

A P P E A R A N C E S

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FOR TRIBUNAL: Mr. John Coughlan, SC

Mr. Jerry Healy, SC

Ms. Jacqueline O'Brien, BL

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I N D E X

Witness: Examination: Question No.:

Owen O'Connell Mr. Coughlan 1 - 450

THE HEARING RESUMED AS FOLLOWS ON FRIDAY, 24th

OCTOBER, 2003, AT 11 A.M.:

CONTINUATION OF EXAMINATION OF OWEN O'CONNELL BY

MR. COUGHLAN:

CHAIRMAN: Thank you Mr. O'Connell, good morning.

Q. MR. COUGHLAN: Thank you, Mr. O'Connell. I think yesterday afternoon we finished on paragraph No. 20 of your memorandum, and that is that you received from Ms. Gleeson a draft press release, together with a covering letter and a series of questions which she had prepared. And I think that is Document No. 18.

So we might go to that now?

A. Yes, Mr. Coughlan.

Q. And I think the letter you received from Ms. Gleeson was dated the 15th May, 1996, and it reads: "Attached is a draft press release which would be sent out today if we get approval from the Department to do so (which is not at all definite, the Minister's advisers thought it a good idea, but I think that Loughrey does not) anyway, regardless of whether it is today or tomorrow, we need to agree the details for publication on ownership and funding anyway.

"Could you look through the attached. I also prepared questions which might be asked on the issue.

"Denis asked me to go to your office at 1 p.m. to discuss the release and the questions which will be asked of the Esat Digifone people at the press

conference in the interests of everyone being "on the same line" it is very important that this practice session be undertaken. See you in a while. Eileen."

And the next document, then, is the draft press release, I think, isn't that correct?

A. Yes.

Q. And that reads:

"Esat Digifone shareholding details:

"In advance of the formal signing of the licence to operate Ireland's second mobile telephone network tomorrow, Esat Digifone has confirmed details of its shareholding structure as follows:

"Esat Telecommunications Holdings Limited, (a wholly-owned subsidiary of Communicorp) holds 40% of the shares. Telenor Invest, (the Norwegian telecommunications operator) holds 40% of the shares and International Investment and Underwriting Limited holds the remaining 20% of the shares. The owner and Chairman of IIU, and therefore the beneficial owner of this 20% shareholding at this time, is Mr. Dermot Desmond.

"IIU has stated that the shareholding, or part thereof, may be placed with additional investors at some future time. This will be reviewed when Esat Digifone is operational towards the end of this year.

"The shareholders as listed above have each contributed to the investment made in the network to

date and each will discharge its financial responsibilities to the entire investment required for the project, which is in the order of €120 million.

This capital will be provided by equity from the shareholders and by debt financing which is being arranged by" and then AIB and ABN.

"Each shareholder has given to the Department of Transport, Energy and Communications details of its ability to provide all of the necessary funding. The Department has stated that it is satisfied with the details of ownership and funding which it has received."

Now, I will deal with the questions and answers document in just a moment, Mr. O'Connell. But if I go back to the letter which Ms. Gleeson sent to you, she says that "Attached is a draft press release which would be sent out today if we get approval from the Department to do so (which is not at all definite. The Minister's advisers thought it a good idea, but I think that Loughrey does not)."

Can you assist the Tribunal at all, or do you have any knowledge as to whom she was referring to there, "the Minister's advisers"?

A. No I don't, Mr. Coughlan, although I would guess it was the Minister's PR advisers or something similar, or counterparts, in other words.

Q. Perhaps it is something that Ms. Gleeson might be able

to assist the Tribunal with.

A. Yes.

Q. In any event, can I take it that this is information which Ms. Gleeson is imparting to you rather than information you had furnished to her which she is referring back to you?

A. Oh, yes.

Q. It is information that she is imparting to you?

A. Oh, yes. Yes.

Q. Again, on the question of the draft press release, this was something which was drafted up in Ms. Gleeson's office, I presume?

A. Yes.

Q. Or wherever, and you were not a party to the preparation of that particular document?

A. No, but the handwritten correction of the name of the banks is mine.

Q. Yes. That is when it came into you?

A. Yes.

Q. Yes. Now, if we then go to the series of questions which she prepared as being likely or potential questions to be raised at a press conference, there we can see the document that is in typed form. Then there are handwritten notes or replies or suggested replies on the document that we have?

A. Yes.

Q. Do you see that?

A. Yes.

Q. Can you assist us as to whose handwriting that might be?

A. That's mine. It is all mine and it seems to have been done on two different occasions.

Q. Right.

A. I am really just taking that from the fact that one set of comments seems to be done almost entirely on the right-hand margin and in fairly heavy pen in the photocopying, whereas the rest is done more towards the centre in a lighter pen. I guess they were done at two different times.

Q. Yes. Could it be that one, perhaps the lighter one is something that you may have done yourself in your own office?

A. Yes, quite likely. One of them, I think, probably I would have done when I got the questions by way of noting the comments that I wanted to make on the questions when we came to discuss them.

Q. Yes.

A. And then quite likely the other, I am not sure which is which, but quite likely the other would be notes I made during a meeting at which the questions were discussed.

Q. Yes. And can you remember such a meeting?

A. Very, very vaguely I remember being at a meeting but I am afraid, apart from Eileen being there, I can't

remember who was there. I have a very vague recollection. Things were quite frantic at this time.

Q. Yes, I appreciate that. Well, did the meeting involve Mr. Brennan, for example?

A. Oh no, no, it would have been I think just the Digifone side.

Q. Just the Digifone?

A. Yes, I think so, yes.

Q. Right. I think we've typed up the handwritten notes?

A. I don't think I have that, Mr. Coughlan.

Q. You don't. Well I can give you a copy of it now. It just might help you.

(Document handed to witness.)

I think it is in Book 51, but I am not going to ask you to look at a book.

A. Thank you.

Q. And I think the first question was: "When were these shareholding details made known to the Department?"

Then it has "MB"?

A. I think that is "NB".

Q. I see, "NB". I see, so it is note de bene, is it?

A. Yes, I think so.

Q. "50% owners by two Esat and Telenor. Disclosed intention re 20% with the bid" that is general operators' percentages, is that correct?

A. Yes. Sorry, I beg your pardon, the first note I am looking now at the handwritten one is "NB 50% owners

by two, Esat and Telenor. Disclosed intention re

20%." That is a note. Then

Q. I can see the point you are making, "with the bid"?

A. The "with the bid" is separate, so is "the general operators' percentage" separate.

Q. So that is something that appears to have been something that appears to have been added at another time, you think?

A. Yes. And also, "The Department have said already expressions of interest given" is relative to this question, not I think to the later question, which it appears under.

Q. All right. Would you just read that out again because it is a bit faint on mine?

A. I think it is, "Department has said already expressions of interest given."

Q. Right. All right. The next question then was: "Was IIU mentioned in the bid document as one possible shareholder? That is, were they one of those that gave Letters of Commitment? " And you seem to have a response, "IIU to say no." Is that correct?

A. Yes.

Q. Then we delete, "Department has said already expressions of interest given"; because you think that is attributable to the earlier question?

A. The earlier question, yes.

Q. "Bid was confidential in that respect, i.e. backers'



identities were not revealed."

A. Yes. This is the second set of notes or perhaps the first one, I think the second, and I am apparently still believing here that the identity of the institutional investors wasn't given in the bid.

Q. Yes.

A. In which I was wrong.

Q. Yes. And then the next question is: "Who underwrote finance as detailed in the bid described as 'acceptable blue-chip investors' by the Minister?" I think that might have been a statement the Minister had made in the Dail at some stage referring to the blue-chip investors here?

A. Yes.

Q. And I think there is a note then, "financial details are confidential. Minister satisfied with the particulars as are we."

A. Yes.

Q. Then again we have "MB", is that NB?

A. "NB", yes.

Q. "Advent 1." What is that? We have, "1 investor"

A. I think it is I am not sure.

Q. " to name those not in consortium."

A. I think it is, "invidious to name those not in the consortium," meaning it would be invidious now to identify those that were intended to be in the consortium, but haven't ended up being in the

consortium.

Q. And Advent perhaps being one?

A. Yes.

Q. Or the one?

A. Yes.

Q. Yes. All right. The next question: "Are the Department satisfied with the information which you have provided? " Yes, otherwise we wouldn't have the licence/won the competition." Is that more or less it?

A. Yes

Q. "Will the shareholdings that you say you have announced today stay at those levels for the future? No, arrangements for change licence has consent provisions by Minister." That, I suppose, is a broad reference to Clause 8 or Article 8?

A. Yes.

Q. "Will there be any possibility for private shareholders investing in the company? Refer 12% in bid. Possible in the future. No immediate plans." Is that right?

A. Yes. I think, Mr. Coughlan, just looking at the note on the previous question.

Q. Yes?

A. Where I say "okay" in the lighter handwriting towards the middle; that suggests to me, and no more than that, that the darker notes on the right may have been those I made when I first got the questions. Then I

went to the meeting and I note and the lighter notes

might be those made at

Q. At the meeting?

A. At the meeting because I am there saying okay, in

other words, this comment is the answer that will be

given. It just suggests that to me.

Q. Right. I think the next question then is: "Is there

any possibility of a flotation at any stage in the

future?" And I think the response or the ditto is the

note, is it? Would that be correct?

A. Meaning the same as the previous answer.

Q. Meaning the same as the previous one. "What is the

breakdown ratio on equity and debt financing

involved?" And then there is a note "between 50:50 and

40:60 and 60:40." That is just that seems to be

A. Yes.

Q. "How much capital has been provided by shareholders to

date?" And the note is: "Up to now, all activities

funded from equity, up to and including signing

licence. Enough for licence fee and cap ex to date"

is that right?

A. Cap ex, capital expenditure.

Q. Capital expenditure.

"Is all debt financing in place and from whom?"

Agreements in place to draw down as required.

Confidential. Sufficient in place. Letter to

Minister from AIB and ABN-AMRO re balance."

A. Yes, I think in fact the arrangements in place to draw down as required relates to the previous question, which is capital provided by shareholders.

Q. I see.

A. And the debt financing is simply "confidential, sufficient in place," etc..

Q. Right.

"The question, "what role will the fundraising exercise currently underway in the US play in the Digifone financing?"

The note is: "It will play a role but not wholly devoted to Digifone." Is that correct?

A. Yes.

Q. "How was the fundraising going? What was the timetable? What are you trying to raise? Where will the money go?"

I think the note is: "Going well, pretty soon. Rest confidential."

A. Yes.

Q. Right. Then the next note is: "What is the timetable of capital investment required for Esat Digifone project? When and what amounts will be necessary over the next few years?"

Then the note is: "Confidential/commercially and competitively sensitive."

Then the next question is: "What participation will Dermot Desmond or his company have in the operation of

the company?"

And the note is: "Board representation. Money as investor. No active operational role."

A. Yes.

Q. And then the next question is: "Do you regret the fact that the ownership and funding details of this project have become such a focus and do you think that this could have been avoided by earlier disclosure of the facts?"

And the note is: "[They say there is no such thing as bad publicity]."

A. And that is in square brackets, implying that I was pretty doubtful about the appropriateness of the answer.

Q. Yes. Would that have been something that would have been said to you at the meeting, do you think?

A. No, I think probably, when I wrote the answer I probably put those square brackets around it.

Q. That particular response mightn't carry?

A. Yes, it mightn't be appropriate.

Q. "Why is it only now that you are prepared" the question: "Why is it only now that you are prepared to confirm what most people were speculating for some time?"

The note is: "This is the appropriate time and place.

Up to now discussions with the Department were on-going and disclosure would have been improper only

now we have become licence holder."

A. Yes, and the last bit from "only now" is added in the different writing.

Q. Right. And then, I think the final question: "How is Denis O'Brien contributing his share of equity?" And I think that is handwritten, I think?

A. Yes.

Q. Is that something that you would have added to the

A. Yes, it may be something I added as one which had occurred to me as being likely to be asked or it could have been added at whatever meeting we had. Somebody else said they are bound to ask this and I would have added it in. It could be either.

Q. I think the note made is: "Make or break legally and politically. Company to answer accurate. If fudge, no lies."

A. Yes.

Q. Right. Then the next document just over, I think, it says, "Items to be detailed at press conference Tuesday the 16th May."

And again, it is "to stress jobs, nationally in Limerick.

"What timing for jobs roll-out.

"Recent appointments Barry Maloney," I think as Chief Executive. Offices, where they are. Contracts awarded, roll-out in progress, and service which can be expected from Esat Digifone. That is things like

the quality of their calls, pricing, customer care and matters of that nature.

So you believe that after you received this documentation from Ms. Gleeson, there was a meeting involving Ms. Gleeson you believe was at it?

A. Yes, I think so. I am pretty sure.

Q. Yes. And there were Digifone people at it?

A. I think there probably would have been but I have no specific recollection of who else was at the meeting.

I have a vague recollection that it was probably in my office.

Q. Right.

A. And that, I probably would have pressed for it to be in my office because I was very busy at that time finalising documents and I wouldn't have wanted to go anywhere else, so that makes sense to me. But who was or wasn't there, I can't recall, except I am pretty sure it was only the Digifone side. It wouldn't have involved the Department. In fact, I was thinking about this last night, and I don't think Martin Brennan or Fintan Towey were ever in my office. All the meetings, the meetings with them always took place in the Department.

Q. Could any PR person have been present from the Department, do you think?

A. I suppose it is possible, I don't recall.

Q. All right. Now, I think on the, going back to your

memorandum just for a moment, moving onto the next document. On the 16th May of 1996, you received a telefax from Fintan Towey with a further draft of licence. And that is document sorry, I beg your pardon, a draft of Article 8 of the licence.

A. Yes.

Q. I think that is Document No. 19. I don't think we need to open that?

A. No.

Q. Okay. And I think also on the 16th May, you sent a telefax to Martin Brennan containing a draft press release which he appears to have requested from you and, and that is Document No. 20. We might just have a look at that?

A. Yes.

Q. And in it you say that, and as you say, things were fairly hectic for you, and this is you sending a telefax over to Martin Brennan. It is marked 'urgent'. Before we just look at the document, why do you think that Martin Brennan would have requested this from you?

A. I think probably I would have mentioned to him, perhaps in a telephone conversation or similar, that Eileen Gleeson had prepared a press release, or maybe just casually mentioned it to him and he may well have said 'Oh, I would like to see that.' and it would just have gone on the list of things to do.



Q. Right. Let's just look at that now. And it is dated the 16th May, "Esat Digifone" we will leave out the "signs GSM License". Somebody you have a circle I think around it, do you, or is that

A. I think it is me, yes.

Q. "The Minister for Minister for Transport Energy and Communications, Michael Lowry, and the Chairman of Esat Digifone, Denis O'Brien, have signed the licence giving Esat Digifone the go-ahead to operate Ireland's second mobile telephone service and Esat Digifone announced that it is well on target to launch the new service in the last quarter of this year."

Then there is a square bracket and a question-mark?

A. I think I am just querying whether Denis would sign the licence, indeed he didn't. It was a Statutory Instrument by the Minister.

Q. Right. "Esat Digifone also confirmed details of its shareholding structure. Esat Telecom Holdings Limited (a wholly-owned subsidiary of Communicorp Group Limited) holds 40% of the shares. Telenor Invest AS (a wholly-owned subsidiary of Telenor, the Norwegian telecommunications operator) owns 40% of the shares, and IIU Nominees Limited, (a wholly-owned subsidiary of Internation Investments & Underwriting Limited) holds the remaining 20% of the shares on behalf of Mr. Dermot Desmond.

"IIU has stated that this shareholding or part thereof

may be placed with additional investors at some future time. This will be reviewed when Esat Digifone is operational towards the end of the year.

"The shareholders listed above have each contributed to the investment made in the network to date, and will each discharge its" and you have a correction there "financial responsibilities to the entire investment required for the project, which is in the order of €120 million. This funding will be provided by equity from the shareholders and by debt financing. ABN AMRO and AIB banks have been appointed lead bankers to arrange the project financing.

"Esat Digifone has been proceeding with the development of its network since October last year and is on target to launch the service to the public during the last quarter of this year. The service will, from day 1, reach 80% population coverage, rising to 95% population coverage within a further nine months of launch. These levels will exceed the quality and population coverage requirements as required within the tender.

"There are nearly 100 people already working on the launch programme, including network roll-out, establishment of the customer care centre, sales and marketing plans, and on service and product development. The company will employ over 300 people at launch stage, rising to over 500 at maturity.

About half of these jobs will be based at the Esat Digifone national customer care centre in Limerick, with the remainder at headquarters in Dublin and a small number in regional centres.

"Esat Digifone intends to locate its national customer care centre at Plassey National Technology Park in Limerick, while the company has also taken three floors of the former Bord na Mona headquarters building on Dublin's Baggot Street to serve as its national headquarters.

"Esat Digifone's has joint Chief Executives, Mr. Barry Moloney and Mr. Knut Digerud. Mr. Moloney has just recently joined Esat Digifone having been..." and it's a profile of Barry.

"Mr. Digerud has been with Esat Digifone through the preparation of the bid and the initial establishment of the company. He was previously..." And again, a profile of him.

"Significant contracts have been awarded by Esat Digifone for the infrastructure and equipment required for the network. Nortel will supply and install all radio and switching equipment required for sites around the country. Nortel were awarded this significant contract following a comprehensive tender process. Irish software and services company called Edacon, has been contracted to supply, in conjunction with Nortel, messaging and security platforms for the

network. And Siemens Limited have been awarded the contract to provide the radio transmission network, which comprises a high-capacity backbone network enabling Esat Digifone to connect every base station in the country back to its main exchange."

And then for further information it is referred to

Ms. Gleeson. I take it that was prepared by

Ms. Gleeson and not by you, was it?

A. Yes, yes.

Q. Was that ever actually released, do you know?

A. I have no idea, I am afraid. I presume it was.

Eileen was quite efficient, but I wouldn't have had any involvement in it.

Q. I am just wondering

A. I only got it probably because Martin had asked me for a copy and I would have asked Eileen. She wouldn't necessarily have even sent it to me otherwise, I expect.

Q. Right. You can't throw any light. You know when Ms. Gleeson sent you the draft press release and the questions and answers?

A. Yes.

Q. And in her covering note she indicated that the Minister's advisers were for the issue of some form of press release, but that Mr. Loughrey appeared to be against it?

A. I am not sure that she was you could well be right,

but I am not sure she was talking about whether there should be a press release. I think she was speculating on the days. I think she was saying that she and the Minister's advisers wanted to go that day, the 15th, but Loughrey didn't. I could be wrong in that, I wasn't a party to it.

Q. That is helpful. That is your

A. When I read it, that was my feeling from it.

Q. your feeling?

A. Yes.

Q. That the Minister, so far as she was informing you, you understood the situation that the Minister and his advisers would have gone with the press release on that day, but that Mr. Loughrey didn't want to go that day?

A. That was my understanding, yes.

Q. We will come back to that, Mr. O'Connell.

Now, I think also on the 16th, this was the same day, you attended a rehearsal meeting for that day's press conference and you made notes of that, isn't that right?

A. Yes. And I think this may well be the meeting at which I also made notes against the questions, the handwritten notes against the questions.

Q. I see.

A. I think I may have got the questions the previous day, made my initial notes on them, not had a meeting

about that day, but then had a meeting the following morning, and that these are the notes of the meeting which should be read together with the

Q. With the handwritten

A. the lighter handwritten notes on the questions and answers.

Q. I see. We will just briefly just go through the notes. Can you remember who was at this particular

A. No, and it is odd that I didn't put down the initials; I usually do.

Q. Well, where do you think this was held? Do you think it was held in

A. I did say earlier that I had a vague recollection of the meeting being held in my office, and if this is the same meeting, I think it must have been in my office, but I would have had the practice of putting the word "here" at the top in such circumstances, and I don't do it on this note so I can't be absolutely certain.

Q. Right. Could this be the meeting that was suggested could be a joint meeting by Martin Brennan and Fintan Towey on the 13th? Do you remember you had a meeting on the 13th with them and they

A. I don't think there was such a meeting.

Q. You don't think there was such a meeting?

A. I don't think so. I think we just ran out of time on it.

Q. Right. Anyway the notes reads: "Rehearsal for press conference. When did Telenor and Esat get together?

And re delay." That is re the postponement of the competition, isn't that right?

A. Yes.

Q. And this second half crossed out, I think, is that right?

A. Yes.

Q. "April 1995." That would have been information you were receiving from somebody at the meeting, I take it?

A. Probably, yes. Yes, most likely.

Q. "Whether ready to put in bid?" And then, "certain 9 May." "April" in quotation marks "is answer"?

A. That relates to when Telenor and Esat got together. I think there had been informal discussions in April, but there was a formal meeting and I think there was some correspondence dated the 9th May so we were sure it was then.

Q. Yes. Because when you put something in quotation marks, can I take it it is something somebody is saying at the meeting; it is not your own

A. Usually, but not necessarily there, because I am putting quotation marks around the answer that will be given to the question.

Q. I see. So, in any event, the note is, "April is answer"?

A. Yes.

Q. "Were ready 23rd June. Felt penalised. Better prepared." What does that mean?

A. That is that refers back to whether we were ready to put in the bid. And it is saying we were ready on the 23rd June. We "felt penalised", meaning we felt penalised by the delay which was announced. And we were "better prepared", meaning better prepared than other consortia.

Q. As of the 23rd June?

A. As of the 23rd June.

Q. All right.

"Team disappointed. Added 500K to cost. Keeping team together. One new competitor."

And then you have underlined "Arve". Does that indicate that Arve, Mr. Johansen was present at this meeting?

A. No, I think it just indicates that he was to give that answer, but it quite likely indicates that he was there as well because we mightn't have penciled him in to give the answer unless he was there to agree. Arve Johansen was in Ireland, I think, at this stage because he was certainly going to be, he had to be there to sign the Shareholders Agreement and so forth, so he could well have been there.

Q. Yes. "Delay in licence. Government/State." So this is?



A. This is us saying that it was their fault.

Q. Yes. Then "DOB contribution"; is this suggested to be a contribution from DOB or is it DOB making a contribution to this meeting?

A. I think it is suggested to be DOB's contribution to the press conference. As with Arve he could have been there, or possibly wasn't.

Q. "I wish to scotch the persistent rumours on this. The licence fee has been paid. Millions have been spent by the company to date, almost entirely out of shareholders' funds. Little or no bank funding to date. All of Esat Telecom Holdings' share of the funds have been paid. Arrangements among the shareholders have been concluded to everyone's satisfaction and are working."

That seemed to be something that took a little bit of work putting together, would you agree?

A. Yes, probably.

Q. Because am I correct that on this particular question in the list of questions submitted to you by Ms. Gleeson, and where you added in the final handwritten question about Denis O'Brien's state of preparedness in terms of funding, and I think your view on the handwritten note was that this was make or break legally and politically?

A. Yes.

Q. So the question of whether Denis O'Brien or his side,

I am not talking about Mr. O'Brien personally, but we are using the short answer "DOB contribution"; who would have been involved in this discussion, because we know as of this moment the Shareholders Agreement had not been signed?

A. Yes.

Q. And all the side letters had not been executed. So as of this time Mr. O'Brien was not in a position to make his contribution, isn't that correct?

A. Yes, certainly, but we knew that before the licence could be signed the Shareholders Agreement had to be signed.

Q. Would have to be signed and all of the other details

A. Yes, that was an essential requirement.

Q. An essential requirement?

A. So that when we were rehearsing for the press conference, we could be absolutely certain that at the time the press conference was being delivered the Shareholders Agreement would be signed.

Q. I understand.

A. As to whose contribution that is, some of it seems a bit, slightly, in my style. The first sentence could be Eileen Gleeson. "Scotch persistent rumours" wouldn't be my type of phrasing, but it could have been anyone there.

Q. Yes. I suppose your own note, "if fudge no lies", it

is carefully prepared, would you agree?

A. Yes.

Q. So as to ensure that there are no lies told?

A. Yes.

Q. It could be viewed as a fudge?

A. Yes, it could.

Q. Yes.

A. But many press releases could be viewed as...

Q. Yes, I understand. And then you say, the final note

is: "Is this the same consortium as that that

applied?" That is just the note. And there is no

further note about that?

A. No, I don't seem to have prepared any answer on that,  
or at least written down one.

Q. Now, I think, returning to your memorandum, you say

that on the, at approximately 11:30 in the morning on

the 16th you received from Regina Finn a draft of

Article 18 of the licence dealing with windfall gains.

That is Document No. 22. Again, I don't think we need

to concern ourselves with it.

A. No.

Q. At 11:55 a.m. on the 16th May you met Martin Brennan,

Fintan Towey and Donal Buggy. The meeting appears to

have dealt with last minute arrangements for signing

of the licence. That is Document No. 23. I think

this is the one where you wondered whether the

inclusion of Mr. Buggy's name as being present, is

that correct, is correct or am I

A. That was an earlier meeting.

Q. Do you think that Mr. Buggy was at this particular meeting?

A. I think so because I noted him there.

Q. You noted him there?

A. Actually this is where Martin asked me for the press release; I have a note of that.

Q. Right. I see. And the note "Knut has to be there. Michael Walsh ought to be there." I think does that mean they should be there for the press conference?

A. Yes. This was very much seen by all, I think, as a media event, a public event.

Q. Yes. "Have told you a lot about this company more'." Do you know what that might be about?

A. It seems to be somebody suggesting that in partial reply to an inevitable question about Esat Digifone structure funding or ownership, he should be given or the answer should be given by saying I told you an awful lot about this already.

Q. Yes. "Loves answer re 500K." That is the extra 500,000 it cost in relation to the delay?

A. Yes, and it is probably me recording that Martin Brennan liked it.

Q. Yes. And then, "Seamus Brennan, Dail Minister to guarantee re coverage geographically and quality. Dail tonight." Do you know what that is about?

A. It seems to be somebody saying that the, that Seamus Brennan had possibly put down a question for the Dail about geographical coverage or the quality of it.

There was a lot of, I suppose, public unrest at this time about the quality of the Eircell network which was perceived to be bad.

Q. "Wants formal press release." You think that is where he is asking for the

A. That could be Martin asking me for it.

Q. "Still looking at letter." Is that the letter that you brought with you on the 13th May?

A. No. I suspect that's the Minister's side letter about the transfer of shares.

Q. Right. Could it be a draft of the side letter of Telenor and IIU underwriting the company, effectively?

A. Yes, it could be that either. There was a series of letters to be delivered with the licence. The one about which there was most discussion and negotiation was the side letter about the shares, the transfer of shares, so that is why I thought it might have been that but it could have been the other one.

Q. Yes. "Very urgent re Shareholders Agreement."

A. The Department were insisting that the Shareholders Agreement hadn't been signed and were disturbed that it hadn't and were just pressing that point.

Q. "Still on for 3:30." I take it that is the press conference?

A. Yes, the signing and the press conference.

Q. The signing. "Printing stage," that is the licence is being printed?

A. Yes, I think so.

Q. "Minister's press release need now."

A. That is probably me saying we need their press release just as they need ours.

Q. "Accountant, Department of Finance 15,000."

A. We were holding the money, William Fry, and I would have asked

Q. Who was it to be paid to?

A. who it was to be paid to.

Q. Yes. Now, I think you say that on the 16th May, again, 1996, you sent a letter to Martin Brennan, Fintan Towey and Donal Buggy enclosing a revised draft side letter relating to Article 8 of the licence and referring to a meeting which you had the previous night with, that is the 15th, at which counsel appears also to have been in attendance. That is Document No. 24?

A. Yes. I have put all these documents which relate to the 16th May, and there are half a dozen-odd. Where I have a time on a fax sheet or similar or I have noted a time on

Q. You put the date, the time?

A. The others I just put in, I suppose, more or less at random, they could belong anywhere in the sequence.

This could have, for instance, been before the meeting  
he have just looked at.

Q. I don't think we need to necessarily open any of this,  
because what you are enclosing is the draft that was  
agreed at the meeting the previous

A. Yes, I think that was probably first thing. In fact,  
I see it is an 8:36 a.m. draft in my office.

Q. The first that went out that morning?

A. Yes.

Q. And I think on the 16th May, 1996, you sent a copy of  
the Esat Digifone Shareholders Agreement as signed to  
Martin Brennan, together with a letter signed by  
Telenor Invest AS and IIU concerning potential funding  
shortfalls. And that's Document 25, is that correct?

A. Yes.

Q. Now, the first document, it is just your letter  
enclosing them, isn't it?

A. Yes, and confirming that the only changes that were  
made were those discussed

Q. I beg your pardon, I will just quickly run through it.

"Dear Martin,

"I have enclosed a copy of the Shareholders Agreement  
as signed. I have had it confirmed to me by the  
solicitors representing the three shareholders, that  
is in the form given to you last night, subject only  
to the amendments discussed then (i.e. no amendments  
have been made today except as discussed with you last

night).

"I also enclose a letter in the agreed form, signed by Telenor Invest AS and IIU, concerning potential funding shortfalls."

That is the reason why I asked you whether your note of the meeting on the previous evening with Martin Brennan or the previous day with Martin Brennan might have been

A. My note, I think, was the same day.

Q. The same day?

A. Yes, it could well have related to it, though, yes.

Q. Whether they were, you had given him a draft of the Shareholders Agreement and a draft of this letter?

A. Yes, it is certainly possible.

Q. And they were still looking at that. It is possible, isn't it?

A. Because that letter is clearly after the meeting. At the meeting he was still pressing me for the Shareholders Agreement.

Q. Yes.

A. So here I am sending it to him. So quite likely the letter is the same one.

Q. Yes. Now, if we just look at the letter that was signed by Telenor and IIU, it is addressed to the Department and it refers to Esat Digifone Limited, the company, and it reads:

"Dear Sirs,



"Telenor Invest AS and International Investment and Underwriting Limited hereby confirm that in accordance with the terms of the Shareholders Agreement governing the company they have agreed to make good, or to procure that there is made good, directly to the company, pro rata to their shareholding in the company, any shortfall which may arise in respect of the financing commitment of Communicorp Group Limited (through its wholly-owned subsidiary Esat Telecom Holdings Limited) to the equity requirements of the company limited to the amounts specified in the business plan lodged with the tender.

"We believe that you have already been provided with satisfactory assurances concerning the ability of the undersigned to meet their foregoing commitments."

So what you were furnishing to the Department was this letter to inform the Department that any inability on the part of Telecom Communicorp Group, through Telecom Holdings Limited, would be met pro rata by these particular shareholders in the company, isn't that correct?

A. Yes, in accordance with the terms of the letter.

Q. And then I think on the afternoon of the 16th May you attended at the Department, the licence was signed by the Minister and a press conference held. You took a very short note, which is enclosed at Document No. 26 and you also enclosed Document No. 27, a copy of a

side letter as signed by the Minister.

A. Yes.

Q. If we just go to Document No. 26 first. That is just a note you made at the press conference?

A. I think the press conference was much longer than this would indicate. I think I began taking notes more or less out of habit and simply got bored, I didn't regard it as terribly significant to me.

Q. Yes. Then it starts off, "ML" I presume is Michael Lowry?

A. Yes.

Q. "Unanimous decision. Questions conclusively responded to. Competition fully respected.

"Signed, dated timed.

"Top table" you have noted there is Mr. Loughrey, Mr. Lowry, Denis O'Brien, Arve Johansen and Michael Walsh. Then JCF, I presume that is John O'Callaghan, is it?

A. I think they were all standing to the side.

Q. "KD" Knut Digerud, Barry Maloney?"

A. I don't see the question-mark.

Q. Sorry. Yes.

A. Maybe there is.

Q. "And MBR"?

A. Martin Brennan.

Q. Martin Brennan, yes. Then you list some of the questions; these were questions that were put, I

suppose, at the conference.

"Why so long? First kind very comprehensive. Complex process. Prudent and cautious process."

So this is what you describe as the first time that this type of process has taken place in Ireland?

A. Yes, I think so.

Q. Then, "DOB whether 120 million has changed from previous 100 million.

"Plan said 124 million total investment.

50 million. Questions re money. Planning?"

A. I think that is planning permission. There was an issue about the masts.

Q. Then there is a note: "Looking good, not an easy ride." Is that your own comment?

A. No, I think that is the answer to the planning question.

Q. I see. "Will meet objective - 80% of population by start-up." Then Knut Digerud and Barry Moloney were introduced?

A. Yes. They were the joint Chief Executives.

Q. Yes. Now, you also enclose, of course, the letter from the Department addressed to Mr. Digerud dated the 16th May. And it reads:

"Dear Mr. Digerud,

"I refer to the grant of the licence to your company.

This letter is written for the benefit of present and future direct shareholders of the licensee.

"The Minister hereby confirms that consent in respect of applications made for consent under Article 8 of the licence will be forthcoming provided circumstances described below apply thereto.

"The circumstances referred to above are that the application relates either:

"1. To issues of shares by the licensee to direct shareholders or;

"2. To transfers of shares by the licensee to direct shareholders.

"Provided that no such issue or transfer (either individually or cumulatively) results in the aggregate shareholding of Telenor Invest AS and Esat Holdings Limited ceasing to amount to voting control of the licensee.

"For the purposes of this letter:-

"A. Direct shareholders are Telenor Invest AS, Esat Holdings Limited, IIU Nominees Limited, as trustee for Mr. Dermot Desmond, and any other person or company acquiring a direct shareholding in the licensee; in accordance with this letter or another consent issued pursuant to Article 8.

"B. 'Voting control' in relation to a company, means the ability to direct the manner in which a majority of votes capable of being cast at a general meeting of the company are cast or appoint the majority of the Board of Directors of the company or both."

And it is signed by Martin Brennan on behalf of the Department, isn't that correct?

A. Yes.

Q. Now, I think that is the end of that particular memorandum, isn't that correct, and the documents you have enclosed?

A. Yes.

Q. I think you furnished a further memorandum to the Tribunal dated the 9th December, 2002, isn't that correct?

A. Yes.

Q. Now, I think you furnished this memorandum in response to something which was said in the Opening Statement; it wasn't as a result of a request from the Tribunal, isn't that right?

A. That's correct. I think it has been opened by you before, Mr. Coughlan.

Q. Well, I opened it in full in the Opening Statement because I was asked to do so by Mr. McGonigal, I think, because the length of time that would elapse between the statement or the Opening Statement and you giving evidence?

A. I see.

Q. Now, I think in this memorandum you say that "on the 9th October, 2002, Mr. John Davis, the Tribunal solicitor, wrote to me inquiring as to the person from whom I received instructions in relation to a letter

written by me on the 20th June, 1995 to Miss Helen

Stroud of Baker and McKenzie Solicitors.

"The date upon which I received those instructions and the source or sources of the information comprised in my instructions. The information in respect of which the sources were queried amounted essentially to four statements:-

"A. The European Commission had objected to the auction concept inherent in the licence competition.

"B. The terms of the competition were to be revised.

"C. The revision would provide for either no upfront payment or a maximum cap thereon. And

"C. The timetable for the competition was expected to be extended by about two months.

Paragraph number 2, you state in your memorandum: "In my letter to the Tribunal of the 11th and 16th of October, 2002, responding, in both cases, to Mr. Davis's letter of the 9th October, I stated that

"A. I have no direct recollection either of the person from whom or of the date upon which I received the instructions which enabled me to refer in any letter of 20th June, 1995, to Miss Helen Stroud to the information summarised in paragraph 1 above.

"B. I had no direct recollection of the source or sources of the information comprised in the instructions, and

"C. A review of the relevant files did not locate

either any written record of my receipt of instructions or anything which was of assistance to me in recalling the source or sources of the information comprised in my instructions.

"These statements are true and correct responses to the questions raised in Mr. Davis's letter of the 9th October.

"3. Since giving my responses, I have read transcripts of the Opening Statement being delivered by Counsel to the Tribunal, which statement is still in course of delivery at the time of preparation of this memorandum. I wish to make it clear that,

"A. A letter such as that written by me on the 20th June, 1995, to Miss Helen Stroud would invariably be written in compliance with instructions received by me from my clients and would convey information received by me from my clients. I would not write or have written such a letter upon my own initiative without receiving instructions to do so and I would not include in any such letter factual or speculative information of the kind referred to by Mr. Davis unless it was given to me by my clients and/or confirmed by them, and

"B. The client on whose behalf I wrote the letter of the 20th June, 1959 was Communicorp Group Limited and the executives of Communicorp Group Limited from whom I was accustomed to receiving instructions at that

time were Mr. Denis O'Brien, Mr. Peter O'Donoghue and Mr. Jarlath Burke.

"It is likely that the instructions and information referred to were given to me by one or more of those persons.

"4. Since reading transcripts of the Opening Statement being made by Counsel to the Tribunal, and since reading and hearing some of the implications and inferences of impropriety, including a possible breach of confidentiality on the part of the Project Team, made and drawn therefrom in media reports, I have carried out further research into the matter and feel that the Tribunal's attention should be drawn to the following:

"A. A press report up and on the date of my letter of the 20th June, 1995, contained statements from which all of the statements listed at A to D above could fairly have been inferred. I append to this memorandum some samples of those reports. It does not appear to me to be the case, therefore, that the possession of that information by my clients necessarily leads to the conclusion that there had been any impropriety or a breach of confidentiality by any person."

I will open those in a moment, Mr. O'Connell.

A. Yes, Mr. Coughlan.

Q. "B. I am aware from documents in the possession of



the Tribunal that Mr. O'Brien and Mr. Ed Kelly of Communicorp Group Limited had a meeting on the 19th June, 1995 with Mr. Martin Brennan and Mr. Fintan Towey at which matters relevant to the informational question were referred to. Although, I am also aware that minutes of the meeting prepared by or on behalf of Mr. Brennan and Mr. Towey do not record the revelation of the specific information referred to by Mr. Davis. However, Mr. Brennan and Mr. Towey specifically directed Mr. O'Brien and Mr. Kelly to examine media reports of the matter and to draw their own conclusions.

"C. I have learned from documents furnished to me from the Tribunal that at a meeting on the 20th June, 1995, with Mr. Condon of the Persona consortium, Mr. Brennan or Mr. Towey was minuted as saying that the closing date for the competition would be delayed by seven or eight weeks; this delay being one of the items of information whose source was queried by Mr. Davis.

"D. I am aware that at the time in question Mr. Burke had a good relationship with officials of the European Commission engaged in the communications sector and frequently obtained information from them as to developments in the sector and their intentions in regard thereto.

"5. Arising from all of the foregoing and subject to

the qualifications that I have already stated, I do not have a direct recollection of these matters, nor records that would assist my recollection thereof. I regard it as:-

"A. Certain that I received information and instructions from Communicorp Group Limited pursuant to which I wrote the letter of the 20th June, 1995.

"B. Very likely that the information and instructions were given to me by one or more of Mr. O'Brien, Mr. O'Donoghue or Mr. Burke:

"C. Likely that the source or sources of the information was or were any one or more of:

1. Press reports published up to and upon the date of my letter, all of which appeared in the Irish press, and would not have been available to Miss Stroud who lived and worked in London, and/or

"2. An unminuted comment made to Mr. O'Brien and Mr. Kelly by Mr. Brennan or Mr. Towey during the meeting of the 19th June, 1995, perhaps similar to the statement made by one of them on the following day to Mr. Condon, and/or

"3. Comments made or documents provided to Mr. Burke by a contact or contacts in the European Commission."

Now, I think if we just look at the first of all, at the time you wrote the particular letter on the 20th June, and we will be coming back to it, you were not privy to what took place at a meeting between

Mr. Condon and Mr. Brennan and Mr. Towey?

A. No.

Q. So we can exclude that as a source?

A. Yes.

Q. Or sources?

A. Yes.

Q. You very correctly say that you would not have written the letter without receiving instructions to do so?

A. Yes.

Q. Yes. And the probability is, or sorry the certainty is that you received instructions from Communicorp Group Limited; they were your client?

A. Yes.

Q. And the probability is that you received those instructions from either Mr. O'Brien, Mr. O'Donoghue or Mr. Burke?

A. Yes.

Q. Who, again, would not have been privy to your knowledge, at least anyway, of anything that transpired at a meeting between Mr. Condon and Mr. Brennan and Mr. Towey?

A. No.

Q. And we have seen the minute of the meeting between Mr. O'Brien and Mr. Kelly, Mr. Brennan and Mr. Towey and there is no references in that particular minute, isn't that correct?

A. Yes.

Q. And I think Mr. Brennan and Mr. Towey have given evidence to the effect that they wouldn't have imparted such information?

A. Yes. If I could explain the reason I was making the point about Mr. Condon was that they did the following day.

Q. I understand. I am not criticising. I am just trying to you don't have a recollection about this. But so can we take it that then the potential sources are the press reports, just by and/or information which Mr. Burke might have obtained in Europe?

A. Yes, most likely.

Q. Most likely. Just to be clear about one thing, can I take it, Mr. O'Connell, that you know that there has been evidence given at this Tribunal about a letter from Commissioner van Miert to Mr. Lowry and which, a page of which was found on documents of Mr. Burke's?

A. I remember reading reports of it but I am not familiar with it at this moment.

Q. I

A. I couldn't put a time on it.

Q. But can I take it you never saw that?

A. No, I don't think so..

Q. Now, if we just look at the newspaper articles for a moment. And the first one is, I think and you very kindly prepared an appendix also, is the Sunday Business Post of the 26th March, 1995, isn't that

correct?

A. Yes.

Q. And that you highlight: "The European Commission may move to scupper Government plan to raise up to 45 million from the award of the second cellular mobile licence in Ireland. The Commission is becoming increasingly anxious about Member States imposing discriminatory licence fees on new cellular network operators.

"A senior Commission official said the Irish Government was warned about imposing a hefty licence fee last January."

I think that is the reference you refer the Tribunal to, isn't that correct, that particular newspaper article?

A. Yes, and the Minister's subsequent comment.

Q. Yes. Now, the second newspaper article you refer the Tribunal to was in the Irish Independent on the 17th June, 1995, isn't that correct?

A. Yes.

Q. And I think in the Appendix what you refer the Tribunal to specifically is that portion which says: "Minister Lowry said the EU was objecting to a situation where the country's second mobile operator would have to pay an application fee of up to 25 million." I think, isn't that correct?

A. Yes.

Q. And also they are effectively saying that if you are going to charge a fee to the new operator, you are going to have to charge one to the existing Eircell operator.

A. Yes.

Q. The next newspaper article you refer the Tribunal to was one in the Irish Times on the 17th June of 1995, isn't that correct?

A. Yes.

Q. And I think what you specifically referred the Tribunal to there is that portion of the article which contains the phrase, "One approach would be to set a maximum level for the fee at a substantially lower figure, leaving the licence to be decided on the basis of the quality of service the new operator would offer."

And, "The Minister remained confident that the winner will be selected this year. And the EU may also suggest that Eircell be faced with paying a charge similar to the new operator to ensure fair competition. In most EU states second licences have already been issued with no charge levied on the existing operator."

I think that is the information you draw the Tribunal's attention to?

A. Yes.

Q. And then the final, finally you refer the Tribunal to

two matters which were contained in the Irish Times on the 20th June of 1995?

A. Which was the day the letter was written.

Q. Which was the day the letter was written. Well, it was the day the letter was dated?

A. Yes.

Q. "The deadline for bids for Ireland's second mobile phone licence is likely to be extended by at least two months, sources in the Department of the Communications confirmed yesterday. The European Commission expressed a strong dissatisfaction with the terms of the licence. Specifically it said that the instance of an upfront payment expected to be in the region of  $\text{€}15$  million to  $\text{€}20$  million gave an unfair advantage to the existing operator, Telecom Eireann. The new provisions were agreed with the Commission, this payment is likely to be set at maximum level, thus removing the auction element of the second licence. Department sources said, "The new capped payment is likely to be considerably less than  $\text{€}15$  million."

And those are the portions of the extracts from the newspapers you wish to draw the Tribunal's attention to?

A. Yes.

Q. I will come back to the letter you wrote to Baker McKenzie in due course when I review the

correspondence dealing with Advent?

A. All right.

Q. But just, could I ask you this: Who gave you these newspaper articles around the 9th of December, 2002?

I take it you didn't go out and do the research work yourself?

A. We have, within William Fry, books of media coverage of this matter throughout the period under inquiry by the Tribunal which we assembled some years ago and when I read newspaper stories on and around December I, I myself went through those books and researched the media sources.

Q. So do you have all newspaper cuttings dating back to the competition?

A. I couldn't say we have them all but we have a great many.

Q. Yes.

A. And radio transcripts.

Q. All of that period? Of the competition period, I mean?

A. Yes.

Q. Now, I will come back to deal with that in the correspondence dealing with the Baker McKenzie and the Advent matters in due course?

A. Right.

Q. Sorry, before I do; do you have any recollection of Mr. Jarlath Burke informing you that he had received



any information from the European Commission about the GSM competition?

A. I don't have a specific recollection, no.

Q. Or do you have any specific recollection of anybody else informing you that they had received information from Jarlath Burke about the GSM competition?

A. No.

Q. And I don't want to quibble with you, but when you say you have no specific recollection, you have no recollection?

A. I have no recollection. The reason I added the word 'specific' is that Jarlath was frequently very informed about matters occurring within the European Commission and he would sometimes talk to me about what was happening.

Q. Yes.

A. And I would have a general recollection of a number of conversations with Jarlath on the phone or face-to-face over the years at which he would have told me what he thought was going on in the Commission and what they were likely to do next on a particular issue, more often on the fixed line side of the business rather than mobile.

Q. Yes, that was what I was thinking, it was on the fixed line side?

A. Mainly on the fixed line side, yes.

Q. Now, I think you have prepared a further memorandum

dated the 15th August, 2003, and it is to deal with

the specific matter, I think, isn't that right?

A. Yes.

Q. And if I just open the memorandum. It commences that

you have no direct recollection of preparing a draft

letter dated the 7th (sic) November, 1995 I beg

your pardon, the 17th November, 1995, for Mr. Denis

O'Brien to Mr. Martin Brennan enclosed with a telefax

of the same date from Mr. O'Connell to Mr. O'Brien,

nor do you have any direct recollection of the

circumstances surrounding the preparation of the draft

letter, except being in a very general sense.

You have reviewed your records in relation to Esat

Digifone at the time and you have informed the

Tribunal that at a meeting on the 9th November, 1995,

between Esat Digifone representatives and Government

representatives, it was made clear by Mr. Andersen

that Esat Digifone's ownership and any changes therein

were among numerous matters to be dealt with during

the impending licence negotiations. This matter, the

matter was in fact dealt with several months later.

You have informed the Tribunal that on the 17th

November, 1995, RTE news reported that "Dermot

Desmond's IIU" was involved in placing up to 20% of

Esat Digifone. The draft letter to which the

Tribunal's inquiry relates was written about two hours

before the news report. And you surmise that a call

may have been placed by RTE to Mr. O'Brien for comment before the report was broadcast.

You further surmise that Mr. O'Brien, while probably made no comment, none having been referred to in the news report, may have believed that he would wish to do so subsequently. You surmise that presumably being aware that ownership was to be addressed in the future, Mr. O'Brien may have considered writing to the Department of Communications before making any public comment and may have asked you to draft a letter on his behalf.

You have informed the Tribunal that this information is based on a reconstruction from the records available to you, rather than any direct recall of events. Is that correct?

A. Yes.

Q. And if we just look at the draft letter for a moment.

Sorry, I beg your pardon, if we just look at the fax first, I beg your pardon. And it is from you, the fax is from you to Denis O'Brien and it says "draft letter follows"; isn't that correct?

A. Yes.

Q. And it is dated the 17th. And then we look at the draft, which has your computer note on the top of it, isn't that correct?

A. Yes.

Q. "Dear Martin,

"I am writing to confirm our conversation of today concerning shareholdings in Esat Digifone.

"Esat Digifone is, and will continue to be, owned and controlled by Esat and Telenor. Esat is in turn owned mainly by myself and Advent International; it is likely that in the course of funding the GSM project, we will introduce new institutional finance, and indeed, we are already negotiating this with CS First Boston. Telenor is, of course, the Norwegian national Telecom operator.

"Our bid made it clear that Esat Digifone would also seek minority financing by public and institutional investors. In preparing for this financing, we have been advised by International Investment and Underwriting Limited, who have also agreed to underwrite the finance, i.e., to locate investors on behalf of Esat Digifone and itself to take up any shortfall.

"Given the fact that IIU is publicly identified with Dermot Desmond, some publicity may ensue. I thought it important that the facts of the matter should be made clear, of which the most important seem to me to be firstly, that Esat Digifone comprises and is controlled by Esat and Telenor, and secondly, that IIU are its advisers and underwriters.

"If you would like any further details, please let me know; in any event, our on-going licence discussions

will, as you have made clear, cover the question of present and future control of Esat Digifone."

"Yours sincerely."

I think we can come back to that particular letter when we look at matters which transpired the whole way through from August, September of 1995 right through to May 1996?

A. Yes.

Q. All right. Is that all right? The only thing I would ask you about the letter at the moment is that the first paragraph seems to indicate that you had been informed by Mr. O'Brien that he had had a conversation with Martin Brennan the previous day, isn't that right?

A. It does, but I suspect that there was no such conversation.

Q. Or of today?

A. Yes, but I suspect there was no such conversation.

Q. Why? Why would you so suspect?

A. Because I think if he had sent the letter he would first have rung.

Q. Right.

A. If he decided not to send the letter, as I think he probably did decide, he wouldn't have rung. In other words, he was anticipating ringing Martin Brennan to talk this over with him and then follow-up with a confirmatory letter. I think on the assumption, which

I believe to be the case, he never sent the letter, he probably never made the call either.

Q. Do you have any idea as to why the letter wasn't sent or what discussion took place that caused it not to be sent?

A. I don't have any, I don't have any knowledge of why.

I suspect it was because as far as he was concerned or he believed, Martin Brennan was aware in very vague general terms from the letter of the 29th of September, of IIU's involvement, and anticipated dealing with it through lawyers when it came to negotiating the licence, as he refers to, or as I refer to, rather, at the end of the draft letter.

Q. Just, and we will be dealing with it in more detail; were you aware that that letter of the 29th September had been sent back to Mr. O'Brien at this time?

A. I think I was, yes, but I certainly wasn't aware that it hadn't been read by the Project Team.

Q. All right. Right. All right. Now, we will just, I think, now, turn to this is your final memorandum, I think, isn't that correct, the one dated the 20th October, 2003?

And you say, that this memorandum was made at the request of the Moriarty Tribunal contained in Mr. Michael Heneghan's letter to you of the 13th October, 2003, and a copy of his letter is attached at Annex 1. You say that Mr. Heneghan's letter addresses

differences between a draft letter prepared by you on the 10th May, 1995, the draft letter, addressed to Mr. Martin Brennan of the Department of Transport, Energy and Communications, the Department, and the letter sent by Mr. Knut Digerud to Mr. Brennan on the following day, the 13th May, 1996, the final letter.

The differences identified by Mr. Heneghan comprised the omission of an explanation for the involvement of International Investment and Underwriting Limited (IIU) in Esat Digifone, having regard to the prior involvement of Davy Stockbrokers and certain of their clients. As has been the case in memoranda previously furnished by you to the Tribunal, you have little direct recollection of the matters which this memorandum addresses, and it is accordingly based on a review of William Fry files from which you have assembled documentation which appears to be relevant.

You understand that all of the documentation has already been furnished to the Tribunal. It is not the case that there is a single file dealing with the matter to which the memorandum relates, and it has accordingly been necessary to assemble documentation from a number of sources. It is therefore possible that there are gaps in the narrative. And then you deal with No. 1.

On the 3rd of May, 1996, you attended a meeting at the Department in the company of Knut Digerud, Peter

O'Donoghue, Arve Johansen, Michael Walsh, and Paul Connolly. You all met with Martin Brennan, Fintan Towey and Regina Finn and a gentleman whose first name was Eanna, and I think that we now know that is Eanna O'Conghaile, I think.

Mr. Brennan, Mr. Towey and Mr. O'Conghaile were all officials in the Department, and you attach at Annex 2 a copy of your note of the meeting from which it is apparent that the Department's requirements as to documentation and information prior to the grant of the second GSM License to Esat Digifone was discussed.

And we have already opened that particular memorandum?

A. Yes.

Q. Yes. Paragraph No. 2 of your memorandum: Although your notes of the meeting are not comprehensive as to the Department's requirements, you believe that on your return to the meeting, you prepared a list of everything your return from the meeting you prepared a list of everything that was required and you attached a list at Annex number 3. And that is the housekeeping list?

A. Yes.

Q. You say, you would refer in particular to Item 4 of the list being IIU versus Davys etc., explanation.

Let me just look at that for the moment, I don't think we need to look at it; it is there.

You believe this recorded a requirement on the part of



the Department for an explanation of how the shareholding in Esat Digifone Limited then held by IIU Nominees Limited on behalf of Mr. Dermot Desmond had been substituted for shareholding originally intended to be taken up by four named clients of Davys stockbrokers.

A. Actually it is three named clients.

Q. And Advent is the fourth?

A. Yes.

Q. You also wish to refer to a memorandum, Annex No. 4, which you have, which you understand to have been written by Mr. Arve Johansen on the 4th May, 1996, the day following the meeting referred to above, in which he said at paragraph 6, "The ministry basically asked for help how to explain how we had substituted Advent, Davy Stockbrokers and other recognised named institutional investors in the bid, AIB Investment Bank of Ireland, Standard Life of Ireland."

You say it is apparent from your files that in the course of the ensuing ten days you spent time obtaining letters and documentation to meet the requirements listed by you on the 3rd May. However, the documents ultimately assembled and provided to the Department are not precisely the same as those listed on the 3rd May and it is also apparent from your files that a number of the documents obtained by you were the subject of discussion and amendment.

You have no written records or direct recollection of discussing the documents required, or their content, with anyone in the Department. Although, you think it likely that you did so probably by telephone with Mr. Fintan Towey. You have a general recollection of frequent contacts with Mr. Towey at this time. In effect, you believe that prior to May this was fine-tuned as the assembly process proceeded date. You have informed the Tribunal that on the 9th May, 1996, you met with Mr. Digerud and Mr. O'Donoghue at Esat Digifone's office. Your note of the meeting which is attached at Annex 5 records an intention to send information to Mr. Towey ASAP tomorrow the 10th of May, for review by Mr. Towey and his colleagues. The following day, 10th May, 1996, you sent the draft letter to Mr. O'Brien for his approval. You believe it likely that you also sent it to Mr. Digerud, who was to be a signatory, but you have no direct evidence or recollection of this.

The covering note accompanying the draft letter, Annex 6, refers to it as 'amended draft letter for Mr. O'Brien's consideration/approval'.

From this you infer that there was at least one previous draft of the letter, and you think it probable that it would have been sent, that it would have been seen by Mr. O'Brien, as well as Mr. Digerud and Mr. O'Donoghue.

Mr. Digerud was Chief Executive of Esat Digifone, and it is your recollection that he was in quite extensive direct contact with the Department at this time.

By fax note sent to you one and a half hours after your fax to him, Mr. O'Brien approved the draft letter with minor amendments. You draw the Tribunal's attention to the fact that the Tribunal's request for this memorandum did not contain the fax sheet with Mr. O'Brien's approval. You have no record of sending the draft letter or any listed documentation to Mr. Towey on the 10th May, but you think it possible that you did so having regard to the intention expressed in your note on the 9th May.

On the 13th of May you had the final version of the letter, which now omitted the IIU/Davy explanation referred to above engrossed, and Mr. Digerud signed it. Mr. Digerud and you brought a final letter with its enclosures to the Department, where you met Mr. Brennan and Mr. Towey. Your note of the meeting refers to a number of requirements expressed by Mr. Brennan, including a requirement for more information on IIU, especially financial information, but do not record any dissatisfaction by Mr. Brennan or Mr. Towey with the absence of the IIU/Davys explanation which had been requested by them on the 3rd May from the final letter.

It is accordingly your belief that at some point on

the 10th May, or possibly on the 11th or the 12th May or on the morning of the 13th May, the IIU/Davy explanation was deleted either by agreement with or at the request of Mr. Brennan and/or Mr. Towey. However, you accept this is a matter of supposition by you, for which there is only circumstantial evidence.

Arising from all of the foregoing, your specific responses to the questions raised by the Tribunal in Mr. Heneghan's letter are:

1. The final letter was requested, in effect, by Mr. Brennan at the meeting on the 3rd May. Your instructions to prepare it would have been implicit in the general instructions you had from Esat Digifone Limited, whose Chief Executive was Mr. Digerud.

Sorry, perhaps I will put the question first.

You were asked the person or persons from whom you received instructions to enable you prepare the draft letter.

And your response is: The final letter was requested, in effect, by Mr. Brennan at a meeting on the 3rd May.

I think we should pause there for a moment. It was also requested in the Department's official response, the letter of the 1st May, isn't that right, the full ownership detail?

A. Yes.

Q. My instructions to prepare it would have been implicit in the general instructions I had from Esat Digifone

Limited whose Chief Executive was Mr. Digerud, to do everything necessary to procure the grant of the second GSM License to Esat Digifone as soon as possible.

2. You were asked for details of all discussions which you had with your client or any person on behalf of your client or any person whatsoever in connection with the contents of the draft letter or any part of its contents, including the identity of such person or persons and the subject matter of such discussions.

And you have informed the Tribunal, the discussions recounted above are all those of which you have records or which you can recall.

You were then asked for your knowledge, direct or indirect, of the review of the possibilities available in the financial market referred to in the first paragraph of the third page of the draft letter.

And you inform the Tribunal that you cannot recall particulars of your knowledge of the possibilities available in the financial market referred to in the draft letter. However, you are certain that the draft was approved by Mr. O'Brien and probably by Mr. Digerud.

You were then asked for your knowledge, direct or indirect, of the agreement with IIU "initially to take up loan stock in lieu of shares in respect of the pre-placing element of its commitments" referred to in

the penultimate paragraph of the third page of the draft letter.

You have informed the Tribunal that you cannot recall your knowledge of this loan stock. However, at the time the draft letter was prepared there were negotiations underway between Communicorp Group, Telenor Invest and IIU to satisfy the Department's requirements that Esat Digifone should be owned at the time of the grant of the second GSM License in the proportions 40:40:20. You think it probable that at the time the draft letter was prepared, there was in existence a proposal whereby IIU would take up loan stock in lieu of shares. Such a proposal was not ultimately implemented. Rather, IIU sought 5% of Esat Digifone to Esat Holdings and Telenor Invest.

I think you were then asked for your knowledge, direct or indirect, of all factors, matters or considerations which caused or prompted your client or yourself to delete from the final letter all portions of the draft comprising the explanation of the involvement of IIU.

And you have informed the Tribunal, "I have answered this question largely on the basis of supposition in your description of events above."

I think you were then asked for your knowledge, direct or indirect, of all dealings between your client or any person on behalf of your client and the Department, or any person on behalf of the Department

in relation to the deletion from the final letter of the portions dealing with the involvement of IIU.

And you have informed the Tribunal that once again, you have given your supposition as to the answer to this question above.

And then the final question you were asked was, your knowledge, direct or indirect, of when and how such explanation was actually provided to the Department.

And you have informed the Tribunal, "I do not now when, whether or how the explanation set out in the draft letter was provided to the Department. However,

I have a general recollection that there were discussions in April/May of 1996 with Department officials as to the identity of Digifone's owners and as to whether they were in accordance with the information furnished by Esat Digifone in its bid for the second GSM License."

You believe it to be likely that in the course of those discussions, much of the information contained in the draft letter was communicated to the Department officials, although you doubt that the agreement by IIU initially to take up loan stock in lieu of shares was so communicated.

Now, if we just look at the letter which was sent or sorry, which was taken by you and Mr. Digerud to the meeting on the 13th, in fact, isn't that correct?

A. Yes.

Q. That is Document No. 1. And it is dated the 13th May, 1996, and addressed to Mr. Brennan. And it reads:

"Dear Mr. Brennan,

"I refer to our recent meeting and to your request for information concerning this company. I confirm that I am a director and the Chief Executive of Esat Digifone Limited.

I enclose the following:

"1. Letter from Telenor Invest AS concerning support for the project.

"2. Copy of a letter from Arthur Andersen & Co. in Oslo concerning the ownership and finances of Telenor Invest AS.

"3. Letter from Chris McHugh, secretary of International Investment and Underwriting Limited.

"4. Letter from Farrell Grant Sparks, financial advisers and auditors to Dermot F Desmond, the beneficial owner of International Investment and Underwriting Limited.

"5. Letter from Paul Connolly, director Communicorp Group Limited, concerning its ownership and interest in Esat Digifone Limited.

"6. Letter from KPMG, auditors to Communicorp Group Limited.

"7. Letter from ABN-AMRO Bank concerning our financing facilities.

"The company will, on or before the grant of its



licence, be owned as to 40% each by Telenor Invest AS (a wholly-owned subsidiary of Telenor AS) and Esat Telecommunications Holdings Limited (a wholly-owned subsidiary of Communicorp Group Limited) and as to 20% by IIU Nominees Limited (holding on behalf of Mr. Dermot Desmond). IIU Nominees Limited is a wholly-owned subsidiary of International Investment and Underwriting Limited (which in turn is wholly-owned by Mr. Desmond)

"I hope the above is of assistance."

And you had the various enclosures.

Now, if we just look at the draft which was prepared.

It seems to have been prepared, it was typed at least on the 10th May, 1996, at 9:28 a.m. or produced by the computer at that time, isn't that correct?

A. Yes.

Q. And, again, it is addressed to Mr. Brennan. And it is concerning Esat Digifone second GSM License.

"Dear Mr. Brennan,

"I refer to our recent meeting and now enclose the following:

"1. Letter from Telenor Invest AS concerning support for the project.

"2. Copy of a letter from Arthur Andersen & Co. in Oslo concerning the ownership and finances of Telenor Invest AS.

"3. Letter from Chris McHugh, secretary of

International Investment and Underwriting Limited.

"4. Letter from Farrell Grant Sparks, financial advisor and auditor to Mr. Dermot F Desmond, beneficial owner of International Investment and Underwriting Limited.

"5. Letter from Paul Connolly, director of Communicorp Group Limited, concerning its ownership and interest in Esat Digifone Limited.

"6. Letter from KPMG, auditors to Communicorp Group Limited.

"7. Letter from ABN-AMRO Bank concerning Esat's financial facilities.

"8. A letter from, blank, director of Esat Digifone Limited concerning its ownership."

Now, it then continues... "During our meeting you asked for an explanation of the involvement of International Investment and Underwriting Limited in this transaction, having regard to the prior involvement of Davy Stockbrokers and certain of their clients.

"As you know, the bid was made jointly by Telenor and Communicorp, who were accordingly responsible for its financing" then there is an arrow just "which were Mr. O'Brien's changes I think, is that correct, putting Communicorp first; it's neither here nor there "which was accordingly responsible for its financing. However, the bid also indicated an

intention to place 32% of the company" I think is that right?

A. Yes.

Q. "...with private and institutional investors (as to 20% immediately and 12% in the short to medium term). At that time, Davys and their clients had given conditional letters of intent in regard to funding 20% of the equity element of the investment but there was no legally binding commitment by them.

Throughout the period, prior to and after submission of its bid, Esat Digifone behaved consistently on the assumption that it would be awarded the licence, planning and spending accordingly. It was thought desirable to" and then "proceed and secure" again, is that a Mr. O'Brien

A. I think so.

Q. "...to proceed and secure the proposed 20% non-Telenor/Communicorp funding. And in addition, Communicorp wished to improve its financing arrangements for its share of the cost of the licence fee and subsequent construction and launch costs associated with the successful bid.

"Following a review of the possibilities available in the financial market, IIU indicated a willingness to arrange funding commitments; in exchange it wished to have the placing of shares and sought in addition, a pre-placing of part of the 12% of Esat Digifone which

(as indicated above and in the bid) was to be placed over time. All in all, Esat Digifone and Communicorp felt this to be a very advantageous offer.

"As you know, the bid merely provided that institutional investors (which IIU is) would be approached to take up the non-Telenor/Communicorp shares and references to other investors (AIB, IBI, Advent and Standard Life) were given on an indicative/intent basis." Then we see that there is, again, an amendment suggested, is that correct, in Mr. O'Brien's handwriting?

A. Yes.

Q. "Indeed AIB and Advent are playing a financing role in the project (i.e. now)." Significant institutions of course as has been indicated, isn't that correct?

A. Yes.

Q. "Accordingly, we believe that the present structure is fully in accordance with the bid. IIU has agreed initially to take up loan stock in lieu of shares in respect of the "pre-placing" element of its commitment, which will result in the shareholding structure certified in the attached letter from Mr. " whoever that director was to be of Esat Digifone Limited. "In this regard, I should make it clear that the shareholding and the 40:40:20 ratio certified in that letter (and also referred to in Mr. Connolly's letter) relate to the situation which

will prevail upon and immediately prior to the grant of the licence; their delivery today should accordingly be regarded as being in anticipation of the issue of the relevant shares.

"I hope that all of the enclosed documents are clear and helpful, but if you have any queries thereon, please let me now."

"Yours sincerely

Owen O'Connell

William Fry."

At Document No. 6, then, is a fax from Mr. Denis

O'Brien to you, isn't that correct?

A. Yes.

Q. Dated the 10th May, 1996, returning the draft to you.

And it reads: 10th May, 1:30 p.m. to Owen O'Connell

from Denis O'Brien. See comments. Denis." Is that

right?

A. Yes.

Q. And we have seen those; those are the comments, the

ones in handwriting, is that correct?

A. Yes.

Q. They are Mr. O'Brien's comments?

A. Yes.

Q. Now, you have informed the Tribunal that you have no

recollection as to why the information about IIU's

involvement in Esat Digifone was excised from the

letter which was sent to the Department; you have no

direct recollection?

A. Yes.

Q. And you say that it is a matter of supposition by you, based on circumstantial evidence, that it was either excised at the request of the Department or that the Department agreed to a request by the company to excise it?

A. Yes.

Q. Now, I am just trying to look at the circumstances, so, for a moment, Mr. O'Connell. You were engaged in discussions with the Department around this time, isn't that correct?

A. Yes.

Q. You were in, as you say in your evidence, in reasonably frequent contact with the Department and you mention in particular with Mr. Fintan Towey, but perhaps with Mr. Brennan as well, is that correct, would they have been your

A. Yes, Mr. Towey tended to do the follow-up work, the operational stuff, whereas Martin Brennan would be at the meetings.

Q. Yes. And we know from evidence which has been given by witnesses from the Department that during this period, Mr. Towey's role was to gather in information, he wasn't involved in decision at this stage; they were being taken at a higher level, according to the evidence we have had anyway?

A. I wouldn't have been aware of that, except possibly to some extent that he would sometimes I think say that he would have to check that with Martin.

Q. Right. So it was in that context that of a request from the Department for this information, both in letter form on the 1st May and as a result of the meeting on the 3rd May, that you set about preparing this draft, having obtained instructions, I presume, to do so?

A. Yes, although I am not certain I had

Q. You had a general

A. specific instructions. It would have been implicit in my being at the meeting and leaving afterwards it would have been delegated to me to do it.

Q. Yes. And we can see that you sent the draft to Mr. O'Brien?

A. Yes.

Q. And Mr. O'Brien, we can see that Mr. O'Brien sent it back to you with some comments on it, isn't that correct?

A. Yes, but otherwise approved.

Q. You think it probable that you would have had some involvement with Mr. Digerud in relation to the letter?

A. Yes, not least because at the time that I drafted the letter on the 10th, I was to be the signatory and by the time it was engrossed on the 13th, he was the

signatory; I think it very unlikely that I would have done that without clearing it with Mr. Digerud, I am certain I wouldn't have done it without clearing it with him.

Q. Could I ask you this: why would your client have requested the Department to excise that information from the letter, do you think?

A. The only reason I can think of, and it may even have been me, was that we weren't yet in a position to give a letter in relation to IIU because the means by which we would achieve the 40:40:20 shareholding hadn't yet been agreed between all parties concerned.

Q. That is one paragraph of the letter.

A. That is the whole

Q. We will go through it in detail, in any event.

A. Okay.

Q. Any other reason?

A. They may have wanted to think about what I said, but that is not very likely. Denis had approved it. I can't think of another reason, which isn't to say there wasn't one, but I can't think of one at the moment.

Q. Now

A. Most likely I think it is because there were still very active talks going on involving IIU, and nobody wanted to commit themselves formally in a letter to the Department in advance of those talks concluding.



So if you were looking for a reason as to why the Digifone side wanted it taken out, that would be it, I think.

Q. Now, on the Department side, what reason could have been advanced to you to delete this information in the letter coming to it?

A. I don't know, but the Department weren't always or even very often in the habit of advancing reasons. They would tend more just to tell me what they wanted and I would go and do it.

Q. Yes.

A. So I wouldn't necessarily have expected to receive a reason. If they said take it out I would have taken it out. We were very much anxious to secure the licence and we were really only asking how high? whenever we were told to jump.

Q. Right. Right. So you believe that if you were just asked to delete reference to that, you would have done it because you were doing the bidding of the Department?

A. Yes, almost certainly.

Q. Did anything like that, to your recollection, happen around this time or previously which would support that view as an explanation?

A. I suppose the strongest one would have been Fintan Towey's call on the, whatever it was, the date has gone out of my head, the one where he told me the

Minister wanted the 40:40:20. There really wasn't any discussion about it after that. From that moment it became the case that it was going to be 40:40:20. The mechanism was difficult and complicated and caused lots of problems, but there was never any doubt that it was going to happen. That's the most obvious example that I can think of.

Q. Right, I understand. Were you ever asked by the Department to leave any information out of a letter in anything you were sending to them?

A. I can't remember ever being asked to do so but I wouldn't really remember, I don't think. I do so many letters.

Q. Yes, but this was a the issue here was the critical issue, wasn't it; the IIU involvement?

A. It is seen, in hindsight, to have been so and at the time it was one of three or four critical issues, yes.

Q. The other well one other critical issue was the financial position of Mr. O'Brien, isn't that right?

A. And a third was Clause 8.

Q. Clause 8, yes.

CHAIRMAN: Five past two.

A. Thank you Chairman.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF EXAMINATION OF OWEN O'CONNELL BY

MR. COUGHLAN:

Q. MR. COUGHLAN: Now, Mr. O'Connell, before lunch, when we were discussing the letter of the 13th and the draft of that letter on the 10th, I think you had proffered a possible reason as to why the request would have come from the Digifone side to remove that portion of the letter?

A. Yes.

Q. And you, I think, informed the Tribunal that you can't offer an explanation as to why the Department requested it, but that you, as solicitor to Digifone, and Digifone being conscious that you had to comply with Department requirements if you were to get the licence, that if you were asked to do something, you would do it, is that correct?

A. Pretty much, yes.

Q. Would that be a fair summary of what you were saying?

A. Yes, it would.

Q. But wherever the initial request came from, I think you have informed the Tribunal that it is your supposition that the references to IIU, or that portion of the letter dealing with matters other than the housekeeping matters, that that deletion took place either with the agreement or at the request of the Department, is that right?

A. Yes, that's correct.

Q. So there would have been a Departmental involvement one way or the other, wherever the request came from?

A. That's my supposition.

Q. That's your supposition?

A. Yes.

Q. Now, that being the case, there must have been some discussion with the Department about it?

A. Yes, logically.

Q. And, we know that you had a meeting in the Department on the 13th May of 1996, isn't that correct?

A. Yes.

Q. And arising from that meeting in the Department on the 13th May of 1996, you prepared a memorandum, isn't that correct?

A. Yes.

Q. I think there are also handwritten notes made by you at that meeting, isn't that correct?

A. Yes.

Q. The handwritten notes are not as extensive as the memorandum, would you agree?

A. Yes, that's correct.

Q. And I think they are at Divider 7, along with the memorandum, isn't that correct?

A. Yes.

Q. If we just look at those handwritten notes.

"Martin Brennan" sorry, it's "Esat Digifone, licence negotiation."

"Martin Brennan and Fintan Towey at Department. KD"

Knut Digerud and you "EEC." "Package of letters

13 May delivered" I can't

A. I think it's "in-house".

Q. "In-house. And Department finance accountant to review whether IIU Farrell Grant Sparks has sufficient information. More than statement, they have money, i.e. what money? New draft paragraph 8 late Friday from counsel" that's Article 8, I think, would that be correct?

A. Yes.

Q. "Now with Parliamentary Draftsman to shorten it." What's that?

A. "Changes of ownership".

Q. "Subject to Ministerial approval." That's Article 8 again. "But grounds for objection are specified"

A. "...taken from EU directive

Q. "...on mobile telecommunications." What's that?

A. EH is my banking partner, Elaine Hanley. "Bank ID clearance" meaning that I contacted from the meeting Elaine Hanley to clear with her or to get her to clear with the banks whether it was in order to identify the banks. You remember there was a question

Q. I do, this was the debt financing, the corporate debt financing, whether ABN-AMRO and Allied Irish Banks were prepared to have their names associated?

A. Yes, that's a reference.

Q. "Identify key questions." This is, I presume, to do with the or the press conference?

A. Yes.

Q. "Draft answer plus"

A. "...reasons for answers."

Q. "...reasons for answers. Meeting Minister/KD." What's that?

A. There was to be a meeting between the Minister and Knut Digerud and one or two others.

Q. Yes. Who might the one or two others have been?

A. I beg your pardon?

Q. Who were the one or two others?

A. I think this was just Martin or Fintan saying it will be the Minister and Knut Digerud and one or two others.

Q. I see. "Knut Digerud re company's independent entity." This is where the request was raised about whether the shareholders would be present and answer questions.

"Definite clear and unacceptable statements." Is that correct?

A. Yes.

Q. Then, "Martin Brennan obvious questions. This is"

A. "Is this the same

Q. "...consortium as applied? Can DOB side stand up? DOB or KD to answer. Reference to Telenor support to end (without implying Communicorp weakness)." Then I can't make "Virtually certain will have to get more information on IIU, some numbers."

That was the handwritten note of that meeting?

A. Yes.

Q. And can I take it that the memorandum you prepared, you prepared when you returned to your office or

A. Yes, immediately on my return, from the timing.

Q. Now, if we just look at that memorandum for a moment, we have it in a number of places, I know 13 in the second memo. Yes, I think both the handwritten and the types are there.

A. Yes, I have it.

Q. It would appear that, from your handwritten note, that the question or the issue as to whether this was the same consortium that had bid, as to whether this was the same consortium as that on the bid, is that correct?

A. Yes.

Q. That was a live issue?

A. Yes.

Q. And if you go then - it's something I asked you about yesterday - I think, to the second page of your memorandum and the third paragraph, and there is a reference you make to "Fintan Towey made the point that the bid referred to 20% of the company being placed with 'blue-chip institutions' (acknowledging that the institutions in question were not identified). He queried IIU's intentions in regard to placing of its holding."

Now, just about that when I asked you yesterday, I told you what the evidence Mr. Towey gave, and you accepted that, that he said that he couldn't have said it. And it was in the particular context, I think, that he was asked about that, that he would have known from the bid that institutions had been named, isn't that correct?

A. Yes.

Q. Now, you hadn't seen the bid, you weren't involved in the bid?

A. I wasn't involved. I couldn't say I hadn't seen it.

I may have done, but I wasn't involved in it.

Q. You weren't involved in the bid. And you accept that in that particular context, attributing an acknowledgment to Mr. Towey that institutions had not been identified could not relate to the bid document.

Would that be correct?

A. I am not sure. The word "identified" could have referred to the bid document or could have possibly referred to public identification.

Q. That's the very point I wish to take up with you, the second point.

A. I see, yes.

Q. I think, would you accept from me that, and we can argue about the extent to which their intent was indicated in the bid document, but we do have tapes of the presentations as well, so that's of assistance to



the Tribunal; but that in the bid document, Advent,

AIB, IBI and Standard had at least been identified?

A. Yes, they had.

Q. And by the time that you had this meeting, you had

prepared the draft of the 10th of the 10th May,

1996, isn't that correct?

A. Yes.

Q. And in that particular draft of the 10th May, 1996, if

I may just look at it again, it's at Divider 6.

A. Yes, I have it.

Q. On the third page of that letter, and I'll go through

the letter in due course when we come to deal with

other matters. The second paragraph on the third

page, you have prepared a draft as follows:

"As you know, the bid merely provided that

institutional investors (which IIU is) would be

approached to take up non-Telenor/Communicorp shares

in reference to other investors (AIB, IBI, Advent and

Standard Life) were given on an indicative/intent

basis. Accordingly, we believe that the present

structure is fully in accordance with the bid."

A. Yes, I see your point.

Q. Do you see the point? So you must have, at least,

received instructions, notwithstanding that you may

not have been part or seen the bid, that AIB, IBI,

Advent and Standard Life had been mentioned in the

bid?

A. In the bid, yes, I accept that.

Q. Would you accept that?

A. Yes.

Q. So that if we come back, then, to the memorandum,

where you attribute an acknowledgment that the

institutions in question were not identified, would

you agree with me that the probability must be that

that is a reference to the fact that the institutions

had not been identified in public?

A. Yes, I would agree with the logic of that.

Q. Would you agree with that?

A. Yes.

Q. And in those circumstances, it would appear that what

you are identifying here is that?

A. Yes.

Q. Now, if that be the case, it would appear that the

discussion which was taking place at this meeting on

the 13th, centred or sorry, this portion of the

discussion anyway centred on a centred on a way

of presenting the fact that it was easy to put IIU in

the position of "institutions" or "investors" because

nobody in the public domain would know about that?

A. Yes, although I would have taken the view anyway, that

it didn't matter whether they knew or not; that the

identification early on of the institutions wasn't

relevant to the ability of the company as a whole to

perform the licence obligations.

Q. Well, I'll come back to deal with that in due course, and if that was your understanding, why it wasn't simply stated all the way along from the 29th September on, but I'll come to deal with that in due course, if that is a rationalisation you are putting on it.

A. Yes.

Q. But at the moment, what I'm concerned about here is the question of whether this accorded with the bid, whether this was the same consortium which had bid for the licence?

A. Yes.

Q. And there can be no doubt about it, leave aside your view about the institutional investors

A. Yes.

Q. that the named people in the bid were Telenor, Communicorp/Esat Telecom, I am not quibbling about that, and four named institutional investors, isn't that right?

A. Yes, that's correct.

Q. And the question of IIU's involvement was the one that was causing the problem, isn't that right?

A. Yes.

Q. Is it your understanding, so, that that must have been what the discussion was about; that it wasn't in the public domain, there wouldn't be difficulty about it?

A. I accept that's the logic of your point, yes.

Q. And that being if that be the case, it affords an understanding as to why a document in the Department making references, as the draft does, to IIU's involvement, and I'll go through to what is stated in due course even in the form it's in; it doesn't necessarily state the full position about IIU's involvement, isn't that right, you'd agree?

A. Yes.

Q. That even in that form, that that could potentially cause a difficulty?

A. That would be a matter of making a judgement on the Department's perspective, but I see your point.

Q. Now, just looking at the draft itself for a moment, Mr. O'Connell, and we can come back to it we'll be coming back to it again, but just to go through it for a moment, and I just want to be clear about this because I haven't got Mr. Digerud's position on this particular letter yet. But there can be no doubt, I think from the documents, that it was certainly sent to Mr. O'Brien, Mr. O'Brien made comments on it and returned it to you, there is no doubt about that?

A. Yes.

Q. Can I take it that you don't have a fax cover sheet enclosing it to Mr. Digerud?

A. No, I don't.

Q. But you think that it is probable that you would have because of his position as Chief Executive of Esat

Digifone, and that you were attending the meeting with him on the 13th? These are the reasons why you think

A. And because he became the signatory of the letter in place of me.

Q. Sorry, yes, he became that's right. On the draft you were to be the signatory. On the actual letter of the 13th, Mr. Digerud was the signatory, isn't that right?

A. Yes.

Q. Nothing probably turns on it. Do you know why a letter couldn't have been signed by you and had to be signed by Mr. Digerud or

A. I don't know why, but Mr. Digerud was keen to maintain and develop his relationship with the Department, his position with the Department and tended to keep a lot of wanted to be involved in all the communications and could well have wanted the letter to go in his name as Chief Executive instead of mine.

Q. All right. Now, if we just look at the letter, and I think we can pass over down to Item No. 7, and then Item No. 8.

"A letter from" and that's supposed to be a director of Esat Digifone Limited "concerning its ownership."

Then, "During our meeting you asked for an explanation for the involvement of International Investment and

Underwriting Limited in this transaction, having regard to the prior involvement of Davy Stockbrokers and certain of their clients.

"As you know, the bid was made jointly by Telenor and Communicorp, who were accordingly responsible for its financing. However, the bid also indicated an intention to place 32% of the company with private and institutional investors (as to 20% immediately and 12% in the short to medium term.) At that time, Davys and their clients had given conditional letters of intent in regard to the funding, 20% of the equity element of the investment, but there was no legally binding commitment by them."

Now, do you remember any discussion with anybody in the Department about that particular issue? That is, the non-legally binding nature of the letters of commitment from Davys' clients?

A. I don't remember one, but I am sure there would have been one.

Q. Mr. Fintan Towey, who was a member of the Project Team, and I think Mr. Sean McMahon, everybody Mr. Brennan did argue, or sorry, make a suggestion about the particular letters, but not in the context that there was any difficulty or there was any difficulty on the Department side about these letters.

Did you ever hear anybody from the Department indicate that they had a difficulty with these letters?

A. I don't recall ever hearing that. Clearly there would have been a difficulty with the letters if they were all there had been by the time the licence came to be granted.

Q. Oh, yes. But we know the way financial institutions, before things are certain, always count their letters in terms of "subject to licence conditions and terms being agreed".

A. Well, the letters of comfort weren't that sort of letter. As I understand your question, you're referring to something like, for example, a facility letter which a financial institution would issue and which would contain a large number of conditions, but nevertheless legally binding, and on which the institution can be sued if the conditions are met.

The letters issued by the institutions which were enclosed with the bid were not of that kind; they were letters of comfort or expressions of intent or desire, depending on how you phrase it. So I don't think it was quite the same thing.

Q. No, I wasn't asking you to look at them in that context. There were letters from the financial institutions which Davys had obtained, isn't that right?

A. Yes.

Q. They were enclosed with the bid?

A. Yes.

Q. What I'm asking you here is, did anyone in the Department, to your knowledge, ever express any difficulty or problem with them?

A. I don't recall ever, that ever being expressed to me, no.

Q. Or you being informed of that fact?

A. No, because I think by the time I the first meeting I had with the Department was on the 9th November, and the institutional letters had been replaced by the 29th September, which was six weeks before I met the Department, so it wouldn't have occurred.

Q. But nobody in the Department, to your knowledge, had ever indicated a dissatisfaction with the quality of the support the financial institutions were giving?

A. No, and I'd have been astonished if they did, and I would remember, because if they had, I'd have said how could you be talking to me about those letters? They have all been replaced by IIU, the 29th September letter.

Q. Well that's because there was something in your mind at that stage, that they were out by then and IIU were in?

A. Yes.

Q. No doubt in your mind?

A. Yes, absolutely. And I would add, that there was never a moment's doubt in my mind until I read, I think it was either Martin Brennan or Fintan Towey's



evidence to this Tribunal, that they were aware from the 29th September that IIU were in. I never had a shred of doubt about that.

Q. Just to be clear about that, and we'll be coming back to deal with that when we deal with the letter. Are you saying that you do not sorry, you didn't, until you read the evidence of Martin Brennan and Fintan Towey

A. Yes.

Q. that as of the 29th September, that it was your understanding that the Department knew all about IIU?

A. All about is overstating it, but knew about IIU, yes, unquestionably. And I remember being astonished at the fact that not only had they sent the letter back, which of course I did know, but that they hadn't read it or taken in the implications of it.

Q. All right. Well, we'll deal with that in due course, but that and I understand your state of mind when you said you were at the meeting of the 9th November if anybody had expressed any concern about the letters from the institution, in your mind, they were gone and IIU, or IIU, Mr. Desmond, Bottin, whatever were in?

A. Yes, and that's why I believe I would have remembered any such expression.

Q. Before the 29th September, did anybody from the Department, to your knowledge, express any discomfort, disquiet, concern?

A. Not as far as I am aware. I wasn't really involved in anything to do with the Department at that time.

Q. And I will be coming back to it, as I say, in due course. But the letters in question, I think, which were the letters of comfort, if we just describe them as that for the moment, letters of comfort, or intent, whatever the correct term for them is, had been obtained at a time, am I not correct, prior to the postponement of the competition and the recommencement of the competition when the cap had been fixed? We can check that?

A. I can't recall.

Q. We can check that.

A. I can't recall. The Advent one was the 12th July, but I can't remember the others.

Q. The Advent, yes, yeah. Now, if we continue: "Throughout the period prior to and after submission of its bid, Esat Digifone behaved consistently on the assumption that it would be awarded the licence, planning and spending accordingly. It was thought desirable to secure," or shall we say "proceed and secure the proposed 20% non-Telenor/Communicorp funding, and in addition, Communicorp wished to improve its financing arrangement for its share of the cost of the licence fee, and subsequently construction and launch costs associated with the successful bid. Following a review of the possibilities available in

the financial market, IIU indicated a willingness to arrange funding commitments. In exchange, it wished to have the placing of shares and sought, in addition, a pre-placing of part of the 12% of Esat Digifone which, as indicated above and in the bid, was to be placed over time. All in all, Esat Digifone and Communicorp felt this to be a very advantageous offer."

Is that correct? Perhaps I'll explain where I have a difficulty in understanding it.

A. Okay.

Q. And we will have to come back to it because the shares, sorry, not the shares, the interest, the interest, let's forget about shares, the interest which IIU had

A. Yes.

Q. arose as a result of the exclusion of the institutional investors, that was 20% interest, isn't that right?

A. Yes.

Q. And the other 5% interest, bringing it up to 25%, came by reason of a dilution of the interest of Esat or Communicorp and Telenor, they both relinquished 2 1/2% interest?

A. Yes, they did.

Q. That's where that came from?

A. Yes.

Q. The 12% was a different issue all together, isn't that right?

A. The 12% was shares which, as I understood it, the bid had indicated would be made available to investors after that

Q. In the short in the medium to long term?

A. Yes, medium term, I think, yes.

Q. So can I take it that that particular statement is incorrect?

A. I don't think you can take it entirely that it's incorrect, but I'd like to elaborate.

Q. Very good.

A. The fact the simple fact of the matter is that IIU had 25% simply because they had demanded 25% as their price.

Q. Yes.

A. Having been put in that position, Esat Digifone, and in fairness, in particular Communicorp, necessarily had to reconcile that position with the bid, the bid documentation. And indeed, much later at the time we are talking about here, the Department had an interest in seeing that position was reconciled with the bid.

In other words, both parties to some degree were taking a fairly legalistic approach to the bid and were saying, 'Well, is there content in the bid with which the award of an additional 5% to IIU can be justified or reconciled?' And there was a series of

conversations, none of which I remember particularly, but I remember the time, in which I was involved and in which other members of the Communicorp bid team were involved, and it was remembered that there was provision in the bid for 12% to be placed. So why could the 5% given to, or perhaps more accurately, taken by IIU not be considered to be a pre-placement, an advanced placement out of that 12%? And that is, frankly, the rationalisation which was come up with in order to create an argument in favour of what was being done with IIU to conform to the strict legalities of the bid. And I would add to that, I think, that certainly by this time, both parties had an interest in the legalities of the situation and were trying to look for strictly legal justifications.

Q. When you say "both parties," do you mean the Department or

A. Yes.

Q. And

A. Esat Digifone.

Q. Esat Digifone?

A. Yes. In other words, an explanation which had been devised by Esat Digifone and Communicorp as consistent legally with the bid had, perhaps by default, been adopted by the Department, and they were willing to accept it as valid. That would be more a matter of my interpretation than of any specific

Q. I want to be very careful because you are a solicitor, Mr. O'Connell, and looking at documents which you drafted, I'm always very reluctant to take issues up with you to suggest that something is incorrect or disingenuous.

A. I am aware that this is a rationalisation.

Q. Yes.

CHAIRMAN: So, in effect, Mr. O'Connell, you are saying that on foot of discussions, it was decided that it was legally stateable to accelerate a course that was probably anticipated as having been further down the line to equate with the immediate legal exigencies?

A. Yes, Chairman. But I should emphasise, that the initial discussions were within the Esat Digifone Consortium, not with the Department. The Department's awareness came later.

CHAIRMAN: Yes.

Q. MR. COUGHLAN: With whom were those discussions within Esat Digifone, could you tell me?

A. Certainly I was involved. I suspect Jarlath Burke may have been involved, I can't remember. Pádraig O'hUiginn was involved. Denis probably was involved, although he didn't tend to get into the legalities too much. Who else? Peter O'Donoghue would certainly have been involved, I think. I can't recall anyone else.

Q. So it really was whilst Mr. O'Donoghue, of course, was Esat Digifone at that time, was he?

A. Well, early on he had a slightly ambiguous position, in that he was Finance Director of Esat Telecom, who had been seconded to Esat Digifone. He formally became Esat Digifone's Finance Director later on. And anyway early on, certainly at the bid phase and for sometime afterwards, while there was a legal distinction between Esat Digifone and Esat Telecom, there tended to be a mingling of people, they were all in the same premises and so forth, so it wasn't always clear who was what.

Q. But can I just be clear about this; you have named a number of people; they are all Esat people or Communicorp people? Esat Holdings and Communicorp people, if I put it that way?

A. Yes, if you are asking whether there were Telenor people involved, I don't recall.

Q. Or IIU people?

A. I don't think so. I couldn't be sure either way, but I don't think so.

Q. Well, as you say, maybe it may have been a matter of indifference to them if they had a 25% interest?

A. It wouldn't entirely have been a matter of indifference because they wanted to be sure they kept it as well as getting it, but I don't remember them being involved.

Q. Now, you were an experienced solicitor. I can understand your involvement in trying to understand or rationalise a position?

A. Yes.

Q. Mr. Jarlath Burke had at least academic legal experience and was acting as Regulator or counsel regulatory counsel. Mr. Peter O'Donoghue was a financial man, isn't that right?

A. Yes.

Q. Again and would have a knowledge, perhaps an understanding and knowledge of shares, and perhaps company law to some extent?

A. Well, had a strong operational role anyway.

Q. What did Mr. Pdraig O'hUiginn bring to the table on these discussions?

A. Knowledge of the people with whom, or to whom the explanation would be presented, that is the civil servants and politicians.

Q. And would that be in the context of what might run?

A. That's a slightly prejudicial way of putting it, but

Q. Well, correct me so.

A. What would be reasonable, acceptable, appropriate. I suppose "what might run" sums that up to some extent.

Q. Sorry, I didn't mean it in that way. Perhaps I take your correction in that regard. I accept, and you very fairly say, it's a rationalisation of the



matter, but it was not what had actually happened,

isn't that right?

A. I would say it was.

Q. Very good. Was there ever any resolution of Esat

Digifone to pre-place the 25%, any of the 12% and

attribute it to the 5% which had been, as you use your

own word, "taken" from Telenor and Communicorp?

A. No, but there wasn't but placing is no more than

giving to or transferring to. Placing has no special

meaning or connotation.

Q. Very good.

A. And it was always the intention, certainly as far as I

was concerned and aware, that IIU were partly short

and partly medium term sellers of the shares. They

did intend, as I understood it, always to sell the

shares on.

Q. Doesn't it look as if this was, in effect, a spin

and

A. No, I don't accept that

Q. And an inaccuracy, at the very least?

A. No, I don't accept that. I, in particular, don't

accept "spin", and I don't accept "inaccuracy" either.

I accept that it was a rationalised presentation of

facts in a particular way, but I don't accept there

was any inaccuracy and I don't accept "spin". I do

think that, as a solicitor, there is a difference

between representing my client's actions and

intentions in the best possible light on the one hand,  
and spin on the other; I don't accept "spin".

Q. Yes, I can understand that in the context of making a submission in a certain way as a solicitor on behalf of your client, whether it be to the Department. This wasn't being presented as an outlining of the full facts and then a paragraph tacked on, that this is our interpretation of it, isn't that right? This is being prepared for the Department as being a statement of fact?

A. Yes.

Q. All right. The draft continues: "As you know, the bid merely provided that institutional investors (which IIU is) would be approached to take up" in fairness, you put that in brackets. And you are putting that, I suggest, as a plea or a submission, or are you stating it as a fact?

A. Depending on one's interpretation of the phrase "financial institution." IIU was a financial institution.

Q. All right.

A. It was Central Bank regulated, it bought and sold shares, it lent money. Those are all typical activities of a financial institution. And in doing them, as I say, it was regulated by the Central Bank.

Q. Did you know all of those things at the time?

A. Yes.

Q. I see.

A. As far as I was concerned, while it wasn't AIB or Bank of Ireland, it was nevertheless a financial institution, and that it was a fair description of what it did.

Q. Well, it continues: "Would be approached to take up the non-Telenor/Communicorp shares. And references to other investors (AIB, IBI, Advent and Standard Life) were given on an indicative/intent basis.

Accordingly, we believe that the present structure is fully in accordance with the bid."

There you were making a case, isn't that correct?

A. Yes, that's correct.

Q. "IIU has agreed initially to take up loan stock in lieu of shares in respect of the 'pre-placing' element of its commitment, which will result in the shareholding structure certified in the attached letter of Mr. of Esat Digifone Limited."

What are you talking about there?

A. I think that at this time, there was some discussion that instead of taking shares for part of its subscribed funds, IIU would take loan stock, and that at some future point an application would be made to the Minister to allow conversion of the loan stock to shares. I believe that was one of the possible solutions to the 40:40:20 problem that was under discussion, and I suspect that it was under discussion

at the time this letter was drafted. In fact, that never occurred.

Q. Right.

A. I think that's what it's about.

Q. Very good. "In this regard, I should make it clear that the shareholdings and the 40:40:20 ratio certified in that letter (and also referred to in Mr. Connolly's letter) relate to the situation which will prevail upon any and immediately prior to the grant of the licence; their delivery today should accordingly be regarded as being in anticipation of the issue of the relevant shares."

"I hope this and all the enclosed documents are clear and helpful."

Now, of course, and in fairness, that certification couldn't have been given on the 13th, could it?

A. No.

Q. Because not only were there matters being dealt with by the Department, but there were ongoing discussions taking place amongst the shareholders, isn't that right?

A. I think the shareholders had pretty much settled the deal the previous day, the 12th, but certainly it hadn't been implemented.

Q. I think that I think for the moment we'll try and deal with some earlier documents now, which aren't referred to in your statement.

I think I indicated to you it's the Baker

McKenzie/Advent matters, if that's all right with you?

And if you have any difficulties, I know you haven't

prepared fully for these particular documents, but if

there is any difficulty, you can just indicate. I'll

be coming back to these matters in due course when we

come to deal with the letter of the 29th September and

all that transpired after it.

A. All right.

Q. I wonder do you have a copy of Book 48?

A. I think my colleague has one.

Q. Just by way of general background, and I am not going

to deal with documents, but I think in 1995,

Mr. O'Brien was involved with, I think, Detecon and

Southwestern Bell in relation to trying to put

together a consortium to bid for the licence, isn't

that correct?

A. Yes, that's correct.

Q. And you didn't have you may have had a general

involvement, but you didn't have a specific

involvement in relation to many of the matters, but

there seemed unhappy differences seemed to arise

over two matters in particular: One was the financing

of Mr. O'Brien's side of things, I think. And the

other was Southwestern Bell being concerned when the

RFP was published and there was an open-ended element

to the licence fee?

A. Sorry, I had quite a bit of involvement, in fact, in the Detecon/Southwest Bell negotiations and dealt with their they jointly instructed a solicitor, and I dealt with him, and we exchanged draft shareholders agreements and so forth. I think the Southwest Bell concern with Esat's financial strength arose out of the concern they also had that the licence competition would be conducted as an auction. The other real problem was one of the control, or relative degrees of control, and the parties simply couldn't agree on the scale and extent of the vetoes which each should have, for instance, or the degree of control which each should have over the consortium. And I would say, in my view, Detecon and Southwest Bell regarded Esat as the necessary local involvement, but didn't really see it as having any significant say in the consortium, whereas Denis regarded himself as the leader of the consortium, and those two views proved incompatible. So rather than saying it was on a particular issue, it was over those contrasting philosophies that the thing fell.

Q. Yes. That latter issue about control was a matter which raised its head later also, I think?

A. It did indeed, yes.

Q. Now, I know that at the final stages before the signing of the licence, and in preparing for the press conference, a question arose about when Telenor and

Esat or Communicorp first became involved?

A. Yes.

Q. And I think April/May, say April was mentioned at that time. And I think there is a memorandum just on that, and that's at Book 48, Divider 5.

A. Yes.

Q. And this is from Mr. O'Brien to Mr. Kedar, Mr. Callaghan and Mr. Prelz. They were all directors of his company, isn't that right?

A. Yes, I think so, yes.

Q. And it's dated the 4th May.

"Per Simonsen spoke to me today and made the following points:-

" Following their meeting here in Dublin last week they briefed their CEO, and his reaction was very positive to their involvement in our GSM bid.

" they require board approval and this should be forthcoming in the week commencing the 15th May. In order to finalise a Board paper, they intend to do financial due diligence on our GSM business plan on Thursday and Friday of this week.

" In the meantime, they are going to provide some resources, particularly in the technical area, in order to write the bid document.

" on Monday next they will send in their technical planner to define how many people we require to write the technical part of the bid. They will then be put

in place by the middle of next week.

" I am due to visit Norway next week to meet with their senior management.

And it goes on "Telenor have agreed to an undisclosed agreement."

It was around this time that the involvement seems to commence, isn't that right?

A. Yes.

Q. There was obviously some meeting at the end of April in Dublin. This is dated the 4th May. And the matter is going to the Board of Telenor for the 15th May for approval?

A. Yes.

Q. So that seems to be the commencement of the involvement?

A. Yes, it does. It does.

Q. Now, did you have any role in preparing the Joint Venture Agreement, which is at Divider No. 7?

A. I don't think I did. It's the language is reasonably legalistic, and without really meaning anything by it, Telenor's language Telenor, when they wrote documents, all got it about 98% right, and you'd usually pick up one or two little errors in the syntax, which would tell you that it had been written by them and they don't those things don't really seem to be here very much. So I couldn't say absolutely that I had no involvement, but I don't



think I did.

Q. Right. Would you have reviewed it, do you think,

or

A. It's possible, yes. I mean, Denis would have been in

the habit very often of sending this sort of thing to

me for review, and it's quite possible I did. But he

often wouldn't want very much in the way of comment.

He'd really only want to know is this disastrous or

not. He wouldn't necessarily want me to come back

with

Q. A formal view on it?

A. Yeah.

Q. Or a redraft of it even?

A. Yeah.

Q. Now, the particular Joint Venture Agreement did

provide for a  $\$1/2$  million guarantee, I think, which we

know was never provided and nothing things moved on

anyway?

A. I don't agree it was never provided.

Q. You don't agree it was never provided?

A. Yes.

Q. I see. Well, we'll come it does provide for it

anyway?

A. It does provide for it.

Q. We'll come to some documentation later which indicates

that it wasn't provided I think, isn't that correct?

A. Yes.

Q. If you just go, then, to Divider No. 13. We are now getting into a period closer to your correspondence, I think, isn't that right?

A. Yes.

Q. And this is a memorandum from Mr. O'Brien to Mr. Prelz in his role in Advent International, isn't that right?

A. Yes.

Q. And it's regarding bridging finance, and it reads:

"On the 19th May, 1995, Advent agreed to give the Communicorp Group a loan of \$5 million convertible after five years into 20% of the radio division. This agreement was reached at a meeting in Esat's board and attended by Bob Sneiderfield, yourself and myself. On the following Saturday, the 20th May, 1995, the terms of the agreement were confirmed with John Callaghan, when John and I spoke to you on the phone from his house. Subsequent to this agreement, you attended a meeting with me at Woodchester Bank and confirmed to them that the loan was being made available.

"On Tuesday, the 30th May, 1995, you spoke to me in Norway and informed me that your Board had not approved our agreement, and that you were now offering a straight five-year-loan with an annual coupon of 30% and specific terms relating to early payment.

Communicorp never accepted this offer.

"On the 15th May, John Callaghan, Peter O'Donoghue, yourself, myself met in our GSM office in Jenkinson

House. We reached agreement on the terms of the bridging finance, and these were documented by John Callaghan, an independent director, a copy of which are attached.

"Can you please confirm to me whether Advent are going to adhere to the agreement reached on bridging finance at our meeting on the 5th June. If Advent are not going to do so, I need to inform the directors at the Board meeting scheduled for tomorrow. In addition, we would also need to hold a board meeting of Communicorp Group immediately to discuss the financing needs of the Group.

"The outstanding issues in relation to the Esat GSM agreement can be resolved there."

So, we then, if we go over the page, there is the handwritten note, and I think that's a note of Mr. Callaghan's?

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

Q. And you can see, "3.2 million bridging finance. One year bridging facility. Draw down on that basis.

30% interest charged for year's use of facility drawn.

Denis O'Brien 600K treated the same. If refinancing takes place, look favourably at Advent and paying the year's charge"?

A. I think it's "taking out".

Q. "Taking out." Then, that was a loan unrelated to the GSM; it was financing of the main group, is that

right?

A. The radio side, yes, I think so.

Q. And then there is a note, "5% equity in GSM company.

Advent to invest 5% of the 20% institutional

investment at par.

Advent to give letter to satisfy Telenor and

requirement of GSM bid.

Strong letter but cannot be a 'commitment' to invest.

" Advent to have opportunity to participate in any financing arrangements for Group and/or GSM company if money is raised directly for GSM company.

" if GSM licence is secured, the contingent payment is deemed to be 3.6 million."

I don't know what that is?

A. I think this is only a vague recollection, but I think Advent had an existing obligation to lend 4 million in certain circumstances, and they were reducing it to 3.6.

Q. Okay.

A. Yes, there it is, "originally 4 million for 50%".

Q. So there were at this stage, two issues under discussion, I think, isn't that right?

A. There was.

Q. There was a straight loan or company, and there is this question, then, of Advent being entitled to invest 5% in the institutional tranche of shares in the GSM company for providing a strong letter of

comfort?

A. Yes, Advent had originally come into Esat as a radio company, and Esat was evolving into something else, a telecoms company, and Advent were becoming more interested in the telecoms side than they were in the radio side, a process which concluded in December '95, January '96, but you see the beginnings of it here.

Q. You see the beginning of it here?

A. Yes.

Q. And this is how they come into the picture in the GSM sorry, they are in the picture in the GSM at all times because of their shareholding in Communicorp?

A. Yes.

Q. This is how they are coming into the picture in the GSM

A. More directly.

Q. More directly?

A. Yes.

Q. Now, if you go to Divider No. 14, this is a memorandum being prepared by, which was prepared by Mr. Paul Connolly, who was a financial adviser, isn't that correct?

A. Yes.

Q. And it's to Mr. O'Brien and Mr. Peter O'Donoghue. I am not going into the details of this, but this is the

commencement of Mr. O'Brien's attempts to raise funds through Credit Suisse First Boston, isn't that correct?

A. Yes. Well, sorry, when you say "commencement", I wouldn't have been aware of this at the time, but insofar as he is talking about comments on the draft engagement letter of 14th June, that would imply to me that there had been a conversation somewhat earlier, because if they had got to engagement letter stage, they'd have to have been a bit before that.

Q. So June perhaps, early

A. May even.

Q. Or May. Now, if we then go to Divider No. 15, and this is a letter you received from Ms. Helen Stroud of Baker McKenzie, isn't that correct?

A. Yes.

Q. They were Advent's solicitors?

A. Yes.

Q. And if we just go through it, and a lot of this correspondence, we needn't go through lines which change such and such on this line or anything, unless there is anything particularly significant.

And she writes to you: "Re Advent International Communicorp Group.

"Thank you for your faxed comments on the draft agreement. I attach a revised marked up draft incorporating some of your proposed amendments"?

A. "Most", I think.

Q. "Of your"

A. "Most of my amendments."

Q. "Upon which I have the following comments:

"1. Recital B, I have made an amendment, but perhaps you could let me know in broad terms the issues raised by the European Commission and the effect it will have on the timetable.

"2. Is the comfort letter to Telenor to be in exactly the same form as that to the Minister?"

And I don't think we need concern ourselves with the rest of the letter, or is there anything specifically that

A. No, I don't think so.

Q. They are fairly technical changes or amendments to the

A. Yes.

Q. And I think then, if we go to Divider No. 16, there is your response dated 20th June, 1995, isn't that correct?

A. Yes.

Q. And you respond: "Dear Helen,

"Thank you for your telefax of the 19th June. In response to the numbered points in your letter:-

"1. The Commission has objected primarily to the 'auction' concept inherent in the proposals for the grant of the second GSM licence. Accordingly, the

terms of application are to be revised, with either no up-front payment required or a maximum cap placed thereon. It is expected that the timetable will be extended by about two months."

Now:

"2. It is fundamental to the current arrangement that the comfort letter to Telenor be in whatever form will satisfy Telenor; if it does not do so, then the entire agreement fails."

Then you go on to deal with other matters, which I do not think we need concern ourselves with.

Now, it was in respect of that reply in the first paragraph that inquiries were made of you as to who gave you instructions to respond to that?

A. Yes.

Q. You furnished your first initial reply, that you had no recollection, and you couldn't say from an examination of your files who gave you these instructions, isn't that right?

A. Yes.

Q. And then that gave raise, when that was raised in the Opening Statement, to your further memorandum, where you inform the Tribunal that the probability is that you must have received those instructions from either Mr. O'Brien, Mr. Burke

A. Or Mr. O'Donoghue.

Q. or Mr. O'Donoghue, isn't that right?



A. Yes.

Q. And you referred the Tribunal to possible sources for that information by reference to the newspaper articles we looked at today?

A. Yes.

Q. And reference to I think we can exclude the conversations between Mr. Condon and the Department, nobody would have been privy to that, and possibly Mr. Burke, because of his association with the European Community. But your general recollection in relation to Mr. Burke is that any information imparted to you in that regard related to fixed line matters, is that correct?

A. Yes.

Q. In the newspaper articles you have referred the Tribunal to, and correct me if I am wrong about this, but I don't see a specific reference to a suggestion that there would be no up-front payment, or am I incorrect in that?

A. I think you are incorrect, Mr. Coughlan, but give me a moment. If you look at the, certainly the 20th June one.

Q. Yes, I understand the 20th June.

A. Oh, before 20th June?

Q. Yes.

A. I'd have to check, I am afraid.

Q. Very good.

A. There is certainly reference on the 17th June to having to substantially reduce the up-front fee.

Q. I see all of that. Speculation seemed to be there was undoubtedly speculation that the Commission didn't like open-ended auctions. There was certainly speculation about reduction of the fee.

A. Mmm.

Q. But specifically as regards no up-front payment, now, that was a debate which had been taking place within the Department

A. Mmm.

Q. some months previously?

A. Mm-hmm.

Q. And I'm just wondering did you, or do you recollect ever receiving any instructions or information from anybody that that type of debate may have been going on within the Department?

A. No, I don't remember anything to that effect.

Q. Again, reference to the potential period of postponement appears to arise in the newspaper articles on the 20th, isn't that right?

A. The period of postponement, yes.

Q. On the 20th?

A. Yes, on the 20th.

Q. But not prior to that?

A. The period isn't mentioned prior to it, but a delay is.

Q. A delay, yes.

CHAIRMAN: I suppose, Mr. O'Connell, whilst you accepted in response to Mr. Coughlan that you weren't, of course, privy to the Persona/Mr. Condon conversation with the Department, I suppose you are entitled to raise the fact that the mere evidence that this was disclosed in the course of other Tribunal inquiries may indicate that that type of approximately correct timescale was being raised with another competitor?

A. Yes, Chairman, exactly. I was suggesting that the Department didn't actually treat the period of delay the fact or period of delay as particularly confidential on the 20th, when they had the meeting with Mr. Condon, and may equally not have done so on the 19th, when they had the meeting with the Esat representatives, and accordingly, although unminuted, the period of delay could well have been mentioned.

Q. MR. COUGHLAN: If you turn over to Divider No. 17, now, Mr. O'Connell.

A. Yes.

Q. I think this is a fax from Mr. O'Donoghue to Mr. Prelz in Advent International, which he copies to Helen Stroud and to you, I think.

"Further to our conversation this morning, I now have had an opportunity to review the notes taken at our meeting of the 15th June last. It was agreed that

Advent has a right to invest up to 5% in the GSM company at par. This allocation is to be made from the 20% being allocated to the institutional investors. I have advised Helen Stroud that this should be reflected in the agreement."

So that is a matter progressing the matter, isn't that right?

A. Yes.

Q. I think then the next document is Helen Stroud writes to Denis O'Brien and Peter O'Donoghue, isn't that right, or she faxes them anyway?

A. Yes.

Q. The first portion of the fax I think is not important, is it? It's the taking up of the loan money by RINV, which is one of Mr. O'Brien's companies, isn't that right?

A. Yes, although she does try to link all of that to the GSM money at the end of the letter.

Q. Yes.

A. Unsuccessfully I think, in the end.

Q. Yes. "Please note that the 12 month repayment term has been agreed to only on the basis that the terms in which the GSM funding will be provided had been agreed by Advent. In particular, this relates to the fact that Advent must receive the same terms and conditions for their 5% as the other investors. It can not be resolved" "if this can not be resolved, the minimum

repayment period will be a two-year term."

So that she is trying to yes, I see.

A. They wanted a longer repayment period because they were charging 30% a year.

Q. And she then faxes you on the 21st June, or writes to you on the 21st June, isn't that correct?

A. Yes.

Q. And she says: "Thank you for your telefax of the 2nd June. I am attaching a revised draft agreement marked up to show the changes from the previous draft upon which I have the following comments using the numbering in your letter:

"2. Advent have always understood that a comfort letter will be issued to Telenor but assumed that the draft sent to you on Friday would have been shown to and approved by them. If this is not the case, could you please let me know what form of comfort they are looking for and amend up the draft accordingly. I therefore put in your wording for Clause 5.1.3, but in square brackets, since I would hope that we would be able to give Telenor this comfort and have their approval before the document was signed.

"Could you please confirm that Telenor has currently only subscribed for one founder share in Digifone, and that there are no shareholders agreements or special arrangements in place with Telenor and any member of the Communicorp Group. In this regard, I assume that

the Articles of Association will be presented," etc..

So what she is asking you there is to show Telenor a draft letter of comfort, and if they are not happy with it, to get back to her and Advent will provide a letter which is acceptable?

A. Yes.

Q. An agreed letter, in effect, a letter acceptable to Telenor?

A. Yes.

Q. Now, that never happened, in fact, did it?

A. No, it never did.

Q. Why was that?

A. I don't think it could ever have happened because Telenor weren't looking for a letter of comfort, they were looking for a guarantee. Communicorp were trying were hoping to persuade Telenor to accept a letter of comfort in lieu of the guarantee.

Q. Well, is it sorry, and we will come to it as we go through the documents, what transpired and what was shown to Telenor and various correspondence which took place. But are you saying that if any letter of comfort was presented to Telenor sorry, if any letter of comfort was acceptable to Telenor, it would have been unacceptable to Advent?

A. Very likely, because one was offering a letter of comfort and the other was seeking a guarantee, and they are fundamentally different things.

Q. We will jump forward to the 12th July when the agreement was signed

A. Okay.

Q. eventually. If this was the state of mind, it was making life very difficult, wasn't it?

A. For whom, I am sorry?

Q. For Mr. O'Brien?

A. Yes

Q. And for Advent?

A. Yes. Mr. O'Brien was behaving here, in my view, as a typical entrepreneur. He was trying to keep all the balances in the air. Telenor were seeking a guarantee, and not to put too fine a point on it, Mr. O'Brien had signed an agreement for a guarantee. Communicorp didn't have the financial depth to enable it to procure a guarantee, but its investor, Advent, were willing to give quite a strong letter of comfort. Mr. O'Brien hoped, I think, and I'm reading his mind here to some extent, but my understanding is that he hoped to obtain a strong letter of comfort from a very reputable source and present it essentially as a fait accompli, to Telenor in lieu of the guarantee, and induce them, thereby, to accept it. In his defence, I would add the point, that a letter of comfort given by an institution as reputable and large as Advent, particularly where given to an equally large and reputable entity such as Telenor, or in the case of

the Minister's letter, to a Government, particularly an EU Government, is something which, although not legally binding, is of great moment to the institution giving it; in other words, to Advent, and would not likely be breached or dishonoured by Advent.

Q. It wouldn't be given willy-nilly?

A. Certainly not. And as I say, the character of the recipient of the letter, it would add to that.

Q. Yes. If we then move to Document No. 20, and we have Mr. O'Brien responding, or sending a memorandum to Mr. Prelz of Advent, regarding the Esat and loan facility agreements.

"I have received a facsimile from Helen Stroud responding to my memos of the 28th June, 1995. I have set out below Communicorp's response to the points raised.

"1. Advent's view that the Esat deal and the RINV are one package is wrong. This was not agreed at our meeting on the 15th June 1995, and John Callaghan has also confirmed this. By interlinking the two agreements, Advent have introduced a new condition to the loan agreement which is now preventing the Communicorp Group from drawing down the bridging facility, and consequently Advent are putting the Group's development in jeopardy.

"It was agreed that Advent is being given the right to participate directly in 5% of the equity of Digifone



in exchange for a letter satisfying Telenor in relation to Communicorp's credit standing in respect of the GSM project. We will not accept any change to this provision. In addition, we would point out that we have already agreed with Telenor on Advent's right to participate directly in 5% of Digifone's equity.

"2. As has been explained to Helen Stroud, it was always the intention that Esat Telecom would invest in Digifone. However, as we are currently in litigation with one of the minorities in Esat Telecom, it has been decided that Communicorp invest directly in Digifone. When the minority situation in Esat Telecom is resolved their participation rights through Esat Telecom would be reinstated. We cannot override the rights of the minorities. I trust this clarifies the situation."

Would you have prepared that for Mr. O'Brien, do you think?

A. I don't think so. It doesn't remind I don't remember doing so. And I was just, as you read it, was trying to remember what the problem in Esat Telecom was and what the litigation was it is referring to, and I can't remember it.

Q. We know about it. It was a chief executive, I think

A. Oh Doug Goldschmidt, yes.

Q. Now, the next page over is the letter of comfort,

isn't that right, to the Department?

A. Yes.

Q. And this is from Advent, and it's dated 10th July, 1995. Addressed to Mr. Martin Brennan.

"Dear Mr. Brennan,

"We refer to the application made to you today by Esat Digifone Limited in connection with the grant by you of a licence to operate the second GSM cellular system throughout Ireland.

"Introduction to Advent International:

"Advent International Corporation is a leading international private equity provider.

"With funds under management in excess of \$1.4 billion and offices in North America, Europe and Asia, Advent International has provided development capital and private equity to over 200 companies, giving entrepreneurs adequate financial resources to develop independent businesses.

"Advent International's investment strategy is to focus on a selective number of industrial sectors which experience an above-average level of growth, in particular our funds have made significant investments in media and telecommunications companies in Europe and have developed a good understanding of the telecommunications business and a strong interest in investing in the same.

"Advent's investment in the Communicorp Group:

"In 1994, certain of the funds managed by Advent International invested a total of approximately \$10 million in Communicorp Group Limited in return for just over 25% of the voting share capital.

Communicorp is the holder of 50% issued share capital of Esat Digifone Limited."

That might have been a bit of an overstatement of things at the moment at that stage, but anyway...

A. I think that was right.

Q. Was it?

A. I think there were only two issued shares in Esat Digifone at that day, and it had one.

Q. "These funds have committed to invest an additional 9.5 million to further develop the Group's activities.

"Advent'S Commitment to the GSM Licence Application:

"We have reviewed the business plan prepared by Digifone in connection with its application for the second GSM licence, and consider its operation of the second GSM cellular system in Ireland to be an attractive and viable project. The application to you by Communicorp sets out how it is intended to inject new equity into Digifone on the licence being granted to it, and shows the Advent funds as 5% shareholders participating in the 20% holding which has been allocated to institutional investors. We are delighted to have the opportunity of investing directly into Digifone, as well as our indirect

investment in the company through Communicorp and Esat Telecom.

"The said application also shows Communicorp Group remaining as a 40% shareholder in Digifone and being required to provide up to 30 million Irish punts to fund that 45% equity participation. We can confirm that we have offered that amount to Communicorp to enable it to fund its obligations.

"Please do not hesitate to contact, Massimo Prelz," etc..

So that was the letter furnished to the Department, is that right, by Mr. Prelz?

A. Yes.

Q. And if we then go over the page, Document No. 22, there is an agreement dated the 12th July, 1995. And it is signed by Advent and Communicorp Group and Mr. O'Brien, isn't that right?

A. Yes.

Q. And would I be correct, unless you want me to go through the whole agreement at this stage?

A. No.

Q. To, in effect, be correct in understanding that this agreement provided for a situation, that in consideration of providing the letter of comfort to the Department and to Telenor, that Advent were entitled to participate in Esat Digifone to the extent of 5%?

A. Yes, provided the Telenor letter was acceptable.

Q. Provided the Telenor letter was acceptable, but the consideration was for providing the letters of comfort, isn't that right?

A. Yes.

Q. I just want to be clear; that's in essence what that agreement was about. It's got nothing to do with the 30 million offering?

A. Correct. Well, except sorry, except insofar as the letter of comfort refers to it's not an agreement for the 30 million.

Q. Absolutely. That's all I want to be clear about, that I understood that that was so and you agree that

A. Yes, I do agree.

Q. Now, the next page is Document No. 23. It's a letter dated 14th July from Mr. O'Brien to Mr. Prelz in Advent.

"Dear Massimo,

"I refer to our agreement dated 12th July in regard to the GSM bid to be made by Esat Digifone Limited.

"As you are aware, you have written to the Minister for Transport, Energy and Communications and to Telenor Invest AS stating that you have offered Communicorp Group Limited  $\frac{1}{2}$ 30 million in respect of their equity participation in the bid.

"We would like to confirm acceptance of our agreement dated 12th July."

Now, for an awful long time, when I looked at this originally, I was confused by the final sentence, but in fact, that just relates back to the agreement of the 12th July, is that right?

A. Yes, I think so.

Q. That's what the why it was stated, I don't know.

A. I am afraid, I don't either.

Q. Although, just looking at it, and we don't know whether this was ever appended to the bid.

A. I don't know either.

Q. You don't know that?

A. No.

Q. And certainly, when I read the agreements originally and discussed them with my colleagues, we were first of all perhaps thrown a little and wondered whether this was an acceptance of the offer of  $i\frac{1}{2}$ 30 million.

Would you accept that the letter, the way it

A. It's confusing.

Q. is drafted is confusing in that regard?

A. Yes, I would accept that.

Q. And it certainly gave the impression to us, as lawyers, of a certain amount of confusion. And do you agree it could give the impression to third parties that this was an acceptance of the offer of 30 million?

A. Yes, but in Denis's defence I suppose I'd say that letters written by non-lawyers attempting to have some

kind of legal effect often do cause some confusion to lawyers.

Q. Yes. Do you know why, and I take it that or there was some legal involvement, perhaps not yourself directly, in the signing of the agreement of the 12th?

A. I was certainly involved in the agreement of the 12th.

The signing

Q. It's witnessed by Jacqueline O'Brien, not my colleague.

A. I don't know, I am sorry, no.

Q. No, it's just something that has always caused us a little bit of, or some confusion here.

A. I think that Jackie O'Brien is Denis's sister, actually.

Q. Right. But why you'd sign an agreement and then write a letter saying that you accepted the terms of the agreement in the context of referring to a letter being written to the Department about an offer of 30 million? But perhaps it's something Mr. O'Brien can deal with?

A. I don't know, I am sorry I can't help you.

CHAIRMAN: I don't think it leads to any enormous

MR. COUGHLAN: No, no, it's just I just wondered,

Sir, and perhaps I should flag it at this stage as to

whether it was intended perhaps to lead to confusion.

That's the only

A. Well, I don't know how it was intended. I wasn't

involved. I did already accept that it is capable of causing confusion, but my own experience, as I say, of laymen writing legal letters, they are capable of causing quite enough confusion before they start intending to.

Q. Leaving aside altogether lawyers writing legal letters which can cause confusion?

A. Yes.

Q. Now, the next document is a facsimile from Mr. Peter O'Donoghue to Mr. Knut Haga of Telenor. And it's dated the 31st July, 1995, and it's regarding the financial commitment to Digifone.

"Further to our conversation today I confirm that

Advent International Corporation and Communicorp Group have formally entered an agreement whereby Advent have committed up to  $\text{€}1/230$  million to the Communicorp Group in the event that Esat Digifone is successful in its bid for the second GSM licence in Ireland. In consideration of Advent making these funds available, Communicorp has agreed that Advent will be entitled to participate in up to 5% of the equity capital of Digifone Limited. Denis O'Brien is also a signatory to this agreement.

"Accordingly, as the above parties represent 100% of the shareholders of the Communicorp Group, they have given their consent to the increase of capital required in Communicorp to facilitate the investment



in Esat Digifone.

"I hope that the above will assist you in finalising your outstanding issues.

"Best regards,  
Peter O'Donoghue."

Now, I don't want to jump straight into this particular memorandum from Mr. O'Donoghue at this stage because it leads on to other documentation coming right up to your opinion being sought, isn't that right, in relation to matters?

A. Yes.

MR. COUGHLAN: And I think, Sir, it's these are a number of documents that I think I'd like

Mr. O'Connell to have just some time to look over, because I am going to ask him about what's stated here in this particular facsimile in due course.

A. Very well.

MR. COUGHLAN: I am just wondering might it be time to rise at this stage because of some of the questions I want to ask him about.

CHAIRMAN: Well, very good. Resumption when, Mr. Coughlan?

MR. COUGHLAN: Tuesday morning, sir.

CHAIRMAN: Make it Tuesday. Obviously to maximise progress, I think for latter stages of the term we may have to consider a five-day week, but there are other matters of urgent business that have to be dealt with.

I'll have regard, Mr. O'Connell, to trying to  
inconvenience you as little as possible, so we'll make  
the most dispatch we can from 11:00 on Tuesday on.

A. Thank you, Sir.

THE TRIBUNAL THEN ADJOURNED UNTIL TUESDAY, 28TH  
OCTOBER, 2003, AT 11AM.