

A P P E A R A N C E S

THE SOLE MEMBER: Mr. Justice Michael Moriarty

FOR TRIBUNAL: Mr. Jerry Healy SC

Ms. Jacqueline O'Brien BL

Instructed by: John Davis

Solicitor

FOR THE DEPARTMENT OF

COMMUNICATIONS, MARINE &

NATURAL RESOURCES: Mr. Richard Nesbitt, SC,

Mr. John O'Donnell, SC

Mr. Conleth Bradley, BL.

Mr. Diarmuid Rossa Phelan, BL.

Instructed by Matthew Shaw

Chief State Solicitors Office

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

Mr. Gerry Kelly, SC

Instructed by: Eoin O'Connell

William Fry Solicitors

FOR TELENOR: Mr. Eoghan Fitzsimons, SC

Ms. Blathna Ruane, BL

Instructed by: Kilroy Solicitors

For Michael Lowry: Mr. Rossa Fanning, BL.

Instructed by: Kelly Noone & Co.,

Solicitors.

OFFICIAL REPORTER: Mary McKeon. SCOPIST: Viola Doyle.

I N D E X

WITNESS: EXAMINATION:Q. NO:

Sean McMahon

Mr. Healy

1 - 223

Mr. McGonigal

224 - 306

Mr. Nesbitt

307 - 526

Mr. Healy

527 - 710

THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY, 3RD

APRIL, 2003, AT 11AM:

CONTINUATION OF EXAMINATION OF SEAN McMAHON BY

MR. HEALY:

Q. MR. HEALY: I think yesterday the last piece of evidence you were giving was in connection with the structure of the consortium. I think just before that, you had mentioned that in the course of starting up the negotiations phase, if you like, of the process, a meeting was arranged, and we have discussed it before, with the Esat Digifone consortium, and that you had a preparatory meeting before that meeting?

A. I believe we had, yes.

Q. We identified the notes that referred to the preparatory meeting. You felt you had your own personal notes for that, and in fact I think both you have identified the notes, but I think also one of the Tribunal's researchers identified the note, and it's ^ been retrieved, and I think you have been shown a note, and is that the note?

A. Yes, I have been shown one this morning, was it the 9th November or something?

Q. I think you are absolutely right, it's the 9th

November.

A. I believe that's the note, yeah. If it's not, I can double check my records at home.

Q. It seems from the content to be a note that you would have prepared, or it seems to have been a note which in any case reflects some attempt to come to grips with some of the issues that would form part of the negotiation process, isn't that right?

A. Yes.

Q. Maybe we'll just get that out of the way first.

A. Yeah, sure.

Q. This document hasn't been mentioned before, so very quickly I'll go through it and then if there is anything in particular you want to draw my attention to, you can. It says, "Preliminary meeting to Esat licence.

"V important issues, we made."

A. "Very important issues we made." I guess that means that they were issues that would have been raised by the regulatory side of the house in the course of preparation for this.

Q. I see. "1. Get it clear ab initio. This is a negotiation bona fide for a licence.

"2. No other entitlement."

What does that mean do you think?

A. I am just guessing here now, that we would try and make it plain to them, I suppose, that they weren't

entitled to a licence as such, having won this competition.

Q. I follow.

"3. No expense or commitment is their own liability."

I suppose any costs are their own affair?

A. Exactly.

Q. "4. We hold ourselves free at all times to end negotiations if substantive progress is not being made."

A. Yes.

Q. "5. Say it today follow it up with letter." I think I can help you there. I think a letter was sent out saying you realise saying to Esat that the costs of this are your own affair, and so forth?

A. Right.

Q. "6."

A. It's "Ideal to have lawyers on board on day 1."

Q. "7. We should"

A. "...hold the high ground with the definitive draft."

Q. Would you read out number 8?

A. I will indeed, if I can read my own writing: "We should make clear that this is a licence and we make it. Negotiations are not the right word; we'll hear their concerns, try to build in their views etc., but it is the State that issues the licence."

Q. I think I follow that, the point you are making.

Number 9.

A. "Mention that we expect to put their warrant fees in it."

Q. We have had plenty of discussion about that already.

A. Indeed. "10. Financial position of Communicorp."

Q. We have already discussed that the other day. That was a flag, you needed to discuss this?

A. Yeah.

Q. And 11?

A. "11" I am not sure I understand this, but I must have when I wrote it, "Get in a forbearance to claim if we have to break our warranties, e.g. to give out a new GSM" yes, I think I know what it means now

Q. As a result of EU law?

A. Yes, exactly.

Q. If you were overtaken by EU law and you had to give out an another licence they could complain they were in a triopoly as opposed to a duopoly, is that it?

A. I think that's it.

Number 12 then, "How to handle Esat law breaking agreed: Statement at the outset all these discussions without privilege to separate the issue of Regulatory Division on simple international resale" that's the SIR.

Q. Right.

A. Do you want me to explain

Q. Yes?

A. Simple as far as I can remember, simple

international resale at the time meant that somebody with a Value Added Services licence to provide telecoms services would take the calls from their customers, route them by means of a little technical black box into their own switch, and then back into the public switched telephone network with a new address on them, or I beg your pardon, with the original address on them, and forward them on to the called party abroad. So that to take an example, if I was ringing you and you were in Australia, and if I was a customer of somebody supplying this simple international resale, you would install a black box in my phone, or rather the company would install a black box in my phone, and when I rang you in Australia, the black box would substitute the number of the telephone company for the number that you had in Australia, and my call would be routed into their switch. They would then reroute that to you via the public switched telecoms network and collect some of the revenue for it. Now, that was outside, we felt, and we had advice to support it, that was outside the terms of the Value Added Services licences issued at the time and was within the privilege, under law, of Telecom Eireann at the time, and so we were doing our best to try and keep this sort of thing under control.

Q. So you are saying that that was a service that couldn't be lawfully delivered by anyone other than

Telecom Eireann under the existing laws that stood?

A. Correct.

Q. And the EU regulations on voice telephony and so forth?

A. Correct.

Q. And were you saying, in other words, that all of the discussions you were having in the course of the negotiation, if I can put it that way, of the licence, I understand what you mean about negotiation, in the course of the working out of the licence provisions, was to be without prejudice to whatever rows, if you like, you might have on the other side concerning use of SIRs?

A. Correct. And that was meant to give comfort to the people we were meeting as well as anything else, because I was concerned that they might be distrustful of myself, for example, sitting on the other side of the table, given that they would know that I was somebody who was trying to enforce the law on their other activities.

Q. Yes, you were saying, "I may have rows with you on that side, but that's an entirely separate matter to what we're involved in here."

A. Yes.

Q. And is that what can you just tell me, were Esat involved in SIRs?

A. Yes, in my view.

Q. And is SIRs the same thing as auto-dialers, or is it related?

A. The black box you would use to accomplish simple international resale would be a router or an auto-dialer, yes.

Q. Could you use it also internally as opposed to international?

A. Absolutely, yes. Do you want me to continue reading that?

Q. Yes.

A. "If the converse is raised, I'll say that we will try to conduct this discussion on the basis that there will be good faith on the other side on the commitments to uphold and comply with the conditions, but at the end of the day, the Minister would have a difficulty in signing off with a consortium that one member was breaking the law."

Q. Right.

A. So in other words, I was going to say that if they had raised the point, or you know, made an issue of it

Q. Well, does that slightly fly in the face of what you said a moment ago, that you were going to say to them, "We have the row on one side of the house only, and we'll conduct these negotiations without prejudice to them," and were you now saying that "You have to bear in mind that we are laying down the rules, you have to comply with the rules and if push comes to shove, the

Minister may have a difficulty in signing off with a consortium." I take it what you meant to say was one member of which was breaking the law?

A. Yes, something along those lines. It's not immediately clear to me now as I read my own syntax here what exactly I was trying to say.

Q. Well

A. Perhaps I was trying to put down words which we would use to explain our view on the fixed line side of the house if they pressed us on it, if they sought to use the occasion to gain some leeway.

Q. You mean to say, that if the occasion of negotiating the mobile licence was used to gain some leverage in connection with the leased lines

A. Fixed lines

Q. Fixed line, I beg your pardon, and auto-dialers, you wouldn't tolerate that?

A. Yes, I might have used some language like that.

Q. But the other point you made at the end, then, does seem to suggest that you were putting down a marker, saying that you realise that if you are breaking the law and there are disputes about whether you are or are not breaking the law, and if it were if the view were that you were breaking the law, the Minister might have a difficulty in signing off on a licence with you?

A. Yes, it was certainly a point that might get used.

Having said that, I mean, we did hold the view that, as I think I said to you yesterday, there was nothing wrong at all with a consortium comprised of somebody with the weight of Telenor on the one hand, and the kind of outfit with the drive that Esat brought to the table, which we felt was not a bad thing at all in a mobile market.

Q. But you aren't talking about drive here, you are just talking about breaking the law?

A. Exactly.

Q. And I think, don't we know that Mr. Fitzgerald, I think, expressed similar views in the course of the licence negotiations, isn't that right?

A. Yes, I think

Q. We are aware from the evidence that he was also

A. I don't think it was somewhere else he said it.

Sorry, go on

Q. I think during the course of the licence he was concerned about the matter, wasn't he, and he expressed his concern?

A. He did, yes.

Q. He expressed his concerns that it would have to be made clear that if Esat was getting the licence, this wasn't to be an endorsement of what he believed to be their questionable, if not illegal activities on the side of the auto-dialers, and would that be one of the reasons why the Government, in, if you like, signing

off on the licence, were, I think, encouraged mainly as a result of, as you put it, banging the table in Mr. Loughrey's office on the 23rd, to agree also to a statement reasserting Government policy on the enforcement of the law as you understood it on auto-dialers, would that be right?

A. Yes, that would be fair enough. In fact, it may I can't recall whether it was my own initiative in banging the table or whether it had been suggested to me that this might be a suitable occasion in which to get something like that before Government.

Q. I think yesterday before we finished, you were saying that your view of the consortium was that it was a 50:50 consortium/40:40 consortium, where 20% of the shares, I keep trying to find a neutral word to this dedicated to a number of financial institutions, all of whom were on board, if I can put it that way, and named as Standard Life Ireland, AIB, IBI, and also then a big international well-established venture capitalist entity, Advent?

A. Yes.

Q. Advent, in fact, were absolutely in, as far as the presentations went, for a 5% holding, I think?

A. Yes.

Q. And I think you say that you weren't going to be too picky about this, that if the three banks were replaced by three other banks, that would have been

all right by you?

A. It would have been all right by me, yes, because this was essentially loan finance. Even if it was equity that was going in, it was in the nature of non-participative equity, if I can

Q. Passive?

A. Exactly, yes.

Q. I think you put it on the basis I think you probably would have put it on the basis that: Look, the banks were there I think this is suggested if not by me by somebody else to another witness they were going to simply put in their money and wait for their investment to come through in the long-term?

A. Yes.

Q. They weren't going to be jumping up and down at board tables, boardrooms?

A. I didn't expect they were going to be making operative decisions in the telecoms business.

Q. In the course of the process, and other witnesses have confirmed this, nobody bothered to check out Standard Life, AIB or IBI, or if they did, they simply checked it out in presumably some easy accessible international register of creditworthiness, like Standard & Poor or Moody's or whatever?

A. Yeah.

Q. Advent were checked out, however, you recall that, because that was a new-ish name to people?

A. It was a new-ish name, and I am trying to recall as I sit here whether I had heard of them at that time, but I believe I may have, because from my knowledge of Esat affairs, I think I might have been aware that Advent already had some relationship with them, with Communicorp, that is, I think, but I wouldn't have known anything more about Advent than anybody else around the table, other than that they were venture capitalists.

Q. Maybe you knew a bit more; you knew they were involved in Communicorp and had been involved for sometime. I think Mr. Fitzgerald certainly appeared to have a deeper appreciation of it. He knew that Advent were involved, and in fact he had the impression that there was a real risk that Advent were going to swallow up Communicorp

A. That was by the end, that was by October he certainly knew those things, but I am thinking of when was it, when the presentations were made to us, I can't say that I knew a lot about Advent at that stage, and I think somebody on the team was going to go and have them checked out.

Q. In any case, we need to distinguish between Advent's direct investment in Esat Digifone; in other words, its direct involvement in the consortium as a holder of 5% of the consortium?

A. Right.

Q. The other 15% being held by three, as they then were, dedicated banks. And Advent's involvement as the supplier of, I think it was, was it 40 million 30 million, I beg your pardon

A. Upstream to

Q. Communicorp, to effectively fund Communicorp's investment in Esat Digifone?

A. Yes.

Q. The issue about which you raised the question at the presentation?

A. Yes.

Q. But Advent, in any case, was checked out. I think Mr. Riordan used his contacts in the accountancy world to carry out some inquiries. I don't think you are suggesting for one moment that you could give a licence or you could agree to conduct negotiations for a licence exclusively with a consortium, the identity of which you didn't know. You were told the identity of the members of the consortium, and then I suppose, you were given a definition of a class of ownership that I suppose satisfied you, not that you could ignore credibility, creditworthiness, reputational issues, but that you could satisfy yourself if that class of ownership always stayed the same, you wouldn't need to pry or scrutinise it any further. Would that be a fair way of putting it?

A. That would be a fair way of putting it, yes.

Q. So you had identified individuals, Telenor, Communicorp, Advent, to a point, and then you had banks?

A. Yes.

Q. And as far as you were concerned, that's who you were negotiating with?

A. Correct.

Q. And if the banks changed, it wouldn't have

A. It wouldn't have phased me unduly, no.

Q. And I think from what we know, you have said a moment ago in that memorandum, where you indicated that the Minister couldn't sign off with a consortium, one member of which was breaking the law, reputational issues in general, specifically reputational issues in the relation to the law, reputational issues in terms of business world and so on were factors that you had to take into account?

A. Yes, they would have been important, yes.

Q. That was the purpose I think of checking out Advent for instance?

A. Yes.

Q. Now, then we had moved on to Ms. Regina Finn's graphic, and I think we were in the course of discussing that when we adjourned yesterday.

A. Yes. You were asking me, incidentally, what were the circumstances in which I had first seen it? I honestly don't recall whether I discussed it with her

first, or whether she left it on my table or what, but

I certainly relied on it.

Q. Well, what I am just trying to get at is: She

notes it's Book 43, Leaf 183

A. 16th April, is that right, Mr. Healy?

Q. 16th April, yes. Now, I was examining Ms. Finn's

Memorandum of Intended Evidence, and she wasn't able

to say, I think, what prompted her to do this, and

it's not clear whether Mr. O'Connell simply rung her

up and gave her all this information. She says that

Owen O'Connell of William Fry Solicitors provided the

following information on behalf of Esat Digifone

Limited. Can you recall whether you or anyone else

asked her as a result of any information you had or

any other communication you had to check this out?

A. No, I certainly don't recall the circumstances of

this, other than that she may have been under my

direction at the time, I suppose, meeting with people

to try and iron out some of the detail, with a view to

drafting the licence. I think she met Owen O'Connell

at some stage, whether for the purpose of this or not

I don't know. It may well have been she came to me

and said, "I have just come from a meeting with some

of the Digifone people and here is the latest

situation," and I then said to her, "Oh gosh, that

sounds strange, you better do a note of that, and

we'll get it over to the other side quickly."

Alternatively, she may have done the note herself following the meeting without my instruction, and simply copied it to me. I really don't recall, I am afraid.

Q. In any case, she, at that time, noted that "IIU, a Dermot Desmond company...", if you look to the bottom of the document, "...currently holds 20% of Esat Digifone, which it intends placing with institutional investors. It also has the right to acquire a further 5% (by means of 12% of Esat Telecom Holdings which is held by miscellaneous." And I think that accounts for her graphic where she shows, at the bottom right-hand side of the graphic, a box with 20%, then plus 5%, linked to Mr. Dermot Desmond, linked to institutional investors. Do you see that?

A. Yes, I do indeed.

Q. I think that seems to suggest that IIU, Mr. Dermot Desmond's company, were going to stand into the place of Davy Stockbrokers and place this with institutional investors?

A. That's what it looks like, yes.

Q. And that at the moment they held 20%, but that they had a right to acquire a further 5% in ease of Esat Telecom's 12% holdings held by miscellaneous?

A. Yes.

Q. The next document in Leaf 184 contains a letter from William Fry Solicitors, in which Mr. Owen O'Connell

says, and if you go to the second paragraph, "There are 3,000,000 ordinary shares of i¼1 each in issue in this company. They are held at 1.125 million shares by each of Esat Telecommunications Limited and Telenor Invest as to 2.75 million shares by IIU Limited." And she indicates that this is 37.5%, 37.5% and 25%. Do you see that?

A. I do, yes.

Q. I take it that is her writing, is it?

A. I can't be certain, but I imagine it is.

Q. "It is intended that by the time notification is received from you, that the second GSM licence is available for issue. The issued share capital will have increased by IRi¼15 million to IRi¼18 million (all comprising shares of i¼1 each) held as to 6.750 million by each of Esat Telecommunications Holdings Limited and Telenor Invest AS and as to 4,500,000 by IIU Nominees." Again this is clarified by a calculation to be consistent with the 37.5/25% holding.

A. Yes.

Q. "The 25% of Esat Digifone Limited held by IIU Nominees Limited effectively represents the institutional and investor shareholding referred to in Esat Digifone's bid for the licence. You will recall that this referred to an immediate institutional investor holding of 20%, with a further 12% in short and medium-term stages. Of the anticipated 12%, 5% has

been pre-placed with IIU Nominees Limited. It is understood that most or all of the shares held by IIU Nominees Limited will in due course be disposed of by it, probably to private and institutional investors."

I don't think the rest of the letter is of any real consequence. It describes a proposed change in the structure of Esat Telecom, or if you like, the Communicorp side of the house.

Now, this document contains a number of small but, nevertheless, not insignificant differences from the information conveyed in the graphic, isn't that right?

A. Well, perhaps you'd remind me.

Q. In the first place, it states that 25% is held by IIU.

Do you see that?

A. I do, yes.

Q. Not that 20% is held by them with a right to acquire a further 5%.

A. Right.

Q. And it also says that, "Most or all of the shares held by IIU Nominees will in due course be disposed of by it, probably to a private and institutional investors."

A. Yes.

Q. Now, this is a new piece of information as well, isn't it?

A. Mm-hmm.

Q. Do you recall what impression this information made on

you?

A. The short answer is I don't recall. As you put it yourself, it is a departure, in the sense that both of those pieces of information were departures from what we knew.

Q. Well, the first piece was a departure from what you knew, in that Telenor now had 37.5%, and Telenor was a bit of a banker for you, wasn't it?

A. Yes.

Q. Communicorp were now down to 37.5%. And could I suggest that you now had two different pieces of information about the other 25%?

A. Yes.

Q. Neither of which was consistent with the other?

A. Yes.

Q. In some fairly important details?

A. I think the important thing, as I read it now and as I read it when I first began to go through these documents, and I assume would have hit me at the time that I read it first, was that we were not only seeing IIU in the shoes of Davys, but that it was beginning to emerge more clearly that IIU were not to be brokers but were to be holders.

Q. Yes, they were shading away from the broker side of the continuum in the institutional side. Firstly you were told that they were going to be simply standing in the place of Davys. Then you are told they are

holding shares. Then you are told they are holding shares for institutional shareholders. Then you are told they are holding shares for institutions and shareholders and private shareholders or intend to place them with private shareholders. And doesn't this look like an attempt to produce a corporate structure which would satisfy you that the consortium was consistent with what had been proposed in the application and at the presentation, that instead of banks you were getting people who fell within the class of institutional investors?

A. Well, I don't know what was intended by it.

Q. I think that was Mr. Loughrey's view anyway. I don't think he was very impressed by it, but...

A. I don't think I would have been impressed by it, but...

Q. Just go on for a moment to Document 195 in the same book

A. Just before you leave that one, Mr. Healy. I think amongst the things that would have occurred to me at the time was that the reduction of the shares of the two parents to 37.5%, would have been, that would have been something that would have concerned me, even if IIU Limited had been very well-known as stockbrokers or something, and

Q. Which they weren't?

A. Which they weren't, and if they had been very

well-known as banking institutions, I mightn't have been unduly concerned in my state of knowledge as it was then about them replacing the banks and Advent, as I think I said. The difference being that, if I recall correctly, the shares of the two parents were not to drop me below 40% until a commercial launch and this would have been a bit premature and I might have been concerned at that.

Q. I suppose you'd have also wanted to know when did this drop from 40 to 37 occur? I think Mr. Loughrey gave evidence that once this information came to hand, it was a lot of information in one sense. It raised a number of issues, and that he recalls that there was a meeting of, I think, maybe Mr. Brennan, yourself, himself, maybe Mr. Fitzgerald, to discuss how to deal with it. Can you remember that?

A. I don't remember that at all.

Q. And he treated it as something of considerable importance and he certainly wasn't impressed at this attempt to slide it in, as it were.

A. Yeah.

Q. If you go on to Document 195 in the same book, this is a note from your journal, and it deals with a number of different matters. I don't think the first are of any concern to us. If you look at the bottom portion, it says, "Jarlath Burke, Esat..." that's Esat Telecom "...called." He may have been calling on

behalf of Esat Digifone as well. But in any case, he seemed to have been calling you in relation to two matters. One was in relation to routers and the other was in relation to GSM.

A. Yes.

Q. So you were going to be wearing two hats in the course of the conversation. And you have a note, "I told him no major obstacles from my point of view to licence now except..." and you have underlined that "...AG's Office anxious about corporate structure, it's not same as bid we're worried too."

Do you see that?

A. Yes.

Q. "He is happy with SIU approach." Is that right?

A. That's what it seems to be. I can't understand

Q. Just get that out of the way. Does it have any relevance? What is SIU?

A. I don't know, I am puzzled.

Q. I think I have just realised what it is. It's Section 111, that's a reference to the Act, and I think that was the basis upon which legally the licence was going to be granted.

A. Right.

Q. So we can dispose of that, it's a matter of no consequence. It's purely technical, isn't it? You agree with that?

A. I would agree with that, yeah.

Q. In any case, you say, "No major obstacles." And from the rest of your note it seems that you were referring to technical matters in the drafting of the licence.

There were arguments, I think, going on for a long while about

A. There were indeed.

Q. about corporate structure going forward which was causing constant problems, to what extent could the corporate structure be changed into the future? But then you say, "No major obstacles except AG's Office anxious about corporate structure, it's not same as bid. We're worried too." That, presumably, is a reference to some of the things I have just described, isn't that right?

A. Yes, it is.

Q. Does that note in any way jog your memory as to what you were being told by Mr. Burke at the time?

A. By Mr.?

Q. Burke. Can you recall what discussion you had about the issue, if any, above and beyond what's noted here?

A. I don't think I was told by Mr. Burke about it at the time, but he would have been pumping me for information about when they were likely to get their licence, and I was simply telling him in a circumspect way that there was this difficulty. I am sure he would have been aware of it anyway.

And as far as I knew at the time, the question of the

corporate structure, i.e. IIU, was being dealt with by Martin Brennan's side of the house and the Secretary and Mr. Fitzgerald.

Q. That's what I want to get clear about. Had that been, as it were, hived off to Mr. Brennan to deal with?

A. Yes, it had been. Yes, it had remained with him would be a better way of putting it perhaps, but you are right, yes, it was being dealt with under his side.

Q. We know, and you'll have seen the documentation, most of which, as far as I can see, doesn't concern you, unless you can tell me otherwise, that there was a lot of activity then between when that information was conveyed by Ms. Finn to Mr. Brennan and ultimately the 16th May, with the activity getting more and more intense right up to the 16th May, all focusing on, or a lot of it, on Mr. Brennan's side and Mr. Towey's side, focusing on this issue of corporate structure, the change in the corporate structure, Mr. Dermot Desmond's involvement and how that would be presented.

Is that right?

A. Yes.

Q. And also on the percentages to be held by the various members of the consortium?

A. Yes, that's my understanding, yeah.

Q. And at the very end, the financial capability of Communicorp and IIU, both of which were causing problems?

A. Yes.

Q. If you just go on to, I think it's the next page, Document 196, Leaf 196, you have a note, "Secretary called." Then it says: "Denis O'Brien, Esat fax of letter." Do you know what the next word is?

A. Yeah, "On file." I don't see a date on it anywhere. I assume there wasn't one.

Q. Well, I'll just see if the contents page contains a date which would indicate that some date had been suggested. It's undated.

A. All right.

Q. Obviously what we have got here is not a single document, but a page from your journal.

A. Okay, right.

Q. And it was presumably found between two dated pages, if you understand me?

A. Yes, okay. So, can you give me an indication of when it might have been?

Q. It was between the two notes of the 24th and the 26th. The note of the 24th April we have just seen, and there is a note of the 26th, which I'll be coming to later on.

A. Okay.

Q. If you want to see the note of the 26th, in case it helps you, it's on the next page.

A. Okay.

Q. Do you see that?

A. I do.

Q. It says, "DOB now terrified he won't get money." I take it that means because of?

A. The three inverted dots, yeah.

Q. "...because of routers.

A. Yes.

Q. "Secretary doesn't think there is much we can do. Minister can't go back on Government decision." This was with a view to getting more capacity?

A. I think that's what this is about, yes, that following the Government decision which accompanied the one on the GSM, and the decision to which I am referring, is the one which relates to enforcing the law on routers and auto-dialers and that sort of thing, that we had issued a letter to all holders of Value Added Services licences, and I think as a result of that some concern arose in the Esat camp about their ability to raise finance.

Q. Or at least that was what was being conveyed to you by the Secretary, presumably as a result of what was been conveyed to him by someone else?

A. Yeah.

Q. I think I should just go through the rest of the note.

It says, "I explained legal uncertainty Paul Gallagher, advice, etc..

" But said this is a political/policy matter.

" Doubts everywhere. Does Ireland want to be first?

" Secretary no. Either way we can't change

Government policy on this. All the VAS people will want in and then no voice market."

Is that right?

A. Yes.

Q. "Me: Should we do independent analysis?

" No, even if voice market survived polls won't wear it.

" Me: 1. Probability is"

A. "Possibility", I think.

Q. "Possibility is to try to get Esat to furnish real value added to distinguish service.

"2. Possibility go to ONP."

A. Now, the ONP is the Open Network Provision, and it was a major plank of European Community policy at the time to open up the telecoms and other services markets, and there was an ONP committee comprised of civil servants from the various jurisdictions which sat regularly in Brussels, of which I was a member, who would discuss difficult issues of this kind arising in the Member States.

Q. And the next line, "Secretary: Okay explore but not hope."

A. I don't think he was holding out much hope of success of it.

Q. Am I right in saying that you were saying, this is an issue on which there is a significant amount of legal

uncertainty. You had advice from counsel?

A. Actually, the advice from counsel was that we were within our rights to enforce the law as it was. The uncertainty was European-wide, in the sense that it was difficult to enforce. Some countries like Britain were beginning to open up and to allow simple international resale and the use of routers and auto-dialers, provided that there was reciprocity from the country to which these calls were going. Other European countries, notably the Scandinavian ones, took a relaxed view of it, and other countries banned it outright, but under the European

Q. Greece, I think, banned it outright?

A. Yes, I think they did. The uncertainty surrounded the difficulty in understanding the provisions of the law. It was very complex, and the British certainly took the view that there wasn't a lot of sense in prosecuting people in Britain because they didn't expect anybody to understand this. That's the kind of uncertainty I was talking about.

Q. And you went on to say, this is really a matter of policy, or it's a political matter?

A. Yes.

Q. The politicians had made up their minds on it. Are they going to enforce it or not?

A. Yes.

Q. Is that what you were saying?

A. That's what I was saying, yes. As I used to say to anyone who would come to me and complain about the activities of those Value Added Services licensees who were breaking the law in our view, I used to say, "Well, look, it really is a policy matter. The only options open to the Government are either to liberalise it or to enforce it." And they would always say, "Well, why can't you get the Government to do one or the other?" And similarly, people like Esat, would come and say, "Look, this is nonsense, there is no point in being this draconian," and I would say the same thing to them, "It's a political matter, it's for the Government to make up its mind whether it wants to either liabilise this or enforce it."

Q. So go to the politicians, don't

A. Exactly. If you want to change the law, go to the politicians.

Q. There was, in fact, Government policy on it and you had that Government decision?

A. I now had a Government decision on this, which

Q. I suppose when you say that, when you noted that "Mr. O'Brien now terrified he won't get money because of routers," does that mean that he wouldn't get money for his side of the investment into the GSM licence project, or was he talking about money in general terms?

A. Well, I can only surmise, but my understanding of it was my understanding of it is now or became later after I met Denis O'Brien, that he needed he wished to raise money not only for the GSM project, but also for his fixed line business, and wished to lump the two together for some reason best known to himself, and that the banks were telling him that he needed to get his act together in Ireland and either come on side with the regulatory people or attain a certain market share, one or the other, or both, before they would consider lending to him. This was the impression I was forming. But I couldn't see why that sort of thing would prevent him from borrowing for the GSM project which was eminently bankable in its own right.

Q. If you go on to the next page, I think there are some references to this in the document in Leaf 197. This seems to refer to a conversation you had with Mr. O'Brien, is that right?

A. Yes.

Q. And does it say "DOB in"?

A. He obviously came in to see me about it.

Q. And whether he came in to see you about routers or the GSM licence, it's clear that you were discussing both in any case?

A. Yeah, yes.

Q. And it looks like you are attempting your own

manuscript graphic of the ownership of, and the relationship between Esat Digifone and Esat Telecom Holdings, is that right?

A. Yes.

Q. Do you see where at this point you have Esat Telecom Holdings 37.5% going to 50%?

A. Yes.

Q. And you have IIU 10 to 12.5%, do you see that?

A. Yes, indeed.

Q. And an exclamation mark?

A. Yeah.

Q. What did you understand by that in light of the information you had received just a few days before?

A. I understood that I was getting a different story. I think what he was telling me was he didn't have the exact figures, but that the shareholding was somewhere between 10 and 12.5% and 37.5 and 50%.

Q. Right. If you go to the narrative then, or the notes, you say, "DOB," and this is Mr. O'Brien speaking, "... lead investor (1st Boston) head said find solution to routers with Department."

A. Yes.

Q. Next point: "Money will go into "Holdings." That's Esat Telecom Holdings?

A. Presumably.

Q. Next point: "14 million on standby. Must find 26 million."

A. 26 or 28, I am not sure.

Q. One or the other. It says

A. Now, the writing beside that is not mine, so it may have been Regina Finn's or somebody who reviewed my note.

Q. I see. We can pass on from it for the moment. "Can write 15 million cheque for GSM." That's presumably a reference to the licence fee?

A. Yes.

Q. "4 million is to go into Esat.

"Me: Why not cut Esat Telecom out of it? If that's the problem." Reflecting what you said a moment ago?

A. Yes.

Q. "DOB: Small losses but overflows losing customers.

"DOB: 10 million turnover.

" Not demanding even asking full solution today."

A. Yeah.

Q. "Me: What is 1st Boston actually saying?

"DOB: That they won't fund Esat Digifone unless Esat gets more capacity." Then you say, "He is shifting position."

A. Yeah.

Q. Then you note Mr. O'Brien as saying, "First Boston recognises position won't be regularised short-term."

" First Boston told me to get" this is a reference from Mr. O'Brien to himself "extra capacity in Esat Waterford and Cork." Underneath

that: "(Desperate)" this is you saying desperate?

A. Yeah.

Q. "It's for legitimate leased line traffic"

A. "...only."

Q. Then: "Me:" referring to yourself. You say: "1.

Reply to Telecom Eireann on that basis.

"2. Value added if it's genuine."

A. Actually there seemed to have been more than myself present because it looks like "we" rather than "me", so I may have had somebody with me.

Q. I understand, I see. It might have been Regina Finn, would it have been?

A. It's possible, yes.

Q. What I think you are noting here is Mr. O'Brien combining the two things that you, at the outset, wanted to keep separate, isn't that right?

A. Well, it was none of my business whether to keep them separate or not, but insofar as he seemed to be presenting me with a problem, I was putting the obvious solution to him, that if he was having difficulty raising money on account of something which Esat Telecom was doing, then why not cut it adrift or separate its activities from that of the GSM project.

Q. Maybe First Boston could tell us something about this, but Mr. O'Brien was also anxious to emphasise that he could write the cheque for the 15 million, isn't that right?

A. Yes.

Q. On the next page you have your own assessment. You say: "DOB is rattled, but his purpose is not clear.

He is evasive as ever.

He is ambivalent on the role of the banks."

Presumably referring to the corporate structure.

"Lawyers haven't done due diligence"

A. It may also be a reference to the role of First Boston. I don't know honestly.

Q. I see. "Lawyers haven't done due diligence yet!"

Then you refer to First Boston. "He says that First Boston wants Esat in the loop, i.e. for finance package.

"He says they told him to get more capacity at Waterford and Cork.

"He may be trying

A) to save Esat and get money for it if banks want to cut it adrift, keep it tied to Esat Digifone, or

"B) Now that it is part of his pitch to the banks, he has been told to regularise it."

A. Yes.

Q. "Seems to realise that the Government has now spoken.

" Seems to realise that he can't have all the DDIs" all the direct dialers ?

A. Dial inwards lines

Q. "... and is pitching for just a few.

"I agreed to adopt our suggestions answer Telecom

Eireann and satisfy them or find true value-added

or shared leased lines or"

A. CUGs, or closed user groups. I had suggested to him,

just to explain to you there, about the use of

value-added and closed user groups; that following my

discussions with people in Brussels, I had come to the

view that if Esat was prepared to come up with a

scheme of some sort whereby it was to add real value

to the service it was providing, other than just

simply attaching black boxes to people's phones, and

in such a way as to distinguish the service and make

it something which was not already being provided by

Telecom Eireann, that it would then fall within the

kind of distinction and exclusions under European law

which would allow us to legitimise it and regularise

it and leave it alone, and so I was constantly asking

him and his people to try this. Closed user groups is

an example, that if you were able to pitch to the

market for a large number of users who could call into

a readily definable sort of category, and provide them

with that kind of service, then we would look

favourably on it.

Q. I suppose the most profitable thing to do was conduct

voice telephony over a leased line, was it?

A. The most profitable thing to do was conduct voice

telephony using auto-routers and auto-dialers, yes.

Q. Using routers and auto-dialers, yes. When you made an

assessment that Mr. O'Brien was "evasive as ever",

what did you mean by that "as ever"?

A. I knew Denis O'Brien from coming in and out on this issue, and I found that it was difficult to get a straight answer from him on things like this, and in his favour, let it be said that Denis O'Brien was a man who surrounded himself with well chosen experts, and it seemed to me that he chose, quite deliberately often, not to know too much about the nuts and bolts of his operation, and would refer matters that were technical, either in an engineering sense or a legal sense, to people who could deal with them, and would give you the impression that he didn't know much about that sort of thing and didn't really want to be bothered about it.

Now, sometimes this appeared to me to be deliberately evasive and that's why I made that remark.

Q. I think, is it fair to say, you were being given certain information and a certain pitch was being made to you about the state of play in a) Esat Telecom and b) Esat Digifone, but that ground was shifting in the course of your discussion?

A. Yes.

Q. You were being given a version, now a further version of ownership in Esat Digifone, which might have caused some uncertainty in your mind, but then you were also being told that they could write the cheque for the 15

million?

A. Yes.

Q. Now, these discussions on the licence, insofar as they apply to Esat Digifone, were, as you said, to be conducted at the outset on a bona fide basis, isn't that right?

A. Yes. There could be no other basis.

Q. And therefore, it's clearly important that you should know at all times who you were negotiating with?

A. Yes.

Q. And you assumed I think, as we agreed yesterday, that you were negotiating with Mr. O'Brien, Telenor, Advent and certainly dedicated banks, but you wouldn't have objected if those banks had changed?

A. I wouldn't have been unduly disturbed.

Q. And that ground was shifting now, isn't that right?

A. Yes.

Q. But from the other information the Tribunal has, I presume you now know that that ground had all shifted before the licence result was even announced?

A. Well, yes, I am aware of the discussions which had taken place and the evidence which has been given.

Something I would need to satisfy myself on before I would answer that question, would be when exactly ground had shifted and in what sense? Was it a legal sense or was it in the sense of an intention?

Q. It was all intentions, wasn't it?

A. Yes, I think it probably was.

Q. Telenor intended to be a member of Digifone. O'Brien intended to be a member of Digifone. AIB intended to be a member of Digifone and so on.

A. Right. But if that was the case, then one would have to say, "Well, what exactly had changed other than intentions?"

Q. Surely, Mr. McMahon, when you were conducting the presentations, when you were conducting the process, you had to assume that what you were being told was correct?

A. Yes.

Q. You surely couldn't have operated on any basis other than that it was Telenor, Mr. O'Brien's entity, whatever it was, 40:40, 5% to Advent and 15% to banks, dedicated at that time to three banks. You couldn't have assumed you were dealing with any other entity?

A. No indeed, no. I am not attempting to defend the people who I think changed their intentions, or anything. But I am just making the point that in order to answer the question that you put to me first, as to whether we were actually dealing with a different consortium or not, the kind of exercise I would conduct would be one like that.

Q. Well, Mr. Desmond has informed the Tribunal that he was a member of this consortium from the beginning for 25%?

A. I see, well that's interesting.

Q. And from the 29th September, he had no doubt about it.

After that date, Mr. Riordan was checking out Advent,

which was a completely moot exercise, and you were

being given this information three days or a week

after Ms. Finn had been given other information?

A. Yes.

Q. Now, as you have said a moment ago, Mr. Brennan and

Mr. Towey were handling the ownership/corporate

structure issue?

A. Yes.

Q. Do you recall giving them this additional information

that you got?

A. I don't recall, but I would be surprised if I hadn't

imparted that information to them one way or another.

Q. I take it you do know that Mr. O'Brien in fact had to

borrow for his share of the 15 million?

A. I think I know that now.

Q. That was to be, because at that point the consortium

had reverted to a 40:40:20 basis, it had to be 6

million?

A. Yeah.

Q. Could I ask you to take Book 44, please. If you go to

Leaf 204.

A. Yeah.

Q. This is the 1st May, coming up towards virtually the

end of the process. This was about a week, six days I

think, to a week, after your meeting with Mr. O'Brien, the one we have just discussed. And could you decipher for me the note in the box on the top left-hand corner?

A. Yeah, I think it's Stentor, who were a telecommunications company at the time.

Q. It's nothing to do with this?

A. I don't think it's anything to do with this, no.

Q. You say: "I called DOB re Esat Digifone finances.

"1. Is Esat Digifone and Esat Telecom together?

"Answer: Yes, they are placed together. It would take a lot to change it."

Then you have a note: "Advent putting up 32 million, AIB 8 million." Then of that total of 40 million, 4 million was to go into Esat Telecom. Do you see that?

A. I do, yes.

Q. And 36 into Esat Digifone. That's what the graphic says anyway.

A. That's right.

Q. Then you have an arrow from Telenor, 18 to 20 million.

A. Yes.

Q. I find that slightly hard to understand, maybe you could

A. I must say I find it hard to understand. I don't recall it at all.

Q. Then on the right-hand side in a little circle or two circles you have two exclamation marks and you have a

note, "DOB said 29th"

A. "That this was part of placing." I think that might be it.

Q. Second point, your question is, "what's banks attitude to Esat's effort to clean up with Regulator?" Then you have three bullet points.

" they want switches unclogged.

If not they would create i.e. time and credibility."

What is that?

A. I think what he is saying in response to my question there is that the banks were telling him that the company's switches were clogged up and needed to be unclogged, or and that's a technical interpretation.

Q. What does that mean?

A. From an engineering point of view I can only guess there might be too much traffic going through the number of switches he had, and he should build more, or that he was using an engineering analogy to say that the bureaucratic gunge which was preventing him from getting the direct dial inwards and other things that he wanted, should be unclogged.

Q. In railway terms he wanted the licence

A. Yeah, sitting here now. I can't be certain of which meaning to take from that.

Q. What does the next part mean?

A. "If not it would create difficulties, i.e. time and credibility." I can only guess that what he is saying to me there was, if he couldn't achieve whatever it was he wanted to achieve at the first bullet point there, that it would create difficulties for him in relation to the time at which he would get his money and his credibility with the banks.

Q. Get money for Esat Digifone presumably?

A. Perhaps yes, but I can't be certain of this.

Q. Well, I suppose that's all you were talking about, Esat Digifone. You said that at the start of the conversation, "I called DOB re Esat Digifone finances."

A. Yes.

Q. So I presume if difficulties are going to be created, they were going to be created by the banks that were providing them with the money to enable him to take up the Digifone investment, is that right?

A. Yes. Now, I can't think why I would have called him on that date, unless perhaps that I was aware of the difficulties the other side of the house were having and had been brought up to date by them and decided to inquire.

Q. The next point is: "Question: What if worst case comes out i.e."

A. That's right, "I.e. where US banks go." Well, there may be something further to the right of that.

Q. Next point: "It would not"

A. It looks like the answer. "It would not affect Esat Digifone in the start-up or the roll-out."

Q. "They have enough money."

A. "They have enough money." Yes.

Q. Did that make sense? If Mr. O'Brien couldn't raise the money, how was Esat Digifone going to have the money?

A. It doesn't seem that it made a lot of sense.

Q. Now, you say that you may have been in contact with Mr. Brennan's side at this stage?

A. What I am saying is that I would, in all probability, have made contact with Martin Brennan about this sort of thing if any information came to my attention.

Q. And if you were drawing anything to his attention, I suppose you would have been saying, or would you have been saying something along the lines that,

"Mr. O'Brien has been ringing me, he seems to be in a lot of trouble with finance. We are getting close to the end game of this process."?

A. Yes.

Q. Because we know from evidence and from information from the participants, that it would appear that at one point Telenor were asked, "Can you bankroll this entire project?" I think in fact yes, two days after this, on the 3rd May, they were asked to bankroll, to stand in and support the entire project?

A. Yes.

Q. Which would mean that, if you like, the chickens were coming home to roost in relation to financial capability on Mr. O'Brien's side, weren't they?

A. Yes.

Q. Now, in the course of his evidence, and in his Memorandum of Intended Evidence, I can refer you to it if you like, it's Book 33, Leaf A, page 76, but it might be easier if I were to read it out. And I know that Mr. Brennan gave evidence along these lines. Mr. Brennan was asked about the extent to which the composition of Esat Digifone diverged from the composition as presented in the applications and at the presentations.

And he says in his answer, and I am summarising, that if you go to page 77, you'll find it, of Section 2, Leaf A

A. I am at page 77 now, Mr. Healy.

Q. Answer 107(A) at the top, and I think it's the second sentence. "This question..." referring to the question of divergence "...was considered in the days leading up to the licence, I think by Messrs. Loughrey, McMahon and I, plus or minus Mr. Towey."

And if you just go on one page for a moment to Question 108, a similar question, and Mr. Brennan says, "I had some discussions with Mr. Loughrey, Mr. McMahon, probably Mr. Fitzgerald and possibly the

Minister in the days coming up to the issue of the

licence about the involvement of Mr. Desmond."

Can you recall in fairness to you, we could be

referring to these discussions, but I had the

impression, and certainly had the impression from

Mr. Brennan's evidence, that there was a meeting, a

physical meeting of people coming together to discuss

this?

A. I certainly don't recall any such meeting, I must say,

but almost certainly Martin Brennan and I would have

kept each other informed, perhaps at our regular

divisional meetings.

Q. I am not going to press you on it because I presume if

you had a meeting about this we would have found it in

your journal, and we are, as you know, missing one

journal, but not for this period, isn't that right?

A. That's right. I don't think it's so much that you are

missing a journal, but rather a period which would

normally have been covered by a journal.

Q. Of course. I think you seem to have put your notes

for that period in a different book?

A. That's right, yes.

Q. And it hasn't found its way to the Tribunal. I am not

suggesting anything by that. Maybe it got mislaid

because it didn't look like the other books?

A. It wasn't the other usual green book, yeah. I have no

recollection of meetings, formal meetings on this

subject alone, and before I gave that reply to the Tribunal, I consulted with Mr. O'Callaghan and I noted that was the one occasion on which I did consult with someone, and he confirms my view that we had enough on our plate certainly, not to be involved in the nitty-gritty of that business towards the end. And he doesn't recall any meetings either.

Q. Was it your impression at the very end that what in fact had happened was that the banks were replaced by Mr. Desmond, the banks and Advent. That initially it was proposed that Mr. Desmond would have 25%, and then that that was reduced to 40% to make the bid

A. Reduced to?

Q. 20%, I am sorry, to ensure that the bid structure corresponded with the bid structure at the time of the announcement of the winner of the competition?

A. I can't recall now what my understanding of the situation was, other than that at the time approaching the issue of the licence, between them Mr. Fitzgerald, the Secretary and Martin Brennan had managed to sort out this business by forcing these people back to the status quo ante, the award, as we understood it to be at that time.

Q. Were you aware that there were very serious question-marks over Mr. O'Brien's financial capacity right up to the day of the licence, which were only resolved by comfort letters from, and guarantees from

Telenor?

A. I don't believe I was aware of that, no.

Q. When I was asking was it your impression that Mr. Desmond came in and replaced the banks at 25%, and then was reduced to 20%, what I wanted to be clear about was whether it was your impression that Mr. Desmond came in around the time you first became aware of it in April of 1996, and they came in at that amount around that time?

A. No, I don't think I understood the full import of his involvement until around the time or shortly after Regina Finn's note and my discussion with Denis O'Brien when it began to look and that letter from, was it Mr. O'Connell in Fry's? When it began to look as if IIU were replacing everybody else.

Q. But what I am trying to get at was, was it your impression up to the day the licence was granted that IIU and/or Mr. Desmond, however we look at it, had only come in around the time that you were informed?

A. Yes, I think so.

Q. In other words, you weren't aware, as I said earlier, that you were negotiating with a different consortium all together to the one you thought you were negotiating with?

A. I wouldn't use those words. If I could rephrase it: I wasn't aware that they were in the wings or centre stage, or anywhere else for that matter, until April.

Q. I see. Now, your concern, I think you say your primary concern was change in corporate structure. Presumably if you had been involved in dealing with this, you'd have had to satisfy yourself that Mr. Desmond also could stand in the footsteps of the financial institutions?

A. Yes.

Q. That would mean and that would have meant that you'd have had to clarify his financial position, isn't that right?

A. Yes.

Q. If you had been aware that in fact Mr. Desmond had been involved from the 29th September, but that you had not been informed of these things, would that have informed the impression that the membership of the consortium was making on you?

A. I beg your pardon?

Q. Would that have informed if you had been aware that in other words, you had not been told the true nature of the consortium from the outset, would that have affected you, and if so, in what way in the course of carrying out your negotiations?

A. And by "negotiations", you are referring to the negotiating for the licence?

Q. Mm-hmm.

A. Yes, it would have informed them in the following way: That I would have been, I suppose, cross that it had

happened without our being told about it.

Q. Could I put it this way: Would you have said, or could you have said, I can't negotiate with you, you didn't win the licence. The licence was won by Mr. O'Brien, Telenor and, if you like, Advent plus three banks. You are now telling me, if you had been told that it's Mr. O'Brien, Mr. Desmond and Telenor, and it's always been that way since the 29th September, how could you have negotiated with those people? You would at least have had that difficulty, let me put it that way. I am not going to ask you any more than that.

A. Yes, that would have occurred to me.

Q. Wouldn't that have been a difficulty of disclosure, wouldn't it? That you had been led to announce the result of a competition without knowing the true nature of the consortium?

A. Well, was the last one or this one of the last questions, I am not subject

Q. Let me put it this way: I think Mr. Brennan said he'd have reached for the Attorney General if he was presented with this issue.

A. Yeah. To answer your question, it would certainly have caused me a difficulty, and I think what I would have had to do, if there had been no John Loughrey, no Martin Brennan, no Fintan Towey or no Sean Fitzgerald, is that I would have done a forensic audit of just

when and to what extent and if at all I had been misled in some way, and if so, whether it was a sufficient breach of trust or warranty or condition to go to the root of the understanding that they had won it.

Q. Presumably to know who had won was the key to the whole thing, otherwise you couldn't have given the licence to anybody? You had to know who had won, didn't you, the competition? You had to be able to put your finger on it and say, "We have given the licence to the following people." And as I think you agreed with me at the outset, you didn't know who 20% were for definite in this case, but you knew they were going to be a certain class of individual, and a number were identified with more or less degrees of certainty. If, in fact, the situation was otherwise and if you had been misled, there are two factors. If the situation was otherwise and if you had been misled, wouldn't that have been a major factor in the whole procedure? You wouldn't have known about it, of course. You didn't know about it?

A. Well, you are asking me to suppose squared, I suppose, there. In extremis, if I felt that there had been bad faith, and I do emphasise that

Q. Leave bad faith out of it.

A. Okay, but I mean that is important. If there had been bad faith, that would have perhaps been one of the

first things I would have turned to these people and said; one, I can't deal with it, or two, you have to re-establish good faith. Now, I just want to get that out of the way. But it is important to point out that in regarding the 20% investor finance, institutional finance, whatever you want to call it, it's a bit like issue in a will, where you don't know what they're going to be at the time you make the will, perhaps, or

Q. Of course.

A. It would not be a major it need not have been a major concern when it came to the operation of this licence, who those people were, provided that they would fulfil the role of putting in the money and waiting to retire their equity and that

Q. I appreciate that, yes

A. And that they did not take operational control in some way.

Q. Can we just go back a little. I wonder can that be right, Mr. McMahon? You couldn't have given the licence to Pablo Escobar, that's for sure?

A. No.

Q. You couldn't have given the licence to somebody who might have given it to him, isn't that right?

A. Can you repeat that last question?

Q. You couldn't have given it to somebody, to some criminal who might have given it to him?

A. That's fair enough.

Q. You had to know who was going to get the licence?

A. Yes.

Q. I am saying that, and I think we have agreed, that as long as you knew the identity of the individual or if you didn't know his identity, as long as he came within a tightly defined class, you could grant or announce the winner to that particular consortium?

A. Yes.

Q. But surely you had to have a means of defining the ownership, either by identifying them or defining them tightly? Otherwise you were giving a blank cheque to somebody. Would not other people complain that you couldn't possibly have operated the licence procedure on that basis?

A. Maybe I can answer your question this way: The term "institutional investors" was used quite a lot.

Q. Yes.

A. If for no other reason, to save people the trouble of listing out the AIBs, the Advents or whoever it was.

Q. Yes.

A. If somebody could have been described as an institutional investor, and did not deal primarily in Columbian cocaine, I think we probably would have been happy.

Q. I think I went over this with Mr. Brennan, and I hope I am not wrong in summarising what I think he agreed

with. You were evaluating a consortium consisting of Telenor, Mr. O'Brien and institutional investors who were not just any institutional investors, they were defined in such a way that you didn't need to put them through the grinder in the process, if you like. It's significant that no, as far as I can see, major evaluation was carried out of the banks, the three banks, but Advent was checked out, because that was a new-ish name to you.

If you were going to feel comfort, legally feel comfortable in granting the consortium, or granting a licence, or the result of a competition to that consortium, surely you could only have done so on the basis that as long as the institutional investors were replaced by people who could be evaluated in the same off-the-cuff way, it wouldn't matter?

A. That's fair enough.

Q. And that wasn't done. They weren't replaced by somebody who could be evaluated off-the-cuff.

Mr. Desmond wasn't an institutional investor.

A. The name IIU stands for, I understand, institutional investors.

Q. Mr. Desmond's company, IIU, had been incorporated around the same time as the licence?

A. All right, I bow to you on that.

MR. HEALY: Thanks very much for your help.

CHAIRMAN: And just, Mr. Healy, I think it should be

clarified in putting your last question and in putting an extreme contingency to Mr. McMahon, I don't think there is any remote question that the Tribunal is seeking to draw any analogy between Mr. Desmond and Mr. Escobar. But I think you referred, when Mr. Healy queried you about these matters in your earlier testimony, to a concept of proportionality.

A. I think I did use that word.

CHAIRMAN: And you would have looked at that?

A. I would certainly have looked at that, yes, to see what extent it applied.

CHAIRMAN: On the envisaged share that was subsequently curbed through negotiations with Mr. Brennan as we know, the 25% was trimmed back to 20%?

A. It was.

CHAIRMAN: But on the initial envisaged share out it was, in fact, two-thirds of what was held by the two key drivers?

A. Yes.

CHAIRMAN: Very good. Ms. Ruane?

MS. RUANE: We have no questions for this witness.

CHAIRMAN: Mr. McGonigal?

MR. MCGONIGAL: Just a few matters, Mr. Chairman.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. MCGONIGAL:

Q. MR. MCGONIGAL: Just a general question first, Mr. McMahon. As I understand it, just in relation to

the process and the way it was carried out,
significant reliance was placed on AMI and
Mr. Andersen, not only by you, but also by the entire
Project Team?

A. That's a fair assessment, yeah.

Q. And I think in fact, as is clear from the way in which
the documentation has been presented, that a lot of
the documentation in its primary form was drafted in
Copenhagen before being given to the PTGSM?

A. That's correct.

Q. And from that point of view, the person who is most
significant and best able to explain its origin is in
fact Mr. Andersen?

A. Indeed.

Q. On the Irish side, the person possibly who played the
most significant part in relation to this process
appears to have been Mr. Towey?

A. I would have said Mr. Brennan, although Mr. Towey
would certainly have been familiar with the nuts and
bolts of it and did a great deal of the actual work,
yes.

Q. Well, it may be a question of degree, but certainly
judging from the papers, it looks as if Mr. Towey put
effectively almost full-time effort into this process
while it was in being?

A. Indeed he did.

Q. While Mr. Brennan, I accept, was the Chairman and had

the overall view of what was going on.

A. Yes, fair enough.

Q. And it's equally clear from your evidence that you relied upon the work which was done by your colleagues from the other sections of the Department significantly to draw views as to what should happen?

A. Yes.

Q. To the extent that it was, in fact, your colleagues who dealt with all of the subcommittees?

A. Yes.

Q. And I think it's fair to say, as is the fact, that neither you nor Mr. O'Callaghan, nor indeed Mr. Dillon took any part in any of those subcommittees?

A. That's correct, I believe.

Q. It's equally clear, I think, that the persons who were on the subcommittees had available to them not only the application forms and the results of the oral presentation, but they also had available to them such other documentation as may have been given to them by AMI, possibly including the early quantitative assessments?

A. Yes, possibly including those things, yeah.

Q. They equally had the benefit of, during those discussions, of sitting down, analysing and discussing amongst themselves the information that was coming to them from that documentation?

A. Quite right.

Q. And it's equally clear that as a result of the documentation, the presentation, and the discussion which they themselves had, that they were able to form a view and come to a decision as to the nature of the grades that should be given to each consortia for each indicator of the qualitative assessment and equally, for the other aspects of the qualitative assessment, and finally for the criteria?

A. Yes.

Q. And there is absolutely no doubt that when one looks at this process, that that formed the most decisive part of the process in the heel of the hunt?

A. It did.

Q. Now, can I take it as a fact, Mr. McMahon, that you have complete and utter faith that the work which your colleagues did in those subcommittees was done both independently and without any outside pressure of any kind?

A. Yes.

Q. And that the results which they came to in those subcommittees and which formed the basis of the first draft report were honestly, sincerely and properly arrived at after fair work done?

A. I believe so, yes.

Q. And insofar as that is the result, you are happy to endorse that result?

A. Indeed I did endorse it.

Q. Now

A. Without actually signing anything, without actually signing anything I did endorse it, yes.

Q. I appreciate that. And you are happy that that was the correct result and the right result?

A. Yes, I am.

Q. And that is still your position?

A. That's still my view.

Q. And you are equally happy and satisfied that there was no outside influence that brought about that result?

A. Yes.

Q. Now, the position your position, in fact, was that when you came to the meeting of the 19th October, you had not had an opportunity to contract the draft report of the 3rd October?

A. I believe you mean the 9th October, but is that right?

Q. That you hadn't had an opportunity to consider the first draft report?

A. I hadn't had an adequate opportunity to consider it, I believe, yeah.

Q. But it's equally clear when one reads that draft report, that it contained, to a large extent, but not completely, a lot of the work which had been done in the subcommittee in the qualitative assessment?

A. That's correct.

Q. And it's equally clear that the meeting of the 9th

seems to have been mainly taken up with a discussion in relation to the report?

A. Yes, I think so.

Q. And the correct drafting of it?

A. Yes.

Q. And I think, in fact, in Margaret O'Keeffe's memo of the 3rd October of the 9th October, you are recorded I'll just get it for you now 121 of Book 42. You are recorded in that, on the second page, Mr. McMahon, of saying it's on the thing beside you you would like to see more of a user-friendly overview "Confidence should ooze out of the report" "The document will be read by the Secretary and the Assistant" "The Minister's Programme Manager and the Department of Finance."

Now, what did you mean by that?

A. I think that I meant that on a reading of the document as it stood then, it didn't measure up to what my view of the report would be, and I felt that it ought to be readable by an ordinary intelligent person, and that in reading it, one should be able to come to the same conclusion, or at least have confidence that the logic in the report was such as to arrive at the conclusion that was in it.

Q. And it is clear that that view that the report should have this confidence was a view which was shared not only by you, but also by others at the meeting?

A. Yes, I think so.

Q. And there was concern to try and ensure that the report, which was reporting the result, would be one, as you say, which could be read easily by people and understood quickly, so that they could see clearly that the result was there?

A. Yes, quickly in the sense that I think I was looking for at least an executive summary of some sort which would set out the result and how it had been arrived at.

Q. Now, it's clear from reading that reading the balance of Margaret O'Keeffe's notes, and also the notes available to us in relation to that meeting of the 9th October, that in fact a significant part of, if not the major part of the meeting was taken up with the discussions in relation to this report and how it was going to be presented and what should be in it and where it should be and what shouldn't be in it?

A. Yes.

Q. And at the end of that meeting, your position, as I understand it, was that you weren't able to take a copy of the report away with you, were you?

A. I think I was.

Q. Were you?

A. I think I would have put it on file.

Q. Because I notice that some of the other departments, after the 9th and before the second report became

available, made available certain notes to Andersens of changes that they thought should be brought into the report?

A. Yes.

Q. I think, for work reasons, other things that your section of the Department had to deal with, neither you nor Mr. O'Callaghan were in a position to be able to do that?

A. To give written submissions you mean?

Q. Yes.

A. Yes, that would be correct.

Q. So that again when one comes to the meeting of the 23rd, we see that Mr. O'Callaghan was able to get a copy of it on the 20th October to read. You apparently weren't able to read it until the 23rd, almost at the meeting?

A. Yes.

Q. This meeting itself went on for a significantly long time?

A. Yes.

Q. And again was focused on trying to get the report to ooze with the confidence which you felt it should have?

A. Yes.

Q. And the significant area which was causing concern, although not the only area, was clearly in relation to the quantitative assessment?

A. The qualitative report.

Q. The qualitative

A. Assessment, yes.

Q. And also to the quantitative assessment, so far as the marking was concerned?

A. I don't recall making a song and dance about the quantitative report, although there would have been aspects of it that troubled me at the time, but it was mainly the qualitative aspect of the report that I felt needed attention.

Q. It was at the end of that meeting, Mr. McMahon, there appears to be documents which indicate changes that were to be made to the report, and I just draw your attention to them. They are in Book 46, Tab 48.

Now, these are suggested textual amendments. And as far as I can make out, Mr. McMahon, these appear to be textual amendments which ultimately went into the report of the 25th and resulted in the effective redrafting of it?

A. Yes.

Q. Now, these textual amendments, although typed here, if I understand what was happening, these textual amendments were the subject matter of discussions at the meeting of the 23rd, where they were initially agreed to. They appear to have been then typed up and may have been further discussed on the 24th?

A. Yes, there is no date on the document I think, but you

are probably correct.

Q. The only reason I am saying that, Mr. McMahon, is because tracing them from the report of the 18th into the report of the 25th, these seem to be some, if not all of the changes that one can find in the report of the 25th from the 18th?

A. Okay.

Q. But assuming that to be correct for a moment, it therefore seems right to say that at the meeting on the 23rd these textual amendments or changes would have been agreed at the PTGSM, as a result of which either Mr. Towey or Mr. Brennan would have communicated them to Andersens on the 24th?

A. Yes, if that's

Q. With the further changes that were agreed on the 24th, and then the report of the 25th would have been arrived at?

A. That seems likely, yes.

Q. So it's clear that if one looks at the changes that were made, it would appear that a fairly in-depth discussion or pouring over of the report of the 18th was gone into on the 23rd?

A. Yes.

Q. And am I right in understanding that as a result of that day-long discussion, and the information which came to you through being able to go through that report, and as a result of listening to your

colleagues, that it became very clear to you that the correct result had been arrived at?

A. Yes, that's fair.

Q. And that you were, at that stage, which was in reality virtually the first opportunity you had, it was the first opportunity to really assess the qualitative assessment as carried out by them?

A. Yes.

Q. And in doing that, you are completely satisfied beyond yea or nay that the work was right, it had been uninfluenced and it was the correct result?

A. I wouldn't quite use those words. What I would say was I couldn't remove, I couldn't remove any reasonable doubts that were remaining, but what I could say was as a result of discussion with my colleagues and everything else that you have mentioned, and as a result of my questioning them carefully, I was satisfied that we had a good result and that we had the right winner, yes. If you had asked me to quantify the amount of certainty, I would be reluctant to do it, but I was reasonably certain, yes.

Q. Now, the position appears to be that you went to Mr. Loughrey at some stage with others during the course of the day?

A. Yes.

Q. And as I understand what you told us yesterday or the

day before, a discussion with Mr. Loughrey took place where you articulated your concerns in relation to the report?

A. Yes.

Q. And as a result of that, it was appreciated by Mr. Loughrey and others that the report would have to be improved?

A. Yes.

Q. You are unsure as to whether a week was mentioned or not, but certainly when you had left the room, all of you knew that the report had to be reshaped to accommodate the concerns which had been expressed at that meeting?

A. Yes. Can I add also, that when you put it to me just now that I was reasonably certain that we had the right winner and result and all of that, that that would have been at the end of the night's work.

Q. I appreciate that.

A. At no stage before I went to see the Secretary.

Q. And if I did imply that I wasn't intending to, I accept that was at the end of the day, Mr. McMahon. But you then all go back into the room and all of you take part in the discussion in redrafting or reshaping that report?

A. Yes.

Q. And your contribution was given as much as anybody else's?

A. Yes.

Q. Your contribution was listened to, accepted, in some parts possibly accepted and in some parts changed and in some parts maybe rejected?

A. Yes.

Q. But there was discussion amongst all of you which resulted in the final report which we now know to exist of the 25th?

A. Yes.

Q. And that was the view of all of the people who had been involved on the 23rd and the 24th?

A. That's my understanding, yes, with the exception of Mr. O'Callaghan, who would have departed somewhat earlier than the rest of us.

Q. I appreciate that. And I think he had discussions on the 24th in relation to certain changes which he wanted to try and bring about?

A. So I believe.

Q. So that at the end of the 23rd, Mr. McMahan, when you retired, you accept that your concerns had been discussed and had been taken on board in relation to the changes that were to go into the report?

A. Yes.

Q. And once those changes went into the report, then you would have been completely happy to stand over that report?

A. Not quite, no. What I had done on the 23rd and right

up to the time that I left the building on the evening of the 23rd, would have been to gain as much control as I could over the amendments to go into the report. There was a considerable amount of compromise along the way to that, but it's better to say that at the end of the night I was in a position where I expected to see another report sometime on the following day, over which I could mull with regard to whatever amount of time we had left, and bring it to the table and discuss it again. What you can say is that I was confident that I would have a report which was nearly there, and that whatever further discussions we were to have concerning the qualitative assessment could be put to bed at that time.

Q. But isn't it equally clear from that, Mr. McMahon, that whatever detail you felt was still to be done, you're completely satisfied that it was not detail that was going to interfere with the result?

A. Yes, that's fair enough. I think the best way to put that is as I have put it, I believe, in my submission, that further analysis I did satisfy myself completely that further analysis was not going to change the result.

Q. And that result was the result which had been brought about and arrived at as of the 28th September from the work which was done in Copenhagen at the subcommittee meetings?

A. It would be it wouldn't be quite right to say that because that implies that that decision had actually been arrived at, whether consciously or otherwise, at that time. It had not.

Q. No, no, what I am, in effect, saying is that the marks, the grades had been done, all that had been completed by the 28th. The result as perceived from those grades and marks was put into the report, and although there was discussion still to take place, that result never changed from then?

A. Yes, I believe that's the case, yes.

MR. MCGONIGAL: Now, I don't think I'll be much longer, Mr. Chairman, but it might be opportune for me to take a break. I hate delaying Mr. McMahon, because I appreciate he has been here much longer than might be anticipated.

CHAIRMAN: So Mr. McGonigal, if you'd rather keep your options, if you have one or two final

MR. MCGONIGAL: I just want to check one or two things before I embark on them, to save some time.

CHAIRMAN: Obviously the Department may have some questions to ask, so we will resume at ten past.

Thank you.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

Continuation OF EXAMINATION OF SEAN McMAHON BY

MR. MCGONIGAL:

Q. MR. McGONIGAL: Mr. McMahon, just a couple of matters.

First of all, can you cast your mind back to the 3rd October, when you were at the meeting, the internal meeting of the regulatory section, and you became aware at that meeting, as it records, that the Minister wanted to accelerate the process. Do you recollect that meeting?

A. This was a meeting between the different divisions on the telecoms side.

Q. Yes, it was. Book 42, Tab 116.

A. Yes, I have got that now.

Q. Now, on the second page of that, you will see "4. GSM: The Minister wants to accelerate the process"?

A. Yes.

Q. What I wanted to find out from you, if possible, was, can you recollect when and who it was that told you that the Minister was aware of the position?

A. I believe that that is actually stated somewhere in one or other of my notes, Mr. McGonigal, but I am not certain of that, and it may be in my submission to the Tribunal. I think it was Mr. Brennan, to answer your question, but I can't remember exactly when or where, and I don't think it was on this occasion, but I am not sure.

Q. Well, that's what I was just trying to clarify. I actually had understood that it wasn't on this occasion, and I just wanted to see if you were in a

position to tie it down between whether it was between that date and the 6th, when clearly you were able to tell Mr. O'Callaghan about it, whether you'd be able to be more precise in relation to it?

A. Yes, I think I have written this somewhere and I have said that he knew the ranking of the top three or something like that.

Q. Okay, I will check that. Just in relation to that memo while I am there. It says, "Legalities more complicated." It occurred to me, and I may be completely wrong about this, but I wonder to myself, "Legalities more complicated" could relate to the issuing of the licence as opposed to the process, which I think is what you thought it related to?

A. No, I think there, subject to being corrected, that Mr. Healy already asked me that question and that I replied along the following lines: That it was meant to convey that although the Minister wanted to accelerate this process, it was a bit more complicated than he seemed to think and that you know, there could be some taint of illegality had we immediately responded to that.

Q. The other thing that I wanted to clarify with you, Mr. McMahon, was am I right in understanding that at no stage did you speak to the Minister?

A. That's correct, yes.

Q. And the Minister never spoke to you?

A. As far as I know, yes.

Q. During the entire process?

A. Yes, that's correct.

Q. And the only other matter that I just want to ask you about; I understand that in relation to the result that, in your opinion, having regard to the combination of Telenor and Esat Digifone, that you considered it a good result?

A. That I considered it a good result?

Q. A good result?

A. It was a good result, yes.

Q. And that was because of the expertise of Telenor as one of the world's leading Telecom people in the market, combined with Esat Digifone's strengths?

A. Correct me if I am wrong, but you may be asking me whether I regarded the makeup of the consortium as a good one or an ideal one, as opposed to whether it was a good bid and a winning bid.

Q. Well, I was probably doing both, but I'll take both your answers.

A. The answer in both cases is yes, I considered it a good arrangement, a good marriage, if you like, and yes it was the best bid.

Q. And so far as that was concerned, it clearly applied for the licence on a 50:50 basis with 20% to be distributed amongst institutional or third-party investors, as the case may be?

A. Can you repeat that for me? I am sorry.

Q. The application was made on the basis of 50:50 as between Telenor and Esat Digifone with, on the licence being granted, 20% to be given to institutional or third-party investors, depending on which word you want to use?

A. Yes, I believe the 20% was to be given at the run-up to commercial launch.

Q. But, so far as your concern in relation to the licence, your primary concern in relation to the licence was to ensure that the corporate structure remained such that Telenor and Esat Digifone maintained control?

A. Yes, that's true. In fairness though, I mean subject as Mr. Healy outlined this morning, that whoever filled the void would be a suitable type of institutional investor.

Q. Absolutely. I mean, a suitable institutional/third party investor?

A. All right.

Q. But leaving that 20% aside just for a second, your primary concern was to ensure that the licence which the State was issuing, they wanted to give it to somebody, to the consortia which maintained the control for which they had applied?

A. Yes, that would have been a primary concern. I mean, naturally there were others.

MR. McGONIGAL: Thanks very much, Mr. McMahon.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. NESBITT:

Q. MR. NESBITT: Now, Mr. McMahon, before I start bringing you through some of the books, for the assistance of the Tribunal team, I'll be bringing you through some of the documents in Book 41, Book 42, Book 43, Book 46, and Book 54.

Now, you appreciate the process that has been gone through here is an inquiry trying to reach into what occurred in relation to the award of the second GSM licence?

A. Yes, indeed.

Q. And report on that. But I was wondering if you also appreciate, in relation to some of the questions you are being asked here, that an implication of those may be that the team, the Project Team, of which you were a party, didn't do its job properly. Have you understood that?

A. Yes, I have understood that that implication has been raised.

Q. Now, I'll come back to that, but perhaps I'd ask you to keep that in mind as we go through the various documents I want to draw your attention to and ask you some questions about.

If I could ask that the witness be given Book 41, Divider 46.

A. Divider 46, did you say?

Q. Yes, please.

Now, this is a document you'll probably be well used to reading it's the actual competition for a licence document, and what I wanted to ask you about is paragraph 19, Clause 19, which, I believe, and correct me if you don't agree, indicates the nature of the process that is going to be applied to people who apply for the GSM licence. And what anybody reading that learnt was that the Minister intended to compare applications on an equitable basis.

A. Yes.

Q. So did you understand the process that you were going to be part of to be a process of comparison, but, at the same time, trying to do it in a fair way?

A. Absolutely, yes.

Q. And in relation to that process, the second thing you knew about the process was that information would be required of applicants in a form of matrix application. So you would attempt to get from applicants the same sort of information about what they proposed, so you could compare one application with another?

A. Yes.

Q. And I think the next thing you learnt about the process was that there were going to be a set of criteria described as the "evaluation criteria", which were listed in this document in descending order of

priority?

A. Yes.

Q. So that basically what was going to happen: You would get applications that would be in some standard form, matrix, and then there would be a question of reading them and comparing them and then having a series of evaluation criteria which would be of importance in a descending order as listed there?

A. Yes.

Q. And there were eight criteria, isn't that right?

A. Yes, that's my understanding, yeah.

Q. And do you see anywhere in this document, anything that talks about the concept of qualitative or quantitative analysis?

A. No. My understanding is it doesn't arise in this document, subject to my reading it carefully in answer to your question, but I don't think so.

Q. So, I assume when you were sitting down with your colleagues and deciding what you wanted to do, so far as you were concerned, I am just talking about you, it's your evidence, you were going to effect a comparison, and you weren't at that point in time, until you worked out how you were going to do the comparison, thinking about quantifying what you were being told in the applications or looking at it from a qualitative basis?

A. At the time that we wrote this document, no, I don't

think that was foremost in our minds.

Q. But I assume, quite quickly, it became necessary to form a view as exactly how you were going to analyse and compare the information that each person that had applied was putting before you?

A. Indeed. We would all have been familiar with the kind of attributes or characteristics of a good GSM provider from our contacts in Europe, certainly from Mr. Brennan's contacts with the other consultants, but that was to be dealt with, so to speak.

Q. So, would it be fair to say, that having read the terms of the competition, having considered it on your own account and with your colleagues, it was clear to all of you that what you were going to have to do was to determine the ranking of the applications in accordance with the priorities specified in paragraph 19 of the tender document?

A. That was the nub of it, yes.

Q. It wasn't hugely academically difficult to work that out, I assume?

A. No.

Q. And I think the other thing you were going to have to do is do it on an equitable basis?

A. Yes.

Q. Now, I am going to take you through a series of documents in the order they appear in the books, and they are not necessarily chronological, but I think it

will be easier to do it this way. So if I could ask

that the witness be given Book 42.

And I want you to go to Divider 95, please.

A. Okay.

Q. Divider 95 represents the official note of or report of the meeting on Monday, 4th September of 1995, the 9th meeting of the GSM Project Group. And I think the fact that your name appears at the top left-hand side means that you were an attendee at that meeting?

A. Yeah, top right-hand side.

Q. Now, I think in relation to what was being discussed, and on that page you see it, the quantitative evaluation was being discussed, and what we see as being reported was as follows: "Prior to presenting the initial draft report of the quantitative evaluation, Mr. Andersen first acknowledged certain shortcomings in the results gleaned so far from the quantitative scoring. The quantitative evaluation had highlighted some incomparable elements." And then he gives four bullet points.

" Some applicants had not calculated the OECD baskets to their best advantage."

Do you see that?

A. I do.

Q. I have to suggest to you that the impact of that is, insofar as the criteria that were going to be used are concerned, if somebody hadn't chosen to calculate an

OECD basket, there was difficulty in quantitatively scoring their tariff criteria?

A. Yes, that's my understanding, yes.

Q. And in relation to the tariff criteria, which was the third criteria, the mark that was going to be given to that was 18, it could have been 18?

A. The weight.

Q. The weighting that was going to be given to that particular criteria went up to 18.

A. Yes.

Q. Now, the next bullet point is, "The IRR had not been calculated in accordance with the tender specification in some cases."

A. Yeah.

Q. And I have to suggest to you that that would have an impact on the business plan marketing?

A. Yes, it would. It was one of the elements in

Q. And that was again carrying a weighting of 30?

A. The whole of the credibility of the business plan carried 30, yes.

Q. So if you didn't have appropriate calculation on the IRR, that 30% chunk had some difficulties with it?

A. There would be difficulties, yes.

Q. So we now have 30% of the marks and 18% of the marks that are in difficulty?

A. Yes.

Q. And if we look at the third bullet point we see: "For

certain cases, not enough information on roaming was supplied to score the application." And in relation to roaming, the weighting given was 6. So we add that to the other two. And then finally, in general terms, we see: "Certain of the indicators proved highly time sensitive, e.g. if scored in Year 4 they showed one ranking, at Year 15 giving a completely different view."

Now, I have to suggest to you that after that meeting the members of the Project Team could have been in no doubt that a very substantial chunk of the weighting that was to be given through the application of the criteria had problems if you were to rely solely on a quantitative evaluation?

A. Yes, a quantitative comparison across the line would have been difficult there.

Q. So that's where you see how much difficulty there would be if you didn't do qualitative. But I have to suggest to you that in fact at an earlier stage the need for quantitative and qualitative evaluation had been discussed by Mr. Andersen, and for the purposes of just drawing that to your attention, I'd ask if you could now turn to the booklet that was produced recently, Book 54.

Now, in the course of giving evidence, I think you have heard people mentioning 1(A) in Book 54. It doesn't appear to be in my book, but if you could look

at Book 54. And I want you to look firstly at Divider

1. I'll just ask you to look at the front page there.

We see a thing that is headed up "Cover page". It's sent to you, and at the end of the box we see that that's a document dated 17th May of 1995, and it's described as a first draft?

A. Yeah.

Q. Now, if we turn over the page, there is then an amount of narrative, and I don't propose to bring you through that narrative. I want you to turn on to Divider 2.

A. Okay.

Q. And at Divider 2 you see the same type of front cover page and the same type of matrix box. At the bottom you see that what had been the draft of the 17th May, '95, has now become a second draft for approval of the 8th June, '95. And in the course of evidence, I think Mr. Healy has correctly identified that document as the 8th June document?

A. Yes.

Q. You have found that. Now, I just wanted to bring you through some of the narrative that we then see. So if you turn over to the second page, we see a narrative that effectively is the same as we had seen in the earlier books, the earlier one. I just wanted to bring you through it.

What was being said in this document, which had been presented to you by Andersen Management International,

was that a decision was to be made to apply both a quantitative and qualitative evaluation model, isn't that right?

A. Yes.

Q. So at least in May, and certainly by June, the people on the project knew that you were going to be going down the quantitative and qualitative route?

A. Yes.

Q. And you knew that the way these things were going to be done, if you look at the second paragraph of that particular page, was that there would be a quantitative evaluation procedure, including the selection of dimensions, indicators and the scoring model, and in relation to a qualitative evaluation model, it would include an evaluation process and a guide to the award of marks, isn't that right?

A. Yes.

Q. So what you knew at that point in time and what actually happened was that in relation to the quantitative scoring, there would be a scoring, and in relation to the qualitative scoring, there would be a scoring?

A. Yes.

Q. So you knew that whatever was going to happen, you had to have some method of giving marks to whatever the appropriate elements were to allow a scoring take place?

A. Yes.

Q. Now, it seems to me, but maybe I misunderstood it, there is a criticism of how weighting operated in relation to marking elements I am using "elements" as a neutral expression elements of the applications that were put before your Project Group for the purposes of choosing a winner. And I want to deal with the question of weighting.

In relation to weighting, the first issue was to weight the criteria that had been provided to you in a descending order of priority, isn't that right?

A. Yes.

Q. Now, we have seen various weights being applied, but I have to suggest to you that the weightings that were eventually used are those that we see referred to in the note of Ms. Nic Lochlainn of the 27th June, and that's at Divider 5 of Book 54 27th July. And that's at Divider 5.

A. Yes, that's the one which takes account of the EU intervention, and that's the one that she noted, I think, following faxes to all of us or notes to all of us which we called back on.

Q. So, if after that date we see documentation that uses a different weighting, that simply is in error?

A. It's in error. Its appearance is in error. I don't think that any other kind of weighting was used to arrive at anything after that date, and insofar as it

appeared, it appeared only as parts of an annex,
mistakenly, I think.

Q. Very good. So having realised that the criteria were now appropriately weighted, you had to come back to ensuring that the information given by the people who had applied was appropriately analysed, marked, so you could then find out where it fitted in the scheme to see who has won?

A. Yes.

Q. And it again seems to me to have been suggested that in respect of the qualitative evaluation, as opposed to quantitative evaluation, there was no understanding as to whether or not weightings might be applied to the elements, and I am using the word "element" as a neutral expression for the moment, the elements which went to allow you analyse how good the application was. I understood Mr. Healy to suggest to you that no decision had been made about giving weightings to well, you'd call them indicators, I'll get on to why you call them that, but I am going to call them elements for the moment that go up to allow you score the quality of the application being made. Did you understand that criticism to be made of the process?

A. Yes, I did understand that criticism has been raised, yeah.

Q. Now, what I want to do is to just refer you to

dividers, or page, or Item 6 in this particular

Divider 2. It's about its two pages from the end

of Divider 2.

A. The page being?

Q. Sorry, it's page 20 of 21.

A. Right. Okay. I have got that.

Q. Now, in relation to the concept of elements: In the

plan for marking the applications, Andersens had

decided on a chronology of terms. We had the criteria

at the top, which had been directed by the competition

process; we had something called "Aspects", which

appears to have been invented by Andersens. I'll come

back to that.

A. Yes.

Q. We then had something called "Dimensions"?

A. Yeah.

Q. And then we had something called "Indicators"?

A. Yes.

Q. And the indicators could be divided into

sub-indicators?

A. Yes.

Q. Now, for the purposes of scoring any application,

where you found the marks being given was at the

indicator level

A. Yes.

Q. the indicator allowed you define something that was

capable of being scored, either in quantitative terms

or qualitative terms?

A. Right.

Q. Now, as I understand your evidence, in relation to qualitative marking, the indicators that would be looked at were capable of being weighted and in all probability would be weighted?

A. Yes.

Q. And that's common-sensical, because if you were trying to weight the quality of this bottle of water, you might decide the container had X marks, but the water inside was probably going to be a lot more, so those would be both indicators you'd look at to decide the quality of that particular product, but clearly the nature of the water inside was probably going to be carrying more marks than the quality of the bottle?

A. Yes.

Q. So that was something that was self-apparent to anybody who was involving themselves in this process?

A. Yes. Not always immediately apparent in the sense that the notion of the criteria, the aspects, the indicators and sub-indicators and things did give rise to some confusion from time to time, but not such that we didn't eventually grasp it.

Q. And as this page says, that in relation to indicators, they weren't going to be weighted ex ante, because until you sat down and decided which were the appropriate indicators, it wasn't going to be possible

to decide which ones might be worth more than the others?

A. That's fair enough, yes.

Q. So when we read that the indicators were not weighted ex ante, that's exactly what we assume should have been happening in the process being operated, as it had to operate, to achieve a mark?

A. Yes, that's a fair statement.

Q. Now

A. I should just say maybe in helping you further on that, I always regarded the dimensions as being the fundamental building blocks of this molecule, and the indicators were the subatomic particles, if you like, and the sub-indicators were, whatever, the quarks.

Q. I'll leave Mr. O'Donnell to do the physics. But I am going to come on to that, because I am going to bring you through those elements and I'm going to come back to that, and I thank you for reminding me of that.

If I bring you back to page 1 of 21 in Divider 22.

This is where we see the concept of aspects coming into it. I am going to come back to it.

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

aspects and financial aspects, in addition to these aspects which form a common denominator in both evaluations."

Now, "both evaluations" has to refer to the quantitative and qualitative evaluations.

"The qualitative evaluation also deals with the risks, i.e. the sensitivities of the business case in relation to the evaluation criteria outlined in paragraph 19 of the RFP document."

So, so far as I can understand, essentially there were four main aspects that Andersens were mentioning at that particular point in time?

A. Yes.

Q. And I am going to bring you on to the evaluation ^ reports. But the evaluation report was following a plan that had been preordained in discussion, before you saw the evaluation report, and I'll bring you through some of the documentation, Andersens had discussed with the Project Group the way in which they proposed to present the evaluation report. And what they actually did was to have an introduction and some other verbiage, but eventually they set about presenting in four sections, what they thought about the aspects that they had identified there?

A. Yes.

Q. I think one of the problems about the aspects was they didn't mirror the criteria, is that right?

A. That's correct.

Q. And the importance of that is, if we come back to the chronological matrix, or the ordered matrix of the criteria, the aspects, the dimensions and the indicators, for the purpose of scoring you had to identify the appropriate indicators?

A. Yes.

Q. Decide under what dimension they fell to be hung?

A. Decided what aspect

Q. No, no, what dimension?

A. All right, yes.

Q. And then what you understood, as I believe, you understood you then had to tie those marks under that dimension to one of the criteria?

A. Yes.

Q. But that's not what Andersens started doing in the report, is it? They presented them connected to aspects.

A. Insofar as they were aspects, it meant plucking these things out of place and slotting them under the appropriate aspect.

Q. Yes. Now again, just looking at this particular report, if I ask you to turn to page 321. On page 321 you see a table, and it contains the eight criteria down the left-hand side, and it also allows you understand how the dimensions we have talked about will fit under a criteria.

A. That's right, yes.

Q. If we turn on to page 20/21 of that particular document.

A. Yeah.

Q. We see that the same dimensions are hung under what are now called "aspects", and we see the four main aspects: marketing aspects, technical aspects, financial aspects and management aspects. And I'll come on to the other aspects in a moment, but those are the four main aspects you saw. And those dimensions were not laid out the same way when looked at from an aspect point of view as they had been when looked at from a criteria point of view?

A. Yes, that's right.

Q. And as I understand it, as soon as the Project Group saw that the aspects, when tied to the dimensions, couldn't mirror the criteria, they felt following the aspect model wasn't going to be the way to be certain that they had marked the applications appropriately to come up with a winner?

A. Yes, that's my understanding, certainly, of the group's feeling. I can't be certain that that was what they said when they were in Copenhagen, but it's certainly my understanding of what we said subsequently.

Q. I think you'll be able to help yourself, because I am going to turn you now to another document that's

slightly out of sequence. This is in Book 43, Divider 132.

A. The divider number again?

Q. In fact, it's Divider 134 I want you to look at.

A. Okay, I have got that.

Q. This is, in fact, a handwritten note you made, isn't that right?

A. Yes.

Q. And it's dated 23/10/95. And the bit I want to ask you about is on the third page, and it's under, half-way down under the heading, "On our return."

Now, I think in terms of chronology, that means having gone to meet, was it

A. The Secretary, yeah.

Q. You came back into this extended meeting, and you then have written down, and I hope I can read it, "Agreed: Final decision should not be on Table 16." I can't read it, perhaps you can help us what's said after that?

A. "Final decision should not be on Table 16 this resulting from both our meet with the sec and independently by the group in our absence."

Q. Very good. So the group had made this decision that you couldn't use Table 16. I am going to come on to Table 16, because it moves around in numbering, and see what that shows it. It then goes on to say: "It should be Table 17 and 18."

A. Yeah.

Q. Now, at this point in time you likely had in front of you, when making this note, the draft of the 18th October, so I'll ask you to turn to that now.

A. And that's at what divider?

Q. That will be in another book, I am afraid. Book 46.

And it's Divider 46 in Book 46, the draft of the 18th.

And if we turn to page 48, we see Table 16 that's been spoken about in your note, and that table is a presentation of marks using the aspect methodology?

A. Yes.

Q. So what was clearly the view of the Project Committee at that point in time was: If we are going to mark this competition and we are going to know who the winner is, we are not going to follow this aspect table, we are going to follow the next two tables, which are Table 17 and 18?

A. That's correct, yes.

Q. And in those few notes we see something that is, I respectfully submit, I would ask you to indicate your evidence on this, is essentially fundamental to the way in which the committee were approaching its task?

A. Yes.

Q. They'd looked at the competition. They had seen Clause 19. They had identified what they had to do. They decided they had to mark the information for the purposes of comparing equitably the applications, and

they did not wish to follow the Andersen aspect grouping as the route to learning the winner. They wished to follow the competition model, and they said that?

A. Yes, that's a fair representation, certainly, of what was in my mind and I believe in the minds of the others.

Q. Indeed. So far as the process is concerned at this point in time, would you agree with me that the process was working properly? It was applying the competition in your mind, at any rate?

A. Yes, it was.

Q. Very good. Now, I want to come back to something that's important, as I understand it, in the concerns the Tribunal have in relation to how well the process worked. And this is the question of marking and analysing what was the quality and the quantity of weight that should be given to the particular applications.

And there was the quantitative marking that, as I understand, was carried out effectively by Andersens doing the number-crunching and reporting to the Project Group?

A. Yes, that's right.

Q. And then there was the qualitative marking, which was done by the sub-groups that we know about?

A. Yes.

Q. Now, I think you and Mr. O'Callaghan were not in any of the sub-groups?

A. We were not present at any of those meetings, no.

Q. And obviously in relation to the qualitative matters, or the quantitative marking, although you were there to reported to you by Andersens what they had done, and that was largely a number-crunching exercise, having just looked at what came in on the application forms?

A. Yes, that's correct, yes. From our knowledge of the presentations we would certainly have perused the quantitative assessment that ultimately emerged, and we were certainly anxious to know what was ahead on what. But it was largely a number-crunching exercise by Andersens, yes.

Q. This brings me on to a matter I think is simple to explain. I am hoping you'll be able to help me with it. It's the position that you adopted as you were being shown the draft reports of the 3rd and the 18th. You hadn't been involved, to the extent you hadn't done it yourself, with the marking that was going to go to lead to a winner, isn't that right?

A. That's right.

Q. And I think you are a careful individual, and you are a seasoned civil servant, and one of the things you were doing was asking for some detail on how the marking had been done so you could understand it, is

that right?

A. That would be right, yes.

Q. Now, as I understand it, you are saying Andersens were telling you and you knew what the results of the sub-groups were, but you wanted to, in your own words yesterday, reach into the wound a bit more?

A. Yes.

Q. And you didn't get the opportunity to reach in to the extent you wanted, isn't that right?

A. No, no.

Q. Can I suggest to you that is the basis of the, what I am going to describe as a constructive tension that came to exist between you and some of the other members of the Project Group when you were saying "I want more time." You were looking to be informed about how other people had done their job, isn't that right?

A. Yes.

Q. Not looking to correct them because you thought there was any reason to doubt they hadn't done their job properly?

A. Yes.

Q. And that's the essence of what you were searching for, is that right?

A. That's fair to say, yes. I had implicit confidence in the quantitative assessment, such as it was, that had been done, and knowing that it had been my own

colleagues who had actively participated in the assessing themselves, that part of the qualitative assessment, insofar as it had been done, I would have had no reason to doubt them, but I still wanted to know for the two reasons mainly: That the report itself wasn't giving me that confidence and that we were being asked to hurry it up.

Q. So, as you sat at the Project Grouping then, and as you sit in the witness-box now, attempting to help the Tribunal as best you can to learn what happened, you are not in a position to say you had any information at all that suggested the marking process had not been done otherwise than appropriately?

A. No, I had no such information.

Q. And the tension, the constructive tension was, you just wanted to know a little bit more about it, but you weren't somebody who had done it and you had no concept of thinking you knew something or would find something to show it was wrong? You just wanted to know about it because you were taking some form of responsibility for the final result?

A. I wanted to know a good deal more about it I suppose is fair to say.

Q. Now, the second thing is the quality of the written report. You were unhappy with that. You felt it didn't really deliver on what was a report of a quality you felt the type of people involved in the

Project Group were capable of producing and worthy of?

A. Yes.

Q. But that was the extent of that criticism, it could be worded more clearly, etc..

A. Not only that, there could have been more in it.

Q. You might just have written it slightly differently.

You had a concept of how it might look better?

A. Yes, it's a bit like the anecdote of I wouldn't have started here if I was going to go there.

Q. Yes, okay. Now, in relation to Document 133 of Book 43, this is the note you wrote to yourself of the 23rd October.

Now, the part of that note I want to ask you about is this, in the context of what we have been through in your evidence so far: At Item 3, Roman numeral 3, you see, "By reference to the report alone, we are unable to come to the conclusion as to which (A3 or A5) is, in fact, ahead." Now, there is some doubt as to exactly what draft report you had in front of you at that time. It might have been a note that was written relying on the draft of the 3rd, or it might have been a note written relying on the draft of the 18th. You are not too sure about that?

A. We are not too sure, but I think, following my discussions with Mr. Healy over the last few days, it's entirely possible I had the draft of the that is the second draft the draft of the 18th in front

of me.

Q. What you were really saying, I'd suggest, and I'd ask you to consider this and give your answer to the Chairman. What you are saying there is, if you are leaving the report alone, you think it's not possible to come up with the appropriate conclusion, but you are not saying, as I understand it, that on the basis there had been quantitative marking and qualitative marking, which you had no reason to doubt, that it wasn't possible to know by relying upon the Table 17 and 18, as they then would have been, who was the winner?

A. As I understand it, you are asking me to say, whether in relying on Table 17 and 18 alone, it would have been possible to present that in such a way that we could see who were the front runners and who was in fact is that right?

Q. Yes, when you look at Table 18 when it's marked, you see one group of marks ahead of the other?

A. Yes.

Q. As I understand it, you accept that does disclose one person being in front?

A. It does indeed, yes. I had hoped for rather more in the report at all times.

Q. Indeed, yes.

A. I made that quite clear.

Q. I can't remember now if you said "interocular", but

you wanted it to be a more punchy report, that you picked up and read it and said "great". You felt it wasn't quite like that?

A. It wasn't quite like that.

Q. But could you see in Table 18 as it then would have been

A. Yes, I could see in Table 18, it's just that I had hoped that the ordinary person reading it from text, or whatever, why.

Q. That's why, I understand it, you are saying to the Tribunal that you don't question who was the winner.

What you question is the way in which the report was presented and the fact that, although you see you can see the final report now, and I'll bring you through that shortly, you just felt that it could have been brought back to you, and it probably could have been a better document in terms of presentation?

A. Oh, yes, yeah.

Q. But if it had been brought back to you, you weren't sitting on any piece of information that you needed to say, "By the way, you have got to put this in because that makes a difference"?

A. No, I had no such information. In fact, the opposite. I had satisfied myself on the evening of the 23rd, that further analysis was not going to affect it.

Q. Fine. Now, if I could ask you now to turn back to number 132 of Book 43. And this is the minute of the

13th meeting of the GSM Project Group.

Now, the Project Group issued these sorts of minutes signed off and dated, and they'd all be sent to you, and you did indeed get this particular document. Your name is on the circulation list and you did get it, isn't that right?

A. Yes.

Q. In relation to that particular document, that purports to disclose a future work plan at the bottom, and it says, in relation to future work plan, "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 a final agreement with AMI in respect of the final text of the report."

Now, you got that all right, you got it on the 12th December, 1995, or thereabouts but you got that?

A. Mmm.

Q. And I don't think you ever took any steps to say that the fact that Mr. Brennan was deputised to come to final agreement was an inappropriate statement as to what was to happen?

A. No, I don't believe I ever took issue with the report, if I ever gave it much attention, seeing as I got it on the 12th December.

Q. Indeed. If there had been something fundamentally wrong about that, I assume you would have felt

inclined to do something about it?

A. Well, in the sense that I did when I saw that, whatever other report it was, on which I had scribbled that there had not been unanimity. Do you remember there was some other report on which so that if in that case I felt there was a need to write and in this case I didn't, I think I can take it the answer to your question is yes.

Q. So that's not a problem to you, that Mr. Brennan was going to be the final word-smithing with AMI?

A. Yes, he was, yeah. Mind you, I do re-state that I had hoped to see the document again.

Q. Indeed. That was this constructive criticism, you wanted to be able to reach into the wound so if somebody said to you "Look, how did the marking work?", you'd know?

A. Yes.

Q. You didn't want to say, "I didn't do it, somebody else did." You wanted to be able to say, "Well, I didn't do it, but they have explained to me how it worked." That's the constructive tension?

A. I wanted to hear what people had to say.

Q. I am going to ask you to come back to some other documents now. Back to Book 42, Divider 95. Do you have that?

A. Yes.

Q. Now, I have already asked you to look at the front

page, and we have seen how Mr. Andersen, as early as September, was indicating how various parts of the quantitative analysis wouldn't work because the way the applicants sort of presented information was interfering with the ability to compare the quantitative issues that arose in some respects. And I want you to turn the page, because at the top of the next page we see it being recorded that the meeting discussed each dimension of the scoring document in turn. "The consensus was that the qualitative (sic) analysis was not sufficient"

A. It's quantitative.

Q. Sorry, "Quantitative analysis was not sufficient on its own, and that it would be returned to after both the presentations and the qualitative assessment.

"It was also agreed that the figures used by the applicants could not be taken at face value and needed to be scrutinised. Responsibility for such scrutiny had not yet been decided.

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

What I want to suggest to you there is, there seems to have been a good discussion at that point in time and a presentation by Andersens of the information relevant to scoring to allow people make their minds up as to what should happen?

A. Yes.

Q. And isn't that something that it's probably fair to say, characterised all the meetings of the Project Group that you were at, that there would be information flowing, as was required, and people would be informed of the information?

A. Yes, I think I said that this morning, that there was a constant flow of paper from Andersens and a discussion of it, yeah.

Q. Now, if I can ask you to turn to Divider 104. Now, 104 is the official minute of the meeting of the Project Group, the 11th meeting on the 14th September. And I think you and Mr. O'Callaghan were there, your names are on the top right-hand corner of that. And I think the first thing we see in the penultimate paragraph on the first page is that Mr. Andersen was talking about what had then occurred, the success of the presentations of the various members of the applicants, and he said, he felt that because AMI were he said, "Mr. Andersen spoke about the success of the presentations generally. He felt that because AMI were well prepared from an early quantitative assessment, they had attained the required information from all the applicants. The presentations had served to highlight considerable variation between the applicants."

I think then there was a review of the current

position, and the third bullet point indicates:

"The presentations had served to consolidate the initial views on the applications arising from the quantitative assessment."

A. Yes.

Q. And then we see how to progress evaluations. And there was to be a finalisation of the qualitative scoring and award of marks on the dimensions. And we see some other things there. And the scoring of the marking of financial and management dimensions were going to take place in Copenhagen later, isn't that right?

A. Yes.

Q. So, so far as anybody was concerned who was on the Project Group, there had been an engagement with the applicants, they had given their oral submissions.

Andersens were reporting to you what they had done and how happy they were that they had the information, and all of you were able to decide how things were to move forward and were happy to move forward in that way?

A. Yeah.

Q. There is just one note I want to ask you about, at Divider 111, and this was a minute not a minute, a memo to Martin Brennan and Fintan Towey of the 21st September, '95, and it's the second page I want to ask you about. And there is a paragraph near the end that excited some comment from Tribunal counsel, and it

starts as follows: "If there is a clear understanding between the Department and AMI of the classification of the two best applications, it is suggested not to score 'other aspects', the risk dimensions and other dimensions."

Now, to understand "Other aspects" we need to come back to the Book 54. And looking at the second Divider, page 20 of 21 pages, we see the four aspects I have already referred you to: The market aspect, the technical aspect, the financial aspect and the management aspect. And then we have something else called the "other aspects", which were risks and effects on the Irish economy.

A. Yes.

Q. As I understand it, that's the other aspects that is being referred to there?

A. Yes, I think that would be fair.

Q. And what I want to suggest to you is this: That the reason that there was consideration of not scoring those if the answer was clear from the four aspects which we referred to, was because Andersens were satisfied that those four aspects were the principal aspects, and they, in fact, didn't relate to the criteria anyway?

A. That's right.

Q. What we know also is that the concept of trying to score this by using the aspects was not something the

Project Group wanted to follow anyway?

A. Yes, that's true.

Q. So this really is nothing to do with how the Project Group eventually decided to reach the analysis of and the decision as to who the winner was?

A. No, it didn't feed into it eventually. It was always something that was there in the background and which we recognised as a result of that paragraph there, even before it was written, that if we should find ourselves in the position where there was a deadlock of some sort, that there then would have to be the application of some sort of tie-breaker, such as the effect on the economy.

Q. Fine. If I could ask you to turn the page in this particular document, I think we learn something else from this, because the authors of this document, over the page on page 3, half-way down under the heading, "The first draft report," tell everybody who is reading this document what's going to happen in relation to what the report is going to look like.

It's going to have an introduction I won't read all of them. It's going to have key characteristics of applications and other material; it's going to have at 3, "A comparative evaluation of applications structured around the four aspects and based on the dimensions."

Now, this is where we see Andersens indicating how

they were going to prepare the report, and they are relying heavily on their aspect concept.

A. Yes.

Q. And I am going to bring you through the reports shortly, but I have to suggest to you, that from the very first time that you got a draft report it had this aspect treatment, which was a treatment, that although interesting, wasn't going to be the way the Project Group wished to find out who the winner was?

A. Yes, it's fair to say that we, although we might have seen that and even digested it, we wouldn't have paid it a lot of attention until we came to see the full effect of what they were talking about in the presentation.

Q. Precisely. Now, although the approach to aspects, I don't want to be critical of it, because I can understand why it's important and why it's good, it's a good way of giving you a textual analysis of who these people are, what they have done, why what they are doing might work, why what they are doing is bad. It didn't present the various dimensions appropriately marked in a way that fitted in with the criteria?

A. That's correct.

Q. And that's your problem. You didn't have any problem with the way they had done it. You just said, this is the wrong route to come from, taking the criteria,

marking the applications and saying who is the winner, so when we decide who the winner is we need to do that bit of it?

A. Yes, the aspect approach puts things rather in a contextual rather than a textual way, and enables you to compare applicants across the board under those headings. It's just simply, as civil servants we naturally had in the back of all of our minds, the request for proposals with paragraph 19.

Q. I suppose you wanted to do what you were asked to do, and that's what you did do?

A. Yeah.

Q. Now, can I ask you to come on to Divider 120 of Book 42. Divider 20 is the official minute of the 12th meeting of the GSM Project Group on the 9th October of 1995. And I just point it out to you there. And over the page we have the verbatim notes written by Margaret O'Keefe of the same meeting, isn't that right?

A. Yes.

Q. Now, I want to ask you about page 3.

A. Of the verbatim notes?

Q. Yeah. And in relation to the issue of weighting at Table 17. Now, Table 17 that's spoken about there, has to be Table 17 of the 3rd October draft?

A. I think so, because it refers also to Table 16.

Q. I just want to look at that. It's in Book 46 at

Divider 34.

Now, one can only assume that the reference to weighting there in Table 17 appears on page 45?

A. So you are asking me to look at what Michael Andersen is saying here in relation to

Q. Well, the note of what somebody says he says, "Table 17 differs from agreed weighting." It's just under "weighting" I think it's John McQuaid who said it?

A. Oh, I beg your pardon. Table 17 yes, I have got that.

Q. It's under "Weighting." It says: "Table 17 different from agreed weighting." But when we look at Table 17, we see effectively the 30, 20, 18, 11, 7, 6, 5, 3, which is the Schedule B details which we have seen, the 27th July. So whatever that remark meant, as far as you are concerned it's wrong because the weightings here are actually right?

A. Yes, they are the correct weightings.

Q. So we can pass from that.

MR. HEALY: I thought Mr. Nesbitt was giving that evidence. I don't think the witness said that yesterday or anything like it.

Q. MR. NESBITT: He is saying it now. Are you happy with that?

A. Yes, those are the correct weightings as I understand them. I think what I may have said yesterday in answer to Mr. Healy, that there was undoubtedly some

confusion between the different documents which emerged from time to time with different weightings in them. But these, to my mind, are the correct weightings.

Q. Yes. They were the weightings agreed.

Now, if I ask you to come down to what is noted under what Michael Andersen said. What the note says is, "16, 17, 18" that must be the tables in the 3rd October draft "...reflect discussions in Copenhagen. If different weighting used, prove you get the same result with different approach."

Now, I won't even try and attempt to know what that means.

"Paragraph 19 was regrouped to reflect that."

Now, I am not sure why anybody is talking about paragraph 19. Perhaps it's Clause 19 of the competition probably is and I think one of the things that was apparent, that when you use aspects, which was Item 17, you didn't get the dimensions being linked to the appropriate criteria, and the concept of regrouping, which we'll see in the report, appears to have been a desire on the part of the Project Team to regroup appropriate dimensions under the criteria that had been directed to be the basis of the decision in the competition document?

A. Yes.

Q. I am going to bring you through the drafts. But it

does seem to me, that when we get to the end of what Mr. Andersen said, and this is a note of somebody else taking a note of what somebody else said about what somebody said, that "If the three tables give different answers, MB said further analysis would be required."

Now, I can assume that when you look at the tables and see what they actually did, if you get rid of the aspects which nobody wanted to use, and if you looked at the tables that did it by looking at the criteria, by using the appropriate weighting with the marks that had been given, there wouldn't be need to revisit anything, because it would have been done the right way?

A. Yes, you'd just have been eliminating the subtotals for the aspects which didn't mean anything, and taking the dimensions, weighting them and coming up with the same as there was on Table 18.

Q. Okay. Now, if I could ask you now to come back to Book 46, which are the draft evaluation reports.

A. Yeah.

Q. If we look at page 1

A. I need the divider.

Q. Sorry. It's Divider 34 of Book 46. If we look at page 1 of that particular document, it starts off by introducing itself and referring to criteria in paragraph 19 of the RFP

A. I just want to be sure I have got the right document here. This is the evaluation of the 3rd October, is it?

Q. 3rd October. I am going to go through the three evaluations with you now.

A. Right. And you want me to go to page what?

Q. Page 1, internal pagination 1, under the heading "Introduction".

A. Okay.

Q. In fact, I might just do one other thing before I get there. If you turn back to the unnumbered page before, which was called "Table of Contents," you see a list there of how the report is going to be presented, and it effectively is going to be broken into five divisions with various subdivisions you can read there. That changes at the end, and I'll come back to that. I just draw your attention to that and I'll come back to how it changes.

If you look at page 1 of the introduction and we drop down to below the quotation about the criteria from the RFP and at paragraph 19, we see the following verbiage, we see: "These criteria have been structured as marketing aspects, technical aspects, management aspects, financial aspects and other aspects."

So there we see Andersens doing exactly what they said they were going to do in the memorandum I referred you

to, where they showed you how the report was going to be structured. And that immediately meant that when you understand how the aspects are connected to the dimensions, that you had a presentation of information about marking that went over the boundaries of the criteria, isn't that right?

A. Yes.

Q. And it also says: "The evaluation comprises both a quantitative and qualitative evaluation, and it was decided prior to the closing date that the qualitative evaluation should be the nucleus of the evaluation."

You don't disagree with any of that?

A. No.

Q. For the reasons we have gone through, self-apparent, agreed and what should have been done.

If I could ask you now to come on to page 10. At this point in time, we see them getting to Division 3 of a draft report, and we know from looking at the table of contents, that's going to be the comparative evaluation of the application. And again, if you look at the Table of Contents, you see that at that point in time, although when they summarise at the end in relation to regrouping of the criteria at 5.3, the bulk of the report is going to be dependent upon their presentation of the aspects linked to dimensions?

A. Yes.

Q. And then they go through that and they bring you

through marketing aspects and various other things.

Now, in relation to the marketing aspects, we see, on page 10, the concept of marketing, and we see market development, coverage, tariffs, international roaming plan, and we see them marked. And I have to apologise to Mr. Coughlan, because I made a mistake with one witness because I understood that those phrases didn't actually follow the appropriate criteria and dimensions, and that's my fault, I am sorry about that.

But we see now that when you have aspects, you have dimensions that are capable of being understood and related back to the main document?

A. Mmm.

Q. And you see them being marked out there. And if we just look at A1, I am going to do no more than that, because it was something that was mentioned yesterday and the day before. If you look at A1, they received for market development C, in numerical terms 3; for coverage B, numerical terms 4; in relation to tariffs C, numerical terms 3; in relation to international roaming plan, A; numerical 5. If you add those up you get 15. And for reasons that no doubt will be explained, when we see the recalculation of weights, the Tribunal get a different figure to that.

But I am not going to ask you about that because you didn't do the marking.

Now, if I could bring you on when you look at the marketing aspects, you see an analysis of those. We can go through the document and we'll see the second aspect comes up on page 23, technical aspects. You can go through that. Page 31, management aspects comes up: 3.3. And finally, we get to well 34, you see financial aspects, 3.4, is the final one. So you have seen the four substantial aspects they wished to discuss. And then you get into part of the report described as "Sensitivities, risks and credibility factors" at page 40. And in this particular report at page 44, we have the Table 16, "Summary of marks awarded," but that's presented using the aspect matrix which nobody wanted to use in the Project Team, isn't that right?

A. Yes.

Q. For the purposes

A. To the best of my memory, none of us were happy with it.

Q. Because that didn't allocate marks that you knew had been given to dimensions of the particular criteria?

A. Correct.

Q. And if we just stop there. As we could see in the Andersen model of June that we have looked at in Book 54, we now see at Table 16 the statement of aspects, and we see that in fact they mark for aspects, as they said they would, marketing aspects is first, technical

aspects is second, financial aspects is third, and management aspects is fourth. And you now can see how the dimensions that hang below the aspects are, as always, exactly the same as they had intended to be as early as June. And we then turn over to Item 17, Table 17, and we see a series of dimensions, and Table 18, we see a conversion of marks to points.

Now, if I could just ask you about these two tables.

One of the problems about these two tables is that they don't actually present the criteria as eight criteria. The first three lines should have been one criteria?

A. Yes.

Q. The next two lines should have been the second criteria?

A. Yes.

Q. And then tariffs, licence payments, coverage, roaming, performance guarantees, frequency efficiency were the final criteria?

A. Yes.

Q. Making up eight?

A. That's right.

Q. And the same issue arises in relation to Table 18.

But nobody in the Project Group would have been confused by that at all, would they?

A. No, that would have been easier for us to assimilate.

Q. When you add the weights up and you know that's the

way the criteria divide, again you have got the very weightings that have been identified in the document of the 27th July.

Now, I want to bring you on to the next report. That is a report of the 18th, which appears at Divider 46.

And if I could ask you just to look at the Table of Contents. There has been a change in the presentation of the report at that stage, and we now have a sixth element there were five before we now have a sixth. And I think the additional thing that has occurred at that particular time is the outline of the conduct of the competition process is now gone in, okay?

A. Mm-hmm.

Q. Which is 2 and everything drops down to 6. And we still have what was 3 has now become 4, the comparative evaluation of the applications, but it's still grouped under aspect presentation, isn't that right?

A. That's right.

Q. At that point in time nobody wanted that, did they?

A. Well, it might be a bit strong to say nobody wanted it. We understood what Andersens were at, but we would have been far happier

Q. Sorry, you are right to restrain my excitement on that one. What people wanted to do was to present it as required by the competition; in other words, fulfil

the competition model and have an answer?

A. Yes.

Q. Good. And I think if we go through these, there is

little I need to draw your attention to here. It

broadly follows the same scope and the financial

aspects and other aspects, just the numbers change

because of the change in what was occurring.

But in this particular report, Table 16, which is on

page 48, and it remains the same, so it's not the one

I want. Sorry, Table 17, if you can just compare

Table 17, which is on page 49, and it's on page 45 of

the 3rd October report, it's been changed, and they

have cured the problem I have identified to you. When

we were looking at Table 17 on the 3rd October report,

market development, financial key figures, and

experience of the applicant's, hasn't been grouped

under its appropriate criteria, and by this stage,

because the Project Group, I suggest, and ask you to

confirm this, because the Project Group said "No, this

is a criteria-driven competition", and you see the

appropriate criteria heading being put in place, so

somebody, not having the extent of understanding that

you people would have had, can read this and

understand how the criteria feed into these particular

marking, isn't that right?

A. Yes. Arguably the tariffs, licence payment, coverage,

etc., should also be in bold, as market development

and technical viability are, but that's a presentational point.

Q. Indeed, that's the pursuit of excellence.

Now, if we just look at paragraph 6.3, and it states:

"The results based on a regrouping of criteria" I pointed out the word "regrouping" way back in the June presentation in some other document, I think. And what's happening there is that you are taking the dimensions which people were happy with, having had them marked using the indicators, and you are hanging them under the criteria, and you say, I can then weight them because once you have the criteria in place with the thing hanging under it, the dimension hanging under it, you can use the weighting multiple, and you end up with an appropriate way of scoring these particular figures?

A. Yes, a descending order of priority as outlined in 19.

Q. Now, you had to do your job, and I don't think there is anybody in the Project Team, but I'd ask you to confirm this, to the best of your knowledge to the Tribunal, who had a difficulty with the way in which you chose to work out what the grand total was in lettered terms?

A. I am not sure I could say that.

Q. Well, talking about yourself then?

A. I certainly didn't like the letters with arrows beside them, although I understood why they were there.

Q. I am not suggesting there is not another way you might have done it, but it was done that way.

A. It was done that way.

Q. You might not have liked it, but it worked?

A. It worked, yeah.

Q. If we turn over the page and we get to it being done numerically, it's a happier visual presentation of what you are trying to explain?

A. Yes.

Q. I think you must have been much happier with that?

A. I would have been happier with that sort of approach.

Q. It allows the layman to read it and say "That's a bigger number than the other number." That's normally, when you are trying to get points, that's usually good as opposed to being bad?

A. You can obviously multiply weights by numbers.

Q. And it's easier to multiply. In relation to 6.3, I just want to bring you through some of the verbiage attaching to Table 17. It says: "In order to investigate whether the conclusions of the evaluators are consolidated on the basis of paragraph 19 of the RFP document, evaluators have carried out a separate conformance testing. The basis for the conformance test is the agreed interpretation prior to the closing date, where 7 incidents of 19 were operationalised into 11 dimensions."

A. Yes, 7 indents.

Q. Subject to Danish English, it's reasonably apparent.

And they then come over the page, and you see the conclusion that's been drawn there, the ranking is:

1: A5, 2: A3, 3: A1. You didn't disagree with that?

A. No.

Q. The worst, from your point of view, was you hadn't been allowed to put your hand into the wound to understand how some of the sub-group marking might have been done. You weren't saying it wasn't done properly, you didn't know because you hadn't been there?

A. That's correct.

Q. If we then come on now to table 18, 6.4. "The results based on a conversion of marks to points." And again, the way in which this was being done was explained in simple detail. There couldn't have been a person on the Project Group or anybody who was reading this who could not understand that you had simply turned an A into 5 and a B into 4, etc., and you had then done the weighting and you then came up with the answer?

A. Yeah.

Q. Right. Can I ask you now to turn to the final evaluation, which is in Divider 50 of Book 46. This is the 25th. Now, I accept you didn't see this, and I want to ask you a number of questions. I've asked them already, but I'll repeat them.

You accept, as I understand your earlier answers to

me, that the necessity that was driving the Project Team was to determine the ranking of the applications, and you had to do that determination in accordance with the priorities of the criteria in paragraph 19?

A. Yes.

Q. And you had to do the same for everybody, because it was going to be done equitably?

A. Yes.

Q. Now, when you were discussing how things would be done, and putting to one side your desire to reach into the wound to learn a little bit more about how things had been done that you hadn't been privy to because you hadn't been able to join any of the sub-groups; as I understand your evidence so far, you had no reason to believe that the people who had taken responsibility for bits of the process, your colleagues on the Evaluation Team, had done other than the right thing, the appropriate thing? You had no information to hand to suggest that you could tell them they had it wrong?

A. Yes, that's right, I had no such information.

Q. And you have explained that you were fully happy with their capabilities, their probity, their honesty and their application to that task they would have been given?

A. Yes indeed, all of that.

Q. And as I understand it, again you agree that the

report that you wanted to have delivered was one that was going to nominate and rank the three best applicants by reference to evaluation criteria?

A. Yes.

Q. And at that point in time, subject to reaching into the wound, am I right in thinking that you would have understood that the marks that were available to be used to understand how everybody had performed, had been extracted from the dimensions, which in turn had fed off the indicators?

A. Yes.

Q. So that had been done

A. Yes.

Q. by the time you had attended the last meeting?

A. Yes, that information had been extracted, yeah.

Q. And that the dimensions that were going to be used to mark, had been hung under the appropriate criteria, and that had been done

A. Yes.

Q. by the time you attended the last meeting. And that the overall scores that were being looked at, and available when you were attending the last meeting, was on the basis of the marks obtained for the dimensions, and the appropriate weighting being given to those dimensions hung under criteria to conform with the competition?

A. Yes.

Q. And that the validation of the scoring done in A, B, C terms in what was initially in Table 17, but in this document becomes Table 16, because you dropped out 16, that that had been done by converting those letters into figures in a manner explained to everybody by Martin Brennan. Now, I think you say in one of your notes, "dreamt up" by Martin Brennan, and I think that's

A. It sounds more pejorative than it was intended to be, because it's certainly clear to me that in some cases during a qualitative assessment they would have had to apply weights. In some cases, none at all, I think as they may have said

Q. I mean "dreamt up" is a slightly emotive term, but you weren't taking away from the fact that Martin Brennan was one of your colleagues you described in particular terms as being competent, and he had had to see how he could do this, and he suggested this and everybody said "yes, that's fine"?

A. That's right.

Q. So, in relation to the decision-making process, it was a decision of all to buy into what was self-apparent from the terms of the draft evaluation reports, and it's what Martin Brennan said he did anyway?

A. Yes, that's fair enough.

Q. And I think if you turn to page 47 of the evaluation report of the 25th, which was the one you didn't get,

you have just described in answer to me the final evaluation as described in that document. So, although you didn't get to sign off on this, and you have said this to other people, I am going to ask you, probably again other people have asked you, that this does represent, as far as you are concerned, the appropriate answer to who won?

A. It does give the appropriate answer, it does indeed.

I think as I already said to Mr. Healy, I should have loved to have more time to see maybe an elaboration of the methodology, the qualitative assessment, such that we could exhaust all the possibilities for placing further distance between the rankings, but I was certainly satisfied as to the ranking.

Q. You had a winner?

A. Yeah.

Q. You were asked to get a winner. You have a winner.

And you did it through a process that you, as far as you are concerned, are satisfied, followed the model handed to you when you were told to go and mark and rank the competition?

A. Yes.

Q. Now, there has been a very substantial amount of looking at notes written by people, looking at bits of information that suggest figures, maybe different figures, worrying over the fact that somebody managed to have what should have been a tote of 100 coming up

103, getting concerned that when you look at weightings there are other documents which suggested that weightings were different. I have to suggest to you that none of those pieces of information that have been looked at, speculated about, take away at all from the process you were involved in and have described with me going through what you did, how it was ranked, how you applied the markings, or how you let the markings be applied. Would you agree with that?

A. Yes, I do agree. They don't affect the result. They are the sort of thing that would have disappeared had I had another week and carte blanche to deal with this report.

Q. But even though you didn't get the chance to do what would have been intellectually rewarding, to get it written to a quality you believe it should have been written?

A. Yes.

Q. Whatever happened, you are still left with the factual position, so far as you were concerned, that's all you can talk to the Chairman about, that this was done the way you understood it to be done, and it was done the way that you understand to comply with your obligations to apply

A. Yes, it does conform with paragraph 19 in the RFP.

Q. And in relation to the final evaluation, which is the

Table 17 the two final ones are 16 and 17, they have changed from 17 and 18, as far as you were concerned, that was the way the marks should have been presented to allow somebody understand why you say one person won over another?

A. Yes, Table 17 is the one.

Q. Table 17.

Now, there are some other changes, I am not going to weary the Tribunal now, because it is self-apparent from the face of the document. But if we turn back to the front page of the draft of the 25th October, and we see the Table of Contents, again it's an unnumbered page.

A. I have it.

Q. The manner in which the thing had been presented now had changed, because you had an introduction, an outline of the conduct of the competition, the key characteristics of the application, the comparative evaluation of the applications, the sensitivities, risks and credibility factors, which was one of the conformance tests that was carried out, and then the final evaluation. And now you have reduced the final evaluation to a final scoring, according to an evaluation criteria. You have taken out doing it on the aspect matrix, because nobody wanted that to be the defining answer

A. Once again let me just say, Mr. Nesbitt, that it's a

question that really must be put to everybody else on the team, as to whether they ever wanted that stuff or not, but my feeling is they didn't.

Q. I don't ask you to answer for anybody else. You end up with the final evaluation, which is presented in a new way saying, "Final scoring in accordance to evaluation criteria.

"6.2. The result based on a conversion of marks to points." You wanted that to happen.

A. Yeah.

Q. And finally, "an assessment of results against the business case sensitivities, risk and credibility."

And you were anxious for that to happen, and it did?

A. Yes.

Q. Although you hadn't been party to the final word-smithing of this particular document, and you could see ways it might be better, I'd like to suggest to you that for all important purposes, and for the purposes of this Tribunal, it represents the application of the competition process to the applicants who applied for the licence, leading to a winner based on a methodology you believed was appropriate?

A. Yes. I'd give it a nihil obstat, it's not quite a you know, I'd pass it, yes.

Q. I mean, it's important. I don't want you to be giving a qualified yes to say no, somebody else should have

won." You don't say that.

A. The winner is clear, yes.

Q. Now, I want to come on to something different now. I

want to come on to the question of ownership.

There is an issue that arises in the Tribunal, you have been asked a bit about it, and it's the people who were behind the applicant, if I can put it that way.

A. Yes.

Q. And I want to describe it as the 40:40:20 argument.

Now, again, in relation to the competition process, Clause 3 of the competition, and I'll bring you back to that, that's in Book 41, Divider 46.

A. Did you say Divider 46?

Q. Book 41, Divider 46, yes. Now, I just want to ask you

some questions about the competition process, because as I understand it, this was a process that was based on an application by an applicant, and we see at Clause 3 that, "Applicants must give full ownership details for proposed licensee, and would be expected to deal with the matters referred to in the following paragraphs in share submissions." So the thing we knew about this competition was a person called an "applicant" was going to give information. Is that your understanding of what was going to happen?

A. Yes.

Q. And the next thing we see is Clause 9. And we see

"Applicants" again this is the person making the application. "Applicants must demonstrate their financial capacity and technical expertise".

Now, can I take it from those words, that what you would understand from that would be that the person who is giving information here and is being required to demonstrate something, is the applicant?

A. Yes.

Q. "And the capability to implement the system, if successful." So, I again suggest to you that when you are looking at that particular clause, it's relating back to the applicant who is applying?

A. Yes.

Q. And, "Must include a business plan." I suggest that business plan is the applicant's business plan?

A. Yeah.

Q. And, "For at least five years and a complete technical proposal." And I suggest to you that what you are actually seeing there is an applicant coming with a proposal to say, "Here is what I am, applicant 1 limited. Here is what I am going to do and here is what I am telling you about, my plan, and I want you to look at my plan and tell me it's the good plan, the best plan and the plan that should win." That's what you were being asked to do?

A. Yes.

Q. And if you link that back to Clause 3, and you are

finding that the applicant again is the person who is giving information about themselves, who owns them, and that the ability of the applicant to give additional information, I am not going to bring you throughout the terms, but effectively was limited to one of two ways: Questions asked by the Project Team, or the presentation, oral presentation at which they were going to get a chance to say a bit more, isn't that right?

A. Yes, that's right.

Q. So, although the application was going to come in in writing and be number-crunched and lead to a quantitative evaluation, and although the Project Team had realised there was then going to be a qualitative evaluation as well, there were some ways in which additional information could come into your hands, the most notable being the oral presentation of each of the applicants?

A. There were basically only three ways: The written presentation, the oral presentation, and the questions and answers that might result from that.

Q. Now, I unfortunately don't have this document here, so you are going to have to trust and hopefully you'll be able to recollect what I'll read out.

In relation to the Esat Digifone application, when they were dealing with the question of the ownership of the applicant as provided for in paragraph 3, they

said two things effectively: They said, "Esat Digifone is an Irish incorporated company. Currently 50% of the shares are held by Communicorp and the other 50% by Telenor. On award of the licence, 20% of the equity in the company, 10% each from Communicorp and Telenor, will be made available to third-party investors."

I want to stop there. I have to suggest to you that that statement is a simple statement and really not demanding of any interpretation, save to realise, here are two people coming in and they are going to have 20% of investment when we reach the grant of the licence. Are you happy with that? I may have a copy no, I have got the wrong document. I'll read it to you again. What they said is, "Esat Digifone is an Irish incorporated company. Currently 50% of the shares are held by Communicorp and the other 50% by Telenor. On award of the licence, 20% of the equity in the company, 10% each from Communicorp and Telenor, will be made available to third-party investors."

And what I am asking you to agree with, if you think it's appropriate to agree with, and say it to the Tribunal, is that what we saw there was two principals, and when you came to grant the license, there was going to be a 20% investor?

A. Yes, that's correct.

Q. So the ownership arrangement of this particular

consortium was going to be, at the date of the licence

being given, 40:40:20?

A. Yes.

Q. The 20 was going to be investors?

A. Yes.

Q. And in relation to paragraph 8.4, this is again more

information about their application. What was said is

this: "The Shareholders' Agreement states that

Communicorp and Telenor will each individually hold

50% of the equity of Esat Digifone. In the period

leading up to the award of the licence, 20% of the

equity, 10% each from partners, will be formally

placed by Davy Stockbrokers, Ireland's largest

stockbroker."

So again you were being told, there is going to be 20%

somewhere else when you give them the licence?

A. Yes.

Q. And what you are being told there is Davys were going

to place it?

A. Yes.

Q. Presumably on the market or wherever. All I want to

put to you is this: That in those circumstances, the

application being made here was presented as an

application that would, at the date of licence, be 40%

in one hand, 40% in another hand, and 20% to be

allocated?

A. Yes, on the award of the licence, the process of

awarding the 20% would begin.

Q. And I think the second thing you knew about all that was that the way the competition operated, you had the competition, and you achieved a winner. The winner didn't get a licence, it got the right to exclusive negotiation to end up with the licence?

A. Yes.

Q. And I think as somebody who had a deep experience of regulation, and how the market worked, and whatever troubles you had had in the past in dealing with people trying to break the exclusive monopoly of Telecom, you understood that when you were negotiating the licence you'd be putting in conditions and terms to protect the position of the person giving the licence, but at the same time trying to respect what is a reasonable business position for the licence holder to hold.

So there was going to be a bit of give and take. Both sides wanted to achieve something that would be useful. And the thing you knew was, that when you said "You have won to get exclusive negotiating rights", you knew what they had said there, that prior to the licence being granted that was the only time line they gave, there was going to be 20% AN Other coming in, or maybe a group of people or whatever, that were going to be investors?

A. Yes.

Q. So, am I right in thinking that at that point in time you would have realised that, "Although I am going to choose a winner, if I want to be certain of controlling the makeup of the owners of the applicant who gets the licence, I am going to have to put terms and conditions into the licence agreement to protect myself"?

A. Yes.

Q. And as I understand it, you saw no difficulty in that, and before you left the involvement in negotiating a licence, you would have understood that the conditions in the licence would include appropriate conditions to protect the giver of the licence from the applicant changing in a way that was making it different to the one that got the licence?

A. Yes, I was certainly well aware of the need for that sort of thing, yeah.

Q. So although you had been told of changes, it wasn't 20% given away by Davys Stockbrokers to particular people. It wasn't somebody called Advent. In fact, the Department were told that IIU/Dermot Desmond was coming in.

Can I suggest to you that from your understanding of the makeup of the applicant, 40:40:20, the fact there were changes really don't make any difference to the applicant, although they may require you to ensure that in your licence agreement you had appropriate

conditions to keep control of who owned it?

A. Yes, that's a fair statement, subject again, I think, to what Mr. Healy said this morning, that the owner, the ultimate owner of the 20% would be someone who could be properly classed within that distinction, institutional investor, and who wouldn't be

Q. Well, let me just deal with that. We'll clarify it in sort of the name lest anybody get anxious. But somebody who wouldn't be viewed in public policy terms as an inappropriate person to be involved?

A. Yes, that's a good way of putting it.

Q. I think you are safe to say Saddam Hussein at the moment, but that sort of position, and that's really what you'd be saying, you'd be saying as long as there was this over-arching public policy protection, that you wouldn't have somebody who was just totally inappropriate?

A. Yes.

Q. As long as you got 40:40:20, and appropriate protections in your licence agreement, you would see no difficulty in the licence being granted?

A. I wouldn't have seen a difficulty, no.

CHAIRMAN: Are you saying nonetheless, Mr. Nesbitt, as counsel for the State, that it was a wholly satisfactory situation that somebody had entered into a further ownership potential agreement and that this was not disclosed at the presentations or in the

applications?

MR. NESBITT: I want to be very careful what I say, Mr. Chairman, because I don't think it's necessarily appropriate for me to comment at all. At the moment this Tribunal is investigating into the award of the licence to a particular person. The Tribunal's interest is because it's looking at the possibility of other things happening. I am just looking at the process at the moment with this witness and asking this witness to agree with me that in relation to process terms, that's the thing I want to have before this Tribunal, in process terms, that was not a difficulty. If you wish me to comment on behalf of the State, I'd like to take instructions on

CHAIRMAN: No, I'll give you an opportunity to reflect on that. If, perhaps, the one matter that I might take up with you, Mr. Nesbitt, very briefly, without pressing you to a final view, and this relates to the substantive portion of your examination on the actual process.

Am I understanding you correctly or am I unfairly truncating what you have put to Mr. McMahon, in saying that it does appear that two of the more important ground rules that the Andersens, as the European consultants, sought to visit upon the Project Team, were first of all, the division and combination of a qualitative and subsequent to a quantitative

examination, and secondly, the revamping or redividing of the initial RFP criteria into aspects and dimensions? And is it, as I understand it, what you are putting to Mr. McMahon, because of events and circumstances, these two proposed ground rules had to either wholly or substantially be abandoned, and the Project Team had to proceed as best it could in the absence of those?

MR. NESBITT: No, I am not making that submission at all, Mr. Chairman. What I am saying is this: That in relation to the analysing and marking and finding of a winner, it was clear that that process had to include a quantitative and qualitative analysis. Had to include it. The competition document is silent on how they achieve the marking, and I thought I had brought the witness through that.

If you look at Clause 19, Mr. Chairman, we see that the Minister was directing the comparing of applications on an equitable basis, and there was to be an evaluation criteria that were listed. Both of those things got done, and the only issue is because they were marking for the purpose of finding a winner, they had to do quantitative and they had to do qualitative. So I don't see Andersens visited that on anybody. I say it was inherent in the process from day one, and the Project Team were quite appropriate, quite correct and doing their job to look at the

things that way.

CHAIRMAN: Very good.

MR. NESBITT: The second thing I said, the second question you asked, Mr. Chairman, was

CHAIRMAN: Well, as regards the reclassification of

MR. NESBITT: Again, I am concerned I haven't got my

point across in relation to that either. In relation

to that, I don't see there is any reclassification

that changed the process. What I am saying is this:

That in the presentation of the final report,

Andersens had suggested it was an appropriate

presentation to look at aspects. I understand the

witness to agree, yes, that's a helpful way of looking

at it, but when you came to present how you marked the

process, you had to be true to using the weighted

criteria that were directed to be the basis of the

equitable comparison that was directed in the

competition policy, and that's exactly what happened.

Because if one goes back and reads through the

reports, any one of the reports, Report 1, Report 2 or

Report 3, which is the final one, you see that when we

talk about aspects, it's just a method of grouping

together information to present it in a document. It

doesn't have any value to it in itself. It just

simply is a way of presenting information about the

applicants. And no doubt it's an easy headline, four

headlines about the appropriate aspects is an easy way

of understanding what the information is telling you, but it's not the way the marking had to be done, and that's all the Project Team said to Andersens, "We'll leave in your aspects description because it's fine, but when you get to the end and we have to say who has won, we must be true to the competition." And that's why you see them taking out the marking on the basis of aspects and leaving in what the competition required, which was marking on its basis of criteria, and that's why we fundamentally disagree with the concerns the Tribunal have or their team have in relation to any problem about this process. We say this process was a good process and a process that delivered the result as required by the competition, and I understand this witness to accept that.

CHAIRMAN: Very good. Mr. Healy?

THE WITNESS WAS EXAMINED FURTHER AS FOLLOWS BY

MR. HEALY:

Q. MR. HEALY: I think you were referred a moment ago, Mr. McMahon, to a document containing the minutes, the formal minutes of the Project Group meeting of the 23rd October, 1995, which I think didn't come until December?

A. Yeah.

Q. And because you made no notes on it, you were asked or invited to agree that that meant that you had no problem with what was contained in it?

A. Yeah. If you can refer me to it, Mr. Healy.

Q. It's there on the overhead projector, the document you referred to. Go to the bottom of it for the moment, it shows the date. It came to you on the 12th of December. Do you see that?

A. Yeah. It's a very short document.

Q. It is a very short document, from a very long meeting. Now, what I have here in front of me is the copy that you actually got, and it does have a note?

A. Oh, I see.

Q. It has a circle which I'll hand to you, because it's the only copy I have got around the date the 12th December, 1995.

A. Yes.

Q. Do you see that?

A. Yes.

Q. I'd invite you to agree with me that that is an exclamation-mark in a big way. What's the use in giving you the minutes of a meeting that took place on the 23rd October, on the 12th December?

A. You might well be right, Mr. Healy, but I can't swear to it.

Q. And wouldn't I be right, to think that what you were invited to agree to a moment ago was pure speculation because you did make a comment on it, insofar as you circled the date, I think? I would suggest that you circled the date to indicate some dissatisfaction with

the fact that you are getting a minute now of a meeting that took place months beforehand?

A. Yes, it's quite possible that I did that, yeah.

Q. A minute, by the way, which bore absolutely no relation to your note?

A. Well, to my note of the meeting of that day, yes, fair enough.

Q. Now, I think Mr. Nesbitt was saying to you that, and was describing what he called the constructive tension between various civil servants involved in a process such as this.

MR. FITZSIMONS: Chairman, I wonder could Mr. Healy ask the witness why he circled that? That's the first question that should have been put to the witness as an inquiry, instead of a definite proposition being put to the witness. This is an inquiry.

CHAIRMAN: As an inquiry

MR. FITZSIMONS: He should ask the witness why, and let the witness think and ponder over why he put this mark on this document, instead of putting a stated proposition in a leading form to the witness. I am sorry, Mr. Chairman, I shouldn't intervene in this way, but this now is a mortal sin in terms of cross-examination.

CHAIRMAN: Well, Mr. Fitzsimons, unfortunately, and I am not in any way criticising Mr. Nesbitt, the fact that his witness over the past hour or so, in fact had

a considerable minority of the viva voce exchanges, it does mean that Phipson, to a large extent, does cease to exist very forcefully in a Tribunal format, and it may be one of the things that may have to be looked at in the future.

I understood Mr. McMahon to indicate that that could be the case, but Mr. McMahon, if you'd like to think about that a little bit more or give a more reflective answer, or if you don't agree with what Mr. Healy suggested, please by all means feel free to say so?

A. No, I think what I said to Mr. Healy is, he could well be right there. If somebody asked me to say what is the probability, that that is what it represents?

Yes, I guess I did circle it, it's more likely than not that I did circle it because it had arrived on my desk on the 12th of the 12th.

Q. MR. HEALY: And I suppose, would there have been any point in commenting then?

A. No.

Q. Now, I was asking you about, what I think Mr. Nesbitt called the type of constructive tension that can exist between civil servants involved in a process such as this. A perfectly appropriate, and indeed perhaps, the correct way to describe a process such as this?

A. Yes.

Q. And it's obviously something to be fostered, isn't that right?

A. Indeed, yeah.

Q. It's something one would encourage?

A. It's certainly something to encourage, yes.

Q. Didn't we touch on it yesterday when I was pointing out you came to the project in one sense without having been involved in some of the nitty-gritty in the sub-groups, and therefore you had an advantage?

A. Indeed.

Q. You left the meeting of the 23rd with the impression that a further document was going to be produced which you were going to then audit yourself, is that right?

A. Which we were all going to see and sit around the table and look at.

Q. Yes. And on the face of it there was no need to exclude your further constructive involvement, isn't that right?

A. No, I don't think anyone was excluding me, but all I can say is that I was looking forward to that occasion.

Q. Yes. And from an administrative point of view, I think you agreed would me that it would be anathema for any civil servant to let a Minister go out into the wider political world without, in this particular case, in the circumstances of this case, an actual document representing the report?

A. I can't deny that. I think I used that term myself.

Q. But what sort of pressures then, or what events caused

all of those things to be put aside?

A. I can only speculate, Mr. Healy. I have only the remarks of Mr. Brennan to the meeting on those two, or was it three occasions? I can't remember, what he said when he said that the Minister wanted the result.

Q. Now, I don't want to get involved in

A. I think, as I said to you yesterday, Ministers are in the habit of asking that things be done yesterday, if possible, and

Q. But I think we did agree

A. Whether they are sealed processes or not.

Q. Whether they are sealed processes or not?

A. Yeah.

Q. But I think we did agree, and I think the Minister did himself on numerous occasions, emphasised the nature of this process as a sealed process?

A. Oh indeed, yes, yeah.

Q. I don't want to get involved in every aspect of every matter that was put to you by Mr. Nesbitt a moment ago, and I certainly don't want to get involved in a series of hostile exchanges. But if I could just take some of the main points, without in any way suggesting that I agreed to any of the propositions put to you naturally flowed from the report or from the process, but could I put some of the main points to you.

I think you heard what the Chairman said a moment ago to Mr. Nesbitt, about what the State seemed to be

suggesting in relation to how the process was conducted. I think in the course of your evidence, you indicated that no one had any difficulty with Table 17. Table 17, we can get it on the overhead projector

A. It depends on which report I suppose we are talking about.

Q. Whichever is the correct one, which is the second-last table. We can go to the final report, and it will be the second-last table. You'll see it on the overhead projector you'll probably be familiar enough with it now, rather than you having to turn it up.

A. Okay.

Q. Now, that table is one that you said no one had any difficulty with. By that

MR. NESBITT: He corrected himself and said he would only talk for himself. And if some other witness is going to have a difficulty with it, let's deal with it with that witness.

Q. MR. HEALY: Yes. You said that you were asked whether anyone had any difficulty with it and you said you had no difficulty with it, is that right, speaking for yourself?

A. Speaking for myself, I think I was never comfortable. I would want it pointed out to me exactly what I said.

Q. I understood you to say that speaking for yourself you had no difficulty with it, but I am happy to be

corrected by you?

A. I am happy to be corrected, insofar as I speak for others, but I think that, I think I said not so long ago, that I never liked the notion of Bs with arrows and Cs with arrows beside them. However, I can I have no further difficulty with that sort of table.

Q. I just want to clarify one thing in the light of the evidence you have given yesterday. And just so you'll understand what I am saying, maybe if I just make a few remarks.

I think a lot of what Mr. Nesbitt put to you about the way the process evolved, or at least the impression I had of it, was that the process didn't evolve the process evolved, or the process required from the civil servants' point of view, sticking to the evaluation criteria, but that Mr. Andersen had other ideas. Is that a fair way of putting it?

A. Let me see if I can put it a better way, which is after all what we are here to do.

Andersens came to this, obviously, with a particular mindset, and from their experience, had been used to putting these things into a particular framework, in some might say, imposing a framework upon it.

Q. And they'd grind out a result that way?

A. Exactly. Now, I have a feeling, correct me if I am wrong here, their request for proposals had already issued by the time they had signed up, is that right?

Q. You are absolutely correct.

A. Right, so they found a situation where they didn't, they would have preferred to be on board earlier, I think.

Q. I think I was discussing this with Mr. Brennan, I think I put that to him, that to some extent, I may have not put it in these terms, they had to reverse the process into their pre-designed matrix or

A. They certainly had to adapt, I think, to what they found. But nonetheless, I think they reverted to type in selecting, and I am not saying there is anything wrong with it, it's a perfectly obvious way of doing things that most people I think asked to think about the way in which you would assess telecoms companies tendering for this kind of job would have said to themselves, yes, of course there is the marketing ability, there is their technical ability and there is their financial ability and one or two others I suppose. So those are perfectly natural things for them to do. I think, again, I said to Mr. Nesbitt, as the thing evolved, it didn't cause us a lot of trouble, we were getting quite a lot of paper from Andersens, including their proposals. We didn't object to it at that stage. I think it was only when the report came to be written, and the obvious difficulty presented itself, for us civil servants in continually trying to cast this back into the

framework imposed by paragraph 19, that we said, well, look, these aspects aren't really going anywhere anyway. The fundamental building blocks are the dimensions. And they are all there, so why not put them into table whatever it was 18?

Q. But do I understand you to be saying with reference to Table 17, or 16 and 17 on the model, 17 simply has the numbers, 16 has the letters that you see in front of you?

A. Yeah.

Q. Do I understand you to be saying that in fact your understanding of the entire process is that it was always the case that the marking was to be in numbers? That was always the case, throughout the entire process?

A. No, that wouldn't be fair to say, because we had the evaluation models.

Q. I just want to understand that now. You are not saying that the translation from letters to numbers was something was a simple recharacterization of a scoring system that you could have had in the process from the very beginning, in other words, that you could have had numbered it from the very beginning and it would have made no difference?

A. That's my own view. I don't know if that was the view of everybody else.

Q. That's my problem. If you look at Table 16, now, I

understood you to say to me, or I understood yesterday, that you had some difficulty, as I certainly have, in seeing how Table 16 tots up?

A. I have some difficulty in seeing, in readily seeing how it tots up.

Q. Could I suggest you don't see it now and you never saw

A. It, no, I think that would be wrong. Because you have got to expend more intellectual effort at seeing that Bs and Cs and Ds add up and then multiplying, or multiplying them first and then seeing how they add them than you do with simple numbers.

Q. How do you multiply them unless you convert them to numbers?

A. Fair enough, but you can use algebraic formulae.

Q. Well, how do you compare the Bs to the Cs then?

A. Well you could ignore the number values of them, or one way to do it would be let A equal 5, let whatever it was, B equal 4, etc., etc. and then proceed as if you were dealing with an algebraic problem.

Q. I don't want to stay here forever doing this

A. I am trying to answer your question.

Q. I am not criticising you at all. What I am going to suggest if there is a system or if there is an answer to this question because we could be exchange views about the maths here for quite sometime, but if there is a mathematical demonstration to explain how this

result is achieved, then perhaps it could be produced, because neither the report indicates it nor any of the documentation?

A. That's right, they don't.

Q. Now, we have been critical, certainly I have been critical at times of Mr. Andersen, but in fairness to Mr. Andersen, I think what should be said is that if you look at Mr. Andersen's evaluation model, and if you look at the quantitative report and the way it was produced and the ranking it produced, with all its imperfections and so forth, as I understood it, what Mr. Andersen then envisaged was that the soft focus qualitative report, which ranged over a much wider range of indicators, would enable you or arm you to go back to the quantitative report and then you could tinker around with that ranking as you pleased?

A. I think that was the initial proposal, yes.

Q. Now, that was never done, as far as I can see, but instead it seems we got a kind of mongrel, isn't that right?

A. You could characterise it that way, yes.

Q. Now

A. It would be a bit unfair though, I think.

Q. Maybe. I want to come to one other matter. I think Mr. Nesbitt mentioned in evidence to you that a number of points in the course of the evidence he mentioned the question of weightings, and I think you

said that the term "dreamt up", or it was suggested that it sounds pejorative but it's not. I suggest it's a factual term?

A. You suggest?

Q. It was a factual term. You were using it factually not pejoratively?

A. Factually, yes. They did have to face a situation at the time.

Q. Yes, of course.

A. But I don't mean dreamt up in the sense that they picked them randomly from the first number that entered their head.

Q. Yes. But there were lots of questions about what are the weightings?

A. Mm-hmm.

Q. But there were no answers, and you were left with the impression, yes, weightings were applied, we don't know what they are. Now people figured them out on the spot or so on, but to get back to my question to you yesterday: if what you are saying is correct, that they were picked, not out of the sky, but nevertheless arrived at somewhat arbitrarily by people involved in the process, there is no record of them?

A. Yes, that does seem to be, yeah, an omission, yeah.

Q. Mr. Nesbitt also mentioned and gave an example from the evaluation report, I think, of Table 1. Again I won't ask you to look at it. I'm getting it on the

projector. Table 1 was the table I took you through yesterday?

A. Mm-hmm.

Q. It's the one that has the marketing aspects, the dimensions that related to that in it?

A. Yes.

Q. And Mr. Nesbitt then suggested that if you go through that table and you add up the 4 sorry, if you add up in relation to A1, you have a C which is a 3, a B which is a 4, a C which is a 3, an A which is a 5, and then a total underneath that, right?

A. Yes, indeed.

Q. And then I think what Mr. Nesbitt was suggesting was that if you took that C as a 3, the B as a 4, you have a 7; the next 3 is a 10 and the A is a 5, you get a total of 15?

A. Mm-hmm.

Q. I don't think I ever asked you to carry out that exercise yesterday.

A. I think you had carried it out yourself.

Q. I didn't. What I did do was I suggested to you that the scores C, B, C, A, came from another table, do you remember that, Table 2, which contains a tot of all the dimensions? Do you remember we looked at Table 2?

A. Just the C, B, C, A, I see where you are coming from. That's quite right

Q. You pointed out Mr. Andersen gave his summary first

and then went into the text later?

A. You are quite right.

Q. Now, I think Mr. Nesbitt then also referred to in referring to a tot he may in fact have been referring to a document which the Tribunal did supply to the State, but which had not been put in evidence, containing a recalculation of table the famous Table 15, if you like, the one with the grouping of the aspects, which contained a recalculation of that table using numbers. And just so there is no dispute about it, I'll just put that on the overhead projector. You'll be able to look at the table and certainly the State will be able to look at it at a later point. I'm just explaining what's going on in it. I think it's been handed around.

This is a recalculation of Table 15 using all of the original information available in the report?

A. Right.

Q. In other words, taking the tables from which the totals for market development were derived, converting them to numbers, and then carrying out the process of translating them all onto this single table at the end.

Now, what you have here is the selfsame information as in Table 17 and 18 but it is grouped and there is a difference, and the difference is that you subtotal the aspects, do you see that?

A. Yes.

Q. You subtotal the dimensions, sorry, in the same way as this was done by Mr. McQuaid, and I think we see in due course by Ms. Nic Lochlainn and others. This was the actual work that was done now. If you go to the bottom of that table, you will see that these are the actual totals of the top three candidates?

A. Yes.

Q. And as you can see, the difference between them hardly counts for anything; do you see that?

A. Okay.

Q. Now, I think what you have said on a number of occasions in answer to Mr. Nesbitt is that there was a clear winner. Now, I understood you to say to me that there was a ranking. You can rank the two in that case we saw a moment ago there was a percent between them you can certainly rank them, but there is no clear winner on any of the tables we saw, isn't that right?

MR. NESBITT: Mr. Chairman, I think if this document, which I am not sure if it's in evidence or not in evidence, this is a recalculation of the aspects presentation, not a recalculation of what this witness has said is the basis upon which the competition should have been dealt with, as I understand it. But I must admit, I have difficulty understanding the document.

CHAIRMAN: Proceed.

Q. MR. HEALY: Sorry, I didn't quite follow perhaps what Mr. Nesbitt is saying. Did you understand what I was putting on the overhead projector there?

A. I did, yes, and I think I also understand what Mr. Nesbitt is saying and if I may, he is saying that the percentages which appear on the bottom line, in the overhead which you showed us, result from an aggregation of the subtotals of each of the thing.

Q. Correct.

A. Now this is something which was not done elsewhere in the document. The subtotals of those aspects did not feature and were not used for anything other than what you have just shown us now.

Q. Correct. What I am saying to you is this: if a recalculation or retranslation into numbers is valid, if you do it at different points in the table or in the report, and either these are in the report or not, this is either a valid exercise or it's not a valid exercise, this is an example of what you get. You have a 1 percent gap between the top two, and you then have a gap to the next of about, what, 6.5 percent or something?

A. Mm-hmm.

Q. You can carry out further exercises. You could go to the indicators and you might get even closer or perhaps you could alter the result alter the

ranking, I beg your pardon, completely. What I am suggesting to you, and it's no more than this, is that whether you take the ranking on Table 16, which is the Bs with the arrows up, the ranking on Table 17, which is the 4.10 and the 4.32, or you take the ranking on that table, the original table, or the recalculated table, you are always going to get a very, very close ranking; no more than that?

A. So, can I ask you a question in turn

Q. Would you agree with me it's not quite correct to describe the process as having produced a clear winner?

A. I would prefer that there had been a clearer result in terms of distance between them, but nonetheless, I have to come back to this, Mr. Healy, that one could perform weird and wonderful statistical analyses of all of this as you have suggested yourself I could have imposed an entirely different, let's say some sort of diagonal matrix on those things and grouped them together according to the first letters in their alphabet there, and then subtalled those to see what we might get.

Q. But I am only grouping them in the way the report grouped them. Nothing else. That's all I am doing.

A. The report didn't actually group them that way.

Q. It did.

A. I don't think it does.

Q. We must be at cross purposes then?

A. I think you said this had been handed to the Tribunal by Andersens?

Q. I think we are at cross purposes. Let's clarify this immediately. What that is is the same as Table 15, the famous Table 15, the grouping into aspects, converted into numbers with the original, the original calculations derived from the tables in the section of the report that deals with the comparative evaluation. Let's take it step by step.

We had the example yesterday of Table 2. Table 2 contains all the numbers which are ultimately fed into Table 1.

A. Yes.

Q. Now, there is Table 2 on the overhead projector. That contains a list of grades. If you look at A1, it has a C subtotal. From memory, I suppose you can now recall that that is the subtotal for market development for a C in the grouping of the dimensions in the aspects. Do you follow that?

A. Okay.

Q. If we just go to the next

MR. McGONIGAL: I wonder, Mr. Chairman, if Mr. Healy could explain to me whether, in this process which he carried out, whether he did the exercise in relation to these letters? And also if he could explain to me why he used percentages instead of adding? And also

if he could explain to me the relevance of this entire process having regard to the fact that none of it appears in the report, and it doesn't appear to have any relevance to the terms of reference, as I understood them.

CHAIRMAN: Proceed.

MR. MCGONIGAL: I know there are four questions but I'll let him take them one at a time.

MR. HEALY: I think I answered these questions, but I'll go through them again with you, Mr. McMahon, so there is no doubt about it.

Q. You will recall that we started at the very beginning of this whole process, these sittings when Mr. Brennan explained how he could not he found it impossible to see a result so he suggested changing letters to numbers, isn't that right? You are aware of that evidence?

A. I am aware that he said that, yeah.

Q. We are aware, which we were not aware of at the time, we are now aware from Mr. McQuaid that in carrying out the detailed work in the sub-groups, he actually arrived at his subtotals, and we'll take the example of, that he gave, of technical

MR. NESBITT: Again, that question was asked on the basis of a misapprehension of evidence of Brennan. As I understand this piece of working, it is Table 15, which is the aspects table. Mr. Brennan was not

talking about that table when he had the difficulty.

He was talking about the lettered presentation that was then turned into numbers in Table 17 and 18, or 17 and 16, depending on which part of the report you look at. Not this table. This is Table 15, this is the aspects table.

CHAIRMAN: Well I don't want to bring Mr. McMahon back tomorrow. If there is any bona fide misrepresentation, I'll certainly make sure that matters are corrected. I think it's preferable that Mr. Healy can put the few remaining questions and if we to revert and reappraise, we'll do so later?

A. If that's a difficulty for you, Chairman, I can come back in the morning. That's okay.

Q. MR. HEALY: I am going to try I think I hope you understand this, Mr. McMahon. The last table, we'll refer to them as the last three tables because they change numbers. The last table in the report contains a numeric result?

A. Mm-hmm.

Q. The second last table contains a set of letters and it contains a lettered graded result?

A. Yes.

Q. It also has a set of all of the dimensions with the weights applied to them?

A. Yes.

Q. The third last table does not contain the weights. It

contains the dimensions grouped under the aspects?

A. That's correct.

Q. When Mr. Brennan was presented with the result first, he says he couldn't see it in lettered terms. So he took, he says, pen and paper together, or went up on to a flip chart I think, and he converted the letters into numbers, and that resulted in the generation of the table, the last table in the report, the one which produces a result of 410, 432 or, if you like, 4.32 and 4.10.

A. I am not sure that that's correct.

Q. I think that's what he said?

A. I think that the last table in the report derives from the replacement by numbers of the letters in the immediately preceding table which has letters in it.

Q. Yes, I am quite happy to do it that way, if you like.

A. And it is grouped according to the criteria set out in paragraph 19 of the RFP.

Q. Yes. One thing we are clear about, though, aren't we, in Table 15, 16 and 17 in the last three tables, the grades are all the same. It's all the same letters?

A. The dimensions will have the same letters.

Q. They all have the same letters?

A. There is this distinct difference, that there are subtotals appearing in 15 which don't matter.

Q. Correct. But it's the same grades in all of them, isn't that right?

A. Yes.

Q. What I am trying to do is to test the validity of the notion that you can convert any of these grades from letters into numbers. When Mr. Brennan gave his evidence, I was not aware, I don't know if anyone was aware because we didn't have the benefit of Mr. McQuaid's evidence, that in actually arriving at if we go to Table 1 for a moment please in actually arriving at any of these scores, the C that you can see there for market development, in his case, he was arriving at a score in the context of the technical aspects?

A. That's right, yeah.

Q. He had a number of indicators; presumably he scored them as A, B, C, D or E. He then tried to weight them. He couldn't weight them so he converted them into numbers, so he had 5, 4, 3, 2, 1. He applied the weighting and he got a multiple. And then he'd have to get the average of that to do a tot?

A. Yes.

Q. And then the result of his tot he'd convert back into a letter. So that in a 5-point scale, or out of 100 marks, if you like, if somebody got 71 or 75 or 76, he'd give them a B; do you understand?

A. I understand, yes.

Q. The C that is contained in that table there

A. That's the C at the bottom of the first column, is it?

Q. Well the C for market development, do you see that?

A. Oh, yes, all right.

Q. That's the score given to that dimension based on the sum of the scores for all of the indicators relevant to it.

A. Okay.

Q. Do you follow that? Those are the indicators.

Now, Mr. Andersen collated all of the scoring of all of the indicators, drew them together under the various dimensions, then drew those together under the various aspects and ultimately grouped them all in what we are calling Table 15.

A. Yes, that's my understanding.

Q. In the course of examining you, Mr. Nesbitt referred to the tot in Table 1. I never totted up those at all but I suspect Mr. Nesbitt was referring to a document that the Tribunal made available, the document which I put on the overhead projector a moment ago.

MR. NESBITT: I was referring to Table 1. I didn't intend to and I stopped asking questions about it.

MR. HEALY: If you go to the recalculation of Table 15 for a moment please. I don't want there to be any suggestion that in some way the Tribunal is juggling the figures here.

MR. MCGONIGAL: Well it is, Mr. Chairman, because those percentages shouldn't be there

CHAIRMAN: Please let the matter proceed, Mr.

McGonigal, that's quite unnecessary. There is to effort to do anything of the sort.

MR. MCGONIGAL: It is correct though, Mr. Chairman.

Q. MR. HEALY: If you look at this and we may have to do this rather more slowly than I had to do it with you yesterday, Mr. McMahon. This is, as it's described at the top, "Recalculation of Table 15 weighted." Do you see that?

A. I do.

Q. Now, this is a list of the aspects and the dimensions contained on the original Table 15.

A. All right.

Q. You can recognise market development, coverage and tariffs in the order they appeared in Table 1 a moment ago; do you see that?

A. Okay.

Q. Then you see the subtotal underneath that. Then you see the next list: radio network architecture, network capacity and so on. Underneath that you have technical aspect (subtotal). Do you see that?

A. Yes.

Q. And underneath that you have experience of the applicant, and that's called management aspects, (subtotal). Do you see that?

A. Yes.

Q. Underneath that you have financial key figures, licence payment, financial aspects (subtotal).

Now, Mr. Andersen has lettered scores for every one of those, and he has lettered subtotals, isn't that right? Not the numbers I have there on that

A. In Table 15, yes.

Q. He has letters only?

A. Okay.

Q. He has no numbers at all. The purpose of this calculation is simply to show you that if you translate what all of those letters stand for into numbers, that is the result you get. If anyone wants to suggest that the arithmetic is inaccurate, I am happy to change it, but I think it's accurate?

A. Can I just add, this is as received from Mr. Andersen, is that right?

Q. No, no, this is a calculation the Tribunal has carried out based on the same exercise that Mr. McQuaid seems to have been doing and Mr. Brennan suggested in the case of table, the last table?

A. Sorry, I had formed the impression that this was something that had been given to the Tribunal but had not been put in evidence.

Q. Not at all.

A. Are you saying this was the same document that you showed me yesterday?

Q. I never showed it to you yesterday.

A. You did show me some document which you had done.

Q. I did. I showed you some recalculations.

A. Yes. Can I suggest something to you?

Q. Yes, do.

A. Have you tried adding each of the number scores there without regard to the subtotals?

Q. Yes, I have. That is, in fact, what's on the next table, but I think what you mean is doing it by using the original figures, is that what you mean?

A. Yes, and the original figures only.

Q. Yes, and the original figures only. I think it's going to be put on the overhead projector now. If you just go to the top of that table so we all know what it is. This is the recalculation of Table 17. And let's be clear what we understand what meant by 'original figures'. I mean now as the figures generated in the tables in which the indicators are subtotaled to arrive at the score for the dimensions; do you follow that?

A. I think I follow you, yes.

Q. That is what happens if you do that exercise. If we could go to the tot, and the weightings are applied, and they are also done without the weightings. The first tot is the unweighted total. Right?

A. Yes.

Q. 42.8, 45.3, 48.4?

A. Right.

Q. The next tot is the weighted totals.

A. Yes.

Q. 489, 433, 425. The next tot is the original Table 17 scores, when you didn't have the, if I'll call it, seminal data?

A. Okay.

Q. 362, 420, 432. The next table, or the next line is the difference between the original table and the table using the scoring system I have suggested. 27 extra for A1, 12 extra for A3, and 3 extra for A5. Then you have the percentages of the totals, 77.8%, 84.4%, and 87%; do you see that?

A. Okay. I don't mean to delay the Tribunal with any kind of mathematical arcanity now, but have you noticed the bottom line and the percentages are different to the percentage on the bottom line of your previous chart?

Q. Yes, of course. That is the point I am trying to make, that if you do a translation into numbers, as has been suggested is the way this process was done, well, then, you are going to get a number of different results. That result suggests a difference of 2.6; do you see that?

A. Yes.

Q. Between percent between the top two?

A. Yes.

Q. The previous result, where you had subtotals, suggested a difference of about a percent?

A. Right. I think that bears out the point I was making

to you a while ago, that depending on the framework you impose on these kinds of numbers, you can continue to produce results. The remarkable thing is that they all give you the same ranking.

Q. What the Tribunal is seeking to do is to see what was intended and how was the process or how was the result that's actually written in the report arrived at? It is not possible to do that from reading the report.

A. Right.

Q. These are potentially purely speculative?

A. Okay.

Q. I'd be the first to concede that to you, because we do not know from the report what was actually intended, though we have some evidence now that this may have been what was intended.

What it does show is that you had three candidates, certainly two of them very close to one another; isn't that right?

A. Yes.

Q. And I think you have already made it clear to me that it's possible that if you kept analysing the applications from now till kingdom come, you'd never bring them any closer, or you might bring them closer, but you mightn't get them any further apart?

A. I am not sure. I think I said to you I was in favour at all times of looking at the qualitative analysis

somewhat to see if we could exhaust any possibilities for doing exactly that.

Q. Yes. If you look at the scoring, no matter what way you juggle it around, you are going to end up with a very close result. I do agree what you suggested was you revisit the qualitative to see if you could find clear differences?

A. Yeah.

Q. And I don't think we have disagreed, in any case, that any result does produce a ranking?

A. Yes.

Q. I simply wanted to identify the extent of that ranking.

Just to clarify one aspect of I'd better not use the word "aspect", I am told just to clarify one I can't use the word "element" either.

Just to clarify one feature of the application, the RFP. I think you were asked about Section 3, paragraph 3, paragraph 10 and paragraph 19?

A. Mmm.

Q. I just want to clarify one thing. You are, I take it, satisfied that what Section 3 required was that the applicants, whoever they were, would disclose full details of their proposed ownership of the intended licensee?

A. Yes.

Q. You were also asked about the description of the Esat

Digifone application as one which involved a 50:50 breakdown between Telenor and Communicorp with the award of 20% to, I think, and I am quoting,

"Third-party investors."

A. Yes.

Q. The application did go on to explain what that meant, didn't it?

A. The Digifone application?

Q. Yes.

A. It did, and it listed

Q. In considerable detail. And I think at the presentation, judging from what I heard of it, could there be any doubt but that if you had said or if somebody had said to Mr. O'Brien, "But third-party investors are no good to us", he would have said, as we know he did, emphatically, "These are not just anybody; these are three of the biggest institutions in this country".

Isn't that right? Isn't that what

A. I don't recall exactly what he did say other than the names of the people were there, yes.

Q. Well, we have listened to it, in any case.

Now, just one or two others matters.

I think at one point you were asked whether the weightings were agreed?

A. Yes.

Q. I just want to be clear about that again. I think you

were invited to agree that they were agreed. I think your question about the weightings having been arrived I won't use the word "dreamt up" in case it is pejorative that they were arrived at by a number of groups working individually?

A. Yes.

Q. Suggests that there were doubts which I think could never be resolved, or questions about what are the weightings other than the heading

A. I think the only doubt, to use your own words, is that they weren't recorded. I am sure the persons who were examining each of the dreadful aspects in return were able to come to weightings that were quite appropriate on the day.

Q. You were then asked about the question raised by the weightings not tallying with what was in Table 17; do you remember that?

A. Yeah.

Q. And I think I had suggested to you that that could only mean that the weightings in the evaluation model didn't tally with what was in Table 17, or Table 17 didn't tally with the evaluation model; isn't that right?

A. I think, and Mr. Nesbitt can speak for himself, but in asking me about when the weightings were agreed, he was referring to the weightings which we knew and were advised should attach to the criteria in the RFP.

Q. Yes.

A. And to the best of my knowledge, those weightings were eventually agreed at the famous 30, 20, 18, 14

Q. No doubt about those?

A. Yes.

Q. I just want to be clear about it, if you look at Table 17, Table 17 doesn't contain in those simple terms, 30, 20 and so on. It contains 10, 10, 10, 10, 10 and so on?

A. That's correct.

Q. I think you agreed with me yesterday that that breakdown is something that must have been agreed at some point in the course of the process?

A. Yes.

Q. But there is doubt about what was agreed, because if you look at the evaluation model, it does have initially a proposed set of weightings for dimensions?

A. Yes.

Q. Do you remember I gave you the example of the 10 for I think it was the licence payment?

A. Yeah.

Q. Which we know was changed, and it was changed in the next version, the 8th June document?

A. Mm-hmm.

Q. The June document contains a whole load of weightings for indicators?

A. Yes. I think part of the difficulty is here is that

there are no written replies logged to Ms. Nic

Lochlainn's note.

Q. What I am concerned to try to find out is, was everybody using the same weightings at the same time?

That's the difficulty I have.

A. Well, insofar as they would have been using them in relation to the same indicator, they would have had to. Insofar as there were different groups meeting at different times, dealing with separate aspects, like the technical people sitting in one room and again this is something you might address to them presumably would have agreed amongst themselves about what weightings to use, if any, in relation to their own indicators. But it's at a much later time, when these things come to be aggregated all together, that the agreed weights come to be applied; and there can be no question about them.

Q. Surely at the dimension stage you have to be operating on agreed weights?

A. But agreed amongst the persons who were

Q. Yes.

A. Yes. And it is desirable, as you say, that they might have been recorded, but they don't seem to have been.

Q. Do you remember I drew to your attention that Mr. Riordan was under the impression that 7.5 was the appropriate weighting to be applied to marketing?

A. Yes.

Q. The first dimension, market development?

A. Mm-hmm.

Q. And he seemed to be under that impression right up to sometime after the 20th?

A. Yes. It may be that because it hadn't been recorded that he had forgotten.

Q. Well, it may be that he was sticking with the evaluation model?

A. Well, it may be that it occurred to him that it would be a useful exercise to do to take the weighting have the evaluation model and apply it retrospectively to what had been done.

Q. I think he was suggesting a change in the result at that point.

You were asked, I think, about the meeting of the 4th September when it was suggested that the quantitative report would be returned to in due course?

A. Mm-hmm.

Q. Do you remember that? I think at that point you were looking at what I think was the first version of the quantitative report?

A. Yes. I think so.

Q. I'll come back to it rather than delay you now. I'll just get a copy of it.

You were then asked, I think, about the what's called the scoring of the other aspects. And your attention was drawn to a document, a memorandum from

Mr. Andersen to Mr. Brennan, in which Mr. Andersen inquired whether that would be proceeded with or not?

A. Mm-hmm.

Q. And I think it was suggested to you that other aspects simply meant the Irish economy, and so forth?

A. Yes, I think I understand that now. At the time that the Tribunal originally asked me a similar question for a written response

Q. No, no, I wasn't concerned about your written response. I am more interested in the fact if you look at the document, what Mr. Andersen actually said is "I want unanimity on a certain point; if I don't get it, I am going to score the other aspects".

A. Right.

Q. And I don't think you were involved ever in any decision making on that?

A. No, that's correct.

Q. Just in relation to the quantitative report, Mr. Andersen produced such a report as you say, and as was recorded by I think Ms. Nic Lochlainn, for the meeting on the 4th September, 1995, and pointing out the shortcomings of it and then indicating that it would be returned to in due course.

The scoring at that point was A3 at 3.48; that's, if you like, 348. A5 sorry, A6, 319; A5, 314 sorry, 313; and A1, 305. And at that point I think what Mr. Andersen said, and this is recorded in the

note, he said "The scoring is relatively close. No conclusions could yet be drawn." That was when there was a gap of 29 between the top two. Would you agree with that description of it as relatively close?

A. Yes. Given that he had there was a lot more work to be done, I think he may have been surprised that it was that close at that time. That sort of closeness might not be described as close in another context.

Q. Just to clarify one matter which may have it may be just an error. I think Mr. Nesbitt suggested to you at one time that the problems with the calculation of IRR resulted in 30% of the weightings being lost. I think he must have made a mistake; I think it's 3%.

A. Well, I was wondering if you'd return to that, but I think Mr. Nesbitt can make the point himself, but it suggested to the people doing it that it destroyed the possibility of using 30%. One could argue that you might salvage some of it by using 10 percent. I think that's the point you are making.

Q. I am not making that point. At various points, references have been made to the quantitative evaluation that disappeared, but in fact I think that the IRR was always scored right up to the last version of the quantitative report. Are you aware of that?

A. I thought there was a difficulty with the IRR, actually.

Q. Yes, there were. But it was only a very small

difficulty.

A. It was scored in the qualitative report.

Q. Yes, that's right. Different, of course, because the qualitative allows you to take account of shortcomings in the quantitative?

A. That's right. But I think the difficulty had been that some people hadn't given us a 15-year time perspective.

Q. Correct. But it didn't undermine 30% of the weighting, is my point.

A. Well, to my mind it might have undermined at least 10%.

Q. How would it have done that if it didn't have 10%?

A. If the appropriate weighting was 10% for IRR.

Q. No, no, it wasn't.

A. What are you saying that it was?

Q. The appropriate weighting was I think I think was eventually 5, in the very end. It was 7.5 on that table.

A. I know it was 7.5 on that, but I think that was wrong.

There is no basis for accepting that 7.5%. I think that's one of the things which Ms. Nic Lochlainn raised with Andersens.

Q. I don't think so. I mean, I think we may be at cross-purposes now at this late hour, but I don't think she raised that with Andersens.

A. She may not have referred specifically to the 7.5%,

but did she not ask

CHAIRMAN: Leave that to Ms. Nic Lochlainn.

Q. MR. HEALY: I think it was consistent with what was in the evaluation model in any case.

I think you were asked at one point, by Mr. McGonigal, about the note you made of the interdivisional meeting on the 3rd October.

A. Mm-hmm.

Q. In particular, the reference to the message that the Minister wanted the process accelerated, and your response was to the effect that the legalities were more complicated?

A. Mm-hmm.

Q. What is clear, isn't it, is that while there may have been some individuals wishing to restrain the process, of whom you were one, Mr. O'Callaghan was one, possibly Mr. McQuaid was one, because you went to the meeting with the Secretary, the process was accelerated, wasn't it, from that point?

A. It was, yes.

Q. There is just two last matters.

You were referred to the textual amendments, a document containing textual amendments. Now, I am not sure whether the document you were referred to was purely a working document or the actual document.

A. I don't know that either.

Q. From the appearance of the document, it looks like a

working document we'll have to wait for a witness.

It's in Book I think we now have it on the overhead projector, which might make it easier altogether.

It's Book 46, Leaf 48. It's going to be easier, I think, to refer to it on the monitor, because I am only going to refer you to one part.

A. Okay.

Q. I'll put it on the overhead projector.

These were and looked like some of the textual amendments that may have been sent to Mr. Andersen.

It looks like a working document on those textual amendments; do you see that?

A. Yes.

Q. You will see the top heading, "Final grading according to evaluation criteria". Do you see that?

A. Yes.

Q. A reference to Table to the work involved in Table 17.

A. Mm-hmm.

Q. That would be Table 17 of the version of the 18th, therefore Table 16 of the final version.

A. Just refresh my memory there; that's one with letters in it?

Q. Precisely. It's the second-last one, the one with the Bs, with arrows up and down

A. I think without any subtotals in it.

Q. Without any subtotals, correct; that's the third-last

table. And you see that it reads "The grades awarded under each dimension are outlined in Table 17. The result in the grand total line has been agreed through a process of discussion by the evaluators to" achieve I can't quite read that part "by taking account of the weighting of the evaluation criteria.

Although this weighting mechanism was agreed primarily in the context of the quantitative model, it inevitably has validity as to the evaluation's interpretation of the importance of the various evaluation criteria subject to respecting the order of priority agreed by the Irish Government."

Do you see that passage?

A. I do.

Q. That was not included in the final version, I hasten to add. I suggest that was removed because it couldn't be stated, because there was no formal basis for including the quantitative weighting.

A. Yes. I think you have asked me this before.

Q. Well, I have asked you the question, but without reference to this, because I hadn't seen it.

A. I can work out why it is removed or who removed it. For what it's worth, I think I would have left it in.

Q. Well, if you had left it in, it would have acknowledged that the weighting was agreed primarily in the context of the quantitative model.

It goes on to say "It inevitably has validity as to

the evaluation's interpretation of the importance of the various evaluation criteria subject to respect in the order of priority agreed by the Government."

Would you agree that it suggests that the final scoring in the last two tables had to be supported by some rationalisation, because it wasn't part of the formally agreed process?

A. I would accept that there is no form of words in the evaluation model, I think, or in the report itself which states specifically that this weighting will apply to both the quantitative and qualitative assessment, and perhaps that was to leave open the possibility that we might have to apply further or other weightings.

Q. Maybe. Maybe that was it.

A. As I think I said to you yesterday, I can see no reason why it should not be used, and I think the argument is expressed there.

Q. But not in the report. I wonder why?

You are shrugging your shoulders, for the stenographer.

CHAIRMAN: Let's conclude.

Q. MR. HEALY: I think lastly you were asked about whether you were aware of any outside influence that brought about the result. I understand from your answer to me a moment ago, or do I understand correctly, that there was pressure to accelerate the

process?

A. Yes.

Q. And that the things that you wanted to get done, which was the revisitation of the qualitative, were not done, and the production of a report to your satisfaction as had been agreed was not done?

A. Yes.

Q. Thank you very much, Mr. McMahon. I hope that you have got copies of those tables, and if you want to take out your calculator, I am quite happy if you want to come back and correct any of them or offer any further views on them. They are simply speculative reworkings.

A. No, I think I will eschew that opportunity.

The only final thing I wanted to say was that in answer to your last statement I wasn't sure whether it was a question or not that in the context where no further analysis was going to make a difference, you know, I would have to say that I am not aware of any of the kind of interference which might have changed.

Q. You weren't aware you were dependent, of course, am I not right in thinking, on your confidence in what Mr. Andersen was saying about how the process had been brought to a conclusion?

A. Yes, amongst other things, yes.

Q. And you are dependent on what other people had said to

you about what had been done?

A. Indeed.

CHAIRMAN: Thanks very much for the lengthy session

and for your assistance this week, Mr. McMahon. I

suspect that even documents of title in the southeast

may look a little more gratifying tomorrow.

I apologise also to the witness who wasn't reached

today. We'll take him first thing at eleven o'clock

tomorrow and ensure that he is not detained. Thank

you.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,

FRIDAY, 4TH APRIL, 2003 AT 11AM.