

A P P E A R A N C E S

THE SOLE MEMBER: Mr. Justice Michael Moriarty

FOR TRIBUNAL: Mr. John Coughlan, SC

Mr. Jerry Healy, SC

Ms. Jacqueline O'Brien, SC

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FOR THE DEPARTMENT OF

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Mr. John O'Donnell, SC

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Mr. Gerry Kelly, SC

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## I N D E X

|               |              |               |
|---------------|--------------|---------------|
| Witness:      | Examination: | Question No.: |
| Denis O'Brien | Mr. Coughlan | 1 - 78        |

THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY, 11TH  
NOVEMBER, 2003, AT 11AM:

MR. COUGHLAN: Mr. Denis O'Brien.

MR. MCGONIGAL: Just before he gives evidence,

Mr. Chairman, there is just two housekeeping matters  
that I want to keep an eye on, and you will forgive me  
for mentioning them.

One is in relation to the opinion, and I know there is  
correspondence between Mr. Coughlan and myself, and it  
will be dealt with at a later stage. And the other,  
of course, relates to the Andersen situation. And  
again, I have had communication from Mr. Healy, and  
there is correspondence in being, but I am anxious  
that neither of those matters should be overlooked. I  
know they won't be, but I just want to keep it on the  
record.

CHAIRMAN: I am satisfied also, Mr. McGonigal, that  
the Tribunal is very conscious of them, and they are  
being expedited as far as possible.

DENIS O'BRIEN, PREVIOUSLY SWORN, WAS EXAMINED AS  
FOLLOWS BY MR. COUGHLAN:

CHAIRMAN: Thank you for coming back to the Tribunal,  
and very briefly, before we start, I might just say,  
it's no secret that on occasions in the past two years

and some months, relations between yourself and your advisers in this Tribunal have had their low moments, and I want to assure you that I welcome the opportunity now of hearing your side of these important events.

I have already read the detailed statement received from you yesterday, and I will continue to give close attention to that, close attention to all the matters that may be addressed in your evidence.

At the end of the day, the report that I will be required to write, must be based on the evidence, and if that evidence directs me in a direction that you won this significant competition fair and square, I will subscribe to that form of report as gladly as any other, but it is the evidence, and there are matters that we do require to address.

In the course of that evidence, Mr. O'Brien, I do not intend that it should go to any indeterminate length being imposed on you, but inevitably it is going to take some days. I am aware that you have some difficulties and important commitments next week, for example. And as far as is reasonably possible, the Tribunal will do its level best to accommodate trying to get it done as continuously and as expeditiously as possible.

If, in the course of your questioning, any matter arises that you might seek an opportunity to reflect

on, please tell me of that and I'll be glad to defer actually hearing your final answer should some situation of particular difficulty arise.

Lastly, and I say it not as a vacuous or cosmetic formula, I do note that since we last met in this place you have been significantly involved in the very commendable and great success of the Special Olympics, and I think it would be churlish of me not to acknowledge and to commend you for that success, and for our own not inconsiderable role in it.

If you want to revert to the device of removing your jacket, feel free to do so.

A. Thank you very much, Chairman.

Q. MR. COUGHLAN: Now, Mr. O'Brien, I intend dealing with your evidence in the form, in the same form as when you gave evidence on a previous occasion. That is, taking you through any statements you furnished to the Tribunal in the first instance, and then, perhaps, going to documents and seeking your views in relation to certain matters, if that's all right with you?

A. Fine.

Q. Now, I think as the Chairman mentioned, you furnished a statement yesterday evening to the Tribunal, and it's my intention to take you through that in the first instance. And do you have that with you?

A. I have that, yes.

Q. I think you say that this is a Memorandum of Intended

Evidence of Denis O'Brien, and you wish to deal with some preliminary matters in the first instance?

A. That's correct.

Q. And you say that you have been asked by the Tribunal to furnish a voluntary statement and to answer queries on a number of matters pertaining to the award of the second GSM licence. You have sought, through the preparation of this memorandum, and will seek, through the evidence, to give to this Tribunal to provide it with the information it seeks. Before doing so, you wish to state that you are deeply concerned about certain aspects of the Tribunal's investigation of these matters.

You say that the licence was won by Esat Digifone because it was the best applicant and won the independent competition organised by the Department and supervised by external consultants. You believe the investigation of the award of the second GSM licence to be wholly unnecessary and unmerited. The fact that the licence was awarded on foot of a competition run by an independent and internationally renowned consultant, Michael Andersen and his AMI team, is of fundamental importance to the investigation being carried out by this Tribunal.

It is important that the Tribunal is aware that Michael Andersen and his AMI team have been involved in competitions around the world relating to the award

of over 120 mobile phone licences. Michael Andersen has publicly acknowledged that Esat Digifone was the best applicant for the licence, and the following quotation of his is illustrative of that belief.

You quote: "The quality and consistency of Esat Digifone's application with regard to the extent and content of the information provided is among the absolute best that AMI have seen during the many evaluations that AMI, at that time and since then, has participated in."

And you give the reference as being at page 37 of the memorandum of AMI's experience of the GSM2 tender in Ireland, 1995, prepared by AMI in January, 2002. And that was for the Tribunal.

You say that in order for the Tribunal to be fully aware of how and why Esat Digifone won the licence, you believe it is imperative that it hears evidence from Mr. Michael Andersen, the independent consultant, who was retained by the Government as lead adviser to the GSM2 project, and who was principally responsible for devising and overseeing the competition. At present, there is complete uncertainty as to whether he will be available to give evidence to the Tribunal.

If he is not so available, you believe there is a serious and significant risk that both Esat Digifone, yourself and the Tribunal will not have the benefit of invaluable independent evidence from Mr. Andersen that

will assist in proving that the award of the second mobile licence to Esat Digifone was both legitimate and merited. Failure to hear his evidence will raise questions as to the appropriateness and the ability of this Tribunal to make findings in respect of the award of the second mobile phone licence. The Tribunal cannot be selective in who they decide to bring to give evidence to determine issues of fact. The fact that someone is available to give evidence, it behoves the Tribunal to ensure that he comes to Dublin to give evidence at any cost.

Two further aspects cause you great concern. First, the Terms of Reference of this Tribunal require it to investigate payments to Charles Haughey and Michael Lowry. This Tribunal is also required to investigate any decisions made by those former politicians which might have been made as a result of payments they received. The award of the second mobile phone licence, although officially a decision of Minister Lowry, was in fact a decision that resulted from a very detailed public competition that was supervised and adjudicated upon by a Project Team and external consultants who were wholly independent of Minister Lowry. Minister Lowry did not involve himself in the process or interfere with its decision. It is a fact that the failure of the public interest or the Attorney General to represent before the Tribunal the

constitutional office of the Minister, is creating a vacuum as to the appropriate legal position of the then Minister in the carrying out of his duties and obligations in the exercise of his statutory power to award the licence.

I just want to pause there for a moment, and I am not going to ask you anything specific about that, but in due course I will be asking you if you could elaborate or explain that particular provision, or portion of your statement to the Tribunal.

This portion of your statement, as you know, was received last night. Counsel for the public interest was informed of its content and at the moment the matter is being brought to the attention of the Attorney General.

A. Fine.

Q. Second, the Tribunal appears to be spending great time and unnecessary effort in investigating Esat Digifone's dealings with Telenor, IIU and other proposed third party investors, all of whom were at some stage involved in the consortium. What concerns you deeply is that the standard dealings and manouverings associated with business and which are an essential part of business have been elevated by the Tribunal into the realm of "The public interest". These dealings and manouverings which necessarily involve each business entity seeking to maximise the



benefit for its own corporate entity are the perfectly normal workings of business, particularly in respect of a significant business deal such as the procurement and negotiation of a second mobile phone licence. All of these dealings related in some way or other to the negotiation and closing of a large commercial deal.

It is your belief that it is difficult for people from the traditional and conservative professions to understand how these business deals are made. It is your opinion that it would be preferable for people with financial experience and expertise to be involved, either solely or alongside members of the legal profession, in inquiring into these kinds of matters.

The following matters also occur to you:

1. The Tribunal should confine itself to inquiring whether Mr. Lowry interfered in the matter of the decision of the award of the licence. Mr. Michael Andersen's evidence will be key here.

Secondly, for the past year, the Tribunal lawyers have been trying to 'assess the assessors', which they are not qualified to do, and in doing so have been behaving more like prosecutors than inquirers.

Thirdly, more than 20 civil servants have given evidence and no evidence of interference has emerged.

Fourthly, Esat Digifone took great heart that when the licence competition was announced, that it would be

conducted totally independently and would be above any political interference.

Fifthly, if the Tribunal wants you to give evidence for several weeks as to how you do business, you will reluctantly make yourself available, but it will be a waste of taxpayers' money. If the Tribunal pursues this avenue of questioning with you, then they should also go through all the other bidders' dealings and relationships between the members of the individual consortia.

Notwithstanding these concerns, you are prepared to give your evidence as to how Esat Digifone competed for and won the second mobile phone licence.

Under a heading, "Allegations":

You also want to emphasise publicly a point that the Tribunal has communicated to you in correspondence, that is that no allegations are being made against you, or indeed, against any of the companies with which you have been associated. Unfortunately, certain elements of the media have sought to present this section of the Tribunal's work as being an inquiry into you and your former business deals. This is not the case. And you believe it is important that the Tribunal should publicly acknowledge this fact.

Now, dealing with the background:

You say, Ireland was very reluctant to allow competition to Telecom Eireann in the fixed line

market, despite the existence of the 1990 EU Service Directive. The Service Directive allowed for the introduction of competition in the business market.

In Ireland, new fixed line competitors could only then connect business customers to their networks via a rented leased line from Telecom Eireann.

In 1991, you founded Esat Telecom and immediately applied for a telecommunications licence to the then Minister for Communications, Seamus Brennan, TD.

You saw the opportunity for telecom competition in Ireland, as the excessive telephone charges of Telecom Eireann had led to the international recognition that Irish telephone costs were too high for a country to dependent on foreign trade. The establishment of the International Financial Services Centre at this time reinforced your view that Ireland needed competition in telecommunications. Eventually, and despite systematic obstruction by Telecom Eireann, the competition introduced by Esat Telecom brought telephone charges down by over 40%.

Esat subsequently applied, unsuccessfully, to the Department of Communications for further licences for a V-Sat satellite service licence and a microwave licence in December 1991.

Having set up the company, you immediately invited a number of business people with experience of the private and public sector in Ireland to join the

board. The selection of a strong and experienced board was to prove invaluable to the building of the company in the years ahead. The following people served as directors of Esat Telecom:

Denis O'Brien, Leslie Buckley, Massimo Prelz, John Callaghan, Denis O'Brien Senior, Pdraig O'hUiginn, Mike Kedar, Mark Roden, Thomas Keavney, Richard O'Toole, Paul Connolly, Brendan O'Kelly.

In 1996, the European Union introduced a mobile phone directive, Directive 96/19 EC, for the purpose of introducing competition to the State-controlled telecom companies in the area of mobile telecoms service. In advance of this EU directive, Ireland was slow to implement the European Union's policies compared with other Member States. The Department of Communications only first mooted the possibility of a second GSM licence in 1993. I just wonder, that may be a typo. 1996 it may be prior to 1993, but nothing turns on it

A. I think publicly they talked in 1993 about a second licence, but I think from other correspondence, it probably was a little bit earlier.

Q. Now, under the heading, "Irish Government Prepare for Mobile Liberalisation":

The first Chief Executive of Esat Telecom was Doug Goldschmidt. Previously he had been Head of Regulatory Affairs at Panamsat, a US satellite company

competing with the monopolist, Intellsat. Soon after his arrival in Ireland, Doug Goldschmidt mentioned to you that the Irish Government would have to issue a second GSM licence allowing a new operator compete with Telecom Eireann's mobile subsidiary, Eircell.

You were impressed by Doug Goldschmidt's knowledge of European Union regulatory affairs, which he had obtained through spending a lot of time on behalf of Panamsat, getting permission from the European Union governments to up-link and down-link services on its behalf. You believed his experience would be helpful to Esat in its battle to get the licence to operate long-distance services, but also to press the Government to hold a competition for the awarding of a second mobile phone licence.

On his visits to the Competition Directorate in Brussels, DG IV, in order to get EU support for Esat Telecom's fixed line licence applications, Doug Goldschmidt inquired as to when the Irish Government would be asked to hold a competition for a GSM licence. He was made aware of the Commission's plans to adopt a directive forcing the issuing of second mobile licences to be issued if Member States did not do so voluntarily.

After eventually being granted a value added services Licence to operate its long-distance services by the Minister, Brian Cowen, TD, Esat decided to launch a

long-distance service for the Irish corporate market in March, 1996. The residential market could not be liberalised

CHAIRMAN: Sorry to be pedantic. '93.

Q. MR. COUGHLAN: I beg your pardon. 1993.

The residential market could not be liberalised until 1998. The press launch took place in the Shelbourne Hotel, and Brian Cowen, TD, Minister for Communications, officiated.

Over the previous two years, the Department of Communications had stalled the granting of Esat's licence, despite the existence of the 1990 services directive which guaranteed any company that met certain criteria the right to be granted a licence.

It was only after Minister Cowen came to office that the Department decided to issue value added services licences to new operators. Unfortunately, while Esat immediately signed up numerous large corporate customers to its service, Telecom Eireann deliberately delayed, often by six months, the provision of leased lines for the connecting up of these customers in Esat's international gateway switch in Fenian Street, Dublin.

I should just pause for a moment and state there as well, Mr. O'Brien, that we are in the process of notifying Telecom Eireann of that particular

A. There is plenty of evidence

Q. Sorry, I'll just we have an obligation to bring these matters to the attention of people who are affected. It's just because when we received the statement, we hadn't been in a position to do so we have done it this morning.

Having visited numerous emerging telecom companies worldwide, you recognised that in order to be a forceful competitor to Telecom Eireann, Esat would have to offer its customers both a fixed and mobile service by being in both of these market segments.

Esat could then realistically try and obtain 25 to 30% of the overall Irish telecoms market. It was accordingly natural that Esat was prepared to compete for the second mobile licence once it was made available by the Irish Government. Esat achieved 25% market share and the target of combined fixed and mobile revenues of  $\text{€}650$  million in mid-2000.

On its own, Esat was responsible for driving the liberalisation process in the Irish telecoms sector.

In doing so, it created a business that attracted  $\text{€}1$  billion worth of investment into the Irish economy from overseas equity and debt providers. Esat also contributed to the Irish economy by providing 2,500 jobs with employment with no State aid. These employees were an integral part of the Esat team, and it was for that reason that when Esat Digifone was sold to British Telecom, over

€300 million was distributed amongst the staff.

A. Mr. Coughlan, my error there, it should read Esat Telecom, not Esat Digifone was sold. So apologies.

Q. I take the point.

"I believe it is important to emphasise these points in order to knock on the head the trite and uneducated contention that Esat Digifone managed to become a 2.3 billion company by simply purchasing a State licence for €15 million. Such a contention fails to recognise that Esat Telecom and Esat Digifone was built up by its management team and its employees, with the benefit of €1.5 billion of infrastructural investment to become a company of that value.

Under the heading, "Esat Expands its Fixed Line Service Nationally":

In March, 1994, Mark Roden and you visited Callnet in Toronto, Canada, a company that was very successfully competing against Bell Canada. Callnet introduced you to the idea of using auto dialers. They had thousands of these black boxes installed at the back of customers PABXs. Auto dialers had intelligence which allowed the PABX to route all long-distance calls over the public switch network to the nearest Callnet local switch. This black box obviated the need to install leased lines, and were very easy to install. On arrival back to Ireland, a supplier of auto dialers was identified in the United Kingdom, and soon Esat



began to install auto dialers at its customers'

premises.

Once again, because of his experience in regulatory matters, Callnet founder and former Chairman, Mike

Kedar, Cellnet

A. It's Callnet.

Q. It should be Callnet. Founder and former Chairman,

Mike Kedar, was invited to join, and did join, the

Esat board.

The introduction of auto dialers dramatically reduced

the backlog of customers waiting for Esat services,

but also allowed Esat generate sales revenues

immediately for new customers. Also, Esat was able to

offer its services to smaller revenue-generating

customers who heretofore could not get the service

because of the high rental cost of leased lines.

Instead of only being able to go after customers that

spent  $\frac{1}{2}$ 5,000 per month on trunk long-distance calls,

Esat could viably service companies spending as little

as  $\frac{1}{2}$ 200 per month.

In November, 1994, Esat, via Communicorp, received

venture capital funding from Advent International.

Advent invested \$10 million in return for an effective

33% stake in Communicorp. Funding was provided by

Communicorp to its 90% own affiliate, Esat Telecom, to

aggressively launch in April, 1995, its new

long-distance voice service. And switches were

installed in Cork, Waterford, Limerick, Shannon and Galway. For the first time, Irish companies had a choice of providers for international long-distance and national trunk calls. Due to Telecom Eireann's deliberate delays in installing leased lines, together with their high installation charges and rental costs, Esat's regulatory and engineering departments were busy looking at alternative ways of connecting to its new customers.

Under a heading, "The European Commission":

On the 11th June, 1994, Esat submitted a discussion document to the Department of Communications regarding the possible criteria for evaluating competitive tender for a GSM licence. Esat stated publicly that they were against the idea of an auction, as this would favour an open cheque-book strategy from international mobile companies from overseas, and it would be difficult for Irish companies to compete.

The financial burden imposed by paying a high price for the licence could seriously restrict the opening up of a competitive market in mobile telephony. This is because the new licence holder might have to recover the cost either through higher toll charges or curtailment of development expenditure. As a strategy, you that is Esat decided not to canvass for dropping the auction process or to complain to DG IV, as you did not want to irritate the

Department and obstruct their plans. You were already in a major regulatory battle with the regulatory branch of the Department of Communications regarding the use of Esat's fixed line business of auto dialers, and the difficulty in getting direct dial in/direct dial out capacity from Telecom Eireann. There was no point opening up another battlefield.

In any event, in 1995, Esat became aware that the European Commission was investigating the Italian Government for the manner in which it had granted GSM licences. Italy had decided that the Government-owned monopoly, Telecom Italia, would get its mobile licence for free, but that the new entrant, Omnitel, would pay a substantial fee. The EU Commission decided that by doing so, Italy was breaking the competition rules, and ordered the Italian Government to take compensatory measures to ensure that there was a level playing field. Based on this case, Esat was confident that sooner rather than later, the EU would vet the Irish GSM competition and insist that Eircell pay the same fee as the new licensee. This, you believed, is why the licence fee was fixed at  $\text{€}15$  million.

In fact, what appears to have happened is that the EU Commission, relying on the Italian case, persuaded the Irish Government that whatever fee was charged to the winner of the second GSM licence, the same fee would also have to be charged to Eircell. Given that the

payment by Eircell to the Government is simply an accounting exercise within the State, Esat was not bothered to pursue this matter any further.

When Esat Digifone successfully won the licence, some media commentators suggested that Esat had persuaded the European Commission to cap the fee at a low amount, and that representation had been made by Padraig O'hUiginn in Brussels. All of these allegations were totally untrue and without foundation.

An illustration of anti-competitive practices that Esat had to deal with during the period, was that the Irish Government had allowed Eircell a derogation from the planning requirements so that it could construct its masts in whatever location it sought, up until 1995. Again, this illustrated the unfair advantage that the State had afforded to Eircell and the huge obstacles that were constantly being put in front of Esat at that time.

The Second GSM Mobile Licence Project Team:

By late 1993, Esat began preparing for a GSM licence bid that would inevitably take place in the near future. This preparation commenced with Esat putting together a small Project Team, consisting of:

Edward Kelly Project Leader,

Seamus Lynch,

Derry Flood,

Peter White,

Gay McCarron Ex Head of Planning, Dublin

Corporation.

Interim work was undertaken to help in the development of a realistic business plan for the licence bid.

This included, firstly, a comprehensive nationwide market research study undertaken by the MRBI, to establish market needs and demand for mobile services in which over a thousand existing mobile users and non-users were interviewed, and their telephone bills were analysed to determine calling patterns and monthly spend.

Secondly, the design of a national backbone SDH trunk network to distribute and receive telephone calls around the country.

On the 11th June, 1994, Doug Goldschmidt sent a letter to Martin Brennan and Sean McMahon of the Department of Transport, Energy and Communications, outlining Esat Telecom's comments/suggestions on the evaluation of GSM licence bids and the fees which might be associated with the granting of this licence. Martin Brennan has given evidence to the Tribunal in relation to the open-door policy which existed at that time.

An initial set-back also took place when and I am not going to mention the name of this particular firm for the moment, because we have notified them this morning, but we are just awaiting their

comments jumped ship as public affairs advisers to the consortium and started instead to work for Motorola, presumably because they thought Motorola had a better chance of winning the licence. You, that is Esat, had a concern that this firm would unethically use information accumulated through their involvement with you to assist Motorola in the preparation of their bid.

Dealing, then, with Southwestern Bell and Deutsche Telecom.

In early 1994, a Dublin-based solicitor, Mr. Jack Kirwan, of Beauchamps Solicitors, approached you to see if Esat would be interested in having Southwestern Bell join you in making a bid for the second GSM licence. You met Denis Moran, Senior Vice-President of Southwestern Bell, and some of his colleagues.

Soon afterwards, Detecon, the technical consultancy of Deutsche Telecom, also became involved in discussions to join the consortium. Southwestern Bell and Detecon wanted to keep a bid cost to the bare minimum until the Government announced the competition process. Esat strongly felt that:

(A) The consortium should immediately spend money on a radio plan in order to determine the number and precise location where masts would be constructed to provide maximum coverage of the country.

(B) Suitable land owners should be approached to sign

site option agreements.

(C) Detailed planning applications for every mast would have to be made to local authorities throughout the country.

Initially, Southwestern Bell and Detecon contributed by sending personnel to Ireland with the necessary radio planning skills. A dedicated site acquisition team started work in the second quarter of 1994. This process was going to be expensive, but in Esat's opinion, it would be one of the key differentiators against other competitive bidders, as it would show the assessors that you would enter the market quickly.

Southwestern Bell and Detecon balked at the cost of signing up site options and making planning applications, but Esat, realising its importance, started the work anyway on its own account.

As time went by, you began to lose confidence in Southwestern Bell. Ironically, they had no problem sending their executives first class across the Atlantic and staying in the best hotels, but would not spend money on strategic bid initiatives such as site acquisitions. Every time they came to Dublin, you would have day long sessions, achieving little or nothing. At a meeting in early 1995, you asked Southwestern Bell how many licence applications had they been involved in worldwide and what their success rate had been. Denis Moran replied that they had made

14 licence applications, but in only one case were they successful, and that was in Taiwan, where they ended up with an 8% stake in a licence. During this time, you, that is Esat, also lost confidence in Detecon because it was clear that they were being led by Southwestern Bell. You were beginning to feel that you were with the wrong team and made your board aware of your views.

In the meantime, the Department was experiencing delays in the issuing of details of the proposed competition. On the 24th October, 1994, in a meeting with the Department, Doug Goldschmidt was told that the announcement would be published 'shortly'.

In late 1994, and early 1995, further disagreements arose between Southwestern Bell, Esat and Detecon, as to the level of Esat's equity participation in the consortium, with Esat seeking a larger share and Southwestern Bell and Detecon seeking, in Esat's view, to relegate it to the status of a token Irish presence in the consortium. In March, 1995, matters came to a head, and by mutual consent, Esat terminated discussions with Southwestern Bell and Detecon. They subsequently went on to form the Irish Mobicall Consortium that competed for the second GSM licence. Under the heading, "Relationship with the Department of Communications":

During the period late 1994, and throughout 1995, Esat



had a serious disagreement with the regulatory branch of the Department in relation to auto dialers. The Department believed that auto dialers, when used to provide voice services, that is long-distance calls, were illegal under the EU services directive. Esat disagreed, and in early 1995, brought the matter to the Competition Directorate, DG IV. In April, 1995, a senior Commission official, Mr. H J Drabbe, issued a letter to Esat setting out the legal reasons why auto dialers used for voice services could be considered legal under the Service Directive.

Esat Telecom was greatly encouraged in the use of auto dialers by this letter from the European Commission, which supported the view that they were permissible. Civil servants in the Department of Communications, and of course, Telecom Eireann, agreed with that view.

Minister Lowry, and subsequently Minister Dukes, endorsed the Esat view, by ordering Telecom to make available direct dial in/direct dial out capacity, presumably because it represented an effective means of introducing competition which was basic EU and Irish Government policy. When she was appointed in 1997, the Telecommunications Regulator replaced the need for auto dialers by insisting on an interconnect agreement with Telecom Eireann which had the same effect and allowed Esat operate without the need for leased lines.

Esat every few months sought more capacity in the form of direct dial in/direct dial out telephone lines from Telecom Eireann to handle its growing customer base connected by auto dialers. Telecom Eireann refused to furnish this capacity, because it had convinced the Department that auto dialers, when used for voice services, were illegal. However, the Department ensured that Esat continued to receive a certain amount of direct dial in/direct dial out capacity for fax and data traffic, that is all auto dialer calls which were specifically excluded from the requirement applying to voice telephony.

Prior to receiving the letter from the EU Commission official, Mr. Drabbe, the Department had been threatening legal action in relation to auto dialers.

However, once Esat had given a copy of this letter from Mr. Drabbe to the Department, you believed that they would never take legal action. In addition, they would have to force Telecom Eireann to give ongoing direct dial in/direct dial out capacity to Esat and other competition, such as TCL (Worldcom) and ITL (GTS). Not surprisingly, the auto dialers issue caused an ongoing strain with the Department, in particular, the Regulatory Division. In fact, there was concern internally at Esat that the auto dialers dispute would derail your GSM bid. In late 1995, and early 1996, Telecom Eireann were also threatening Esat

and the Department that they would launch a High Court action. Significantly, around that time, you understood that the Department itself was in the throes of drafting legislation for the setting up of the ODTR, an independent communications regulatory body. Esat welcomed this, because it would eliminate a conflict of interest for the Department, who effectively owned Telecom Eireann, and would make life easier for both the officials and new telecom companies.

Despite the doubts of many of your Esat colleagues, you believed that the Department officials would deal with Esat GSM's bid even-handedly.

Under the heading, "GSM Competition Announced":

The GSM competition was formally announced on the 2nd March, 1995, with the issuing of a request for proposals, the RFP, which stated that the closing date for receipt of applications was Friday, 23rd June, 1995. In paragraph 19 of the RFP, the document stated as follows:

"The Minister intends to compare the applications on an equitable basis, subject to being satisfied as to the financial and technical capability of the applicant in accordance with the information required herein, and specifically with regard to the list of evaluation criteria set out below in descending order of priority:-"

and they were:

" Credibility of business plan and applicant's approach to market development;  
quality and viability of technical approach proposed;  
its compliance with the requirements set out herein;  
the approach to tariffing proposed by the applicant, which must be competitive;  
the amount the applicant is prepared to pay for the right to the licence;  
timetable for achieving minimum coverage requirement and the extent to which they may be exceeded;  
the extent of the applicant's international roaming plan;  
the performance guarantee proposed by the applicant;  
and efficiency of proposed use of frequency spectrum resources."

Also, on the 2nd March, 1995, a memorandum for the information of applicants was issued. In paragraph 3 of the memorandum, entitled "The Selection Process", further information was provided to applicants in relation to the process.

Once the competition was announced, Esat's group of external advisers, most of whom had been appointed in

1994, began to meet more frequently to help determine your bid strategy. The external advisers included: PJ Mara; Jim Mitchell, TD, formerly Minister for Communications; Padraig O'hUiginn; John Callaghan, and Dan Egan.

In parallel, Nortel France provided the technical team to draw up a radio plan for the network, and ^ Eve Construction designed the backbone SDH trunk network. Retired former Chief Planning Officer of Dublin, Mr. Gay McCarron, worked with a team of six people in putting together 150 initial planning permissions for Phase 1 of the network roll-out plan, which would cover 80% of the population. Mr. McCarron reviewed all planning applications and checked that the information that local authorities needed to make a decision was being made available.

PA Consulting and the bid team:

You felt that in order to increase the professionalism of the bid team and put together a compelling application, outside international telecoms consultants would have to be engaged to help structure and write the bid documentation and ensure its internal consistency, you approached PA Consulting in March 1995.

PR was chosen because in addition to having the required consultancy skills, they had worked on a number of successful GSM licence bids throughout

Europe, both as consultants to applicants and as adjudicators for governments. A fee agreement was reached quickly. And you refer to a letter of that agreement which was signed on the 27th April, 1995.

PA started to work on the bid in March, 1995. Nick French, a senior consultant at PA, and a team of seven PA consultants moved to Dublin.

Now, I think something is a little bit out of sequence, but we come on to the rest of the bid team in due course, so I'll just skip over

A. Apologies for that.

Q. You then say under the heading, "The Need to Have a Successful International Partner Join the Consortium":

Nick French, senior consultant with PA, told you that in order for Esat to be successful in the bid, an international partner was a prerequisite, and he suggested that Esat approach Telenor. Prior to approaching Telenor, Esat had been approached by Southwestern Bell and Detecon. These approaches, described earlier, were made throughout 1994 and early 1995. The negotiations fell apart for the reasons outlined earlier. The other international companies with whom Esat entered into discussions for the purpose of forming a partnership were:

Bell South:

You had one meeting with Bell South in Brussels in early 1995. This was merely an exploratory discussion

about them joining the consortium. Bell South did not want to apply for a licence.

France Telecom:

Esat had two meetings with France Telecom in Paris in March/April 1995. The meeting was merely an exploratory discussion about them joining the consortium. The negotiations did not proceed anywhere because France Telecom were too slow and could not make a decision.

Tele Danmark:

There was one meeting with Tele Danmark in early June 1994, which again was merely an exploratory discussion about them joining the consortium. Tele Danmark never responded substantively to Esat.

Under the heading, "Telenor Joins the Consortium":

Nick French, senior consultant with PA, telephoned Telenor in April, 1995. Within a couple of days, Sjur Malm and Per Simonsen arrived to meet you in Dublin on the 27th April, 1995. Telenor were very positive about joining the consortium, and despite no final agreement being signed, they sent a technical and business planning team to help with the bid. You travelled to Norway on the 9th May, 1995, and over the next number of weeks a Joint Venture Agreement was negotiated and concluded. Although the Telenor/Esat consortium did not come into full legal existence until the 16th May, 1996, when the Shareholders

Agreement was signed, there was an agreement in principle by May/June 1995 to form the consortium and advance the bid. A Joint Venture Agreement was signed by Telenor and Communicorp on the 3rd June, 1995.

This agreement was entered into on a 50:50 basis, but Telenor was only prepared to pay its share of the incremental costs of the bid from the date they became involved at the end of April, 1995. This amounted to approximately 400,000, but approximately 1 million had already been spent by Communicorp.

William Fry acted as legal adviser. PA Consultants were advisers on the GSM bid strategy. Both would have been aware of the Joint Venture Agreement being negotiated with Telenor. Telenor joined the bid at an important stage, even though a substantial part of the bid had been written. They brought extensive mobile experience in important areas, such as network design, business planning and IT design. As part of your agreement with Telenor, Telenor personnel had to approve the final version of each of the sections of the bid document.

Turning now to the start of the work on the bid document.

You realised that because Esat would be regarded as rank outsiders, its bid would have to be exceptional in all aspects. Not only would your response to the criteria laid out in the requests for proposals have



to be comprehensive, but they would have to give even more information than was asked for. Esat's proposal would have to show, among other things, that:

Firstly, Esat had the right consortium, made up of partners with the required market knowledge, general know-how on the delivery, and operation of a successful GSM business, and financial backing.

Secondly, Esat had to have the optimum network design and site roll-out plan with as much preparatory work done, including planning permission for as many sites as possible, to ensure a speedy roll-out of the network and an early launch of the services should its bid be successful.

Thirdly, Esat being the only applicant with direct experience of the Irish telecoms market, could show it had a unique knowledge of the market place. You understood the market's mobile needs, the potential for mobile usage and how to present attractive pricing models and innovative product, all of which ensured that you were well placed to develop a vibrant market in mobile usage in Ireland.

This is what Esat Digifone did: It resulted in a bid so comprehensive that you were confident other bidders would find difficulty in matching it. In fact, you believe that the other bidders did not take steps anywhere near as comprehensive as Esat, nor did they spend as much money in preparing their bids. Your

preparations were reflected in the fact that following your obtaining of the licence, you were extraordinarily successful in rolling out the new network and obtaining within a short period of time, 40% share of the mobile market. You doubt if any of the other competitors for the licence would have been so successful.

By early 1995, Esat employed 40 staff and consultants, excluding contractors, to work on the bid, and a complete bid team was formally put in place working full-time by early March. In order to guarantee the confidentiality of the work of the bid team, a short-term lease was signed for approximately 5,000 square feet of office space in a basement in Jenkinson House off Lombard Street. You had been told originally by Southwestern Bell that bidders in other markets had gone to extreme lengths to find out what other bidders were up to and what price they were going to bid at the auction. Because of this, 24-hour security was employed and all windows were blacked out so that nobody could see in. A security firm swept the offices for listening devices every two weeks. Then here now you outline the GSM bid team. And they were:

Seamus Lynch Sale and Distribution Strategy;

Christine Hamilton Editor, Bid Document;

Denise O'Sullivan Administration Support;

Susana Zubiri Planning Application;

Hilary Handley Administration Support;

Michael O'Hara Site Options/Legal;

Enda Hardiman Bid Coordinator;

Deri Flood Network Construction;

Jim Hogan Dealer Development;

Liam McDermott Customer Support Letters;

Stephen Cloonan MD Harry Moore/Retail Distribution  
Strategy;

Paul O'Brien Gamma Mapping;

John O'Mahony Business Development;

Jackie Carroll Site Planning;

Brian Noble IT/Billing;

Peter Norton Dealer Support Letters;

Derek Handley Marketing Manager;

Gay McCarron Site Planning Application/Consultant;

Declan Drummond SDH Backbone;

Edward Kelly Business Planning;

Peter White CAD Operator.

You then outline the Esat Telecom bid personnel:

Denis O'Brien;

Aidan Duffy Switch Engineer;

Sally-Anne McEvoy PA;

Peter O'Donoghue Chief Financial Officer;

Catriona Beatty Company Secretary;

Sarah Carey Marketing;

Jarlath Burke Head of Regulatory Affairs;

Jacqui O'Brien PA;

Michael McDonnell Logistics/Facilities;

Peter Gibney Radio Engineer;

Brenda O'Keeffe Financial Planning.

And you say that the Telenor personnel were: Six

Nortel radio planners based out of Paris and the UK;

Per Simonsen Telenor Invest/Business Plan;

Hans Myhre Telenor Mobil/technical Director

Designate;

Arne Egil Moen Telenor Mobil/Network Design;

Egil Ranboel Telenor Mobil/Network Design;

Frode Enge Hoedel Telenor Invest design;

Halvard Woxholt Telenor Mobil/Network Design; and

Sven Oskar Seimn Telenor (Consultant)

A. Sorry, Mr. Coughlan, just a technicality. The six

Nortel planners really weren't Telenor personnel.

They should be under a different category. I

apologise.

Q. I take your point.

A. Okay.

Q. Then the Ideas Company marketing section of bid:

Lucy Gaffney; Paula McEvelly.

Advisers and consultants:

Eileen Gleeson public relations;

Leslie Buckley Board Member/Adviser;

Padraig O'hUiginn Board Member/Adviser;

PJ Mara Adviser;

Paul Meagher Solicitor, Site I take it that's to

do with the site?

A. Acquisitions, yeah.

Q. Paul Connolly Funding/Corporate Finance Adviser;

Declan O'Reilly Sherry FitzGerald, Site Leases;

Niall O'Brien seconded by KPMG/financial modelling;

Dan Egan adviser/Power of 7 brand logo and

advising;

Dave Curran Graphic Design;

Geraldine Lally Oral Presentations Skills Trainer.

Then Coillte mast sites:

Eugene Cooke Head of Business Development, Coillte.

Under the heading then, "The Competition":

Within the text of the document, "Competition for a  
licence to provide digital mobile communication GSM in

Ireland," issued on the 2nd March, 1995, on page 4,

paragraph 19, the Minister set out the evaluation

criteria in descending order of priority. "Although

we did not know the weighting of each of these

criteria, the very fact that they were in descending

order gave us an indication of the assessors'

thinking. It also steered us on how we should

prioritise the bid team's resources in addressing

these criteria. We filled out every section of the

bid with as much information as we thought could be

relevant to the assessors. In every case, our aim was

to secure maximum points. PA helped greatly in the

business side and market development. Telenor and Nortel handled the selection, or the section described in the whole technical network, planning and roll-out. Nearly every day key executives of the core bid team of five or six people would meet to discuss progress from a detailed checklist and Gantt chart, and to discuss ways of enhancing each section of the bid. Everybody was working twelve hours a days with only one thing in mind, and that was to win the licence. Most of the bid team were on substantial success bonuses. It was always Esat's view that the bid should be vibrant and interesting for the assessors to read. Having a chosen brand name would be part of this strategy. After much to-ing and fro-ing, it was decided to run with the brand name, Esat Digifone. The following important actions were carried out in order to advance your chances of succeeding in the bid:

1. A comprehensive distribution strategy was drawn up by Stephen Cloonan.
2. This involved visiting the second mobile operations in eight markets around the world; Denmark, Germany, UK, France, US, Canada, Australia, New Zealand and examining your competitors' advantages in each of these markets.
3. The Ideas Company Limited was engaged in the development of detailed marketing plans, together with

the briefing of a creative team, to work up an initial advertising launch campaign.

4. Gerard O'Neill from the Henley Centre was retained on an exclusive basis to analyse market behaviour and forecast future lifestyles in Ireland over the 15-year period of the licence.

5. A creative design team, the Power of 7, produced all of the marketing collateral material, including the production of a 30-second radio TV ad.

6. Desmond O'Meara & Partners drew up a detailed detailed new deal launch campaign.

7. 500 letters from existing Esat customers were procured, as well as 200 letters from mobile dealers across the country, stating that they would like to become dealers for Esat Digifone.

The idea behind all these additional actions was to show the assessors that Esat had thought of everything, and more importantly, could launch the business quickly and get into the market early.

The deadline for the bid was 25th June, 1995. And you scheduled to freeze the bid one week before the due date in order that all sections could be proofread.

The bid had a total of over 2,500 pages, and 12 copies had to be submitted to the Department.

Under the heading, "Keeping the Consortium Under Wraps":

It was a deliberate part of the team strategy to say

nothing to the press and to keep everything under wraps. At the time you wanted the other bidders to underestimate Esat's chances. The media had Persona/Motorola as the front-runners, and you were happy to let them do this. You kept reminding the bid team that Dave Wottle came from the back of the field in the 1972 Munich Olympic Games to take the 800 metre gold medal. Knowledge of Telenor's participation in the consortium was withheld so that the other bidders would think that you did not have an international partner. Planning permissions were made in different companies' names to avoid revealing our identity.

You knew from having so many people working on the site acquisition team that you were way ahead of the other bidders in this area. "This was only at a late stage when Persona heard that we were at what we were at, did they go after sites. But nothing like the number we had signed up. The ESB part of the Persona consortium would not cooperate with us in any way." In contrast, Coillte entered into agreements with Esat at an early stage, realising the commercial opportunity for them.

It also became obvious that one of the competitors, Irish Cellular Telephones, backed by Independent Newspapers and AT&T, had a strong focus in the Munster region. They had also brought in Shannon Development as a member of their consortium to further bolster



their Munster origins. In order to block any geographical weakness on our side because of them, we decided to commit ourselves to placing our customer care centre in Limerick employing over 300 people.

Although five State companies were equity participants in other consortiums, e.g., RTE, Bord na Mona, CIE, ESB and Shannon Development, you decided not to invite State companies, as you believed this would lead to a diminution of your private sector credentials. You had also been involved in a licence bid with GPA, together with Telecom Eireann and RTE, to obtain the Irish Government's concession to launch a broadcast satellite in 1985. This consortium lost to a totally private sector bidder, Atlantic Satellites. The Government felt at that time it was too risky a project for semi-State companies to be involved.

From mid-May, 1995 sorry, under the heading, "Competition Laid":

From mid-May, 1995, the bid team worked seven days a week, with many staff frequently working throughout the night to meet deadlines set for the production of each section of the bid document. You were scheduled to freeze the bid one week before the due date of the 24th June. This was necessary in order for all sections of the bid to be proofread a number of times, and the final version professionally printed in full colour by BFK Design. The bid had a total of over

2,500 pages, and 12 copies had to be submitted to the Department.

In addition to that, you had an excellent bid document with additional elements in it which had not been requested in the RFP, and that was why the concept of a beauty contest would suit you.

You were originally going to use the week between the 16th and the 23rd June to decide what fee you were prepared to bid at the auction. This would have enabled you to finalise the decisions which you were arguing in relation to the auction fee. It was going to be the last piece of the jigsaw to be inserted into the bid document.

On Friday afternoon, 16th June, 1995, a letter was faxed by the Department of Communications to your bid office, stating that the Department had been in discussions with the European Commission in relation to certain aspects of the tender, and that the closing date would be extended for a further four weeks until the 4th August, 1995, to complete the consultation process.

On the following Tuesday, 19th June, 1995, Edward Kelly and you met with Martin Brennan and Fintan Towey of the Department to establish why the deadline had been extended. There were press reports speculating that the licence fee would be capped. By changing the nature of the competition from an auction to a 'beauty

contest', Esat's chances of success dramatically increased, as if an auction had gone ahead, an overseas company could have bit an uncommercial amount just to get the licence, which is what happened in the 3G auctions in 2000. This would have enabled you to finalise the discussions which were going on in relation to the auction fee.

The bid team took the weekend off, and on the following Monday, the core group met to decide how you would use the extended bid time. Clearly the auction element was up in the air.

Coincidentally, around this time, Esat received a letter from Minister Lowry indicating that the direct dial in/direct dial out lines would not be provided to any operator that was using auto dialers for voice services. You were concerned that your relationship with the Department was deteriorating, but you were advised by your legal advisers (Jones Day Reavis and Pogue) in Brussels, and William Fry Solicitors in Dublin, that despite the Minister's letter, the Department had a legal obligation to ensure that you received direct dial in/direct dial out capacity.

Under the heading, "PA London does Independent Assessment of Bid."

You thought that you should use the delay to get the draft bid in its entirety assessed by a third party, and each section scored. For confidentiality, PA were

chosen, but at this time a separate team within PA in London would score the bid. None of these assessors had worked on your bid. You spent approximately  $\pounds 30,000$  sterling on this exercise. A staff member was sent to London with the three copies of the bid in suitcases to be delivered to PA. Within three weeks, on the 17th July, you received a very detailed report of where your perceived weaknesses were, and suggestions on how you could strengthen sections of the bid. A full work plan was put together to address the weaknesses and strengthen all sections of the bid. In parallel, you went full steam ahead to use the delay to make more planning applications for mast sites.

Turning now to Advent International's financial commitment to Esat.

In the Joint Venture signed on the 3rd June, 1995, Communicorp undertook to provide Telenor with a bank guarantee for  $\pounds 5$  million, and 50% of the licence fee.

In the weeks prior to the submission of the bid, Telenor began to express concerns on how Esat would fund its share of the equity capital should you be successful. In order to satisfy Telenor, Advent International had written a letter of comfort to the effect that it would commit up to  $\pounds 30$  million to fund Communicorp's 40% holding in Esat Digifone. Advent directly confirmed, by way of letter of comfort, to

Telenor that it would offer that amount to Communicorp to enable it to fund its obligations. Separately, Advent for writing this letter were to be allowed a 5% investment in the third party institutions' block of Esat Digifone equity. Advent and Communicorp formally entered into an agreement on the 12th July, 1995, whereby Advent committed up to  $\text{€}30$  million to the Communicorp Group in the event that Esat Digifone was successful in its bid for the second GSM licence. A clause in this agreement provided that the rights and obligations of Advent under the agreement were conditional upon the following matters being fulfilled by no later than the 30th November, 1995:

- A. The GSM licence being awarded to Esat Digifone and;
- B. The other providers of loan equity financing having fully met their commitments, and;
- C. Telenor being satisfied with the comfort letter issued to it by Advent (regarding the bank guarantee), and having resolved on that basis to proceed with its participation in Esat Digifone and the application.

Communicorp Group was funding all of the costs of the bid alone until Telenor joined the consortium in May, 1995. A total of  $\text{€}1.5$  million Irish was spent by Esat Digifone by August, 1995. At the same time, Esat Telecom's fixed line business was expanding rapidly and using up large amounts of cash on a monthly basis.

Advent's initial investment in October, 1994, of \$10 million in Communicorp was being used up quickly. Hence, the group asked Advent for a loan of  $\text{€}3.2$  million until Esat knew the outcome of its GSM licence bid when longer term financing would be put in place.

The terms that Advent were insisting upon were extreme, since they were insisting upon an interest rate of 30% per annum. You also contributed  $\text{€}600,000$  from personal resources.

The Joint Venture Agreement between Telenor and Communicorp provided for a guarantee by Communicorp of  $\text{€}5$  million Irish plus 50% of the licence fee. This was presumably included because Telenor knew that Communicorp was a relatively new company and they wanted some assurances as to its ability to fund the project. A guarantee itself was not provided, but it was effectively replaced by the letter of comfort which was the subject of subsequent discussion and agreement with Advent, which has been described above.

It transpired that Telenor did not accept the letter of comfort given to them by Advent, and on the 3rd August, 1995, they requested a reworded letter of comfort prior to the submission of the new bid deadline on the 4th August. On the 4th August, 1995, Communicorp wrote to Telenor confirming that although they had received an offer of sufficient funds from Advent, they wished to seek alternative sources of

funds because the terms of Advent's offer were unfavourable to Communicorp, and management felt that other institutions would offer better terms.

Communicorp realised that having only one provider of equity finance, that is Advent, a potential placing of shares in Communicorp was not going to be advantageous in terms of pricing and also dilution. In further correspondence between the 4th and the 11th August, Telenor voiced concerns regarding the ability of Communicorp to fund its share of the capital amounts needed in the event that Esat Digifone was granted the GSM licence. Communicorp confirmed that if it failed to raise sufficient funds from other sources, it would accept Advent's offer, but indicated that it was pursuing other funding avenues, including a fundraising by an investment bank, Credit Suisse First Boston, in New York.

Paul Connolly and you were working with Credit Suisse First Boston on a placement of equity by the group.

Meetings took place in New York in May, June and October, 1995. CSFB said they would be able to raise the money with US institutions should Esat win the licence, but they were not in a position to provide a binding offer of equity finance. Ultimately, CSFB completed an equity placing, raising \$45 million in June, 1996. Had this equity placing not been successful, you would have taken funding on less

favourable terms from Advent or availed of the underwriting from IIU.

The guarantee to be furnished by Communicorp:

Under the Joint Venture Agreement between Communicorp and Telenor of the 3rd June, 1995, Communicorp was obliged to furnish a financial guarantee for  $i_{\frac{1}{2}}^{\frac{1}{5}}$  million plus 50% of the licence fee. Communicorp had difficulties in obtaining such a guarantee and were under sustained pressure from Telenor to do so throughout the period. You suspect, although you cannot prove, that Telenor knew the absence of a guarantee did not prejudice them, and their underlying motive was to obtain control of the Esat Digifone consortium. Their desire to do so is evidenced by much of their behaviour in later years, and eventually by their hostile takeover bid for Esat Telecom in late 1999/early 2000.

As well as feeling the pressure from Telenor, you were aware that Communicorp's perceived financial weakness was potentially damaging to the consortium as a whole, in the context of the review of its bid by the Project Team. You were, therefore, preoccupied throughout the bid period with strengthening the perception of Communicorp as financially sound. You say that you wish to stress at this point that the financial strength issue was, for you, always a matter of perception rather than reality. You were always



confident that if Esat Digifone's bid was successful, there would be no difficulty whatsoever in obtaining finance both for Communicorp and for Esat Digifone, having regard to the very high investment interest in telecoms projects, and especially in mobile telecoms projects in the US and elsewhere. Communicorp also had substantial radio assets in Ireland and overseas that it could pledge or sell to raise funds.

For about a month after signing the Telenor Joint Venture Agreement, you had a series of discussions with Massimo Prelz of Advent International, in which you sought his agreement to provide a guarantee to Communicorp. Advent had already, in November 1994, invested \$10 million in Communicorp. Mr. Prelz was unwilling and/or unable to procure a formal commitment by Advent, mainly, you believe, that there was as yet no business in which Advent, as a venture capitalist, could invest, and you recall that it was not permitted to give guarantees as such. However, he was willing, for a price, to have Advent furnish a comfort letter in respect of an investment of up to  $\frac{1}{2}$ 30 million. You, that is you and Mr. Prelz, also had a conversation between you, in which you agreed the principal terms of such an investment, including a weighted voting arrangement in your favour, and in which he gave you a commitment as to the availability of such an investment. Advent was, and is, a major

international financial institution, and comfort letters from such entities carry very considerable weight. While not legally enforceable, they amount to a very strong commercial commitment. You regarded the combination of Advent's comfort letter and Mr. Prelz's verbal commitment as cast iron in commercial terms. It would appear that the evaluators accepted your assurances during the oral presentation in relation to Advent. You would assert that similar commitments were given by ABN-AMRO and by Allied Irish Banks to Esat Digifone concerning the availability of the equivalent amount of project finance. These commitments were also accepted by the Project Team and were performed in due course by both banks without question. You had no doubt, at the time, and have none now, that if the commitment given by Advent and Mr. Prelz had been called on, it would similarly have been performed in full. However, you preferred to avoid calling on the Advent commitment if it proved possible to do so because, as a venture capitalist, Advent would seek a rate of return of 30% per annum early (that is three to five year) exit commitments, substantial equity participation, and for an investment of that size, negative or even positive control of the company through vetoes and other rights in their Share Subscription Agreement.

On the 12th July, 1995, you reached agreement with

Mr. Prelz for the provision of two comfort letters, one each for the Minister for Communications and Telenor. In return for its comfort letter, Advent obtained from Communicorp an agreement whereby it would be entitled to take up to 5% of Esat Digifone at par, to be acquired either directly, or if Communicorp could not procure that, indirectly through the acquisition of additional shares in Communicorp itself, and a series of associated rights. Advent's demand of this price for its comfort letters is a fair reflection of the weight it attaches to the issue of such letters and reflects too the nature of the entities to which they were given. Advent at that time had \$1.4 billion of funds under management and would not likely have dishonoured commercial commitments given to an EU member State Government and a State-owned multinational telecoms company. The agreement for the comfort letters was on the 12th July, 1995.

Communicorp needed a comfort letter for the Minister because it and you believed, as indicated above, that Communicorp's perceived financial strength had to be improved. You needed a comfort letter for Telenor because you hoped that such a letter from an institution as respected as Advent and for an amount larger than the guarantee required under the Joint Venture Agreement of the 3rd June would satisfy

Telenor. You made the latter, Telenor's acceptance of the comfort letter, a condition precedent to Advent's entitlement under the agreement of the 12th July. No such condition was inserted in regard to the letter to the Minister because the Project Team's satisfaction with it could not, of course, be measured or determined.

The comfort letter addressed to the Minister was duly included in Esat Digifone's bid submitted on the 4th August, 1995, and was discussed in the subsequent oral presentation of the 12th September, 1995.

Turning now to Telenor's non-acceptance of the Advent comfort letter:

Advent's comfort letter was duly sent to Telenor, who were disinclined to accept it as fulfilling

Communicorp's obligations under the Joint Venture Agreement for the provision of a guarantee.

Discussions and disputes on this matter rumbled on throughout July, with you trying to persuade Telenor either to accept the comfort letter for what it was, that is the best you could do at the time, or ideally, to acknowledge that the personal and commercial commitments from Mr. Prelz and Advent respectively amounted to a satisfactory commitment in terms of the Joint Venture Agreement. Telenor, however, were never prepared to accept this, and from a legal and technical point of view, if not from a commercial and

practical point of view, they were entitled to stand on their rights under the Joint Venture Agreement. You inform the Tribunal that you were aggrieved at Telenor's insistence on this point. When they joined the consortium, Telenor had refused to pay one half of the bid costs incurred by Communicorp to date, agreeing only that vouched costs could be recovered out of finance obtained by the consortium itself if and when your bid was successful. Accordingly, Telenor was benefiting from a free carry on all Communicorp expenditure made up to the time they joined the consortium, amounting to  $\text{€}1$  million. Although Telenor were within their legal rights in pursuing you for the guarantee, you felt that, in fairness, they should have accepted the comfort letter combined with you bearing the bid costs disproportionately. In fact, you believe, although you cannot prove, that Telenor knew all along that they were not really at risk as a result of your inability to provide a guarantee. You believe they wanted to use your lack of resources to obtain majority control of the consortium, and intended at a critical point to cite your default in relation to the guarantee to trigger a crisis in which they would concede control for a waiver of the guarantee obligations. This whole period and the way Telenor behaved greatly affected the relationship for the

future. Telenor tried to embarrass you with Advent, and were patronising in the way they dealt with the guarantee issue. You could not understand why they would not accept a commitment from an institution with \$1.4 billion under management. Telenor had made a demand on you. You expended a tremendous amount of time and effort in trying to meet this demand which you did. Notwithstanding this, Telenor refused to accept the guarantee from Advent. Your relationship with Telenor never recovered from this period.

You say the guarantee issue first caused a crisis on the 3rd and 4th August, 1995. Telenor had not yet been identified publicly as a member of your consortium, and with submission of a bid due by the 4th August at latest, they demanded the guarantee with a threat as to their continued participation if it was not forthcoming. After heated exchanges, they agreed to allow a little more time, and the bid went ahead.

Of course, once the bid had been submitted including Telenor, they were formally part of the consortium, and their position was considerably strengthened.

Telenor made it clear that they still had a legal right to insist on the guarantee, and that they were clearly not inclined to concede on the issue.

At this time you were seriously concerned. You believed that Telenor would use their financial muscle to take control of the consortium, unless you could

obtain either a big cash injection or a legally binding commitment. While you knew Advent would be there for you if and when you won the competition, you feared that you might by then be no more than Telenor's junior partner. You had driven the process at enormous personal and financial cost to yourself to the point where you had just submitted a fantastic bid with a real chance of winning, only to face the prospect of becoming a minority shareholder or a junior partner.

Turning now to the ESB:

You say that you realised that the Persona consortium would make a great play of the fact that the ESB would be a key part of the retail distribution plan. At that time, you became aware of complaints by small electrical dealers against the ESB for allowing cost selling of goods

A. Below cost

Q. below cost selling of goods. On the 5th September, 1995, you drove to Castlebar to meet with the Secretary of the Electrical and Electronics Retailers Association of Ireland, John Kilkenny. You outlined the ESB situation. Immediately, John Kilkenny realised the threat of the ESB being involved potentially in the part ownership of a mobile operator. As a counter, you subsequently worked with the association in the drawing up of a full page

newspaper campaign, which you funded, that appeared in the Sunday newspapers, objecting to the ESB's dominant role in the electrical goods retailing business. You inserted these ads. And then, on the 24th September, between the period of the bid going in and the oral presentation.

You start the portion at the end, "your call Mr. Lowry..." But we can look at them if we need to

A. They are there with you if you want them.

Q. Turning now to the delivery of the bid.

The new date for delivery of the bid was the 4th August, 1995. The bid emphasised that Esat Digifone had two operating partners: Communicorp Group Limited and Telenor. The bid also outlined the ownership structure of Esat Digifone. It stated that 50% of the shares were held by Communicorp, and the other 50 were held by Telenor. It also stated that on award of the licence, 20% of the equity in the company, 10% each from Communicorp and Telenor, would be made available to third party investors. The management section of the Esat bid emphasised that as of submission of this application, Davys Stockbrokers had received written investment commitments from:

Allied Irish Banks,

Investment Bank of Ireland,

Standard Life Ireland,

Advent International plc.



For the purpose of delivering your bid, you set your attention to the creation of an event in order to demonstrate some of your marketing skills, and to make your bid vibrant and a talking point with the officials of the Department. Consequently, it was decided that an Irish violinist, Fionnula Sherry, who had starred in the Norwegian group that won the Eurovision Song Contest would play her violin to the backing of the winning song outside the Department.

A 40 foot articulated trolley was hired and painted with 25 foot signage on either side "Esat Digifone".

You got all the vans that Esat owned and set out in a convoy from the warehouse on the docks at 11:30am on the 4th August. At 11.50 the truck arrived outside the Department. The large doors burst open with dry ice billowing out. Fionnula Sherry appeared out and got up on a plint and started to play her violin to the winning Norwegian Eurovision song. To the beating of drums, Esat and Telenor staff carried twelve glass perspex bid boxes out one at a time. The Telenor staff were dressed as Norsemen. Virtually all the staff in the Department were hanging out the windows watching the show. It was a carnival atmosphere. Out of the corner of your eye you could see two of the other bidders standing across watching the performance. They had arrived earlier in taxis to drop their bids in.

At twelve noon on the 3rd August, you held a press conference in the Shelbourne Hotel announcing the details of your consortium. The day after the bid went in you placed a full-page advertisement in the national dailies entitled "Announcing the Most Exciting Team Since an Irish Woman Played Norway's 'Nocturne'".

That night you hosted a party in your home for the 80 people, staff contractors and suppliers who worked on the bid. Seamus Lynch and Jackie Carroll did a River Dance Irish dancing show for the Norwegians.

As far as you can recall, on the day the bid was delivered, Jarlath Burke and yourself had a prearranged meeting within the Department in relation to planned telecommunications legislation, and in particular, the establishment of the ODTR as an independent regulator. Michael Andersen had been engaged by the Department to advise on policy, and he was at the meeting, together with an official from the Developments Division of the Department. You seem to recall that Michael Andersen joked that we could discuss anything except your GSM bid. The Department official stayed for part of the discussion, which included the discussion of Esat's submission on new legislation, after which the official indicated that at the direction of his supervisors he would leave the meeting so that you could speak candidly with Michael

Andersen in relation to regulatory matters. You used that time to explain to Michael Andersen the dispute in relation to auto dialers, but he made it clear that he could not comment on the issue.

Turning now to the oral presentation:

You say that your next opportunity to impress the assessors with new information was going to be at a three hour oral presentation on the 12th September, 1995. At the oral presentation, the management team would have an opportunity to show its metal and particularly, its experience of mobile communications.

You spent the week between the 4th August and the 12th September working out a clear and well thought out presentation. For three days prior to the oral presentation, you practised the presentation. At your final dress rehearsal in the Mont Clare Hotel, you invited Pdraig O'hUiginn to join you and advise you as to what he thought. After listening for one and a half hours, Pdraig made a number of discussion suggestions on how we could improve and strengthen our presentation. He emphasised that you needed to highlight the weaknesses of the other bidders and turn their negatives into positives for your bid. For example, Motorola, as a manufacturer of mobile networks and handsets, would have a conflict of interest in bidding for the licence as part of the Persona consortium. There was an agreement in other

markets that manufacturers should not be allowed to bid at all. The positive, from your point of view, was that you had no conflict of interest and did have a manufacturer in your consortium. You also had no semistate companies in your consortium, so the State was not going to compete with itself. You also pointed out that you were the only consortium with a member who had experience of successfully selling a telephone service to the Irish public against the monopolistic incumbent. Also, you had the highest Irish shareholding of any bidding consortium ensuring focus on the needs and interests of the Irish market. Prior to the oral presentation, you previewed the room, in order to make sure that you had enough time to set up your visual presentation. You had hard copies of a summary of your presentation for each of the Department's team, and you also had business cards printed with the Esat Digifone logo for each of your team. The persons who attended the oral presentations on behalf of Esat Digifone were:

Denis O'Brien,

Arve Johansen,

Barry Maloney,

Per Simonsen,

Peter O'Donoghue,

Hans Myhre,

and Jan Thygesen.

The oral presentation itself lasted for one and a half hours, and afterwards you faced a series of questions from the Department's GSM Project Team. There were a number of questions on the issue of finance, particularly about how Communicorp would fund its share of the 52 million start-up equity.

After the oral presentation, you had a post-mortem, at which you all agreed you had done well. However, you, that is you personally, and others from Communicorp, Telenor and PA did not feel that you necessarily assured the evaluators that Communicorp did not have a financial weakness.

Turning now to the heading, "Telenor's concerns about the presentation":

At the oral presentation, you stated that Communicorp had both a commitment from and an agreement with Advent in regard to its proposed investment in Communicorp. It was the case that you and Communicorp had personal and commercial commitments from Mr. Prelz and Advent respectively, and that Communicorp had an agreement with Advent for which valuable consideration was given relating to the comfort letters.

Telenor were concerned at the assurances you gave to the Project Team at the oral presentation on the 12th September concerning Advent's commitment to Communicorp. Telenor, having received essentially, the same comfort letter as the Minister, did not

regard it as a commitment. You disagreed. As a result, the guarantee issue came fully to a head, and Telenor wrote to you on the 15th September stating formally that they were not satisfied with the comfort letter.

"The letter of the 15th September was not written at my instance. The letter was completely consistent with Telenor's agreement with Communicorp in June, with everything they had said and done since, and with events at the oral presentation three days earlier, to which it expressly refers."

You were aware that Telenor's counsel had sought to present Telenor sorry, you are aware that Telenor's counsel has sought to present Telenor as being, in some respects, 'babes in the wood' on their arrival in Ireland. Their counsel criticised Mr. Owen O'Connell, Esat Digifone's solicitor, for not advising Telenor that they should get their own independent legal advice in Ireland. This is one of the most farcical statements made in respect of the second mobile licence. Telenor were an experienced State company that had interests around the world, including Russia and Montenegro. It is inconceivable that Telenor would do business in Russia and/or Montenegro, or indeed in Ireland, expecting their business partners in other countries to advise them as to what actions they should take. Any such large international

corporation is sufficiently experienced to be aware that if it wants proper advice, it should procure its own advisers, rather than being dependent upon others.

Also, Telenor had its own internal legal department which advised them in respect of all matters concerning its dealings with Communicorp and Esat.

Also, you believe it's important to emphasise that Telenor's commitment to the project was significantly smaller than Esat's. Telenor, which was a much larger corporation than Esat, invested a sum of around  $\text{€}400,000$ , whereas Esat invested  $\text{€}1$  million in preparing for the bid.

The IIU Underwriting Agreement:

You have informed the Tribunal that prior to the oral presentation, you were seriously concerned that Telenor would use their financial muscle to take control of the consortium unless you could obtain a legally binding commitment that in their eyes satisfied them. On the 10th August, 1995, you found the possibility of an answer to your problem when you were invited to Glasgow by Dermot Desmond to watch a Celtic football match. On the way home you discussed the prospects of his company, IIU, underwriting Communicorp's financial commitment in return for a stake in the consortium; a stake for which IIU would pay full price, and in respect of which it would bear its share of all the bid costs from the beginning, win

or lose.

Negotiating this agreement from IIU took time, and you were still under pressure from Telenor. To relieve the pressure, and to buy time, you sought to have Owen O'Connell, of William Fry, issue an opinion to Telenor to the effect that the commitments obtained from Mr. Prelz in Communicorp were legally binding. Not surprisingly, he declined to do so. He did, however, write a long letter to Mr. Bugge, of Telenor, on the 17th August, 1995, in which, firstly, he sought to persuade Telenor of the merits of Communicorp's guarantee, and secondly, he set out an analysis as to why Telenor were not at risk in the absence of a Communicorp guarantee. You believed, in fact, that Mr. O'Connell's analysis was correct, and that indeed, has since been borne out by events. Telenor would not relent, though, and did not accept the analysis. Your concern about the perception regarding Communicorp's financial weakness and your wish to have 40% of the consortium underwritten, lead you to seek the underwriting, although under the rules of the RFP, no such underwriting was required. If everyone had to underwrite their bids, it would have greatly increased the bid costs.

Negotiations with IIU progressed after the 11th August, 1995, with the main issues being the terms of the underwriting commitment which IIU would give. The



percentage in Esat Digifone which it would acquire, (you covered 20%, they sought 30%), its participation or otherwise in shareholders agreement, Telenor's attitude to the investment and the basis upon which IIU would be enabled to syndicate its investment if it wished to do so.

Numerous meetings took place with Dermot Desmond and Michael Walsh between the 11th August and the 27th September, culminating in an underwriting agreement.

In return for the underwriting agreement covering Communicorp's 40%, and the 20% third party investors block, IIU would also have the right to replace the third party investors. IIU negotiated a 25% holding, but you did, however, believe that if Esat Digifone was ultimately successful in its bid, the Department could insist on the third party block remaining at 20%. A letter was sent by IIU to the Department on the 29th September, 1995, confirming IIU's underwriting commitment but was returned by the Department with a note to the effect that it would not be taken into account.

The purpose of the letter of the 29th September, 1995, was to demonstrate that the consortia members had financial resources available to invest in Esat Digifone if it was successful in its bid. It was your perception that there was an issue in respect of Communicorp's financial strength. You believed that

the provision of underwriting by IIU improved the financial strength of the bid. You also thought it appropriate that this change in the ownership details, although it did not materially alter the nature of the bid, should be communicated to the Department. In many respects, you say you might have been criticised for not furnishing this information. You believed it was more appropriate to pass this information on. You did not and do not believe that the letter breached the rules of the competition, and the reply from the Department does not indicate that the Department believed this to be a breach of the rules. You say you should emphasise that this was a matter of addressing perception rather than reality. You also believed that a successful bidder would have no difficulty in raising funds, and events proved you were correct in this.

Prior to the letter of the 29th September, 1995, you say you attended a meeting in Oslo with Mr. Arve Johansen on the 22nd September, 1995. One of the purposes of this meeting was to have Telenor agree to the IIU terms. You believed that the inclusion of IIU would greatly strengthen the financial aspect of the bid. At that time, you had felt that there was a perception of financial weakness on your part. Also, immediately after the presentation, you were advised by Mr. PJ Mara and Mr. Padraig O'hUiginn, both of whom

were consultants to Esat, that they felt a financial strengthening was highly desirable. You recall that during the meeting Telenor were at least as anxious as you were that you should be strengthened financially, and they regarded IIU's involvement as meeting these requirements. And then you say, See Arve Johansen's letter to you dated 2nd October, 1995, wherein he states 'We are pleased with the plan to have another solid Irish underwriter...' It is your recollection that Telenor were fully aware of the IIU arrangements. And you would add, that correspondence and draft documents were copied to them by William Fry. You say that you fully informed Mr. Johansen of all matters in respect of IIU and Communicorp, and you believe you copied the draft agreement to Telenor for approval.

CHAIRMAN: I think that's an appropriate time to take lunch and resume at five past two. Thank you.

Q. MR. COUGHLAN: There is just one small matter, perhaps, Sir, just because if we go back to page 10, Mr. O'Brien, I think where you stated that this is in relation to various setbacks in the early stages.

A. Yes.

Q. I think I can now name the firm that has been mentioned there. I think you have stated that, "initial set-back took place when Drury Communications jumped ship as public affair advisers to the

consortium and started instead to work for Motorola, presumably because they thought Motorola had a better chance of winning the licence. We had a concern that Drury Communications would unethically use information accumulated through their involvement with you to assist Motorola in the preparation of their bid."

Now, we brought this to the attention of Drury Communications, and they have just now responded, and perhaps I should, for clarification, read the whole response.

It's a letter to Mr. Heneghan, the Tribunal's solicitor, of today's date. It reads:

"Dear Mr. Heneghan,

"I received your fax this morning at 10.30am, when, unfortunately, I was engaged in a meeting, hence, I did not see the correspondence until 11.15am.

I note the comment that they relate to Drury Communications and take fundamental issue with them.

They are factually wrong.

"Drury Communications did resign from advising the Esat consortium in early 1994. We were subsequently appointed by Motorola Ireland to advise the company on public relations for their manufacturing plant in Ireland. There was no link between our decision to resign from advising the Esat consortium and our subsequent appointment by Motorola. They had no involvement whatsoever with the Motorola/Sigma

consortium bid for the mobile licence. The consortium was advised by Slattery Public Relations for the duration of the bid process. At no time was Drury Communications aware of any details of Motorola/Sigma consortium bid. It was advising Motorola as per our brief. The bid was never discussed in any form or fashion.

"The allegation contained in this evidence is absolutely without foundation. The suggestion that Drury Communications would act unethically in this way is mischievous and without basis. The company adopts the highest professional standards and business ethics.

The evidence of Mr. O'Brien in respect of this issue is absolutely incorrect."

I am not taking the matter up with you at this stage,

Mr. O'Brien. I just wanted

A. We can come back to it.

Q. I can come back to it.

CHAIRMAN: Five past two.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF EXAMINATION OF DENIS O'BRIEN BY

MR. COUGHLAN:

Q. MR. COUGHLAN: I think, Mr. O'Brien, we were on page 36 of your memorandum.

A. That's correct.

Q. And under the heading, "The Swapping of the Third-party Investors for IIU and Its Impact Upon Telenor."

And you have informed the Tribunal that by the time you received Mr. Haga's letter of the 15th September, you were well advanced in your discussions with IIU for a complete underwriting of Communicorp's commitments. Mr. Haga's letter finally removed one of the two principal benefits to Communicorp of Advent's commitment. The first was the conditional offering of equity finance. The second being credibility of the Project Team.

Furthermore, the 5% of Esat Digifone which Advent was to receive in return for its comfort letter was now required for IIU under the proposed arrangement with them. "We, therefore, needed to invoke the condition precedent in the agreement with Advent on the 12th July. With this in mind, I sent Mr. Haga's letter to Owen O'Connell for the purpose of arranging a termination of the 12th July agreement with Advent. On the 19th September, Owen O'Connell wrote to me indicating that he felt that Mr. Haga's letter 'may be of assistance' in denying Advent's participation in Esat Digifone."

You wish to have your ability to invoke the condition precedent in Advent's agreement as clear as possible. Accordingly, following receipt of

Mr. O'Connell's letter, you drafted another letter intending to ask Mr. Haga to send it to you in lieu of his letter of the 15th September. This is the draft letter of the 19th September, 1995, which Mr. Haga says he has no recollection of preparing, and "it may be that it is this letter which he recalls on having been written at my insistence. He is, of course, correct in saying that he did not prepare the 19th September draft, although not, I think, in his disclaimer of any knowledge of the meeting with the Department. My main purpose in drafting the revised version of Mr. Haga's letter, was to reduce the possibility that Advent might dispute termination of the 12th July agreement.

"Owen O'Connell did not approve my drafting efforts, and on the 21st September, sent me a different draft of the letter by which Telenor would reject the Advent comfort letter, the rejection being in a form which would most clearly accord with the requirement of the condition precedent in the agreement of the 12th July." At the same time, Mr. O'Connell prepared letters to be sent by you to Davys Stockbrokers terminating Communicorp's arrangement effected through Mr. McLaughlin with Standard Life, AIB, and IBI, and to Advent terminating the agreement of the 12th July, 1995, on the grounds that the condition precedent had become incapable of fulfillment.

"The combined effect of these three letters was to have Communicorp burn its bridges with regard to its financing arrangements previously put in place, and to depend solely on its arrangement with IIU. It was for this reason that Mr. O'Connell warned me against either issuing the Davy letter or obtaining the Telenor letter until and unless I was absolutely confident of obtaining a commitment in appropriate terms from IIU fulfilling IIU's conditions, delivering its consideration and ensuring that IIU could live up to its commitment.

"The real advantage of IIU's involvement was that they had given an unqualified commitment.

"I believe that Davys was informed in late September, 1995, that we had come to or were about to come to an arrangement with IIU in replacement for the institutions earlier sourced by him. This subsequently resulted in a letter from Mr. Kyran McLaughlin of Davys, dated 22nd November, 1995, in which he raised queries concerning the decision not to proceed with the four proposed investors. I met Mr. McLaughlin after his letter of the 22nd November, 1995, and sought to explain to him that we had felt the requirement for legally binding commitments of finance which had not been available from the institutions identified by him necessitated the introduction of IIU." Your recollection is that the



meeting was cordial and that he accepted the explanation.

As matters transpired, you never did obtain, as far as you can recall, you did not even try to obtain the revised version of Mr. Haga's letter of the 15th September, either in the form of the draft prepared by you on the 19th September or in the form of the second draft prepared by Mr. O'Connell on the 21st September, and you instead terminated the Advent agreement on foot of Mr. Haga's letter of the 15th September. As expected, the termination was disputed by Advent's solicitors, Baker McKenzie, although not on the grounds that Mr. Haga's letter of the 15th September, was insufficiently clear, but rather on technical grounds in the agreement of the 12th July itself.

Some months later, this dispute was settled as a minor part of the overall agreement with them concerning the restructuring in December 1995/January 1996 of Communicorp providing mainly for the provision of its telecom and radio interests into two separate entities.

"The reason I saw Dermot Desmond on the 17th September" that's 17th September, 1995, I take it and Owen O'Connell on the 18th September, 1995, was that Telenor's formal rejection of the Advent comfort letter on the 15th September, 1995, marked, to your mind, the commencement of an attempt to place

Communicorp in default of the June Joint Venture Agreement and to acquire control of Esat Digifone. The discussions with IIU, which had begun over a month earlier, had thus become critical on that Friday. You met Dermot Desmond on the Sunday as part of your protracted negotiations, and Owen O'Connell on the Monday, to instruct him to draft the documentation, in both cases, impressing on them the need to move urgently. That is why Owen O'Connell issued drafts on the same day as your meeting with him, and why Michael Walsh responded the next day.

When the IIU underwriting was finalised ten days later, it was, of course, the guarantee of funds which had been committed to in the Joint Venture Agreement four months earlier, and much more. It is your belief that Esat Digifone was entitled to place the 20% to any investor, subject to the Department's final approval, if you were successful in your bid.

Now, turning to the meeting with Minister Lowry on the 17th September, 1995. You have informed the Tribunal that you attended the All-Ireland Football Final on the 17th September, 1995, as a guest of Pdraig O'hUiginn, and you were seated a number of rows behind Mr. Lowry during the game. You spoke to him briefly in the hospitality area, probably at half time, and tentatively arranged to meet him for a drink afterwards. Subsequently you met in Leeson Street

outside Hourican's. Mr. Lowry was with the late Sean Murray and other people. You were unconscious of Mr. Murray's presence, as you understood that Mr. Murray was involved with one of the other applicants for the second GSM licence, namely Eurofone. Since Hourican's was extremely busy, Mr. Lowry and yourself went across the street to Hartigan's, where you discussed a number of matters, mainly the match. You also took the opportunity to advise Mr. Lowry of the serious Telecom Eireann capacity issues then affecting Esat's fixed line business, which, at that time, was of considerable concern to the company. You do not recollect that any other matters concerning Esat were discussed.

Your drink with Mr. Lowry lasted no more than half an hour, and was probably only fifteen minutes. This meeting with Mr. Lowry was entered by you in your diary, along with several other entries for that week, subsequent to them taking place. There was no arrangement to meet with Mr. Lowry prior to seeing him at the All Ireland Football Final.

Under the heading, "Esat Digifone Wins the Competition":

You say that on the 25th October, 1995, it was announced that Esat Digifone had been selected as the second GSM licence winner. The actual award for the licence was expected to follow relatively quickly.

The initial target launch date was September, 1996.

An executive team had been put in place prior to the announcement of the award, and consequently, there was an executive team ready to run the company at the time of the award. The initial team was as follows:

Jan Edward Thygesen Chief Executive;

Peter O'Donoghue Financial Director;

Colm Moloney Accountant;

Hans Myhre Technical Director;

Dirk Ivertsson IT Manager;

Derek Hanly Marketing Manager;

Seamus Lynch Sales Manager;

John Hennessy Human Resource Manager;

Knut Haga Project Finance.

During this period, Jan Edward Thygesen and Peter O'Donoghue began negotiating a  $\text{€}1\frac{1}{2}$ 25 million financing package with ABN-AMRO and AIB. The first board meeting of Esat Digifone was held on the 20th December, 1995. John Callaghan and yourself were there as Esat Digifone representatives, while Arve Johansen and Knut Digerud were present as appointees of Telenor. By January, 1996, you were concerned that sufficient progress was not being made in respect of further site acquisitions. Consequently, you decided that site meetings should be held every Monday. And that these took place from the 14th January, 1996, to late February/early March, 1996.

At the second board meeting of the company, on the 30th January, 1996, the main issues under discussion were progress reports on the signing of the licence, plans for the roll-out of 170 base stations for early October, location of the Digifone switch, the 1996 budget, the lease of 76 Lower Baggot Street, the choice of GSM supplier, and the appointment of executives.

At that meeting the continuing negotiations with IIU were also discussed, and it was agreed to invite the IIU Nominees to the next board meeting.

Then you say, you deal with the concern about the roll-out being the role being played by Telenor.

By the fourth board meeting of Esat Digifone, on the 5th March, 1996, you were getting really concerned about the role being played by Telenor and their commitment to the project. You were concerned about the lack of senior radio planners from Oslo, and insisted that such individuals were needed immediately. The board formally demanded full support from Telenor on the radio planning issue and expressed concern over the ability to deliver 80% coverage on the launch date. During this time, Telenor was supplying a whole series of radio planners on a short-term basis of two week rotations. This did not provide the continuity required to get the plan completed in an efficient manner. As a result of

these concerns, you sent a letter on behalf of the board to Arve Johansen highlighting the concerns expressed at the board meeting.

On the 14th March, 1996, Knut Digerud was appointed as Chief Executive Officer, along with Barry Maloney, but both yourself and Arve Johansen were empowered to negotiate a contract with Knut Digerud, and John Callaghan was to conclude negotiations with Barry Moloney. Jan Edward Thygesen resigned to return to Norway for family reasons.

Turning now to the Department's awareness of IIU's participation:

You cannot recall when or by whom the Department was informed of IIU's equity participation in Esat Digifone, although it was aware of its role as an underwriter, which role would normally result in equity participation from the 29th September, 1995.

On the 25th October, 1995, the Department would have assumed the equity participation to be as follows:

Telenor - 40%,

Communicorp - 40%,

Institutions - 20%.

The Department may or may not have inferred that IIU would be a direct shareholder, although it was certainly aware that IIU was an underwriter at this stage. Apart from the initial meeting with the Project Team post the competition result on the 9th

November, 1995, you have no recollection of being involved in any discussions with anyone in the Department regarding negotiation of the licence. At this time, in March/April, 1996, Mr. Digerud was the primary channel of communication with the Department on the subject of the shareholding. Discussions or contacts with the Department were dealt with by Mr. Digerud, and in part by Mr. Owen O'Connell of William Fry. At this time, there were discussions with IIU as to the possibility that Esat might buy shares in Esat Digifone from IIU. Telenor were informed of these discussions and were unhappy at the prospect if shares were to be sold, they might not participate fully in the purchase. Accordingly, it is your recollection that Telenor participated quite fully in the discussions and negotiations, and assertively enforced an understanding subsequently confirmed in writing, that any such purchase of Esat Digifone shares from IIU would be on an equal basis as between Esat Holdings and Telenor.

On the 12th April, 1996, a board meeting of Esat Digifone was held, at which the shares of the company were issued as follows:

Esat Telecom - 37.5%,

Telenor - 37.5%,

IIU - 25%.

You believe that on the 12th April, 1996, the

Department was aware of IIU's actual holding of 25% of Esat Digifone, but it may be that they did not become aware of this until Owen O'Connell's letter to Regina Finn of the 17th April, 1996.

Could I just pause there for a moment, Mr. O'Brien.

Could you just assist the Tribunal as to why you believe that on the 12th April, 1996, the Department was aware of IIU's actual shareholding of 25% ?

A. I'd have to go through the documentation and examine that. Maybe we can come back to it?

Q. All right.

A. Do you want to open it now or

Q. No, I'll come back.

A. Okay.

Q. It is your recollection that the Department, at that stage, were less concerned than they became subsequently as the replacement of institutions by IIU in the shareholding, and were relatively unconcerned as to the difference between a 20% shareholding and a 25% shareholding, provided Communicorp/Esat Holdings and Telenor controlled Esat Digifone.

On the 17th April, 1996, Owen O'Connell of William Fry wrote to Ms. Regina Finn at the Department, setting out the ownership of Esat Digifone. At this time it was still the case that IIU was expected to have 25% of Esat Digifone, and that IIU would sell on most of its shares to private and institutional investors.



You became aware at the end of April, 1996, that the Department sought greater clarification of the swapping of the four institutions for the one financial investor, and wished to have a full understanding of Esat Digifone's ownership so as to be sure that financing was in place. This issue caused the shareholders of Esat Digifone to concentrate on the issue of IIU's shareholding. In response to a financing query from the Department, letters were provided on the 2nd May, 1996, by ABN-AMRO bank and AIB plc confirming willingness to provide finance.

Although you were not there, you are aware that there was a meeting at the Department on the 3rd May, 1996 at which the Department's requirements as to ownership and financing were spelled out in detail. On the 7th May, 1996, IIU wrote to the Department confirming that it was a hundred percent beneficially owned by Mr. Dermot Desmond. You understand Mr. Owen O'Connell also received a telephone call from Mr. Fintan Towey of the Department on the 7th May, 1996, in which Mr. Towey informed him that the Minister had a strong preference that Esat Digifone should be owned in the proportions 40:40:20 by Esat, Telenor and IIU at the time the licence was granted.

Turning now to the reduction of IIU's share to 20%: Between the 12th May and 16th May, 1996, extensive discussions took place within Esat Digifone as to how

the shareholding could be reverted to the 40:40:20 proportions. These meetings involved members of Esat, Telenor and IIU. Ultimately these discussions concluded with an agreement that IIU would sell 2.5% of its shareholding in Esat Digifone to both Esat and Telenor for a total consideration of  $\text{€}2.75$  million. The Shareholders Agreement was signed on the 16th May, 1996, and it reflected the 40:40:20 distribution as originally outlined to the Project Team.

On the question of the delay in the granting of the licence:

You say, negotiations in respect of the licence commenced after Esat Digifone won the competition. At a meeting of the Department in November, 1995, it was made clear to Esat Digifone the licence to be granted would be based primarily on the draft included in the competition document. This would be amended to take account of elements of Esat Digifone's bid which were relevant, and some statutory and EU provisions which either had come into being since its original publication or had not been fully taken into account in its preparation. You understand that the Department were also willing to entertain proposals from Esat Digifone, and to take them into account in its redrafting exercise, if and to the extent that they were useful. However, it was made clear that the redrafting process would be conducted by the

Department with the assistance of the Office of the Attorney General, and would result in the offer, in early course, of the licence to Esat Digifone.

The discussions with the Department the discussion and the Department's intentions were set out in a letter from Martin Brennan to you on the 13th November, 1995. Shortly after this meeting, Esat Digifone submitted extensive proposed amendments to the existing draft licence. There followed a hiatus in which very little occurred, despite the Department's statement that a draft licence would be available in early course. Esat Digifone was anxious to obtain the licence because without it, it would not be possible to finalise project financing for the construction of its network. Without committed finance, construction could not begin, which put at risk the deadline for roll-out of the network in Esat Digifone's bid and, more critically, a launch before Christmas 1996.

The consequence of the latter failure could be serious because a large number of sales of new mobile phones and subscriptions to the network was expected to occur in or about Christmas. It became apparent in early January, 1996, that the Department was finding the drafting of the licence more difficult than anticipated. And there appeared to have been delays in getting the draft legally vetted by the Attorney

General's Office.

On the 22nd March, 1996, a draft licence was sent to the Department by Mr. Knut Digerud. This was expressed to be an indicative draft, that had not been cleared by the Department's lawyers. By this time Esat Digifone regarded itself as being in a position in which it would have to accept almost whatever licence was offered in order to quickly get into business. In April, 1996, there was an exchange of correspondence, in which Esat Digifone protested vigorously about the Department's delay in providing the licence, and indicated it regarded itself as being under duress in regard to the acceptance of the licence. This was strongly rejected by the Department, and led to some cooling of relations. It was at this time, 16th April, 1996, that the Department start asking for particulars as to the ownership of Esat Telecommunications Holdings Limited and other companies within the Esat Telecom Group.

On the 13th May, 1996, you had a telephone conversation with the Minister, during which you believe you would have expressed your dissatisfaction at the delay in the grant of the licence. This conversation resulted in a meeting being arranged on the 14th May between the Minister, Mr. John Loughrey, and yourself. At that meeting, the Minister sought information concerning IIU and finance. You believe

the Minister informed you that the shareholding in Esat Digifone on the day the licence was granted had to be 40:40:20. You also expressed concern at the delay in the granting of the licence. There was also a discussion at the meeting of the press conference that would take place at which the grant of the licence would be announced. You also protested to the Minister that the draft Article 8 of the proposed licence was very tough and allowed the shareholders to do nothing in relation to their shareholdings. He said that at least shares should be permitted to be transferred among existing shareholders, especially if it did not thereby allow the telecom parties, (i.e. Esat and Telenor) to reduce their shareholdings. It was agreed that John Loughrey would meet Owen O'Connell and Martin Brennan the following day. Subsequently, on the 16th May, 1996, the licence was signed by the Minister and a press conference held.

The press conference on the 16th May, 1996:

With any major announcement, it would have been routine for you to prepare your comments, take advice from PR consultants as to the likely questions and suggested answers, and consult others with detailed knowledge. You would not be alone on this, as most businessmen would prepare similarly. Although the Department had asked for key questions to be identified and answers prepared prior to the press

conference, this would not have been the principal reason for your preparation. You would have done it anyway. The questions that were proposed prior to the press conference were, you think, initially identified by your PR consultants, FCC. You believe that Eileen Gleeson of FCC, Peter O'Donoghue, Knut Digerud, Owen O'Connell and yourself, and probably others, were involved in the preparation for the press conference.

Between March, 19 on the question of political donations:

Between March, 1995, and December, 1995, you decided that Esat should follow the standard practice of commercial enterprise and take tables at political party functions. You had engaged Dan Egan to assist in political lobbying on behalf of Esat Digifone. He advised you that Esat should attend some political functions such political functions. The reason for doing so was to promote Esat in the political world as a major player in the telecommunications, whose activities were of great economic value in reducing telecommunications costs, and thus improving Ireland's competitive position. It was also an opportunity to push for greater liberalisation of the telecoms market. Telecom Eireann still had unjustified influence, in that they could continue unchecked to obstruct competition by delaying inordinately the provision of leased lines and other anti-competitive

practices. It was only when Telecom Eireann was privatised that the Regulator moved to impose strict time-limits on the delivery of leased lines.

There was nothing exceptional in Esat's involvement in political functions. Some of the other bidders were involved in such functions, including the Fine Gael golf outing in 1995. You understand that Cellstar, one of the other applicants for the second mobile licence, also attended at this golf outing, as did Heneghan Public Relations, the principal of which, Mr. Pat Heneghan, was involved in an applicant consortia. Mr. Heneghan, Mr. Pat Dineen and Mr. Sean Murray were all involved in organising the golf outing all three were involved with applicants for second mobile phone licence.

Indeed, one of the bidders, Persona, wrote a letter enclosing a brochure on the merits of their bid to every member of the Oireachtas emphasising Motorola's plan to create 2,000 new jobs. Telenor was fully aware of Esat Digifone's attendance at these political functions, and Telenor personnel attended many of them, supporting these functions. Fine Gael were more prominent than other parties, as they were the major party then in Government.

Turning to the Shareholders Agreement:

From early November, 1995, to mid-May, 1996, detailed negotiations involving Telenor, IIU and Esat were

conducted with a view to settling a Shareholders Agreement, the Articles of Association governing Esat Digifone Limited. These negotiations were mainly conducted for Esat by Mr. Gerry Halpenny of William Fry. One of the issues in the Shareholders Agreement negotiations was whether IIU would hold 25% or 20% of Esat Digifone, and one of the issues relevant to this matter was the statement made at the time of Esat Digifone's bid for the licence, that each of Esat and Telenor would hold 40% of the consortium.

Another possibility raised in the Shareholders Agreement discussion was that IIU might place all of its interest in Esat Digifone with Esat and Telenor either equally or with Esat having a slight majority, rather than with institutional and private investors, as originally intended by IIU. At that time, Esat was seeking to raise funds in the US market. "We had been advised by Credit Suisse First Boston that our task in raising funds would be easier if Esat could consolidate the accounts of Esat Digifone with its own. It was recognised that this could be done by Esat holding 50% of the shareholding. IIU, however, were reluctant to sell all of their shares in Esat Digifone, and Telenor were reluctant to allow Esat to acquire greater shareholding than Telenor. These issues remained under discussion, but unresolved, through March and April, 1996."



Your understanding is that these matters were being negotiated by Mr. Halpenny, Mr. Moran of Matheson Ormsby Prentice, representing Telenor, and Mr. O'Byrne of William Fry's, representing IIU.

Conclusion:

There was no luck involved in Esat winning the licence. The licence was won because Esat prepared diligently, had better and more driven people working for it, and spent more money in proving to the competition judges that Esat was ready to get the network up and running quickly, as it did.

With the benefit of hindsight, it can now be seen that the decision to award Esat Digifone the second mobile licence was one of the best commercial decisions made by the Irish Government in recent years. Esat Digifone met every target in its financial and business plan, and each of these was exceeded by a multiple. For example, subscriber numbers were to reach 400,000 by 2005. This was achieved in 1999.

From the Government's point of view, Esat Telecom and Esat Digifone procured 1.5 billion of investment in competitive telecom infrastructure, and in the process created 2,500 jobs.

When Esat Telecom was sold to British Telecom following a hostile takeover attempt by Telenor, these employees shared in over 300 million, I think that should be euros rather than pounds. I don't know

A. The dollar was nearly the same.

Q. Now, I think you also furnished some other memoranda to the Tribunal, isn't that right?

A. That's right.

Q. Now, I think the first one of those was furnished on the 10th April, 2001, and I think it's 2002, I beg your pardon and it's to be found in Book 36, at Divider 7. Do you have a copy of it there?

A. Yes, I have it. I think there is a misdate here, it says 2000, but it's 2002.

Q. It's 2002, there is no doubt about that. That's correct. And this is in response to queries raised by the Tribunal in February of 2002, I think, isn't that right?

A. That's correct.

Q. In February and March of 2002, I beg your pardon.

Now, the first query that was addressed to you was your knowledge, direct or indirect, of the association of Allied Irish Bank, Investment Bank of Ireland, Standard Life of Ireland, and Advent International with the bid and/or the consortium and the subsequent disassociation of them from the bid or the consortium.

And I think you informed the Tribunal, that you had asked Kyran McLaughlin, of Davys Stockbrokers, to help in placing 20% of the equity in Esat Digifone with a number of institutions. Advent's 5% was included in this 20%. Mr. McLaughlin approached institutional

clients of Davys, but ultimately the letter of interest received from the institutions did not show an irrevocable commitment to proceed with an investment should Esat Digifone be successful in its licence bid. You believe that the lack of this irrevocable commitment to be a significant weakness in the makeup of the consortium. Communicorp and Telenor had committed irrevocably, whereas the institutions had not.

I think the next query which was then addressed to you was, for your knowledge, direct or indirect, of the association of Mr. Dermot Desmond/IIU with the bid and/or the consortium and their subsequent disassociation from the consortium.

And you have informed the Tribunal, that Mr. O'Brien decided to source some other institution to underwrite this institutional 20% block of equity to demonstrate that all of the equity funding was pre-committed. As far as you can recall, you spoke to Credit Suisse First Boston, but because of the tight time-frame, it was going to be impossible to put an underwriting agreement in place in time. In June, 1995, Communicorp was short of cash and needed to raise approximately  $i_{\frac{1}{2}}$ 5 million. Dermot Desmond had been approached by you on behalf of Communicorp, but Communicorp and Mr. Desmond were unable to agree terms. A \$5 million loan was subsequently obtained

from Advent at an interest rate of 30%.

You were invited by Mr. Desmond to a Celtic football match in or about August of 1995. In the course of conversation during the trip, you explained the bid initiative to Mr. Desmond. Mr. Desmond offered to underwrite the institutional 20% holding in its entirety. In subsequent negotiations over a couple of weeks, it was agreed eventually that Mr. Desmond would not just underwrite the institutional 20%, but would actually take up, in the first instance, with a view to selling some or all of it on later, as well as underwriting Communicorp's equity commitment as well.

In return, it was agreed that Mr. Desmond would be allowed to increase the initial 20% he actually sought to 30%, and that he would also be paid an underwriting fee. This left the consortium equity split as follows:

Communicorp and Telenor - 37.35%,

Dermot Desmond/IIU - 25%.

On or before the signing of the licence, Mr. Desmond sold 5% of his 25% holding to Communicorp/Esat Telecom Holdings Limited and Telenor in equal proportions.

Esat Holdings Limited at this stage was the successor company to Telecom/Communicorp as

Communicorp Telecom Holdings, I presume as

Communicorp had demerged and separated out of its radio and telecommunications interest.

You are then asked for your knowledge, direct or indirect, of the negotiations with Mr. Desmond/IIU from August, 1995, to May of 1996.

And you inform the Tribunal that you would have had numerous discussions with Mr. Desmond or his representative, Michael Walsh, during the period between August, 1995, and May, 1996. Initial discussions focused on IIU's agreement to underwrite the institutional 20% equity block, and subsequently on Communicorp's equity holding in Esat Digifone. Further negotiations took place in the run up to the signing of the Shareholders Agreement, and this was entered into by Esat Telecom Holdings Limited, Telenor and IIU. Any record Mr. O'Brien might have had regarding these early discussions or the subsequent negotiations would have been among the documentation furnished by McCann Fitzgerald in February, and which you understood has been forwarded to the Tribunal.

Now, I think the next one is a request for your knowledge, direct or indirect, relating to the underwriting arrangements, if you see the response.

You have informed the Tribunal that, your recollection is that serious discussions with Mr. Desmond on the issue of the underwriting and his equity holding only commenced in September, 1995. Further discussions took place between IIU, Telenor and Esat Telecom Holdings Limited regarding the possibility of Esat

Holdings Limited taking a 50% stake in the consortium, so that the Esat Digifone financial account could be consolidated by Esat Telecom Holdings Limited. These discussions were initiated at the request of Credit Suisse First Boston, who were acting for Esat Holdings Limited in the place of the Esat Telecom Holdings equity with US investors.

After some discussion and correspondence, Telenor did not agree to any arrangement under which Esat Holdings Limited would increase its shareholding in the consortium disproportionately to Telenor. By May, 1996, agreements had been reached with Dermot Desmond that Dermot Desmond/IIU would reduce its equity stake from 25% to 20%, and Esat Holdings Limited and Telenor would each increase their stake to 40%. This agreement was what was reflected in the executed Esat Digifone Shareholders Agreement. IIU disposed of a further 19% of its holding of 20% over the next couple of years, leaving it with a shareholding of just 1% at the time of the white knight bid for Esat Telecom by BT. IIU had the right to one transfer of equity without the standard offer round provision being applied, because it was originally the intention that some of its holdings would be sold on to or placed with investors. This ultimately allowed British Telecom to purchase 49.5% of Esat Digifone through Esat Telecom, and a further

1% separately from IIU.

You were then asked for details of your involvement in any respect aspect of negotiations with IIU/Mr. Desmond.

And you inform the Tribunal that while your client would have had some direct involvement in aspects of the negotiations with IIU/Mr. Desmond, his direct involvement would have been in the very early discussions in August/September, 1995, after which time most of the detail was worked out between respective solicitors, as would be reflected in the documentation furnished to the Tribunal.

And I think you were then asked for details of the establishment of the Esat Digifone consortium.

And you inform the Tribunal, the consortium only took on the name "Esat Digifone" around the end of June, 1995. Up to that time, "Esat" had been a loose term for a perspective consortium. Originally Southwestern Bell and Deutsche Telecom were going to join Esat and put in a bid for the expected GSM licence. This consortium had made significant progress in preparing a bid, including the compilation of an outline radio plan, and the identification of a significant number of base station sites. Negotiations lasting nearly a year were never concluded. The main stumbling block being the makeup of the equity holding.

You were then asked for details of the preparation of

the Esat Digifone application.

And you inform the Tribunal that in April/May, 1995, PA Consulting, who had been engaged by Esat to help in the preparation of the bid, advised you that in their opinion, it would be difficult for Esat to win the licence without an overseas industrial player.

Discussions initially took place with France Telecom, but nothing materialised. And at PA's suggestion an introduction was made to Sjur Malm at Telenor. Within days, Mr. Malm and two colleagues arrived in Dublin, and negotiations commenced with a view to Telenor joining the consortium. At that stage, Esat had expended a considerable amount of money in preparing for its prospective bid. An issue arose early on regarding Telenor's refusal to pay any historic costs and its willingness to discuss further costs only on an equal basis. It was envisaged that Telenor would provide radio planning expertise and technical help in putting the bid together. Telenor staff supported the six or seven consultants PA had made available for the preparation of the bid.

Preparation of the application itself took place over many months between 1994 and 1995, and involved Esat personnel staff, under contract, PA Consulting, Telenor personnel and Nortel network staff. A separate premises was rented just off Fenian Street, and up to 50 people were engaged in the preparation of



the bid once the RFP had been issued.

You had identified the planning permission for cellular masts were going to be a critical aspect to the bid, particularly from the roll-out perspective.

With this in mind, you sanctioned expenditure and the entering into of lease agreements subject to planning permission for a number of mast sites which would cover Phase 1 and network roll-out. A team of eight to ten people worked on this facet of the bid documentation included in making approximately 150 planning applications to local authorities across the country.

I think you were then asked for details of the consortium's dealings with the Department in the course of the evaluation process.

And you inform the Tribunal, that the consortium had limited dealings with the Department in the course of the evaluation process, and their communications would have related to the change of the bid deadline from the end of June, 1995, to August, 1995, correspondence regarding the RFP and the arrangements for the oral hearing in September, 1995, and that three-hour oral hearing in September, 1995, itself, with the Department and officials of other departments of Government.

Esat Telecom may have had some discussions with the Department regarding its fixed line business during

the same period, but you cannot recall any details.

These discussions focused on the DDI/DDO capacity and the legality of auto dialers, on which Esat Telecom had obtained an EU ruling.

Then you were asked for the consortium's dealings with the Department in the course of the licensing process.

And you inform the Tribunal, the consortium's dealings with the Department in the course of the licencing

process comprised primarily meetings and

correspondence, but occasional telephone calls with

officials of the Department. On the Esat Digifone

side, some of these communications would have been

with principals of the consortium, but mostly they

would have been with the consortium solicitors and/or

Mr. Jarlath Burke, Esat's then in-house counsel.

These communications started in November, 1995, but

became more intense in April and May of 1996, and

related to negotiating terms of the draft licence and

providing the Department with detailed background and

the shareholding in and interests of the consortium

members. Copies of the relevant correspondence would

be with Esat Digifone or William Fry.

Now, I think the next memorandum is one dated the 2nd

December, 2000. And it's to be found at

A. 2002.

Q. 36/7C. It's a short one. I just want to put it in context for you.

I think the Tribunal made inquiry of you as a result of receiving information from Mr. Per Simonsen or from Telenor, which related to Mr. Per Simonsen, isn't that correct?

A. Yes.

Q. And what specifically I think it's Question No. 70 this is I think you have seen this particular memorandum; it's similar to questions and answers-type memorandum you yourself had received from the Tribunal. And this one is a response from Telenor. And Question No. 70: "Telenor's knowledge, direct or indirect, of all meetings, discussions, dealings or contacts of whatever nature between Mr. Denis O'Brien, or any other person on his behalf, and the Minister or the Department at any time from the first involvement of Telenor in the Esat Digifone consortium to the date of issue of the licence on the 16th May, 1996."

And the response which was received from Telenor reads as follows sorry, Per Simonsen

"Per Simonsen has no actual knowledge, direct or indirect, of any meetings or discussions, dealings or contact between Denis O'Brien or any other person on his behalf with the Minister or the Department, other than the oral presentation on the 12th September, 1995, and the press conference on or about the 26th October, 1995."

Then it continues:

"Denis O'Brien informed Per Simonsen in or about the last two weeks of September, 1995, that Denis O'Brien had happened to meet the Minister in a public house. Per Simonsen has no knowledge as to whether a meeting actually took place. Denis O'Brien informed Per Simonsen that the Minister suggested that IIU should be involved in the consortium."

So I think that was brought to your attention, is that correct?

A. I remember the allegation.

Q. This was brought to your attention.

I think your response was then converted into this memorandum, isn't that right? I am going to bring something else to your attention in case of you in a moment. I'll just deal with this for a moment.

I think you informed the Tribunal that you have no recollection of any meeting or conversation with Mr. Simonsen in the last two weeks of September during which the alleged reference to the Minister might have been made. Furthermore, nothing in your diaries, nor in any of the correspondence, notes, minutes and other materials which have come to light concerning the period discloses either a meeting between you Denis O'Brien and Mr. Simonsen, or even an apparent opportunity for such a meeting, isn't that right?

A. That's correct.

Q. And I just also want to bring it to your attention,

because I want to be very clear about this. I think you furnished that information to the Tribunal, or your solicitors furnished it in the form of a letter, and it was converted into this memorandum?

A. What date was that letter?

Q. The date of the letter was the 2nd December, 2002.

And I just want to be absolutely clear about what is being said by you through your solicitors.

You do make reference to the meeting in Oslo on the 22nd September of 1995, the one you attended with Mr. Arve Johansen?

A. I don't have the documents that you have to hand, so maybe if you could

Q. Yes, I'll read it to you now.

(Document handed to witness.)

And we can deal with it in due course.

A. What I don't want to do I just want to get the context, if you don't mind?

Q. That's what I am trying to get for you.

If you see the commencement, you refer to "our letter," right?

A. My solicitor's.

Q. And then it continues: "According to a statement, Mr. Simonsen has no recollection of the meeting on the 22nd September, 1995. We wish to draw the Tribunal's attention to Mr. Simonsen's answer to Question 30, from which it is clear not only that he has no

recollection of attending the meeting, but that he positively has no recollection of who was present or what was said."

All right? I just want to bring that to your attention. And I might just now read out the answer to Question 30?

A. Mm-hmm.

Q. Yes, 30, which was directed to Mr. Simonsen, was this, Mr. O'Brien, if you just bear with me for a moment.

Mr. Simonsen was asked the purpose of the meeting between Mr. Denis O'Brien and Mr. Arve Johansen in Oslo on the 22nd September, 1995, and in particular, "1. The date on which the meeting was arranged" it goes through a number of things.

And the response from Mr. Simonsen is:

"Per Simonsen has no recollection of this meeting. He does not deny that there may have been such a meeting, but he is unable to provide any assistance."

And then all other matters I think, regarding the meeting, the Tribunal is referred to the fact that Mr. Johansen will deal with them. So I just want you to bear that in mind. And that is the reference in this letter now to the response to Question 30, that Mr. Simonsen has no recollection of the meeting.

A. Okay. I am in a little bit of a vacuum. I have this letter, I don't have the questions, but I mean, we'll keep going and maybe we can come back to it, okay.

Q. We can come back to all this. I just want to I don't want to leave your response in a vacuum, because it did come in a context.

A. Sure.

Q. That's all I'm trying to deal with at the moment. You needn't be worried, Mr. O'Brien. This is in ease of you, Mr. O'Brien?

A. Fine, okay.

Q. Now, you say the letter continues from your solicitors: "In his answer to Question 70, Mr. Simonsen states that in or about the last two weeks of September, 1995, Mr. O'Brien told him of a meeting with the Minister. It is apparent from his Answer 30 that this alleged conversation between Mr. O'Brien and Mr. Simonsen did not occur in Oslo on the 22nd September."

And then the letter continues:

"Mr. O'Brien has no recollection of any meeting or conversation with Mr. Simonsen in this period during which the alleged reference to the Minister might have been made. Furthermore, nothing in Mr. O'Brien's diaries, nor in any of the correspondence, notes, minutes and other materials which have come to light concerning the period, discloses either a meeting between Mr. O'Brien and Mr. Simonsen, or even an apparent opportunity for such a meeting."

So it's really I wanted to put your statement in

its full context.

A. Thank you very much.

Q. Is that all right?

A. Thank you. I wonder would it be appropriate to put into the record the rest of that letter, the last paragraph or

Q. Yes, indeed. Yes, very good. I think it is this is you speaking through your solicitor?

A. Yeah, that's right.

Q. So I can say, that you "are at a loss to understand how Mr. Simonsen's Answer at 20 can be reconciled with the contradiction apparent from what is said above and in his Answer 30, and strongly urge the Tribunal to conduct further investigations into the time, date, place, attendees at, and the content of the alleged conversation referred to in Answer 70 before either referring to it in the Opening Statement or adducing evidence publicly on it."

A. Fine.

Q. Now, I think you did furnish a document, or a memorandum meetings, you were asked about any meetings with Minister Michael Lowry, isn't that right?

A. Yes, 17th September.

Q. And I think you informed the Tribunal that the only time you have a recollection of meeting Mr. Michael Lowry between the 17th September, 1995, and the 25th



October, 1995, is a contact on the 17th September,

1995, isn't that right?

A. The All-Ireland, yes.

Q. The All-Ireland matter?

A. Yes.

Q. You say there are two entries in your diary, one for the 2nd October, 1995, the Fine Gael lunch at Berkley Court, and one on the 16th October, Fine Gael dinner, but that you have no recollection of meeting Mr. Lowry on those occasions, and indeed, you are not positive at this remove whether you attended both or either of those functions?

A. That's correct.

Q. You inform the Tribunal that on the 17th September, 1995, that was the day of the All-Ireland Football Final, you recall being seated a number of rows behind Mr. Lowry during the game. You spoke to Mr. Lowry briefly in the hospitality area, probably at half time, and you tentatively arranged to meet him for a drink afterwards. You subsequently met at Leeson Street outside Hourican's/Hartigan's. You believe that Mr. Lowry was there with the late Sean Murray and others. Hourican's was extremely busy. You and Mr. Lowry went across the street to Hartigan's, where you discussed a number of matters, mainly the match. You also took the opportunity to advise Mr. Lowry of the serious issues then affecting Esat's fixed line

business, which at the time was of considerable concern to the company. You do not recollect or believe that any other matter concerning Esat was discussed.

The contact in Leeson Street lasted approximately fifteen minutes to half an hour. You entered this matter in your diary, along with several other entries for the week, subsequent to the events taking place.

There was no arrangement to meet Mr. Lowry prior to seeing him on the 17th September or the 17th September at the All-Ireland Final?

A. That's correct.

Q. I think then you furnished a further memorandum on the 2nd December, 2002 this deals with fundraising political fundraising matters, isn't that right?

A. Yeah, political fundraising.

Q. If I just deal with that. I think you were asked to provide the following information:

1. Details of all donations made by you or by companies with which you were associated to the Fine Gael Party in the year 1995, including in particular a donation of  $\text{€}5,000$  in June, 1995, during the Wicklow By-Election; a donation of  $\text{€}600$  in relation to the Dublin South East Constituency annual fundraiser on the 2nd October, 1995, and a donation of  $\text{€}4,000$  by way of sponsorship of the Fine Gael Golf Classic on the

16th October, 1995.

I think you informed the Tribunal that according to entries in your diary for 1995, you attended a fundraising lunch at the Glenview Hotel, County Wicklow on Thursday, 22nd June, 1995. You recall that at the lunch you were approached by someone in Fine Gael seeking to raise funds for the upcoming by-election.

I think you were then asked I think you then continue, "This donation was made on a corporate basis by Esat as a sub" "or a subsidiary of Esat to the Fine Gael Party by way of a cheque or draft sent to the Party." Is that correct? That's

A. I am just struggling to find out where my answers are to these questions. Would it be in the letter of the 29th November?

Q. Yes.

A. Okay. To Mr. Davis.

Q. To Mr. Davis?

A. With a schedule then.

Q. I don't want to go into all of that at the moment. I am just dealing with this. We'll come back to all of that in due course.

A. Okay.

Q. Then, we now turn to the 4,000 donation to the golf classic, isn't that correct, and that's Answer No. 3?

A. Mm-hmm.

Q. As regards a donation of €4,000 by way of sponsorship of a Fine Gael Golf Classic held in the K-Club on the 16th October, 1995, your recollections are as follows:

Esat was asked to become one of the sponsors of the Fine Gael Golf Classic. You recall that you sponsored the event in the sum of €4,000, €1,000 for a hole a €3,000 for wine?

A. That's right.

Q. While you were anxious that at some point Esat Digifone should be regarded as having been a supporter of the event, you were also conscious of the then ongoing bid process and did not want the sponsorship misrepresented at that point in time. It was for this reason that you requested that the fact of the sponsorship should not be publicised at the event?

A. That's correct.

Q. You believe that other sponsors may have done likewise. That's

A. That's correct.

Q. Now, I think you informed the Tribunal that you have no document relating to the question the €600 Dublin South East Constituency donation, but you believe a table may have been purchased?

A. That's right.

Q. I think you also informed the Tribunal that you would like to point out that you have a number of friends, acquaintances and associates in various of the main

political parties, and that you would have attended and sponsored a number of functions arranged by each of these parties during 1995 and 1996, and indeed, in the years to date?

A. That's true.

Q. And then, this is your you are correct about the letter that for the information of the Tribunal, you attach a schedule setting out donations to sponsorship of political parties' events for 1995 to 2000, I think that's what the schedule contains?

A. Mm-hmm.

Q. "The information contains schedules drawn from Mr. O'Brien's recollection following an exhaustive review of your files and diaries. However, the Tribunal will appreciate that it is difficult to piece together all such events at this remove, and thus the schedule may lack some details."

A. Yes.

Q. Now, I think you were asked now, again I think you were furnished, just to put it in context, you were furnished with a statement, and you may have reviewed the evidence given by Mr. Mark FitzGerald to this Tribunal, isn't that correct?

A. Some time ago, yes.

Q. Again, we'll go through that in more detail. Just for the moment, a response that you provided to the Tribunal.

A. Fine.

Q. With reference to the information regarding meetings, conversations that allegedly took place with Mr. Mark FitzGerald, you acknowledge that Mr. FitzGerald is an acquaintance of yours, and indeed, his firm would have acted for Esat and you on a number of occasions in connection with property transactions in his capacity as Chief Executive of the Sherry FitzGerald Group. However, although you may have spoken to Mr. FitzGerald on a number of occasions during '95, your recollections differ significantly to those of Mr. FitzGerald. In particular, you have no recollection of ever speaking to Mr. FitzGerald in reference to Mr. Albert Reynolds or the Motorola consortium. You also have no recollection of ever meeting Mr. FitzGerald in the company of Mr. Jim Mitchell or Mr. Phil Hogan. And having reviewed your diaries, have found nothing to dispute this. In any event, you are at a loss to reason why such meetings would have taken place, isn't that right?

A. That's right.

Q. We can expand on that. I just wanted to I think you inform the Tribunal that you had approaches on a number of occasions by various members of the Oireachtas requesting you to consider a member of their constituency for jobs and or for posts and things like that.

Now, the final memorandum we have is a very specific matter and I think, in fairness, it should be taken up in the context of dealing with various bank drafts and cheques that we will be looking at in due course. It won't make any sense if we

A. Okay.

Q. Now, it is not my intention, today, Mr. O'Brien, to go into any great detail with you in relation to matters.

I have indicated to your counsel that I would have a discussion with him and would indicate the areas where we would be looking at matters tomorrow.

A. Thank you.

Q. But, I would just like to ask you one matter before we do rise. And it really is, and you are entitled to express your views, Mr. O'Brien, in relation to matters, but you expressed a view that it is difficult for people from the traditional and conservative professions to understand how these business deals are made. You remember

A. That's right.

Q. And you expressed the opinion that it would be preferable for people with financial experience and expertise to be involved either solely or alongside members of the legal profession in looking at matters?

A. That's correct.

Q. I wonder, because you are correct in this respect: Lawyers are not necessarily businessmen. Some lawyers

may be businessmen, but lawyers are not necessarily businessmen. But is there something that you can tell the Tribunal now as regards law, ethics or propriety, which could assist the Tribunal in doing its very best to view these particular matters through the eyes of a businessman?

A. I don't really understand your question.

Q. You are the one who made this statement.

A. What I was really in my statement, what I am really saying, that if a solicitor or a lawyer is looking at business dealings, okay, obviously normal contracts and things like that, normal course of things they would have experience of, but if you are involved in commercial negotiations or fundraising, raising money, putting structures together, rolling out businesses, the benefit of advisers from maybe the commercial world would be helpful to lawyers. That's my point.

Q. I see. So can I take it, there is nothing as regards ethics that we need to be pointed to, the standards which apply, or normal ethics?

A. I think it's fair to say that the legal profession always has very good training in those three subjects that you just mentioned. Really what I'm saying is, in a tribunal process, it is my opinion, rightly or wrongly, that when you look at matters, maybe it's good to have somebody with a financial background, for example, of a retired managing partner of a major



practice, and a lawyer could turn around and say to that person, is this normal practice? Do you swap out shareholders? You know, what about, in terms of underwriting, all of these different facets of a major I mean, this is one of the biggest infrastructure projects ever completed in the country.

Q. So, are you directing the Tribunal's attention really to a business a business advice or angle in relation to the mechanics of what was going on?

A. Yes, yeah. It wasn't a criticism of the legal profession. I want to assure you of that.

Q. No, Mr. O'Brien. I have no I didn't take it as that. But if you wish to, you are perfectly entitled to you are entitled to have that view. It was just I was anxious and the Tribunal was anxious could you, as a businessman, as you have made the statement, direct the Tribunal towards something which would assist the Tribunal in viewing matters under discussion here?

A. I think a further point, it's like a business person trying to look at a legal contract. It would take a great deal longer for that business person to understand that contract. And the reverse is the case; if you took a lawyer and asked them to look at a business dealing and asked them to look it over.

Q. Well, I was really asking you, because you seem to have made that statement in the context that you were

concerned deeply that the standard dealings and manouverings associated with business, and which are an essential part of business, have been elevated by the Tribunal into the realms of public interest. It was really in that context

A. I think when our team, and certainly I am concerned that a great deal of time is being spent on the negotiations and the machinations between Communicorp, Telenor, Advent, IIU, the 5%, the 20% and all of these issues, and I am not so sure whether that is that important because ultimately, we ended up in a certain place in May 1996.

Q. Well, what we are dealing with here is not just a business transaction, isn't that correct, Mr. O'Brien? What we are dealing here with is the conferring of a major benefit by the Irish people in the awarding of a scarce public asset, namely a licence to enable persons to carry on a GSM duopoly. That's what this Tribunal is looking at, is that right?

A. No, it's the actual I would look at it differently. I'd look at it commercially, and I'd say that you are giving the benefit of an opportunity for somebody to go and invest vast amounts of money.

Q. In a duopoly?

A. Sorry, it's not a duopoly. Obviously I can only comment from where I left off, which was late 1999.

Q. And

MR. MCGONIGAL: I hesitate to interrupt, Mr. Chairman.

It does seem to me that Mr. Coughlan isn't directly raising an issue as to the Terms of Reference, as to whether what the Terms of Reference may actually mean.

There is an argument that the Terms of Reference are merely directed to whether or not Mr. Lowry did or didn't do certain things as a result of certain finances which may or may not have passed hands. That is slightly different to the issue as to whether or not the Irish people properly allowed a national asset to be given away, and I think there is a dispute and a debate there which may be more appropriately dealt with at a later time, if there has to be one.

CHAIRMAN: I think we are at the incidental end of a matter, Mr. McGonigal, that I don't anticipate any great time will be spent on. And we can take matters up in more detail tomorrow.

Q. MR. COUGHLAN: In fairness to you, Mr. O'Brien, this is probably an aspect of your statement that you may not have paid as much attention to as some of your legal team?

A. No, no, I paid a lot of attention. I wrote the statement, I should say, Mr. Coughlan.

MR. COUGHLAN: Perhaps tomorrow morning, Sir, so, in fairness to Mr. O'Brien, because I want to talk to Mr. McGonigal where I am going now.

CHAIRMAN: Yes. Is it a subtext, Mr. O'Brien, of what

you mentioned in relation to that particular matter, that you feel, and certainly no one here takes any offence, be they barristers, solicitors, or judges in the legal profession, that perhaps there may have been a slightly cocooned upbringing, and that lawyers may not be entirely alert to realising the naturally competitive nature of jousting for hardly contested business matters, and that perhaps for lawyers to talk inordinately of perhaps people feeling under a duty to advise a possible opponent, may lack somewhat in reality.

A. That's probably correct. That's a very good summary, Chairman.

CHAIRMAN: Well, you are happy then, Mr. O'Brien, then, that on foot of discussions between Mr. McGonigal and Mr. Coughlan, you have an appraisal of how far matters will be going in the morning, rather than we take them up now, and the little time we have lost today, we'll seek to make up over the next two days. Eleven o'clock tomorrow.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY, WEDNESDAY, 12TH NOVEMBER, 2003, AT 11AM.