

A P P E A R A N C E S

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I N D E X

Witness: Examination: Question No.:

Fintan Towey Mr. Nesbitt 1 - 142

Mr. Coughlan 143 - 306

THE TRIBUNAL RESUMED AS FOLLOWS ON FRIDAY, 23RD MAY,
2003, AT 11AM:

CONTINUATION OF EXAMINATION OF FINTAN TOWEY BY
MR. NESBITT:

Q. MR. NESBITT: Now, Mr. Towey, I want to move on to another document in Book 42, and it's to be found in Divider 113, and it's the letter of the 29th September of 1995 that came in from Professor Walsh for the attention of Mr. Brennan, and you have given evidence about receiving that, and what you did about it. I just want to tease out exactly how you saw what you had to do by way of reaction fitting into the process that you were involved in.

Yesterday you described the limitation on the inflow of information into the competition process. There was the application form and there was a possibility of making a presentation at the oral presentations, and they were the two main routes for information to come into the process. And I think in relation to this letter, you said to Mr. Coughlan that you viewed this as a production of information that wasn't coming in, and I paraphrase now, through the appropriate channels for information to come into the system. Is that a fair analysis?

A. Yes, that's correct.

Q. It seems to me that when you received this, you had to decide what to do about it, and on the basis that you had formed the view it was information inappropriately advanced, did you feel you had many options in relation to what was the appropriate step to take?

A. No, I mean, I took a clear view that it was an attempt to enhance the application of Esat Digifone, and as I have said, it was very prominent in my mind that we had very clear rules designed to ensure fair play between applications. And there was a clear prohibition on new information being provided to the Department, and in the case of this particular consortium, just two weeks earlier at the end of their presentation, there was a very, very clear exchange between Martin Brennan and Denis O'Brien along the lines of, 'Don't call us, we'll call you'. So in a sense, even aside from the general rules, there was a certain sense of you know, in this case, there had been a clear breach of the rules.

Q. So the view you took was that this information was not information which should go into the process for the purposes of being considered to arrive at an end result?

A. No. I felt that if we had admitted this to the process, then the process could be criticised for having given, for having treated this particular consortium more favourably in allowing them to add

some information to enhance their application.

Q. Now, what I wanted to tease out was this: You were part of the process and you had learnt about this letter. Did you see it as being possible that you could know about this and still not let it influence the outcome of the process?

A. Oh, yes. I mean, I was clear that I was clear that I could set this aside as a piece of information, if I can put it that way.

Q. Now, again in relation to the process, we had learnt that there was to be a quantitative evaluation, we described or we discussed yesterday how that was running into problems, certainly at this point in time I think it had well run into problems, it was clearly not going to be a route by which a winner would be chosen?

A. Yes.

Q. And you had the qualitative analysis which was being done. And are you saying to the Tribunal that you were able to know this, but it didn't have to come into the process or form any part of the process decision?

A. Yeah, that is my view, that I regarded it as something outside the process.

Q. And matters proceeded on that basis and you were happy with that?

A. Yes.

Q. Very good.

Now, I think there is just one thing in the letter, I am not sure if it occurred to you, in the penultimate paragraph it says: "We confirm we have arranged underwriting on behalf of the consortium for all of the equity (circa 60%) not intended to be subscribed for by Telenor."

Did you note that that was saying to you that Telenor would be subscribing 40%?

A. Yes.

Q. Now, if I could ask you to turn to Divider 119 of Book 42. There is a document here, and it's a letter from Ms. Nic Lochlainn to Patricia Caffrey of the CAG auditors, and it's dated sometime in October, unfortunately the exact date in October has been punched out in some way. Do you see that in front of you?

A. Yes.

Q. 6th October. Thank you. Now, this effectively contains a thumbnail sketch of the six applications, and the one I am interested in is Esat Digifone, which in fact is the last bundle of documents. I think it's five pages from the end of this particular divider. And in relation to Esat Digifone, we see there that the members of the consortium were clearly stated to be the Communicorp Group and Telenor. But if we read down the financial and legal structure in the second

paragraph we see: "The Communicorp Group and Telenor will initially hold 50% of the equity. In the period leading up to the licence 20% of the equity, 10% from each will be made available to investors by Davy Stockbrokers, who have received written investment commitments from AIB Investment, Bank of Ireland, Standard Life." And then it goes on to note: "Within three years of launch, 32% of ED" which I understand is Esat Digifone "equity will be made available to investors on the stock exchange."

So was your understanding then, there would be a partnership taking in an extra 20% of equity, and in the fullness of time, a little more equity be taken in?

A. Yes.

Q. Now, did you ever have occasion to consider the letters that were attached to the Esat Digifone application indicating the support that was being offered?

A. I certainly would have read them.

Q. And I will just give you copies of them now.

(Documents handed to witness.)

I don't want to labour this point, Mr. Towey, but yesterday we touched upon the fact that this was quite a commercial deal that was being done, although the State had the giving of the licence, it was taking what probably wasn't an entirely new or innovative

step, but taking an interest in the quality of the person to whom the licence would be given from the point of view of business decisions, did they have a good business plan? Were they the sort of person to be doing business with?

A. Yes.

Q. And in that respect, this letter, and these letters had been given. Now, did you have much understanding of raising capital and how venture capitalists would look at putting money into this sort of operation? How it would be funded, all the bits and pieces that would go to fund the sort of transaction that was taking place?

A. Well, I would have touched at issues like that in the context of academic studies, but as regards experience in my civil service career, I'm not sure that I would have I don't believe I have much experience, I touched on it in one other area.

Q. In some respects people may think it's common sense, but in other respects you presumably, as you went along, were beginning to realise the business of being in mobile phones is quite complex?

A. Yes, yes, that's true.

Q. Sometimes things weren't as obvious as you might think from the point of view of applying logic, that was something you'd find?

A. Well, I mean, certainly it is a complex business. I

think there is no doubt about that.

Q. I think Mr. Loughrey had some past experience in banking and funding, did you know that?

A. I knew that he had worked with the European Investment Bank for sometime.

Q. But you hadn't done anything like that?

A. No.

Q. Okay. Now, just in relation to the commitment to produce funding, could I ask you just to look at Appendix C, which is the letters, and I just want to point out one or two things to you and ask you to comment on them for the Tribunal.

In relation to AIB, effectively, they were saying, they'd reviewed an information memorandum prepared by the consortium, which was the consortium applying, and were writing to confirm that it was prepared to invest 3 million by way of equity and/or loan stock in the consortium subject to, and then there were two conditions:

"The licence being prepared to the consortium on terms broadly in line with those set out in the memorandum or the tender documents or, where amended, on the terms which we agree with the consortium are acceptable, and

"B. The terms of our investment being approved by our investment committee or board."

Now, using your level of knowledge of borrowing money,

did you understand that to be a binding commitment to do anything?

A. I wouldn't have seen it as a binding commitment. I would have seen it as a very positive statement of willingness.

Q. Would you be prepared to accept that as best seen as an expression of possible intention?

A. Yes.

Q. Now, I think if you turn over the page, IBI, but I won't read out the letter, it's in similar terms, and they were then making it quite conditional?

A. Yes.

Q. Did you have an understanding at that point in time, when you were reading these letters, what would be the terms of the investment? We see in those two letters the concept of investing by way of equity and/or loan stock. Presumably seeing that the terms had to be approved, meant there were other terms you weren't reading about in those letters that were going to be in the mix yet to be agreed?

A. Well, beyond viewing these letters as a commitment to investing, I don't think I thought through the question of how exactly that would be done or the procedures.

Q. And I think the letter then from Advent International, which is next, the 10th July, a friendly letter, but did little more than indicate that they were willing

to offer an amount to fund Communicorp's obligations?

A. Okay.

Q. And the final letter I want you to look at is the letter of the 14th June, the penultimate page sorry, there is two letters if you look at the penultimate page of that letter, the letter of the 14th June from ABN-AMRO?

A. Yes.

Q. I'd suggest when you read this letter you are really seeing a new level of sitting on the fence, and in the last two paragraphs read: "Furthermore, we confirm our interest in assisting the company in its joint venture partner, Communicorp Group Limited, in bidding for the forthcoming GSM licence in Ireland, and if successful in meeting their ongoing financial requirements. Based on our extensive experience and financing GSM projects, we would envisage this to involve supplier and export credit schemes and local funding, which could typically be arranged through our full banking office in Dublin.

Please note this letter is to be interpreted only as a strong expression of interest."

Do you think the concept of strong expression of interest was really the height of what was being offered in those letters?

A. Yes, certainly in that one I, when I look at it now, I see that's a significant note of caution.

Q. Well, if we turn over the last page, we have NatWest Markets. And these appear to be some form of venture capital corporation. If you see they are writing, they are aware "that Esat Digifone will present an offer in response to public auction for the GSM mobile phone licence award, and furthermore, that Esat Digifone will use this letter as an indication of financiability of their planned GSM mobile phone network." Then they say various other things.

In the penultimate paragraph they say, "In the event of Esat Digifone being awarded the licence, Natwest Markets is keen to provide financing to the project under the terms and conditions to be negotiated and agreed. Based on our experience, it is envisaged that senior debt financing in an amount of approximately £1290 million to be repaid from the available cashflows of the business with a maturity of 8 to 10 years, would be an appropriate level of indebtedness to such a project.

"Natwest Markets is delighted to provide support to Esat Digifone in their endeavours. Naturally, however, this letter is not a commitment to lend and is governed by English law."

When you had read those letters, would it be fair to say that what you were looking at was an expression of interest, strong possibly, but that was the height of what you were seeing in relation to the people who

would be possibly the 20% of investors?

A. I think that's true, but we had, you know, we had a clear view that there was a strong level of interest in relation to this investment. And we took from this, a view that there would be no difficulty.

Certainly that's not something that we felt in the evaluation, that there would be any difficulty in placing this 20%.

Q. I think you have said, and other witnesses may have said, but I ask for your comment for the Chairman, that in relation to the concept of running a GSM business, the second one in Ireland, the feeling, if I put it no higher than that, this was going to be a business that would succeed. It was a good opportunity for somebody that would get the licence?

A. There was quite a strong view that it was a very attractive business opportunity, and there was no instance, for example, of any second GSM operator in other European countries that wasn't prospering, for example.

Q. Now, just looking at the NatWest Markets' letter, I mean, there is a phrase there used called "senior debt financing", did that actually mean anything to you?

Did you understand the types of language that financiers use to finance commercial deals?

A. No, I wouldn't have understood that term.

Q. Fine.

Now, if I could ask you to move on now to the 9th October, and it's Divider 120 in Book 42. I just want to set what we are going to talk about now in context. And I need to have you thinking about the draft evaluation reports that were coming to hand. And it's Book 46 is where you find the evaluation reports. And just for the assistance of the Tribunal, the 3rd October report is 46, 34; the annex is at 35. And the 18th October report is at 46, 46, and the annex. The appendices are then at 47, and we have the final report in Book 46 at 50, and the appendices at 51.

If I could ask you to take the report of the 3rd October, which is Divider 34. Now, this is the report that had been promised on the 3rd October, became available, and when we see the minute of the 9th October, we are looking at the minute of the Project Group following the examination of the 3rd October report, isn't that right?

A. Yes.

Q. Now, I just want to tease out a number of issues that arise in relation to the information that was available in the report, for the purposes of allowing the Project Group understand and present to the reader of the report, the basis upon which they had arrived at the decision reached. And we spoke yesterday about the way in which the information that was being processed to arrive at an indication was presented,

and you will recall that I was looking at Appendix 3 of the evaluation model, and we have the matrix there that has the criteria listed, the dimensions listed, and the indicators listed and links it across?

A. Yes.

Q. Now, if I could ask you just to turn to the appendices to that report of the 3rd. And it's the third annex at that point in time page 10 of Annex 3.

A. Yes.

Q. Perhaps I better bring you back to page 11 of Annex 3. Page 1 of Annex 3 is the evaluation model as presented in an annex at that point in time?

A. Yes.

Q. On page 2 we see the dimensions assessed in quantitative evaluation, the document I am using to pull things together, and then we see some more material, but eventually I just want to bring you on to looking at page 10, where we see a document that appears to be the same document that we have seen in the June version of the Andersen methodology for evaluating, is that right?

A. Yes, it's page 11, is it?

Q. It's page 10 on mine if you are looking at the 3rd October report. Maybe I am looking at the wrong one.

A. Divider 35, October 3, page 11.

Q. That that is the version that appeared in the June evaluation model, isn't that right?

A. That's correct, yes.

Q. And we have been through that, I don't want to labour this. We know this was the one there was a mistake, it was 103, and it didn't add up in some other respects?

A. Yes, that's right.

Q. Now, did you have any recollection of that fact being discussed at the group?

A. Not at the group. I think it arose at some point afterwards. I don't recall exactly.

Q. Now, I want to bring you on to Book 43. While we are looking at these documents, sorry, could I bring you back to Divider 121 of Book 42?

A. Yes.

Q. I am jumping around a bit. I got lost. We are looking here at the Margaret O'Keeffe note?

A. Yes.

Q. And a number of issues arise, and one I want to deal with is the John McQuaid reference on page 2 of this note. And John McQuaid, under his name we see the following cryptic note, "Page 44 Corr, okay, evaluation model appendix. Quantitative analysis, a report based on qualitative analysis concluding remarks."

Now, I just want to tease out what that seems to mean.

As I understand it, when the evaluation draft report of the 3rd October came to hand, from your evidence,

the position was as follows: That the quantitative analysis was not going to lead to a satisfactory way of, rather the quantitative analysis was not going to lead to a satisfactory way of finding a winner because of the holes in the information to be fed into it?

A. That's right, yes.

Q. So your view, you were down to the qualitative analysis at that point in time?

A. Yes, that's correct.

Q. And when we see a note, and no doubt Ms. O'Keeffe can tell us about this when she gives evidence, we see a note by her that John McQuaid was asking a question, or raising an issue or whatever, and that the quantitative analysis is a report based on the qualitative analysis. Is that your understanding of what the 3 October report was doing, presenting information that was flowing from the qualitative analysis?

A. Yes, that's what I saw it as being.

Q. So when we see the provisions of the report and the reference to quantitative in the 3rd October, that in fact is a qualitative scoring, it's not a quantitative scoring?

A. It's a qualitative scoring.

Q. Was there anybody, so far as you were concerned, at the meeting who would not have understood that?

A. I don't believe so. I mean, I think it was clear that

all of the dimensions had been scored on a qualitative basis.

Q. And if we turn over the page in Note 3 and we see what's said under "Michael Andersen" we see "16, 17, 18 tables reflect discussions in Copenhagen. If different weighting used, prove you get the same result with different approach.

"Paragraph 19 was regrouped to reflect that.

Have to apply a numerative approach.

"If 3 tables gave a different answer MB said further analysis would be required to seek to re-examine them."

Just again looking at these three tables, I don't want to labour it. Table 16 presented information hanging things under the aspects, isn't that right?

A. It did, yes.

Q. And the problem you had with the aspects was that that wasn't being true to the criteria that were being used in the competition document?

A. Yes, that's right.

Q. Now, you can see how the aspects could be examined, and you could see how you could take apart individual marks that had been hung under an aspect and put them under criteria, but your view was, as I understand your evidence that, that was not the way to go; you wanted to move ahead, and that the answer would be seen in Table 17 and 18?

A. That's right, yeah. I didn't see the aspects as being meaningful in the context of the selection criteria.

Q. And I think you were making it clear, at this meeting, that the quantitative analysis was too simplistic to give results, and that is indeed noted at the bottom of page 3 of that note?

A. Yes.

Q. And was that something that the people at the meeting appeared to be understanding?

A. I mean, I think that view would have been generally held. I think I was making that point that, okay, we know it's too simplistic, but we should put it in because it formed part of its process.

Q. I think another point being made, probably by Mr. Andersen, but it's noted on page 4 of the Margaret O'Keefe note, was that, and it's halfway down under "quantitative," that: "50% of the weighting is lost due to scoring that can not be used and the qualitative analysis has" "the quantitative analysis has been undermined."

Now, as I understand that reference is coming back to what had been said by Mr. Andersen, and we went through that yesterday, where he had identified that because there were problems with the IRR, because there were problems with tariff analysis, because not everybody did the right thing for the 4th year and a number of other matters, up to 50 I think 54 was

the figure I reached yesterday, but certainly over half of the marks that were being awarded or the weighting being awarded for the criteria was in trouble, if you used a quantitative analysis?

A. I understand, yes, yes.

Q. And was that something discussed, that you recall being discussed at this meeting?

A. I mean, not at that level of detail, but I do recall, in general terms, that I got no support for attaching the quantitative scoring, because of the general view that it was deficient.

Q. Okay. So we have a meeting now, that has realised the problems with quantity and is now moving ahead in relation to qualitative?

A. Yes.

Q. Now, the next thing I want to move on to is this: In relation to scoring and arriving at a result, we get into what I understand to be a matter of concern to the Tribunal team in asking you questions. They are trying to reach in and find the answer, and that is the issue of the question of weighting the results of the qualitative analysis, and I just want to bring you through how those are presented in simplistic terms.

A. Okay.

Q. If we look at the evaluation of the 3rd October, in Book 46.

A. Yes.

Q. And we move forward to page 44, which is Table 16.

A. Yes.

Q. This is the aspectual approach, and this is something Andersens had said they do to present the information, and you have said you didn't want to have followed because it wasn't being true to the process?

A. That's correct, yes.

Q. And if we turn over the page, we then see the tables that were now being discussed as the ones that would present the answer to allow somebody know who had won the competition, is that right?

A. Yes.

Q. Now, this table has clearly in the second column from the left, the concept of weight being applied to the appropriate dimensions?

A. Yes.

Q. Now, that has, that column has been there in every draft, and in the final evaluation report. And did anybody ever raise the issue that they didn't understand, from looking at that table, that the concept of weighting would be applied to what they all knew was results that were flowing from qualitative analysis?

A. I don't recall any issue arising in the Project Group on that point, but as you recall, I have said that I don't recall the detail of the exchanges within the group, and I know that Mr. Andersen initially had some

difficulty on this, but if there had been a substantive reservation, I feel that in the group, I feel that would stick in my mind.

Q. Now, if I could just ask you to turn to Book 43, Divider 148. That's again, in fact it's something being repeated, it's just a copy of the 12th meeting, this meeting of the 9th October?

A. Yes.

Q. The opening is just telling people that it's still very confidential, but the Minister has been informed of the progress of the evaluation procedure and the ranking of the top two applicants, and that the fact the Minister was disposed towards announcing the result of the competition quickly after the finalisation of the evaluation report.

Now, what I want to try and tease out with you, Mr. Towey, is how, whatever the state of the Minister's knowledge was, what was happening inside the process could really be impacted upon by anything the Minister wanted to do or not do, and as I understand your evidence so far, when we arrive at analysing the draft report of the 3rd October, which has been reported here on the 9th October, the entire Project Team understood: 1) quantitative analysis was no longer going to be the basis upon which the competition could be determined; qualitative analysis is the way the matter would be dealt with?

A. Yes.

Q. That in relation to bringing together and presenting the results using the draft of the 3rd October, you were going to be using Tables 17 and 18, isn't that right?

A. I am not sure that that was understood by the group in advance of the meeting.

Q. No, no, on the 9th October?

A. But certainly in terms of the presentation of the meeting, that was certainly very clear at the meeting, yes.

Q. So people leaving the meeting of the 9th October, so far as you were concerned, understood that's where matters had been reached?

A. Yes.

Q. So, insofar as there is any suggestion that that was a view reached earlier than the 9th October within the Project Group, that would be a mistaken view. This was the work of the Project Group on the 9th October, left them understanding how the result was to be arrived at and how it was being presented?

A. Yes.

Q. And insofar as people understood that Table 17 and 18 would be used to present it, I have looked at Table 17, and we see weighting appearing. Perhaps if we just look at Table 18 and we see again, the same weighting is clear?

A. Yes.

Q. So in your mind, is it possible that anybody could have, if they had been paying attention, left the meeting of the 9th October not understanding that weighting was being applied to the scores that we see in those two tables?

A. I think it was laying it out quite clearly.

Q. Now, again, and I don't want to labour this because we have been over these in some depth. If you go back just a little bit earlier in the book of 43, we have, I think it's Mr. McMahon's note at Divider 134?

A. Yes.

Q. And if you just turn to the third page of that, we have what occurred after we have heard evidence, and you know about this I think, that this meeting went on for sometime, a deputation went to see the Minister I think, and came back, and Mr. McMahon notes on page 3 under the heading "On our return

CHAIRMAN: The Secretary, surely?

Q. MR. NESBITT: The Secretary, sorry. Thank you, Mr. Chairman. The Secretary, "On our return, and it was agreed final decision should not be on Table 16." Are you happy that was an accurate statement as to what was happening at the meeting?

A. Yes.

Q. And then if we drop over the next two lines you see, "It should be in Table 17 and 18."

A. Yes.

Q. And then there is a cryptic comment, "Whether same weights went in. Seems Martin Brennan dreamt them up during qualitative evaluation."

Now, I suggest to you that that indicates there was a discussion about how the weighting came to be there and where they had come from?

A. I believe so, yes.

Q. And was that your broad understanding at that time was where they had come from?

A. My understanding was direct recollection that there had been a decision taken in Copenhagen, that an appropriate breakdown was 10:10:10.

Q. Fine. So

A. What this indicates to me is that it wasn't, at this point, clear to Mr. McMahon. But knowing Mr. McMahon as I do, I have no doubt that there was a discussion about it and that he emerged satisfied on this point.

Q. Well, just to deal with Mr. McMahon. He hadn't been actually party to any sub-group that was going to be scoring?

A. No.

Q. But he did have the report, and we have heard what he says about that, and there was discussion about weighting, and how the weightings were being applied was clear from the tables that we are talking about?

A. Yes.

Q. And that remained static throughout this version of the report, the version of the 18th, and eventually when we get to the final version, we see the same presentation?

A. Yes.

Q. The note I am reading from there, I should have brought you forward, that, in fact, was the note made by Mr. McMahon on the 23/10, so at that point in time he would have had the second report?

A. Yes.

Q. I jumped ahead of myself. So, in relation to asking you about the meeting of the 9th, I intended to ask you about the meeting of the 23rd.

A. Yes, I understand.

Q. Now, in the context of the report of the 18th, if I can ask you to turn on to that, and that appears at 46.

A. Yes.

Q. The final matter in which the report would be presented had not yet finally been agreed. If you look at the table of contents. I am not going to labour it because we can see the differences. You have the executive summary, and you have basically 53 pages laid out under six headings.

A. Yes.

Q. When you get to the final report of the 25th, that's changed. And again at Divider 50 of booklet 46, we

can see the manner in which the report has been set out at that time. And it seems that, although the beginning of the report remains broadly the same through to the comparative evaluation of the applications, at the end we see sensitivities, risks and credibility factors being dealt with, the final evaluation and the conclusions and recommendations?

A. Yes.

Q. And that's presenting it slightly different to the report of the 18th. And I just wanted to bring you forward to the final report, just to tease out the matters that were discussed leading to this particular presentation.

Now, I think the one thing that remained you left Andersen presenting the report under aspects, but you changed the report to make sure that the winner was presented by an analysis hanging under the criteria, isn't that right?

A. Yes, that's correct, yes.

Q. And if we move into the final parts of the report, at page 14 of the 25th, we see information concerning the comparative evaluation of applications, and what was said at the beginning of that chapter is: "This chapter intends to provide a presentation of the results of the comparative evaluation. Each section deals with one of the identified aspects comprising an overview of the various dimensions attached to the

aspect, together with the assessment (marks awarded) of both the dimensions and the aspect."

And I am not going to ask you to read through that.

We have been through that, and people have views about what it says.

A. Okay.

Q. If we come to the sensitivities, risks and credibility factors, we see in page 44: "Various analyses and investigations have been conducted in order to deal with the sensitivities, risks and credibility of the applications and the business case behind the applications. A critical factor in any consideration of the credibility or the risk analysis of the applications is the capability of the principals to finance the project, including the ability to meet any shortfall in funding requirements due, for example, to unforeseen capital expenditure. In general terms, the applicants have provided comfort that the appropriate funding arrangements are in place. The evaluators have concluded that having regard to the level of interest in the Irish competition of the GSM licence, and the high profitability of mobile communications generally throughout Europe, that the project is fundamentally robust, and after a licence has been awarded an attractive opportunity for corporate debt financiers. The evaluators have therefore formed the view that at subject to at least one of the principals

having sufficient financial strength at this stage to ensure the completion of the project, a potential financial weakness of one consortia member should not have a negative impact on a ranking of the applications."

Now, as I understand that, in sort of simplistic terms, it says if you have got one strong member, that means you will be considered satisfactory. So, It doesn't matter if you have ten strong members or one strong member, that's going to be good enough for us?

A. Yes.

Q. And was that the view of the people in the Project Committee?

A. It was, that was the shared view. This piece of text was looked at very carefully, and I believe that it was preceded I believe it was preceded by a draft which I prepared, and was worked through carefully, and this is what came out. So it was a very deliberate decision on the part of the Project Team.

Q. But whatever you felt about all that, and however that's presented, and we can read through it, since the 3rd October the information available to allow a decision, the competition had been won, was qualitative information being presented in accordance with tables, originally 17 and 18, and then changing in number later on?

A. That's correct.

Q. And from the very beginning, that was done on the basis of weighting being applied to that particular information?

A. That is right.

Q. And that is all, I think you described it as being explicit anybody who had read the report would see that's the way it was being done?

A. Yes.

Q. Now, you also have here the concept of final evaluation, and that's at page 47, and what it reads is as follows: "The final evaluation: It is now necessary to determine the ranking of the applications in accordance with priorities specified in paragraph 19 of the tender document. It's clearly stated in the document that the evaluation would be carried out on an equitable basis and in accordance with information contained therein, and in accordance specifically with the evaluation criteria set out in descending order of priority.

"This report aims at nominating and ranking the three best applications in order of merit by reference to the evaluation criteria. This has been achieved by"

I'll bring you through these briefly

" extracting the marks awarded to each application under which the eleven dimensions on the basis detailed in Chapter 4.

" Grouping the dimensions according to the eight

evaluation criteria;

" An award of overall score for each application on the basis of the marks obtained for the eleven dimensions and determination of the appropriate ranking respecting the weighting formula determined prior to the closing date of the competition;

" Validation of the result by converting marks to points and calculating a numerical total score for each application; and finally

" Validation of the results by a review of the analysis of the sensitivities, credibility and risks."

I think in that respect the matter then goes on to score under the appropriate tables, and there is conclusions and recommendations.

Now, as I understand one possible line of inquiry that the Tribunal is concerned about, it's this: It suggests that sometime during discussing and reaching unanimity in relation to the final report, and the presentation of the winner, that the question of the weighting, the fact that weighting was relevant to the material that was to be used to allow the winner be chosen, was in some way uncertain, if somebody didn't understand about the fact weighting was being used?

Do you think that's a possibility, so far as you are concerned?

A. I believe so, on the basis of the way the report was presented.

Q. And did anybody ever, to your recollection, or say to you that this isn't working because the weightings, 'I didn't understand the weightings were in' or 'I don't know it's not weighted,' or anything along those sorts of lines?

A. No, I don't recall a discussion of that. Obviously Mr. Andersen had some reluctance initially, but other than that, I don't recall there being any significant reservation or significant problem in relation to this.

Q. But I mean, so far as Mr. Andersen had an issue with it, that was discussed out and debated and a result come to?

A. It was, yes.

Q. So

A. Yes, he agreed

Q. He picked it up at an early stage, discussed it, and it went ahead the way you figured appropriate?

A. Yes.

Q. What I want to find out, and it's a thing I am having considerable difficulty with; on the basis that all those on the Project Team had, in rudimentary terms, a very clear understanding of the way the process was working, how the winner was going to be chosen, where the marks were coming from to have the winner chosen,

and looking at the report, at least on two occasions
where it was crystal clear weighting was being applied
in the tables that led to the winner

A. Yes.

Q. that there could have been any problem flowing from
weightings that might have unsettled the answer that
people saw coming from the report?

A. I don't recall there being any problem in relation to
the use of weightings.

Q. I was going to ask you a little bit further than that.
Could you conceive how they could have a problem,
given the way the information was being presented and
the level of understanding that the members of the
Project Group had?

A. No. I believe that the way that we proceeded in this
in Copenhagen was fair and consistent with the
evaluation criteria.

Q. Now, I don't want to labour this point, but I'll just
come back to it: We see the competition terms, and
yesterday I asked you did you understand them to say
that there would be a qualitative and a or a
quantitative analysis? Those are not phrases used in
the provisions of the competition document?

A. No, they are models that emerged when Andersens
produced their evaluation model.

Q. And we can parse the document, we can pick out words,
we can spend a long time looking at all the underlying

documents. But at the end of the day, is it fair to say, from your point of view, that in fact the whole process is quite simple, and when you are sitting looking at the evaluation report of the 3rd, the 18th, or when you read the final one, the process that was gone through was apparent to those involved in it?

A. Yeah, I think so. I think that is true, and that it's clear how this process related to the evaluation criteria.

Q. It's easy to be wise in hindsight, and lawyers have a lot of fun picking over documents and drafts and what people were thinking, and cryptic notes, but at the end of the day, it was the evaluation report that was going to hold the answer?

A. That's correct, yes.

Q. It might be written better, it might be fuller, but the essential information is there?

A. I wouldn't disagree. I mean, I wouldn't disagree with the point that it might be written better, but I believe all the essential information is there.

Q. Has any of the members of the Project Team ever come to you and said 'We got it wrong'?

A. No.

Q. Has any of the members of the Project Team ever come to you and said 'If we had worked at it longer, it would have changed'?

A. No.

Q. Do you think that's the way it would have been?

A. I don't believe the result would have changed.

Q. As far as you are concerned, in relation to Minister Lowry, do you think that he could have had a sufficient understanding of how the project was working to have intervened to change the way the Project Group were doing its business?

A. No. To my knowledge all he received were superficial progress reports. I don't believe he had any level of depth of understanding of the detail of the process or how it worked.

Q. Did you ever see anything, or suspect anything, that would make you believe that the Minister either was trying to impact on the outcome of the deliberations of the Project Group or would have been in a position to do so?

A. No, I didn't. To the extent that the Minister, to the very limited extent that the Minister was aware of the progress of this project, I didn't view any of those contacts as giving rise to interference or any influence in relation to the project.

Q. Now, we have the at Divider 132 of Book 43 the 13th GSM Project Group meeting of the 23rd, which is the minute.

A. Yes.

Q. And just the future work plan, and it says:

"Amendments to certain sections remained to be finally

agreed. They were to be agreed within the Irish members of the group on the following day, and Mr. Brennan was then to be deputed to come to final agreement with AMI with respect to the final text of the report."

Now, so far as you are concerned, is that an accurate analysis of what was left to be done as you left the meeting of the 23rd October?

A. Well, you will recall in my evidence that initially I didn't actually recall this. But in looking at this meeting report, I have no reason to doubt it, and in fact, I think there was a further document that we looked at which was prepared for the meeting of the 24th that suggests that is consistent with this.

Q. Do you have any problem with that being presented as where things had reached at the time?

A. No problem.

Q. And given this minute didn't go out till December, and some people have given evidence and commented to that, did anybody ever come to you after that minute had been released to say, 'No, this is horribly wrong. We shouldn't be relying upon this final report'?

A. No.

Q. Now, I want to turn on to, just a couple of other things. I won't labour them long.

We have the concept of the ownership of the people who were to be given the licence, and it's the 40:40:20

argument?

A. Yes.

Q. Now, you have been tested under examination in relation to exactly what you knew about this, and the series of meetings towards the end of the process where the licence was about to be finally agreed and issued?

A. Yes.

Q. And you have been criticised for not keeping a minute, or somebody has been criticised for not keeping a minute, maybe it wouldn't be you, and a series of meetings have been referred to coming up to the end of the 13th May, the 14th May and the 15th May of 1996.

Now, I want to tease out with you what was actually happening on the ground then, and what was the exact nature of these meetings that were taking place. I need to just come back in time a little.

A. Yeah.

Q. We had reached a stage where the winner had been announced sometime before, and you had gone into a second phase. You were now having exclusive negotiating rights between the winner and the State for the purposes of agreeing what the final licence would be?

A. Yes.

Q. And it was pretty clear that each side would have views as to what the terms would be; the State wanted

to make sure the licence terms were sufficient to protect their interests, and the person operating the licence wanted to have a set of terms they could live with in commercial terms?

A. Yes.

Q. And the thing went through. But by the time you reached into the beginning of May, how much of all the negotiation in relation to what the terms would look like were done, as far as you were concerned, in sort of big picture terms?

A. The work at this time was being led by the Regulatory Division within the Department. And it was, I think, in process terms, it was something that was taking longer than we had originally anticipated. It proved, I guess, to be a more difficult exercise. And during that time, Digifone, I think, had approached the Department on a couple of occasions in order to seek to accelerate the progress towards finalisation of the licence. And I think at around mid to end April, they indicated to us that in order to tie down, to finalise the tying down of financing for this project, that it was necessary to get the licence in order to finalise the deal.

Q. So effectively, the way in which each side wanted the licence to look, was pretty clear at that point in time?

A. There were discussions, and significant progress had

been made towards finalisation, yes.

Q. Now, we know about the letter of Frys to Regina Finn of the 17th April of 1996, that's the one in which and it's at 43, Divider 184.

A. Yes.

Q. In that letter, the fact that the equity owner, the third equity owner who was meant to have 20%, was now possibly getting 25%, that was clear?

A. That was clear, yes.

Q. So the record in the Department clearly indicated that instead of a 20% group coming in, there is now meant to be a 25%?

A. That's correct, yes.

Q. As I understand your evidence, that was simply unacceptable to the State?

A. Yeah, that was unacceptable. Now, clearly this letter was given consideration, and the view that emerged in relation to this was that the proposed structure was not acceptable, that we had conducted an evaluation in relation to a company that was structured 40:40:20, and that that was the corporate structure that we were proposing to award a licence to.

Now, clearly, also, this was the first time that we had notification that IIIU was to be the third equity partner, and our view at that time, and I can't recall, unfortunately, the exact steps, but I know that the view within the Department was that in

principle there was no difficulty with IIU as a partner, subject to their having the necessary financial capability. The 25% share was a problem, but in principle there was no difficulty with IIU as a shareholder.

Q. Well, what I want to get at is this: As I understand, as we come into those last few days of May, the issue of it being ever more than 20% was non-negotiable. The Department was simply not going to move on that and made it very, very clear, is that right?

A. Yes. This is that was very clear, that was not a negotiating point, and I think that together these factors create an important context for those meetings that took place in May; that we had understood from their contacts, that Digifone were ready to take up the licence, so to speak, they just needed to finalise the financing.

CHAIRMAN: At that stage, Mr. Towey, was the fact that IIU had notified you on the 29th September that they were going to be a board, or would seek to be in some shape or form; did that weigh in your own evaluation, even though you have told us you didn't share that with Project Group colleagues?

A. I didn't link it back to that letter. In fact, I mean, IIU was not a company that would have been familiar to me in September. I presumed it was some kind of a joint venture sorry, a venture capital

investment company, but I didn't think of it beyond that, and quite frankly, I promptly forgot the name of the company, so that when we came to looking at IIU at this stage, I didn't make any link whatsoever back to September.

CHAIRMAN: And you remain of a mind, as you said last week, that even though you and Mr. Brennan may have discussed and looked at the document, the name of Mr. Desmond at the bottom of it totally escaped you?

A. It didn't yes, it didn't register with me.

Q. MR. NESBITT: But just coming back to this point, just when we come into those few days of May, 20% was non-negotiable, so if you were meeting with people where that might be raised, other than saying, 'Read my lips, it's 20%', that was the end of the discussion?

A. Yeah, that's correct. So these meetings took place in a context, where I have said before, my frame of mind was that there was not going to be a problem, that this process was not going to fail. I mean, I don't think any licence negotiation in relation to the award of a licence has actually ever failed.

Q. Now, just, the absence of minutes of the meetings; I mean, if we had minutes that would be great, but from your point of view, was there much you needed to be noting down at these meetings? As far as you were concerned 40:40:20 was it, there wasn't going to be

negotiation. There was nothing to talk about?

A. Yes.

Q. One thing that there was to talk about was how the terms of the change in ownership, Clause 8 of the licence, from recollection, that was something that the other side were worried about, weren't they?

A. Yeah, they were anxious to have commercial freedom in that respect, and that was something that we took a legal view on.

Q. Yes, and you ended up entering into this side letter?

A. That's correct, yes.

Q. And that side letter existed, and it's on the record?

A. That's correct, yes.

Q. And so again, there was no attempt to hide that. It's on the Department files. People can read it, people can see it. There may not be a minute of that meeting, but the effect of the thing that happened that would make a difference to people was clearly recorded, and is available in writing for all to see?

A. Absolutely, yes.

Q. Now, there were other people at these three meetings that have featured of the 13th, 14th May and 15th May. Did you make any attempt to stop them taking notes of those meetings?

A. No, there would be no question of that.

Q. And did the issue ever arise, 'This is a no minutes meeting, guys'?

A. Absolutely not. It doesn't happen in the civil service.

Q. Precisely. The fact there is no minutes is the reality. Is there anything sinister to read into the lack of minutes?

A. No, no. There is nothing. As I have said, in the context of what we were doing, the Department didn't have any problem. There was nothing that we saw that would, for example, derail this process. On the question of the ownership, our line was very clear and we stuck to that. We weren't negotiating on it. And there was no question, there was no question of any concealment. This was, we were going through the final stages of a process. It was obviously quite a busy time. And I think the hypothesis that there might have been any concealment is, quite frankly, joining up the dots to create shapes that don't reflect the reality of the time.

Q. Now, the final thing I want to deal with, Mr. Towey, is press conferences. And I don't want to insult the media, but sometimes the media focus can get a bit out of proportion when looking at commercial matters?

A. Yes.

Q. I think we have been through the fact that although this was the State dealing with something that was a bit commercial, was new, or new-ish, it was something that was of interest to Ireland. This was Ireland

moving into a new dawn in relation to mobile phones, isn't that right?

A. Oh absolutely, yes. And I mean, I have referred to the Strategy Group report that report that informed our overall approach to telecommunications. So this was actually a very important step forward in our telecommunications policy.

Q. And people were interested, and there were vikings walking around Dublin, and there was all sorts of speculations who was going to win and all those sorts of things, and the concept of speaking to the media to let people know what was happening appears to have become something of an issue in just the campaign of getting the licence out?

A. Yes.

Q. I mean, the Department would obviously communicate with the media in normal circumstances, but I think the sort of level of excitement and the commerciality of this was probably bringing this onto a different plain and probably one you hadn't been involved in in relation to the media?

A. It was, yes, and I think the difficulties that we had in providing information to the unsuccessful candidates fed into it fuelled the media, in the sense that the media had a sense that there was information that they didn't have access to, if I could put it that way.

Q. And was that to any appreciable extent sort of feeding the need to try and handle the media because this was this interest, understandable, and there was this interest to communicate as well?

A. Yes, certainly I mean there was some controversy in the media, and there was a concern in the Department that it was unfounded.

Q. So, again, just insofar as media comment has been made, and releases have been made in the media, and things have appeared in newspapers; again, should we read anything sinister into that from your point of view in relation to how the process was actually run?

A. Well, there was quite a limited release of information to the media outside of, I believe, the civil servant press conference and licence award press conference. In terms of what was in the media, certainly we felt that there was quite a lot of speculation. There was rumour and innuendo which we felt was not grounded.

Q. And I think the other thing we know about dealing with the press, they are keen to find out what's happening, and preparation helps?

A. It does, yes, absolutely, yes.

Q. And was what was happening with the Minister anything, as far as you were concerned, more than simply attempting to prepare somebody who might be asked questions by the media?

A. Oh, yeah, I mean, quite clearly, I mean in terms of

preparation for the award, we were facing into a situation where the Minister, as an elected official, would be sharing a platform with non-elected officials, and in relation to an item which was somewhat controversial, and in those circumstances I believe it's the duty of a civil servant in fact, to ensure that the Minister goes into a situation like that with his eyes open.

Q. Well, could I test you on the use of the word "controversial". Might I suggest exciting might be a better description?

A. Yes, yes.

Q. And fun for the media?

A. Matters that are of particular interest to the media, yes.

Q. A lot of other people wishing they had been the winner?

A. Absolutely, yes. I mean, all along we felt that the emotion of disappointment was a significant factor in fuelling the kind of media interest in this.

Q. Now, just for yourself, and this is your evidence to the Tribunal, did you attempt to, in any way, mislead the Minister or mislead anybody by the bits and pieces you had to do with assisting in preparing for media briefings or press conferences?

A. No, absolutely not.

MR. NESTBITT: Thank you Mr. Towey.

THE WITNESS WAS FURTHER EXAMINED AS FOLLOWS BY

MR. COUGHLAN:

Q. MR. COUGHLAN: There are just a few matters. I don't intend going over areas that we have covered extensively over ten or eleven days.

But just a few matters that were dealt with this morning. First of all, if we look at the questions which My Friend asked you this morning about the letter sorry, about the letters of commitment or interest that were submitted?

A. Yes.

Q. You viewed them in a positive light, and the Evaluation Team did, didn't they?

A. The Evaluation Team viewed it that there was a high level of interest and there would be no difficulty placing the 20%.

Q. And just to put that in context; at the time of the licence award in May of 1996, I think that the Department was furnished with a letter from ABN-AMRO, and Mr. Loughrey dealt with this. This was in respect of corporate debt financing, and they confirmed they had arranged bridging finance of 25 million, and that they had agreed draft terms for project finance which would be subject to the bank's normal due diligence?

A. Yes.

Q. And I am not making any particular point on it, because Mr. Loughrey said that was a conditional

letter, but he being a commercial man, appreciated that it was something which the Department needn't have any great difficulty about; that it would come to fruition. And can I take it, that it was in similar light that you would have viewed the particular letters of the, that were submitted of the bid, that this was the strong expression of interest. It was getting a second mobile licence, you were going to be a duopoly, isn't that right?

A. That's correct, yes.

Q. And I take it there was no other thinking within the Project Group that there was anything particular wrong with what was being suggested or submitted about these financial institutions?

A. No, that's fair, yes.

Q. And we know in fact that the financial institutions never asked to come out, they were asked to step aside. But that's neither here nor there.

A. I think I have seen some of your papers, yes.

Q. All right. Just another point which Mr. Nesbitt touched upon today, and I note from the transcript yesterday, he dealt with the question of the quantitative report, or the quantitative evaluation and the difficulties which it gave rise to.

A. Yes.

Q. And we know the difficulties which it gave rise to are outlined in the evaluation report, isn't that right,

that's the official report?

A. Well, that's the official record, yes. You recall we had a discussion

Q. That's where we go to, and you said in fact, to Mr. McGonigal yesterday, I think that that is the official record and you stood over the whole thing.

So that's what's recorded. That's the official report. That's what was done.

I just want to come to one thing, because I am sure Mr. Nesbitt didn't intend it this way, but just reading it, just to clarify the matter. There was a difficulty with IRR?

A. Yes, okay.

Q. You remember that?

A. Yes.

Q. Now, IRR was an indicator, one of the indicators for financial key figures, isn't that right?

A. That's correct, yeah.

Q. And financial key figures was one of three dimensions for the first criteria?

A. It was, yes.

Q. So if there was a difficulty with IRR, you don't disregard the 30% attributable to the first criteria, isn't that right

A. I understand what you are saying.

Q. on the quantitative?

A. I understand what you're saying.

Q. Now, there is just one other point there, and I just want to clarify this, because it may be, and I think it was My Friend's mistake in the first instance, when he spoke about the meeting of the 9th October, and that nobody could have been in any difficulty in understanding that the result was to be presented on Table 17 and 18. The result was never presented on Table 18, even in the final report. The result is always presented on Table 17, isn't that right?

A. Yes.

Q. I think you agreed with My Friend about it being on the 9th October, but when he read Mr. McMahon's note, he said that the note related to the 23rd October?

A. Yes.

Q. Of course that's just a mistake, because we know that in the second report, that is the report of the 18th, the result is still being presented on the Table 16, the aspect table, isn't that right, in the second evaluation?

A. Yes, I understand what you're saying, but it would you know, my view is that at the 9th October, those who were in Copenhagen, as in myself and Martin Brennan, would have laid out that Table 17.

Q. I understand what people in Copenhagen although it's not how Mr. Andersen records it in either of those reports, but I understand the point you are making.

A. Okay, but I believe it would have been laid bare, put it that way.

Q. Now, in the final report, that's the one of the 23rd, which we know that at least one member of the Project Team, Mr. Sean McMahon, never read, or Mr. O'Callaghan never read or received it either?

A. The final report?

Q. The final report. But just, if we could go to Chapter 6, there is just something that occurred to me when I was looking at it there. It hadn't occurred to me before.

You see the report ends at "Nominating and ranking the three best applications in order of merit in reference to the evaluation criteria. This has been achieved by extracting the marks awarded to each application under each of the eleven dimensions on the basis detailed in Chapter 4."

That's what happened. Then it says: "Grouping of dimensions according to the eight evaluation criteria."

If you look at Table 17 then?

A. Yes.

Q. What they do is they set out the 11 dimensions, isn't that right that's what that table is about?

A. Yes.

Q. The fact that there is text put in, market development, etc., and then three dimensions, is not a

grouping of them. What is set out here are the 11 dimensions on the table, isn't that right?

A. Yes.

Q. And that is how the result is achieved?

A. Well, the intention was grouping of the criteria, yes, grouping of the dimensions, pardon me.

Q. Now, again, I want to be careful, because it's not necessarily language which you used yourself in the first instance, but I think a proposition may have been put to you that Table 16, that's the aspects table, was not true to the criteria?

A. Yes.

Q. Or words to that effect?

A. Yes.

Q. Of course, it was true to the criteria, isn't that right? It was designed to be. It was a recasting of the dimensions on the basis of the criteria, isn't that right? Isn't that what happened?

A. It was a recasting of the dimensions representing the criteria, but it doesn't clearly reflect the criteria.

Q. It does clearly reflect the criteria, I might suggest to you. What it doesn't have is a weighting in it?

A. It doesn't have a weighting.

Q. A weighting. It is recast, and that was specifically what Mr. Andersen intended it to be, isn't it, a recasting of it around the criteria to respect the criteria in paragraph 19 of the RFP?

A. That may have been Mr. Andersen's intention, but ultimately there was a view that it didn't respect the criteria.

Q. Now, just going back to a few matters from yesterday. I think Mr. McGonigal commenced by asking you about the role of Andersen and why the Department retained the services of Andersen or a consultant?

A. Yes.

Q. And of course, nobody had ever done this before in Ireland. You were all on a learning curve, and you agreed with him, that to a significant extent you were dependent on Andersen, and upon the advice and work which Andersen Management carried out?

A. Yes.

Q. And you said, "Yes, that's right, I would have seen a number of roles for Andersen, but mainly in providing a guiding light in terms of process expertise, but also in bringing telecoms market expertise and financial and legal expertise to this process." So that was your view, that that was the role of Andersens?

A. Yes.

Q. They were the ones who were going to tell you how to do it?

A. Yes.

Q. I am just wondering why, when it came to that crucial time in Copenhagen on the 28th September, this guiding

light in terms of process expertise which you were relying on told you about the question of how a result should be arrived at, and the problems with attempting to put weights on a qualitative analysis.

A. Yes.

Q. Did you have any other advice from outside, that was yourself and Martin Brennan, which enabled you to form a view that the advice you were receiving by the retained experts should not be accepted?

A. No, no, we didn't. The difficulty we had was with Mr. Andersen's ability to demonstrate how Table 16, as it was, could clearly, clearly show that a result was being arrived at in accordance with the selection criteria. That was the difficulty. And in response to our arguments, we reached an agreement which ultimately was reflected in the report.

Q. Mr. McGonigal put this question to you yesterday, and it's at Question 20:

"And I understand, am I right in understanding that the fixing of the criteria in advance of Andersens getting involved caused some problem in relation to producing the model which this came up with?"

Your answer was: "I would say that's true, yes."

Now, Andersen were, or all people tendering for the position of the consultant, would have received the RFP document, isn't that right?

A. That's right, yes.

Q. And they would have seen the criteria, Paragraph 19?

A. Yes.

Q. And they would have known that that was fixed and that that reflected the Government decision, isn't that right?

A. Yes.

Q. And they tendered on that basis, isn't that right?

A. They did.

Q. And they tendered on that basis and they pointed out that the best way to approach it and also in conformity with the EU view about how beauty contests should be conducted, was to have a quantitative evaluation and a qualitative evaluation, isn't that right?

A. Yes, that's correct.

Q. And they pointed out that the benefit of that was that the results were usually the same?

A. I recall you

Q. And that this was the effective safeguard for the process that you carried it out two ways, and you showed that this is how the result came about, and because they usually tended to be the same, that would satisfy everybody looking at it?

A. That's the way he described it.

Q. That's what he said in his tender document, isn't that right?

A. Yes.

Q. And he was successful, and then you entered into a contract, and the terms of the contract were that he was to produce the evaluation model, isn't that right?

A. Reflecting the evaluation criteria.

Q. Reflecting and that's what he did? Isn't that

A. He produced an evaluation model, yes.

Q. He produced the evaluation model?

A. Okay

Q. The evaluation model. And that was adopted, isn't that right?

A. That was agreed by the Evaluation Team, or by the Project Team, yes.

Q. And in fairness to yourself, when it was being put to you that you possibly hadn't adopted the weightings on the indicators, I think in fairness to you, you said yesterday, it was implicit that you accepted the whole lot?

A. Yes.

Q. Now, then coming to the questions which Mr. McGonigal raised with you over and above the problems identified in the quantitative evaluation in the report, he spoke about the 103?

A. Yes.

Q. When you tot up the now, that was something that was taken up, that was spotted, the 103, and we see some document about normalisation?

A. Yes.

Q. That doesn't present any difficulty at all, does it?

Let's take the first criteria, where 32.5, I think it comes out at, but the split is 7.5, 15, 10, I think that's the way the split is?

A. Yes.

Q. A simple normalisation of that would be 32.5 over 30 multiplied by the score?

A. Correct.

Q. It doesn't present the slightest difficulty. And you preserve and retain the relativities within the dimensions?

A. There is no question about it, yes, that you can do the mathematics to renormalise, but I think the point was that the group would not intentionally have done that.

Q. I see the point. It's not it's a minor problem, it's not an insurmountable problem to normalise?

A. I understand, yes.

Q. What is significant is that the group adopted the dimensions split and the relativities, the split of them, that was that financial key figures was twice that of marketing, and experience of the applicant was 50% greater than that of marketing. That was the split. That was how it was adopted, isn't that right?

A. That was implicit in the decision, yeah. If I can add in relation to that point, just reflecting on it, I think that Mr. McGonigal's point in relation to that

line of questioning which brought out something that may be in my own evidence, I hadn't demonstrated so clearly, which was that the Project Group's decision in relation to the weighting of the selection criteria was a very deliberate explicit decision, whereas the adoption of weightings at the level of the indicators was implicit in the sign-off on the evaluation model.

Q. Because you don't have any clear recollection, but we had been over it before, about one had to come from indicators I'll put it to you this way: If you accept, if you say that you had it at criteria level, that you had a weighting of 30, 20, 18?

A. Yeah.

Q. That was no good to anybody. You couldn't evaluate anyone, because you had to break this was broken down into dimensions and indicators, and to start marking on the quantitative, you had to have a specific weighting to apply to the scorings, to the scores, isn't that right?

A. Yes.

Q. There is no doubt about that?

A. Yes.

Q. And in fact, we see a document from Mr. Andersen, I think again Mr. McGonigal again I don't think there was just an error in relation to something, that the same confidentiality didn't attach to the evaluation model as to the Margaret O'Keeffe, or the

Maev Nic Lochlainn document with the weightings noted,

30, 20, 18?

A. Yes.

Q. It was a confidential document, there is no doubt about that?

A. Yes.

Q. And we actually see Mr. Andersen, if we go to the weightings book, which is Book 54, and I don't think you need to go to it specifically, but it's at Tab 4, and it commences with a note from Maev Nic Lochlainn, this is on the 27th July. This is to do with the revision of the weightings after the European intervention and the licence fee being reduced?

A. Yes.

Q. And there is a note from Maev Nic Lochlainn, "Advice received from Andersen Management International indicating their preference for reducing the fee weighting by three percentage points and increasing the weighting for tariffs by a corresponding amount."

You know that?

A. Yes.

Q. If you go over the document from Andersen, again which is headed, "Confidential Memo on the Adopted Evaluation Model," do you see that? You just see it there?

A. Yes.

Q. He goes down through it. And it's particularly when

you come down to the third paragraph: "Nevertheless, it cannot be neglected that no changes in the present weighting might lead to a slightly different ranking in the quantitative evaluation. For this reason, we prefer to move the said three percentage points between the two indicators" he is moving them up to tariffs at that stage?

A. That's right, yes.

Q. And you can see what he is discussing there. So he is talking about at indicator level, isn't it, there is no doubt about it that that was it appears to be his understanding and the concept of the model?

A. Well...

Q. It's a bit inelegantly drafted, I agree?

A. Yes, yes. Well, I see what he has written there, yes.

Q. Now, there was just one other area I think that I wanted to ask you about, and that was perhaps two they all come back to the 28th September in Copenhagen.

A. Yes.

Q. One is

CHAIRMAN: Is there something to be said for deferring that, Mr. Coughlan? I am just anxious to try and finalise the realities for next week. It might be well if we had the opportunity, even though I know you won't be much further with Mr. Towey, that we just had an opportunity to check what can be arranged. Very

good. We'll resume briefly at two o'clock.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF EXAMINATION OF MR. FINTAN TOWEY BY

MR. COUGHLAN AS FOLLOWS:

Q. MR. COUGHLAN: Just before lunch I had referred you to the meeting in Copenhagen on the 28th of September, and there are just two matters I would like to ask you about. The first one is that, Mr. McGonigal asked you about the practice which Andersen might have had of collecting all papers?

A. Yes.

Q. You have no recollection of that being a particular practice or procedure of Andersens?

A. No, I don't recall that, but, I mean, Andersens did have charge of maintaining a record.

Q. That is what I want to ask you about. You said that it was agreed that Andersens would maintain the record?

A. Yeah.

Q. Now, we know from the documents we have received from Michael Andersen, that he only got a very limited number of minutes of the PTGSM?

A. I think I actually

Q. Just one, I think it was just one?

A. I think I did see that in his memorandum, and I find that rather rather strange.

Q. All right.

A. Okay.

Q. The second point is, that Andersen maintains that he was never asked to keep an audit trail, which was the facility offered; in other words, that you would be able to follow the documents through and have a full audit of the process?

A. Okay. It was understood at these sub-group meetings that Andersens would keep a record of the agreement, and the basis for it. I mean, I think you will find, in relation to those sub-groups well, you know, in relation to those sub-group meetings, there is no Departmental papers.

Q. Other than some technical there are one or two, not a full set, but there are one or two on the technical side, but I take your point.

A. Okay. The point I am making is that it is clear that I, or other people from the Department attending at those sub-groups in Copenhagen, didn't feel a responsibility to make a report or keep the record.

Q. I understand that point.

A. Yes.

Q. But there is no formal agreement or no formal noted agreement that Andersen would keep all papers?

A. I don't believe it is a noted agreement, but that was the understanding.

Q. All right. Now, the other thing I just wanted to ask

you was this question about the question which

Andersen asked on the in his memo of the 21st,

about the question of scoring other aspects?

A. Yes.

Q. And you have told us that that was that wasn't discussed with the full PTGSM, that was a view that yourself and Martin Brennan took, that it shouldn't be scored, isn't that right?

A. Yes, the view we took, that it wasn't a criteria, and therefore...

Q. I want to ask you about that, because I think you said in response to, I think Mr. McGonigal, and you would have said it, I have no doubt if I went back over the transcript, when I was dealing with you about this.

A. Yes.

Q. That and what is recorded in the official record of what transpired, that is in the report, and even through the various drafts of the report

A. Yes.

Q. that it is nowhere indicated that it wasn't scored because it wasn't a criteria. What is stated is

A. Okay.

Q. I think, am I not correct, that in the, or words to the effect, that in carrying out an analysis or that it would have shown up the same result as the as the table showed up, in relation to the top three, now, I am talking about?

A. I think what the report says is that in ranking the applications according to credibility, the same ranking emerges as emerged from Table 17.

Q. Mm-hmm?

A. But on the question of specific sensitivities and risks, I think it is recorded that, that if those sensitivities and risks were scored, it would not have the effect of changing the ranking.

Q. Right. I understand that, that is exactly the point I want to ask you about, which means that there must have been some analysis carried out to enable that statement to be made?

A. Yes.

Q. Can you point me anywhere in any of the documents to this particular analysis?

A. Well, it was Andersens who carried out the analysis.

Q. But you agree with me there is no there is no document of that particular analysis anywhere; there is a bald statement in the report all right, but there is no record of the analysis which enabled that statement to be made?

A. Well, in the appendices there is a record of the analyses carried out in relation to the issues that had been identified by Andersens as potential risk issues.

Q. Yes. Are we talking about the Appendix 10?

A. The Appendix 10 is probably the one dealing with

financial matters.

Q. That's right.

A. But equivalently, there are ones dealing with tariffs and interconnection issues.

Q. In fact, other aspects and it is nowhere stated, you agree, in the report, that "other aspects" weren't scored because there was a view taken that it wasn't a criteria?

A. Yeah, I think that is a correct statement, yes.

Q. In coming up with the model, the whole question of "other aspects" was to examine risks and sensitivities, isn't that right, that was what was envisaged?

A. Yes.

Q. And, of course, they, in they could be used for the purpose of examining all of the other indicators and dimensions used, isn't that right?

A. Explain that to me?

Q. Sorry, they could have a bearing or an effect on any of the dimensions?

A. Yes, potentially, yes.

Q. Potentially?

A. Yes.

Q. So the question as to whether they were a separate criteria, I suggest to you, is probably irrelevant in the concept of Andersens' understanding of the model; it was to produce an objective view about risks and

sensitivities, which, in the qualitative analysis,

would enable you to look at all of the other

dimensions which existed, and address them?

A. I am not entirely clear what you mean. I mean,

Andersens had

Q. What I am trying to understand is this: What is the

difference between saying, "I am not going to score

'other aspects'," and then carrying out an analysis,

because remember, the quantitative evaluation was by

way of analysis, isn't that right?

A. Yes.

Q. So you carry out an analysis?

A. Yes.

Q. That is the quantitative evaluation?

A. Qualitative.

Q. I beg your pardon, the qualitative evaluation, isn't

that right?

A. Yes, okay.

Q. What is the difference between doing that, and saying

that that was done in incorporating it in the report,

and actually saying that you won't score the other

aspects? Is it not the same thing?

A. Well, it may be that there would be different means of

getting to the same result, but in the context where

we had a defined number of criteria, and where we felt

we had a weighting attached to those criteria, the

possibility of adding a score under a different

heading was not, in our view, consistent with that.

Q. Oh, yes. But this is on Table 16, remember?

A. Yes.

Q. And the model, of itself, didn't contain weightings, isn't that right, on Table 16?

A. On Table 16, it didn't.

Q. That is what I am trying to understand and to see where this particular analysis was carried out, because

A. Okay.

Q. because the way it is carried out in the report or the way sorry, what is described in the report identifies risks and sensitivities, and offers a solution?

A. Yes.

Q. For example, in relation to incorporating conditions into a licence or making a demand for more equity, or matters of that nature?

A. Yes.

Q. And you say that this was carried out specifically in relation to the top three, isn't that right, this type of analysis?

A. Well, I think at some point it is recorded that there was a clear division between the top three and the other three.

Q. I understand that.

A. And that the analysis should focus primarily on the

top three.

Q. Yes, I understand that. But in relation to the top two in particular, you were identifying, rightly or wrongly, whatever the position may be, you were identifying risks and sensitivities, particularly in relation to financial capability, isn't that right?

A. Certainly it was one of them, yes. I mean, in relation to

Q. It was a fairly significant one?

A. It was a significant one, yes. In relation to Persona, there was an issue in relation to tariffs

Q. Mm-hmm?

A. which was viewed by the consultants as quite significant, certainly.

Q. But in that analysis, there was incorporated in the text, or sorry, in that description, now we haven't seen the analysis, but in that description in the report, there is incorporated in the text, for example, the statement that Esat Digifone opt for market leadership?

A. Yes.

Q. And that is considered to be quite significant because or was it, in the text?

A. I think that the consultants viewed that as a positive, in terms of looking, you know, in a general way at the applications.

Q. I understand that.

A. Yes.

Q. And Mr. Sean Fitzgerald, as a reader of the report, understood that to be the situation, and considered it to be of significance, for example?

A. Yes.

Q. Market leadership doesn't appear anywhere in the criteria in any dimensions or in any indicator, isn't that right?

A. No, it is not referred to as such, but, I mean, clearly market development is in the first criteria.

Q. Yes?

A. And the indicators that were scored in relation to that were they were designed to accord merit to applicants that would drive the market, the development of the market, yes.

Q. Doesn't it we have listened to the tapes of the presentations, and this was a question which Mr. Andersen posed to people

A. Yes.

Q. "What type of strategy do you envisage for your company?"

A. That's right, yes.

Q. "Is it market leadership?" Do you remember that?

A. It was categorising them according to Michael Porter's generic strategies, that's correct.

Q. That is where that came from, isn't that right?

A. That's right, yes.

Q. Just one other point there: Mr. Nesbitt was asking you about the Minister and the Minister's state of knowledge, and matters of that nature, and I accept that you were saying "yes" to particular answers; I don't know if you were expressing that view. You only know two things: The Minister spoke to you, isn't that by telephone?

A. Correct.

Q. So maybe three things: You know that the Minister may have been kept informed about the critical path, that is the progress, he may have been?

A. Yes.

Q. And you know that Martin Brennan spoke to the Minister after Copenhagen, isn't that right?

A. Yes.

Q. And that is all you know?

A. That is all I know.

Q. That is all you know?

A. Yes. And my answer was on that basis.

Q. That is what I just want to clarify. I just want to clarify that, yes.

Now, there is a matter, now, that I am going to put into the public record because it is in the context of all of the matters we have been discussing about the evaluation process, the first draft report, the second draft report and the final report, and all that happened, and evidence that you have given which does

not emerge from the reports of the state of thinking of yourself and Martin Brennan and how matters emerged and evolved in Copenhagen, and matters of that nature?

A. Yes.

Q. And this is relating to Mr. Andersen. Mr. Andersen

A. Yes.

Q. Mr. Andersen has not come here. He has furnished information to the Tribunal and attended meetings with the Tribunal at an early stage, but has not come here to give evidence, and it looks as if he is not coming to give evidence, to stand over this particular report.

A. Yes.

Q. And we know, or you know specifically, that he was paid significant fees by the Department, isn't that correct, for his work?

A. That's correct, yes.

Q. And I think he was also paid fees by the Department in relation to some strategic planning?

A. A study of the establishment of independent regulation, yes.

Q. That would be in the region of hundreds of thousands of pounds, isn't that correct?

A. In the

Q. I am told, maybe this is wrong, it may have been close to a million euro, in euros, I don't know, in all?

A. In pounds, I think what he received for the GSM work

and for the regulatory study was in the order of half a million pounds, I think.

Q. Pounds. All right. Now, the Commission for Communications Regulation have informed the Tribunal that Mr. Andersen received the following payments from them - this is from the Irish State, in effect, for work he carried out here?

A. Okay.

Q. That is in addition, now, to the monies which he received from the Department for your work.

He received fees of €3,953,259.21, made up of:

DCS 1800 - 570,513 sorry, these are euros

€570,513.77.

Third Mobile Licence 3G - €1,995,089.79.

FWPMA I don't know, maybe you could help me on that
500

A. Sorry, FW

Q. FWPMA?

A. Fixed Wireless Public Mobile Access, I think.

Q. Okay. FWPMA - €502,021.09.

Orange Case - €340,744.89.

FWA Court Case - €12,995.91.

FWMPA Review - €216,723.44.

FWA Project A - €47,769.29.

TETRA - €43,156.84.

FWA Project B - €219,977.85.

And Mobile Access Charge - €4,266.33.

Making in all the total $\text{€}23,953,259.21$.

Now, do you accept that it is at least strange that somebody who received this level of fees from the State for work in the telecommunications area, would not come to a Tribunal established by Dail Eireann?

MR. O'DONNELL: That really isn't for this witness to answer at all, Chairman, with the greatest of respect.

CHAIRMAN: Well, we could argue about that, Mr. O'Donnell, but I don't frankly, it is one of these matters, I think it is almost quicker to offer Mr. Towey an opportunity of commenting, if he wants to. Have you any view on that?

A. I find it strange that he wouldn't.

CHAIRMAN: Fair enough.

Q. MR. COUGHLAN: Now, there is just there is just a final matter, I want to deal with it, it is a fresh matter, it is the documents that he received from Mr. Owen O'Connell. I think your solicitor would have been furnished with a copy of them yesterday. That is the note Mr. O'Connell has of a meeting with you on the 29th of April of 1996.

A. I saw it sorry, I saw it yesterday. I don't have it in front of me now.

Q. I will see if I can get you a copy of it.

(Document handed to witness.)

A. Thank you.

Q. There is the handwritten note, and Mr. O'Connell has

also, helpfully, transcribed it?

A. Okay. The 29th of April one, is that correct?

Q. Yes, the 29th of April. So, we will just deal with the 29th, the other document has nothing to do with you, it wasn't a meeting with you, so we will leave that out for a moment.

"Fintan Towey,

Trying to hammer down paper trail between beneficial ownership as in bid and as now proposed; to determine whether there are any differences. Legal people involved.

"If telecom interests held Esat Holdings and radio by Communicorp asset base for Communicorp reduced.

Doesn't know whether it would be a problem.

"Suggested meeting" then this is Mr. O'Connell

recording his view "(I believe this to be a reference to my having suggested a meeting.)

"Premature" again Mr. O'Connell "(I believe this to be Mr. Towey's response to my suggestion of a meeting."

Then: "Question is whether company to be licenced is same as company that applied. Has to be assured from a legal perspective.

"Haven't reached decision as to whether there is any difficulty or anything they want done differently.

"Warranties regarding ownership and financing.

Identifying institutional investors. Means ownership

at date of licence.

"Owen O'Connell no difficulty with that at all."

Then under that: "Report Knut Digerud major GSM supply contract 2nd May. Would suggest contemporaneous execution."

Now, we know that you sought legal advice, and we know the position as regards that, I am not going over that again.

A. Yes.

Q. I just want to ask you about this.

A. There is a point that I might just clarify, because I think you put it to me that Mr. O'Connell's statement suggested there was a meeting on the 29th. I said I don't believe I ever met Mr. O'Connell one-to-one. I imagine that is telephone call.

Q. Very good. The only reason I say "met" is, Mr. O'Connell in his Memorandum of Intended Evidence, again when he comes to give evidence he may correct that, that may be the situation I only said it there because he had used that expression, "I met"?

A. I understand.

Q. It is just the, you see the first portion there, "Trying to hammer down paper trial between beneficial ownership as in bid and as now proposed; to determine whether there are any differences. Legal people involved."

A. Yes.

Q. Now, as far as we can see, there were no documents received by the Department, isn't that right, in relation to this issue?

A. I am not sure I understand exactly. I mean, there is the letter of the 17th of April.

Q. I understand. But this is after that?

A. Yeah.

Q. "Paper trail between beneficial ownership as in bid and as now proposed." You weren't furnished with any documents, or am I right?

A. I think I understand what you mean.

Q. The agreement of the 29th of September, that was entered into, or any further movements in relation to that, you didn't receive any of those documents, isn't that right?

A. No, we didn't, and okay, I don't actually think that we were looking for that.

Q. All right.

A. To be honest.

Q. All right. The reason I interrupted My Friend yesterday, when he was asking you about the letter of the 29th of September, and I wanted you to see this, in fairness to you, before you committed yourself to any particular reply. Was you see, that letter of the 29th of September does form part of the paper trail?

A. I understand, yes.

Q. And that didn't, you had no recollection of that particular letter as of this time when you were talking to Mr. O'Connell?

A. No, I didn't. I should say again, to focus on that word "paper trail," I mean it doesn't reconcile with my memory that we were looking for the actual historical documents documenting anything that might have happened, but rather that we were seeking a clear written explanation of it.

Q. You see, the reason I suggest to you, well again Mr. O'Connell will come and give his evidence, but you see, if you look at it, "The paper trail between beneficial ownership as in bid and as now proposed; to determine whether there are any differences. Legal people involved." You see, it is the legal people who would want to see the documents to see that what was being proposed now was different than in the bid because that was the nature of the advice that was sought?

A. Yes.

Q. But not obtained and not pursued?

A. Well, I think that's, I think I wouldn't agree with that comment.

Q. Right. Now, just this morning, I think when the, perhaps when the Chairman intervened and asked you a question, you am I correct in understanding you to have stated that as of the 29th of September when you

received the letter from IIU

A. Yes.

Q. that you have a recollection that you had an impression that IIU were some sort of venture capital company?

A. What I am saying is that I saw that letter as being, I suppose, well I saw it as a commitment in relation to providing financial backing.

Q. Yes?

A. So, in general terms I would have thought of it as venture capital company, the investment arm of a bank, or something like that, but in truth, I mean, I didn't think, as I have said many times, I didn't think at any great level of depth about that.

Q. Yes. Come April and May of 1996, you now knew that IIU was not a venture capital company or the investment arm of any bank, but, in effect, the private vehicle of Mr. Dermot Desmond, isn't that right?

A. That's correct, yes.

Q. And that didn't cause anything to jog, that didn't jog your memory at all, no?

A. No. I mean, I want to be, I want to be quite clear, we are talking about eight months later.

Q. I know that.

A. When I received that letter, as I have said at length, I had a particular frame of mind formed my dominant

reaction. It is clearly regrettable at this stage that I didn't notice Dermot Desmond's name as a director at the bottom, but the fact of the matter is that I didn't.

Q. Right.

A. And I took the action that I did. Now, as regards the impact of that letter on me, as I said, I saw it as a further commitment to financing to enhance the bid, and I didn't following that link it with any other event in relation to this process until at some point much later I think that the letter was published in one of the newspapers.

Q. Yes.

A. That was the first time that I made a link between 29th September and subsequent events as they unfolded.

Q. That is as a result of Martin Brennan saying something to you, or you discussing with Martin Brennan at the time of the newspaper article, I think it was Mr. Matt Cooper's article in the Sunday Tribune?

A. I can't say now, there was an article and I think Martin Brennan brought it to my attention.

Q. But, if you have a recollection that you had an impression that they were, on the 29th of September, that they were a venture capital company or the arm of a bank

A. Yes.

Q. can I take it that if that was the impression,

that your impression was that they were some sort of an institution, an institutional investor?

A. That would have been my impression, yes.

Q. Yes. And that certainly wasn't the case by the time April came around, when you had full knowledge of what IIU was?

A. That's right, yes.

MR. COUGHLAN: Yes. Thank you very much indeed, Mr. Towey.

A. Thank you.

MR. COUGHLAN: Sir, I think those are the witnesses available for today.

CHAIRMAN: Yes.

MR. COUGHLAN: And there have been a couple of hiccups, if I could describe it that way, about arranging witnesses. I think the best we could say is Wednesday morning at 11 o'clock.

CHAIRMAN: Mr. Towey, it just remains to thank you.

I appreciate you have had a long spell in the witness-box, and having had to commute with Brussels.

I appreciate you making yourself available, and that it has been quite a difficult couple of weeks. Your testimony is now ended, and I thank you.

A. Thank you Chairman.

CHAIRMAN: I am conscious of that, Mr. Coughlan, it is unfortunate, whilst it is no fault on anybody's part.

In respect of the next witness, who had made himself

available on one or two occasions, I think he is committed to a week in New Zealand. In the context of that, we have had to marginally revise our schedule, so we will take up matters on Wednesday at the usual time. Thank you.

MR. McGONIGAL: Just one matter in relation to that last letter that Mr. Coughlan put to Mr. Towey. I haven't had an opportunity of taking full instructions, it is unlikely that I would like to ask any questions of Mr. Towey, but should I need to do so I would communicate through the Tribunal first, if that necessity arises.

CHAIRMAN: Yes. Well, in any event, Mr. McGonigal, as you may be aware, it is anticipated that Mr. Brennan will be recalled to effectively conclude this phase, so it may be that

MR. McGONIGAL: I understand that.

CHAIRMAN: the opportunity will arise there. I will bear in mind the situation.

MR. McGONIGAL: Thank you.

CHAIRMAN: Thank you.

THE TRIBUNAL THEN ADJOURNED TO WEDNESDAY, THE 28TH OF MAY, 2003, AT 11 A.M..