

Northern Ireland Affairs Committee

Oral evidence: [Changes to NI Renewable Heat Incentive Payments](#), HC 2070

Tuesday 7 May 2019

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Members present: Dr Andrew Murrison (Chair); John Grogan; Kate Hoey; Nigel Mills; Ian Paisley; Jim Shannon; Sir Desmond Swayne.

Questions 292-345

Witnesses

I: George Peretz QC, Monckton Chambers; Sean Ennis, Director at Centre for Competition Policy, Professor of Competition Policy at Norwich Business School.

Examination of witnesses

Witnesses: George Peretz and Sean Ennis.

Q292 Chair: Mr Peretz and Mr Ennis, thank you so much for being with us today. Just to be clear, we are trying to better understand a complicated scheme for an investigation we are undertaking, which probably has at least as much significance as anything we have done before, as the Secretary of State has made clear that she will await our recommendations with particular interest, given the need to ensure that this scheme is fair and seen to be fair. I hope we are approaching that task in a thoughtful and measured way but, to do so, we need to understand some of the detail, which I know is complicated. Hopefully you will move us on in the time available this afternoon.

Before we get into questions, I wonder if you might briefly introduce yourselves and give us a little snapshot into how you see this, if that is possible. We will then crack on with some questions. Do you want to start, Mr Ennis?

Sean Ennis: I am an economist by background, currently a professor at the University of East Anglia Centre for Competition Policy, which is one of the leading interdisciplinary centres on competition policy in the UK. I should state at the beginning that I am new to the specific questions in this matter. I have not been involved in any of the cases or the investigations that are related to the history of what I think we are looking at today. I feel that state aid is often a complex topic, from an economic perspective. It is one that has, nonetheless, been in the minds of the European Union creators since the beginning of the EU. Even before the 1957 EEC agreement, there was a report leading to that agreement that said some type of control of state support to enterprises was essential to that future agreement. I will stop there.

George Peretz: I am a barrister and I specialise, among other things, in state aid law. I am joint chair of the UK State Aid Law Association, which Kelyn Bacon QC and I founded seven or eight years ago. Over the last 20 years or so of practice, I have advised public sector, central Government and private sector bodies on all aspects of state aid law, and been involved in various state aid cases in the courts.

Q293 Chair: Can I start with an opening question that has to do with the validity of the Secretary of State's assertion in the House of Commons a few weeks ago? She said that not only is the scheme as was unaffordable, which is a fair enough assertion on the face of it, but also that it conflicted with state aid rules laid out by the European Commission. That assertion seems to be based on a letter written on 1 April this year by the European Commission, giving what appears to be a preliminary view; it is sold as a preliminary view on the matter. I suspect you have probably seen this, and I would be grateful if you could



comment on whether you think it is valid or not.

George Peretz: Let me start by explaining the legal framework, because it might be helpful before we start. One of the most fundamental principles of EU state aid law is that a state aid measure cannot lawfully be implemented unless and until it has been notified to and approved by the European Commission. That is often referred to as the “standstill obligation”. You need to get approval from the Commission before you start implementing a state aid measure. In practice, there are a number of exceptions to that, because there are general exemption regulations that allow you to offer a lot of state aid under the framework of those regulations, but this scheme is outside those, so the general rule applies. It could not lawfully be implemented unless and until it was approved by the decision.

In this particular case, in 2012, you had a Commission decision that approved the state aid scheme. You then had a couple of subsequent decisions from the Commission that dealt with amendments to the scheme and approved those.

What I find a little surprising as a practitioner is that the Commission has shifted its ground, to some extent, with the most recent couple of letters. Essentially, the question that arises is that a state aid measure is unlawful unless it is approved. That then gives rise to the question of what exactly has been approved, because only what has been approved can be lawfully implemented. As I read the original decision and as the Commission itself seems to have read the 2012 decision when it was looking at amendments, it approved a decision setting out certain tariff rates, which the Commission knew about, looked at and decided for itself were compatible with a 12% rate of return. That seems to be the basis on which the Commission proceeded and how it interpreted its own decision.

It now seems to say that its decision in 2012 did not approve a particular schedule of tariffs. It approved a measure that delivered a 12% rate of return. We now know, or I am now told, that the decision did not deliver a 12% rate of return. The Commission is saying there may be a problem here, because some of the money paid out may have gone beyond what was approved, because it delivered a much greater rate of return than was approved. That seems to be the position.

You then asked me to comment on what the Secretary of State has said about it. The Secretary of State appears to assume that what the Commission says about its decision now, in its most recent letters, is correct. There may be all sorts of reasons why it is prudent for the Secretary of State to operate on the basis that what the Commission now says is its view is right. It is often sensible to assume that what the Commission is currently saying accurately represents the law, from a pragmatic point of view. It avoids having to have an argument with them, and it avoids having litigation with the Commission. Ultimately, the answer to the question of what exactly the Commission approved is not a



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matter for the Commission; it is for the courts, first a national court and, ultimately, the Court of Justice of the European Union. Lawyers are familiar with this paradox. Quite often in law the people who write a decision are not the people whose interpretation of it is decisive. You as MPs are familiar with this: you write the laws, but MPs do not ultimately interpret them. That is for the courts.

Q294 Chair: If I can bring you back to the statement the Secretary of State made in the House of Commons, she was quite clear in her assertion that we were rubbing up against a determination made by the European Commission. I appreciate that, ultimately, that has to be interpreted by the courts, but it is absolutely central to what is now happening and it is impacting upon real lives in Northern Ireland. We need to be clear as to whether she is correct in making that assertion. From your knowledge of what has happened subsequently in relation to action that the Northern Ireland Office may or may not have taken on this matter, I am wondering what your reaction is to that?

George Peretz: Frankly, it is a question that is entirely arguable either way. The Commission's current view of what its 2012 decision meant may be right. I think the view that it took in 2015 and 2017, when it looked at amendments to the decision, is inconsistent with the line it is now taking, but may alternatively be right. As so often in the law, you have a situation in which there are competing interpretations of the 2012 decision, both of which are arguable.

Against that background, the Secretary of State may well have taken a decision as a mixture of legal advice and policy. Anybody who has advised Government is familiar that the two are often intertwined. There is legal advice about the strengths and weaknesses of a case, and then policy about what to actually do. She may have taken the view that the sensible and prudent course is to accept that what the Commission is now saying is right and that the 2012 decision only authorised grants in so far as the scheme successfully delivered a 12% rate of return. To the extent it did not, there may have been overpayments. She may be thinking to herself, "That is a sensible view to take of what a court is likely to decide and I am going to proceed on that basis". That view could, in principle, be criticised based on a legal analysis. One might say she is wrong to take that view, but my initial impression is that it is legally arguable either way. There are then issues about the policy implications of taking that view, which are more for you than for me.

Q295 Chair: One of the reasons we were told that this had to be done urgently was because there is a possibility of people not being paid. Also, there could be clawback. My question is to what extent that is a real threat. If you could, answer that by citing examples of where the European Union has, in the past, insisted on clawback. That will lead us, in a few minutes, to a discussion on hardship schemes, since hardship will certainly be generated by this.



George Peretz: The general rule is that when unlawful aid is granted—so aid that either is not authorised by a decision at all or is simply outside the scope of what the decision authorised—there has to be recovery of the aid from the beneficiaries. That is a very strict rule indeed. The Commission and European Court have made it clear, over the last decades, that the obligation to recover overrides national rules that preclude recovery or make it procedurally difficult. Member states cannot refuse to recover aid simply because it creates a danger of insolvency. They have to take the attitude of a hard-nosed creditor determined to get its money back if at all possible. You do not pursue companies that have gone completely insolvent, if there is nothing left, but you take a hard-nosed commercial attitude to recovery, and that is a very strict obligation.

The United Kingdom does not have that much experience of this because, over its membership of the European Union and its predecessors, the United Kingdom has been extremely well behaved in the field of state aid, in comparison to some other countries. There are very few recovery decisions involving the United Kingdom, so almost all the case law comes from other member states. I will not list the ones that generate a lot of this—the Committee can probably guess—but there is little UK practice in this. The general rule is that there is a recovery obligation.

The wrinkle in this case is the legal issue of whether there has actually been an overpayment, i.e. outside the scope of the decision. That depends on your view of what the 2012 decision was and what it means, which, as I said, is a legal issue on which two views could be taken. If recovery were ever sought, the lawyers representing the beneficiaries would want to argue that, as far as they could possibly do so.

Q296 **Chair:** Mr Ennis, can you reflect on the scheme announced last month for the Republic of Ireland, which, on the face of it, looks quite generous, some would say more generous than the scheme that we are discussing for Northern Ireland and probably also Great Britain. Clearly we live in the here and now, and some, for example the Ulster Farmers' Union, would say they are placed at a competitive disadvantage for hatching eggs, broiler fowl and the rest of it. What do you have to say about that, based on the admittedly probably not comprehensive account yet available of the Republic of Ireland scheme?

Sean Ennis: It is worth looking very closely at the comparison of schemes, especially those that potentially involve trade between countries of the product that is benefiting from the schemes. State aid is specifically intended to focus on situations in which there would be a competitive effect, either within or across borders. Having reviewed some of the statements and facts in recent times about the renewable heating initiatives, I find the arguments about appropriate levels of state aid to be highly fact-specific. They depend on factors that are not obvious to us sitting here, for example the types of fuel commonly used by growers. The facts are very important to interpretations of how rates of return are



determined for the receivers of these payments, but I am not immediately aware of the numbers in front of us.

I suggest this may be a very good area for the Committee's inquiry to better understand the underlying numbers that could potentially justify what seems to be substantially different treatment or could actually be equitable treatment. It could be that the net effect of the aid given in different regions, depending on the types of fuel that growers start with, is equivalent across regions. That could be the case between Northern Ireland and Great Britain and, in principle, between Northern Ireland and the Republic of Ireland. I have not seen sufficient information to draw a good conclusion on what the net effect of state aid would be in the two most obvious comparator geographies.

Q297 Chair: Of course, the most comparable are the two jurisdictions on the island of Ireland, since the counterfactual and also the capital cost of plant would be more or less the same, north and south. That is not the case east and west.

Sean Ennis: I am not sufficiently aware of the facts to comment on that statement.

George Peretz: I entirely agree. Having had a quick glance at the evidence given to you last week, I picked up the concern that there has been a difference in treatment by the European Commission to a comparable scheme in Ireland, as opposed to those we have been looking at. I have not had time to look at the Irish scheme or the material published in relation to it at all.

My experience, in 20 years or so of litigating European law issues, which quite often involve allegations of difference of treatment between two complex sets of comparators, is that it is very dependent on the detail. These claims can be entirely made out, but you have to get into the detail. There is the obvious danger of comparing apples and oranges. It can also be quite difficult, even when looking at two different state aid approvals. The decisions we are looking at are technically known as phase one decisions, because the Commission reaches a view after a quick look. The decisions are quite short—you may think not so short, but short by my standards—running to 60 paragraphs or so. An in-depth decision, after a detailed investigation, can go into hundreds of paragraphs. What I think of as very short decisions often skim over points of detail that might be quite critical. Even if one is looking at the Commission decisions, it is often not entirely clear whether there has been a difference of treatment or if something is hidden in the undergrowth that you do not know about. I would be careful.

I would suggest this is an issue to explore with the relevant UK and Northern Irish authorities, because one would hope it is something they have thought about. They may have missed a trick, to put it colloquially, which was spotted in Dublin. It would be regrettable if that has happened



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but, until one gets into the detail, no one can comment on whether that has happened.

Chair: We have officials coming to see us tomorrow, so perhaps we can explore that with them.

Q298 **Ian Paisley:** Gentlemen, you are very welcome. Mr Peretz, you indicated that state aid measures must be notified to and approved by the European Union in order for them to be lawful. The history of this process is that the original decision in 2012 was amended around 2015-16, but the EU was not notified then.

George Peretz: It was notified then.

Ian Paisley: No, it was not notified then.

George Peretz: It was not notified originally. It was notified a little late.

Q299 **Ian Paisley:** I have the decision in front of me. It is the Brussels decision of 31 March 2017. It said this, which is very interesting: "The Commission regrets that the United Kingdom implemented the changes effected in November 2015 without notifying the Commission and so put those changes into effect before Commission approval had been received in breach of" the article. It went on to say this, which is very interesting in terms of what you have said: "Nonetheless, the Commission concludes on the basis of the foregoing assessment that the measure, as amended, is compatible with the internal market pursuant to Article 107". You have just told us that the decision that the Secretary of State has taken appears to be inconsistent with the line that the Commission took in 2016-17.

George Peretz: There are a number of different things going on here. In 2015, the Commission was notified of a change in the rules of the tariffs. It was a change in the tariffs designed to pull the rate of return back to the 12% that it was supposed to be. That was the aim of it.

Q300 **Ian Paisley:** It was basically to cap it. In real terms, it brought it back to about £13,000.

George Peretz: Yes, that was the idea. The Commission was not told about that as it happened but was told about it late. Remember earlier I said that the way in which the Commission took its 2015 and 2017 decisions seemed to show that, at that time, it thought its 2012 decision authorised a particular tariff structure. I say that because, in 2015, you see the Commission saying to itself, "Hang on, a change in tariff structure went on that we were not told about, and that matters". They regarded that as an alteration to the aid scheme. It complains that it was not told about it in time, which shows it thought of itself as approving a particular tariff structure. It complained that it was told about it late.

One slightly interesting thing about that is I find it quite hard, given that, as far as I can see, the tariff structure was universally unfavourable to



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beneficiaries, to think how anybody could have benefited improperly from that change. People were made worse off; nobody was made better off. There is a slight feeling of it being somewhat academic because, actually, there is nobody who got something that they should not have, as a result of a change in tariff structure that they were not told about.

Q301 Ian Paisley: It is not academic that the cost of buying pellets has increased in the main market.

George Peretz: It is the change in the tariff structure. As I understand it, there is nobody who would have done better under the new tariff structure than they would have done under the old one. There is a slight flavour of the Commission talking about rather an academic issue at that point. It is complaining it should have been told earlier, before it was done, but the Commission always complains it should have been told earlier, before it was done. There are routinely decisions where member states start implementing something before it is cleared by the Commission. The Commission says, "You should not have done that. We are going to clear it". In that situation, the member state does not need to recover anything, because it has been declared compatible, and there is a general moan about, "You behaving unlawfully. You should not have done".

Q302 Ian Paisley: I am trying to characterise this. In 2012, the scheme comes in and the balloon goes up: "Houston, we have a problem". The Government locally in Northern Ireland fix the problem and the Commission is notified. The Commission has its moan, but says that is the problem fixed. Then we come to this year and it says, "That did not fix the problem". Is that what has happened here?

George Peretz: It is starker than that, in a way. It is now saying that, back in 2012, it was not approving a particular set of tariff structures, which were implemented. That was done. The tariff structures that were approved were ones that actually done in 2012, and there was no aid, as I understand, that was given outside the framework of the rules. If there was, it would have been a problem. The aid causing you concern was granted in accordance with the rules in 2012, which people assumed was granted correctly, but there is now a problem. If you regard the 2012 decision as approving a set of rules, nothing we are worrying about was granted outside that framework. The Commission now appears to be saying that it did not grant approval for a particular framework to rules; it granted approval to any set of rules that delivered a 12% rate of return. The difficulty that causes the people you are concerned about is that the rules did not deliver the 12% rate of return, hence there is a problem.

Q303 Ian Paisley: In your assessment, was it originally designed to get a 12% rate of return? My impression from reading this directive is that they wanted to achieve 12% renewable heat and 30% renewable electricity by 2020. The actual rate of return appears to come much later.

George Peretz: I am not sure what paragraph you are looking at.



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Ian Paisley: I am halfway down paragraph 3 of that directive.

George Peretz: Is that the 2012 decision?

Ian Paisley: No, it is the 2017 amendment.

George Peretz: That is where, in 2017, it is summarising what it did in 2012.

Ian Paisley: The 12% mentioned there is not a rate of return. That is a target to achieve 12% renewable heat.

George Peretz: Is that not something different from what we are looking at?

Q304 **Ian Paisley:** I am wondering if there is a difference. My first question is if it has confused that or if it has decided to introduce that rate of return later. Initially, rate of return was not considered; it looked at the internal rate. You are nodding, Mr Ennis; is that right? Has it confused or conflated these two?

Sean Ennis: I do not know about the confusion, but it initially considered the internal rate of return. It evaluated possible rates between 8% and above 20%, and found that 12% was a reasonable internal rate of return.

Q305 **Ian Paisley:** Could you explain, for our record, the difference between IRR and ROR, and why that is significant?

Sean Ennis: The internal rate of return depends on the starting point. You might have growers with different assets at the beginning. I think this is the difference, but you may wish to correct me. If a grower begins with equipment appropriate for only one type of fuel, which is expensive, that is a different starting point to calculate the internal rate of return than for one who has equipment for natural gas heating, which has a lower operating cost. It would create a rate of return from improving the investment that is lower than the rate of return that you get going from a distant second-best towards a newer form of production.

Q306 **Ian Paisley:** It seems that, if you use IRR, the calculation is more generous and open. If you come to ROR later, it closes this down financially. It appears that the Government decided at the end of last year to use ROR as the *raison d'être* for all this, when it was actually never mention until this date.

Sean Ennis: In state aid calculations, it is generally considered more appropriate to focus on IRR.

George Peretz: That is right, yes.

Q307 **Ian Paisley:** That is fascinating. It is more appropriate to focus on IRR than ROR, yet the current legislation we are looking at focuses only on ROR. Is that right?



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Sean Ennis: I cannot comment on this specific legislation, because I have not read it sufficiently carefully to comment on that point. I could do so, if you wish, and provide you with further comments later.

Q308 **Ian Paisley:** That might be useful, but I do not notice IRR mentioned anywhere in the April 2019 legislation. Mr Peretz, what is your view of the scope of the 2012 legislation on balance?

George Peretz: I am afraid I am not deeply familiar with the 2012 legislation, so I find it difficult to answer that question.

Q309 **Ian Paisley:** You have already told us how they missed a trick in their interpretation. Whenever you look at what has happened here, do you think there has there been a trick missed in what they were trying to achieve and what they are trying to do now?

George Peretz: To be honest, I am not familiar enough with the detail to know that; I am sorry.

Q310 **Ian Paisley:** I will not continue with it. Let me ask you this question: does EU law allow an internal market of a member state to create an anticompetitive practice internally?

George Peretz: It might be helpful if you gave me an example. That was a rather abstract case.

Q311 **Ian Paisley:** The whole of the United Kingdom has RHI schemes. One operates in Scotland, one operates in Northern Ireland and one operates in England and Wales. They have now created changes to how the RHI operates in Northern Ireland, which is part of the United Kingdom, and they have created a new scheme in GB, but it is anticompetitive in that it does not allow us to compete fairly with GB internally. It will probably drive poultry production on to the main island and off our island, and it creates anticompetitive issues with a different member state, namely the Republic of Ireland. I am not interested with the Republic of Ireland at the moment but, internally, they have created anticompetitive activities. Should state aid rules be allowed to achieve that?

George Peretz: When deciding whether or not to approve a state aid, the European Commission has to look at the effect of the state aid on the internal market as a whole and, in particular, competition. It is concerned by competitive distortions, both within a member state and in interstate trade. It will not be state aid at all if it has no effect on trade between member states, but all the schemes we are talking about here plainly do. That is a very low threshold in practice and, as you are probably aware, in Northern Ireland, given its geographical location, it is easy to find an effect on cross-border trade even in small projects, because Ireland is no more than 100 miles away and it is a close market.

Q312 **Ian Paisley:** The differences here are stark. If you are in Cavan, Monaghan or Donegal, and you have an RHI scheme approved under EU state aid rules, you will be able to get £19,000 a year. If you are across



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the border, whether in Londonderry, Armagh, County Antrim or wherever, you will get £2,000 a year. In England, you will get £14,000 or £15,000.

George Peretz: The European Union ought to think about the effect on competition of the measures it is approving. That will be looked at in the round, looking at what is going on, which is relevant, in all other member states. You have to remember that it is a principle of this and most types of state aid that there should not be any overcompensation. Here, where you have aid designed to encourage people to use renewable energy, it should not be more than is necessary to encourage them to switch from fossil to renewable fuels. In principle, it should be the case, although obviously it can happen in practice, that any scheme gives operators a leg-up. It should do no more than compensate them for making the switch that one wants.

Q313 **Ian Paisley:** What jars with me and with most people is how two member states apply the same scheme but have different outcomes against each other and internally. Surely that is just wrong.

George Peretz: You will have to get into the details of whether you are actually comparing apples and apples, or apples and oranges. I agree it is a sensible question to ask, but I cannot help you answer it, I am afraid.

Sean Ennis: One observation I would make about these regimes is that they are focused on providing incentives to growers to purchase new machinery and heating devices. It is odd to incentivise that by providing price supports, as opposed to support to purchase the devices. The situation now is that many growers have made investments based on an expectation of what payments they will receive in the future. It could be argued that is a legitimate expectation, and so they have made investments. As the aid is not based on the purchase of the machine but a payment based on usage, in a sense, it puts them in an exposed position. Now these payments have been retroactively altered on two occasions and yet the initial decisions to invest were based on a prior expectation. It is legitimate to ask if the type of aid that is being provided would achieve the objective of expanding renewable heat in the most effective, long-term and fair way.

Ian Paisley: That was very helpful, gentlemen. Thank you.

Q314 **Kate Hoey:** To follow on from that, the latest Republic of Ireland one was only approved in April 2019. How much of this kind of approval depends on the relationship between a particular state and the European Commission, and the way the state discusses and argues with the Commission? I get the feeling that our Secretary of State and civil servants threw in the towel very early on, perhaps for other reasons, and yet the Republic of Ireland has managed to get a very good scheme for their people. In fact, it is wider than what was in Northern Ireland and covers all sorts of areas. In other words, is the Commission political about this?



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George Peretz: It would be naive to say that the Commission is not political about state aid compatibility decisions. That is inevitable, to some extent, because the test it applies involves an evaluative judgment, balancing very important public policy considerations against one another. You are balancing the effect on competition against an important public policy objective being pursued by a scheme, and you have to reach a judgment about whether the public policy objective outweighs the distortion of competition, which is inherent in a state aid scheme. That is an evaluative judgment, which you can tell is very political. There is no point in trying to dress it up as a purely legal test that a court could happily answer. Indeed, it would be a difficult test for a court to answer. It is inevitably a policy judgment and it would also be naive to suggest that the Commission does not take careful note of the general political background when it is taking its decisions.

The position is complex. There are very good officials in the state aid unit of DG COMP that insist on rigorous methodologies being applied. The general line of competition commissioners over the last 10 or 15 years has been to insist on a rigorously analytical approach. Think back to the time of the banking crisis and the decisions taken. It is complicated. It would be naive to say there is no politics in it, but also naive to say it is only politics. It is a complicated picture. In this particular case, I do not know whether Ireland is getting any political benefit from being in a somewhat different political position in relation to the EU, if I can put it gently, from the United Kingdom. I simply do not know, but I would be surprised if it is as crude as that. One never knows at the margin.

As to whether the United Kingdom has missed a trick, from my own experience of being involved in UK notifications, there are good officials now at the state aid unit of BEIS and UKRep. They do a professional and thorough job, in my experience. They get appropriate advice when they need it and they are good at what they do, but one can never rule out tricks being missed.

Q315 **Kate Hoey:** That leaves us with a position where we are the United Kingdom, but Great Britain has a better rate than Northern Ireland.

George Peretz: I do not know enough about the background to explain why that may be so. I just do not know.

Q316 **Kate Hoey:** It is a huge amount. Mr Paisley gave the difference, and these are parts of one country. That is why we cannot understand, in making it very simple, how Great Britain can have such a big rate, when Northern Ireland is not allowed to have it, yet we are supposed to be operating under the same state aid rules.

Sean Ennis: I will make one observation. It seems, with all the changes that have occurred over the last years, at least one set of rates has to be incorrect between the different geographic areas. Without further information, it is difficult to say which one and whether there has been a convergence towards a fair point with higher levels of equity or away



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from that. If there had been subsidies for the purchase of machines that are separate from those related to usage, what is happening would have been clearer.

Q317 **Kate Hoey:** Are you talking about between Northern Ireland and Great Britain, leaving the Republic of Ireland out of it?

Sean Ennis: Yes, I am leaving the Republic aside. The Commission would be careful with the Republic of Ireland, because it is aware of all the considerations concerning the scheme in Northern Ireland and of the potential for an appeal against the decision in the Republic of Ireland, as they are making decisions there. It would be interesting to see the details of a decision it has made in the Republic of Ireland and the basis for the Republic of Ireland's arguments.

Q318 **Ian Paisley:** The GB scheme was approved in 2011, which was before the Northern Ireland scheme, and it was approved with a higher tariff than the Northern Ireland system. It still operates at that higher tariff.

Sean Ennis: We have to distinguish between a higher starting tariff and higher end tariffs. There were quantity limits in the UK scheme from the beginning, which were not present in the Northern Ireland scheme at the beginning. That turned out to be a very substantial difference between the schemes.

Ian Paisley: Yes, there was a cap on the GB system. That is right.

Q319 **Kate Hoey:** Legally, can one state challenge another state's? Could the United Kingdom Government decide to go to the European Commission and say, "This is ridiculous"?

George Peretz: Yes, they could. There is a strict two-month time limit from the date of the publication of the decision but, yes, they could. At the moment, the United Kingdom is involved in litigation on the clearance by the Commission of the Hinkley Point state aid scheme, in a challenge brought by Austria, which is currently in the Court of Justice of the European Union.

Q320 **Kate Hoey:** Can they challenge another country's?

George Peretz: Absolutely, any member state can challenge any decision of the Commission. That is a basic principle.

Kate Hoey: I am glad we are getting out of it, hopefully.

Q321 **Chair:** Mr Ennis, you said that these three schemes cannot all be right. It therefore follows that one or two of those schemes could feel that the Republic of Ireland scheme is unfair. Take the GB and Northern Ireland schemes. Presumably we could make the case that the Republic of Ireland scheme is more generous. You would then expect, would you not, the Government to challenge the Republic of Ireland with the European Commission? From what you say, it has a narrow window to do that. The clock is ticking.



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George Peretz: When was the Irish decision? I am afraid I do not know.

Kate Hoey: It was 16 April.

George Peretz: It is two months from the publication of the decision so, yes, there is a narrow window to do that. It is open in principle. The UK Government have the right to challenge any decision of the European Commission without demonstrating that it is affected by it at all. Austria/Hinkley Point is an example. It is not entirely clear what the effect of Hinkley Point is on Austria, other than that Austria has a particular view on nuclear power, so it has the right to do that. Obviously it has to find grounds for challenge, otherwise it is pointless, and would have to articulate those very carefully, against a background where there is some discretion at the Commission.

I say "some" because, if it is at the phase one stage, one of the issues that arises is whether the question has been looked at in sufficient detail. Has the Commission got to the bottom of things? The phase one is a no-doubts decision. There is a quick look and no reason to be concerned. If you can demonstrate there is a reason to be concerned, the decision should be quashed and the Commission told to think about it again. Showing there is a reason to be concerned is a bit easier than showing that the Commission got something legally wrong at a final decision when, actually, the Commission has a lot of discretion. That makes legal challenge quite tricky at that stage.

Q322 **Chair:** From your experience of dealing with a Europe that, increasingly these days, is split into regional or provincial legal entities—thinking of Catalonia, Flanders or Northern Ireland in this context—is there a way in which those regional entities might be able to challenge with the Commission some perceived unfairness within the nation state? In this case within the United Kingdom, it would be Northern Ireland versus the GB scheme.

George Peretz: It is more difficult for regional governments to bring litigation in the European Court because, unlike member states, they do not have an automatic right to bring cases. They have to show they have an interest in the decision, so they have a procedural hurdle to jump to bring legal proceedings. Of course, the Commission would almost certainly have discussions and hear any regional government that was concerned about something. The Commission would have an open door to them, I am sure. To what extent it pays any attention is a different question. I think that is my answer.

Q323 **Nigel Mills:** Am I correct, Mr Peretz, that this is not an iterative process in which a state makes a request for approval and the Commission says yes or no? It does not say, "Thanks for asking for 12%, but did you realise you could have had 18% if you had wanted?" Is there a discussion that takes place at some point about the parameters?



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George Peretz: In practice, it is quite an iterative process. The almost universal practice now, as it was back in 2012, before any state aid measure is notified, is to have what are called prenotification discussions with the Commission. I have come across that in the course of my work advising central Government. One is asked to advise on things, and the immediate decision to be taken at that stage is whether to talk to the Commission on an informal basis. These days, you increasingly see that even the texts of decisions reference the pre-notification discussions.

Those prenotification discussions are quite informal: the member state will come along and say, "We have it in mind to do such-and-such. What would you be likely to say and what information do we need to give you for you to be satisfied you could sign this off?" Those discussions can go on for a long time. In the recent case involving an electricity generation scheme, the discussions went on for some years before the notification was finally made. There is actually a lot of scope for informal discussion. Yes, one could imagine a conversation in which a member state comes along and says, "We are thinking about doing this", and the Commission may say, "Actually, we have no worries about your doing this. In fact, if you did that it would be fine". One could imagine that discussion taking place.

Q324 **Nigel Mills:** It would have been open to the Government to say, "We know we came to you and got clearance for 12%, but it has all gone a bit wrong. Is there any scope if we ask for it to be a 15% rate of return?"

George Peretz: Yes, those discussions can happen. Sometimes tactically a decision is taken to ask for more than you are going to get, with an expectation of being knocked down. As politicians, I am sure you are all familiar with that sort of negotiation.

Q325 **Nigel Mills:** That was open to the Government to do. I am sorry I missed the start. I am keen to understand the consequences of doing something different from what was approved. What is the worst sanction the Commission can impose on a member state, if it approves a return of 12% and then offers a return a lot higher than that?

George Peretz: If a member state gives out aid that either has not been cleared by a decision at all—there was no decision and it never went to the Commission—or there was a decision, but it does not cover what was done, that aid is unlawful. That means the member state is under a duty to recover it. The example you are probably all familiar with, because it involved so much money, is the issue of Ireland and Apple. Ireland has exercised its obligation to recover €13 billion from Apple, on the basis that it was unlawful state aid.

Nigel Mills: You have to recover it; you cannot pay it yourself and say, "It was our mistake".

George Peretz: No, it has to be recovered back to the state coffers. That puts Ireland in the interesting position of actively fighting receiving a



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cheque for €13 billion, but they have their policy reasons. That is the sanction on the member state. It has to unwind the aid it has given and recover it. The problem is that, as you can see from this particular case, if one is thinking of it in terms of punishment or consequence, it is slightly paradoxical. The real pain is felt by the beneficiary. Apple can easily afford €13 billion.

You are obviously concerned and the concern in Northern Ireland is with the position of farmers in Northern Ireland who received a sum of money, under the rules of the scheme that were then applicable, perfectly honestly and without any problem at all. They are then told it may be claimed back, on the basis that it was unlawful aid they should never have got. We have discussed the issues in this particular case, but that is obviously a general problem in aid schemes or aid: that the people who are in real difficulty when it turns out that aid is unlawful are usually the companies that received the aid, because they assumed they got it lawfully and have gone off and spent it. That becomes a real problem when they are asked to pay it back, with compound interest.

Q326 Nigel Mills: How frequently is a demand to go and recover it made? Does it happen a few times a year but generally it is a slap on the wrist? Do you have to seek a revised clearance? Is that common?

George Peretz: If the Commission looks at the aid and says, "If you had come to us, which you did not, we would have approved it", you do not have to recover it. Technically, it is still unlawful. The problem arises when the Commission says, "If you had come to us, we would not have approved it and, therefore, you need to recover it". That is when it gets painful for the beneficiary. There are a lot of examples there. You probably missed it when I said at the outset that the experience of this in the United Kingdom is limited, largely because the UK, to its credit, has pretty much always operated within the state aid rules and has given little unlawful aid over its decades of membership. As I said earlier, the same is not true of certain other member states, where recovery orders are rather more frequent.

Q327 Nigel Mills: The Government's reasoning may have been that the return is running way over 12%; if they did not fix it quickly and get the returns down, they may have to claw it all back. There were other ways to resolve this than retroactive decisions to reduce the tariffs. The range would have been from seeking another clearance for the revised amount. Is there ever any scope for saying, "We probably would not have approved this but, actually, it is not that big a deal, so we will just move on"?

George Peretz: If the Commission establishes that aid has been paid out when it should not have been and it was not approved, and the Commission now says, "We would never have approved it", it will ask for recovery. The Commission is rigorous about that and it is partly because the United Kingdom has, over its 20 or 30 years of membership, pushed the Commission in this direction. The United Kingdom is quite keen to



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make sure that, when other member states give state aid without getting clearance from the Commission, in situations where approval would never have been given, those states get the money back and the state aid is reversed. That has been a matter of UK policy across all Governments for 30 years and the UK has pushed the Commission in that direction. The Commission's hard line is entirely in concordance with UK policies as a member of the EU.

The wrinkle in this particular case is the issue that you may have missed at the beginning. It is unhelpful when lawyers say this, but unfortunately it is true. It is arguable either way as to what the Commission in 2012 was actually approving. Was it a measure with a particular tariff structure? In that case, nothing was paid out unlawfully, because the tariff structure was approved and what was paid out under it was, by definition, within scope. Or, as the Commission now seems to be saying, was it the approval of a measure where it did not matter what the tariff structure was, providing a rate of return of 12% was delivered? As we now know that was not what happened, which creates a possible issue of overpayment. That is the legal issue and, as I was saying earlier, the only way it can be definitively resolved is by a court and, ultimately, the Court of Justice of the EU, because it is a question of law about what the decision meant. The Commission can be wrong about what its own decisions mean.

Q328 Nigel Mills: It is entirely open for the Government to have decided that we were spending more money on this than we wanted to and blame state aid rules, as a big baddy making them change it when, actually, it is a different motivation.

George Peretz: It has occasionally been known for politicians and Governments of all parties to blame decisions that they wanted to take anyway on aspects of European law. That, to some extent, has affected the debate about our membership of the European Union.

Q329 Sir Desmond Swayne: No quarter is given on recovery. Is there any scope, therefore, for some sort of hardship scheme that might be devised?

George Peretz: I find that quite difficult. The basic problem comes, just thinking about it at an abstract level, once you have established that perhaps a small company has been given a whole lot of state aid that was unlawful, that if the Commission had been asked about it, the Commission would have said no, and that if the Commission was not asked about it and the company gets this money, the principle is that it should be recovered.

There are strings of cases that go on to say, unsurprisingly, that it is entirely impossible for a member state, under their own law, to say, "If that happens, you can sue your member state in damages and get the money back in damages", because that is effectively giving you back the aid that you should never have got in the first place. The basic principle is



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that the state should get the money back and should not come up with clever wheezes to find ways of pushing it back again.

As a basic rule of thumb in EU law, the clever wheezes to try to get around principles of EU law do not work, because the courts will stop them. You can fit about 50% of EU case law into that head. It is clever-wheeze-spotting. The principle is that companies should not get state aid, unless it has been approved by the Commission and is compatible with the operation of the internal market. If you are trying to pursue a policy result that involves allowing money to rest in the hands of people who should never have got it, it will not work, no matter how clever you are in finding ways of doing it.

That is my problem with the hardship fund. I am not saying that there is nothing that you can do. One way of putting it might be to think in terms of there being a sort of buggeration factor; I cannot think of a better word, and apologies for the language. If somebody has been given money that they should never have had, and then has to hand it back, they may also have been exposed to additional costs simply as a result of all of that having happened. They may have had legal costs. They may have incurred obligations that they would never have incurred, which also have costs.

In fact, it was suggested extra-judicially—i.e. out of court—by a former judge of the Court of First Instance that a beneficiary might have the right to sue a member state in a situation where the member state had given out money that it should not have had and then had to recovery, simply for—and it was not his term—what I will call the buggeration costs: the costs of dealing with all of this issue; that is not getting the money back that they should never have had but simply the costs occasioned to them. The most obvious one is legal costs, but employing lawyers, or perhaps the cost of developing a project that you would never have developed if you had realised right at the outset that you would never have had the money. In terms of all these incidental, extra things that you have done, you might be able to get that back.

Sean Ennis: The European Court of Justice has consistently sought to protect legitimate expectations and, in particular, has held that “any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of the protection of legitimate expectation”. This principle is still being tested with respect to some of the tax cases that are under court evaluation. There is a question of whether the UK Government, the Northern Ireland Government or the European Commission have themselves, jointly or individually, created legitimate expectations in this case.

George Peretz: The problem with that is that there is also a string of European case law to show that a legitimate expectation generated by the member state does not count, so it does not matter if a farmer was told by the Northern Ireland Government, “We are absolutely confident



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that you are entitled to this money". That is a legitimate expectation generated by a member state but it is overridden; otherwise, you would get around the state aid rules.

Q330 **Kate Hoey:** So a Government commitment, in writing to people, in terms of what was going to happen means nothing under the European Union laws.

George Peretz: There is a reason for that.

Q331 **Kate Hoey:** So there is a reason why we must want to leave.

George Peretz: The reason why you have that rule is because, otherwise, state aid rules would be a dead letter, because a Government would always say, "We absolutely promise you that this is not state aid", and then say, "In which case, you can keep it because we promised you that it was not state aid". That is inevitable to get the regime to work. It sounds unfair but there is a pretty good reason behind that particular rule, because you have to get the system to work. The exception is if a legitimate expectation is generated by the European Commission itself. If the European Commission says something along the lines of, "Do not worry; this is not state aid", then the beneficiary can rely on that, and there is case law, because that is not from the member state but from the European institutions.

I am just wondering whether that has any applicability in this case. The only statements I know about are the statements in the Commission letters and in their decisions. The problem is that it all collapses into the question of what the decision actually means. That is going to be a question of interpretation by the courts, and the courts will end up saying, "This is what it means, and anybody who was told anything different was simply given inaccurate advice about the law and cannot rely on that". That is a first-blush view.

Sean Ennis: The Commission did say it was "satisfied that total tariff payments do not exceed the difference between renewable and heat-production costs" with regard to the 2012 scheme in Northern Ireland.

George Peretz: There may be something. I am just thinking it through but you might be able to rely on something. I could see the case going some way up the courts on that.

Q332 **Ian Paisley:** The people who dreamt this up and managed this—the Departments in Northern Ireland—are awfully clever people and they would have known all of this. It was not as if it was their first rodeo. They had met with the European Union over several decades. Are you suggesting that they would know that suggesting the hardship fund was really just a wheeze to maybe buy us off?

George Peretz: A hardship fund can mean a number of things. It may be that they have come up with a thought that I expressed earlier, that they might be able to help with in relation to what I call buggeration



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costs—you might call them incidental costs—as a result of almost a maladministration-type issue. That is not getting back the money that they should never have got, but just the costs generated by the whole saga and some sort of compensation for that. That may be what they have in mind. It seems to me that, if they are going much beyond that, you are looking at something which involves probably a state aid, because you are giving money to companies.

Q333 Ian Paisley: That brings us back to square one.

George Peretz: That brings you back, but because you would not be covered by any of the standard exemptions, you would have to go to the Commission and explain why you were doing it. As you say, they are very clever people and they may have thought of some way of doing that. It is not immediately obvious to me, but then a lot of things turn out to be right that were not immediately obvious to me.

Ian Paisley: I was maybe being a bit abstract when I used that compliment.

George Peretz: You are quite right. There is a lot of experience in Northern Ireland, for obvious reasons, of the state aid rules, given the degree of public sector investment in the province, and they are very expert people there.

Q334 Ian Paisley: Knowing what you know, how would you rate the Department and its handling of this?

George Peretz: They have never been a client of mine, which has the fortunate consequence that I can say what I like about them, and the unfortunate one that I do not really know very much about them, so it is a bit difficult for me to comment. I do not think I can comment.

Q335 Ian Paisley: Here is a customer, not a client, who has gone three times for three bites at the one cherry. How would you rate them?

George Peretz: I would rather not comment. I really do not know enough. My general experience of Whitehall—and I would include Stormont or Belfast in that—is that the people who deal with state aid are good and know what they are doing, but all people make mistakes and sometimes things go wrong, so I simply do not know.

Q336 Kate Hoey: Getting back to the Great Britain difference with Northern Ireland, I am not sure I really understand how we can end up being in one country with the same state aid rules and yet Northern Ireland people involved in this are going to end up with a huge amount less than they were promised, and Great Britain is not affected, in very non-legal terms.

George Peretz: I would say that there is a difficulty. I am being cautious because I know from experience that you can often get what look like quite contrasting forms of treatment, which are, in fact, justified by reference to some relevant difference between Britain and Northern



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Ireland. As I say, I am not familiar with the facts and the issues here. All I have done is read the letter that you have from the Permanent Secretary of DfE, and he points to the difference in the current energy mix in Northern Ireland as between natural gas and oil, and he points to other differences. It is probably more a matter for Sean than for me, but I do not really have a feel for the extent to which those differences plausibly translate through into very different types of scheme.

Q337 **Kate Hoey:** It is just such a big difference.

George Peretz: I can appreciate the question.

Q338 **Kate Hoey:** If it had come up with £1,000, more or less, we might feel there is some justification.

George Peretz: It seems to me, with respect, a very sensible set of questions to be asking. It is just that I am not much help with the answers and, really, to be of much help with the answers, you would have to get quite into the details of the scheme to be confident that you were not comparing apples and oranges.

Sean Ennis: The principle of the existing energy mix being a basis on which one would calculate the internal rate of return from changing to a different energy mix is probably a defensible principle. It is not necessarily that which one would hope would exist in 10 years' time or in 20 years' time. That principle is likely defensible, and so what matters is the extent to which there is a factual basis underlying these different treatments.

Q339 **Kate Hoey:** I have one final question. When we leave the European Union, and if, for example, we were to leave on WTO terms, which still could happen, would we then immediately be able to say, "That is great; now that state aid rules have gone, we can now compensate people in Northern Ireland or make sure that they are being treated the same as the rest of the United Kingdom"?

George Peretz: The current position is that the Government have made a statutory instrument under the Withdrawal Act, which effectively reinstates or legislates for our own set of domestic state aid law regime on a no-deal exit. Those regulations were made in February. They are currently being debated in Parliament. On the assumption that Parliament approves those rules and that there is a WTO no-deal Brexit, we would have our own domestic state aid rules, which, for practical purposes, would be pretty well identical to the EU state aid rules. The change would be that the Competition and Markets Authority would replace the Commission.

Q340 **Kate Hoey:** We would not be subject to the European Court.

George Peretz: No, we would be subject to our own courts, but under the same rules.



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Sean Ennis: I would just add that, in the guidance for this, the UK Government would continue to work with the devolved administrations to ensure the new state aid regime works for the whole of the UK.

Q341 **Chair:** Finally from me, just to press you on the hardship scheme, it has been suggested that our report might deal particularly with the design of a hardship scheme, and nothing you have said today really gives me very much confidence in our ability to come up with something that is watertight. However, I am right to say, am I not, that normally an organisation or an individual that felt it had suffered loss as a result of the actions of another body would be able to litigate against that body and, having identified the extent of the loss, secure some sort of compensation—usually money—from that body?

In this case, we are really talking about the Department for the Economy that set up this scheme. If we were to take the state aid element out of this, a farmer, for example, who has gone through this, involving the distress, hassle and expense, potentially, of engaging with this in good faith, would normally be able, through the Ulster Farmers' Union or somebody, to tackle the Department for the Economy and potentially secure some sort of compensation to match the level of his assessed loss. From what you are saying, that right to seek redress in that kind of way is removed by EU state aid laws. Is that correct?

George Peretz: It is removed to the extent that what you are trying to get is the grant you should never have had in the first place, because, as I said, that comes under what I have called the "clever wheeze" heading. It is simply another way of giving you back the same money.

Q342 **Chair:** Except that these people have designed their business case around this scheme, and that has been blown out of the water by the fact that this was rubbish.

George Peretz: That is why you may want to draw a distinction between, as it were, getting the money back that you should never have got in the first place and what I have called incidental or buggeration expenses, which would include legal costs as well as the costs of drawing up a business plan and making investments based on that, on the assumption that you were going to get what you, in fact, did not get, because that has caused you real loss. You may have made an investment or bought something that you simply would never have bought had you realised that you were going to have to hand this money back.

This is speculative and is at the cutting edge of state aid law but there is support, extra-judicially, from a former judge of the Court of First Instance of the EU and an expert in state aid rules, that this ought to be right. As a matter of principle, it is very plausible that you would have that right. There may well be a right of action that a beneficiary could bring against the granting Department in that situation.



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What is established to the point of certainty is that you can, as a competitor of somebody who gets state aid that they should not have got, sue the granting authority and say, "Because you gave that money to the person who competes with me and who, as a result, was able to make more sales and reduce my sales, and I can demonstrate that, because they got the money to build this new factory, I lost a whole lot of sales as a result". If they can prove that, they can then sue the granting authority. That is clear as a matter of law, so that is an action that can be brought.

A competitor can also go to the court while a measure is ongoing and say, "I demand that this unlawful aid is stopped now and steps taken to recover the money". That is something that people can do in national courts. It is important to remember, in state aid law, that you are dealing not just with the European Commission, although in practice you quite often are, but you can also be dealing with ordinary litigants bringing state aid disputes before the national courts that have responsibilities, as courts upholding the law, to uphold European law as much as UK law.

Q343 Chair: Following on from that, would it be reasonable for the Department for the Economy, the Northern Ireland Executive or the UK Government to say, "We are not going to claw back money from those who we have identified as potentially suffering hardship from this, but those who wish to claim that their business has suffered as a result of not getting this"—presumably, mainly in the Republic of Ireland—"are capable of taking us to the law"? Would that be reasonable or not?

George Peretz: It is certainly right that a business in, say, Ireland that thought that it could show that it had lost as a result of a business in Northern Ireland getting money they should not have got could take the DfE to court. In saying that, it would simply be acknowledging a statement of legal fact. There is a lot of room between cup and lip, of course, here. These actions are quite difficult, as you can imagine, and are also quite expensive because, if you think lawyers are expensive, try employing expert economists who would need to prove the claim. The risk may, in practice, be theoretical—I simply do not know—but there is certainly a principle there.

If the Department wants to resist recovery, it seems to me it can only do so by taking the line that the Commission decision in 2012 approved the aid that was given. That is interpreting 2012 as being based on the tariff structure. That does not seem to be the line that the DfE wants to take at the moment, and the reasons why, presumably, are a mixture of legal advice and its own policy. I cannot speculate on that. It seems to me that it would be open to it to take a different view, but that is the view that it has taken.

Q344 Ian Paisley: I just have one final question. The Secretary of State insisted that, if the House did not take the action of approving the legislation before 1 April, all payments would cease to claimants. In your assessment, is that correct or would it have reverted to the existing or



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old tariff?

George Peretz: I do not know whether that is right as a matter of domestic law but, if the legal basis for the scheme had come to an end, you would have needed to do something else. I cannot remember off the top of my head whether that was the position you were in.

Q345 **Ian Paisley:** I would have assumed that the continuing situation just would have continued. We can stand still; in other words, we would have stayed where we are on the tariff.

George Peretz: The view that is now being taken, presumably on the basis of the Commission letters, is that, provided the future scheme stays within the 12%, there is no need to go back to the Commission. Since the Commission has said that in its letters, I can see why that view was taken, but it is not what the Commission said earlier.

Chair: Gentlemen, thank you very much indeed for all of that. There is a fair degree of detail in what is extremely technical, and you have explained it very well to us laypeople. Thank you very much indeed for being with us this afternoon.