

THE TRIBUNAL RESUMED ON THE 10TH OF JUNE, 2009, AS FOLLOWS:

CONTINUATION OF EXAMINATION OF FINTAN TOWEY BY MS. O'BRIEN

AS FOLLOWS:

MS. O'BRIEN: Thank you, Mr. Towey. When we finished yesterday afternoon, Mr. Towey, we were just discussing the meeting that you attended with officials from the Office of the Attorney General on the 22nd of April, and also a meeting, of which we now have a record, of the 23rd of April with Mr. Nesbitt which you attended, but of which you have no memory yourself?

A. Yes.

Q. Now, if I could ask you to refer to the letter of the 24th of April that you sent to the Office of the Attorney General, and that's at Book 43 at Divider 193. And just before I open that, Mr. Towey, and I am not making any point on it, but you have it there, I think, do you just before I open it, I am not making any point on it, but I just want to draw to your attention that you didn't make, generate or keep any note of the meeting of the 23rd of April which you had with senior counsel?

A. No, I don't believe I did.

Q. And also in that regard, I just want to draw to your attention again, and I make no point on it, but to just give you an opportunity to comment on it if you wish, that whilst I have no intention of opening any of the other privileged documents over which there is no waiver of privilege, we have seen that on two previous occasions, I

think in September of 1995 and in January of 1996, you did keep a formal and generated a formal typewritten note of meetings that you had attended with Mr. Nesbitt?

A. I believe that I may have done, yes.

Q. Now, the letter of the 24th of April, 1996, it's addressed to Mr. McFadden and Mr. Gormley.

"Dear Mr. McFadden/Mr. Gormley,

"Further to our meetings on the 22nd and 23rd of April, I enclose the following:

" a report on the Department's assessment of the compatibility of the consultants of the draft GSM licence with Directive 96/2, and

" a consolidated text of Section 111 of the Post and Telecommunications Act, 1983, incorporating amendments contained in SI 45 of 1992, and amendments proposed in the transposition of Commission Directive 96/2.

"I have also as requested consulted internally on the question of consulting the European Commission in relation to the terms of the licence. The Department is of the view that apart from the time constraints, it may not be prudent to invite the Commission's scrutiny at this point. The question of compliance with the provisions of Directive 96/2 will no doubt fall to be examined in detail by the licensee in due course possibly in consultation with the Commission.

"I would also like to reiterate our requirement for a legal opinion on the restructuring of the ownership of Esat

Digifone (relevant papers were provided at our meeting on the 22nd of April). In particular, the question of whether recent correspondence suggests any change in the identity of the beneficial owners of the company which could be considered incompatible with the ownership proposals outlined in the company's application must be addressed. Before the ultimate award of the licence, it is now considered that it would be preferable to seek warranties in relation to both the beneficial ownership of Esat Digifone and the financing package for the project. This is considered prudent given the nature of the concession being given to the company. Perhaps you would advise, however, whether such a requirement could be challenged by Esat Digifone as an imposition not envisaged in the competition process or otherwise unreasonable on legal grounds.

"Finally, I will provide a brief for counsel on the proposed disclosure procedure as soon as possible, but would, as discussed, appreciate your early opinion on the question of whether debriefing sessions should proceed in the shadow of a complaint to the Commission regarding the process."

And it's signed by you.

Now, just to deal with them initially, Mr. Towey. In the first two bullet points of that letter, what you are doing there is furnishing to the Office of the Attorney General the documentation that you agreed that you would provide at

the meeting of the 22nd of April; isn't that right?

A. Yes.

Q. And the first one was a report on the assessment of the compatibility of the conditions of the draft licence with Directive 96/2?

A. Yes.

Q. Now, we actually referred to that yesterday, and it's, I think, in Book 85D. If you wish me to, I'll open it again but I think you can

A. I know what it is.

Q. You can happily agree with me that it's absolutely nothing to do with the ownership conformity issue; isn't that right?

A. That's right, yes.

Q. The second matter that or the second document that you were enclosing was a consolidated text of Section 111 of the 1983 Act incorporating the amendments that would follow from the Statutory Instrument that you were going to adopt; isn't that right?

A. Yes.

Q. And again, that is absolutely nothing to do with any aspect of the advice you were seeking on ownership; isn't that right?

A. Correct.

Q. And then in the second paragraph of that letter, you are confirming consultation that you had with the Department as to the advisability of consulting with the Commission on

the draft licence that you intended to issue; isn't that right?

A. Yes.

Q. And that was also a matter that had been discussed at the meeting of the 22nd of April, and which you agreed you would, in effect, take instructions on and follow up on?

A. Yes.

Q. So then it's the third paragraph of the letter, where you move on to the issue of ownership. You said that you would like to reiterate your requirement for a legal opinion on the restructuring of the ownership of Esat Digifone, and you refer to the papers which you provided at the meeting of the 22nd of April, and you state that, in particular, the question of whether recent correspondence suggests any change in the identity of the beneficial owners of the company which could be considered incompatible with the ownership proposals outlined in the company's application must be addressed. And that's the opinion that you were seeking in relation to ownership conformity; isn't that right?

A. Yes.

Q. And that was the matter that we know you discussed on the 22nd of April meeting with the two officials of the Attorney General's, and they are in paragraph 5 of the note that you signed off on the same day as that letter?

A. Yes.

Q. And you had furnished the Office of the Attorney General

with the three documents that we have seen and you did that on the 22nd of April. I think you may have furnished additional copies that day or the following day, and they were the extract from the management section of the Esat Digifone application, a copy of the letter of the 17th of April from Mr. O'Connell, and a copy of what you had headed "departmental note"; it was Ms. Finn's note that she had prepared after her meeting or telephone call with Mr. O'Connell on the 16th April, isn't that right?

A. Yeah, I passed those documents on the 22nd. Of course, we met and discussed them on the 23rd, as well.

Q. You may have, but as you said in your evidence, you have no recollection of that; isn't that right?

A. Sorry, I don't have a specific recollection of a discussion at that meeting, but I did say in my Statement of Intended Evidence that I believe I may have had discussions with senior counsel, and I don't know when

Q. You don't know when.

A. so I can't exclude it was then, if you know what I mean.

Q. Yes, I do, I do, of course. Now, the further matters you refer to in that paragraph related to warranties; they actually have nothing to do with the ownership conformity issue, isn't that right?

A. Yes.

Q. And then the final matter that you refer to is that you need an early opinion on the question of whether debriefing sessions should proceed with the disappointed applicants in

the light of the complaint that, I think by then, had been made by Persona to the Commission; isn't that right?

A. Yes.

Q. Now, again, just to follow through on the paper trail. I think we have a copy, then, of the letter that the Attorney General's Office forwarded to senior counsel, which is in Book 85, at Divider D. Do you have it there?

A. Yes, I do.

Q. And it's "Re proposal of Minister for Transport, Energy and Communications to grant a licence to Esat Digifone Limited to be the second provider and operator of a GSM mobile telephony service in Ireland and Commission Directive 96/2/EC amending Commission Directive 90/388/EEC and minute of the Department of Transport, Energy and Communications dated 24 April, 1996.

"Dear Richard,

"With reference to the above matters and yesterday's consultation, please find attached a copy of the above minute received from the Department and its enclosures.

The 'consolidated text' of Section 111 is not enclosed as it does not incorporate the more recent draft of the proposed amendments thereto.

"A copy of the 'relevant papers' referred to in the third paragraph of the Department's minute is also enclosed, together with a new draft Article 8 of the proposed licence which is relevant and your opinion on the issues set out in that paragraph would be appreciated.

"If you require any additional information or consider that a consultation would be desirable, please let us know."

You can see there that the Attorney General's Office forwarded to senior counsel as regards the ownership conformity issue, a copy of your letter of the 24th of April and a copy of the three documents that you had provided at the meeting on the 22nd of April?

A. Yeah.

Q. And just finally, so that we can clear up what senior counsel had, or was furnished to him, if you just move on to Divider G in that same book, you will see that there seems to be what is a follow-up letter of the 3rd of May, 1996, and again it's headed "Re proposal of the Minister for Transport, Energy and Communications to grant a licence to Esat Digifone Limited to be the second provider and operator of a GSM mobile telephony service in Ireland" and the same Commission Directive, and it says:

"Dear Richard,

"With reference to the above matters and this office's letter of the 18th ult, please find enclosed revised drafts of the licence and regulations to implement Commission Directive 96/2/EC.

"If you require any further information or we can be of assistance, please let us know."

You see that?

A. Yes.

Q. And that letter was enclosing, if you like, the up-to-date



draft of the licence that the Department was intending to grant to Esat Digifone and also an up-to-date draft of the Statutory Instrument on which you had been working in order to implement that Directive?

A. Yes.

Q. Now, having attended the meetings of the 22nd and the 23rd and having written to the Attorney General's Office on the 24th, you were awaiting legal advice on four matters, isn't that right?

A. I think that's right, yes.

Q. Firstly, there was the Directive to implement the the Statutory Instrument to implement the Directive?

A. Yes.

Q. That was, if you like, the framework document?

A. Yes.

Q. Secondly, there was the draft licence itself

A. Yes.

Q. isn't that right? Thirdly, there was the advisability of meeting with disappointed applicants in the light of the complaint that had been made regarding the process to the Commission?

A. Yes.

Q. And fourthly, there was the ownership conformity issue, isn't that right?

A. Yes.

Q. They were the four issues. Now, as regards the third of those issues, which was the advisability to meet with

disappointed applicants in the light of the complaint made to the Commission, you had sought an early opinion; isn't that right?

A. Yes.

Q. And, again, I am not going to refer to it, but it is the case, is it not, that you received a very prompt response from senior counsel in relation to that matter?

A. I think we did. I am not sure, but

Q. From looking through the papers, it appears that you received a letter dated the 25th of April, which was the following day?

A. Okay.

Q. So that dealt, if you like, with the third item of advice that you were awaiting?

A. Yeah.

Q. Now, what I want to explore briefly before I move on, Mr. Towey, is what your own mindset was at that stage when you had received the notification from Esat on the 17th of April regarding both the restructuring of the proposed licencee and also the restructuring of Communicorp's business interests as regards the decoupling of the broadcasting and telecommunications interests. And can I just refer you briefly to the evidence regarding that matter which you gave to the Tribunal on the 21st of May, 2003. That was day 221, and we can put it on the monitor for you. It commences on page 24 of the transcript for that day. Now, what counsel had been discussing with you

prior to question 77, was a statement that the Minister had made in Brussels on the 8th of May. Do you recall that statement, Mr. Towey? It was after the Minister had had a meeting with Commissioner van Miert in relation to the complaint that had been made by Persona to the Commission, and the Commission had confirmed that it wasn't going to grant interim relief preventing the Department from, and the Minister from issuing the licence. And do you recall there was a press conference and a statement was made by Mr. Lowry?

A. I know there was a meeting with the Commissioner, yes.

Q. Just to put this extract, this passage from the transcript in context. And at question 77 counsel asked you:

"And here I suggest to you is a clear example of the Minister driving a situation and that the only result, come hell or high water, was that the licence would be awarded to Esat Digifone?"

Answer: Yeah, yeah.

Question: Do you understand the point?

Answer: Well, I do see what you are saying. Now, I suppose at the time my own frame of mind was that while there was a process to be undertaken in relation to the financing and the ownership of Digifone, I didn't personally view it as a likely outcome that that would result in Esat Digifone not being awarded the licence.

Question: How could that be so?

Answer: I am saying that was a view that I had, it may

have been a naive view, it may

Question: Fair enough.

Answer: That was my frame of mind. I didn't have an expectation or I didn't have a sense that, you know, maybe this was not going to, or maybe that this was going to fall apart because, I mean, you know, that's why it would have been, I think. I didn't have that sense

Question: Right.

Answer: as such, I don't think I would have well, I certainly didn't piece together those pieces of information that you have just done, and I didn't have any, you know, I didn't see any sinister implications, I suppose, in the papers that I saw at the time.

Question: Right. Nevertheless, as you describe it, your own, perhaps naive view that things wouldn't come unstuck or there wasn't the risk of them becoming unstuck.

Nevertheless, can I take it that you would have been aware perhaps of the Minister's desire that things should not come unstuck?

Answer: I wouldn't have seen it in those terms. I mean, I knew the Minister was anxious to move this along.

Question: When you say to 'move it along', to issue the licence?

Answer: Yes, to issue the licence.

Question: To issue the licence to Esat Digifone?

Answer: Yes. And my understanding all along was that this was necessary now in order to finalise the financing

package and to keep the project moving. In other words, what the consortium had been putting to us was that they had been, they had been financing this as far as they could without the licence, but that they had reached the point where now they needed the licence to continue to finance the project.

Question: But can I take it that, and I understand the way you were describing your state of mind at the time

Answer: Yes.

Question: that from the moment this particular information came into the Department on the 16th and 17th, was it your the 16th and 17th of April, 1996

Answer: Okay, yes.

Question: From around this time?

Answer: Yes.

Question: Was it your view that the attitude or the direction that things were taking in the Department was to bring this to a conclusion or a finality which would result in the award of a licence, the licence to Esat Digifone?

Did you see it just as effectively further administrative steps to be taken?

Answer: Well, as you know, the Project Group had taken a clear view that this was, this was a robust opportunity, so, as I say, my frame of mind was that, you know, this, that there wouldn't be a problem. A problem would not arise which would thwart the award of the licence.

Question: And can we take it that you understood that also

to be the Minister's view?

Answer: Yes, I expect so, yes."

So just there in your evidence, what counsel was exploring with you was your mindset, and I think that was your mindset, that these were steps that you had to go through.

You had to ensure that the capital configuration and the ownership issues were addressed and dealt with, and there was also the question of financing; isn't that right?

A. Yeah, that's right.

Q. But it wasn't your expectation at the time that these issues were not going to be resolved; isn't that right?

A. Yeah, I think I had a clear view that Esat Digifone had, you know, they had come through the more difficult phase of the process in winning the competitive procedure, and that, arising from that, the line they had to step up to, essentially, was to meet the requirements set out in their bid, and the requirements, obviously, implicitly, of the RFP. And I don't think I had any doubt that, you know, having registered such a big win, I don't think I had any doubt that they would find a way of stepping up to the mark.

Q. So it was your expectation all along that these were matters that would be resolved?

A. That was my expectation.

Q. Now, we know, again, and I am going to refer you briefly to Mr. Brennan's evidence, because Mr. Brennan had a slightly different view to you, and I am just going to refer you to

two short passages of his evidence on Day 178, which was the 4th of February, 2003. And the first passage is page 1 to page 3 of that transcript. And, in fact, just again to put that in context, Mr. Brennan had been giving evidence for some time, and he had given evidence on the previous Friday, and he came back on the Tuesday morning and he wanted to clarify a point on which he had given evidence.

So, on page 1:

"Question: Mr. Brennan, if you look at Book 43, Leaf 186 for a moment, please.

Answer: Before I do that, if you don't mind, there is something I wanted to clarify about Friday. And I suppose my answer was incomplete or maybe inaccurate, born completely out of tiredness. But towards the end, you were asking me about why it was, when we got written information that IIU had become part of the scene, that we didn't then announce that; and I said that it may have been a tactical decision or something yeah, well, as soon as I had a cup of coffee, it occurred to me that that was a stupid answer.

What really was the situation that triggered two responses in the Department. One was to check out who are these guys and are they good for it? And the other was to trigger legal advice as to where stood the application in the light of that development.

So when you put it like that, it's clear why we weren't in a position to make any announcement at that stage.

Question: Can I just clarify that again, that you said

that you think that, firstly, you were looking at it from the point of view of who are these people, that was the first thing that went through your minds at the time?

Answer: I didn't deal with it directly on a hands-on basis until sometime later than that. But they were the first two responses within the Department, was you know, who are IIU? Have we evidence as to whether they are substantial? And the other response was to get legal advice as to what the effect of this had in terms of the application.

Question: But that didn't in any way take from the fact that you were being told that these people were the consortium; isn't that right?

Answer: Yes.

Question: You were told that they were the consortium. It's irrelevant, really, whether they were capable of keeping up their end or not. It was irrelevant who they were. If you were told that you know, it was Mickey Mouse was now going to be taking over the consortium, it didn't matter. That's who was going to be taking it over. That was or taking over that 20%. That's what the fact was; isn't that right?

Answer: Yes, but it would be very strange if we accepted that at face value without any inquiry whatsoever.

Question: But sure how could you possibly have failed how could you have taken any view other than it was the fact that it was the solicitor for the consortium who



told you this; isn't that right?

Answer: I think it was, yeah.

Question: He said 'These are the facts'. The consortium had described itself in these terms. It was hardly a matter for you to write back to them and say 'Well, we don't accept the way you describe yourself because we don't know who IIU are' or 'We don't know if they have got the money to keep up their end of this.' Surely you simply had an obligation to note or to record the fact and then to take whatever steps you felt were appropriate, but to record the fact that the consortium now consisted, as far as you were aware, of Telenor, Communicorp Denis O'Brien and IIU, whoever IIU was?

Answer: Well, what I was seeking to clarify is that the Department's response then was to consider whether that was an acceptable situation in the light of the application, and to look at the financing. That's what actually happened. Whether it's what should have happened or what you believe should have happened or not, I don't know.

It's what actually happened."

Then, can I just refer you to page 47 of the transcript, and again just to put this question, it's only one question and answer I want to refer you to, but again just to put it into context.

Counsel for the Tribunal had been discussing with Mr. Brennan the statement that Mr. Lowry made in the Dail on the 30th of April and a reference that had been made in

that statement to the possibility that IIU or Mr. Desmond would be a shareholder. And the question then is just question 104 and the answer.

"Question: At that moment, leaving aside what was contained in the evaluation report, you didn't even know whether you'd run with that consortium; isn't that right?"

Answer: I think there was some doubt, yes."

So, I just wanted to bring that to your attention, what Mr. Brennan's evidence was, but certainly it was your mindset that this was a process that had to be gone through, you had to check out these matters, you had to satisfy yourself that this was consistent with the application, but, overall, it was your belief that the probability is that you would be able to do so and that the licence would issue to Esat; isn't that right?"

A. Yeah, I mean, that is what I expected. I am obviously conscious that in a subsequent licensing process, the winning applicant actually failed ultimately to secure the licence. But at the time I thought my view was that, I suppose that Esat had passed the more difficult test and that they would successfully undergo the licensing procedure.

Q. Now, at that stage, as you say, you were awaiting legal advice, certainly, initially, on four matters, but one of them was dealt with fairly speedily, so you were now, towards the end of April, awaiting legal advice on three matters; isn't that right?"

A. Yes.

Q. Now, it's quite clear that this was a matter that certainly did bear on the minds of the officials within the Department, and can I refer you now to the document behind flag 198 in the same Book 43. And this was a memo that you received from Regina Finn on the 25th of April, 1996. And I think you probably remember this memorandum.

It's "To: Fintan Towey.

From: Regina Finn.

Date: April 25, 1996.

Subject: GSM licence (particularly Article 11).

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

Mr. Bacon was from the Office of the Parliamentary Draftsman; isn't that right?

A. Correct.

Q. "Re Article 8 ownership.

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

"Re: Article 11 - Security.

"I have further revised this Article, as you will see, and attempted to answer some of the parliamentary draftsman's questions. However, I have been hampered in this by the lack of access to information which is held in Communications Division on a secret file. I hasten to add that this was no one's fault, just a consequence of being in different buildings. When I finally had a chance to view this file today, it became clear that the issue had been addressed in some detail by your division (including some legal advice from the AG) and I propose, therefore, that you or Paddy Campbell would liaise directly with Laney Bacon from the Parliamentary Draftsman's Office on any queries he has."

And it's signed by Regina Finn.

Now, just to deal with the final paragraph of that.

Article 11 was just the entitlement, I think, of the Department or of the Minister to intercept telephone calls on public security or on State-security grounds; isn't that right?

A. Yeah, security interception.

Q. And it has no application to what we are considering at the moment?

A. Correct.

Q. Now, as regards Article 8, you see there that what Ms. Finn was saying to you was that she had prepared a revised draft, that Peter O'Donoghue of Esat Digifone was looking

for it, but that she had been advised by Mr. McFadden of the Office of the Attorney General that that draft shouldn't be issued until the ownership conformity issue had been resolved.

A. Yes.

Q. And just one other thing there. She says that "Mr. McFadden will consider this further and may request a meeting to clarify the Department's request on this issue."

Now, I don't know if you recall, but there is certainly nothing in either the privileged or non-privileged documents to suggest that there was ever any further meeting to clarify that matter?

A. What request?

Q. Sorry?

A. What request does this sentence refer to?

Q. The Department's request on this issue, the ownership issue. If you read it here, "As discussed, Denis McFadden advises that the revised draft should not go to Esat Digifone until the ownership issue is resolved. He will consider this further and may request a meeting to clarify the Department's request on this issue." I think "this issue" refers to the ownership issue, do you see that?

A. Okay.

Q. Now, as I said to you, from the documentation we have seen and certainly from the evidence we have heard, there doesn't seem to be any indication that there ever was any further meeting between you and officials of the Attorney

General's Office to clarify your request for an opinion on the ownership issue?

A. Do you mean between this date and the 9th of May or

Q. Yes.

A. I am not aware of one.

Q. Now, just two matters in relation to Ms. Finn, because in your Memorandum of Intended Evidence, I think you indicated in it that you felt it would be appropriate if the Tribunal heard evidence from Ms. Finn in relation to this matter; isn't that right?

A. Yes.

Q. Can I just refer you to some extracts from the evidence that the Tribunal heard from Regina Finn, and they are all on Day 216. I just want to bring those to your attention. The first extract is on page 41. And at question 90, she was asked: "I appreciate at the time that your focus would have been entirely different from Mr. Brennan, Mr. Towey and Mr. McMahon, and also you would have had none of the familiarity that they had with the information which had been furnished both in the application by Esat Digifone consortium and also information provided during the course of the evaluation process; but do you recall at all whether you were conscious of the impact that this information had on the other members, if you like, of your inter-functional team?"

And there, what was being discussed with her was the information contained in her memo of the 16th and the

letter of the 17th. And she answered as follows:

"Answer: In terms of the impact that it had on them, I think that having sent the information over, and being unaware of you know, the magnitude, or otherwise, of it, I don't think I would have had a particular awareness of how it was being dealt with by the team in the other building, obviously, because they were in a different building.

Question: Would you have been aware or would it have been relayed to you that this was being seen by and being perceived by the Department as being significant new information which was coming to light?

Answer: I don't recall having that information passed to me or perceiving it in that light."

And then, later, on the same day - she only actually gave evidence on one day - it's at page 43, she was asked whether she had had any role at all in following up the request for an opinion on ownership conformity. And she was asked as follows as question 98:

"Question: Now, while you were present at that meeting, did you have any role in following up the request for assistance from the Attorney General's Office regarding that issue of ownership?

Answer: No, I don't believe so at all."

And then, finally, at page 47 of the transcript, the transcript records an exchange with her. In fact, it arises in the context of the letter of the 1st of May which

was the Department's formal response to Mr. O'Connell's letter of the 17th of April which, as we know, was, in fact, drafted by you and I think went out over Mr. Brennan's signature. And she was asked:

"Question: And I am just wondering why it was that the response to the letter, if you like, not only passed from your hands but passed from the regulatory side of the division over to the developmental side and was replied to by Mr. Brennan?"

Answer: Well, my recollection is that this was based on the division of responsibilities between the two sections, the regulatory section compared to the development section, and Mr. Brennan and the development section had taken the lead in the competition process, and therefore continued to have responsibility for any issues arising out of that that needed to be finalised. I am not surprised that I passed the issue over to that division for them to deal with. I am not surprised that Mr. Brennan responded to follow it up. I think there was some comment by somebody during a transcript that I might have drafted this. I don't believe I did have any hand in drafting this letter. There wouldn't have been a sense any sense in that, because I wasn't aware of the information in the bid document.

Question: I see. So just to summarise, therefore, am I correct in thinking that your feeling on it is the reason that it passed over is that a question now arose as to what information had been furnished in the course of the



competition process vis-a-vis the information which was now being furnished regarding ownership and capital configuration, and it was for that reason that it passed back to the Development Division?

Answer: Yes. It was much more appropriate for them to deal with it (a) because they had all the information, and (b) they took the lead in that issue.

Question: And are you quite happy and clear that you wouldn't have had any input into the preparation of this letter?

Answer: Yes."

So you will see from those three extracts from the transcript of Ms. Finn's evidence, that it's quite clear from her evidence that, firstly, she, being on the regulatory side of the house, had no role in relation to following up on the issues that had been disclosed by the letter of the 17th of April. Secondly, it seems that she had no appreciation of the impact of those because she had not been involved in the evaluation process itself. And thirdly, that she had no role, on her evidence, in following up that opinion. So I just wanted to bring that evidence that Ms. Finn gave to the Tribunal to your attention. And I just also want to bring to your attention that Ms. Finn's solicitors have been furnished with all of the documentation in relation to this matter, with the Tribunal's public sittings books, and they have not indicated to the Tribunal that she has any evidence that

she wishes to give to the Tribunal in relation to it.

I just wanted to bring that to your attention.

A. Yeah, I mean, I think that well, just commenting on the series of documents there. I think it began with a question which asserted that Regina Finn may not have had a familiarity with the RFP and the applications. In fact, she was handling, she was leading on the licensing process and the foundation documents for that process were, in fact, the RFT, the Esat application and the draft licence that we had provided, so that Ms. Finn would have had a familiarity with those documents. And I think it is clear that she did take a view that issues arose in relation to the consortium which should be referred back to the Development Division. I think she did have extensive discussions with the Esat Digifone consortium in relation to various terms of the draft licence. So it's clear that she perceived that there was something quite different or something quite significant about this, and she created that quite complex diagram, I think, showing the different shareholdings.

Q. Oh, yes.

A. So I think she certainly was cognisant of the fact that there were changes here, and felt that there were issues that needed to be looked at. And what I am suggesting is that I don't actually have a particular memory of Ms. Finn saying to me that, kind of, that there were issues here that may call into question whether this licensing process

could proceed. That's the context in which I made that comment.

Q. Okay. Now, Mr. Towey, we know that the Department responded to the letter of the 17th of April on the 1st of May, but just before I come to that letter of the 1st of May, I think I brought to your attention this morning the memo that had been provided to the Tribunal by Mr. O'Connell of an interaction which he had with you on the 29th of April, 1996. I think you remember I brought that to your attention this morning. And I am not going to open the transcripts of evidence on it, but you may recall that when you gave evidence in May of 2003, the Tribunal hadn't, at that time, heard any evidence from Mr. O'Connell. So what the Tribunal did was it brought to your attention an extract from his Memorandum of Intended Evidence in which he had referred to what he thought was a meeting and certainly an interaction with you, and, at that time, the Tribunal did not have a copy of this note to provide you with. I think your evidence was that you had no recollection of that, that you didn't recall having any meetings with Mr. O'Connell; isn't that right?

A. I am quite sure that I never met him on a one-to-one basis, certainly.

Q. So, Mr. O'Connell then came and gave evidence and gave evidence in accordance with his Memorandum of Intended Evidence, and he actually provided the Tribunal with a copy of this memo recording his interaction with you of the 29th

of April, 1996. And I just want to explain that this is actually a reconstituted version of the memo. The memo he took at the time was a handwritten memo and this typed one was typed up and prepared by Mr. O'Connell himself from his handwritten note. And when he came to give evidence to the Tribunal in November of 2003, it was his evidence that he had this exchange with you and that he had made a record of that exchange and then he had reconstituted it in this typed form. So just that you understand it.

And it's "To: File.

From: OOC.

Date: 29/04/96.

"Fintan Towey

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

"If Telecom interests held Esat Holdings and radio by Communicorp asset base of Communicorp reduced. Doesn't know whether it would be a problem.

"Suggested meeting. (I believe this to be a reference to my having suggested a meeting.)

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

Question is whether company to be licensed is the same as company that applied. Has to be assured from a legal perspective.

"Haven't reached decision as to whether there is any

difficulty, or anything they want done differently.

"Warranties regarding ownership and financing. Identifying institutional investors. Means ownership at date of licence.

"OO'C no difficulty with that at all."

And then, below that, we have "Reported KD major GSM supply contract 2 May; would suggest contemporaneous execution."

Now, I wonder does that note assist your recollection at all, Mr. Towey, of that interaction with Mr. O'Connell?

A. Not particularly.

Q. You say that you never met him in a one-to-one meeting to discuss anything like this; is that right?

A. That's correct, yes.

Q. So it follows, therefore, if you are correct in that, that this must have been a telephone conversation that you had with him, doesn't that seem to be the position?

A. Correct, yes.

Q. In fact, we know that you did have a subsequent telephone conversation of the 7th of May, so perhaps that was the way that you and Mr. O'Connell were doing your business at the time?

A. I suspect that that's correct.

Q. Now, this, in fact, predated the official response, your interaction predated the Department's official response of the 1st of May. And from what we can see from the documentation available, this seems to be the first

reaction, if you like, from the Department's side, to the letter of the 17th of April, would you agree with that?

A. I am not sure that that is the case. I mean, I know that there was a message communicated to, I think, Owen O'Connell that the Department required the structure of the consortium to revert to 40:40:20.

Q. That's right.

A. So I don't know if that would have taken place before this or after this.

Q. No, no, that was actually after it; that was on the 7th of May.

A. Okay.

Q. So this seems to be the first contact, certainly between you and he on the telephone, after the letter of the 17th of April?

A. Okay.

Q. And it's clear, isn't it, that what you are dealing with is the information which was brought to your attention in the letter of the 17th of April, isn't it?

A. I think that's true, yes.

Q. You start off by saying "Trying to hammer down paper trail between beneficial ownership as in bid and as now proposed; to determine whether there are any differences. Legal people involved." You see that?

A. Yes.

Q. That's the first sentence in Mr. O'Connell's memo. And would you agree with me that what that appears to record is

that you were saying to him that you were trying to hammer down the paper trail between beneficial ownership as in bid and as now proposed to determine whether there are any differences, would you agree with that?

A. Yes.

Q. That seems to have been information that you are imparting to him?

A. Yes.

Q. And you are telling him also that there are legal people involved, which of course was correct?

A. Yes.

Q. Then it goes on: "If Telecom interests held Esat Holdings and radio by Communicorp asset base of Communicorp reduced. Doesn't know whether it would be a problem."

And again, this seems to be you, if you agree with me, you commenting on the second substantive matter that was brought to the Department's attention in the letter of the 17th of April; that was the decoupling and restructuring of what had been the telecommunications and broadcasting interests, both of which had been vested in Communicorp?

A. Yes.

Q. Then records "Suggested meeting". Now, I should add that Mr. O'Connell made it clear that the words in italics in brackets after that were his views subsequent to creating this memo. He didn't insert that comment at the time he created it. It was when he was reconstituting it in typed form and in assisting the Tribunal that he inserted that

comment there, that he believed this was a reference that he made to having suggested a meeting, and that the response "premature" was your response.

It then goes on: "The question is whether company to be licensed is the same as the company that applied."

And that's a very clear statement, isn't it, Mr. Towey, of exactly what the issue was that the Department was facing?

A. Yes, that's the ownership issue, is what we were looking at.

Q. And it goes on: "Has to be assured from a legal perspective." Then, below that: "Haven't reached decision as to whether there is any difficulty or anything they want done differently."

Now, would you agree with me that that also appears to be information that you are conveying to Mr. O'Connell and which he is recording?

A. Well, I mean, I don't remember the telephone conversation.

Q. I know.

A. But, I mean, if Mr. O'Connell is suggesting that this is what happened, I can accept that, in all probability, that that's true.

Q. And then, below that: "Warranties regarding ownership and financing. Identifying institutional investors. Means ownership at date of licence."

And there, just the reference to warranties, that really echoes what you had been discussing with the Attorney General's Office and it also echoes a passage in your



letter of the 24th of April, doesn't it?

A. Yes.

Q. Where you had raised the prospect that the Department might insist on warranties in relation to ownership and financing as of the date of issue of the licence?

A. Yes.

Q. So again, this must have been information that you were imparting to Mr. O'Connell?

A. I think that's a reasonable interpretation.

Q. Now, we'll just go to Divider 203 in Book 44, and we'll look at the letter of the 1st of May.

And that letter of the 1st May followed on two days after your telephone conversation with Mr. O'Connell, and we know from the documents we looked at yesterday, that you, in fact, had prepared a draft of this I think on the 30th, and that you had sent a fax of that draft to the AG's Office asking him just to have a look at it and to settle it; you remember we looked at that yesterday?

A. Yes.

Q. And they made one or two very minor amendments to it; isn't that right?

A. Yes.

Q. Now, it's to Mr. Owen O'Connell, William Fry Solicitors.

"Dear Mr. O'Connell,

"I refer to your letter dated 17th of April, 1996,

concerning the restructuring of certain ownership interests in Esat Digifone.

"In accordance with the requirements of the GSM competition documentation, Esat Digifone provided ownership details which indicated that, at licence award, the ownership would be as follows: Communicorp Group Limited 40%; Telenor Invest AS 40%; institutional investors 20%. The application also provided details of the ownership of the operational partners and identified the probable institutional investors and the broker who would be responsible for placement of equity with institutional investors. In the case of Communicorp, it was indicated that it was 66% owned by an Irish investor (Mr. Denis O'Brien) and 34% by Advent International.

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

- " the nature of any differences between Communicorp Limited and Esat Telecommunications Holdings Limited in relation in particular to expertise or asset strength, and
- " full details of the ownership and categories of all shares of Esat Telecommunications Holdings Limited, including in particular by persons other than the owners of Communicorp.

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

"Finally, it would be appreciated if you could confirm that

full certification of the following matters will be

provided before the award of the licence:

" the precise equity ownership of Esat Digifone,

including the identity of all institutional investors.

" the identity and financial commitments of providers of

debt financing.

"It is essential that these matters be cleared up before

issue of the licence. We also need to discuss the public

presentation of these matters.

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

foregoing."

And that was signed by Mr. Brennan, although I think

drafted by you; isn't that right?

A. I think that's true, yes.

Q. Now, when you gave evidence to the Tribunal in May of 2003,

you indicated that the purpose of this letter was to obtain

further information from Esat Digifone regarding the

restructuring and regarding the ownership matters; isn't

that right?

A. I think that's right, yes.

Q. I can refer you to it, if you wish. It's Day 220, page 67,

and at question 238:

Counsel for the Tribunal referred to the letter. He said:

"Question: Right. Because just in the light of what the

Minister stated in that final paragraph in the Dail, the

next day Mr. Brennan wrote to Mr. Owen O'Connell, and

that's the next tab, it is Tab 203. We have been informed

by Mr. Brennan that this was the formal response, it was the formal response of the Department to Mr. O'Connell of his letter of the 17th of April of 1995.

Answer: Yes.

Question: And

Answer: I think we consulted legal advisors on this letter, also, a draft of it."

And there, you are referring to the fax you sent to the Attorney General's Office on the 30th, where you had sent the draft of the letter you were working on. The letter was then opened. I am not going to reread it again.

And then I'll take you on to page 69, question 241, which followed on from the opening of the letter, and Tribunal counsel asked you:

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

Answer: Clearly, I mean, we felt we needed more precise information in order to evaluate."

You see that?

A. I see that, yeah.

Q. So, as we say, that was the formal response to the letter of the 17th of April. You had informally responded to it already in your telephone conversation with Mr. O'Connell of the 29th of April, and you sent that letter and you were looking for more information, more precise information in

order to enable you to evaluate the matter; isn't that right?

A. Yes. I think that's correct. Now, I think in that transcript there is a suggestion that no view could have been formed by officials. But I think there was a view, I can't say exactly when it was formed, but there was a view, clearly, on some of the issues that were raised within that letter of the 17th of April.

Q. Of course there was, of course there was, and we'll come to that. But here, you were looking for further information

A. Yes.

Q. to enable you to evaluate it; isn't that right?

A. Yes.

Q. So you couldn't have formed any view on it until you got that information; isn't that right?

A. Well, I mean, there was a preliminary view.

Q. Of course.

A. But clearly, there was also a view that further clarification was necessary.

Q. Was necessary. When you were looking for that more precise information, can you recall, Mr. Towey, was it your intention that that more precise information would then be furnished to Mr. Nesbitt for the purposes of the legal opinion that he was going to provide?

A. I don't know at this remove. I mean, I think it would have depended on what information was forthcoming, and whether

it raised whether it would have assisted in that legal review.

Q. Well, if it was going to be if you felt you needed more precise information, surely, and if you received more precise information, surely it had to follow that if you were going to obtain a legal opinion on which you could rely, that you would have to transmit that information to the counsel who was going to advise you?

A. I can see the point that you are making, yes. I think, in the event, the legal view that was expressed suggested that the kind of detailed changes in the restructuring of Communicorp didn't actually give rise to ownership issues, because the senior counsel that gave advice in relation to it, had, I think, a more liberal view of the potential for restructuring of ownership than perhaps I would have had.

Q. We'll come to that, but really, at the moment, what I'm just trying to ascertain and to clarify is that you were looking for more precise information, and as of the 1st of May, it was your belief that you needed that more precise information in order to enable you to evaluate it?

A. I think, yes, that's fair enough, yes.

Q. Now, we know, then, that you met with Mr. Digerud, Mr. O'Donoghue, Mr. Arve Johansen, I think that's Mr. Walsh, Mr. Connolly and Mr. Owen O'Connell, together with Mr. Martin Brennan and Ms. Regina Finn, and I think one other official, on the 3rd of May, which was the Friday following that letter of the 1st of May. And if I could

just refer you briefly, at Divider 206, to Mr. O'Connell's note of that meeting. That's at flag 206.

A. Yes.

Q. "Clear a political football.

"Identity of each shareholder legal and beneficial ownership. Esat Digifone changes relative to bid.

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

"Need detailed information/quality/about IIU."

I am not going to open the rest of that note because it doesn't relate to the ownership issue. But it's quite clear there that at the meeting, would you agree with me, at the meeting of the 3rd of May, that you were reiterating your request for this information?

A. Yes.

Q. So you had written on the 1st of May and you had reiterated your request then at the meeting on Friday the 3rd of May.

And can I refer you, then, to the document behind Divider 209, which is the note that Mr. O'Connell made of your telephone conversation with him on the 7th of May.

A. Yes.

Q. It's headed "Memo," and again, the handwritten contemporaneous note is over the page, but this is the reconstituted note that was prepared by Mr. O'Connell.

"Memo.

To: File

From: OOC

Client: Esat Digifone

Matter: Licence negotiation

File No.: 12457-001-002

"Fintan Towey:

"Minister V strong preference for 40:40:20 at time of licence. But understands need for flexibility afterwards.

Will take Esat Holdings subject to no substantive difference plus outline in writing."

You remember that note. And it featured in some detail in the evidence that you already gave.

A. I remember discussing it previously, yes.

Q. And in that note, you were conveying to Mr. O'Connell that the strong preference was to restructure back the shareholding in Esat Digifone to the configuration which had pertained at the time of the bid, to 40:40:20. And you are also saying there, it seems to me, that you were accepting "Will take Esat Holdings subject to no substantive difference and outline in writing".

Do you see that?

A. Yes.

Q. Now, on the 7th of May of 1996, at that stage you had received no legal opinion from Mr. Nesbitt; isn't that right?

A. I think that's right.

Q. And you had received no response to the request that you had made for information on the 1st of May and that you had reiterated on the 3rd of May; isn't that right?



A. I think that's right, yeah.

Q. Now, can I just ask you to look in the context of that note again, at the letter of the 17th of April, Mr. Towey. I'll just bring you back to it. It's at Book 43, Divider 184.

Now, I am not going to open it, read it all out again, Mr. Towey. But in that letter, you were being Ms. Finn was being informed of two matters, isn't that right, the two headings in it: Esat Digifone Limited and Esat Telecommunications Holdings Limited; isn't that right?

A. Yes.

Q. And as regards Esat Digifone Limited, Mr. O'Connell was informing the Department that the share structure was going to be 40:40 it was going to be 37.5:37.5:25, and the 25% shareholding was going to be held by IIU; isn't that right?

A. Yes.

Q. So as regards Esat Digifone, you were being told two pieces of information: Firstly, the share configuration was being altered; and secondly, that the ownership of what was now the increased minority shareholding of 25% was going to be held by IIU, isn't that right?

A. Yes.

Q. Then the second thing you were being told, which is the second heading, is it was being explained to you that Mr. O'Brien's company, Communicorp, was going to restructure its holdings; it was going to decouple its broadcasting business from its telecommunications business, and that the telecommunications business was not going to

be held by Communicorp. Communicorp was going to be left with the broadcasting business and there was going to be this new company, Esat Telecommunications Holdings Limited, and it was through that company that the Communicorp shareholding or the shareholding on the Mr. O'Brien side was going to be held in Esat Digifone Limited, the licence company; isn't that right?

A. Yes.

Q. So you were being given information about two companies: Firstly, the proposed licensee, Esat Digifone; and secondly, its shareholder, which was going to become Esat Telecommunications Holdings Limited; isn't that right?

A. Yes.

Q. Now, if we go back to your note of the telephone conversation that you had with Mr. O'Connell on the 7th of May sorry, Divider 209 in Book 44 the first thing you are addressing is the matter of Esat Digifone Limited, the proposed licensee company; isn't that right?

A. Yes.

Q. You are saying the "Minister's very strong preference is for 40:40:20 at the time of the licence;" isn't that right?

A. Yes.

Q. So what you are doing is you are conveying the Department's response to the information they had been given on the restructuring of Esat Digifone; isn't that right?

A. Yes, a clear view was taken on that in the Department.

Q. And indeed the Minister's view, as it's recorded there?

A. I recorded it as the Minister's view, but you will be aware of other evidence in relation to that point.

Q. And that, of course, was before any opinion had been furnished; isn't that right?

A. That's right, yes.

Q. But the second thing you are doing, as well, is that you are saying that the Department would accept the restructuring and decoupling of Communicorp's business; isn't that right?

A. That's correct, yes.

Q. And that dealt with the second matter that you were being informed about or were informed about in the letter of the 17th of April; isn't that right?

A. Yes.

Q. So in the course of that telephone conversation, according to Mr. O'Connell's note, you commented on both of the items of information that had been communicated to the Department on the 17th of April; isn't that right?

A. Yes.

Q. And you were indicating to him what the Department's attitude was; isn't that right?

A. Yes.

Q. And the only matter that isn't referred to in that note is the involvement of IIU as the minority shareholder; isn't that right?

A. It's not referred to there, no.

Q. And there is assuming that Mr. O'Connell's note is an

accurate note, and certainly the Tribunal would have no reason to question the accuracy of Mr. O'Connell's note-keeping and note-taking, if he has made no record of any reference to the minority shareholding and the introduction of IIU, would you agree with me that the probability is that you made no reference to it?

A. I presume that that would have been the case, yes.

Q. But you did, of course, on the 40:40:20?

A. According to that note, yes, and I presume the note is correct.

Q. Can I just raise this as a possibility with you, Mr. Towey, and see if you agree with me. You see, what a reasonable person or a member of the public might interpret that note to mean is that you were coming back to Mr. Owen O'Connell, that after the Department received the letter of the 17th of April, you went back to him on the 29th of April on the telephone before there was any formal response to it, and you marked his cards as to what the Department's thinking was on the 29th of April. You conveyed information to him, you told him what problems the Department had identified and you indicated that it had been looked at from a legal perspective; isn't that right?

A. Yes.

Q. The Department then wrote formally to Esat Digifone on the 1st of May, and it looked for more information. It met with representatives of Esat Digifone on the 3rd of May, the Friday before this, and it reiterated its requirement

for more information. And now, on the following Wednesday, the 7th of May, you are going back again by telephone to Mr. O'Connell, and bear in mind that none of this is recorded anywhere in any formal response from the Department, and you are coming back to him and conveying to him what the Department's view is and what the Minister's view is in relation to the information that had originally been furnished on the 17th of April?

A. Yes.

Q. Now, in that regard, Mr. Towey, can I just refer you to some of the evidence that the Tribunal heard from Mr. Brennan on the 5th of February of 2003 relating to the Department's consideration of this whole ownership conformity issue; that's Day 179, it was the 5th of February, 2003, and it's pages 15 to 19 of the transcript.

And if you can commence at question 46:

"Question: At one of the meetings that we referred to yesterday, or one of the notes of the meeting I think it was the 3rd May, reference is made to the need for an explanation for why Advent, IBI, Standard Life and AIB were no longer being proceeded with. Can I ask you, why did the Department place so much importance on the 40:40:20 configuration and seem to ignore the identity of the blue chip institutional investors who were part of the application?

Answer: I don't believe the Department ignored the identity. I think the Department made significant

inquiries, and including taking legal advice.

Question: I don't think the legal advice on the change in share configuration was ever pursued; at least we have not been able to see any legal advice dealing with it.

Answer: I can't comment without researching the documents on that.

Question: In the discussions that you had in the Department, and you say there were many discussions on the issue, can you tell me what consideration was given to insisting that the consortium stick not only with the share configuration, which was part of the evaluation, but also the shareholders or intended shareholders who were part of the evaluation?

Answer: I think there was a close examination of the application itself leading to the conclusion that there was some flexibility around the placement.

Question: What flexibility?

Answer: In the sense that the application talked about to be placed and talked about with institutional investors of which certain ones were identified as being in a position to commit. But I think what we were looking at was, was this an exclusive list or not? And we came to the conclusion that it wasn't.

Question: So do I understand you to say, then, that you concluded that it wasn't an exclusive list, although I think the application made it clear that it was exclusive, but you concluded it wasn't? But did you decide that

although it wasn't an exclusive list, any other institution, any other financial institution which satisfied you would be acceptable?

Answer: It wasn't a question of satisfying me. It was a question of satisfying the legal requirements, if you like, to comply with the application.

Question: What did you understand those legal requirements to be?

Answer: I believe that we looked closely at the application at that time to see what exactly was it saying, and then we looked closely at what was happening to see were the two consistent.

Question: Well, the application, we'll leave aside the issue that we have a difference on and that I canvassed a minute ago, but the application said that you were going to have 40:40:20 or 50:50, with ultimately a 40:40:20 configuration, 20% to be placed with I suggest that it was identified but leave that aside financial institutions, blue chip financial institutions. Is that what you were were you trying to see whether that was consistent with what happened?

Answer: Blue chip was a word used later. It wasn't in the application, in any event.

Question: I see.

Answer: The question being looked at was, was there consistency between what we were now presented with as the party to be licensed with the application and the

conclusion seems to have been reached that there was.

Question: Did the Department form the view that the way to describe the institutions who were mentioned in the application was blue chip?

Answer: I don't know whether there was a conscious forming of a view in that sense. It was words used possibly first by Mr. Loughrey, I am not sure, but by somebody.

Question: It was used in the Dail debates. It was used, I think, in the public statements, wasn't it?

Answer: It probably was, yeah.

Question: I suggest it's a fair way of describing the type of institutions involved. They were blue chip institutions, so therefore you were able to form a view as to whether this consortium had the financial capacity to do the work. It had Telenor, it had Mr. O'Brien's vehicle, it had blue chip institutions, or, if you like, it had financial institutions. Well, was there a correspondence between that configuration Mr. O'Brien, Telenor and financial institutions and what you were being presented with on the 16th of April?

Answer: It seems to me that after a lot of consideration involving a number of people, that view was formed.

Question: And was the Minister involved in that discussion?

Answer: I can't say that he wasn't, but equally I can't say that he was. I think these are questions that you may have to put to Mr. Loughrey in the first instance as to



what was going on at that level.

Question: I am sure you won't disagree with me when I say that it's my impression that if you were to reach a decision like that, it's a decision that would have to go all the way to the political head of the Department, isn't it?

Answer: That sounds reasonable, yeah."

Now, that was Mr. Brennan's evidence on the 5th of February. And in the course of that evidence, he described a lengthy consideration within the Department as to what was in the applications and what you were now being told and whether they were consistent; isn't that right?

A. That's what he says there, yes.

Q. Do you recall any such consideration within the Department itself?

A. Well, I recall the question of IIU being involved, being I recall the issue arising, and I recall very clearly the view being formed that the the institutional investors, the identity as such of the institutional investors wasn't important, but, rather, their capacity to provide the necessary funding. Certainly, I mean, my own view, having been closely involved with the evaluation, was that the institutional sorry, the institutional investors were not looked at in any great amount of detail, because the nature of the funding commitments was quite weak and there was a clear understanding within the Project Team that this was a project which would attract equity investment without

any great amount of difficulty. And I do recall the view being held in the Department that IIU was as acceptable as other institutional investors, but that the apparent jockeying for position whereby IIU was seeking to have a 25% rather than a 20% share was not something that was seen as being consistent with the application. So I do recall that view being taken. I can't comment in any detail as to how exactly it was formed, but clearly it was a view that was taken.

Q. Do you in the course of that passage from the transcript, Mr. Brennan refers to you scrutinising carefully what was said in the applications and what you had been told and whether that was now consistent with what you were now being told. Do you recall that exercise?

A. Well, I mean, Mr. Brennan may well be reflecting his thought processes in relation to that. From my own part, I would have known that certain banks were named in the application and that IIU was a difference, but, like I say, the view was clearly formed that the identity of the institutional investor wasn't actually that important.

Q. Yeah, but what I am trying to get at, what I am trying to get at, Mr. Towey, is this: Do you remember looking at the application to ascertain what you were told putting to one side for a moment what you did on the evaluation, because we know in the evaluation you didn't need to evaluate the minority shareholding because you were told this was going to be placed with a number of named

institutions and certainly at that time there could have been no question but that those institutions would be good for the money, so they didn't need to be evaluated at all, we understand that entirely. They were presumed, they were taken as being blue chip; there was no need to look at their finances, there was no need to look at their experience, there was no need to look at their input. So clearly, the 20% financial institutions' shareholding provided for in the application didn't need to form part of the evaluation; it was a given that they had the money.

But what I am trying to get at is this:

Do you recall at this time, as Mr. Brennan has described and did describe in his evidence, looking closely at the application to see whether or not what you were now being told could fit into that application?

A. Well, I mean, this was the reason that we took the relevant part of the application and passed it to the legal advisors.

Q. That's why you did?

A. Yes.

Q. All right. And we know what you communicated to Mr. Owen O'Connell on the 7th of May?

A. Yes.

Q. Now, the opinion and covering letter of Mr. Nesbitt, I am going to come on to now. And before I open it to you, I just want to try and pinpoint when you might have received it. And we know that there is an official letter from the

Attorney General's Office dated Monday, 13th of May, but I just wonder do you remember at all whether you received the opinion and advices and the draft documents that were enclosed, before that weekend?

A. I don't know the answer to that.

Q. I am just going to draw your attention, just again for the purposes of pinpointing when you might have received it, to a document in Book 44, which is, in fact, Mr. O'Connell's note of the meeting that you had on the 13th of May sorry, it's at flag 213. I am not going to open it all to you at this point, Mr. Towey, but I want to refer you to the final paragraph on page 2 of it.

"Fintan Towey said that a new draft of the licence was imminent and especially that Article 8 thereof would be amended. He said that a new draft of Article 8 had been received late on Friday last (10 May) from counsel and was now with the parliamentary draftsman who wished to shorten it. MB added that the counsel involved was Richard Law Nesbitt, SC. Martin Brennan said that the thrust of the new clause 8 was that all changes of ownership would be subject to ministerial approval, but that the grounds for objection by the Minister were specified in the clause (and had been taken largely from the recent EU Directive on mobile personal telecommunications). After a brief discussion between MB and FT, FT left the room to obtain a copy of the latest draft."

So it seemed, certainly, at that meeting on the 13th, you

did have a copy of the draft that would have come in with Mr. Nesbitt's letter and opinion, and you do refer to the fact that it arrived late on the Friday afternoon. Do you recall at all whether you had an advance copy at that stage?

A. I don't particularly recall but I wouldn't be surprised if we had.

Q. Now, I want to refer you now to the letter and the opinion. It's at Divider H of the Tribunal Book 85. And I'll refer you firstly to the letter from the Attorney General's Office to the Secretary of the Department, which is marked for your attention.

It's the 13th of May, 1996.

"Attention: Fintan Towey, APO

Communications

"Re: 1. Proposal of the Minister for Transport, Energy and Communications to grant a licence to Esat Digifone Limited to be the second provider and operator of a GSM mobile telephony service in Ireland, and

"2. Stamped draft of regulations entitled 'European Communities (Mobile and Personal Communications) Regulations, 1996' to give effect to Commission Directive Number 90/388/EEC of 28 June, 1990, and Commission Directive Number 96/2/EC of 16 January, 1996, and

"3. Stamped draft of licence to be granted under subsection (2) of Section 111 of the Postal and Telecommunications Act, 1983 (No. 24 of 1983) as amended by

the above-mentioned regulations when made."

And it states:

"With reference to previous correspondence, we have been directed by the Attorney General to forward to you the above-mentioned draft regulations and draft licence which have been prepared in the Office of the Parliamentary Draftsman by Mr. Bacon together with the advices of Richard Law Nesbitt, Esquire, SC, dated 9th of May, 1996, concerning same.

"Commission Directive 96/2/EC which was first brought to the attention of this office last month further complicates the already legally complex proposal to licence a second provider and operator of a GSM mobile telephony service in Ireland. A very large number of issues could be raised in relation to the exact meaning of that Directive and Directive Number 90/388/EEC of 28th of June, 1990, which it amends. These issues have not been explored with the Commission and most likely will arise in the future and perhaps be the subject of litigation, the outcome of which cannot be predicted with any certainty. In this regard, it is to be noted that the Commission have not had sight of drafts of either the proposed regulations or licence to date.

"The preparation of the draft regulations and licence within the time frame allowed has been an extremely difficult task particularly because of the opaqueness of the Directives.

"The Attorney General has asked that it be pointed out that in view of these factors, there is the possibility that some of the terms of the licence proposed to be granted could be successfully challenged. Mr. Law Nesbitt in his advices has highlighted some terms which he considers could be subject to attack.

"The drafts now furnished represent, in our view, the best available solutions, bearing in mind the various constraints which applied.

"Finally, we would ask you to note that the regulations should be made prior to the licence being granted, and if both are made and granted on the same day, the time of the making and granting should be recorded to prove that the regulations were made prior to the granting of the licence."

And that's the letter from the Attorney General's Office enclosing the draft of the Statutory Instrument, the draft of the licence as it had been approved and copies of Mr. Nesbitt's advices.

Now, Mr. Nesbitt's advices came in terms of a document headed "Advices," dated the 9th of March

A. May.

Q. Sorry, the 9th of May, I do apologise, and that was enclosed with a letter from Mr. Nesbitt to the Attorney General's Office dated the 9th of May, 1996.

I am going to refer you firstly to the letter. I take it you would have received this letter, would you?

A. Yes.

Q. It's "Re licensing mobile telephones.

"Dear John,

"I enclose my suggested amendments to the Esat licence, my suggested amendments to the Statutory Instrument given to me, and some general advices.

"I am sending my views on the complaint made to the Commission under separate cover. However, I remain of the view that the Minister should not drag his feet in issuing the licence. If there was to be litigation, so be it, but delaying does not achieve any end. Before issuing the licence, you should make it clear to Persona's solicitors that he is not holding his hand on the issue of the licence. The form of draft letter has already been discussed with you. My reasoning in this regard is that the Minister is committed to grant a licence. He is now in between two competing interests. One, Esat, who say they are entitled to the licence, and the other, Persona, who are indicating that the licence should not issue. Delaying issuing the licence would clearly damage Esat. If Persona wished to stop Esat getting the licence they should be required to take appropriate legal action to restrain the issue. They will then be required to give undertakings to the parties affected, particularly Esat. This will concentrate their minds, particularly in circumstances where the Commission are likely to be making unsympathetic noises in relation to their complaint.



"There is one final matter that is important. It occurred to me that the Minister may wish to impose on the persons backing Esat Digifone an obligation to stay with their commitment to back Esat Digifone for a given period, say 3 to 5 years. It could be possible to include in the licence a condition that the licence shall not be actioned until an appropriately worded commitment is to hand. I do not know enough about the terms of the application to know what sort of commitment you could seek or from whom. However, it is a matter worth considering and, in my opinion, a sustainable condition to attach to the granting of a licence to carry on an activity which, by definition, means that somebody else will be deprived of the opportunity to carry on that activity."

And that was the covering letter.

And then the document which we were referring to as an opinion and which is headed "Advices," and I want to open that to you as well.

"Advices,

Querist: The Minister for Transport, Energy and Communications and the Department of Transport, Energy and Communications.

"Re: The Esat Digifone (GSM) mobile telephony licence.

"I have now had the opportunity of considering the complicated issues which arise relating to the introduction of a Statutory Instrument to take into account the effects of Commission Directive 96/2/EC and to settling the terms

of the draft 'Esat Digifone telecommunications licence' which the Minister wishes to issue."

There is then a subheading: "The Draft Licence":

"I have dealt with the draft licence by taking the draft of the 2nd of May, 1996, and indicating where I think there should be amendments. The balance of the document can remain in its current form. Attached to these advices are the amendments I suggest. You should also include in the licence the subheadings that exist in the Articles. I did not trouble to repeat them in the amendments that I have suggested.

"The terms of the amendments I have suggested to Article 1, 2, 4 and 5 should be self-explanatory.

"The amendments I have suggested to Article 8 are more substantial. Article 8 imposes conditions material to the ownership of the licence and the management of the licence service, most particularly the ownership of shares in the licensee company. I view these matters as being particularly sensitive and an area where the Minister's hand is substantially tied. The Minister agreed to give the licence in question prior to the introduction of the Commission Directive 96/2/EC. However, as a matter of law I am forced to conclude that if the licence document includes terms and conditions which are not sustainable under the Directive, and licensee, in my opinion, is free to apply to the courts to have such non-conforming provisions struck down.

"If one analyses why the Minister is concerned about the ownership of shares in the licensee the only legitimate concern he can have is that if there is a change of ownership the service that has to be provided will in some way be compromised. I do not think it is tenable to suggest that the licensee has been awarded the licence because of the parties who own the licensee. Rather, the licensee has been awarded the licence because its plans and proposals were the most meritorious and it provided a funding plan which looked feasible. There is no reason why any of these matters have to be compromised by a change in ownership. However, I do accept that there is a possibility that this might occur. It is also a real issue in the mind of the public.

"In the circumstances I have proposed changing Article 8 quite fundamentally. What I have proposed is that the licence continue to be personal to Esat Digifone, the restriction on transfers and assignments of interest in the licence and assets remain and that the Minister include in the licence provisions which will allow him add additional conditions to the licence should Esat Digifone wish to issue shares to the public or by private placing and give to the Minister the right to veto any proposal to issue shares or transfer the ownership of existing shares.

However, the right must be prescribed and I have done this by only allowing the Minister to act if" and I think there should be a "he" there "if he forms the opinion

that the proposals will be to the detriment or will compromise all or any of the matters which the Directive indicates are proper concerns for the Minister when issuing licences. I find it difficult to imagine circumstances where the Minister will see a proposed issuing of shares and/or change of ownership which justifies saying he will not consent to it. However, I think it is prudent to try and maintain such right. It will certainly allow the Minister to say that he has taken appropriate steps to protect the Public Interest in this regard.

"I am dubious as to whether or not the Minister can demand that the administration and management of the business be carried on in premises in the State. However, I can understand why this has been included.

"In relation to Article 15 I have suggested an amendment. It is largely cosmetic.

"Article 17 holds the licensee to the provision of a service which develops in accordance with the promises he made in his submission at competition stage. I am concerned that the penalties that are imposed on failure to deliver as promised are likely to be subject to attack falling outside what the Minister can do, given the recent Commission Directive. However, I understand why they are being imposed and simply flag these as provisions in the licence which could be subject to attack.

"As I have already stated, I am gravely concerned about the terms of Article 18. I am aware that Mr. O'Brien promised

such a windfall gains provision in his submission and should be held to his promise, but I am equally satisfied such an arrangement falls well outside what is permitted under the recent Commission Directive. I have left it in the terms as drafted but again point out that, if challenged, it will be in difficulty."

Then it goes on:

"In respect of the proposed Statutory Instrument, I have caused this to be retyped, and where I have made amendments I have over-lined the sections in question. Essentially since the implementation of Commission Directive 96/2/EC which amends Directive 90/388/EEC, the State is obliged to offer available radio frequencies to prospective communication service providers. The frequencies are to be licensed by open, non-discriminatory and transparent procedures.

"The proposed Statutory Instrument amends Section 111 of the Act by inserting two new subsections (2B) and (2C) for the provision of mobile and personal communications services, and mobile and personal communications systems is subject to licence by the Minister. What the Statutory Instrument does not do is to provide a mechanism by which the Minister will alert people to the available frequencies or provide the practical arrangements which need to be put in place for the processing of applications by persons who want to operate such services or systems. It would be prudent for the Department to consider how this is to be

done because otherwise there will be complaints by persons who would like to operate such a scheme that are not being advised as to the availability of frequencies and have not been provided with a procedure whereby applications can be submitted. This will not stop people making applications but it does call into question how open, non-discriminatory and transparent the procedures really are. Frankly, I do not know enough about the availability of frequencies to make any sensible suggestions at this stage. However, it is something that needs to be considered urgently and be the subject matter of a set of regulations.

"The ability of the State to limit the number of licences for mobile and personal communications systems is restricted to certain specified non-economic reasons in the Public Interest and the lack of availability of frequency spectrum. Restrictions have to be proportionate to the aim to be achieved. It is also clear that the Directive seeks to outlaw restrictions on operators in respect of the establishment of their own infrastructure, the use of infrastructure provided by third parties and the sharing of infrastructure and other facilities and sites.

Interconnection must be permitted and restrictions on interconnection lifted. Finally, access to the public network must be guaranteed. Obviously interconnection requires conditions but these must be based on objective criteria which are transparent, non-discriminatory and compatible with the principle of proportionality. Clearly

the Department should think about setting out a set of interconnection conditions of general application to allow prospective licence applicants know what lies in store for them. Rather than repeat the amendments I have made to the Statutory Instrument, I suggest you take time to consider the draft I return and I can deal with any questions that arise.

"Nothing further occurs at present."

And it's dated the 9th of May, 1996.

Now, Mr. Towey, we will look at this opinion and the covering letter and indeed the letter from the Attorney General in some detail, but before we do that, you have stated in your Memorandum of Intended Evidence that when you read and saw that opinion, you had no doubt at all in your mind that it covered the ownership conformity issue; isn't that right?

A. Yes, I saw this as composite advice that covered all of the remaining issues relating to licensing Digifone.

Q. So you saw it as covering all the remaining issues?

A. Yes, all of the issues.

Q. Just bear with me for a moment. Now, you were awaiting advice on three matters at that stage. You had sought advice on four. You had received very prompt advice on meeting with the disappointed applicants. What you were seeking advice on was the drafting of the Statutory Instrument, the terms of the licence and the ownership conformity issue?

A. Yes.

Q. And you saw this covering letter and this opinion as covering all of those?

A. Yes.

Q. Okay. Can you point out to me, because I want to be absolutely clear as we go through these documents, what passages of either the covering letter or the opinion itself you considered addressed the ownership conformity issue?

A. Well, I mean, I can't say at this remove exactly what consideration I gave to it then.

Q. All right. Well, let's look at it now, then. You can't say what consideration you gave to it then?

A. No, I don't recall in detail.

Q. Do you recall receiving the opinion?

A. I certainly recall we had the opinion, yes.

Q. Do you recall reading the opinion?

A. Not particularly.

Q. You don't. Is it possible that you didn't read the opinion at all and that you just assumed that it dealt with all matters?

A. No, it's very unlikely.

Q. You can't say now what passages from this opinion or this covering letter led you to your view at the time that it covered all remaining and outstanding issues, is that it?

A. What I am saying is well, that my understanding was that this covered all of the issues in the sense that I had no



feeling that there were further issues that needed to be raised with the legal advisors.

Q. Well, looking at it now with the benefit of hindsight, can you point to me, so that we know where we are coming from in analysing it, what passages of it you now believe address the ownership conformity issue?

A. Well, in my Statement of Intended Evidence, I think I referred to the fact that Mr. Nesbitt had a more liberal view in relation to ownership than I would have had, and, in particular, that the Minister's reasons for restricting ownership would have to be related to issues relating to the provision of the service. So it was that kind of view that it was that view that the Minister could only exercise indirect control as a starting point, if you like, would have to be that this would have implications for service provision. That was in contrast with my view, which would have been, quite simply, well, we can put in the licence what we want really about ownership restrictions. So I do recall having the view that Mr. Nesbitt had a much more liberal approach to this, so that, to some extent, the questions of detail were somewhat overtaken by that legal view.

Now, I don't know, as I have said in my Statement of Intended Evidence, exactly how that view was communicated to me, whether that was a view that Mr. Nesbitt expressed in a meeting or whether it was before or following this particular opinion. But I know that that view was clearly

expressed.

Q. We can go through all of that. But just at the moment, looking at this opinion now, what I want you to do is point to me what you consider now, at this point, at this stage, having reviewed it, what passages, in your view, constitute the furnishing of an opinion on the ownership conformity issue, if any?

MR. O'DONNELL: Sir, I wonder is that appropriate given that he was asked to recall what was his view of the opinion then and he has given an answer to that. I just wonder how useful it is to ask him now what he sees now as being important now, whereas what you are looking into, I assume, Chairman, is what happened then and what his state of mind was then.

CHAIRMAN: Well, he's obviously been entitled, Mr. O'Donnell, to refresh his memory of events.

MR. O'DONNELL: Oh, absolutely. Sorry, I don't quarrel with that at all, but I am just saying how useful it is to ask him now what he sees is being important now or relevant now, given that I presume what you are looking at, Chairman, is what was his state of mind then, how was he affected by the advices he received back in 1996, and I am not trying to stop it, but I am just wondering the usefulness of saying to him, "what do you think now might have been relevant then?" If he says, "I just thought it was all it answered my questions." What's the point in asking him what he thinks now?

CHAIRMAN: Well, I think it may be helpful, just, assuming that he has had the opportunity of saying what bits seemed to particularly address the question of change of personnel.

MR. O'DONNELL: The problem is that, I suppose, he said that he is not able to identify any particular bits that he recalls striking him then. I am just wondering the usefulness of asking him what strikes him now. But it's a matter for you.

MS. O'BRIEN: We can go through the letter and the opinion, Mr. Towey, maybe, sir, after lunch.

CHAIRMAN: Well, it's probably now, at five to one, a proper time to rise. We will resume matters at five past two.

THE TRIBUNAL ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF EXAMINATION OF FINTAN TOWEY BY MS. O'BRIEN  
AS FOLLOWS:

Q. MS. O'BRIEN: Mr. Towey, thank you very much. Now, what I want to do, Mr. Towey, is just take you through the covering letter and the opinion again, because as I said before lunch, in your Memorandum you have said that you had no question in your mind as to what the position was in the light of the Memorandum, and also, you stated in your Memorandum that you recalled a discussion with Mr. Brennan in relation to the opinion of the 9th of May, where Mr. Brennan indicated that he was quite satisfied that it

addressed the issue.

The other thing I want to make clear, as well, is that the Tribunal fully recognises that whilst the Attorney General's letter was directed for your attention, that this was not an opinion that was being sent to you only. This was an opinion that was being made available to the Department and it's an opinion which you provided to your superordinate officials?

A. Yes.

Q. Now, if we just go to Mr. Nesbitt's covering letter. In the first paragraph of that, he says that he encloses his suggested amendments to the Esat licence and his suggested amendments to the Statutory Instrument, and some general advices. Do you see that? Sorry, it's at Book 85, flag H, if that's of assistance to you.

A. Yes. Thank you.

Q. So, in the first paragraph, he is defining what he is sending to the Office of the Attorney General: The draft Esat licence, his suggested amendments to the Statutory Instrument and some general advices, do you see that?

A. Yes.

Q. Now, in the second paragraph, he goes on to refer to his views regarding the complaint made to the Commission under separate cover. Now, just before I proceed, I want to pause there for a moment. Now, the complaint to the Commission was a complaint that had been lodged by Persona on the 23rd of May; isn't that right?

A. Yes, I think so.

Q. And Persona had written to the Department informing the Department of its complaint and requesting the Department not to issue the licence to Esat Digifone until the complaint was dealt with by the Commission; isn't that right?

A. I think that's right, yes.

Q. And, in fact, initially, correct me if I am wrong, I don't think I am, the Commission advised the Department that it might be appropriate and sensible not, in fact, to proceed to issue the licence until the Commission had had an opportunity of looking at the complaint; isn't that right?

A. Sorry, I am not sure where that view was expressed.

Q. Okay. I can refer you to it, although I don't think an enormous amount turns on it.

Now, if I can refer, then, to Book 44, 205, draft report of the meeting with the European Commission, 2nd of May, 1996.

A. Yes, I have the report.

Q. In fact, you were at that meeting, certainly you are on the list of attendees. Do you see that? At paragraph 1:

"Attendance and Purpose:

"Mr. M. Brennan, Mr. A. Hodson, Mr. F. Towey and Ms. Nic Lochlainn from the Department, with Dr. Herbert Ungerer and Mr. Christian Hospier of the Competition Directorate of the European Commission on the 2nd of May, 1996. The primary purpose of the meeting was to discuss Ireland's draft submission to the Commission seeking a derogation," and so

forth.

"Persona complaint regarding the GSM competition, the Commission's position on routers, the implications of the mobile directive in relation to the licensing of further mobile operations and the draft postal directive were also briefly discussed."

I am not going to open it all, but if I can refer you to the fourth page of that note, paragraph 8, under the heading "Complaint regarding the GSM competition process."

"The Commission indicated that it was premature to give their views on the Commission's jurisdiction regarding the complaint or the time-frame within which it would be dealt.

The complaint had only been received on draft form the previous week. A formal copy was provided at the end of the meeting. The Commission envisaged that the Directive dealing with public procurement may have a central role in view of the parallels between procurement and the award of licence concessions. On the question of signing the licence, the Commission offered the informal view that the licence should not be signed pending the Commission's response to the complaint. This view was motivated by the fact that the Commission's response could theoretically unwind the process and, in this event, the award of a licence would be a complicating factor. The Commission officials strongly urged, however, that the Minister contact Commissioner van Miert regarding his intentions as soon as possible."

Do you see that?

A. Yes.

Q. And, in fact, there was contact between the Minister and Commissioner van Miert, and we know ultimately that on the 8th of May, there was a meeting in Brussels and the Commission confirmed that they wouldn't be granting any interim relief to Persona restraining the grant of the licence pending the consideration of the complaint; isn't that right?

A. I think that's right.

Q. So I just wanted to place that in context. So going back then to paragraph 2:

"I am sending my views on the complaint made to the Commission under separate cover. However, I remain of the view that the Minister should not drag his feet issuing the licence. If there was to be litigation, so be it, but delaying does not achieve any end. Before issuing the licence, you should make it clear to Persona's solicitors that he is not holding his hand on the issue of the licence. The form of the draft letter has already been discussed with you. My reasoning in this regard is that the Minister is committed to grant a licence, he is now in between two competing interests. One, Esat, who say they are entitled to the licence, and the other, Persona, who are indicating that the licence should not issue. Delay issuing the licence would clearly damage Esat. If Persona wished to stop Esat getting the licence, they should be

required to take appropriate legal action to restrain the issue. They will then be required to give undertakings to the parties affected, particularly Esat. This will concentrate their minds, particularly in circumstances where the Commission are likely to be making unsympathetic noises in relation to their complaint."

And you see that advice there?

A. Yes.

Q. And that advice was that the Minister shouldn't drag his or shouldn't stall in issuing the licence in the face of the complaint made by Persona and in the face of Persona's request that he not do so pending the resolution of their complaint; isn't that right?

A. That's right, yeah.

Q. And that, in fact, echoed earlier advice that you had received from Mr. Nesbitt, didn't it?

A. Well, I can't say for certain, but, I mean

Q. I can refer you to it if needs be. It's in a memo of the 3rd of May that you had received that advice, and we know also, and it's referred to in that letter, that Mr. Nesbitt had, in fact, drafted the responding letter which the Department ultimately sent to Persona notifying Persona that the Department intended to proceed to issue the licence and effectively putting it up to them to look for an injunction if they wanted to; isn't that right?

A. I think so. I mean, I didn't clearly know then, but obviously the senior counsel in question here is a very



successful businessman and I do recall that he always brought a very kind of pragmatic, go-ahead approach to these kind of things which might be more so than an ordinary senior counsel that might look at it in the basic legal terms.

Q. What's quite clear, in any event, is the advice that he was giving in the second paragraph of that letter, was in the face of the Persona complaint and the response that, in his view, the Department should make to that complaint; isn't that right?

A. Yeah.

Q. Then the final paragraph: "There is one final matter that is important. It occurred to me that the Minister may wish to impose on the persons backing Esat Digifone an obligation to stay with their commitment to back Esat Digifone for a given period, say 3 to 5 years. It could be possible to include in the licence a condition that the licence shall not be actioned until an appropriately worded commitment is to hand. I do not know enough about the terms of the application to know what sort of commitment you could seek or from whom. However, it is a matter worth considering and, in my opinion, a sustainable condition to attach to the granting of a licence to carry on an activity which by definition means that somebody else will be deprived of the opportunity to carry on that activity."

And that final paragraph simply addresses in, as you indicated yourself, a fairly commercial way, something that

the Minister might consider putting in the licence; isn't that right?

A. I think so, yes. I don't particularly recall considering it at the time.

Q. Okay. Let's go on and look at the opinion itself, as I said headed "Advices".

Now, the first paragraph of that states:

"I have now had the opportunity of considering the complicated issues which arise relating to the introduction of a Statutory Instrument to take into account the effects of Commission Directive 96/2/EC and to settling the terms of the draft 'Esat Digifone telecommunications licence' which the Minister wishes to issue."

You see that paragraph there?

A. Yeah.

Q. That's, really, a kind of a preamble to the advices given, isn't it?

A. I think so, yeah.

Q. And it defines what senior counsel is addressing in the advices, doesn't it?

A. Well, I suppose. I am not sure exactly what his intention was, but certainly, on the face of it, it means that he is moving on towards settling the regulations and the licence, which implies that he feels that's an appropriate step, which would suggest there is no major impediment to moving to that stage.

Q. Well, now, hold on a minute, Mr. Towey, let's not go too

far at the moment. Let's see what those sentences say.

"I have now had the opportunity of considering the complicated issues which arise relating to the introduction of a Statutory Instrument to take into account the effects of the Commission Directive and to settling the terms of the draft Esat Digifone telecommunications licence which the Minister wishes to issue."

And I have to suggest to you that what that says is that:

"I have now had a chance to look at the draft Statutory Instrument and I have now had an opportunity to consider the draft licence." Isn't that what it says?

A. I mean, it says what it says. I don't see any point in me saying the same thing in a different it says

Q. Do you agree that's what it says?

A. I agree it says what it says.

Q. We then have I just want you to look at the structure of the opinion then for a moment. We then have a subheading:

"The draft licence." You see that, don't you?

A. I do, yes.

Q. Now, in fact, there is only one subheading in the document, but I don't know if you'd agree with me, but it does seem to me that there is a natural break, if you like, in the material on the third page of the document. If you just go to that. If you go to the third paragraph there, it says:

"In respect of the proposed Statutory Instrument," and would you agree with me that, at that point, senior counsel seems to be moving on to consider a new topic, which was

the proposed Statutory Instrument?

A. I can see what you are saying.

Q. Okay. If we go back, then, to the earlier section, it says

"The draft licence".

In the first paragraph, it says:

"I have dealt with the draft licence by taking the draft of the 2nd of May, 1996, and indicating where I think there should be amendments. The balance of the document can remain in its current form. Attached to these advices are the amendments I suggest. You should also include in the licence the subheadings that exist in the Articles. I did not trouble to repeat them in the amendments that I have suggested."

So, in that paragraph, he is explaining to you what he has done in relation to the draft licence, which was dated the 2nd of May; isn't that right?

A. I suppose.

Q. He then goes on to state: "The terms of the amendments I have suggested to Article 1, 2, 4 and 5 should be self-explanatory."

Now, that's a very clear statement as well, isn't it?

A. Yes.

Q. He is effectively saying, "the amendments to Articles 1, 2, 4 and 5 are self-explanatory and I don't need to go into them further," isn't that it?

A. It seems okay to me.

Q. Okay. He then goes on, and he refers to the amendments

which he suggested to Article 8, which are more substantial. Do you see that?

A. Yes.

Q. And if I can just put that to one side for the moment and take you to the bottom of the second page. He then refers to Article 15 and the amendments he has made to that, which are largely cosmetic; isn't that right?

A. Yes.

Q. And then if we go over the page again, to the third page, he deals with Article 17, which holds the licensee to the provision of a service which develops in accordance with the promises he made in his submission at competition stage. Do you see that?

A. Yes.

Q. And he is commenting on that, isn't he? He is commenting on the amendments that he has made to paragraph [sic] 17?

A. Yes.

Q. To Article 17. And, in fact, that's the Article that dealt with the performance guarantees in the evaluation process, isn't it?

A. Yes, I think that's correct.

Q. And then, finally, he deals with the amendments he has made to Article 18 and he explains some concerns that he has over them; isn't that right?

A. Yes.

Q. So I have to suggest to you and I should say that, after that, he then moves on to the separate topic, which was the

proposed Statutory Instrument, do you see that?

A. I see that, yes.

Q. So in the structure of that first portion of the opinion, what he has dealt with is he has explained what he has done with the draft licence, he has indicated to you that the amendments he has made to Articles 1, 2, 4 and 5 are self-explanatory and then he has gone on to comment on the amendments he has made to Articles which are not self-explanatory and which require some explanation and comment; isn't that right?

A. Okay, yes.

Q. Now, let's go back to the amendments I have suggested to Article 8 and let's bear in mind, again, we opened Article 8 in the form in which Ms. Finn had forwarded to the Attorney General's Office on the 25th of March, 1996, and we also referred to the updated revised draft of Article 8 of the 24th of April, which I think took into account some of the concerns that Esat Digifone had as to the impact that the Article 8 might have in terms of its ability to create securities and mortgages, and so forth?

A. Yeah.

Q. Now, the material on Article 8 is comprised in four paragraphs; isn't that right? You have the first paragraph beginning at the bottom of page 1?

A. Yeah, that seems to be the case.

Q. If you go over the page, there is another three paragraphs after that; isn't that right? Let's look at the first

paragraph first:

"The amendments I have suggested to Article 8 are more substantial. Article 8 imposes conditions material to the ownership of the licence and the management of the licence service, most particularly the ownership of shares in the licensee company. I view these matters as being particularly sensitive and an area where the Minister's hand is substantially tied."

And that echoes the advice that you had received for some time from Mr. Nesbitt, doesn't it?

A. Which advice do you mean?

Q. The advice that you have spoken about, that Mr. Nesbitt had a certain liberal view?

A. Yes, yes.

Q. It then goes on to say: "The Minister agreed to give the licence in question prior to the introduction of Commission Directive 96/2/EC. However, as a matter of law, I am forced to conclude that if the licence document includes terms and conditions which are not sustainable under the Directive, and licensee in my opinion is free to apply to the courts to have such

MR. O'DONNELL: It should be "... under the Directive, the licensee, in my opinion is free" I think it must read that.

MS. O'BRIEN: I think it must be, yes. "...and the licensee in my opinion is free to apply to the courts to have such non-conforming provisions struck down."

And there, Mr. Nesbitt is commenting on the impact of Directive 96/2 on the grant of this licence; isn't that right?

A. Yes.

Q. And effectively what he is saying is that even though the Minister had run the competition, or the competition had been run by the Department and, in effect, had been won prior to the coming into force of the Directive, nonetheless, in granting the licence, the Minister and the licence itself would have to comply with the provisions of the Directive; isn't that right?

A. That's correct.

Q. And he is saying that, because of that, that any unnecessary restriction on the transferability of ownership would be open to challenge under the Directive; isn't that right?

A. That's correct, yeah.

Q. He then goes on to say:

"If one analyses why the Minister is concerned about the ownership of shares in the licensee, the only legitimate concern he can have is that if there is a change of ownership, the service that has to be provided will in some way be compromised."

And that all relates to Article 8 and the change of ownership, doesn't it?

A. When you say "the change of ownership," which one do you mean? You mean all of the change of ownership issues that



the senior counsel had considered?

Q. I mean, we are talking about Article 8.

A. Well, all of the change of ownership issues that counsel had considered.

Q. Can you just tell me, Mr. Towey, what could Article 8 have to do with any other ownership issues?

A. Well, my understanding is that this was composite advice produced by senior counsel in a response to the various ownership issues that had been raised with him.

Q. No, what I am asking you to do is just look at the words at the moment. I know what your mindset was and I understand what your perspective was, but I am just asking you to look at the words of the opinion at the moment, if you wouldn't mind.

A. Can I just ask to what purpose?

Q. Because I am trying to ascertain what paragraphs or what portions it was of this opinion which confirmed you and left you with no question in your mind regarding the ownership conformity issue which had arisen in your mind on receipt of the letter of the 17th of April, and I am trying to ascertain what portion of the opinion you believed or you now believe addressed that issue?

A. Well, I have said to you that I don't recall looking at it in detail at the time, so I can't tell you specifically.

But what I can tell you is that, on the basis of the advice that is given here in relation to ownership, it was clear to me that the intention of counsel was that this

encapsulated all of the ownership issues that needed to be addressed. I mean, at the end of the day, settling the terms of Article 8 would be a rather meaningless exercise if there was a far more fundamental issue in relation to ownership that needed to be addressed.

Q. What I am asking you to look at now is what's said in this document.

MR. O'DONNELL: Chairman, he is now being cross-examined.

I do have to intervene at this stage because he has now said, he has given his view about what the opinion says and it's now being put to him that if you look at the words, it means something different; that is cross-examination by any other by any other name.

CHAIRMAN: I think it's examination in the context of a tribunal, Mr. O'Donnell, to seek to elicit, if there was a sudden change here, that suddenly one addressed the question of the changes that Ms. Finn had drawn to departmental attention.

MR. O'DONNELL: He has given his answer that he said I don't object to the Tribunal trying to inquire into what his state of mind was, but he has given his answer as to what it was. And what is really being put to him now, with respect, Chairman, is that, "well, how could you have thought that, given that these words appear to say this?" And he has given his answer. I am conscious of not wishing to interrupt every time, but he has given his answer on a number of occasions, and the more he is pressed on his

answer, it seems to me, it does become more like cross-examination. I accept that there is a slightly different nature of examination in a tribunal to record, but it does look like what's being put to him now is that the opinion couldn't have been understood by you to say that. He has said what he has said.

CHAIRMAN: Well, it's something I am interested in, Mr. Towey, just because there does seem to be a fair amount of material given to you by Mr. Nesbitt on the question of Article 8 on subsequent disposals after the licence has been issued, and I am somewhat concerned to see what portion of this, early in page 2, induced you to believe that the matter of the changes that Ms. Finn had notified you of coming from Mr. O'Connell, was now specifically being addressed by Mr. Nesbitt?

A. Well, clearly, Mr. Nesbitt had seen all of the documents, they had all been given to him, and there were clearly contacts with Mr. Nesbitt and with the Attorney General's Office, and it was clearly known that the intention was to award this licence and that this was a process that we were undertaking with a view to that end.

Now, clearly, in the event that there were issues that were an impediment to that end, a different course may have to have been taken. But in the event, the advice that was given made clear that there were no ownership issues that created a difficulty. Now, certainly, while I understand the point that you make, Chairman, in relation to future

disposals, etc., I would not at the time have particularly differentiated between a change of ownership that might take place the day before the licence was granted as distinct from the day after the licence was granted. In practical terms, I wouldn't have seen that as being a very significant or practical distinction to make. And my understanding, clearly, was that Mr. Nesbitt had looked at all of these issues. He had considered both the existing change of ownership and future possible changes of ownership, because I think Digifone were in touch about the possibility of a side letter accompanying the licence at that stage dealing with some potential future ownership changes.

So all of these and, indeed, Mr. Nesbitt gave advice in relation to that letter. So all of these ownership issues had been put to senior counsel, had been considered, and this advice was taken to be his view in relation to how we should proceed with the draft licence in that wide context.

Q. MS. O'BRIEN: Mr. Towey, all I am trying to do is to test, on the basis of what's in this opinion, the credibility of your statement in your Memorandum of Intended Evidence that there was no question in your mind, having seen this opinion, what the position was, and that is all I am trying to do. And you must bear in mind that the Tribunal has been told that its working interpretation regarding the scope of this opinion was wrong, and I am also exploring that with you. So there are two matters that I am

exploring with you.

Firstly, your evidence that you had no question in your mind at all, having seen this opinion, as to what the position was, and I am trying to test what it was in the opinion that drew you to that conclusion, and secondly, I am looking at this opinion on the basis that the Tribunal has been told by the Department that its working interpretation was wrong and that this opinion addressed the matter of ownership conformity and was not confined to Article 8. So just that you understand.

A. Well, I am telling you what my interpretation was.

Q. Yes.

A. What I understood also to be Mr. Brennan's interpretation.

Q. Yes.

A. What I understood to be the interpretation of the Attorney General's Office.

Q. Yes.

A. And what I understand now is described by Mr. Nesbitt as the correct interpretation of his intention.

Q. Can we go back now to the opinion itself and read it, and we'll go back to the second paragraph. We have already established that, in the first paragraph on Article 8, that Mr. Nesbitt was echoing, again, his concerns about the extent to which the Minister could fetter the entitlement of the shareholders in Esat Digifone to deal with their shares, and we have also dealt with the fact that he addressed, in that paragraph, the application of the

Directive which came into force in February of 1996.

Now, having said that, and bear in mind, also, as you have agreed, that in these paragraphs he was commenting on the amendments which he had made to Article 8.

He goes on to say:

"If one analyses why the Minister is concerned about the ownership of shares in the licensee, the only legitimate concern he can have is that if there is a change of ownership, the service that has to be provided will in some way be compromised."

Do you see that?

A. Yes.

Q. Then it goes on:

"I do not think that it is tenable to suggest that the licensee has been awarded the licence because of the parties who own the licence."

And he goes on:

"Rather, the licensee has been awarded the licence because its plans and proposals were the most meritorious and it provided a funding plan which looked feasible. There is no reason why any of these matters have to be compromised by a change in ownership. However, I do accept that there is a possibility that this might occur. It is also a real issue in the mind of the public."

That paragraph ends there.

And then he goes on to say in the next paragraph:

"In the circumstances, I have proposed changing Article 8

quite fundamentally."

Now, isn't it clear from what he said there that everything in that second paragraph that I have read out to you leads to explaining the proposed changes that he has made to Article 8?

A. Well, I don't know that it does.

Q. Okay.

A. I mean, if you take the last sentence of the previous paragraph, I mean, it is not particularly clear what senior counsel means by that sentence. But on the assumption that he doesn't know the public mind, I assume that he can only be reacting to some of the media coverage in relation to change of ownership issues which had already been speculated upon in the media, and which were the subject matter of the material that had been given to him for the purposes of producing this opinion.

Q. He does say before that sentence: "However, I do accept that there is a possibility that this might occur."

Doesn't that clearly signify that what he is talking about is something that will occur in the future, as opposed to something that has occurred in the past?

A. Well, I don't know that that is the case.

Q. I see.

A. I mean, it might occur in the context of any change of ownership.

Q. Now, Mr. Towey, we know that in your letter of the 24th of April and in your meeting with the Attorney General's

Office, you had very carefully indicated the advice and the opinion that the Department was seeking, hadn't you?

A. Yes.

Q. You had reiterated that what the requirement what the Department required was an opinion on the change of ownership and whether that was in conformity with the ownership information that had been provided in the application; isn't that right?

A. Yes.

Q. You provided three documents: you provided an extract from the management section of the Esat Digifone application; you provided a copy of Mr. O'Connell's letter of the 17th of April; and you provided a copy of Ms. Finn's memorandum that she had prepared on the 16th of April; isn't that right?

A. Yes, yes.

Q. And what you had been concerned about were two matters: Firstly, the configuration of 37.5:37.5:25; and secondly, the introduction of IIU as the minority shareholder; isn't that right?

A. Yes.

Q. Now, can you point to me anywhere in this document headed "Advices," in the letter from the Attorney General's Office under which this document and Mr. Nesbitt's covering letter were furnished, or in Mr. Nesbitt's covering letter, where there is any deference to share configuration, where there is any reference to 37.5:37.5:25, where there is any



reference to 40:40:20, where there is any reference to the ownership details of the proposed licensee contained in the Esat Digifone application, or there is any reference at all to the information contained in Mr. O'Connell's letter of the 17th of April, or, for that matter, the question that you had asked?

A. When I look at the letter now, I am not sure that I see a direct reference to those things that you mention.

Q. Well, apart from what you have said in relation to that sentence there, "It is also a real issue in the mind of the public," do you agree now that that issue was not addressed in either the letter or the advices?

A. That which issue?

Q. The issue of ownership conformity?

A. Well, my understanding is that this paragraph contains what I understood to be senior counsel's view in relation to the issue of the Minister having concerns about changes of ownership. So it may be that he had examined the specific ownership documents that we had sent, and had essentially, or, in effect, moved his thinking on towards focusing on the next step, which was the licence. And as I have said, it was a feature of the advices given by Mr. Nesbitt that it was very pragmatic, commercially-oriented move ahead, and I think it's in that kind of context that we would have taken this.

Q. And in looking at those two or three sentences referred to in that second paragraph on the commentary and Article 8,

is that what you had envisaged when you had gone to the trouble, on the 22nd of April, of meeting with the officials of the Attorney General, and when you carefully put together all of those documents and when you had written again on the 4th of April, did you envisage three sentences dealing, as you put it, in a pragmatic way with what the position might be?

A. Well, I don't know if I would have particularly foreseen that. I think I had anticipated that there would be a response which would reflect what had been my own starting point, that we had the wherewithal to exercise tight control over ownership. So that is kind of the broad line that I would have expected in response. But, in response, what I found was that there was a different view being expressed, a different direction taken.

Q. Just focusing for a moment on those sentences. "I do not think it is tenable to suggest that the licensee has been awarded the licence because of the parties who own the licensee. Rather, the licensee has been awarded the licence because its plans and proposals were the most meritorious and it provided a funding plan which looked feasible." It's those two sentences there?

A. Yes.

Q. Now, from your involvement and your knowledge of the evaluation process, would you have considered that to be an accurate statement of what the entire evaluation process involved?

A. Well, I am not sure, I don't believe I ever looked at those sentences in that particular way, but I see the point of emphasis that is being made by senior counsel is that the starting point could not be there is a change of ownership, that's a problem. The starting point had to be there is some problem here in relation to the delivery of the service as foreseen in the application. So what I would have been struck by is, I think, this was a change in direction.

Q. Is that your view now or was that your view at the time?

A. My view at the time was certainly that the advice indicated a far more liberal view of ownership than I would have had.

Q. But, Mr. Towey, it's a far more liberal view of ownership in terms of Article 8 and the position going forward after the licence was issued, isn't that as clear as day, looking at what's stated in the opinion?

MR. O'DONNELL: This is cross-examination, Judge Chairman. I am sorry for calling you 'Judge', but I'm forced into it because I feel I am back in an adversarial position. That is cross-examination. He has given his answer three or four different times

MS. O'BRIEN: I am perfectly entitled to cross-examine this witness. This is exactly what an inquiry is all about.

MR. O'DONNELL: Well, it's supposed to be an inquiry. It is not supposed to be adversarial. It is turning, I don't know whether you call it inquisition, but it is certainly, now, cross-examination of a witness and hammering him again

and again until she gets the answer that she is looking for. And I am sorry to put it in those terms, Chairman, but I don't think it's an appropriate way of dealing with this witness. He has given his answer. If the Tribunal decides to call Mr. Nesbitt, obviously these matters can be put to him.

CHAIRMAN: It's something I'll have to know about, Mr. O'Donnell, because this issue has arisen, and in this particular paragraph, Mr. Towey, a statement is made by Mr. Nesbitt, but, I mean, you will recall yourself that there were rules about having to disclose membership of consortia, and I don't think you'd be suggesting that one could have wholesale substitution of Telenor by British Telecom or perhaps by Mr. O'Brien, Communicorp by some other Irish-based Telecom company without any demur or inquiry?

A. No, I agree. And, I mean, I think the view would have very clearly well, certainly, my own instinct would have towards having tight control of ownership, but, within the scope of this opinion, I can understand the logic of the position, that any particular change of ownership would have to lead to some concerns that there might be some compromise in service provision.

Q. MS. O'BRIEN: Mr. Towey, do you agree with me that Article 8 was all to do with the licence?

A. I understand the interpretation that you feel is appropriate in relation to the advice that was given here.

But in the context of the manner in which this advice was received and the discussions that had gone on beforehand, the possibility of other discussions that I said that I don't recall, I think it is incredible to it would be incredible to take the view that this advice had been constructed without reference to those ownership changes that had been very specifically put to the Attorney General's Office and senior counsel.

Q. Well, can you agree with me that, looking at your letter of the 24th of April and looking at this opinion of the 9th of May, that any person who didn't have the knowledge that you have, would conclude that it didn't answer the question that you had asked?

A. Well, I think the essential point of the legal position taken by Mr. Nesbitt was that we were focusing we weren't focusing on the correct questions and that the correct issue to focus on was the service that was to be provided, the service that had been contracted for, if you like, in the application that was made.

Q. So were you satisfied, therefore, after you saw this, that you had an absolutely rock-solid opinion that you were entitled to accept the ownership information that was contained in the letter of the 17th of April?

A. I was satisfied that there were no issues that needed to be pursued further.

Q. What does that mean? Does that mean that you were satisfied that you had an opinion on it, Mr. Towey?

A. Yes, I was satisfied that this was a line under the legal assessment that was going hand in hand with the financial assessment of the proposed licensee.

Q. And that this was an opinion that you could rely on?

A. Yes.

Q. Now, can I just refer you back briefly to some portions of your Memorandum, and again, this is really in terms of understanding what your perspective was.

You say at paragraph 2.1 that you recall being of the view that Richard Nesbitt, SC, did not believe that any wish which the Department may have to tightly control ownership changes could be sustained. You say that you cannot say whether this view arose from the opinion of the 9th of May or earlier or later meetings. You believe Mr. Nesbitt also recalls meetings where this view was put by him.

And this was your understanding of Mr. Nesbitt's overall perspective on the ownership restrictions that could properly be inserted in the licence; is that right?

A. Well, that was my view on his view of the ownership issue generally.

Q. Yes. Well, now, hold on a minute, Mr. Towey, we need to take this very, very slowly.

MR. O'DONNELL: He has given his answer.

MS. O'BRIEN: Let's take it very slowly. Mr. Nesbitt was never involved in giving you any advice on the evaluation process, other than the capping of the licence fee; isn't that right?

A. And he advised on the draft licence.

Q. No, I am talking about the evaluation process, the evaluation process that started on the 2nd of March when you issued the RFP and ended on the 25th October when you announced that Esat Digifone had won the licence?

A. He gave advice during that time in relation to the draft licence.

Q. Yes, I am not talking about the draft licence at the moment; I am talking about the evaluation process.

A. On the evaluation

Q. Yes.

A. No, I don't believe he advised on that.

Q. No. The only matter he advised on in relation to the evaluation process itself, from what we can see, is that he advised on the capping of the licence following the intervention of the European Commission; isn't that right?

A. Yes.

Q. Other than that, he gave no advice at all?

A. I think that's correct, yes.

Q. Now, the first advice we can see, and we can't refer to it, came in, I think, August or September of 1995 when you consulted the Attorney General's Office as to what conditions the Minister could impose on the licensee and could insert in the licence; isn't that right?

A. Yes.

Q. And wasn't it at that stage that Mr. Nesbitt first gave you the advice that, in his view, the Minister had to be very

careful about the extent to which he would restrict dealings by the licensee in his shares; isn't that right?

A. I think that's correct, yes.

Q. And that advice was being given solely in relation to what was going to be in the proposed licence; isn't that right?

A. That's right, yes.

Q. It had absolutely nothing to do with the evaluation process?

A. I think that's right, yes.

Q. He gave no advice, did he, on the RFP document?

A. I don't believe so, no.

Q. He gave no advice on paragraph 3 of the RFP document, which required applicants to furnish details of the ownership of the proposed licensee, did he?

A. I don't believe he did.

Q. He gave no advice on how you approached the evaluation, did he?

A. No.

Q. He gave no advice on how you should determine the financial capability of the proposed licensee, having regard to the proposed owners of that licensee, did he?

A. No.

Q. The first piece of advice he gave on ownership was in September of 1995, and that advice related solely to what was going to go into the licence once it was issued; isn't that right?

A. Correct, yes.



Q. You didn't consult Mr. Nesbitt again in relation to the draft licence until April; isn't that right?

A. I think that's right, yes.

Q. So there was no opportunity between September and April when he could have given any further view on ownership or what should be in the draft licence; isn't that right?

A. I think that's correct, yes.

Q. You did consult him in January of 1996, isn't that right, on another matter?

A. Remind me what that was again.

Q. I think that was about disclosing information about unsuccessful applicants.

A. I'll take your word on that, yeah.

Q. So what we have is, we have one instance of advice being given in September of 1995 on the extent to which the Minister could restrict dealings in shares once the licence had been issued, and we then had Mr. Nesbitt's advice from April; isn't that right?

A. I think so, yes.

Q. And both instances of advice related to Article 8; isn't that right?

A. Well, we have been through it. As I say, the advice given in May wasn't interpreted as being specific, or wholly specific to Article 8.

Q. Now, at paragraph 2 you say: "I also recall a discussion with Martin Brennan in which he expressed the view that senior counsel's opinion confirmed that there was no legal

reason to have concerns about the restructuring of ownership being undertaken in Esat Digifone."

You see that?

A. Yeah.

Q. Now, I think you confirmed that the opinion you were referring to there was the opinion of the 9th of May; isn't that right?

A. Yes.

Q. Now, can you recall when that discussion was?

A. No, I can't say specifically.

Q. Well, presumably it must have been at some stage after you received the opinion; isn't that right?

A. Obviously.

Q. You thought you might have possibly received an advance copy on the 10th of May, but you certainly must have received it by the 13th of May?

A. Yes, 14th.

Q. Well, the letter is dated the 13th of May.

A. Okay.

Q. I suppose we can assume that it was a fairly urgent matter, you would have received it on that day?

A. Yeah.

Q. And what do you recall of that conversation that you had with Mr. Brennan or that discussion you had with him?

A. I don't recall any of the detail at all, but I recall that we had a discussion or I recall, in particular, the conclusion that is essentially here; that there are no

legal issues relating to the ownership issues that had been raised. Therefore, it was as I described earlier, a line drawn underneath this particular element of assessing the Esat Digifone proposal.

Q. Do you recall anybody else present when you were having that discussion or was there anybody else involved?

A. I don't believe so.

Q. Now, I just want to briefly deal with the meetings that you had with Mr. Nesbitt, because you have said that these were impressions or explanations, these were impressions that arose, may have arisen from things that were said at meetings.

Now, we have already referred to and dealt with your interaction with the Attorney General's Office and with Mr. Nesbitt in September of 1995, and we know that was all about Article 8, all right? We know that was all about the ownership of the licensee and the extent to which you could restrict ownership.

A. Yeah.

Q. Now, we know from the note we now have that you met or you attended a meeting with Mr. Nesbitt on the 23rd of April; isn't that right?

A. Yes.

Q. That's the one we looked at yesterday, which dealt it's just a three-line note, and it refers to the Trips case?

A. Yes, we saw that.

Q. And it was following that meeting that you confirmed the

Department's requirement for a formal opinion; isn't that right?

A. Yes.

Q. And in fairness to you, you said, yesterday, and I am sure you'll confirm it again, that even if the matter was discussed and some views were given at a meeting like that, you wouldn't have considered those definitive; you would have expected them to be followed up, isn't that correct?

A. Oh, yeah. I mean, if an informal view was given, I wouldn't have regarded that as the definitive article. So that would have been my view. I don't know whether an informal view was given. Maybe it was, at that stage.

Q. And what I am then just trying to explore with you is when you might have met on any other occasion with Mr. Nesbitt when this matter might have arisen?

A. I don't have any record that I met him before the 9th of May.

Q. Do you have any memory of meeting him after the 9th of May?

A. I don't have a specific memory of a meeting, but I note there is a record that we met on, I think, the 14th of May.

Q. Now, there is a note of that meeting. I can't refer to it because the State isn't prepared to waive privilege over it.

MR. O'DONNELL: Sorry, hold on, we were asked to waive privilege on it the day before yesterday. This matter has to go to Cabinet. It's not a question of refusing. We were asked for the first time to waive privilege on it the

day before yesterday. This matter has to go before Cabinet and there are obviously other things to be dealt with in Cabinet as well as this. So as soon as we get a ruling when the matter goes up to Cabinet, when we get the ruling, we will deal with it then. But to simply say that the State have refused to deal with it it's under submission, it's under active consideration. But to say that we simply refused it, is simply unfair.

CHAIRMAN: Proceed insofar as you can, Ms. O'Brien.

MS. O'BRIEN: Very good, sir.

I think you'll agree with me - I don't think you have seen that and I am not going to refer to what's in it - but I think you'll agree with me that there is nothing in that note that any matter of ownership was ever discussed?

A. Well, I am obviously reluctant to preempt Cabinet, but I don't think there is any detailed record.

Q. Can I refer you also to the terms of the letter that the Tribunal received on the 8th of June from the Department in relation to those documents, and it's to Mr. Brady, dated 8th of June, 2009.

"Dear Mr. Brady,

"I refer to previous correspondence, in particular to the Tribunal's letter dated 8th of June, 2009, to the Attorney General's Office wherein the Tribunal seek that that Office waive privilege over documents sent to the Tribunal under cover of letter dated 4th of February, 2003, by the former Attorney General. This letter was forwarded to this

office, given that it is a matter for my client to decide to waive privilege.

"The aforementioned documents furnished to the Tribunal consist of legal advices and/or correspondence between the then Department of Transport, Energy and Communications, the Office of the Attorney General, and counsel, which do not appear to be directly relevant to the issue of 'ownership' as raised by Fintan Towey in his minute of the 24th of April, 1996. Furthermore, a Cabinet decision will likely be necessary should my client, Department, decide to waive privilege over all or any of the documentation."

MR. O'DONNELL: In fairness to Ms. O'Brien, we will try and short-circuit the issue of waiver, and it may not even be necessary for it to go to Cabinet. Obviously, this opinion had to go before Cabinet, but it may but we will get it dealt with as quickly as possible. I don't think, without dealing with the issue in advance of seeing the document, that the document had anything in relation to ownership written in it, but we will get it dealt with.

CHAIRMAN: That seems to be the thrust of the matter anyway, I accept that, Mr. O'Donnell.

MR. O'DONNELL: In case people would think that there was something mysterious in it, there isn't, but I don't want to be saying too much, but so far as it's suggested that we are refusing to deal with it, we are not, and we'll get it dealt with as quickly as we possibly can.

CHAIRMAN: We have a working hypothesis, it is not about

ownership.

MR. O'DONNELL: That the memo doesn't record any discussion of ownership.

MS. O'BRIEN: Well, what's said in the letter, and this is all I was trying to do was to short-circuit matters, that we have now been informed by the Department that it does not "the Department considers that these documents do not appear to be directly relevant to the issue of ownership as raised by Fintan Towey in his minute of the 24th of April, 1996."

So we are assuming, I think not unreasonably, we are assuming that that is a fact, that it isn't material?

A. Okay.

Q. Can I just ask you now, Mr. Towey, to ask you to look at one or two final documents in Book 44, because

A. Sorry, just, in relation to the issue of privilege in relation to the particular document that you referred to and the question of whether the record shows a reference to ownership, I don't believe I have seen a document that looks like a significant record of that particular meeting.

Q. We are just going to take it as a fact, in any event, that they don't relate to the matter of ownership, because that's, in effect, what we have been told by the Department.

MR. O'DONNELL: We said that the memoranda does not record a discussion about ownership. That is not a concession by the Department that there wasn't a discussion of ownership

at the meeting. They are two different things.

A. That's what I meant to say.

Q. MS. O'BRIEN: Now, Mr. Towey, I understand your evidence.

Your evidence is that after you got this opinion, you

decided that you could draw a line under all of those

issues; that you had an opinion, there was no problem

relating to ownership in the past, there was no problem in

relation to the involvement of IIU, there was no problem of

any sort. Isn't that right?

A. Yes.

Q. It was done and dusted?

A. Well, there was an issue of a clarificatory letter which

Digifone was looking for in relation to Article 8.

Q. Oh, yes.

A. And discussion of that continued right up until the

licensing day.

Q. Yes, yes. Just so that we clarify exactly what that was,

and there is no misunderstanding; that was a side letter

that was issued by the Minister to Mr. Digerud on the 16th

of May, indicating that the Minister wouldn't be

withholding his consent to a change of ownership in certain

circumstances; isn't that right?

A. Yeah. I mean, it reflected this new sort of more liberal

regime in relation to the whole ownership issue which had

been clearly established.

Q. Anyway, as far as you were concerned, you had drawn a line

under all of this?



A. Yes.

Q. Once you had seen the opinion, you had discussed it with Mr. Brennan, you were quite happy the whole matter had been disposed of?

A. Yes.

Q. In any event, you had already had your telephone conversation with Mr. O'Connell on the previous 17th of May.

Well, what I just want to draw your attention to, Mr.

Towey, to allow you comment on it, because it's something that occurs to the Tribunal as surprising, is why it was,

therefore, that ownership continued to be such a concern to

the Department in these last four days? And I am just

going to draw your attention to the record of that in the

documents that the Tribunal has. And the first of those

documents is at Divider 213, and it's Mr. O'Connell's

record of the meeting on the 13th of May, 1996. And I'll

just refer you directly to the fifth page of that document,

and just about five lines down from the top of the page:

"MB stressed the need to have a number of definite, clear

and acceptable statements for use at the press conference

and he outlined a number of 'obvious questions' as follows:

(a) is this the same consortium as that which applied?" Do

you see that there?

And let me refer you also to Divider 217, which is a

meeting between Mr. O'Brien, Mr. Lowry and Mr. Loughrey on

the 14th of May, 1996.

A. A manuscript document?

Q. Yes, a manuscript document. And if you go to the second page of it, it starts:

"Public announcement. Lowry wanted last week. Do everything in one go. Deflect attention away from ownership. Discuss turnover, infrastructure, contracts, roll-out plan, employment." I think some other contracts.

Do you see that?

A. Yes.

Q. And then again, I'll refer you to flag 223, which, again, is Mr. O'Connell's note of a meeting that you attended with Mr. Brennan, Mr. Buggy in the Department on the 15th of May, 1996, the day before the licence was issued, and there is both the manuscript and reconstructed versions of that document. And if you go to the fourth page, I think the typed one is probably easier.

It starts at the top:

"45:45:10 'Cruising altitude'. In normal trading circumstances, debt equity around 50%.

In start-up phase, more fluctuation because of capital spend will tend a little more towards equity, especially in early phases."

And below that: "MB" Martin Brennan and it's either "Save Minister needs our help," or, we have been told, possibly, "Saying the Minister needs our help."

And below that: "Whether same project as one competition."

Do you see that?

A. Yes.

Q. And then if I refer you again to the document behind flag 227, and it's a manuscript note, and it's:

"Tracking events on the 16th of May."

And at the base of that, or the lower part of it, you see:

"3. Worst possible questions

No. 37 competition re SSM licences

William Fry to play devil's advocate

Legal advisor will attach Davy

Solicitor to attend

1. Ownership

2. Deflect attention away more business information

improvement."

And there is a number of notes below that.

"Infrastructure," and so forth.

And you see in all of those documents, Mr. Towey, a concern about ownership and a concern about deflecting attention away from ownership. And what I want to give you an opportunity to comment on is: Why is it the case, if the Department had an opinion that told them that there was absolutely no difficulty in the substitution of IIU and Mr. Desmond for the four financial institutions, that there was any need to deflect attention away from ownership?

A. Well, I mean, clearly, the legal advice that we have been speaking of dealt with the principle of ownership change.

There was a separate exercise underway, a parallel exercise in relation to the financial issues, and clearly, that

entailed full certification of the ownership of the Esat Digifone consortium and the financing of the project. So, inevitably, that did lead to further discussion of the ownership issue.

But I think it was very clear to everybody concerned that the ownership question had attracted quite a bit of Public Interest at the time when the announcement of the winner was made, and, as such, it was something that the Department was aware that there was a political sensitivity to, and I think that formed the backdrop against some preparation for the public announcement where the Minister would be sharing a platform with people from the private sector that may not have the same kind of political concerns or sensitivities about how issues might be interpreted.

Q. Wasn't the simplest way of dealing with this, Mr. Towey, for the Department to simply say: We were told this was a consortium of 40:40:20. Telenor: 40, Communicorp: 40, and financial institutions: 20. We were told who those financial institutions were or who they were likely to be. They are not now involved. What is involved now is IIU, and IIU is a financial institution, and we are quite happy, whether they are or not, that we need have no concerns, and we have an opinion provided by the Attorney General from senior counsel to say there is no difficulty with that at all. Wasn't that the easiest way to deal with it?

A. Well, I am not sure if that would necessarily have been a

good way of dealing with it.

Q. But wouldn't it have been the truthful way of dealing with it?

A. Well, I mean, there are others who would be more qualified to comment on the issue than I would, but it's not necessarily always the case that it is the best course to invite attention to a particular subject.

Q. But in all of that as well, Mr. Towey

A. It's clear I think it is clear also, I think it's worth I mean, it is clear there is nothing that was hidden in relation to the ownership at the time of the licence award.

It was all made very clear at that point.

Q. Well, I don't think anybody was ever told, Mr. Towey, that IIU had not been mentioned as one of the possible investors in the application, isn't that the case?

A. I think that may be the case, but I can't say for certain.

Q. Well, you can take it, I think, from anything that we have seen, that there was no question that it was mentioned ever that IIU had not initially been in the application.

In those documents, as well, that I referred you to where you were discussing it with Mr. O'Connell and Mr. O'Connell was present and you were dealing with William Fry, you never mentioned to them, and there is certainly no record of it that you had this opinion?

A. Never mentioned to Owen O'Connell?

Q. Never mentioned to William Fry. In those meetings that you were having where you were discussing the whole ownership

issue, where you were making references to deflecting attention away from ownership, where you were discussing the sensitivities of the ownership problem, whether this was the same consortium that applied, how it should be handled in announcing the result and announcing the grant of the licence, never once did you mention to William Fry, Solicitors, that you had this opinion?

A. Well, I mean, I don't see why we would necessarily share opinions or the contents with

Q. Well, why wouldn't you? I mean, this was a problem, this was a problem that you were saying that you both had to deal with. You had to decide between you how best to deal with it, how best the information should be released into the public domain, how you could deal with the sensitivities. Wouldn't it have been the most natural thing in the world to say to them: Look, we have an opinion and there isn't a problem?

A. But it wasn't a legal problem. It was a presentational issue.

Q. But hold on a minute now. Isn't the simplest way of dealing with a presentational issue like that to simply say, "We have an opinion from the Attorney General provided by senior counsel to say there is no problem." What difficulty what presentational difficulty arises surrounding the release of that information?

A. Well, I suppose the starting point would have to be to suggest that we might have a problem, and that's not

something that we would naturally do. I mean, the position was that the legal issues had been resolved. It was water under the bridge. There was no legal problem. And now, we were talking about the presentational issue moving forward.

Q. You had told Mr. O'Connell, on the 29th of April in the note that I referred you to this morning and your dealing with him, that you were getting legal advice on the matter; isn't that right?

A. Yes.

Q. Why, then, wouldn't you have told him that you had got the legal advice?

A. Well, I don't think we necessarily I don't think we concealed that from anybody. I mean, I don't specifically know that we did tell him that we had legal advice, but I don't know that we didn't, either, and, I mean, it may have been well, clearly, it was evident from the fact that the process was progressing, that there wasn't any legal obstacle.

Q. Well, there is absolutely no record in all of Mr. O'Connell's meticulously-made notes of you or anybody in the Department having informed him that you had obtained legal advice on it?

A. Well, are you suggesting that Mr. O'Connell is of the view that there was a legal issue that hadn't been addressed?

Q. I am not certain at all what Mr. O'Connell's view was. But you had told Mr. O'Connell, on the 29th of April, that these were problems, that you were getting legal advice,

you had actually gone back to him on the 7th of May, long before you had ever obtained legal advice, and you attended a number of meetings with Mr. O'Connell and with other representatives of Esat Digifone in the run-up to the 16th of May when the licence was issued, when one of the principal topics under consideration was how you were going to handle this ownership matter. And I am just giving you an opportunity to comment on the fact that, in all of that, you never disclosed to Mr. O'Connell that he shouldn't be concerned, because, ultimately, if it did arise, you had legal advice?

A. Well, I can't imagine that that wasn't clearly implicit in what we were suggesting about the presentational issues that needed to be addressed.

Q. Now, just finally, Mr. Towey, I want to just review with you very briefly some correspondence which the Tribunal had with the then Attorney General dating from December 2002 and January and February 2003, because there has been reference to that correspondence but I don't think it's been opened, although it has been circulated, and I think, in fact, the Department have had copies of it for quite some time.

And I want to refer you firstly now, the first letter is a letter of the 16th of December to the Attorney General from the Tribunal, and I just want to put that in context for you.

I think the Sunday previous to that letter, an article had



appeared in the Sunday Business Post commenting then on the Tribunal's Opening Statement and I think some of the evidence that the Tribunal had heard in December of 2002.

And it was headed "O'Brien Digifone - The Kaiser Factor,"

and I can just refer you I think the article was

appended to the letter. If I can just refer you to the

second page of the article, and it's the sixth column:

"The Tribunal is expected to hear that just hours before

the announcement was made awarding the licence to Esat

Digifone, senior civil servants sought advice from the

Office of the Attorney General on whether consortia should

be permitted to alter the makeup of their investors. The

advice they received was the consortia could, but only for

shareholdings of 20% or less.

"Legal sources believe this advice may become a source of

contention at the inquiry, however. It is understood that

in recent months the State has been examining the basis on

which the advice was being given in order to establish

whether it would stand up to close scrutiny. The matter is

known to be causing considerable anxiety in Government

circles."

Now, the only just to put that in context for you the

only advice or opinion that the Tribunal had seen at that

stage was the opinion and letter of the 9th of May of 1996,

and the Tribunal, on the 16th of December, 2002, wrote the

following letter to the Attorney General:

"Dear Attorney General,

"I am writing to you in my capacity as Solicitor to the Tribunal of Inquiry appointed by the above Order of the Oireachtas.

"I enclose herewith a copy extract from an article which appeared on page 11 of yesterday's edition of the Sunday Business Post. The relevant portion of the article reads as follows:

"The Tribunal is expected to hear that just hours before the announcement was made awarding the licence to Esat Digifone, senior civil servants sought advice from the Office of the Attorney General on whether consortia should be permitted to alter the makeup of their investors. The advice they received was that consortia could, but only for shareholdings of 20% or less.

"Legal sources believe this advice may become a sort of contention at the inquiry, however. It is understood that in recent months the State has been examining the basis on which advice was given in order to establish whether it would stand up to close scrutiny. The matter is known to be causing considerable anxiety in Government circles.'

"The Tribunal wishes to know whether the above extract is correct. In particular, the Tribunal wishes to establish whether the following statements of fact are correct:

"1. 'That Just hours before the announcement was made awarding the licence to Esat Digifone, senior civil servants sought advice from the Office of the Attorney General on whether the consortia should be permitted to

alter the makeup of their investors.'

"2. That 'The advice they received was that consortia could, but only for shareholdings of 20% or less.'

"3. That 'In recent months, the State has been examining the basis on which advice was given.'

"If the above statements (or any one or more of them) are correct, the Tribunal would be anxious to obtain a narrative account setting out all of the information available regarding these matters, and in particular:

"A. The identity of the civil servants who sought advice from the Office of the Attorney General;

"B. Precisely when the advice was sought and in what circumstances;

"C. Identity of the officials (or counsel retained by the Attorney General) who provided such advice;

"D. Whether such advice was furnished orally or in writing;

"E: The 'basis' on which the advice was given;

"F. All of the information made available to the Attorney General in connection with such request for advice (if any.)"

And it continued: "The Tribunal would also be very much obliged if you could provide the Tribunal with copies of all documents in your power, possession or procurement which touch or concern these matters insofar as it is confirmed that they are factually correct.

"This request for assistance is being made in the course of

the investigative phase of the Tribunal's work when the Tribunal is engaged in the process of gathering evidence or information which may lead to evidence material to its Terms of Reference. Documents or information provided to the Tribunal in response to this request will remain strictly confidential unless in the absolute discretion of the Sole Member they are or they become material to the Tribunal's Terms of Reference and appropriate to be led in evidence at public sittings of the Tribunal.

"I would be very much obliged to hear from you at your earliest convenience.

"Yours faithfully,

John Davis."

Now, the Tribunal received a holding response on the 17th of December, 2002:

"Dear Mr. Davis,

"I wish to acknowledge receipt of your letter dated 16th of December, 2002, which I will bring to the attention of the Attorney General."

And then the substantive response was received on the 20th or dated the 20th of December. I think it was received sometime later by the Tribunal, and it's addressed to Mr. John Davis:

"Re: Tribunals of Inquiry.

"Dear Mr. Davis,

"Thank you for your letter of the 16th instant and its enclosures.

"Messrs. Gormley and McFadden of this office (legal assistants here at the relevant time) have read the extract from the article which appeared in the Sunday Business Post and refers to advice being given by the Attorney General "just hours before the announcement was made awarding the licence to Esat Digifone." It is understood that the announcement was made on the 25th of October, 1995. After an examination of the office's file, they have reported to me in the following terms:

"1. They have no recollection of furnishing the advice referred to in the said extract or receiving a request for same and do not believe they gave such advice.

"2. There is no copy on this office's file of any advice of the type mentioned in the extract or any note of same having been given by the Attorney General or any other person in his office.

"3. There was a request for advice contained in the Department's minute of the 24th of April, 1996, concerning the restructuring of the ownership of Esat Digifone since the date of their application and the Attorney General's response thereto has already been made available to the Tribunal. Mr. Nesbitt's opinion of the 9th of May, 1996, which was released to the Department with the sanction of the then Attorney General on the 13th of May, 1996, dealt with the matter.

"For my own part, I wish to state that there has been no examination by me or by my office of the alleged advice

mentioned in the extract (and referred to as statement of fact No. 3 in your letter) nor have I been made aware of such examination being carried out by any other State authority.

"Finally, I should point out that neither I nor my office has made contact with Dermot Gleeson, SC, in relation to the content of your letter.

"If I can be of any further assistance to the Tribunal in relation to this matter, please let me know."

Now, it was that letter, Mr. Towey, which the Tribunal received from the Attorney General in response to its request for information as to whether any advice which indicated that a change of ownership, provided it was on a 40:40:20 footing, was acceptable. And it was that response which the Tribunal received. And I just wanted to refer to that, lest there be any suggestion that the Tribunal has failed to do so.

The Tribunal, for better or for worse, interpreted this letter as confirming that advice in relation to the ownership conformity issue had not been given, as the then Attorney General had confirmed that there was no evidence of such advice on the files of the Department. The Tribunal had itself seen the advices and the covering letter of the 9th of May of 1996, and the Tribunal, and I think you would agree, did not unreasonably conclude that that was not directed to the matters raised in your letter of the 24th of April.

You have now given your evidence on that, and I am not going into that with you again. But I simply wanted to explain to you, and I wanted to refer to that letter which the Tribunal received from the Attorney General and the view that the Tribunal took of it.

I just want to refer you to a subsequent exchange of correspondence arising from that as well, lest there be any suggestion that it's not been referred to.

It's a letter from the Tribunal dated the 9th of January, where the Tribunal took the matter up further with the Attorney General's Office. It's addressed to

"Mr. Rory Brady, SC,  
Attorney General.

"Re: Tribunals of Inquiry.

"Dear Attorney General,

"Thank you for your letter of 20th of December last in response to mine of 16th of December. The Tribunal is grateful for your prompt response to its inquiries.

"Having given further consideration to the wording of the article which appeared in the Sunday Business Post on the 15th of December, 2002, the Tribunal is of the view that the reference to advice given by the Attorney General 'just hours before the announcement was made awarding the licence to Esat Digifone,' may refer to the actual grant of the second mobile phone licence to Esat Digifone rather than the announcement of the result of the competition process. While the announcement of the competition process result

was indeed made on the 25th of October, 1995, the announcement of the actual awarding of the licence to Esat Digifone was not made until the 16th of May, 1996.

"In the light of such interpretation, the Tribunal would be very much obliged if you could kindly reconsider the Tribunal's request by reference to the announcement of the actual award of the licence on the 16th of May, 1996."

So the Tribunal went back to the Attorney General to clarify the matter further. And the Attorney General replied on the 4th of February of 2002:

"Re Tribunals of Inquiry (Evidence) Act.

"Dear Mr. Davis"

It says 2002. Sorry, that was clearly a typing error and it should be 2003, because you will see it's in response in the first line to the Tribunal's letter of the 9th of January, 2003, and it's, in fact, stamped as received by the Tribunal, the actual date is difficult I think it's the 3rd of February, 2003.

"Dear Mr. Davis,

"Thank you for your letter dated 9th January, 2003.

"Messrs. Gormley and McFadden of this office have again read, in the context of your recent letter, the extract from the article which appeared in the Sunday Business Post. There has been a further review of this office's files in relation to the Esat licence and I now set out further information on the basis that the article in question related to the date of the announcement of the



actual awarding of the second mobile phone licence to Esat Digifone Limited, i.e. 16th of May, 1996. In addition, this office has sought and recently received clarification from counsel (Richard Law Nesbitt, SC) and Mr. Fintan Towey on the issues raised in your letters.

"On the basis of the information of which I have now been apprised, the following is the position:

"1. On the 14th of May, 1996, there was a consultation with counsel (and others) attended by Mr. McFadden and Mr. Gormley of this office. Mr. McFadden kept a note of that meeting.

"2. On 15th of May, 1996, Mr. Fintan Towey of the Department sought advice from this office regarding the content of a draft letter which the Minister proposed to send to the Chief Executive of Esat Digifone Limited concerning the consent required under Article 8 of the licence in relation to the issue of shares by the licensee and to the transfer of shares in the licensee in specified circumstances and under certain conditions. Messrs. Gormley and McFadden regarded the draft letter as merely relating to the then ongoing process of negotiating the terms of the licence in particular Article 8.

"3. On receipt of the draft letter, this office (Denis McFadden/John Gormley) sent it to counsel for his general advices.

"4. On the afternoon of 15th of May, 1996, counsel furnished his written advices where, inter alia, he advised

certain amendments to the draft letter.

"5. Counsel's advice was forwarded (John Gormley) to the Department at 6.25 p.m. approximately on 15th May, 1996.

"6. Subsequent to counsel furnishing his written advice, he was requested to attend at the Department during the closing stage of the licence issuing process. Counsel has informed this office that, while he was there, he furnished oral advice in relation to the licence condition regarding ownership changes and, in particular, he was asked whether such condition was solely 'forward-looking'. Counsel advised that that was the case.

"No officials from this office or the Chief State Solicitor's Office attended this meeting. Mr. Owen O'Connell of William Fry was present at the meeting. Other officials from the Department may have been present but this has not been confirmed at this stage. So far as this office is aware, there is no note of attendance of this meeting.

"Copies of documents from this office's file concerning the events listed at points 1 to 5 above are enclosed herewith.

I am informed that Mr. Towey's letter of 15th May, 1996, and that counsel's opinion of 15th May, 1996, were previously furnished to the Tribunal by the Department. I also enclose other documents from this office's files which may be relevant.

"If I can be of any further assistance to the Tribunal in relation to this matter, please let me know."

So you see there that the Tribunal went back to the Attorney General to clarify whether any further advices and what further advices may have been given in the immediate days prior to the 16th of May.

There is just one final very net matter that I want to ask you about, Mr. Towey, and that relates, again, to the advices and covering letter of the 9th of May, and in particular the advices or opinion, as we refer to it.

Now, it's your view that, in dealing with that, Mr. Nesbitt was drawing a line under the ownership conformity issue, and I understand your evidence on that and I have been through it with you, and I have also drawn your attention to what the words state, what the layout of the opinion is, and so forth. And in the course of doing that, I drew to your attention that there was no reference whatsoever to the share structure issue, that is the 40:40:20 or the 37.5:37.5:25 issue, do you remember that?

A. Yes.

Q. Really, what I want to suggest to you is that, while I understand what you are saying about your belief that the receipt of that opinion was dealing with all matters on which you were awaiting advice and that a line was then to be drawn under the ownership conformity issue, but I have to suggest to you is that there is absolutely no reference of any sort in this opinion, direct, oblique or indirect, to the share structure issue, to the 40:40:20 or the 37.5:37.5:25, isn't that so?

A. It doesn't refer explicitly to those things.

Q. But does it refer anywhere, implicitly, or even obliquely, to the 37.5:37.5:25/40:40:20 issue?

A. Well, it's implicit in settling the terms of Article 8 of the licence in negotiation with Esat Digifone, that there are no ownership issues relating to that consortium.

Q. Yes, but can you point out to me even one sentence, Mr. Towey, that you say refers indirectly or obliquely to that?

A. Well, I have said that it's not an explicit reference. I have said that it's implicit.

Q. Well, where is it implicit?

A. It's implicit in the context of the advice being given.

Q. What portion of the advice given? What line of the opinion, Mr. Towey?

A. Well, there is a paragraph, which I think is the second paragraph on page 2 of the advice, which captures what I understood to be Mr. Nesbitt's general approach to the whole issue of ownership.

Q. Mr. Nesbitt's pragmatic, commercial approach?

A. Yes.

Q. Would you agree with me there is absolutely no reference there to 40:40:20 or 37.5:37.5:25?

A. They are not referred to there.

Q. As far as you were concerned, what was the legal advice that you received on the 40:40:20/37.5:37.5:25 issue?

A. Well, as I understood it, the issue of changes in ownership

that didn't compromise the provision of the service, were not an issue that gave rise to legal considerations.

Q. And that included, as far as you were concerned, the share structure of Esat Digifone?

A. That's what I understood, yes.

Q. Well, then, why was it necessary to revert to 40:40:20?

A. A decision in relation to that issue had been taken by the Department before the legal advice was obtained.

Q. Why was there any need to do it? If there was going to be no legal difficulty in it, and we know the problems that it caused for the actual consortia members because we have heard lengthy evidence over to their negotiations over that weekend of the 10th, 11th and 12th of May, if you are now being told that there is no legal problem at all, why were you asking them to revert to 40:40:20?

A. Well, that view had been taken and it's not it wasn't something that I thought we could do a U-turn on.

Q. Okay. Thanks, Mr. Towey.

CHAIRMAN: There will obviously be some other questions from other legal representatives, Mr. Towey. So it seems reasonable to make a start. I think of course, I'll hear you, Mr. O'Callaghan, but I think I had indicated that Mr. Fitzsimons, on behalf of Telenor, following the normal sequence, would be first.

MR. O'CALLAGHAN: I was going to ask if Mr. Fitzsimons wouldn't mind if I could make a brief issue. I was trying to seek clarification from the Tribunal on one point, and

it related to the correspondence between the Attorney General and the Tribunal, and I thought it might be an appropriate time just to mention it now, sir, so maybe the Tribunal could think about it overnight.

CHAIRMAN: Would it be sufficient if you were to mention it to one of the legal team? Perhaps if we embark on Mr. Fitzsimons' evidence or examination, and I'll see what the position is then.

MR. O'CALLAGHAN: It is a very relevant point to what has just been opened by Ms. O'Brien in terms of the correspondence between the Tribunal and the Office of the Attorney General. It will take me two minutes to make the point. I thought it might be more appropriate to do it now, because I am going to find myself in a situation where, tomorrow, when I am asking Mr. Towey questions, I'll be putting it to him, when, in fact, in fairness to him, this witness can't really answer the question upon which I require clarification; it's more a matter for the Tribunal.

And it simply relates, sir, to the letter that was written by the Attorney General on the 20th of December, 2002, that Ms. O'Brien opened, sir. And you will note at the bottom of that, the Attorney General mentions that "there had been a request for advice contained in the Department's minute of the 24th of April, 1996, concerning the restructuring of the ownership of Esat Digifone since the date of their application, and the Attorney General's response thereto has already been made available to the Tribunal.

Mr. Nesbitt's opinion of 9 May, 1996, which was released to the Department with the sanction of the then Attorney General on the 13th of May, 1996, dealt with the matter."

And the issue upon which I seek clarification from the Tribunal, sir, is that, on the 25th of February, 2008, the Tribunal issued a ruling, and I can just hand up the relevant page in respect of it, issued a ruling in respect of the privilege claim over Mr. Nesbitt's opinion, and at paragraph 8 of that ruling, the Tribunal pointed out the predicament it found itself in with the fact that it had a claim of privilege being made over an opinion by the Department, and it sought to resolve a method of resolving that difficulty. And if you can look at paragraph 9 of the ruling which is up on the screen now, sir, it says:

"There seemed to be only two ways of demonstrating that the advice actually sought had not been furnished; that is, either by disclosing the opinion, which would have been firstly in breach of the Tribunal's undertaking to the Department, and secondly, of the Government's privilege, or by conveying in some other way the fact that it did not contain the advice actually sought. The latter was achieved by obtaining from the then Attorney General a letter stating that the advice actually sought had not been provided."

Now, if I could ask you to move forward, sir, to the second extract from your ruling, which I'd ask you to look at, which is at page 10 and 11, and at paragraph 18 on page 10,

there is a reference to Counsel for the Tribunal's questioning of Mr. Loughrey on Day 188, and the question is asked:

"Now, that particular issue was not addressed in any legal advice which was furnished to the Department.

Answer: It is clear in perusal of the papers, actually, that that appears to be the case, Mr. Coughlan. However, at the time we took, or personally I took the decision, I was not so aware. Let me put it this way: Nobody had informed me that there was any problem on the legal side. I assumed, therefore, that I would have been let's say if a problem had arisen, I would have been informed, so I am now aware, clearly, from the papers here, that I don't see any evidence of that, actually, so that must be the case.

Question: Yes.

Answer: But having said that

Question: And I can assure you it is because the Attorney General himself has informed the Tribunal so?

Answer: Of course I would accept that."

So the clarification which I seek, sir, is that it appears that what's contained in the ruling is not consistent with what is within the letter from the Attorney General, because the Attorney General clearly says that the issue of ownership was dealt with in Mr. Nesbitt's opinion, yet your ruling seems to say something different. And I simply ask for clarification in respect of that.



CHAIRMAN: I'll have to check the papers in the matter, and it will be addressed. Mr. Fitzsimons?

MR. FITZSIMONS: No questions.

CHAIRMAN: Very good. Mr. Shipsey?

MR. SHIPSEY: Sir, can I just inquire as to how long you propose to

CHAIRMAN: Well, I think, as a general rule of thumb, I think it's oppressive to have witnesses in the box continuously for more than two hours, so I am really envisaging that we have 15 minutes.

MR. SHIPSEY: Very good.

THE WITNESS WAS EXAMINED BY MR. SHIPSEY AS FOLLOWS:

Q. MR. SHIPSEY: My name is Bill Shipsey, I appear for Dermot Desmond. And I am perhaps one of the ordinary senior counsel that you alluded to earlier, unlike Mr. Nesbitt, but I will, nonetheless, try to get to the point in relation to the advices you obtained from him.

You gave evidence some, I think it's five or six years ago in this Tribunal; isn't that correct?

A. Correct.

Q. And you sought to explain your position in relation to what you had done at that time?

A. That's correct, yes.

Q. And when you gave that evidence, Mr. Nesbitt's opinion was known to the Tribunal at that stage, but it was not in the public domain, or it wasn't led in evidence because of the undertaking that the Tribunal had given to the Department

in relation to the privilege attaching to that document, is

that correct?

A. That's what I understand, yes.

Q. And insofar as your evidence back in 2003 was concerned,

and the evidence that you have given today to the Tribunal

is concerned, do you regard yourself as having given any

different evidence, or do you want to convey anything

differently to the Chairman of the Tribunal between 2003

and 2009?

A. No.

Q. And you have heard reference made to I think what's called

the working understanding of the Tribunal in relation to

what's described as the ownership conformity issue. Were

you in any doubt in 2003 as to what the position was in

terms of that ownership conformity issue that seems to be

weighing on the minds of the Tribunal and of the Chairman?

A. I wasn't in any doubt, no.

Q. If I can just ask you to look at Mr. Nesbitt's opinion,

which is sent under cover of his letter of the 9th of May.

You said, I think, to Ms. O'Brien that you can't recall, or

perhaps can't recall the detail with which you looked at

that, but again, I take it as somebody intimately involved

in the process, you were mindful, having sought the advice,

to see what Mr. Nesbitt had said?

A. Oh, yes, I expect so. I mean, I couldn't remember the

detail of how I processed it or thought about it, but I am

quite certain that I read it.

Q. And would it be fair to say that, in the way that Ms. O'Brien has put to you that there were four questions being raised or four questions that had presented themselves to you of a legal nature, that you didn't go down through this, seeking to tick off the points which are not sort of set out in that particular four-point format?

A. No, that's correct. I mean, in the context of what we expected was closing down this process, I saw this as a composite advice covering the remaining issues.

Q. And in terms of those three remaining issues, I think you mentioned that Mr. Nesbitt had dealt very promptly with advices that were sought in relation to meeting the disappointed consortia, but in relation to the other three issues, namely the Statutory Instrument

A. The draft regulation and the draft licence.

Q. the draft regulation and the draft licence and this issue of the, what's now described as the shareholding conformity, I take it there were differences between those three points in this sense, Mr. Towey: In terms of the drafting of a licence, or the drafting of a regulation to bring the Directive into Irish law, that's not something that you would have taken upon yourself or taken upon yourself to have a view in relation to that; that's something you'd leave exclusively to lawyers, would that be correct?

A. Well, I would have I would actually have drafted the transposing regulation, subject to its being examined and

settled by the legal advisors and parliamentary draftsman.

Q. Albeit that you might draft it, you wouldn't take it upon yourself to ensure that it was in conformity?

A. No.

Q. And insofar as the other issue was concerned about the shareholding ownership, you had been involved in the process from the outset back in 1995 and into 1996?

A. Yes.

Q. And I take it that insofar as your understanding of the Esat proposal was concerned, there were matters that were of greater importance and matters that you would have assessed as being of lesser importance?

A. Yes.

Q. And I take it insofar as the composition of that Esat consortium was concerned, and I take what the Chairman said a little earlier in terms of a change - for example, if Telenor went out and BT came in and if Communicorp went out and somebody else came in, that is something that would have raised very serious alarm bells; is that correct?

A. We'd have been very sensitive to changes in the kind of expertise that would have been brought to bear in delivering the second mobile phone service, yes.

Q. And I take it, therefore, that insofar as the financing of the consortia, there was a difference between the Telenor and Communicorp expertise on the one hand, and the persons providing some of the working capital on the other hand?

A. Yeah.

Q. And I take it you would have known, of your own knowledge, that once a licence was granted, and this was a much coveted licence, that it would be unlikely that you would have a difficulty in getting it financed?

A. No, the Project Group had a very clear view there would be no difficulty in attracting equity finance.

Q. And your concern, therefore, in relation to the 20%, or the identity of the 20% stake that was being earmarked either before award of licence or post award of licence in the application, because as Ms. O'Brien says, there was some difference between the Executive Summary and the body of the application, but that concern would have been, I'd have to suggest, not a major concern, and certainly nothing like the concern you'd have over the competence or expertise or drive of the principal participants in the given consortium?

A. I think that's correct, yes.

Q. And therefore, when you were in receipt of Mr. O'Connell's letter in April of 1996, and it was making reference to a change from, I suppose, what were then regarded as blue chip institutions, it mightn't necessarily follow that Mr. Desmond would be viewed in lesser favour than those institutions if one was considering it today, but when you were considering the change from Davy's placing with the four institutions in April of 1996 and a reference to IIU stepping into the shoes of those four financial institutions, would I be correct in saying that your

principal concern, if you have a legal concern and you have a financial concern, would be as to the financial wherewithal of that party to come up with the money, rather than a legal concern that it might affect the validity of the application?

A. Yeah, I mean, it was, I think, only when the actual change was put forward that we began to think of it, but we were certainly very clear that the financial institutions would bring only equity investment, only money to the project, and therefore, when we looked at the proposed change, there was a clear view that, you know, the essential requirement was that the money would be available.

Q. And in that context, Mr. Desmond's money would be as good as AIB's money in 1996?

A. Yes.

Q. Now, Ms. O'Brien, in examining you in relation to your statement and in relation to the documentation, asked you what your understanding was upon receipt of Mr. Nesbitt's opinion, which is attached to his letter of the 9th of May, 1996, and I think, in particular, you referred to the second paragraph on the second page as being the paragraph which gave you the greatest comfort in relation to Mr. Nesbitt's view that there was no legal concern or impediment surrounding the shareholding conformity issue; is that correct?

A. That's right, yes.

Q. And that's a view, if I understand your evidence correctly,

that you had at the time, and it's an abiding view or conviction on your part; you still have that view in relation to that paragraph, is that correct?

A. I have the view, absolutely, that the opinion resolved the legal issues, including the ownership conformity question.

Q. And although it didn't refer to 40:40:20 or 37.5:37.5:25, did you ever feel the need, back in 1996, to ask

Mr. Nesbitt for greater clarification on his opinion?

A. Well, I thought the nature of his advice, and I think it is on the first page of his opinion, that he says that the Minister's hands are quite tied in relation to ownership, so I think it was clear that he had quite a different view on how rigidly one could control ownership.

Q. And in this paragraph that I am referring to, though, the second paragraph, where he says "I don't think it is tenable to suggest that the licensee has been awarded the licence because of the parties who own the licence," did you understand that as being referable to something that might happen in the future or referable to the particular applicant that was being presented and that was seeking to have the licence awarded to it?

A. I didn't attempt to divide this opinion up into what might be looking backwards and what might be looking forwards.

Q. And where it says "Rather, the licensee has been awarded the licence because its plans and proposals were the most meritorious and it provided a funding plan which looked feasible," now, that couldn't have been looking forward

because you were dealing with a specific applicant, and that can only have been dealing with the position as you then understood it, or at least as Mr. Nesbitt then understood it?

A. Yes.

Q. Because it's talking about something that has happened in the past tense, isn't that right?

A. Yes, I see that.

Q. "... because its plans and proposals were the most meritorious and it provided a funding plan which looked feasible." And that seemed to be directing your attention to the fact that what you really ought to focus on was whether the funding proposal as envisaged by IIU was any different than the funding proposal of a placement by Davy's with four financial institutions, would that be right?

A. Well, I saw it in wider terms well, I think I would have seen it in wider terms in terms of Mr. Nesbitt's general approach, that any prospective change in ownership would have to give rise to a concern that there was going to be a problem with service delivery, otherwise there wasn't a grounds for having a restrictive view of ownership change.

Q. And in terms of what Mr. Nesbitt had been asked to deal with, it was clearly the issue of the draft of the licence and also the statutory, looking at the Statutory Instrument, but he was also asked to look at whether anything arose from the change that had been announced in



the letter from Messrs. William Fry in April of 1996; isn't that correct?

A. Yeah, I think that's very clear from the letter that was written by Messrs. McFadden and Gormley of the Attorney General's Office.

Q. And where he says in the same second paragraph: "There is no reason why any of these matters have to be compromised by a change in ownership" that's the reasons why the applicant for a licence had been granted it I'd have to suggest to you that that could only have meant, and could only have been referable to the only proposed change that was on the table at that time, namely the change from Davy's with the four financial institutions to IIU?

A. Well, it was clearly our view it was composite advice embracing all of those issues.

Q. It may be unfair to the Tribunal, and I am sure the Chairman will tell me if it is unfair, but underlying the working assumption of the Tribunal in relation to the nonavailability of specific advice on the shareholding conformity issue is some suggestion that, although you asked Mr. Nesbitt for advice, you didn't get it and you ignored his failure to give you that advice. And I am just wondering what view, if I am correct and not being unfair to the

MS. O'BRIEN: Sir, that is not something that I ever suggested, good, bad or indifferent, to Mr. Towey, and, in fact, it's something that I don't think the Tribunal has

even considered. So I don't think it's proper that it should be put in those terms. We certainly might look at it and might examine it further, but we certainly haven't at the moment.

MR. SHIPSEY: Chairman, I am just wondering, I may be wrong and I am subject to you ruling that I am wrong even to suggest that there is such an inference, but for fear that I might not be wrong, I am just wondering would it not be right to allow Mr. Towey to express a view in relation to that so that I suppose we don't have to come back on maybe a third occasion where some further or different working assumption is arrived at. But again, I am subject to your ruling on it, sir.

CHAIRMAN: Well, I don't think that contention has been put in the course of Ms. O'Brien's examination, and a number of possible scenarios that perhaps Mr. Towey had made the assumption that the matter that the tenor of the advices governed a wider field than perhaps on some readings it might have, can be pursued. I don't think it's helpful to put pejorative versions that haven't been advanced.

MR. SHIPSEY: I certainly wasn't trying for it to be pejorative, but I was trying to see where such a working assumption led. But, again, as I have said, sir, I am subject to your ruling in relation to it. I certainly didn't think it was unfair to give Mr. Towey an opportunity insofar as there might be a finding that was critical of his conduct.

CHAIRMAN: Well, in case of Mr. Towey's position, may I take it, Mr. Towey, that it wasn't the situation that you explicitly realised you hadn't got the advice you sought and decided to plough on regardless?

A. The proposition that the advice didn't address all of the issues in a composite way wasn't suggested by anybody who was involved in receiving or interpreting the advice, including the official of the Attorney General or the officials of our Department.

MR. SHIPSEY: Thank you, sir.

Just one or two other brief matters, Mr. Towey. I am keen to stick with Mr. Nesbitt's opinion and what happened in 1996, but you were not hearing about IIU for the first time in April of 1996. I think a letter had been received in the Department but had been returned, a letter written by Mr. Walsh in September of 1995?

A. Yeah, I have given extensive evidence in relation to that, and it's clear from that evidence that I wasn't acquainted with IIU and I didn't retain any particular memory of that letter from September 1995.

Q. No, I am not being critical of you, but once you knew of the existence of IIU back in September 1995, one can forget it but you can't unknow it, so come April of 1996, whether it registered again with you or not, it may not have because of all the documentation you were dealing with, but you know that there was a letter sent in by IIU in September of 1995?

A. Oh, yes, I know it far better now than I knew it in April '96, I can tell you.

Q. Thank you, Mr. Towey.

CHAIRMAN: Right. It's ten past four, so we'll resume at 11 o'clock in the morning. Thank you.

THE TRIBUNAL ADJOURNED UNTIL THE FOLLOWING DAY, THE 11TH OF JUNE, 2009, AT 11 A.M.