perhaps even more detailed information concerning the way the evaluation was going and what problems were being encountered.

So that from Mr. Brennan's evidence alone, we know that the Minister must have had a significant I better not use that word a not insignificant amount of information.

We also know that the Minister had given a number of had made a number of interventions, in that he requested that the process be accelerated at one point, and you have recorded that in your meeting of the 3rd?

A. Yes.

Q. Subsequent to that, it seems that the Minister indicated that he wanted to announce a winner quickly, having been told that there was a "winner", though there is some dispute over whether the word "winner" was used, having been told a ranking in any case, as of the day of that conversation sometime prior to the

meeting of the 9th?

A. Mm-hmm.

Q. As of the 17th, it would appear that the Minister had intimated to Mr. Fintan Towey that he wanted to go to Government on the 24th, isn't that right?

A. Yes, so I gather.

Q. At the meeting of the 23rd, a report was made to the meeting that the Minister wanted to go to Government the following day, I think

A. A decision that day.

Q. That he wanted a result that day, but that he hasn't been promised one?

A. Yes.

Q. I think Mr. O'Callaghan says that on the 24th he was informed that the Taoiseach had requested the Secretary to expedite the position with a view to clearance of Government on the following day, on the 25th. This was all during a period in which, according to the evaluation model, there was supposed to be something in the nature of a round table-type discussion of the result proposed by Andersen in their 3rd October Evaluation Report?

A. Yes.

Q. Doesn't it suggest that there was, for whatever reason, I am not asking you to speculate about the reason, political or Ministerial pressure, if you want to put it that way, to get the process closed down

during that period from the 3rd to the 25th October?

A. I was with you up until the time you chose the word "closed down". If you want to rephrase.

Q. Sorry, that the thing concluded.

A. Yes.

Q. And that that pressure was being brought to bear at the time when some people on the Evaluation Group, perhaps you more than others, perhaps you and Mr. O'Callaghan more than others, perhaps you, Mr. O'Callaghan and other people more than the rest, to make time. So there was a tension between your desire to make time for more scrutiny and the Minister's desire for speeding up the matter?

A. Yes.

Q. Now, obviously I can understand that if a Minister thinks he has a result, he won't want any time wasted in dotting Is and crossing Ts if he can get a bit of good news?

A. Yeah.

Q. And whereas it may have been unwise to maybe it's unwise to give a Minister even the smell of a result for fear you are going to bring enormous pressure on top of yourself to get something finished. But be that as it may, there does seem to have been that pressure?

A. Yes.

Q. And when you come then to the 23rd, the 24th, and the

25th, it seems to me that the pressure became intense, and I think it's reasonable to conclude that it became intense because civil servants were prepared to bring a report to a Minister, even though they didn't actually physically have it. They may have felt in their own minds, 'I have a document, part of it is here, part of it is Copenhagen, part of it consists of amendments which we have all agreed, which I think we have all agreed,' bona fide I think we have all agreed, but there was no physical document, and my instincts tell me that civil servants feel uncomfortable that there isn't a physical iconic representation of what this the result of this process was to mean.

A. It's more than that. It is positively anathema to civil servants not to have the backing document for a decision.

Q. And a Minister would be going in to meet his colleagues without the document in his hand. I am not suggesting the Minister would read it, but he wouldn't physically have it in his hand?

A. Mmm. I don't want to lose the opportunity to present all of the facts which were impinging on me at this time, and you have heard a lot of this already, but there was the argument on one side that and I am sure in the Minister's mind perhaps that continued paralysis by analysis would serve no purpose, and now

that the thing was in the political domain, one could say it was in the public domain because there is usually a very short time-lag between the two.

Q. Yes.

A. And the arguments which you have heard, I think from Mr. Loughrey and Mr. Fitzgerald, and probably from Mr. Brennan, that the potential for mischief and for strong lobbying would be there if we didn't act quickly.

Now, what I neglected to say to you a while ago is, when we were with the Secretary on the 23rd at 3:30, some of those arguments were put forward, and then on the other hand, the feeling which I held fairly strongly, as you have just described yourself, for the necessity to have the backing document, the source, if you like, and not simply because of a civil servant's instinct that you must have the document, but also for the reason that you can satisfy yourself that what you have had to come to a conclusion about on the basis of argument and back of the envelope number-crunching late at night, can actually be seen in

Q. Can be seen to stand up?

A. Yes.

Q. Could I come to that discussion you had, or that view you have expressed and that discussion you say took place in the Secretary's office, about the desirability of getting something finished and done

for fear that once it was in the political domain you were going to be subjected to lobbying, which is something one can readily understand.

But aren't I right in thinking that until such time as the Minister released the information to his colleagues, there was no risk of lobbying?

A. That's not always been my experience unfortunately, and you know, I think it was Mr. PJ Mara said there is no such thing as a State secret any more. The smallness of our society and the invention of the photocopier has seen to that.

Q. But your Project Group, in the view of everybody who has given evidence to date, had, subject to the exceptions I have mentioned, kept all information confidentially to yourselves

A. That's correct.

Q. during the period?

A. As far as I know, yes.

Q. The only evidence that there may be, if it's accepted, of leaks or leakages came as a result of conversations with the Minister?

A. So it would seem.

Q. Now, none of that had generated, as far as we know, subject again to the evidence, any lobbying that you were aware of. You hadn't been subjected to any political lobbying?

A. No, I hadn't, no.

Q. Nobody in the group, apart from maybe the reference to access to the Minister, had been privy to any instance of was privy to or was aware of any instance of lobbying, isn't that right?

A. As far as I know, yes.

Q. And I think Mr. Jennings, who was press officer, has told the Tribunal and will give evidence, presumably, to this effect, that he was satisfied that the Project Team had kept everything to themselves, and that he would have no fear of any leakage until it went beyond the Minister into the wider political arena. I can well understand that, if it found its way into political discussions between heads of parties or whatever, it was bound to

A. Well, he was going to the Cabinet Subcommittee with it.

Q. Yes. But if that step wasn't taken, is there any reason to believe that the confidentiality, which you all believed you had maintained up to then, was all of a sudden going to break down or become subject to

A. Subject to what I said to you a moment ago, no.

Q. It would only happen, the pressure would only come on after the Minister went to his colleagues, and there was no reason, as I see it, why that couldn't wait, at the very least, until you had a physical report or no reason why it couldn't wait another week, as you wanted originally to look at the whole thing in

greater depth?

A. That was essentially the argument I put to the Secretary on the 23rd, that whatever mischief might be wrought by the leaking of the things by whatever means, was more than balanced by the requirement to have a final report.

Q. Isn't there a risk that once you let as a civil servant information that is part of a sealed independent, I'll call it, civil service process, one which is at arm's length from the Minister, advertised as being at arm's length from the Minister, and if you like, represented to the world as being all the better for that, isn't there a risk that once the Minister gets access to that process, again without there being any suggestion of impropriety, perhaps maybe some lack of prudence or whatever, but isn't there always the risk that if the Minister is given access and expresses satisfaction with the result so far or the progress so far and wants it hurried up and speeded up, that there is going to be a natural tendency to want to do what it is your boss, be he political or otherwise, wants?

A. Yes, there is such a risk.

Q. And in a political context, in the context of civil servants, without wishing to pander to a Minister, isn't there always presumably going to be, to some extent, the desire on the part of a busy civil

servant, which you all were at that time, with an awful lot in your in baskets to feel, 'Look, we have got this, the Minister seems happy enough, he wants a result. Okay, so, maybe some people aren't happy, let's drive through and get a result and keep the Minister happy', or please the Minister. Is that a dynamic that can take over in the civil service?

A. Conceivably, yes.

Q. And in this case, in the case of a sealed process, doesn't it seem that there was a degree of interest by the Minister in the process over and above simply knowing whether the milestones were being passed or not? If you like, before you answer that question, let me remind you that all your other colleagues have said that they are satisfied that the Minister didn't interfere. I am suggesting firstly that he had an interest which went beyond the milestones. This is reflected in what was said to you.

A. I am not sure that I have enough evidence to go all the way with you there, Mr. Healy. The Minister did seem keenly interested. He did seem interested in getting the process done and out the door. And there was

Q. And we have been told he is a Minister who wanted to get things done quickly, speed was his

A. Well, most of them do. I was, I suppose, taken aback by the occasions on which I learnt that he knew what

he did and that he wanted what he did, and I think my answers and my notes reflect that. So if you want to put that question to me again, let's see if I can

Q. I am happy, I am not going to push you where you have only got a limited amount of information yourself. I am simply trying to understand what is happening and what was driving people on at this time when there was, I think you'll agree, a frenetic amount of activity?

A. Yeah.

Q. And civil servants certainly being prepared to go an extra mile with no protection for themselves in the form of a physical report?

A. Well, to the extent that that's what was done, you are quite right, it would be going quite more than an extra mile. I wasn't in favour of it, as you can see.

Q. Now, to go on to the period after the report now, Mr. McMahon, was announced. I don't think you were involved in the faxing which has led to some uncertainty or unclarity or a lack of clarity around the 25th and 26th October. I don't think there is any need to trouble you with that.

A. This is faxing of

Q. The final report. When was the final report available in the Department? I think I am fairly confident to say

A. I don't seem to have been involved, and I can't recall

it.

Q. I don't think you were. Having announced the winner of competition, the next day was the negotiations?

A. Mm-hmm.

Q. And it was envisaged that you would play a major role in preparing the licence, isn't that right?

A. I am not sure it was envisaged immediately. There was a lot of to-ing and fro-ing between my own division and Mr. Brennan's, and indeed Mr. McQuaid's division, and there was the draft licence which we had furnished as a kind of an indicative draft, but it became clear after a while that a considerable amount of redrafting would have to be done and a new approach taken. In fact, I think we took it on our side at that time.

Q. Can you clarify something for me, and if you can't today, try and clarify it overnight. This impression that I had which I put to Mr. Brennan from reading the documents, and it's not of huge significance so I haven't gone to the trouble of looking at it again, but I may do, that after you started on the licence, not only did you discover that you'd have to do rather more than you envisaged in your draft licence, but the drafting of the licence was overtaken by changes in EU law, or the implementation in Ireland of EU law, and a decision had to be made about whether you were going to incorporate those changes which did not exist, or that

landscape didn't exist when you announced the competition?

A. That's correct. I believe it's centred around the transposition of what was called the "mobile directive".

Q. Correct, and you decided in the end that you would have to

A. I can't remember what role I played in deciding that, but I remember

Q. I am not saying you decided, Mr. McMahon.

A. We looked at a number of possibilities, and part of the difficulty was that if we had let the law as it was, we would have been issuing a licence to Esat Digifone with the consent of Telecom Eireann, which was something I wasn't prepared to countenance.

Q. Well, I think that ultimately the Department, when I say "you", the Department took advice, and I think as a result of all of that advice, it was decided that you should incorporate the mobile directive?

A. Yeah, I think so.

Q. The provisions of the mobile directive in your approach to the licence?

A. Yeah.

Q. There was a meeting, then, of the GSM licence of the GSM Project Group I think it's the first meeting on the licence discussions with the winner, on the 9th November, and you'll find that in Leaf 150.

A. Yeah, I have got that, I think.

Q. On your side, Mr. Brennan was present in the chair, Messrs. Towey, Ms. Nic Lochlainn, Messrs. McMahon, O'Callaghan, McQuaid, Andersen, Iversen. Then Messrs. O'Brien, O'Toole, O'Connell, Burke, Myhre, Digerud, Skedsvig and Simonsen on behalf of Esat Digifone.

A. Yeah.

Q. Do you see that?

A. I do.

Q. Before I come to the details of the meeting, can I ask you: Do you recall was there any discussion after the announcement of the winner as to how you were going to incorporate conditions or what conditions should be incorporated into the licence to take account of the financial problems of the Esat Digifone consortium?

A. Yes, I have some recollection of it now, but once again, I will have difficulty in putting this in time and space. But I think from the time that we first knew that A5 was a likely winner, or at least a possible winner, we had known of the difficulty of its solvency I think in years 2 and 3, and we would have had worries about Advent, as we then believed, exercising control beyond what we expected. So that those were issues we felt would either have to be resolved in some way or eventually take up some place in the licence, and I think the draft final report, at least the one of the 23rd, that we were reviewing on

the 23rd, either had or was supposed to have something, a special analysis in the appendix on that. So that it would have been something we were highly conscious of. Now, in addition to that, I think we discussed, and indeed circulated papers amongst ourselves prior to this here meeting, and I believe that on Regulatory Division files, you probably see notes by me or by Ed O'Callaghan to each other about the sort of things we wanted to see in this licence.

Q. Is this prior to the announcement of the winner or

A. No, prior to this meeting here that we are looking at.

Q. I see. Well, maybe I'll institute a search of those files again. But am I right in thinking there is no document in which the report was formally tabled, and I think Mr. Fitzgerald called it the health warning, was formally tabled and the proposal as to what remedial steps could be taken was discussed? You might have been discussing it?

A. I can't answer that question. I am not sure that is your question related to Mr. Fitzgerald's presence or?

Q. No, not at all, he simply described it as a health warning.

A. Is it not addressed in this here document, for example?

Q. Well, it is alluded to, yes. Maybe we'll look at what's said here about it and then we'll discuss it in

more detail?

A. Okay.

Q. It says: "Mr. Brennan opened with a statement outlining the Department's position as formally agreed at a Departmental preparatory meeting. This position was clarified in a letter issued to Esat Digifone 23 November, 1995. (Copy attached for information.)

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

"3. Mr. Denis O'Brien indicated that Esat Digifone was fully committed to fulfilling the promises in its application and was eager to complete the discussions this side of Christmas '95.

"4. Key points raised were:

" Technical discussions to be handled separately.

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

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

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

A. Yes, that was a fax document I believe

Q. I think I can show it to you in a minute. It's in this book.

"5. Discussion of some length focused on the" something "of tariffs

A. Provision of tariffs revision of tariffs.

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

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

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

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

"It was agreed in principle that another meeting would

be held within 10 days. Denis O'Brien to contact

Mr. Towey."

A. Actually I did a meeting note of that as well.

Q. You did, and it's the next document in fact. And I

think if we come to it just for a moment. If you go

to the second page, and opposite Michael Andersen's

name you have, "Stresses need for 40% minimum equity

in Esat Digifone. Notes negative worth of

Communicorp." That's the point you made earlier.

"Promises by Esat."

Michael Andersen goes through his document, "Note on

incorporation of A5 promises/info into licence.

"Mr. O'Brien says 'We'll do what we said we'll do. We

won't weasel out.'" Do you see that?

A. That's right.

Q. If you go back to the very first document in this

book, you'll find I think the document that

Mr. Andersen was referring to. "Note on incorporation

of A5 promises/info into the licence." Do you see

that, it's Document 131?

A. Yeah, I have got it.

Q. I think it's an attempt to go through the A5

application to some extent, in the light of the

evaluation, with a view to identifying things that

should be picked up in the licence.

Now, firstly it refers to the forward to the

preliminary draft licence, which confirms that

undertakings given by the successful application could be incorporated in conditions in the licence.

If you go on to the next page, the first heading, it describes the licensee. Do you see that?

A. Yes.

Q. In QUOTES "Is an Irish incorporated company.

Currently 50% of the shares are held by Communicorp Group Limited and the other 50% by Telenor Invest. On award of the licence 20% of the equity in the company, 10% from Communicorp and 10% from Telenor will be made available to third-party investors.

"Communicorp Group Limited is a company incorporated under the laws of Ireland. It is owned by Denis O'Brien, 66%, and Advent International plc London 34%.

"Telenor Invest AS is a limited stock company incorporated under the laws of Norway. Telenor is a wholly-owned subsidiary of Telenor International AS, which again is a wholly-owned subsidiary of Telenor AS, the Norwegian public telecommunications operator."

It goes on: "Telenor, Communicorp and Esat Digifone have prepared to enter into a Shareholders' Agreement which defines rules of share capital, funding of the licensee, etc., in addition, according to a letter dated 10 July, 1995, addressed to the Department of Transport, Energy and Communications, Advent International Corporation has committed to fund up to 30 million in support of Communicorp's 40%

shareholding. The commitments made by Telenor, Communicorp and Advent International regarding the equity capital and funding for the licensee ought to be included in the licence.

"The intention of making 20% of the equity capital available for third-party investors on award of the licence should also be referred to in the licence."

Now, I understand that at no time in the course of that meeting were you informed, or were you informed at any time shortly after the meeting, that in fact Advent were not going to be involved or that Mr. Denis O'Brien Mr. Dermot Desmond had become involved in the consortium

A. That would be correct.

Q. to the extent of 25%?

A. That's correct.

Q. And so you assumed that what had been stated in the application was still in fact the case?

A. Yes.

Q. And to get back to my earlier point about the incorporation of conditions into the licence; apart from that discussion, or the reference to the incorporation of conditions, including, if you like, the reference by Mr. Andersen to the negative worth of Communicorp

A. Which is the same point I made a moment ago.

Q. Yes, it is. Was there any discussion amongst the

Department themselves, as a group, as to what conditions would be put in to deal with this problem in Communicorp?

A. I seem to remember that there was a discussion. Now, I think myself and Ed O'Callaghan would have discussed it. I certainly seem to remember writing something on the subject. It may well have been also that we discussed it amongst ourselves at a pre-meeting. I think, in fact, if you look at my scribbings on the front of the note of that meeting. Yes, if you look at my scribbling on the right-hand corner of the note of the meeting of the 9th November, I believe I am referring there to a pre-meeting, so that we

Q. Maybe you'd explain that to me? I am sorry, I beg your pardon, on the top right-hand side of the minute, I am sorry, yes.

A. Now, the photocopy doesn't help, but I'll use the monitor here. It says, "Mr. O'Callaghan...".

Q. "...to see".

A. "...to see." "I think this ought to reflect the pre-meeting and the statements to be agreed beforehand, etc.. What your views?" So that I believe we did have a discussion, and I guess that it was between all of the persons

Q. I have a note of a pre-meeting, if you go to Leaf 149, but it seems to be about much more technical matters all together. Do you see that?

A. Hold on a minute now. Yes.

Q. "The first meeting of Esat Digifone regarding the issue of a GSM licence has been arranged for Thursday, 9th November. A preparatory meeting with Andersen International will be held at 9:00am." Maybe that's the meeting you are referring to?

A. It probably it could be indeed. But as you say, that looks like a technical one.

Q. There are three meetings. Look at it this way: This is a memorandum from well, there may be three meetings, it's not clear a memorandum from Mr. Towey. It seems to be a memorandum

A. Yes, to Martin Brennan and Maev Nic Lochlainn, yeah.

Q. Yes. Well, do I understand that it's a memorandum of a meeting with yourself, Mr. O'Callaghan, Mr. McQuaid, Mr. Ryan and Mr. Andersen?

A. Yes, that's what appears to be the case.

Q. And then following on from that, there is there are two meetings. One a preparatory meeting with Andersen at 9:00am on the 9th, and then finally the full meeting with Esat Digifone on the 9th. Does it look like that?

A. Yes. Where is the reference to the meeting with Andersens of the 9th.

Q. On the 9th, yes, if you look at Document 149, second first paragraph. Do you see that?

A. Yes. "A preparatory meeting with Andersen Management

International will be held at 9."

Q. Yes, presumably that was held, although we don't have a note of it. Then the meeting with Esat Digifone took place. Then you got the note of that meeting from Maev Nic Lochlainn on the 23/9. And then you wrote on it something referring to discussions you had at the pre-meeting, is that right?

A. Yes, yeah.

Q. Would that seem to be the sequence?

A. It seems to be the sequence, yes.

Q. At that stage, whatever was to be agreed about the licence, you didn't actually have the final report?

A. That would seem to be the case. Although I see a reference there in the document that we have just looked at to the latest version of the draft report being sent to Telecom Eireann for views. Now, maybe I had that latest version, but...

Q. Maybe you had. Looking at the documentation from there on, right up until the 16th/17th April, with the exception of a few notes in your journals, you don't seem to have, or there doesn't seem to have been, in any case, any special focus on the drafting of conditions to deal with the health warning contained in the report?

A. Yes, I have noticed that from a reading of the files myself.

Q. I think Mr. Brennan agreed with me that it might have

been wiser all round if that had been the first out among the agenda. Would you agree with me, if it's left to the last item, as it was on May 16th

A. And the health warning being specifically in relation to

Q. The health warning being that this company could run into trouble and conditions could be put into the licence which would deal with this. That's summarising it.

A. Yeah.

Q. That matter wasn't ultimately dealt with until, if you like, the 16th May of 1996, and I think I suggested to Mr. Brennan that at that stage you were a hostage to fortune. You couldn't reverse your engines, politically, professionally, even from a vanity point of view. You couldn't reverse your engines at that point, would I be right?

A. Well, you are putting me in Mr. Brennan's place, number one, and then you are putting a hypothetical question to me. If I had felt at any time, even after the award, or the announcement of this winner, that there was something fundamentally wrong such that they would never deliver what we had tendered for, I would have had no compunction in going to that Minister and the Secretary and saying so.

Q. But you didn't have any information until the last minute, isn't that right?

A. Yes, but I am not even imputing into that statement that that information would have been such as would have caused me to do that.

Q. You didn't know that you were commencing your negotiations without being in possession of the full facts?

A. The full facts in the sense that Advent had dropped out of the picture, that's correct.

Q. You didn't have the full facts, in the sense that you assumed you were negotiating with a certain consortium, a consortium which had won a right won a right to exclusive dialogue, whereas in fact you were dealing with a different consortium?

A. Subject again to what I said to you earlier on, that we were dealing with the principals holding between them 80%, at least.

Q. Well, you thought you were?

A. Well, we thought we were. 80% at least, that we assume that Advent were going to place the remaining 20%, as it was, with AIB, IBI and themselves.

Q. Davys were going to present it?

A. I beg your pardon, Davys were going to do it. Advent, AIB, IBI and whoever

Q. Standard Life Ireland?

A. Standard Life, yes. Now, you know, assuming that that 20% had changed, I think what I said to you this morning would be the case, that we would have stood

back immediately and taken stock of the situation and decided, I think

Q. Could I put another scenario to you: you were conducting negotiations with somebody who was representing, in your mind, a 40:40 consortium with 20% going this particular route?

A. Yes, yeah.

Q. In fact the consortium was 37.5:37.5:25 as of that time, so you were negotiating with what you thought was a 40:40:20 consortium, while the actual consortium was 37.5:37.5:25. I am not saying you knew this?

A. No, we didn't, but had we known

Q. But had you found out that, as you did ultimately find out in April, that this is the consortium, what you didn't know was that you thought that until then you were dealing with a 40:40:20?

A. Yes.

Q. But you hadn't. That's why I asked you did anyone tell you at the first meeting that this consortium was not 40:40:20?

A. And I think I answered that no, nobody told us and I certainly wasn't aware at that time.

Q. So therefore you were negotiating with somebody who knew you were under a misapprehension as to what the true consortium was, isn't that right? Would that not be something that would affect you?

A. What you say is correct, unless the persons we were

negotiating with had somehow believed that we knew,

and I have no evidence that that was the case.

Q. What I want to go on to, Mr. McMahon, I am not sure

there is any point in I going on to it today, is this:

You mentioned to me yesterday that you had some

involvement in the Dail, or may have had some

involvement in speeches or replies to parliamentary

questions?

A. That would be a regular part of our job, yeah.

Q. What I want to do next is to look at the reply to

parliamentary questions in the Dail, or I think it was

in the Dail, on the 22nd November, of 1995, and then I

want to go on to, mainly go on to look at the Dail

speeches on two dates in April of 1996.

A. Sure.

Q. And then go into the period between the 16th April and

the 26th May of 1996?

A. Okay.

Q. So if you could maybe try to familiarise yourself with

those main areas before tomorrow.

A. Certainly.

Q. Okay.

CHAIRMAN: Well, just one question perhaps before we

wrap-up today's proceedings, Mr. McMahon. I think in

your long response to the questionnaire, you had

indicated that it was difficult to be certain about

when you first became aware that Mr. Desmond's

company, IIU, was in fact a shareholder at all or let alone of some significance. You may have, in the course of having been present for quite a number of days before you were called to give evidence, become aware that we heard, through Mr. McGonigal, of a February, 1996, publication in the Irish Times by Mr. John McManus, indicating a sizable amount of detail of the nature and extent of the IIU involvement. And I think I may have taken it up with your colleague, Mr. Fitzgerald, in the context, that without it suggesting anything wrong on anybody's part, it did seem strange that given all the various disciplines, the outside consultants, and the press office involved in the DTEC Department, that it seemed surprising that that had not come to light. Did you get any inkling of that particular February article or can you help at all?

A. No. Likewise, just as with Mr. Loughrey and Mr. Fitzgerald and the others, it seems, Chairman, that I didn't see it, or that if I did, I didn't attribute enough weight to it to take it into account. On the day on which that was discussed here, I remember being just as perplexed as the others were about it. I don't recall, as I sit here now, whether it stated that IIU were to be involved as anything other than underwriters, or whether it said that they were to actually take part of the shareholding

themselves.

CHAIRMAN: I think there was a reference to the shareholding, yes.

A. Was there? All the more reason I guess why we should have spotted it at the time.

CHAIRMAN: Well, very good. We'll take up matters tomorrow. Obviously I am not going to take anyone short tomorrow. It would of course be helpful, not only to the witness, but to everyone, if we were to complete the evidence of Mr. McMahon tomorrow, but I am not going to take anybody short. However, I think it might make sense in that context if we started at half ten. Is that suitable for you? Thanks very much.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
FRIDAY, 14TH MARCH, 2003, AT 10.30AM.