

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 - 527

THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY, 30TH  
OCTOBER, 2003, AT 11AM:

CONTINUATION OF EXAMINATION OF OWEN O'CONNELL BY  
MR. COUGHLAN:

Q. MR. COUGHLAN: Mr. O'Connell, I'm still at Book 49.

A. Okay.

Q. And I wonder if you'd now go to Tab 120, please. And  
this is a letter from your colleague, Mr. Halpenny, to  
Mr. Prentice of Matheson Ormsby Prentice, who are, of  
course, Telenor's solicitors, and it reads:-

"Dear William,

"I refer to previous correspondence in relation to  
bridging arrangements between Telenor and Esat Telecom  
Holdings Limited in respect of Esat Digifone Limited.

"Given the delays which have occurred in relation to  
the signing of the GSM licence, which in turn have a  
knock-on effect in relation to Esat's fundraising  
exercise, my clients are requesting that the time for  
repayment of the bridging loan be extended from 30  
June, 1996, to the 30 September, 1996.

"Perhaps you could take your client's instructions on  
this and revert to me.

"I look forward to hearing from you."

Could you assist us about this bridging loan, or do

you know anything about it?

A. As far as I recall, Telenor were going to bridge Esat Telecom in respect of the first cash call-out of Esat Digifone.

Q. Yes.

A. And indeed, I noticed yesterday that I agreed with you when you said that in May Esat Telecom didn't have the money for the licence. In fact, of course it did; it had arranged to borrow the money from Telenor, and this is what's being talked about here. Now, the problem was that Esat Telecom was not going to be able seriously to market or, therefore, to close its fundraising in the US until Esat Digifone had the licence, that was a very large part of what was effectively being sold, and once the likely period for completion of the US financing went beyond the end of June, July and August would largely be lost. It's very difficult to carry out these roadshow exercises in the United States in those months because so many people are aware. So effectively if you lose the end of June, the next trading month effectively is September.

Q. Yes, but so the position at this time was that Esat Telecom didn't have, out of its own resources, the money to meet its commitments?

A. No, it was anticipating getting the money from the US.

Q. It was anticipating getting the money from the United

States and the placement that CS First B were

undertaking for them?

A. Yes, and as did occur in due course.

Q. And there was an arrangement with Telenor for bridging?

A. Yes, although subsequently IIU participated in it as well. I think

Q. This time there was an arrangement, or there was a discussion?

A. Oh, there'd been discussion, and indeed there was a document signed as far back as January I think, between Esat and Telenor, for a 9 million bridging facility. I think this is the same thing.

Q. This is the same thing, you think?

A. I think so, yes.

Q. Was that, or do you know, was that independent of the payment was that independent of the payment for the licence fee?

A. No, I don't think so. That was it. My understanding is that was the same money.

Q. So do you know how was Esat Digifone funding its activities at this stage?

A. It had an overdraft, I think, from AIB of 25 million, and that was funding its activities.

Q. That was funding its activities?

A. That is to the best of my recollection.

CHAIRMAN: What date was that letter of Mr. Halpenny

to Mr. Prentice?

MR. COUGHLAN: It's the 11th April, 1996, Sir.

CHAIRMAN: Thank you.

Q. MR. COUGHLAN: I just want to go to a Departmental file just to, for the moment to put things in context.

A. Yes.

Q. How matters evolved. I think an indicative licence had been furnished by the Department, isn't that right?

A. Yes.

Q. In March I think it's in March, you can take it, March I think?

A. Yes.

Q. And this gave rise to the letter which Mr. Digerud sent to Mr. McMahon on the 3rd April of 1996, isn't that right, I think?

A. I'll take your word for it.

Q. You know the letter in any event, I think?

A. This is the duress letter.

Q. Yes, the duress letter.

A. Yes.

Q. You know about that?

A. Yes, I remember that letter.

Q. You know you don't agree with the view expressed by Mr. Brennan that this looked like litigation planning, but leave that aside, that's a view taken on his side, and there was a robust response in any event?

A. I think our response to their response proved that it wasn't litigation planning

Q. There was a robust response from Mr. Brennan's side?

A. There was, yes.

Q. That's just to put it in context because the next note or memorandum or sorry, note made by you, sorry, in this book, I am not saying it's the next note made by you. 120A. And I think that's putting this note in context, isn't it, the letter to the Department and the response? Because your note, we have already been through the Departmental note on this meeting, but your note reads: "KD plus POD Department apparently under pressure re licence.

Bank originally willing to go along"

A. "Apparently willing."

Q. "...to go along with no mortgage over licence.

Confidentiality of licence terms?"

What's this is obviously information you are receiving from Mr. Digerud and Mr. O'Donoghue, I presume?

A. Yes, the bank information, more likely Mr. O'Donoghue.

Q. Mr. O'Donoghue. And then under that, "Department: Regina Finn and Fintan." It must be Fintan Towey?

A. Yes, I think that means we went to the Department.

Q. Does that indicate that you went to the Department?

A. I think the top of the note is a preliminary meeting.

Q. And you have a line through it?

A. And then we went to the Department.

Q. Then you have a line underneath it.

"They have letter of 3 April. Will respond before close of business today will not go into issues today.

"Meeting scheduled for next Wednesday to go through licence on article by article basis.

Will give explicit provision allowing mortgage over assets of company," is it?

A. Yes, "company".

Q. "Not licence," is that right?

A. Yes.

Q. What are you recording there, do you think?

A. At this time, not just in Ireland, but worldwide where such things were going on, there was an issue generally between banks and mobile phone companies and governments, in that governments were granting licences to mobile phone companies which, of themselves, were very valuable assets. Mobile phone companies were then borrowing large amounts of project finance to roll out their networks, land acquisition, masts, switches and so forth. The physical assets which were purchased with the borrowings were relatively worthless as security to lenders, because a bank couldn't sell a mast on the top of a hill unless it had the ability to run a mobile phone licence with it. So in country after country, disputes arose where

banks sought to get mortgages over the licences as well as just the assets which were bought with the money they lent. And government after government was refusing to allow that because, of course, once a mortgage is permitted over the licence then, in effect, the Government loses control of who has the licence, and a bank wouldn't generally be regarded as a party capable of operating an effective mobile phone network and, in effect, the Irish Government here is falling into line with other governments, not permitting the mortgage of the licence, but, in fact, early drafts of the licence, and certainly the indicative draft which we are discussing here, had gone even further and had prohibited the mortgage of any assets whatever of Esat Digifone. Now, the banks, whatever about their willingness to go along with not having a mortgage over the licence, certainly weren't going to go along with not having a mortgage over the other assets, and the Department here are signalling that they will allow a mortgage over the other assets, but not over the licence.

Q. I understand. Then the note continues:

"Eircell will be granted a licence by Department on 'level playing field' terms.

Don't accept duress as a result of Department's act or omission; note concerns. Significant problem with negotiation after signing licence."



Do you have any recollection of what that was about?

A. Yes, I do. The letter which I had written, the one which Mr. Brennan thought was setting up litigation, for that reason, obviously, had caused the Department a major problem. They were putting on record here that they don't accept there was any duress. They don't accept they had done anything wrong or omitted to do anything they should have done. They want us to note their concerns in this area.

In the same letter, if you recall, I had proposed that we would take whatever licence was on the table on the day and they would agree that that would be an interim step and we would negotiate, you remember, subsequently.

Q. I remember that.

A. And they are saying they have a significant problem with negotiation after the licence is signed. In other words, they are saying no to that proposition.

Q. Yes. Yes. And then the note continues: "Confirm acceptance of licence. Representation subsequently to be made. Then right to accept, discuss or reject."

Do you know is that the same discussion?

A. Yes, it is. And this is, in fact, what subsequently happened. They wanted us, and we agreed that we would, accept the licence however it was worked out, and rather than any right of negotiation of its terms afterwards. They were simply saying, if we wanted to,

we could come back in and make representations and they might accept them or they might reject them or they might discuss them, but they were giving no commitments.

Q. They were giving no commitment?

A. Yes.

Q. They wanted to have a free hand or to be in the driving seat, as they saw?

A. Yes. And on foot of this meeting we wrote a letter almost immediately afterwards effectively withdrawing almost everything we said in the earlier letter.

Q. Yes, and that has been opened.

Then the note: "They had big problems with duress, principals contained in the licence." That's the same argument, the same dispute, or the same discussion?

A. Yes.

Q. Now that was on the 12th April, 1996, isn't that right, that meeting took place?

A. Yes, and the meeting that's referred to there is the following week, on an article by article basis, is the 17th April meeting which you asked me about earlier in my examination. I did research that, and if you wish I can go into what I determined?

Q. Yes.

A. The 17th April was intended to be a meeting to follow the provision by the Department of, probably, a last draft or a next to last draft of the licence, and we

would spend a long time at that meeting going through it article by article or line by line, as required.

In fact, the Department, I believe, due to continuing problems in the Attorney General's Office weren't able to provide a licence the following week, as was intended. So the meeting of 17 April didn't occur.

In fact, I think the next draft of the licence wasn't forthcoming until about the 12th or the 14th May.

Q. That's correct.

A. Although there were drafts of individual articles from the licence provided before that which had been at issue. So there was no meeting on the 17th April, simply because the subject matter of the meeting wasn't to hand. There was a meeting, in fact, on the 16th April, the previous day, but it wasn't for that purpose. There wasn't a licence available.

Q. And I'll come to the meeting on the 16th April, is that a meeting with Regina Finn?

A. Yes.

Q. And we have a note of that, and we can come to that in due course.

A. Yes.

Q. Now, on the if you go to the next tab, 121, it's minutes of a Board meeting of Esat Digifone Limited on the 12th April, isn't that right?

A. Yes.

Q. And it was resolved that the share capital of the

company be increased by 998 shares to 1,000 shares.

There had been two  $\frac{1}{2}$  shares, isn't that right, issued?

A. Yes.

Q. And that: "Contribution be made in accordance with the following amounts:" And then it's 374 - Esat Telecom; 374 - Telenor; and 250 - IIU Nominees Limited. Isn't that right?

A. Yes.

Q. That's the 37.5:37.5:25 split, more or less?

A. Yes, and this is the point at which IIU actually acquires its shares. The two by 374 were because Esat and Telenor already had one share each.

Q. They had one share each already, that's correct. Now, the meeting at the Department on that day was an opportunity to inform the Department of the true position, isn't that correct?

A. Yes.

Q. And that did not happen?

A. No.

Q. Why?

A. I can't recall. I think possibly because we were still trying to sort out the whole IIU situation of the Shareholders Agreement, but I'm not sure.

Q. Well, the Shareholders Agreement wasn't sorted out eventually until, I think, the 16th May?

A. No, it wasn't. But there had been constant references

to it about to be signed. I remember there was

Q. Yes, I know that, yes, but whatever about that type of negotiation or discussion that may have been going on, there was no doubt about it, that on this day the interest which IIU had was crystallised into the shareholding, isn't that right?

A. Yes.

Q. Now, I just want to ask you; the second resolution in the minute is: "Subject to the signing of the Shareholders Agreement between IIU Nominees Limited, Esat Telecom Holdings Limited, Telenor Invest AS and Esat Digifone Limited, a further increase in the share capital be made to 2,999,000 shares of  $\text{€}1/2$  each, and that the contribution be made in accordance with the following amounts." And again, the split was the 37.5:37.5:25 split, isn't that right?

A. Yes.

Q. And then those were the resolutions recorded in the minutes?

A. Yes.

Q. Now, the minutes were signed, of course, on the 24th April; that would be at, perhaps, the next Board meeting. That would be normal practice?

A. I presume so, yes.

Q. Now, present at the Board meeting were Mr. O'Brien, Mr. Digerud, Mr. Walsh, Mr. Arve Johansen, and in attendance were Peter O'Donoghue, Knut Haga and

Catriona Beatty. I think Ms. Beatty was company secretary at that time?

A. Yes.

Q. Now, there appears to be a resolution dated or a meeting of the Board on the 13th April, 1996, or a resolution anyway, and both minutes were signed on the 24th which, again, I presume was the next meeting perhaps when the documents, or when the minutes were available, I presume?

A. Yes.

Q. And this is recorded as: "Minutes of a duly convened meeting of the Board of Directors of the above mentioned company held on the 13th April, 1996, at William Fry Solicitors, at which and duly constituted quorum of directors of company were present and voting throughout and at which the resolutions" and it gives the people present, Board members in attendance.

And it was resolved that: "The share capital of the company be increased by 2,999,000 shares, to bring the total issued share capital to 3 million. And further, that the shares be issued in the following amounts."

And again the split of the same split.

"It was further agreed between the parties that part of the appropriate funding would be provided by the conversion of loans due to the shareholders and amounts due in relation to the bid costs.

"There being no further business, the meeting

concluded."

Do you know what that was about?

A. I would guess and that's all it is, I wasn't at the meeting, that the banks wanted some of the shareholder debt converted to equity before they'd allow a further drawdown from their overdraft facility. That would be my guess.

Q. That would be your guess.

A. The money was already in, all they were doing was changing it from debt due by the company to equity, and that's moving it from one side of the balance sheet to the other, and that's usually a bank requirement. That sort of thing is usually a bank requirement.

Q. All right. But it accelerated that particular process, didn't it, the

A. It did, yes.

Q. And it dispensed with the signing of the Shareholders Agreement, I suppose, is how you might describe

A. In effect it did.

Q. In effect it did.

A. It may have been either because they had expected to sign the Shareholders Agreement the previous day and therefore it would have happened anyway, or it may have been because generally they were all keeping their powder dry, as it were, and not converting debt to equity until they had the Shareholders Agreement.

Obviously conversion to equity makes it much more difficult in the event everything breaks down to get your money back.

Q. Yes, of course. I think, now, for a moment, I have to go over to the Departmental book, and this is the note or memorandum made by Ms. Regina Finn

A. I see.

Q. of the 16th. It's in Book 43, Divider 183. And you don't have it there, I know that. I'll see if I can sort you out with a copy of the note.

A. I think my colleague has it.

(Book handed to witness.)

I am sorry, which divider, Mr. Coughlan?

Q. It's 183. Now, just to let you know; Ms. Finn, I think, believed that this was a telephone conversation, but you believe that there was a meeting?

A. She could have been right. It may be that I didn't record anything about this in my notes of the meeting, so it may be that I went back and called her or she called me. So she could well be right, I'll have to take her word for it.

Q. And the diagram is something she did?

A. Yes.

Q. Based on information she received. But the note reads: "Owen O'Connell, William Fry Solicitors, provided the following information on behalf of Esat



Digifone Limited:-

"At present Communicorp is the vehicle whereby Denis O'Brien holds shares in Esat Digifone. Communicorp also has ownership of Esat Telecom and the radio interests of Denis O'Brien. The objective is to uncouple the telecommunications and the radio elements of Communicorp because they are incompatible from the point of view of investors. With this in mind, Communicorp will retain the radio interests and 'slide out' of the current picture in relation to telecommunications."

That, of course, had happened I think, hadn't it?

A. Yes, it happened I think in January.

Q. In January. When the agreement was concluded, or differences were resolved between Mr. O'Brien and Advent?

A. Yes.

Q. Then: "Esat Telecommunications Holdings Limited has been incorporated to take over the telecommunications interests of Communicorp." Then it sets out the ownership of that

A. Actually, Mr. Coughlan, if I could just put a slight qualifier on my previous confirmation. Certainly agreement had been reached. As to whether there was a very complicated reorganisation. I am not sure whether everything had been done by now, but agreement had been reached.

Q. Agreement had been reached. Giving effect to it might not have been completed?

A. Possibly so. There were various revenue clearances under reorganisation and things like that.

Q. Then it sets out the ownership of Esat Telecom Holdings, "Mr. O'Brien, Advent, miscellaneous" and then, "Denis O'Brien - 6%, and the employees of Esat - 6%."

"A flotation is currently underway by First Boston Bank" that must be CSFB?

A. Yes, I think so.

Q. "...which involves the placing of shares in Esat Telecommunications Holdings Limited. It is not yet known what percentage of the company will finally be owned by American investors.

"Esat Telecommunications Holdings Limited in turn owns:

Esat Telecommunications Limited - 100%

Esat Digifone Limited - 37.5%.

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

IIU, a Dermot Desmond company, currently holds 20% of Esat Digifone, which it intends placing with institutional investors.

"It also has the right to acquire a further 5% (by means of the 12% Esat Telecom Holdings Limited which is held by miscellaneous?)

"Owen O'Connell is to provide further information in writing, including deadlines for this change in ownership."

Do you first of all agree with the content of this note; that's what you informed Ms. Finn?

A. It looks broadly right. It's quite a while since I have looked at this note. I am looking at it again now for the first time in a long time, but it looks about right, yeah. I think I told her that yes, she mentions I did, that I'd give her a letter confirming it all, which I think did the following day.

Q. That's right.

A. In answer to your question, I would say that to the extent there are differences between this and my letter, I disagree. To the extent it's the same, I agree. I was giving her a very complicated story or structure and the telephone isn't the best way to do that.

Q. And in fairness, I think she also felt it was, the information she was receiving was complicated and wanted it in writing I think, wanted it explained to her. I am not going to ask you to comment on the chart she prepared. That's something she prepared

A. In substance it looks right, but in detail I'd have to go through it very carefully.

Q. Very good.

Now, you then sent a letter, which is at, the next

divider, 184. What we have here is the

Departmental sorry, it's Divider 184.

A. Yes, my 184 is empty, unfortunately.

Q. It may have been taken out when Ms. Finn was giving evidence. I'll get you a copy.

A. I remember the letter all right.

(Document handed to witness.)

Yes.

Q. Now, this is the Departmental copy that we have here.

A. Yes.

Q. Or the original. And you needn't concern yourself with the notation on it, the handwritten

"Dear Regina,

"I refer to our telephone conversation of yesterday regarding the ownership of Esat Digifone Limited and of Esat Telecommunications Holdings Limited. The position is as follows:"

A. Sorry, Mr. Coughlan, clearly she was right, it was a telephone conversation.

Q. Fair enough. Nothing turns on that particular point.

"Esat Digifone Limited:

"There are 3,000,000 ordinary shares of £1 each in issue in this company. They are held as to 1,125,000 shares by each of Esat Telecommunications Holdings Limited and Telenor Invest AS, and as to 750,000 shares by IU Nominees Limited."

And you can see, that somebody in the Department has worked out 37.5 and 25.

A. Yes.

Q. "The 25% of Esat Digifone Limited held by IIU Nominees Limited effectively represents the institutional and investor shareholding referred to in Esat Digifone's bid for the licence."

A. Sorry, Mr. Coughlan, you skipped a paragraph there.

Q. I did, I am sorry.

"It is intended that by the time notification is received from you that the second GSM licence is available for issue, the issued share capital will have increased by  $\text{€}15$  million to  $\text{€}18$  million (all comprising shares of  $\text{€}1$  each) held as to again the 37.5:37.5:25: "

A. Yes.

Q. "The 25% of Esat Digifone Limited held by IIU Nominees Limited effectively represents the institutional and investor shareholding referred to in Esat Digifone's bid for the licence. You will recall that this referred to an immediate institutional/investor holding of 20%, with a further 12% in short and medium-term stages. Of the anticipated 12%, 5% has been pre-placed with IIU Nominees Limited. It is understood that most or all of the shares held by IIU Nominees Limited will in due course be disposed of by it, probably to private and institutional investors.

"Esat Telecommunications Holdings Limited:

"This company is owned either directly or indirectly as to approximately 57.% of the issued share capital by Denis O'Brien, and as to approximately 31% thereof by a group of investment funds managed and controlled by Advent International. The remaining 12% is owned, again, directly or indirectly, by a number of individuals (including Denis O'Brien) who are primarily present or former directors, employees, advisers or shareholders in Esat Telecom Limited.

These percentages assume the full conversion of all existing issued convertible debentures in the company, i.e. they are expressed on a 'fully diluted' basis.

"A placing of shares is near to completion in the United States, whereby the effective ownership of Esat Telecommunications Holdings Limited will be altered by the subscription for a substantial number of shares by a number of US financial institutions. The US institutions are likely to hold approximately one-third of Esat Telecommunications Holdings Limited after the placing (although Mr. O'Brien will retain a majority of voting shares). In addition, Advent International may increase its holding somewhat by participating in the placing.

"Other group companies:

"You asked me about a number of other companies of which you were aware, including Esat GSM Holdings

Limited and Communicorp Group Limited. While these companies remain in being and are within the overall group structure, they will not have a direct role in the licence.

"I believe that the foregoing accurately summarises the effective and beneficial shareholdings of the parties concerned, although the full shareholding structure is somewhat more complex than outlined. As I told you on the telephone, many of the effective shareholdings are held indirectly through other companies. If you wish, a full briefing can be given as to the exact shareholdings of all parties in and through all companies, but I am not sure that this will serve any productive purpose. Please contact me if you would like such a briefing.

"At the risk of labouring the point, I must reiterate the anxiety of Esat Digifone to procure a grant of the second GSM licence as soon as possible, since significant damage to its plans and prospects is already being incurred and could largely be avoided by the grant of the licence.

"I look forward to hearing from you."

This, and I mean this in the response to a request or an agreement to provide full details in writing on the 16th, is the first documented notification to the Department at least, isn't it

A. Yes, I think so.

Q. of the involvement of IIU?

A. Well, if you include press reports in 'documented', then, no, but in terms of direct communication.

Q. I am going to come back to those, Mr. O'Connell, yes, particularly Mr. McManus's article I think in February of

A. '96.

Q. It is February, I think?

A. Yes, February '96.

Q. But I will come back to that in due course. But documented in, I suppose, an informal way?

A. Yes.

Q. A notification?

A. Yes. Again, other, I suppose, than the 29th September letter, but we have been over that, and that did only refer to underwriting

Q. Let's be clear, the 29th September letter informed the Department about underwriting?

A. About underwriting, yes.

Q. This informed the Department of IIU's involvement as a shareholder, isn't that right?

A. Yes, that's correct.

Q. And I think, this is the first time that the Department is also informed that the position of Esat Telecom Holdings Limited in terms of its equity requirements for the mobile phone company was going to be funded by a private placement, rather than the



funds being obtained from Advent?

A. Probably.

Q. I won't hold you

A. I am not sure.

Q. I know you are thinking about it, so I'm not if you have any further information, you can tell us.

Now, what discussions, to your knowledge, took place on the Esat Digifone side of the house which enabled you to have instructions to send that particular letter?

A. Oh, I am afraid I can't recall. I am sure there would have been discussions. I wouldn't have written this letter without instructions. And very likely I'd have talked to Knut Digerud and Peter O'Donoghue, who were at the meeting with me.

Q. That's the meeting of the 12th?

A. With the Department, and probably I'd have talked to Denis, but I don't recall doing so, but I'd be prepared to concede I probably did. But as to what was said or whatever, I can't recall. But I would regard this letter, I know that Mr. Healy doesn't, in respect at least of the fourth paragraph, I would regard the letter as pretty straightforwardly factual. There is, what I have previously referred to as "rationalisation" in the fourth paragraph, but leaving that aside, the rest of it I think is very dry, straightforward factual and numerical data.

Q. I'd agree.

A. So, probably whatever discussions that there were, or whatever instructions I received, were simply to tell it as it was.

Q. And well, what prompted this telling of it?

A. The fact that we were asked the question?

Q. Straight up.

A. Straight up. Nothing else. You made the point a moment ago that this was the first time the Department had been told formally in writing of the share of the IIU shareholding. I think it was also well, the previous day was also the first time Esat Digifone had been asked for these particulars. So the question was asked and the answer was provided.

Q. Right. So I suppose we should go back to the previous day, the question was asked. You gave some information, I'll put it that way, to Ms. Finn the previous day, but you both agreed that you would put the matter in writing?

A. I think I gave her pretty much all the essentials the previous day. I did confirm it in writing and put it on record and I wouldn't, the previous day, have had numbers like, you know, 1 million 1

Q. The shares, that sort of thing?

A. But pretty much, what I had in this letter is what I'd given her over the phone the previous day. She seems to have had most of it from her note.

Q. Was this a phone call out of the blue, do you think, or how did it arise?

A. I just can't remember. If you remember, a few moments ago I was saying I wasn't even sure whether it was a phone call. So I am not sure.

Q. Now, if you go to the fourth paragraph on the first page, firstly, it's slightly at variance with

Ms. Finn's note of the 16th. Can I just ask you about that, because you did make the point that where there may be any differences, you prefer your letter to Ms. Finn's note. But if you go to "IIU" at the bottom of her note, "A Dermot Desmond company currently holds 20% of Esat Digifone, which it intends placing with institutional investors." Now, whatever about its intentions, it held 25% of Esat Digifone?

A. Yes, it did.

Q. "It also has the right to acquire a further 5% (by means of the 12% of Esat Telecom Holdings Limited which is held by" well, we'll leave that aside.

Now, did you say that to her?

A. I can't recall. I obviously can't take responsibility for her note, but I could speculate that she may simply have misunderstood the way in which I was distinguishing between the 20% and the 5% as meaning that the 5% was something to which IIU had a right, rather than something which it had got, as I explained it or rationalised it, by means of a different route.

That's a possible explanation.

Q. That is a possible explanation, but she has given evidence, and she well, it's a matter for the Sole Member, but I'll just put it to you that she appeared like a fairly careful and conscientious type of person, and I accept she agreed she was getting complicated information or new information at that stage, but it's just the note is interesting, isn't it? That it seems to be recorded that she was told, as a fact, that they currently hold 20%. If she was told that, that couldn't have been correct, isn't that right?

A. You mean because it held 25%?

Q. Yes. I know if you hold 25%, you hold 20%, but let's not play games.

A. I would assert, that simply based on what I wrote to her a matter of hours later, I would have told her that it had 20% plus 5%, and I would have distinguished as to the means by which it acquired those holdings, or that aggregate holding. She may have picked up what I said as meaning that it had a holding plus a right to acquire a further holding. Frankly, I can do no more than rest on the letter I wrote. It wasn't as if I wrote the letter weeks and weeks later having reconsidered it.

Q. I understand that.

A. I think I probably put down the phone and dictated

this letter more or less on the spot and then had it proofed the next day or something.

Q. Very good. All right. Let's go to the letter, so, and the fourth paragraph. That reads that the: "25% of Esat Digifone Limited held by IIU Nominees Limited effectively represents the institutional and investor shareholding referred to in Esat Digifone's bid for the licence. You will recall that this referred to an immediate institutional/investor holding of 20%, with a further 12% in short and medium-term stages. Of the anticipated 12%, 5% has been pre-placed with IIU Nominees Limited. It is understood that most or all of the shares held by IIU Nominees Limited will in due course be disposed of by it, probably to private and institutional investors."

Now, you very fairly say there is an element of rationalisation there, and I am going to ask you about that in a moment. And in fairness to you, I should also say that this did not impress Mr. John Loughrey, anyway, as an explanation or a rationalisation; he has given that evidence, but just to bear that in mind.

A. Yes.

Q. First of all, and in fairness to you, you say that the 25% of Esat Digifone held by IIU Nominees Limited effectively represents the institutional and investor shareholding referred to in the bid. Now, whatever about the letters furnished by the institutions, and

I'm not going to necessarily have any debate with you about those. We have seen Mr. Kyran McLaughlin's letter of November, but what the bid did indicate was a class, isn't that right, institutional investors a class?

A. Yes.

Q. And I don't think anyone could rationally quibble with some sort of a de minimus rule there, that it wouldn't make any difference if you substituted one member of that class for another member of a class?

A. Well, I would set the de minimus bar far higher.

Q. I know that, but I am asking you first of all to do you agree with me in relation to that? For example, if it had been I don't know, National Westminster Bank or something of that nature, and for the purpose of the bid and to enable people conducting the evaluation to be comfortable or satisfied on financial matters, leave aside the individuals, the class would be something that would either impress them or wouldn't impress them, or would cause them to make inquiries or not make inquiries. In this case it caused them to make no inquiries because they were extremely satisfied with the type of investor that was being, and I'll use your word for the moment, "indicated"?

A. Wasn't it the case that they also suggested that if the Minister entered into negotiation with this

consortium, he should seek a guarantee from the financially-sound member of it as to all of the remaining financing which the Minister duly did?

Q. Where is that stated?

A. I'll have to find it for you, but I recall reading it.

I think it's in the

Q. The final evaluation report?

A. I think so.

Q. Well, we'll look at that because what it did was ask that they look at the weak, the weakness of Communicorp's position, isn't that right?

A. Yes.

Q. That's what

A. I am not sure it's that confined. I think it goes further.

Q. Right. Now, what you are representing here, is that IIU is effectively in the same class, isn't that right?

A. No, I don't say anything about a class.

Q. I know you don't say anything about a class. I am just asking you to bear in mind what we have just been talking about, Mr. O'Connell. The bid indicated a class?

A. Yes.

Q. What you were saying here is that IIU Nominees 25% effectively represents the institutional and investor shareholding referred to in the bid that's the 20%?

A. What I'm saying, as far as I'm concerned, is that the shares which IIU Nominees Limited has are the shares which the institutional investors referred to in the bid would have had.

Q. Is that what that means so?

A. That's what I say it means, yes.

Q. So you are not contending for the proposition that IIU is in the same class as the institutions indicated in the

A. I am contending that IIU is a financial institution, a financial institution, but I am not addressing the class at all.

Q. I am not asking you that question. Are you contending for the proposition that IIU is in the same class as those institutions indicated in the bid?

A. I am not doing that, simply because my letter makes no reference whatever to classes.

Q. I know that, Mr. O'Connell. I'm asking you to look at the overall picture here, that's what I asked you to do, and I thought you agreed with me that these financial institutions were a class "sound", "blue-chip" has been mentioned, words like that, but a class?

A. I accept they were a class in the bid. But I'm not

Q. But that was what was evaluated, isn't that right?

A. I don't know what was evaluated.

Q. Well, you do know, Mr. O'Connell, because that was



what was in the bid. Sure, you must know, like, as a

matter of common sense, that that was in the

A. Knowing what was in the bid gives no knowledge of what was evaluated.

Q. Are you saying that you don't know that the bid was evaluated?

A. Of course I know that the bid was evaluated.

Q. That's all I am asking you about, Mr. O'Connell, and it doesn't seem that difficult; that that was what was evaluated, isn't it?

A. The bid as a whole was presumably evaluated, including the comfort or letters of intent from the four institutions.

Q. And you would not contend for the proposition that IIU was in that class, that type of institution?

A. I am sorry, you say I would not contend

Q. Or would you?

A. You'll have to rephrase the question, I am sorry.

Q. Would you contend, or were you contending that IIU was in that class of institution, the one that was in the bid?

A. No, I am not contending that. I am contending that the shares it has are the shares which would have been held by that class.

Q. Which would have been theirs?

A. Yes.

Q. Because now, we don't know this for definite, but

in our ordinary every day life, and in your ordinary every day life as a solicitor practicing in the area of commercial law, it is improbable that at any time from the 25th October on, that any of the financial institutions mentioned in the bid are, or like institutions, that is of the same class as them, would have ever been in a position where they would have been unable to meet a capital call, isn't that right it's unlikely?

A. It's a fair assumption.

Q. Nevertheless, you have recorded, as of the 8th February of 1996, that that was the position that IIU were in at that time, and I think you expressed the view that they would have been that was the position they would have been in from the time that the announcement of the winner of the competition was made, and for some time after the 8th February, "in the interim" I think is the note that they would not have been in a position to meet a capital call?

A. No, I don't think I said anything about the period from 25th October to February. I think if you look at the record, I was talking about from the 8th February until some further date, which wasn't specified.

There was only a reference to interim period.

Q. But there was a period?

A. Yes, and I also qualified that I felt that was a cash or a liquidity issue rather than an asset issue.

Q. Yes, that's neither here nor there. You have recorded that they were not in a position to meet a capital call?

A. Yes.

Q. It would be a fair assumption to make that the institutions named in the bid, or like institutions, would ever have been in that position in relation to liquidity?

A. Yes, but there is a difference between "could" and "would".

Q. No, I am looking at a rationalisation that's being made here, Mr. O'Connell.

A. Yes, you are.

Q. And that's what I am trying to test.

A. And I am making the point that where you are focusing on the ability of IIU as against the other institutions to meet a capital call, I am asserting that the willingness is also a relevant consideration, because the letters given by the institutions were not binding, whereas the letter given by IIU was.

Q. Well, I suppose looking at that, Mr. O'Connell, we have to take into account the letter written by Mr. McLaughlin to Mr. O'Brien?

A. Yes, we do. But Mr. McLaughlin wasn't authorised to represent the four institutions in respect of whom he wrote.

Q. Well, Mr. McLaughlin will give his evidence. You have

seen the letter, and you agreed that it is a significant letter coming from somebody like Mr. McLaughlin, and it raises pertinent issues?

A. Yes, I agree with both of those things.

Q. Now, I just want to come back to distinctions you draw between willingness and ability, as to whether the banks or financial institutions would have been willing, which you say IIU was. There is very little point in being willing if you haven't got the ability, isn't there?

A. Yes. I would remind you, though, that IIU did have the ability.

Q. You record as of the 8th February, that at that time

A. If a call was made on that day

Q. and in the interim?

A. and for some future indeterminate period, it would have difficulty. But I would also say, in my view, that the only day that ever mattered as to whether it could meet a cash-call, was the day on which one was made, and when a cash-call was made, it met it.

Q. I am only looking at this in the context of looking at IIU vis-a-vis the type of institution that was indicated in the bid. That's all I am asking about.

A. Yes.

Q. So the willingness is not the issue, it's the ability at any given time.

A. And I am saying that any given time is irrelevant.

There is only one date that's relevant.

Q. Very good.

Now, you then go on: "You will recall that this referred to an immediate institutional investor holding of 20%, with a further 12% in short and medium-term arrangements. Of the anticipated 12%, 5% has been pre-placed with IIU Nominees Limited."

Now, you say that this was a rationalisation which was worked out between you, Mr. O'hUiginn, Mr. Jarlath Burke and Mr. Peter O'Donoghue, you believe?

A. I am not sure about the latter two, but I think there were certainly others involved.

Q. Mr. O'hUiginn was involved?

A. Yes.

Q. Now, what the bid had stated was that, as of licence, that the company would be as to, in terms of ownership: 40% Esat/Communicorp I am not distinguishing between Communicorp and Esat 40% Telenor; 20% institutional/investor, isn't that right?

A. Yes.

Q. And the bid also went on to say that in a period, I think it mentioned three years, I am not within two to three years, but we won't quibble about that that it was the intention, or that they might make available 12% to the market; that would depend on many things I presume; the state of the company, the

state of the market at the time, other matters of that nature. I think that's what the bid indicated. And that in those circumstances, the shareholding of Esat and Telenor would drop to, I think, 34% or something like that. Isn't that right?

A. Yes.

Q. And if that were to happen, of course, it would mean that it would be Esat and Telenor selling 6% of their interest?

A. No, probably not.

Q. Probably not. How would that be done so?

A. It would almost certainly have been a new issue to secure finance for the company, rather than finance for Esat and Telenor.

Q. But it would be a form of selling in that there would be a value to them as shareholders?

A. No, there would be no value to them as shareholders.

Q. There would be no value to them, you say?

A. In the classic expression, they would have a smaller slice of a bigger cake.

Q. So they would have a value in terms of indirectly an enhancement of the capital value of the company, Esat Digifone?

A. No, it would be neutral.

Q. It would be neutral. So either would you agree that either Esat Digifone would benefit or they, as individual shareholders, would benefit; those were the

two cases it could be done?

A. Yes.

Q. Now, what, in fact, happened here was this: On the 29th September, IIU obtained a 25% interest in the company, isn't that right?

A. It acquired the right to acquire 25%.

Q. It acquired an interest?

A. Yes.

Q. The consideration for that was the furnishing of the underwriting letter to the Department and the that's why they obtained the right to the 25%, and the underwriting of Communicorp's interest, isn't that right?

A. Yes, and of course they had the obligation to pay for the 25%.

Q. Yes. They had the obligation to subscribe as calls were made, isn't that right, up to the full issued capital, that was their obligation?

A. Yes, absolutely.

Q. They didn't pay Telenor or Esat for their 2.5% dilution, at that stage, did they? You can take it they didn't?

A. No, I am sorry

Q. Or did they

A. No new shareholder would ever have paid the old shareholders for their dilution. If new investors if exactly what had been provided for in

the bid had occurred, new shareholders would have come in post-licence. Almost certainly they would have paid amounts of money to Esat Digifone Limited and would have been issued with shares. That would have had the consequence of diluting Esat and Telenor, but the new shareholders would not have paid Esat and Telenor for the dilution any more than IIU did. All IIU undertook to do when it agreed for the 25% was to pay money to the company for those shares when they were to be issued, and this is precisely what any subsequent shareholder would have done post-licence.

Q. I understand. What happened here was that when IIU reduced its shareholding from 25% to 20%, it sold them

A. Yes, absolutely.

Q. to Esat and Telenor?

A. Yes.

Q. In equal proportions?

A. Yes, it did. The only two ways legally in which that could have been done, because except for very rare circumstances which have to be court sanctioned, a company can't or couldn't, at that time anyway, pay back share capital subscribed. It would have had to either be a sufficiently dilutive new subscription by the other shareholders or a transfer to them, and the latter was simply more convenient.

Q. Mm-hmm. So in real terms what happened here, am I not



correct in understanding the situation, that on the 29th September, Esat and Telenor agreed to a reduction in their interest?

A. They agreed to a reduction in the number of shares which they would be entitled and obliged to subscribe for in the future.

Q. Yes. And they had to buy that back when IIU reduced their shareholding from 25% to 20%?

A. I am sorry, I think that's an inaccurate statement. I think what actually happened was that subsequent to the 29th September, IIU performed its obligation; in other words, it subscribed money to the company for shares, and subsequently sold those shares to Esat and Telenor. I think you are concertina-ing the sequence of events too much.

Q. Very good. What subscription did IIU make, did you know of, for its shares?

A. It would have been the 750,000.

Q. Was that the call when the 3 million, the increase of the share to the 3 million

A. Yes.

Q. where debt was converted into equity, is that right, by the way you believe, anyway?

A. I don't think they had debt, I think they had to pay cash, but I'd have to confirm that.

Q. All right.

A. Actually, they may have put in some of the 750, or

even all of the 750, in cash previously, I can't be sure.

Q. All right.

A. Although it could be checked quite readily.

Mr. O'Donoghue would probably know.

Q. Right. But there had been no discussion, as of the 29th September, that the reduction of the interest, I'm using that in its broad sense, by Telenor and Esat, to 37.5% was in any way a pre-placing of the 12% which was intended after the licence was issued after the company was up and running and in a period two to three years, isn't that right? There was no discussion about that?

A. Not that I recall, no.

Q. And wouldn't it appear, Mr. O'Connell, that to represent that as a fact of the anticipated 12%, 5% has been pre-placed with IIU Nominees, to represent that as a fact is not an accurate representation?

A. No, I don't accept that.

Q. You say it's accurate?

A. I say it's a rationalisation, but I would not go so far as to say it is inaccurate, or wrong. The net effect of what actually happened vis-a-vis IIU, and I'm taking net effect through to and including the 16th May, is the same; in other words, the amount of money subscribed to the company would not have been different irrespective of what subscribed it.

Q. Yes.

A. So from the point of view, logically, of the Department, there was no difference in what actually happened, from a financial perspective, versus what they understood would happen. In other words, shareholders subscribed funds to meet the capital requirements of the company, including the licence fee. Now, they did so in proportions and as to certain parties as to identities different to those proposed, but the subscriptions were the same. In other words, from logically from the perspective of a Project Team manager, or member, I should say, in September, 1995, he might have said hypothetically, Well, hold on, the people subscribing this money are supposed to be AIB, Advent, et al, and here it is IIU putting it in. And the people subscribing the money are supposed to be doing so as to 1/40 and 1/40 and 1/20, and they are doing it as to 37.50, 37.50 and 25. But if he were to proceed to the end of the road and say, well, my concern really is that shareholders subscribe sufficient capital to fund the project; that end would be achieved.

Q. I agree with you, that particular end would be achieved. But we had a slight complication here, that there had been a decision by the Government that there would be a competition for this licence, isn't that right?

A. Yes.

Q. And there had been ground rules, effectively, set in relation to that competition?

A. The RFP.

Q. The RFP. And that competition was what preceded anyone's entitlement to enter into exclusive negotiations or obtain the licence, isn't that right?

A. Yes, but at the risk, Mr. Coughlan, of annoying you again, as I did yesterday.

Q. You don't annoy me at all, Mr. O'Connell.

A. All right, Mr. Coughlan. The RFP permitted changes after the 31st January.

Q. All right. Permitted what changes?

A. Changes in the information supplied pursuant to the RFP.

Q. Where does it say that?

A. It says well, it says so by implication. There is a sentence in the RFP which says that each bid must contain a statement to the effect that information in it will remain valid for 180 days from the final date for submission of bids.

Q. Let's just think about that for a moment,

Mr. O'Connell. The information, first of all, in relation to the facts surrounding this particular

matter, the bid indicated that the

interesting first of all, the bid required a statement of ownership, isn't that right?

A. Yes.

Q. That was mandatory. I think there is no doubt about that.

A. No.

Q. It required other matters as well: Financial, technical, all such matters, commitments?

A. Most of which, in my view, were of far more significance, but that's only my view.

Q. The Esat Digifone bid did, under Clause 3, give the particulars, isn't that right?

A. Yes, 50:50 Esat and Telenor.

Q. It went further than that.

A. Well, the particulars of ownership were 50:50.

Q. It went further than that, Mr. O'Connell, and you know it did because you have been following this Tribunal, and you know what was said at the presentations as well. It went further than that.

A. What was said at the presentation was what the ownership would be in the future. What was said in the presentation was what the ownership was at that date as well. The ownership at that date was 50:50.

Statements were made as to what the future ownership would be.

Q. What statements?

A. Whatever was made in the oral presentation concerning the institutions.

Q. Yeah, and that's what the RFP required?

A. They were statements as to the future.

Q. That's what the RFP required?

A. You asked me about statements as to ownership. The statement of ownership was 50:50.

Q. Mr. O'Connell, so that is the statement of ownership that you referring to. What Clause 3 of the RFP required was that, that a bidder or an applicant must give full ownership details of the proposed licensee?

A. Yes.

Q. The proposed licensee, isn't that right?

A. Yes, the proposed licensee was and remained Esat Digifone.

Q. But sure, Mr. O'Connell, are you seriously suggesting that that was all that was required under Clause 3?

A. No, I am not. I am answering your question, Mr. Coughlan.

Q. Full details of ownership?

A. Full details

Q. Full details of ownership?

A. Yes.

Q. Details of ownership was those behind Esat Digifone, isn't that right?

A. Those who owned it. Ownership is the ownership.

Q. Yes. As of the time of the licence, the proposed licensee, isn't that right? That's what it says?

A. Yes.

Q. And what the bid and the presentation do, and there is

no need for any great debate, whether it's 50:50, but it certainly indicated at the time of licence it would be 40:40:20, and it said that the class that we have described?

A. Yes, but I am trying to answer your questions very precisely.

Q. And that was to enable the people conducting the competition to evaluate the bid, isn't that right?

A. I presume so. I didn't prepare the competition.

Q. You knew it was a beauty contest?

A. Yes.

Q. And you knew there were other applicants?

A. Yes.

Q. Or bidders.

A. Many of whom, by the way, didn't provide information as to their full ownership. At least one of which merely referred to a trust on behalf of unnamed Irish investors.

Q. Who was that?

A. I can't remember which consortium it was. I'll check for you.

Q. Now, the evaluation continued, isn't that right

A. I presume so.

Q. after the bid. And up to the time of the announcement of the competition result on the 25th October, 1995, the information, which the Department had, to the best of our knowledge at the moment

anyway, was what was contained in the bid, isn't that right?

A. Except for the 29th September letter.

Q. Except, as you say, for the 29th September. And that was it, wasn't it?

A. Yes.

Q. So what was evaluated, what was in the bid and, in fact, on the evidence we have so far, the letter of the 29th September wasn't included in the evaluation, on the evidence we have so far, you understand that, but I see your point about that going in.

So as of the 25th October, when the competition result was announced, what was stated was that the proposed licensee would be Esat, Telenor and, I'll just put it in this sense, the class of institutional investor?

A. Yes.

Q. But as of that date, that was not the position, that was not the true position, isn't that right?

A. No, the true position was 50:50 Esat/Telenor.

Q. No, as of the 25th October, was not the true position: 37.5% Telenor; 37.5% Esat; and 25% Mr. Dermot Desmond? Wasn't that the true position?

A. That had been agreed but not implemented.

Q. Mr. O'Connell

A. We are both lawyers, Mr. Coughlan.

Q. Let's not play with words now, Mr. O'Connell. That was the true position, wasn't it? That was the true



position. That's who had the interest in this company?

A. No. The shares were owned one by Communicorp, one by Telenor. They had entered into an agreement with IIU whereby IIU would be obliged and entitled to subscribe for 25% of shares in the future and they would subscribe for 37.5% of shares in the future each.

Accordingly, IIU had a contractual interest or a right in the company, but it did not have a shareholding.

You have reminded me repeatedly that I am a lawyer, that I am a commercial lawyer, that I am a trained lawyer, that I have to be careful. I am being careful.

Q. Okay. Well, let's take it like that so. There were two shares issued; there were two shareholders?

A. Yes.

Q. But there was an agreement which could be enforced by IIU, isn't that right?

A. Yes.

Q. That they had an entitlement to 25% interest in the company to hold the licence?

A. Yes.

Q. So they had a beneficial interest?

A. Arguably, yes.

Q. And that was the true ownership, not of the company at the time, but of the proposed licensee, isn't that right?

A. Yes.

Q. And that was the position on the 29th September, and it was the position on the 25th October, and that was not known to the Department, isn't that right?

A. Yes, it is.

Q. So the statement that the information, I am just taking it on that narrow point first; the statement that the information would be valid for 180 days from the date of the bid had not been complied with, isn't that right?

A. Probably, yes. Which brings you to materiality.

Q. Now, what was the bid had to be respected, isn't that right? The bid had to be respected?

A. As to its essential elements, but not in every particular. If in the bid it was said, for instance, that Mr. X would be Marketing Director and Mr. X left

Q. I agree.

A. There was a materiality qualification implicit in the bid.

Q. I agree, I agree. Now, on the 17th, or following the 17th April of 1996 I beg your pardon, after the announcement of the competition there were many opportunities to inform the Department of the true nature of the owners of the proposed, the ownership of the proposed licensee, isn't that right?

A. Yes.

Q. This was not done?

A. No.

Q. Why?

A. You'd have to ask those who made the decision not to do it.

Q. All right. That's a fair that's fair enough. I am not going to ask you, you weren't the solicitor. But you believe there was a decision taken not to do it.

A. I assume well, I know there wasn't a decision made to do it. It may simply have been a matter of omission. I am not certain there was a conscious decision made not to do it. It was clear there was not a decision made to do it.

Q. Right. Now, I referred you to a whole series of memoranda yesterday from November on, I think, isn't that right?

A. Yes.

Q. Where you are being informed "problem re IIU"?

A. Yes.

Q. So there must have been a lot of discussion about it?

A. There was certainly a fair bit, I imagine, yes.

Q. So it's unlikely, I suggest to you in those circumstances, it was merely an inadvertent omission or anything of that nature; that this was a conscious decision not to inform the Department of the true position?

A. I think it was likely that the timing and presentation

of the information had to be considered and decided upon. That's the likelihood.

Q. This is a question of frankness, Mr. O'Connell.

A. I am sorry?

Q. This is a question of frankness. There was an obligation there was an obligation under the RFP to inform the Department of the ownership of the proposed licencee, isn't that right?

A. Yes.

Q. And surely if that be the case, there must have been an obligation to inform the Department of the true position?

A. I would say there was such an obligation, yes, but to do so before the licence was granted.

Q. So you can say what you like in the application, and you can then say what you like before the licence is granted; is that what you are contending for?

A. No, that isn't what I am saying. And I have to say, with respect, Mr. Coughlan, that's a matter of putting words in my mouth. What I am saying is that insofar as a change occurred in the bid particulars, clearly it had to be told or notified to the Department before the Department took any irrevocable act, essentially the granting of the licence. I would contend that the putative licencee had a degree of discretion as to the manner in which it communicated that information and the timing with which it communicated the information.

I would further contend, that the materiality of the information has a bearing on the timing. In other words, a major negative event should have been communicated early, a moderate one in reasonable time, and a minor one whenever was convenient. I would further contend that the perception of the materiality of this event has been distorted in the lens of hindsight, particularly having regard to the proceedings of this Tribunal; that you should judge the actions of those concerned in this matter by the standards, the knowledge and the perspective of the time in which they were acting or failing to do so.

The view of the owners of Esat Digifone, supported by those conversations they had, which were few and far between, with the Department, was that so long as Esat Telecom and Telenor controlled a majority of Esat Digifone, they were relatively unconcerned as to the remainder of the shareholding. That point was made on a number of occasions. It was also flagged at meetings, agenda setting meetings, for example, that the question of ownership would have to be discussed in the future.

I would contend that having regard to the relatively low perceived importance of this issue, the consortium members fairly perceived themselves as having discretion as to when and in what manner they informed the Department, but knew they had to inform the

Department before the licence was granted.

Now, I accept that a considerable time elapsed before the information was conveyed, but I would also contend that a considerable time elapsed between the expected time for grant of the licence and the actual time for grant of the licence. And there are statements on record by the Department, or on behalf of the Department. For instance, we were discussing whether the restriction on ownership would what level of percentage would have to be maintained and so forth. And I think that the consortia members had fair reason to believe that the Department were relatively unconcerned about this, and as long as they told them in good time before the licence was granted, there wouldn't be a problem and they weren't in any material default.

Q. Right. Well, when, do you believe, the members of the consortium intended informing the Department about this?

A. I don't know when they intended to do it, but they did it as soon as the direct question was asked.

Q. Yes, I know that, I know that. A question was asked?

A. Well, the question.

Q. The question the question. The question. Yes, the question was asked. If the question hadn't been asked, it was planned, as your note indicated there was a meeting planned I think for, I think, the 17th

April, which couldn't go ahead because the final draft of a licence wasn't available, but it must have been anticipated that things were coming to a head, at least in relation to the licence, isn't that right?

A. Oh I think so, yes.

Q. Well, do you remember any discussion among the members of the consortium at that stage?

A. I don't. But I accept that it was likely or it is likely that there was some.

Q. But none with you, because there is nothing recorded by you of any

A. But I have never pretended that everything that was said to me I recorded. Far from it.

Q. Now, Mr. O'Connell, as a solicitor, you do have certain obligations, isn't that right, to keep attendances?

A. I have never seen that written down anywhere, Mr. Coughlan.

Q. You are saying you don't have an obligation to keep attendances?

A. I think I have an obligation to record what it is I have to do. Whether I have an obligation to keep an accurate record or a minute of every meeting and every conversation, no, I wouldn't regard myself as having that obligation.

Q. I didn't ask you about a minute of every conversation. I asked you about an attendance.

A. I endeavour to keep attendances, but I don't always succeed.

Q. Well, that's fair enough. You endeavour to keep attendances?

A. Yes.

Q. And one can understand if there was a lot of to-ing and fro-ing, that one mightn't be able to note everything; I accept that, of course. But this was in the category of a significant matter, isn't it?

A. Yes, but there are several notes we have come across in which I do record ownership issue, or IIU problem or whatever.

Q. Yes, yes

A. So there were discussions.

Q. Oh, there were discussions, and we see that back in November?

A. Yes.

Q. There were discussions, and it was seen as a problem?

A. Yes, it was, one of many though.

Q. No, it was a problem?

A. One of many.

Q. It was a problem. It was a serious yes, there were other problems, but it was a serious problem?

A. No.

Q. It wasn't. Well, you do record, on the 3rd November of 1995, somebody perhaps saying something to you this is at Book 49, Tab 84. Attendance here on



Denis O'Brien, Leslie Buckley, Paul Connolly, John

Callaghan. Now, there is nobody there at this

stage

A. Sorry, which tab, Mr. Coughlan?

Q. It's Tab 84.

A. Okay.

Q. Am I correct the attendance is: Mr. O'Brien, Mr.

Leslie Buckley, who was a businessman and a director,

I think, of Esat Telecom or

A. And Esat Digifone.

Q. And was Mr. Buckley a director of Esat Digifone?

A. Yes.

Q. Paul Connolly, who was a financial adviser, a man

experienced in business matters, isn't that correct?

A. Yes.

Q. And Mr. John Callaghan, a chartered accountant?

A. Yes, Mr. Connolly was a chartered accountant as well.

Q. And Mr. Connolly, a chartered accountant. And then:

"IIU issue bullet points for press release.

Problem re material change in shareholders Vs bid."

That's what you record, isn't that right?

A. Yes, not "serious problem" though.

Q. No. But what you talk about is material change in

shareholders against bid, and you are either receiving

that information or it's something you are noting as a

result of a consultation. And you, as a solicitor,

are there, Mr. O'Brien as a businessman, Mr. Buckley

as an experienced businessman, and two chartered accountants are there, and that is noted, "material change"?

A. Mm-hmm.

Q. And the rest of the entire meeting is devoted to how it might be dealt with, isn't that right? Am I right?

A. I am just reading through it.

Q. Yes, okay.

A. Yes.

Q. And that seemed to be the purpose of that meeting, isn't that right? There is no other note of anything else of significance being discussed?

A. It seems to have been, yes. But I met those people constantly.

Q. Pardon?

A. I met those people constantly.

Q. I know that.

A. That was one meeting on that issue. There were other meetings on other issues, possibly even the same day.

Q. Yes, but that's what's recorded, isn't it?

A. Yes, it is.

Q. Now I am just looking for a document which may have been prepared around that time as well now, I think you prepared, and it's referred to in your own Memorandum of Intended Evidence, that is I think, what's described as your third Memorandum of Intended Evidence, isn't that right, dated 7th October, 2002,

at Divider No. 2? You prepared a draft, "Second GSM licence, Esat Digifone, preliminary response to Department of Transport, Energy and Communications."

This is after you had been at the meeting I think, of the 9th November, isn't that right?

A. Sorry, I am still looking for it, Mr. Coughlan.

Q. I beg your pardon.

A. 7th October, which divider? Divider No. 2?

Q. Divider No. 2.

A. This is an attendance at Esat Technical?

Q. No, I am sorry. What it is is, it's a "Draft of the Second GSM Licence, Esat Digifone Preliminary Response to Department of Transport, Energy and Communications"?

A. I see, yes.

Q. Now, there is some annotation, is it yours? I don't think so.

A. Yes, that's from the 26th January meeting.

Q. Is that your note?

A. Yes, I made that on the 26th January, when I met the Department to discuss these points.

Q. Oh I see, you brought this with you?

A. Yes.

Q. I see.

A. I made that clear in my memorandum.

Q. Yes, I am sorry, you do. And I am just trying to be clear because we are still looking for a note of that

meeting in the Department files. It may be there. We are just looking for the moment.

A. I see.

Q. But this draft had been prepared as early as November, isn't that right?

A. This was sent to the Department following the 9th November meeting. They asked for our points. And we sent it to them. And then nothing happened for more than two months until, on the 26th January, we had a meeting, and they gave us their broad brush responses to the points, and that's what I have noted in the margin.

Q. Right. I understand now. So you sent it, and you brought it along to the meeting on the 26th as well?

A. Yes.

Q. Very good. I am with you now.

Now, if you go to the you say that, "This document is written in advance of the receipt by Esat Digifone of draft licence and associated statutory instruments, and in response to the summary documents received by Esat Digifone from the Department of Transport, Energy and Communications, in which indications are given as to the likely contents of such documents."

So that's how it goes on?

A. Yes.

Q. "Esat Digifone reiterates its commitment to its application for the second GSM licence." Isn't that

right?

A. Yes.

Q. "Accordingly, the application prevails over this document and anything in this document which after discussion with the Department is shown to be inconsistent with Esat Digifone's application will be withdrawn or amended accordingly." Is that right?

A. Yes.

Q. So that's asserting that Esat Digifone commits to its application?

A. Yes.

Q. And everything in its application?

A. Yes.

Q. Then it goes on to deal with European law. I don't think we need refer to that. Then it says: "The paragraphs numbered below refer to the paragraph numbers in the preliminary memorandum for the information of prospective applicants prepared for the guidance of applicants by the Department of Communications.

"1. For all practical purposes, Esat Digifone constitutes Esat Group and Telenor Invest AS. It is submitted that the licence should provide that the licensee will continue to be owned as to a majority of its share capital by both of these parties and that each of them will continue to have a substantial shareholding (defined as more than 10%) therein, at

least for a period ending on the later of the third anniversary of its grant and the substantial achievement of all coverage commitments in Esat Digifone's application. Thereafter, the consent of the Minister should be required only to either a party permitting its shareholding to fall below 10% and the minister should not be entitled unreasonably to withhold his consent."

Now, what is that particular paragraph about?

A. It's about ownership.

Q. And this was an opportunity, wasn't it, both by sending it to the Department and at the meeting of the 26th January of 1996, to inform the Department of the true position, isn't that right?

A. Yes.

Q. And it wasn't taken?

A. But that wasn't the purpose of this document. This document is proposing the content of the licence.

Q. But what I am saying is these were opportunities to inform the Department of the true position, isn't that right?

A. But, with respect, Mr. Coughlan, there was an opportunity every day. We could always have picked up the phone or written a letter.

Q. But these, when you were in direct contact with them, and it's being asserted here that for all practical purposes Esat Digifone constitutes Esat Group and

Telenor Invest AS?

A. Yes, and that's a reflection of my materiality point earlier.

Q. Although you had noted as of the 3rd November, the material change from the bid, isn't that right?

A. Yes.

Q. So if that note be correct, and we have no reason to believe that it's not correct, did you write it down?

A. Oh, I did write it down, but sorry, are you saying my note means I was saying it was a material change?

Q. I didn't say you said anything.

A. Okay.

Q. I said you noted it.

A. Okay.

Q. I don't know who said it. Or

A. Or asked it.

Q. You asked it?

A. No, or asked it.

Q. There is no response recorded in relation to that, is there, if it was asked?

A. There often isn't.

Q. I see.

A. My notes are piecemeal.

Q. I see. But here the Department were not being informed of the true position, isn't that right?

A. Yes, but when they respond, they are not giving any indication of particular concern. I mean, all they

say is that the third anniversary is too soon and it

will be more than 10%.

CHAIRMAN: I think Mr. O'Connell has acknowledged that

there were a number of opportunities, and has

responded as to his view as to its particular context.

MR. COUGHLAN: Yes.

Q. Now, do I want to come to, and it might be appropriate

now to, Mr. McManus's article in the newspaper in

February?

A. Yes.

Q. Perhaps maybe we might look at a couple of them, the

November period. There is something in the newspapers

around November as well?

A. I think there is, yes.

Q. But I think you attach particular significance to the

February article?

A. I haven't attached any significance to it. I presume

I did see it at the time but I have no particular

recall of doing so.

Q. Right. Book 58 seems to contain the ones of the 24th

and 25th October of 1995. I just haven't got them to

hand at the moment. Perhaps I'm come back to those

after lunch, and I'll just go to Mr. McManus's article

in February.

A. Very well

Q. I'll see if I can give you a copy

CHAIRMAN: Well, from recollection, I think the



pre-Christmas articles only referred to it in an agency context, be it in placing or underwriting.

Q. MR. COUGHLAN: Well, in broad terms, yes, but I think there may be some other slight reference. But in broad terms I think that is correct. I'll see if I can give you a copy of this now. Book 58, B7, I think is Mr. McManus's article. I'll give you this and I'll read it off the screen. We have it here.

(Document handed to witness.)

Now, this is the Irish Times, the 28th February, 1996.

And it was on page 19 of the Business Section. It's under the byline of Mr. John McManus. The heading is "Esat seeks  $\text{€}1/230$  million in debt to fund mobile phone network launch.

"Communicorp, the parent of Esat Telecom, is seeking to raise  $\text{€}1/230$  million in debt to fund its shares of the  $\text{€}1/2100$  million cost of launching the second mobile phone licence network.

"The company is hoping to raise the bulk of the money in the US, and its Chief Executive, Mr. Denis O'Brien, is understood to have been making presentations to US investors over the last two weeks.

"Communicorp is a 37.5 percent shareholder in the winner of the second licence, Esat Digifone, through its holding in Esat Telecom.

"The Norwegian state phone company, Telenor, owns another 37.5 percent, while Mr. Dermot Desmond's

company, International Investment and Underwriting

Limited, holds the remaining 25 percent.

"Under the terms of the planned fundraising,

Communicorp will be reorganised. A new company, Esat

Holdings, will be created as the holding company for

Esat Telecom and for the Group's stake in Esat

Digifone.

"Communicorp's other interests, including the Dublin

radio station, 98FM, and radio stations in Prague and

Stockholm will be held separately.

"Esat Holdings will be 88 percent owned by Communicorp

and 12 percent by outside investors on Esat's board,

including the former Secretary of the Department of

the Taoiseach, Mr. Pádraig Ó hUiginn; the former

senior partner of KPMG/Stokes Kennedy Crowley,

Mr. John Callaghan; and the management consultant,

Mr. Leslie Buckley.

"Communicorp is 65 percent owned by Mr. O'Brien and 35

percent by the US venture capital company, Advent.

"The  $\text{€}130$  million in debt will be raised through Esat

Holdings and will mainly be used to fund its share of

the cost of starting up the new network. However,

some of the money may be used to fund Esat Telecoms

planned expansion. This is understood that Esat

Holdings wants to raise the  $\text{€}130$  million through loan.

The notes will be split into  $\text{€}15$  million of loan notes

with convertible stock warrants and  $\text{€}15$  million

convertible into second preference shares. The US bank, CS First Boston, is advising the company.

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

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

"Esat Digifone won the competition to operate the second mobile phone system in October last year.

However, the company has not yet been officially awarded the licence. The Department of Transport, Energy and Communications said yesterday that the negotiations were at an advanced stage.

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

Now, you don't have a recollection of reading that article, do you?

A. I don't have a specific recollection of doing so, no, but I am sure I did. I read the Irish Times most days, and the business pages in particular.

Q. Do you remember whether this was a statement issued by anybody to the Irish Times?

A. No, I don't, but certainly from the tone of it, and indeed there is a direct reference to a spokeswoman for Esat Digifone, it seems to have come from the Esat Digifone, and/or Esat Telecom sources.

Q. Well, some of it at least anyway, or do you believe that the whole article is one which came from an Esat an Esat source?

A. I don't know. But I suspect a lot of it did. It's clear some definitely did, and I suspect a lot did. As to whether all did, I don't know.

Q. Have you inquired about this, as to where it did come from?

A. No.

Q. Who was the spokeswoman who may be referred to there, do you believe?

A. I would guess it's probably Eileen Gleeson, who was PR consultant to Esat Digifone.

Q. She might be the one who can assist us, so, on the question of

A. Possibly.

Q. this particular article.

Now, if, and I accept you don't have a recollection, but if you were in the habit of reading the Irish Times and you saw this article, would it have caused you any concern, that this information hadn't been given to the Department?

A. Not particularly. As I have said a number of times,

we didn't regard the information as anything remotely as material, as it has since been made out to be. We just I would accept that we knew there was an issue, we knew it had to be resolved, we knew the Department had to be told, had to be told at the right time and in the right way. We knew all of those things. But the other problems, both for Esat and for the rest of us in our daily lives, were all consuming as well, and this was just one thing on the list that had to be dealt with. It has been built up into something far greater than I believe it was at the time. So the fact that I don't remember this I mean, if this had been as huge an issue as it has been presented to me since, I would have had a heart attack and dropped dead on the floor of my office when I read this article. I would certainly remember it vividly, and I don't. It just wasn't that much of an issue, Mr. Coughlan.

Q. Very good. Now, nobody in the Department seems to have noticed it, on the evidence given so far; that Mr. John Loughrey has informed the Tribunal that if he had been aware of the content of this, it would have certainly caused him to act. You are aware he gave that evidence?

A. I seem to recall something, I didn't read all of his evidence, I think.

Q. So

A. I accept

Q. So whatever about that, the effect it might have on the Department, it's your view that it wasn't a big issue on your side?

A. You see, we understood the Department knew that IIU were involved.

Q. Yes, yes.

A. We didn't think there was any great difference between 40% and 37.5%, or between 20 and 25%. So, so what?

This is maybe giving the Department more detail than they had, but not to the point that there'd be any huge problem. I think I don't recall, but I think that would have been the attitude.

Q. I see your point. And I can understand it, that you believed that the Department knew that IIU were involved?

A. Involved in some way in the shareholding. Remember, underwriting necessarily involves more than just advice or agency. It involves fairly intimate interest in shareholding. An underwriter will start off with a contingent obligation to take all of the shares concerned, frequently owns all or most of them for a period while he passes them through his ownership to placees, and also sometimes ends up with some, or occasional cases all of the underwritten shares. So saying to someone that so-and-so will underwrite an issue, to someone

familiar with the concept of underwriting is effectively saying to them, so-and-so is going to be a shareholder in the company, whether briefly or for a longer period, or whether for all of the shares or for some of the shares. It's certainly making a statement about shareholding.

Q. Right.

A. So as far as we were concerned, the Department knew IIU were involved in our shareholding and we didn't think the difference between 40 and 37.5, and to be perfectly honest with you I still don't think the difference between 40 and 37.5% is all that big a deal.

Q. I can see your point in terms of shareholding, perhaps, but in conformity with the bid, it was a deal, wasn't it, or appeared to be a deal from the Department's point of view anyway?

A. Yes, so it seems. But equally, we had contrary indications from the Department, remember.

Q. What were the contrary indications?

A. Well, the contrary indications was that a list of Mr. Andersen gave a list on the 9th November of other minor issues that would have to be dealt with in the licence, ownership was one. On the 26th January the Department responded after quite a long delay to our proposals in regard to ownership, not by saying 'That's out of the question, this is far more

important, it will be total control.' Merely saying, 'Well, your proposal about three years is a bit too short and your 10% is too little.' So nobody was creating a head of steam about this.

Q. I understand. And you do note, of course, or there is a note, whatever it means, of that meeting of the 26th January, "Ownership and shareholding is notified to Minister as well"?

A. That's in the schedule. We discussed that yesterday, we have different interpretations of that phrase.

Q. We didn't have a different we discussed it. That's what's recorded, isn't it?

A. Yes, it is.

CHAIRMAN: We are almost on one o'clock, Mr. Coughlan.

I think we'll leave if until ten past two. Thank you very much, Mr. O'Connell.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF EXAMINATION OF MR. O'CONNELL BY

MR. COUGHLAN:

Q. MR. COUGHLAN: Mr. O'Connell, just before lunch you expressed a view about your understanding of the knowledge available to the Department or the information available to the Department about the involvement of IIU, and you informed us about your understanding of the letter and what that would indicate to somebody in terms of even the broad



understanding of underwriting?

A. Yes.

Q. I understand the point you are making. And you also, then made the point that in subsequent correspondence/meetings, it never arose, ownership never arose as an issue, but that there are references to ownership in correspondence and memoranda. I think we have been through many of those?

A. Yes.

Q. Now, I am interested in your view about this, because just from a recollection and a quick flick through the documentation, most or if not all of that mention of ownership, or most of it anyway, appears to be Article 8 ownership or ownership in the context of Article 8. Now, you can take it that there are references in the context of Article 8. Can you help the Tribunal as to whether there is anything else that you could point to that might assist the Tribunal in having an understanding of why you were of the view that the Department had knowledge, information

A. All I said is that

Q. We will leave out Clause 8 stuff now.

A. Yes. Well, I don't think the Department had information about ownership, otherwise than as a result of the 29th September letter, or possibly the John McManus article.

Q. Mm-hmm.

A. What I said was that although the question of ownership came up a number of times, it wasn't, whatever opportunity thereby arose to make disclosure wasn't taken, I accept that.

Q. Yes.

A. I don't think there was in my mind, nor I suspect in others, any two categories of ownership issue. I don't think there was an Article 8 ownership issue and present ownership issue, if I can put it that way.

Q. Very good.

A. There was just ownership. And certainly in hindsight I would be prepared to concede that, if we'd just come out sometime in October or November, 1995, and said, by the way, those four institutions aren't going to be involved anymore, and it's IIU, and by the way it is 25% instead of 20. I know John Loughrey had a different opinion, but my own opinion is that if we had done that, they would have said that is a bit odd, can you explain it all? And we would have explained it. And they would have said oh, all right. I don't know that for sure, that is speculation. No one will ever know. But we didn't. For whatever reasons, I am not clear at this remove, and obviously a lot of time has been spent here inquiring into why we didn't and whether we should have and when we should have.

Q. Yes.

A. Coming back to your question, no, I have no beyond

what has already been mentioned, I have no specific information.

Q. Very good. I am interested in your view about that and I was just wondering if there was anything else that we should address to the Department?

A. I don't think so. Over lunch, Mr. McManus's article, somebody said to me that they thought the story had come originally what it was called a red herring document. In the United States a red herring is a kind of pre draft of a prospectus which is used in the United States.

Q. Yes.

A. And circulated among the investment institutions. And somebody said they understood Mr. McManus's story to have come from his hearing of this information being in a red herring document in the United States.

Q. Fair enough. So that he would have got information that may have been circulating in the United States?

A. Yes, that would be Esat information for its fundraising.

Q. Yes. I understand that. Well, it is something we can take up with Ms. Gleeson, but I was just thinking in fairness to her, the reference to her is fairly limited in the article?

A. Yes.

Q. And it seems to be addressing specific queries, is it, perhaps?

A. Yes.

Q. If you go to Tab 125 of Book 49. I know you have made reference to it already, but just trying to understand this evolution of the one free transfer?

A. Yes.

Q. I don't it's you can see that that is a letter to Mr. Walsh from Neville O'Byrne?

A. Yes.

Q. And attached to it is the agreement or what would be a draft of what would be the agreement in respect of the one free transfer, isn't that right?

A. Yes, I think so.

Q. Just, could you just help us on that?

A. Yes. I will try. The obviously as a private company, not obviously, but it is normally the case; Esat Digifone had a preemption or what is commonly called an offer-round provision in its Articles of Association, whereby before any share could be transferred or any interest in a share could be transferred outside the company, it had first to be offered to the existing shareholders, and if they competed for that share, or those shares, they were allocated among them pro rata to their prior shareholdings. Because it was the intention that IIU would place the shares which it got, either all of them or a number of them, it didn't it in marketing terms it couldn't have gone to a potential

placee and said, would you like to buy so many thousand shares in Esat Digifone at so many pounds per share? But by the way, if you say 'yes' we will first have to offer the shares to these chaps over here and you will have to wait 90 days, or whatever it is they have to make up their minds, and then we'll come back and if it is all right we will sell them to you and if it is not, we won't. And maybe things will have changed in the interim and maybe you will have spent your money on something else or whatever. So in order to facilitate, or really more than that, make possible, the mechanics of a placing, IIU had to have one free transfer; in other words, the intention was that whoever it placed the share with, whatever institution or individual, would him or itself be subject to the preemption article in the usual way, but the transfer from IIU to that person or institution would not be so inhibited.

Q. That's the purpose or that was the purpose?

A. That was certainly my understanding of the purpose, yes. Of course, it had a much more dramatic impact later in the history of the company.

Q. Later in the day it had an enormous impact, yes.

Now, I think if we go to Tab 128. This is the meeting in the Department on the 3rd May?

A. Yes.

Q. Before that I should just mention, I think we did

we have opened it already. I think you received a letter from the Department on the 1st May which was the formal response to your letter of the 17th April, isn't that right?

A. That's correct.

Q. And amongst other matters, that letter requested details of the ownership, isn't that right?

A. Yes.

Q. It also requested financial information as well, I think?

A. Underlying IIU, I think, yes.

Q. Yes. Now, we have your note of that meeting, and it is just Mr. O'Donnell asked me would I put up one of the reconstituted ones because it is easier to read and you can work off your handwritten

A. I have them both here, Mr. Coughlan.

Q. You have them both. And we have been through "Clear a political football.

"Identity of each shareholder legal and beneficial ownership.

"Esat Digifone changes relative to bid.

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

What is that?

A. This is really the moment or just after the moment when everything I said before lunch about the relative unimportance or my view of the relative unimportance

of the ownership changes itself changed, and I am recording that somebody at the meeting said, probably someone on the Department side, but it was something of which I agreed, that the whole issue of ownership had now become a political football. The Persona complaint had gone into the Commission and been announced in a press release about ten days earlier. And following that, there was a frenzy of press speculation and reporting about the licence: Would it be granted? Would it not? Would Persona succeed? Were there any grounds for the Minister not granting the licence? And while I have no certain knowledge, there was a sense that Persona perhaps were feeding this speculation.

Q. Right.

A. And the Minister, I think, made a statement in the Dail as a result.

Q. Did he, on the he made the statement on the 30th April?

A. Right.

Q. Yes.

A. And, of course, that fed the interest, it provided oxygen to the story and as a result, by now when we met on the 3rd May, whatever anyone's view of the objective importance of the changes, that had gone out the window and the politician primarily concerned, Minister Lowry, was presumably concerned. The

newspapers were very hot on the issue and it had become a political football, and a press football as well, and it was going to have to be dealt with.

Q. Right. Then it goes on:

"Need detail information/quality/about IIU.

"Confirmation that Telenor is same as at bid date."

That was a confirmation that was being sought isn't that correct?

A. Yes.

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

A. More or less the same point.

Q. "Numbers re IIU. Telenor 'backdrop statement as operator as last resort.'

Arve Johansen 'That is way we see it anyway. We will never abandon this one'.

Not requesting statement but would be helpful per Martin Brennan.

"Project finance POD" deals with debt equity ratio.

"Donal Buggy, Billy Riordan, maybe Andersen" that is perhaps to be proposed there to look at financial matters or numbers?

A. I think that is in reference to the presentation phrase just above it.

Q. Right. "Better than 50% chance that Commission will send us Persona complaint."



That is not relevant to this now for the moment.

If you then go to the sorry, the next tab then is the list, isn't that correct?

A. Yes.

Q. The list you took away from the meeting?

A. I think prepared that after the meeting.

Q. Very good.

A. I am not sure I prepared it at the meeting.

Q. It is a list that arose from the meeting at least anyway?

A. Yes, I think so.

Q. And Item Number 4: "IIU versus Davys etc. explanation."

A. Yes.

Q. Now, if you go to Tab 130. This is the Mr. Johansen's memorandum of the 4th May of 1996. And I think I have dealt with the first portion of that with you already, isn't that right?

A. Yes.

Q. And we can come back in due course.

I think we can proceed then from that paragraph 3, isn't that right, to just to open it.

"Some days later the nature of the agreement with IIU comes clearer into the light, as an underwriting agreement to guarantee for Communicorp's timely payment for its share of the capital into Digifone, and including the right to place the shares with up to

four nominees. This was unwillingly accepted by Telenor (since we understood it to be the right steps to be taken from an 'official Irish standpoint' to secure the licence.)"

I think that bit there, I got a reference to official sources or something when I spoke to you on the last occasion.

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

"The agreement was never signed by Telenor, neither as authorised Digifone signature nor as a shareholder and a party to the agreement. Sometime shortly after, the Advent commitment to invest \$30 million into Communicorp disappears, as it was essentially not necessary anymore since Communicorp's liability to pay capital to Digifone was anyway underwritten by IIU.

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

"I have good reason to believe that the terms put forward by Advent for investing into Communicorp did not suit Denis O'Brien. With the above arrangement that he orchestrated for all other sorts of reasons, he has actually achieved to bolster his/Communicorp's

balance sheet and paid for it with Digifone shares at a cost to Telenor. He has done this in an atmosphere of trust where Telenor even has agreed to bridge finance Communicorp while he raises funds through a private placement in the US.

"6. As we go along we learn more, but it all serves to disclose more details which again more and more prove the above scenario.

"In the meeting with the Department of Communications Friday May 3rd it became evidently clear that IIU was not a favourable name in an 'Irish public' point of view. On the contrary, the ministry basically asked for help for how to explain why we had substituted Advent, Davys Stockbrokers and other recognised named institutional investors in the bid (AIB, Investment Bank of Ireland, Standard Life of Ireland).

"Eventually the project coordinator from the ministry, Mr. Martin Brennan, actually appealed (off-the-record) to Telenor to write a letter of comfort that we would serve as a last resort for the Digifone company for funds and operational support. My feeling was that if Telenor had owned it alone, he had been more comfortable than with the current shareholders.

I think it would be a very prudent thing for Telenor to do especially since we then effectively underwrite the whole project, both Communicorp and IIU, after already having paid Communicorp's price for

the first underwriting which now appears to be useless.

"7. But the story doesn't end there. Two days ago I was informed by Denis that he had entered into an agreement with IIU to buy back 12.5% of the shares now held by IIU. I found it absolutely unbelievable, and made it clear that Telenor would not accept anything but equal partnership, either we buy 6.25% of the IIU held shares each or Telenor should take the other 12.5% of the IIU held shares.

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

"IIU apparently has no (or very little at least) money and cannot afford more than 12.5%. The price agreed is a little cryptic but it looks as though any advances IIU has to make for the disposed 12.5% before the transaction's effective date (31 May 1996) is seen as cost (???) It will, if this is the case, serve as a moving target for IIU's eventual gain on the transaction, putting an immense pressure on Communicorp to delay capital calls in Digifone until the US placement is finalised.

"The return favour from Communicorp is to release IIU from all of its underwriting obligations in Digifone.

Does Digifone have an opinion on this and what about Telenor? This effectively gives Communicorp back its

12.5% of the shares at par (or close to), releases IIU from all of its underwriting liability which Digifone paid 25% for, and IIU ends up having delivered absolutely nothing, having done nothing but complicated the award of the licence (if we get it at all) but with (some cash?) and 12.5% of the shares of Digifone which effectively have deprived from Telenor, at the same time as the Department and our honoured partners gently asked us to underwrite the whole project.

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

Now, you were at this meeting?

A. The 3rd May, yes.

Q. The meeting on the 3rd May. Do you have any comment to make on Mr. Johansen's note of the meeting?

A. I certainly agree with his note that he was asked to give a letter of support. I have no note of what is said here about IIU I am just looking for the piece, sorry, where he said that it was made clear that IIU were sorry, not a favourable name. I didn't take a note of that and I don't have a direct recollection of the meeting. I can't say it wasn't

said. I just don't recall.

Q. Right.

A. But certainly I agree that the Telenor, that Telenor were, at that meeting, asked for a letter effectively underwriting the project.

Q. Underwriting the whole project?

A. Yes, and I did take a note of that.

Q. You did?

A. And in fact I quoted him.

Q. Yes. Yes.

A. I would say in relation to the memo as a whole, there are parts I do agree with and parts I don't agree with.

Q. That is where he is making argument or drawing conclusions?

A. Well, I think some of it is, as I say some of it is right and some of it is justified where it is argument, some of it is wrong where it is fact.

Q. If you wish, where do you agree or disagree with it?

A. I just made a few notes as we went through it. I haven't analysed it in detail.

Q. Fair enough.

A. I think the bit about bolstering Communicorp's balance sheet is wrong. The deal did nothing for Communicorp's balance sheet.

Q. Yes.

A. I mean, just technically or factually or from an

accounting point of view, it didn't.

Q. Yes.

A. The speaking from hindsight, I would understand that the reason Mr. Brennan may have asked for the letter was perhaps not because of any discomfort with IIU, but because it was flagged in the bid-related documentation or the evaluation-related documentation, which I have since seen, that such a request should be made, and I would think that may have been why. He says that Denis told him that he had entered into an agreement with IIU. I don't think there was an agreement. I think there were certainly negotiations, but I don't think it had got to the point of being an agreement. I think his understanding at the first arrowed point under 7

Q. Yes.

A. of what was proposed to be the deal, is more than a little confused. I don't think that is right.

Q. Yes.

A. I certainly agree with his next arrowed point where he talks about, I suppose he is being somewhat sarcastic, "Does Digifone have an opinion on this and what about Telenor?" Certainly I would have understood the underwriting by IIU to have been for the benefit of Digifone. You can argue about the quality of the underwriting, but it was a commitment to Digifone, and certainly Digifone and IIU sorry, Telenor, as a

major shareholder in it, would have to have had a say.

I said yesterday that there was an air of unreality to that whole deal, and I still think that to be the case.

Q. Yes.

A. Not deal, but that whole proposal.

Q. Well now, I know you have notes of the meeting of the 3rd and subsequent meetings, and you readily acknowledge that you may have had other dealings or meetings with the Department that you don't have a note of because of the hectic nature of those couple of days?

A. Yes, that is possible.

Q. I think in fairness you said that. But the Tribunal first learnt about this meeting on the 3rd through this particular memorandum from Mr. Johansen?

A. I see.

Q. Now, as of this time, the 3rd May, for whatever reason, the IIU position was a problem, isn't that right?

A. Yes.

Q. And it had to be resolved?

A. Yes.

Q. And can I take it that I will just bring you back to the 180 days reference in the RFP, that didn't arise at this stage?

A. No it didn't, no.



Q. And it wasn't even a matter of consideration, was it?

A. I think it would have arisen if on this day we didn't yet know whether we were engaged in an exercise to persuade the Department to accept the situation as it was, or whether we would have to change the situation, and indeed four days before this Fintan Towey had told me he didn't yet know which would be the situation.

Q. Mm-hmm.

A. And I think four days after this Fintan Towey rang me and said, "You do have to bring it back to 40:40:20; the Minister requires that". So at this point we knew it was a problem, but there were at least two possible outcomes. One, that we would, that the Department would accept whatever case was made; and the other, that it would demand a change, a reversion to 40:40:20. And I suppose a range of more extreme outcomes could have been posited as well. So it wasn't until the 7th that we knew we were going to have to come back to a 40:40:20.

Q. Yes.

A. Now, the last thing we wanted to do, was to get into a dispute with the Department. I said earlier in my evidence, that when they told us to jump, we just asked how high at this stage. If I think the Department had come back to us on the 7th, and said, look, none of this is acceptable; in other words, if

they had gone to a complete extreme and said we are not giving you the licence at all, then 180 days and a lot more would have become relevant, but at this point we were still very much in the mode and we remained right up to and through the grant of the licence in the mode of doing what we were told because we all had our eyes on the ultimate goal, which was the licence.

It was only if that was seriously threatened that legal issues would really have come into it. I gave some thoughts to these issues.

Q. Mmm.

A. I did give some thought to these issues at the time.

Q. What were those thoughts?

A. Well, just thoughts about what happens if the Department says they won't give us the licence, what do we do? Do we sue? Obviously as a lawyer I would do that.

Q. Yes. But on what basis? What did you believe to be the position that would enable you to not offer the advice but at least think about it and consider whether it was possible?

A. Well, I can't remember now what specifically what I thought, I didn't do an analysis paper or anything like that. I would have done if it had gone that way but it didn't go that way. We were waiting to hear from the Department what they wanted in regard to ownership and we heard four days later.

Q. Was it a possibility, in your mind at least, that the licence was at risk?

A. I don't think so. I mean, I would always, as a matter of practice, try to analyse a situation from its worst to its best outcome through the various more likely outcomes so I am sure, again I don't have any notes of my doing so, but I am sure at the time I would have thought through the worst, which was denial of the licence, to best, which was them saying, look it is all right, don't worry about it, and the various outcomes in between. That would have been habit for me.

Q. And I suppose it is difficult if you can't remember what you thought at the time. All you would be doing now is rationalising?

A. Yes, trying to recreate

Q. Yes. Now, I think I just Tab 133.

A. This is an 8th May meeting?

Q. I beg your pardon, what it is, this is a fax sent, it looks like, from Mr. Arve Johansen to Mr. Arthur Moran. Do you see that?

A. Oh, I do yes.

Q. You see that. It seems to be sent from Esat Digifone's offices?

A. Yes, I see it.

Q. You see that?

A. Yes.

Q. And it is marked "Very Private and Confidential." And

it is from the fax is from Mr. Johansen to

Mr. Moran. And he attaches:

"Memo/proposed from Neville O'Byrne/IIU yesterday to  
memo from IIU to Denis O'Brien for"

A. "From last Autumn."

Q. "...from last Autumn? (Not dated)."

And if we go to the second memorandum, that is the one

that is undated. Remember, we looked at this before

and you were of the view, and obviously correctly of

the view, that it wasn't from your office, I think, is

that correct?

A. Yes.

Q. But you can't assist us as to the date. It is

undated. And Mr. Johansen is talking from last

Autumn. It is not dated?

A. The strap line is a little unclear on mine. Did that

help?

Q. No. No, this is the date on which Mr. Johansen is

sending it to Mr. Moran?

A. Oh, yes, I see yes.

Q. In any event

A. I can't help, I am afraid. Presumably it was earlier

than December '96, because that date is referred to in

it. I am afraid not.

Q. Yes. I think this isn't the one this may be around

January. In any event, it is something that we can

sort out.

I think if we then go to Tab 134. It is a note of yours of the 9th sorry I have passed over the note of the 7th where Fintan Towey informed you of the Minister's preference, isn't that right?

A. Yes.

Q. This is the 9th then.

"Knut Digerud, Peter O'Donoghue at Esat Digifone."

What is that?

A. "Sequence."

Q. "Sequence, information to Fintan Towey ASAP" is that tomorrow?

A. "ASAP tomorrow," as soon as possible tomorrow.

Q. Yes?

A. "Pay review."

Q. "Pay review."

A. "Meet company/shareholders."

Q. "Agree to joint statement."

Would that seem to indicate that you knew or somebody had another telephone conversation with Mr. Towey or somebody?

A. It could do. It is really just me saying the information here I think is the information requested at the meeting of the 3rd.

Q. Yes?

A. The information on my list. And as I said in one of my memoranda, I had been assembling that information

and there is a lot of correspondence on my files with various accountants and people like that, and banks. And I suspect I am getting close to the end of that process now and I am reporting to them that I am hoping to have the information for Fintan Towey tomorrow, the Friday. And the Department would review it and then meet with any issues that arise. I do again I say in my memorandum, I do generally recall that I was in touch with Fintan Towey quite a bit at this time.

Q. Quite a bit in this period?

A. So quite likely this followed a discussion with him and me telling him "Fintan, I expect I will have that stuff for you on Friday," that would be logical.

Q. I take it that Regina Finn was not involved in any communication with you at this time; it was Mr. Towey and/or Mr. Brennan you were dealing with primarily; would that be correct to say?

A. I think so, but they were reasonably interchangeable in my mind.

Q. That is Mr. Brennan and Mr. Towey?

A. No, Ms. Finn and Mr. Towey. I think I was theoretically, as it were, aware that Regina Finn was from a different section, but throughout this I regarded Martin Brennan as the man who was making the decisions, and Fintan Towey and Regina Finn as the people who were implementing them and doing the

operational work for him.

Q. Or gathering information.

A. And I don't think I'd ever thought it or did think it odd if one called me and not the other. I didn't really distinguish between the two of them.

Q. Mr. Brennan was the one you considered to be in the key position

A. Yes.

Q. you considered?

A. Yes. I mean, I had practically no dealings whatever with Mr. McMahon. I know now that Ms. Finn reported to Mr. McMahon, but I while I may have known it somewhere at the back of my mind then, I regarded both Ms. Finn and Mr. Towey being effectively directed by Mr. Brennan who was in charge of the process.

Q. Very good. Now, I think we have been through the draft letter prepared by you on the 10th May

A. Yes.

Q. 1996, isn't that correct? That is at Tab 130A.

A. I addressed that in my memorandum. There was some question about whether Knut Digerud was aware of it.

I have since come across a covering note sending the final version.

Q. Yes.

A. The one of the 13th on the Monday.

Q. Yes.

A. To

Q. To Mr. Digerud?

A. No, to Mr. O'Brien. I am sorry I have to find it now.

Q. Right.

A. I am saying that the letter has been jointly drafted by me and Mr. Digerud, and I am also saying that Mr. Digerud had talked to Mr. Brennan about it.

Q. This is the final version, the version dated the 13th?

A. The 13th.

Q. Right.

A. Yes. I will see if I can get it, the cover note now.

I only came across it this morning.

Q. All right.

A. Yes. It is a letter from me of the 13th May.

Q. Could you just this is the letter of the 13th May from you to?

A. To Denis O'Brien and Leslie Buckley with a copy to Gerry Halpenny and to Michael Walsh with a copy to Neville O'Byrne.

Q. All right.

A. And it says:

"Dear Denis, Michael and Leslie,

"I enclose the final draft letter to the Department which has been prepared by Knut and myself and seen by Arve Johansen and Paul Connolly. I also enclose copies of its enclosures. Please confirm approval urgently."

Then there is a PS which says, "Martin Brennan has



asked Knut to deliver the letter personally at 12:30

p.m.."

Q. Right. I wonder could I have that just for a moment

and we will put it up?

A. Yes, indeed.

Q. This is helpful information. Thank you very much. I

am sure we have it.

A. You do, I think.

(Document handed to counsel.)

The letters "NB" and a line appear twice.

Q. I will give this back to you for your file.

A. They were me this morning, the rest is a parietal.

Q. It is to Mr. O'Brien and Mr. Buckley and you copy it

to Gerry Halpenny, is that right, sent to Mr. Michael

Walsh, is that right? And you copy that to

Mr. O'Byrne obviously?

A. Yes, and it is 14 pages.

Q. Yes. And the licence.

"Dear Denis, Michael and Leslie,

"I enclose the final draft letter to the Department

which has been prepared by Knut and myself, and seen

by Arve Johansen and Paul Connolly. I also enclose

copies of its enclosures.

"Please confirm approval urgently."

Right.

A. Then there is a postscript.

Q. Yes, postscript. "Martin Brennan has asked Knut to

deliver the letter personally at 12:30 p.m."

Very good. And the date of your letter is the?

A. The 13th.

Q. The 13th.

A. The same day.

Q. The same day. What the enclosures are obviously the list of documents that we know, the certification and matters of that nature, isn't that correct?

A. Yes.

Q. And is the final draft you are referring to there, is that in the form it went on the 13th?

A. Almost certainly.

Q. Yes. Not the draft of the 10th?

A. Not the 10th, I think.

Q. Right. And you are indicating there that the draft of the 13th, which was in fact the final form, was the one that was drafted or prepared by Mr. Digerud and yourself?

A. Yes. The reason I bring it to your attention was there was some discussion between us the other day as to whether Mr. Digerud or to what extent Mr. Digerud was involved in the letter generally, and I said I thought I was sure I would have sent it to him and he would have seen it because he was a signatory and so forth, but I had no record of that.

Q. Yes?

A. And this is, at least it is an indication he saw the

final draft.

Q. I agree.

A. Which is, makes it more like, in my view, that he would have seen an earlier draft as well. I also thought there might be some relevance in that there was clearly a conversation between Mr. Digerud and Mr. Brennan on the subject during that morning, that is from the postscript.

Q. That is from the end, the postscript?

A. Yes.

Q. Because if I might just, and again we are seeking to obtain Mr. Digerud's full comments but from what is indicated to us through Telenor's solicitors at least, that Mr. Digerud, I think, would agree that he saw the final version?

A. Yes.

Q. Either in draft or final form. But that doesn't seem to be the case as regards the draft of the 10th?

A. I see.

Q. Now, I am awaiting more formal comment from Mr. Digerud in that regard.

A. Yes, I haven't come up with any definitive evidence that well, any concrete evidence that he did, except my own view, that it is it is rather unlikely, in my opinion, that I would have made such a major change in the first place, that I would have drafted the letter without clearing it with the

client; and in the second place, have made a major change to the letter excising more than 50 percent of its total content, without some contact with the client. Thirdly, Knut was, throughout the period, in direct contact, more than I was, with the Department, and was quite proprietorial about the relationship with the Department. So for all of those circumstantial reasons I regard it as unlikely that he wouldn't have seen or have been aware of the earlier draft.

Q. The draft of the 10th. In any event, you did send the draft of the 10th to, we know to Mr. O'Brien, according to the fax?

A. Yes, I did.

Q. And his notation on that?

A. Yes.

Q. We see that. And do you know if you sent the draft of the 10th to Mr. Leslie Buckley or to Mr. Michael Walsh or copied them to Mr. Neville O'Byrne or to Mr. Gerry Halpenny?

A. No, I don't know.

Q. But it is your supposition that you were either requested or you requested, you can't be sure which actually happened, to remove that portion that was excised from the draft of the 10th?

A. My supposition mainly, yes mainly arises from the fact that at the meeting at which the letter was presented,

no comment or protest appears to have been made at its absence, despite the fact that it was expressly requested ten days earlier.

Q. Yes. That is what you are basing your supposition on.

So you are informing the Tribunal that it is your belief that that was by agreement that it wasn't included?

A. Yes.

Q. I am just trying to get this clear; are you expressing the view that there was an agreement with the Department and that Mr. Digerud would have been privy to that? Is that what you are saying to the Tribunal?

A. Yes, although there are two separate parts to that.

Q. Right.

A. I am saying that I believe the Department either requested or approved the removal of the IIU material because they had earlier asked for it and when the letter was presented without it they didn't comment or protest or make a further request in relation to it, which logically they would have done if they had got everything they had asked for except that. I am saying that I believe Mr. Digerud would have been aware of the draft and of the removal of the material because of his closeness to the matter as a whole, in particular to any communications with the Department. So I would have been more likely to send it to him as chief executive and perhaps to Denis who was something

of an executive chairman, in draft form, where I clearly sent it in final form to the other addressees here who were directors but not taking a particularly executive role.

Q. Yes, that is Mr. Walsh and Mr. Buckley?

A. Mr. Walsh and Mr. Buckley.

Q. Yes.

A. And my reference to, in this letter to the letter having been prepared by Knut

Q. And seen by Arve Johansen, was that a reference to how do you know how that would have come about?

A. Well, he was wasn't he in Esat Digifone that day? He was certainly there the previous day.

Q. That was the fax we see sent to Michael Walsh?

A. Yes.

Q. Or to

A. The one we have just looked at.

Q. The one to Arthur Moran, the one that was sent to Arthur Moran?

A. I think Arve was around this whole period because we were into the end game, really, here

Q. Yes?

A. as regards the licence. So I am just saying that when I talk about the letter having been prepared by Knut and myself, it is unlikely Knut would have suddenly come into the preparation at the final version, the engrossment stage.

Q. Yes, I see. Well, that is a matter we can take up with Mr. Digerud.

A. Yes.

Q. Now, I think if you go to perhaps Divider 136 now. Sorry, perhaps before we do that, if you go to 135B, do you see that? I think it is a Gerry Halpenny attendance, is it?

A. Yes, I think so.

Q. That is of the 10th. It is Knut Digerud, Arve Johansen, Rolf Busch, Arthur Moran, Owen O'Connell, Gerry Halpenny.

"Department want the licence out on Monday." Is that right?

A. I think so.

Q. "Documents to be delivered to Department today. Shareholders beneficial ownership" is that "beneficial ownership"?

A. I think so yes.

Q. "...funding 40:40:20 document. Underwriting agreement valid"

A. "expire on Shareholders Agreement."

Q. Yes. "Expire on Shareholders Agreement. Telenor not prepared to dilute and Esat not to do same"

A. "If Esat not."

Q. "If Esat not to do same. Present present position."

Equal negotiations with IIIU.

Conditional on Telenor approval.

Telenor go on the basis of underwriting agreement.

Telenor accept 40:40:20 provided."

Then "Owen O'Connell," is that something to reorganise the shares or...

A. Certainly those look like share numbers.

Q. Yes.

A. But I don't know what he meant by that.

Q. All right. On the 10th, then, if you go to the next divider, 136. Yes, just before I leave that.

Mr. Halpenny is recording there that, or was there some suggestion that the documents, you know the documents which went with the letter of the 13th, that is, that they were to be delivered on that day, the 10th?

A. Yes, he seems to be.

Q. Doesn't there?

A. Yes.

Q. And that the Department wanted to get the licence issued on the Monday?

A. Yeah. Yes, that seems to be the although whether that was the final draft for our approval, which I think we got on the Tuesday, didn't we get a final draft on the Tuesday? I think that may be what he was talking about, rather than the actual signature of the licence, but I am not sure.



Q. Right. Then there is this is Mr. Johansen's letter of the 10th May, 1996, to Mr. Denis O'Brien.

"Dear Denis,

"I refer to our meeting held today at which I attended together with Rolf Busch, general counsel of Telenor, Arthur Moran of Matheson Ormsby Prentice, our solicitors, and Leslie Buckley and Paul Connolly and your solicitor Gerry Halpenny and Knut Digerud and Owen O'Connell, representing Esat Digifone. I would like to clarify our position following that meeting.

That seems to be the meeting just referred to, I suppose, is it?

"The joint venture entered into between Communicorp and Telenor last year in order to bid for and be awarded the licence for the second GSM network in Ireland was originally based on 50:50 participation by Communicorp and Telenor. It was subsequently agreed that 20% would be made available to institutional investors probably at a premium and that, accordingly, Communicorp and Telenor would each hold 40%. It has subsequently been stressed by Telenor on several occasions that the equal participation of Communicorp and Telenor is a basic condition for Telenor's involvement in the company.

"At today's meeting, Communicorp's representatives confirmed that Communicorp would adhere to such equal participation principle with respect to the control of

the company, but that their presently contemplated financing arrangement necessitated a deviation from that principle with respect to the two parties' economic interest in the company.

"The bid submitted by Communicorp and Telenor was based on commitments from the Allied Irish Bank and some other parties to be the institutional investors and Advent's commitment to invest \$30 million in Communicorp.

"In 1995, and on an unspecified date, an arrangement agreement was negotiated and signed by you alone on behalf of the company, the effect of which was to dilute Communicorp and Telenor's interest in the company from 40% each to 37.5% and making available to the counterparty to the arrangement agreement, International Investment and Underwriters Limited, (IIU), 25% of the company. The purpose of the arrangement agreement was to strengthen Communicorp's ability to finance its obligation in respect of the capital required by the company. The signing of the arrangement agreement was not authorised by any resolution of the joint venture partners. Now we understand that Communicorp has established a further form of financing for its participation in the company, which it is suggested is conditional upon Communicorp obtaining 50% of the shares of the company, leaving Telenor with 37.5%, and the financing

company, IIU, with 12.5%. This arrangement is conditional upon Telenor's consent to the increase in Communicorp's ownership of the company from 37.5% to 50%.

"As thoroughly explained to your representatives during today's meeting, Telenor cannot accept that Communicorp increases its shareholding from 37.5% to 50% without Telenor having the opportunity equally and on the same terms and conditions to increase to a 50% ownership and maintain equal participation in the company with Communicorp. Telenor considers that the proposed arrangement as a whole jeopardises fundamentally the basis for the joint venture between Communicorp and Telenor. At today's meeting, Communicorp's representatives stated, however, that other sources of financing could be available to Communicorp on the basis of a 37.5% ownership and without the requirement to breach the equality participation.

"Telenor would be willing to discuss a bridging arrangement giving Communicorp some time to put together financing of a 37.5% shareholding. As I hope you will understand such a bridging arrangement would necessitate firm commitments in relation to the equal participation principle between Communicorp and Telenor and appropriate undertakings in that regard.

"If it would be convenient to you, I can make myself

available in Dublin during the weekend of May 11/12 in order to discuss the above arrangements, but I will need to hear from you before 10 a.m. tomorrow as I shall otherwise depart to Oslo."

Now, do you remember that meeting and this particular discussion going on?

A. Not really, no. I would have been, I suppose, a little semi detached from that meeting because it was with Gerry Halpenny there representing Communicorp.

It seems to have been a discussion on this point anyway, between

Q. Shareholders?

A. shareholders, Telenor, particularly, and Communicorp.

Q. Yes?

A. So I don't have much I don't really have a recollection of it. There seems to have been a proposal, which I don't remember I must admit, that the shares would presumably be divided into two classes, one carrying economic interests and the other voting control, so that the 50:50 principle would be maintained in regard to voting control but breached or departed from in respect of financial but that doesn't seem to have gone anywhere. The reference to institutional investors at a premium is, I must say, the only time I have seen that reference; I never came across it before.

But it doesn't really ring any bells with me, I am afraid, no.

Q. They still seem to be operating on the 37.5% basis there, didn't they?

A. Well, Arve was, yes.

Q. Arve was?

A. I mean, it was two days after this that the deal was done or finalised for the 40:40:20 to be restored.

Q. I understand that. But you were being told by

A. By Fintan Towey.

Q. by Fintan Towey a few days prior to this, isn't that right, I think on the 7th?

A. Yes.

Q. That the Minister wanted it a 40:40:20?

A. Yes, absolutely, yes.

Q. Yes.

A. I think Arve is talking about it as it was on that day rather than as it was to be, but I certainly can't speak for Arve.

Q. Right.

A. Denis gave quite a robust reply to that, I think.

Q. That is what I am going to come to because that is I wanted to open the letter. I will go to that immediately just to put it in context. I think it is in Book 50, in fact.

I suppose before I go to Mr. O'Brien's reply, because he is addressing two letters in fact because

Mr. Johansen wrote to Mr. Walsh as well, I think, didn't he, on the 11th? That was the day after. Just bear with me for a moment. It is Divider 137 in Book 49. Perhaps we should open that as well because Mr. O'Brien's response is in respect of both letters, I think.

And Mr. Johansen wrote to Mr. Walsh.

"I refer to your letter of the 1st May, 1996, where you:-

"1. Enclose your letter to Communicorp of the 1st May, 1996, outlining the terms and conditions subject to which IIU would be willing to sell 12.5 percent of its shareholding in Esat Digifone Limited to Communicorp bringing Communicorp's shareholding in Digifone up to 50 percent and ask Telenor Invest AS to confirm that it would continue to support the Digifone project in such a case.

"2. Enclose two draft share transfer agreements subject to which IIU would transfer 2.5 percent of its shares in Digifone each to Communicorp and to Telenor.

"First we will comment on the arrangement outlined in your letter of the 1st May, 1996, and then comment on the draft share transfer agreements.

"Communicorp and Telenor last year entered into a joint venture to bid for the second GSM Licence in Ireland. Telenor believed that a joint venture between Communicorp and Telenor would be a strong

contender for the second GSM Licence in Ireland.

Telenor being an experienced and successful mobile operator and having sufficient financial strength to commit to such a project, and Communicorp representing first of all the Irish participation in the project.

"Although Telenor would have preferred to have a majority participating interest, Telenor accepted that the joint venture with Communicorp was established on a 50:50 basis. This was accepted despite the fact that Communicorp did not have the financial strength to carry half of the financial commitment that was necessary to support the joint venture if it was awarded the licence.

"As a consequence of Communicorp's lack of financial strength, Communicorp subsequently has invited institutional investors to participate in the project, necessitating a dilution of the existing shareholders.

Communicorp has strongly argued that Telenor under the circumstance must accept a dilution of its participation, despite the fact that the dilution was caused by Communicorp's lack of financial strength.

Telenor has opposed to the reduction of its participating interests below that of Communicorp. On two occasions, therefore, Communicorp's and Telenor's participating interest in Digifone has thus been reduced first to 40% and then to 37.5%.

"The reduction of Telenor's and Communicorp's

participating interests from 50 percent to 40 percent each followed a commitment from the Allied Irish Bank and some other institutional investors to take a 20 percent stake in Digifone. And Advent's commitment to invest \$30 million in Communicorp. The reduction from 40% to 37.5% followed as you will know from the arrangement agreement entered into sometime in 1995, between IIU and Denis O'Brien. Subject to this agreement IIU also undertook to underwrite Communicorp's financial obligations with this respect to the funding of Digifone.

"Communicorp now has established yet another way of financing its share of the funding of Digifone. This financial arrangement is organised by Credit Suisse First Boston and would, as we understand from your letter of the 1st May, 1996, 'ideally require Communicorp to have 50 percent in Digifone'. In your letter of the 1 May 1996 you state that you would be willing to sell a 12.5 percent share in Digifone to Communicorp bringing Communicorp's share in Digifone up to 50 percent. In return Communicorp would pay to IIU its historical costs related to said 12.5 share plus an amount equal to the subscriptions due on IIU's remaining 12.5 percent.

"First, Telenor wish to state that the transfer of 12.5 percent of the shares in Digifone from IIU to Communicorp would require Telenor's express consent,



which as you will know from the copy you have received of our letter to Denis O'Brien of 10th May, 1996, Telenor is not prepared to give.

"Second, Telenor cannot confirm that it would continue to support the Digifone project if as a result of the events and arrangements described above Telenor would end up with a lower participating interest in Digifone than Communicorp.

"However, as you will know from the copy you received of our letter to Communicorp of 10 May, 1996, we have offered to Communicorp to enter into a bridging agreement subject to which Telenor would carry Communicorp's financial obligations vis-a-vis Digifone during a limited time period allowing Communicorp even more time to arrange its financing.

"With respect to your proposal concerning the transfer of 2.5 percent of the shares in Digifone to both Communicorp and Telenor, we consider that your handwritten points on the front page of the draft agreement need to be inserted, and in particular, the mechanism for the transfer of legal title to the shares with immediate effect from the signing of the agreements.

We agree" and then it is fairly technical?

A. Yes.

Q. Now, Mr. O'Brien wrote to Mr. Johansen and it is Divider 142 of Book 50. And you can see at the top, I

think that is Mr. O'Brien's writing isn't it,

"Strictly Personal/Private and Confidential"?

A. Yes, I think so.

Q. Yes, and it is dated the 12th May and it reads:

"Dear Arve,

"I refer to your letter dated Friday the 10th May and your letter dated the 11th May to Michael Walsh.

"I am disturbed by the contents and accuracy of both these letters. Furthermore, your continuous personal comments throughout the meeting to my colleagues on Friday at the office of Matheson Ormsby Prentice when you also questioned the integrity of Dermot Desmond, IIU, and myself was outrageous and totally unacceptable.

"Just to remind you of some of the things you said which were noted and minuted at the meeting.

" the IIU agreement prior to the awarding of the licence 'was a method for Denis O'Brien to get back door control of the business'.

" the IIU agreement was entered into without the knowledge of Telenor.

" on a number of occasions you clearly cast dispersions (sic) on my character. Having repeated these dispersions (sic) both Leslie Buckley and Paul Connolly stated that they were not prepared to accept the personal nature and basis of your allegations.

"This kind of behaviour is not acceptable to us as

partners and prevents reasonable discussion and debate taking place.

"May I now remind you of some of the sequence of events:

"IIU conspiracy theory.

"1. On Friday 22 September, 1995, I travelled to Oslo to meet with" I think that is where we get the date referred to by Mr. Johansen in his memorandum?

A. Yes.

Q. "I travelled to Oslo to meet with Sjern Malm and yourself to discuss the GSM bid and the participation of IIU in the consortium. Per Simonsen also joined us later on in the meeting.

"I had received a letter dated 15 September (copy attached) from Knut Haga stating that Advent's letter of financial support was not acceptable. IIU's participation for 25% of the equity in Esat Digifone was brought about for two reasons: Firstly, it was viewed that the consortium needed more firmly committed Irish investment content, as the other institutional letters from IBI, AIB, Standard Life, were letters of intent and not legally binding. The other reason being that Telenor had rejected Advent's letter of financial support.

"In your letter dated the 2nd October, 1995, which I enclose, you state 'In order to reassure the Ministry and give an even stronger signal to the Irish

community in general, we are pleased with the plan to have another solid Irish underwriter.' It was also viewed that by having 62.5% Irish content the bid would be greatly enhanced.

"Later in the same letter you state 'but on the basis of the JV and draft shareholders agreement we feel obliged and accept a pro rata dilution to 37.5%. Any further dilution would be in conflict with the principles of our participation and the Board resolution of Telenor AS'. The Norwegian content (non-EU) was deemed to be high at 40% particularly since Sjern Malm and Per Simonsen told me on the 27 April, 1995, that Telenor would be selling off half its interest within 12 months to Tele Denmark (from an EU member).

"At our meeting on the 22nd September, 1995, in Oslo I made two requests.

"1. Communicorp Group did not want to reduce its holding to 37.5% as we were the lead consortium member having spent two years on the bid, thus we wanted to maintain our 40% interest and asked for Telenor to reduce to 35% with IIU at 25%. Despite reasoned and rational arguments on our side you rejected this request.

"2. Telenor had refused to go pari passu on the bid costs, which at the time were running at 1.5 million to 1.6 million. I had asked you to go pari passu and

you refused, despite reasoned argument by me on behalf of Communicorp. However, your letter of 2 October, 1995, did say that 'Telenor, based on the agreement will absorb its equitable share of these costs. If however, you feel that Communicorp for some reason is not fully compensated, we are willing to discuss this problem in further detail.' Both myself and my colleagues raised this matter with yourself and Knut Haga, but we were told that Telenor was not prepared to go pari passu. In essence, Communicorp risked 1.1 million on the licence bid while Telenor were only prepared to risk half a million pounds. This was not the behaviour of a partner.

"To finish on this point, I feel it incomprehensible that you are still arguing that IIU have a 20% holding, and that you want Communicorp to cede 5% to IIU. You also claim that Telenor never approved IIU's participation in our consortium. This is in direct contradiction to your letter of the 2nd October. In fact, you told the meeting on Friday last, minutes of which have been passed to me, that 'I do not accept the arrangement with IIU'. All documentation between IIU and Esat Digifone was reviewed and cleared in advance of signing by Telenor executives.

"Clearly you now have arrived at a situation despite your letter of 2nd October that you disagree with both partners, Communicorp and IIU.

"12.5% shareholding issue:

"IIU hosted an Esat Digifone shareholders' breakfast meeting on 9 February. At this meeting I formally asked both Telenor and IIU whether they would be interested in selling Communicorp's 17.5% as our investment advisers in New York, Credit Suisse First Boston, had advised that US investors would want us to consolidate our holding in Esat Digifone. Initially we thought we would need 12.6% in order to consolidate our holding for accounting reasons, but subsequently we were informed by KPMG that only 50% was required. We informed IIU of this. Subsequently Telenor wrote to us to say they were not interested in selling any shares. On 27 February we wrote to Knut Digerud to say that we were pursuing a deal with IIU to purchase 12.5% from them.

"At all stages we were frank about our pressing need to purchase 12.5% in order to complete our US placing. Richard O'Toole representing Communicorp had also been open to Knut Haga during the detailed Shareholders Agreement negotiations. In fact, we did not ask for any changes in the Shareholders Agreement to reflect a 50% shareholding. We negotiated in good faith on the basis of equity with no one partner dominating another. We wanted a shareholders agreement to reflect this basic principle and to push for this outcome.

"Since the 27th February, you knew we were going ahead with the purchase of 12.5% from IIU, and with the placing in the US with CSFB to finance 50% economic interest in Esat Digifone.

"At our meeting on the 2nd May I updated you on the CSFB placing and drew a financing chart. You expressed some concern about Communicorp increasing to 50% by again explaining the rationale for this as we needed this economic interest to close the placing. You also told me before you left my office, to go to the Canadian Ambassador's residence to sign the Nortel contract, that 'There would not have been a licence without Denis O'Brien.'

"At 7:30 p.m. I received a conference call from Scott Seaton, Managing Director of CSFB, and his colleague, who was in charge of our placing, Sean Toomey. They told me that you had contacted them to ask about the Communicorp placing and whether we needed to consolidate our 50% shareholding in Esat Digifone.

They asked whether I had given you permission to talk to them directly about the placing, I told them absolutely no.

"Arve, you interfered without permission by calling my company's investment bank, CSFB, to seek information regarding our forthcoming placement. You had absolutely no right nor did you receive any consent to do this."

Then it goes on to deal with the question of the appointment of Mr. Barry Moloney as Chief Executive.

A. I am actually missing that page there, Mr. Coughlan.

Q. You are?

A. I have the page ending "I told them absolutely no."

Then the next page is the page beginning "Despite all of the foregoing events..."

Q. The only thing I don't think we need to go into the question of Mr. Moloney in this letter and Mr. Digerud in this letter. You can see there where he is informing Mr. Johansen that he had no right and he had no consent to talk or to approach his investment bankers?

A. Yes.

Q. Then if we go to the final page you have there?

A. Yes.

Q. "Despite all the foregoing events, which are factual in content and despite your behaviour throughout last Fridays's meeting and because of the critical importance of resolving the outstanding matters quickly, you must understand that we have our problem in closing our CSFB placing on 20 May and that the economic purchase of the 12.5% from IIU is of critical importance to complete this placing, there is no alternative financing package.

"My understanding of a partnership is that all parties are treated properly with respect and consideration



and without rancor. Provided that these principles are applied to I am happy to meet with representatives of Telenor."

That's Mr. O'Brien's response to Mr. Johansen's letter to himself of the 10th May and to Mr. Michael Walsh as of the 11th, isn't that correct?

A. Yes.

Q. Now, I know on the first page there are certain inaccuracies. Can you assist the Tribunal as to who drafted this particular letter?

A. No, I can't. If you are implying that I might have done, I didn't.

Q. No, no.

A. No.

Q. No?

A. I suspect it was Denis himself. I don't know, though.

Q. Right.

A. This was done on a Sunday.

Q. Yes, it was. There were meetings going on all that weekend, isn't that right?

A. Yes, there were, yes.

Q. It is a fairly lengthy letter and gets fairly technical also, doesn't it?

A. Yes, but there are quite a few issues to be dealt with arising from Mr. Arve Mr. Johansen's two letters.

Q. Yes. One is, well amongst the matters that he is dealing with is that he is informing Mr. Johansen that

he went to him on the 22nd September, that he had received a letter it seems carefully drafted here, "dated the 15th of September, (a copy enclosed)". Do you see that?

A. Yes.

Q. And I know we had certain difficulties ourselves when we were dealing with that letter, but I don't know, it is a matter we can take up with Mr. O'Brien. You would imagine that somebody saying "I received a letter from you on such and such" anyway we can

A. He may well have asked me to look at it. I don't think he did because if he did

Q. I know you would have corrected

A. I would have corrected the 'dispersions' and things like that, and the 'outrageous' misspelling and stuff like that. Now, when I say I don't think I had anything to do with it, that is really why I am saying that because I would have immediately

Q. Yes?

A. gone for them.

Q. Yes, I know. But he is pointing out to Mr. Johansen that there were two reasons, isn't that right, for the involvement of IIU?

A. Yes.

Q. Firstly it was viewed that the consortium needed more firmly committed Irish investment content as the other institutional letters from IBI, AIB, Standard life

were not legally binding?

A. Yes.

Q. And then the other reason was that Telenor had rejected Advent's letter of financial support?

A. Yes.

Q. Now, whatever your own view about the letters from IBI, AIB, Standard, you have informed us that you had received no information that the Department had told anybody that because they weren't legally binding that there needed to be a stronger, let me get the exact words, 'a more firmly committed Irish investment'?

A. No, I don't recall receiving anything like that.

Q. I took this out of sequence because I wanted to get Mr. O'Brien's response in

A. Yes.

Q. to the letter. Now, just going to the final page, despite all the foregoing where he is holding out the olive branch, I suppose he is telling Mr. Johansen that the placing with CSFB is of critical importance and it is critically important to complete it because there is no alternative financing package?

A. Well, I think yes, absolutely. I think CSFB had been the financing, the preferred certainly financing mechanism for Esat Digifone since well before Esat Digifone even won the licence.

Q. Yes.

A. And had become the only one, once the Advent thing

went away. I mean, I suspect now, that if CSFB had not worked well, CSFB worked out after the licence was granted.

Q. Yes, I know that. But if all of this couldn't be resolved, it was insurmountable, wasn't it, the problem for Communicorp, or for Telenor Holdings or not for Telenor Holdings, but for Esat Holdings?

A. No, because what happened actually was it wasn't worked out the way he wanted it to. He didn't get his 50% but he did still pull off the CSFB financing.

Q. Yes, I know. But it was worked out, it was worked out that the licence could be obtained. If the licence couldn't be obtained

A. Yes.

Q. there was, perhaps, no point in pursuing the CSFB?

A. No. The principal purpose of the CSFB financing was to provide the funds for the Esat Digifone venture which was to consume tens of millions in the ensuing months.

Q. To enable that placing the licence had to be in position, isn't that right; that was the real nugget?

A. That is what transpired, yes. I don't think he would have known that a year earlier but he certainly knew it from the winter.

Q. From this time?

A. Yes.

Q. That was the nugget, wasn't it?

A. Yes, yes. That was what the bridging was for.

Q. Yes.

I think I just have a few more documents in Book 49.

Now, we have notes at Tab 138, and these are, these seem to be Mr. O'Brien's's notes, the famous ones witnessed by Paul Connolly.

A. Yes.

Q. And they seem to relate to negotiations that were going on over that weekend, isn't that right?

A. Yes.

Q. Or toing and froing?

A. The subject matter of the correspondence we have just reviewed, the 12.5%.

Q. Yes.

A. And the 2.5, I suppose.

Q. I will just very briefly run through it because well sorry, you weren't, you didn't participate in this?

A. I don't think so, no. Probably if I had, it would be my note. Denis wasn't a notetaker and almost certainly I would have taken the note if I had been there.

Q. Yes. Well, there is this is something we can take up with Mr. O'Brien. If you weren't involved in it there is no point in asking you about it.

Now, there is, at Divider No. 139, a note of yours, isn't that right, of the 12th May of 1996? It is an

attendance, I think, is it?

A. Yes, I am afraid my copy of it is almost in my handwritten copy is almost indecipherable.

Q. Yes, I know, it is poor.

A. It would have been Fitzwilton House rather than Fitzwilliam House anyway.

Q. Yes. So it is an attendance at your offices?

A. Yes. This is the negotiating meeting that we went through on the first day of my examination, I think.

Q. Yes. That's right.

A. It is where they settle the 40:40:20.

Q. Yes. And this was being negotiated by the principals because you are keeping a fairly extensive note of things there, isn't that right?

A. Yes. You see as Esat Digifone I wasn't directly involved, yes.

Q. Yes.

A. Although Dermot wasn't there. Yes. And Denis, I think, arrived part way through.

Q. Yes. I don't think we need open this again.

A. Okay.

Q. Then finally in the book at Tab 140, this is Mr. O'Brien's note to Mr. Desmond; it is on William Fry notepaper. They must all have been around your offices that weekend so?

A. Yes.

Q. So that would explain that?

A. Yes, they all kept taking our pads. These are the pads that are left in conference rooms. The other pads with the client details on them aren't.

Q. I know that. Again, did you have any involvement in this? Because it seems to have been what led to the resolution of events or helped resolve matters at least anyway?

A. As we have seen, I was there. I think what this is Denis at the end of that meeting writing a note to Dermot saying that is what we have agreed.

Q. Yes?

A. So I think I was in the building, but I think it was one of those meetings where people come in and out of rooms all the time.

Q. Right?

A. And go away and come back and go to a different conference room and go out into the corridor and go out and make a phone call. Whether I would have actually been in the room when this was written, I don't know. Also, it being a Sunday tends to promote that kind of behaviour.

Q. Yes. This is really a matter for Mr. O'Brien, I think, rather than you

A. I think so. I think it is basically the deal that was done, though.

Q. Yes. Just a few documents in Book number 50 I think we can deal with. Now, matters seemed to be resolved,

at least, on the 12th, isn't that right?

A. Yes, I think the nuts and bolts had to be dealt with but the deal was done.

Q. The deal was done. Can you or can you assist the Tribunal by just summarising your understanding of what deal was done?

A. IIU or Dermot Desmond would sell 2.5% to each of Esat Telecom Holdings and Telenor Invest for a price which was the corresponding percentage of IRi; 1/252 million, plus the actual amount which had been paid into Esat Digifone in respect of those shares; that's the 1.375 million. There was a reasonably firm assurance, which I don't think was legally binding, by Dermot Desmond, that he would offer a further 10 percent in equal shares subsequently, I can't remember the exact period, to the two, and then an even less binding, very woolly statement about his ultimate intention in regard to the final 10 percent of his holding.

The 2.5 percent were to be paid for upon completion, which was to occur as soon as possible, but in any event before the licence was signed; would be paid for on completion by Telenor, and on the 31st May by Esat.

The payment by 31st May was to be secured by a mortgage of those shares in favour of IIU. And there was an acknowledgment that Denis O'Brien might ask for and Dermot Desmond might grant a 14 day grace period in which to make the payment. That was because,



although he expected to have the CSFB money by then, there are always slips between cup and lip, and he thought it might take a few days longer, and he didn't want the mortgage called.

The Shareholders Agreement would be signed as soon as possible. I don't think there were any outstanding issues on the Shareholders Agreement at this time, although I could be wrong, Gerry Halpenny could tell you.

Then the various there were to be side letters exchanged in which the principle that neither Communicorp nor Telenor - sorry, neither Esat nor Telenor would buy shares otherwise than on an equal basis, and whereby IIU would not offer shares otherwise than on an equal basis, were to be enshrined, those undertakings were to be enshrined, as they were in letters on the 16th.

I could have missed something, but I think those are the bones of it. If you if I check the letters that were done on the 16th May, they will contain the whole thing and I could well have missed one or two.

Q. I might briefly go through those with you at some stage.

A. Yes.

Q. I think that that fairly summarises the events.

Now, the meeting that took place in the Department on the 13th May of 1996?

A. Yes.

Q. And after you prepared a memorandum or a minute?

A. By the way, I found by the way you were asking me earlier on why I had done a typed version of that, and I said I thought it might be because Knut Digerud was very punctilious. Actually I found the reason. If you go to Tab 44, that is a Matheson Ormsby Prentice note.

Q. That is 144?

A. Yes, sorry.

Q. Yes.

A. There is a note there, this is I think, is it Arthur Moran?

Q. I think it is Arthur Moran.

A. There is a note "OO'C to minute". If you look

Q. Yes, I do.

A. The second or third line. I am reporting on that meeting. I have been to the Department with Knut and we have come back to this meeting in Matheson Ormsby Prentice.

Q. I see that.

A. We were reporting to everyone and Arthur Moran is reporting that I have been asked to minute it.

Q. Yes.

A. Do you see in the second

Q. Yes, I do.

A. That is where the typed version came from.

Q. That is why you prepared that?

A. Yes.

Q. That is helpful. Now, going to the second page of the minute, and we have been over this ground before and perhaps even over it this morning as well in matters we discussed. Fintan Towey made the point that the bid referred to 20 percent of the company placed with blue-chip investors, acknowledging institutions in question were not identified. He queried IIU's intention in placing, to placing of its holding. I think your and you go on, you reply that IIU was a financial institution and qualified under the bid description. So there seemed to be, there seemed to be at least a view as of that time from the documentation of the time, that it was the bid description that was exercising everybody's mind?

A. Yes, because I think the press reports were focusing on it.

Q. Yes. Well there was more than that, Mr. O'Connell. That may have been your

A. Yes.

Q. But a letter was written to the office of the Attorney General seeking advice in relation to this particular matter on the ownership?

A. Yes, it was. But didn't that result in an opinion by counsel that broadly the matter was all right?

Q. No.

A. I see.

Q. No. That particular issue sorry, I want to be clear about this, we get confused about ownership and I know in your own mind the Article 8 ownership may be all rolled up in the concept of ownership. But on this, on ownership Clause 3 or Article 3 of the bid, the RFP, that issue, there was never any advice furnished in relation to it?

A. I see. Very well.

Q. I just want to draw that distinction.

A. Could I just make a comment, Mr. Coughlan?

Q. Yes.

A. It is something that has been on my mind for some time. When Mr. Healy was examining Mr. Brennan on this issue, on this, specifically on this paragraph of this note

Q. Yes?

A. he put it to Mr. Brennan that I was inviting Mr. Brennan to participate in a spin exercise.

Q. Mm-hmm.

A. And he presented it to Mr. Brennan as a hypothetical question, but in the transcript the, Mr. Healy's comments were placed in quotation marks, as if Mr. Healy was quoting things which I had said to Mr. Brennan, quoting an invitation

Q. Right?

A. to Mr. Brennan to participate in a spin, and he

also quoted the second point here about, if queried by journalists, and that was put in quotation marks.

Now, in relation to the latter, I would point out that I stressed in the note that it wasn't my view but was based on comments made by Michael Walsh. The record on those matters I felt at the time was very damaging to me.

Q. Right.

A. Because it appeared to be quoting me in respect of matters which I had never said and which if I had said, would have been improper.

Q. Yes.

A. I considered writing to the Tribunal on the matter at the time but decided I wouldn't do so but that I would mention the point for the record when I came to give evidence, and I am mentioning it now because we have come to this document in my examination.

Q. Very good.

A. I would just like it recorded that I didn't make any suggestion to Mr. Brennan that he should participate in a spin and I don't regard what is said in this paragraph as doing so. Thank you.

Q. I take your point there, that you say that anything that you are referring to there, and I think in your direct evidence you said that you stressed in this note, stressing that this was not Owen O'Connell's view, but was based on comments made by Michael Walsh?

A. Yes.

Q. And you stressed it at the meeting, you said, as well, isn't that correct?

A. Yes.

CHAIRMAN: I think, Mr. O'Connell, that will be dealt with.

A. Thank you, Chairman.

Q. MR. COUGHLAN: Whatever your view about it, whether it was or wasn't a spin, you are attributing these comments to Michael Walsh, is that correct, or are you attributing any or all of this to Michael Walsh?

A. I am saying that at Michael Walsh wasn't at this meeting.

Q. I know that.

A. I am saying that at the meeting in response to Fintan Towey's point as outlined in the first four lines

Q. Yes?

A. I said not attributing it to Michael Walsh, although in fact I think I had had a discussion on the matter with Michael Walsh, that IIU was a financial institution, and then I said as a second point, attributing this to Michael Walsh, that if queries were raised on the point, someone answering might reply that recent turmoil over the licence made such a placing unlikely for market reasons for some time. That latter point I took care to say was something which had been given, as it were, to me by

Michael Walsh to be passed on.

Q. And you stressed that at the meeting?

A. I did.

Q. And you stressed it here?

A. Yes.

Q. I just want you to be clear about that?

A. Yes.

Q. Well, seeing as all you were doing was recounting something that had been said to you by Michael Walsh, it is a matter that we should take up with Michael Walsh rather than with you.

A. Yes, perhaps.

Q. Now, at this meeting on the 3rd

A. On the 13th, I think.

Q. Sorry, I beg your pardon, the 13th, it was stressed to you by Martin Brennan, you record if you go to page 4 of the need to prepare for the press conference, isn't that right, that the Minister wished to announce it at a press conference?

A. Yes.

Q. And that was where the question arose of Esat Digifone identifying key questions and preparing draft or potential responses?

A. Yes.

Q. The issue of the ownership was a significant matter, wasn't it

A. Yes.

Q. to be addressed in terms of the and the issue as to whether it was in conformity with the bid was a matter that was raised as well, isn't that right?

A. Yes.

Q. And had to be addressed?

A. Yes.

Q. And I think we will come on to the draft, the questions, the draft questions prepared and various responses that were noted and that might be given. But, on just for the moment, on that question of the likely question to arise as to whether the licensees were disclosed in the bid, or words to that effect, or whether the ownership would conform to the bid; I think a suggested response there was that confidentiality should be relied upon in relation to those who had applied in the bid, or can you remember off the top of your head?

A. I think the confidentiality, I think off the top of my head the confidentiality reference that you mean is where if there was a question as to who were the institutions named in the bid pre IIU

Q. Yes?

A. that they shouldn't be named because it was unfair to them, they having been in and then having been out, as it were.

Q. Yes?

A. I think that was the confidentiality reference.



Q. Yes. Well, I will come on to those in a moment.

CHAIRMAN: Well we are right on 4:00, Mr. Coughlan.

You are plainly not going to conclude direct in the remaining few minutes, although we are probably very much on the downward portion, and so I think it is realistic to reconvene at 11 o'clock in the morning.

Thank you very much.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,

FRIDAY, 31ST OCTOBER, 2003, AT 11 A.M..