THE TRIBUNAL RESUMED ON THE 26TH OF OCTOBER, 2010,

AS FOLLOWS:

CHAIRMAN: I should commence, I think, by asking for any fresh representation matters to be conveyed.

MR. GLEESON: Mr. Chairman, I appear with Mr. John Breslin for Professor Michael Andersen, instructed by Maples and Calder, and I would ask for the usual order in relation to legal representation.

CHAIRMAN: I think you are aware, from prior representation, of the nature of that --

MR. GLEESON: Yes.

CHAIRMAN: -- and its general repercussions. Of course, I make that order in the context of what has transpired today, Mr. Gleeson.

MR. GLEESON: Thank you.

MR. SHIPSEY: Chairman, I appear with Mr. Robert Barron, Senior Counsel. Mr. Barron has taken over from Mr. Hogan on Mr. Hogan's elevation to the High Court Bench. I have a number of preliminary points and matters I would wish to raise with you before any evidence is taken, at an appropriate time.

CHAIRMAN: I will speak to those in a moment, Mr. Shipsey.

MR. SHIPSEY: Thank you.

CHAIRMAN: Mr. Lowry.

MR. LOWRY: I am here on my own, as you can see, and I want to address you in respect of this matter and I would ask for your indulgence. I would like ten minutes of the Tribunal's time to address the issue of the fact that I do not have representation at your Tribunal.

CHAIRMAN: I am aware you have had correspondence in recent weeks in that regard, Mr. Lowry, with the Tribunal, and I'll revert to that matter very shortly.

MR. LOWRY: Chairman, I wish to address your Tribunal this morning. I wish to state that before the Tribunal commences its public sittings to hear evidence for Mr. Michael Andersen, that I wish to address you on this matter, which is a matter of great concern to me. And I want to point out to you, you are saying you'll address this in due course; I want to put on the public record today the correspondence and the communications that I have had with you over a period of time since 1997. You have failed to respond positively to my request and you have left me in the position that I am in here today, defenceless.

Now, what I find extraordinary here today, what I find extraordinary here today is, as I walked in, I see the great Mr. Michael McDowell walk through as part of your

team. Now, I want to put that in context here today, Mr. Chairman, before this Tribunal commences proper. As far back as the 17th of November, 1997, in a letter to the Tribunal, my senior counsel, Donal O'Donnell, who is now a member of the Supreme Court, brought to your attention his serious concerns in regard to the acute problem facing me in resourcing a legal team before a prolonged Tribunal. The Tribunal was again advised, through my solicitors, on the 23rd of October, 2002, that I was not in a position to pay my counsel, to pay a solicitor or to pay an accountant for all of the work they had done on my behalf with the Tribunal. It was pointed out to you that it was virtually impossible for me to participate on a daily basis and to deal with the enormous multitude of documents I was receiving from the Tribunal.

This issue of costs was subsequently referred to on several occasions in correspondence between my solicitor and the Tribunal. My solicitor, again, on the 29th of January, 2010, wrote an extensive letter to the Tribunal dealing with cost issues. My solicitor repeated his request for relief from the funding burden on the 11th of May, 2010. The efforts of my legal team failed to elicit any meaningful response from you as Sole Member. Due to the fact that I came under pressure for payments, I resorted,

for the first time in the lifetime of this Tribunal, I wrote directly to you, Mr. Chairman, and in my letter to you of the 24th of September, I advised you that I was facing a very serious problem in relation to my legal representation at the Andersen model and I felt compelled to bring it to your personal attention. I informed you that members of my legal team, who had been extremely considerate and patient, had informed me that I was at the end of the line, so to speak, and must address, to a significant extent, the matter of professional fees outstanding.

When this Tribunal started 13 years ago, my legal team engaged with me on the presumption of a two- to three-year commitment. Not even someone with the wildest imagination could have anticipated the length of this marathon investigation. In that letter to you of the 24th, I advised you, Chairman, that it had been made very clear to me that I would not be represented until such time as some sizable payment was made to my legal team. I cannot blame them for this approach, considering the duration of the Tribunal's inquiries. However, I simply was not in a position to make such payments. I never had, nor do I have, funds of this magnitude at my disposal. Despite making interim payments to my professional advisors over

that 13-year period, there still remains substantial amounts due to them. Mr. Chairman, in my letter of the 24th, I sought your approval for some assistance or accommodation to address this crippling financial burden. I asked that you would carefully consider an interim payment on account so that I could put my legal advisors in funds in advance of the pending evidence of Mr. Andersen. It goes without saying, that because I am unable to secure legal representation and because of this inequality of arms, I am grossly disadvantaged in terms of the ongoing activity of this Tribunal. I have a very considerable fear that my interests cannot be defended or protected in these circumstances.

It is my view that fair procedure and justice under the Constitution requires that an interim payment be made by the Tribunal so that I can discharge my professional fees and continue to be legally represented here at this Tribunal.

Mr. Michael Andersen is a very important witness in the Tribunal's inquiries into the awarding of the second mobile licence. I, as the subject person of the Tribunal's inquiry, I am the one person whose reputation and interests are foremost at stake in this process. However, unlike practically every other person who is affected by the

Tribunal inquiries, I am unable to fund legal representation on an ongoing basis. I do not have the resources of the Tribunal team here in front of me: two senior counsels, a couple of juniors and whoever else is with them. I don't have the representation that the Department have; there is a fully-fledged team out here from the Department of Communications. I don't have the kind of resources that Denis O'Brien has, I don't have the kind of resources that Telenor has and I don't have the kind of resources that Dermot Desmond has. In fact, I counted 34 legal representatives in this room today; not one of them are belonging to me.

It is fair and reasonable to say that I am suffering an inequality of arms when one considers the vast amounts of money that have been paid to lawyers acting for the Tribunal, who have received massive monthly payments each and every month since 1997. There is a very obvious disparity between my position and the position of the Tribunal's legal team inquiring into my personal and professional matters. The Tribunal lawyers have endless resources at their disposal to inquire into me. I, in contrast, have very little at my disposal with which to defend myself. As a consequence, Mr. Chairman, serious issues arise regarding fairness and my rights as a citizen

under the Constitution.

I want to put it on record that following the McCracken Tribunal, I was awarded costs after a public hearing on costs. That claim was then sent to the legal cost accountant, and it was later then forwarded to the Taxing Master. So, eventually, eventually, four years after I had made that application for costs, I received payment from the Exchequer. If you apply that principle to this Tribunal, I am, therefore, expected to wait whatever length of time this is going to last, thirteen years already, possibly into the fourteenth year and four on top of that, so I'll have to wait, I am expected to wait 17 or 18 years before I get any funds. It is unreasonable, it is unfair, and it is unjust, Mr. Chairman, to expect me, or indeed any citizen, to personally bank-roll a quasi-judicial legal monster for this period of time. I am angry and I am disillusioned that this dilemma could be visited on me in the name of a justice system.

In stark contrast, the Tribunal had no difficulty whatsoever in meeting the costs of Dr. Peter Bacon, although I would actually question his competence or his relevance to the evidence he gave in relation to this inquiry. Similarly, legal costs have been met by two English solicitors, Ruth Collard and Kate McMillan, and

also I am aware that massive fees and costs have been pledged to Mr. Christopher Vaughan, an English solicitor, and his barristers.

In light of this, it is impossible to reconcile why I, the party being primarily inquired into, should be deprived of my entitlement to legal representation as a consequence of the Tribunal refusing to make an interim payment to my legal advisors.

And to add to this, I want to say that, as you are no doubt aware, late last year, or early this year, I should say, a significant judgement was handed down by the Supreme Court in the matter of Murphy versus Flood, and you, Mr. Chairman, in the course of these deliberations, on several occasions have resorted to quoting from rulings in Supreme Courts as precedents on matters to which you would rely on. Well, I am going to rely on the judgement of Mr. Judge Hardiman in the Supreme Court, when he stated in his deliberations on that court challenge, and I quote as follows: "There have been tribunals of inquiry since the 1920s. The modern series of Tribunals may be regarded as commencing with the Beef Tribunal of the early 1990s. These tribunals have become immense in their duration and consequently in their costs. It is fair to say that both the length of the present inquiries and their costs were

utterly unimaginable, not only in 1921 but even in 1997."

Supreme Court Judge Hardiman continued: "I am unaware of any international comparator, even among states much richer than Ireland, whose public inquiries approach ours for length, complexity or expense or who exhibit such readiness to have recourse to a tribunal. This is to be deplored from every point of view. I agree with the academic authorities cited by Fennelly J, another Supreme Court Judge, in his judgement in this case, who said: 'The inquiry is inquisitorial in character and often takes place in a blaze of publicity. Very damaging allegations may be made against persons who have very little opportunity of defending themselves and against whom no legal charges are preferred.'"

Judge Hardiman added: "Both the length and cost of tribunals are due in part to the enormous powers which have been conferred on them. They have power to require any person or body in the State to cooperate with them, to produce enormous volumes of documentation and to make themselves available to be questioned. Confidentiality can be set aside and the privilege against self-incrimination does not apply. Sometimes the cost of doing this, which the individual or company must bear, are themselves enormous. It will not be reimbursed for years, if ever.

The tribunal may withhold any reimbursement at all.

Furthermore, in recent times, tribunals have taken to conducting a good deal of the work in private. This means that the material they have obtained will normally be known to the tribunal and may be selectively concealed from the parties."

And Judge Hardiman further stated in his judgement:

"The political and social impact of the Tribunal has been enormous and is beyond doubt. Equally, its unique capacity to damage, even to ruin individuals, is well-established."

Judge Hardiman and Judge Fennelly, in that ruling, accurately described my personal experience, my sentiments and the impact that this Tribunal is having on me as an individual. Bearing in mind the foregoing extracts from the judgement of Judge Hardiman, I renew my application for an interim award of costs to enable me to discharge some of the legal costs which have accrued, and, more importantly, to enable me to be legally represented at this most important sitting of the Tribunal. It is indeed ironic and irreprehensible that I, the party being inquired into, should find myself disadvantaged to such an extent.

Mr. Chairman, for over 13 years, you and I have grown older together here in Dublin Castle. I don't know about you, Chairman, but I presume you think the same as I do, but I

am tired of it, I am weary and I am exacerbated by this incredibly tortuous process. When the Oireachtas established this Tribunal, I was tossed into it and included under the Terms of Reference through political expediency. The political establishment, while making faint-hearted efforts, has, in reality, funked responsibility to rein in your Tribunal and to curtail the outrageous cost to the Exchequer. The actions of the Tribunal and the inaction of the political system has given credence to the notion when you put politics and justice together, you get neither.

And, in conclusion, Chairman, I want to say in this application that, over the years, you, as Chairman, have advocated the principle of fair procedures and justice. In compliance with that principle and in accordance with natural justice, do you not feel obliged to sanction an interim payment? I request you to respond to me and to give me a clear direction today before the taking of crucial evidence from Mr. Andersen.

And finally, Mr. Chairman, while I am on my feet, and rather than detain you at a later stage, I want to say that I find it extraordinary today that I am in this position and that the Tribunal, who was down one of its numbers, that you could approach the Government, as Chairman of the

Tribunal, and get satisfaction to the extent that you can parade Mr. McDowell in here today as part of your team. Now, I want to make a point about this. I have no legal representation, but when I saw him passing me here today, the first instincts I had about Mr. McDowell is this: Is he not in some way or another -- is his position proper? Mr. McDowell has service as a Minister for Justice, he has also served as Attorney General. Has he not a conflict of interest someplace along the line? Was he not sitting at Cabinet tables when decisions were taken in relation to the Terms of Reference or when decisions were taken about resources for this Tribunal? And I'd also wonder why he is being brought in here today, considering that the costs of the Tribunal are an issue. They are an issue because I haven't been able to get any costs from the Tribunal and I find it galling, and I find it appalling to walk in here today and to find another member of a Tribunal team against me. This man is obviously after getting a brief to read his brief, probably in the region of 30 to €40,000, and I am sure he is on your team at €2,350 a day, or whatever he is on. Now, I want to know, Mr. Chairman, before we start, in what capacity is Mr. McDowell here? Is he here today as an advocate for your already-flawed theory that there is something wrong with the licence process? Is he here as a

consultant or is he here as an advisor? And if he is here as an advisor capacity, why is he here? Because you shouldn't have got it as wrong as you did. You have already admitted to making serious errors.

so I conclude before senior counsel tries to stop me on that, but I just want to point out one other thing: That maybe the reason Mr. McDowell is here is because he represented in another High Court case where I am very obviously aware of the fact that Meteor were granted the third licence to operate here in Ireland, mobile licence, and that was challenged in the courts by Orange. You know, I do recall that, in that challenge, because I followed it carefully, in that challenge, Mr. McDowell represented Orange. He failed to strike down that decision and the fact the Supreme Court gave a very strident judgement in that matter where it said that the courts have no business or anybody has no business second-guessing a licence process. But it's interesting to note that, in that process, in that legal hearing, that Mr. McDowell represented Orange at that particular stage and gave seven days cross-examining the man we are going to hear from later on, Mr. Andersen. So it's a huge, huge coincidence that we have him here today to shore up the Tribunal and to make a case that you have been making here for the past

eight -- nine to ten years.

So, Mr. Chairman, those are some of the remarks that I have to make. But I can assure you, I will represent myself, I will do it to the best of my ability, and I want to assure you, Mr. Chairman, that whatever resources I have from here on will be directed towards protecting my reputation, whether it will be with the media or the Tribunal, and I understand that I have very little recourse to the courts while this Tribunal is sitting, but I want to put on record today, Mr. Chairman, that I will chase every decision emanating from this Tribunal if it's not fair, if it's not reasonable and if it's not in accordance with the facts.

CHAIRMAN: Thanks, Mr. Lowry. I'll come back to that in a short time. It is the case, I think, Mr. McDowell, that you are retained by the Tribunal in relation to the matters immediately to transpire in regard to Mr. Andersen's attendance as a witness. There is one jurisdictional matter.

MS. O'BRIEN: Just one matter in relation to Mr. Lowry's submissions. I know, sir, that you have the greatest sympathy, as indeed do all persons who are connected with this Tribunal, in relation to Mr. Lowry's current predicament, and it is, indeed, very unfortunate that now we are here with what we expect to be a very final witness,

that Mr. Lowry should find himself on this occasion without the representation of his legal team that he has had heretofore.

The position is, sir, that you did respond to Mr. Lowry, to both of his letters to you. You responded to him on the 14th of October, 2010, and you also responded to him on the 28th of September, 2010, and you endeavoured, in both of those letters, to explain to him the predicament that you find yourself in, because, as a matter of law, sir, and it is established yet again by the Supreme Court in July of 2009 in the case of Hazel O'Callaghan and the Mahon Tribunal, you have no -- Hazel Lawlor, I should say, and the Mahon Tribunal -- you have no inherent jurisdiction in relation to costs, sir. Your jurisdiction in relation to costs is provided for and prescribed by statute and that statutory provision has been interpreted by the Supreme Court as recently as July of 2009, as entitling you to make orders for costs only when your work comes to finality. And in that regard, sir, you are also mandated to have regard to any desire of the Houses of the Oireachtas, as specified in your Terms of Reference, and without going into them, sir, there are provisions in your Terms of Reference which will appertain to your consideration of costs when you arrive at the stage of dealing with that

matter.

In relation to the costs provision as regards

Mr. Christopher Vaughan, Mr. Lowry's solicitor from the UK,

and Mr. O'Brien's solicitor from the UK and indeed

Mr. O'Brien's other two solicitors from the UK, Ms. Collard

and Ms. Kate McMillan, none of those witnesses were

prepared to come here and to attend unless the Tribunal

paid their costs. But there is no precedent at all, sir,

for the Tribunal ever making provision for the costs of any

witness to attend the Tribunal who is amenable to your

jurisdiction and a fortiori and indeed further, sir, no

provision has ever been made for the costs of any amenable

witness in terms of representation, and by that I mean

representation for the purposes of cross-examining another

witness's witness whose evidence may impact on them.

But you are constrained in this matter, sir, by statute.

You have no inherent jurisdiction to provide for any

pre-emptive or interim order for costs, and with the

greatest of regret, and as has been explained to Mr. Lowry

and bearing in mind the sympathies that you have for his

position, there is, regrettably, very little - in fact,

nothing - that you can do for him at this juncture, and it

is certainly very unfortunate that, at this final stage, on

this last witness, that he no longer has representation

through his legal team. So that's the position in relation to the costs matter.

CHAIRMAN: There seems to be also some suggestion of a possible conflict?

MS. O'BRIEN: In relation to Mr. McDowell, sir, the position there is that --

MR. SHIPSEY: I wonder, in the interests of saving time and having to make repeats of motions, there are other parties that wish to take issue in relation to Mr. McDowell's attendance and perhaps it might be more economical and a better use of Tribunal's time if you heard from those other parties before Ms. O'Brien makes any response in relation to that.

CHAIRMAN: Well, I think I'll hear what, in broad terms, Ms. O'Brien proposes.

MS. O'BRIEN: Well, the position, sir, in relation to Mr. McDowell is that Mr. Lowry is in error. Mr. McDowell was not part of the Government at the time that the Terms of Reference of this Tribunal were settled, nor did --

MR. LOWRY: I never said that, Mr. Chairman.

MS. O'BRIEN: Mr. McDowell is here as a member of the Bar, sir. Mr. McDowell was a member of Government at one point. He was never Attorney General at any time that the Tribunal had any dealings with Government in relation to the

indemnity that had been sought by Mr. Andersen. If he was a member of Government at the time that a Government decision was made, it's certainly my submission, sir, that that has no impact on his ability to come here today, as a member of the Bar, to examine Mr. Andersen on your behalf.

MR. O'CALLAGHAN: I just indicate to you, Chairman, the matter that I mentioned to Mr. McDowell earlier this morning, I wished to make an application in respect of your retention of Mr. McDowell. I am conscious you are very anxious to start with Mr. Andersen, but in the circumstances, sir, would you permit me to make that application now as I think it would be appropriate for you to hear it now and for you to rule upon it now, rather than starting the evidence with Mr. McDowell here?

MR. O'DONNELL: I should say, also, I have an application to make, although it doesn't relate to Mr. McDowell, and I'll be asking you to hear that application before Mr. Andersen gives evidence.

CHAIRMAN: I think I'll make a few remarks first, gentlemen.

In view of what I regard as utterly unwarranted slurs and imputations cast on behalf of some interested or affected persons on certain members of the Tribunal legal team, I have decided to retain Mr. Michael McDowell on behalf of

the Tribunal for the forthcoming evidence of Mr. Michael Andersen and immediately related matters.

I should state that I have taken this decision with the complete support and approval of all members of the Tribunal legal team.

Today's business is the evidence of Mr. Michael Andersen, the economist and consultant, who, through his company, Andersen Management International, advised the Project Team in the GSM licence competition and who has had dealings with the Tribunal over some years. As I understand will be referred to in the Opening Statement to follow, attempts have been made by the Tribunal to schedule Mr. Andersen's evidence at earlier stages this year since he notified his preparedness to testify and furnished a statement to the Tribunal in April of this year. It has been conveyed to the Tribunal by Mr. Andersen's legal advisors that he is unable to continue his testimony beyond Friday week next, which is the 5th of November. Whilst he is an important and substantial witness, I believe his testimony should be capable of being satisfactorily completed within that time span. But time is precious. It has been an arduous task for the Tribunal's comparatively small legal and office teams to, in effect, reverse engines over several years and fulfil all the procedural and documentary stages relating

to preparation for these sittings.

Two consequences appear to me to follow. The first is that it now seems to me necessary to maximise the available two weeks of sittings, it seems necessary that we should sit on Monday next.

The other is that, while there has been a measure of correspondence in recent times over such matters as the form of Mr. Andersen's statements and the status of earlier provisional findings, I see no benefit in these matters being debated upon during the immediate hours of public sittings ahead.

Insofar as these matters have not been already addressed or ruled on, I will receive any further written submissions thought necessary and deal with them as expeditiously as I can, but I have learned, in the course of past sittings, that an anxiety to afford free rein for comment and debate in the interests of fair procedures, can, on occasion, lead to lengthy and unproductive exchanges that curtail time primarily meant for evidence. Accordingly, subject to considering whether any conflict or jurisdictional point immediately arises, I intend that Mr. Andersen's examination, in the first instance by Mr. McDowell, as Tribunal counsel, should very promptly commence.

Although not directly relevant, I should also point out

that, despite a number of requests from me that communications with the Tribunal be conducted through the respective legal advisors, Mr. Denis O'Brien has again seen fit to send to me, signed by him last Tuesday, a lengthy four-page document by way of letter, largely confined to abuse, accusations of bias and preemptory demands.

Mr. O'Brien, like any other affected person, will continue to receive fair procedures and a report that is properly and duly grounded upon all the evidence, including that to be heard from Mr. Andersen, but it should not be supposed that steps that may smack of attempted intimidation or a wish that a final Tribunal report should not be presented, will not be of avail.

We are all of us here for the purpose of hearing Mr. Andersen's evidence. That process, which I expect to commence with Mr. McDowell, as Tribunal counsel, taking him through his various statements furnished, will commence at the very earliest feasible juncture. I have indicated that reluctance to hear, at this stage, any initial matters of debate or argument because I believe that these have been dealt with to a substantial degree in the course of correspondence between the respective legal advisors. I made an exception in the case of Mr. Lowry because he is, at present, unrepresented, and because, as he correctly

points out to me, he is the person most fundamentally affected as one of the two individuals named in the Terms of Reference of the Tribunal. Of course, it is a matter of regret to me that Mr. Lowry's position vis-a-vis the obtaining of legal advice is palpably more disadvantageous than that of any other person before the Tribunal, and it is the case that I have had an exchange of correspondence with him over recent weeks in relation to that particular position, but, as is correctly summarised by Ms. O'Brien, on behalf of the Tribunal, this is a situation in which I do not have an interim or pre-emptive jurisdiction to make advance awards of costs, whatever sympathies I might feel. It is the position that it is only in respect of those non-compellable, witnesses referred to by Mr. Lowry, who were outside of the jurisdiction, that an accommodation in relation to costs was able to be afforded.

As regards any entitlement of Mr. Lowry's, as stated in the Terms of Reference and as established over the practice of a number of tribunals, whilst I can readily see his may require some considerable priority in due consideration, it, nonetheless, appears to me clear on the law from the Lawlor case, and other authorities, that I have no jurisdiction to make any advance award of costs.

Accordingly, whilst I am only too happy to enable

Mr. Lowry, who is, doubtless, capable of asking questions himself of Mr. Andersen, also to refer any questions he may wish to have raised to Tribunal counsel, I see no feasibility in my seeking to make an order at this juncture that is palpably beyond my jurisdiction.

Now, Mr. Shipsey, I have indicated a clear view that I am anxious, indeed, to embark upon Mr. Andersen's evidence and I have indicated that I will receive written submissions and I will deal with them as expeditiously as possible.

MR. SHIPSEY: Sir, with the greatest of respect, that is wholly unsatisfactory. The issue arising over Mr. McDowell's appearance is a matter that the Tribunal has brought upon itself without notice to any of the parties here. It is entirely unsatisfactory that parties would be forced, in a sense, to go ahead with the hearing here without having the submissions that they would wish raised. All of the parties here are extremely anxious to have Mr. Andersen's evidence heard. We are extremely anxious that we be afforded a full opportunity to cross-examine him, and, in fact, the first of my four points you have partially addressed in relation to the sitting times, but it's not just the sitting times, with respect, Chairman, that is important.

It is going to be clear, if the Tribunal take an inordinate

amount of time with Mr. Andersen, that the other parties before this Tribunal will not have sufficient time to ask him questions, and it is my first submission to you and my first request to you that there would be some equality of time in relation to the examination of Mr. Andersen, and if we are to be here for two weeks, there must at least a week afforded to the other parties so that they're not faced with a situation where you, understandably, sir, towards the end of next week, are telling the rest of us to hurry on, in circumstances where Mr. McDowell, if he is still appearing for the Tribunal at that stage, is afforded four or five or six days to examine him. So there must be some assurance given to the parties here that we are not going to be put in that position.

The second matter I want to raise, sir, and it really has to be raised now, is that we have one, and perhaps two, redacted statements of Mr. Andersen, one of which we got in April of this year, not from the Tribunal, but the Tribunal is aware that we got them, and there must be an explanation from you, sir, as to why the statement that is now before the Tribunal and which is clearly redacted because there are paragraphs referred to with items deleted, and we are aware what are in those paragraphs because we got the statement last April, but you, sir, must explain how it is

that the Tribunal is purporting, in open hearing before this Tribunal, to go ahead with Mr. Andersen in circumstances where you are aware that there are at least two other statements which he has made.

The third, sir, relates to a matter that's very important to Mr. Desmond, and that is putting it as mildly as possible, the failure on the part of the Tribunal to disclose to the parties relevant documentation, and the most relevant, in the context of Mr. Andersen's evidence, is a memorandum that his Danish lawyer furnished to the Tribunal back in June of 2002 which refers to there having been a third quantitative evaluation, and we now have that memorandum, most recently provided by the Tribunal in the course of the last week and we also have the document that was generated back in October of 1995 when that third quantitative evaluation took place.

The significance of this, sir, is that, to the best of my recollection, no evidence was led by the Tribunal in relation to this. This document wasn't furnished to the Tribunal's purported expert, Mr. Bacon, and this third quantitative evaluation is what I might describe as an inconvenient truth, because in this third quantitative evaluation, not Esat, not Persona, but an entirely other applicant, applicant number six, was shown to be the winner

on that pure quantitative evaluation. But I want to know, sir, from you, in circumstances where we have expressed concern in the past over the failure to make available documentation, why this memorandum of Lisbeth Bork and the attachment which was furnished as far back as June of 2002, was not furnished to the parties.

And finally, sir, I would just wish to say that Mr. Desmond finds it extraordinary that Mr. McDowell, the former Attorney General and Minister for Justice, who served, I think, from -- memory serves me, from 2002 to 2007 as Minister for Justice and from 1999 to 2002 as Attorney General, how, in relation to all the counsel that were available to the Tribunal to assist the Tribunal if it was felt necessary to retain additional counsel, how it could be that the Tribunal would run the risk of both infuriating the parties appearing before the Tribunal, but run the risk of the appearance of bias and the appearance of impartiality in relation to a very distinguished former Attorney General and Minister for Justice, who must have, in the course of his time as Attorney General or Minister for Justice, had to consider matters touching upon this Tribunal, how it is that the Tribunal could come to seek to represent him to appear now, is really very difficult for Mr. Desmond to comprehend or to understand. And that

follows upon the concern which Mr. Desmond has expressed, and I know, sir, you refer to utterly unwarranted slurs; I am not aware of any unwarranted slurs on any of the other Tribunal members, but a concern was raised, has been raised as to the perception of bias that can arise over Mr. Healy's prior involvement with one of the parties who was unsuccessful in this bid, and to characterise that, sir, and to raise questions about the appropriateness of a counsel appearing for the Tribunal in relation to the award of the licence, having previously acted for one of the parties who was unsuccessful in the bid, how you can characterise that as an utterly unwarranted slur, sir, is, again, somewhat beyond me.

So, on behalf of Mr. Desmond, I am instructed to formally object to Mr. McDowell's involvement, in circumstances where we have no assurance that, either as Attorney General or Minister for Justice, Mr. McDowell had -- and had to take decisions in relation to Mr. Andersen or any question of indemnity provided by Mr. Andersen or, indeed, any matters touching upon this Tribunal's deliberations, as a matter of the Cabinet.

MR. O'CALLAGHAN: Sir, can I just say that I understand, although I don't agree with your ruling on the issue of the redaction of the statement. That issue is being dealt with

in correspondence and I can understand your hesitancy in entering into a debate, here now, about that, when, to a certain extent, it can be dealt with when Mr. Andersen is giving his evidence.

But the issue of Mr. McDowell's presence here, sir, wasn't dealt with in any correspondence, and, for that reason, I say I should be given an opportunity to make a submission now, an application to you, Judge, in respect of Mr. McDowell, that you should rule upon. If Mr. McDowell starts taking Mr. Andersen now, the whole purpose of my application will be defeated and I think it's a very important application, Judge --

CHAIRMAN: If you feel that aspect can be dealt with succinctly.

MR. O'CALLAGHAN: I will deal with it succinctly. Judge, can I start by saying, like most people in this room, I am always pleased to see Mr. McDowell, but seeing him in this forum is, in my respectful submission, an alarming and ill-advised development, and it's for that reason, Judge, that I make an application to you stating that the Tribunal cannot and should not proceed with Mr. McDowell as its counsel, because if it does so, the effect will be that the Tribunal will be displaying bias against my client and indeed against other affected parties

in this Tribunal.

I say that bias will manifest itself, Chairman, because of the involvement by Mr. McDowell in the public affairs of this country over the past 15 years, and, in particular, in his involvement on and statements on the subject matter of your Tribunal's inquiries, namely the second GSM mobile phone licence. And I say to you, Chairman, that through public statements and involvements, Mr. McDowell has accumulated around him a whole mass and series of interests which conflict with this Tribunal, and before I identify what I say are ten examples of Mr. McDowell's conflicts, I want to make four succinct points preliminary to the basis of the application.

The first preliminary point I wish to make, sir, is that, generally, it's entirely a matter for you as to which counsel you choose. As Chairman of a Tribunal, you are perfectly entitled to pick whoever it is you wish, and, in general, individuals such as me or other lawyers representing other parties can't interfere with that prerogative that rests with you.

The second preliminary point I wish to make, Chairman, is that the role of the counsel to a tribunal is a particularly sensitive one, because counsel to the Tribunal are, in many respects, the face and image of the Tribunal,

and I think as you have stated before, Chairman, they are an emanation of the Tribunal. Counsel to the Tribunal ask questions that you want them to ask and, in effect, they are part of the mechanism of your Tribunal.

The third point I wish to make as a preliminary point, Chairman, leads on from the second point, and that is, that if there is any perceived or actual conflict of interest on the part of counsel to the Tribunal, well, then, that conflict becomes, once that counsel is retained by you, a conflict on the part of the Tribunal itself. And if counsel to a tribunal has involved himself previously in an issue affecting the Tribunal's inquiries, that Tribunal leaves itself open to the charge of having a conflict of interest.

And the final preliminary point I'd make, Chairman, is that a conflict of interest on the part of a barrister does not necessarily give any entitlement to another party to raise a legal issue. There are many conflicts which just give rise to an ethical issue, but what I say is that if a conflict is such that it gives rise to a perception of objective bias on the part of the administrative body, well, then, in that instance, the conflict of interest becomes actionable and I am entitled to object to it. And this is one of the few exceptions, sir, when other parties

are entitled to say to you that you should not retain a particular counsel. And I say that the retention of Mr. McDowell by this Tribunal does give rise to a perception of bias on the part of the Tribunal, and, for that reason, my client is entitled to object to Mr. McDowell's retention.

And what I wish to do now, sir, is outline the ten reasons I say Mr. McDowell should not be retained by this Tribunal, and while it gives rise to a conflict, and my solicitor will hand out a book which I will go through very quickly, sir, and I am very conscious of the time restraints you are operating under, but will indicate, I say, insurmountable interests.

MS. O'BRIEN: Sir, the Tribunal was never informed of any of these matters before it sat this morning at 11 o'clock. We are now being circulated with documentation which the Tribunal has never seen before, so if you just retain them for a moment. I think, sir, if the Tribunal is to have regard to this in any meaningful way, it should have been notified of this in advance. Clearly, Mr. O'Callaghan, although he makes much of the fact that you did not disclose who you chose to represent you to him before this morning, sir, he has obviously been aware of this for some time and he has had time to put together all of this

material; no doubt, its press clippings, and so forth, and I would submit to you, sir, that you should have an opportunity to consider these matters before they are opened.

MR. O'CALLAGHAN: I can resolve that very easily. I don't need to give up the booklet.

CHAIRMAN: I don't think it's going to enhance matters having books.

MR. O'CALLAGHAN: I'll just take you through it orally. The first ground I say upon which Mr. McDowell is conflicted is that when the competition to award negotiation of the licence to Esat was announced on the 25th of October, 1995, Mr. McDowell was a member of Dail Eireann, he was a TD for the constituency of Dublin South East. One month after the announcement that Esat were given the right to negotiate for the licence, on the 22nd of November, 1995, Mr. McDowell asked the following question of Mr. Lowry: He asked the Minister for Transport, Energy and Communications the procedures and requirements involved in the awarding of a licence for Ireland's second mobile telephone service. And what we now have, sir, is that your counsel, back in 1995, was questioning Mr. Lowry about the award of the competition to Esat. The very thing you are looking at here over the next

two weeks is the award of that competition, and I say, prima facie, that constitutes a conflict on the part of Mr. McDowell.

The second ground upon which I rely, sir, is that, in 1995, when the competition result was announced, Mr. McDowell was a member of the Progressive Democrat party which had a parliamentary party of ten TDs. Throughout the months from November 1995 to May 1996, eight out of ten of those Progressive Democrat TDs questioned Mr. Lowry about the award of the licence. In particular, as you will be aware, sir, Mr. Bobby Molloy, TD for Galway East, who was the Progressive Democrat spokesman on telecommunications, stated in the Dail that Article 3 of the competition rules were not complied with. So that was a statement by the Progressive Democrats in 1995/1996 - the specific references are in the book - stating that the rules had not been complied with. Mr. McDowell was a member of that party. I presume he was loyal to that party at the time, and that was the view of the party then and I say that must remain the view of Mr. McDowell now. That's the second ground upon which I object.

The third ground upon which I object is that on the 28th of May, 1996, when the licence was granted to Esat, Mr. McDowell put another question down in Dail Eireann of

the Minister, when he asked the Minister whether he originally suggested the figure of 15 million as a cap on the fee of the proposed second mobile phone licence, and, if not, the person who did suggest the figure of 15 million and if he will make a statement on the matter.

And I know, sir, the issue of the cap on the licence is not an issue that is currently being considered by you. You accept, I think, now, sir, that the Commission were the ones that put the cap on that. But what it again reveals is that your counsel, who sits here today, was questioning the grant of the licence and the reason for the licence back in 1995/1995, and the test for bias, sir, as you will be aware, is the objective test as to whether or not a reasonable individual would perceive that there is some unfairness involved in what is going on here, and when you look at the adversarial politics of Dail Eireann, I think you have to accept, sir, that any opposition politician who asks questions about a Government decision, is, in effect, questioning it on the basis that he thinks that decision is wrong.

The fourth ground upon which I rely is that in December 1996 Mr. Lowry resigned from the Fine Gael/Labour/Democratic Left Government. On the 10th of December, 1996, prior to the establishment of the McCracken

Tribunal, Mr. Molloy, telecommunications spokesman for the Progressive Democrats, put down a motion seeking the establishment of a tribunal of inquiry into the payments to Mr. Lowry by Dunnes Stores. In his speech, Mr. Molloy stated that he wished to share time with Mr. McDowell. Mr. McDowell gave a very lengthy speech, which I was going to open to you in part, sir, but you can consider it in due course, but where, in effect, he stated that the alleged wrongdoing by Mr. Lowry needs to be investigated. What this Tribunal is doing today, sir, is, it's inquiring into Mr. Lowry's conduct. It's required to do so impartially and without preconceived views about Mr. Lowry. It is a basic principle that Mr. Lowry is entitled to fairness when it comes to the investigation by this Tribunal. He now finds himself in a position where a former political adversary is one of the mechanisms of this Tribunal investigating him. On any simple basis, sir, that is unfair and that constitutes bias. Even if you look at a Dail select committee which isn't renowned for its recognition or observance of constitutional procedures and entitlements of individuals, if a politician said something which previously was damaging of a party being investigated by a select committee, they will stand aside. We now find ourselves in a situation where a political adversary of

Mr. Lowry, who specifically spoke on payments to Mr. Lowry, on what he described as the irregularity of them, that he is now an investigator of Mr. Lowry, and I say, fundamentally, sir, that is unfair.

And you may legitimately ask, "Well, why are you raising that, Mr. O'Callaghan, since it doesn't affect you?" It does affect my client, because a finding against my client is a finding -- sorry, a finding against Mr. Lowry is a finding that will damage my client.

The fifth ground upon which I object, Chairman, is the ground referred to by Mr. Lowry earlier, and that is that, in the case of Orange Communications against the Director of Telecommunications Regulation and Meteor, Mr. McDowell appeared for Orange, and, during the course of that, he challenged the evidence of Mr. Michael Andersen.

Mr. Andersen was the person who evaluated the competition for the third mobile phone licence. We are here today to try and assess and appraise whether his evaluation for the second mobile phone licence stands up. This man, who is the world expert on mobile phone competitions, who has done about 140 of them, has only ever been challenged in courts or tribunals twice: once in respect of the third mobile phone licence in Ireland and once in respect of the second mobile phone licence in Ireland. And if you look at Judge

Macken's judgement at page 140, she quotes parts of Mr. McDowell's cross-examination of Mr. McQuaid where Mr. McDowell refers to Mr. Andersen's theories. And I say, Judge, again, anyone looking on at this would say it is unfair now that the individual who questioned Mr. Andersen the one time previously when he was assessed on his work, is now the person who is going to impartially investigate him here.

CHAIRMAN: I think he did uphold Mr. McDowell's argument; it was the Supreme Court that reversed that decision.

MR. O'CALLAGHAN: It is, but the issue of bias, Judge, is a perception of bias, whether a reasonable person, objectively looking at this, would say that's a bit unfair, and I'll come back to that in due course at the end, sir. I just want to get through it quickly.

The sixth ground upon which I object is that you will be aware, sir, that an issue of fundamental importance for my client and all the individuals here was the Nesbitt Opinion. In your ruling, Sir, the amended revised ruling of the 24th of March, 2010, you refer to how the Nesbitt Opinion had privilege claimed over it, and you said that in around May 2001, you started contacting the Chief State Solicitor's Office, and then, in February 2002, a schedule of documents was furnished to you and privilege was claimed

over it. At that time, Mr. McDowell was Attorney General. He had to be involved in advising the Government as to what documents it claimed privilege over. His decision or his -- the advice that the Government -- or the advice to the Government was to retain privilege over that document, and I say that led to an unfairness against my client. I say that the evidence which you heard of Mr. McFadden, the documents that were produced from him, the evidence of Mr. Nesbitt, I say, and you don't have to -- I know you can't comment on this, Chairman, but I say that evidence was significantly to my client's advantage when it was heard here before and I say that that evidence was prevented from getting into this Tribunal because of a decision which I respectfully submit was made in part by Mr. McDowell.

The seventh ground upon which I object is that in 2001, when Mr. McDowell was Attorney General, two of the defeated contestants for the second mobile phone licence instituted proceedings against the State and others. Comcast and Persona instituted those proceedings. Those proceedings had, in the Comcast proceedings, defendants that included my client and the Attorney General at the time, who was Mr. McDowell. Mr. McDowell was obviously heavily involved in the defence of those proceedings, and the defence of

those proceedings at the time was a defence which, from his point of view, perfectly properly, was the defence of the State and the Attorney, and I say that conflicts now because the same issues are, in effect, being dealt with here now today, and yet you have, not the lawyer but the client from that previous proceedings, who is assessing, impartially and independently on your behalf, the witness, Mr. Andersen.

The eighth ground, Judge, is, and I don't want to use excessive language, but it is a very surprising ground. On the 3rd of December, 2002, Mr. Nesbitt, Mr. O'Donnell and junior counsel sought representation here on behalf of the State, and at that time Mr. McDowell wasn't Attorney General, he resigned as Attorney General on the 6th of June, 2002. But the issues concerning the Department and the investigation by this Tribunal of the second mobile phone licence were alive as far back as the year 2000. It had to have been the case that Mr. McDowell played a role in instructing one of the legal teams here today, and I was trying to think of an example of it, and I thought would it be like if you, sir, decided to take on board the inimitable Mr. McGonigal as your counsel, but, in fact, it would be stranger than that because Mr. McGonigal was the Barrister for Mr. O'Brien. In fact, it would be like if

you took on the client, it would be as though you took on Denis O'Brien as your counsel, which is a prospect I don't think particularly likely.

And I should also say that as the ninth ground, Judge, on two occasions when Mr. McDowell was Attorney General, on the 15th of October, 1999, and on the 27th of January, 2000, you received submissions from Mr. Clarke, as he was then, on behalf of the Public Interest, relating to jurisdictional matters. It related to the separate party report, to the Ellis Party report, but what it did indicate, sir, is that, once again, you were getting submissions directly from Mr. McDowell, who was the client at the time, about issues pertaining to your Terms of Reference.

The tenth point I rely upon, Judge, is that - and this is a point which can be interpreted in a number of ways - I believe, and I have never met Mr. Andersen, but I believe that, at the end of Mr. Andersen's evidence, that you will validate the award of the second mobile phone licence. You don't have to comment about it, and I know that you won't, but that is my belief, based on my confidence having read the documents.

Back in 2000, my client made political donations to all of the political parties in this country. He gave a donation

of 50,000 to Fine Gael, Fianna Fail, Progressive Democrats and the Labour Party. At that time, Mr. McDowell was involved in the Progressive Democrats. I do not want to have a situation where when, I believe will happen, that this Tribunal validates the award of the second mobile phone licence, that somebody can turn around and say, well, you knew that Denis O'Brien had made a donation to the Progressive Democrats back in 2000, that's what swung it when McDowell got involved. And I want to say everything I have identified here, the ten grounds, represent perfectly respectable and appropriate behaviour by Mr. McDowell. In respect of each of them, he was carrying out his constitutional and professional duty to the best of his ability. He did absolutely nothing wrong. But where an issue arises, Chairman, is when Mr. McDowell seeks to come in here and cloak the gown of Tribunal counsel upon him. It can't be done. He cannot leave the baggage, political baggage, of those years at the door. He has around him, Chairman, such a massive conflict, that I think it would require use of the rescue drill and Phoenix Capsule from the Chilean mine rescue to abstract him from it, and I don't see it in the hall. May it please you, Chairman.

CHAIRMAN: You have no direct authority, Mr. O'Callaghan; obviously, the generic matters on objective bias are

well-known to all of us, but given that there have been a large number of barristers in the history of the State who have been Attorneys General or Cabinet Ministers and have reverted to practices at the Bar, you may yet yourself emulate that distinction --

MR. O'CALLAGHAN: Highly unlikely, Chairman, I suspect.

CHAIRMAN: -- that there is no specific case.

MR. O'CALLAGHAN: Well, I was thinking of that. I hope Mr. McDowell will forgive me if I put him in the same sentence as F.E. Smith, the first Earl of Birkenhead, but there was, back in 1912/1913, the Marconi scandal, when F.E. Smith and Edward Carson had been retained by liberal politicians to represent him at the select committee that was investigating this insider-dealing scandal. But at that time, F.E. Smith and Edward Carson were hugely criticised by their Tory colleagues, because when they were in Parliament, they sat on their hands and refused to engage in any debate about the Marconi issue and they said they couldn't because of their professional obligations and they had dealt with it in a judicial and a court fashion. That's a reversed example.

But I don't have a particular example, sir, in respect of it. I can refer you to the authorities on bias, though. O'Neill against Beaumont Hospital --

CHAIRMAN: No need, Mr. O'Callaghan.

MR. O'CALLAGHAN: You are probably aware of them and they are fairly succinct. All of them rely upon the objective test, and the objective test is whether or not a reasonable person looking at this would think there is an unfairness to that. And the one point, if I was to emphasise one, and I am concerned, I see Mr. Lowry making movements here which means he may make a submission you, but the fact that Mr. Lowry's political adversary is now being retained as counsel to the Tribunal, that can't be right, sir.

MR. O'DONNELL: I have a brief submission to make. It does not relate to the presence here of Mr. McDowell, you'll be glad to hear, but it does relate to the redacted statements, and I hear what the Tribunal has said in relation to correspondence. With respect, sir, with the greatest of respect to the Tribunal, it is not appropriate or adequate to simply say "we are closing off any further discussion or debate of that matter." It is not appropriate to deny my clients, and other persons in the room, full access to the statements made by Mr. Andersen. It is also inappropriate to say that because time is against us, it is not appropriate to have any further debate in relation to this matter. The statement which my client has sought of you, is a statement that was furnished

to you in December of 2008. It is heavily redacted. We know that from the April 2010 redacted statement, that when we look at the unredacted version, which as the Tribunal is all too well aware is available on the Internet, the unredacted statement contains elements of serious criticism of the Tribunal and of its workings, as well as some of what might be called the working hypothesis of the Tribunal.

It is manifest that any criticism that Mr. Andersen makes or made in a statement that he made in 2008 of the hypothesis of the Tribunal or the analysis made by the Tribunal, is clearly relevant to my clients, because they were part of the same evaluation process, yet the Tribunal, through a process which it acknowledges in correspondence is artificial, has said "we will allow you to see factual assertions made but we will not allow you to see comments by Mr. Andersen on those factual assertions." And I say that that's unreal and unfair. We have also said that it compromises our ability, as legal advisors to the Department, to defend and present -- to represent and defend their interests in the best way possible.

And, sir, I say that it is clear that what you have sought to do is to try to discourage any discussion in relation to the provisional findings. But even if the Court were --

even if the Tribunal were to provide the statements on the basis of a confidential basis to my clients, we are surely entitled to hear what Mr. Andersen has to say on a conclusion that the Tribunal has expressed, which Mr. Andersen believes to be wrong, and yet the Tribunal, yet again, is seeking to close down discussion on that, and, as I say, is also seeking to close down any adverse comment which appears to be made by the Tribunal.

Now, sir, my instructions are clear. The Koran case was a case in which the High Court set aside findings which were made against a person at a tribunal of inquiry because his fundamental and constitutional rights were not honoured by that tribunal. The Murphy decision, which has already been referred to, roundly condemned the Flood Tribunal's refusal to provide material to an affected person in advance of that person giving evidence. And they are both situations which I find myself in now.

I should also say, Judge -- or, sir, that the memorandum, that while we have received a redacted memorandum for 2008, it is incomprehensible, and it is incomprehensible not because, as is suggested in correspondence by the Tribunal, that Mr. Andersen's first language isn't English; it's incomprehensible because of the way in which it has been cut and pasted by the Tribunal so as to exclude bits that

don't suit them. And I say, sir, that this is an issue that has to be resolved now. I am not seeking an adjournment of the hearing, I am not seeking to delay in any way Mr. Andersen giving his evidence, but I say that it is imperative and I am formally asking you to give, immediately, full disclosure of the unredacted statement of Mr. Andersen of December 2008, and, logically, it follows that we should also receive the April 2010 statement also. And I note that the court -- that the Tribunal has, in correspondence, refused to do this, but we ask you, if there is some doubt in your mind about this, that you refer the matter to the High Court for directions, which you are perfectly able to do under Section 3 of the Tribunals of Inquiry Act. That is a section that is tailor-made to allow you to resolve complicated issues of law which would entitle you to refer that matter now while Mr. Andersen is still giving evidence, and I do not know if the court is prepared to do that -- if the Tribunal is prepared to do that, but to date, so far, it has refused to do so without giving an explanation as to why it would not do so. As I say, it's not simply good enough to say that this is a matter of time, because you have had them since 2008 and we have been looking for the statements since July of this year.

The other thing I am asking you to indicate now is that it is clear that, as a result of Mr. Andersen's evidence, that new provisional findings will have to be made, and I am asking you to confirm that you will be making new provisional findings, in the light of Mr. Andersen's evidence, that it's not appropriate that you would make final findings but that you must make provisional findings and then hear the parties before and after those provisional findings are made. And I am instructed, sir, to make it clear, that if the Tribunal refuses to provide my clients with full unredacted statements, my clients reserve the right to move to set aside any adverse new provisional finding which the Tribunal makes in respect of my clients, including the civil servants, on the grounds set out above in Koran and in Murphy, and so it's on that basis that, to avoid a clash of that sort, that I ask the Tribunal to provide me with the full unredacted statements of Mr. Andersen which were made to the Tribunal in December of 2008 and April of 2010.

MS. O'BRIEN: Now --

MR. GLEESON: Could I just briefly say a few words on behalf of Professor Andersen. I am perhaps more conscious than anyone in this room of the limited time that we all have to get through and complete, hopefully, his evidence

in the next two weeks, and, in my submission, the primary focus of the next two weeks should be his evidence and his evaluation of the process itself.

Having said that, there are a couple of things that I wish to address. Firstly, the question of redacted statements. We accepted in correspondence that there wasn't going to be permitted by the Tribunal any reference to the provisional findings during the course of this hearing. We did so, however, on the understanding that those provisional findings would be set at nought when he appeared before the Tribunal. Now, that understanding appears to be misplaced because it now transpires that the provisional findings are not set at nought but are being held in reserve in some way.

Now, that raises a difficulty for Mr. Andersen -- sorry, for Professor Andersen. He is being told that certain matters are going to be raised but not the provisional findings themselves. Now, I have advised him that he must endeavour to give his evidence without referring, if he can, to the provisional findings, and he will endeavour to do that. But it is a somewhat artificial exercise, when he has made a full written submission to the Tribunal in December 2008 in response to and rebuttal of those provisional findings, and that is the document which has

been heavily redacted. So I am anxious that his evidence would proceed, but I think it's important that the Tribunal should understand that he is going to do the best he can not to refer to the provisional findings, but he must, however, defend himself, and if we reach a stage where the questioning from Mr. McDowell, or whoever else appears for the Tribunal, seeks to challenge his professional integrity and reputation, then defend himself Professor Andersen will, and this Tribunal is obliged to vindicate his entitlement to so defend himself.

Now, if I can just raise -- deal with one or two of the other points raised by My Friends. The question of timing, in my submission, sir, it would be certainly preferable that the Tribunal would indicate by when it's going to be concluded with Professor Andersen's direct evidence, because we will certainly need a number of days after that has been concluded and before he completes his evidence, in order to have him examined, not only by his own legal team but by other parties affected.

Secondly, in relation to the objection to Mr. McDowell's presence, I am somewhat taken aback by some of the statements that I have heard from Mr. O'Callaghan, but I am not formally objecting to Mr. McDowell's presence today. I am, however, reserving my client's position in relation to

that.

And finally, I should say that we prepared a further statement from Professor Andersen dealing with the issue of the indemnity which he obtained from Mr. O'Brien and it explains the reason why he obtained such an indemnity and the history of his request for an indemnity going back to 2003. I understand that that statement was faxed to the Tribunal yesterday. It is, I understand, being considered by the Tribunal, but I would be very anxious that that statement would be read into the record, the same as the other statement which, I understand, is about to be read into the record, and I would be anxious that that would be done before Professor Andersen commences his evidence, or as soon as possible thereafter.

MS. O'BRIEN: Sir, just dealing with Mr. Andersen's most recent statement. That was received by the Tribunal at 10.43 this morning. It's being considered by the Tribunal and it's very probable that it will be opened at the appropriate point in the course of the initial stage of Mr. Andersen's evidence.

Now, there is a number of matters that I am going to have to address, sir, and it's unfortunate, because as everybody is mindful of the fact that despatch needs to be made and some finality has to be brought, not only to Mr. Andersen's

evidence but to your work, sir, and you must be committed to bring that work to finality.

Now, the first point arises in relation to the provisional findings, sir. Mr. Gleeson has intimated that if Mr. Andersen feels it necessary to defend his position, that it will be his intention or that he may feel obliged to refer to the provisional findings. Now, it's been made very clear in correspondence to Mr. Andersen, dating back to the middle of April this year, that the purpose of his attendance here today is not to challenge the Tribunal's provisional findings; the purpose of his attendance here today is to make himself available to assist the Tribunal by giving evidence in accordance with the Tribunal's request dating back eight years, sir, to the middle of 2002. The provisional-findings procedure which you implemented uniquely in this jurisdiction, sir, in comparison to all other tribunals, was for the purpose of extending fair procedures to affected persons. You notified them of provisional findings and you invited them to make written confidential submissions addressed to those provisional findings. Mr. Andersen has had his opportunity to avail of that procedure. He did so. The Tribunal received his submissions in December 2008 and has given consideration to them and that is the end of the

provisional-findings procedure that arose in November of 2008.

With regard to the waiver of provisional findings, sir, it seems that Mr. Andersen must have been under some misapprehension that the Tribunal had adopted a procedure whereby it would waive provisional findings if a witness who had been notified of provisional findings adverse to them and who had not given evidence or made themselves available to give evidence prior to the notification for provisional findings, would have those provisional findings waived. No such procedure was ever adopted or promulgated by the Tribunal.

Now, in the case of Mr. Christopher Vaughan, who attended in March of 2009, provisional findings were waived, but that was not the case in relation to a witness who attended after that, sir, and in July of 2009 another witness attended against whom provisional findings also had been notified and in respect of whom the provisional findings were not waived, and that was for a very good reason, sir. Provisional findings are not findings; they are purely a snapshot in time of your thinking, based on the evidence that you have heard, which was the evidence up to 2008. They have no legal consequence and they have no factual consequence. They are implemented solely for the benefit

of extending fair procedures to affected persons. And it is in pursuance of that, sir, the provisional findings are notified. There is no necessity to waive any provisional findings when a witness who has given no evidence before they were formed, makes himself available after they are formed to give his evidence. If it is the case, sir, that you are of the view, having heard Mr. Andersen's evidence, that additional provisional findings should be notified to Mr. Andersen, you will do so. And as I understand it, sir, that's the procedure that you intend to adopt and there is nothing, sir, objectionable or unfair in that procedure.

Now, the second matter that I need to deal with is the question of documents, and there are various elements of the documents that arise in relation to Mr. Andersen's evidence to which exception has been taken. Now, Mr. O'Donnell has referred to a document with which the Tribunal was furnished in December of 2008. That was not, with the greatest of respect to Mr. O'Donnell, and he is aware of that and the State are aware of that, that was not a statement made to the Tribunal. That was a submission made by Mr. Andersen in response to the Tribunal's provisional findings. It was part of the Tribunal's confidential process.

The document which the Tribunal has constructed, based on

the information contained in Mr. Andersen's submission, has been headed "A memorandum," but the document with which Mr. Andersen furnished the Tribunal confidentially was a submission made confidentially, addressed to the confidential provisional findings and part of that confidential process, sir.

Now, the Tribunal reviewed that document in the course of the weeks prior to Mr. Andersen's attendance and it reviewed that document in the context of a request made by the State for access to it. The Tribunal's initial view of it was that it was not a document that could ever fall within the principles of the O'Callaghan decision, because the O'Callaghan decision related to information furnished to a tribunal by a witness in the course of the private information-gathering process of the Tribunal which the Supreme Court held should be made available to persons affected by the evidence of that witness so they could fully and properly exercise their right to cross-examine the witness.

However, having reviewed it further, sir, the Tribunal recognised that, in some ways, Mr. Andersen's confidential submissions addressed to the Tribunal's provisional findings in December 2008 were somewhat unique, because he hadn't given evidence. So that to the extent that the

information that he refers to in that submission was not the subject of earlier evidence, the Tribunal took the view that, on a wide interpretation, even wider than the Tribunal's usual interpretation of O'Callaghan, that it may constitute information which should, in fairness to affected persons, be disclosed to them, and, to that end, the Tribunal extracted from Mr. Andersen's submissions that part of his submissions that contained factual material. It reconstituted that into a memorandum and it furnished that to the affected persons last Tuesday.

So it is quite incorrect for Mr. O'Donnell to characterise the Tribunal as having redacted or failed to distribute or circulate any statement made by Mr. Andersen to the Tribunal.

Now, the material redacted from that submission, sir, is not comment or observation on any hypothesis of the Tribunal, as Mr. O'Donnell has characterised it. It is comment on observation and submission addressed to the most confidential part of the Tribunal's work, which is its provisional findings. These provisional findings, sir, if they were to emanate into the public domain, could seriously and unnecessarily damage and impact on the reputations of affected persons, because they do not represent your findings. They do not represent findings

that you may ever make. And, in fact, sir, at this point in time, they may not even represent your provisional views, because over the last two years you have had the benefit of submissions from very many affected persons and you have also had the benefit of additional evidence.

So, in those circumstances, sir, I would urge you, in the strongest terms, to refuse and resist Mr. O'Donnell's requirement that -- or request, that you circulate those full unredacted submissions. They are not a statement. They were not made for the purposes of giving evidence but they are addressed to the most centrally confidential aspect of the Tribunal's investigations and procedures, implemented not for the purpose of the investigation but solely and purely for the protection of the rights of affected persons. So that's the first point in relation to documents.

The second point in relation to documents relates to Mr. Andersen's statement of the 13th of April. Now, Mr. Andersen's statement of the 13th April, sir, was furnished to the Tribunal on the 14th of April, not by Mr. Andersen but by Messrs. Meagher & Co, Mr. O'Brien's solicitors. At the same time. Messrs. Meagher & Co circulated that statement in its full form to all affected persons, so there is a complete unreality in anybody

complaining that they do not have a copy of that statement. They have a full copy of that statement.

There are two forms of that redacted statement that have been circulated by the Tribunal. The first form of the redacted statement, sir, was circulated on the 11th of October, two weeks ago, for the purposes of O'Callaghan production, and this arises because of the decision of the Supreme Court where the Tribunal notifies all affected persons of any information or documents furnished by a witness who is about to give evidence. That version of his statement did redact a considerable amount of material from it. That material was redacted because of a suggestion by Mr. Andersen at a very early stage in the Tribunal's dealings with him since last April, I think in fact it was his Danish solicitor's letter of the 7th May, that his evidence to the Tribunal should be confined to the substantive inquiries conducted by the Tribunal. The Tribunal acceded to that but subject to the reservation that if matters connected with his engagement with the Tribunal became material, that it would have to refer to them.

That arrangement, if you like, between Mr. Andersen and the Tribunal, at his suggestion, has been superseded by subsequent events, to which I don't need to refer to at

this juncture, but that has given rise to the statement of the 13th April in the form that was circulated last Friday. And in the form that it was circulated last Friday, as anybody who received it can easily check and clarify by comparing it with the original that they have, has been redacted only to the extent of removing references to the provisional findings, sir. And it has been made clear to Mr. Andersen and it's been made clear to affected persons, that there will be no reference to your provisional findings in the course of these sittings or in the course of Mr. Andersen's evidence, and I think, sir, it is your view that you intend to adhere to that in the strictest possible terms. So that's the position about Mr. Andersen's statement.

Now, there has been no question of the Tribunal withholding or in any way trying to withhold from public scrutiny or the scrutiny of affected persons any of the matters that have been included by Mr. Andersen in his statements or of whatsoever nature, sir.

Now, the third matter which relates to documents is a matter raised by Mr. Shipsey in which he said that the Tribunal had withheld a memorandum furnished by Lisbeth Börk, who was a solicitor retained by AMI after Mr. Andersen ceased to have any involvement with them in

June of 2002, and documents which were produced to the Tribunal at that stage, and in particular a third set of quantitative results dated the 2nd October of 2002.

Now, sir, it will be quite apparent and will be demonstrated that there is absolutely no truth whatsoever in anything that Mr. Shipsey has addressed you, and had Mr. Shipsey been here in the course of the Tribunal's substantive inquiries into the second GSM licence, and I note, in fact, that of the 160, or so, days of sittings, that Mr. Shipsey was here -- or Mr. Desmond's legal team; I am not sure if Mr. Shipsey was here for all of the 18 days, but they were present for 18 days, and, in fact, on the majority of those days they were present because Mr. Desmond or Dr. Michael Walsh or some other witness whose evidence directly affected their client's interests, happened to be giving evidence. In terms of the Tribunal's substantive inquiries with its main witnesses, Mr. Brennan, Mr. Loughrey, and for Mr. Loughrey I think they were here for three days, and, in fact, what will become apparent, sir, is that not only was that third set of results referred to by the Tribunal in its Opening Statement in December 2002, it was circulated in its public sittings books and it was taken up with at least five of the departmental witnesses, so there is absolutely no basis

whatsoever, in fact, for the complaint that has been made by Mr. Shipsey in that regard.

Now, in relation to the final matter, sir, which is the objection that has been taken to Mr. McDowell appearing here for the purposes of Mr. Andersen's examination, there is just one or two points that I wish to make in that regard.

Firstly, sir, Mr. McDowell's views, one way or the other, of this competition, or the manner in which it was run, are entirely immaterial to his examination of Mr. Andersen. Mr. McDowell is here solely for the purposes of questioning Mr. Andersen on your behalf. He is not a member of your legal team, save for that purpose, and, in questioning Mr. Andersen, he is doing so, as all Tribunal counsel do at all times, at your direction, sir.

Mr. McDowell has not been appointed as a member of this Tribunal. He has not been appointed or he has no role whosoever, sir, in your functions, and your functions remain solely yours and absolutely yours.

The fact that he previously cross-examined Mr. Andersen in the course of the Meteor and Orange litigation back in 1996, sir, I would suggest has absolutely no application of any sort. There are many instances in which counsel appear on one side and the other. They examine witnesses in one

case, they cross-examine them in the other case and that has no bearing whatsoever and could not give rise to any issue of bias, objective or subjective, sir. In the circumstances, sir, Mr. McDowell has a very limited role. As you said, sir, there appear to have been no instances in the reported case law in this jurisdiction where any objection has been taken to a former Attorney General of this State acting in litigation in relation to any matter. So it would be my submission to you, sir, that no reasonable objection can be taken and nor does any suggestion of objective or subjective bias arise on your part, arising and by virtue of the fact that you have asked Mr. McDowell to conduct your examination of Mr. Andersen on your behalf.

I don't think I can put matters any further.

CHAIRMAN: Well, Mr. Lowry, what are you going to add?

MR. LOWRY: Mr. Moriarty, I am representing myself. Every other participant here has had the opportunity to say what they have to say and I would like the opportunity to make a comment in relation to the appointment of Mr. McDowell as one of your senior counsel.

CHAIRMAN: You have already done that, Mr. Lowry, and I have noted that.

MR. LOWRY: I'd like to confirm some of the points that

have been made --

CHAIRMAN: If you don't mind, Mr. Lowry, I am trying to make despatch, I am trying to afford fair procedures, but these matters have emerged unexpectedly this morning.

MR. LOWRY: I accept that, but I am trying to be helpful to you because there was nobody in a better position to make a judgement on this than I was, and I am advising you, Chairman, as Tribunal Chairman here, that when I was Minister and proceeded with a policy initiative by the then-Government, we appointed an independent committee drawn up from my Department, then Transport, Energy and Communications, and the Department of Finance. We advertised and ran a competition for an independent consultant, and when the result came through and when the Government accepted the recommendation of that particular committee, I want to advise you, Mr. Chairman, to assist you in your deliberations, within three days of that announcement being made, the losing consortia, Persona, were doing the political rounds, making all sorts of outrageous allegations against the officials in the Department of the time, and the biggest cheerleaders they had at the time, Mr. Chairman, was none other than Mr. McDowell and his eight members of the PDs at that time. I believe that it is totally wrong, I believe it is

improper, and I think that because of his political contribution to those debates at that time, that Mr. McDowell is hopelessly compromised because he brings to this Tribunal preconceived ideas about the competition, he brings to this Tribunal a predetermined judgement, and, in anybody's language, that's unfair. As far as I am concerned, the PDs, and he was one of them, your senior counsel sitting before you today, harassed and chased me and went to the extent that they had numerous meetings with Persona and fed back that information through the Dail. I believe he should not be sitting in this chamber today examining Mr. Andersen. That's --

CHAIRMAN: Thanks, Mr. Lowry.

MR. LOWRY: On the redacted version of the statement, look --

CHAIRMAN: Mr. Lowry, I am trying to run -- I am trying to fulfil a public function. I've given you a full hearing this morning.

MR. LOWRY: I want to make a point, a very important point in relation to the redacted statement. Senior counsel, Jacqueline O'Brien, has made a statement here about lovely niceties. Look, I am a layman. I got a statement from Mr. Andersen, and I got a second statement from the Tribunal, and a blind man will see that you had taken out

the sections in his first statement which didn't suit the Tribunal's deliberations. A blind man will see that any criticisms of Mr. Healy was removed in the second statement that I received. Why, then, was paragraph 4 removed from it? I'll say no more about that because when we come to examine this matter, I want to see the first statement on the screen, I want to see the second statement on the screen and I'd like to see the bits that you have omitted deliberately.

CHAIRMAN: That's enough. Thanks, Mr. Lowry. Very good. I am not going to seek to give an improvised ruling on all the matters that have been raised this morning. I am satisfied that, on the matters of redaction of any statements and on the matter of provisional findings, that no infirmity or impropriety such as induces me to take a particular course at this moment, is disclosed. Because of the improvised nature at which these matters largely arose, I reserve the right to give further consideration and give any additional ruling, be it in writing or at a later hearing, that may be necessary.

Likewise, in relation to the matters raised in relation to Mr. McDowell, it would have been vastly preferable, in view of the fact that it has been possible to compile a fairly detailed booklet of instances and other documentation, that

this should have been provided to the Tribunal at an appreciably earlier stage because it indicates that it was not exactly one of the secrets of Fatima that Mr. McDowell had, in fact, been retained by the Tribunal.

From what I have heard to date, I am far from being led to the belief that the criteria required to fulfil objective bias have in any way been disclosed. As a barrister and politician in relation to matters in which he was elected to public office, invited to serve in Cabinet and invited to serve as Attorney General, the open activities conducted by Mr. McDowell are distinguishable from his functions as a private barrister. When he was contacted as one of the possible persons who might render this limited form of assistance to the Tribunal, he assented to do so on terms, I may say so, very radically distinguishable from those suggested earlier by Mr. Lowry, and I am satisfied that his retention and his continuing to act on this limited basis is not one that should in any way be impugned.

Accordingly, I proceed. While reserving any rights to give further consideration to certain of the matters that have been urged, I propose to proceed forthwith to make such progress as we can on the initial statements, and I would welcome Mr. Andersen --

MR. O'CALLAGHAN: Judge, I just wanted to say that

obviously there is a slight criticism of the fact that I didn't provide the booklet beforehand. There was no statement by the Tribunal that Mr. McDowell had been taken on. I looked on your website every day. There was no indication he was the new senior counsel. I had heard gossip, to be honest with you, that this was going to happen. I disbelieved it, but, nonetheless, I prepared myself, as every barrister should, for the eventuality, and it's only when I saw Mr. McDowell coming in and I knew I was going to make the application. But really, I shouldn't be criticised for the fact that I didn't notify the Tribunal. The Tribunal should have publicised that Mr. McDowell was its new counsel.

CHAIRMAN: Let's proceed if we can, Mr. Gleeson.

MR. GLEESON: Professor Andersen, please.

MS. O'BRIEN: Sorry, sir, there is an Opening Statement to be delivered, unfortunately, first, before Mr. Andersen is called to give evidence.

OPENING STATEMENT:

MS. O'BRIEN: Today, the Tribunal will commence hearing evidence from Mr. Michael Andersen, the Managing Director and lead consultant with Andersen Management International, the Danish consultants engaged by the Department of Communications to provide expert assistance in connection

with the second GSM competition. While for many years Mr. Andersen declined to come to Ireland to give his evidence, his appearance here today is welcome and his evidence is awaited with some measure of expectation as being of potential significance to a number of important matters canvassed before this Tribunal. It must, however, be recognised that Mr. Andersen's appearance as a witness at this very advanced stage of the Tribunal's inquiries is not without its difficulties, having regard to the fact that, unknown to the Tribunal for some five months, he had been in receipt of an indemnity from Mr. O'Brien which appears to be connected with his availability as a witness. This will be referred to in due course.

The entire process for the design of the competition to the ultimate formal grant of a licence involved a number of stages as follows:

Firstly, the identification of the relevant evaluation criteria, which, in the first instance, was done by the Department.

Secondly, the identification of an expert consultant to assist the Department in the running of the competition.

Thirdly, the choice of and design of an evaluation model.

And fourthly, the design of the competition, the receipt of applications and the evaluation of those applications

leading to the announcement of the winner.

The winner of the competition was not automatically entitled to the licence, but was the person to whom the State, in the first instance, was obliged to offer the licence in terms to be negotiated.

If negotiation with that entity or individual proved ineffective, it was envisaged that the State would move to the next entity, and so on.

Mr. Andersen's role was almost exclusive confined to the evaluation process, and, as far as can be seen, he would not appear to have played a major role in the negotiation process.

the Tribunal's public hearings in connection with the second GSM licence commenced in December 2002. Although Mr. Andersen provided assistance to the Tribunal prior to and following that date, he declined, despite the Tribunal's repeated requests, to provide evidence to the Tribunal. As will be mentioned later, it was initially intended by the Tribunal that the major, if not exclusive, focus of the Tribunal's inquiries at these sittings would be directed to Mr. Andersen's role in the evaluation process as was suggested by him, although this was not to say that the Tribunal would not wish to focus mainly on the part he played and the part of his company, AMI, in the

evaluation process.

The preparation for these sittings has entailed significant expense by reason of the fact that many documents accumulated over a number of years have had to be re-examined, as has evidence given over many days by officials of the Department, members of the Project Team, other officials of the Department and other persons connected with the competition process. In the limited amount of time available, it is not proposed to set out in this Opening Statement a comprehensive account of the evaluation process and its surrounding circumstances. This was already done at considerable length at the time of the institution of the Tribunal's public sittings concerning the licence.

What I now propose to deal with briefly are the main features of the competition, with specific reference to those parts of it with which Mr. Andersen was involved.

The competition to licence the second GSM operator to compete with Eircell was launched by Mr. Michael Lowry on the 2 nd of March, 1995. The competition was instituted on foot of a Government decision of that date which authorised the holding of the competition and approved the evaluation criteria. That decision provided that the process would be promoted and controlled by the Department of Transport,

Energy and Communications and that a recommendation will be put by Mr. Lowry to Government in time for a final decision by the 31st of October, 1995. The closing date was initially fixed for 23rd of June, 1995. This was delayed until the 4th of August, 1995, due to an issue surrounding the competition design raised by the European Commission. The projected completion date of the process was also deferred until the end of November 1995. The result was, however, announced one month, early on the 25th of October, 1995, as four weeks envisaged for Government consideration had been abridged.

The competition process was initiated by the public issue by the Department of a Request for Tenders documents. This was contained in a document referred to in the course of the Tribunal's evidence as the RFP and was available to all interested parties on payment of a fee of £5,000. It contained the rules of the competition and it notified interested parties of the criteria by which applications would be evaluated.

Paragraphs 3, 9 and 19 were the significant paragraphs in terms of the Tribunal's inquiries, and you will recall, sir, that they were paragraphs that were raised with a number of the Departmental Officials who gave evidence and those officials were asked as to what they understood by

virtue of the contents of those paragraphs, and just briefly to recap on them.

Paragraph 3 declared that applicants must give full ownership details for proposed licensee.

Paragraph 9 required applicants to demonstrate their financial capacity and technical experience and capability to implement the system if successful.

And paragraph 19 was the pivotal provision of the RFP in that it set out the framework whereby applications would be evaluated.

And I am just going to quote from that, sir.

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

"credibility of business plan and applicant's approach to market development;

"Quality and viability of technical approach proposed in its compliance with the requirements set out herein;

"The approach to tariffing proposed by the applicant which must be competitive;

"The amount the applicant is prepared to pay for the right to the licence;

"Timetable for achieving minimum coverage requirements and the extent to which they are may be exceeded;

"The extent of applicant's international roaming plan;

"The performance guarantee proposed by the applicant;

And finally, "Efficiency of proposed use of frequency spectrum resources."

The comparative evaluation of applications was to be conducted by a Steering Group or Project Group and it was known as the PTGSM. It comprised civil servants drawn from the three divisions of the telecommunications section of the Department: the Development Division, headed by Mr. Martin Brennan; the Regulatory Division, headed by Mr. Sean McMahon; and the technical division, headed by Mr. John McQuaid. The Project Group also had the assistance of two accountants on secondment to the public service from PricewaterhouseCoopers. The Project Group met on twelve occasions, and on its second meeting on the 6th of March, 1995, agreed a time-frame for the process, together with a protocol for dealing with interested parties. It was envisaged at the meeting of 6 March, 1995, that the Project Group and its consultants would be required to advise on a successful applicant by

approximately the middle of September 1995 in order to give ample time to put the matter to Government for a decision, bearing in mind that the tender document committed the Department to a completion date of 31 October, 1995.

Andersen Management International, Mr. Andersen's company, were selected as consultants following a Europe-wide competitive tendering process. Six tenders were received by the Department, including a tender from KPMG London, who had already advised the Department at an early point in the process on the design, and indeed from AMI, who were ultimately the successful candidates.

In their tender documents, Andersens proposed a detailed methodology for conducting a comparative evaluation of applications. In the first instance, each of the evaluation criteria identified in the RFP document published by the Department would be subdivided in what Andersen's termed the dimensions of those criteria. Those dimensions would then be regrouped into four categories, which they termed aspects, and which were defined as marketing, technical, management and financial aspects. Each of the dimensions was, in turn, subdivided into indicators, and, in some instances, further subdivided into sub-indicators, and it was these indicators and sub-indicators which were intended to form the focus of the

assessment that was proposed by Andersens in that tender document.

The key feature of the tender submitted by Andersens was the recommendation that a dual evaluation technique should be used embracing quantitative and qualitative evaluation methods as follows:

Firstly, a quantitative technique based on a system of points whereby the dimensions as represented by their constituent indicators or sub-indicators would be scored numerically.

Secondly, a qualitative technique whereby the same dimensions would be reassessed and graded comparatively on the basis of an award of marks.

Thirdly, in the light of the qualitative evaluation, the quantitative evaluation would then be revisited and an interplay would arise between the qualitative and the quantitative before arriving at a final assessment and ranking of applications.

This two-pronged technique, according to the tender document, was based on the hard scoring of the quantitative evaluation, balanced by the soft scoring of the qualitative evaluation. The hard scoring brought the advantage of objectivity and numerical certainty, and this was offset or balanced by the woolier but nevertheless more nuanced and

wide-ranging scoring of the qualitative evaluation.

The advantages of the combination of the two were self-evident. The use of both quantitative and qualitative techniques would, according to the tender document, maximise the validity and reliability of the results.

Andersens further explained in that tender document that it was their experience that the two techniques commonly yielded the same ranking which outcome would reassure the Department that the correct result had been achieved.

The Evaluation Model, following on from the tender document, stipulated the dual evaluation technique. An information memorandum for the assistance of applicants was issued and Andersens also recommended the provision of further guidelines to applicants concerning the manner in which applications should be presented, as well as 22 mandatory tables for completion by applicants that seemed to be designed to assist in the quantitative evaluation.

The Evaluation Model adopted by the Project Group on the 9th of June, 1995, also provided for the application of numerical weightings to the scores which emerged from the quantitative assessment, which weightings were intended to reflect the descending order of priority fixed by the Government decision setting up the competition. Some confusion has emerged in the evidence heard by the Tribunal

concerning the manner in which these weightings were fixed, and whether the weightings ultimately applied were those agreed for the purposes of the Evaluation Model.

The Model as adopted by the Project Group on the 9th of June, 1995, identified the weightings by reference to the constituent indicators of the criteria fixed by Government. For example, it appears that following consideration by the Project Group at its meeting of 18 May, 1995, the weightings for the three dimensions of the first ranked evaluation criterion, being credibility of business plan and applicant's approach to market development, as adopted at that meeting, were as follows:

(i) market development: 7.5.

(ii) experience of applicant: 10.

(iii) financial key figures: 15.

This resulted in an overall weighting of 32.5.

When, ultimately, the weightings came to be applied for these criterion as part of the final Evaluation Report, the indicators were equally ranked with a weighting of 10 each. This appears to be at variance with the Evaluation Model as adopted at 9th of June, 1995. From the evidence of officials also heard, it would appear that whilst those weightings adopted on 9th of June, 1995, when aggregated, came to a grand total of 103 instead of 100, this

discrepancy was to be accounted for in the course of the calculation of the quantitative scores by the application of what was known as a renormalisation factor. In other words, each weighting was to be adjusted without losing its proportionality to the other weightings so as to aggregate to 100 instead of 103.

The qualitative evaluation, by contrast, as described in the evaluation methodology, did not call for the application of any predefined weightings. Instead, the assessment was to be undertaken by sub-groups comprised of Departmental Officials and Andersen Consultants which would discuss the indicators for each dimension and would arrive at a consensus assessment of the relative importance of the indicators assessed and mark each application accordingly on a so-called soft scale from A to E.

The Evaluation Model, as already mentioned, entailed, firstly, a quantitative evaluation, followed by a qualitative evaluation and the revisiting of the quantitative evaluation in the light of that qualitative evaluation. The precise nature of this revisiting and the interplay that was then to take place between the two approaches appears to have prompted some discussion at the Project Group on the adoption of the Evaluation Model. Following discussion, an additional section expanding on

this final limb of the evaluation was added, whereby the general principles of the revisiting were amplified in the final page of the Evaluation Model document.

In the event, it will be recalled the quantitative evaluation was not produced as a separate part of the intended dual evaluation in the Evaluation Report, and the revisiting of the quantitative analysis on the completion of the qualitative analysis and the final interplay contemplated in the tender document and contemplated in the Evaluation Model never seems to have proceeded.

The Evaluation Model made no provision for any pre-admission assessment of the financial capability and technical capability of applicants, although it was clear from the Department's RFP document, and in particular from paragraph 19, that these were preconditions to entry to the evaluation proper. Mr. Andersen may be in a position to assist the Tribunal in relation to this particular point.

More generally, the reconciliation of any degree of inconsistency as between the competition as designed, on the one hand, and the Evaluation Model, on the other, as well as the resolution of any difficulties of evaluation inherent in the competition as designed, are matters that the Tribunal wishes to explore with Mr. Andersen in his evidence.

On the evidence before the Tribunal to date, it was not the intention of the Project Group that the substantive evaluation should be delegated to Andersens. At the same time, Andersens did attend virtually all meetings of the Project Group and certainly all those convened during the critical period of evaluation in September and October 1995, and the Tribunal will wish to return to certain of these meetings with Mr. Andersen in order to obtain an understanding of how he and other Andersen Consultants understood the evaluation process to have unfolded, including for the purposes of identifying when precisely certain conclusions were arrived at or decisions taken and by whom.

The Tribunal will also wish to hear Mr. Andersen in relation to his understanding of Andersen's role in relation to the Department and in relation to the Project Group. In particular, what was Mr. Andersen's appreciation of the precise responsibilities of Andersens in the evaluation process vis-a-vis both the Department and vis-a-vis the Project Group? How, if at all, did that role evolve or change over the course of the evaluation?

Andersens emerged as winners of the tender process, among other reasons because of the level of fees which they nominated for their services in their tender document which

was based on work actually undertaken subject to a ceiling of £297,450. However, during the course of the evaluation process, and indeed commencing a short time after the closing of the information round and before the critical work of evaluation commenced, Andersens renegotiated upwards its professional fees in connection with the evaluation of bids. Andersens contended that the ceiling fixed in June, 1995, in their consultancy agreement with the Department, should not apply in circumstances where six applications rather than the maximum of five that had been expected by Andersens had been received and where certain features of the applications received rendered them less readily comparable, necessitating more work. In order to ensure that Andersens would be in a position to stand over the result that emerged, the Department eventually agreed to a significant fee increase whereby the fee ceiling was increased to £370,000.

The relevance of these fee negotiations and of their outcome to the role and remit of Andersens, including any changed role or remit, is a matter that the Tribunal wishes to explore in evidence with Mr. Andersen. In particular, the Tribunal will wish to address the question of the degree to which, if any, the terms of engagement of Mr. Andersen in the final stages of the evaluation process

may have altered by reason of the outcome of these negotiations.

The evaluation process entailed that the quantitative evaluation would precede the qualitative evaluation and that effectively the qualitative evaluation would emerge from an analysis of the quantitative. The ranking that emerged from the quantitative, contrary to what had been anticipated in the Evaluation Model, proved to be very different to the ranking that ultimately emerged from the qualitative. Notably, consortium A5, Esat Digifone, which eventually was to emerge as the winner of the qualitative evaluation, ranked, at best, third, and, in one version, fourth, which was indeed the final version of the 2nd of October, to which some reference has been made in submissions here this morning, in the three versions of the quantitative results generated by Andersens.

In circumstances and for reasons which will have to be revisited with Mr. Andersen but which are far from clear, a decision was taken to abandon the separate quantitative assessment and the results of that separate assessment. Some of the quantitative results were, it seems, ultimately processed as part of the qualitative evaluation but in a manner which was markedly different from that which was envisaged in the Evaluation Model. The Evaluation Model,

in the end, did not entail the three-step process described; namely, a quantitative evaluation followed by a qualitative, followed by the revisiting of the quantitative and the interplay between the quantitative and qualitative to produce a result.

The final report presented only the outcome of a qualitative evaluation. No quantitative report was appended to the Evaluation Report, as was originally envisaged.

The Tribunal is anxious to hear Mr. Andersen's evidence on the reasons for this important change to the evaluation process and how exactly it came about. What were the precise circumstances and reasons for the abandonment of the quantitative evaluation, if abandoned it was? How did the work on the quantitative side feature, if at all, in the final analysis? And was it really the case that the entire quantitative analysis was unreliable? Was the final set of quantitative results ever produced, or, if so, were they ever received by the Department? Who took the decisions and on whose recommendation, if any, to alter the evaluation process as it was implemented and where and when were those decisions taken? A related question is: Who was responsible for the reasons advanced in the final report for the abandonment of the quantitative analysis and

for the recasting in the report of the original intended role of the quantitative analysis?

CHAIRMAN: I think, Ms. O'Brien, that might be an appropriate stage to rise for lunch and we will resume sharp at ten past two, and I envisage sitting a little late to try and make up some of the time that had been expended this morning. Very good.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS:

MS. O'BRIEN: Sir, before lunch, I was just dealing with the initial part of the Opening Statement and I was just tracing the inquiries that the Tribunal --

MR. SHIPSEY: Chairman, sorry -- I did mention to Ms. O'Brien and Mr. McDowell that I would be making an application just to say, sir, I have instructions, on behalf of Mr. Desmond, who was here this morning, to seek to institute Judicial Review proceedings in relation to Mr. McDowell's continued involvement with the Tribunal, and, in those circumstances, I just wanted, as a matter of courtesy, to inform the Tribunal that that was the instruction and that we would be proceeding to institute the proceedings with all due haste. In the circumstances, obviously it's possible that the Tribunal could continue with the Opening Statement and may continue with

Mr. McDowell, but if the Tribunal do continue and Mr. McDowell does commence to examine Mr. Andersen and the High Court decide that it shouldn't have happened, I just wanted to have put the Tribunal on notice that it doesn't have to proceed but that we are intending to institute proceedings right away in relation to the matter.

CHAIRMAN: Well, you are hardly expecting me to take it on the basis of that assurance, which I take it as a matter of courtesy, that I take the view that it is wrong for Mr. McDowell, having expressed the views I have already in advance of lunch that --

MR. SHIPSEY: I don't expect you to do anything. I am just telling you as a matter of courtesy.

CHAIRMAN: And I thank you for your courtesy.

MR. O'CALLAGHAN: Just as a matter of courtesy, I wish to tell you I have similar instructions and if the Tribunal wishes me to give the book to the solicitors so it can be considered in more detail, we are prepared to do that, but I wanted you to know the basis of the application will be the ten points, eight of which were not answered by Ms. O'Brien in her reply.

CHAIRMAN: Noted.

MS. O'BRIEN: Very good. If I could just proceed now with the Opening Statement, sir. As I said before lunch, I was

outlining the various areas that the Tribunal wishes to take up with Mr. Andersen in the course of his evidence in relation to the substantive GSM2 process, and I am just going to proceed with those, they shouldn't take too much longer, and then there is just one or two other small matters to which reference will be made in the Opening Statement before Mr. Andersen's evidence commences. There are a number of other important technical matters bearing on the evaluation process, and potentially affecting its outcome, in respect of which Mr. Andersen's evidence may be important. These are, in some cases, interrelated, and in many cases, require a detailed knowledge of the evaluation process that cannot be readily summarised in the time available to me this morning. They include the following:

1. The decision taken in mid-September 1995 to concentrate on the three top-ranked applications as they were then emerging, leaving the three other applications out of the further evaluation, in particular in circumstances where there appears to have been no pre-qualifying test; that is, no basis upon which any applicant could have been excluded from evaluation once it had been admitted to the competition.

2. The circumstances and reasons for the relevant

sub-group not proceeding in the manner envisaged with a qualitative analysis of the financial key figures dimension.

3. The circumstances and reasons for not proceeding to evaluate the so called "other aspects," being the risks and sensitivity elements. It appears that this was identified at a late stage in the competition as a way of proceeding, otherwise than is provided for in the evaluation model in the event that agreement on ranking could be reached on the basis of the four aspects scored.

4. The decision to arrive at a provisional ranking by reference to a grand total of marks, and, further, how that grand total was arrived at.

5. The decision to carry out what appears, from the evidence heard, to have been an ad hoc exercise whereby the performance of the two top-ranked applicants were compared, the methodology applied in that exercise, and the manner in which that exercise came to influence the analysis and tables contained in the final report and in appendices and to influence the eventual outcome.

As part of this last-mentioned inquiry, an extremely important set of particular questions arises as to whether a meeting took place as between departmental officials and Mr. Andersen in Copenhagen on the 28 September, 1995.

Mr. Andersen has asserted that no such meeting took place, despite the evidence of officials in relation to that meeting.

It was the evidence that the Tribunal has heard in that regard that Mr. Andersen, Mr. Martin Brennan and Mr. Fintan Towey concluded the evaluation and determined a ranking in the overall process at that meeting of 28 September, 1995, by an ad hoc comparison of the performance of the two top-ranked applicants based on the qualitative assessment.

If such an analysis took place, the Tribunal wish to inquire as to who advocated this approach and was such analysis appropriate and, if appropriate, was it reliable?

6. The Tribunal will wish to inquire into the methodology applied to the analysis of the financial key figures dimension, whether Andersens were responsible for it and degree of knowledge and input of the seconded accountants to this element of the evaluation, if any?

7. The switching on the qualitative side of the scoring system from a wide grading based on marks of A, B, C, D and E, to a more narrow and inflexible numerical scoring system based on scores of 1, 2, 3, 4 and 5.

8. The application of a weighting matrix to the resulting numerical scores.

9. The application of a weighting matrix in respect of the

"credibility of business plan" criterion of equality weightings of 10:10:10 rather than weightings of 15:10:7.5, and the reasons for this. In this regard, if the original weighting had been applied or even the relative importance of the dimensions respected within a revised cumulative weighting for this qualitative criterion, a question arises as to the consequences for the overall ranking.

Finally, the circumstances in which these revised weightings came to be identified in the final report as the pre-closing date agreed weightings for quantitative purposes.

A particular question is what consideration, if any, was given to requesting further information from applicants in order to resolve any difficulties encountered or with a view to letting participants know of changes in the evaluation process. Alternatively, to what extent could it be said that the original evaluation model remained valid; was there a need, in the circumstances, to reconstitute the competition?

Cutting across most, if not all, of these technical questions, is the question of the relative roles of the Project Group, of particular elements within the Project Group and within the Department, and of Andersens. How did information pass and what matters and developments were

reported between the persons responsible for the evaluation as the process evolved? Having adopted and agreed on a particular methodology, why was this abandoned in favour of a different methodology, adopted only after applications had been considered and evaluated?

The Tribunal will also wish to explore with Mr. Andersen the final stages of the evaluation process leading to the eventual result. Amongst other matters, Mr. Andersen may be in a position to assist the Tribunal in relation to when, if at all, the Project Group arrived at a consensus on the final result or recommendation on the basis of what information and by reference to what particular version or versions of the evaluation report. One question which remains unclear is whether a full copy of the report was even available when the matter was brought to Government on 25 October, 1995.

Mr. Andersen may also be able to help the Tribunal in understanding how questions and doubts concerning membership of consortia and the financial standing of their members were approached and resolved. In particular, it appears that certain revisions to the second draft report made on the day the result was announced introduced the notion of "bankability" as a solution to the negative equity and financial frailty of Communicorp, the Denis

O'Brien side of the Esat Digifone consortium. Where did this notion originate, from Andersens or the Department, and what was its significance?

was Mr. Andersen aware of work carried out by the seconded accountants in reviewing the financial analysis at a very late stage of the process that might have affected the overall ranking of applications and what was the response of Andersens and of the Project Group to the specific changes proposed by those accountants? Did Andersens take responsibility for the financial analysis contained in the report, as apparently insisted on by the accountants?

Furthermore, when did Andersens regard the process as having been concluded? When did Mr. Andersen sign off on his involvement with the evaluation process and did he expect to be further consulted before the winner was announced on 25 October, 1995? Did Mr. Andersen regard the work of the Project Group as having been completed at the last formal meeting of the Project Group that he attended on the 23rd of October, 1995? Was he aware of conflicts within the Project Group as to what remained to be done?

When and how did Mr. Andersen become aware that the Minister wished to accelerate the announcement of the result, and was this a course which he recommended?

As already mentioned, the purpose of the inquiry is not to

rerun the second GSM competition or to reassess the applications of the various candidates; the purpose of the Tribunal's inquiry is to endeavour to establish to what extent the competition was conducted as originally envisaged. In this respect, the Tribunal has already examined and will wish to reconsider the extent to which the competition was interfered with or capable of being interfered with or influenced by outside considerations, and, in particular, by any involvement or influence of Mr. Michael Lowry. What the Tribunal has already examined, and will now wish to consider, is to the extent to which it is relevant -- in the course of Mr. Andersen's evidence, is the extent to which the process was susceptible to influence. The Tribunal will also wish to consider the extent to which deviations from the evaluation model made the process vulnerable to, or even more susceptible to interference.

All of these matters, and the more general interaction of Andersens and of Mr. Michael Andersen himself with departmental officials, leading to the final version of the evaluation report, are relevant to the wider questions under inquiry, as to whether the evaluation of the second GSM competition was objectively robust and impregnable, as Andersen's involvement was intended to ensure, and as to

whether the promise of a structured and verifiably fair process, as free from unduly subjective or arbitrary considerations as could be achieved, was, in fact, delivered in the circumstances.

By the time it had been indicated to the Tribunal that Mr. Andersen might be available to give evidence many years after his assistance was first sought, the Tribunal had already disposed of the evidence connected with the second GSM process and had proceeded to the stage, in November 2008, of issuing provisional findings. It had considered extensive and, in many cases, helpful submissions based on those provisional findings, and had, moreover, heard evidence arising from, or in other ways connected with, those provisional findings. Despite the fact that Mr. Andersen's belated availability was bound to markedly extend the duration of the Tribunal and to increase significantly its costs, as has also been the case with the belated appearance of Mr. Christopher Vaughan, the Tribunal felt that, having regard to his extensive role in the process, his evidence should be taken and would be likely to be worthwhile. Prior to learning of his eventual availability as a witness, the Tribunal had extensive previous contact with Mr. Andersen. To put that contact in context, it should be noted that at all times in the course

of the Tribunal's proceedings since its inquiries into the GSM process commenced, Mr. Andersen had been furnished with the relevant books made available to other affected persons, plus the Tribunal's books used in the course of its hearings, and these were updated as appropriate from time to time in the course of hearings, and, of course, he had access to the Tribunal's website, to its Opening Statement and to the various rulings made by the Sole Member from time to time. He had also been provided with the relevant Tribunal provisional findings and had been afforded an opportunity to make submissions thereon, which he availed of in December 2008.

Up until 16 March, 2005, the Tribunal corresponded with Mr. Andersen through his Danish solicitors, Messrs. Bech-Bruun, who are based in Copenhagen, and, in particular, with Mr. Carsten Pals of that firm. By letter of that date, 16 March, 2005, the Tribunal was informed that future correspondence should be addressed to Mr. Andersen directly. Thereafter, for a number of years, the Tribunal corresponded, as requested, variously with Mr. Andersen himself or with Mr. Pals of Bech-Bruun in response to specific letters from him. The Tribunal's provisional findings were sent to Mr. Andersen directly by letter of the 18th November, 2008, and his submissions,

received under cover of a letter of 12 December, 2008, were furnished through a company with which Mr. Andersen was associated.

The Tribunal first learned of Mr. Andersen's availability through Messrs. Meagher & Co, solicitors acting for Mr. Denis O'Brien. This was by letter of 14 April, 2010, in which they had enclosed a copy of a statement stated to have been made by Mr. Andersen with a view to his making himself available as a witness at the Tribunal's sittings. This letter was copied to all affected persons in the Tribunal's proceedings by Messrs. Meagher and also to the Attorney General. Within a matter of hours of the Tribunal receiving this statement on the 14th of April, it was clear from press references to the content of it that it had been made available to the media. This ultimately prompted a series of queries from the Tribunal concerning breaches of confidentiality, to which reference will be made. At this stage, it is important to state that the Tribunal was surprised that, despite having previously dealt with Mr. Andersen through his Irish lawyers, subsequently, extensively through his Danish lawyers, and directly with himself, that what would appear to have amounted to a change of heart on his part as regards attending to give evidence should have been communicated not by Mr. Andersen

himself but through solicitors for Mr. Denis O'Brien.

At that point, a newspaper report in The Irish Times indicated that Mr. O'Brien was not paying Mr. Andersen's costs. The Tribunal has recently confirmed that this statement was made by an official spokesman for Mr. O'Brien. On receipt of Messrs. Meagher's letter of 14 April, 2010, the Tribunal sought to communicate with Mr. Andersen himself directly. The Tribunal's correspondence at that point was directed to establishing whether Mr. Andersen was willing to make himself available as a witness, whether what had been relayed to the Tribunal as his statement was, in fact, to be viewed as his statement, and whether there were any conditions attaching to his attendance as a witness.

In this Opening Statement, it is not proposed to trace in detail the history of all of Mr. Andersen's dealings with the Tribunal in connection with the giving of evidence, but it seems fair to say that while, initially, he provided certain assistance to the Tribunal and attended meetings with members of the Tribunal legal team, principally in the early months of 2002, ultimately he declined to make himself available as a witness, citing a number of obstacles which, despite the Tribunal's best endeavours, it was unable to overcome. Ultimately, when it appeared that

the Tribunal might have been in a position to persuade Mr. Andersen to give evidence, he sought an indemnity from the State as opposed to from the Tribunal itself indemnifying him and associated companies.

It must be stated that since July of 2003, the Tribunal has undertaken to be responsible for Mr. Andersen's costs, and by letter of 29 July, 2003, the Tribunal informed him that it would meet his legal costs, his travel, accommodation and other expenses incidental upon his intending to give evidence and the costs of his time in travelling to and from Dublin, of attending meetings with members of the Tribunal legal team and of attending to give evidence. The duration of the Tribunal's dealings with Mr. Andersen with a view to seeking to secure his attendance as a witness, extended over many years. When the Tribunal, therefore, took matters up with him once again in April 2010, on receipt of Messrs. Meagher's letter of 14 April, 2010, it was anxious, in the first instance, to establish the precise position with regard to his requirements in connection with his attendance to give evidence in the shortest possible time.

In the course of its initial dealings with Mr. Andersen concerning these and related matters, the Tribunal was requested to confirm that Mr. Andersen's evidence would be

confined to his role in the second GSM process and that the history of or background to his attendance, or, as the case may be, his non-attendance over a number of years, would be excluded. Despite the Tribunal's reservations concerning such an approach, having regard to the fact that the statement furnished to the Tribunal by Messrs. Meaghers and referred to extensively in media coverage had alluded to dealings with the Tribunal in terms which reflected negatively on the Tribunal, it was felt that in order to expedite his attendance and to obtain what was hoped would be significant assistance in relation to the substance of the GSM process, to accede in part to this request. The Tribunal accordingly confirmed that the primary focus of Mr. Andersen's examination would be on the substance of the GSM process and his involvement in it, but pointed out that questions relating to the background to his attendance or, as the case may be, his non-attendance over a number of years, could arise either from his own evidence or from evidence elicited as a result of cross-examination by counsel for other parties, and that, in those circumstances, the Tribunal could not be precluded from referring to that history and background.

The Tribunal's dealings with Mr. Andersen's lawyers pertained, in addition to the foregoing matters, to a

number of other issues, as follows:

1. The question of costs.

2. The question of the impact of provisional findings.

3. Questions relating to Mr. Andersen's claim for costs in respect of what he claimed was his assistance to the Tribunal over a number of years prior to his making himself available as a witness.

Mr. Andersen, through his lawyers, asserted repeatedly that he was not setting conditions for his attendance. The Tribunal pointed out that it viewed Mr. Andersen as having, in the past, set conditions, most significantly the requirement for an indemnity as a precondition to his attendance. The characterisation of his previous attitude to making himself available as a witness was not accepted by Mr. Andersen.

Between Messrs. Meagher's letters of 14 April, 2010, and 11 August, 2010, a date the significance of which will be referred to in a moment, there were, in all, 25 letters by way of exchange of correspondence between the Tribunal and Mr. Andersen or lawyers acting for him. In all, some 12 letters were sent to the Tribunal by or on Mr. Andersen's behalf. During that period, the Tribunal had sought to establish Mr. Andersen's availability, and, on 3rd June, 2010, proposed taking his evidence over two weeks,

commencing on 1 July, 2010. Mr. Andersen rejected this date, indicating that it was a holiday month in Denmark, and instead proposed to make himself available from 25 October, 2010. The course of that correspondence pertains specifically to queries from the Tribunal surrounding the circumstances in which confidential dealings between Mr. Andersen and the Tribunal came to be made available to the Tribunal by Messrs. Meagher & Co, Mr. Denis O'Brien's solicitors, and also to the circumstances in which that statement of 13 April, containing confidential information, was made available to third parties and to the media. In responding, Mr. Andersen, through his solicitors, asserted that he had not had any dealings with the Irish media. The Tribunal sought confirmation on whether he had had any dealings concerning that matter with any other individuals and, if so, the Tribunal requested details of those dealings.

In response on 11 August, 2010, it was stated that Mr. Andersen had not discussed or provided any information concerning his dealings with the Tribunal to any individual with whom he did not believe he had what he described as a legal professional relationship, and informed the Tribunal that one such individual was Mr. Tom Reynolds. Mr. Tom Reynolds is a solicitor with Digicel Limited and is an

associate of Mr. Denis O'Brien. At this point, Mr. Andersen informed the Tribunal that Messrs. Meagher and Company, Mr. O'Brien's solicitors, were acting for him in providing a copy of his statement to the Tribunal. He further stated that, when providing the statement, he did not do so on the basis that it was confidential. He stated that his statement was signed by him on 13 April, 2010, and it was sent on that day to Mr. Carsten Pals of Bech-Bruun, who reviewed it, and it was also sent to Mr. Tom Reynolds. He stated that he was not aware of who took care of providing the statement to Messrs. Meagher, Solicitors, for onwards distribution to the Tribunal.

In the course of the aforementioned exchange of correspondence, the Tribunal sought an express commitment from Mr. Andersen that he would conform to the Tribunal's confidential procedures. This was in the light of an earlier statement he had made reserving his right to communicate as he saw fit. In response to the request that the Tribunal set out its confidentiality procedures, the Tribunal stated as follows:

"Communications between the Tribunal and your client, including your firm on behalf of your client, is confidential. Your client is under no obligation to provide the Tribunal with information or responses to

queries as part of its private confidential engagement with him. It is only as a witness at public sittings or on foot of an order for discovery or production that he can be compelled to provide responses to queries. Any responses provided in the course of his confidential exchanges with the Tribunal will be considered with a view to incorporating them in a Memorandum of Intended Evidence. Your client will have an opportunity of correcting or altering any such memorandum should it fail to reflect his confidential communications. The Tribunal looks forward to receiving your client's confirmation and that of Messrs. Bech-Bruun, that they have to date and will continue to abide by this confidentiality. In particular, your client should confirm that he had not provided and will not provide any such documentation, material or information, including the subject matter and/or substance thereof, to any person other than his legal advisors. The Tribunal naturally assumes that you and your firm will abide by the confidentiality protocol as outlined above and will be grateful to receive your confirmation in this regard."

By letter of 30th July, 2010, Mr. Andersen's solicitors wrote to the Tribunal confirming that they had obtained instructions from Mr. Andersen authorising them to confirm that he had not breached the Tribunal's confidentiality

rules to date and that he undertook to honour them going forward.

In light of Mr. Andersen's solicitor's confirmation on his behalf that he had not breached the Tribunal's confidentiality procedures and that he would not do so in the future, the Tribunal was surprised that he had indicated that he had communicated with Mr. Tom Reynolds and that in informing the Tribunal of those dealings and indeed in having done so belatedly, the Tribunal was surprised that he should have described himself as having a legal professional relationship with Mr. Tom Reynolds, who, although a qualified solicitor, is employed by Digicel Limited, and was not, as far as the Tribunal was aware, in practice either in Ireland or Denmark, and was at all times, in connection with these matters, in the employment of a company associated with Mr. Denis O'Brien.

The Tribunal wrote to Mr. Andersen's solicitors again on 13 August, 2010, expressing its concern that he should have disclosed details of his confidential dealings with the Tribunal to a third party, specifically to Mr. Tom Reynolds, and that, moreover, he should have felt able to assert that he believed he had a legal professional relationship with Mr. Tom Reynolds. The Tribunal, therefore, sought further information concerning those

dealings and particularly the circumstances of his dealings with Mr. Tom Reynolds. In response, his solicitors asserted that Mr. Andersen, through his Danish lawyer, Mr. Carsten Pals, was approached by Mr. Reynolds on behalf of Mr. O'Brien in furtherance of the latter's desire that Mr. Andersen give evidence. His lawyers informed the Tribunal that despite the fact that Mr. Andersen believed that his relationship with Mr. Tom Reynolds was protected by legal professional privilege, Mr. Tom Reynolds did not give legal advice to Mr. Andersen and simply facilitated the provision of his statement to the Tribunal. It was stated that Mr. Reynolds merely assisted Mr. Andersen in the logistics of supplying the statement of the 13th of April, 2010, and that the information disclosed to Mr. Reynolds was merely the contents of the statement; that other than the logistics, the statement was the work of Mr. Andersen alone. The Tribunal was informed that Mr. Reynolds had contacted Mr. Pals on the 8th of April, 2010.

In a subsequent letter of 6 September, 2010, further information was provided in response to further queries from the Tribunal concerning Mr. Andersen's dealings with Mr. Tom Reynolds. On this occasion, the Tribunal was informed for the first time that Mr. Tom Reynolds met with

Mr. Andersen and his lawyer, Mr. Pals, and discussed the possibility of his, Mr. Andersen, attending to give evidence. This meeting, the Tribunal was told, took place on 9 April, 2010, and the Tribunal was informed that it lasted two-and-a-half hours, and that, at the meeting, the content of a preliminary statement drafted by Mr. Andersen was discussed, together with the possibility of Mr. Andersen giving evidence with an indemnity from Mr. O'Brien.

The Tribunal was also informed that, as a result of this meeting, Mr. Andersen finalised the statement in the following days, which was pursued by Mr. Pals' office, and was subsequently sent to Mr. John Bruel, who had been an associate of Mr. Andersen's in Andersen Management International, and was then furnished to the Tribunal by Mr. Meagher, Mr. O'Brien's solicitor, as it was described, as offered by Mr. Reynolds.

This was the first time that the Tribunal was informed that an indemnity had been provided by Mr. Denis O'Brien to Mr. Andersen. The indemnity was described as being contained in a letter from Mr. O'Brien to Mr. Andersen dated 13 April, 2010, which was, in fact, the same date as that on which Mr. Andersen's statement was sent by e-mail to Mr. Tom Reynolds. In Mr. Andersen's solicitor's letter

of 6 September, 2010, Mr. Andersen stated that the indemnity letter was confidential and that he required Mr. Denis O'Brien's consent to its release to the Tribunal. The letter of 6 September, 2010, was in response to a set of queries from the Tribunal, one of which sought details of all assistance rendered by or on behalf of or by any person associated with Mr. Tom Reynolds to Mr. Andersen in what Mr. Andersen had described as the logistics of furnishing a statement to the Tribunal and bearing in mind, in particular, that Mr. Andersen had, since 2003, been represented in his dealings with the Tribunal by the same Danish lawyer, Mr. Carsten Pals of Bech-Bruun and also requesting that Mr. Andersen identify the apparent obstacles to the furnishing of the statement to the Tribunal directly which Mr. Tom Reynolds had been capable of assisting him in overcoming. In response, it was stated that Messrs. Bech-Bruun were not established in this jurisdiction and that Mr. Andersen had not appointed Irish advisors and that Mr. Pals had advised him to take advantage of the offer from Mr. Reynolds to facilitate the furnishing of his statement to the Tribunal.

The Tribunal wrote to Mr. Andersen's solicitors by letter of 15 September, 2010, which is addressed to Mrs. Caroline Preston of Maples and Calder,

"Re Tribunals of Inquiry.

"Your client: Mr. Michael Andersen.

"Dear Mrs. Preston,

"I refer to your letter dated 6 September, 2010, in response to the Tribunal's letter of 24th August, 2010. I am instructed to respond as follows:

"The Tribunal has already addressed the terms of its confidentiality procedures at considerable length in previous correspondence.

"You suggest in your letter under reply that it seems extraordinary that the Tribunal should take an adverse view of the assistance rendered to your client by Mr. Tom Reynolds as the Tribunal had itself failed to secure the attendance of Mr. Andersen as a witness. You are incorrect in your suggestion that the Tribunal has taken an adverse view of this matter. The Tribunal is quite properly concerned at this development and is pursuing investigations. That apart, I am instructed to inform you that the Tribunal believes that what you state is, quite frankly, a nonsensical distortion of the true position. Your client declined to give evidence to the Tribunal from 2002 to April 2010, despite the Tribunal's endeavours to meet his conditions, because he was not provided with a State indemnity. Some five months after the Tribunal was

informed by Mr. Denis O'Brien's letters that your client was, in fact, willing to attend, it now transpires that that willingness was based on the provision of an indemnity by Mr. O'Brien.

"You have now informed the Tribunal that the interaction between your client and Mr. Reynolds went beyond a contact between Mr. Reynolds and Mr. Carsten Pals, your client's Danish solicitor, in early April 2010, but extended to a two-and-a-half [hour] meeting between Mr. Reynolds, Mr. Pals and your client, on 9 April, 2010, at which the contents of 'a preliminary statement drafted by Mr. Andersen' were discussed, together with a possibility of your client giving evidence, with an indemnity from Mr. Denis O'Brien. Whilst you assert that there was no mystery surrounding that meeting, you will, of course, recognise that it was not disclosed to the Tribunal until receipt of your letter under reply.

"It seems to the Tribunal that the information now disclosed may also be at odds with your letter dated 20th August, 2010, when you informed the Tribunal, on behalf of your client that 'Mr. Reynolds assisted Mr. Andersen in the logistics of supplying the statement of 13 April, 2010, and the 'information disclosed' to Mr. Reynolds is contained in the aforesaid statement. Other than the logistics, the

statement was the work of Mr. Andersen alone.'

"Please now furnish the Tribunal with a copy of the 'preliminary statement drafted by Mr. Andersen' that was discussed with Mr. Reynolds at the meeting of 9 April, 2010, together with all drafts or versions of your client's statement, or any part thereof, whether generated by your client or any other person. Please also provide the Tribunal with any note, attendance or transcript made of that meeting and any documentation (whether in electronic, hard text or other form) relating to all of his dealings with Mr. Reynolds.

"The Tribunal has noted that the indemnity provided to your client by Mr. O'Brien is contained in a letter dated 13 April, 2010. You state that the letter is confidential and that whilst your client has no difficulty in waiving that confidentiality and providing it to the Tribunal, he requires Mr. O'Brien's consent, and that you assume that the Tribunal will request that from him. The Tribunal does not intend to protract matters further, and as you have already been in correspondence with Mr. O'Brien's solicitors, the Tribunal takes it that you will have no difficulty in requesting them to confirm Mr. O'Brien's position in that regard. If Mr. O'Brien's waiver cannot be obtained, the Tribunal will, of course, facilitate matters

by making an order for production of that document.

"The Tribunal also wishes to obtain full details of all financial arrangements, whether by indemnity or otherwise, made between your client and Mr. Denis O'Brien, or any other person on his behalf or between your client and any other person, connected in whatsoever fashion with any or all of the past or prospective assistance provided or to be provided by your client to the Tribunal, including your client's attendance as a witness.

Finally, you refer to a letter dated 28 August, 2007, in which you state that your client and some of the AMI consultants drew the Tribunal's attention to what you suggest was an error in a ruling of the Sole Member made on 17 July, 2010, and you state that no response was received from the Tribunal to that letter. The Tribunal has no record of receipt of any letter from your client, or his solicitors, of that date.

"The Tribunal would accordingly welcome a full response to this request within the next seven days."

Now, Mr. Andersen's solicitors replied by letter of the 17th of September in the following terms:

"Dear Mr. Brady,

"Our client: Mr. Michael Andersen.

"We refer to your letter of 15 September, 2010.

"There is nothing inconsistent between that which was stated in our letter of 9 April, 2010, and in the letter under reply. The 'preliminary' statement to which we referred is the statement which was furnished to you by Messrs. Meagher. We described it thus because we anticipate a fuller statement being furnished by Mr. Andersen in due course. There was no draft or other version of this statement. There is no other documentation which relates to that meeting. For clarity, we confirm that the entire meeting took approximately two-and-a-half hours. Mr. Reynolds attended for approximately three-quarters of an hour and the balance was spent with Mr. Andersen and Mr. Pals reviewing the statement.

"We have no difficulty with seeking consent from Mr. O'Brien to the production of the letter of 13 April, 2010. We have written to his solicitors in this regard.

"We enclose herewith a copy of the letter of 28 August, 2007, as requested.

"We again call on you to furnish us with the documentation upon which the Tribunal intends to rely during the course of Mr. Andersen's evidence."

On the following Monday morning, 20 September, 2010, an article appeared in The Irish Times newspaper referring to an interview provided to that newspaper on the previous

day, Sunday, 19 September, 2010, in which Mr. Denis O'Brien stated that he had provided an indemnity to Mr. Andersen, but that the indemnity was limited to his costs.

This was the first reference by Mr. O'Brien or a representative of his to such an indemnity and appeared to suggest that the earlier statement by his official spokesman made on 15 April, 2010, was made in circumstances where that spokesman may not have been informed of the indemnity. Later on the morning of 20 September, Messrs. Meagher & Co, solicitors for Mr. O'Brien, wrote to the Tribunal, in a letter which was not in response to any correspondence from the Tribunal, stating that, on their client's instructions, they were enclosing a copy of an indemnity between their client and Mr. Michael Andersen dated 13 April, 2010. The copy of the letter from Mr. O'Brien to Mr. Andersen dated 13 April, 2010, furnished by Messrs. Meaghers, carried a date-stamp indicating that it had been received by them on 20 September, 2010. From separate correspondence between the Tribunal and Messrs. Meagher & Co., Solicitors, it would appear that that firm had not been informed of the indemnity until that date.

By this date, the Tribunal had been in correspondence with Mr. Andersen for four months concerning the details of the arrangements for his costs and had, as already stated,

undertaken, since 2003, to be responsible for his costs.
However, it is important to state that the indemnity deals in part only with the payment of costs and, in fact, contains a much wider general indemnity from Mr. O'Brien to Mr. Andersen in respect of his interaction with the Tribunal whereby Mr. O'Brien undertakes personally to indemnify Mr. Andersen in relation to any personal liability that might attach to him arising from sworn evidence given by him to the Tribunal.
It embraces any personal exposure and/or exposure by companies in which Mr. Andersen held a controlling interest, to legal liability from legal proceedings taken by third parties that might arise pursuant to evidence given by him to the Tribunal or arising from statements provided by him to the Tribunal. It is, therefore, in terms, as ample in its ambit as the indemnity sought by Mr. Andersen from the State in 2003 and it is equivalent to it.
By letter of 20 September, 2010, the Tribunal wrote to Mr. Andersen indicating that, in the circumstances, it had found it extremely difficult to place reliance on information with which it had been furnished by him regarding his dealings with Mr. O'Brien's associate, Mr. Tom Reynolds, and informing him that the Tribunal intended

to pursue inquiries to get to the bottom of those dealings.

It will be recalled that the Tribunal, in response to Mr. Andersen's earlier suggestions, made on 12 May, 2010, that his examination be confined to his substantive involvement in the GSM process, had agreed that the primary focus of the examination would be so confined, subject to the qualifications already mentioned. That position could no longer obtain in light of the information which had emerged concerning Mr. Andersen's dealings with Mr. Tom Reynolds and the fact that he had obtained from Mr. Denis O'Brien what amounted to a secret indemnity, an indemnity which was kept not only from the Tribunal but from Mr. O'Brien's own lawyers and, it seems, from his own public relations representatives.

When the Tribunal was first informed of Mr. Andersen's availability as a witness by Messrs. Meagher & Co., solicitors for Mr. O'Brien, a letter was written by them dated 14 April, 2010, which was copied to a number of interested parties, including the Attorney General, and which asserted that the Tribunal had been misleading in suggesting that Mr. Andersen was not available as a witness, a reference to the Tribunal's earlier understanding, repeatedly stated in its proceedings, that Mr. Andersen was not available except on the terms of an

undertaking from the State. Mr. Meagher has confirmed to the Tribunal that he was not aware of the indemnity furnished by his client to Mr. Andersen on 13 April, 2010, the day before he wrote that letter, on what can only be taken to have been the instructions of his client, and, needless to say, he could not have written that letter or made the accusations in it to the effect that the Tribunal had misrepresented Mr. Andersen's position, had he known of the fact of that indemnity.

Whilst it is still the Tribunal's intention that Mr. Andersen's examination should be focused mainly on his substantive involvement in the second GSM process, the fact of his dealings with Mr. Tom Reynolds, in particular the fact that these were comprised in a secret agreement between himself and Mr. O'Brien, may have to be taken into account ultimately in assessing the weight of his evidence.

In this connection, it should be borne in mind that the Tribunal had initially intended to take Mr. Andersen's evidence in July of this year and that, had his evidence been given at that point, the Tribunal would have been entirely unaware of the indemnity or of Mr. Tom Reynolds' role in either of the provision of the indemnity or in the genesis of Mr. Andersen's statement. From the information made available to the Tribunal by Mr. Andersen to date, it

has not been possible to establish, with any degree of accuracy, the circumstances in which Mr. Andersen's statement of 13 April, 2010, came to be produced, as to the respective roles of Mr. Andersen and his own lawyers, on the one hand, and of Mr. Tom Reynolds, on the other, in the generation of that statement.

CONCLUSION OF OPENING STATEMENT

MS. O'BRIEN: And that, sir, concludes the Opening Statement, and we can now proceed with Mr. Andersen's evidence.

CHAIRMAN: Thank you, Ms. O'Brien.

MR. McDOWELL: I call Professor Michael Andersen.

MR. GLEESON: Just before Mr. McDowell does so, I did refer to the other indemnity statement which Professor Andersen furnished yesterday by fax. I know the Tribunal say they only received it this morning, but Ms. O'Brien did say that it would very probably be read into the record and I am just wondering when that might happen.

MR. McDOWELL: We haven't had an opportunity to consider it in full, Chairman, but Ms. O'Brien's indication does represent our intention that, subject to there being no problem with it, it, or nearly all of it, will be read into the record.

CHAIRMAN: All right.

MR. GLEESON: Just before we conclude on that issue, I mean, the Tribunal has just read into the record its Opening Statement which gives its version of events. Professor Andersen disputes many of the matters that have just been read into the record. He has furnished a short-ish statement dealing with the indemnity issue, and I do think if there is going to be equality of treatment here between the Tribunal and Professor Andersen, that there should be a more concerted effort made to read into the record his statement relating to the indemnity. It doesn't preclude My Friends from examining Professor Andersen as to the contents of that statement, but he is surely to be accorded the facility of having that statement read into the record now.

CHAIRMAN: Well, it comes in sequence, logically, after his substantive statement, which is 40 pages, Mr. Gleeson, so that may be addressed in due course. Of course, I don't envisage the material matters that Mr. Andersen wishes to draw to my attention being withheld.

MR. GLEESON: Well, in that case, sir, what I would ask, that I be entitled with Mr. Andersen, when I am re-examining him, that he be allowed the facility of reading that statement into the record.

MR. McDOWELL: I haven't indicated any attitude yet, and it

does appear that, subject to there not being a deviation from the rubric of confidentiality that the Tribunal has established, that the entirety of the statement will be read into the record when we have got through his -- the statement he furnished, the memorandum of questions and answers which he furnished to the Tribunal, as well, and then we'll get to the third point in relation to his opening position, will be that statement, but the Tribunal should be -- the public should be aware that this document was only given to us this morning, and that's our problem with it. We hadn't had an opportunity to go through it carefully in the intervening period because other issues were raised before the Tribunal this morning.

CHAIRMAN: Let's proceed.

MR. McDOWELL: Professor Andersen, please.

PROFESSOR MICHAEL ANDERSEN, HAVING BEEN SWORN, WAS EXAMINED BY MR. McDOWELL AS FOLLOWS:

CHAIRMAN: Thank you for your attendance, Mr. Andersen.

1 Q. MR. McDOWELL: Mr. Andersen, have you a copy of the redacted statement before you, dated 22 October, 2010?

A. Which one of the redactions?

2 Q. It's headed "Redacted statement of Mr. Michael Andersen, Introduction and Background..."

Just to be one hundred percent clear, your counsel has

referred to you as "Professor Andersen"; I am doing that, as well, as a courtesy. Is it right or wrong or --

A. That's correct, that's fine. Thank you.

3 Q. Thank you, Professor. I think you informed the Tribunal that you are 51 years of age, that you are a Danish national, that you are presently Chief Executive Officer of Andersen Advisory Group and that you are actively involved in a number of business ventures in the field of telecommunications, and that you currently hold the position of Adjunct Professor at Copenhagen Business School within the field of business strategy; is that right?

A. Yes.

4 Q. And I think you also say that you studied political science at the University of Aarhus and graduated at a level between MA and Ph.D. in 1983, specialising in telecommunications policy; that you graduated as a Fellow of the Salzburg Seminar in August 1985; that you also graduated with a Degree of Bachelor of Commerce from Copenhagen Business School in 1987; and that you are a Certified Management Consultant and hold professorial memberships of the Strategic Management Society and the Academy of Management?

A. Correct.

5 Q. I think you also tell the Tribunal that, between 1983 and

1987, you worked as head of section at the Danish Ministry of Finance and Ministry of Public Works, dealing with telecommunications, and from the four years 1987 to 1991 you worked as Deputy Managing Director of AIM AS, which is a Danish company; is that right?

A. Correct.

6 Q. And that that was acquired by Deloitte's in 1990, at which point you became a partner at Deloitte Denmark, and that in 1991 you left Deloitte's and established Andersen Management International AS and became Managing Director and co-owner of that telecommunications consultancy business. The business was sold, I think, in 2000, and, in 2002, you continued your present business through Andersen Advisory Group AS, which is based in Copenhagen; is that right?

A. Yes.

7 Q. So just stopping there; from the year 2000 to 2002, you were not in that business on your own account, is that right?

A. I was, in part of 2000 I was -- in 2001, in the beginning of 2001, I was still Managing Director of Andersen Management International, and later on in 2001 I became external consultant, you know, having sold the company.

8 Q. So you were exiting from that company and you established

your own company?

A. Exactly.

9 Q. I think throughout your professional career you say that your primary focus has been on the field of telecommunications, primarily in the field of mobile telecommunications, and, to date, you have dealt with the awarding of in excess of 200 mobile communications licences in jurisdictions all over the world and very many of them as the lead consultant and you instanced to the Tribunal countries such as the United States, Sweden, Iceland, Norway, the Netherlands, Hong Kong, various Baltic States, Denmark, the CIS countries, and a number of African countries, Austria, and not to forget Ireland, isn't that right?

A. Correct.

10 Q. I think you have worked as a consultant to the World Bank on numerous occasions and that you have carried out work in mobile tender processes for a great many national regulatory bodies and state agencies and ministries all over the world, and that AMI, your previous company, had already worked in at least 48 countries in or about the time of the Irish tenders that we are concerned with here, isn't that right?

A. Correct.

11 Q. I think you have also said that you lectured at Copenhagen University and at Copenhagen Business School and that you have taught business strategy and innovation as part of an MBA programme run by the Danish Technical University; that you have been the author of very many publications in the field of telecommunications and that you are co-author, along with a Professor Flemming Poulfelt, of the book 'Discount Business Strategy - How New Market Leaders Are Redefining Business'. You say that this has been translated internationally to a number of languages, including Russian and Korean, and that you co-authored another book, 'Return on Strategy - How To Achieve It', and that this book is currently being translated into Chinese and Danish; is that right?

A. Correct.

12 Q. During 1995/1996 you say that you were the principal of AMI, and, during that period, it acted as lead consultant to the Irish Government in respect -- leading to the awarding of the second mobile licence, GSM2, and this licence was awarded to Esat Digifone Limited on 16 April, 1996, following a competitive tender process involving six applicants. AMI was very heavily involved in this competitive tender process. AMI was also involved, although to a significantly lesser degree, in the period

between the announcement of the competition on 25 October, 1995, and the actual awarding of the second mobile licence to Esat Digifone on 16 May, 1995. Details of AMI's introduction to and involvement in the second GSM licence tender process in Ireland are set out in the relevant section of this statement.

Then you deal with Michael Lowry, is that right?

A. Correct.

13 Q. And you say that, at paragraph 7, that you understand that the Moriarty Tribunal is inquiring into the awarding of the second mobile licence as part of its inquiries into acts and decisions of Mr. Michael Lowry during the period when he was Minister for Transport, Energy and Communications. Michael Lowry was Minister for Transport, Energy and Communications during the periods whilst AMI were engaged in GSM2 process in Ireland. You inform the Tribunal that you did not meet Michael Lowry either before, during or after GSM2 process. Neither you nor any of your colleagues in AMI had any contact whatsoever with Michael Lowry as part of the GSM2 process, or indeed otherwise. Other than very general policy -- public policy statements made by him as a Minister, that you were not aware of any directions, instructions, preferences or even opinions in relation to the GSM2 issue; is that right?

A. Correct.

14 Q. And you also say that you were certainly never aware of any preference, or apparent preference, on the part of Mr. Lowry, for any particular applicant in the process, no such preferences were ever relayed or even intimated to you by any of the civil servants involved, or indeed otherwise, and as far as AMI was concerned, Mr. Lowry was not part of the GSM2 decision-making process?

A. Correct.

15 Q. I think you say that, based on your extensive worldwide experience, you want to state to the Tribunal that you wouldn't regard direct involvement by a government minister in such a bid as being highly unusual. However, you are certainly not aware of any such involvement and/or interference with the GSM2 process on the part of the then-Minister, Michael Lowry. He simply didn't feature as part of the competition process and you are confident that if any such interference on his part existed, that you would have become aware of it as part of your central and critical involvement in GSM2, is that right?

A. Yeah.

16 Q. I think at paragraph 11, you say that at no point during the GSM2 process were you informed of any preference for the Esat Digifone application express or implied on the

part of any civil servant involved in that process. No such preference was ever expressed to AMI. "I am certain that if such process," you say -- preference, rather, had existed on the part of any individual or civil servants, that you would have become aware of it given your central role in the GSM2 process and your close contact with the individual civil servants involved from the Department of Transport, Energy and Communications and the Department of Finance over a period of a number of months of intense activity. "I can say categorically that I do not believe that any such preference existed on the part of those involved in the GSM2 process."

A. Correct.

17 Q. That's your position, is it?

A. Yes.

18 Q. "I should mention that the only time a relative preference or apparent relative preference for any particular application came to AMI's attention was when Mr. Sean McMahon of the Department's Regulatory Division expressed a concern that Esat Digifone would be particularly difficult to deal with from a regulatory perspective and that Persona would not present such challenges." Is that right?

A. Correct.

19 Q. You also go on to say that you are entirely satisfied from

your perspective that all of the civil servants involved in the GSM2 process carried out their work with the utmost integrity and without any element of favouritism for any applicant being brought to bear. You are also satisfied that if any such desire or preference to assist any particular applicant existed, you'd have become quickly aware of a preference, given your close involvement in the process and your experience gained from international competitions the world over. It's not, you say, feasible to suggest that such preferences or interference could be brought to bear without the consultants conducting the process becoming aware of or even suspicious of such motivations. However, there was no such awareness or suspicion on the part of AMI in the GSM2 process in Ireland. As far as AMI was concerned, the licence competition process was conducted fairly and without any untoward interference or influence being brought to bear. The winning applicant was simply the best applicant measured against the applicable evaluation criteria which were laid down prior to the reception of the applications, and as far as AMI is concerned, there is no more to it than that.

I think then you go on to deal with the A5 application in the GSM2 licence competition.

Paragraph 14, your statement says: "I understand from my dealings with the Tribunal, particularly in my private meetings with the Tribunal legal team, that certain members of the Tribunal's legal team had a strong view that Esat Digifone ought not to have won the second mobile phone licence competition and that the best candidate was the Persona application. I would absolutely reject the justification of any such view. I am unaware of any qualifications or expertise on the part of the Tribunal's legal team which would give their view any degree of justification. I am not aware of any evidence that would support such a view. Persona was the second highest ranked application according to the evaluation criteria. It was not the highest ranked. It is, in my view -- it is my view that certain members of the Tribunal's legal team demonstrated a bias against Esat Digifone and in favour of Persona. And that you have never met with the Chairman here today; is that right?

A. Correct.

20 Q. You are not talking about him.

At paragraph 15, I think you go on to say that "Esat Digifone" -- which is A5 -- "won the second mobile phone licence competition, for the plain and simple reason that it submitted the best application in accordance with the

criteria set down by the Irish Government in the requests for proposals, the RFP document, published on the 2nd of March, 1995. These criteria were set down in descending order of priority at paragraph 19 of the RFP. Esat Digifone was a clear winner of the GSM licence competition process. By "clear," I mean that there was certainly an appreciable difference between Esat's application and the application of the second-named applicant, Persona. It is important to note that by "clear winner" I mean that no amount of further supplementary analysis or scrutiny of the applications would have changed the result. Esat's margin was not narrow, based on AMI's experience -- was not narrow, based on AMI's experience. Esat clearly won the competition as the so-called A5 application was the highest ranked according to the evaluation criteria, with an appreciable margin to the second applicant, a margin well outside what could be regarded as close enough to prompt the requirement for further supplementary analysis or a review of the scoring process. It's fair to say that Esat's highest ranking in the second mobile phone licence process was clearer or more emphatic in terms of what AMI would regard as typical in such mobile competition processes. It was certainly clearer than the results that would have been arrived at in many similar mobile phone

competition processes that you have been involved in; is that right

A. Correct.

21 Q. "I was and remain absolutely convinced that the Esat Digifone -- that Esat Digifone, by any objective standards, submitted the best application, in accordance with the criteria set down by the Irish Government in the RFP. There was simply no question about it: In simple terms, Esat Digifone's application was comparably better, in some cases very considerably better, than the next ranked application when viewed in the context of the relative importance of the individual paragraph 19 criteria. Had AMI been of the view that there was not such an appreciable difference between Esat Digifone's application and that of the next-placed application, then AMI would certainly have demanded that such further analysis be carried out as may have been required. However, the result was perfectly clear and no amount of such further analysis would have changed that. Esat's application was very clearly the best, according to the applicable evaluation criteria, and arrived at in a unanimous fashion among the Project Group GSM, the PTGSM."

A. Correct.

22 Q. "I should also point out," you say, "that, in AMI's view,

the application submitted by Esat Digifone was one of the most impressive applications that the AMI team had ever considered in any such tender processes worldwide, either at that time or indeed since. The level of detail and the substance of content as provided by Esat Digifone in their application was hugely impressive. As an example, this was so in the sections of Esat's application dealing with ability to roll out their network. I recall, in particular, the Evaluation Team being astounded by the level of preparation done by Esat Digifone in terms of signing up site options, applying for site planning permissions, etc. No other application came close to Esat Digifone in this regard." Is that right?

A. Correct.

23 Q. "During my numerous private meetings with the various members of the Tribunal's legal team between 2001 and 2003, it was suggested to me that Persona's application and credentials were superior to those of Esat Digifone. During these private meetings, certain Tribunal legal member teams clearly sought to undermine Esat's credentials and stressed the relative merits of Persona." In particular, you recall a remark made personally to you "by Senior Counsel to the Tribunal, Mr. Healy, during one of these meetings, that Esat Digifone's site

options/agreements, planning permission documentation as submitted in their application were not genuine. Indeed, he used one of the most defamatory words he could use to describe that documentation. I found Tribunal counsel's approach to this matter and indeed to their advocating of Persona's position generally, to be troubling. It seemed quite clear to me that at least part of the Tribunal was operating under a pro-Persona and anti-Esat-Digifone agenda. This apparent bias in favour of Persona and against Esat Digifone was also evident at a meeting held in Copenhagen on 23 October, 2003, between me, my solicitor Carsten Pals, Jerry Healy and Stephen McCullough, representing the Tribunal. I would note that I hosted and funded the cost of this full-day meeting at Mr. Pals' office. At this meeting, it was very evident, and indeed to me and indeed to my lawyer, Mr. Pals, that Tribunal counsel was operating on the basis of some foregone conclusion or predetermined outcome in terms of what had happened during the GSM2 process. Tribunal counsel was clearly only interested in pursuing matters they felt could be interpreted as reflecting negatively on the GSM2 tender process. I would characterise their approach as a form of thinking backwards. It was as if the Tribunal had already decided what the final result of their deliberations would

be and that the Tribunal counsel were simply intent on securing information that could somehow support that result or be interpreted as supporting that result. Subsequently, I received a document from the Tribunal which is supposed to be notes or a record of that meeting on 29 October, 2003. I was most disturbed at the contents of that document. I didn't regard the document as being an accurate reflection of the meeting and was disturbed by the Tribunal's attempt to have me confirm it as being accurate. In particular, I was offended by the defamatory remarks made about Mr. Martin Brennan as contained in the Tribunal's document. I most certainly did not make such remarks or suggest it in relation to Mr. Brennan in the course of that meeting or otherwise. I believed the notes to be inherently biased in several respects and refused to confirm the contents of these notes as being accurate. Some years ago, I learned of the Tribunal's dealings with Mr. Peter Bacon. In retrospect, it does seem clear to me that Mr. Healy and Mr. McCullough were also seeking during the meeting of 29 October, 2003, to have me somehow validate or endorse the contents of Mr. Bacon's report. I wasn't informed, during that meeting, of the Tribunal's dealings with Mr. Bacon, nor was I ever informed that the Tribunal was using Mr. Bacon's report to guide their

workings."

At paragraph 23, you say: "AMI first became involved in the GSM2 process by responding to an invitation to tender as published in the Official Journal of the European Communities in late 1994. AMI submitted an initial prequalification document and subsequently a final tender to the Department of Transport, Energy and Communications on 16 March, 1995. AMI's tender was accepted in late March 1995 and AMI began their work on GSM2 process in April 1995.

The first contract between the Department and AMI was signed on 9 June, 1995." You go on to say: "It's very important to note that the nature and scope of AMI's work changed very considerably as the process developed from what had been initially agreed upon and recorded in this document on 9 June. In particular, AMI was required to undertake work which was well outside of the scope of the tender submitted on 16 March, 1995. An initial amendment was agreed on 14 June which related primarily to developments, including the European Commission and their apparent disapproval of the 'option' concept of the GSM2 process. The involvement of the European Commission and the assimilation of their views into the GSM2 process created a very significant level of additional and

unforeseen work for AMI and for the Project Group."

Is that right?

A. Correct.

24 Q. "Further amendments were required due to other unforeseen circumstances which arose during the GSM2 process. AMI was required to engage in further detailed discussions with the Department in order to adapt AMI's role and level of involvement, which naturally impacted on the level of fees involved. These issues did lead to certain contractual difficulties as between AMI and the Department in the context of the GSM2 process. In the end, AMI's work was very considerably wider than had been anticipated in the tender provided by AMI and accepted by the Department. These contractual discussions culminated in a further agreement being reached on 14 September, 1995, which agreement was recorded in a letter to AMI written by Martin Brennan dated 14 September, 1995. This letter incorporated a fixed fee element which was contrary to the original quotation and tender as submitted by AMI on 16 March, 1995. AMI was also retained at this time by the Department to prepare a separate report on the regulatory regime applicable in Ireland and this work was wholly separate from the GSM2 process.

"It should be noted that AMI was engaged" -- just before we

go from paragraph 16, are we to take it that on the -- that the agreement for extra remuneration was finalised in September 1995; is that right?

A. That's fully correct.

25 Q. "It should be noted that AMI was engaged as consultants in the GSM2 process after the Government had published the RFP document on 2 March, 1995. As such," you say, "AMI had absolutely no role in determining the actual criteria upon which the GSM2 competition would be decided, nor was AMI involved in designing the rules of the competition. This was somewhat unusual. As such, AMI had to design an evaluation methodology and process that would 'fit around' such pre-existing paragraph 19 criteria and respect the descending order of priority applicable to those criteria as set out in the RFP. Typically, AMI would have been involved in defining the criteria to apply in such competitive processes. This was not the case in Ireland. The view of AMI was the design of the criteria did not meet best international practice at that time or certainly not European best practice." However, you were bound to -- "AMI was bound to respect the criteria as published prior to its engagement by the Government. This did, however, cause some problems as the evaluation process developed." Is that right?

A. Correct.

26 Q. At paragraph 28 onwards, you deal with the conduct of the licence competition process. You say: "A dedicated team, the PTGSM, was established to carry out the GSM2 competition process. This PTGSM consisted of civil servants from three telecoms divisions of the Department of Transport, Energy and Communications, civil servants from the Department of Finance and, later on, an AMI consultant on the basis of an ad hoc basis. The chairman of the PTGSM was Martin Brennan from the Department of Transport, Energy and Communications. He made it clear to AMI that civil servants from his Department did not have expertise in financial matters and would be reliant on officials from the Department of Finance and the consultants from AMI. Is that right?

A. Correct.

27 Q. I think you, as principal of AMI, acted as the lead consultant in the GSM2 process. The other consultants from AMI who worked on the GSM2 process were John Bruel, who is your co-team-leader; Marius Jacobsen, who is now deceased; Ole Federsen; Michael Thrane and Michael Vinter; is that right?

A. Correct.

28 Q. Excuse my pronunciation.

A. That's fine.

29 Q. Moreover, Mr. Taga Iversen, a director of the national Danish Telecom Regulator, was part of the AMI team and performing a reviewing and auditing function in the GSM2 licensing competition process. His involvement as a very senior official from a national regulatory authority was a significant addition and ensured a consistent quality of AMI's final deliveries. Although you were part of the Project Group, AMI did not participate in all of the Project Group's meetings. On other occasions, AMI consultants were only present for certain parts of the meeting. AMI regarded some of these meetings as being internal civil service meetings. AMI only occasionally received minutes or notes of those meetings.

By agreement with the civil servants, the evaluation process was performed as a joint exercise between AMI consultants and the civil servants from both Departments. The Project Group was a kind of -- was subdivided into ten evaluation sub-groups which evaluated the ten distinct elements of the various bids as identified in the RFP. AMI consultants were involved in every one of the ten evaluation sub-groups. And it's fair to say, given their expertise, that AMI played a central role in conducting the second mobile phone licence evaluation process. Once AMI

were on board, no other external mobile telecommunications experts were retained by the Irish Government. The civil servants involved, very clearly, as one would expect, were heavily reliant on the input of AMI throughout the evaluation process. Is that right?

A. Correct.

30 Q. "The closing date for applications, as set out in the RFP was issued -- issued on the 2nd of March, 1995, was the 23rd of June, 1995. Twelve parties purchased the initial tender documents and a facility was provided to interested parties to allow written questions about the process to be posed. 230 sets of questions, many of them detailed with sub-questions, were received. This gave rise to the publication of two detailed memoranda to interested parties." Just to stop there. If people asked questions of the group, were -- all people were entitled to get the memorandum, is that right, or were they replied to privately?

A. Those who had bought the RFP document and paid the 5,000 Irish pounds, they were given the answers to the questions posed, yeah.

31 Q. "Further significant amendments to the RFP were published on 12 May, 1995. AMI advised that such additions or enhancements to the original RFP needed to be made to

increase the likelihood that comparative evaluations could be made on a like-for-like basis. Despite these additions," you say, "it was not possible to fully restore the actual design of the competition and tender documentations to comply with European standard practice. These shortcomings in the RFP document did have an impact on the evaluation process, particularly in relation to the ability to properly complete the quantitative evaluation."

Paragraph 32, you say: "Prior to the original deadline for the receipt of applications, the Project Group completed a number of activities, including

A) agreement of division of responsibilities which confirmed AMI's significant role in all aspects of the evaluation process;

B) adoption of an Evaluation Model which set out how a quantitative and qualitative Evaluation Model would be combined;

C) adoption of a detailed work programmes to ensure timely delivery.

"Shortly before the closing date on the 23rd of June, 1995, the European Commission expressed series reservations concerning the inclusion of an auction element in respect of the licence fee to be paid by the winning applicant, and as a result of detailed and intense consultations, the

closing dates for receipt of applications was extended to 4 August, 1995. I understand the Tribunal is not pursuing any allegation in relation to the allegation of the European Commission and the deferral of the closing date. However, it is important to note that the changes introduced following interaction with the European Commission altered to a considerable degree the design and nature of the evaluation process. These changes, coming at the stage which they did, put quite significant pressure on AMI and resulted in considerable additional work, work which hadn't been anticipated at the outset being taken on by AMI, and this was reflected in the amendments to the contract made between AMI and the Department." Is that right?

A. Correct.

32 Q. "Six applications were received on 4 August, 1995, as well as a preliminary business case from Eircell, which was required for comparative purposes. A more detailed business plan was submitted by Eircell following a request on 11 August, 1995, and this proved to be a very valuable reference point and was used, where relevant, for comparative purposes. None of the six applications were deemed to have substantial deviations from the minimum requirements of the RFP, and, as such, all six applications

were admitted to the evaluation process. The applicants were identified A1 to A6. A5 was Esat Digifone and A3 was Persona."

A. Correct.

33 Q. "It appeared at an early stage that some of the applications contained insufficient information. In accordance with the rules of the RFP, tailor-made written questions were provided to the applicants on 24 August, 1995. Answers were received on 4 September, 1995, which resulted in valuable improvements in terms of the ability to comparatively assess applications. These answers also identified that the applicants had used widely-deferring assumptions in terms of key elements of their bids, such as metering principles, initial call charges, etc. The use of differing assumptions was, in AMI's opinion, attributable to a significant degree to the somewhat ill-defined manner in which the evaluation criteria had been laid out in the RFP on 2 March, 1995. As noted above, the important element of the evaluation process was conducted -- an important element was conducted via the establishment of ten sub-groups, each dealing with one of the ten dimensions identified in paragraph 19 of the RFP." And you set them out here:

market development;

coverage;

tariffs;

international roaming plans;

radio network architecture;

network capacity;

frequency efficiency;

performance guarantees;

financial key figures, and experience.

Each sub-groups contained civil servants from the Department of Transport, Energy and Communications and consultants from AMI with the appropriate experience and expertise as required for that sub-group. The Department of Finance provided officials to participate in the sub-groups dealing with financial issues and performance guarantees.

Paragraph 37, you say: "Invitations to say attend oral presentations were issued to the six applicants on 5 September, 1995. Three oral presentations, following the same format for each applicant, were carried out as six separate meetings as between 11 and 14 September, 1995. One hour was reserved for a presentation; one hour to answer questions, each posed and worded to all applicants in the same way; and one hour was reserved by the Project Group to pose questions.

"Following the conclusion of the oral presentation on 14 September, the remaining part of the evaluation was concluded, dealing with credibility, risks and sensitivities of each application. This led to the overall evaluation and final marking being completed, the results being that three candidates could be nominated for the right to negotiate for the licence with certain reservations being stated with regard to the applicants. The reservations with regard to the winning application, Esat Digifone, related to that entity's financials. The Evaluation Report containing the result of the GSM2 competition process was drafted by AMI and forwarded to the Department on 25 October, 1995."

You say that you strongly advised Mr. Brennan, of the Department, on a number of occasions, that once the Department was in possession of the final result via the final report, that it should announce that result as soon as was possible. This advice was based on AMI's extensive previous experience in such matters. It was your firm advice to Mr. Brennan that the result ought to be announced straightaway. "I understand that this advice was taken and that the result was announced by the Minister on 25 October, 1995. I wholly endorsed this approach, reflecting as it did my clear advice to the Department."

So you are saying there that the speeded-up announcement was done on your express advice, is that right?

A. I wouldn't say "speeded up," but what we did was that we stuck to the timetable.

34 Q. I see. Well, the timetable had been extended, hadn't it, due to the EU thing?

A. No, that's not correct, actually.

35 Q. We'll come back to that.

"In fact, the timing of the conclusion of the licence evaluation process and the production of the final report was agreed between AMI and the Department in the contractual amendment letter of 14 September, 1995. This letter, as written by Martin Brennan, very clearly sets out the agreed contractual time-line for the provision of two drafts of the final report on 13 and 17 October, 1995, with the provision of the final version on 25 October, 1995. It was AMI who insisted on the inclusion of these dates in the amended contract. This contractually-agreed deadline was followed exactly as set out in the letter of 14 September, 1995. The question of acceleration simply did not arise --

A. Yeah, you see, it didn't arise.

36 Q. "The evaluation process was conducted entirely in accordance with what had been agreed contractually between AMI and the Department on 14 September, 1995, and the dates

reflected what AMI had pushed for in those contractual negotiations." So just to clarify that, you are saying that you believed that the original time-frame of 25 October stood, and that you were -- as late as 14 September, you were asked to produce the final report for that day, is that what you are saying?

A. Exactly. I was -- on the 14th of December, I was asked to produce a report on the 25th of October, the final version, so everybody in the team knew at that time that the final report would be there.

37 Q. And going on from there, Professor, had you been aware that there had been four weeks provided for consideration at Government level of the outcome of the GSM2 process?

A. No, I was not involved in that part of the decision --

38 Q. Were you aware that it had been anticipated that there would be four weeks for the Government to decide that?

A. No.

39 Q. Nobody ever told you that?

A. No.

40 Q. I see. Now, in fact, you go on to say "The timing of the conclusion of the licence evaluation process and the production of the final report was agreed" -- sorry, I am repeating myself now.

"The first version of the Evaluation Report was produced on

3 October, 1995. This draft was discussed by the Project Group on 9 October, 1995. Comments by members of the Project Group in relation to the presentation of the results of the evaluation process on this initial draft and a subsequent draft were incorporated in a final version of the report. The final version was produced in accordance with the contractually-agreed position on 25 October, 1995. These contractual issues between the Department and AMI did cause an element of friction, but they were resolved. AMI had run considerably over budget in terms of time/cost dedicated to the GSM2 project. In the end, a fixed-fee arrangement was agreed, which was as set out in the letter of 14 September, 1995, which was contrary to AMI's normal method of working and, indeed, with what had been set out in AMI's tender. As a result, AMI was not fully compensated in terms of the full cost of the GSM2 project, but this was agreed between AMI and the Department as part of the contractual amendments. The work towards the end of the GSM2 licence evaluation project was also severely limited somewhat by agreement with the Department. However, none of this had any impact whatsoever in terms of the final result of the GSM2 competition. Esat Digifone was the clear winner in AMI's view and no amount of supplementary analysis or further work would have changed

that position in any way."

Paragraph 44 -- are you happy with that?

A. I am happy.

41 Q. At paragraph 44, you say: "AMI's involvement in the period between the announcement of the result of the competition on 25 October, 1995, and the awarding of the licence on 16 May, 1996, was very considerably less. AMI participated in the following activities during this period:

firstly, the preparation of draft rejection letters to be issued to losing applicants and comment on draft letters prepared by the Department;

secondly, participation in the first licence negotiation with Esat Digifone;

third, advice to the Department in relation to issues being raised by losing applicants, including representations being made by or on behalf of certain applicants by the US Embassy;

fourth, attending at meetings in Dublin with disappointed applicants;

and fifth, limited oral advice regarding a formal complaint which was made by Persona to the European Commission."

I think at paragraph 46, you go on to deal with the -- some issues in relation to the GSM2 process.

You say: "It's clear that the Department did not retain

all of the services and models which had been proposed at the outset by AMI in its tender documentation. As set out above, the terms of the contractual arrangements between AMI and the Department were amended by consent on a number of occasions, culminating with the letter of 14 September, 1995. The contents of a letter received by the Department dated 16 July, 1996, are significant" -- and you attach a copy of this to your statement -- "and it's clear from that letter that AMI fulfilled its contractual obligations to the Department."

And just for completeness, that letter is sent to you by Martin Brennan, isn't that right?

A. Correct.

42 Q. And it's dated 16 July, 1996, addressed to you personally at your company, saying:

"Dear Mr. Andersen,

"I would like to confirm the completion of our contractual arrangements in relation to the selection and award of a licence to a second operation of GSM mobile telephony in Ireland. I also want to take this opportunity to convey my thanks to you and your firm for the assistance given to the Department during the process.

"During the time that you worked with the Department, your work was considered to be of consistently high and

professional standard and both the quality of the advice you gave and the experience that you brought to the process played valuable parts in ensuring the smooth progress of the work at hand. This applied to all stages of the process from the detailed preparatory work in relation to clarification of tender documents for interested parties, the design of the Evaluation Model, the execution of the evaluation itself and the documentation of the results, and, finally, to the information sessions for the unsuccessful applicants at the end.

"I wish you and your company well in any similar projects that you might undertake in the future.

"Yours sincerely,

Martin Brennan."

A. Yes.

43 Q. Now, at paragraph 47 you say that "AMI fulfilled its contractual, ethical and moral obligations at all times. Mr. Bacon," you say, "is not somebody AMI has ever encountered in the field of telecommunications. We don't believe that Mr. Bacon has any expertise whatsoever in the field of telecommunications." Is that right?

A. Correct.

44 Q. "I would point out that AMI worked extensively for the Irish Government subsequent to the second GSM process.

Indeed, AMI was retained by the Irish Government to act as consultants in relation to the third mobile phone licence, GSM3. The final decision in that matter was judicially reviewed in the High Court, Orange v. ODTR, and the integrity of AMI's work was ultimately supported by the Irish Supreme Court. In its decision delivered on the 18th of May, 2000, the Irish Supreme Court, consisting of Chief Justice Keane, Mr. Justice Barron, Murphy, Murray and Geoghegan, unanimously found that AMI had acted properly at all times. Indeed, the Chief Justice referred to AMI as an entity with a particular level of expertise and specialised knowledge which or -- which, at the least, has the capacity which the Court is not to draw on such specialised knowledge as the director did in this case by retaining the services of AMI. And in addressing allegations made against AMI in the context of those proceedings, Mr. Justice Murphy remarked as follows: 'Evidence of the existence of a malign influence bearing on the judgement of the evaluators, or some of them, so as to sway themselves and their colleagues consciously or unconsciously in favour of the second defendant or against the plaintiff, is slight indeed. The evidence to the contrary is, in my view, overwhelming. AMI were selected themselves by a very competitive process. They clearly have a very high

reputation in the specialised field in which they practice." And you emphasise the last sentence, isn't that right?

A. Yes.

45 Q. "I understand," you say at paragraph 49, "that the Tribunal itself eventually confirmed that Mr. Bacon wasn't an expert in these matters." And you go on at paragraph 50 to say you will refer to the contents of your response to the Tribunal, as cosigned by John Bruel, dated 11 December, 2008, in support of your evidence to the Tribunal, that you also reserve the right to refer to the numerous documents provided by yourself and AMI to the Tribunal in the period 2001 to date, and, in particular, you reserve the right to refer to the memorandum of AMI dated 20 June, 2002, dealing with a number of issues raised with the Tribunal, including

A) the audit trail of the quantitative evaluation;

B) the amendments of the draft Evaluation Reports;

C) weighting issues; and

D) provision of final version of the report to the Department.

And you go on at paragraph 51 to say you were very concerned about inaccurate statements made on behalf of the Tribunal in relation to your cooperation with the Tribunal and your willingness to attend and give evidence; that you

are concerned, indeed troubled, by your dealings with the Tribunal in the period 2001 to date. You do feel that the Tribunal's lawyers were very hostile towards AMI and you, and that, ultimately, they did not wish for you or your colleagues to give evidence publicly in relation to your involvement in the GSM2 process. Is that right?

A. Correct.

46 Q. And you say that, in this context, it's recently come to your attention that the Tribunal has made documents publicly available purporting to be minutes from private meetings with the legal team of the Tribunal during 2002. Some of the matters recorded are factually wrong and, in some cases, extremely distorted. You have never seen, far less approved those records. "I am concerned that these records from 2002 had formed the basis for the legal team's questioning of the witnesses during the subsequent years when the evidence was conducted. In my view, there are very serious issues here in relation to transparency and objectivity." Is that right?

A. Yeah.

47 Q. "As is clear from the records, I provided a very considerable amount of assistance to the Tribunal on a voluntary basis over a lengthy period. I attended numerous private meetings with the Tribunal both in Dublin and in

Copenhagen. I also prepared numerous documents for use by the Tribunal. During my first private meeting with the Tribunal, the Tribunal confirmed that nothing provided by me would be put into the public domain without my express approval. The Tribunal ignored this commitment to me and proceeded to make public references to private meetings with me. They also posted a document clearly marked 'confidential' on their website without my personal knowledge or approval. Moreover, also, a number of other documents written by my solicitor, Mr. Carsten Pals, and clearly marked 'personal'/'confidential', have entered into the public domain on the initiative of the Tribunal without prior content of either Carsten Pals or myself. I also found my public meetings with the Tribunal's -- my private meetings with the Tribunal's legal team to be troubling. On one occasion, I was asked to meet the Tribunal in private for a one-hour meeting scheduled at 1800 hours on the 30th April, 2002. I travelled to that meeting with colleagues from AMI from Copenhagen, but the Tribunal team didn't turn up until seventeen minutes past eight, 20 hours 17. This necessitated us having to rebook flights and make accommodation arrangements at late notice. As was the case with all the previous assistance I provided to the Tribunal, I was not reimbursed any costs or expenses. I

specifically recall that during the meeting of 30 April, 2002, as Tribunal counsel were clearly rather excited and satisfied by what they regarded as the results of the quantitative evaluation which they erroneously felt established A3, Persona, as the 'winner', I recall that AMI informed them that they were not -- that they were using the wrong version of the quantitative scoring chart. In fact, the correct version does not have Persona as the applicant with the highest score. Although I have brought this to the Tribunal's attention time and time again, they have continued to rely on this inaccurate version and claim that Persona won the quantitative evaluation. This is simply incorrect. I cannot understand why the Tribunal has proceeded to consistently misrepresent this matter when this has been corrected time and time again, included having been corrected in a lengthy and detailed memorandum as provided to the Tribunal on 20 June, 2002."

A. Yes. Sorry, not correct in two places. In the first place, you didn't say "quote and unquote" with regard to the results of the quantitative evaluation, and that's an important point for me to state, because there was never a final result of the quantitative evaluation. So this is a quotation of what members of the legal team has said during the private meetings. Just to set the record straight.

And the same applies when you, some lines later on, didn't say "quote, unquote" with "Persona won the quantitative evaluation." So "won" should also be "quote, unquote".

48 Q. So that's an inaccurate version to claim that they won?

A. Exactly, thank you.

49 Q. But apart from that, you are saying that you are happy with that?

A. Yes, thank you.

50 Q. Now, at paragraph 55, you say you were "also concerned by the threatening and unpleasant tone of correspondence received from the Tribunal. Considering that I was assisting the Tribunal on a purely voluntary basis, never having received any reimbursement of costs expenses, I regarded the sequence of such threatening letters, of which there are many examples, to be absolutely unmerited and inappropriate and to constitute a kind of inquisitorial blackmail, as I have already made the Tribunal aware of. I should also point out that whilst I have been provided with a commitment in relation to costs/expenses involved in AMI staff giving assistance to the Tribunal, the Tribunal has not lived up to this commitment." Is that right?

A. Correct.

51 Q. "Ultimately, I had decided that I was not prepared to continue to provide further voluntary assistance to the

Moriarty Tribunal, given the hostile and inappropriate treatment that I was exposed to during the period in which I dealt with the Tribunal." Is that right?

A. Yes.

52 Q. "It is my view that there was a deliberate ploy on the part of the -- that this was a deliberate ploy on the part of the Tribunal legal team. It is absolutely clear to me that the Tribunal's legal team did not agree with the evidence I was prepared to give to the Tribunal which supported the integrity of the second mobile phone licence process. My conclusion in this regard was confirmed, when some years later, I learned of the Tribunal's interaction with Mr. Peter Bacon and the course of action the Tribunal has taken. I regard the Tribunal's actions in this regard to have been extremely inappropriate." Is that right?

A. Indeed.

53 Q. "I should confirm that I never told the Tribunal I was unwilling to give evidence. I have been approached by parties represented before the Tribunal who inquired if I would be willing to give evidence. I confirmed that I was so willing. My decision in this regard has been very considerably influenced by recent developments of the Tribunal of which I have become aware through the media. It did occur to me that there were very many parallels

between the recent evidence from the officials of the Office of the Attorney General and my personal position and experience with the Tribunal. I am willing to give evidence under oath to the Tribunal, despite the fact that I am not in any way compelled to do so, for the simple reason that I believe that it is in alignment with the Public Interest to get all factual errors and misunderstandings cleared before a final report may be published by the Tribunal. In this context, I would also point out that I have not received any substantive response to my recent correspondence with the Tribunal. For instance, my solicitor wrote to the Tribunal on 28th August, 2007, in relation to clear factual inaccuracies contained in the Tribunal's published ruling on 17 July, 2007. No response to this letter was received from the Tribunal. Furthermore, John Bruel and I wrote a lengthy and extensive document to the Tribunal on 11 December, 2008, in response to provisional findings issued by the Tribunal. No response to this submission was received from the Tribunal, despite the fact that we clearly document a considerable number of factual errors, misunderstandings and apparent bias in the said provisional findings. When I queried this, a simple letter of acknowledgment was received. However, no substantive response to any of the

many critical issues raised in that Tribunal dated 11 December, 2008, was received from the Tribunal. It's my firm impression that the Tribunal has been content to ignore communications in these matters and does not welcome input that undermines the foregone conclusion and predetermined outcome that the Tribunal seems to have been working towards. There is ample evidence that the -- demonstrating this to be found in the Tribunal's provisional findings." Isn't that right?

A. That's correct, yes. In the provisional findings, yes.

54 Q. Did you sign that statement on 13 April of this year, of 2010?

A. No, I don't think I signed it, but I am not fully aware, but I can go back to my files and see if I signed it.

55 Q. Well, do you say did you hand over an unsigned copy to Mr. O'Brien's employee?

A. No, I sent it to my solicitor.

56 Q. Unsigned?

A. Yes, because it was -- it was sent by electronic mail.

57 Q. I see. So you, in fact, have never signed this statement yourself, to your knowledge?

A. I don't recall whether there is a signed version in my own files, but it was definitely sent unsigned to Carsten Pals, and I don't see any, you know, difference in it, because

the document is as it is.

58 Q. You adopt it as your statement, signed or unsigned; is that right?

A. Exactly. That's the point I would like to make.

59 Q. Can I just ask you in relation to this, are we to understand that this document was generated by you between the 9th April, when you met in Mr. Pals' office, you met Mr. O'Brien's representative; is that right?

A. Not --

60 Q. I shouldn't ask you --

A. Not really, no.

61 Q. When did you agree to make a statement?

A. There was no such a thing as an agreement. If we could go back to paragraph 58.

62 Q. Yes.

A. You will appreciate what you have just, helpfully, read aloud, that four sentences down: "Furthermore, John Bruel and I wrote a lengthy and detailed document to the Tribunal on 11 December, 2008, in response to provisional findings issued by this Tribunal. No response to this submission was received from the Tribunal, despite the fact that we clearly documented a considerable number of factual errors, misunderstandings," etc. But if you go to my response document, and cosigned and also drafted by John Bruel, you

will see, in the end of that response to the provisional findings, that we reserve the right to come back with an additional statement. So therefore, over some time I had actually worked and reflected on an additional statement.

63 Q. I see. So I just want to understand this. You are saying that you worked on this document between December 2008 and April 2010, is that it?

A. Yes. So -- yes, so I was actually having some information which I was not able, time-wise, to include in my response to the provisional findings, because John Bruel and I had very short time to respond to the provisional findings, for the simple fact that we received them very late and there was only a three-weeks period in which we could respond to provisional findings.

64 Q. I see. Well, I am asking you, it appears what you are telling the Tribunal now is that this document here was composed over a 15-month period; is that right?

A. Yes, but you know --

65 Q. Or a 16-month period?

A. You would appreciate that I have had other things to do than writing this document, and so had John Bruel, so, you know, we were not working on it on a daily basis, but some of it was actually left over from what we didn't manage to include in the response document to the provisional

findings in December 2008.

66 Q. Well, did you draft this or did Mr. Bruel draft this?

A. The statement you have just read aloud?

67 Q. Yes?

A. Yes, I drafted, you know, most of it, I would say. I was the key drafter of this document.

68 Q. And did Mr. Bruel have input into this document?

A. I sent it to him for his review, as Jacqueline O'Brien helpfully stated in the opening remarks, and he didn't have, you know, any further input into it, so he has not had any revisions to it.

69 Q. When did you send it to him for his review?

A. Pardon?

70 Q. When did you send it to Mr. Bruel for his review?

A. I don't recall. That was -- I don't recall the date.

71 Q. Was it before or after the 13th of April?

A. It was around that time.

72 Q. I just want to get the sequence of events correct. As we understand, you have a conference in your office on the 9th of April with Mr. Pals there and the representative of Mr. O'Brien in attendance, isn't that right?

A. Pardon?

73 Q. On the 9th of April, you had a meeting in your solicitor's office, Mr. Carsten Pals, your lawyer's office?

A. Yes.

74 Q. At which an employee of Mr. O'Brien attended, isn't that right?

A. That's correct.

75 Q. And I am asking you was this document available at that meeting?

A. No, not at that -- no, it was not put on the table at that meeting. What was discussed at that meeting was, you know, how to make a statement.

76 Q. I see.

A. To get, what you say, the headlines of a statement, the issues of a statement.

77 Q. So the topics to be dealt with in a statement were discussed that day on the 9th of April; is that right?

A. Yes, some of the topics, how to draft a statement. I hope you will appreciate that --

78 Q. Who was telling you this -- I just want to understand the process?

A. Yeah... you will appreciate that neither me nor Carsten Pals has any experience with Irish court systems and tribunal systems, so, we were, you know, not aware of how you circulate and draft, etc., these kinds of statements, because we are not at all used to this form in our own jurisdiction.

79 Q. And who gave you assistance in drawing up the topics to be covered in the statement and gave you advice on the issues that you should deal with?

A. There was no such a thing as advice.

80 Q. No, well, you said -- you and Mr. Pals didn't know how to draft a statement of this kind, and you say that the topics were discussed. Who suggested how you go about drafting a document as comprehensive as this?

A. Well, I had some issues beforehand, as I just told you, that I had been working on that document for some time.

81 Q. I appreciate that.

A. And then Carsten Pals asked Tom Reynolds how is it that you, in the Irish context, deal with these kinds of statements?

82 Q. But do I understand it that this document was not produced on the 9th of April, but that your lawyer asked Mr. Reynolds how, in general terms, you produce a statement for use in an Irish tribunal?

A. Yeah, yeah, yeah.

83 Q. And are you saying that Mr. Reynolds supplied information to him as to how you generally go about composing a statement such as this, is that it?

A. Yes. In very general terms, it's probably correct what you are asking about, but it was something like, you know, what

are the logistics? What are the headlines of a statement?

84 Q. I see. And just for completeness, since this wasn't put on the table at the meeting of the 9th of April with Mr. Reynolds at all, but how to prepare it and structure it was, when did you contact Mr. Bruel about its contents? When did you put it past him?

A. Well, I have regular contacts with John Bruel because he is a former colleague.

85 Q. Since this document didn't exist, when did Mr. Bruel see it?

A. Mr. Bruel saw it in the final version, but he had also --

86 Q. I am asking you when, Professor?

A. Yeah, I don't have the date here.

87 Q. Well, was it before or after the 9th --

A. The final version he would have seen after it had been filed.

88 Q. I see.

A. Was sent, yeah.

89 Q. So, were there -- how many versions do you think there were of this document?

A. No, not really, because, as I told you, we had -- John Bruel and I had collectively drafted a response to the Tribunal's provisional findings and at that time we looked into a number of documents, and so forth, but due to the

time constraints, as I discussed before, we could, you know, not take everything on board what we wished on the -- our response document to the provisional findings. So we had, you know, some documents on the table, you know, some Tribunal documents, some minutes, some various kinds of stuff, a little bit here, a little bit there, but there was no such a thing as a, you know, a document like the statement on the table.

90 Q. So there was no draft, ever, of this?

A. No.

91 Q. This was a new document. I presume there is an electronic file for this, is that right?

A. Yes, that's correct.

92 Q. And when was that file opened?

A. What do you mean by "opened"?

93 Q. You know when you are making a document, I take it it's a Word document, or something like that, is it?

A. Yeah, yeah.

94 Q. When you are about to create a Word document, you open a file. When was that done, can you recollect? Was it before or after you met Mr. Reynolds?

A. That was after.

95 Q. I see. So it's after the 9th of April --

A. Yes.

96 Q. -- that the file for this is produced?

A. Definitely.

97 Q. And we are fairly sure that you forwarded this to Mr. Pals, and it went on to -- through a number of hands, to the Tribunal and to others, but you parted company with this on the 13th, is that right?

A. Sorry, I didn't --

98 Q. You gave this document to Mr. Pals for onward transmission on the 13th of April, isn't that right?

A. That's correct.

99 Q. So, I am just asking you, is the Tribunal to take it that this document was brought into existence after your discussion with Mr. Reynolds and was completed in a four-day period?

A. Both yes and no. I would like to qualify my answer here because it was not completed based on discussions with Tom Reynolds, but it was -- it is correct that it was completed after the meeting in April and of course then sent on the -- I believe it was the 13th of April.

100 Q. And at the meeting of the 9th of April, as I understood your evidence, you and Mr. Pals told Mr. Reynolds that you had no experience in how to conform a document for submission to the Tribunal?

A. Yeah.

101 Q. And that I assume that he gave you assistance in how to do the job, isn't that right?

A. He told us how he could handle the procedure of bringing it to the Tribunal and also, you know, how you could structure it with Arabic numbers, and so forth. You know, we are used to a quite different style, really.

102 Q. So are we to take it from all of that, that when he gave you the rough structure of your statement on the 9th, that you, over the next three days, the 10th, the 11th and the 12th, generated this document for the first time?

A. Now you are not understanding what I am trying to convey.

103 Q. I am asking you --

A. No, it's incorrect, and I have to say it's incorrect, because John Bruel and I, we had worked on, you know, the response document to the provisional findings as stated in paragraph 58 of the statement we are now discussing back in 2008 and with some documents. So, you know, we didn't come from cold in drafting this document.

104 Q. No, you had submitted a document to the Tribunal in 2008?

A. Yeah, and we had some additional material at that stage which we didn't manage to include, so what -- it's not correct if you are asking me whether I can confirm that we wrote this document from cold from the 9th April to the 13th April.

105 Q. You are saying --

A. We didn't come from cold.

106 Q. I see. You are saying that, between yourself and Mr. Bruel, there was some material, which is reflected in this document, generated between December 2008 and April of 2010?

A. Yeah, essentially, yeah.

107 Q. And can I just briefly ask you: Does this document incorporate that material and reflect it or is it just portions of it that are similar?

A. It's mainly the underlying documentation, you could say. I hope you will understand that drafting such a document is also based on a lot of the underlying documentation. So you do not draft these documents without having, you know, a number of underlying documents in your recollection, such as the different versions of the quantifications, such as minutes of meetings, such as the Evaluation Reports, such as the appendices to the Evaluation Report, so it's a huge, huge documentation there.

108 Q. You are saying that you couldn't make a statement like this unless you had the material to which you refer, available to you?

A. Exactly, exactly. That's the point I am trying to make.

109 Q. And just to go back to Mr. Bruel again. Are we to take it

that after the 9th, after the meeting on the 9th with Mr. Pals in his office, are you saying that between the 9th and the 12th, you gave this to Mr. Bruel to look at, or it must have been later, after you had finished with the document, that you sent it to him for his inspection?

A. He saw the document after the 13th April.

110 Q. So to get it now clear --

A. The final version.

111 Q. Mr. Bruel never saw this document in the form that you were working on it during that period, is that correct?

A. Exactly.

112 Q. I see. Now, can I just briefly ask you, did anybody assist you in making this document? Did Mr. Pals polish it up for you or anybody else polish it up for you?

A. Yeah, Mr. Pals assisted me in drafting this document.

113 Q. I see. And did anybody else?

A. No.

114 Q. So it was just you and Mr. Pals were responsible for producing that document?

A. Correct.

115 Q. And that was over the days the 10th, 11th and 12th of April of this year?

A. Yeah, from the 9th to the 13th. You will recall that the meeting you refer to between Carsten Pals and Tom Reynolds

took place on the 9th of April, and if you want to be meticulous here, we can say that that was a morning meeting and my electronic version of the document sent on the 13th of April is sent in the late evening.

116 Q. I see. So you have four days, really, not just three days?

A. Exactly.

117 Q. I see. Now, I think you have also been sent a document by the Tribunal -- I am going on to the next stage, and this is a three-stage process, Chairman.

CHAIRMAN: Yes. Well, obviously, Mr. McDowell, you have worked out the sequence you are going to work in. I am just concerned -- I don't want to have the witness going -- undergoing an inordinately long --

MR. McDOWELL: I am now going to deal with the responses to the Memorandum of Information, that document, and it's a fairly lengthy one --

CHAIRMAN: It's 40 pages. Might --

MR. GLEESON: I am just wondering, in ease of the time constraints that we are under, would it be possible to adopt a procedure that is sometimes invariably adopted in the Commercial Court; namely, that a statement produced by a witness is deemed to be his direct evidence, and that would, it seems to me, save a lot of time, that it's deemed to be part of the record if he adopts it and then he can be

questioned upon its contents. I am just suggesting that in ease of the Tribunal.

CHAIRMAN: Well, it hasn't been the practice to date, Mr. Gleeson. I am anxious to do anything that will expedite the process, but I think this is the next document, in any event, Mr. McDowell, and I propose that we go perhaps twenty minutes to see if we can make some reasonable despatch on that.

MR. McDOWELL: Mr. Andersen, I think there is a -- your response to a Memorandum of Information, and I can hand that to you now.

A. Perfect. That's helpful. Sorry, in the interests of expediency, could we just read my response and not the questions, maybe? That's just a suggestion to save time.

118 Q. I wonder will they make sense if there are no questions.

MR. O'DONNELL: I am happy to do anything to facilitate Mr. McDowell to quicken this up. We took half an hour on the four days taken to produce this statement. We didn't look, for one second, at Mr. Andersen's involvement in the substantive process. We were looking for half an hour at the time it took him to make up the statement of the 13th of April, and while obviously that's a matter for Mr. McDowell and for the Tribunal, I am as concerned as you are, Chairman, if not more, given that I represent the

State, that this matter be concluded within the available time, and if it helps for the statement to be read out by -- or to be taken as read, I am quite happy that it be dealt with in that way. I don't know what my colleagues feel about that, but we have all been circulated with the Tribunal. If the Tribunal feels that they should be provided to the media, that's a matter for the Tribunal, but anything that speeds this up. We can't -- if we are going to spend half an hour on how long it took Mr. Andersen to draft a statement, we will be here not 'til this Christmas, but 'til next Christmas.

CHAIRMAN: That was a separate matter, Mr. O'Donnell, as you know. Mr. McDowell, I have indicated we will sit for a further twenty minutes and see what progress can be made in that time. No, thanks, Mr. Lowry. I want to go ahead with that.

MR. LOWRY: Did you say "no, thanks", Mr. Chairman?

CHAIRMAN: Not just at the moment, if you don't mind. I want to have twenty minutes more evidence and I'll hear anything further that needs to be said.

MR. LOWRY: Before you conclude, before you conclude with your twenty minutes, could I make a point before that?

CHAIRMAN: What is that?

MR. LOWRY: That point, Mr. Chairman, is very relevant to

me as the one who is being inquired into here.

On the 19th of October, your Tribunal team wrote to my solicitor, and on the bottom of that letter it says: "The Tribunal is in the process of assembling, for the convenience of Mr. Andersen and to assist him in giving evidence, public-sitting books and documentation extracted from the books already circulated, in most cases dating from November 2002."

Now, on Friday evening, I knew that I would not have a legal team here and that I would have to represent myself. I rang my solicitor at 4.30 on Friday evening to know where these books were, which Mr. Andersen was going to be examined under, and I was told that nothing had arrived, and I received that documentation sitting at this table this morning at exactly 10.45. Now, Mr. Chairman, that is not adequate notice for me, but neither would it have been adequate notice if it was a legal team that I have, and I want to say for a tribunal that is so well-staffed and resourced, that this is either gross inefficiency or gross incompetence, and I am saying that as long as Mr. Andersen, who is a vital witness to this Tribunal and a vital witness to me, I need time to study that documentation and I want Mr. Andersen taken through every line of his statement.

CHAIRMAN: We'll deal with it as I see fit, Mr. Lowry. The

document was, on my information, produced by courier at your solicitor's office sometime shortly after 4.30. The courier was unable to gain admission, but I am not going to be --

MR. LOWRY: At 4.30 on a bank holiday weekend, so that was Saturday and Sunday. What was I to do? What was any legal team to do on a bank holiday evening at 4.30? Simply not good enough, Mr. Chairman.

CHAIRMAN: You will have ample time to prepare any questions you wish to ask. Mr. McDowell, please proceed.

119 Q. MR. McDOWELL: I think in 2002 you were sent a memorandum seeking information from the Tribunal, is that right?

A. That is not fully correct, because the schedule --

120 Q. I am referring to the 17th of May, just for your information.

A. This 2002?

121 Q. Yes.

A. That was sent to AMI, that was not sent to me. So that's incorrect.

122 Q. I am sorry, it was sent to the company. And what was your position in that company at that time?

A. I was external consultant, so that's why I am objecting a little bit when you say that it was sent to me. It was not sent to me.

123 Q. Well, were you made aware of it at the time that your employers or the person to whom you were a consultant, was sent it?

A. I was made aware of the fact that it had been sent to AMI, but I did not see the schedule at the time.

124 Q. Did you ask to see it?

A. No.

125 Q. Well, now, in 2010, I think you were, after you indicated that you would be a witness, you were sent a similar memorandum asking you a number of questions which the Tribunal wanted your assistance on, is that correct?

A. That's correct. And I received those, yes.

126 Q. And I think the first question asked you to detail the submissions or proposals made by Andersen Management to the Departments in relation to the request to tender in relation to the appointment of a consultant to the GSM2 process, isn't that right?

A. Yes.

127 Q. And I think that you indicated that there was a prequalification document and there was your tender document, and you appended both of those to your response, isn't that right?

A. Yes, yes.

128 Q. I am shortening this time in deference to the time

constraints. And again, I think you were asked a second question, to set out the terms of Andersen's appointment as consultants to the process, including the intended role, the extent of the relative input of Andersens and the Department Project Group to the process and the precise terms of your appointment, whether you were to select a winner of the process or to rank the applicants in order of merit or otherwise, isn't that right?

A. Yes.

129 Q. And your answer to that is that you cease to have any connection with AMI - which was the body which made the tender - since 2002, and you are assisting the Tribunal in a personal capacity. AMI performed a consultancy role. Its agreement was to provide consultancy services, was with the Minister. AMI's role was to assist the civil servants in the Department in the evaluation of applications and to provide guidance to the Department in respect of what was the best application. AMI, however, did not decide which applicant should be awarded the licence, and, likewise, AMI did not decide the scoring of the applications. The Department appointed a Project Group known as PTGSM and you set out the Departments from which its personnel were drawn. AMI provided its consultancy services to PTGSM and to the Department. However, neither AMI nor its employees

were members of the PTGSM. Furthermore, you did not attend all of the PTGSM meetings and from time to time you only attended part of the meetings; is that right?

A. Correct.

130 Q. In addition, AMI was not routinely afforded copies of the minutes of meetings by the PTGSM, and, when it did receive copies, it had no right to comment on them or to revise those minutes. AMI was not responsible for record-keeping or other audit trail matters in connection with the evaluation of the applications for the GSM2 licence. This function was solely the responsibility of the Department. Is that right?

A. Correct.

131 Q. Before its appointment as consultant, AMI had offered to perform this function but this offer was declined by the Department. Is that right?

A. Yes.

132 Q. And you then deal with a number of bullet points in respect of AMI's role in the evaluation process, the first of which is the specific functions -- AMI's specific functions was subject to instructions from the Department and the Project Group and to the fulfillment of your contractual obligations.

The second point you make is that AMI would normally join

in the evaluation discussions based on its knowledge from other tenders and from the GSM business at the time. However, AMI had no decision-making powers at meetings and it was the Irish civil servants who took the decisions, that is decisions on the weightings and scorings of the applications. While AMI gave advice on scoring the applications, it did not score the applications itself, is that right?

A. Yes.

133 Q. And you also go on to say that "Once AMI had delivered the agreed input to the Project Group, AMI normally left their meetings. Moreover, in a number of instances, AMI was bound by work responsibilities in Copenhagen, combined with meeting logistics, such as was the case at the meeting in October 1995, and AMI representatives did, therefore, not participate in the meetings in full."

Which meetings are you referring to there that you had logistical difficulties?

A. In particular, referring to meetings on the 9th of October and the 18th of October, if you want it precisely.

134 Q. Just, Ms. O'Brien just reminds me just to -- there seems to be a question as to whether there was a meeting on the 18th or on the 23rd, and I don't want us to be --

A. Oh, sorry, yeah, it's probably correct. She is correct,

it's the 23rd, yeah. So it's the 9th and the 23rd.

Correct.

135 Q. And the third point you make is, according to your tender document, your role was to assist with the evaluation and not to select or nominate a "winner". Following a contractual change in September 1995, it was decided that AMI was to assist in the ranking of three eligible candidates with whom the Minister could enter into negotiations to award the GSM2 licence.

And is that agreement was the one embodied in the letter of the 14th of September, 1995?

A. Exactly.

136 Q. So it was at that point it was stated you were to produce three with whom the Department could deal; is that right?

A. Yes.

137 Q. I see. In a letter dated the 14th of September, 1995, you -- the following is stated: "The final Evaluation Report, taking into account the view of the GSM Project Group, shall be submitted to the Department by AMI by the 25th of October, 1995. Accordingly, AMI was bound to take the views of the Project Group into account. To this end, AMI was to produce a report summarising the work carried out during the evaluation process. As set out above, AMI's role was not to select a winner of the process, nor was it

part of AMI's function to rank the applicants in order of merit, or otherwise. The applications were evaluated by the Irish civil servants with the assistance of AMI."

Is that right?

A. Correct.

138 Q. The third question, they asked you for your understanding of the role envisaged for the Cabinet, the Cabinet Subcommittee and the Minister, in the GSM evaluation process, and, in particular, Andersen's understanding of their respective input into the ultimate decision as to the outcome of the process compared with the source -- together with the source of such understanding.

And your reply to that question was: "AMI was not involved with or privy to any decision-making process at the level of Cabinet or Cabinet Subcommittee, nor was Michael Andersen aware of any input by Cabinet or any Cabinet Subcommittee to the decision-making process. The role, if any, of Cabinet in the decision as to who would get the GSM2 licence, was not a matter of which Michael Andersen was aware. AMI's understanding was that it was the Minister's decision as to whom the licence should be awarded; is that right?

A. Exactly.

139 Q. You had no understanding whatsoever that it was intended to

bring the matter to Government and have a Government decision, is that what you are saying?

A. I was not aware of any process behind the delivery of the final Evaluation Report to my client.

140 Q. I see. Now, you are asked, then, about -- to give details of discussions between AMI and the Department or between AMI and any other person concerning the construction to be placed on the RFP document, and, in particular, on paragraphs 3, 9 and 19, to which Ms. O'Brien made reference today, isn't that right?

A. Yes.

141 Q. And your answer to that is: "A standard emerged internationally at the time whereby there was an initial minimum requirements test, also known as an admittance test, followed by an evaluation of the eligible applications. Such a two-stage process was not formally instituted in the RFP document prepared by the Department and their former consultants. No minimum criteria were laid down in the RFP with regard to financial matters, contrary to a number of other tenders in which AMI was involved at the time which contained minimum criteria - for example, solvency degrees of at least such-and-such a percent, or a degree of self-financing at the degree of some other amount."

A. Exactly.

142 Q. "Subsequent tenders in Ireland adopted a more formal and well-prepared two-stage process. In the GSM2 tender, however, as no material admittance criteria in respect of financial matters were adopted by the Irish Government, no material admittance process could be used by the Project Group concerning such matters. Instead, AMI performed a detailed test which was finalised on the 7th of August, 1995, comparing the conformance of the applications with formal minimum requirements. These requirements were set out in a letter dated 7th of August, 1995, from Michael Andersen" -- that's you -- "to Mr. Towey, which was sent by fax on the 8th of August, 1995. It should be noted that A1, A3 and A5 were in full conformance with these identified minimum requirements which are set out below:

Firstly, that the entire application shouldn't exceed 350 pages.

Secondly, that the Executive Summary shouldn't exceed 25 pages.

Thirdly, a statement that concerns that the licence fee payment should be included.

Fourth, 90% coverage of the population should be reached within four years of issue of the licence.

And fifth, it should contain a validity statement

concerning the contents of the application for a period of

180 days."

Is that right?

A. Correct.

143 Q. And you are saying that three of the applicants were in

conformity with this. Are we to take it that three

weren't, or is that the inference?

A. No, no. In actual fact, all six were admitted.

144 Q. I am just trying to -- I am just asking why you note

particularly that A1, A3 and A5 were in conformity?

A. Okay, then, we need to open the document if we are to go

into more detail.

145 Q. I don't want to go into detail at this stage. I am just

asking you the question, is there an implication that

others were not? And you are saying that that's not a

correct implication, is that right?

A. No. As far as I recall, the conclusion of the document to

which reference is made here, it is such that three

applicants meet the five criteria 100 percent. And then

the remaining, the remaining three applicants, they have

some minor deficiencies. But, you see, the problem with

the RFP document, and maybe we will revert to that later

on, is that there were no kind of rejection procedure. In

a normal RFP document, if you are to reject to admit an

applicant to the evaluation, you have to have a rejection procedure stating that you can post them questions whether the application should be understood to be only containing this and that material, whatever. But such a procedure was not instituted.

146 Q. Yes. So there was no procedure for rejecting applications for non-conformity?

A. Exactly.

147 Q. And in a standard or a well-constructed competition, you'd expect to see a procedure which gave people notice as to why it was proposed to reject their application?

A. Yeah, yeah. So we took the decision that, although there were minor deficiencies with three applicants, these deficiencies were not sufficiently strong to reject them.

148 Q. I see. I think you say: "Moreover, twelve other issues were addressed which were set out in that letter, but these were not defined as potential rejection criteria in the RFP document. There were oral discussions which took place at the PTGSM in respect of paragraphs 3, 9 and 19, and, in particular, paragraph 19. There was nothing substantively measurable in the financial requirements. They were part of the evaluation of the applications by the Project Group. In addition, paragraph 19 formed part of the discussions throughout the exercise and especially when creating final

evaluation tables of the Evaluation Report. In fact, paragraph 19 became more important as the evaluation process progressed when it became clear that the quantitative analysis was not going to be self-contained.

A. Exactly.

149 Q. Can I just ask you, that term there, "self-contained," what do you mean by that? Because it may have some importance.

A. You know, it's a matter of fact that there was not produced a separate report on the quantitative evaluation in a final sense of the word, and "self-contained" means, in this context, that there were so many deficiencies detected during the quantification process that it was not defendable. For instance, with regard to normal statistical means of measurements like reliability and also validity, that a report or a result could be self-contained.

150 Q. So, just for clarity, are we to take it that that means that when it became apparent that the quantitative analysis was going to be indefensible due to these issues --

A. Yes.

151 Q. -- the consideration of paragraph 19 as part of the qualitative examination assumes a greater importance?

A. I would say, you know, in an evaluation process, and in every evaluation process in which I have been involved, we

have had different kinds of challenges throughout such a hugely complex process. Whenever you face challenges, I think that the most fair thing to do is to look more and more into what the evaluation criteria adopted by the Irish Governments were, because the Irish Government had adopted, as I understood it at least, paragraph 19 and the different criteria there.

152 Q. Yes. Could I ask you, Professor Andersen, in relation to this document, could I ask you to study it this evening, because it may be that I may be able to ask you umbrella questions about it tomorrow --

A. Fine.

153 Q. -- and get your overall adherence to it, rather than bring you through each paragraph in the way I am doing at the moment, do you understand me?

A. Yeah. That's okay with me.

CHAIRMAN: I think that makes some sense, Mr. McDowell. I am obviously anxious to facilitate the expressed wishes of, I think, pretty much everybody in attendance that we make the maximum progress possible. I suppose that incorporates really the need to make a start at half past ten, if that's feasible. Is that suitable to you, Professor Andersen?

A. Yes.

CHAIRMAN: That's very helpful. Thank you.

THE TRIBUNAL ADJOURNED UNTIL THE FOLLOWING DAY, WEDNESDAY

THE 27TH OF OCTOBER, 2010.