

A P P E A R A N C E S

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I N D E X

Witness: Examination: Question No.:

Fintan Twoey Mr. Coughlan 1 - 452

THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY,

8TH MAY, 2003 AT 11AM:

CONTINUATION OF EXAMINATION OF FINTAN TOWEY BY

MR. COUGHLAN:

Q. MR. COUGHLAN: I just want to deal with something which we were discussing late yesterday afternoon.

Unfortunately the final two minutes on the transcript aren't available because of a technical glitch, but I think that the Sole Member has a note of what transpired about the last two minutes, and it relates to the Glacken Report I was asking you about; do you remember that?

A. Yes.

Q. And I think you had am I correct in understanding that you had indicated that you had some sort of a broad or general familiarity with the Glacken Report, or that there had been a report?

A. Yeah, I had a general awareness that there had been a report. I hadn't seen it or read it.

Q. And you don't remember discussing it with colleagues, but you can't rule it out, I think is what you said, or words to that effect?

A. That's correct.

Q. Would that be correct?

A. Yes.

Q. Now, if you did discuss it with colleagues, can you say when that might have been?

A. No.

Q. Right. When you say that you had a general awareness,

that would have been from around the time probably as a result of the report and may have related to matters which were carried in the newspapers, or something like that; would that be a fair

A. I think there was some TV coverage, perhaps a Today Tonight programme, or something like that.

Q. I just want to bring to your attention some aspects of the Glacken Report, and firstly, I think Mr. Glacken was appointed an inspector of two companies, in particular, by the Minister for Industry and Commerce I think it was O'Malley and his warrant of appointment were in the following terms: "The Minister for Industry and Commerce, Mr. Desmond J. O'Malley" I have, I think, perhaps a copy of this portion; it's in the Interim Report, but it's up on the monitor you see there 1.1, "Terms of Appointment as Inspector"; do you see that?

A. Indeed, yes.

Q. He recites the warrant "The Minister for Industry and Commerce, Mr. Desmond J. O'Malley TD, in exercise of powers conferred on him by Section 14 of the Companies Act 1990, being of the opinion that there are circumstances suggesting that it is necessary in the public interest, hereby appoints Mr. John A. Glackin as Inspector under the said section to investigate and report on the membership of the Chestvale Properties Limited and Hoddle Investments Limited and otherwise

with respect to these companies for the purpose of determining the true persons who are or have been financially interested in the success or failure (real or apparent) of these companies or able to control or materially to influence the policy of these companies.

Without prejudice to the generality of the foregoing, the investigation shall extend to the investigation of any circumstances suggesting the existence of an arrangement or understanding which, though not legally binding, is or was observed or likely to be observed in practice and which is relevant for the purpose of investigation."

Then, that's his warrant of appointment there as recited?

A. Yes.

Q. I think you may be generally aware that the controversy arose concerning these two companies, and it related to the telecoms or Johnston Mooney and O'Brien site in Ballsbridge. I think you would be generally aware of that; is that correct?

A. Yes.

Q. And I think in your own Department there may have been, in the first instance, an inquiry in order to ascertain information surrounding this particular transaction, but that there weren't sufficient powers; and subsequent to that, O'Malley, as Minister for Industry and Commerce, appointed Mr. Glackin as

Inspector under the Companies Act about all the inherent powers, and there were a number of court outings, I can tell you, in relation to this, and Mr. Glackin's powers were endorsed by the Court on each occasion, including very wide-ranging powers in relation to discovery and asking questions of people and getting information from people.

Now, then Mr. Glackin, having conducted his inquiries and got discovery of documents and interviewed various witnesses, made a finding that Mr. Desmond, inter alia, was behind or had an interest in these two particular companies. I think you would remember that in general terms, would you?

A. In general terms, perhaps, yes.

Q. Now, at and I have, I think, copies of portions of the final report of Mr. Glackin. He first of all presented an Interim Report and then a final report.

And just a few matters. In the first instance, at paragraph 3.6 of his final report, under the heading "Fundamental Premises of Mr. Desmond's Evidence":

3.4.1. "The entire nexus of Mr. Desmond's evidence to me is based on two fundamental premises which he repeatedly stated to me in his sworn evidence and in affidavits sworn by him in court proceedings:

"1. That he, Mr. Desmond, was not himself financially interested in any way in the success or failure (real or apparent) of the companies, nor was he able to

control or to materially influence the policies of those companies.

"2. That Mr. Probets owned Freezone, which provided all the mezzanine finance for the purchase of the JMOB site and received the US\$1.5 million and IRi½2,431,170 paid on the 30th July 1990 out of the proceeds of the sale of the site then in the account of Dellion at Ansbacher" I should hasten to add that's a different Ansbacher altogether to the Ansbacher which has been the subject matter of inquiries of this Tribunal "as referred to in the chronology paragraph 1.10 supra".

Then the 3.1.4, other findings related to Mr. Desmond.

Do you have that?

A. No.

Q. I'll get it for you now: It's at 3A, Book 41, but I'll give you a hard copy here; you needn't get out the book it's big.

(Document handed to witness.)

"3.14.1. As set out in Section 4 and Section 6 post, I have found that Mr. Desmond was also financially interested in success or failure of the companies by virtue of being the true beneficial owner of Freezone and the person who controlled the account of UBF Geneva through which the advance of i½1 million was made to Chestvale on the 9th August, 1989.

"3.14.2. In making the determination that Mr. Desmond

was a person financially interested in the success or failure of the companies and that he controlled them, there are a number of other aspects of Mr. Desmond's evidence on which I have had to make findings of fact.

These findings are as follows:

"(i) that while acting as an agent and conducting the negotiations with interested third parties on behalf of UPH, to dispose of its contractual interest in the JMOB site between April and July of 1989, Mr. Desmond purchased the said interest from UPH without disclosing to UPH that it was doing so and without disclosing to UPH that he knew about Telecom's interest see paragraphs 5.2.5 and 5.2.15 of the Interim Report and paragraph 3.3 supra.

"(ii) that whereas the possible involvement of Sportsfield with the JMOB site, by transferring the property into that company in consideration of the issue of shares in conjunction with the proposed reverse takeover involving Mr. Smyth and others, may have been mooted among a limited number of persons; the advisers to Sportsfield, Mr. Desmond's colleagues in NCB, were not aware of this; it was not part of the formal proposal put by Mr. Smyth to Sportsfield and its advisers on the 28th July 1989, and there was never any serious intent that Sportsfield would acquire the property at the end of July or even at the beginning of August 1989, and in fact it could not

have done so at best for many months after that"

then he refers to various paragraphs of the Interim Report and paragraphs in this report.

"(iii) that Mr. Desmond misrepresented to certain banks and to Mr. Smyth, knowing that Mr. Smyth would make similar representations to banks, about the involvement of Mr. Goodman, Mr. Magnier and Dr. Smurfit in UPH and in companies, even though he knew that Mr. Goodman was involved in neither, and that Messrs. Magnier and Smurfit were not involved in the companies." Then he refers to various paragraphs in the Interim Report.

"(iv) that Mr. Desmond told Trinity Bank and Lombard and Ulster Bank about the possibility of a sale to Telecom in July 1989." Then he refers to paragraphs in the Interim Report.

"(v) that Mr. Desmond induced the editor of the Irish Independent to publish an apology in February 1990 in relation to an article published by them on the previous day alleging his involvement in the JMOB site, when he knew that the original article was substantially correct and that he was not entitled to an apology." He refers to paragraphs in the Interim Report.

"(vi) that Mr. Desmond misrepresented to Mr. Smyth in September 1989 the proposed role of Mr. Bourke, who was then a financial adviser to the Magnier family

trusts. He informed Mr. Smyth that Mr. Bourke would be involved in refinancing the purchase of the JMOB site, while knowing that that was not the true role of Mr. Bourke, and that Mr. Bourke was asked to consider only the tax aspects of the transactions on behalf of UPH." He refers to paragraphs of the Interim Report.

"Incidentally, Mr. Bourke was described at the introduction to the Interim Report as an employee of John Magnier/Coolmore Stud. He should have been described as a former financial adviser to the Magnier trusts.

"(vii) that having become aware of Dr. Smurfit's interest in acquiring a site for a corporate headquarters for Telecom, he, Mr. Desmond, discussed the JMOB site with Dr. Smurfit and by letter on the 1st December 1989 informed Dr. Smurfit that he could not advise Telecom on the transaction. He added that 'We disposed of the property to Chestvale, and if I can influence the Chestvale people in any way, I would be delighted to do so.' however, he misrepresented his status by not telling Dr. Smurfit that he, Mr. Desmond, was financially interested in the success or failure of Chestvale and that he effectively controlled it. He accordingly assumed a position of influence with Dr. Smurfit, knowing that Dr. Smurfit relying on his, Mr. Desmond's, apparent and declared independence would be likely to rely on him, which he

did. See paragraphs 10.10.2 of the Interim Report.

"(viii) that Mr. Desmond informed Mr. McGovern, the Chief Executive of Telecom, at a meeting on the 20th December 1989 convened to discuss the JMOB site, that he, Mr. Desmond, was an intermediary and thereby induced Mr. McGovern to deal with him as a bona fide intermediary. However, he deliberately failed to disclose to Mr. McGovern, (i) his personal financial interest in the success or failure of the company that owned the site; (ii) the fact that he effectively controlled that company; and (iii) the fact that only a few weeks earlier, he tried to sell the same property for $\frac{1}{2}$ 6.3 million. These omissions put Mr. Desmond in a position where a conflict of interest was inevitable whether or not he subsequently acted bona fide see paragraphs 10.11.8 and 10.12. 4 of the Interim Report and paragraph 8.1.3 supra.

"(ix) that in his letter of the 20th February 1990 to Mr. McGovern, described at paragraph 10.14.18 of the Interim Report, Mr. Desmond deliberately misled Mr. McGovern by stating that "I am not sure how far negotiations have gone..." when he was fully aware through briefings from Mr. Smyth.

"(x) that on the 28th June, 1990, Mr. Desmond executed a personal indemnity in favour of Mr. Smyth as Mr. Smyth had to assume personal liability to Telecom on foot of warranties and indemnities. Mr.

Smyth had been wired by Telecom to give these warranties at the closing of the sale on behalf of three companies, Chestvale, Hoddle and Dellion, but he refused to do so without having a counter indemnity from the person whom he considered as his principal.

Mr. Desmond did not seek account indemnity from any other party and remained ultimately liable personally on foot of the various warranties given to Telecom.

"(xi) on the 26th July 1990, Mr. Desmond telephoned Mr. Moloney, managing director of Ansbacher, and instructed him to make three payments from the Dellion account; see the chronology in paragraph 1.10 supra.

Mr. Desmond promised Mr. Moloney to get written authority for these payments from the person who held the bank mandate, but he did not do so, and Ansbacher did not get written confirmation until the Dellion accounts were closed in October 1991."

Now, I appreciate that you hadn't seen the report or any part of the report when you stated yesterday that there may have been certain suggestions in the report concerning Mr. Desmond. There were in fact very strong negative findings about Mr. Desmond in the report; isn't that correct?

MR. NESBITT: I object, Mr. Chairman, to any question being asked of this witness to comment on this report.

He said he hadn't read it, and he said he hadn't seen it. And how any answer he gives concerning this

speculation by My Friend has any relevance to this Tribunal is impossible to see, with the greatest respect.

CHAIRMAN: I can't see how it's speculation. He is reciting the finding of an authorised officer engaged by the Minister at the time, senior solicitor in this town, and I have already held that whilst of course I am not going to embark on any possible findings in relation to this matter until all relevant evidence has been heard and until all persons have had an opportunity to make submissions, I would effectively be holding that this Tribunal is operating in cloud cuckoo land if I did not hear this portion of the evidence. I think it's unnecessary that Mr. Towey be pressed to advance a view on that, because it's self evident that the matters that do stand as a matter of record did make certain findings. We'll proceed on that basis.

MR. NESBITT: With the greatest of respect, Mr. Chairman, that is the fact. It does not require to be put to this witness in any way that that is a fact. That is the actual fact. And when he is now asked to comment on that fact, I respectfully submit, it is impossible to see how that has any relationship to the evidence he is in a position to give to this Tribunal in circumstances where he hadn't read the report on his evidence.

MR. COUGHLAN: Perhaps I'll deal with this way.

Q. As My Friend had said, that is the fact.

A. Yes.

Q. This was an official report; isn't that correct?

A. Yes.

Q. Now, when you say that you do not recollect having any discussions with colleagues about this report, but you can't rule it out?

A. That's correct, yes.

Q. You had a general familiarity with it; isn't that correct?

A. General awareness, yes.

Q. And this was an official report carried out on foot of a warrant of appointment by the Minister for Industry and Commerce under the Companies Act, and this document had official status?

A. Yes.

Q. Now, I now want to ask you about the letter which you received dated 29th September 1995 from Mr. Michael Walsh addressed to Mr. Martin Brennan at the Department.

A. Yes.

Q. Were you aware when you saw that letter that Mr. Dermot Desmond had an involvement in IIU?

A. No.

Q. Were you aware of the relationship between Mr. Michael Walsh and Mr. Dermot Desmond?

A. No.

Q. Now, again I just want to bring to your attention that on the letter, if we just go through if we look did you have any understanding, so, as to who IUU were?

A. No.

Q. Now, if we go to the foot of the letter. Had you noticed the foot of the letter where the directors and partners, a Mr. D. F. Desmond was mentioned as Chairman?

A. No.

Q. When you discussed this letter with Mr. Martin Brennan and Mr. Brennan has given evidence that he wasn't familiar with this particular report because I think he had been in Brussels around the time that Mr. Glackin's inquiry was taking place can you remember exactly what you said to Mr. Brennan?

A. No. Let me be clear that I cannot recall the details of my discussion with Martin Brennan. What my evidence is is that I believe that I would have had a discussion with him.

Q. Yes, and I understand that, and I appreciate that and I don't expect you to remember verbatim, obviously, something that occurred that length of time ago. But just could you give us some sort of a flavour of the discussion, as to how you believe it would have gone?

A. Well, if I was to speculate as to how I might have acted, I believe that I would have said to Martin Brennan that a letter had been received; I would have told him the contents, my view on it. I may well have passed it to him so that he could read it himself in order to form his own view. And my belief is that we would have reached an agreement on what course of action to take based on that kind of approach.

Q. If we just look at the letter now for a moment. I think Mr. Brennan's recollection is slightly different. And you may have been present for some of his evidence?

A. Yes.

Q. And in fairness, he indicated that you might have a different recollection of events as well?

A. Yes.

Q. But I think, am I correct in remembering Mr. Brennan's evidence was to the effect that he didn't he doesn't believe he saw the letter?

A. I believe that is correct, yes, yes.

Q. You told him that this letter had been received, and that I am not sure whether he used words, "You don't want to know the contents of it", or words to that effect?

A. I don't believe I used those words.

Q. Right. Now, it is fairly important for the Tribunal to try and understand exactly what happened about this

letter and what transpired between yourself and Mr.

Brennan.

A. Okay. Sorry, if I may come back on that point that you just mentioned where you suggested that I used particular words.

Q. Sorry, I could be incorrect about this. I am just trying to remember, I think, what Mr. Brennan said.

A. Okay, yeah, I believe that form of words was suggested by Mr. Brennan, and I believe that there is some background relating to some private discussions between me and yourselves and counsel on the part of the Tribunal where this issue may have arose.

Now, my evidence is that if I used those words, or if I suggested that I used those words at any time, I was merely seeking to convey that there was an unwelcome development, in the sense that a letter had been received. I have no recollection of using those words at the time, in September '95. And certainly there would have been no question of me seeking to prevent Mr. Brennan from seeing the letter or not disclosing the contents to him.

Q. I understand that you were in fact Mr. Brennan's subordinate in the conduct of this process; isn't that correct?

A. Yes.

Q. If you just if I run through the letter just fairly quickly, I think we are all fairly familiar with it,

and perhaps you are too now.

A. I am now, yes.

Q. And it's re Esat Digifone: "Dear Sirs,

"We refer to the recent oral presentation made by the consortium to the Department in relation to their proposal for the second GSM cellular mobile telephone licence. During the course of the presentation, there was a detailed discussion in relation to the availability of equity finance to the consortium from Communicorp and a number of institutions.

"We confirm that we have arranged underwriting on behalf of the consortium for all of the equity (i.e. circa 60%) not intended to be subscribed for by Telenor. In aggregate, the consortium now has available equity finance in excess of $\text{N}g\frac{1}{2}$ 58 million.

"We do not foresee any additional need for equity. However, we are confident that if such equity is required, we will not have a difficulty in arranging it."

Now, first of all, what is your view as to the content of that letter? It seems to be, first of all, some form of a letter of undertaking; does that appear to be the well, sorry, perhaps you could tell me what your view is of it.

A. Well, I mean, my view, clearly, then and now, was that it was an attempt on the part of Esat Digifone to redress what they felt was being perceived as a

weakness in their application. And it was intended to convey that a further institution was now willing to provide financial backing both for the Communicorp equity and also the 20% of the equity that was being set aside for institutional investors.

Q. Now, I am not going to go into it in any great detail with you; we have been over it with a number of witnesses about the institutions. We have the tape of the presentation.

A. Yes.

Q. That's sufficient record, I take it, from the Tribunal's point of view, as to what transpired at the presentation. That is the record.

A. I think that's true. I mean, clearly it's an audio record, so in that sense, it fails to capture kind of you know, body language, you know, other elements of the overall communication. And in that respect, you know, it may not give a complete picture as to the exchange.

Q. Now, is there any sense that you can assist the Tribunal, so, as regards any body language you remember which would or could lead to a different view being taken of it?

A. No, I have no specific recollection of that.

Q. You are making a general comment?

A. I am making a general comment, and what I am doing is, I suppose, I am drawing attention to the fact that it

is clear in that letter that Digifone are responding to what they felt, arising from the presentation, was a weakness; okay?

Q. Yes, I understand the point you are making, that the perception which they may have which may have been real or unreal, whatever the situation was.

A. Yes.

Q. We have listened to the tapes, and the one thing that's absolutely certain when you listen to the tapes is that nobody asked any questions about the financial institutions; isn't that correct?

A. I think that may be correct, yes.

Q. In fact, you'd hardly need to, would be a fair way of putting it, I suppose?

A. Yeah, yeah, it wasn't an issue of concern.

Q. It wasn't an issue. And questions had been directed to, particularly, Mr. O'Brien's side of the consortium, I think, about Communicorp's equity participation in Esat Digifone; isn't that correct?

A. Yes.

Q. And again we have heard that, and we heard Mr. O'Brien responding I think the lead there was Mr. Billy Riordan, I think, asked certain questions, and Mr. O'Brien responded. And nobody, nobody questioned Telenor's ability to fund their equity participation?

A. I think that's correct, yes.

Q. I think "hardly needed to" would be a fair way of

putting that.

Now, this particular letter, which appears to be, in effect, informing you of underwriting on behalf of the consortium of all of the equity other than Telenor's equity in Esat Digifone

A. Yes.

Q. includes the 20% institutions; isn't that correct?

That particular letter there?

A. It does, yes.

Q. Did that strike you as strange?

A. Not at the time, no.

Q. The likes of AIB and Standard Life and these sort of institutions hardly needed to be underwritten, did they?

A. No, no, I mean, I think my general

Q. In fairness

A. No, I don't believe that I interpreted that letter as suggesting that they were going to underwrite those banks which had been mentioned in the application. My understanding was that they were undertaking to back Communicorp to the extent required and also to take up the 20% available for institutional investors.

Q. That they would take up the 20%?

A. That they would take it up, yes.

Q. That's how you interpret that letter?

A. Yes.

Q. Might I suggest to you that you are the only one in

the whole wide world who has interpreted the letter that way?

A. Okay.

Q. Is that what you thought at the time?

A. Yes, I think so.

Q. Fair enough. Did Martin Brennan think that?

A. I don't know that.

Q. Did you discuss that with him?

A. I can't say.

Q. You had never heard of this crowd, IIU?

A. No.

Q. Well, very good, in the context of your understanding of that particular letter, that it would be to underwrite Communicorp and take up the 20% institutional interest in the company?

A. Yes.

Q. This was I can take it that the letter was stating it as a fact; isn't that right?

A. I didn't interpret it in that way. I interpreted it as an offer to provide financial support in the same way that the other financial institutions had provided offers to provide placing of the 20% equity.

Q. If we just perhaps yes, I understand what you are saying; but if you just look at the second paragraph there for a moment, "We confirm that we have arranged underwriting on behalf of the consortium for all of the equity." That's stating it as being a done; isn't

that right? "We have arranged".

A. It may be that you could interpret it in that way.

But I mean, surely this was a conditional offer.

Q. Well, you may be right, but I am just trying to understand, looking at the letter, where does it say that?

A. Say which?

Q. That it is a conditional offer.

A. Well, we are talking about a funding requirement in the context of a licence being awarded.

Q. But where does the letter say that? Everything was conditional on anyone getting the licence?

A. Yes.

Q. That's that's a taken, from everybody's point of view, of course.

A. Yes.

Q. I understand that. But where does the letter say that?

A. It doesn't say that. It doesn't say that. I am saying that I mean, that my interpretation of it was that this was conditional on Digifone winning the licence to trigger this underwriting, and although it's not stated as such in the letter, I interpreted this letter as being a further option available to the consortium, in the sense that the consortium had indicated that there were a number of possibilities available to it in relation to the 20%. I saw this as

a further possibility.

Q. Now, I just want to be when you read the letter, can I take it that what you are telling us now is the view you formed at the time, or is it a view you are forming now? Was that the view you formed at the time, that this was another option?

A. Yes, I believe so. I believe that my view at the time was that here was Digifone seeking to deal with a perceived weakness in its application and providing a further assurance that equity financing would be available, that the funding requirements would not be a problem for this project.

Q. And there was a financial weakness, wasn't there, in Communicorp?

A. There was yes, we had the view that Communicorp was not a financially strong company.

Q. Can we take it so that, and am I correct in your understanding so, that you saw this as, in the first instance, underwriting Communicorp and this outfit, IIU, whom you knew nothing about, replacing the institutions? Is that right?

A. Potentially.

Q. Now, it wasn't anything extra; it wasn't an option, it wasn't another option. It was a substitution, isn't that correct, as you under understood it there?

A. It became the case that IIU became the institutional investor

Q. I understand that, I understand that, but your understanding of this letter was that it was a substitution?

A. No.

Q. And what was your understanding of the letter?

A. My understanding of the letter was that IIU would, in the event of the licence being awarded, be willing to underwrite the equity of Communicorp and take up the 20% available to institutional investors. In other words, I saw it as a funding option available to the consortium in the event that they got the licence, and a funding option which, presumably, would have worked both ways, in the sense that it wasn't a binding agreement.

Q. But you saw it as the banks being out?

A. I saw it as being the possibility that the banks would be out, yes.

Q. Did that not concern you?

A. No. I mean, this wasn't for example, I mean, this wasn't a definitive statement that the financial institutions mentioned in the application would not have any role. This was a letter saying that IIU were willing to provide backing.

Q. Well, did it not at least cause you concern to the extent that you wondered what is going on here?

A. No.

Q. You didn't ask yourself that question?

A. No. It was quite clear what was going on, that Esat Digifone felt there was a weakness in their application that needed to be redressed, and that's what they were doing.

Q. The institutions weren't a weakness in the application?

A. No, but we you know, we felt there was a weakness; there was a concern in relation to the financial strength of Communicorp.

Q. Yes, I understand that point.

A. So I could understand I could understand the reason behind the letter.

Q. I understand the point about Communicorp.

A. Yes.

Q. What I don't understand is the institutions point; do you understand me? There was no suggestion there could have been no perception of weakness?

A. Yeah, there was no concern about the we weren't concerned about the ownership of the 20%.

Q. You weren't concerned about the institutions; isn't that right? You had no concern about the institutions?

A. I am not sure exactly what you mean. No, we certainly weren't concerned about the institutions. We weren't concerned what institution or financial backer that 20% would be placed with ultimately. That was not an issue of concern. We were clear, from the point of

view of evaluating, that the 20% shareholder would bring financing to this business. We weren't depending on that shareholder to bring telecommunications expertise, for example, or technical ability. It was simply funding. And as such we weren't concerned.

Q. We know that. Everyone knows that. It doesn't need to be stated.

A. Okay.

Q. Now, just let's take this slowly, because it's becoming a little more disturbing in light of the evidence you are now giving, Mr. Towey, that this was returned without other members of the Project Group being informed of its existence or content, in light of the analysis which you made of this particular letter at the time. I am just indicating that to you. There was no concern about the credit of AIB, the credit of IBI or the credit of Standard Life; isn't that correct? There was no concern about that?

A. That's correct, yes.

Q. And there was no concern about the character of those particular institutions being a party to this consortium, if I could put it that way; there was no reputational issue with them?

A. Yes.

Q. Advent were an institution whom the Department were not familiar with to the same extent that they would

have been with AIB, Standard Life, and Investment Bank of Ireland.

A. Yes.

Q. They were aware of Advent because of their involvement in Communicorp prior to the application; isn't that correct? That had been disclosed?

A. Yes.

Q. And inquiries were made about Advent?

A. Yes.

Q. Relating to their creditworthiness; isn't that correct? That they were good for it?

A. Yes.

Q. And those inquiries resulted in satisfaction, if I could put it that way? There was no doubt about them?

A. I think that's true, yes.

Q. Now, there was no concern, and therefore no inquiry about AIB, Standard Life, Investment Bank of Ireland.

You had just come back from Copenhagen; isn't that right?

A. That's correct, yes.

Q. There was clear concern about the financial wherewithal of Communicorp; isn't that right?

A. There was a concern, yes.

Q. Clear concern, it's stated in the draft report and in the report, they didn't have the money to do this?

A. No, I don't think that's true. I don't think we had the view

Q. That's what the appendix says.

A. We had the view that they had funding available to them to carry out this project, but there was a concern that in some of the sensitivity analysis in a worst-case scenario, that there may be a funding shortfall.

Q. Well we'll come to the reports in due course. Did you ask yourself the question, who are this crowd, IIU?

A. When I received the letter, no.

Q. Nevertheless, you viewed this as another option for Communicorp?

A. Yes.

Q. And you had never heard of IIU?

A. No.

Q. You didn't notice Mr. Desmond's name at the bottom of that letter?

A. No.

Q. And you weren't aware that this was some procedure or manoeuvre to oust the institutions and replace them with this outfit, IIU?

A. No, I didn't see it in that way. I mean, the question of ousting the institutions suggests that this was a binding agreement and that the institutions were no longer potentially going to be participants in this consortium. And I don't believe that the letter conveys that message. I certainly didn't interpret it in that way.

Q. Might I suggest to you, Mr. Towey, that it seems incredible, in the true legal sense of that word, incredible, that you did not notice Mr. Desmond's name at the bottom of that letter and that you were completely unaware of Mr. Desmond's involvement with IIU when you received that letter?

A. Well, if I can take the second point first, I don't see why it should be incredible that I would not be aware of a link between Dermot Desmond and IIU.

Q. It's stated on the letter he is Chairman.

A. Well, you made two points: the first, that I didn't notice it on the letter; the second, that I was not aware. So I am dealing clearly with the second point first. I don't find that incredible at all that I wouldn't be aware of that link.

On the question of not noticing on the letter that Dermot Desmond is declared as a director, I think it's necessary to paint the wider context in which this letter was received and assessed. There are many, many instances in the papers relating to this process, where we clearly set out that there is no question of additional material being admitted to the competition process after the closing date for the competition.

That's set out very clearly, clearly, in the information memorandum issued on the 28th April. It is very clear, in general, from the procedures that were followed, that we were very anxious to ensure

absolute parity of treatment of all the interested parties in this competition, parity of treatment in terms of access to information and in terms of the information that they could provide in support of their applications. It's also evident from the Project Group meeting which was held before the presentations were held that it was clearly the case that the presentations were for the purposes of clarifying applications to allow applicants to visually present material and to respond to questions raised. That's set out in the report of the Project Group meeting.

In the Project Group meeting which took place at the end of the presentations, again it's recorded that we were satisfied that all applicants had been treated fairly and that no new material had been admitted to the process, that we had continued with fair treatment. It is also the case that in the Opening Statement made by Martin Brennan at each of the presentations, it was clearly stated again that no new material would be admitted and specifically in the case of Digifone, there was an exchange at the end where again of it made clear: "Don't call us, we'll call you", as far as providing any further information.

So what I am trying to do is paint for you a picture where there was a very, very important view on the

part of the Department that we had to ensure that this evaluation procedure was absolutely fair and that no applicant in the process had the opportunity to provide further information that would enhance an application.

Now, if you look at the letter, there can be no question that that letter was sent to the Department in response to a perceived weakness at the Digifone presentation. Absolutely no question about it. It was clearly an attempt to enhance their application, to improve their position. And it was in that context that I read the letter. And my overwhelming concern in response to that was what we should do with this letter in order to ensure fair treatment and that we didn't give an advantage to any company. And in those circumstances, I felt there was absolutely no option but to return it and not even keep a copy. Not even keep a copy. And that's what I did.

As a result of that, I read this I read this letter at a certain level of depth, if I can put it that way.

In other words, I was clear that it was an attempt to redress a weakness. I didn't look at the question of what might underlie the letter or what the implications of that might be. And I certainly perceived that letter as being fully in line with the application that we had received; that is that after licence award, the Digifone consortium envisaged that

the structure would change to a 40:40:20 structure with 20% being owned by an institutional investor, and I saw IIU as becoming the institutional investor, but also undertaking to back Communicorp. I saw it as being fully in line with the application, an attempt to enhance their position, and I saw absolutely no option but to return it.

Now, on the question of not noticing Dermot Desmond's name at the bottom. I think that signifies the level of depth at which this letter was read, and the primacy of the reaction that we had to deal with the fact that it was material that we could not admit to the process.

Q. Right. Now, you saw this letter as being clearly in line with the application and the process; is that right?

A. Yes, correct.

Q. The application, and that after the announcement, that people were free to do something else; is that right?

A. In the case of Digifone, it was clear to me that they were always going to place 20%, yes.

Q. We all know that. And they said how they were going to place it in the application, didn't they?

A. They indicated that they would place it with third parties.

Q. They indicated who they were placing it with?

A. Pardon me?

Q. They said who they were placing it?

A. They said that

Q. They said who it was being placed with; they named them?

A. They said a number of financial institutions were willing to take up do it?

Q. No they didn't; they named them. They named four institutions, didn't they

A. They did.

Q. in the application, in the presentations, unless my ears fail me.

A. No, they name them. There is no question about that, yes.

Q. And when the Minister announced who the applicants were

A. That is correct, yes.

Q. he said four financial institutions, and they couldn't be named because Esat had asked for confidentiality in relation to disclosure of the names?

A. That's correct.

Q. And I take it you may have drafted that particular announcement by the Minister; would that be fair to say?

A. Yes.

Q. So, let's talk about reality here. The four institutions were named in the bid, in the

presentation, and are you seriously suggesting that a letter which would indicate to you that after the award or after the announcement of the winner of the competition, that it didn't matter who had been named in the competition or in the bid?

A. What I am saying is that in the bid, it was clearly indicated that there was a willingness on the part of financial institutions to invest in the 20%. The possibility of a change in the institutions wasn't particularly considered until it became a reality after we had announced the result.

Q. Look, Mr. Towey, can I bring you to the response to a question you gave in your memorandum of intended evidence, when you were asked about paragraph 3 of the RFP document, your understanding of it.

It's Question 16, page 11 of the memorandum.

A. Yes.

Q. And the answer is on page 12, Answer 16: "My understanding" sorry, I should read paragraph 3, paragraph 3: "Applicants must give full ownership details for the proposed licensee."

A. Yes.

Q. And "and will be expected to deal with the matters referred to in the following paragraph in their submission."

Not it doesn't say "Applicants must give full ownership details of people who are bidding, but

somebody else can be the licensee", or words to that effect, does it? It says "the proposed licensee".

A. Yes.

Q. "Full ownership details".

A. Yes.

Q. And your response to that is "My understanding was that paragraph 3 was designed to ensure clarity as to who the backers of the project would be." Isn't that right?

A. Yes.

Q. And the bid documentation and the presentation gives full details, doesn't it? It does.

A. Well, I mean

Q. Oh Mr. Towey, Mr. Towey it says that these are the people, if we can get the licence, are the owners; isn't that right?

A. It says that

Q. Isn't that

A. It says that the consortium was 50/50 owned by Telenor and Communicorp, and that in the period leading up to licence award, 20% would be placed with financial institutions

Q. With named financial institutions?

A. And four financial institutions are named.

Q. And they are named?

A. Correct, yes.

Q. And that is in conformance with paragraph 3 of the

RFP; isn't that right? That is in conformance with paragraph 3 of the RFP?

A. Yeah.

Q. No doubt about it?

A. Oh, yeah. I mean, quite clearly none of the people who evaluated these applications felt that paragraph 3 was not complied with by all the applicants, including Digifone.

Q. Yes, they had named them. They had named who the proposed licensee is going to be.

A. Yes.

Q. But your understanding of this letter was that after it was announced who won the competition, they could do something else, that they had another option; is that right?

A. My view was that this was a funding option, yes, for the 20%.

Q. But sure wasn't that all the more reason why you had to bring it to the attention of the members of the Project Team, that what had been declared in the bid and what had been declared at the presentation may not now necessarily be the case at all; we are dealing with something different. Isn't that right?

A. I didn't interpret it in that way.

Q. And the members of the Project Team were entitled to get to the bottom of it to see what the true situation was; isn't that right?

A. I felt there was a far greater danger in admitting this new material to the process that we would have been held to have treated applicants unequally.

Q. How could you have treated them unequally? How could you have treated them unequally? Here were people saying to you that, "Forget about our bid. It doesn't matter now. This is the position." And wouldn't that, or couldn't that I am not saying it would have, but couldn't that have led the Project Team to the view that these people do not, as presented in the bid, do not have the financial capability and fail on the chapeau? Couldn't that have been an outcome?

A. I don't believe so. I mean, in the sense that, you know, I felt the chapeau requirements, so to speak, were a basis on which applications could have been disqualified from the process.

Q. I am not saying that it would have been the outcome. But it could have been the outcome if the full Project Team were being made aware, particularly in light of what had been stated at the presentation, that what had been said at the presentation and what it contained in the bid are not now the true position?

A. I don't believe

Q. Was that not a matter for the Project Team

A. I don't think the Project Team would have arrived at that conclusion.

Q. I am saying that they would. They could have. They

weren't given the option to consider it, because you didn't tell them.

A. No, but I mean, it is quite clear this letter was sent to us to redress a weakness in the application.

Q. Precisely. Precisely. But what had been represented at the presentation did not indicate a weakness?

A. At the presentation, Digifone made clear that they had funding available.

Q. And they had an agreement in place to that effect?

A. Yes.

Q. And because Mr. McMahon, we now know the voice of Mr.

McMahon just asking Mr. O'Brien, "Has there been agreement to that effect?" And the answer is yes.

This particular letter could lead you to the view that what had been stated was incorrect; as transpired to be the true situation, there was no such agreement in place.

A. If you take the view that this was confirmation that there was a binding agreement that excluded others in relation to the backing of Communicorp and the 20%, the 20% investment, then you may be correct in your view.

Q. But isn't it just something that what I am suggesting to you is that the Project Team were excluded from considering it, at least.

A. Oh, yeah, absolutely, there is no question of this being admitted to the evaluation. We were quite clear

in that view.

Q. And can I take it I'll take a complete extreme position: If somebody had written and said they had no money at all, would you have brought that to the attention of the Project Team?

A. If I had got a different letter, I might well have taken a different action. I mean, quite clearly this was an attempt to enhance an application, and that's something that we were very clearly not willing to entertain.

Q. Did it not trigger any suspicion in your mind about what had been conveyed to the Department previously, it may not be the true position?

A. No, it didn't.

Q. None at all?

A. No.

Q. Did you consider it?

A. No.

Q. Did you consider why this should have been done when things had been stated so emphatically at the presentation about an agreement in position that Communicorp had funding in place, in fact that they had fat in relation to the funding?

A. Yes, I took it that they weren't entirely convinced that the Department was happy.

Q. Happy about what, do you think?

A. The financial strength of Communicorp.

Q. That the Department didn't believe them when they stated that they had that in place?

A. It was clear, clearly my view on reading that letter that they had come away from that presentation with a view that there was a weakness that needed to be redressed, and I think that's evident from the letter.

Q. Well, if that be so, did you form the view did you form that view before you read the letter, or did you form that view when you read the letter?

A. Well

Q. That they would have

A. From reading the letter, I believe the letter says that they are responding to the presentation.

Q. Very good. Now, you were at the presentation?

A. I was, yes.

Q. And you read you, above all people, would have read all of the bid documents quite closely?

A. Yes.

Q. And at the end of the presentation, we have asked other witnesses whether there was a sort of a bit of a discussion at the end of each. There is no note of any particular discussions. Can you remember whether there was any bit of a discussion at the end of each?

I know you were doing two a day on occasions; people may have been tired?

A. There was a brief discussion. I am not sure whether it was after each presentation or at the end of each

day.

Q. Nobody from the Department side has indicated, or there is no record of it anyway, indicating that as of the presentation, that there was any suggestion that what had been stated by Mr. O'Brien was disbelieved; is that correct?

A. That's correct.

Q. We know from information furnished by Mr. Johansen of Telenor that Mr. O'Brien came to see him and indicated that they needed that he had information from the Ministry, or official circles, or words to that effect; I use the term "Ministry" perhaps to mean the Department, including the Minister, that they effectively needed to strengthen or beef up on the institutional side of the investment in the consortium. That could never have been conveyed to Mr. O'Brien or to anybody by anyone in the Ministry, from your understanding of events?

A. Absolutely.

Q. Did you discuss your view of the letter with Mr. Brennan?

A. I believe I would have done, but as I say, I can't recall the discussion.

Q. Right. When matters developed in April and May of 1996, coming up to the award of the licence and the formal communication by Mr. O'Connell to the Department about IIU and then Mr. Desmond, did you

bring the content, or the fact that you had received

this letter, to anybody's attention?

A. You mean this letter of the 29th?

Q. This letter of the 29th.

A. No, no, I mean by the time we became aware in '96 that

Mr. Desmond was to be an investor, I had forgotten the

contents of this letter, and I didn't make any link

whatsoever.

Q. You didn't make any link whatsoever. I think you

gathered together some documents or information from

Mr. Buggy, probably on the instructions of Mr.

Brennan, to enable Mr. Brennan or Mr. Buggy to carry

out some work in May of 1996; isn't that correct?

A. Yes.

Q. Again, I'll come to the document in due course, but

Mr. Buggy notes somewhere a reference, I don't know

whether it was a reference made by Mr. Walsh or

information conveyed, of an agreement of the 29th

September of 1995. Do you recollect that particular

document?

A. I may have seen that document, but the date of the

29th September '95 wouldn't have been of any

significance to me. I mean, it wouldn't have been the

cause of my making a leader of this, for example.

Q. You never say any agreement which took place between

Mr. Desmond, IIU, Telenor, Esat Digifone, Mr. Denis

O'Brien, around this time, did you? You never saw any

agreement?

A. There was a shareholders agreement in May '96.

Q. But you never saw an agreement

A. An agreement

Q. of this date?

A. No, I don't believe so.

Q. And can I take it that or did you have any

knowledge that Mr. O'Brien was in discussions with Mr.

Dermot Desmond and Mr. Michael Walsh leading to an

agreement of the 29th September?

A. No.

Q. During the period of the bid and the presentation?

A. No knowledge.

Q. Did you know that Minister Lowry had spoken to Mr.

Denis O'Brien on the night of the 17th September 1995?

That was after the All-Ireland.

A. No.

Q. When did this letter and/or its contents come to your

attention after you returned it?

A. I am not sure exactly when that was, but it was by way

of a report in the newspapers that a letter had been

sent on the 29th September '95 to the Department by

IIU, and it was only when I saw that report that I

made the link with this letter and realised that this

letter had related to what became Dermot Desmond's

eventual involvement in the company.

Q. And that came to your attention I think it was an

article in the Sunday Tribune, I think; isn't that

correct?

A. It may have been.

Q. And what did it trigger in your mind, that particular article? That you had received a letter?

A. Yes. I mean, it didn't particularly trigger any thought process.

Q. Was there a discussion in the Department about it at that time?

A. No.

Q. There was no discussion in the Department?

A. At the time when it was reported in the media? No, no.

Q. None at all?

A. No, no. I think Martin Brennan, in fact, may have brought to my attention that this newspaper report suggested that the letter we had received and returned had in fact been in relation to the involvement of Dermot Desmond.

Q. And was it left at that in the Department, just Mr. Brennan informing you of that?

A. Yes.

Q. And there were no further inquiries in the Department?

A. No.

Q. At all?

A. No.

Q. By anybody?

A. No.

Q. Did you even try to find it?

A. To find the letter?

Q. A copy, to see if

A. No. I mean, I knew that we had returned it. I knew we didn't have a copy.

Q. You remembered that?

A. Yes. That stood out in my mind because we were absolutely we wanted to absolutely ensure that our procedures for the competition weren't compromised.

Q. And when did you actually see a copy of the letter again?

A. I believe when I obtained it from the Tribunal.

Q. And had you discussed it with anybody other than Mr. Brennan in the intervening period? That is, before you received a copy?

A. No, I don't think so.

Q. Now, again I am not asking you to go to head to head with Mr. Brennan in relation to your recollection of what may have transpired between you, but doesn't it seem more likely that you must have discussed the content of the letter with Mr. Brennan in order for both of you to arrive at a view that it would go back?

A. I certainly had formed a view which I would have put to him, and I imagine that we discussed the contents and that the line I proposed was agreed. I mean, as I say, the issue of not admitting new material to the

competition would have been very, very prominent in our minds.

Q. But of course you could also look at it this way, Mr.

Towey: You had just arrived back from Copenhagen, and

you were going off to meetings of the PTGSM to deal

with the draft report and whatever discussions

transpired subsequently, which we will go into. If

the PTGSM or some members of it had been informed that

this letter had been received and the contents of it,

it could well have taken the discussion down a

different road, particularly in relation to the

financing and that aspect of the report dealing with

Communicorp; isn't that right?

A. I don't believe that I saw the possibility of that

implication in that letter.

Q. Ah, Mr. Towey, you had come back, yourself and Mr.

Brennan had come back. You had been over, you and Mr.

Brennan were I think you were present in Copenhagen

with Mr. Andersen and Jon Bruel, only you and Mr.

Brennan?

A. That's correct, yeah.

Q. The two members only two members of the Project

Team were present where matters which we will inquire

into in due course occurred; that is, certain

scorings, the drawing together of certain matters and

bringing them back to Dublin. Isn't that right?

A. Yes.

Q. And the content of that letter could have blown the whole thing out of the water, couldn't it?

A. I didn't view it in that way at all.

Q. I know you didn't, but looking at it now, Mr. Towey, would you be clear about this? It was certainly, certainly calling into question the financial capability of Communicorp and what may have been represented at the presentations. Sure, isn't it as clear as a pikestaff?

A. It wasn't calling into the question into question the financial strength of Communicorp to an extent that we weren't already aware of. There was no question about that. If one was to draw a comparison between it and the information given at the presentation, then one could say that, yes, the suggestion here was that Advent were to be replaced as a financial backer. Now, I am not sure that that of itself is of any great significance.

Q. Other than people might ask, "Who in God's name are IIU? What's their track record? What's their financial strength? Who are they?"

A. That question

Q. Sure it occurred to yourself. You didn't know who they were.

A. That question may have arisen if we were evaluating this material, yes.

CHAIRMAN: Just on that point sorry, Mr. Coughlan;

I'll be brief and you took the view it was an attempted enhancement of their hand, contrary to the ground rules, and you rejected it?

A. Without question.

CHAIRMAN: You, having had read to you and seen the portion of the second paragraph, "We have arranged underwriting on behalf of the consortium", I suppose it's a possible alternative view that it was a substitution rather than an enhancement. You don't agree with that, but it's a possible view?

A. Yes, that it was a substitution, but the motivation in my view was without question

CHAIRMAN: I see that's your point.

Now, in the course of this closed period when you, by anybody's reckoning, worked enormously diligently and conscientiously through many late nights, did you get, apart from the correspondence that you received in general terms, did you get a certain amount of eccentric or crank mail? I know the Tribunal certainly has over its years.

A. No, we didn't. We didn't.

CHAIRMAN: There weren't silly letters that you just binned, urging

A. No, no.

CHAIRMAN: But it occurs to me that whatever view you took, you didn't look on this as a frivolous or trifling letter; you did at least look on it as

something that was sufficiently serious to be attempting to bind Communicorp and Esat Digifone that had been sent with Mr. O'Brien's authority, because you sent it back to him.

A. Yeah.

CHAIRMAN: You did at least give it that status.

A. Yes, certainly I did see it as significant. But the word "bind," that's not a conclusion or a train of thought that I drew from the letter, that this was a binding agreement.

CHAIRMAN: Oh no, but you did at least take the view that this was from somebody serious, and that it was sufficiently linked with Mr. O'Brien's application that it was to him rather than to Professor Walsh that you sent it back.

A. Oh, yes, no question about that.

CHAIRMAN: Again, does it not seem a reasonable comment, since it was from a company that you hadn't heard of, that one of the first things that you'd prudently have done would be to screen the letter to see who was behind the company, what individuals were set out as directors, when the stakes were so high and when this letter has transpired to be a matter of very great importance, and indeed, from Mr. Desmond's legal advisers, it seems is sought to be relied upon to some degree?

A. Yeah, I mean, I suppose I think, by way of context,

while there were provisions in the competition in relation to ownership and while there were proposals in the Digifone application in relation to how ownership would evolve, there was nothing sinister about those provisions. We didn't they are not something that was concerned, of particular concern to you as a Project Team, in writing the provision, or I didn't write the provision in paragraph 3, but I saw the provision of paragraph 3 as not setting out to guard against anything in particular, but that it was the kind of information that we should have available to us in evaluating applications.

Now, although we know from subsequent events and from material uncovered by the Tribunal that there were difficulties within the Digifone consortium, it is not something that the Department was concerned about at this time, in September '95. And quite honestly, in looking at this letter, we didn't get past the initial overwhelming reaction that this was an attempt to improve the application. We didn't go beyond that in looking at this letter or the implications of it.

CHAIRMAN: Thank you. Sorry to interrupt you.

Q. MR. COUGHLAN: Just in that regard, in paragraph 3, the ownership details of the proposed licencee.

A. Yes.

Q. I understand your point; you know, you didn't draft that particular thing.

A. That's correct.

Q. But of course, this was public business, first of all, and it was the awarding of a scarce State resource to somebody. The State and the public would have to know who they were giving it to, wouldn't they? Like, that's just common sense.

A. Yes.

Q. Both from the point of view of the ability to do it

A. Yes.

Q. and of course, one would also have to guard against it falling into undesirable hands, if I could put it that way.

A. I don't believe that we ever had that particular view.

Q. Well, if I could and I am not suggesting that anyone here involved in this consortium falls into this category.

A. Yeah.

Q. But you couldn't have it falling into the hands of organised crime, for example?

A. If that had arisen, I have no doubt that we would have, yes, have

Q. There are many reasons that. First of all, there is the ability to do it. The second thing, reputational, if I can use it in its broadest sense, would be a consideration. The State can't give it to undesirable elements, if I use it in its broadest sense?

A. In the broadest sense, yes. But I mean, our approach

here was that we were going to be dealing with corporations. We were dealing with companies. And that particular thought didn't cross my mind. Or, I believe, anybody else's.

Q. One could see why one would need to know and of course those were the rules of competition. Everybody had to play by the same rules?

A. Yes.

Q. And everybody had to be treated fairly in that regard everybody?

A. That's right, yeah.

Q. And can we take it that everybody who applied must have had the same view, that the rules applied to everybody?

A. Oh, yes, I expect so. Of course we had foreseen that there would be evolution of ownership also. I mean, that was acknowledged in the information memorandum on the 28th April.

Q. Yes, that related to once the licence was awarded; isn't that correct?

A. Yes.

Q. Once the licence was awarded, and I understand that because obviously you can't hold a company has to develop or to trade, of course, of course, that's perfectly understandable. It would have been ridiculous to say you are bound with that and you can't raise funds somewhere or you can't do a certain

type of business connected with this business to enable the business to flourish. I understand that.

But those were the rules. Like it or not. Those were the rules that everyone had to play by?

A. They were, yes.

Q. And those were the rules that your Project Team had to comply with. You had to adjudicate in accordance with those rules; isn't that right?

A. That's correct, yeah.

Q. Fairly and equitably?

A. Yes.

Q. Now, it's just Mr. Healy draws my attention to the fact that Mr. Nesbitt has indicated at some stage that it couldn't go to somebody who was inappropriate from a public policy point of view, but that was a point which was made by Mr. Nesbitt.

Before I go into some documents, particularly documents leading up to the involvement of Mr. Andersen and the development of the evaluation model and matters that lead into that, could I just for a moment go back to something we touched on yesterday, and that was the communication which the Minister made with you when you think sometime you think in September of 1995; remember, we discussed that?

A. Yes.

Q. You brought that to Mr. Brennan's attention; isn't that correct?

A. I believe I would have done so, yes. I mean, in the sense that the Minister had been looking for him, and also in the sense that it was the first instance that I was aware of where the Minister had shown an interest in the progress of the competition.

Q. And I think you may be aware from evidence Mr. Brennan gave that he also had a discussion with the Minister, he believes, sometime in it must be September. He wasn't there in August anyway; he was away on annual leave. But sometime in September of 1995, where he had a discussion along the terms of emerging that they were there were plenty of good applicants, and he might have split it into, if it was a horse race, that you could split it 3:3, or 2:3:1, or something like that?

A. Something like that, yes.

Q. When the Minister rang you, of course and you have just said where he had shown an interest in the progress of the competition, he showed more than an interest in the progress, didn't he? He wanted to know if what you described as the bookies' and the media's front runner had it, or it was sown up, or a foregone conclusion, or something like that; isn't that right?

A. Yes, he specifically wanted to know how it was working out.

Q. And I think you had no doubt that he was referring to

the Persona consortium in that context?

A. That was my yes, that was my view.

Q. And can I suggest to you that that, at least, was the Minister indicating, if not a preference that that particular consortium shouldn't be successful, was at least not indicating what I might describe as a negative interest about the process?

A. Well, I didn't really draw any conclusions from...

Q. No, but just examining it now, doesn't it appear to be, looking at it with the benefit of hindsight, that he was putting down a marker? He was under pressure from another consortium concerned about the bookies' favourite or the media's favourite, Persona?

A. I don't know that it was necessarily one.

Q. We know the consortia which the Minister has indicated that he had contact with.

A. Okay.

Q. Because he has told us.

A. Okay.

Q. He has told us and this is hotly disputed between himself and Mr. O'Reilly the Minister has indicated that there was a discussion on Derby Day of 1995; there is a dispute about that. If the contact was in September, perhaps it's improbable that it relates to any conversation which took place in June of 1995, because you got the impression that he was phoning from a public place, at least; isn't that right?

A. He was, yes.

Q. He has told us about a meeting with Mr. Tony Boyle of the Persona consortium, as did Mr. Tony Boyle, and that was about the 16th August of 1995, and again it appears improbable that it related to that particular contact. We know of one other contact that the Minister has informed us of, and that is a contact with Mr. Denis O'Brien on the evening of the 17th September of 1995?

A. Yeah.

Q. So those are the three consortia that he has indicated. Now, he had met in official conducting of official business, perhaps members of the ESB and, I don't know, Bord na Mona and people like that; but might I suggest to you that it was the Minister, if not attempting to influence by indicating at least a lack of neutrality as regards Persona, if it wasn't that, there was at least the perception that that could have been the case. Isn't that right?

A. That possibility didn't cross my mind.

Q. I am asking you to look at it now, the perception, the perception in the first instance, such a conversation taking place. You were involved in a sealed process.

A. Yeah.

Q. First of all, for a Minister to ring any of his civil servants, particularly civil servants who were asked to do this particular weighty job, to even suggest

that they might have run with a foregone conclusion, particularly what might have been perceived as perceived as a promise from a previous Government of a different party, would be fairly insulting, to say the least of it, wouldn't it?

A. Yes.

Q. Were you annoyed?

A. No.

Q. Well, I suppose, in fairness, perhaps that was an inappropriate question. You are a professional person in carrying out this work, and perhaps you wouldn't be annoyed; but did you take it as being an insulting inquiry?

A. No, I didn't interpret it in that way.

Q. But there can be little doubt that at the very least, that was the perception, of the Minister attempting to influence by expressing a view to you that he was under pressure, that it was a foregone conclusion that another consortium would get it; isn't that right?

A. It may be possible to construct that interpretation.

I certainly, at the time, didn't take from it a message any message of that kind whatsoever. My interpretation, quite simply, in fact, was that he was subject to an approach, and he basically wanted to get this person off his back. That's the kind of impression that I had.

Q. But he could only get him off his back by giving him

information which perhaps inured to the benefit of person that was on his back, that at least there was no decision?

A. Yes.

Q. Now, I suppose and it's a matter for Mr. Lowry, it's not a matter for you, it's just if you wish to comment Mr. Lowry could have dealt with it by saying to the person who approached him, "I can't talk about it or do anything about it". He could have gone down that road?

A. He could have, yeah.

Q. Now, I know you didn't inform the rest of the group about it. Do you remember if Mr. Brennan ever mentioned it to the rest of the group, that the Minister had been made contact with you?

A. Well, I don't believe it was mentioned to the rest of the group, and it was followed, I believe, by a discussion between the Minister and Mr. Brennan, which would have been the substantive discussion, I presume, which was reported to the group.

Q. Was that the discussion the Minister had with Mr. Brennan which is recorded in the minute of the 9th October of 1995?

A. I don't believe so.

Q. You don't believe so?

A. I don't think so.

Q. Perhaps we can look at the notes of the group. I

don't seem to recollect, I could be wrong, I don't seem to recollect any other note of or record of the Minister and Mr. Brennan having a discussion which was brought up at the Project Group, other than, I suppose, there is the reference at a meeting, not a Project Group meeting but an interdivisional meeting on the 3rd, I think, of October, where Mr. McMahon records Mr. Brennan as indicating that the Minister wanted to accelerate the process. Those are the only two notes the only two occasions that I recollect. We'll look at it. I may be wrong.

A. My conversation with the Minister would have been earlier in September, because clearly at the time there was no result evident. The top two or three candidates hadn't been divided, and if the conversation had taken place later towards the end of September, when I had a clear view on what seemed to be the way the result was emerging, it would stand out in my mind, I believe, that I was actively concealing information from the Minister.

Q. I understand that. Was it could it have been after the presentations? Nothing had emerged solidly there yet. You still had the quantitative you had the quantitative evaluation; that was the one done on the 30th August, I think, which was considered at the meeting on the 4th September. There was a meeting prior to the presentations to discuss how you'd

proceed with the presentations. There were the presentations

A. It may have been. It may have been after

Q. It may have been after the presentations?

A. It may have been.

Q. Sorry, you just say it may have been?

A. Yes.

Q. Did Martin Brennan tell you about his conversation with the Minister?

A. At some point, yes, and again I can't put a precise date on it, but he told me that he had discussed it with the Minister; he had told the Minister who the top contenders were, and the Minister had said he had no difficulty with any of them with either of them; I believe it was two that he mentioned.

Q. And that would have been Persona

A. Persona and Esat.

Q. Persona and Esat. Did you understand what the Minister meant by he had no difficulty? Or was it just an expression?

A. I didn't I didn't feel it was anything that needed to be read into deeply. I thought it was just an offhand kind of "Fine by me" type of thing.

Q. Did Martin Brennan say anything whether the Minister had expressed any political preference or view?

A. No, he was clear. He was clear that the Minister had no difficulty

Q. What he told you, that's what he was clear?

A. Yes.

Q. We do know from a note which was made by Mr. Bruton, who was the Taoiseach at the time, when Minister Lowry came to him on the 25th, this was to get clearance you may or may not have seen that note, so perhaps I should wait until I open it to you that Mr. Bruton, Mr. Bruton had has a practice of keeping notebooks, and he writes down a lot of what is being said to him at meetings or when he is talking to people, or at least he did have the practice at that time, and he has a note to the effect that he believes it's Mr. Lowry saying something to him, that Albert had promised it to Motorola. That must have been a reference to the Persona consortium, I suppose?

A. Yes.

Q. Now, that's in the realm of politics; it's not in your realm. But do you ever remember, other than when the Minister inquired of you about what you understood to be Persona, whether it was a foregone conclusion, do you ever remember any other discussion about Persona and a view that it was the other political side?

A. No.

Q. Now,

CHAIRMAN: If you are moving to a different aspect, maybe you might just indicate to Mr. Towey

Q. MR. COUGHLAN: In fact what I was just going to do, to

conclude before lunch, just to draw something together, really, in the context of the Minister's communication with you and the line of questioning I have been pursuing with you about whether it could be perceived to be an attempt to influence or you see, Mr. O'Donnell and Mr. Nesbitt have been asking questions of all departmental witnesses along this line, and I suppose it's also, in fairness to you, along the lines of what you stated on page 2 of your memorandum, that there was not, to your knowledge, any external influence brought to bear on the process which could have had the effect of ensuring any particular result. And Mr. O'Donnell and Mr. Nesbitt had been asking questions of departmental witnesses along the lines of whether they considered that their independence or will to implement the process carried out to the best of their abilities was ever overborne, fairly

A. Never in my case.

Q. or was there any influence?

Well, just in relation to that particular response which you have just given, you did give information to the Minister about the sealed process, isn't that correct, because you considered that the Minister was entitled to the information?

A. I believe so, yeah. And when you say "a sealed process", my view always was that the process was

sealed insofar as people outside the Department were concerned, external interested parties.

Q. Well, just to let you know, Mr. John Loughrey who was the Secretary of the Department, took the view that nobody had any entitlement of any information about the process other than the critical path, in fairness, until the work of the Project Team was completed and they came with the result.

A. That may well be the case, but if Mr. Loughrey had asked me for information, I would not have said to him that I believed that he wasn't entitled to it.

Q. Mr. Loughrey didn't, because he didn't

A. Correct.

Q. because he was the Secretary who had set up this particular process. He was the Secretary when this process was set up.

A. I know, but what I am trying to do is make clear to you my interpretation of the word "sealed" that you are using it.

Q. I understand that. But isn't that an example of giving the Minister information, an example of your will being overborne? You considered it appropriate, but your will was overborne; you wouldn't have given it? You wouldn't have volunteered it to the Minister?

A. No.

Q. Perhaps I'll just leave it there before

CHAIRMAN: Two o'clock. Thank you.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF EXAMINATION OF FINTAN TOWEY BY MR.

COUGHLAN:

Q. MR. COUGHLAN: Mr. Towey, I am going to settle down with a few documents for the afternoon. If you might go to Book 41

A. Before you do, I'd like to come back on something.

Just before lunch on the final exchange that we had on the question of my will being overborne, you suggested to me that I wouldn't have given the information to the Minister voluntarily or at my own initiative, and I said no, that's true, but I just wanted to be clear that it's not my view that my will was overborne, in that I responded to the initial request of the Minister.

Q. I understand.

A. Okay.

Q. I am going to move on in the documents a bit, Mr. Towey, unless you want to come back to some at some stage. And I'll just indicate to you, I don't intend going through things like the various aide-memoires which went to Government which resulted in the ultimate policy of Government, unless you have something specific that you would want to bring to the attention of the Tribunal at the moment. I suppose the major development in policy terms from the

aide-memoire which went to Government in, I think, November 1994, to the one which ultimately represented the policy, was that position of the development of what you have described as the chapeau, you know, the financial and technical capability being taken out of criteria and moved to a headline position in the paragraph as reflected in paragraph 19. I think that's the only major matter. I know we had the licence or the licence fee, but we have been through all of that and I think we have a clear understanding, and there is no disagreement or anything that needs to be added, as far as I understand, in that regard anyway?

A. Yeah, okay.

Q. And just on that question, you, I think, in your memorandum, indicated that you are not sorry, you don't know why, what has been described as the chapeau, the financial and technical capability, moved into that position as opposed to being in the criteria, do you?

A. No, I am not sure whether KPMG advised or whether it was just a draft in change.

Q. Now, again, we have opened all of these documents over and over again, so I only want to come to specific ones with you, so I might just briefly we know about the RFP document; we have it, and it's been opened a number of times, and, in fact, you have made

comment on various provisions of it, and we'll be going to look at paragraph 19 in due course in the course of the evaluation process. But there also accompanied the RFP document, the memorandum for the information of applicants, and I don't think we need to look at that at this stage, unless there is something that you want to draw to the attention of the Tribunal.

Now, I think on the 6th March, 1995, there was the second meeting of the GSM Project Team, and it was agreed that consultants would be required to advise on successful applications, or an applicant, by approximately mid-September, in order to give ample time to put the matter to Government for decision, I think. Isn't that your recollection of events?

A. Yes.

Q. And it was at that particular meeting that what we have come to describe for shorthand purposes, the confidentiality protocol, was also adopted at that particular meeting, and I think you'll find that at Book 41, Divider 47, but I don't think you need go through it in any great detail. We have been over it again, and I think you can take it that's been the confidentiality

A. Okay.

Q. protocol that was adopted. I think the Minister made a Dail statement, just about the competition, on

the 7th March. Nothing, again, turns on that.

A. Okay.

Q. Now, I think on the 29th March, 1995, there was a third meeting of the GSM Project Group, and that's at Divider 50 of Book 41, and that was that relates to the selection of the consultants which, at that stage, had narrowed down between Andersens and KPMG, and there was a discussion, and we know that Andersens were the ones who emerged, in any event, isn't that correct?

A. Yes.

Q. Then, on the 10th April, 1995, there was a fourth meeting of the GSM Project Group, and that's at Divider 52, and there was an update on the consultants. And the first meeting for Andersens was fixed for the 19th April and there was a discussion of the letter from the Department of Finance. We know the letter from the Department of Finance, and again, I don't think we need to go into this correspondence in detail; you have given a view in your Memorandum of Evidence, and you said that it's a matter for the correspondence. That's the correspondence between Mr. McMeel and Mr. Brennan about the whole question of weightings and the time allowed and that the decision was one for Government, and that your Minister had to bring a recommendation to Government. You know that particular correspondence?

A. I do, yes.

Q. I don't think you can add anything particular to that.

Mr. Brennan and Mr. McMeel have given their evidence about it. Or is there anything you wish to particularly

A. No, I mean, I was obviously, you know, I was obviously involved in drafting letters in that exchange, and I was certainly active in arguing the Department's view that the weighting should be disclosed.

Q. Yes. Now, I think on the 11th April, 1995, the Minister announced the appointment of Andersen Consulting, and that's at Divider 53. And would you have drafted this, do you think, or would it have been done in the press office?

A. It wouldn't have been done in the press office. In all probability, I drafted it, or Martin Brennan. Probably me.

Q. And it just says, "The Minister for Transport, Energy and Communications, Mr. Michael Lowry, announced today that he had appointed Andersen Management International of Copenhagen to assist his Department with the competition he announced some weeks ago to select a licensee to become the second GSM mobile telephony operator.

"The major part of the consultancy is to carry out a detailed evaluation of the competing bids for the licence but the consultants will also assist with all

other aspects of the competition. The Minister said that Andersen are particularly well suited to be his independent advisers, taking account of experience gained while recently undertaking similar tasks for both the Danish and Dutch governments. They were selected following a competition between six short-listed firms of consultants. They will commence their involvement immediately.

"The closing date for licence bids is the 23rd June and the final decision is due to be announced at the end of October."

Now, I think at Divider 49, if I might just ask you to look at that for a moment, I think that at Divider 49 is Andersen's tender document, isn't that correct?

A. Yes.

Q. And it was based on this particular tender document, then, that Andersens were selected, isn't that correct?

A. Correct.

Q. And ultimately there was a contract between the Department and Andersens. In fact, there was a confidentiality sort of one as well, I think, but the main contract was in respect of this tender, isn't that correct, and I think you informed us yesterday that you may have, in fact, drafted the contract?

A. Yes.

Q. Now, there just sorry, I referred you to Andersen's

tender document, and I'll ask you to come back to that, but if we just go to the contract, which is, in fact, dated the 9th June, isn't that correct? It's at Divider 69?

A. Yes.

Q. And then there are various recitals on the first page there, and then the agreement what was agreed is on the second page, isn't that right?

A. Mm-hmm.

Q. And the consultants: "It was agreed that the consultants shall provide advice and assistance to the Department on the award of a licence to a second operator of GSM telephony in accordance with the draft terms of reference at Annex A of the consultancy tender and specifically on the following matters:"

And then what's required is:

"A. The development of an evaluation model for applications for the GSM licence based on the selection criteria at paragraph 19 of the GSM tender document in accordance with the principles outlined in paragraphs 3.2.1 and 4.2.1 and Section 5 of the consultancy tender. This advice shall be provided before 23 June, 1995, by a document providing an outline evaluation model which might be further developed during the evaluation.

"B. The responses to questions submitted to the Department by prospective applicants for the GSM

mobile telephony licence as provided for in the GSM competition process, and, insofar as they are relevant to the Department, questions submitted to Telecom Eireann by prospective applicants. This advice shall be provided before 23 June, 1995.

"C. The elaboration of guidelines and calculatory assumptions for the submission of licence applications in accordance with the proposals outlined in paragraph 3.22 and 4.22 of the consultancy tender. This advice shall be provided before 23 June, 1995.

"D. A detailed evaluation of the applications for the GSM licence in accordance with the evaluation models developed pursuant to A above and in accordance with the process outlined in paragraphs 3.3.1 and 4.3.1 of the consultancy tender.

"E. A comprehensive written report on the outcome of the evaluation carried out pursuant to D above..."

"F. Preparation of a draft licence.

"G. Any other task related to the competition for the GSM telephony licence requested by the Department."

Paragraph 2 I think goes on to deal with questions of payment, isn't that correct?

A. It does, yes, and it confirms that there is a ceiling.

Q. 3 is expenses incurred. I don't think we need to go into the rest of the agreement.

A. Okay.

Q. So you received the tender document; Andersens were selected; you enter into an agreement with them, and they agreed, for a certain sum of money, to provide the advices and consultancy services as specified in the contract, isn't that right?

A. Yes.

Q. And what the first thing they were asked to do was to develop an evaluation model, isn't that right?

A. Yes.

Q. based on the selection criteria at paragraph 19. And I think they did that, isn't that right?

A. Yes.

Q. Now, I think we know, and we will look at the evaluation models in a moment, but we know that the evaluation models developed involved both the quantitative and the qualitative approach, isn't that correct?

A. Yes.

Q. And I think you, in your evidence yesterday, and in the memorandum furnished, informed the Tribunal that you asked somebody in Andersens, it may be Michael Andersen - I am just trying to find out who you did ask - about this question of the quantitative and qualitative, did they produce different results or the same results, and you got an answer to the effect that they usually resulted in a different result, isn't that right?

A. Yes.

Q. Can you remember who said that to you?

A. I believe it was Marius Jacobsen.

Q. Marius Jacobsen, right. I was just wondering about it, because in the tender document, if you go to Divider 49, please, and if you go to page 17 of the tender document, under the heading "5. Specific comments and suggestions concerning the evaluation models".

Do you have that?

A. Yes.

Q. And it says, "The nucleus of the evaluation is to apply the adopted evaluation models on the admitted applications. In fact, we expect all applications to be substantially better than the minimum requirements and it is therefore likely that 4-5 applications will be admitted to the in-depth material examination during both the quantitative and the qualitative evaluation. One of the advantages of having both a quantitative and a qualitative evaluation is that they often turn out with the same end result, which will be a strong argument for the validity and the reliability of the procedures behind the nomination of the highest ranked application. In addition, the quantitative evaluation will generate a wealth of useful hard data which can serve as a fact base for the later-coming qualitative evaluation."

Do you remember reading that in the tender document?

A. No. I mean, I would have read it but

Q. I know you did read the tender document; I am not suggesting that you didn't, at all. But I am not saying it's at odds, but it's somewhat at variance to what Mr. Jacobsen told you, isn't it, that particular statement?

A. Yes, it is.

Q. Do you remember or sorry, can you remember how you had this conversation with Mr. Jacobsen or the context of it?

A. I don't remember it specifically. Can you remind me of the date of the Project Team meeting where that exchange took place?

Q. I am unsure myself as to the date of the project meeting. It was from your

A. It may not be particularly significant. I suspect

Q. No, I don't see it recorded in a Project Group meeting. Again, I may be incorrect about that, but it's really I think it was you certainly discussed the model on the 18th May?

A. Yes, and in June.

Q. And in June?

A. It could have been

Q. Those two occasions.

A. It could have been in the context of or the examination of the model on either of those two dates,

or it could possibly have been at the meeting in early September, I believe, when

Q. The first quantitative was available?

A. Yes, when it was presented by Andersens. It could have been any one of those.

Q. Yes, all right. Do you know what might have prompted the inquiry by you?

A. Well, the fact that we had what seemed to be two separate models, that of itself could have been the cause, or if it was at the September meeting, it may well have been, given that the Persona consortium was ranked first following that, it could well have been, well, you know, is it what we can expect to be the likely outcome when we finish our evaluation? I don't know.

Q. It's just you may be able to help us about this. If you go to page 8 of the tender document, and you can see there that this is under the heading of a table "The logical consistency between aspects, dimensions, indicators and sub-indicators." Do you see that?

A. Yes.

Q. And there is a table then set out as an evaluation criteria, organisation, an example, and then the aspect, dimensions, the indicator, sub-indicators, I suppose further sub-indicators could be developed. It says, "As evident from Table 1, each evaluation criteria can be detailed in a rather precise manner.

However, there will, of course, always be a need for a general or holistic approach in order to be able to assess the overall performance ability and consistency of the entire business case presented by the applicants. Clearly, this is also reflected in paragraph 19 of the RFP document in which the credibility of the business plan is top priority criterion.

"Having specified the above-mentioned evaluation criteria, it will be possible to develop preferably two evaluation approaches:

"One way to go is to compose (one or more) models based on a system of points whereby the values of the different applications can be scored, e.g. according to a scale of arabic number connected to each specified performance criteria. (Application A1 has 3.5 points more than application A2, but 5 points less than application A3, etc.)

"Another way to go is to award qualitative marks (e.g., A, B, C, D) to the applicant's performance areas, which will finally allow for a simple ranking of the applications, (e.g. Application A1 is better than application A2).

"In both models it is difficult to make the addition of the measured performance, since the added results are highly dependent on the weighting of the different evaluation criteria (which do not by nature belong to

an interval scale). The addition of results at the bottom line will inevitably contain some arbitrariness except for the proposed licence fee payment, which is normally easy to assess in an objective and transparent manner. It should therefore be considered to use both methods in order to maximise the validity and reliability of the calculated results. Attention should also be paid to the calculation process. One extreme is to let different participants in the Evaluation Team calculate their own results, the 'Independence' model. Another extreme is to gather the participants to common sessions in order to discuss and agree on the calculations (a 'Delphi' model).

"Independent of which evaluations models the Department finally chooses, we recommend that supplementary analyses be carried out where no immediate discrimination of the applications can be made."

I think what we are trying to understand, and first of all understand what this is about, and secondly, what did happen during the course of the evaluation process.

You see where he describes the independence model and the Delphi model?

A. Yes.

Q. Could you assist us as to your understanding, first of

all, of those two particular models?

A. Well, I mean, my understanding of what he is saying is that, in the independence model, that members of the sub-group would come to the sub-group meeting with their individual awards of marks to the different indicators, and that the result would then, presumably, be achieved by some kind of averaging.

In the Delphi model, it's a discussion, and a consensus, and that was the approach that we adopted.

Q. You adopted?

A. Yes.

Q. So you say that it was the Delphi model was the one that was adopted by the Department?

A. Well, I think the Delphi model

Q. Am I not correct - or maybe I am incorrect - am I not correct that the Delphi model might have envisaged a broader range of discussion in order understanding, that in carrying out an evaluation, that everyone might have a view but that you reduce the risk of an arbitrary or a less than good result, the more people who are involved in the process and discuss it. Do you understand me? Just like a jury, say, for example, would discuss

A. Yeah

Q. Would I be correct in thinking that was a view that was intended in the Delphi model? Obviously the more people who discuss it and a result is arrived at, you

hope that, by that particular process, that you would arrive at a reasonable result across the board?

A. Yeah, I don't think he is particularly comparing the two there, but, I mean, my view is that, yes, a process of discussion and consensus is one that is likely to lead to a better result than individual scoring and doing a simple averaging of individual scores.

Q. Now, I think if you do you have the book which is called the weighting documents? Book 54.

A. Not at the moment.

(Book handed to witness.)

Q. Now, I think you will find it behind Tab 1. This happens to be, I think, Mr. Sean McMahon's copy. It doesn't matter I think that was the first draft of the evaluation model which was submitted by Andersen, isn't that correct, and considered by the PTGSM on the 18th May of 1995?

A. Yes.

Q. And it looks from the minute of the meeting of the 18th May, it was gone through in reasonable detail, this particular draft?

A. Yes, I think it was, yes.

Q. And I think in the introduction it indicates that the it has been decided to apply both a quantitative and a qualitative evaluation model to the eligible applications, and this document contains

information concerning the quantitative and qualitative evaluation models and intends to give a complete description of these. And that's what it intended to do, isn't that correct, and that's what was discussed?

A. Yes.

Q. Now, it may be it may be at that meeting that you may have raised the question

A. It's possible.

Q. It may have been. Now, I think at page 2, it sets out the procedure for the quantitative evaluation process, isn't that correct?

A. Yes.

Q. And it says that "The following steps describe the procedure for the quantitative evaluation of the application. It sets out at 1 a set of dimensions and indicators has been selected for the quantitative evaluation process. An assessment, including a point scoring method, will be defined for all indicators.

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

"2. All the selected indicators will be assigned a weighting factor.

"3. The score of each indicator will be a value between 5 and 1, with 5 being the best score. All scores should be rounded to the nearest integer.

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

"5. The result of the quantitative evaluation should be considered with due respect to the significance of differences in the total sum of the points assigned.

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

Then if you go over to page 3, and it deals with the dimensions assessed in the quantitative evaluation.

And in the left-hand side, in the left-hand column, in various boxes, it sets out the evaluation criteria from paragraph 19, isn't that correct?

A. Yes.

Q. Opposite those, then, are the dimensions linked to each evaluation criteria and opposite those are the indicators for the dimensions, isn't that right?

A. Yes.

Q. And I think you then go to Section 4 of the evaluation model, which is on page 16 of 19.

A. Yes.

Q. And that sets out the vote-casting and weight matrix, isn't that correct? And it's directly referable back to the dimensions to be assessed in the quantitative evaluation and directly related back to the evaluation criteria taken from paragraph 19 in the left-hand column, isn't that right?

A. Yes.

Q. Then at page 17 of 19, there is set out the procedure for the qualitative evaluation process, isn't that right?

A. Yes.

Q. And that reads: "Despite the hard data of the quantitative evaluation, it is necessary to include the broader holistic view of the qualitative analysis. Other aspects such as risk and the effect on the Irish economy may also be included in the qualitative evaluation, which allow for a critical discussion of the realism behind the figures from the quantitative analysis.

"The following describes some of the major steps in the qualitative evaluation process:

"1. The eligible applications are read and analysed by the evaluators.

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

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

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

"5. When the dimensions are assessed, the evaluators should, as far as possible, use the same indicators as

used during the quantitative evaluation. New indicators may be defined, however, if the existing indicators are not sufficiently representative for the dimensions to be evaluated.

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

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

"8. The results of the qualitative evaluation will be contained in the main body of the evaluation report. The results of the supplementary analyses will be annexed to the report."

And then, at page 19 of 19, there is a guide to the award of marks, and it reads, "In order to guide the mark-giving, a matrix has been elaborated below. The dimensions and indicators are not weighted ex ante.

The marks will be awarded according to a "soft" 5-point scale, A, B, C, D, E, with A being a best mark. Averaging will be made after consensus among the evaluators."

Then the aspects and dimensions are set out, isn't

that correct? What we have here are the aspects, in fact. Again, all of the aspects here are directly referable back; they comprise dimensions which are directly referable back to paragraph 19 of the RFP, isn't that right?

A. Yes.

Q. Now, I think at this particular meeting, there was, as we said, a lengthy discussion, and Andersens had recommended certain weights in respect of the various indicators for the quantitative evaluation, isn't that correct?

A. Yes.

Q. And there was a discussion about those, I think, as well?

A. I don't recall a discussion at the level of the indicators.

Q. Well, of the weights?

A. Yes.

Q. These were the weights that were being discussed, isn't that correct?

A. "These" meaning, sorry?

Q. Sorry, the weights which became the subject matter of discussion were the weights as submitted by Andersen for discussion with the draft evaluation model, isn't that right?

A. I don't think so.

Q. What don't you think?

A. We had a discussion of weighting at that meeting, and we agreed a weighting model. My recollection is that that weighting model was agreed on the basis of a proposal put by Andersen. Now, it wasn't the proposal put in this document. He put a proposal by way of writing the criteria on a flip chart, proposing a weighting, and it was agreed. There was a discussion. There may have been changes, which I don't particularly recall, and there was an agreement on the weighting model. So the weighting model was agreed in the context of the selection criteria as distinct from in the context of the sub-indicators.

Q. Is there any document to that effect?

A. How do you mean a document to that effect? I mean, there is a document or there is a record of the weighting model according to the criteria.

Q. No, what we have is we have a minute of the meeting of the 18th May, 1995.

A. Yes.

Q. And we have the presentation of the evaluation model by AMI, isn't that right?

A. Yes.

Q. The minute records a long discussion about it.

A. Yes.

Q. And specifically even under on the second paragraph, dealing with the question of solvency, you know there was a discussion about that, and the

weighting which would be attached to that?

A. Okay.

Q. Or the scoring, I beg your pardon. And it was stated that the qualitative evaluation is to provide a common sense check on the quantitative model.

There is nothing recorded in the minute that they were two separate steps. Maybe they were. It may not be an issue. What I am just trying to understand is where the weights came from, do you understand me?

They were, as you said, they were suggested by Andersen, isn't that correct?

A. Yes.

Q. Andersen came with this evaluation model, isn't that correct?

A. Yes.

Q. And all of the indicators are referable back to the selection criteria in paragraph 19, isn't that correct?

A. Yes.

Q. And if you add up the various weights applicable to the indicators in Andersen's model, they are directly referable back to the weights attributable to the criteria in paragraph 19, do you understand me?

A. I can't confirm that's the case.

Q. I think you can take it that that is so. You see, I take your point that Andersen may have put up a flip chart.

A. This is the May document?

Q. The May document, in the first instance. We'll go to the June one in due course.

A. Okay, but on page 16, where the weightings are set out

Q. Page 16?

A. Yeah. The up-front licence payment from the applicant at 10%, that wasn't

Q. I accept that. I agree with you. These changed.

There was a variation, and it specifically related to licence fee and tariffs.

A. Yes, later, yeah.

Q. Later, but there were also changes within between this document and the next document, which was presented in June, on the various weights applicable to the indicators. Do you understand me?

A. Okay. Now, what I am saying to you is that when we made our decision as to the weighting, we did not look at this table on page 16 and consider whether we were satisfied with the proposed weighting attributable to each of these 13 indicators and then total up the ones that related to section to selection criteria number 1, for example, and so on. Okay? So, in other words, the agreed weighting model, 30, 20, 18, and so on, that was not arrived at from the bottom up by way of a summation of the weightings that we wanted to have for the underlying indicators; it was arrived at

by way of a proposal put by Andersens on a flip chart where he proposed a weighting for each evaluation criterion.

Q. I understand. Andersen came with this document?

A. Yes.

Q. Whether he asked you to consider it and tot up and say that that is the weighting applicable to the criteria in paragraph 19, he, nonetheless, had this information in his possession, and when he put up a flip chart and drew to your attention the various weightings, it must have come from the information which he had

A. It may well be that it was consistent with this

Q. Doesn't that appear to be the situation?

A. Yes.

Q. Now, this particular document, can you remember was it circulated before the meeting?

A. No, it was at the meeting, I believe.

Q. That may be correct, because the first paragraph of the minute of the meeting is that prior to the presentation of the AMI evaluation model, its confidential nature was emphasised. It was agreed that three copies would be left in Dublin in the hands of various people.

So I can understand Mr. Andersen having the flip chart, but, in what he was proposing to you, must have arisen from the work he had done in this document to enable him to do that?

A. That may well be.

Q. It wouldn't have just

A. That would be logical.

Q. And it conforms with the weightings which are sorry, that one was not approved. That particular one was not approved. But that's how he approached it in the first instance, was it, that he showed you this?

A. Yes.

Q. And it must, I suggest, follow, therefore, that the information on which he based this presentation arose from his development of a vote-casting and weight matrix in respect of the quantitative evaluation, isn't that correct?

A. Yes.

Q. Because this particular document, and in fact the next document, didn't provide for any weightings ex ante, isn't that correct? That's in relation to the qualitative guide to award of marks?

A. The document, no, the document didn't.

Q. Now, the next meeting, then, of the PTGSM was on the 9th June, it's Divider 70 of the book, it was on the 9th June of 1995, and there was a lot of discussion at that meeting about the Commission and the contact Mr. Brennan had with the Commission.

And at the last page of the minute, it's the second last issue, "Evaluation Model", and it records that

"This was approved as presented with correction of one minor typo on page 6 of 21. Further comments, if any, to be forwarded to Maev Nic Lochlainn within a few days of the meeting."

And that related to the second evaluation model

Mr. Andersen submitted for that meeting, isn't that correct?

A. Yes.

Q. And that was adopted at that meeting?

A. Yes.

Q. Now, can you remember whether there was any discussion between the meeting I know there was a and I can appreciate that there was a lot of discussion about the European Commission, and that was exercising the mind, I suppose, of people in the Department between the 18th May and this date, on the 9th June, but can you remember whether there was any discussion taking place about the evaluation model in the intervening period?

A. I don't believe there was any.

Q. Can you understand sorry, I am just wondering, then, because there is a difference between what Mr. Andersen presented the second time and what had been presented the first time. Do you understand me?

A. I do.

Q. And can you understand or sorry, can you assist the Tribunal as to what might have prompted these

particular changes?

A. Can you draw my attention to them?

Q. Yes, indeed. Well, first of all, this is now a document which is 21 pages.

A. Yes.

Q. Again, if we go to page 3 of 21, no great difficulty there. It's set out in the same format, isn't that right?

A. Yes.

Q. If you go to page 17 of 21, you will now see that there is a difference in the weight. Do you see or some differences?

A. In the breakdown of the weightings at indicator level, there is a difference, yes.

Q. Do you know how that occurred, or why it occurred?

A. I don't, I don't believe it occurred at the instigation of the Department. I suspect that this breakdown of the weightings was calculated by somebody within the Andersen organisation, perhaps, not Michael Andersen himself, and I don't recall there being any discussion in fact, I don't think there was any discussion of the weighting at the indicator level at that June meeting.

Q. It was adopted, as far as we can see from the record anyway?

A. The model was adopted, yes.

Q. We can take it if the model was adopted, the content

of the document was adopted?

A. Yes, yes, but what I am saying is that I don't think there was any specific discussion of the weighting at indicator level.

Q. Well, I suppose we could take it this way, in trying to understand; the first draft submitted of the model was perhaps the considered view of Mr. Andersen when he submitted it, and there was a discussion about it?

A. Yes.

Q. Can you understand, or can you assist the Tribunal as to why there should be changes in the weight at indicator level? We can't see anything in the minute of the 18th, we can't see anything in the minute of the 9th, other than adopting it. Can you remember any discussion about it?

A. No, I don't recall any discussion, but in Andersen's original proposal, I am not sure what percentage or what total marks would have been available for the first selection criteria, whether it was 30, for example. Certainly, at the May meeting it was decided that 30 points should be awarded for the first selection criterion, and if that was at variance with the May proposal by Andersen, then Andersen or someone within that organisation had the task of seeing how that 30 points should then be broken down amongst the indicators corresponding to the first selection criteria criterion, even.

Q. I think perhaps it goes the other way. It was initially 30, and it's now 32.5 on this particular model - that's the one that was adopted on the 9th June.

A. Yes, okay.

Q. And it would seem that perhaps there must have been a discussion to give greater emphasis or greater weight to it, for this to have occurred?

A. I don't recall, I don't recall that discussion.

Q. You don't recall?

A. No.

Q. You don't recall such a discussion?

A. I don't think we had any discussion at the level of the weighting of the indicators. I think when we spoke of the breakdown of weighting, we only did so in the context of the selection criteria, according to paragraph 19.

Q. Yes, but we knew where they came from, didn't we? We knew. You had the presentation of the model that day, on the 18th?

A. Yes.

Q. You knew that it came from the quantitative evaluation model as developed by Mr. Andersen, isn't that correct?

A. Well, no, I don't I mean, I don't think so.

Q. Where else did it come from? Where else did the information come from? Where did the proposal come

from in the case of Mr. Andersen, based on the

documents before us?

A. The proposal made by Mr. Andersen, I have no doubt

that it was consistent with the figures set out in the quantitative evaluation model. But what I am saying

is that from the Project Group's point of view, I

believe that the exercise we were engaged in was a

scoring or sorry, a weighting of the selection

criteria in order to ensure that we could

transparently reflect the descending order of priority

that the Government had prescribed. We had an

exchange of letters with the Department of Finance as

early as April on the principle of whether it would be

a weighting system or not.

Q. I understand that.

A. So what I am saying is, there was a clarity, I think,

within the Project Group that the selection criteria

would be weighted to reflect that descending order of

priority, and I am suggesting that that's not purely

specific to the quantitative model proposed by

Andersen in this document.

Q. Now, let's halt there for a moment, so. The only

discussion that could have taken place, based on a

recommendation or a proposal by Mr. Andersen, was

based on the information which he had gathered

together and developed in his evaluation model, isn't

that correct?

A. Well, I mean, I don't know what procedure Mr. Andersen adopted.

Q. Well, now, we have the minute of the meeting of the 18th, where there is a presentation of this particular evaluation model.

A. Yes.

Q. That's where it commences, the minute.

A. I am sorry, that's where?

Q. The meeting the minute of the meeting commences with the presentation of this evaluation model?

A. Yes, okay, yes.

Q. And we can see in the evaluation model that Mr. Andersen sets out the criteria - this is at page 3 of the first draft - he sets out the criteria in the left-hand column, isn't that correct? He sets out the dimensions linked to each criteria next to that, and then he sets out the indicators for the dimensions in the third column?

A. Yes.

Q. Can we take it that that was presented?

A. I expect it was, yes. I presume so.

Q. And that you worked your way through the evaluation model, and you would have come or you may have gone immediately to the vote-casting and weight matrix?

A. Okay.

Q. That's at page 16.

A. Yes.

Q. And when you add these particular indicators together, you come back to the criteria and you get the weights for the criteria as proposed by Mr. Andersen, I suggest?

A. I have no doubt that the figures add up.

Q. That would have been the way it was done, I suggest? It had to be?

A. No, no, if you are suggesting that we had a discussion of the figures in the right-hand column on page 16 of the May document, if you are suggesting we agreed those figures and that we subsequently agreed a modification to those figures, and then subsequently agreed that the weighting model, according to the criteria, is 30, 20, 15, 14, 7, 6, 5, 3, then that's not the way that it was done, in my recollection. My recollection was that at this point in the meeting, we agreed that we were going to decide the weighting model for the selection criteria. The selection criteria were written down on a flip chart, Andersen's proposal alongside it, which I have no doubt would have been consistent with what's here in Table 16, but it was on that basis, and it looks like we did modify it and we did agree a weighting model at the level of the criteria. We didn't then go back to this Table 16 and say, now, having decided new weightings at the level of the selection criteria, this is how we are proposing that they should break down for the

quantitative analysis. That was something that we left to Andersens.

Q. Just to understand that; Andersen, you say, proposed weightings for the criteria unrelated to the weight matrix for the indicators, is that correct? I am just trying to understand?

A. I am sure it was consistent.

Q. I am asking you, did he do it independently of it or did he do it by reason of it?

A. He did it independently in the sense that we were not looking at this document when we agreed the weightings. We were looking at a flip chart where Mr. Andersen put up a proposal.

Q. Right. Now, can you point to me, and we'll go to the meeting of the the 7th meeting of the GSM Project Group, which is at Divider 64, which commences "Presentation of the evaluation model by AMI:

"Prior to the presentation of the AMI model, the confidential nature was specified.

"2. AMI distributed copies of the draft model.

After initial study, the group had no major difficulty with the chosen format and a page-by-page scrutiny ensued. The following points were agreed."

And then it deals with the various paragraphs.

A. Yes.

Q. If we go right down through it. Then it comes down "The qualitative evaluation was to provide a common

sense check on the quantitative model. This part of the model would need to be clarified further before evaluation begins."

And that's what happened in the next draft that came in.

"If a latter challenge were to reveal that any two persons among the evaluators proceeded with a different understanding of the process, then the entire evaluation process could be put in question."

Then the logistics on the work plan for the evaluation tenders were set out, then the availability of the staff. And it was agreed that everyone would strive to maintain an overview while focusing particularly on their own area of expertise.

Then if you go over the next page, then, it's dealing with the interim interconnection regime, the Commission letter, and it was agreed that Mr. Andersen would accompany the Irish delegation for discussion with the Commission on this matter.

Now, it's a fairly comprehensive minute, probably one of the more comprehensive minutes we have seen of PTGSM meetings whereby paragraph-by-paragraph matters are gone through and noted, what may have transpired and decisions made.

A. Yes.

Q. Can you show me there where it is recorded what you described or what you told us happened?

A. Well, it says in the context of paragraph 4, which relates to that part of the evaluation model which contains the table that we discussed.

Q. Very good. It says, "Reference can be made on the file to the formulae agreed."

A. Yes.

Q. And that and I presume Ms. Nic Lochlainn was recording this as matters evolved, seems to have been recorded after there had been a complete discussion on the page by page of the draft model submitted, doesn't that appear to be the case?

A. Yeah. There is a note on the file which is separate from the meeting report where it says, "Agreed at the meeting the formulae".

Q. I read that note. And there is another note that we have which is taken which I will get in due course, which was taken from the disk, I think, of Ms. Nic Lochlainn, which records the weightings as, and I think reference is made, the weightings agreed to the quantitative.

A. Okay.

Q. So what I am looking for here is information, I am looking for, do you understand?

A. Yeah.

Q. And it just seems to me that, looking at this minute, there was a page-by-page discussion of this draft evaluation model, and what I am suggesting to you is

that, arising from that, the weightings were agreed on the presentation of Mr. Andersen. Now, you may recollect, or you may believe that he put a flip chart up before such a discussion took place. Could it have been as a result of the discussion that Mr. Andersen put up the flip chart, then? Do you understand the

A. No, I don't recall. I mean, the only point I am making, really, is that I don't recall a detailed discussion at the level of indicators, so the deliberate decision following discussion was at the level of the criteria.

Q. Well, can I take it that members of the PTGSM were new to this?

A. Yes.

Q. Andersens had experience; they had been involved in the Dutch one and the Danish one, I think, or

A. That's correct, yes.

Q. And what they were bringing they were advising and guiding you on how to approach this, I think, would be a fair way of putting it, wouldn't it?

A. Yes.

Q. And the minute seems to record them going through the evaluation model with the PTGSM, or the PTGSM going through it with Andersens, and then, at the end of that, reference can be made on the file to the formulae agreed, isn't that right?

A. Yes.

Q. And there is no reason to believe that that record is inaccurate?

A. No, no, there is no reason to believe.

Q. And the sequence is probably how things evolved?

A. The sequence, yes, I mean, I agree.

Q. Now, if you go to the second draft, you know the one that was considered at the meeting or sorry, that it was adopted at the 8th meeting on the 9th June, 1995.

A. Yes.

Q. Now, I want to be fair about this; a lot of that meeting was taken up with consideration of Commission matters, isn't that correct?

A. Yes.

Q. The minute seems to record that. And would that be your recollection, that that was a major issue?

A. Yes.

Q. And Andersens were present, and Andersens were advising and assisting in that as well, and it was agreed that they'd attend meetings with the Commission with members of the Department?

A. Yes.

Q. But do you remember any discussion about what was now adopted, the draft which was adopted?

A. I don't.

Q. Would that have been circulated beforehand or would that have operated on the same basis of

confidentiality as the first draft?

A. I suspect it would only have been circulated at the meeting.

Q. At the meeting?

A. Yeah, it's dated, I think, the day before, is it?

Q. Yeah, I think so. I think that's probably reasonable to assume that. It contained highly sensitive information, didn't it?

A. Yeah.

Q. Now, the weight matrix, the weight matrix in respect of the indicators here, we know, is different to the one in the first draft, isn't that correct?

A. Yes.

Q. And this was adopted? This particular model was adopted?

A. The model was adopted, yes.

Q. There is no doubt about that. Now, I think at the meeting, and perhaps you are correct in thinking that your discussion with Mr. Jacobsen was at the meeting on the 18th May, because the minute of that meeting records that there needed to be elaboration in relation to the qualitative aspect of the evaluation model, and the document which was furnished for the consideration of the meeting on the 9th June, does have more detail about the qualitative evaluation. So perhaps you are correct about that.

Now, I don't believe he was at the meeting of the 18th

May, but it may be I don't know, you may have had some discussion with him in the meantime?

A. I think it was in the context of a meeting, and I think it was him as distinct from Mr. Andersen, yeah, as distinct from Michael Andersen or Jon Buel.

Q. Well, in any event, if we just look at page 18 of 21 of the second document now, that is the second evaluation model, the procedure for the qualitative evaluation is set out. And it sets out procedure for the qualitative evaluation process. "Despite the hard data of the quantitative evaluation, it is necessary to include the broader holistic view of the qualitative analysis. Other aspects such as risk and the effect on the Irish economy may also be included in the qualitative evaluation which allow for a critical discussion of the realism behind the figures from the quantitative analysis.

"The following describes some of the major steps in the qualitative evaluation process:

"1. Eligible applications are read and analysed by the evaluators.

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

"3. When deemed adequate and necessary, indepth supplementary analyses would be carried out.

"4. Initially the marks will be given dimension by dimension. Afterwards marks will be given aspect by

aspect (subtotals) and finally to the entire applications (grand total).

"5. When the dimensions are being assessed, the evaluators should, as far as possible, use the same indicators as used during the quantitative evaluation.

Supplementary indicators may be defined, however, if the existing indicators are not sufficiently representative for the dimensions to be evaluated.

"6. During the qualitative evaluation, the evaluators should take the results from the quantitative evaluation into account as a starting point, and make the operationalisation of the dimensions in order to make fair comparisons between the applications.

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

"8. The result of the qualitative evaluation will be contained in the main body of the draft evaluation report. The result of the supplementary analyses will be annexed to the draft report.

"9. The draft report is to be presented and discussed among the essential persons (identified by the Department). On this basis, Andersen Management will be asked to propose a final report."

Then they present the guide to the award of marks, again in similar form to the one which had been previously provided. Again, the aspects are the aspects and dimensions, the aspects and the dimensions are all related back to the RFP document, if I can put it that way.

A. Yes.

Q. And they are not weighted ex ante in the qualitative evaluation, is that correct?

A. That's correct, yes.

Q. And then the next page, then, 7, "The interplay between the quantitative and the qualitative evaluation: Initially the quantitative evaluation is conducted in order to score the applications. This initial score will be given during the first three weeks after 23 June. This submission score together with number-crunching performed on the basis of excel spreadsheets will then form the basis for the presentation meetings and the qualitative evaluation.

"When the bulk of the qualitative evaluation has been performed, however, this evaluation will conversely form the basis for recalculation of scoring applied initially if mistakes, wrong information or similar incidentals can be documented.

"The results of both quantitative and qualitative evaluation will be contained in the draft report with

annexes to be prepared by the Andersen team."

And I think that's what was presented and that's what was adopted, is that correct?

A. Yeah, yeah, and I think it's clear in that Section 7, relating to the interplay, that the quantitative analysis is something that would be done very quickly and that the more substantive evaluation is the qualitative evaluation, and I think that's reflected also in the respective sections of the document dealing with those models, because it says, for example, that the quantitative evaluation will be annexed to the main report, whereas it is clear that the qualitative evaluation will be in the body of the main report. And the final point, I think, point 9, under the section dealing with the qualitative analysis, it states the draft report is to be presented and discussed among the essential persons identified by the Department. So I think it's clear from that, that arising from the qualitative analysis, there will be a final report and a final ranking. I think that's the clear indication there.

Q. Now, we know that there was a quantitative evaluation conducted, and that a first evaluation report in that regard was produced around the 30th August, or thereabouts, of 1995, isn't that correct?

A. Around that, yeah.

Q. And that was considered at the meeting of the PTGSM on

the 4th September, 1995, isn't that correct?

A. Yes.

Q. And I'll come to those minutes in due course. But what was indicated at that time by Mr. Andersen was that one had to be guarded about that quantitative report in respect of certain lack of information, or lack of comparables, is that correct?

A. Yes.

Q. And this was then agreed, that you would proceed with the presentations and qualitative analysis, and revisit the quantitative in due course, isn't that right?

A. Yeah. I think there is a record of that in the report of the meeting where it states there were fairly significant problems, actually, with the

Q. Whether they were significant or insignificant, it was agreed to return to it in due course, isn't that right?

A. Yes.

Q. We know that the quantitative we know that a second quantitative analysis seems to have been carried out by Andersens, and that was on the 20th September of 1995.

A. Okay.

Q. And the Tribunal has been furnished, and I don't believe the Department were ever, because it's not in any Department documents, with a third quantitative

analysis which appears to have been conducted around the 2nd October of 1995. It's not in any Department documents. It was furnished to the Tribunal by Andersens.

Now, could I just confirm one thing: The quantitative analysis, no quantitative analysis is contained in any of the draft reports or the final report, isn't that correct?

A. That is correct.

Q. The PTGSM did not return to the quantitative report or evaluation, either the one of the 30th August of 1995, or the 20th September, 1995, after any qualitative evaluation had occurred, did it?

A. The only consideration of the outcome of the quantitative evaluation was the one on the 4th September, the meeting dated 4th September.

Q. So you agree with me, the PTGSM did not return to any quantitative report after qualitative evaluation any qualitative evaluations had occurred, isn't that right?

A. It didn't look at any quantitative evaluation.

Q. Sorry, it didn't it didn't return to any quantitative evaluation, did it?

A. No. The only time where, to my recollection, the issue of a quantitative analysis arose at the Project Group meeting, was on the 9th October, where, I think in Margaret O'Keeffe's record of the meeting, I

raised I personally raised the question of including the outcome of the quantitative evaluation.

Q. You did, indeed, yes, I'll come to that.

A. That was the only time. Other than that, I am not aware that any sub-group or the Project Group at any time returned to the quantitative analysis.

Now, I don't exclude that the figures arriving from the quantitative analysis would have been used in looking at the scoring of indicators under the qualitative evaluation.

Q. Yes, I understand that, because that was part of the model. That was to be the starting point in the qualitative?

A. Exactly. And when you say that you have received documents dated 20 September and 2 October, I know, for example, on 20 September, sub-groups were meeting in Copenhagen to look at marketing management and financial aspects, and it may well be that the model was rerun or reprinted for the purposes of extracting some of the figures in order to score indicators in the qualitative analysis. I mean, it's also relevant, I believe, that in Andersen's report, that's the more recent report that Andersen's have provided you with, it does say that it's an aspect, or with his computer system, when he prints off a document, it prints with a current date. So I suspect that those two documents may be, as in 20 September and 2 October, may be an

instance of the document being printed off for the purposes of checking figures in the qualitative evaluation.

Q. Yes, I understand that.

A. If you know what I mean, as distinct from

Q. I understand that. But what was envisaged in this model was that initially the quantitative evaluation would be conducted in order to score the applications.

The initial scores given would be during the first weeks that date changed. "The initial scores, together with the number crunching performed on the basis of Excell spreadsheets, will then form the basis for the presentation meeting and the qualitative evaluation."

That was it, was it?

A. Sorry, where are you reading from?

Q. Sorry, I beg your pardon, page 21 of 21, of the evaluation model?

A. Of the June one, yeah, okay.

Q. You see the first

A. Yes.

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

That wasn't done, was it?

A. I am not clear on the precise meaning of this, and I suspect what it's intended to convey is that the indicators from the quantitative evaluation and the scores given to them, will be incorporated into the qualitative evaluation. But if it is the case that some of the wider analysis provided for in the qualitative evaluation gives rise to a question mark over some of the scores in the quantitative evaluation, then those scores will be revisited.

Q. You can recalculate them?

A. Yes, okay. Now, we did not revisit the quantitative evaluation

Q. Very good.

A. arising from the

Q. That's the answer, you didn't. And I think you have informed the Tribunal in your memorandum that the qualitative evaluation was the one which formed the basis of the decision, is that correct?

A. That's correct.

Q. And that is the qualitative evaluation as adopted in the model submitted by Andersen and adopted by the PTGSM on the 9th June of 1995?

A. Well, I mean, the qualitative evaluation as carried out, which is based on the qualitative evaluation set out here in this model, but I think that in this model, the qualitative evaluation, the logical extension of how that will lead to a ranking in

accordance with paragraph 19 of the tender document is

not set out here. But that

Q. Hold on a second now, Mr. Towey. Hold on a second.

You furnished your memorandum of intended evidence to the Tribunal some time ago, isn't that correct?

A. Yes.

Q. You informed the Tribunal, and you gave it in sworn evidence yesterday, that the decision I think if

you go to question 40, page 25 of your memorandum, you

were asked details of each and every aspect of the

Project Group's initial views on the applications

arising from the quantitative evaluation were

confirmed by the presentations as recorded in the

minute of the 11th meeting of the PTGSM on the 14th

September, 1995. And you go on and you say, "While

the quantitative evaluation indicated that the

application by Persona had the highest score and the

oral presentations confirmed that this was a strong

application, the quantitative evaluation was clearly

an inadequate basis on which to make a decision. The

possibility of doing so did not occur to me or, to my

knowledge, any other member of the Project Team. I do

recall at some point posing the question to the

consultants as to whether it was unusual, in their

experience, that the quantitative and qualitative

evaluations would produce different results. The

response given was that it would be unusual for the

different techniques to produce the same result. All of the Project Team were party to the consensus decision that the final result should be determined on the basis of the qualitative evaluation."

Now, that's what you gave in sworn evidence yesterday.

That's what you informed the Tribunal a long time ago in your memorandum of proposed evidence, and isn't that your evidence, Mr. Towey?

A. Yes, yes. The consensus related to the qualitative evaluation as set out in the report.

Q. No, the qualitative evaluation as adopted at the meeting of the PTGSM on the 9th June of 1995, isn't that right, Mr. Towey?

A. It evolved

Q. Where is that recorded?

A. It's recorded in the report in the sense that

Q. We'll look at the report in due course, Mr. Towey, which I am going to suggest to you is an ex post facto attempt at a justification as to how the result was arrived at.

A. I reject that.

Q. Just be clear about that?

A. I reject that.

Q. I know you reject that. I am going to deal with it in due course, Mr. Towey. I'll take you through all the minutes. Can you show me in one minute of the PTGSM where it is recorded that the qualitative evaluation

evolved, other than the application of further sub-indicators, which is perfectly understandable and envisaged in this model. Point me to one single document where it's recorded, Mr. Towey?

A. In the evaluation report

Q. Before the evaluation report, Mr. Towey, before it. Point me to one note, one memorandum, or one minute where it is recorded, can you?

A. No, it's not recorded. It's not recorded.

Q. I'll come to the evaluation report in due course, Mr. Towey?

A. But what I am saying to you is that, in practice, it evolved, and I am saying that there was no way that we could take a decision in accordance with the table relating to the qualitative model set out in this evaluation document, which was consistent with the Government decision in relation to the tender document and the selection criteria.

Q. Why not?

A. Because in order to do that, we needed to apply the descending order of priority decided by the Government, and the weighting model determined by the Project Group.

Q. Now, Mr. Towey, when did that occur to you? When did that occur to you and the Project Team? This particular model was in the possession and adopted by the Project Team as of the 9th June of 1995?

A. That's true.

Q. It proceeded on that basis, isn't that correct?

A. Yes.

Q. That table was the one which was produced by Mr. Michael Andersen in Copenhagen when you went with Mr. Martin Brennan, isn't that correct?

A. That's correct, yes.

Q. And that is the result that Mr. Michael Andersen presented, isn't that right?

A. Sorry, that was the result

Q. That was the result which he presented to you and Martin Brennan at the meeting in Copenhagen?

A. Yes, he did, and I think it's represented in the evaluation report at Table 16.

Q. And that is the result of the qualitative evaluation that was carried out, isn't that right?

A. Well

Q. That table that Mr. Andersen produced at the meeting in Copenhagen?

A. That is the first result of the qualitative evaluation.

Q. That is the result, isn't that right, as presented by Mr. Andersen?

A. Let's be clear: That is the result as presented and agreed at the meeting in Copenhagen, and I think the 28th September. And that

Q. Sorry, I beg your pardon

A. is consistent with the evaluation model agreed on the 9th June, insofar as it went.

Q. Yes.

A. But what I am saying is that it was necessary to develop, or to develop the output from this table, to put it into the order reflected in paragraph 19 of the tender document in order to respect the evaluation criteria laid down by Government and the order of priority which was prescribed.

Q. We'll go through the documents in detail, but I want to suggest to you now for a moment, Mr. Towey, this is for you to consider overnight: The reason why the result of the qualitative evaluation which was contained in the table - of course it had to be submitted to the full PTGSM - could not be relied upon, was because it could be interpreted as not giving a result, or not giving the result that Esat Digifone were ahead, if one looked at it, isn't that right?

A. Well, to the extent that there is any inference in that question that I wanted any particular result, I'd like to make it clear that I reject that.

Q. Martin Brennan gave evidence to this Tribunal that when he went to Copenhagen and he was presented with a table by Michael Andersen, he said he couldn't see a result in it, and it was that table, wasn't it? It was the table on the aspects, the subtotals and the

total at the bottom, isn't that right?

A. I am not sure that it was that table. It may have been the following table where the criteria were re-ordered in accordance with paragraph 19 of the tender document, and his reaction to that was that we needed numbers rather than letters.

Q. Hold on a second now, Mr. Towey. Was that reorganisational table done by instigation of Mr. Martin Brennan or done at the instigation of Mr. Michael Andersen? Michael Andersen presented you with a table which was in accordance with the evaluation model presented by him, isn't that correct?

A. I believe it was done, in fact, at my instigation initially

Q. At your instigation?

A. but that Martin Brennan fully supported it.

Q. What I want to be clear about this: What Michael Andersen had in Copenhagen was that particular table, which is on the screen above, which is the scoring on the table as set out on the guide to the Award of Marks table on page 20 of 21 of the adopted evaluation model. That's what Michael Andersen presented, isn't it, and that's all he had done?

A. Well, yeah, I mean, I don't know that he had done so before the meeting or whether arising from what was agreed at the meeting, he produced this, but, I mean, that was he certainly did present that table.

Q. Look, Mr. Towey, neither you nor Mr. Brennan had any entitlement to agree to anything at the meeting which bound anybody. Remember this: You were members of the PTGSM. The consultant advising the PTGSM produced that table, and you and Mr. Brennan wanted to take it a step further in order to bring it back to Dublin, isn't that right?

A. We wanted to bring it forward in a way that respected the evaluation criteria.

Q. But not respecting the PTGSM, Mr. Towey, I must suggest to you. You didn't bring that back in its naked form, as presented by Michael Andersen, for the consideration of the PTGSM; you brought it back in the context of further tables, isn't that right?

A. We did, yes, but, you know, I mean, we did bring it back in the context of further tables, but that, I believe, was made clear to the Project Group, and, in fact well, I perhaps need to kind of recall

Q. We'll go into the documents

A. I need to reflect further, but I believe the Project Group was informed of the procedure we had applied.

Q. Were they?

A. I believe so.

Q. Well, I won't push you in relation to that at the moment. I'll come back to that tomorrow.

But to be clear; that's what Michael Andersen presented, isn't it?

A. Yes, he did, he also presented the other tables

Q. As a result of intervention by either you or

Mr. Brennan. He did not present the other tables of

his own volition or motion at this time?

A. That's correct.

Q. And that was how he saw the outcome of the qualitative

evaluation, isn't that right? That table?

A. Yeah, that may be the case.

Q. And that is the only result that was ever in relation

to the qualitative evaluation, isn't that right, the

only result recorded that table?

A. Well, what I have been describing as the qualitative

evaluation, and anywhere I use that term in my

statement of evidence, it should be interpreted as

meaning the qualitative evaluation as we applied it

and as reflected in the evaluation report. I am not

concluding with that particular table.

Q. Well, I'll deal with that in due course. But I might

suggest to you that what you and Mr. Brennan were

doing were moving the situation away from the agreed

evaluation model, and bringing back and presenting an

apparent fait accompli to the rest of the PTGSM?

A. Well, we were bringing together a totalling of the

scores that had been awarded by the sub-groups, and we

were bringing that back, yes. I mean, when you use

the term "fait accompli", you know, that has certain

connotations.

Q. It certainly does

A. That we were presenting

Q. It doesn't involve you, necessarily, Mr. Towey, but

Mr. Brennan had a discussion with the Minister before

the PTGSM met on the 9th October

A. Okay.

Q. and informed the Minister of the shape of the

evaluation and the rankings as resulted from, not

necessarily this particular table, but what had been

added, that is the subsequent tables. That's what

happened. The Minister

A. Okay.

Q. before the PTGSM, in its sealed or closed phase,

was informed by Mr. Brennan about this.

A. Okay.

Q. You didn't know it at the time, I take it, did you,

that Mr. Brennan was going to tell the Minister about

it?

A. Well, I can't say that I didn't know at what point he

may have had a discussion with the Minister.

Q. Did he discuss with you that he was going to inform

the Minister before the other members of the PTGSM had

an opportunity to consider it?

A. I wouldn't rule out that he did. I simply don't

recall.

Q. It certainly appears to be the case, from all the

evidence we have heard, that it was from the time the

Minister had knowledge of what was going on in the PTGSM group, that is from Mr. Brennan, that the Minister that it begins to be recorded that the Minister either wants to accelerate the process or wants to move the process along quickly. That's when it begins, this particular recording of Ministerial intervention, I'll call it, clear intervention

A. Okay.

Q. in the work of the PTGSM. Do you remember informing Mr. Ed O'Callaghan, as of the 17th October of 1995, that the Minister wanted to bring the matter to Cabinet on the 24th?

A. Not specifically, but I wouldn't rule out that that may have happened. I was certainly aware that the Minister was keen that the process would be brought to a result quickly.

Q. There was need for further discussion with the PTGSM, wasn't there? That was evident from the meeting of the 9th. It's certainly evident at the meeting of the 23rd. There were fairly heated discussions taking place?

A. There were certainly discussions about the report and the presentation of the report and the clarity of the report and

Q. Could you understand the need for the Minister to accelerate the process when you still had, as of October, the guts of two months to go, isn't that

right or a month and a half, anyway

A. You mean

Q. to completion time?

A. in terms of schedule that we had laid out?

Q. In terms of the critical path?

A. Well, I mean, I was aware that that time-frame had

been laid down, but, I mean, I wouldn't have seen the

objective of beating that timetable as being you

know, I don't think that

Q. I can understand that. People try to do things if

they can; I suppose most of us leave things on the

long finger, but I can understand that consideration.

But here was something which was a serious

consideration this was a very serious matter, isn't

that right?

A. It was, yes.

Q. It wasn't just an ordinary matter. Could you

understand why this pressure to get it done now

A. I didn't feel that the pressure was enormous, and

certainly, I mean, I could understand the Minister's

interest in getting a result out quickly. That was

very, very clear to me.

I think that my view at the time probably was that the

substantive evaluation had been completed, and what we

were working on at that stage was to ensure that it

was fully, fairly and robustly reflected in the

report, and having been quite close to the action

myself, I may not have allowed for the fact that other members of the Project Team didn't have the same level of comfort as I did with the evaluation.

Q. That's a fair way of putting it. But there was undoubtedly Ministerial intervention to move it, wasn't there?

A. There was, yes.

Q. During the month of August of 1995, once the applications had come in, the records show you were working fairly hard. You were circulating information to people, readers' guides from Andersen; you were, I think, sort of cajoling people into getting things done within a tight time frame, and Martin Brennan was on holidays at that time?

A. Correct.

Q. And it's just something that and in fairness to you, I want you to deal with it, because it was something that Mr. Loughrey had said in his evidence, that perhaps because Martin Brennan was away in August, that the Minister had got used to going down the chain of command and making contact with you. I just want you to deal with that. Apart from your ordinary face-to-face meetings with the Minister, which were not one-to-one, and the occasion on which the Minister spoke to you by telephone when he didn't get Martin Brennan, was there any other occasion that the Minister spoke to you about this particular matter

in any form?

A. No, there was no other, and Michael Lowry was the kind of Minister that would talk to people typically at my level, except in the kind of circumstances where he rang me; that is, he wanted to get a line on something, and my superordinates weren't available.

Q. I just want to, in fairness, I just want to give you an opportunity to deal with that particular speculation?

A. He didn't establish any practice of talking to me.

MR. COUGHLAN: I think, Sir, I am going to move on to some other documents now and it might be an appropriate time?

CHAIRMAN: We have covered a reasonable amount today. We'll take it up at eleven o'clock tomorrow morning.

Thanks, Mr. Towey.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
FRIDAY, 9TH MAY, 2003, AT 11AM.