

A P P E A R A N C E S

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FOR TRIBUNAL: Mr. John Coughlan, SC

Mr. Jerry Healy, SC

Ms. Jacqueline O'Brien, BL

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OFFICIAL REPORTER: Viola Doyle

SCOPIST: Mary McKeon.

I N D E X

Witness: Examination: Question No.:

THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY, 20TH MAY, 2003,

AT 11 A.M.:

CONTINUATION OF EXAMINATION OF FINTAN TOWEY BY

MR. COUGHLAN:

Q. MR. COUGHLAN: Morning, Mr. Towey. Mr. Towey, I will be coming back to the report; I am not going to do it immediately?

A. May I come back on something?

Q. Yes, indeed, please do?

A. There is an important point from my evidence last week that I want to come back to. You recall that we spoke about the evaluation model which was agreed.

Q. Yes.

A. And the question of the weighting of the selection criteria and how that applied.

Q. Yes.

A. And you recall that I put the view that my view was that the weighted model applied to both the quantitative and the qualitative method, models, and I recall it was your view that it applied To the quantitative model.

Q. Yes.

A. Over the weekend I was re-examining the papers with a view to finding papers that would, I suppose, bear out what I understood to be my recollection.

Q. Yes.

A. And, in fact, when I looked at the papers, to the extent

that they were available to me, I feel that your view was point subsequently that I formed the view that the weighting model applies to the qualitative evaluation.

Q. In fact that is very helpful, and I will come back to it and I will deal with it in an orderly way, because I've pulled out some of the documents. I am going to show them to Mr. Nesbitt and we can discuss it then

A. Okay.

Q. with the documents, if that is all right with you?

A. Yes.

Q. I understand the point you are making.

A. Yes.

Q. I think for the moment, though, we might just continue on post the 25th of October of 1995 for the moment. We had been dealing with the Dail speech.

A. Yes.

Q. I just want to now ask you, because there was a newspaper article which preceded that speech in the Dail by the Minister, and I just want to ask you about it. We have asked other civil servants about this particular, about a number of newspaper articles I am going to ask you about them as well as to what your state of knowledge or if they had any affect on your thinking at various times, if that is all right?

A. Yes.

Q. Yes. And the first newspaper article is the one, it is in Book 58, Section B, Tab No. 5.

A. The headline is "Desmond Company to Handle Esat Sale" is that it?

Q. Yes, that is the article. Now, this was, let me see this first one is an article which was in the Irish Times on the 18th November of 1995. And I'll just quickly go through it.

"Mr. Dermot Desmond's financial services company has been appointed to handle the sale of a 20% stake in Esat Digifone, the company which won the second mobile phone licence.

"The Chairman of Esat, Mr. Denis O'Brien, last night confirmed that Mr. Desmond's company, International Investment Underwriters (IIU) had been appointed as advisors for the sale of the stake.

"However, he would not comment on industry sources belief that Mr. Desmond, or one of his companies, has purchased a portion of those shares.

"When the 20% stake is placed, Mr. Desmond's holding company, Communicorp, will have a 40% stake in the company. The remainder will be held by the Norwegian telecommunications company, Telenor.

"Esat Digifone is estimated to be valued at $\text{€}100$ million.

"Last month Mr. Desmond paid $\text{€}14.5$ million for London City Airport. Given that the airport was originally on the market for $\text{€}30$ million, Mr. Desmond is seen to have driven a hard bargain in the deal.

"Mr. Desmond is perhaps best known as the man behind NCB

Stockbrokers. He sold his stake last year. He has since invested $\frac{1}{4}$ million in Glasgow Celtic Football Club. Esat expect to begin providing a nationwide mobile service by the end of the year."

Now, do you remember seeing that particular article? And perhaps we will go through the two articles, if we go over to the next tab, this is the "Desmond firm advising Esat Digifone in placing shares" is the headline. That is the Irish Independent on the 18th November.

And the article is in the following terms:

"A financial services company owned by financier Dermot Desmond is advising Esat Digifone on the placing of 20% of the consortium's shares with institutions and other investors, it emerged yesterday.

"A statement from Esat Digifone the winner of the second GSM (global system mobile) phone licence said that Dr. Michael Walsh of the IFSC-based International Investment and Underwriting (IIU) had been appointed to advise the consortium on this aspect of its financing.

"A spokeswoman said IIU would arrange the placing of 20% of the group's shares, but she declined to comment on reports that Mr. Desmond's company would be underwriting this sale.

"There was speculation last night that Mr. Desmond himself or some of his companies was likely to take up some of these shares.

"IIU was established by Mr. Desmond to deal with a limited number of clients in selected investments and probably

trade its own capital. The spokeswoman said the identity of the investors would be revealed in a few weeks' time.

"The day after winning the GSM licence, Esat Telecom chairman, Denis O'Brien, said that the shareholding in Esat Digifone would be 40:40:20 between Esat, the Norwegian state phone company," I think it is.

A. Yes.

Q. "The Norwegian state phone company, Telenor, and unnamed investors. He said the overall investment was underwritten by Esat and Telenor. Mr. O'Brien has consistently refused to be drawn on the identity of the other investors in Esat Digifone. He said on winning the licence that the funding was there, but that 'institutional investors don't write cheques until they see the terms of the licence.'

"It is not clear what the present market value of a 20% stake in the consortium would be worth.

"Mr. O'Brien has said the group will invest around $\text{€}100$ million in building a network.

"Given that he also said that the debt-equity ratios in the business usually ranged between 50:50 and 40:60, a 20% stakeholder might be expected to invest a minimum of $\text{€}10$ million in the group.

"Any investor is likely to have to pay a premium to reflect the expected revenue generating potential of the licence.

"The consortium has also said that it would consider floating 20% of its shareholding in about three year's time, depending on the state of the market, giving

investors an opportunity to cash in on their gains if the licence proves as successful as expected.

"The news that IIU will be advising Esat Digifone comes only a couple of weeks after the announcement that Mr. Desmond had purchased London City Airport" and his investments, then, in Glasgow Celtic.

Do you see these particular articles?

A. I don't specifically recall seeing them but I wouldn't rule out that I did.

Q. We have been told by Mr. Loughrey, and I think that there was a press cutting service in the Department, is that correct?

A. There was indeed, yes.

Q. And that matters of interest would be circulated or placed on the desk or circulated amongst people who might be interested in particular areas, is that correct?

A. Well, the method was that all of the press cuttings relating to the Department were circulated to, I think, all principal officers and officers above that.

Q. Yes, right. Leave aside for the moment the letter of the 29th of September

A. Yes.

Q. did you have or had anyone informed you, to your knowledge, prior to the Minister making his speech at the end of November, that Esat or that IIU would be the placers or handling the transaction?

A. No.

Q. And had anyone informed you that IIU themselves would be investing in the project?

A. No.

Q. You remember when we looked at what the Minister said in the House at the end of November, last Friday, and coming towards the end of the exchanges in the House, he had stated that the make-up of the consortium was 40% Telenor, 40% Mr. O'Brien side, Communicorp, or whatever they were, and 20% institutional investors or sorry, institutions, and then do you remember there was the little tag-on "or other investors." Do you remember that?

A. Yes, yes.

Q. Now, that was from the documents that we have seen that was not scripted for the Minister?

A. Yes.

Q. But there is a similar reference here in this article, do you see that, the one in the Irish Independent, the first paragraph in the article in the Irish Independent at Tab 6?

A. Yes.

Q. "And other investors, it emerged yesterday."

A. Yes, yes.

Q. Now, we can see it is not scripted by any civil servant, unless the Minister just got it from the newspaper article, but he did say this had been stated privately and publicly; that may be a reference to a public statement about it, but as far as you know, you were never a party to any private conversation where this information is imparted to the

Department?

A. No.

Q. No.

CHAIRMAN: I think the second article, Mr. Coughlan, the Independent one, went in as the 18th December, but presumably they were both the 18th November?

MR. COUGHLAN: They are both the 18th November, yes, Sir.

Q. Now, I think you were present at the first licence meeting, which I think was on the 11th November, sorry the 9th November, and I will get you the it is Book 43, Tab 150.

And, in fact, if you just go to the preceding document, that is at Tab 149, I think this is in fact a note which may have been prepared by you and circulated prior to the meeting. Am I correct?

A. Yeah, yes, that seems to be what it is.

Q. Mm-hmm. And that note states: "The first meeting with Esat Digifone regarding the issue of a GSM License has been arranged for Thursday, the 9th of November, at 11 o'clock in the first floor conference room, 44 Kildare Street. A preparatory meeting with Andersen Management International will be held at 9:00.

"The first meeting will basically involve the Department setting out the ground rules for the process. Esat will put down markers regarding aspects of the licence which they regard as critical and will follow-up, if necessary, with a document on the subject. We have been in touch with the Chief State Solicitors Office in relation to legal

representation and it is anticipated that a solicitor will be designated to represent the Department before Thursday's meeting.

"Enclosed for information then is:

"1. The latest version of the draft GSM License.

"2. A document prepared by AMI regarding elements of Esat Digifone's application that might be incorporated into the licence.

"3. A list of the statutory instruments and licences which must be put in place in the context of licensing GSM II.

"4. Draft versions of the following are enclosed:

" A draft order under Section 111(1) of the Act.

" A draft regulation under the Wireless Telegraphy Act to impose spectrum fees to be expanded to include analogue fees and an initial list of the sections of the 1983 Act which might be applied to the GSM II by regulation under Section 111(5) of the Act.

"Telecom Eireann were invited to provide views on the provisions which might be included in the regulations under Section 111(5) above, but have declined to do so in detail.

(Copy of reply enclosed.)"

So, you were involved in preparing for this meeting and circulating the people who would attend it?

A. Yes.

Q. And there was, or do you remember a meeting at 9 o'clock with Andersens which was to precede the first licence meeting?

A. I don't particularly recall that.

Q. All right. Now, the minute of the meeting lists people that were present it is at Tab 150 and the note continues: "Mr. Martin Brennan opened with a statement outlining the Department's position as formally agreed at a Department preparatory meeting. This position was clarified in a letter issued to Esat Digifone on the 13th November, 1995." And there was a copy attached to this note for information.

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

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

"4. Key points raised were:-

" Technical discussions to be handled separately.

" The impact of Telecom's liberalisation as it developed in the EU. Ireland was discussed briefly.

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

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

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

"The meeting finished with a discussion on Esat Digifone's difficulties with planning permission and Denis O'Brien's proposal that the regulator intervene at this point.

Martin Brennan said that DTEC would be as helpful as it could be at the appropriate time. Michael Andersen later clarified that DTEC should come to a policy position on this.

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

"9. It was agreed in principle that another meeting would be held within 10 days. Denis O'Brien to contact Mr. Towey."

Now, just do you remember the meeting at all or is it just the note can assist you in trying to figure out...

A. In general terms I remember the meeting, yes.

Q. Now, there was a at the discussion beforehand there was

a discussion about a suggestion or a recommendation being made by Michael Andersen to tie down the question of Esat's financial position at that stage. Do you remember that type of discussion, to tie it down, to understand it, to tie it down and to get the commitments and the understanding from Esat Digifone? Do you remember that type of discussion?

A. On the morning of this meeting?

Q. Yes. Perhaps at the morning. We have some slight reference in the note which is at the next tab which were some notes made by Mr. McMahon which he believes must have been made at the meeting which preceded the formal meeting?

A. Okay. I don't particularly recall

Q. It is his note of the formal meeting, I am informed. If you go to the second page of it, on the second page, you see

A. Yes.

Q. "MA (Michael Andersen): Stress need for 40% minimum equity in Esat Digifone.

Notes negative worth of Communicorp.

Promises by Esat.

Michael Andersen goes through his document note on incorporation of A5's promises/info inter licence.

Denis O'Brien: 'We'll do what we said we'd do. We won't weasel out.'

Do you remember any discussion either preceding the formal meeting or at the formal meeting about this whole question

of the negative equity position of Communicorp and the need to tie things down?

A. No, I don't.

Q. Right. Well, can I take it that do you have any recollection of being informed at that meeting by Denis O'Brien, or anybody on his side, that the position now was that Mr. Dermot Desmond, through IIU, was going to be an investor in the company?

A. No.

Q. That wasn't told to you?

A. No, it was much later, much later before that came to light, I believe.

Q. Just one matter as regards the minute of the meeting and that is at, I think, at point number 7 on the second page.

You can see that the meeting finished with a discussion on Esat Digifone's difficulty with planning permission and Denis O'Brien's proposal that the regulator intervene at this point?

A. Mm-hmm.

Q. Do you remember that point being raised at the meeting?

A. Not particularly. I mean, planning did become an issue later certainly.

Q. It became an issue. That was one of the big selling points, wasn't it, of the Esat Digifone consortium bid and presentation; how far they were ahead in relation to site acquisition, potential site acquisition and how far they were ahead in terms of submission of planning applications

and all the rest of it; that was a big point in their bid?

A. Certainly an element of it, yes.

Q. Was there you don't remember anyone discussing here, so, on the basis of "What you represented to us may now not be as telling a point", if I can put it that way, "That we are now looking for the help of the Department to intervene on the planning side"?

A. I don't recall any discussion of it or any linking between this and the application.

Q. All right. It is just that one might consider it surprising, bearing in mind the bid, the representations made, and the view evaluators took that this was a good thing that they were ahead of the posse, in effect

A. Yes.

Q. that they were now saying that they needed help on the planning side; there was no surprise about that?

A. Well, I can see what you are suggesting.

Q. Yes, yes.

A. But I mean, I think it is also unsurprising that somebody would say they were having difficulties with planning.

Q. I take that point entirely. I take that point entirely, because anybody who knows anything about Ireland knows that the mere acquisition of sites or agreements or the potential acquisition of sites or even submitting planning, it we all know the difficulties that one can encounter, and it is not necessarily perhaps when one looks at it as telling a point, bearing in mind that everybody is going to

have difficulties with planning?

A. Yes.

Q. And particularly when one mentions a mast around Ireland as well, isn't that right?

A. Yes, yes.

Q. Now, there is a document that I just want to refer you to, just to first of all, did you know anything about it?

and I am going to give you Mr. Brennan's explanation about this. But it is a document, and it is in Book 49, Tab 90.

And, in fact, if I could give you a hard copy because I don't want you to have too many books up there.

A. Book 49.

Q. Tab 90. I am only making one reference here so you can give that book back and get it out of your lap for the moment.

A. Okay.

Q. When you are finished, I'll just explain to you what this document is first of all. It is a note made by a Mr. Gerry Halpenny, a solicitor, and it's an attendance of a meeting he had on the 21st November, and that seems to be with Richard O'Toole, Peter O'Donoghue, Knut Haga, Per Simonsen and Arthur Moran, who was by then a solicitor for Telenor.

And you see it is recorded there, or there is a note there:

"Position re the Department IIU. Not a problem for Martin Brennan and the Department. Main concern that Denis O'Brien and Telenor mainly involved on the operational side."

Now as of that date, which was the 21st November

A. Yes.

Q. you didn't know, as a person in the Department, that IIU were to have an investment position in the consortium, did you? I am not trying to catch you out or to catch Martin Brennan. I will explain

A. No, I didn't, and I mean

Q. in fairness

A. I don't know if I had an awareness of the newspaper articles, or whatever, but certainly nothing in relation to IIU registered in my recollection as a significant fact.

Q. Mr. Brennan had, I think, speculated about this particular reference, that it could, it could be a reference to the fact that it was stated in a newspaper that IIU were just going to place matters and that if that is a correct record of something that he said, that it would reflect that position; that there wouldn't have been a difficulty if IIU were just acting as the agent for the placing, rather than being involved in the thing?

A. Yes, yes.

Q. Now, if such, if a conversation, even along those lines, took place with Mr. Brennan, that is he was being told, "Look, instead of Davys placing this with the institutions, IIU are going to place it with the institutions..."

A. Yeah.

Q. Do you think it is something that you would have been kept informed of?

A. I expect that I would have been.

Q. Yes.

A. But I don't have any recollection of it now.

Q. Right.

A. Had I been informed of something in those terms, of that, for example, I don't think I would particularly have looked upon it as being significant.

Q. Yes, if you had been informed of anything else, that they were actually to be involved as investors in that is something that you would have expected to have registered on your mind and it is something you would recollect, isn't it?

A. I think it would, yes. I am not obviously saying that I would necessarily have had a negative view of it.

Q. But something that would have registered with you?

A. I think it would, yes.

Q. Now, in the latter part of 1995, I don't think there is anything specific that I want to draw your attention to.

There were on-going negotiations, I think, between the Department and the consortium's side and other matters, but I wanted to bring you now to, I think, February of 1996 and an article appeared in the Irish Times written by Mr. John McManus. Now, I think it is in 58.

A. Yes.

Q. I think

A. Divider?

Q. I will get it for you now. I think in fairness you told us

in one of the earlier day's of your evidence that you were on leave during this period?

A. I was, yes.

Q. It is Book 58, Section B, Divider 7.

A. Yeah.

Q. And you can see that the article by Mr. McManus. Would you have known you would have known Mr. McManus; he was viewed by Mr. Loughrey, anyway, as being a serious financial journalist and if he wrote something, that it is something that you would take notice of?

A. I would have known that he was a regular writer, yeah.

Q. And the article reads: "Communicorp, the parent of Esat Telecom, is seeking to raise $\frac{1}{2}$ 30 million in debt to fund its share of the $\frac{1}{2}$ 100 million cost of the launching of the second mobile phone network.

"The company is hoping to raise the bulk of the money in the US and its Chief Executive, Mr. Denis O'Brien, is understood to have been making representations to US investors over the last two weeks. Communicorp is a 37.5% shareholder in the winner of the second licence, Esat Digifone, through its holding in Esat Telecom.

"The Norwegian State phone company, Telenor, owns another 37.5%, while Mr. Dermot Desmond's company, International Investment and Underwriting, holds the remaining 25%.

"Under the terms of the planned fundraising, Communicorp will be reorganised. A new company, Esat Holdings, will be created as the holding company for Esat Telecom and for the

group's stake in Esat Digifone.

"Communicorp's other interests include the Dublin radio station, 98FM, and radio stations in Prague and Stockholm will be held separately.

"Esat Holdings will be 88% owned by Communicorp and 12% by outside investors on the Esat's board, including the former Secretary of the Department of the Taoiseach, Mr. Pdraig O'hUigin, the former senior partner of KPMG/Stokes Kennedy Crowley, Mr. John O'Callaghan, and the management, consultant Mr. Leslie Buckley

"Communicorp is 65% owned by Mr. O'Brien and 35% by the US venture capital company, Advent International.

"The $\text{€}1/230$ million in debt will be raised through Esat Holdings and will mainly be used to fund its share of the cost of starting up the new network. However, some of the money may be used to fund Esat Holdings' planned expansion.

It is understood that Esat Holdings wants to raise the $\text{€}1/230$ million through loan notes. The notes will be split into $\text{€}1/215$ million of loan notes with convertible stock warrants and with $\text{€}1/215$ million convertible into second preference shares. The US bank, CS First Boston, is advising the company.

"A spokeswoman for Esat Digifone said last night, 'The project would be financed through a mixture of equity put up by the consortium members and debt raised by Esat Digifone itself. The equity finance was committed and underwritten,' she said.

"AIB and ABN-AMRO banks were organising the debt portion and had already committed $\text{€}1/225\text{m}$ in bridging finance at this stage,' she said.

"Esat Digifone won the competition to operate the second mobile phone system in October last year. However, the company has not yet been officially awarded the licence.

The Department of Transport, Energy and Communications said yesterday, that the negotiations were at an advanced stage.

"Esat Digifone plans to spend $\text{€}1/2100$ million over the next five years developing its network. The investment will include an upfront payment $\text{€}1/215$ million licence fee to the Government."

Now, were you ever aware of that article?

A. I don't recall this article, no.

Q. You don't recall this article. Certainly if you take the first two columns of the article, they are dealing with a situation and outlining a position which appears to be a position which is being outlined, perhaps in the United States, in the market there for the purpose of raising what is later described as the loan notes, and it certainly outlines the position of what is being represented is that the holding in Esat Digifone would be 37.5:37.5:25%, isn't that so?

A. Yes, I see that, yes.

Q. Yes. And that that 25% was being held by IIU?

A. Yes.

Q. Now, you don't recollect any discussion in the Department

when you came back from annual leave about this particular matter, and nobody discussed it with you?

A. I don't recall any discussion about it, no.

Q. If you weren't I should ask you first: in your section, what way did the cutting service operate? Would it be one set of cuttings would come to the section in the morning or would each desk get one dropped on it?

A. One set of cuttings went to each division and attached to the front of it was a circularisation list which would be broadly in order of seniority.

Q. I see.

A. So in this instance, it would come to Martin Brennan first and

Q. Seeing as you weren't there?

A. Well, it would come then to, there is another assistant principal, at least one other assistant principal in the division, and I am not sure whether it would have gone to him first or me first and then onwards down through the list.

Q. Down the line?

A. Yes, but yes, when I wasn't there it would have passed on. I think in my earlier evidence I mentioned that press cuttings would be piled up.

Q. Yes.

A. And while that has happened in other divisions where I would receive a personal copy of press cuttings, in fact in this division, this was, at this point, as in other

divisions, there was a circularisation list attached, so it would have gone on to whoever was next.

Q. And when you returned from your leave, can I take it you wouldn't set about reading every press cutting unless something was highlighted or brought to your attention or would you read all the press cuttings for the period you were out?

A. No, typically I wouldn't.

Q. You wouldn't?

A. I would be more interested in other elements of the work.

Q. Yes. It does seem, and we know Mr. Loughrey has given evidence, Mr. Brennan, Mr. Fitzgerald, Mr. McMahon, I don't know if we asked Mr. O'Callaghan about it, but I think you would agree that this is a fairly significant article, isn't it, in terms of the information contained in it?

A. Yes.

Q. And it does seem unusual that all of the senior civil servants in the Department, and bearing in mind the nature of the work of the Department, that everyone seems to have missed this particular article, would you agree it seems

A. I understand what you are saying, and I am just looking at the article and wondering that, you know, if your approach to it isn't with a suspicious mind, so to speak

Q. Yes

A. whether it does contain any hugely surprising information?

Q. Well, yes, okay.

A. I am just asking that question.

Q. Perhaps I will go through that with you.

A. Yes.

Q. I suppose the two significant pieces of information which it contains are the configuration, 37.5, 37.5, 25; that is the first one. And the second one, the statement here that "Mr. Dermot Desmond's IIU is the 25% holder." So those are two new pieces of information, isn't that correct?

A. Yes.

Q. And it also, just going down through it, and again I understand the point you make, if you are not going through it with a suspicious mind, but it looks as if Advent's $\frac{1}{2}$ 30 million funding, which had been indicated to the Department, is effectively gone and that it is going to be funded by a new way, by the raising of these loan notes?

A. Yeah, yes.

Q. Again perhaps indicative of the fact that, and I will come back to discuss this again, this bankable concept, that the way it was being done was in the market looking for loan notes in the United States, perhaps at a significantly higher level, carrying out a greater premium than one would from a normal bank loan?

A. Okay.

Q. I suppose, just raising that little question mark on the concept of bankable or bankability and how it might be used. I am just it didn't come to your attention; you have no recollection of it, is that correct?

A. I don't have a recollection of seeing it or having a discussion about it.

Q. Right.

CHAIRMAN: You see also the reference, Mr. Towey, in the latter part of the article, about Mr. McManus seemingly having got onto the Department to get a comment. Now, while I agree with you that he doesn't seem to say that he put the entire basis of his story; the only record that he, or response he seems to have got was that negotiations for the eventual licence were at an advance stage. But can you say of your own information, having been so much involved in the various stages of the process, what was the practice? There was obviously intense press interest. Did they get on to Mr. Brennan or yourself from time to time to try and have a direct contact or would they have been referred to the press section of DTEC?

A. It is rare for journalists to contact civil servants directly because I think it is now a well established practice that communication with the press is channelled through the press office typically. So typically they would have contacted the press office.

Now, I can't say that I recall any great volume of inquiries in relation to these licence negotiations, but I think that, you know, that we would have, our response would have been that the negotiations were on-going, that they were confidential, and I think in fact at that meeting, the minute of the meeting that we looked at of the

9th November, there was an agreement in principle between Martin Brennan and Denis O'Brien that the negotiations should be confidential.

Q. MR. COUGHLAN: All right. And just generally, that article contains information about how money was being raised, that is $\frac{1}{2}$ 30 million by way of loan notes and how they would be split. On the whole question of bankable and bankability, can I just ask you this: the project, first of all, that is the mobile phone project

A. Yes.

Q. on the question of bankability, we see at the meeting of the Project Group on the 18th May of 1995, when Andersen first presented an evaluation model, and on the question of financial strength, the question of IRR was a matter which he made reference to, isn't that right?

A. Yes.

Q. That was one of the indicators, or one of the indicators, I think, isn't that right, for financial key figures, solvency an IRR were the two?

A. They were the two, yes.

Q. And again just, if I might just generally, IRR was the internal rate of return, and as a concept the way one normally looks at it is, it is what the person who intends to invest hopes to make or the return he hopes to get from the business and he will look at that over and above what you might get in?

A. A risk free investment.

Q. Government Stock. And it is that which is the one which either motivates him to make the investment or he decides not to; that's what it is in general terms, that is what IRR is?

A. It is, yes.

Q. And Andersen, in the first instance, approached it on the basis that a high IRR, that is the expectation which the investor intends to get out of the business, is a good thing in the mind of the investor; that would be the one that may motivate him to do it, and there was discussion about this, wasn't there, at the meeting on the 18th, whereby the PTGSM fixed on, for scoring purposes, an IRR of 11, isn't that right, 11%?

A. I remember, in general terms, a discussion of that kind, yes.

Q. Yes. I will come back to it when I look at the documents, but Andersen then gave an explanation that this wasn't the normal way to look at IRR, but it was the view Martin Brennan, I think, expressed that in a utility, that bearing in mind the responsibility to the consumer, that this was the figure which was fixed on by the PTGSM as being one which a regulator might consider appropriate in a utility situation; do you remember that type of discussion?

A. I remember yes, I remember the general principles, yes.

Q. Leaving all that aside for a moment, on the question of bankability, did you ever take any advice from any bank or any financial advisor about the company Esat Digifone being

bankable for corporate debt financing based on an IRR of 11

or 12?

A. No.

Q. And you do not know, in the raising of corporate debt financing, what presentation Esat Digifone made to the financial institutions?

A. No.

Q. Because whilst one can readily understand, I suppose, and I am just going to make a slight reference now to, if I can find it, it is the Memorandum of Intended Evidence of Mr. Greg Sparks which has been circulated to everybody, it is just dealing with this question of bankability. I think he was the Tanaiste's programme manager at the time?

A. I believe so, yes.

Q. And he was a senior partner of a large firm of accountants in Dublin, isn't that right?

A. Farrell Grant Sparks.

Q. And it is Book 38, Divider 11A.

A. Divider 11?

Q. 11A.

A. I am sorry, I am having trouble finding this.

Q. All right.

A. Book 38.

Q. I will give you a hard copy of it.

(Document handed to witness.)

I will give you a hard copy here, Mr. Towey.

A. Okay, thank you.

Q. Right. Now, it is a portion of you can go to page 4 where you can see that Mr. Sparks has rolled up responses to a number of queries raised by the Tribunal, and I don't want to go through the whole lot of that. There is just one portion of it I want to go through. If you go to page 5.

A. Page 5, yes.

Q. And you can see the top. I am just continuing: "As I understand it, the decision of the Sub-Committee was made in an informal meeting. The party leaders were meeting in the Taoiseach's office. The Minister for Finance, when Minister Lowry rang the Taoiseach to tell him that the Andersen recommendation was received, as I understand it, the Minister was invited to the Taoiseach's office where the report and his recommendations were discussed."

Leave that aside for the moment. The recommendations were certainly discussed.

"A decision to accept the Andersen recommendation was made. Sometime following the meeting I met with the Tanaiste who told me of the decision. I expressed surprise. I explained to the Tanaiste that the licence would, in my opinion, allow the recipient access to super profits. I understood that Esat Digifone, at that time, was not financially strong."

That can only be a reference to the Communicorp side of it.

"I acknowledged that with the licence it would have no problem raising capital, but I would have thought that its

current financial status was relevant."

Right, you can see that?

A. Yes.

Q. Again, I suppose, coming back to the whole question again, you can give the licence to somebody who doesn't have the wherewithal at that time, which may be relevant in the competition, and there is no doubt that everyone envisaged profits from the operation of the mobile phone licence, but also if one was to raise funds, the question of IRR, of course, is significant, in that if the profits are going to be curtailed, say, to, in this case, in the competition, are marked or evaluated on the basis that they be curtailed at 11 or 12?

A. Yeah.

Q. That a financial institution may well not have been, may well not have been as enthusiastic about the level of funding it would make available for corporate debt financing bearing in mind the length of time it might have to wait for a return on its loan if there was a limitation on the IRR; do you see the point?

A. I understand what you are saying, yes.

Q. None of that was taken into account, to your knowledge?

A. I don't recall any discussion of it.

Q. And I can understand, of course, that you cannot have somebody making excessive profits in a situation, but where somebody is stating that they expect a higher IRR than another applicant, that may well be, and can be evaluated

in the context of evaluating whether it is just profit-taking or whether they are more efficient at running their business and therefore if their tariffs remain at a competitive level, their efficiency gives rise to a greater internal rate of return. None of that was taken into account, to the best of your knowledge?

A. Well, I think, in general terms, the view was that a high rate of return requirement represented a view that profits would be prioritised over tariff reductions.

Q. I suppose if I could just ask you in general terms, the term and the concept of bankability wasn't examined in the context of 11%, to the best of your knowledge, because no advices

A. No, I don't recall any discussion of those two things.

Q. And there certainly wasn't perhaps time to do that either

A. Well

Q. bearing in mind the requirement of finalising the report and getting the matter through, as a result of intervention by the Minister I am saying now, the time aspect of it?

A. Well I mean, I am not sure that further time would necessarily have given rise to a discussion of that kind.

Q. Very good. I am not going to go through you know, there are documents here about correspondence with the ESB and about mast sharing matters?

A. Mast sharing matters, I saw those in the evidence of Martin Brennan.

Q. That has been dealt with by Mr. Brennan and Mr. Loughrey and I think Mr. Fitzgerald as well. Have you had a chance of having a quick look at their evidence? Unless you have anything to add to it, I am not going to particularly ask you. I take it you would have been involved in the preparing of some of the documents, would you, some of the correspondence?

A. I would have been, I expect, yes.

Q. They would have gone up the line?

A. They would have done, yeah.

Q. I suppose the only point about it is, and it links back to something which happened in November, the ESB weren't informed that they were in second position if Esat Digifone weren't successful, isn't that right?

A. That's correct, yes.

Q. Although, we have seen that there were, back in November, there was some consideration given to whether Persona would be informed that they were in second position, because we saw a draft letter which wasn't sent. Do you remember any discussion about that?

A. Well, I mean, I recall, in general terms, the issue of feedback and what letters should be sent, and obviously I was involved in the heart of that, and there were different views as to what amount of information should be released, specifically on the question of whether they should be informed that they were in second position. I don't particularly remember any discussion of it.

Q. All right. Can I ask you this: what was your role after the 25th October? I mean, what was your role or your understanding of the role in the licensing area?

A. Okay. Well essentially, I mean, it changed, in the sense that it was my view initially that it was the role of our division to bring this project to closure, so to speak, in other words to lead on the licence negotiations, the development of the licence and its issue. But in the course of, in the course of the preparatory work, and I am not sure exactly at what point in time, but I might be able to fix that more clearly by looking again at the documents, but at some point fairly early in the process, it became clear that the Regulatory Division had a strong view that there was a lot of Regulatory Division business to be sorted out here, in the sense that once the licence was issued, they would have the job of regulating the licensee and interpreting it, applying it, amending it and so on and so forth. And that view prevailed. So in essence, leadership of the project passed for a time from my division over to Sean McMahon's division.

Q. Right.

A. And during that time I wasn't actually directly involved myself, and it was only at the point where the issue of ownership arose, or the issue of a draft licence to Esat Digifone, I am not sure, again, of the time of the sequence of those two events.

Q. It seems to be around April?

A. It was around mid-April that my division became involved, again, in finalising those issues and finalising the licence.

Q. How did you become involved? Was it something that you were asked to do or...

A. I am not entirely sure.

Q. Right.

A. It may have been, in part, that the Regulatory Division took the view that the questions arising in relation to ownership and structure were a matter for my division; I expect that was the case. It may have been the case that the Minister or Mr. Loughrey, having the view that our division was leading the project, that, you know, it may have been that there was an approach from Mr. Loughrey.

Q. Right.

A. Again, the sequencing of events I am not entirely sure on because, you know, there was the question of the Minister asking that a draft licence be issued.

Q. There was.

A. And I am not sure whether that came before or after the 17th April.

Q. It came before.

A. Okay.

Q. Came before. This is where I think the Minister was abroad, Mr. Loughrey has told us about it. And we have a note of Mr. McMahon's, that the Minister considered issuing a direction to Mr. McMahon to issue a licence. I think

Mr. Loughrey intervened there, and then the question of the draft licence was the one which evolved at that time.

A. Okay.

Q. That preceded April of 1996?

A. Okay. Okay. I am not sure whether I became involved again as early as that.

Q. At that time?

A. What stands out in my mind is the ownership question of the 17th April.

Q. Yes. Yes. Coming to that period now in April, sorry there is just sorry, just bear with me for a moment.

The Minister dealt with this matter in the House again on the 16th April and it is at Book 43, Tab 182.

I was just clarifying, there, my recollection about this.

I think in fact this came into the House, I think, on the 16th April and it was on the adjournment, I think, if my recollection is correct?

A. Okay.

Q. So it is my understanding, I think from Mr. Brennan, that one would have to there would be a lottery system and one wouldn't know in advance what particular questions the Ceann Comhairle was going to allow and it would only be at fairly short notice the Department would know what questions the Ceann Comhairle was going to allow. Is that the way it would happen?

A. Short notice that you had confirmation that it was on, yes.

Q. Is that the way it would happen?

A. Yes.

Q. Now, you can see that Mr. Molloy

"Ceann Comhairle: Deputy Molloy gave notice that he wished to ask the Minister for Transport Energy and Communications if the reason for the delay in signing the GSM License for Esat Digifone relates to concerns expressed by other applicants about the circumstances surrounding the awarding of this licence. I understand the Deputy wishes to share time.

"Mr. Molloy: Yes, with Deputy O'Rourke. The matter I tabled for this debate continues, particularly in relation to US corporations' continued interest in investing in the Irish economy, and if he will give details of representations made in this matter by the US Government, US corporations and the IDA, and if he will make a statement on the matter. That was the full text of my question."

Then he deals with the matter in some detail Mr. Molloy.

If you go over the page, then the Minister interjects "The Deputy is exaggerating." These have all been read out before, I don't intend reading through every portion of them.

A. Yes.

Q. And then it goes down: "Mrs. O'Rourke: My party demands full disclosure of all the facts appertaining to the award of this licence. We have embarked on a new adventure of the breakup of monopolies and it is important, domestically

for our reputation in Europe and throughout the world, that this business be carried out in an open, transparent and accountable way." Etc..

Then the Minister, "Mr. Lowry: The GSM License is a milestone document and it is of critical importance that it be well drafted. The only and I emphasise the word 'only' reason for delay in issuing the licence is the time needed to draft this competition document correctly. While an indicative draft was available at the time of the competition, it could only be finalised and put into legal form as soon as a decision was made. Much of its detailed content is based on the winning tender. I am determined that the licence be issued as soon as possible. We must not make haste at the expense of accuracy. The content of the licence is agreed between my Department and Esat Digifone and it is now with the Attorney General's Office for legal clearance.

"In circumstances where there were six professional costly and competitive applications, it is entirely understandable that there are disappointed applicants; there was only one prize. That this disappointment should manifest itself in the type of innuendo and comments we have heard from Deputy Molloy is entirely unacceptable. I want to emphasise one more time that the selection process was thoroughly carried out by a team of officials and consultants without interference of any kind from me or anybody else. They carried out their evaluation by reference to the selection

criteria which were well-known to all applicants in advance and they specifically respected the priority order indicated. The Departmental team and the international independent consultants, separately and collectively, recommended one winner and the Government approved that result."

Then Mr. Lowry continued: "The separate question of whether to give feedback in relation to their applications to individual applicants has been under consideration for some time. The form of such feedback, whether oral or written, is being considered and the details of this approach are being settled in discussion with the consultants and the Attorney General's Office. There is no question of comparative feedback with the winning applicant or with other applications; the confidential rules would not allow it. Please remember that somebody came last as well as first and they may not wish that fact to be trumpeted. Within that constraint, the intention is to be reasonably forthcoming.

"There have been formal requests from a number of applicants, informal approaches by the US Embassy and some contact by the IDA on the matter. The country enjoys a high reputation among US corporations for probity and honesty in its business dealings with them. I cannot imagine that failure to win a single licence in a clean competitive process would damage that reputation."

Then there is some exchange.

Then just down to the Minister again: "I am anxious to facilitate requests for information but can only do so within the legal constraints of the competition."

And that's the end of matters.

You can see there that the Minister is informing the House, on the 16th, that the only reason why there is any delay is the issue of preparing the licence and complexities about that and perhaps legal matters surrounding the licence itself, isn't that right?

A. That's correct.

Q. That is essentially what he is telling the House there, isn't that so?

A. Yes.

Q. I just wanted to ask you there, that being the state of knowledge of the Department at the time when this particular statement I presume this was, this was drafted for the Minister but that being the state of knowledge there, the whole question of confidentiality surrounding ownership must, in the view of the Department, have moved on, because it was, if the only delay was the technical difficulties surrounding the production of the licence, were the ones which were delaying it?

A. Yes.

Q. Would that be fair would that be a fair assumption?

A. Well, I mean at that time the ball was in our court, so to speak, in the sense that the Department was developing a licence.

Q. Yes

A. and hadn't reached a conclusion in relation to its view as to what the licence should contain.

Q. Yes.

A. at this point, I think.

Q. Yes.

A. and I think that the, that Esat Digifone had been in touch with the Department on a couple of occasions urging us

Q. To issue a licence?

A. To issue a licence, yes.

Q. I agree, yes. But just, can I take it that it was your understanding of the position as of the, when the Minister spoke in the House on the 16th, or when that was prepared for the Minister, perhaps on the morning of the 16th

A. Yes.

Q. that the only matter that was presenting difficulty about the issuing of a licence were ones on your side and they were technical and legal?

A. I think that is what we would have seen as the big hurdle to be got over, yes.

Q. As far as you were concerned, there was no question arising about ownership and share configuration at that time?

A. No.

Q. And can I take it that it was your state of knowledge and state of your mind, that what you had seen in the bid and what you had been told at the presentations, that there was

no change from that, as far as you knew?

A. Yes, yes.

Q. Now, on the same date, that's the 16th, if you go to Tab 183?

A. Yes.

Q. Regina Finn sent a fax to you and Martin Brennan, isn't that right?

A. Yes.

Q. And she stated: "Attached is the latest information to come to light about the shareholdings in Esat Digifone.

Eoin O'Connell is to provide further detail in writing.

You may wish to pursue further."

And then we go over the page and she has told us she prepared this particular chart from information she had received from Owen O'Connell?

A. Yes.

Q. And we know both from her and from Mr. McMahon that she tended to worked work that way; she liked to prepare charts to show things. Do you remember receiving this?

A. Not specifically in terms of time, but I mean, the document is familiar, I know I received it, yes.

Q. And just looking at the text then, "Eoin O'Connell, William Fry Solicitors, providing following information on behalf of the Esat Digifone.

"At present Communicorp is the vehicle whereby Denis O'Brien holds shares in Esat Digifone. Communicorp also has ownership of Esat Telecom and the radio interests of

Denis O'Brien. The objective is to uncouple the telecommunications and the radio elements of Communicorp because they are incapable from the point of view of investors. With this in mind, Communicorp will retain the radio interests and 'slide out' of the current picture in relation to telecommunications."

Then there is: "Esat Telecom Holdings" and they have Denis O'Brien - 57%, Advent - 31%, miscellaneous - 12%, and they show how that is made up.

"A floatation is currently under way by First Boston Bank which involves the placing of shares in Esat Telecommunications Holdings Limited. It is not yet known what percentage of the company will be finally be owned by American investors."

Then under that, "Esat Telecommunications Holdings Limited in turn owns

Esat Telecommunications Limited - 100%,

Esat Digifone Limited - 37.5%.

"Telenor Invest AS owns 37.5% of Esat Digifone Limited.

IIU (a Dermot Desmond company) currently holds 20% of Esat

Digifone which it intends placing with institutional

investors. It also has the right to acquire a further 5%

(by means of the 12% of Esat Telecom Holdings Limited which

is held by miscellaneous.)

"Eoin O'Connell is to provide further information in

writing, including deadlines for this change in ownership."

Now, can you say whether you would have received that on

the 16th April from Regina Finn or would it have come to you sometime later?

A. I expect it was faxed I expect we received it on the 16th, yes.

Q. With whom did you discuss it, can you recollect?

A. I can't specifically recall, but obviously this would have given rise to discussions.

Q. Yes, I appreciate that. But with whom, who is it more likely you would have discussed the matter with, if I can approach the matter that way?

A. I expect that I would have well myself and Martin Brennan would have discussed it, no question. Whether there would have been a discussion with Mr. Fitzgerald or Mr. Loughrey, I can't say. I mean, I believe a discussion took place at some time, but I don't recall exactly when.

Q. Now, we have heard other witnesses about the share configuration at 37.5%, and matters of that nature, but the information which Ms. Finn is recording as having been imparted to her, is that Dermot Desmond currently holds 20% of Esat Digifone

A. Yes.

Q. which it intends placing with institutional investors. That accounts for the, that is an explanation being given about the 20%?

A. Yes.

Q. But you see then, "It also has the right to acquire a further 5% by means of the 12% of Esat Telecom Holdings

Limited which is held by miscellaneous." Of course there had been a discussion at the presentation, and I think in the bid documents, that it was the intention that within three years of launch, that 12% would be made available to the market, isn't that right?

A. I think there was a suggestion of that possibility, yes.

Q. And it appears that what is being indicated here is that that 5% represents part of that and that it seems to be an indication that they will take another 5%, but it is out of the 12% which it was intended to launch or to float after launch to the market-place in general. This isn't being suggested by your side; this was being suggested by Mr. O'Connell.

A. Yes, but is it not the case that the 12% being spoken of here is 12% of Esat Telecom, whereas the flotation was 12% of Esat Digifone

Q. Sorry, you are absolutely right. You are absolutely right.

Sorry, you are absolutely right. It is the letter I need to come to the letter in a moment because the clarification, I think what Ms. Finn got was correct here in terms of an understanding of where the 12% was, but what is stated here is 12% of Esat Telecom. We will come to the letter in a moment and we will see. You are absolutely right.

If you go over the page, then, to the letter over the tab, it is Tab 184. And then it sets out:

"Dear Regina,

"I refer to our telephone conversation of yesterday regarding the ownership of Esat Digifone Limited and of Esat Telecommunications Holdings Limited."

Then he sets out the position as follows: "Esat Digifone Limited: There are $\text{€}1/23$ million Ordinary Shares of $\text{€}1/21$ each in issue in this company. They are held as to 1,125,000 shares by each of Esat Telecommunications Holdings Limited and Telenor Invest AS, and as to 750,000 shares by IIU Nominees Limited" you can see there whose writing is this? Is this Regina Finn's writing?

A. Mmm.

Q. You see the 37.5 there noted above the 1,125,000, and 25% under the 750,000.

"It is intended that by the time notification is received from you that the second GSM License is available for issue, the issued share capital will have increased by $\text{€}1/215$ million to $\text{€}1/218$ million (all comprising shares of $\text{€}1/21$ each) held as to 6,750,000 by each of Esat Telecommunications Holdings Limited and Telenor Invest AS and as to 4,500,000 by IIU Nominees Limited."

Again there is a note 37.5% and 25%?

A. Yes.

Q. "The 25% of Esat Digifone held by IIU Nominees Limited effectively represents the institutional and investor shareholding referred to in Esat Digifone's bid for the licence. You will recall that this reference to an immediate institutional/investor holding of 20%, with a

further 12% in the short and medium-term stages. Of the anticipated 12%, 5% has been pre-placed with IIU Nominees Limited. It is understood that most or all of the shares held by IIU Nominees Limited will in due course be disposed of by it, probably to private and institutional investors."

Then going over the page, it sets out the ownership of Esat Telecom Holdings Limited and other group companies. Do you remember receiving this particular letter?

A. I remember I received it, yes.

Q. And can you remember if you discussed it with anybody?

A. I don't remember specifically a discussion, but I do know that, you know, my initial reaction was that this wasn't consistent with the bid and that there was a departure here from the 40:40:20, and I expect that gave, there was a discussion in relation to that, at least with Martin Brennan. Now, I gather from evidence given that there was a discussion also with Mr. Loughrey, but I am not sure exactly at what point.

Q. Were you involved in that, do you recollect?

A. I don't specifically recall the discussion, but I can't rule out, often myself and Martin spoke jointly with Mr. Loughrey.

Q. Right. I think, I understand the point that you make about the 40:40:20 versus the 37.5:37.5:25, but I think the question of the ownership issue was also one which there was a discussion about, isn't that right? Or sorry it was one that you considered anyway, whether there was a

discussion about it, we will come to in due course.

A. Yes, I mean, you know, clearly, yes, the 40:40:20 was changed. There was a reference to IIU placing 20% and I expect there was the question of who exactly owns that 20% arose at that stage also.

Q. Yes.

Now, do you remember, and Mr. Brennan has stated in his evidence that following receipt of this particular letter, at least there was something that exercised his mind as to whether there was a discussion around this matter or whether you recollect such a discussion; that there was a question mark over whether the licence could be given to Esat Digifone at all because of the question of the share configuration, the question of ownership and the question of financial capability. Do you remember any discussion yourself around that? Mr. Brennan has said that was in his mind anyway?

A. I don't recall a discussion of that kind. Certainly the question of ownership, and given the fact that there had been some controversy in relation to the ownership issue, certainly it was clear that what was being put to us here was different from the application.

Now, I don't recall any discussion along the lines of questioning whether what was being put to us here gave rise to a serious question mark over whether Esat Digifone would be entitled to the licence or not.

Q. All right. I think the next day the Minister issued a

press statement, isn't that right? Sorry, I beg your
pardon, well it is a departmental press statement on the
18th April; it is the next tab?

A. Okay.

Q. 185. It is to the Evening Herald. It says:

"Dear Sir,

"I refer to recent political comments and media coverage
generally on the award of the GSM License to Esat Digifone
in October 1995. That there should be disappointment among
unsuccessful bidders is understandable, but that this
should feed a six month campaign of speculation and
innuendos against all concerned in the process is
unacceptable. As a politician, I have no difficulty in
defending my role and record and dealing with criticisms
from either political or media sources, even when I believe
these to be unfair and unfounded.

"The recent innuendo campaign has gone beyond the level of
acceptability or fair comment and involves the questioning
of the process of selection and the integrity of the civil
servants and professional advisers who were directly or
indirectly involved. These were people who acted with
professional independence and integrity and, unlike me, are
without a platform, short of legal action to defend and
clear their good name and reputation against smears and
innuendo.

"I have already made numerous statements in Dail Eireann
regarding the objectivity of the process which lead to the

selection of Esat Digifone as the second GSM operator. I have also pointed out the constraints on me in publishing the report on the evaluation because of confidentiality commitments sought by the applicants themselves before the closing date for the competition and the commercial damage such publication could do to the winner.

"Within these limitations and in order to further clarify the process and the role of participants leading to the decision, I am now arranging that a number of key members of the Project Team which conducted the evaluation will be available for a press briefing tomorrow at 2:30 p.m. in the Conference Room in my Department at 44 Kildare Street.

"The briefing will clearly be of special interest to journalists in the communications and business areas and I invite you to send a representative to the briefing.

"Yours sincerely
Michael Lowry."

Were you one of the civil servants who were anxious to have a press conference at this stage?

A. I don't think I especially was leading the charge, so to speak, and I believe it was Martin Brennan's view, in particular, and it was one that I sported in general terms.

Q. Yes. But I understand that you supported it in general terms. Can I take it that it wouldn't have bothered you if there hadn't been a press conference?

A. Not especially.

Q. Right.

Now, the next document, it is just at Tab 186, it is a press query from the Irish Times. It was a query about the GSM and the queries about "At the Public Accounts Committee this morning, Fianna Fail made allegations about how the GSM contract was awarded.

"Also there are protests from the US-based companies who are going to leave because of bad decisions made by the Department in awarding the licence.

"Thirdly, it is believed the licensee did not have money for the contract.

"Can the Irish Times have a statement form the Department on the above?"

Did you ever see that particular query?

A. I don't particularly recall it, but I expect I would have seen it, yeah.

Q. I suppose, leave aside what might have been stated in the political toing and froing, but the third point there,

"Thirdly, it is believed that the licensee did not have the money for the contract," do you know if there was ever a specific response to that query from the Irish Times? We know that there was a press well, we have a draft of a press statement there was a press statement issued?

A. Okay.

Q. Do you know if there was ever a specific response to that query from the Irish Times or whether the press statement, the draft of which is at the next tab, and the actual statement itself, which is at Tab 188, was issued? I can

tell you we can't find any document anyway, in the files given to us, of a specific response to that Irish Times query?

A. Okay. Sorry, when you refer to Tab, the next tab as a draft press statement

Q. Yes, if you go to the next tab, 188, you see the press statement is issued. It was issued on the 19th?

A. Okay. That press draft statement and press statement, though, am I not right in saying they are press statements in the context of the civil servants' press conference as distinct from a response to this?

Q. They are indeed.

A. I don't recall a response to this. I mean, there is no reason not to deal with any of the questions, obviously, arising in it.

Q. Right.

A. And I couldn't rule, I couldn't rule out that it may have been responded to orally; that does happen from time to time.

Q. Yes, I agree.

A. Particularly if it is fairly straightforward.

Q. Yes. I accept that, it could be answered orally. Do you know who would have prepared, at Tab 187, the draft press statement? Did you have any involvement in that preparation?

A. I expect that I would have been involved in it. Martin Brennan would have been involved in it, I expect. Mr.

Fitzgerald, Mr. Loughrey would have had some role.

Q. Right. I think Mr. Brennan

A. In fact when I look at the second paragraph, "I have personally managed this project since..."

Q. I think Mr. Brennan told us that started life as a personal statement of Mr. Brennan's, that was his intention anyway, and it evolved into a departmental press statement, I think?

A. Okay.

Q. That was how it came about. But would you have assisted him, do you think, in the preparation of this?

A. I certainly would have seen it, no question about that.

Q. Now, it is just, if we go to paragraph 7 of the draft?

A. Yeah.

Q. That is in the final text as well.

"The competition was conducted fully in accordance with the rulings which were approved of in advance and known to all participants. Our approach to the evaluation including the weighting given to the published selection criteria were settled by us before the closing date and was carried out to the letter. Each application was examined meticulously by appropriate qualified sub-groups of the Project Team, including consultants, representatives and marked by the sub-groups. When the marks from the various sub-groups were put together, there was a clear winner. Further supplementary analysis served to confirm the result. The Project Team unanimously made a single recommendation which

was quickly accepted by the Minister and approved by the Government. No factors other than those specified in the rules were taken into account."

Again I am just, it is something I am going to come back to, not in any great detail, but this question of the weightings, which I will come to discuss with you in due course. But the only point that I would ask you about there again in relation to this, describing the process; there is no description there of one step in the process which was the quantitative work, isn't that right?

A. That's right, yeah.

Q. Although it does state that the approach to the evaluation, including the weightings to be given to the public selection criteria, were settled by us before the closing date and were carried out to the letter."

A. Yes.

CHAIRMAN: Do you want to take that up at two o'clock?

MR. COUGHLAN: Yes, Sir.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF EXAMINATION OF MR. FINTAN TOWEY BY

MR. COUGHLAN:

Q. MR. COUGHLAN: Mr. Towey, we can move on from the press statement at the moment. I just, if you would move on to Tab 192 of the same book, that is Book 43, please.

Now, I think this is a note of a meeting

A. Yes.

Q. which you and Ms. Finn had with officials from the Attorney General's Office, I think?

A. Yes.

Q. And the meeting was, first of all, to deal with the question of disclosure of information to unsuccessful applicants, and the transposition of Directive 96/2 and its impact on the award of the GSM License to Esat Digifone.

And then are dealt with, if you turn over the page

A. Yes.

Q. You see at item number 5 on the note: "The Department also gave to the Office of the Attorney General a copy of an extract from Esat Digifone's application outlining the ownership of the company, together with an internal Departmental document and a letter from William Fry Solicitors concerning the restructuring of the Esat Limited.

"The Department indicated that clarification would be necessary of any change in the ownership structure of Esat Digifone relative to that outlined in the application."

And you were doing that, isn't that right?

A. Yes.

Q. If you then go over to the next tab, I think you sent this letter then to the officials in the Attorney General's office, and again the first portion of the letter is dealing with the technical matters?

A. Yes.

Q. Then the main paragraph: "I would also like to reiterate

our requirement for legal opinion on the restructuring of the ownership of Esat Digifone. Relevant papers were provided at our meeting on the 22nd April. In particular, the question of whether recent correspondence suggests any change in the identity of the beneficial ownership of the company which could be considered incompatible with the ownership proposals outlined in the company's application must be addressed. Before the ultimate award of licence it is now considered that it would preferable to seek warranties in relation to both the beneficial ownership of Esat Digifone and the financial impact of the project.

This is considered prudent given the nature of the concessions being given to the company. Perhaps would you advise, however, whether such a requirement could be challenged by Esat Digifone as an imposition not envisaged in the competition process or otherwise unreasonable on legal grounds."

So again you were, again, stating in this letter what had transpired at the meeting with the officials on the 22nd April, isn't that right?

A. The 22nd, yes.

Q. Can you I know it is a long time ago can you remember what documents were given to the Attorney General's Office, at that stage, about the portion of the application outlined in the ownership?

A. I thought I had seen a copy of this in the papers.

Q. Right.

A. And what I think the papers bear out that what I gave was an extract from the Esat Digifone application.

Q. Right.

A. Copy of the letter from William Frys, and a copy of the chart produced.

Q. The Regina Finn chart?

A. Yes.

Q. Right.

A. I think that was it, yes.

Q. Right. And if you go to Tab 198, then, I think Ms. Finn sends you a memo, and I am conscious, and I think you have given evidence to this effect already, that in this period you were effectively fulfilling a Secretariat function in relation to what was going on, isn't that correct? You were doing things that you were asked to do; you were getting information, sending documents and matters of that nature, isn't that right?

A. Not exactly, in the sense that certainly I think that would be a correct description of my role in relation to the exercise carried out by Martin Brennan and Donal Buggy in relation to financing.

Q. Right.

A. But at this stage I would have been playing a prominent role in looking at what kind of legal advice we needed to get and

Q. Of course, and you were asking?

A. Yes.

Q. You were asking, isn't that right?

A. Yes.

Q. And this memo, then, from Regina Finn, at Tab 198:

"Further to previous discussion, please find enclosed a revised draft of the licence which was prepared following comments by Laney Bacon and discussion with John McQuaid.

"Re Article 8 ownership.

"As discussed, Denis McFadden advises that the revised draft should not go out to Esat Digifone until the ownership issue is resolved. He will consider this further and may request a meeting to clarify the Department's request on this issue. I have informed Peter O'Donoghue (who has asked for the article) of the sense of the revised draft but that until some questions about ownership are resolved. I am not in an position to let him have that revised article."

She is informing you of her communication with Peter O'Donoghue, isn't that right?

A. Yes.

Q. Now, you can see there the statement of Regina Finn recording that Mr. McFadden is indicating that he might request a further meeting?

A. Yes.

Q. There don't appear to be any records of any further meeting. Do you recollect whether there was such a meeting or not? We don't see it.

A. If the papers don't suggest it, I mean, I don't remember

anything further, no.

Q. Very good.

A. I mean, my understanding is that this issue was then referred to counsel, and I think that is indicated there.

Q. We have seen counsel's opinion I am not going to discuss counsel's opinion with any witness, we have counsel's opinion in this matter and we know Mr. Loughrey's understanding on matters as well?

A. Okay.

Q. Right. I will be moving on to Book 44 now. The first matter which arises in Book 44 is the speech made by the Minister in the Dail on the 30th April, and the draft which was prepared. I just want to ask you about one thing, and you needn't go into this in great detail, but it is contained in Book 38, Divider 1B and this is a Memorandum of Intended Evidence of Mr. Owen O'Connell. I just want to ask you at page 4 of that, and I will read it out to you for the moment. If you have the text there.

(Folder handed to witness.)

A. 38, Divider?

Q. Divider 1B.

A. Sorry, I have a mix of letters and numbers here.

Q. All right. I will get you it. Can I just read it out to you, first of all, and if there is difficulty, we can come back to it?

A. Yeah.

Q. Mr. O'Connell has informed the Tribunal in this memorandum,

it is in his memorandum dated the 7th October, 2002. At page 4 of that, paragraph number 9: "On the 29th April, 1996" I might be able to put it up now as well, page 4, paragraph number 9. It should come up on the screen now.

A. Okay.

Q. "On the 29th April, 1996, I met Mr. Fintan Towey of the Department, in which he raised the question of beneficial ownership of Esat Digifone and of the companies owning it. He told me that this issue had been raised by his 'legal people', but made it clear that no decision had been made as to whether any difficulty arose from the issue. The next day Knut Digerud spoke to Martin Brennan and was told that the Department had a problem in reconciling the original position with the present position, and wished to have a full understanding of Esat Digifone's ownership. Mr. Brennan also sought assurances as to the availability of Esat Digifone's financial facilities."

Now, I just want to ask you, do you remember any meeting with Mr. Owen O'Connell on the 29th April, the day before the Minister spoke in the Dail?

A. Not specifically, and I don't know whether there are any papers in relation to such a meeting.

Q. No, there are not. In fact we have just written to Mr. O'Connell and asked him if there are any documents. It is unlikely; Mr. O'Connell tends to, when he furnished this type of statement, to furnish any attendances he might have. There may be, we have asked him just on the

offchance that there may be, we have asked him.

A. Okay. I don't think I met Mr. O'Connell on a one-to-one basis.

Q. All right.

A. I don't have a recollection of any such a meeting.

Q. All right. I just wanted to ask you about that.

A. But also, can I say in looking at that, I mean, I am not sure why I would have used that kind of coded language.

Q. Well, perhaps Mr. O'Connell

A. This issue had been raised by his legal people. I mean, this is he had raised it with the legal people, if you understand what I mean.

Q. In fairness well, Mr. O'Connell can speak for himself quite adequately. Just for the moment, in fairness, it may not be any suggestion of a use of coded language; it may just be Mr. O'Connell indicating that this was a matter that was being discussed between you and your legal people at the moment?

A. Okay.

Q. Were you aware that Mr. Brennan had a meeting, or sorry, had spoke to Knut Digerud and indicated that the Department had a problem in reconciling the original position with the present position as regards ownership? Were you aware of that?

A. I don't recall.

Q. You don't recall. Very good.

A. But I wouldn't be surprised.

Q. Very good. Okay. Well, if we go, now, to Book 44 and now, I think you may have been involved in the preparation of the script, or portion of the script, in any event, or preliminary drafts of it, but I just want, before we get into it at all, and we have heard Mr. Loughrey give evidence about this, and Mr. Brennan has given evidence about this. Mr. Brennan prepared a memorandum for sending to the secretary and Mr. McCrea and Mr. Richard Moore after this particular matter had been dealt with and it is contained at Book 52, Tab A2.

A. I have it.

Q. You have it. He writes: "Secretary, it imposes unacceptable pressure on individuals when there is not a better coordination in relation to who does what and when coming up to a major speaking occasion such as the GSM speech on the 30/4/96. The events of the final 24 hours are the worst but not by any means the only examples of the kind of chaos to which I refer.

"I found myself adapting the preliminary draft following oral inputs from the Minister and from you while others were chopping and changing from earlier drafts in parallel.

We joined the Minister at 1:35 with two different 'final' versions. The 1:35 was too late in such circumstances anyway. The panic which sets in in the final hours is intolerable for those who have to sort out the mess.

Fintan Towey did trojan work in very difficult circumstance on this occasion.

"There is a clear need for some order to be put on the chaos. For example, only one person should be amending the text at one time and the Minister has to be persuaded to make his hands-on intervention a bit earlier in the timeframe.

"There were relatively trivial mistakes made on this occasion which could easily have been avoided. They could have been more serious.

"We must learn from our experience."

Now, do you remember chaos surrounding the preparing for this particular speech by the Minister?

A. Not particularly but I do remember a number of people being involved, yes.

Q. Can I take it that for Martin Brennan to send, to prepare such a memorandum for the Secretary, indicates that there must have been some view taken in your division anyway?

A. Yes. It indicates that it is clear in his mind.

Q. That this is too much?

A. Yes.

Q. It is in that context I want to approach the preparation of this particular speech, because whilst you were involved in preparation and perhaps dealing with amendments, there was certainly clear intervention coming from the Secretary and the Minister in relation to it as well, as it was unfolding, the draft of the speech?

A. That's what the note records.

Q. Yes. Can I take it that if the Secretary and the Minister

themselves were involved in a hands-on way, that the final say-so as to what went in would have rested at a level higher than you anyway, or didn't go in, as the case may be?

A. Yes, I mean that would be the case.

Q. Now, I've been through this whole speech with Mr. Loughrey and Mr. Healy has been through it with Mr. Brennan.

A. Okay, yes.

Q. And I think there is no need for me to go through the whole speech with you and ask you about which portions you prepared or amended, because I take it you couldn't be of any assistance in giving any further information at this stage?

A. It would be very difficult, at this stage, to identify who exactly wrote what.

Q. Yes. And in any event, we know because of Mr. Brennan's note that the Minister was there and one would expect would have the final say-so in what it contained?

A. Yes.

Q. Do you know if you were watching the Minister give this particular speech on the monitor?

A. I think I may have done.

Q. Yeah.

A. I think I did. I think I did.

Q. Right. And the portion of, if you go to Tab 202 I am going to the actual report of what happened in the Dail?

A. Yeah.

Q. At Tab 202. And in the top right-hand corner you may see, it is page 11 of 14, statement page 11 of 14.

A. I think I have it: "In mind namely" are the first words of the text.

Q. Yes.

A. Okay.

Q. That's the one. Now, if you come down to Mr. S. Brennan, the second the second reference to Mr. Brennan?

A. Yes.

Q. And he is saying to the Minister: "Why were names not disclosed on the 22nd November when letters were submitted before the Minister made the award? Did he know who owned the 20% before awarding the licence? Did he mislead the Dail on this issue? Will he tell the House who are the beneficial owners of the remaining 20% of the winning consortium?"

Then you see that interjection from Mr. Molloy: "25%"?

A. Yes.

Q. Do you remember that happening at the time, that interjection by Mr. Molloy? It is a fairly significant intervention in terms of if we look at the speech, I am not going to ask you about the speech

A. Okay.

Q. because Mr. Loughrey has dealt with it in particular, and Mr. Brennan, and we understand the position, but this particular intervention here, "25%", obviously Mr. Molloy

must have had information from somewhere?

A. Yes, well I mean, certainly that is, certainly that's what it suggests now, bearing in mind what the figure of 25% was about, so to speak.

Q. In the Department anyway?

A. Yes.

Q. And the Minister goes on: "No, I will not do so because of the confidentiality clause. I will put the matter in context."

Now, there then continues the exchanges between the Minister and Mr. Brennan and then Mr. Brennan continues on down: "Who owns the 20%?"

Mr. Lowry then goes on: "I reiterate that there was nothing unusual about the Esat Digifone application in this area compared with most of the other applicants. We are talking about an upfront capital investment of approximately $\frac{1}{2}$ 120 million. It is understandable that any business of that size would be financed by debt and equity in the normal ratio 50:50. That is precisely what happened in this case."

Then Mr. D Ahern: "Someone must own it?"

And Mr. Lowry: "That is how at least five of the bidders proposed to fund it."

We won't continue on then along.

A. Yes.

Q. Then over the next page you see, you come to the main section from the Minister.

"Mr. Lowry: The company concerned is the only source from which information on the beneficial owners of the licence can emanate. We are granting the licence to Esat Digifone and before it is issued I will request the company to put on public record the composition of the consortium and from where the funding came."

Now, I do appreciate that Mr. Loughrey, who was the Secretary of the Department, has informed the Tribunal that effectively there may have been a line being held while matters were being worked out in the Department and that may account for how some of the responses occurred in the House in relation to the matter as of the 30th April; I understand that. But this question of it being raised in the House, the question of a 25%; it was true, it was accurate what Mr. Molloy was saying, isn't that right?

A. Yes, the figure of 25% was true at one point, yes.

Q. And no, it was true at all times. Just to clarify that, it was true at all times because at the very end what happened was Mr. Dermot Desmond sold 5% to Esat and Telenor?

A. To Esat and Telenor, yes.

Q. But do you remember any discussion in the Department, after the Minister's speech, about what happened in the House, particularly the reference to 25% being made by Mr. Molloy?

A. No.

Q. And again, bearing in mind, and I do appreciate the question of holding a line, but did you prepare any portion

of a draft whereby a Minister could inform anybody that when the State were going to grant a licence, that the information as regards ownership could only emanate from the proposed licensee?

A. No, I don't believe that's no, no.

Q. It is not even common sense?

A. I don't believe there would have been any question of the Department not being willing to release that information.

Q. Yes. Now, if you go over the page again, and you can see if you come down to Mr. Bat O'Keefe's intervention: "Why, when the Tanaiste was having discussions with one of the groups the day before the announcement was made, did he indicate that this decision would not be announced for a month given the Taoiseach's espousal of openness and transparency, and the fact that this was the sale of a public asset, why did he not insist that matters pertaining to ownership would be in public view? Will the Minister accept that perhaps it was a mistake given that we now have a press speculation that 20% would be owned by people such as Mr. Desmond and others? The confidentiality has now led to speculation throughout the press. Will the Minister make public the full ownership of Esat Digifone before the licence is signed?

Mr. Hogan: He did.

Mr. Lowry: I will not speculate on what the Tanaiste said."

Then we go to Mr. Lowry: "The Deputy has missed the point.

I stated clearly that all five of the participants in this competition" well, it was six "had various ways and means of raising funds to fund the project. I will not speculate at this stage or cast aspersions on the credibility of others. The Deputy mentioned Mr. Desmond.

If Mr. Desmond or any other company is in a position to fund this project and is acceptable to Esat Digifone, and if it means that this project is up and running, so be it that is their business, it is not my business to determine who should participate in a consortium of this kind. My only priority is to ensure that the necessary funds are in place to fund the project and get it to roll out in time. It is very simple."

Again, we don't see anything prepared by way of a draft speech for the Minister which enabled him, as a result of a briefing inside the Department, to make that particular statement in the House?

A. I expect that he was made aware at that stage that we had, that IIU would be involved in placing...

Q. Yes, yes, I understand that, and Mr. Loughrey was trying to sort matters out, and Mr. Loughrey's view, and he has expressed some views about this particular statement and I am not going to concern you about them, but about this whole statement in the House, but there was nothing prepared, was there, for the Minister that we can see, or was there, that as of this stage that if Mr. Desmond or any other company was in a position to fund the project and is

acceptable to Esat Digifone, that that is their business?

A. Yes.

Q. Of course it had to be it had to be the Department's business of course?

A. Yes, quite right.

Q. Now

A. I mean, we wouldn't express it in those terms.

Q. You couldn't at all.

A. No.

Q. And you don't remember any discussion after this speech about what was said in Dail Eireann?

A. I mean, this is a speech which has some colourful passages in it.

Q. And we have been through that with Mr. Brennan and I think Mr. Brennan has indicated and he has identified the passages which would have come from civil service sources and which would perhaps have come from political advisor source?

A. Yes. I mean, I think we would have had a discussion in general terms about the speech, about how it went, about whether we felt it would defuse the apparent controversy about this issue and so on. But if you are asking me more specifically did we have a discussion on some of the specific responses there? I don't recall any such discussion.

Q. Right. Because just in the light of what the Minister stated in that final paragraph in the Dail, the next day

Mr. Brennan wrote to Mr. Owen O'Connell, and that's the next tab, it is Tab 203. We have been informed by Mr. Brennan that this was the formal response, it was the formal response of the Department to Mr. O'Connell of his letter of the 17th April of 1995.

A. Yes.

Q. And

A. I think we consulted legal advisers on this letter also, a draft of it.

Q. "Dear Mr. O'Connell,

"I refer to your letter of the 17th April, 1996, concerning the restructuring of certain ownership interests in Esat Digifone.

"In accordance with the requirements of the GSM II competition documentation, Esat Digifone provided ownership details which indicated that at licence award the ownership would be as follows: Communicorp Group Limited - 40%; Telenor Invest AS - 40%, institutional investors - 20%.

"The application also provided details of the ownership of the operational partners and identified the probable institutional investors and the broker who would be responsible for placement of equity with institutional investors. In the case of Communicorp, it was indicated that it was 66% owned by an Irish investor (Mr. Denis O'Brien) and 34% by Advent International.

"In view of the information contained in your letter of the 17th April, 1996, it would be appreciated if the following

could be clarified:

" the nature of any difference between Communicorp Limited and Esat Telecommunications Holdings Limited in relation in particular to expertise or asset strength, and;

" full details of the ownership and categories of all shares of Esat Telecommunications Holdings Limited including in particular by persons other than the owners of Communicorp.

"It is essential that the Department can identify precisely any changes in the effective ownership (both direct or indirect) of Esat Digifone since the time of the submission of the application.

"Finally, it would be appreciated if you could confirm that full certification of the following matters will be provided before the award of the licence:

" the precise equity ownership of Esat Digifone including the identity of all institutional investors;

" the identity and financial commitments of providers of debt financing.

"It is essential that these matters be cleared up before the issue of the licence. We also need to discuss the public presentation of these matters.

"I am available for any discussion you may require of the foregoing.

"Yours sincerely,

"Martin Brennan."

Now, here Mr. Brennan is looking for information from

Mr. O'Connell, isn't that correct?

A. Yes.

Q. And no matter what was happening, no view could have been formed by officials until at least there was a response to that letter, the information that the Department was looking for?

A. Clearly. I mean, we felt we needed more precise information in order to evaluate.

Q. In order to know what was going on?

A. Yes, but we did have previously the preliminary, we had the notification from Frys.

Q. I appreciate that. But you were looking specifically there were two issues or there were perhaps three issues arising here?

A. Yeah.

Q. One, what was the composition of Esat Telecom's holding, how it compared to Communicorp, do you understand?

A. Yes, correct.

Q. There was some financial matters being concerned, but there was also the, what you were looking for was the ownership of Esat Digifone as it was now and how that was in conformity with what had been contained in the bid, isn't that right?

A. Yes.

Q. And of course, this letter comes after the Minister has informed Dail Eireann that it doesn't matter, as far as he

is concerned, whether Mr. Desmond is in a position to fund it, and if he is, it is a matter for Esat Digifone, isn't that right?

A. Yes.

Q. And I think in fairness to Mr. Brennan, and to you, and the Department, the second page of the letter, the second last paragraph: "It is essential that these matters be cleared up before issue of licence. We also need to discuss the public presentation of these matters." So there would be no, it was being pointed out to Mr. O'Connell this was serious and essential that information be obtained, isn't that right?

A. Yes.

Q. Now, I now want to come to, there was a meeting on the 3rd May of 1996, and I will be turning to Tab 206 in this book, that is Book 44, and that contains handwritten notes of Mr. Owen O'Connell and they have been typed up. And this is his record of a meeting which occurred on that day. And present at the meeting, you will see, were Knut Digerud, Peter O'Donoghue, Arve Johansen, Michael Walsh, Paul Connolly, Owen O'Connell, at the Department of Communications, and then Martin Brennan, Fintan Towey, Regina Finn and I think that is Eanna O'Conghaile?

A. Yes.

Q. Now, how the Tribunal came to be aware at all that there was a meeting in the Department on the 3rd was when Mr. Arve Johansen furnished a document to the Tribunal and

that document is contained at Book 49, Divider 130.

A. Book 49?

Q. Book 49, Divider 130.

A. A document headed "Private and Confidential".

Q. Yes.

A. Yes.

Q. Now, I may come back to the whole of that document in due

course, but there are matters there that you have informed

us you wouldn't have known anything about which Mr.

Johansen refers to, but I will come back to it to put the

whole picture, as Mr. Johansen saw it, before you. If you

go to the second page of it and you go to paragraph 6, it

says, "As we go along we learn more, but it all serves to

disclose more details which again more and more prove the

above scenario.

"In the meeting with the Department of Communications

Friday May 3rd, it became evidently clear that IIU was not

a favourable name from an 'Irish public' point of view. On

the contrary, the ministry basically asked for help for how

to explain why we had substituted Advent, Davy Stockbrokers

and the other recognised named institutional investors in

the bid (AIB, Investment Bank of Ireland, Standard Life

Ireland).

"Eventually the project coordinator from the ministry

Mr. Martin Brennan actually appealed (off-the-record)

to Telenor to write a letter of comfort that we would serve

as a last resort for the Digifone company for funds and

operational support. My feeling was, that if Telenor had owned it alone, he had been more comfortable than with the current shareholders."

Now, that was how the Tribunal first became aware that there was a meeting and what Mr. Johansen said happened at the meeting. We now come to this note at Book 44, Divider 206, and it is Mr. O'Connell's note of the meeting.

A. Yes.

Q. And it reads: "Clear a political football.

"Identity of each shareholder legal and beneficial ownership.

Esat Digifone changes relative to bid.

"Change in institutional investment replacement of Advent International and Davys by IIU.

"Need detailed information/quality/about IIU.

"Confirmation that Telenor is same as at bid date.

"Difference (in detail) as to expertise and asset strength between Communicorp and Esat Telecom Holdings.

"Numbers re IIU.

"Telenor 'backdrop' statement as operator as last resort.

"AJ 'That's the way we see it anyway.' 'We'll never abandon this one'.

Not requesting statement, but would be helpful per MB.

"Project finance POD bank 60/equity 40.

ABN + AIB appointed co-providers.

1/225m bridging committed.

Thought to presentation. More the better provided agreed in advance.

"Donal Buggy + Billy Riordan. Maybe Andersen.

"Better than 50% chance that Commission will send us Persona complaint; Department would already have replied + would like us to coordinate response. When Telenor and Esat began to talk? (Ref complaint)"

Now, we know there is no record of this meeting in the Department, isn't that correct?

A. Yes.

Q. We know there is no note of it, very good. Do you remember the meeting?

A. Yeah, I mean the description of the meeting here rings a bell with me, yes.

Q. Yes. Can you tell me, who convened this meeting?

A. I can't say, but I am, my impression is that it was at the request of Digifone following the letter.

Q. The receipt

A. That is what I would expect, yes.

Q. That is not reasonable, yes. I think that is not unreasonable to think that that is how things happened. So it was part of the information gathering process that was commenced by the letter of the 1st May, isn't that correct?

A. Yes.

Q. You would think people may think that it is an unimportant question we ask as to why there is no note of this meeting in the Department, bearing in mind the purpose

for which the meeting was held?

A. Yeah.

Q. But isn't it a question of huge importance, that if the purpose of the meeting was for the purpose of gathering information

A. Yeah.

Q. particularly based on the letter of the 1st May, that there would have been a note kept of responses given?

A. Well, I mean it would be normal, where an important meeting takes place, to keep a record.

Q. Yes.

A. That is as a general rule. I mean, occasionally sort of an intention to keep a record may be overtaken by other priorities, or indeed the events at a meeting may be seen to be overtaken by events, if you understand what I mean.

Q. I understand that. But in the context of what was going on here

A. Yes.

Q. there couldn't have been a more important meeting taking place?

A. Well...

Q. Would you agree?

A. I mean, I am not, I am not sure that I am not sure that it is a meeting that I would have seen as particularly important at the time in the sense that clearly there is some general discussion, you know, reinforcing the need for a response to the letter we had sent, but in terms of the

nature of the request for information, I don't think it particularly adds anything to the letter.

Q. Yes. Fair enough. Could I just ask you, from what we have seen, this is the first contact with Esat Digifone people since the letter of the 17th April?

A. Yeah.

Q. From what we can see.

A. Okay.

Q. And if Mr. Johansen's recollection of events is correct, as noted by him, that the Department "It became evidently clear in the meeting with the Department, that IIU was not a favourable name from an Irish public point of view. On the contrary, the Minister basically asked for help as "how to explain why we have substituted Advent and Davys stockbrokers and other recognised international named institutional investors in the bid, (AIB Investment Bank of Ireland, Standard Life)."

Now, Mr. Walsh is at the meeting as well, according to this note; "MW" if that is Michael Walsh, I presume it is?

A. I yeah, I would be it would seem likely that that refers to Michael Walsh, yes.

Q. Now, of course, Mr. Johansen has to come and give his evidence and be questioned about this and as to whether, in the first place, I suppose, whether the note is accurate.

I suppose we could operate on this basis: that Mr. Johansen would have known nothing about IIU other than what he was being told either by his partners or perhaps by the

Department as he records here, isn't that right? He was outside the country, he wasn't even the Telenor man on the ground here in Ireland at the time?

A. Yeah, yeah, I think that is probably a not unreasonable assumption, yes.

Q. And accepting for the moment that what he records is what actually happened, he is being told that IIU is not a favourable name from an Irish public point of view?

A. I mean, I don't, I don't believe that that description by Mr. Johansen reflects any view expressed by the Department at the meeting because

Q. All right.

A. I mean speaking on my own behalf, I would never speak in those terms and I don't believe that Mr. Brennan would either, and I think that, I think I would recall an exchange of that kind. I suspect that in that view, and I think I am right in saying that that document prepared by Mr. Johansen was a paper that he prepared reflecting the evolution of Telenor's relationship with Mr. O'Brien.

Q. That's correct. But he seems to have made this particular note the following day?

A. Okay. All right. Okay. Well, I mean, here Mr. O'Connell has recorded that it is clearly a political football and I think that we would have been, there is no question but we would have been forthright that there was an on-going political controversy around this issue which seemed to us, in our view, to be proportionate, in other words, we had no

reason to believe there was any grounds for a public controversy or public concern. But I suspect that he is extrapolating from some kind of exchange in those kind of general terms.

Q. All right.

A. You know, taking, presumably taking these kind of comments together with the letter that we had written seeking detailed clarification of ownership.

Q. We will have to hear from Mr. Johansen, of course, on the matter. I don't think for a moment I would read it I don't think for the moment I would read it or anyone would read what Mr. Johansen is recording here as being a transcription of a shorthand note of what transpired, but he was making a note the following day of the impression that this meeting had on him in any event?

A. Okay.

Q. And whilst I don't think for a moment I would think that anyone might have said that IIU is not a favourable name from an Irish public point of view, or use language so formally, it is a recording of his impression of what was conveyed to him, whatever the language was used?

A. Okay.

Q. And, in fact, there was controversy, wasn't there, from an Irish public point of view?

A. There was controversy, yes.

Q. So he does appear to be recording a correct fact, that there was such a controversy, isn't that right?

A. Yeah, I mean

Q. And that he got this information at this meeting from a Department source?

A. Well, I mean, he is recording his impressions, I presume that there would have been some discussion afterwards amongst the team that met the Department, for example.

Q. Well, he says that it was in the meeting that it became clear

A. Okay.

Q. in the meeting. As you say, Mr. O'Connell talks about or notes that there was some discussion about "clear a political football"?

A. Yes.

Q. Now, you see, I understand what you say, that depending on the importance of a meeting, one might or might not keep a note, but what I am suggesting to you is that this was an extremely important meeting. Mr. O'Connell kept a note.

Mr. O'Connell is a trained solicitor; he was there on behalf of clients. It would be a requirement that Mr.

O'Connell keep a note of events whilst he was carrying out his client's business. Mr. Johansen makes a note of the meeting?

A. Yes.

Q. Now, could it not be suggested that the reason why no note was made or kept in the Department was because this was such a political football that nobody wanted a record kept of it there?

A. No, that wouldn't be the case why I didn't keep a note. I mean, in my view, it expands a little on the basic message conveyed in the letter; that, you know, there are clearly issues here that we need to resolve and we want no unanswered questions about who owns what.

CHAIRMAN: I think in your own statement, Mr. Towey, at page 23, you make the perfectly valid point, it seems to me, that the reason that you taped the presentations, a different sort of meeting, was to make sure there could be no row about what was actually said.

A. That's correct, yes

CHAIRMAN: Is there not a certain analogy here, that you would have been in difficulties if there was a conflict with somebody from Mr. O'Brien's team in ensuing days about what may or may not have been said if you hadn't kept a record?

A. I think I see it in a slightly different light, in the sense that we are talking about the provision of information by the licensee in prospect, so to speak. I don't think this kind of exchange is something that I would particularly see a legal action or a challenge arising in relation to, as might have been the case in relation to the presentations, for example. I mean, I don't see any reason there is nothing that strikes me here as being enormously important, but I want to be clear, that certainly there is no reason to conceal anything, because there was absolutely no mystery about any of the issues

that we were raising or seeking clarification of.

Q. MR. COUGHLAN: Now, just, again, I just again draw to your attention something Mr. O'Connell, in the Memorandum of Intended Evidence which he furnished to the Tribunal, dated the 7th October, 2002, again at page 4 of that, and if we go to paragraph number 11, please. He informed the Tribunal "On the 3rd of May, 1996, I attended a meeting at the Department with Knut Digerud, Denis O'Brien, Arve Johansen, Michael Walsh, Paul Connolly, Martin Brennan, Fintan Towey and Regina Finn. A copy of my notes of the meeting is attached as document number 6" that's the document we have been looking at now.

A. Yes.

Q. "Arising from the meeting, I prepared a list of the documents which were sought by the Department, which is attached as document number 7." So I am now going to ask you to look at, it is Divider 7.

Now, these were documents that were sought by the Department and he makes a note of them.

"1. Directors certs x 3.

"2. Auditors certs x 3.

"3. Comparison bids against now.

"4. IIU versus Davys, etc., explanation.

"5. Telenor 'backup statement'.

"6. Detailed information re IIU quality.

"7. (If Esat Telecommunications Holdings)

confirmation re strong.

"8. Bank letter.

"9. When Telenor and Esat began to talk.

"10. If Communicorp and how interplay to get

Holdings in.

"11. Digifone/IIU agreement re 5% (if 20%.)

"12. GSM operator of the year award for Telenor."

Now, you can see that the Department required a number of

documents

A. Yes.

Q. from Mr. O'Connell, and Mr. O'Connell, of course, made a

note of them so that he could comply with the requirements

of the Department, obviously?

A. Yeah.

Q. If there was nothing going on at the meeting that, as you

say required noting, how was the Department ever going to

have a record of what they asked Mr. O'Connell for and

whether he had complied with it?

A. Well, I mean, this was something that was going to happen

quite quickly and it was a matter of responding to our

letter which had asked these questions, so clearly

Q. The letter didn't ask for the specific list of documents,

that happened on the 3rd of May?

A. Okay.

Q. Mr. O'Connell makes a note of them all. I am just I

have to, once again, in light of that, suggest to you that

it would be not unreasonable to form the view that the

reason that there was no note kept of this in the

Department was to conceal what was going on at this stage?

A. There was no need to conceal anything.

Q. All right.

A. I don't see how the question of concealment would arise.

Q. Very good. Now, if you go to Divider 209?

A. 209?

Q. Yes, Divider 209 in Book 44?

A. Yes.

Q. Now, this again is an attendance of Mr. O'Connell's and it is typed up in the front portion, you see the handwritten

A. Yes.

Q. It appears to be an attendance on you. And he has been informed "Minister very strong preference for 40:40:20 at time of licence but understands need for flexibility afterwards. Will take Esat Holdings subject to no substantive difference plus outline in writing." Do you see that?

A. Yeah, this is a phone call, is it?

Q. Yes, it must have been. Do you see there is a telephone number at the bottom: 6095010, do you know what number that is?

A. 0 I think it is 604, perhaps, because I think

Q. Maybe it is 6045010, we have it as 9, maybe it is a 4. Is that a Department number?

A. I think well, sorry, the numbers that are in that building now are 604 and I think they were then.

Q. That may be a 4, I see the handwritten note, or sorry, I don't think we typed these up, I think Mr. O'Connell did, but yes, in fact we can go to Mr. O'Connell's memorandum and he does say that he received a telephone call from you?

A. Okay.

Q. And this is his record of

A. Okay.

Q. Do you remember that?

A. I don't specifically recall this, but if Mr. O'Connell records it, I have no doubt that such a conversation took place.

Q. Who would have instructed you to make that call?

A. I can't say, but I mean, it is a phone call I mean in conveying a message like that, it would have been a message that was agreed within the Department. Now, as to who specifically would have been involved in that, I can't say for certain, but I would expect it was at a very senior level.

Q. Because you seem to be conveying the Minister's view on this, isn't that right? I take it you would, at this stage, you wouldn't have been taking the Minister's name in vain?

A. I would have to reject that question, I don't know if the Minister was consulted on this question.

Q. I see. You don't know? You don't know whether he was?

A. I don't know if the Minister was consulted on this question.

Q. On this question of 40:40:20?

A. On this question of 40:40:20.

Q. You don't know whether the Minister was consulted. Why would this particular information, which is very important, be conveyed in an informal way rather than a letter written about it?

A. Well, there is I mean, there is no reason why a letter wouldn't have been written.

Q. But it wasn't; there is no note?

A. Okay.

Q. There is no note in the Department files of this telephone contact either. This is a very, very significant.

A. I agree this is an important message.

Q. Very significant. And there is no record of it in the Department files?

A. Yes.

Q. Again isn't it open to the suggestion that the reason for that is so as to conceal it in the Department?

A. Well

Q. To conceal the official record, to conceal it?

A. There is no reason, I mean why would concealment arise? I mean, you know, it was a clear view on the part of the Department. At this stage I believe we were awaiting legal advice and obviously this was a view that the Department took, and whether or not the Minister was consulted, I cannot say, but I mean, it's a position that, you know, one can objectively stand over, so the issue of concealment is

a strange suggestion.

Q. Why I ask it is this: that if, as you say, you were awaiting legal advice and you were putting this as the proposition to the solicitor for Esat Digifone, first of all one might ask the question, it seems extraordinary that you would be putting such a proposition without having obtained the legal advice; and secondly, I suggest to you it is extraordinary that you would be putting such a proposition without recording it in the Department?

A. Yeah, as I say, it would be normal to record something of this kind.

Q. All right. Because on the 7th May, 1995, Mr. O'Connell wrote a letter to the Minister; it is at the next tab, I think: "We are writing on behalf of our clients, Esat Digifone Limited, in connection with the pending grant to our clients of the second GSM Mobile Telephone Licence for Ireland.

"As you know, our clients were informed on the 25th October last of the decision taken in principle to grant them the licence. Since that time, on the basis of the promised licence, they have incurred extensive commitments and expenditure, including:-" Then he sets out the whole position there.

"All of these things have been done in anticipation of the licence being granted in early 1996. This did not occur and our clients are accordingly facing massive losses if the present delay continues. You will appreciate that the

licence necessitates capital expenditures of over £100 million mostly in advance of revenue being received. Our clients cannot be expected to incur expenditure on such a scale unless the licence is granted.

"We understand your predicament having regard especially to the voluminous adverse publicity stirred up by losing contenders for the licence and the complaint made to the European Commission by the Persona consortium. As you know, it is our view that there is no foundation whatsoever for either the publicity or the complaint, and that the competition for this licence was won fairly by our clients on the basis of separate assessments made by your Department and independent consultants according to previous announced criteria.

"Our client's expenditure is predicated on the assumption that they will be in a position to achieve very large sales in the period before Christmas 1996; this in turn requires the establishment of a comprehensive and tested network in Autumn 1996. Delay in the pretrading period will cost our clients millions of pounds. If the licence is not granted within the next week, launch of the Esat Digifone service in October may have to be abandoned with a huge impact on the project's finances which may never be recovered.

"In all the circumstances, we must appeal to you as a matter of the utmost urgency to grant our clients the licence promised by them without any further delay. We would like to assure that you everything necessary to be

done by us and our clients or their other advisors either has been or will be done forthwith on request.

Owen O'Connell."

There is no reference, there is no response to the letter of the 1st May to that, is there?

A. No.

Q. And what it is is a letter pointing out all of the first of all saying that a licence had been promised, no such thing had happened anyway, no licence had been promised.

Leaving that aside, the language that had been used, what it is doing is saying, 'We spent all this money and we could be at significant loss', and I suppose one way of reading this letter is, it could be sort of firing a shot across the Department's bows, that, you know, 'We may be coming after to you in relation to the losses.' Would that be a reasonable way of stating it? It doesn't state it explicitly.

A. I understand what you are saying, I can see that it is saying it is the responsibility of the Department, pushing the responsibility towards the Department, yes.

Q. Yes. Now, it didn't happen, but nobody wrote back and said "We note what you say, that's your problem, please reply to the letter of the 1st of May." That didn't happen anyway.

And all of what was going on behind the scenes is obscured from any official audit in that no record is being maintained in the Department, isn't that right?

A. Well, there have been two instances where a record wasn't

maintained, that's correct.

Q. Yes. Do you know was there any discussion with Mr. O'Connell as to whether this letter might be sent to the Department?

A. That he might send such a letter?

Q. Yes. Do you know if that happened? I am only inquiring.

A. No, it doesn't ring any bell with me.

Q. It seems an extraordinary letter just in the chain of correspondence, but we will ask Mr. O'Connell about it.

Now, if you go to Divider 213, and this is a minute, which Mr. O'Connell prepared, of a meeting which occurred in the Department on the 13th May, 1996. And he records as being present at the meeting, Knut Digerud, himself, Martin Brennan, and you. Do you see that?

A. Yes.

Q. And the meeting was held in Martin Brennan's office at the Department, 44 Kildare Street, Dublin 2. And the subject under discussion was the imminent grant to Esat Digifone of the second GSM License.

"After an exchange of courtesies, the meeting began with Knut Digerud handing a number of letters to Martin Brennan with copies thereof to Fintan Towey. (Copies of the letters in question are enclosed.)"

And we know what the letter, particular letters are. They are the unless you want me to open them in detail, you may know yourself: there is the letter about Telenor's financial position; I think there is a letter from Arthur

Andersen, their auditors; there is a letter from Paul

Connolly, if I recollect, about

A. Esat.

Q. Esat's position, and you know the documents?

A. I know.

Q. You know the documents I am talking about?

A. Yes.

Q. They are the formal documents.

"Martin Brennan and Fintan Towey scanned the letters, with

Martin Brennan noticeably pausing to read closely the

letters concerning IIU. He noted that Farrell Grant Sparks

were IIU's auditors and commented that he would like to

have known this fact earlier. (This was generally taken to

be reference to Greg Sparks' position as programme manager

to An Tanaiste (Dick Spring.)

"Martin Brennan then said that he would send the documents

to the Department's in-house accountant and also to an

accountant in the Department of Finance who was awaiting

them. He said there may well be requests for further

information and/or clarification of the letters, but it was

quite likely that more information would be required in

relation to IIU, specifically 'more than a statement that

they have money i.e. what money?'

"There was some general discussion about the purpose and

manner of presentation of the letters, all of which was a

acknowledged by Martin Brennan and Fintan Towey.

"Fintan Towey made the point that the bid had referred to

20% of the company being placed with the 'blue-chip institutions' (acknowledging that the institutions in question were not identified). He queried IIU's intentions in regard to placing of its holding. OO'C replied that IIU was a financial institution and qualified under the bid description, so the placing question should not arise; and that while it might place its shares in future, if queried now on the point by journalists, might reply that recent turmoil over the licence made such a placing unlikely, for market reasons, for some time (stressing that this was not OO'C's view, but was based on comments made by Michael Walsh.)

"Fintan Towey said that a new draft of the licence was imminent, and especially that Article 8 thereof would be amended" Article 8 is that portion of the article of the licence dealing with changes of, future changes of ownership in the future, I think we know

A. Correct.

Q. "He said that a new draft of Article 8 had been received late on Friday last (10th May) from counsel and was now with the Parliamentary Draftsman, who wished to shorten it.

Martin Brennan said that the counsel involved was..."

"Martin Brennan said that the thrust of the new Clause 8 was that all changes of ownership would be subject to ministerial approval, but that the grounds for objection by the Minister were specified in the clause (and had been taken largely from the recent EU directive on mobile

personal telecommunications). After a brief discussion with Martin Brennan and Fintan Towey, Fintan Towey left the room to obtain a copy of the latest draft.

"Knut Digerud and Owen O'Connell were permitted to review the draft (which extended to two pages) but not to do so at length or in detail, or to take copies. After this review, OO'C raised the point that one of the paragraphs referring to ministerial consent being required for a private placement of shares could be interpreted as requiring such consent for a routine issue of shares consequent on a financing round. The point was also made that the clause should distinguish between existing shareholders (who were presumably acceptable to the Minister and thus not require a comment on acquisitions of shares by them), and new third party shareholders. After some discussion these points were acknowledged by Martin Brennan and Fintan Towey who said that they would look at the matter further. Apart from this, Knut Digerud and OO'C indicated that as a very preliminary view and subject, obviously, to both detailed examination of the clause and discussion with shareholders and colleagues, there did not seem to be any fundamental difficulty.

"Martin Brennan asked whether the banks named in one of the letters given to him (ABN-AMRO and AIB) would consent to their names being used in an announcement of the granting of the licence. Having checked the matter with one of his colleagues, Owen O'Connell indicated that the banks would

so agree, subject to no statement concerning them being made which was inconsistent with the letter of the 2nd May given by them to Martin Brennan, and that any written press release or similar statement which was inconsistent with the letter of the 2nd May given by them to Martin Brennan and that any written press release or similar statement which referred to them should be subject to prior clearance with them.

"The meeting moved on to a discussion of events in the immediate future. It was indicated by Martin Brennan and Fintan Towey that they were about to engage in 'feedback meetings', these being meetings with unsuccessful applicants for the second GSM licence for the purpose of giving them reasons for their failure to obtain the licence. It was felt that it might be somewhat insensitive to grant the licence while these meetings were underway and accordingly the proposed date for the grant of the licence was Thursday next, 16th May. Martin Brennan also said that the Department had written to solicitors for the Persona consortium informing them of their intention to grant the licence and that if Persona consortium wished to challenge this, they should do so through the courts. However no response had been received.

"Martin Brennan added the Department's view that the licence had expired as a live issue for the press, and the Minister and the Department were very anxious not to revive it by injudicious statements being made by anyone at

the press conference.

"Martin Brennan said that it was the Minister's wish to announce the grant of the licence at a press conference co-attended by Esat Digifone. Great stress was repeatedly laid on the need to prepare extensively and exhaustively for this press conference, and it was stressed that the journalists present would have been briefed in a hostile way by 'other's' (this clearly being a reference to unsuccessful consortia). Martin Brennan said that he wished to have Esat Digifone identify key questions likely to be asked at a press conference, to draft answers to them and to explain to the Department the reasons for those answers. He would also then wish to arrange a meeting between the Minister for Transport Energy and Communications and Knut Digerud, together with 'one or two others' at which 'the progress of the press conference would be discussed/rehearsed'.

"Martin Brennan indicated that there had been discussions within the Department as to whether shareholders should participate in the press conference, and if so, to what extent and in what way. At this point Knut Digerud made a strong point to the effect that Digifone saw itself as an entity independent of its shareholders, that it had premises, employees, funds, and a viable business in its own right and that there were issues likely to be raised at a press conference which would not necessarily be a matter for the company but rather matters for its shareholders.

Fintan Towey conceded this as an 'fair point' and acknowledged that the company would be at liberty during a press conference to refer questions concerning its ownership to its shareholders. Martin Brennan interjected to say that in such a case, the Minister would wish to know what response the shareholders would make when the questions were put to them. Martin Brennan stressed the need for a number of 'definite, clear and acceptable statements for use at the press conference' and he outlined a number of 'obvious questions' as follows:

"A. 'Is this the same consortium as that which applied?';

"B. 'Can the Denis O'Brien's side of the consortium stand up?' (Adding that either Denis O'Brien or Knut Digerud should answer this question);

"C. 'Will Telenor support the project to an end?' (To this query Martin Brennan added that it was sensitive in nature as to it would have to be answered in such a way as not to imply any doubt in the Department as to Communicorp's financial strength).

"Owen O'Connell made the point that within reason (and certainly short of telling any lies) Esat Digifone was willing to be guided by the Department as to the conduct of the press conference and would follow policy lines laid down by the Department; Esat Digifone also expected the Department to have some input as to the answers to questions to be given by it, i.e. would coordinate such answers with the Department. This was acknowledged by

Martin Brennan and Fintan Towey.

"The meeting ended with Martin Brennan reiterating that it was 'virtually certain that we would have to get more information on IIU, some numbers'.

"The meeting concluded at 1:10 p.m.; it's tone throughout was cordial and it concluded amicably."

Do you remember that meeting?

A. I remember it in general terms, yes.

Q. Again there is no record of this meeting in the Department, is there?

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

Q. There is no record even that this meeting occurred, isn't that right, it is not noted anywhere?

A. Well, we did receive the letter at the meeting. I don't know whether that is noted on the letter, for example.

Q. It is not recorded in any, perhaps it is but we haven't seen it, in any diary or official journal of the day in your division, is it, that this meeting occurred?

A. I take your word on that, I believe there is no official report of it.

Q. No report at all?

A. Yes.

Q. Bearing in mind what was being discussed at this particular meeting, if Mr. O'Connell's note is accurate, and I think you have stated in response in your memorandum that you accept or believe that this may be an accurate, a reasonably accurate account of the meeting?

A. Yes, yes.

Q. What was being discussed here was serious stuff, wasn't it?

A. There was some serious issues here, yes.

Q. There is no doubt about it. When you go to the last page

the questions which were identified, it is funny they seem

to be the sort of questions that popped up over and over

again in the course of this Inquiry's work "Is this the

same consortium as that which applied? Can the Denis

O'Brien side of the consortium stand up? Will Telenor

support the project to the end?"

A. Yes.

Q. These obviously reflected concerns within your Department?

A. Well, I think they were, I think they reflected a view as

to the kind of questions that might emerge at a press

conference, yes.

Q. And they emerged from people, Martin Brennan in your

Department who was the Chairman of the Project Group and

would have had, would have been more familiar with what was

going on than any journalist or any disgruntled defeated

applicant?

A. Yes.

Q. Might I suggest to you that the reason why there was no

record kept of this meeting in the Department was, once

again, to conceal what was going on and to conceal these

very serious views which were held within the Department?

A. I wouldn't agree with that, with that view.

Q. Right.

A. There are important issues being discussed here, but I mean, it is clear that the discussion in relation to the letters, for example, is by way of preliminary reaction and there is clearly a more detailed understanding to follow.

Q. Yes.

A. Or a more detailed examination to follow.

Q. Yes, there is.

A. There is a discussion in relation to Article 8 of the licence.

Q. Yes, I can see that.

A. That is clearly an informal discussion on the basis that

Q. I note that.

A. further discussion, there will be a further formal consultation in relation to it.

Q. Yes. That was a formal consultation in relation to some amendments that the consortium wished to suggest, insofar as they believed that it may have been viewed as being too restrictive and that the Minister's consent would be necessary on all routine issues of shares consequent on a financing round; that was the issue that was being discussed there, isn't that right?

A. Yes, yes.

Q. I can see the point and it is not an unreasonable point to be made, perhaps, as well. We know how it evolved, how Article 8 evolved; that it was significant, a significant change in shareholding, isn't that right, was the one that became the view?

A. Yes, yes, I think that's correct.

Q. I think you can take it that is true?

A. Yeah, yes. There is a general discussion about Persona, and we move on to talk in relation to the press conference where we are, you know, clearly talking about a further preparation, a further, an exchange in the preparation of material by the company. So really I suppose what I am suggesting to you is that all of the discussion here relates to events that were to follow, and I don't see how the question of concealing anything could possibly arise. It was a discussion of things that were all going to be out in the open.

Q. I understand what you are saying. Well, again, we have to hear from Mr. O'Connell. You say it is a reasonably accurate I take it that it is reasonably accurate.

Maybe Mr. O'Connell may wish to clarify or change some matters, but...

A. Okay.

Q. I am just again looking at its format. It is not in the form of an attendance document which a solicitor would normally make at a meeting where he would jot down the key points as he was receiving information. It seems to have been important enough for Mr. O'Connell to create, what he describes as a minute, which is effectively in the form of a report

A. Yes.

Q. of the meeting. And to do this immediately after the

meeting because he has it here as 3:09 p.m. but that is neither here nor there, I suppose. You have given your explanation as to why you say it didn't amount to an act of concealment, isn't that right?

A. Yes. And I mean, there may well have been other reasons why Mr. O'Connell felt it was necessary to keep a careful record of discussions of this kind.

Q. Vis-a-vis the Department, you mean other reasons?

A. Well, vis-a-vis his client, for example.

Q. Well, his client was Esat Digifone?

A. Yes.

Q. And Mr. Knut Digerud was present at the meeting?

A. Yes. But the shareholders and his client at this time were, I think, going through a difficult period judging by

Q. I know that the documents are clear about that, that is none of his business; he wasn't acting for the shareholders, he was acting for the company Esat Digifone in his dealings with the Department, isn't that right?

A. Yes. I understand. No, my point is that you said that Mr. O'Connell obviously felt the need to write a long and detailed report.

Q. Yes.

A. And I am just suggesting to you that Mr. O'Connell may have had reasons to do that that would not serve as reasons on my side, on the Department's side.

Q. Yes, I take your point about that. The only thing is that

Mr. O'Connell does record something in relation to the preparation for the press conference at page 5.

A. Yes.

Q. Which isn't just necessarily a record of what was conveyed at the meeting and it is fairly specific about that; he has identified but you see, I must suggest to you this was the concern that the Department had, the concern that the Department you see, if you go back, Mr. O'Connell is perhaps, or perhaps not, erroneous when he records, at page 2 of this minute, the third paragraph: "Fintan Towey made the point that the bid referred to 20% of the company being placed with the blue chip institutions (acknowledging that the institutions in question were not identified)."

Now, in fact, what he is recording there, and I should note that that is in brackets and appears to be or appears to be Mr. O'Connell recording his view as opposed to recording a statement by you?

A. Yeah, I wouldn't have made such a statement.

Q. No, because you couldn't have made such a statement, not at all.

CHAIRMAN: I suppose some of the content of the long memo, if we take it that Mr. O'Connell was accurate, was unusual; for example, the reference I think fairly early in the document to Mr. Brennan pointing out that the media had gone quiet on controversy over the licence and there was no anxiety that it would be stirred up again in any way. I mean, this was somewhat unusual to be part of an agenda

between senior civil servants and a large business consortium and would have been something to put in a letter?

A. Well, I guess I would have seen that as, you know, sort of, you know, sort of an informal kind of off-the-record comment because obviously the public controversy in relation to this was an issue both for the Department and for the company itself.

CHAIRMAN: But it was hard to utterly segregate the entire business and the quasi political ends of it in dealing with it?

A. Yes, yes.

Q. MR. COUGHLAN: Perhaps Mr. O'Connell tells us in his memorandum do you know who convened this meeting? It doesn't say in this note and it is not in his memorandum?

A. I don't recall, but I suspect that this was the Digifone side saying "we have some information, we have some letters to bring" and that they sought the meeting to do that.

Q. Right. It might seem a bit unusual that they wouldn't send them in because there was information being sought by correspondence, the letter of the 1st May, isn't that right?

A. Yes.

Q. The only intervening piece of correspondence is a fairly general letter which was the 7th May?

A. Yes, the 7th May.

Q. Then there is a meeting on the 3rd, not recorded. Then

there is this meeting where these documents are brought in, not recorded. Did it not occur to you that if you got into dispute with Esat Digifone, that the Department were going to be in a difficult enough position with no contemporaneous document to point to to indicate what had transpired between you?

A. I don't believe that I thought of the exchange in those kind of terms, no.

Q. Right. Do you remember any decision being made not to make a record?

A. No. That would be, it would be unusual in the extreme and it would stand out in my mind.

Q. I just think now because we started into these meetings in the first place because Mr. Johansen informed the Tribunal about them; that was the meeting on the 3rd. I just want to put Mr. Johansen's memorandum to you, just for a moment.

Book 49.

A. I've got 49, yes.

Q. 130, Tab 130. And you will see that he made this note on the 4th May of 1996, and that on the third page

A. Yes.

Q. it is entitled "'Re memo on the shareholding in Esat Digifone'.

"I have below summarised a few points that has become clear to me over the last 24 hours as a consequence of the information acquired regarding Communicorp's attempt to buy back 12.5% of the IIU shares.

"1. Denis O'Brien came personally over to me in Oslo probably sometime during September last year. He informed me that, based on information from various very important sources, it was necessary to strengthen the Irish profile of the bid, and get onboard people who would take a much more active role in fighting for Digifone than the 'neutral' banks who basically would like to keep a good relation to all consortia.

"I accepted Denis's word for the necessity for this new move. Note: Underwriting was never used as an explanation."

First of all, we haven't heard Mr. O'Brien or Mr. Johansen yet about this so we have to hear both of them about this particular meeting. Can I ask you this question: do you know if you or any member of the team ever indicated to anybody that they needed to strengthen the issue profile?

A. Absolutely not.

Q. Or did you or any member of the team ever indicate to anybody, and I am not just talking about this consortium, that neutral banks would have any adverse effect on an evaluation of the process?

A. No, no question of it.

Q. Right. Or after the submission of bids, that one needed to get on board anyone to become more active in fighting for Digifone, that is in the context of the competition now?

A. No, no question of it.

Q. All right. Now, "2. IIU should apparently be the ideal

choice for this function; the only string attached being that they had demanded a 30% equity participation 'for the job'. Denis had managed to reduce this to 25%, but it was absolutely impossible to move them further down. This was a disappointment to us, since everything we had said and done up to then had been focused on at least 40% ownership for the principal shareholders at the time of the issuing of the licence. But not only that: Denis then pushed very hard for Telenor to swallow 15% of this and Communicorp only 10% to which I never agreed but I accepted the principle of 'sharing the pain' and maintaining equal partnership (37.5/37.5%). It was also said that a too high Telenor ownership stake would be seen as aggressive and could be inhibiting the award of a licence."

Now, just again, going through a few matters there. As of September of 1995, had you any knowledge that there were even discussions along the lines that there would be 37.5%, 37.5% to Telenor or that IIU would have either a 20% or a 30% stake in the

A. No, no, I mean that issue didn't come to attention until mid-April or thereabouts.

Q. Can I ask you this: to your knowledge, did any member of the Project Team or did you ever even hear it discussed amongst civil servants and/or the consultant, that too high a Telenor ownership stake would be seen as aggressive and would be inhibiting the award of the licence?

A. No, there was no question of that view having been held by

me or, to my knowledge ,anyone on the Project Team.

Q. Am I correct in thinking that to your knowledge, within the group of civil servants and the consultants, Telenor had a high reputation?

A. That is very true, yes.

Q. Continuing: "This was the first time I experienced real har, and very unpleasant, push from Denis.

"3. Some days later the nature of the agreement with IIU comes clearer into the light, as an underwriting agreement to guarantee for Communicorp's timely payment of its share of the capital into Digifone, and including the right to place the shares with up to four nominees. This was unwillingly accepted by Telenor (since we understood it to be the right steps to be taken from an 'official Irish standpoint' to secure the licence)."

Now, first of all, did you know anything about this agreement to which Mr. Johansen is referring to here?

A. No, obviously we have been through the

Q. You knew nothing about this?

A. No.

Q. You see the reference that he makes there, "That Mr. Johansen understood it to be the right step to be taken from an 'official Irish standpoint' to secure the licence".

To your knowledge, and I mean from the point of view of civil servants and the consultants on this, that there was ever any discussion even that it was necessary to take such a step to enable Esat Digifone to secure the licence?

A. No, not to my knowledge.

Q. Right.

"The agreement was drafted by Frys/Owen O'Connell, and signed in a hurry (basically in drafts form) by Denis O'Brien alone on behalf of Communicorp and Digifone (even though we in the Joint Venture Agreement have made it clear that two authorised signatures are required one for each party).

"4. The agreement was never signed by Telenor, neither as authorised Digifone signature nor as a shareholder or a party to the agreement. Sometime shortly after this, the Advent commitment to invest US \$1/230 million into Communicorp disappears, as it was essentially not necessary anymore since the Communicorp liability to pay capital to Digifone was anyway underwritten by IIIU.

"5. In hindsight it is quite clear who benefitted from this arrangement.

"I have good reasons to believe that the terms put forward by Advent for investing into Communicorp did not suit Denis O'Brien. With the above arrangement, that he orchestrated for all other sorts of reasons, he has actually achieved to bolster his/Communicorp's balance sheet and paid for it with Digifone shares at the cost of Telenor. He has done this in an atmosphere of trust, where Telenor even has agreed to bridge finance Communicorp while he raises funds through a private placement in the US.

"6. As we go along we learn more..." And I have already

read that paragraph to you.

A. Yes.

Q. Were you aware at any time that Telenor had agreed to bridge finance while he, Denis O'Brien, tried to raise funds from a private placement in the United States?

A. No.

Q. "6," we have read that. Then I'll continue: "I think it would be a very prudent thing for Telenor to do especially since we then effectively underwrite the whole project, both Communicorp and IIU, after already having paid Communicorp's price for the first underwriting which now appears to be useless.

"7. But the story doesn't end there. Two days ago I was informed by Denis that he had entered into an agreement with IIU to buy back 12.5% of the shares now held by IIU.

I found it absolutely unbelievable, and made it clear that Telenor would not accept anything but equal partnership, either we buy 6.25% of the IIU held shares each, or Telenor should take the other 12.5% of the IIU held shares.

"I have now also seen the letter of agreement between Communicorp and IIU which strongly supports the scenario outlined above.

" IIU apparently has no (or very little at least) money and cannot afford more than 12.5%. The price agreed is a little cryptic, but it looks as though any advances IIU has to make for the disposed 12.5% before the transaction's effective date (31 May, 1996) is seen as the cost (???) It

will, if this is the case, serve as a moving target for IIU's eventual gain on the transaction, putting an immense pressure on Communicorp to delay capital calls in Digifone until the US placement is finalised.

" The return favour from Communicorp is to release IIU from all of its underwriting obligations in Digifone. Does Digifone have an opinion on this and what about Telenor? This effectively gives Communicorp back its 12.5% of the shares at par (or close to), releases IIU from all of its underwriting liability (which Digifone 'paid' 25% for), and IIU ends up having delivered absolutely nothing, having done nothing but complicated the award of the licence (if we get it at all) but with (some cash?) and 12.5% of the shares of Digifone which effectively have deprived from Telenor, at the same time as the Department and our honoured partners gently ask us to underwrite the whole project.

" Fortunately IIU is at least realistic enough to see that this can not take place unless Telenor continues to support the project. This fact, the time limit, and the cooperative spirit shown (by disclosing the letter) may signal a hope for a sensible solution to this mess." And it is signed by Arve Johansen.

You can see there both in that final paragraph and in paragraph 6, Mr. Johansen records that the Department are gently asking Telenor to underwrite the whole project. Do you remember that?

A. I remember the exchange that is recorded in one of Mr. O'Connell's notes where Mr. Brennan said that if Telenor were willing to give a letter underwriting the project, that would be welcome but that it wasn't formally being asked for.

Q. Did you understand why that would be welcome, that they would underwrite the whole project? Was there a concern on the Communicorp and the IIU side as far as the Department saw it?

A. I think there was certainly a concern in the public mind.

Q. Of what?

A. There was a concern in the public mind. I think public publicly in the media issues had been raised in relation to the funding of the project.

Q. But there must have been concern in the Department's mind as well, musn't there? You had it in the report about the position of Communicorp?

A. But the evaluation in the evaluation report, we had reached a conclusion that the funding was in place for this project.

Q. Yes. Well you didn't really, but anyway, I will come back to deal with that. I am not going to get into a great debate about it, but what you did have, as you have informed us, that as you understood it, Mr. Andersen's ground rules were that the safety net was that if one consortium member could

A. Yes.

Q. carry the whole thing, that that might be the saving grace and, you know, you now knew as of the time of this meeting on the 3rd, which Mr. Johansen attended, that Advent appeared to be out of the picture, isn't that right? That was conveyed to you in the chart which Ms Regina Finn drew up on the 16th April and the communications from Mr. Owen O'Connell on the 17th; isn't that right?

A. Yeah.

Q. And you were now being told about IIU and you weren't sure about exactly their position, isn't that right?

A. We were investigating that.

Q. At that time?

A. That's correct, yes.

Q. Doesn't that seem to make it more likely what Mr. Johansen is recording here as being the correct version of events, that the only one the Department saw with the wherewithal to back this, at this time, was Telenor, isn't that right?

A. Well, I suppose let me put it this way: if Telenor did not come back with a letter in relation to this, and I haven't looked at their letter actually for some time, but I think it is, it is less than definitive in any event.

Q. It is.

A. But if they hadn't come back, I don't believe there is any question of the Department pursuing it. So in other words

Q. You don't believe the Department would have pursued it?

A. I don't believe the Department would have pursued the

question, no.

Q. I see.

A. Because I don't recall, I don't recall any firm view being taken that we should seek an undertaking from Telenor. It did arise at that meeting but I understood it, at the time, to be spontaneous.

Q. I see.

A. That it was spontaneous at that time, and my view is that if Telenor didn't respond, it wouldn't have been pursued, and like I say, the terms in which they did respond were, I think in any event, not definitive.

Q. If you didn't get some response from Telenor, you wouldn't have been able to issue the licence at all because Mr. O'Brien didn't have the money on the day on which the licence was issued, but that's we will come to that tomorrow morning perhaps.

A. Okay. I mean, there was an assessment done in relation to that which reached a different conclusion.

Q. Of Mr. O'Brien?

A. Of the ability of the backers to fund the project.

Q. All right.

CHAIRMAN: Well we are just on four. Eleven o'clock in the morning. Thank you very much, Mr. Towey.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
WEDNESDAY, 21ST MAY, 2003, AT 11AM.