

THE TRIBUNAL RESUMED ON THE 2ND OF NOVEMBER, 2010,
AS FOLLOWS:

CHAIRMAN: My apologies for starting slightly late.

Mr. O'Callaghan, I think you had indicated you had a brief application.

MR. O'CALLAGHAN: Thank you, Chairman. Chairman, you have now had the opportunity, over the past five days, of hearing possibly 20 hours of evidence from Professor Andersen, and I think what is apparent from his evidence, in my respectful submission, is that the evidence you have heard is evidence from a witness who is both respected and honest, and in respect of his honesty, Chairman, I would say that this Tribunal has not sought to attack his honesty in its cross-examination. At no stage did your counsel, sir, seek to suggest that Professor Andersen's evidence in any respect was dishonest or misleading, and I say that's an instructive point for the purpose of my application, sir.

Another point which I say is apparent from the evidence which he has given over the past 20 hours, is that Professor Andersen clearly, and this is something upon which we all agreed, was an absolutely crucial witness to the investigation of the GSM licence. We know from his evidence, and indeed we knew from the documents beforehand, that Professor Andersen oversaw the process of the GSM competition; we know that Professor Andersen formulated the evaluation; and we know, more importantly, sir, that this licence process could not have been interfered with unless, in some respect, Professor Andersen was interfered with. The evidence he has given to you, sir, over the past five days, is that he stands over the award of the licence to Esat Digifone one hundred percent, and I say that there is no evidence challenging Professor Andersen in respect of that evidence he has given. You may recall, sir, yesterday, that I stood up and intervened when I objected to Mr. McDowell not putting evidence to the witness, and I think part of the reason why Mr. McDowell could or did not put transcripts of evidence to the witness is that there simply is no evidence, Chairman, from other witnesses suggesting or supporting that this licence was, in some respect, interfered with by Minister Lowry. And, sir, if this was the first witness who was giving evidence to you in this GSM process, I could well understand why you may say, "well, I need to hear the evidence from other relevant witnesses," but he is not the first witness, and we all hope that Professor Andersen is, in fact, the last witness, but, sir, you have already heard evidence from 15 civil

servants from the relevant Department, including evidence lasting 25 days from Martin Brennan and 11 days from John Loughrey. You have already heard evidence from two officials from the Attorney General's office, you have heard from Senior Counsel, Mr. Nesbitt, and you have also heard evidence from five members of the Cabinet at that time, including a former Taoiseach and Tanaiste. What's instructive, sir, in respect of all of that evidence, is that not one of those witnesses have given evidence suggesting that the competition or licence award was fixed or deliberately compromised.

And we now have the evidence of Professor Andersen, which fills in any holes that you may believe may have existed in the GSM competition and any further explanations that you believe may have been required. And in respect of Professor Andersen over his evidence over the past 20 hours, not only is it the case that he was not challenged as to his honesty, but it was not put to him by your counsel, sir, that, in some respect, his work was fundamentally flawed, and we know that the Tribunal previously had a view that the work of Professor Andersen was fundamentally flawed. And we know, also, that it was not put to Professor Andersen that, in some respect, Minister Lowry intervened in the process.

And this Tribunal, sir, as your counsel mentioned on day 163, is not a tribunal that is inquiring into whether the GSM licence was conducted in an appropriate fashion or whether this Tribunal would have run that competition differently. What your counsel said on day 163, sir, to Mr. Brennan, was; he said "The Tribunal is not interested in invalidity and not interested in whether you exercised a judgement to go one way or the other, but whether your decision to go one way or the other was in any way influenced or the result of any intervention by a third party, or was, I think in the words of Mr. Michael Lowry when he was Minister, massaged in any way."

And there is now, sir, at the end of the evidence-in-chief of Professor Andersen, no evidence from all of the witnesses giving evidence on the GSM process that it was in any way intervened or interfered with by Minister Lowry. The only evidence you have seeking to challenge the licence is the evidence of Mr. Bacon, and, in fairness to him, his evidence was that he had no evidence that the process was in any way manipulated.

And that brings me to my application, sir, and my application is, I believe, an appropriate application and it's an application made in the hope that it will be given some deliberation. And it is, sir, that having heard all

of the evidence in respect of the GSM process and now having heard through Professor Andersen, the last piece in that jigsaw, my application is that you, sir, should state that you have conducted an extensive inquiry into the competition and licence and that your conclusion, having heard that evidence, is that the licence and competition was fairly awarded to Esat Digifone.

And I say, sir, that my client and that the civil servants and that the politicians involved and indeed the people behind Esat and the other applicants, deserve that ruling at this stage, which can be made now, sir, because there is no contradictory evidence. And the alternative is that we now all have to start a lengthy process of cross-examination of Mr. Andersen, when, in reality, there is no evidence supporting any suggestion that this licence was massaged or interfered with.

And if you do not agree with me in respect of that, sir, I'd like to remind you that there is the facility to have this application of mine independently reviewed and to see whether there is, in fact, any evidence substantiating the fact that the licence wasn't fairly awarded, and that can be done under Section 4(a) of the 1997 act. But, sir, I would ask that some deliberation be given to that application and I think it is an appropriate application for me to make in light of the fact that there simply is no evidence that this licence was interfered with.

Thank you, sir.

CHAIRMAN: Thank you, Mr. O'Callaghan.

In my duty, as Sole Member, to report at the conclusion of this lengthy Tribunal, I will be required to consider all the evidence that has been adduced, not merely on the GSM2 process but in relation to the other matters other than those involving Mr. Haughey which were reported on, that have occupied a considerable amount of time. I will be required, as regards this particular evidence, to take into account all the evidence that is given by Professor Michael Andersen, including the background to his attendance and all material matters, and I will be required to take into consideration, in addition, all the matters that transpired between the participant persons involved in the licence. Insofar as Professor Andersen's evidence taken fully into consideration by me favours the inferences affected persons and, in the present instance, Mr. O'Callaghan invites me to draw, this will be reflected fully in my report, which I intend to have produced at the absolutely earliest vantage point remotely feasible. But this is a public Tribunal, and whilst I note with care what has been stated by Mr. O'Callaghan, it seems to me that some of his remarks are

akin to a counsel applying for a non-suit or a direction in litigious proceedings, be they civil or criminal. It appears clear to me that I have a duty to report as quickly as I can on all the matters that have been heard in evidence. I have heard important evidence from Professor Andersen. I envisage some further evidence that may be of note may be canvassed in the course of cross-examination and I propose to hear that and proceed to conclusion at the earliest feasible vantage point.

The contingency that was briefly canvassed by Mr. O'Callaghan, that I should avail of recent legislation in referring the matter to another High Court judge, seems to me not to be a feasible option. Accordingly, having noted this application, I decline it and feel that it is necessary that the Tribunal hear the remaining matters that may be canvassed in the course of examination by affected persons in the remaining days of evidence.

Some other matters arise at this vantage point. I have already held in the events that transpired earlier this year in a ruling given by me on the 23rd of March last, that the maxim nemo judex in causa sua, that nobody should be a judge in their own cause, precludes me calling Tribunal counsel as to what transpired in the course of meetings or investigations relative to the events that were then considered.

Similar aspects here appear to have arisen in that Professor Andersen has been critical not merely of the Tribunal in correspondence and other communications addressed, but of Tribunal counsel in regard to certain meetings had with him, contending, amongst other matters, that what he viewed as a pro-Persona bias, was evident on the part of one or more of those counsel. Although it was put by Mr. McDowell, in his examination, to Professor Andersen that no such bias or perception was held by the Tribunal or its barristers, it has not been sought, on the part of Mr. McDowell, to cross-examine as to the circumstances of any such alleged instances.

I am satisfied that, in this instance, also, insofar as it has arisen, I am again precluded from calling or hearing the evidence of Tribunal counsel in relation to these matters. It seems to me that the degree of contact and connection between the Sole Member and the barristers is such as to make it an inherently undesirable and unsatisfactory procedure.

Insofar as the matter did arise from the vantage point of Mr. John Gleeson, as counsel for Professor Andersen, in the course of the reading of the statements made by Professor Andersen, it appears to me that that was justifiable as a

basis of explaining or defending any observations that might have been made in the context of delay in his attendance. But, as regards other affected persons, I am not at all persuaded that a cross-examination on these matters is justified and I do not propose to allow or to countenance it. This is far from being a defensive or self-protective ruling on the part of the Tribunal. It seems to me that the prospect of hearing evidence when, in effect, hands are tied behind backs in the context of Tribunal barristers being precluded from responding to any matters referred to in that evidence, seems inherently unsafe and improper.

I have already mentioned that one of the central precepts of natural justice is that nobody should be a judge in his or her own cause. Another basic precept of natural justice is audi alteram partem, both sides must be heard, and I am satisfied that I cannot fairly hear both sides in regard to this, and, accordingly, I do not propose to entertain evidence in relation to meetings or notes that may have transpired in this regard.

As to the matter of any alleged bias by any member of the Tribunal legal team in favour of the runner-up, Persona consortium, it is worth remembering that, quite some years ago, a detailed ruling was made by me in this regard in the context of Mr. Healy's very minor and peripheral involvement in relation to intended Judicial Review proceedings, and in which I noted that matters had been referred to counsel then acting for Mr. O'Brien, and that a letter from Messrs. Fry's, the solicitors then acting, had indicated that no possible objection was taken to Mr. Healy's continued retention.

Should these matters of potential controversy arise at any later stage in relation to proceedings or other matters, then it will be perfectly open for Tribunal counsel to enter the witness-box, to make affidavits or to testify in relation to what occurred, and it may well be that they will welcome that opportunity, but, at present, I have indicated that I cannot hear them, and to permit an entirely one-sided basis of evidential hearing would seem to me to be inherently wrong and I do not propose to allow it.

The essence of what has occasioned all of us to be here this week and last week, is examining the manner in which the GSM process was conducted in the context of the Tribunal's Terms of Reference in relation to the particular matters under consideration and, in particular, as to how Professor Andersen, as lead consultant, can assist the Tribunal in that regard.

Accordingly, I propose to embark upon the remaining matters of cross-examination in the hope that proper rein can be given to persons seeking to canvass matters with Professor Andersen, but that an acceptable time-frame will accommodate the broad timescale I referred to at the conclusion of last week. It is my intention that the examination on behalf of affected persons should, at a maximum, conclude by lunchtime on Friday so that some limited period is available for re-examination on behalf of the Tribunal.

The last matter that I would refer to relates to observations that were made by Mr. Lowry, acting on his own behalf, on Wednesday last just before lunchtime, when he indicated to me that, having regard to Ms. O'Brien's opening remarks and references to the possibility that the process was capable or susceptible to ministerial interference, that he wished to know which term of reference was relevant in that regard. And, in consequence, the Tribunal's solicitor has written to Mr. Lowry and also to his solicitor, Mr. Michael Kelly, referring to these submissions made by him and replying in the following terms: "The relevant portion of the Terms of Reference is contained in subparagraph (g), which is as follows: '(g) Whether Mr. Lowry did any act or made any decision in the course of any ministerial office held by him to confer any benefit on any person making a payment referred to in paragraph (e) or any person who was the source of any money referred to in paragraph (f) or on any other person, in return for such payments being made, or procured or directed any other person to do any such act or make such decision'."

The letter continues to Mr. Lowry:

"As you will be aware, the Tribunal provided an extensive Opening Statement at its first sittings in December 2002, January 2003, concerning the GSM2 process, in which these matters were referred to in detail. As was indicated in its recent Opening Statement, it was not intended to restate what already had been recounted in its first Opening Statement concerning those matters. The recent Opening Statement should be viewed as an extension of that earlier Opening Statement concerning, in overall terms, what is the same matter, namely the GSM2 process.

"While there are references to matters under inquiry at various points in the course of the Opening Statement, you will find that such references are, in the main, contained in the concluding remarks. If you require any further assistance, please do not hesitate to contact me.

"Yours sincerely,

Stuart Brady,

Solicitor to the Tribunal."

Having indicated those matters, I would propose to now proceed with cross-examination.

MR. O'CALLAGHAN: Chairman, first of all, thank you for your ruling in respect of my application. I have to say I am extremely surprised upon what I say is the unjustifiable restriction that's going to be imposed upon the cross-examination of Professor Andersen. It is noteworthy that the Tribunal allowed all of Professor Andersen's unredacted, or, rather, partially-redacted statement to be read out. That statement included references to meetings with Tribunal counsel which he had. So, in effect, what has happened is that the Tribunal has been allowed to effectively examine him on that and it chose not to, and we are now being restricted from raising that issue. I say it is an unjustifiable restriction, but also, sir, it's a new restriction, because when Mr. McFadden, from the Attorney General's Office, was here, no such procedure applied, and I would ask you to consider the danger that would have occurred if that procedure had applied when Mr. McFadden was giving evidence. Because it was only through the cross-examination of Mr. McFadden about meetings he had with the Tribunal counsel that it became apparent that, in fact, Mr. Nesbitt had given the advice back in 1995 and he had mentioned that to the Tribunal back in the year 2002 at a meeting. So I say the consequence of this restriction, sir, upon the cross-examination of Professor Andersen, is undeserved, unjustifiable and it is a novelty that has not been introduced before. I know, sir, you say that it is not a defensive mechanism, but in my respectful submission, that may not be your intention but it is the effect, because what, in effect, will now happen is that we cannot cross-examine a witness about what transpired in a meeting with Tribunal counsel. There is a remedy perfectly available to the Tribunal if it disagrees with Professor Andersen's evidence about what happened in a meeting with Tribunal counsel. The Tribunal is perfectly entitled to call its own counsel to give a conflicting account in respect of what happened at that meeting. The basis for your refusal to allow Tribunal counsel to give evidence, sir, is that you say it would constitute a breach of the rule of nemo judex in causa sua. I say that can't be the case, sir, because you are the deliberative body in this Tribunal, you determine the issues, and you should, and you have indicated previously that you can deliberate without involvement from your counsel, and, on that basis, sir, I see no reason why, if the Tribunal disputes what's

contained in Mr. Andersen's evidence about meetings with the Tribunal counsel, why it can't call Tribunal counsel to say Professor Andersen is wrong. And it is a remarkable restriction, sir, that's only been brought to your attention today, and I want to reserve my position in respect of it, sir, because I think you will appreciate that it is a novel approach for any tribunal of inquiry to take, to seek to restrict cross-examination of such an important witness, and it may not have been your effect to -- it may not have been your intention to treat it as a defensive mechanism, but that is the effect of it, sir.

CHAIRMAN: I believe I have made clear, Mr. O'Callaghan, in my ruling, that I did allow Professor Andersen's unredacted statement to proceed in full because I was anxious that he be afforded a full opportunity of indicating his reluctance to attend on earlier occasions and his wish for an indemnity before, be it from the Government or in the present instance from Mr. O'Brien, before committing himself to attendance here.

I do, somewhat, take issue with Mr. O'Callaghan's remarks that this is a matter that has arisen entirely afresh this morning. I made it quite clear in my ruling of earlier this year that I felt clearly precluded from calling the barristers that I have worked with over a number of years and I am quite satisfied that that would be an unworkable, unmanageable and untenable proposition, and whilst I did afford the entitlement to Professor Andersen to justify his reluctance to attend over a number of years until matters of indemnity and other circumstances had been resolved to his satisfaction, I believe it was clearly apparent from my ruling of last March that I did not countenance calling the barristers that have been retained by me in the course of the Tribunal to deal with contentious matters and I am satisfied that is a proper step to adopt.

MR. SHIPSEY: Chairman, I am the counsel who is going to commence the examination of Professor Andersen on behalf of my clients, but I have to say that I am shocked at your ruling, firstly that you would make a ruling without hearing parties in relation to why they should be afforded an opportunity to cross-examine Professor Andersen on all of the matters canvassed by him in his statement, but my instructions are that I need to take my client's instructions in relation to the matter. I was intending to examine and explore with Professor Andersen the circumstances in which he came to give evidence before the Tribunal, and it does seem, having qualified it by saying I have to take instructions, but just on my feet as I am addressing you now, sir, it does seem extraordinary that,

in some sense, Mr. Gleeson might be afforded some latitude in relation to this but that the other parties in the Tribunal would not be afforded an opportunity to cross-examine. I don't know of any other precedent, sir, when you impose such a restriction on parties. And even in the case of the representatives from the Attorney General's Office, whilst you did make the ruling that it would be invidious for you to call your counsel to give evidence, there was no restriction on the ability of the parties at that time to examine or to cross-examine either of the officials from the Attorney General's Office. And it will certainly give the appearance, sir, that you do not want criticisms of your counsel to be ventilated, and it may well be that you didn't know or weren't aware of what was happening and it may well be that, as a result of the examination that is proposed of Professor Andersen, that that will cause you to review your findings, but unless we can bring out from Professor Andersen what, in fact, transpired, it's going to be very difficult for us to get a fair hearing and it may well be that there is a conflict between you not wanting to be a judge in your own cause and parties who are affected by your rulings having a right to be heard. And in circumstances where there is a contest between our having a right to be heard and to cross-examine witnesses who are appearing before the Tribunal, I would respectfully submit, sir, that that right of the parties appearing before you, must trump any concern that you have that you would appear to be a judge in your own cause. It was clearly open to you, and the case has been made very clearly by you, that because of those concerns and a concern about disruption by Professor Andersen, that you needed to retain what you have described as independent counsel. I don't know if that makes the other counsel here somehow dependent or lacking in independence, but it certainly would be open to you, consistent with that, sir, to retain independent counsel to examine your counsel, your other counsel, should you wish to call them to give evidence in relation to the matter, but it's very difficult to see how you, sir, can sit in judgement as to the credibility of Professor Andersen, when the only evidence you will have heard from him will be evidence that is led by Mr. McDowell and evidence that's led by Mr. Gleeson. How can you fairly assess the credibility of Professor Andersen in relation to the very serious allegations that he has made unless the parties who will be, by implication, affected by any of your rulings, have an opportunity to question him in relation to that? And that, sir, even if the questioning of Professor Andersen will reflect or may

reflect poorly on the conduct of the investigative phase by the counsel to the Tribunal.

So whilst I am happy to start my cross-examination of Professor Andersen in relation to the matters in 1995 and 1996, I must reserve my position in relation to --

CHAIRMAN: Well, which are those, Mr. Shipsey, 1995 and 1996, are you talking about Professor Bacon?

MR. SHIPSEY: I am sorry, no, 1995 and 1996 is --

CHAIRMAN: Sorry, I beg your pardon. Yes.

MR. SHIPSEY: I am talking about the actual period in which Professor Andersen --

CHAIRMAN: Yes, of --

MR. SHIPSEY: Not 2005 and 2006. I did want to cross-examine and ask the witness questions in relation to Dr. Bacon's report and also in relation to his cooperation with the Tribunal, because we say they are relevant to you, sir, in terms of you coming to a view as to whether it was appropriate -- as to whether it is appropriate to make any findings in relation to the matter.

CHAIRMAN: Did I not disallow, after hearing your submissions and those of all other affected persons, did I not, quite explicitly, disallow the evidence of Dr. Bacon on the basis that whilst there is considerable detail in GSM matters, they were not so impenetrable as to require the retention of an expert. I made that decision unequivocally after hearing your submissions and those of others, and it was merely on foot of the caveat in Mr. Justice Quirke's decision in the High Court that whether or not Professor Bacon was called, that Mr. O'Brien would be entitled to require him to attend for cross-examination, that he ultimately was heard, and, in an endeavour to afford fair procedures, I extended the High Court's specified entitlement to Mr. O'Brien to yourself and to Mr. Nesbitt on behalf of the State.

MR. SHIPSEY: Of course, sir, but we are, in a sense, where we are, and you have heard the evidence of Dr. Bacon, and it would, in my respectful submission, be unreal for you to have to weigh up that evidence, having heard it, without us having an opportunity to put to Professor Andersen, or to ask Professor Andersen his view in relation to that evidence.

CHAIRMAN: But you urged me to disregard it. Now you are seeking to have your cake and eat it.

MR. SHIPSEY: Well, no, sir. You did -- we did make that submission and you did rule on it and then you allowed the evidence of Dr. Bacon. So we have heard the evidence, and we did exercise our right to cross-examine Dr. Bacon. But I must be entitled to ask Professor Andersen, in my

respectful submission, questions in relation to that Bacon evidence, because that is part of the evidence that was heard by the Tribunal. But that's just one part of it, sir. I do wish and it was my intention to seek to ask Professor Andersen questions in relation to the period 2001, 2002, 2003 and up to the time when he is now coming to give evidence, and I am just surprised that you would have ruled without hearing us in relation to that matter, but what I can do is I can start in relation to this and then reserve my position in relation to the other matters to take such course as my client wishes to take in relation to that matter.

CHAIRMAN: Well, I am anxious to make despatch, obviously, Mr. Shipsey, as it occurred to me to call upon Mr. O'Donnell, who, plainly, has matters substantively related to the process to canvass probably in some detail, but if you and Mr. O'Callaghan, who you have indicated it had been contemplated would precede Mr. O'Donnell, wish to raise the matters that I believe are the primary focus of, if not the sole focus of, my inquiry into Professor Andersen's evidence, by all means feel free to do that now.

MR. SHIPSEY: Very good.

MR. LOWRY: Mr. Chairman, first of all, as you know, I am defending myself as a result of your decision and your ruling, which I reluctantly have to accept. There is a few comments I'd like to make, because normally at this stage of the proceedings when the witness is heard, time is allocated to those of the other parties. I don't know what discussion has taken place in relation to that. But, first, can I say that I find your ruling, this morning, I find that an extraordinary ruling. That, here, we had meetings with Mr. Andersen held by members of your Tribunal team. Mr. Andersen, in his evidence, has been extremely critical of the approach and the manner and the conduct of those meetings and the recording of those meetings. It's no so long ago since I recall a witness here being berated for the fact that he was a professional and that he wasn't actually taking notes.

Now, I'd like to count the number of times that your counsel for this Tribunal has been at meetings, including ones with Mr. Andersen, where we had no official record of them.

I find it extraordinary that I am at a position today when it comes to my turn, whenever it will be, to examine Mr. Andersen on the detail of those conversations and the discussion he had with the Tribunal. I am a layman, but it seems to me, Mr. Chairman, to be extraordinary protectionism. You quote Latin there and rules in relation

to it, but, to me, the sensible conclusion that anybody could come to if this man had those meetings, the full record of those discussions should be available, and I, as an affected party, should be allowed to ask questions on it.

CHAIRMAN: Sorry to interrupt you, but if I did, perhaps, hear Tribunal counsel and upheld their view, wouldn't you be saying to me that I was totally biased in their favour?

MR. LOWRY: Well, what I am saying, Mr. Chairman, is that I shouldn't in any way be restricted in what questions I put to Mr. Andersen in terms of his contact with the Tribunal or any representative of the Tribunal.

And I will open my comments by saying we are where we are now, 13 years later, but I would remind you of what one of my counsel said when this module was initially introduced, and I quote from what he said. What he said was, my senior counsel said to you at the time that you are embarking on a prolonged inquiry into the Tribunal -- the Tribunal into the licence process, you call it a tribunal within a tribunal, and my counsel pointed out to you at that particular stage that you were embarking on a performance of Hamlet without the prince. Now, we have all realised how importance the prince's evidence, Mr. Andersen in this case, is to this Tribunal. So I just want to make it clear, Chairman, today, that I intend spending some time with Mr. Andersen in examining him. It is very difficult for me to estimate how long that will take. I am not a barrister. I can't say with any real degree of accuracy how long it may take me to get through the material that I wish to put to the witness. However, I want to inform you, Mr. Chairman, that it is my intention to take Mr. Andersen through a number of important areas that I feel are relevant to the position to which I find myself in now.

Chairman, as you know, I have had to live with extremely serious allegations against me in relation to the second mobile phone licence from the moment it was announced back in October 1995. The attack on this process and the attack on my involvement in that process was launched literally within hours of the result being made public. I have endured an enormous amount of damaging media attention over all those years, and I am now, finally, in a position where I believe that I can properly confront and demolish those allegations that have plagued my existence over that length of time.

Professor Andersen referred to having received more than 80 hostile letters from the Tribunal since he informed them of his willingness to give evidence in April of this year. I have not counted how many such letters I have received from

the Tribunal over the years, but it is probably closer to 500.

Now, Chairman, I just want to make the point that I have suffered before this Tribunal in relation to this licence, for over nine years. Your Tribunal, as you have stated this morning, delivered a mammoth seven-day Opening Statement in December 2002 which went into January 2003. You described, at that time, this statement as a monumental opening. That Opening Statement, from my perspective, was littered with suggestive allegations and it was laced with innuendo. In fact, it took Tribunal counsel seven uninterrupted days to read into the record all of the allegations that it wanted investigated against me and senior civil servants. I had to listen and sit and endure those seven days of allegations and the subsequent years of relentless adverse media publicity that followed. It is hard to put into words the pressure that I have been asked to endure throughout this Tribunal process. It has been a very long and arduous road for me.

I find myself now, in 2010, without legal representation. But I want to say to you, Chairman, I am resolute in my determination to finally clear my name in respect of this licence process. I will not allow this Tribunal, or anyone associated with it, to seek to impede my rights in that regard. I have suffered enough at the hands of this Tribunal and I will not be intimidated any longer by the counsel or legal team for this Tribunal. It is very obvious, Mr. Chairman, that this Tribunal is keen to wrap up Mr. Andersen's, and I'd consider Mr. Andersen's evidence very uncomfortable for the Tribunal. After eight agonising years of crawling through countless allegations, countless witnesses, countless theories, I am not prepared, just because it is deemed expedient by the Tribunal, to allow my examination of Mr. Andersen to be curtailed or subjected to any form of time pressure. I am the one who is being investigated, I am the one who has had my good name and character sullied and dragged relentlessly through the mud. The Tribunal has had full rein, free rein and an open cheque-book to damn me over those years for more than a decade. My examination of Professor Andersen will take as long as it needs to take. I am not going to be content with a ticking clock. When the Tribunal was in attack mode, nothing could stop it or obstruct it, nothing could slow down its momentum. Now that the Tribunal's deck of cards has come crashing down, it wants to pull down the shutters on Professor Andersen's evidence with indelicate haste.

Mr. Chairman, I am not going to be rushed and I am not

going to be subject to a guillotine in relation to my examination of Professor Andersen. I am here to stand up for myself and defend my reputation in the face of years of relentless assault by your Tribunal. Not one of your Tribunal team, including the ones that are missing for the last number of days, and I find that extraordinary, as well, Mr. Chairman, to be honest with you, sitting here and standing here as the accused, I find it extraordinary that we have beefed up our Tribunal team; Mr. McDowell was brought in at the last minute to beef it up, and, at the same time, we have -- your senior counsel is, for whatever reason, whether not able to participate in the proceedings and now we are told that he is to be further sheltered and won't be available for examination by any of us, I find that extraordinary, as a layman.

But not one of your legal team has ever shown the slightest inclination to defend my interests, to stand up for my constitutional rights or ensure that fairness was applied. The Tribunal has gone to extremes to try and prove that I politically intervened in the second mobile phone licence process. Seventeen civil servants have already given sworn testimony that I did not in any way interfere with the process. Another individual who can definitively prove that these allegations are completely without substance is now sitting in the witness-box. I have questions to ask Mr. Andersen. I refuse to be somehow curtailed or limited --

CHAIRMAN: I fully accept that, Mr. Lowry. Hadn't we better get on with it in those circumstances? Once you abide my ruling, you will have your opportunity to examine, but let's use the time. I have taken most of the points that I think I heard last week and I don't think they are news to me.

MR. LOWRY: Well, Mr. Chairman, you, too, five minutes ago, and I am saying to you now and I am saying this with all sincerity, you, five minutes ago, in your ruling, stated that we would have the opportunity; anybody who wishes to examine Mr. Andersen, would do that within the time-frame that you set out earlier in the week. I am telling you, Mr. Chairman, you can put away your stopwatch. I will not be restricted in terms of the amount of time that I require to examine Mr. Andersen. So starting now with Mr. Shipsey, and whoever is next, when it gets to my turn, Mr. Chairman, there is no point in anybody in your position or from the Tribunal counsel rushing me or hurrying me; I'll take whatever time is necessary to get my point across to the most important witness that this Tribunal has had.

CHAIRMAN: Once you obey my ruling, you will have your

chance to do that, Mr. Lowry. Mr. Shipsey.

PROFESSOR MICHAEL ANDERSEN WAS EXAMINED BY MR. SHIPSEY
AS FOLLOWS:

1 Q. MR. SHIPSEY: Professor Andersen, my name is Bill Shipsey.

I appear for three parties: I appear for Dermot Desmond, I appear for a company called IIU and I appear for a third individual, a Professor Michael Walsh. And you are probably aware that when the second GSM licence was eventually awarded, IIU was a shareholder in the Esat Digifone consortium, I think you are probably aware of that, but may not have been aware of that back in 1996; would that be correct?

A. I don't think I was aware at the time, but subsequently I became aware, yes.

2 Q. And, Professor Andersen, it had been my intention to examine you in relation to the matters in 1995 and 1996 and also in relation to other matters, but I think you have heard the ruling that has been made by the Sole Member which restricts our entitlement to inquire into matters that you have referred to and referenced in your statement. So if I can just start on the 1995 and 1996 matters. And I think, Professor Andersen, you are aware that this is a Tribunal of Inquiry and not a dispute between two contestants for the mobile phone licence? I think you have, as you indicated in your statement, had experience on only two occasions of being embroiled in what you might describe as litigation surrounding mobile phone licences, and both of them, as I understand it, have been in Ireland, is that correct?

A. That's correct.

3 Q. I think you were involved as a witness and as the consultant to the third mobile phone competition, which was eventually won by Meteor, is that right?

A. That's correct, yes.

4 Q. And can I just ask you in relation to that, and in relation to the second GSM licence, I think it's clear, Professor Andersen, that your company, AMI, at the time tendered for the ability or to become the consultant to the second GSM licence, is that right?

A. That's correct, that was by way of an EU tender. So the Department ran a competition for consultants based on the EU rules for tendering, as such.

5 Q. And I think I am also correct that for the third GSM licence, your firm also tendered and won that competition, is that correct?

A. That's also correct, yes.

6 Q. Therefore, I take it you are familiar with the process of competitive tendering and the importance of objectivity,

transparency and fairness in relation to competitions?

A. Yes.

7 Q. And I think in the case of the second GSM licence, there were five other contestants for the --

A. Consultancy job.

8 Q. -- consultancy job to advise the Irish Government Departments in relation to the second GSM, and they were named in the papers, but they included a number of international consultancies, is that correct?

A. That's correct, but I would not have known these names in 1995. They only transpired to me in terms of the underlying documentation for this Tribunal.

9 Q. Though you would not -- when you are tendering and when your firm was tendering, in the spring of 1995, for this consultancy, you wouldn't know, directly at least, who the other consultants were who were tendering?

A. No.

10 Q. And can I just ask you in relation to, firstly, your decision to tender for the second GSM consultancy, is it the case that your firm were tendering across Europe and around the world for similar consultancy positions at that time?

A. Yes, we certainly did. I mean, that was the mission of my company, AMI, at the time, to do such assistance to regulators and telecom ministries in a number of countries.

11 Q. In other words, that was the work that your consultancy was primarily or exclusively engaged in, is that correct?

A. I wouldn't say exclusively, but I would assume that some 80 to 90% of our turnover came from activities related to tendering GSM at this moment.

12 Q. All right. Now, the GSM project, which was -- became part of our consciousness in Ireland from about 1995 onwards, was that an old regime in 1995 or had there been earlier GSM competitions across Europe in 1995?

A. There had been a number of earlier competitions, and Ireland came out as one of the last, if not the last, EU member country to run such a tender. So it was generally perceived at the moment that Ireland was a laggard, and that was also a concern for the EU at the moment because what is a fact here is that it was the EU Commission who had actually pushed to set up the GSM system. The GSM system was an EU idea and EU set up a special institute called ETSI to develop the specifications for the dimension system, so once the specifications were adopted, EU were eager to introduce GSM and competition within the field of GSM across its Member States.

13 Q. And did you have any involvement in the setting up of ETSI in Europe or did you have any involvement with the

institutions of the European Communities in relation to GSM?

A. Well, it's a matter of fact that some of my team members, they were actually heavily involved in setting up the GSM specifications, and if you take one of the consultants, for instance, Marius Jacobsen, he was in the chairmanship of what is called Groupe Spécial Mobile, you know, the GSM term, which generally, today, is perceived as an acronym for Global Systems Mobile, was, at the time in the eighties, an acronym for Groupe Spécial Mobile, taking into account that a special group, a special team of experts were set up in this ETSI -- this EU subsidiary organisation, ETSI, which was domiciled in the south of France, and this team, this Groupe Spécial Mobile, they were to develop the GSM standard, and Marius Jacobsen, he was part of that group, for instance.

14 Q. And, by 1995, had you assembled a team of experts and drawn them into your consultancy?

A. Yes, that was the way I worked in order to gather as much expertise as possible within this field.

15 Q. And I think it's come out in the evidence and in your statement that, by 1995, you had participated in, I don't know whether it was 150 or 200 competitions around the world by that time, is that correct?

A. Anyhow, a high number.

16 Q. And it included not only European Community states but also the United States and other countries outside of Europe and North America, is that correct?

A. That's correct. And in addition to assisting individual governments, individual regulators in specific countries, we also assisted the EU Commission, for instance, we assisted the World Bank and we assisted the EBRD with expertise on how to tender in this GSM field.

17 Q. And when you tendered, in 1995, for the consultancy position for the second GSM competition in Ireland, would your reputation and the reputation of Andersen Management have been known and known to Irish officials at that time?

A. I clearly think so, because we were -- we had a number of references from individual countries, as I mentioned. We were very much involved in advising, also, the EU Commission. Thirdly, we were drafting, at the time, a manual for the World Bank on how countries should or could run GSM tenders, and a similar type of task was also executed by my team in relation to EBRD and countries in eastern Europe and the so-called CIS countries of the former Soviet Union, and these activities, these manuals which we drafted on behalf of the World Bank and on behalf of EBRD, was also followed up by training courses. So we

would, in our office facilities in Copenhagen, from time to time, run training courses in order to train civil servants on how to execute evaluations and how to run tenders within the field of GSM.

18 Q. And can I ask you in relation to the tender that you submitted for the second GSM, was that what you might describe as a beauty contest or was that an auction, were you auctioning your services, or are they inappropriate terms to consider in terms of the procurement of the consultancy?

A. Well, I think the way we tendered for the job in Ireland was neither/or really, because the model we proposed in our tender was sufficiently flexible to move either in a direction of some additional or more outspoken auction element, but it could also go to a pure qualitative or holistic beauty contest type of tender.

19 Q. But I am actually talking about your tender itself, the tender for the consultancy, was that based on a most economically advantageous or was it just based on price, or do you recall?

A. I don't recall, actually.

20 Q. Now, when you decided to tender for the second GSM, you, presumably, knew something about what they were looking for, what the Irish Department was looking for, is that correct?

A. That is correct, yes.

21 Q. And I take it that you had available to you, by the time you applied, what's described as the RFP memo of the 2nd of March, 1995, is that right?

A. Yes, it's correct. But, again, you know, this started, I can see from the communication already in 1994, I mean, we submit the first document in 1994 as a kind of expression of interest, and I don't believe that we saw the RFP document at that time because the RFP document was not drafted at that time.

22 Q. Now, the RFP document, which I think is dated the -- as I said, March of 1995, that set out the parameters of the competition for a licence to provide digital mobile cellular communications in Ireland, isn't that correct?

A. Yes.

23 Q. And if I understand the import of your evidence and lots of the documents I have read, that you are critical of that document, and, if I understand it correctly, you would have preferred to have been involved as a consultant in framing the parameters for the competition, or have I misunderstood you?

A. No, that's correctly understood, that I think it would be more in line what we did in other countries if we had been

involved in also drafting or co-drafting the RFP document.

24 Q. But a decision was taken in Ireland that the RFP would be drafted by the Department. Do you know of any other consultants who may have been involved in the drafting of the RFP document?

A. No. I only knew that other consultants had been retained by the Department in order to assist them in drafting the RFP document.

25 Q. Now, for example, in relation to the third GSM, which was eventually won by Meteor, when you won that consultancy, did you have an involvement in drafting the equivalent of the RFP?

A. Yeah. In that tender, the third GSM mobile phone licencing process, we were involved from, so to speak, from start to finish.

26 Q. And what advantage did that give to the third GSM licence process by comparison with the second?

A. In my view, it gave the advantage that we could already, from the beginning, specify more directly what kind of information that the applicants should submit when they submitted their application, and that, then, facilitated our evaluation greatly. And there are, maybe, two things that are important here. One thing is what we have already discussed during the foregoing days about statistical comparability. So I will leave that out. But there is one thing more that has not been touched at all in my examination and that is if you spare the second and the third mobile licensing process, you will see, in the third mobile licensing process, what we actually were very meticulous about in that RFP document was to ask for binding commitments from the applicants so that there would be better correspondence between what they actually submitted in their application and what they then would know would be transformed into binding requirements for acquiring the licence.

27 Q. And when you went beyond the expression of interest in acquiring the consultancy for this second GSM, but when you actually put in your proposal, I assume you knew that the RFP document was there and had been made known to persons who would be applying for the second GSM licence?

A. Yes. Yes, when we ultimately submitted our tender, yes.

MR. SHIPSEY: Sorry, Chairman, there seems to be some concern on the part of your counsel. Perhaps if there is -- well, I'd very much like to get on, but if there are to be -- if there is a concern on the part of Tribunal counsel, I'd like to hear it and not to have -- can I ask you then, Professor Andersen, in relation to the RFP document and in relation to your decision to tender,

did that have a bearing on your interest in tendering for the consultancy? In other words, did you consider not tendering for the second GSM because the RFP document was already cast in stone and you didn't have an involvement in preparing it?

A. No, I don't think that that would be fair to say, because we were interested in getting the job. That was part of our mission, as consultants, to assist regulators. But, of course, we were aware that there was already an RFP document there. I think the most obvious concern that I can recollect was, actually, not the one that you are, time-wise, addressing, but one which came a little bit later, because it is a matter of fact that when we eventually came on -- came on board as consultants, then we were pretty close to the submission deadline.

28 Q. And what impact did that have, as far as you were concerned, and what concern did that raise with you?

A. That would have the impact that we were not -- we would not be able to go the whole way to reconstruct the RFP document or to repair it to a higher level than was actually done.

29 Q. And the RFP document, as we know, contained the Clause 19, which set out the manner in which the Minister intended to compare the applications on an equitable basis, and you saw that when you were tendering and presumably knew that that's what you had to operate to?

A. Yes, that's correct.

30 Q. And did you anticipate, at that time, the challenges that the RFP document and Clause 19 of the RFP document would create and would impose for you, as consultant?

A. I am not entirely sure what you mean by "challenge" in this aspect?

31 Q. Well, you knew there was an RFP document and you knew that Clause 19 of that document listed a number of criteria in descending order?

A. Yes.

32 Q. And presumably you looked at that, and I am just wondering did that cause you any concern in relation to your ability to act as consultant for this particular GSM licence?

A. No, not at such, no, or, at least, I can say that there is no reservation stated on that particular matter in the tender submitted by us, but what I said to you before was that there were some time lapses between our tender for getting the job and then our actual retention. So, the reservation, when you are asking me about the reservation that we -- or if we had a reservation when we submitted our tender, there is no evidence of that in the tender. But that reservation became more actual when we were actually retained as consultants because we started, obviously, the

job after we had submitted the tender, and the longer time that elapsed, the bigger the concern.

33 Q. I see. And I think on the 11th of April of 1995 was the day in which Minister Lowry announced your firm as the GSM -- as the winner of the GSM consultant contract?

A. Sorry, I didn't get the date.

34 Q. 11th of April, 1995?

A. Yes.

35 Q. And then I think you attend, you and Mr. Jacobsen, whom you have already mentioned, attend the first meeting of the GSM Project Group on the 19th of April, 1995?

A. Yes.

36 Q. And had you assembled a team that were going to work on the second GSM licence application in AMI?

A. Whether I did it?

37 Q. Had you a team that you had in mind for this?

A. Oh, yes. There was a very specific team identified, and I think, in all fairness, the team was described in my tender and it actually transpired that it was exactly, more or less exactly the same experts that executed the job.

Whereas, you know, in the consultancy business, you could find consulting firms denominating some people, appending their CVs and then it might be only some of them or a different team that actually executed the job, but, in this case, it was exactly the same people who were identified in our tender that actually also carried out the work.

38 Q. And you appended their CVs to the tender --

A. Yes.

39 Q. -- so that the Department knew not only what they were getting but who they were getting?

A. Exactly.

40 Q. The fact that you were coming into the fifth meeting of the GSM Project Group meant that there had been -- there were four earlier meetings of that Project Group. Can you just describe to us, or tell us, how that first meeting with the Project Group went and what and how you went about developing a relationship with the other members of the Project Group?

A. Yeah, I am struggling a little bit because I would, ideally, like to see a minute, or whatever, but I'll just take the gist -- let me just take the gist of it --

41 Q. If book, I think it is, Book 91 can be produced, it's at Tab 11 of that.

A. While that is being produced, the gist of it, from my side, was that we were well-received, there was a good sentiment. But I also think that, already, at that stage, it was a kind of overwhelming, in a sense, that there were, was it 230 questions posed to the RFP document by interested

parties?

42 Q. And what did that tell you in terms of the number? Was that a higher number than you would have expected or a lower number?

A. That was a considerably higher number than I would normally expect.

43 Q. But what did it tell you about the RFP document if so many questions had to be asked?

A. Well, it tells me that some uncertainty might have been there on the part of interested parties. Sorry, I didn't get the tab.

44 Q. It's Tab 11. The fifth meeting of the GSM Project Group of the 19th of April, 1995.

A. Yes.

45 Q. You will see the attendance, apart from yourself and Mr. Jacobsen, are Martin Brennan, Fintan Towey, Maev Nic Lochlainn, Eugene Dillon, Denis O'Connor, Jimmy McMeel, Billy Riordan and Aidan Ryan.

A. Yes.

46 Q. And can you tell me, because I will want to ask you later in relation to the ten sub-groups, but in relation to the GSM Project Group, were there members who were more active than others on the Project Group from the Department side?

A. Certainly. I think it's inevitably so that the working style of different people are different and some are more active than others, yes.

47 Q. And if I can just -- I know we are jumping ahead to I think it's August of 1995 when the ten working groups were set up. It's my understanding that not every member of the Project Group, that is the main group, was actually on a working, a smaller sub-group, is that correct?

A. That's correct, that's correct.

48 Q. And I think you mentioned or instanced yesterday Mr. McMahon, certainly, and also, there was one other, was it --

A. Ed Callaghan.

49 Q. Mr. O'Callaghan?

A. O'Callaghan, yeah.

50 Q. Neither of those, although they are on the main committee, they weren't on any of the working groups?

A. That's correct, and they did not participate in this meeting, I see, either.

51 Q. So this meeting was your first meeting that you attended on the 19th of April, but you didn't have a contract signed at this stage; I think the contract was not signed until sometime in June, is that correct?

A. The contract was signed around the 9th of June, as far as I recall.

52 Q. And that was very close to the actual closing date for the receipt of applications for the second GSM licence?

A. That's correct.

53 Q. Did the fact that your consultancy agreement wasn't concluded 'til the 9th of June, have any bearing on the work that you were doing from April until the 9th of June?

A. No, I don't think so.

54 Q. In other words, you weren't holding back from getting stuck into this process because a contract wasn't signed?

A. Definitely not. We carried out the work, but it may have had one bearing, though, and that is, part of -- became part of the contract and that was on the Evaluation Model. Because if you take the document which is the contract between the Department and AMI, then it's specifically stated in that contract from June 1995 that the Evaluation Model had to be further developed.

55 Q. And was that unusual, having regard to your experience of other -- being consultant in other projects?

A. That was a bit unusual, but we should also take into consideration here that there was the discussion with the EU Commission.

56 Q. And I think that discussion with the EU Commission took place sometime in June of 1995, is that correct?

A. Yeah, at least there was a meeting in June, that's correct.

57 Q. But the discussion had started before that?

A. The discussion had started before that, and I would be familiar, from my general activities with the EU Commission, that they were looking at the Irish tender.

58 Q. And the familiarity you had with the European Commission, what was your expectation in terms of what they were looking at?

A. Well, I think I have explained that earlier, that it has been generally perceived here in Ireland that the Commission was very concerned about an unkept fee, but I don't think -- dealing with the Commission, I don't think that was their main concern. Their main concern throughout was to get competition introduced in this market, so they were generally concerned about a number of other things than the unkept licence fee, such as the fact that no similar type of fee seemed to be projected to be imposed on Eircell, the existing monopoly or born GSM licensee, matters related to the price for leased lines, matters relating to the access to Eircom's fixed network, which new entrants should also use, and such things. So there was a general level playing field concern from the Commission.

59 Q. And the Commission was wearing, I would understand from your answer, a competition hat or a pro-competition hat, and they were opposed to a large licence fee because of the

effect that that might have on competition, would that be correct?

A. Exactly.

60 Q. And did you -- I think you also went with the Irish officials to meet with the European Commission officials, is that correct?

A. That's correct, yes.

61 Q. And that was in June of 1995?

A. Sometime in June. I don't recall the date.

62 Q. Yes. Can you just tell us, in terms of your team, the amount of time relative to your other assignments that was being devoted to the Irish contract, the consultancy contract you had for the second GSM licence? You weren't exclusively involved on it, I take it?

A. No, we were not exclusively involved, but I have earlier said that some of us were working close to what I call full-time. However, you know, being workaholics, we would work more than seven-and-a-half hours a day and we would also, typically, work during weekends, and stuff like that.

63 Q. And what was the full complement of your team? How many were working from Andersen Management on this assignment?

A. I think we had seven nominated people, and then I can see from the files that we also draw on people who were actually not mentioned in our tender but who did auxiliary work such as checking things, and stuff like that.

64 Q. And who were those persons who were checking things?

A. Well, I can see from the underlying documentation here that a person called Jasper Conalondeine (phonetic), for instance, he made the printout of documents because it's recorded in some of the underlying documentation here that he sent the Evaluation Reports to the Department. So that's one thing. And as another thing, I saw from the documents we opened over the previous days that a person called Jen Stone appears and he appears in the context of having assisted in the admittance test.

65 Q. And all of these --

A. Yeah --

66 Q. -- whether they were nominated persons or persons drawn in as part of the AMI team, they were all working under your ultimate direction, is that correct?

A. Oh, yes, oh, yes. So they were fully employed in my company and under full and stringent confidentiality rules and such things.

67 Q. Now, you have said in the course of your examination by Mr. McDowell, you have said that you were the consultant to the Department, and that is, obviously, clearly true, but what I'd like to get from you is some sense and understanding as to who was directing this competition? In

other words, was it a Department-directed competition or was it a consultant-led competition? And you don't have to be modest in relation to this, Professor Andersen. We are trying to get a sense as to who was driving this particular competition?

A. That's very difficult to answer that question. I think it transpires from the documentation that I was driving a lot to get the work done, to get the work executed.

68 Q. You were pushing your client?

A. I am pushing -- I was pushing my client, yes.

69 Q. And in terms of pushing your client, who, principally, were you pushing? Who was your principal point of contact that you were pushing to get things done?

A. I think the principal persons were Martin Brennan, Fintan Towey and Maev Nic Lochlainn, because they dealt with contractual matters, but there was also a lot of contact going on with, for instance, John McQuaid and Aidan Ryan, because they were in charge of the technical part of the evaluation which still accounted for 50% of the weightings, and then, of course, there was also contact with people in charge of the financial aspects.

70 Q. And although we have the minutes of the meetings of the Project Group, am I correct in understanding that, between meetings, there was considerable contact between various people as the project went on?

A. Yeah, that's correct.

71 Q. Now, the result of the interaction with the European Commission was that the -- there was to be a cap on the licence fee, is that correct?

A. Yeah, but again, I, here, have to make the point that that is what was generally perceived in the public, so it's not incorrect what you are stating, but there were a number of additional requirements from the EU Commission.

72 Q. And they were also being addressed and being insisted upon by the Commission, is that correct?

A. That's correct.

73 Q. And as a result of that, the competition deadline was put back, I think, until the 4th of August?

A. That's correct.

74 Q. And further information was provided to those interested in tendering to enable them to submit their tender in accordance with the changes brought about by the Commission intervention, is that right?

A. Yes.

75 Q. Was there anything unusual about that in your experience from other competitions?

A. Well, that was unusual, because I haven't participated in other tenders where the EU Commission intervened during the

tendering process.

76 Q. And in terms of the tension that was going on here between the Irish State, on the one hand, and the European Commission, is it a tension between -- is it too simplistic to say it's an Irish State trying to get as much money as possible for this second GSM licence and the European Commission trying to ensure a level playing field, or is that too simplistic?

A. Yeah, it is simplistic, but that's a fair statement, anyhow.

77 Q. And understandably, I suppose, from a State's perspective, this is a valuable licence and you try to get as much for the taxpayer as possible?

A. I would not necessarily say yes to that because at this time, in the nineties, you will appreciate that, in this country, there was only the TACS 900 system running on the 900 megahertz frequency spectrum, and only very few people had, actually, mobile phones. So at this stage and at this point in time, I would certainly not subscribe to your thesis that the most optimal thing was for the State to recoup as high a fee as possible. I think that the general macro-economic effects would have been better served by not imposing an uncapped fee and then reap the benefits of a tougher competition.

78 Q. Is it my understanding, therefore, that you were in the camp of the pro-competition rather than in the camp of those who tried to maximise the fee for the licence?

A. Yeah, at this stage. I think that that position changed an EU -- the position of the EU position also changed over the years, so that if you go to, let's say, the year 2000 when the UMTS licences were to be awarded, the EU Commission was more pro-auction. They were against auction elements in the beginning of the nineties and also in 1995 and clearly in favour of beauty contest competitions.

79 Q. Now, the fact that the European Commission intervened and the fact that there was a cap placed on the licence fee, that, presumably, had a bearing on the way the competition was going to be run?

A. Yes.

80 Q. And a bearing that hadn't been, perhaps, contemplated when the RFP document was issued in March of 1995?

A. That's also correct.

81 Q. And if you can just explain how that impacted upon your work and the advice that you were giving to the Department at that time?

A. Well, it impacted in the following way: Initially, and also when we came to the meeting you asked me about before, on the 19th of April, discussions were conducted on how to

make a kind of mechanical evaluation as part of the holistic evaluation, but nevertheless, an evaluation which was more having an auction-type element than a pure beauty contest. And having had the intervention of the EU Commission and having, also, as you correctly remarked, the imposition by the Commission of a cap on the licence fee, everything turned more in the direction of a beauty contest, and, for that reason, I also reallocated some of our resources in our company. So less resources were retained to do the quantifications and more resources were put into the qualitative/holistic evaluation.

82 Q. If I understand it correctly, it was always envisaged that there would be a qualitative element --

A. Yes.

83 Q. -- to the evaluation; it wouldn't be just a quantitative evaluation?

A. No.

84 Q. But that, as a result of the intervention of the European Commission, the qualitative became more important and, correspondingly, the quantitative less important?

A. Exactly. The relative importance of the elements in what I call it before, the flexible element in the AMI tender, was changed, yes.

85 Q. Now, after that decision of the European Commission was communicated, presumably the GSM Project Group had to take that on board and you had to advise the group as to the implication of that Commission decision, is that correct?

A. Yes.

86 Q. And that, presumably, begins around the end of June and into July of 1995, is that right?

A. That's correct.

87 Q. And you, presumably, advised the Project Group of the implications and the fact that there would be a diversion of your consultancy resources more towards the qualitative and away from the quantitative, is that correct?

A. Correct, and that they should also set aside resources, resources which subsequently were retained to participate in the ten sub-groups.

88 Q. And if you can just assist me and assist the Tribunal, in relation to the tender closing date for the competition of the 4th of August, how far in advance, how far prior, how many days or weeks prior to the 4th of August was the -- or did the GSM Project Group resolve as to how it was going to approach the evaluation of the tenders that would be received on the 4th of August?

A. Well, I think it's clear from the documentation that there is no Steering Group meetings in the period you address here, so I assume that the communication here has been

primarily on a telephone basis.

89 Q. And how was that telephone communication taking place? Was it a bilateral basis between, let's say, you and Mr. Brennan or you and Mr. Towey or you and Mr. McMahon, or was it by way of conference call?

A. I would not recall the exact nature of that.

90 Q. But before the 4th of August, did you know, for example, that you were going to have ten working groups working on each of the tenders that were submitted?

A. Yes.

91 Q. Did you know the names of each of those working groups or the areas in which those individual working groups were going to be operating?

A. Yes.

92 Q. Did you know the personnel who were going to be working on each of these groups?

A. No, because that only transpired during August.

93 Q. But did you know the personnel from AMI who were going to be assigned to assist in each of these groups?

A. Yeah, more or less, with, let's say, 90% certainty.

94 Q. And in relation to the ten separate working groups that were going to work on the evaluation of the tenders, did each of these working groups have one or more AMI representatives?

A. Yes, they did.

95 Q. And did each of these working groups, as it transpired, have one or more Departmental Officials working to them or with them?

A. Yes. It was such that at least two Irish civil servants were to participate in each evaluation sub-group.

96 Q. Now, on the 4th of August, the six applicants for the licence submitted their applications, and, if I understand it correctly, the length, in terms of the number of pages in each of these applications, varied to a considerable degree, from several hundred pages to numbers running into the 14 and 15 hundred pages, is that correct, or am I wrong in relation to that?

A. Something like that. According to my recollection, for instance, the A6 application that was Eurofone, that was a very thin application, around the 350 pages, with a few appendices, whatever. And then you had the -- for instance, the A3, but notably, also, the A5 applications running over, yeah, thousands, 1,500 or even 2,000 pages. I don't know the exact -- I don't recall the exact number, but it was a huge, mammoth application from these.

97 Q. Now, when these applications were submitted on the 4th of August, can you just tell me what Andersen Management did with these six applications and how the work was allocated

and how it was divided out amongst the ten working groups that were to consider the evaluation of these applications?

A. Yes. The applications had a -- there was a specific time during the 4th of August when the applications had to be delivered, I don't know the time of the day, but we were there to check that no one came late together with Departmental Officials.

98 Q. They had to be delivered to a specific place by a specific time?

A. Yeah.

99 Q. And you were there to supervise that, is that correct?

A. Exactly. And then the applications arrived, and already, at that particular day, I think that a lot of additional or assisting material was handed out by AMI to the Irish evaluators in terms of a reader's guide and some additional material in order for the Irish civil servants and also for the AMI consultants to start the reading of the applications, and the applications were then distributed in such a fashion that the Department retained X number of copies and we sent X number of copies to our office in Copenhagen.

CHAIRMAN: Can I just consult you, Professor, on a matter of procedure, because the lawyers were discussing matters until 11 o'clock, I think your testimony started around then, but I still did say I'd give you what I think

Mr. Brennan used to call a comfort break, if you chose to take it. Would you prefer that we took it now?

A. It's up to your stewardship. I can manage until lunchtime.

CHAIRMAN: We might manage until lunch, and obviously we will adopt the prior procedure in the afternoon.

100 Q. MR. SHIPSEY: This reader's guide that you mentioned, was this an Andersen document?

A. Yes.

101 Q. And is that one that you mentioned earlier that you had either drafted or created or prepared?

A. Exactly.

102 Q. And this wasn't part of the application; this was to assist the persons taking part in the ten sub-groups in the tasks that they were going to undertake, is that right?

A. That's correct. I mean, it was envisaging that it was probably to be a demanding task for the Irish civil servants, in particular, to read, let's say, 6,000 pages, or whatever the amount was, and the reader's guide could then assist them taking notes, being aware of things, etc.

103 Q. And had you mentioned the reader's guide or that you would provide a reader's guide when you submitted your tender?

A. Yes.

104 Q. And was that one of the, as it were, the competitive

selling points of your firm, that you had that experience and that you had a reader's guide to assist the Department with?

A. I think so, yes.

105 Q. And is that a reader's guide that was used in other competitions?

A. Well, it would not be the same guide because the guide in this context would have to take into consideration the evaluation criteria in paragraph 19.

106 Q. So it was tailored to this particular competition?

A. It was tailor-made for this particular competition, yes.

107 Q. Now, in terms of how the ten working groups were to operate and in terms of the explanation that was provided to them as they went about their task after the tenders were submitted in August of 1995, who was it that gave the direction as to how they should operate? Was that you or somebody in Andersen Management or did that come from the Department or one of the Department officials?

A. Are you questioning how the work should be executed?

108 Q. Yes.

A. Well, I think that that was very much driven by AMI, because AMI had the experience of running such type of competitions, which the Irish civil servants obviously did not have, so I believe it was very much on the initiative of the consultants.

109 Q. And can I just ask you, just because we have reached a point in time in August of 1995 where it appears to me from your evidence that ten working groups are assuming importance in relation to the procedure, if we just park that for a moment and we come to the period up to the 4th of August of 1995, how would you describe the working relationship between you and the Andersen Management consultants on your team and the members of the Project Group, the Department officials from the two Departments who were working with you?

A. Generally, the working tone was very good, and I think the Irish civil servants, they displayed a high integrity and also a high level of working capacity, but at some stage I think it is documented that I had to pressurise them because they were obviously also doing other jobs than the GSM evaluation, so I had to pressurise them to allocate resources to execute the work at a sufficient level of quality in the ten sub-groups.

110 Q. But again, we'll come to that, but you have mentioned the, what I might describe as the integrity and the diligence of the civil servants who were working with your consultants in the period up to the 4th of August of 1995?

A. Yes.

111 Q. And I take it you had an opportunity, first hand, to actually witness that, from working with them in the period from April of 1995 until August of 1995?

A. Yeah, exactly, and I had an opportunity to depict or assess their different qualifications and where they had their core expertise, so to speak. Core expertise was an important point here because we would like to allocate the resources in the ten different sub-groups in such a way that the best available expertise was put into each of the ten supplementary -- ten sub-groups, and obviously because the ten sub-groups dealt with different topics, it would be different people from one group to another in most cases.

112 Q. And were you satisfied, Professor Andersen, that the persons who were allocated from the two Government Departments to each of the sub-groups, did have the competence and expertise that was called for?

A. I was satisfied, together with the -- of course, the expertise that we brought to the table from AMI.

113 Q. Which complemented the Departmental officials and their expertise?

A. Yes. It varied, though, because if you look, for instance, at the technical evaluation, the Department sourced two persons, namely John McQuaid and Aidan Ryan, and they had been working with mobile telephony previously and also with technical aspects of that. So if I could just try to illustrate how the work was done or how the expertise was put together. I believe it was a perfect match we had there, because they would be expert in local Irish technical matters such as the nature of the fixed network propagation characteristics of radio frequency signals in different areas of Ireland, hot-spot capacity challenges in Dublin, etc., so they could bring to the table their valuable expertise on local technical matters. Whereas, Marius Jacobsen and Olaf Feddersen, they were the participants from the AMI consultants, they would bring in expertise regarding the GSM specifications, they would bring in expertise from other tenders, etc., so they would know the general technical GSM stuff and be familiar with evaluating technical aspects of GSM applications, and from two sides really, because I have previously mentioned Marius Jacobsen, who was also -- it hasn't been said here but I would like to say it, he is mentioned in the literature and in the general colloquial discussions as the father of GSM, so he knew the GSM specifications. He was a member of the Groupe Spécial Mobile, etc., and he was from the regulatory side. I had recruited him as consultant from the National Telecom Agency in Denmark, two or three years, I believe, before the evaluation took place in

Ireland. But then I move on to Olaf Feddersen. Olaf Feddersen, I recruited him from the private sector, so he had been working with mobile operators in Denmark so he would know technical aspects but from the business perspective, if you understand. So the competition was that I had one expert, technical expert, being the best you could get, probably, in the world, or in Europe, at that time, from the regulator side, and then also one from the business side. So I don't know whether that gives an idea as to how we tried to put together the best expertise we could get.

114 Q. Now, as a matter of fact, just on the documents that we have, the eighth meeting of the GSM Project Group took place on the 9th of June, 1995, and the ninth meeting took place on the 4th of September of 1995, and that's a period of some almost three months between meetings of the Project Group. Was there anything unusual about the period of time that elapsed between the formal meeting of the entire Project Group in the summer of 1995?

A. I think, generally, it was the summer-holiday recess period, at least it was so for the Danish consultants because they normally take a recess in June.

115 Q. But the fact that there were no formal meetings, didn't mean that work wasn't -- a lot of work wasn't happening in that three-month period, clearly?

A. No, no, and that is also shown to some extent in the documentation; for instance, the relative importance of tariff vis-a-vis licence-fee payment.

116 Q. Now, the tenders came in, I think, on the 4th of August, and if you just could go to Tab 37 in Book 91, which I have been dealing with, and that's a fax cover sheet from you to Fintan Towey of the 9th of August, and that references what you call your semi-structured reader's guide?

A. Okay, yeah. That is where it's tabled, yeah.

117 Q. "We use the guide as we read the applications in order to look after salient points that later on could/should be addressed during the qualitative evaluation."

Now, it doesn't have the reader's guide behind it, but that is presumably the date that you sent it, and, after that, it was circulated to the members of the ten working groups, is that right?

A. Yes, you can see on the fax cover sheet that there are a total of 12 pages, so the reader's guide would be an 11-page document.

118 Q. Now, can you just explain to us, Professor Andersen, in the period from the 9th of August, 1995, until, let us say, the 9th -- or the 4th of September of 1995, what was happening, what were the ten sub-groups doing during that period?

A. Sorry, which period?

119 Q. It's from, let's say, the 9th of August, 1995, until the 4th of September, which is the date of the next, the ninth meeting of the GSM Project Group?

A. I think in the first phase there were no sub-groups established. The sub-groups were not established from the outset, so to speak, with named persons on it. It would definitely be such that I had put the Department on alert prior to the 4th of August that there would be these ten sub-groups working, and also the topic of each of these ten sub-groups because each sub-group was set down according to a dimension, one of the ten dimensions. But the sub-groups were not formally established at this stage. At this stage -- in the first part of August, very much concentration was going on in order to start what we call critical reading of the applications, or just reading, if that's easier to understand, but we called it "critical reading" because we said to the -- we said to all readers, all evaluators, that they should be critical when they read the applications. Now, from AMI's side, that period would also allow for putting all the business case figures received from the applicants on floppy disks into a common format so that a handout could be made to each reader with the quantifications, and, also, graphics were begun to be produced. So the sub-groups only begin to be formed when I wrote a fax to Fintan Towey around the 15th of August, where I specifically mention the ten sub-groups and the beginning of the meetings of these sub-groups.

120 Q. Now, that document, I am sure, is amongst the documentation that's been provided, but it's not in this core booklet. I am just wondering if the Tribunal can assist me in - not immediately - in identifying that document. I can come back to it.

A. I can tell how it went along. I mean, I knew from similar competitions that in order to be as efficient and as effective as possible, we needed to start the work in the evaluation sub-groups, and therefore, I wrote a fax to the Department stating the identity of each sub-group, the suggested members from the consultants, and also, then, requested input from the Department as whom were to participate from the Irish civil side.

121 Q. Can I just ask that Professor Andersen be given Book 90, and Tab 14, and this is a fax from you of the 15th of August to Fintan Towey. Is that the fax that you were referring to a few moments ago in your evidence?

A. Exactly.

122 Q. And you say in the cover sheet:
"Dear Fintan,

"Your reaction to the attached memo is needed. Please give me a call when you have had time to read it. We can discuss the various issues.

"M.J." -- that's, presumably, Mr. Jacobsen, is it? -- "will give you a call tomorrow re the logistics of the presentation meetings.

"Best regards,
Michael Andersen."

A. Yes, the presentation meetings, that was a separate issue, so, yeah, that's correct.

123 Q. And if you then just go into the body of -- this is a two-page memo addressed to Fintan Towey, Department, copied to the AMI team, from you, dated the 15th of August, and then it's headed: "Planning of the GSM evaluation."

And you say, "The AMI team had a meeting today and the team agreed to seek to proceed as follows:

"A. The draft quantitative evaluation, a spreadsheet with quantitative comparisons of the applications, a synopsis for the presentation meetings, and a number of questions will be elaborated before the forthcoming PTGSM meeting in Dublin in which JB, MJ, MIV and MMA will participate. It is the wish of the team that this meeting could commence at 11am and continue in the afternoon, in the evening and the following morning. The AMI team will assist in writing to the applicants concerning the presentations.

"B. AMI suggest that the Department this week informs the six applicants that presentation meetings will take place from the 12th to the 14th of September as approximately three-hour sessions with an agenda and some general questions which will be sent out to the applicants by fax September 5th. AMI suggests a preparatory meeting Monday the 11th and will be available for such a meeting. MJ is to coordinate the AMI activities and to draw the attention of the Department to the many tricky logistics.

"C. Through the concerted efforts of the AMI team, a number of uncomparable matters have already been identified, as well as some of the applications lack conformance with the tender specifications. Prime examples are tariffs (metering principals), interconnection assumptions, blocking and drop-out rates and IRR. Other examples may appear during the next couple of days. Consequently, the AMI team recommends in writing to request applicant-specific questions in accordance with the provisions made in paragraph 16 of the RFP document. AMI would like to receive a decision on the matter from the Department ASAP.

"D. AMI has, so far, identified the following areas in which supplementary and additional analyses have to be

carried out:

" -- financial recalculation on the basis of similar interconnection examples (MT and MIV)
" -- tariff comparisons (MI and MMA)
" -- licence matters (TMI)
" -- conformance with EU requirements (TMI)
" -- analysis of blocking and drop-out (OCF and MJ)
" -- track recording and verification (JB)
" -- effects on the Irish economy (JB and OCF assisted by MT and MMA)."

Can I just pause there in relation to the persons that are mentioned there. Are they all Andersen Management or is it a mixture of Andersen Management and Department officials?

A. That's all AMI staff.

124 Q. And then you go on: "The track recording verification, parts of the tariff comparisons and the effects on the Irish economy are foreseen supplementary analyses, whereas the remaining analyses are additional.

"E. It has been decided to begin the qualitative evaluation as follows with sub-group meetings concerning each identified dimension. Each sub-group should comprise at least three persons, preferably more, of which only two are identified at present: "

Then you list out the ten sub-groups and then you put names beside them. And again, are they all AMI names?

A. They are all AMI names, yes.

125 Q. And you say, "The Chairman" -- underlined -- "has to ensure the quorum (three at least) to introduce the agenda, to suggest indicators and sub-indicators, to suggest an initial award of marks and to make minutes as a background to feed into the reporting phase at a later stage.

"Overview meetings, scoring of the aspects, the risks and the grand total will take place after the presentation meetings.

"AMI welcomes the participation of the PTGSM members in this part of the evaluation, and facilities (desk, PC, etc.) have already been provided for FT."

Can you just explain that last reference there, after welcoming "the participation of the PTGSM members... and facilities have already been provided for (FT)"; FT being Fintan Towey, is that correct?

A. That's correct.

126 Q. And so AMI had provided some facilities to Fintan Towey to enable the ten sub-groups to operate and to record what they were doing it, is that right?

A. That's correct, yes. That's how it reads.

CHAIRMAN: Mr. Shipsey, I am loath to curtail counsel, but it does seem that we have been over this ground and it may

relate to days in which your client wasn't even represented. It's not my style to try to curtail examination, but I am very anxious that, with the limited time available to us, for all persons, that we make such despatch as we can.

MR. SHIPSEY: If it is the case that Professor Andersen has gone over this at this hearing, I am not aware whether he has, and it may well be that it was a day when we were -- that Mr. Callaghan and I were elsewhere, but I am not aware that this document was gone through in the evidence by Mr. McDowell.

CHAIRMAN: My recollection is that the general tenor of this has been very well covered. I am just anxious that we perhaps get to the more critical periods, if possible.

MR. SHIPSEY: Sorry, sir, your view as to what is critical doesn't necessarily conform with what the other parties do, because, in my respectful submission, and this is more a submission than a question, in my respectful submission, and what I am trying to elicit from Professor Andersen is that the significant and important work is done by the ten subcommittees prior to the meetings that take place in the early and middle part of September, and, if that is the case, that has a very material bearing on the conduct of the GSM process and on the ability of any party to interfere in that process.

So I think it is very important to you, sir, to understand the amount of work that went into it and the critical importance of these ten sub-groups, so I am loath not to pursue this with Mr. Andersen. I do appreciate that the later period of September and into October has been gone into in very considerable detail, but, with respect, sir, it is my understanding, it's my instructions that, in fact, that ignores or underplays the significance of what transpired in August and early September in terms of the workings of the sub-group, and I am trying to find out if my understanding in relation to that is correct. I am certainly not trying to delay this procedure --

CHAIRMAN: I don't think there is any disagreement between you and the witness. I am just expressing the general hope that we can bring matters forward.

MR. SHIPSEY: Yes.

127 Q. Professor Andersen, can I ask you just then in relation to this and in relation to the work that started after the 15th of August of 1995, where that, as it were, fits into the process that took place later in September, when the ten working groups, or sub-groups, reported back?

A. I think, on the basis of this document faxed to Fintan Towey, I would have had a discussion with the Department on

how to progress the work, and that would be my working style throughout, that I would write these kinds of documents and then trying to facilitate and accelerate the work. So, based on what is here, I would have had a discussion with the Department and feedback from the Department on what is mentioned under item E, so that I would have got input from the Department on which civil servants were to participate and also how the general work in the sub-groups would take place.

128 Q. And did you --

A. Some of it is described here, but we would also discuss upfront, so to speak, how to facilitate or how to make the work in the ten sub-groups as efficient and as effective as possible.

129 Q. And did you get Department buy-in to this suggestion and to the co-option, as it were, of Departmental Officials on to these ten sub-groups?

A. Generally, yes, but I think there were some minor modifications, actually, to my suggestions, and that would be a general thing throughout the evaluation process, that a consultant and the client have discussions on how to progress the work.

130 Q. Now, you, Mr. Andersen, are listed as being part of two of the ten sub-groups, market development and tariffs, and there are, in fact, dates specified for, I think, the meetings of these sub-groups, is that correct?

A. That's correct, yes.

131 Q. And can you just tell the Chairman how those meetings of the two sub-groups that you participated in, progressed on the days that they met?

A. Well, here is suggested dates on the 29th of August and the 30th of August respectively, and I think, at this stage, the Irish civil servants in this particular -- in these two particular groups, according to my recollection, were not up to speed, so to speak, so they did not participate in a formal sub-group meeting here. So what we did, as consultants, in order to progress the work, that is we did some preparatory work, and then, subsequently, two, three or four meetings would take place physically with the participation of the Irish civil servants.

132 Q. When they were up to speed?

A. When they were up to speed, yeah. And then there would be a lot of telephone information exchanges and information exchanges bilaterally over the fax machine, and so forth.

133 Q. And in relation to the groups that you weren't on, was there any interplay between the sub-groups themselves; in other words, market development talking to tariffs or coverage talking to radio network architecture, and the

like?

A. We need to have some exchange of factual information, and it is -- but it was limited, I would say. However, I participated in more groups than is depicted here. For instance, let's take the financial sub-group, I don't think, for instance, that Mikkel Vinter participated in that group. According to my recollection, I participated in part of the first meeting where Billy Riordan, Donal Buggy and Fintan Towey also participated, and then I was substituted by Jon Bruel later on. Just to take you an example. So it's just an example to show to you that I participated in more than two groups.

134 Q. And were you, as the project leader from the AMI side, in contact with the other sub-groups and the Andersen Management representatives on those other sub-groups during this period?

A. Definitely. Also, in order to seek the consistency of the work and to ensure that the sub-groups worked on the same basis.

135 Q. Now, can I just ask you to look at the participants at the meeting of the Project Group on the 4th of September, which is the ninth meeting of the GSM, I think it's Book 91 at Tab 38 or 39, I am not sure -- 39, Book 91. And you will see from the minutes of the report of that meeting, there are nine Departmental Officials listed and three AMI officials listed, do you see that?

A. Yes.

136 Q. Now, can you tell us who, amongst the nine of the Departmental Officials, was not on one of the ten sub-groups?

A. Nuala Free was not a member of any of the sub-groups, Sean McMahon was not a member of any of the sub-groups, Ed O'Callaghan was not a member of any of the sub-groups. So that's the three persons who were not in the sub-groups.

137 Q. Three of the nine were not part?

A. Yeah. And then, in all fairness, if you look -- that's the Irish civil servants. From the AMI team, Mikkel Vinter did, effectively, not participate in the sub-groups.

138 Q. So one out of three of yours didn't really participate?

A. Yeah.

139 Q. Now, by the 4th of September of 1995, had all of the sub-groups been formed and had they all met or commenced work?

A. I think they had been formed, and some of them had met, yeah, but I am not -- I cannot see, from the records, when they exactly did start. I can see, for instance, let me just take an example, a number of sub-group meetings took place in Copenhagen, I believe, on the 6th and 7th of

September, and it may also very well be the case that, for instance, the technical sub-groups, they would meet on the 4th of September, because you have some of the participants of these groups here present. So that would be my expectation.

140 Q. And can you just describe to the Chairman the -- based on your knowledge and your participation in three of the ten groups, the volume of work that was carried out by the ten sub-groups in the period from the end of August to the -- let's say, the middle of September?

A. The work process was very intense and very thorough, I would say. It would, typically, start in the group by a discussion on how to identify indicators, and if you take, for instance, the sub-group on tariffs, I believe around ten indicators were identified, and then it was discussed, very much, how to -- how to identify the relevant underlying documentation for the scoring of each indicator. Typically, that would require requests, then the number-crunching, typically Mikkel Vinter, in order to produce graphics, to produce additional statistics, etc. And coming to the evaluation sub-group meetings, each participant would have the reader's guide, as I mentioned before, but factual information inserted in the reader's guide, because what we did with the reader's guide was to request each participant to write down relevant facts for each indicators, in this -- in my example under "tariffs," and then there would also be all the business case data delivered to each evaluator where each evaluator would be able to see, for instance, what were the tariffs projected, how was the call revenue stream going to be subdivided into minutes of use, usage revenue streams, subscription revenue streams, etc., and, as a third thing, there would be the graphics. So once this material was on the table, people could start discussing how to score each indicator, and that could go over several meetings with or without scoring. There was only a need to score when people were ready to do it on a solid factual basis.

141 Q. Now, by the 11th of September of 1995 when the tenth meeting of the GSM Project Group took place, had all of the ten sub-groups either commenced or finished their work by that time?

A. All had commenced their work. I think -- are you talking about the 11th of September?

142 Q. The 11th of September, yes.

A. I believe that nobody had finished their work at that stage.

143 Q. And is it fair to ask you what percentage of their work had been done by that point in time, or is it the case that

some were nearly finished and some were only beginning at that stage?

A. It's hugely difficult for me to give any percentage. What I can say is the work -- the preparatory work, that was what I tried to explain earlier this morning, started right after the applications were received with the reading and then the subsequent reader's guide, etc., so each evaluator would have started early on with what we call the critical reading of the applications, and then we could see from one of the documents that the sub-group work started in the end of August. Initially, they may have been without participants of civil servants, but they quickly came on board after my pressure and then there were, typically, two, three or four physical meetings in the sub-groups before they finalised. And the minutes -- each sub-groups had to draft minutes from their meetings, and we can see from the record, I believe, that the last revisions to the minutes are made in the end of September. So effectively, the work in these sub-groups took place over approximately one month, one man month, and I would assume that the participants worked full-time on that task.

144 Q. Now, if you weren't involved in this sub-group, if you were a GSM Project Group member and you weren't taking part in that one man month period, were you at a disadvantage in terms of your understanding as to what the quality of the various applications were vis-a-vis the other members?

A. Yes, I would say so. The core of the GSM2 evaluation took place, of course, in the sub-groups, which I also think is termed the nucleus of the GSM evaluation, in the final Evaluation Report. So I believe that's very crucial to understanding the work.

145 Q. And the meeting that took place on the 11th of September, 1995, the tenth meeting, that was just in advance of the presentations that were to be made by the six applicants?

A. Yes.

146 Q. And can I ask you this, Professor Andersen: By the 11th of September, did you have a view or any sense of who the strong applicants were and who the weaker applicants were among the six applications?

A. In or around the 11th of September?

147 Q. Yes?

A. To some extent, yes, to some extent, because you would be able to see that there were good applicants and there were less-good applicants. That would be clear to everybody from the reading of the applications. So you should -- when answering your question, I should also take into account that, at this stage, I, as a project leader, would have read all the applications.

148 Q. But would it be fair, and obviously you can't answer this definitively except for yourself, would it be fair to say that all of the persons who read the applications and who used the reader's guide and who were participating in the ten sub-groups, must have had a sense, by the 11th of September, as to who was good and who was not so good?

A. Yeah, that's correct.

149 Q. And to use the sort of beauty analogy, who was doing best in the beauty contest?

A. Yes.

150 Q. And if you weren't part of that, it wouldn't have really been possible to know who was doing well?

A. No.

151 Q. How significant, then, were the presentations that took place, I think, over three days, is it between the 11th, 12th and 13th or maybe 12th, 13th and 14th? I am not quite sure of the dates. But there were presentations, three-hour presentations, that took place over, I think, a three-day period, is that right?

A. That's right. I think they ran from the 11th to the 14th of September, sometimes with two presentation meetings, other days with only one presentation meeting, and we had a total of six as we opted for not having a presentation meeting with Eircell, as far as I recall. That was the seventh business case we also had in this competition.

152 Q. And if you just look at the Project Group meeting of the 11th of September, who did not participate in the presentations on the Department and the AMI side?

A. Sorry, which tab are we at?

153 Q. I am looking at Tab 42.

A. Okay. I am not a hundred percent sure, and I think this can be easily checked by going through the transcript of this, so, with that in mind, I will just briefly say who I don't believe was there, but I cannot do it with a hundred percent certainty. I know that Martin Brennan and Fintan Towey was there and so was Maev Nic Lochlainn. I don't recall Margaret O'Keeffe being there, but I would not rule out the possibility that she was there. Billy Riordan, I recall being there. I am a bit uncertain about Jimmy McMeel, whether he was there. From the AMI team, all the four listed people there, they were there during the presentation meeting. And then I don't recall Sean McMahon being there, so I don't think he was there. And then I don't think that Ed O'Callaghan was there, either. John McQuaid was definitely there and Aidan Ryan was definitely there, also, and then I think that John Breen might have been there, but I am not one hundred percent sure. So if it's significant for you --

154 Q. It's possible to check?

A. -- we should check it factually.

155 Q. Yes. And can I ask you, in relation to the presentation meetings that were held, there were, as I understand it, questions posed to the six applicants prior to those meetings? There were written questions posed, is that right?

A. I think it tells something about the complexity of this tender because there were applicant-specific written questions posed to the applicants according to the provision instituted in paragraph 16 of the RFP document, but that ran separately from the presentation meetings, as such; that had nothing to do with the presentation meetings, as such. But then in the invitation to presentation meetings, some predefined questions and topics were actually flagged to the applicants in order for them to prepare their presentation on an equal and qualified basis.

156 Q. And were they candidate-specific questions or were they generic questions to all six?

A. There were definitely generic questions and generic agenda items. I don't recall whether there were also applicant-specific questions. I think there were -- I think it was divided into three sections, really, with one hour for a general presentation, then one hour to discuss predefined questions and then one hour for questions on the spot, so to speak. That's my recollection of it.

157 Q. And who was responsible for drafting the questions that were asked both in advance of the presentation and the questions that were drafted in accordance with article or clause 16 of the RFP?

A. I think that was AMI. At least, I know that AMI put some effort into this.

158 Q. Now, we have reached, I think, the 14th of September of 1995, and I just want to ask you, at this point: You have been working with the members of the GSM Project Group and you have also been working with the members of the sub-groups. Is it correct -- is my understanding correct that there were persons on the sub-groups who weren't part of the GSM Project Group?

A. I cannot identify named persons who --

159 Q. You have identified persons on the Project Group, that's the GSM Project Group who weren't on the sub -- on any of the ten sub-groups, but you don't know if there was anyone on a sub-group who wasn't on the GSM Project Group, is that right?

A. Yeah, that's right. I think they were all members of the Steering Group.

160 Q. And you had been working with all of them, including those who weren't taking part at this stage in any of the sub-groups since April of 1995, isn't that right?

A. Yes.

161 Q. In the month of April or May or June or July of 1995, did anyone put pressure upon you in relation to the conduct of the competition and your involvement as a consultant to the Departments?

A. No, I don't recall pressure put on me, no.

162 Q. Did anyone, to your knowledge, try to influence the direction or the advice that you were providing, in a manner that caused you any concern during that period from April to the end of July of 1995?

A. No.

163 Q. Based upon your experience in the 150 or 200 competitions in the 40 or 48 countries that you had operated in, do you think you would have been sensitive to the application of pressure upon you by any of the Departmental Officials?

A. Yes. I think if a certain pressure was there or were there, I would have sensed it, based on my experience not only as a man having worked on a number of similar tenders, but also in my capacity as having worked as a civil servant myself.

164 Q. After the presentations on the 11th, 12th, 13th and 14th, there was a meeting of the GSM Project Group on the 14th of September after the last presentation, is that correct?

A. That's correct.

165 Q. And there is just reference -- there seems to be specific reference in that to the A4 presentation. If I understand it correctly, that's because the A4 presentation was the last presentation just before the group met, is that correct?

A. That's probably correct. I don't have a clear recollection, but that's how it reads.

166 Q. You weren't singling A4 out for special treatment, other than --

A. No.

167 Q. -- the fact that it was the one that immediately preceded your meeting, is that right?

A. That's right.

168 Q. And I think the second page of that minute records the fact that the group agreed that the presentations had served as a useful exercise, and then a number of other bullet-points are mentioned?

A. Yes.

169 Q. And then after a comment from Mr. Brennan to the effect that no further contact between the Evaluation Team and the applicants was possible, although access to the Minister

could not be stopped, AMI recorded as saying that "While all the applications would be scored, greater resources would, from now on, be expended on the leading applications. Two distinct groups had emerged: those with a good score to date and those whose ranking was such that further intensive evaluation was deemed unnecessary."

A. Correct.

170 Q. So by the 14th of September at least, there were, amongst the six applications, two groups. And was that two groups of three or was that a group of two and a group of four or a group of four and a group of two?

A. That was two groups of three respectively.

171 Q. And can you tell us, who was in the two groups?

A. Okay. The group with good -- so-called good score, as it is recorded here in the minutes, would be A1, A3 and A5 respectively, and the other group with less favourable scores would then be A2, A4 and A6.

172 Q. And this paragraph here which records that greater resources would now be expended on the leading applications, did that mean that, insofar as one was going forward, 1, 3 and 5 were the ones that attention was going to be devoted to?

A. "Attention" is a fair word, but it didn't mean that the work on the remaining applications scoring less favourable would then stop, so I believe it's fair to say that the focus would mostly be on the applicants who had received the most favourable score.

173 Q. And of the ten sub-groups, is my understanding correct, that by the 14th of September, five of them had largely completed their work, or were about to complete their work, and another five were due to conclude their work the following week?

A. That's correct.

174 Q. And to the extent that five of the ten had concluded their work, did it mean and did it follow that the members of those five sub-groups knew who was ahead and who was behind in relation to the particular sub-group area that they were addressing?

A. Yes, I think so, yes.

175 Q. And whilst the actual scoring may not have taken place, those individual sub-groups that had completed would have known who was the best and, conversely, who was the worst?

A. Yes, yes, within the scoring context of the sub-groups they had participated in, yes.

176 Q. And each of those sub-groups, those ten sub-groups you have mentioned, had access to quantitative data that was relevant to their particular sub-group. You have mentioned that some business case figures were, or something of the

sort, were provided and presented to them, is that correct?

A. Yes. What I mentioned earlier on was that we got some floppy disks from the applicants. That was requested as part of additional material sent out to applicants, I believe it must have been in April, and in order to stress the importance of that material, we had requested the applicants to fill in what we called mandatory tables. I personally think that it was needed to use a word like "mandatory" because no such information requirement transpired from the RFP document itself, but we had also requested them not only to insert the figures in the mandatory tables but also to deliver that information on electronic format. So what was done in AMI, on receipt of the applications, was to fill that electronic information, the electronic business case data into tables where all six applicants occurred and where there was also, from time to time, a reference point to Eircell, because Eircell was also requested to come with business case information in electronic format.

177 Q. And going forward from the 14th of September, in terms of the work that had taken place, how would you describe the importance or the significance to the ultimate outcome of the work that had taken place up to the 14th of September of 1995?

A. Well, obviously a lot of very important work had already been executed. The evaluation was not finalised, but each evaluator would have read all the applications and would have participated typically in more than one physical sub-group meeting, and the presentation meetings were also over. So a rather important part of the evaluation work had taken place. But I am not able to give you a percentage base figure. I know you were looking for that before. I am not able to make it into a quantification exercise.

178 Q. Now, if I am correct, the next full meeting of the GSM Project Group after the 14th of September takes place on the 9th of October of 1995?

A. That's right.

179 Q. And significantly and importantly, a week after the 14th of September, there is a letter from you of the 21st of September, 1995, setting out the work programme for the next approximately ten days. But before we come to that, can you just tell us what you were doing between the 14th of September of 1995 and the letter that you wrote on the 21st of September of 1995?

A. Yes, working days and nights. But I think it is recorded that, on the 18th, the whole of the 18th and the whole of the 19th of September, sub-group meetings were held in

Copenhagen with regard to the marketing dimensions and also with regard to the financial dimensions.

180 Q. And did you participate in some of those sub -- those working group meetings?

A. Yes. I would participate in most of these.

181 Q. And did they take place at your offices or at another venue?

A. They took place in AMI's offices.

182 Q. And if all ten working groups were there, or was it all ten working groups or just --

A. No, it would be five of the sub-groups who met, because the other five --

183 Q. Had finished?

A. -- were more or less finished, or at least to an extent that they didn't need a separate physical meeting to score the dimensions.

184 Q. And were you informed of the outcome of the working group meetings that you hadn't participated in after the meetings on the 18th and 19th of September?

A. Yes.

185 Q. And how were you communicated with by the other working group members after their meetings; that's the ones that you didn't participate in yourself?

A. Well, typically, there would be a minute from the meetings in the sub-group and the record of the scoring of that sub-group. So that was one kind of communication. And then, obviously, there will also have been verbal communication.

186 Q. And so when you come to write your note on the 21st of September, is my understanding correct, that you had received feedback from all ten of the working sub-groups by that time?

A. Yes.

187 Q. And if we take it, that date of the 21st of September of 1995, by comparison with the 14th of September of 1995, how would you describe the conclusiveness of the results of the evaluation by each of the ten individual sub-groups?

A. Well, I will describe it in the following way: That if you see what subsequently transpired as Table 15, I would be able to insert letters, or scorings by way of letters, in most of the cells in that table.

188 Q. On or before the 21st of September?

A. Yeah.

189 Q. In the month of August or up until the 21st of September of 1995, were you aware of or conscious of any pressure being brought to bear on you or any of the AMI team members by any Departmental Officials showing or demonstrating a preference for one applicant over the other?

A. No.

190 Q. Had such pressure been applied or attempted to be applied on you, do you think you would have been conscious or aware of it?

A. Definitely, yes.

191 Q. Were you aware, or made aware by any of your AMI colleagues, working under your direction, of any concern being expressed by them that any pressure was being brought to bear to influence them in the conduct of their evaluation as members of the individual sub-groups?

A. No, not at all. And if it had been so, it would, most probably, have been discussed as an inappropriate thing, but it didn't transpire.

MR. SHIPSEY: Chairman, I imagine I am going to be something of the order of 30 to 45 minutes more. I am about to go on to another topic. I am just wondering if it were --

CHAIRMAN: Well, I have indicated, obviously without cutting you short, my anxiety that we do make such despatch as possible. It is now a quarter to one. So I think we might take a slightly premature and slightly foreshortened lunch.

MR. SHIPSEY: And come back maybe at 2.00, then?

CHAIRMAN: Well, maybe a little earlier. I'll just make it the hour. A quarter to two. Thanks, Professor.

THE TRIBUNAL ADJOURNED FOR LUNCH.

THE TRIBUNAL CONTINUED AFTER LUNCH AS FOLLOWS:

CHAIRMAN: With a view to maximising the limited further availability of Professor Andersen this week and to enabling the respective representatives of affected persons to have as fair and reasonable an opportunity of putting matters to him as is manageable, what has seemed to me the fairest scheme of arrangement has been devised by me.

In this regard, I have regard to the rather obvious considerations that counsel, naturally, in examining a witness, will seek to limit the matters primarily inquired into, into those directly referable to a particular client, and that there is plainly no need for repetition for matters that have already been addressed, and I note also that, thus far, Professor Andersen has resolutely adhered to his evidence in response to Mr. McDowell in his questioning, thus far, by Mr. Shipsey.

In devising the particular list, I have had regard to the desirability of favouring the interests of Mr. Michael Lowry, as the person who is specifically named in the Terms of Reference and who would be prior to Mr. Gleeson himself on behalf of his client and any Tribunal re-examination, being the last of the affected persons to be entitled to

cross-examine.

Accordingly, I intend to adhere to this, save, of course, if it is felt by counsel undertaking examinations of Professor Andersen that individual practitioners may wish to give an extra portion of time to another person, that can be done, but otherwise I believe this is the most feasible way of seeing that we make despatch to complete the Professor's evidence before his departure at the end of Friday's sitting. Both the registrar and our stenographer have kindly indicated their preparedness to extend even marginally further the hours of sitting, but it seems to me there is a point at which if one goes beyond a five- to six-hour sitting, little may productively be achieved. So I propose, then, that we take up the balance of Mr. Shipsey's examination of Professor Andersen on that basis.

MR. O'CALLAGHAN: May I just make my objection known now, because you will know from Mr. Justice Hardiman's decision in Maguire against Ardagh that cross-examination should not be restricted by time-line, and what we have been handed out here looks like an exam schedule, which tells me that I am on until 5 o'clock today and I finish at 1 p.m. tomorrow, and then Mr. O'Donnell is on from 2.00 to 5.00 but he is on Thursday morning as well. I just think this is contrary, as well, to the principles of natural justice that have been enunciated by the superior courts in this country and, in particular, in the Abbeylara decision.

CHAIRMAN: Mr. O'Callaghan, it's not my attempting to impose an exam schedule; it's my attempting to devise realistic and practical arrangements that will convenience both Professor Andersen and the various legal advisors involved, and I don't, otherwise, propose to respond to that. Professor, if you'd be kind enough to come back.

MR. SHIPSEY: Chairman, I am about to move into the, very briefly, the question that does touch directly upon my clients, and that is the letter from Professor Walsh of the 29th of September of 1995, and I take it, obviously, there is no difficulty with me pursuing that cross-examination.

CHAIRMAN: Indeed, I'd welcome your assistance on it, Mr. Shipsey. It's a matter of importance.

MR. SHIPSEY: Chairman, I'll tell you where I have a concern with, and you have made your ruling this morning in relation to exploring with Professor Andersen any allegations he is making about bias vis-a-vis the Tribunal counsel, but Professor Andersen was questioned in the course of the private examination about the letter from Professor Walsh and also about his knowledge or lack of knowledge about the participation of IIU in 1996. And

there is documentation that you furnished us under the O'Callaghan Rule in those two booklets, booklet 1 and 2. Now, they postdate the involvement of Professor Andersen in the adjudication, but I would be keen to inquire of Professor Andersen what he was furnished and what he was told in relation to that, but I am sort of mindful not to wish to sort of trespass on the ruling that you have made in relation to that. I mean, there are -- you have furnished us all with two volumes of documents, and many of those touch on the allegation that Professor Andersen has made in the course of his statement, but some of the matters don't touch upon any allegation, and I am just wondering what the purpose was of furnishing us with the documentation if we can't rely upon it and if it can't see the light of day in the Tribunal? And I am just wondering -- I am obviously bound by your ruling, sir, but I am concerned that a blanket ruling of going anywhere beyond 1996 will have the effect of me not being able to discharge my responsibility to my client to try seek to elicit the facts that are contained also within that documentation.

CHAIRMAN: Well, Mr. Shipsey, I feel that my ruling must stand, and if I start making derogations from it, these could be ongoing and continuous. I don't think it's beyond the capacity of as resourceful an examiner as yourself, to elicit the matters that pertain to this rather important letter without going into what may have transpired between other persons at a much later date.

MR. SHIPSEY: Very good.

CONTINUATION OF EXAMINATION OF PROFESSOR MICHAEL ANDERSEN
BY MR. SHIPSEY AS FOLLOWS:

192 Q. MR. SHIPSEY: Professor Andersen, if I could ask you to turn to Tab 48 in this booklet that we have been dealing with, Book 91, and I'll be brief in relation to this. This is a letter that was written by Professor Michael Walsh, for whom I act, on behalf of IIU, to Mr. Brennan, on the 29th of September of 1995. And I think if I recall your evidence, you say you were not aware of this letter, and secondly, that insofar as you were informed that Mr. Brennan returned it, in fact, to Mr. O'Brien rather than to Professor Walsh, that that was the correct thing to do?

A. Yes, that was the correct thing to do, because during a competition, we would not take what we call additional material not asked for by the evaluators or the Department into account.

193 Q. And therefore, insofar as there is any -- insofar as your evidence is concerned, what Mr. Brennan did here in relation to this letter was entirely appropriate?

A. That was appropriate, yes.

194 Q. And insofar as you are concerned, not knowing about this letter, this letter cannot have weighed on your mind, good, bad or indifferent, in terms of the evaluation that you conducted?

A. No.

195 Q. Now, can I ask you just a more sort of general question, and it relates to changes in the composition of consortia, either prior to or subsequent to a decision on a competition to give them the right to negotiate for a licence. Can you be of any assistance to the Tribunal in terms of the reality, the changes take place; in other words, that somebody may take part in a consortium to apply, but by the time a decision is taken or by the time a licence is being negotiated for, that person no longer wishes or the other parties no longer wish them to be part of that consortium, is that something that you are familiar with?

A. Yes, it happens from time to time, that there are changes in the consortia. If you look at the GSM2 tender in Ireland, there were six applicants, and some of the applicants had three, four, five, or whatever number, consortia members, and the evaluation -- or, sorry, the tender went along with a submission date sometime in June and would then continue for a period of approximately six months before the winner was announced. And during that time -- during such a time, it would not be so that you could exclude changes -- exclude the possibility of changes in each and every consortium, and that was also the case in a few other tenders, I recall.

196 Q. And I think in particular in the GSM3 competition, there was a change in that I think, in that case, perhaps AT&T dropped out at one stage, am I correct or incorrect in relation to that?

A. That's correct. There was a change in ownership consortium there, yes, and I think you recall correctly that it was AT&T which withdrew from the so-called Meteor consortium.

197 Q. And can I ask you also in relation to IIU, you are, I take it, now aware, and you subsequently became aware, that the Esat Digifone consortium had two operator members, that is Communicorp, Mr. O'Brien's company, and Telenor, the State telecommunications company in Norway, you were aware of that?

A. Yes.

198 Q. And then there was provision in their application for 20% of the shareholding to be allocated to, I think it was, Advent, for a number of institutional investors, that 20% was to be placed, or do you recall that?

A. As far as I recall, four institutional investors, summing up to 20%, that's my recollection.

199 Q. And you may or may not be aware, but that in April of 1996, IIU were substituted for Advent and they acquired 20% of the shareholding in the company, you may or may not be aware as to when it happened?

A. I am not fully aware, and you say substituting Advent.

200 Q. Correct.

A. That was not the way I read it. I read it as, from the A5 application, that 20% was simply reserved for four institutional investors.

201 Q. And that institutional investor became IIU but wasn't an operator?

A. Yeah, but you said Advent.

202 Q. I am sorry, I stand corrected on that. Is there a difference between the proposed operator and a proposed investor in terms of the significance when one is considering licensing a particular entity?

A. Maybe there is a difference in relative importance. Maybe it's something like an operator is delivering operational experience as to how to run a telecom operation, whereas an institutional investor is basically expected to deliver capital and funding.

203 Q. And all things being equal, one person's capital or euro is as good as another, to that extent?

A. Yes.

204 Q. And were you aware also, or were you informed in the course of your examination of the material in this Tribunal, that legal advice was obtained by the Department in relation to IIU becoming the institutional investor in Esat Digifone?

A. I don't recall to be aware at the time, but I was aware that the Department had two types of legal advice over this tender period: One source was the AG and another source was a senior counsel, or counsels, in plural; I believe there were two.

205 Q. Now, if I can come back, then, to your letter of the 21st of September which you wrote to Mr. Brennan, and that made reference to a proposed meeting to take place in Copenhagen, and I think, very fairly, you say you don't know or don't recall whether that was a meeting in person or a meeting over the telephone, but again, if I can understand your evidence, you are prepared to accept Mr. Brennan and Mr. Towey's evidence if they say a physical meeting took place, even though you don't recall it, is that right?

A. Yes, I am.

206 Q. And that was not a meeting of the full Project Team, and a meeting of the full Project Team didn't take place, I

think, until the 9th of October, is that right?

A. That's correct.

207 Q. And I wasn't sort of quite clear from your evidence in answer to Mr. McDowell, was there any significance that you attached to the fact that there was no full project meeting in Copenhagen and, in fact, no full project meeting until the 9th of October?

A. The evidence I gave was that I was eager to progress the work and the evidence I gave this morning to you when we discussed the work, the huge work in the sub-groups, was that once we had reached the mid of September, we would actually have scorings from all the sub-groups coming in and being able to fill in most of the cells in Table 15, what transpired to be Table 15.

208 Q. And that was even before your meeting, be it a telephone meeting or a meeting in person with Mr. Brennan and Mr. Towey on the 28th of September?

A. Correct.

209 Q. And does it follow from that that whilst it was undoubtedly an important meeting with Mr. Brennan and Mr. Towey, there was no sense in which the two of them and you and perhaps one of your colleagues was sort of taking decisions, as it were, behind the backs of the Project Team?

A. No, I wouldn't think there was anything taken on behalf of others, because if you look at how we went through the working process of the sub-groups this morning, each of the ten sub-groups came up with scorings, and they were -- they were the scorings to be made in this process and what was left was only things that had to do with aggregation. I don't know if I am making me sufficiently clear, but there are two types of scoring in this process: there is the scoring of each dimension, and then there are aggregating up to the total. But, you see, the scorings from the sub-groups, they are the basis of all this. They were there from the sub-groups.

210 Q. And in a sense then, if I understand you, did those scorings from the individual sub-groups determine the aggregate that you arrive at?

A. To some very considerable extent, yes.

211 Q. Perhaps not absolutely, but you certainly know the direction that you are going in when you have the information from the sub-groups, is that right?

A. Correct.

212 Q. And the information you have gleaned from all the sub-groups would enable you to rank the applicants in an order from best to worst, is that correct?

A. You would get a very good and close approximation by looking at these scorings, yes.

213 Q. And then the work that is done or had to be done to aggregate these, is that something that happened on the 28th of September or did it happen before or subsequent to the 28th of September?

A. Well, according to my reconstruction of it when reading these documents, it's both/and, because I cannot answer either yes or no to your question; it's more differentiated, because you will appreciate that prior to the point in time you are asking about, all the technical scores and also the score for a technical aspect had been cast, and also other scores. So what remained was, as I think -- I am not sitting with the document in front of me, but I think I recall that was -- what remained was, maybe, a score for the marketing aspect and then the grand total on the 21st of September.

214 Q. That's what remained to be done?

A. That was scorings that I had not filled in in Table 15.

215 Q. But all of the others, you had?

A. Yeah.

216 Q. And then the scoring for those two tables that you hadn't filled in in Table 15 came subsequent to the 21st of September?

A. Yes.

217 Q. And before the 28th?

A. No, not necessarily. I am not familiar with the exact point in time when I was able to fill in that table, but we are talking here, just to put it into perspective, we are talking about aggregations only. The underlying scores for the aggregations had been recorded.

218 Q. And they had been recorded when, to the best of your recollection?

A. Over the duration of the evaluation, really, as I have tried to clear for you, the technical scores were actually in earlier than some of the rest of the scores. So it wasn't so that you could say, take one definite day and say all the scores come in on that particular day, on that particular time of the day.

219 Q. They were coming in at different -- on different dates over that period?

A. Yeah, because of the fact that we have ten different sub-groups working.

220 Q. Now, when you came to write the draft report that is dated the 3rd of October of 1995 --

A. Yes.

221 Q. -- what are you short in terms of information to enable you to write that report which is presumably written in the days prior to the 3rd of October?

A. That's a difficult question to answer because there is some

kind of logic which I don't understand behind the question.

You say I submitted a report on the 3rd of October, but what did I miss? I missed nothing.

222 Q. I am not saying --

A. I drafted the report -- I submitted the report.

223 Q. I know you did, and maybe that answers the question that you were -- there was no impediment to you drafting a report which was the first Draft Final Report of the 3rd of October, is that correct?

A. Sorry, what does "impediment" mean?

224 Q. Anything preventing you from doing it, some obstacle to you preparing that draft report?

A. No, no, otherwise I must have flagged this.

225 Q. And after the 3rd of October --

A. Let me just qualify a little bit here so I give it one hundred percent precisely. If you look at the appendices, for instance, there are blank sheets, so to speak, in the appendices, and there are also parentheses there, so obviously I would, you know -- some of the supplementary analyses, for instance, they were not there, and in order to be fully concise in my answer to you, Appendix number 2 was not there, either.

226 Q. And that's the methodology applied wasn't actually there and drafted, is that correct?

A. That was not fully drafted.

227 Q. Yes. But the body of the report, apart from the appendices, was --

A. -- was drafted.

228 Q. Was drafted.

A. The main report was drafted and presented as the first draft.

229 Q. And by that stage of the 3rd of October of 1995, in your mind, in terms of the information that had been fed in to you, was it clear what the ranking was in relation to the second mobile GSM licence competition?

A. On the 3rd of October?

230 Q. Yes.

A. It was abundantly clear.

231 Q. And when you say it was "abundantly clear," do I understand it that Esat Digifone was the winner of the competition?

A. I mean, in the report of the 3rd of October, you have table -- I think they are numbered as Table 15, 16 and 17, if I recall correctly, and if you look at these tables, they remain constant without any changes except for a copy-type error of one of the aspects, but except for that, they remain essentially the same -- they remain the same from the 3rd of October to the 18th of October and then through to the 15th of October.

232 Q. 25th --

A. So when I say it was abundantly clear, then it was abundantly clear to me. You are asking me --

233 Q. Oh, I am.

A. So I was abundantly clear on that. And in hindsight, for good reasons, because the scores were not changed afterwards.

234 Q. Now, in compiling this draft of the 3rd of October, that's done by AMI in Copenhagen, is that correct?

A. Pardon?

235 Q. The draft report of the 3rd of October is compiled or is prepared or written by AMI in Copenhagen?

A. Yes. AMI did, by far, the most of the drafting of the reports.

236 Q. And insofar as it wasn't drafted by AMI, it was fed in to you and you were the one who was responsible for the final version of that 3rd of October draft, is that correct?

A. Yes, yes.

237 Q. In other words, it emanated from your machine and was sent out from there?

A. That's correct. But -- and taking into account that was maybe what we paid most attention to, taking into account the minutes of meetings and the scoring diagrams from the ten different sub-groups.

238 Q. And all of that information was fed in to you?

A. Yes.

239 Q. Did anyone exert any improper influence over you in writing and preparing that draft report of the 3rd of October?

A. No.

240 Q. Did anyone get you to do anything that you disagreed with in preparing that draft report of the 3rd of October?

A. No.

241 Q. Were you conscious of persons putting influence on other persons to try to get you or your colleagues to do anything in relation to that report?

A. No.

242 Q. And would you have been alert to that possibility and aware of same if it was happening?

A. Yes.

243 Q. Now, you have spoken of the meeting of the 9th of October, and if I am correct, that was the second-last meeting of the GSM Project Group prior to the 25th of October; in other words, there was a meeting on the 9th and a meeting on the 23rd of October, and then you submit the final report on the 25th of October, is that correct?

A. Yeah, correct.

244 Q. And if you just look at the attendees at the meeting on the 9th of October, if you go to Tab 53 of the booklet and Tab

66, if you can hold them both open.

A. 53 and 66?

245 Q. Yes.

A. Yes, I have it.

246 Q. I think the only additional person who was at the meeting of the 23rd of October, by comparison with the 9th of October, was Donal Buggy -- no, he is at both, sorry.

There is one additional person, Mr. McMeel?

A. Jimmy McMeel.

247 Q. I am sorry, Mr. McMeel. And clearly, there were some persons at both of these meetings who had not participated in the ten working groups, isn't that right?

A. That's correct.

248 Q. Were you conscious or aware of any, as it were, difference between the level of participation of those who had participated in the working groups by comparison with, let's, say, for example, Mr. McMahon or Mr. O'Callaghan, at those meetings?

A. Was I aware or --

249 Q. Were you conscious of a difference in their level of participation in either of these meetings?

A. Yes, yes, I were, because I would know that, for instance, Sean McMahon and Ed O'Callaghan, together also with Jimmy McMeel, by the way, they had not participated in this very intense work in the ten different sub-groups and had not participated in the scoring of any of the dimensions.

250 Q. And do you think that that placed them at a disadvantage relative to their other colleagues?

A. Yes.

251 Q. And, again, insofar as them being at a disadvantage, nothing unusual or unexpected about that, given the fact that the other members had taken such an intensive involvement over that previous month, is that correct?

A. That's correct. It's only understandable that people having been very actively involved in the core evaluation process, they would have a better understanding of it than people not participating in that intense work process.

252 Q. Now, there has been reference to consensus and there has been reference to unanimity amongst the members of the GSM Project Group, and before I ask you about whether a consensus emerged or whether there was unanimity amongst the members of the GSM Project Group, can you assist the Chairman by telling him whether, as a professional consultant, you were conscious of or aware of any, as it were, bullying between the members, the Departmental members of the GSM Project Group?

A. With respect to the scoring or with respect to the approval of the report --

253 Q. Well, in respect of each other, in terms of the conduct of those meetings, did it occur to you or appear to you that some members were either bullying or putting pressure on other members of the group in any untoward or unusual fashion?

A. No, not as such, but I have also given evidence to Michael McDowell that some kind of tension was going on.

254 Q. And I think that's something you --

A. But maybe I should qualify it a little bit in making reference to what we discussed this morning, namely the work in the sub-groups, because the work in the sub-groups had flowed in such a way that all the ten dimensions had been scored and they had been scored according to a process of consensus where work had been ongoing for a time, and a lot of analysis had been put into things as a background for using, as part of the consensus method, to arrive at the scorings which the individual ten sub-groups did. So it would only be natural that people who did not participate in that process would say, "How did you arrive at scores?" or would not understand the value of the scores. Let me just take an example. People who were intensively involved in the work of the ten sub-groups, they were quite clear that there was a considerable appreciable difference between the A5 applicant and then the A3 applicant, and again, down to the A1 applicant for that sake. But -- and that's due to the fact that they had been involved in the scoring and they had also seen what transpired during the presentation meetings and all that kind of stuff. They had got numerous figures concerning all the business cases, they got the graphics, etc., so they were familiar with the difference between the applicants at this stage.

But I can -- to some extent, I can understand that people who were not involved in that scoring process, they could have said, "Well, is this a big difference or is it a small difference? And why is one ahead of another? And could that be different?" Whatever. I can, intellectually and socially, accept it as a normal behaviour because I believe that, you know, anybody not having taken part in such a process would have to have longer time to digest, that was the term I used yesterday with Michael McDowell, to digest the result and what was behind the result

255 Q. And that process of digestion was a process that, for example, you think Mr. McMahon and Mr. O'Callaghan had to go through because they hadn't been, as it were, feeding on the information as part of the sub-groups, is that right?

A. Correct, that's the point I am making.

256 Q. But was there any impediment -- I am sorry, impediment --

was there any obstacle to Mr. McMahon or Mr. O'Callaghan, for example, asking questions of you when they were at the meetings of either the 9th or the 23rd of October?

A. No, there were no obstacles. We could have an open discussion and that was the style in the Steering Group.

257 Q. And, Mr. Andersen, I don't know if this is fair to ask you, there was no sense in which the Departmental officials were in awe of you and afraid of you as the world-renowned consultant to the project?

A. No, I don't think so, but you'd better ask them instead of me.

258 Q. And in terms of your style, are you a consensus person or are you a more domineering person, would you say, would you describe yourself?

A. Well, I am -- as a consultant, you will have to be more a consensus-like person than the opposite, and I would definitely say here that -- I cannot answer your question about what other people felt and how other people perceived me, but what I can tell you about, that is how I perceived the dialogue in the Steering Group and how I perceived Mr. Martin Brennan's leadership in that context.

259 Q. And how did you perceive it?

A. He had a very open-minded leadership style, and he did not suppress comments, or anything like that. So there was an open discussion style.

260 Q. And were you conscious at any stage of this spectre of a Minister behind these officials, to whom these officials were, as it were, in fear?

A. I was aware, of course, that there was a Minister in this universe. That's clear. And I was also aware that that Minister was informed, as is recorded in the minutes.

261 Q. And that's as of the 9th of October of 1995 when this is first recorded?

A. Let's deviate a little bit from the dates. But the environment where you have a Minister as the ultimate boss for a department, I was aware of that. I was aware that the civil servants could inform him from time to time. That's a normal process, that's a standard process.

262 Q. You have a 'Yes, Minister' in Denmark as well, or I don't know if you are familiar with 'Yes, Minister'?

A. I know what you are making reference to. But I didn't perceive Martin Brennan, Fintan Towey, Maev Nic Lochlainn, John McQuaid, and all these civil servants with a very high integrity, to be inclined just to do what the Minister would do.

263 Q. And again, as a former civil servant, were you in a good position, you think, to judge that and to assess that?

A. Definitely. Because I had both seen 'Yes, Minister'

several times in Denmark but also been a civil servant myself.

264 Q. You then prepared a further report of the draft report of the 18th of October?

A. Yes.

265 Q. And a final report on the 25th of October, which was delivered, prepared and delivered by you electronically from Denmark, is that correct?

A. I don't recall the exact method of delivery.

266 Q. But you don't remember taking it physically from Copenhagen to Dublin?

A. Which of the reports?

267 Q. The final report on the 25th.

A. I think it's on the records that the final report, with the so-called shadow text solution we used, was produced as hard copies and sent by courier after the 25th of --

268 Q. Yes, I think it arrived on the 26th.

A. And I think that the report on the 25th of October may have been faxed, or whatever, at least there was this fax exchange with Fintan Towey. I don't recall any particular electronic communication there, so I can --

269 Q. I may have that wrong.

A. I can say that, from AMI's part, there would have been no problems of it. We were the first users of what is called X400 back in 1991, so, with many clients, we would do electronic communication and transfer of documents, but I am not sure that that took place with the Department, actually.

270 Q. Now, I have asked you about your drafting of the first draft of the 3rd of October and I want to ask you about your drafting of the second draft of the 18th and also the final report on the 25th. Was that your work that went into both the draft report of the 18th and the final report of the 25th of October?

A. Well, I think if we look at both the 18th of October report and the final report, that that -- there, the changes were very much directed by the PTGSM and my communication with the Department.

271 Q. And I think you got a long memo from Mr. Towey and you indicated with a tick those changes that you were agreeing to?

A. Yes.

272 Q. Did those changes have any bearing whatsoever on the result of the second GSM competition?

A. No.

273 Q. Had the result changed between the draft of the 3rd, the draft of the 18th and the final report of the 25th?

A. No, it hasn't.

274 Q. Did the results shown in each of those three reports, the two draft and the final one, emanate from the work that was undertaken in conducting a qualitative evaluation by the ten sub-groups?

A. Whether the work contained in the reports emanated from the ten sub-groups?

275 Q. Yes.

A. Very much so.

276 Q. To your knowledge, did anyone interfere with that process?

A. No.

277 Q. Now, you are aware, Professor Andersen, that there are a large number of personal reputations at stake awaiting the outcome of the deliberations of this Tribunal?

A. Yes.

278 Q. You know it's not inter partes litigation between a winner and a loser; this is a public inquiry and you know that it's a public inquiry that has to do with not who won but whether the person that won the award won it fairly or unfairly, to put it in a neutral manner; you are aware of that?

A. I am aware of that. But I take notice that while I have been in the witness-box, I am all the time questioned about things which might affect, for instance, A5, whether -- and weightings and stuff like that. But no, I have not been posed -- I don't recall being posed any questions, so far, about how A3 was scored and things that might have affected the evaluation of the A3. So, in my view, if -- you know, my expectation, coming here on a neutral basis, would be that if we are to examine this on a either like-for-like basis or on a neutral basis, you know, all questions should not only be on why did you do this and that with A5, but also, what did you do with A3 and with A1, for that sake? They were the three highest-ranked applicants. So I take on board that it is a public inquiry, but I am a bit surprised about the direction this has been going.

279 Q. You have also heard, I think in examination, in your examination by Mr. McDowell, you are aware, or at least you accept that the civil servants may have continued some of their meetings after you had left?

A. Yes, that was -- Michael McDowell put to me yesterday.

280 Q. And I don't know whether it was the meeting of the 9th of September or the -- sorry, 9th of October?

A. I think it was the 23rd of October, to be fair, yeah.

281 Q. 23rd of October.

A. Yeah.

282 Q. Now, if it were the case that such -- that there was a continuation of the meeting amongst the civil servants and there was some discussion and some disagreement exchanged

between the civil servants, was that ever communicated to you?

A. No.

283 Q. Did that have any influence or bearing on the outcome of this GSM competition, assuming, for the moment, that such a disagreement or that there was some dispute between the civil service members that took place after you had left?

A. No, it had no bearing.

284 Q. Now, it's difficult to be absolutely certain about anything in life, Professor Andersen, but as you sit here under oath, are you satisfied that the second GSM licence competition was won fairly and squarely by applicant number 5, Esat Digifone?

A. Yes.

285 Q. Has anything that you have learnt or heard or been suggested to you in the period from the 25th of October, 1995, to the 2nd of November, 2010, caused you to reflect on that or to doubt your position about the result of that competition?

A. No, not really.

MR. SHIPSEY: Chairman, insofar as the conduct of the competition is concerned, they are the only questions I have for Professor Andersen. I do have, and had prepared, other questions, and I do wish to renew my application to be allowed to explore into some of the matters post the period of 1996, but I am conscious, from your ruling after lunch, that you appear to be ruling out any questions of this witness in relation to any involvement he had with the Tribunal in the period from 2001 onwards, and I would just wish to renew my application, having taken my client's instructions, and just to -- I wish to make six or seven brief points as to why I should be allowed do that. I am still operating within the time allocated to me, and I am just wondering if you'll permit me to renew that application?

CHAIRMAN: It wouldn't be my form to inhibit you, Mr. Shipsey.

MR. SHIPSEY: Well, I am glad of that, and I wish that that extended to the cross-examination. But if I can just make the points briefly in relation to the two O'Callaghan books, sir, we have been furnished with two very extensive booklets in compliance with the obligation that the Tribunal, no doubt, operates under as a result of the O'Callaghan decision. And unless we are permitted to cross-examine on foot of those, no evidence has been led, and one then has to ask, what was the point of furnishing the parties with that material if we weren't allowed to do anything with it? There are meetings that took place in

2001, 2, 3 and 2005, which we would wish to explore with this witness.

The second point, sir, that just occurs to me, is that, in declining Mr. O'Callaghan's application this morning, you said in the course of your ruling that the report that you prepared would have to report on all matters, including the background on Professor Andersen's attendance, and I take it that is obviously -- I accept that that is correct. But if that is the case, sir, it's not only Professor Andersen that is impacted by any view that you would take -- let us say, in a very extreme situation, you were to come to the conclusion that Mr. Andersen came here because he was paid to come here, that would, in that very unlikely and extreme situation, have a bearing on the credibility of Professor Andersen, and any impugning of his credibility must have a bearing on the view that you take on the outcome of the second GSM competition, and that must impact upon my client.

The third matter, Chairman, and it's perhaps a delicate and a difficult one, but you, in one sense, are to be admired and complimented for your desire to protect the good name of the counsel who are retained by you in circumstances where criticism is made of them and where it is understandable that you would not wish to have them called to give evidence which would result in you having to adjudicate between those lawyers and whatever evidence was critical of them, but I'd have to suggest to you, sir, that that, as it were, dichotomy and that separation between you and what I might describe as your non-independent lawyers, is not a real one, because you have ruled that, in fact, the Tribunal is a collectivity of you, as Sole Member, your lawyers and administrative staff, and therefore, to the extent that there is criticism of your lawyers, that, unfortunately and inevitably, must reflect as a criticism of the Tribunal collectivity, and for you, sir, not to allow cross-examination of this witness in relation to allegations that he has made and which are contained within his statement and which are documented in the booklet that we have been furnished, is not just to protect the lawyers who are individually named and criticised, but it is to prevent, in a very real sense, criticism of this Tribunal. And this Tribunal, as a Tribunal, must, in my respectful submission, be able to withstand the scrutiny of criticism in relation to its operations.

The fourth matter, sir, is that this material which we have been provided with, in a very real sense opens what you might describe as the appalling vista for you, sir, that it calls into question the decision taken, in 2002, to

commence an inquiry in public into the award of the second GSM licence. Because if Professor Andersen is correct and if he had given information to the Tribunal and was prepared to assist the Tribunal and had explained to the Tribunal what had happened, but, notwithstanding that, because of a perception on his part that there was bias on the part of the legal representatives to the Tribunal, it must be relevant, in ensuring that the public are aware of everything that has happened in the conduct of this inquiry, that we should be entitled to explore with Professor Andersen whether there is any substance to that and whether, in fact, there is an argument which can be made in our closing submissions to the effect that this inquiry shouldn't have been embarked on at all.

The fifth matter, sir, it's very difficult to see how you can adjudicate on Professor Andersen's evidence without having regard to whether he is here willingly and voluntarily or whether he is here as some type of hired gun to give evidence before this inquiry. And if only the Tribunal, and perhaps Professor Andersen's own counsel, are to be permitted to cross-examine him on that, that, in our respectful submission, will have the result that it will be impossible for you to adjudicate on the evidence because that evidence will only have been challenged by two of the many parties who have an interest in the outcome, and it's not the case that you can just adjudicate on Professor Andersen's evidence without having a knock-on effect on the rights of other persons affected.

And for those reasons, sir, I would respectfully ask you to reconsider your decision to allow examination to take place on the O'Callaghan documents which we have been furnished. We say it is important in the interest of the credibility of this Tribunal and in the Public Interest, that those documents, which you have determined relevant for us to see, would be ventilated in public and would see the light of day in the course of this open hearing before the Tribunal.

If, as I anticipate, you do not intend to reverse your ruling, sir, and if this is the last witness appearing before the Tribunal, it does appear to me that the Tribunal is not anxious to have any further participation on behalf of the legal representatives of Mr. Desmond or IIU or Professor Walsh. And if that is the case, sir, then the cross-examination of this witness by me is finished and I would have no further involvement in the Tribunal. But I would ask you, sir, formally to rule on the points that I have made to you.

CHAIRMAN: Do you want to say something, Ms. O'Brien?

MS. O'BRIEN: Just one or two matters, sir, in response to the submissions that have been made by Mr. Shipsey.

Firstly, the production of documents, sir, on foot of the O'Callaghan authority, is an obligation placed on a tribunal, certainly as it's been interpreted by you, sir, in a wide way, to produce to affected persons records of any information or documents provided by a witness before that witness attends to give evidence. Now, it's very important, sir, that the actual intendment of that judgement should be considered and the intendment and protection afforded by that judgement is a protection to affected persons in circumstances, sir, where, for the first time, a witness makes an allegation which impacts on the reputation of affected persons in the witness-box, as indeed was the case in the O'Callaghan decision.

So, in circumstances, sir, therefore, where there is an unscripted allegation which impacts negatively on an affected person, the Supreme Court determined that that affected person must have access to records of any previous dealings of that witness with the Tribunal. Now, there is absolutely nothing, sir, in the evidence that Mr. Andersen has given, which impacts adversely on the reputations of Mr. Desmond, on the reputations of Mr. O'Brien or, as I see it, on the reputations of any of the Departmental Officials, or indeed on Mr. Lowry. So, in those circumstances, sir, I would say that the object of the O'Callaghan decision and the protections afforded by it, do not arise on the basis of the evidence that Mr. Andersen has given.

Now, secondly, sir, in relation to what Mr. Andersen has said in his statement in relation to myself and my colleagues, Mr. Andersen has not been inhibited in any way from giving evidence of those matters. He has been referred to his own statement. He hasn't been inhibited or he hasn't been frustrated in any way in expanding on that. His own counsel will have an opportunity, if there is any additional matter that Mr. Andersen wishes to put, to examine him on that. And in those circumstances, sir, I would say that there is no protection that is required to be afforded to affected persons in relation to that element of matters.

Thirdly, sir, in relation to the allegations that Mr. Andersen has made against myself and my colleagues and, by inference, he sought to visit on you, sir, they are, indeed, allegations that can be pursued. But what I would submit, sir, is that they are allegations that must be pursued in the appropriate forum, and the appropriate forum for those allegations, sir, is the courts and not in this

Tribunal. And indeed, if it is pursued in the courts, or was pursued in the courts, there would be ample opportunity for the Tribunal itself to meet that and for those allegations to be contradicted.

And then, finally, sir, I should say that the reason that these particular meeting notes have no relevance at all to Mr. Andersen's evidence, is that, in fact, in common with what has always been the Tribunal's practice, Mr. Andersen has not been held to any of the information that he furnished to the Tribunal in the course of those private meetings, and, to that extent, sir, they are immaterial to the evidence that he has given. He has made no reference to them, they have not been put to him. It has never been suggested to him that he stated any differently to the evidence that he has given in the course of his testimony to the Tribunal over the last number of days.

So, in those circumstances, sir, they are just the short submissions that I wished to make and put before you in response to Mr. Shipsey.

CHAIRMAN: Well, in regard to Mr. Shipsey's understandable application to review my ruling of this morning, I am of the view that the ratio of the decision in O'Callaghan related, as described by Ms. O'Brien, to the need that affected persons should be put unequivocally on notice of any inconsistency in accounts that may have been given on differing occasions by another person to the Tribunal so as to enable that affected person's legal advisor explore fully and robustly any such discrepancies. The decision, in the first instance, of Mr. Justice O'Neill in the High Court, and in the principal decision in the Supreme Court of Mr. Justice Hardiman, appears, as regards its application to the present facts, distinguishable, and it seems to me that neither Mr. Shipsey nor any other counsel representing affected persons is inhibited in the way that was apprehended in the High Court and Supreme Court decisions.

As to the matters of the background of Mr. Andersen's attendance here this week and last, I believe that what was put in the course of his statements and what was enabled to Mr. Gleeson and to Mrs. Preston will more than adequately ensure that fair procedures are afforded to Mr. Andersen.

As regards the suggestion that in declining to entertain a scenario in which I may have to hear sworn evidence from the counsel appointed to the Tribunal, I am, in effect, seeking to protect myself, I am perfectly satisfied that a situation has arisen in which the basic precepts of natural justice require that I disqualify myself from hearing evidence of those persons or ruling upon any possible or

likely conflicts in recollections of meetings had with Mr. Andersen. I believe it would have been an impossible situation had I envisaged such a scenario, and in making the ruling I did, I did so on what I believe to be the clearest legal grounds, not ones related to either self-preservation or the protection of my counsel from any possible embarrassment.

As regards the decision, some years back, to embark upon the GSM, which indeed has been a long and wearisome process, it appears to me that the decision that I then made after extensive preliminary inquiries had been carried out by the Tribunal legal team, based not just on the matters that have been addressed in Professor Andersen's evidence but on the overall picture of available evidence that was opened in the course of that extensive opening, I believe that was a correct, bona fide and justifiable decision. The fact that it has involved much lengthier hearings than was contemplated at the time does not reverse my view at the time that this was a matter that, in the public interest, had to be inquired into.

And as to the final matter relating to, again, Mr. Andersen and the suggestion that, in some sense, he may be held out on behalf of the Tribunal as being a hired gun, I am satisfied that, from the degree of limited latitude that I am prepared to give Mr. Gleeson as the person primarily representing Mr. Andersen and indeed solely on this occasion as counsel and from what has already been opened in relation to his statements and the background to the entire background, that I am satisfied that fair procedures can be complied with. In these circumstances, I believe we should continue with the cross-examination, and, Mr. O'Callaghan, if you are in a position to take up matters. We are now at 3 o'clock. I had indicated a break to Professor Andersen at some stage if we are going on 'til 5 o'clock, and I suggest that, perhaps, we take some 40 minutes now and then a short ten-minute break.

THE WITNESS WAS EXAMINED BY MR. O'CALLAGHAN AS FOLLOWS:

286 Q. MR. O'CALLAGHAN: Professor Andersen, I appear on behalf of Denis O'Brien, and I just want to start, in the first instance, by thanking you, on behalf of my client, for coming to this Tribunal and for devoting two weeks to giving evidence.

Professor Andersen, you have been through, in quite microscopic detail, explanations as to the evaluation process that was used leading to the winning of the competition by Esat Digifone. But can I ask you, as a first question, if, in general terms, you could outline to the Chairman why it is that you believe Esat won the mobile

phone competition?

A. Well, I think that will be answered by making reference to what we have just been through with Mr. Shipsey, primarily that a well-structured evaluation process went on with the so-called ten sub-groups and with scorings as laid out in my response to Mr. Shipsey. These scores were subsequently inserted in the first Draft Evaluation Report on the 3rd OF October, 1995, and it has appeared that the scores and the aggregations show A3 as -- sorry, A3 as number 2 and A5 as number 1. And following the process in the Steering Group, there was adoption of this result. So, everybody involved, together with seven of the AMI consultants, on a unanimous basis has actually recommended the Minister to enter into licence negotiations with A5.

287 Q. You were recorded as stating, Professor, that the bid submitted by Esat Digifone was a particularly good bid and one of the best bids you had encountered, is that correct?

A. That is correct, yes. And that is not only my perception, but it is, I believe, stated in a memo drafted by AMI, so it is AMI's view and also the collective view of the seven AMI consultants involved in the process.

288 Q. I know it is 15 years ago since you reviewed the Esat bid, but are there aspects of it that you recall which stood out to you as being exceptionally good?

A. With regard to the A5 application?

289 Q. Esat, which is A5?

A. Yes. I think that the documentation and evidencing of the application and the offerings made in the application was exceptionally good. I also think that the technical aspects of the application was exceptionally good, just to take two examples that comes on top of my head.

290 Q. I also recall reading somewhere, Professor, that the Project Group, and perhaps you, were impressed by the fact that Esat had a high level of preparedness for establishing the mobile phone network, is that correct?

A. Yeah, that is a further explication of what I call documentation and evidencing, because at the time, as experienced consultants, AMI would typically distinguish applications in several categories. One category of application would be what we would call "off-the-shelf" applications, meaning that we would be able to detect, as evaluators, that one application was just written off from another maybe previous application from an international consortium in another context. So that was the "off-the-shelf" type application. Then there would be a middle category of a good application meeting the requirements of the tender document and with some local touch, if I may use that expression. So that would be the

second category. The third category would be what we label as pre-implementation, and by pre-implementation I would refer to the fact that the A5 applicant had made, for instance, planning permission, draft planning permissions, A5 had concluded its branding process with not only the company paper but also the logo, and stuff like that, and, in addition to such a thing, there were also advertisements, even, how to do the launch campaign for this company with advertisement films, and stuff like that. I am just picking some examples because I could give you more, but that is what we would then label a pre-implementation; that is to say, an applicant who has not only provided response to the RFP document, but had acted in such a way that the company behind the applicant had already taken a number of means of measurement in order to kick-start the commercial launch of the company. And what I say here is that the A5 application was in the latter category, the pre-implementation-type application.

291 Q. Can I ask you, Professor, from your exceptionally broad knowledge of mobile phone competitions, is it usual that an applicant fits within that pre-implementation category?

A. No, that is unusual.

292 Q. What percentage of applicants in mobile phone competitions that you have appraised, would fit within that pre-implementation category?

A. Very, very few. Very, very few. And I have not seen an application ever, I believe, with that degree of pre-implementation.

293 Q. As a Scandinavian, Professor, you would also have been aware of Telenor at the time back in 1995, isn't that so?

A. Not particularly. Telenor is a Norwegian-based company and they would not have had any activity in Denmark, for instance, my home country, in that, but, of course, I would be aware of them as well as any other of the multinational mobile operators.

294 Q. And your knowledge of them, is that something that would have provided you with confidence about the Esat Digifone consortium?

A. Some confidence, yes.

295 Q. You also were present, I believe, Professor, at the presentation in September 1995, which was led by my client, Denis O'Brien, on behalf of Esat, isn't that correct?

A. Sorry, I didn't get the question.

296 Q. Were you present at the presentation made by Esat Digifone in September 1995?

A. Yes, I was.

297 Q. Can you tell the Chairman whether you were impressed by that presentation by Esat Digifone?

A. Well, as an experienced consultant having conducted a number of these presentation meetings in other jurisdictions, I would always have some kind of reservation personally as how to be impressed, because during such presentation meetings, also some marketing and some marketing gimmick is taking place, so you would always have to deduct something and that was definitely also the case with your client's presentation. But, that having been said, if I take some of my colleague consultants and speak about their approach to this, I do recall that even Marius Jacobsen, the very experienced founding father of GSM, he was hugely impressed by the technical presentation during A5's presentation meeting; that is to say, how did they present the roll-out of the network, how did they present the cell structure, how did they deal with hot-spot and propagation issues and how did they respond to very tricky questions on international roaming plans and stuff like that.

298 Q. Professor, you worked with the Danish telecommunications regulator's office from 1983, isn't that correct?

A. That's correct, yes.

299 Q. And prior to that, I think, or maybe subsequent, but you have a Bachelor in Business from Copenhagen Business School, is that so?

A. Sorry, I didn't get that.

300 Q. Have you a Bachelor's Degree in Business from the Copenhagen Business School?

A. That's correct, yeah.

301 Q. And I think you are a doctor of political science, is that correct?

A. No, that's overstating it. I think -- I am at the level --

302 Q. I am confusing you with Mr. McDowell, I beg your pardon.

A. I am at the level of Ph.D., and, you know, the external lectureship I got at Copenhagen University actually implied or required me at the level of Ph.D., and I passed that. So that's as far as I can bring my own qualifications.

303 Q. Are you still involved in running mobile phone competitions for countries around the world?

A. No, not at this stage.

304 Q. But you have, as you told Mr. Shipsey, been involved in approximately 200 competitions around the world?

A. Yes, and from time to time I also give a little advice here, a little advice there, but I am not personally involved in any competitions now.

305 Q. In respect of those approximately 200 competitions, out of how many of them, or rather, how many of them have you ended up before a tribunal or a court having to explain the work that you did?

A. Well, I would rather limit it, the answer to your question, to countries.

306 Q. Please do.

A. It's only Ireland where there have been legal issues.

307 Q. Is there assistance you can give to the assembled Irish people in this hall as to what it is about Ireland that you believe makes it the only country where your work has been challenged?

A. I have speculated quite a bit on this, because it is a matter of fact that I think that all types, almost all types of tenders here in Ireland have been subjected to at least some kind of Judicial Review. If I take them one by one. We have this GSM2 tender. We have also been talking about the GSM3 tender, which Michael McDowell, by the way, is also familiar with, but it is also a matter of fact that we assisted the Office of the Director of Telecommunications Regulation on two instances with other tenders, mobile tenders, which ended up in legal review: one was the FPW PNP tender and the other one was the FWA tender. And it's just a matter of fact. I am really not able to understand why.

308 Q. Okay. We have looked in detail, Professor, at the evaluation mechanism that is used by different countries in order to determine who should win a mobile phone licence. But, at a high level, what should the objective of a state be when it is about to give out a mobile phone licence? What should the Minister of the state be trying to achieve through this mobile phone competition or grant?

A. That's a telecom policy-type question, and I think that my answer has to differentiate where a particular country is in that process of liberalisation which a tender is an expression for, because, when you tender, it is a kind of liberalisation; the state is handing out frequency spectrum. That is, in essence, all it is about. It's as simple as that. The Irish State hands out frequency spectrum, full stop.

309 Q. Well, would you agree --

A. But that is a liberalisation process. But the specific answer to your question is then that, in my view, the policy considerations are of one type when you do a GSM2 tender, but of a different type when you do other type of tenders. When you do a GSM2 tender, your primary concern is to introduce competition into a market for the first time, and, thereby, just getting successful competition into the market is a very important policy consideration, which was also, at the time, the philosophy and the backup from the EU Commission.

When you subsequently hand out more spectrum, you can

differentiate your policy considerations. For instance, to concentrate on low tariffs, that could be one policy goal, and which was the policy goal of the third mobile licensing process, but it could also be special coverage, for instance, in rural areas, or whatever, which was the policy goal behind the introduction of FWA in this country.

310 Q. But the objective of the Irish Government, in granting GSM2, in your opinion, was to establish competition in the mobile phone network in this country?

A. Exactly.

311 Q. And do you believe, from what you know of the network that operates in this country, that that was achieved through the grant of the mobile licence to Esat Digifone?

A. Yes, that was achieved.

312 Q. Are you aware of any examples, Professor, where countries have granted mobile phone licences to consortia that have simply not been able to perform the function?

A. Let me just try to be clear on your question. Is your question confined to GSM2 operations?

313 Q. No.

A. Because I would be aware of -- there will be examples out there that when you introduce GSM4 or GSM5, or whatever, that a fourth or the fifth mover is less successful than the second mover. But I am not aware of any example of GSM2 operators, that is to say second movers that did not turn out to be successful. You can just take the example, for instance, of the UK, where you see Vodafone was the second mover in that market and became a hugely -- became, and is, a hugely successful multinational operator. And it was, practically speaking, the same in all European member countries that the GSM2 operators were successful.

314 Q. Professor, could I ask you to look at Book 90, which deals with contractual documents. If I could ask you, in the first instance, to look at Tab 1, which is a letter from you to the Department dated the 19th of July, 1994, in which you indicate to the Department that you are aware that a GSM tender will be launched in Ireland and you express your interest in getting involved.

Can I ask you, how did you know that a competition was coming up in Ireland when you wrote this letter?

A. Well, I think that I wouldn't recall exactly how, but just to put it into context: The EU had a timetable, and earlier today I called Ireland a laggard, that was the terminology that the EU civil servants used, because Ireland was already, at this stage, a little bit behind what I recall to be the EU timetable.

315 Q. So it had to have a competition shortly?

A. It had to come, and it had to come quickly.

316 Q. And the decision had to be made quickly, would that be a fair follow-on from that?

A. That would, maybe, stretching it too far.

317 Q. Could I ask you to move two pages forward in Tab 1, and you'll see you have a section in your document entitled "Introduction," and if I could just refer you to the third-last paragraph in that, Professor, where you say: "In order to address the various needs of our clients, our core skills include the following broad categories: Management and strategic aspects, marketing aspects, technical aspects, legal aspects and financial aspects." Are they aspects that are important in assessing a GSM application or are they simply aspects that are important to any GSM process at all, whether it's an application or not?

A. Well, they are important for a GSM tender process, that's for sure, and they are not equally important for each and every task you could have in this field, because we could also assist, for instance, regulators with interconnection regimes, that would be drawing on financial expertise, for instance, or tariff expertise, that would be drawing on the marketing expertise, whatever. So these aspects here are particularly important with regard to GSM tender expertise.

318 Q. Could I ask you to turn to the next page, please, Professor, and if I could just open the top asterisk where you outline the services provided by Andersen, and you state: "Our services are geared to the specific needs of our client. Often, the client requires a highly integrated multidisciplinary package. We develop a tailored solution to each client and not just a standardised concept labelled service management, quality manage or TQM."

Would you agree with me, Professor, that in the instance of the GSM2 competition in Ireland, you weren't able to provide a fully-tailored service to the Irish Government because it had put out the RFP prior to you getting involved?

A. That's correct, yes.

319 Q. And did that make your involvement in this competition more difficult than your involvement in other competitions where you were involved from the beginning?

A. Yes, it did.

320 Q. And in particular in respect of the evaluation process, did it create difficulties in that?

A. Yes, it gave particular problems with regard to what we have been over the previous days, related to quantifications.

321 Q. Could I ask you to go to Tab 4, please, Professor. This is an internal departmental document which you wouldn't have

seen at the time, but, in it, Mr. Towey, of the Department, outlines the prospective consultants that are to be, or could be engaged by the Department, and they are yourselves, Deloitte & Touche, KPMG Peat Marwick, PA Consulting Group, Citibank, CLC Consulting Inc. Are those other five entities mentioned there, Professor, were they your competitors at the time back in 1994 or 1995?

A. Yeah, it seems so, but at that time I would only know number two, namely Deloitte & Touche, because I was a partner with Deloitte & Touche before I established my own company, AMI. I was actually partner for the International Telecom Advisory Group in Deloitte, so I would know them, but I would not have a specific knowledge of the others.

322 Q. Are you aware whether Deloitte & Touche and/or the others were involved, prior to this, in evaluating mobile phone competitions?

A. No, they were not -- they were not known by me to have given advice in other tenders, no.

323 Q. How many competitors would AMI have had back in 1994 and 1995 in terms of the services it was providing in respect of mobile phone competitions?

A. Very few, I would say.

324 Q. Were there -- was there anyone else in the market providing the same sort of service that AMI provided?

A. Not that I was aware of. If you compare AMI with Deloitte & Touche and KPMG, for instance, just to take that into consideration, AMI was a specialised self-contained company, whereas Deloitte & Touche and KPMG obviously is part of a multinational chartered accountant-type organisation, so they would not have been recognised as niche specialist, as were Andersen Management International, and if you look at PA Consulting Group, they would have telecom expertise, but they were most frequently assisting operators and not regulators. AMI, I believe it's fair to say, was recognised at the time as being a regulator's consultant within this very specialised field.

325 Q. Throughout all your time being involved in mobile phone competitions, did you ever encounter Mr. Peter Bacon as an individual who provided assistance to countries or was involved in mobile phone competitions?

A. No, I have never heard of him until there was -- yeah, a report sent to me by the Tribunal in, I believe, 2004 or 2005, whatever.

326 Q. Could I ask you to go to the next tab, Tab 5, please, Professor, and this is a letter from Mr. Brennan dated the 13th of February, 1995, and at the second paragraph he says: "Having carefully examined the expressions of

interest, I am now pleased to inform you that your company is one of the six which will be invited to submit a detailed tender for the assignment. Detailed tenders will be requested formally when the GSM competition is announced..."

Can I ask you, Professor, first of all, do you recall receiving this letter back in February 1995?

A. Yeah, I think I would receive it, yes.

327 Q. Did it surprise you that you were only going to be asked for your detailed tenders once the mobile phone competition was announced in Ireland? Do you see the sentence there, the second sentence, "Detailed tenders will be requested formally when the GSM competition is announced..."? Do you recall whether that surprised you at the time?

A. I would think it would have surprised me, yes. But talking about my recollection 15 years ago, I cannot recall it with certainty, or anything.

328 Q. Well, looking at it today, do you agree with me that it does indicate again that the State was only proposing to get consultants involved after it had announced the mobile phone competition?

A. Not necessarily, because other consultants could have been involved prior to this, to their retention of, potentially, AMI as consultants.

329 Q. And I think there were what were referred to as some smaller consultants involved earlier on in this process, isn't that correct, Professor?

A. Maybe the assignment was small, but I think it was said to me later on that it was KPMG, so it was not a small firm, but the assignment might have been small.

330 Q. But do you know whether KPMG, when they were providing the service to the State at that time, whether it was taking into account how the bids would be evaluated subsequently?

A. No, I don't know.

331 Q. Could I ask you to go to the next tab, Tab 6, please, Professor.

A. Yes.

332 Q. And this is just the document that's been sent out to you looking for a tender. And if you look at the fourth paragraph down, I just want to open the second sentence in that paragraph where Mr. Brennan says, "The chosen consultant will be expected to prepare a detailed report and to mark the bids in order of merit taking all parameters into account, to make statements justifying the ranking and, to the extent possible, quantifying the differences."

So would you agree with me, Professor Andersen, that from the use of the words "to the extent possible," that

Mr. Brennan recognised back in March 1995 that the process of quantification was not going to be an easy one?

A. That's correct.

333 Q. Now, you then submit a bid, Professor, which is contained at Tab 7. Your bid is attached to your letter to

Mr. Brennan dated the 16th of March, 1995, and could I ask you to go to page 7 of your tender?

A. Yes.

334 Q. And what you say here, the second paragraph down, you say, "In addition, we propose that the consultants initially participate in elaborating a document with an outline of the logical links between key legislative and regulatory options as expressed in the RFP document on the one hand and different kinds of evaluation criteria and techniques on the other hand.

"This translates into a final specification of the evaluation criteria which can be grouped around the four categories outlined as follows."

And you then outline those four categories, Professor, which are the marketing dimensions, the technical dimensions, management dimensions, financial dimensions.

And am I correct in stating that they subsequently formed the basis of your evaluation of the bids that were submitted for the second GSM?

A. Yes, that's correct.

335 Q. And, in doing so, as you mention on the penultimate paragraph on that page, you say, "Most attention should be given to the evaluation criteria outlined in paragraph 19 of the RFP document underscored above."

A. Yes.

336 Q. That was a recognition that since the State had put out an advertisement indicating that these were the requirements in descending order, that the evaluation process would have to correspond with that, isn't that so?

A. That's so, but at this stage we would not be familiar with what we were told later on once we were retained as consultants, that the Irish Government had actually approved paragraph 19. So, over time, paragraph 19 became even more important than we realised at this stage.

337 Q. Could I ask you to go to page 25 of the document, please, Professor? And on this page, and indeed on the subsequent page, you give an indication of the countries in which you provided regulatory assistance to countries dealing with mobile phone competitions.

Can I ask you, was the evaluation process that you used in these other countries significantly different to the evaluation process that was used in Ireland for GSM2?

A. No, not significantly different. On page 25, only a few

countries are mentioned, but it is a matter of fact that we participated in many other countries.

338 Q. Yes.

A. But maybe if you want me to qualify the answer, I could say there would invariably be differences between assisting in competitions in European Member State countries and then third-world countries, for instance.

339 Q. And in Denmark, Denmark I think was one of the first countries to establish a GSM network?

A. Yeah, I believe the first, yeah.

340 Q. Were you involved in that competition?

A. Yes, we were actually involved from start to finish.

341 Q. Yes.

A. We were involved even more -- or earlier than the RFP stage because we were also retained already when the legislation was drafted.

342 Q. And that was the first competition in the world, the Denmark competition?

A. I think that was the first in -- on the GSM, yeah.

343 Q. And I think in this application, Professor, if you could jump forward around 50 pages to Annex F in your tender, you include two articles that you wrote and published about the mobile phone competition in Denmark. I wonder if you could manage to get that, Annex F, "Articles on GSM Tenders"?

A. That's correct.

344 Q. And the first article, if you have it, Professor, is entitled "Introducing competition in the mobile telephone field," and this is an article from 1992 edition of 'Teletechnic', isn't that correct?

A. That's correct.

345 Q. And there is a photograph of you, which isn't particularly good, on the front page there?

A. Maybe it wouldn't be better if it was seen in a clear way.

346 Q. Could I ask you just to, in that article, to go forward to page 31, because it gives an indication of how the mobile phone competition in Denmark took place. I just want to open the paragraph under "Public call for tenders" where you write, "As mentioned above, the GSM act was passed by the Folketinget as act Number 744 of 14 November, 1990.

Prior to this, work had been initiated within P&T preparing the call for tenders described in the bill for the purpose of selecting the GSM2 operator. The work was carried out by a GSM Steering Group in which the Telecom Inspectorate (from 1 January 1991, the National Telecom Agency) and the general directorate of P&T participated. The group was assigned the task of organising the call for tenders and the subsequent evaluation of the tenders submitted.

Throughout, a consulting firm was associated and took part

in the group's work."

Are you the consulting firm that's referred to there,
Professor?

A. Yes, correct.

347 Q. Could I ask you then to go forward to the next page, which is page 32, where you write about the evaluation in Denmark back in 1991. If I could just open the first two paragraphs under the subheading "Evaluation." You write, "During the period after completion of the tender documents on 3 December, 1990, up to the submission of tenders on 1 March, 1991, the Steering Group further defined the evaluation criteria on which the tenders received were to be evaluated. The starting point was the legal basis for the invitation of tenders, see above, in which the general conditions for selecting operators had been specified. Also defined were some evaluation criteria which followed the general structure of the tender documents, i.e. market-related, economic, technical and management-related aspects. Finally, it was pointed out that the evaluation should employ a holistic approach. This was also in close conformity with the conditions on which the act was based. Within this framework, the appraisal methodology was defined, including how marks should be allocated to different aspects, so that it would be possible at the final evaluation to compare the tenders submitted on the basis of a previously decided appraisal scale."

So am I correct in stating there, Professor, that your job in the GSM2 in Denmark was considerably easier when it came to evaluation because you were able to prepare, from the beginning, the type of issues which were required to be submitted by applicants?

A. That's correct.

348 Q. And you also note in it, even though that you can quantify or evaluate the bids, that you still are going to adopt a holistic approach in Denmark?

A. Yeah.

349 Q. What is the advantage of a holistic approach in Denmark, which was also the approach that was applied in Ireland?

A. The advantage is that if you do a beauty contest application of the tender, then you are able to clearly focus on a broad perspective as to how -- as to who is the best applicant. You would be able to work also in your underlying methodology with some kind of flexibility.

350 Q. Could I ask you, Professor, to go to page 33 of your article, and the last paragraph on that page where you write, "In the evaluation phase, the four tenders submitted, as well as the tender received from Tele Danmark, were examined a number of times. The analyses

which formed the basis for a final Evaluation Report generally composeddd the following:

" -- a technical scrutiny of all tenders to ensure compliance with the requirements of the tender documents.
" -- a number of statistical comparisons; this was possible because a number of requirements for statistical data had been specified in the tender documents."

Isn't that the very point that we have a problem with in Ireland when the competition was announced?

A. Exactly. And here we are talking about experience four years earlier than what transpired in Ireland in 1995.

351 Q. You continue:

" -- evaluation and marking in accordance with the criteria laid down by the Steering Group before the expiry of the tendering period.

" -- a number of supplementary analyses in priority areas, where significant differences were noted between the tenders submitted, in order to test and support evaluations and marking."

And, Professor, could I now ask you to go to page 35, where there is a subheading entitled "Preparation for the political decision." Do you see that?

A. Yes.

352 Q. And if I could just take you to the third paragraph of that section where you say, "The result of the consideration by the Government's coordination committee was that on 30 May, 1991, the Minister was able to announce that the consortium Dansk Mobil Telefon had been selected as the GSM2 operator in Denmark."

And we know, Professor, that the tenders were submitted by applicants on the 1st of March, 1991, for the Danish competition. So within a period of three months, the Danish Minister had announced the result, is that so?

A. That's correct.

353 Q. So when you look at the Irish decision-making process, which was the tenders were received in in August, the beginning of August, and the decision was announced by Minister Lowry on the 25th of October, there isn't any significant difference; in fact, they are comparable with what happened in these two countries?

A. That's more or less the same time-frame, yes.

MR. O'CALLAGHAN: I was just moving on to another topic, Chairman. I don't know if you wish to rise?

CHAIRMAN: We'll take the ten minutes now if that's in ease of you, Professor Andersen. Thank you.

THE TRIBUNAL ADJOURNED AND RESUMED AS FOLLOWS:

354 Q. MR. O'CALLAGHAN: Professor Andersen, you also wrote an article in the January 1995 edition of Mobile

Communications International entitled "Awarding Mobile Licences." Could I ask you to look at that. It's just after the previous article we looked at.

A. Yes.

355 Q. And I suppose this is particularly useful to the Tribunal because it's written in 1995 just prior to you becoming involved in the Irish process. I just want to open a couple of paragraphs and then ask you questions on them. And if I could open the second paragraph of the article, which says: "Much attention has been focused on the GSM licensing process in Denmark indicated by recurrent questions such as, how did you manage to be the first country in the world with two GSM systems with nationwide coverage? And the country with one of the highest mobile penetrations? And the lowest tariffs?

In fact, there is a simple answer given later in this article. Before jumping to the conclusion, however, we would like to derive the general regulatory philosophy behind the licence awards, summarised by a cornerstone approach that includes:

"1. Setting the stage by laying down a sound regulatory framework for competition within the mobile field.

"2. Framing the tender by elaborating detailed tender specifications closely related to the evaluation criteria."

If I can just pause there, Professor. Even in 1995, you believe that a cornerstone of a successful GSM network was that you had a tender that was framed by specifications which closely related to the evaluation criteria, isn't that correct?

A. That's correct.

356 Q. And we didn't have that, unfortunately, in Ireland?

A. No.

357 Q. Could I now ask you to look at the last two paragraphs on that page under the subheading "Framing the Tender". This is about Denmark again.

"Once the legal background for the best application method is established, it becomes crucial to develop tender specifications that allow for a comparative evaluation of the prospective bids. This is the second cornerstone of licensing. Some countries have learned that without comprehensive tender specifications, incomparable applications are likely to appear. In turn, the whole process can be protracted as occurred with the GSM2 tender in Norway.

The Danish, German and Dutch GSM tender documents are prime examples of tender documents which specify the requirements of the applications in such a way that comparative evaluations are possible."

So again, am I correct in stating that the Irish bid is different from the Danish, German and Dutch bids and more comparable to the Norwegian bid?

A. Exactly.

358 Q. What happened in Norway?

A. Well, in Norway, they faced relatively huge difficulties of evaluating the applications, because essentially there was no tender document.

359 Q. And the Government just said put in applications for a GSM2 network?

A. Yes. And therefore, the decision process took a very long time in Norway.

CHAIRMAN: Did it present similar difficulties as regards having a separate and self-contained quantitative evaluation, from your recall?

A. Yes, yes.

360 Q. MR. O'CALLAGHAN: On the second page of your article, on the left-hand side column, near the bottom, there is a subheading. This is slightly difficult to read, Professor, but I'll read it out and then ask you questions on it.

Subject heading is "Evaluating applications and nominating the best applicant.

"Overall consistency between the politically-approved selection criteria, the tender requirements and the applied Evaluation Models, is important to safeguard transparency and objectivity throughout a tender. If there is logical consistency between these three cornerstones, the outcome of the tender is likely to be robust against criticism and illegitimate licence hunting."

Could I just ask you, Professor, what is "illegitimate licence hunting"?

A. That is a situation you have seen, for instance, in African countries where you can try to go into a regulator of some kind and then buy a licence.

361 Q. Okay. That paragraph continues: "Comparative evaluations and hearings may be time-consuming and expensive but they help the regulator and their consultants to assess how the different business cases will affect various competitive scenarios. Some of the critical stages of an evaluation are predictable. Does the applicant have a thorough knowledge of the market and have sufficient market analyses and pre-feasibility studies been undertaken? What are the weaknesses and strengths in the consortium? Do complementary skills add up to a beautiful and competitive award? When will the applicant be fit for battle in the marketplace?"

How does the track record of the consortium and its members relate to the competition within the mobile field?

Are there risks of loss and" -- something -- "in duopolies or monopolies that could be avoided by nominating another set of potential licensees?

In summary, which operators will best meet the requirements of the market and deliver the best and least expensive services to the customer?"

Those categorisations you have set out there, Professor, is it fair to say that they constitute what is a holistic approach to the evaluation and choice of a mobile operator?

A. Yeah, I believe that's fair to say.

362 Q. And at this time, was there a debate in Europe, Professor, between those who said "Let's just sell off a licence to the highest bidder," and those, such as yourself, who were saying, "Well, that really isn't sufficient. We need to do a proper regulatory mechanism in order to ensure we get good service in the long term"?

A. Yes, there is a big difference there.

363 Q. And I think just the last subheading on that page, page 85, it's entitled "Best application and competition," and just five lines down from the top, it says: "The best application method involving comparative evaluations has proven to be superior to lotteries and auctions as long as the regulator has a consistent approach to maintaining and sustaining competition, even in a dramatically changing technological environment."

And then at the beginning of the next paragraph, you state, "The European Commission should be supported in its pleas and demands for best applications and comparative evaluations expressed in the Green Paper on Mobile Communications."

Am I correct in stating, Professor, that, at that time, the European Commission was stating there should be this holistic view about the best choice and there should be a comparative evaluation of competitors before licences are granted?

A. Exactly. That was what was mentioned in the Green Paper from the EU Commission and the best application method is mentioned as a term in that Green Paper.

364 Q. Do you recall, Professor, whether the Green Paper specified that you had to have a quantitative evaluation in order to assess this?

A. No, it wouldn't have.

365 Q. And then just the bottom of that column, the paragraph: "Indeed, persistent focus on competition has been one of the single most important factors when evaluating the outcome of the Danish cellular licence. Obtaining the least expensive and best possible services has been achieved by the earliest nationwide coverage, a variety of

different services," and the other two I don't need to refer to.

I just want to open the last paragraph of the article to you, Professor: "When awarding mobile licence, regulation and competition can be viewed as two sides of the same coin. The Danish experience supports the viewpoint that the introduction of competition based on a well-prepared and implemented tender process followed by an appropriate regulatory regime, light-handed but proactive, can give substantial benefits to customers."

And those two articles, Professor, relate to your experience of what happened in Denmark and what happened in other countries. Did you try to apply to the Irish GSM2 competition the principles that you enunciated in these two articles?

A. Yes, to the extent possible. You have just summarised that there were two hallmarks in the end of this article, a well-prepared tender and an independent regulatory regime. None of the two hallmarks were present in this country in 1995.

366 Q. And I think they were subsequently in GSM3, is that correct, Professor?

A. That's correct.

367 Q. Did you have an input into the tender document in GSM3?

A. Concerning GSM3, AMI was retained as consultant from start to finish, yeah.

368 Q. So we learned the lesson. Could I ask you, Professor, now, to go to Tab 10, please, and we have the agreement between AMI and the Minister at the time. And if you could go to the second page of that and Clause 1A of the agreement, and this was what you, in AMI, agreed to provide the Minister back in June 1995. And it is "The development of an Evaluation Model for applications for the GSM licence based on the selection criteria at paragraph 19 of the GSM tender document in accordance with the principles outlined in paragraphs 3.2.1 and 4.2.1 and section 5 of the consultancy tender."

Would you agree with me that there is nothing there which requires you to provide a quantitative evaluation?

A. No, there is nothing there to provide that.

369 Q. And if you turn over the page to paragraph (d), the contract provides that you have to "Ensure there is a detailed evaluation of the applications for the GSM licence in accordance with the Evaluation Models developed pursuant to (a) above and in accordance with the process outlined in paragraphs 3.3.1 and 4.3.1 of the consultancy tender."

Now, does that include, in the consultancy tender, an indication that some quantification assessment is going to

be carried out?

A. There was a what I call flexible model described in the tender comprising both quantitative and qualitative techniques, yes.

370 Q. And Clause E requires you to provide a "Comprehensive written report on the outcome of the evaluation," isn't that so?

A. That's correct.

371 Q. And ultimately, that's what you provided in the report of the 25th of October, 1995, isn't that correct?

A. That's correct.

372 Q. Could I ask you to go to Tab 13, please, Professor.

A. Yes.

373 Q. Now, at this stage on the 8th of August, 1995, the bids have been received, isn't that correct?

A. Yes.

374 Q. And can I just open the last part of this fax from you to Fintan Towey. The last four lines, you say, "In addition, I already now foresee that we are under-staffed re, in particular, tariffs, in which area I foresee that it will be more difficult to compare the applications than expected."

Why did you foresee at that stage that it was going to be more difficult to compare tariffs?

A. That was on the basis of the information we had got in the applications.

375 Q. So you had had an opportunity to look at these applications?

A. Yeah.

376 Q. And you realised "this process of evaluation is going to be more difficult than I thought initially"?

A. Yes. At this stage, we would already have tried to look at the OECD basket, to take one example.

377 Q. But the primary difficulty was that, because the way the RFP was framed, that you didn't have an opportunity to ensure that when information was coming in, it was coming in in a comparable basis?

A. Yes.

378 Q. Could I now ask you to go to Tab 14, please, and this is a fax from you to Fintan Towey dated the 15th of August, 1995, so you now have the bids for a period of ten days, or so, and if I could open paragraph (c) to you. You say, "Through the concerted efforts of the AMI team, a number of uncomparable matters have already been identified, as well as some of the applications lack conformance with the tender specifications. Prime examples are tariffs, metering principles, interaction assumptions, blogging and drop-out rates and IRR. Other examples may appear during

the next couple of days. Consequently, the AMI team recommends in writing to request applicant-specific questions in accordance with the provision made in paragraph 16 of the RFP document. AMI would like to receive a decision on the matter from the Department ASAP."

So the consequence on this lack of comparability between the bids is that you were advising the Department that "we need to get more information from the applicants"?

A. Yes.

379 Q. And if you turn over the page, within that tab, Professor, at paragraph E, you are informing the Department that "It has been decided to begin the qualitative evaluation as follows with sub-group meetings concerning each identified dimension. Each sub-group should comprise at least three persons, preferably more, of which only two are identified at present."

And am I correct in stating, Professor, that what you do thereafter is you identify the ten sub-groups and the two individuals from AMI who will be part of those groups?

A. That's correct.

380 Q. And MT is a reference to Michael Thrane, is that correct?

A. That's correct.

381 Q. MMA is a reference to yourself?

A. Correct.

382 Q. OCF is a reference to Olaf Feddersen?

A. Correct.

383 Q. MJ is a reference to the father of GSM, Marius Jacobsen?

A. Yes.

384 Q. And MIV is Mikkel?

A. Vinter.

385 Q. Vinter, okay. And to these sub-groups was added the individual from the Department or from the Irish side, isn't that correct?

A. It's correct. And as I have explained earlier, I think this was not implemented in exactly this way proposed by me, because it was implemented in such a way that there were at least two civil servants from the Department present, etc., so you should read this as a suggestion for me in order to -- yeah, in order to get feedback from my client, and when I subsequently got feedback from the Department, some of this was slightly changed, I would say.

386 Q. And did you choose the AMI individuals for each sub-group based on their expertise within those sub-groups?

A. Exactly.

387 Q. Could I now ask you to go to Tab 16, please, Professor, and this is a fax from you to Mr. Towey dated the 22nd of August, 1995. If I could ask you to look at the second page, where you begin by stating, "We think that you are

owed the information that we are moving quickly forward with the evaluation although the evaluation turns out to be somewhat difficult. A more precise status can be outlined at the forthcoming PTGSM meeting, where we intend to present the preliminary results of the quantitative evaluation, a spreadsheet of the quantitative comparisons, some graphical comparisons and the preparations for the applicant's presentation."

What did you mean when you told the Department, Professor, that the evaluation was turning out to be somewhat difficult?

A. This relates to the fact that some of the quantitative information was not comparable.

388 Q. And if you look at paragraph C on that same page, you state, "In order to compare the applications on a fair basis, it has been agreed with the Department to pose written applicant-specific questions in accordance with the provision made in paragraph 16 of the RFP document." So, again, you are emphasising, on the 22nd of August, 1995, that fairness requires that the applications be compared, but they can't be compared based on the information you have?

A. No, that is correct.

389 Q. Can I ask you to go to Tab 17, which is a letter from Mr. Brennan to you dated the 29th of August, 1995, and this is when there is a dispute between AMI and the Department arising from the fact that you believe there is a lot more work to be done, and, consequently, you are entitled to be paid more, isn't that correct, Professor?

A. No, I wouldn't say that. You use the term "dispute"; I think that's overstating the point.

390 Q. Okay.

A. I acknowledge that we had a renegotiation, but "dispute" is not the correct term.

391 Q. Okay. But there was a conversation between yourself and the Department about --

A. Yes.

392 Q. -- whether -- the amount of work that was required to be done by AMI?

A. Yes.

393 Q. And the workload was greater, Professor, was it not, because of the difficulty you had in comparing these applications?

A. Exactly.

394 Q. And on the second page of that letter, on the second-last paragraph, Mr. Brennan says, "At this point, I wish to clarify the Department's understanding that the task of evaluating a set of GSM applications is necessarily

unpredictable in nature. It is impossible to gauge the number, volume and complexity of tenders in advance of a closing date. It can be expected that certain elements of the applications received may be more intricate, while other areas may be simpler than anticipated."

So I suggest to you, Professor, that that sentence, or those sentences from Mr. Brennan, indicate that the Department was responding to your complaint about the fact that there was more work to do and that they are not comparable, would that be a fair assessment?

A. That's fair, but I think what Mr. Brennan tries to drive out of this is that we should have been able to foresee that in AMI. So that's where he is coming from.

395 Q. And what is your response to that, Professor? Does he have a point, that you should have been able to foresee this considering --

A. I mean, it was a renegotiation, the term I used before. I think it was the best argument he had.

396 Q. And if I could now ask you to go to Tab 21, and this is a paragraph that Mr. McDowell placed emphasis on. It is the letter from Martin Brennan to you dated the 14th of September, 1995, and the last bullet-point in the negotiations:

"It is being proposed by the Department that AMI shall submit by a target date of 3 October, 1995, unless an alternative date is expressly approved by the Department prior to the said date, a first draft of the Evaluation Report along the lines set out at step 18 of the tender submitted on 16 March, 1995."

And we don't need to go back and look at that, Professor, but it's at Tab 7, page 15, if the Chairman wishes to look at it subsequently.

And you continue, "The Evaluation Report shall contain a quantitative and a qualitative evaluation of all the applications and the results of any supplementary analyses undertaken."

And the point Mr. McDowell was seeking to suggest to you is that why didn't you write back to Martin Brennan on the 15th of September and say, "listen, there can't be a quantitative assessment because it's just not possible"?

What answer can you give to that, Professor?

A. Well, I think that that was unnecessary, because at this stage we are talking about the 14th of September, 1995, and we would already have discussed some of the challenges we faced during this evaluation with the quantifications, so I would know that he was aware of that, and that a separate self-contained report would not transpire on these quantifications but that there would still be quantitative

elements in the holistic evaluation.

397 Q. And as you mention, Mr. Brennan is at the project meetings prior to this letter, where it has already been indicated to him that there is a problem with quantification, isn't that so?

A. Exactly.

398 Q. Can I ask you to go to Tab 22. It's a letter from you dated the 18th of September, 1995, to Mr. Brennan. I'll just open the first paragraph.

"Thank you for your letter of the 14th of September, 1995, concerning contractual matters. Having to deal with a considerable number of voluminous applications, and having to restore some of the information due to lack of comparability, and having to rank the applications, including the nomination of the winner, most certainly requires more work than could be anticipated in our tender from 16 March, 1995."

So again, you are emphasising to the Department, Professor, that there is further work to do because of the uncomparability of these bids?

A. Exactly.

399 Q. Could I ask you to leave that book, Professor, and if you could go to Book 91. And before I open Book 91, which deals, to a large extent, with the involvement of the Irish civil servants, can I ask you, in general terms, what was your impression of Irish civil servants who were involved in the GSM2 process?

A. They were hard-working, always willing to work during unusual hours, and they had a high personal integrity. So they would be -- they would be similar to Danish type of civil servants.

400 Q. You have obviously experienced civil servants in many other countries as well; I am not asking you to identify any other countries, but how would Irish civil servants be evaluated by you, comparatively speaking? You can do a qualitative evaluation of them.

A. Well, seen from an holistic perspective, I would say that it's pretty much the same whether we are talking about Danish, Swedish, Norwegian, Dutch, German or Irish civil servants. It's pretty much the same.

401 Q. And they are committed people, performing a public service?

A. Yes.

402 Q. Did they strike you as individuals who were very scared of the Minister or were enthralled to a Minister in any respect?

A. I don't know what you mean by "scared". I certainly did not perceive them as being scared.

403 Q. Or overborne by a Minister?

A. Pardon?

404 Q. Did you think that they were individuals who, every time they performed a function, they were concerned and worried about what the Minister would say?

A. No, no, not in this project, no.

405 Q. Could I ask you to go to Tab 1 of Book 91, please, Professor.

A. Sorry tab?

406 Q. Tab 1.

A. Tab 1, yes.

407 Q. And this was a note prepared for a Cabinet Committee of the Irish Government in February 1995, and it really sets out the logic and philosophy and proposed mechanism for the competition for the second GSM licence. And if I could ask you, and unfortunately it's not particularly well paginated, but if you could go to page 273, and the pagination is at the top right-hand corner, and there is a section in chapter 11 of this document entitled "The Selection Process".

A. Yes.

408 Q. And I just want to open the third paragraph down after the bullet-points, after it says that "The consultants will be engaged to assist in the process of final selection," it continues: "The highest bidder will not necessarily be successful and this is clearly stated and emphasised in the tender documentation. The documentation indicates 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 therein and specifically with regard to the list of evaluation criteria set out below in descending order of priority."

And it then sets out what we now know are the provisions from the RFP, Professor, in descending order of priority, and that's where the RFP descending order of priority comes from, it comes from this document.

But what is your assessment of the descending order of priority? If you had to draft this RFP from the word go, would you have drafted the evaluation criteria in this descending order of priority? Was there anything fundamentally wrong with it, do you believe?

A. There are a number of things which I would have done differently. I don't really know where to start, but if I could just take the main points of it, would that be okay?

409 Q. Yes, please. I don't want you to be too specific, but just the main...

A. Number one would be that it would have made the -- it would have made things easier if, instead of descending order of

priority, the exact weightings were attached to each bullet-point. That's one example.

A second example is that the wording of some of the criteria are too woolly, in my view, in order to achieve the highest obtainable level of transparency. So they could have been -- they could have been formulated in a more precise fashion. For instance, I mean, "approach to market development," what is meant by that? To take one example. Another example is the third bullet, "the approach to tariffing"; what is "approach to tariffing"? It's not so easy to understand, and you could put more interpretations into that. I acknowledge that it reads "proposed by the applicant which must be competitive," so I acknowledge that it's probably low tariffs, for instance. But why not write "low tariffs" then or "lower tariffs than the existing tariffs in the Irish market"? So, I mean, it could have improved the competitive element of the competition if these criteria were formulated in a way that left less behind with regard to speculation on how to interpret the meaning of these words, and then, also, to specify in a more clear way the weightings.

And, you see, it's implicit in this document that it's difficult to understand, because, both here, but also in a subsequent press release, it is stated that the -- for instance, that low tariffs are important. That's fine. But here, in this paragraph, it is not stated as the highest criteria.

410 Q. Could I ask you to go to Tab 6, Professor, which is the RFP itself that was published on the 2nd of March, 1995, and you'll see, at page 309 of it, that the criteria that were in the Cabinet Subcommittee aide-memoire are replicated in paragraph 19, you see that?

A. Yes.

411 Q. And I am correct in stating that, although it says that they will be evaluated in descending order of priority, applicants are not informed that this evaluation is going to be either qualitative or quantitative, isn't that so?

A. That's correct, they are not informed.

412 Q. They are simply told that "there will be an evaluation of your bid based on these requirements in descending order"?

A. Correct.

413 Q. And all they are told about the evaluation in the RFP, Professor, is what's contained at page 314, using the pagination in the top right-hand corner, where, at the end of that page, there is a section on "Evaluation of applications:

"Independent consultants will be employed to assist with the evaluation of applications."

And nothing is informed about how they will be evaluated. In the other competitions of which you were involved in, were applicants informed as to how their bids would be evaluated?

A. Yes, in a far more precise way, I would say, and now you are pointing out tariffs as point Number 9 here. It says something like there is an expectation that there will be a downward trend in mobile tariffs in the future, and applicants are asked to indicate future tariff regime to which they are prepared to commit themselves. I mean, this is a very vague formulation and does not accord with what I would perceive as best practice to seek binding commitments from applicants pitching on such a criteria, because they could be bound to very exact proposals inserted in a draft licence, for instance. But that is not the case here in this tender.

414 Q. Could I now ask you to go to Tab 8 please, Professor, and this is the note of the third meeting of the GSM Project Group. And, at this stage, you still aren't in the evaluation process, you haven't been retained as a consultant as of yet, but you are the first item on the agenda in the meeting of the 29th of March, 1995, and it says:

"Mr. Martin Brennan gave an update on the selection of consultants. The choice was clearly between Andersen, a Danish consultant, and KPMG, but KPMG was too expensive. Andersen to be pursued on -- timetable of the project, legal expertise in the team and to give a commitment that the fees would not increase over the bid amount. Some difficulties were arising in relation to sanction from Department of Finance."

So even as of the third meeting of the Project Team, Professor, you weren't on board as of yet, isn't that so?

A. That is correct.

415 Q. And then if we go to the next tab, there is the minutes of the fourth meeting of the Project Team, which is on the 10th of April, 1995, and again, there is an update on the consultant, and it says:

"Department of Finance has given go-ahead on Andersen as our selected consultant. Press release is expected on 11 April, 1995, to announce the successful candidate.

" -- first all-day meeting with Mr. Andersen will be on Wednesday, 19 April."

Then just beneath that, under the subheading "letter from Department of Finance," there are three bullet-points I wish to open up to you.

" -- a letter received from Mr. McMeel, Department of Finance, re the weighting of evaluation criteria, was

discussed.

" -- some argued in favour of weighting criteria because of the need to provide clarity for GSM applicants. Others believed that too defined a system would leave the Government only with a rubber-stamping role in the selection process.

" -- no conclusion was drawn, it was agreed to re-open the debate with Andersen."

Now, when you were involved, Professor Andersen, do you recall being part of that debate as to the weighting system?

A. No, not the way it is formulated in the bullet, the second bullet you opened, the bullet reading "Some argued in favour of weighting criteria because of the need to provide clarity for GSM applicants. Others believed that too defined a system would leave the Government only with a rubber-stamping role in the selection process."

I don't recall a specific discussion on that one, and maybe for good reasons, because the paragraph 19 had been approved, I was told, by the Irish Government, so I think if anything additional should have been sent out to the interested parties, then it might have needed another approval procedure.

416 Q. In your experience, Professor, have you ever come across a situation where a Project Team has recommended to a government that a certain applicant be awarded the licence but then the Government decides not to follow that?

A. I think I lost you there.

417 Q. Have you ever experienced --

A. Are you talking about an evaluation report not being approved?

418 Q. Have you ever come across an experience where a government has refused or not followed the recommendation of the Expert Group or the Project Group?

A. No, not from my personal experience, no.

419 Q. And it would have been an extraordinary thing, I have to suggest, if, having got the report on the 25th of October, 1995, Minister Lowry was not to announce that A5, Esat Digifone, had won the competition and deserved to be negotiated with for the licence?

A. Yes, that would have been an unprecedented thing.

420 Q. Could I now ask you to go to Tab 11, please, Professor, and this is the first meeting which you attend of the Project Group and you are accompanied by Marius Jacobsen. And did you regard yourself as part of the Project Group, Professor, or were you advising the Project Group?

A. It was more the latter. We were not -- I was not a formal member of the Steering Group.

421 Q. And at this meeting, at the bottom of the minutes, there is a record, again, of the concerns of the Department of Finance, and it's noted: "This issue was discussed at length again. It was pointed out that the process would be open to legal challenge by the CION if some sort of quantitative evaluation was not preferred.

-- the Andersen approach favoured combining quantitative and qualitative elements for evaluation,

-- giving no guidance as to weighting might lead to the worst-case scenario of receiving non-comparable bids.

Mr. McMeel (Finance) pointed out that the weighting scheme had not been approved by Government and that such a scheme could result in removing the decision-making role from Cabinet, a role which the Government had expressly reserved to itself.

"Common ground was established with reference to the Government's approval of the order of priority in the list of criteria in para 19. It was agreed that the Andersen tender document would be circulated to the Department of Finance and that, pending its perusal, escalation of the issue to the political arena would be avoided."

Now, were you aware at this meeting that there appeared to be internal tension between the Department of Finance and the Department of Telecommunications over the introduction of weightings?

A. I was aware that something was going on, and my perception of it and my recollection of it was that the Department of Finance, they would like to have a tender with an auction-like structure or a very mechanical quantification of applications.

422 Q. And would it be correct to say that the Department of Finance's opposition to weighting was primarily that they were concerned, if weighting was introduced, they mightn't get as much money?

A. That might have been the case, yes.

423 Q. And --

A. I clearly recall that they were very much concerned on the figure they expected to recoup on this.

424 Q. And it's apparent at this meeting on the 19th of April, 1995, that you were favouring a combination of a quantitative and qualitative evaluation, but, of course, you hadn't had an opportunity to inspect the bids at this stage, isn't that so?

A. Sorry, I hadn't?

425 Q. Had an opportunity to inspect the bids from the applicants, because they hadn't come in as of the --

A. They hadn't come in. They hadn't come in. But I think it's correct, as stated here in the second indent, that

it's correctly recorded that I would be in favour of combining these elements, yes.

426 Q. If that was possible?

A. Yes.

427 Q. Can I now ask you just to go to the next tab, Tab 12, and about eight lines down from the top of this note from the Department of Finance, there is a reference to the following:

"Applicants have mentioned the weighting formula in their questions, which have to be responded to by 28 April, and also directly with the Minister for Telecommunications. At this stage, the response will go no further than that contained in the RFP document at paragraph 19; that is to say, the selection criteria, but with no weightings. No commitment will be given that weightings will be released. DTEC are anxious to state that the question of weightings will be discussed with the consultants with a view to determining a way forward. Department of Finance reps asked whether the entire question of weightings could be deferred until after the applications had been received. DTEC could not agree with this approach. The consultants appear to be sensitive to the inter-departmental politics of the issue."

So I think from the answer you gave me previously, Professor, that you were aware of the inter-departmental politics that was going on between Finance and Telecommunications, is that correct?

A. Yeah, it's essentially, essentially, it was about one Department being in favour of an auction-like type focusing on a specific amount to be recouped, and therefore, focusing on the licence fee, and another Department being focused on what was more in line with the EU Commission and the Green Paper which we discussed earlier, namely a beauty-contest-like tender.

428 Q. And at Tab 13, Professor, you will see, in more bald terms, the exact concerns of the Department of Finance. If you look at the third paragraph and six lines down from the top of that, there is a sentence that begins "We contend that there is a danger that the adoption of a weighting formula will turn the selection process into a foregone conclusion and thereby effectively remove the final decision from Government. In addition, there is a further real danger that if a low weighting is attached to the up-front fee element, as the Department of Transport, Energy and Communications seem inclined to do, the scale of that fee will be considerably reduced."

Then just the last line or last three lines of that document:

"For that reason, I have told this Department's representative on the group to insist that no weighting formula be applied or disclosed. They have backed off on this for the present at any rate."

This is a document that went to the Minister, and the Minister, as is indicated in manuscript at the top, shares the concern of the Department of Finance.

Now, that's a concern you were aware of, Professor?

A. Yes, I was aware of the concern. And, you see, it was not easy waters to travel in here because we had a less-than-perfect RFP document and then we had two Departments which had inter-departmental issues and disagreements between them.

429 Q. Now, at Tab 16, Professor, you'll see an information Memorandum that was published by the Department of Transport, Energy and Communications on the 28th of April, 1995. Now, if I could ask you to go to page 5 of that, and the pagination is at the bottom of the page. You will see that there were a number of questions that were received from the applicants about the selection process, and those questions are summarised in the box at the top of the page. Underneath the box, the information memorandum states: "A model to be used to assist in the evaluation of tenders for the second GSM licence is being developed by the Department in conjunction with its consultants. Criteria will be evaluated in the order of priority detailed in paragraph 19 of the tender document. The Department does not intend to publish further details of this model."

Were you involved in drafting this response that was required for the information memorandum?

A. I don't specifically recall. I know that I was involved in drafting responses to the financial, to one of the financial questions, but I do not specifically recall being involved in this. It may be, but I simply don't recollect.

430 Q. But you were working with the Department at the time in developing a model to evaluate, isn't that so?

A. Exactly. And what I think is a matter of fact is that AMI actually provided input to the next section just below the one you read aloud before.

431 Q. Okay. "Financial Capability"?

A. Exactly.

432 Q. So you did play a part in drafting this document in general?

A. I would rather say provide input into, that would be more precise.

433 Q. Okay. And at this time, there was the debate about the weightings to be applied. You wanted and thought it was necessary that weightings be applied, Professor, isn't that

so?

A. Yes.

434 Q. And at Tab 17, there is a letter from the Department of transport to Mr. McMeel in the Department of Finance where the imposition of weightings is being explained and justified. And on the first page, underneath the two bullet-points, if you could look at the fourth line, there is a sentence that says: "The proposed weighting of selection criteria is simply a tool to ensure that this recommendation is made on a fair, objective and transparent basis."

Now, do you agree with that, Professor, that the whole purpose of weightings was so that the competition would be fair?

A. Yes. But I am not saying 'yes' in all instances. I think that the RFP document is what it is in paragraph 19. I mean, any applicant that entered into this competition would have read, hopefully have read, the evaluation criteria in paragraph 19 where they are set out in descending order of priority. So unless the evaluation or the outcome of the evaluation departed from these criteria, no one could say that it was not transparent or that it was unfair, if you know. But it is also correct that the more precise you formulate the evaluation criteria and the more you disclose exact percentage space weightings, the more transparent you can get a tender.

435 Q. This letter from the Department of Finance, on its second page, Professor, purports to record your view on the weighting. If you look at the second paragraph on that page, it says:

"The weighting approach is also, as you are aware, strongly favoured by the chosen consultants, Andersen Management International, in order to carry out the first stage of the evaluation viz the quantitative method. However, given that Andersens propose to carry out a qualitative analysis and supplementary analysis in particularly difficult areas, I am confident that this allows flexibility to ensure that a perverse result does not emerge. This matter will be discussed further at the GSM Project Group meeting on 18 May, 1995, on the basis of a presentation by Andersen Management International."

Is it the case, Professor, that if you simply have a quantification analysis on its own, that you can have perverse results?

A. Yes, indeed.

436 Q. Sorry, please continue.

A. I said, yes, indeed.

437 Q. Oh. And the whole purpose of a qualitative analysis and a

holistic approach is to ensure that you don't have that perversity?

A. Yes.

438 Q. Could I now ask you to look at Tab 18, and this is the document you prepared on the evaluation, quantitative and qualitative evaluation on the 17th of May, 1995, isn't that correct?

A. That's correct, yeah.

439 Q. And I don't propose to go through it in inordinate detail, but could I ask you to go to page 6 of 19, and the pagination is at the bottom right-hand corner, and this is a copy of Sean McMahon's and this is his reference, or his comments at the top right-hand corner in manuscript on what appear to be the quantification aspect of the evaluation.

He says, in bullet-point:

" -- market development is more than just number of SIM cards.

" -- AMI agrees but very difficult to provide for assessment of traffic figures.

" -- may be best to combine this with traffic tariffing and do a combined quantitative measure.

Agreed AMI will look at this."

So when you presented this document to the Department, were they aware that there were potentially problems that could arise from this quantification method that was being put forward by you?

A. Yes, I think so, and this is what it says here with his handwritten note, that's clear.

440 Q. And then if you go to page 16 of 19, we have the weightings for the quantification evaluation, isn't that correct?

A. Yes.

441 Q. And different weightings were given to different aspects there, and if you turn to the next page, you have outlined the procedure for the qualitative evaluation, and, on page 19, you give a guide as to how the qualitative evaluation will be performed, subdividing the areas into marketing, technical, financial, management and other aspects, isn't that so?

A. That's correct.

442 Q. And, of course, at this stage you still hadn't received the bids, so the issue about the difficulty in comparing bids wasn't apparent to you in the same way as it was in August and September, isn't that correct?

A. Yes.

443 Q. If you look down at the next tab, Tab 19, we have the seventh meeting of the GSM Project Group on the 18th of May, 1995. Yourself and Jon Bruel attend. And on the second page of those minutes, in the middle, under

paragraph 4, there is stated as follows:

"The qualitative evaluation was to provide a common-sense check on the quantitative model. This part of the model would need to be clarified further, before evaluation begins. If a later challenge were to reveal that any two persons among the evaluators proceeded with a different understanding of the process, then the entire evaluation process would be put in question."

That's part of your presentation, Professor, where you are stating that the qualitative evaluation was there to provide a common-sense check, isn't that so?

A. Maybe, maybe not. That's not how I recall it.

444 Q. Okay. And if you go to the next page in those minutes of Maev Nic Lochlainn, the last section, there is a reference to the CION letter to the Department, and it says:

"AMI had issued a draft memo to the Department in response to the CION letter. This was discussed. AMI advised that they were fairly certain that the CION would push the licence fee issue again."

Just the last part of that note:

"It was agreed that Mr. Andersen would accompany the Irish delegation for discussions with CION on this matter."

Were you aware at this time, Professor Andersen, that the Commission would have an objection to the proposal about the licence being sold at a certain amount if Eircell didn't pay? Were you aware that that could be a problem for the competition?

A. Yeah, yeah, I would be aware of that in the light of the general attitude that the EU Commission had in 1994 and 1995, yes.

445 Q. And the purpose of that was to ensure that there was a level playing-field between the winner of the GSM2 and Eircell, isn't that so?

A. Yes.

446 Q. And it would have been unfair if the winner of GSM2 had to pay a huge fee and yet Eircell had to pay nothing?

A. Yeah, that would infringe the EU competition rules as they were interpreted at the time.

447 Q. Now, if you go to the next tab, Tab 22, we have another internal Department of Finance memo from Mr. McMeel, and it's a reference to the Project Group meeting at which you circulated the evaluation methodology document. And if you look at the second paragraph in section 1 on the first page, the minute states:

"The evaluation document deals with quantitative and qualitative evaluations. The latter acts as a check on the form and, as such, is at a higher level. The quantitative evaluation forms an annex to the Evaluation Report. The

consultants' experience has been that both the quantitative and qualitative evaluations tend to produce the same leading candidates. The qualitative process narrows it down."

Would you agree that that's an accurate account of what you were saying to the Departments back in May 1995?

A. It could be, it could be, but I have no recollection of having said this.

448 Q. Of course, but it is the case that you believe that the qualitative assessment operates at a higher level, isn't that so?

A. Yes.

449 Q. And that it's your belief that the qualitative process really narrows down, once you get to the top two or three candidates, the qualitative process will really identify the winner, isn't that correct?

A. That's correct. And as is stated in the AMI tender, the wording "holistic evaluation" is mentioned in several places there. So what is contained in this note for the file, is one direction it could take from the rather flexible Evaluation Model that was contained in the AMI tender. But what subsequently transpired was that this moved in another direction with more emphasis on the qualitative elements and more emphasis on the holistic evaluation.

450 Q. The next tab, Professor, there is a reference to the eighth meeting of the Project Group on the 9th of June, 1995.

Again, you attended with Mr. Bruel. And at this meeting, there is a record of the meeting which you attended with the DGIV and the European Commission on the 2nd of June, 1995. Do you recall attending that meeting with the European Commission?

A. Yes.

451 Q. What did it say to you?

A. Well, two issues were on the top of the agenda. One was to make an agreement, a prospective agreement with the Irish State so that the tender could proceed without the Commission claiming that the Irish State were infringing the EU competition rules.

And then, secondly, the beauty-contest tender design was also addressed.

452 Q. That minute also records a meeting between the GSM group and the Office of the Attorney General. Did you, Professor, ever have any contact with the lawyers during the course of your advice being given to the Irish State? Did you deal with the Attorney General's Office or any other lawyers?

A. No, I don't recall having any contact with them.

453 Q. Okay. Then, at Tab 24, Professor, your qualitative and quantitative Evaluation Report is updated and we have the second draft dated the 8th of June, 1995, which you submit to the Departments, isn't that correct?

A. That is correct, yes.

454 Q. And it's an updated version of the first draft, obviously. Could I ask you to go to page 17 of 21.

A. Yes.

455 Q. And again, we have, here, the quantitative weightings for the assessment of the bids. Who came up with those weightings?

A. I don't recall who came up with these weightings. What I recall is, if you go back to -- this carries a date on the 8th of June, 1995. If you go back to the minutes from the eighth meeting on the 9th of June, that is the day after, under Tab 23, you will see from the minutes, you can just skim page 1 and page 2 and they are focusing on the EU issues, and then, on page 3, you will have a big portion of that discussing the Vodafone claim, there was a claim from Vodafone.

456 Q. I think --

A. So that carries on, you know, a considerable part of that page. And if you then go to page Number 3, I notice that when you -- when the person making these minutes are going to refer to the Evaluation Model, it is only done in a very short fashion. It says, "This was approved as presented, with correction of one minor typo on page 6 of 21. Further comments, if any, to be forwarded to Maev Nic Lochlainn within a few days of the meeting."

So I think it is the collective -- it was the collective understanding that very much energy here was consumed with fixing matters with regard to the Commission and also looking into the Vodafone claim, and less importance was attached to the evaluation document.

457 Q. Okay.

CHAIRMAN: We are just about on 5 o'clock, if you are moving on to something else.

MR. O'CALLAGHAN: Yes.

CHAIRMAN: It's been a long undertaking for Professor Andersen. 10 o'clock in the morning, if it suits you.

Thank you, Professor.

THE TRIBUNAL ADJOURNED UNTIL THE FOLLOWING DAY, WEDNESDAY, THE 3RD OF NOVEMBER, 2010, AT 10 A.M.