

Where are the grey areas in defining “enterprise” and assessing specificity? How big must a subsidy be before it meets the fourth limb of section 2(1)?

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# “Enterprise”

- S.2(1)(b): a subsidy must confer an economic advantage “*on one or more enterprises*”

# “Enterprise”

- S.7 defines “enterprise”
  - Positive requirement: s.7(1)(a): [i] a person [ii] who is engaged in an economic activity [iii] that entails offering goods or **GP2** services on a market, [iv] to the extent that **GP1** the person is engaged in such an activity **GP3**
  - Negative requirements
    - s.7(2): an activity is not economic if and to the extent that it is carried out for a purpose that is not economic
    - S.7(3): not an enterprise merely by virtue of owning shares in a body **GP4** corporate that is an enterprise
  - Explanatory Notes para 42-43:

“This section sets out the definition of enterprise as a person ... engaged in an economic activity. This section also explains the circumstances when an activity is not to be considered to be economic activity, or when a person ... is not to be considered an enterprise”

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**GP1**

What does ii and to iii? Perhaps the idea that money changes hands (though NB "on a market")

George Peretz KC, 2025-06-17T11:45:56.314

**GP2**

NB s.7(1)(b) on groups under common ownership and control

George Peretz KC, 2025-06-17T11:46:52.296

**GP3**

Can be an enterprise for some activities and not for others

George Peretz KC, 2025-06-17T11:47:27.066

**GP4**

What does this add? Implication is that identical activities can be classified as economic/non-economic depending on the purpose they are being carried out for. Gift shops? Is an "economic purpose" the same as "making a profit" (DBT doesn't think so, apparently)? If not, what does it mean?

See Durham below

George Peretz KC, 2025-06-17T11:49:18.942

# “Enterprise”

- DBT Guidance:
  - Examples that “may” not meet the test
    - Recipient doesn’t provide goods/services on a market (NHS providers)
    - Ring-fenced grant to a charity for non-economic activity
    - Support for organisation that carries on non-economic activities and less than 20% economic (café/gift shop)
  - Much more detailed guidance in Annex 1

GP1

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**GP1**

Though NB that DBT guidance goes on to say that these are unlikely to be caught because no effect on competition and trade: 15.42

George Peretz KC, 2025-06-17T13:15:06.184

# “Enterprise”

- Detailed DBT guidance
  - Bodies operating on voluntary or non-profit basis can be enterprises
  - Provision for free is not economic activity
  - Charging fees does not entail economic activity, especially where no relationship between fee and cost
  - Core public powers not economic activity (air traffic control etc)

# “Enterprise”

- *Durham Company v Durham CC* [2023] CAT 50
  - Obiter consideration of s7(2) at para 42(7)

This is necessary to deal with the case where a person’s activity may involve providing goods and services on a market but where the purpose of the activity is not economic. To determine what the purpose of the Council’s commercial waste collection operation was in providing services to commercial customers, we are thrown back to the functional approach which we have identified in paragraph 37 above as presenting certain difficulties. However, on the agreed facts in this case, we do not have any difficulty in agreeing with the Council that the commercial waste collection service was not engaged in economic activity. The commercial waste collection service is based on a statutory duty to collect, or arrange for the collection of, commercial waste within its area, which is a statutory duty primarily driven by environmental and public health concerns, rather than an economic purpose. Further, unlike a private operator, the Council cannot refuse to collect (or arrange for collection) as long as the customer is willing to meet the reasonable charge levied by the Council. Nor can the Council’s commercial waste operation extend beyond the geographical scope of its responsibilities: the Council is responsible for County Durham, and not beyond.

# Dangerous comparisons

- “Enterprise” in TCA

- Article 4(2)

*“For greater certainty, neither this Agreement nor any supplementing agreement establishes an obligation to interpret their provisions in accordance with the domestic law of either Party.”*

- “Undertaking” in competition law

- “Economic activity” in Art.9 Principle GP2 VAT Directive  
(*Longridge v HMRC* [2016] EWCA Civ 930)

- WTO ASCM: no help

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### GP1

So don't assume has EU law meaning.

George Peretz KC, 2025-06-17T12:13:33.845

### GP2

A x-reference to EU competition law. NB that DBT guidance largely follows competition law approach

George Peretz KC, 2025-06-17T12:15:46.675

### GP2 0

NB though that Durham at 33 regards it as significant that the term is not used and that s.7 refers to a person (or group of persons). Durham isn't quite the same point because there the question was really about construing "give" in s.2: and also the terms of s.7 here require precisely the functional approach that the CAT found problematic in Durham (as the CAT recognised at 42(7))

George Peretz KC, 2025-06-17T13:56:49.776

### GP3

Not a WTO concept: presumably because subsidies to non-business activity won't typically adversely affect trade

George Peretz KC, 2025-06-17T12:33:22.931

# “Specificity”

- S.4

- Negative requirement in s.4(2):

*Financial assistance is not to be regarded as being specific if the distinction in the treatment of enterprises is justified by principles inherent to the design of the arrangements of which that financial assistance is part.*

- Particular rules on tax measures in s.4(3)-(5) – based on TCA which which reflects EU as well as WTO law (*R(British Sugar v SoS International Trade* [2022] EWHC 393 (Admin) at 136-137)
- Particular rules on special purpose levies s.4(6)-(7)

# “Specificity”

- Explanatory Notes:

38. Subsection (2) confirms that financial assistance is not considered specific if different enterprises are treated differently in a way that can be justified by reasons that are inherent to the assistance arrangements. For example, in the case of a special levy for environmental purposes, a differentiated treatment for certain good or services can be justified by the objective pursued by the levy.

39. Subsections (3) to (7) set out further considerations relevant to whether a taxation measure or levy should be considered specific. Subsection (4) sets out examples of the reasons for which tax measures may treat enterprises differently without being considered specific by reference to the normal taxation regime. For example, a tax relief measure by a local authority that advantages one or more enterprises over another in its area is likely to be specific but it will not be specific if all enterprises in its area benefit and the local authority is acting autonomously in relation to that measure. Subsection (5) makes provision for identifying the normal taxation regime by reference to the internal objective and features of the regime and the level of autonomy of the public authority in the design of the regime. Subsections (6) and (7) confirm that a levy with a non-economic public policy objective would not be specific if any difference in treatment of enterprises could be justified by objective criteria; and nor would any carve-out (‘forgoing of an amount’) from that levy if the same conditions applied.

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**GP1**

Picked up in DBT guidance para 2.19

George Peretz KC, 2025-06-17T13:14:08.179

# “Specificity”

- DBT Guidance: 15.83-15.103
  - “certain enterprises on the basis of characteristics specific to them”
  - “where administrative authorities have discretion GP1 in deciding which enterprises can benefit”
  - “only available to business operating in a certain area (unless the authority is responsible only for GP3 that area)”

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### GP1

DBT goes on to discuss whether there is different treatment of comparable enterprises. Suggests that you identify the internal policy objective and see if all enterprises in a comparable position entitled to the grant". But not well expressed: Borset CC grant may have the policy objective of encouraging widget making in Borsetshire and give a grant to any company that makes widgets in Borsetshire. Not obvious to me that that isn't specific. Problem is where policy objectives are themselves specific.

George Peretz KC, 2025-06-17T13:34:21.144

### GP2

But NB OK if discretion exercises according to objective criteria even if they leave a margin of appreciation.

George Peretz KC, 2025-06-17T13:35:32.399

### GP3

Azores principle: NB regional authority must be acting "autonomously with regard to process and funding" - which is presumably a reference to the Azores approach.

George Peretz KC, 2025-06-17T13:37:41.222

# “Specificity”

- Tax measures: see CJEU case-law (and WTO):  
*British Sugar*
- Who you really need: -



# “Effect on competition, trade, investment”

- “Effect on competition within the UK” is not required by the TCA
- In practice, a grant to any enterprise that competes (or may well soon compete) with other enterprises is likely “potentially” to distort competition within the UK: DBT guidance 15.109 points out that measure can pass test even if very local market or very low amount
- Paradox: less “intrusive”, more “flexible” SCA22 catches more than State aid rules did
- Cases where effect on investment/trade but not on competition: eg UK monopolies but international investment and competition

**Thank You**

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