

## THE BEV ANTI-SUBSIDY INVESTIGATION OF THE COMMISSION INDUSTRIAL POLICY AND GEOPOLITICS IN DISGUISE?

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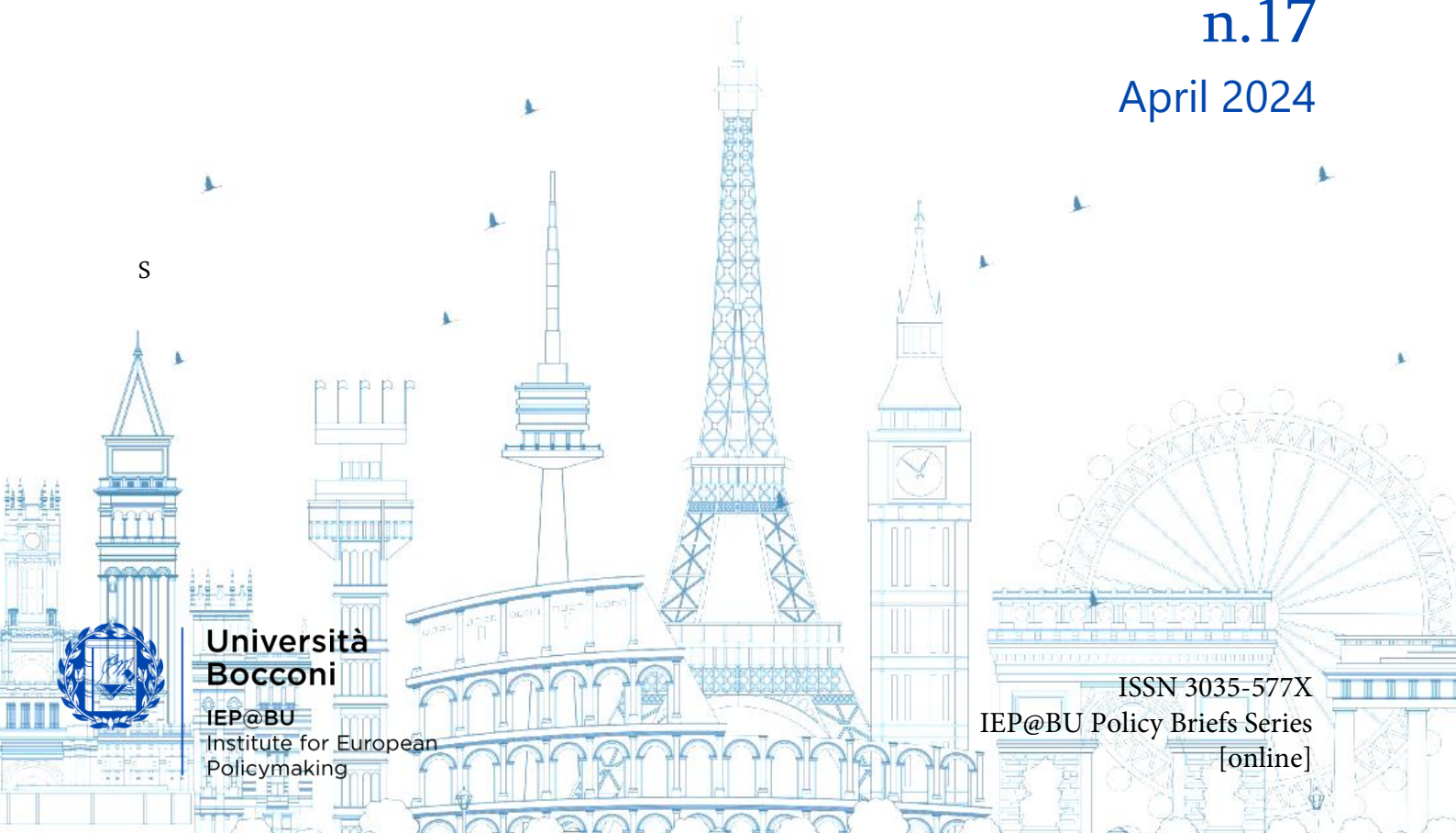
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## Abstract

The anti-subsidy investigation against battery electric vehicle (BEV) imports from China launched by the Commission in October 2023 looks to be motivated more by industrial policy and geopolitics than by evidence that Chinese countervailable subsidies have harmed European industry. It is difficult to understand why the Commission would see the need for an investigation when those whom it is supposed to protect have not complained.

If follow the ratio decidendi established in its previous countervailing determinations against the relevant imports from China, the Commission will likely find countervailable subsidies, including those granted by 'State-owned banks and other financial institutions'. The Commission's position may be consistent with its regulatory framework governing such financial institutions in the Single Market. Eventually, it is a question whether these findings could withstand a challenge in the WTO due to the unsettled debate on public/private body – as a provider of a financial contribution.

The Commission might also want to prove that subsidies to Chinese battery makers (and other upstream products) constitute an unfair advantage to Chinese BEV makers. But it would then have to face counter-claims because of the subsidies the EU is providing to its own battery producers.

The economic logic of the investigation seems questionable given that EU producers charge EU consumers much more for the same cars they are also selling (and producing) in China. Instead of subsidies, it might be the overall cost advantages in China and the high price strategies of European car producers that allow Chinese BEV to compete on the EU market.

Ultimately, any decision on countervailing duties will need to pass the 'Union interest' test. This test will not only involve the usual interests of consumers, but also the Union interest in the green transition.

A countervailing duty that covers the price/cost difference between the EU and China would increase the cost for European consumers by at least 10 thousand euros per car, allowing EU producers to keep their prices higher and thus reducing considerably the market for BEVs. With 2 million BEVs expected to be sold this year, this translates into a cost to European consumers of over 20 billion euro. The cost would rise as BEV penetration ratios increase.

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## Introduction

The anti-subsidy investigation on Chinese BEVs<sup>1</sup> launched in October 2023 by the Commission has several key features that set it apart from all previous cases. But it is also instructive because it concerns an industry that is globalised with many EU firms owning plants all over the world, including of course in China. Moreover, this investigation illustrates once more the conflict between mercantilism and green policies. Finally, this investigation concerns a strategic industry. BEVs are widely seen as the future of the automobile industry, an important industrial sector and the one in which the EU has so far kept a competitive advantage, at least as far as internal combustion engine cars are concerned.

To succeed the anti-subsidy investigation, the Commission will need to determine that the BEV value chains in China benefit from countervailable subsidies, and that such subsidies cause or threaten to cause economic injury to EU BEV industry. (The EU claims a threat of injury exists despite the still relatively small market share of Chinese BEVs on the EU market because imports have increased very quickly).

If its case is established, the Commission may impose definitive countervailing duties on the relevant Chinese BEVs to offset any subsidies granted, directly or indirectly, to remedy the injury caused. However, before that, the Commission must conduct a ‘Union interest’ test in order to make sure that it is in the EU’s interest to impose such duties. The applicable law of the investigation is the Anti-Subsidy Trade Defense Instrument (ASTDI). It implements the WTO Agreement on Subsidies and Countervailing Measures (ASCM), and reflects the language of the Agreement in Union legislation to the best extent possible.<sup>2</sup>

This paper will discuss the legal aspect of this anti-subsidy investigation, of which it also ponders over the economic logic. It will start by asking three questions on the initiation of the investigation. Then, on subsidies, the focus of the paper is on the existence of the subsidies that are allegedly provided by those ‘State-owned banks and other financial institutions’. In this regard, it is a question whether the Commission’s findings could withstand China’s possible challenge due to the unsettled debate on public/private body – as a provider of a financial contribution. The Commission would most likely regard its approach as consistent with the Single Market rules. After that, this paper explores the economic reasoning of the BEV anti-subsidy investigation. Whether it is the BEV subsidies or the overall production advantages and EU-China differences in market that afford Chinese BEV imports lower selling prices in the EU? Before concluding, the paper will highlight the ‘Union interest’ test that exposes the conflict between mercantilism and green policies.

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<sup>1</sup> See Official Journal of the European Union (2023), Notice of initiation of an anti-subsidy proceeding concerning imports of new battery electric vehicles designed for the transport of persons originating in the People’s Republic of China, 4 October, C/2023/160.

<sup>2</sup> See the preamble of the REGULATION (EU) 2016/1037 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (codification): <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1037>.



## The logic of the initiation of the BEV anti-subsidy investigation

From the outset, it must be clear that subsidies per se are not illegitimate. Very often subsidies are provided for pursuing the interest of a social good or an economic policy.<sup>3</sup> However, subsidies that cause market distortions should be rectified to level the playing field so that fair competition could be restored.

The Commission launched the BEV anti-subsidy investigation on its own initiative by virtue of Article 10.8 of the ASTDI. The following query the logic of the investigation.

### *1) The EU BEV industry itself did not see the need for protection?*

The BEV anti-subsidy investigation represents a first because the Commission initiated it, although the EU BEV industry had not complained about the subsidised imports from China.

The official explanation is that while their market share is still low, there is a '*surge of low-priced imports of BEVs*' originating in China and the Commission had to act on '*an imminent threat of injury to an already vulnerable EU industry*' – based on the basis of sufficient evidence of countervailable subsidies, injury and causal link that is at its disposal.<sup>4</sup>

According to the Commission, the share of BEVs from China sold in the EU jumped from less than 1% to 8 % in 2022. This share could soar to 15 % by 2025. Nonetheless, two-thirds of EU imports of BEVs from China are from EU and US firms manufacturing in China.<sup>5</sup>

In any case, although launching the anti-subsidy investigation is meant to protect EU industry, it is strange that the Commission would see such a need when those it is supposed to protect have not complained. It is also highly unusual as anti-subsidy actions are supposed to be initiated when, among others, there is a significant increase in volume, effect and consequent impact of subsidised imports in the Union.

The argument of the Commission is that 1) the subsidised BEV imports from China have increased at a significant rate in both absolute and in market share terms in the EU market; 2) there is sufficient freely disposable capacity in China suggesting an overcapacity which would cause injury to the EU BEV industry. In reality, based on the statistics revealed in September 2023 when the BEV anti-subsidy investigation was launched, Chinese brands account for 4% of EU BEV sales in 2022, albeit up from 0.4% three years ago. In comparison, European brands account more of Chinese BEV sales in the same year, which was 6%.<sup>6</sup> The Commission's argument appears discretionary at best.

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<sup>3</sup> See <https://www.britannica.com/money/topic/subsidy>.

<sup>4</sup> See Official Journal of the European Union (2023), Notice of initiation of an anti-subsidy proceeding concerning imports of new battery electric vehicles designed for the transport of persons originating in the People's Republic of China, 4 October, C/2023/160.

<sup>5</sup> Grieger G. (2023): EU anti-subsidy probe into electric vehicle imports from China, European Parliamentary Research Service.

<sup>6</sup> ACEA (2023): EU-China Vehicle Trade Fact Sheet, September. Available at: [https://www.acea.auto/files/ACEA\\_fact\\_sheet\\_EU\\_China\\_vehicle\\_trade-September\\_2023.pdf](https://www.acea.auto/files/ACEA_fact_sheet_EU_China_vehicle_trade-September_2023.pdf).



Furthermore, the profit margins of EU producers remain high as they charge EU consumers much more for the same cars they are also selling produced in China. The same Chinese BEV model is charged typically 50 percent more in Europe than in China. Such pricings are diametrically opposed to ‘significant price undercutting’ or ‘depress prices to a significant degree or prevent price increases’, as prescribed by Article 8.2 of the ASTDI.

## *2) Why does the Commission tackle some subsidies that are more prone to challenges under WTO rules?*

Many countries provide subsidies to their BEV industry these days, in order to accelerate a green transition.<sup>7</sup> For example, the EU spends billions of euros to subsidise its battery industry to ensure EU supply chains and an ecosystem on batteries and electric vehicles is strengthened. The financial support package granted in 2023 amounts to €3 billion under the EU Innovation Fund.<sup>8</sup> If such subsidies meet the public interest requirement in the EU the same should hold for China.

Nonetheless, some means of ‘green’ subsidisation can be controversial. A chief example is the purchase credit provided by Section 30D of the Inflation Reduction Act of the United States. Since the purchase credit is contingent upon a ‘local content’ requirement, such a subsidy is prohibited outright, therefore countervailable, under Article 3.1(b) of the WTO ASCM. This might have provided a case against imports of US made BEVs (Tesla). But the Commission did not pursue this case for obvious geopolitical reasons.

In contrast, although based on the relevant ratio decidendi it has established, the likelihood for the Commission to determine the countervailable BEV subsidies provided by Chinese ‘State-owned banks and other financial institutions’ is high, whether the findings would pass the scrutiny in the WTO is uncertain. This is because determining the identity of such institutions, whether they are a public or a private body on a given occasion, could be a controversial undertaking. The WTO has provided only general guidance in this regard. It might be that some aspects of the EU’s ratio decidendi are not compatible with WTO case law guidance, although they may be seen as norms from the standpoint of the Single Market. Ultimately, if ever China succeeds in challenging the Commission in the WTO, and if ‘State-owned banks and other financial institutions’ are proven not public but private bodies within the meaning of Article 1.1(a)(1) of the ASCM, the existence of these subsidies will not even be established, let alone imposing countervailing duties for rectification.

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<sup>7</sup> In fact, many countries provide industrial subsidies. Still, industrial subsidies in China are several times higher than those in large EU and OECD countries. The size of the estimated difference ranges from a ratio of at least three to four in conservative estimates to a ratio of as high as nine in more encompassing studies. If counting only the more easily quantifiable subsidy instruments, industrial subsidies add up to about Euro 221 bn or 1.73% of Chinese GDP in 2019. See Bickenbach, F., Dohse, D. Langhammer, R.J. and Liu, W.-H. (2024), Foul Play? On the Scale and Scope of Industrial Subsidies in China, Kiel Policy Brief. Available at: [https://www.ifw-kiel.de/fileadmin/Dateiverwaltung/IfW-Publications/fis-import/bc6aff38-abfc-424a-b631-6d789e992cf9-KPB173\\_en.pdf](https://www.ifw-kiel.de/fileadmin/Dateiverwaltung/IfW-Publications/fis-import/bc6aff38-abfc-424a-b631-6d789e992cf9-KPB173_en.pdf).

<sup>8</sup> See European Battery Alliance (EBA 250) strongly welcomes new EU financial stimulus of €3bn to boost growth of the battery industry. Available at: <https://www.eba250.com/european-battery-alliance-eba-250-strongly-welcomes-new-eu-financial-stimulus-of-e3bn-to-boost-growth-of-the-battery-industry/>.



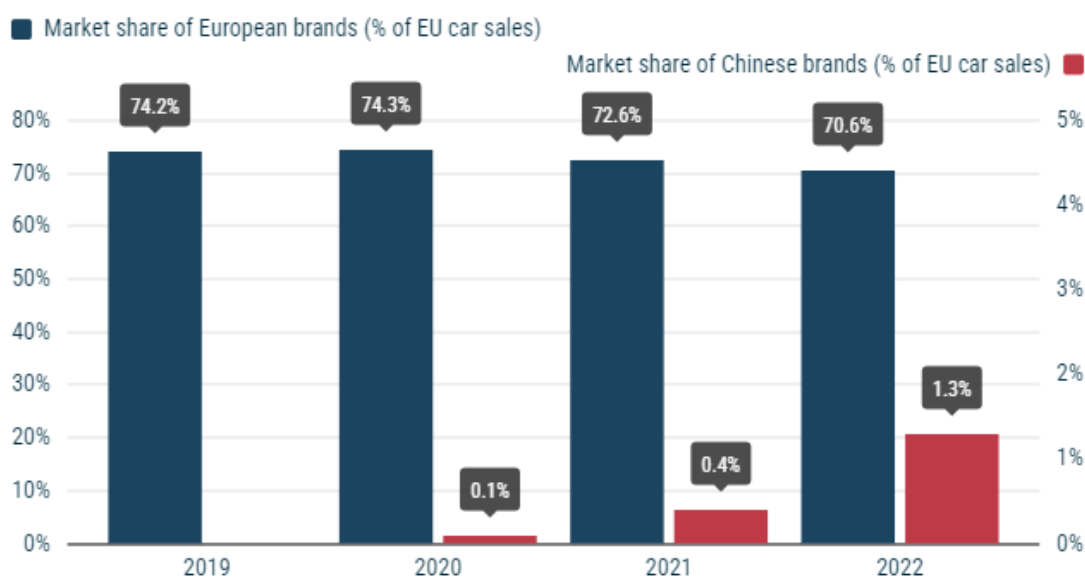
It is interesting why the EU did not take trade defence actions against those ostensible countervailable subsidies but has aimed to levy countervailing duties to some Chinese BEV subsidies it has no guarantee to prove their existence in the WTO.

### 3) *A small sample for investigation—to protect a subset of European BEV manufacturers?*

After a controversial sampling exercise,<sup>9</sup> the Commission picked three Chinese carmakers, namely BYD, SAIC and Geely, for the BEV anti-subsidy investigation. They are not the biggest exporters of EVs from China into Europe.<sup>10</sup>

No European-owned car producers that import their ‘made in China’ BEVs into the EU are included in the investigation, although European brands (with Tesla) still dominate EU BEV imports from China (Figure 1). This is difficult to reconcile with the rules, or at least preferences, governing the sampling exercise in an anti-subsidy investigation because the sample should be ‘*the largest representative volume of the production*’, in accordance with Article 27.1(b) of ASTDI.

Figure 1: Market share of European and Chinese brands of EU car sales (2019-2022)



Source: Fact sheet: EU-China vehicle trade, AECA.

<sup>9</sup> See Article 5.3.1.(a), Notice of initiation of an anti-subsidy proceeding concerning imports of new battery electric vehicles designed for the transport of persons originating in the People's Republic of China, 4 October, C/2023/160.

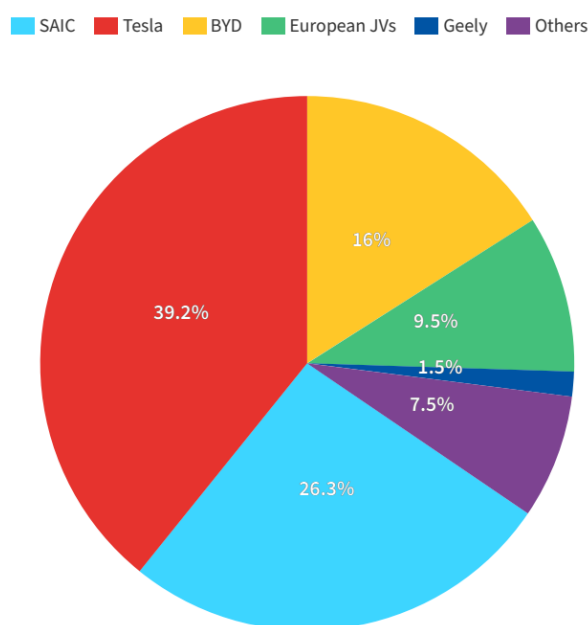
<sup>10</sup> For example, Tesla is by far the biggest exporter of EVs from China into Europe. See Preussen W., Posaner J. and Gijs C. (2023), Tesla is furious it's not in EU's Chinese subsidy probe. Here's why, 10 November, POLITICO.





More specifically, in the first six months of 2023, Tesla accounted for 36.5 percent of all Chinese EV exports; SAIC accounted for 26.3 percent; European-Chinese JVs accounted for 9.5 percent; and Geely accounted for only 1.5 percent, of all Chinese EV exports (Figure 2).<sup>11</sup> The underlying question raised by this sampling choice is whether probing subsidies provided by a foreign government to EU-owned firms with operations in that country are in the interest of the EU. As far as the purpose of the ASTDI is concerned, the question is thus whether rectifying trade distortions should be juxtaposed with safeguarding production inside the EU or protecting the global interests of EU-based multinational producers. One cannot help but is triggered to think about geopolitics, instead of trade in its totality.

Figure 2: China EV Exports by Company, January to June 2023



*Source: Mazzocco I. and Sebastian G. (2023), Electric Shock: Interpreting China's Electric Vehicle Export Boom, September, CSIS Briefs.*

By investigating only Chinese manufacturers (so far without operations in Europe) the Commission has implicitly taken the stance that the purpose of the anti-subsidy trade tool could also be used to protect production (of BEVs) inside the EU. This is compatible with Article 9.1 (a) of the ASTDI which defines 'EU industry' as those producers that are not related to the exporters or importers, or themselves are not importers of the alleged subsidised products. Most of the major EU producers of BEVs, such as BMW, Mercedes-Benz, Renault-Nissan-Mitsubishi, Volkswagen, also have operations in China. The anti-subsidy investigation thus aims only at a small subset of the European automobile sector.

<sup>11</sup> See Mazzocco I. and Sebastian G. (2023), Electric Shock: Interpreting China's Electric Vehicle Export Boom, September, CSIS Briefs.



## Determine a countervailable subsidy provided by ‘State-owned banks and other financial institutions’

On the alleged countervailable subsidies, based on the Notice of investigation, at the Commission’s disposal there are two categories of countervailable subsidies that ‘would pose an imminent threat of injury to an already vulnerable EU industry’.<sup>12</sup>

One category is those ‘conventional’ subsidies. Their existence is based on the definition prescribed by the ASCM, and the Commission has adopted it. By virtue of Article 3 of the ASTDI, such ‘conventional’ subsidies include (1) direct transfer of funds and potential direct transfers of funds or liabilities; (2) government revenue forgone or not collected, and (3) government provision of goods or services for less than adequate remuneration.

These types of ‘conventional’ subsidies are relatively easy to prove as their characteristics would conveniently match the ingredients of a subsidy by definition.

Another category of alleged countervailable subsidies is those ‘unconventional’ subsidies, of which their existence can only be established if the providers of such subsidies are, or proven, ‘public bodies’ – a concept which is neither defined by the ASCM nor by the ASTDI. According to the Commission’s evidence, such subsidies are provided by China’s ‘State-owned banks and other financial institutions’ in particular in the form of, for example, provision of preferential export insurance; income tax reductions and exemptions, dividend tax exemption, import and export tax rebates, preferential loans.<sup>13</sup>

The Commission has developed over the years its case law jurisprudence in order to prove the existence of the aforementioned ‘unconventional’ subsidies. Countervailing duties were then imposed in each anti-subsidy investigation for the purpose of rectifying market distortions.<sup>14</sup> The ratio decidendi of the relevant countervailing duty determinations coincides with the Commission’s policy objective – in the context of ASCM reform<sup>15</sup> – to rein back the role played by chiefly the Chinese state-owned enterprises (SOEs) in acting as public bodies to grant subsidies. Presently, such conduct taking place on specific occasions may escape from WTO Members’ scrutiny because ‘public body’ is not defined by the ASCM while in the meantime, the WTO Appellate Body (AB) has construed the concept very narrowly in its adjudication

<sup>12</sup> For a detailed list of the subsidies provided to the Chinese BEV imports, see Evidence of subsidisation, in Official Journal of the European Union (2023), Notice of initiation of an anti-subsidy proceeding concerning imports of new battery electric vehicles designed for the transport of persons originating in the People’s Republic of China, 4 October, C/2023/160.

<sup>13</sup> According to the Commission, these subsidies are countervailable since they involve a financial contribution provided by a public body or a private body ‘directed or entrusted’ by a government, and confers a benefit. On the latter, the Commission has found that they appear specific since, among others, they are limited to certain sectors, products and/or regions, in accordance with Article 4 of the ASTDI.

<sup>14</sup> See Council Implementing Regulation (EU) 2022/72 of 18 January 2022, 2017/969 of 8 June 2017, and 1239/2013 of 2 December 2013.

<sup>15</sup> The Commission has aimed to improve subsidy transparency and notifications, better capture SOEs (by widening the scope of public body) and capture more effectively the most trade-distortive types of subsidies (by expanding the scope of prohibited subsidies). See European Commission (2018), Concept Paper: WTO modernisation - Introduction to future EU proposals.





but, at the same time, the guidance it has provided is ambiguous subject to interpretation. This being the case, possible market distortions caused by the prohibited or actionable subsidies will not be rectified – which is a challenge faced by the WTO and the Commission.

In the case of the BEV anti-subsidy investigation, a key to establish the existence of those ‘unconventional’ subsidies provided by those Chinese ‘State-owned banks and other financial institutions’ is to prove they are public bodies on a given occasion. This is somehow not so hard, based on the Commission’s jurisprudence, and supported by its ASCM reform policy objectives. However, as illustrated below, there will be discrepancies between the approach that the Commission is likely to undertake and the WTO’s. The former may fall within the regulatory framework governing those public bodies in the Single Market; the latter will nonetheless determine whether the Commission’s findings would withstand China’s possible challenges in the WTO.

### *1) Public body under the ASTDI and EU law*

ASTDI measures will be triggered when a subsidy is countervailable. In applying the ASTDI the Commission is likely to be guided by the EU’s own jurisprudence on subsidies, not necessarily by principles developed in WTO cases.

A first condition under Article 4.1 of the ASTDI is that the subsidy in question must be specific. And, to prove specificity, the existence of a subsidy must be established in the first place, i.e. the subsidy must be limited to a specific firm, industry, or group of firms or industries. Whether a certain measure is specific should not be difficult to ascertain. But the real question is whether any specific measure constitutes a subsidy.

By virtue of Article 3 of the ASTDI, the existence of a subsidy may be established if a financial contribution<sup>16</sup> provided by a government or any public body in the country of origin or export<sup>17</sup> confers a benefit.

However, while ‘government’ is a straightforward concept, ‘public body’ is not defined by the ASTDI (just like the ASCM). As a result, what constitutes a public body, or what is a private body, is a highly debatable subject, in the case of China largely related to SOEs<sup>18</sup>, including those State-owned banks and financial institutions as could be the case of the BEV anti-subsidy investigation. These entities, although operating as a commercial entity, may occasionally undertake governmental functions, including acting as a provider of a financial contribution. In the absence of a definition, proving a ‘private body’ as a de facto ‘public body’ on a particular occasion could be a challenging undertaking. However, in the context of the EU

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<sup>16</sup> Financial contribution also means any form of income or price support within the meaning of Article XVI of the GATT 1994: [https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gatt1994\\_art16\\_gatt47.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art16_gatt47.pdf).

<sup>17</sup> Based on Article 1.2 of the ASTDI, not only those BEVs directly imported from China but also those exported from an intermediate country may be subject to this anti-subsidy investigation.

<sup>18</sup> See Sacerdoti G. and Borlini L. (2023), Systemic Changes in the Politicization of the International Trade Relations and the Decline of the Multilateral Trading System, German Law Journal, Volume 24, Special Issue 1: The Resurgence of the State as an Economic Actor-International Trade Law and State Intervention in the Economy in the Covid Era, February, pp. 17 – 44.



Single Market, the regulatory framework governing ‘public body’ may offer some reference.

Public body is a concept with several definitions under European law, which differ from sector to sector. Attention (sometimes exclusive attention) is given to the kind of activity involved and the particular legal regime. The legal status of the body does not matter.<sup>19</sup> EU jurisprudence on this issue was developed with the aim of enforcing the Treaty prohibition of state aid.

For example, by virtue of Article 7.4 of the Directive 2014/23/EU, a ‘public undertaking’ is defined as ‘any undertaking over which the contracting authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership thereof, their financial participation therein, or the rules which govern it. A dominant influence on the part of the contracting authorities shall be presumed in any of the following cases, in which those authorities, directly or indirectly: (a) hold the majority of the undertaking’s subscribed capital; (b) control the majority of the votes attaching to shares issued by the undertaking; (c) can appoint more than half of the undertaking’s administrative, management or supervisory body’.

As will be highlighted below, the Commission’s position on public body, or ‘public undertaking’, within the remit of the above public procurement directive is similar to the one undertaken in the context of countervailing determinations, such as ‘rebuttable presumption’ and ‘majority share-holding’. But this does not appear compatible with the WTO approach.

## 2) *Public body under the WTO ASCM*

The WTO AB has only provided general guidance that a ‘private body’ may be qualified as a ‘public body’ on an ‘entity-to-entity, state-to-state, and case-by-case’ basis.<sup>20</sup> Such guidance is subject to interpretation.<sup>21</sup>

In China’s case, the challenge is that after having undertaken the measures like privatisation and cross-investment in the past decades,<sup>22</sup> many ‘public bodies’ appear perfectly (formally) ‘private’, for example being listed in a stock market open for stock trading. But at the same time, these ‘private’ entities may perform governmental functions (or even as public bodies in disguise). They would then become ‘public bodies’ since, conventionally, a public body may be understood as ‘a formally established organisation that is (at least in part) publicly funded to deliver a public or government service’.<sup>23</sup>

Notwithstanding, in accordance with the findings of the WTO AB in US — Countervailing Duty Measures

<sup>19</sup> Maltoni A. (2019), Dictionary of Statutes within EU Law, at pp 447–54.

<sup>20</sup> See WTO (2019), United States - Countervailing Duty Measures on Certain Products from China - Recourse to article 21.5 of the DSU by China, WT/DS437/AB/RW, 16 July. See also Hu W. (2019), Industrial subsidies, state-owned enterprises and market distortions: problems, proposals and a path forward, Institute for International Trade, The University of Adelaide, Australia: <https://iit.adelaide.edu.au/ua/media/441/IIT%20PB05%20Industrial%20Subsidies.pdf>.

<sup>21</sup> In fact, the issue of ‘private body’ is so controversial that it has contributed to the US’ grievances against the WTO Appellate Body (AB). The USTR has alleged that, due to the AB’s ‘erroneous interpretation’, ‘... members’ ability to address China’s subsidy practices is now limited’. See USTR (2020), Report on the Appellate Body of the World Trade Organisation, February, at pp. 81-9.

<sup>22</sup> Pelkmans J., Hu W. et al (2018), Tomorrow’s Silk Road – Assessing an EU-China Free Trade Agreement (2nd eds.), CEPS, RLI, pp.189-95.

<sup>23</sup> Available at: <https://www.instituteforgovernment.org.uk/explainer/public-bodies>.



on Certain Products from China (DS437), it will be inconsistent with Art. 1.1(a)(1) of the ASCM if the Commission determines certain Chinese ‘State-owned banks and other financial institutions’ as ‘public bodies’ just because they are majority owned, or otherwise controlled, by the Chinese government. In the same regard, it will be equally inconsistent with the WTO case law if the Commission engages a ‘rebuttable presumption’ approach.<sup>24</sup> In parallel, as decided in United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (DS436), it is established that a government’s ‘meaningful control’, by ownership and other factors, would not automatically give rise to the constitution of a public body.

According to the AB in DS437, evidence that government exercises meaningful control over an entity and its conduct may serve as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions. Where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority. The AB also considered that public bodies are characterised by the ‘performance of governmental functions’ which would ‘ordinarily be considered part of governmental practice in the legal order of the relevant Member’.<sup>25</sup>

However, since a private body may occasionally become a ‘public body’ depending on circumstances and when a government ‘entrusts or directs a private body to carry out’ one or more governmental functions, the question is what constitutes ‘entrustment’ and ‘direction’ within the meaning of Article 1(a)(iv) of the ASTDI.

### *3) China’s ‘State-owned banks and other financial institutions’ – are they public bodies?*

At the moment the evidence at the Commission’s disposal is not public. We may refer to the ratio decidendi that the Commission has established in its previous determinations against certain Chinese imports in the EU market<sup>26</sup> in order to anticipate how the Commission may qualify those ‘State-owned banks and financial institutions’ as public bodies. In this regard, while trying to establish they ‘possess, exercise or are vested with governmental authority’ along the line set down by the WTO AB, the Commission seems to have followed its own policy objectives on SOEs (seen from the ASCM reform objective) and qualified these institutions as public bodies based on the regulatory framework governing them in the Single Market.

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<sup>24</sup> Available at: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds437sum\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds437sum_e.pdf).

<sup>25</sup> WTO (2011), United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, Report of the Appellate Body, WT/DS379/AB/R, 11 March, paras 317, 290, 297.

<sup>26</sup> See Council Implementing Regulation (EU) 2022/72 of 18 January 2022, 2017/969 of 8 June 2017, and 1239/2013 of 2 December 2013.



### a. 'State-owned banks'

Considering China's State-owned banks in the light of the public-private body argument, a typical example in this regard will involve a State-owned bank listed in the world's major stock exchange markets, and therefore is qualified as a private body. But on occasions it lends with below-market interest rates and automatically rolls over of unpaid principal and interest for national development reasons. By definition, such operation is not based on 'commercial consideration' suggesting, among others, the bank acts under 'the government's meaningful control and exercise governmental function'. This being the case the bank's action may be attributed to the government, and therefore the ASTDI applies.<sup>27</sup>

Determining whether a Chinese State-owned bank is a public body may not be especially difficult under certain circumstances. Very often such governmental function is stated in the statutes of these banks. If circumstances warrant, it does not seem so hard to determine that they are under the Chinese government's 'meaningful control' and exercise governmental function as far as a specific subsidisation is concerned. Thus, the conclusion of 'public body' would be reached.

For example, the Industrial and Commercial Bank of China (ICBC) states that the bank '... earnestly implemented the decisions and plans made by the Communist Part of China Central Committee and the State Council.'<sup>28</sup> Referring to the case against the optical fibre cable imports from China,<sup>29</sup> the Commission found that, based on the various banking legislation, the State-owned financial institutions in China are operating in a general legal environment that directs them to align themselves, de jure and de facto, with the government's industrial policy objectives when taking financial decisions. For example, Article 15 of the General Rules on Loans (implemented by the People's Bank of China) provides that 'In accordance with the State's policy, relevant departments may subsidize interests on loans, with a view to promoting the growth of certain industries and economic development in some areas'.<sup>30</sup>

The Commission has also determined that, in the absence of explicit regulatory requirements or factual conduct, a government's shareholding in the ownership structure could be an indicia of a government's meaningful control of a State-owned financial institution. Moreover, when managers and supervisors in a State-owned financial institution appear to be appointed by the government and be accountable to the government, a government's 'meaningful control' could be drawn to the same conclusion.<sup>31</sup> Ultimately, even if the State-owned financial institutions were not to be considered as public bodies, it may be possible to establish that they are 'entrusted' or 'directed' by the government to carry out functions normally vested in the government. Thus, their conduct would be attributed to the Chinese government in any event.

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<sup>27</sup> Article 3.1(a)(iv), ASTDI.

<sup>28</sup> Available at: <https://www.icbc-ltd.com/en/column/1438058341816746041.html>.

<sup>29</sup> See Commission Implementing Regulation (EU) 2022/72 of 18 January 2022.

<sup>30</sup> Similarly, Decision No 40 of the State Council instructs all financial institutions to provide credit support specifically to 'encouraged' projects and promises the implementation of 'other preferential policies on the encouraged projects. See Commission Implementing Regulation (EU) 2022/72 of 18 January 2022.

<sup>31</sup> See Commission Implementing Regulation (EU) 2022/72 of 18 January 2022.



### b. 'Other financial institutions'

Presently, based on the Notice for investigation, it is not clear what are those 'other financial institutions' that the Commission refers to in its present anti-subsidy investigation. They could be private financial institutions, such as a wholly-owned locally incorporated foreign bank (e.g. HSBC), a rural cooperative or credit union, or a private equity trust fund (e.g. Shanghai International Trust). Anyhow, the above analysis on whether 'a government's meaningful control and exercise governmental function' applies to 'other financial institution', too. Although their statutes may not stipulate the role of the government, it is to examine whether the relevant financial institutions had been 'entrusted or directed' by the Chinese government to grant subsidies to the BEV sector within the meaning of Article 1(a)(iv) of the ASTDI. For this purpose, the Commission is likely to apply the test that the WTO AB has set down in United States – Countervailing duty investigation on Dynamic Random Access Memory (DRAMS) from Korea (DS296). According to the WTO AB, 'entrustment' occurs where a government gives responsibility to a private body and 'direction' refers to situations where the government exercises its authority over a private body. In both cases, the government uses a private body as a proxy to make the financial contribution, and 'in most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement'. At the same time, Members are not allowed to impose countervailing measures to products 'whenever the government is merely exercising its general regulatory powers' or where government intervention 'may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market'. Rather, entrustment or direction implies 'a more active role of the government than mere acts of encouragement'.<sup>32</sup>

If we follow the Commission's argument applied in the various cases against some Chinese imports, those 'other financial institutions' would likely be determined as 'public bodies', too. The Commission has asserted that both the State-owned and private financial institutions in China operate under the same framework of banking legislation, for example the various implementing rules issued by China Banking and Insurance Regulatory Commission.<sup>33</sup> Therefore, the presence of the government's 'entrustment' and 'direction' is proven, for the purpose of determining a 'public body'.

### c. Forms of BEV subsidisation

As seen from the Notice of investigation, the evidence of BEV subsidisation presented by the Commission includes grants, provision of loans, export credits and credit lines. However, some legal practitioners argue

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<sup>32</sup> WTO (2005), United States – Countervailing duty investigation on Dynamic Random Access Memory (DRAMS) from Korea (DS296), WT/DS296/AB/R, 27 June, paras 114, 115, 116.

<sup>33</sup> In the Optical Fibre Cable case, to illustrate its point, the Commission referred to 1) Implementing Measures of the China Banking and Insurance Regulatory Commission ('CBIRC') for Administrative Licensing Matters for Chinese-funded Commercial Banks (Order of the CBIRC [2017] No 1), 2) Implementing Measures of the CBIRC for Administrative Licensing Matters relating to Foreign-funded Banks (Order of the CBIRC [2015] No 4), 3) Administrative Measures for the Qualifications of Directors and Senior Officers of Financial Institutions in the Banking Sector (CBIRC [2013] No 3). See Commission Implementing Regulation (EU) 2022/72 of 18 January 2022.





that these subsidies are provided in accordance with governmental laws/regulations. As a result, the subsidies should not have been attributed to ‘the state-owned banks or other financial institutions’.

On the other hand, cheap credits provided by the so-called government guidance funds (GGFs)<sup>34</sup> could be a form of subsidy, too, although the Commission did not include it in its Notice of investigation. GGFs may be understood as venture capital investment adapted to the Chinese political and economic context,<sup>35</sup> and can be found at all levels of government in China.<sup>36</sup> They are mostly financed by central and local governments, large SOEs and State-owned financial institutions. GGFs are enormous in size,<sup>37</sup> they in general aim to produce financial returns and further the government’s industrial policy goals.

The GGFs invest in China’s BEV industry, for sure.<sup>38</sup> However, the Commission may have alleged that the GGFs have provided countervailable subsidies, it would undertake the same analysis when trying to establish the existence of a subsidy in question.

In the meantime, the Commission has alleged a series of different forms of subsidies including grants from government at different administrative levels, the provision of different forms of capital at below market rates come from non-governmental sources, too. The details of this evidence are not public. It is thus difficult to judge at this point whether the three Chinese producers under investigation have received subsidies that are ‘countervailable’, i.e. specific enough to allow the EU to impose countervailing duties.<sup>39</sup>

<sup>34</sup> According to DiPippo G. et al, there are nine categories of subsidies: direct subsidies to firms, R&D tax incentives, other tax incentives, government financed business R&D, below-market credit to SOEs, state investment funds (government guidance funds), below-market land sales to firms, implied credit advantage among SOEs for their large net payables balances, and debt-equity swaps. See DiPippo G. et al (2022), *Red Ink: Estimating Chinese Industrial Policy Spending in Comparative Perspective*, May, CSIS.

<sup>35</sup> Lan X. (2024), *How China Works: An Introduction to China’s State-led Economic Development*, Chapter 4, Section 3, (translated by Gary Topp), Palgrave Macmillan.

<sup>36</sup> USTR (2024), *2024 National Trade Estimate Report on FOREIGN TRADE BARRIERS*, p.78.

<sup>37</sup> It is said that, by the end of 2020, 1,851 GGFs had been established, with a total designated funding scope of 11.5 trillion yuan (€1.59 trillion). On the other hand, it is very difficult to trace these GGFs. Often, they make equity investments in unlisted companies and start-ups in targeted sectors, such as strategic emerging industries and advanced manufacturing industries. China’s National Development and Reform Commission lists seven areas that government-guided funds are encouraged to invest in: (1) non-basic public services, such as higher education and culture and entertainment, (2) infrastructure, (3) social housing, (4) environmental protection, (5) underdeveloped regions, (6) strategic emerging industries and advanced manufacturing industries, and (7) innovation and entrepreneurship. In recent years, most visible investments made by these funds have focused on the last two areas. See Huang T. (2019), *Government-Guided Funds in China: Financing Vehicles for State Industrial Policy*, June, PIIE. Available at: <https://www.piie.com/blogs/china-economic-watch/government-guided-funds-china-financing-vehicles-state-industrial-policy>.

<sup>38</sup> For example, as reported by Nikkei in 2019, NIO, a Chinese EV maker, received an investment of up to 10 billion yuan (€1.36 billion) from Beijing E-Town Capital, a state-owned fund, in the run up to the phase-out of EV subsidies in China. See China’s NIO to receive \$1.5bn state investment as EV subsidies fade, May 2019, Nikkei Asia: <https://asia.nikkei.com/Spotlight/Electric-cars-in-China/China-s-NIO-to-receive-1.5bn-state-investment-as-EV-subsidies-fade>.

<sup>39</sup> Based on Article 4.2(a)(b), 4.3 and 4.4 of the ASTDI, a subsidy is specific if it is either enterprise-specific (where particular enterprises are targeted for subsidisation), industry-specific (where particular sectors are targeted for subsidisation), or regional-specific (where producers in specific parts of a territory of a government is targeted for subsidisation). Subsidies contingent upon export goods, or the use of domestic over imported goods, are specific subsidies, too. See also Ledwos M (2022), *Subsidies in the context of the WTO – Overview*, 30 March. In case a subsidy does not fall within one of the four categories of ‘specificity’ but there are reasons to believe that it may be specific, a few factors can help to confirm such suspicion by virtue of Article 4.2(c) of the ASTDI. Such factors include 1) use of a subsidy programme by a limited number of certain enterprises, 2) predominant use by certain enterprises, 3) the granting of disproportionately large amounts of subsidy to certain enterprises.





Notwithstanding, one general point on subsidies in the form of cheap credit is that this form of subsidy only leads to extremely low rates of subsidisation as the subsidy is only the difference between market and subsidised rates. But the Commission in the past has, for example, treated loans as grants on the grounds that the subsidised company would not be able to repay the loans, as seen in the hot-rolled flat steel case.<sup>40</sup> As a consequence, the subsidy amount becomes quite high.

Once the existence of a subsidy is proven, the next step is to examine the specificity of a subsidy. This is to scrutinise the identity of the recipient of a subsidy and to ascertain if it is an enterprise, industry, group of enterprises or group of industries, referred to as “certain enterprises” by Article 4.2 of the ASTDI, within the jurisdiction of the granting authority. After that, one must determine how a subsidy is granted in order to pinpoint the specificity of the subsidy. This can be done by checking against the scenarios of subsidisation prescribed by Articles 4.2-4 of the ASTDI. For example, a subsidy is deemed specific if it grants explicitly limited access to certain enterprises only. A subsidy contingent upon ‘export performance’ or ‘domestic content’ will equally be deemed specific.

#### d. Would the Commission withstand a challenge in the WTO?

Based on its findings in the previous countervailing duty determinations, we may very well predict that the Commission could manage to favourably conclude its investigation (the Union interest test would determine probably just the percentage of countervailing duties to be imposed). It is then worth asking whether the Commission would withstand China’s challenge in the WTO, including the Commission’s findings in relation to ‘State-owned banks and other financial institutions’ – since those findings seem to fall within the remit of the regulatory framework governing ‘public bodies’ in the Single Market. Therefore, in the following, we will try to predict the future by examining the past.

The Commission has determined that there is a general legal environment, under which the State-owned banks and other financial institutions in China operate under the government’s meaningful control, or with the government’s entrustment or direction, and perform governmental functions.

Apparently, the Commission did not give regard to the ingredients of ‘some form of threat or inducement’ when establishing ‘entrustment or direction’. Neither did the Commission seem to bother distinguishing between a government’s ‘general regulatory powers’ and a government ‘gives responsibility’ to, or ‘exercises its authority’ over, a private body. Only the latter would give rise to ‘entrustment or direction’.

The specific banking legislation that the Commission invoked as evidence as mentioned above reflects

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<sup>40</sup> In the hot-rolled flat steel case, the Commission found that the Chinese financing practices in the steel market are characterised by ‘revolving loans’, i.e. loans which allow a company to replace the capital repaid on loans at the maturity date by fresh capital from new loans. According to the Chinese guidelines on risk-based loan classification, they should be classified as so called ‘concerned’ loans, indicating that even though a borrower is currently able to repay the principal and interest of the loan, there are some factors which may negatively affect its repayment ability. See Commission Implementing Regulation (EU) 2017/969 of 8 June 2017, paras 125, 155.



more likely a government's exercising its regulatory powers, with the nature of guidance and encouragement. Moreover, although the Commission aimed to examine 'general legal environment', its focus appeared to be exclusively on the regulatory authorities' guiding principles on subsidisation. The Commission seemed to dismiss the relevance of other relevant legislation within the same financial regulatory framework. Arguably, the latter could simply negate the very guiding principles.

For example, Article 34 of the Chinese Bank Law requires that commercial banks act 'under the guidance of the industrial policies' of the government. However, at the same time, the Chinese Bank Law explicitly prohibits the government from exercising any form of control over the decisions of commercial banks. Articles 4 and 5 of the Chinese Bank Law respectively provide that commercial banks shall 'make their own decisions' and operate 'without interference from any unit or individual'. Article 41 of the Chinese Bank Law stipulates that 'no entity or individual may coerce a commercial bank into granting loans or providing a guarantee'. The provisions of the same law display diametrically opposite positions in relation to a financial institution's lending decision-making. While this conflict exposes China's weakness in law-drafting, the Commission did not establish the specificity of the link between the government and the particular conduct of a financial institution, e.g. lending with below-market interest rates. Also, it remains debatable whether the Commission established 'entrustment or direction' before concluding that those financial institutions were public bodies.

There is equally an allegation, for example as in the hot-rolled flat steel case, that the Commission tends to use the findings of previous investigations to argue a present one. Therefore, the principle of 'entity-to-entity, state-to-state, and case-by-case' set down by the WTO AB was not observed.<sup>41</sup>

To be fair, the Commission often has to rely on public sources to conduct its investigations. Most Chinese financial institutions do not provide the Commission the information it requested in order to, for example, establish, or possibly eliminate, 'entrustment or direction' between the government and private bodies. But then there is equally the controversy centered around the issues of confidentiality and 'non-cooperation' as far as 'evidence' is concerned. The Chinese side often insist that much information requested by the Commission is confidential not for disclosure, and so much in the questionnaire is requested – as if engaging in 'fishing expeditions' – making it 'functionally impossible' to complete.<sup>42</sup> In the solar panel case, the Chinese government claimed that the Commission had made conclusions on the basis of credit risk assessment of one sampled exporter provided by one bank and applied them to other relevant banks in the investigation and thereby used adverse inferences when determining 'entrustment and direction'. The reality was that the government and the banks refused to provide any other relevant credit risk assessments; and the Commission was forced to apply the best facts available and to draw its conclusions on the document.<sup>43</sup>

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<sup>41</sup> See Commission Implementing Regulation (EU) 2017/969 of 8 June 2017, para 292.

<sup>42</sup> See Council Implementing Regulation (EU) 2022/72 of 18 January 2022, 2017/969 of 8 June 2017, and 1239/2013 of 2 December 2013, para 3.2.

<sup>43</sup> See Council Implementing Regulation (EU) No 1239/2013 of 2 December 2013, para 426.



Indeed, for example determining ‘entrusted or directed’ could be an arbitrary exercise.<sup>44</sup> Still, it remains debatable if the EU’s legal approach in identifying subsidies is compatible with the WTO jurisprudence.

Despite all the above, while the Commission’s positions have been consistent, it is still a question if the decisions laid down by the WTO AB and panels are entitled to be treated as binding precedent and must be followed, absent ‘cogent reasons’. The USTR has argued that it is not.<sup>45</sup> The Panelists in future disputes cases will have to adjudicate. So, the Commission’s ratio decidendi may very well prove precarious in front of the WTO.

#### e. Subsidy transparency?

Certainly, a private body’s occasional role in countervailable subsidisation is not a China problem exclusively; other countries have their fair share of such controversies, too. But perhaps due to the size and the scale of the subsidy programmes that China has been undertaking – while China remains a non-market economy in the eyes of the EU, and because there is still much room for improvement in subsidy transparency, it is the public/private bodies from China that have generated most controversies.

In recent years, China has improved its subsidy transparency compliance in accordance with Article 25 of the ASCM.<sup>46</sup> However, many improvements have taken place on the aspects of ‘timely’ and ‘sufficiently specific submission’ notification requirement. Overall, China’s subsidy notification remains incomplete, which is the third aspect of the transparency requirement. In this regard, not least because those subsidies provided by some public and private bodies are believed missing from China’s subsidy notifications.

Specifically, reading China’s subsidy submissions to the WTO, one notices that all the financial contribution providers in these submissions are governments at central, provincial and even city district (of the Shanghai Municipality) levels.<sup>47</sup> In contrast, not a single subsidy provided by a public body, or a State-owned bank is notified. It is well established that some Chinese banks, like the ICBC, facilitate the implementation of national development policies, thus subsidisation in the BEV industry may be reasonably

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<sup>44</sup> In *European Communities — Countervailing Measures on Dynamic Random Access Memory Chips from Korea (DS299)*, the Commission wanted to prove ‘entrustment or direction’ by inferring from a Korean government official’s presence at Hynix’s Creditor Council meeting. But the WTO Dispute Settlement Panel held that a mere presence was insufficient to reasonably conclude that the Korean government entrusted or directed the private banks to purchase Hynix convertible bonds within the meaning of Article 1.1(a) (1)(iv) of the ASCM. In the same dispute, the Commission also claimed that ‘an indication or a nudge by the government or a public body to a private body is also a direction’ and the notion of ‘putting something into the care or protection of someone’ means to ‘entrust’. Available at: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds299sum\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds299sum_e.pdf).

<sup>45</sup> See United States Trade Representative (2020), Report on the Appellate Body of the World Trade Organization, February, pp.55-63.

<sup>46</sup> For example, until July 2016, China did not submit to the WTO a complete notification of subsidies maintained by the central government, and it did not notify a single sub-central government subsidy, when it provided information largely only on subcentral government subsidies that the United States had challenged as prohibited subsidies in a WTO case. See USTR (2023), 2022 Report to Congress On China’s WTO Compliance, February. Available at: <https://ustr.gov/sites/default/files/reports/2022/2022USTRReportCongressChinaWTOCompliance.pdf>

<sup>47</sup> See WTO (2023), Subsidies – new and full notification pursuant to Article 16:1 of the GATT and Article 25 of the Agreement on Subsidies and Countervailing Measures, 20 July, G/SCM/N/401/CHN. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/SCM/N/401CHN.pdf&Open=True>.



expected but it is nowhere to be seen in the subsidy notifications that China submitted to the WTO. Ditto, the GGFs as mentioned above. Of course, in parallel, subsidies provided by for example the European Investment Bank<sup>48</sup> and the US EXIM Bank,<sup>49</sup> respectively, are not notified to the WTO, either. Nonetheless, it is worth highlighting that subsidies provided by the American public bodies, e.g. Nevada Commission on Economic Development, are submitted to the WTO in accordance with Article 25 of the ASCM. Even so, the lack of transparency increases the suspicion of China's trading partners and aggravates their grievances against China's trade policies and practices.

## Is the success of China's BEV likely to be due to subsidisation?

Many countries in the world provide subsidies to their BEV industry in different ways, from supporting battery manufacturing to exempting taxes (e.g. road tax, VAT), etc. The Commission's anti-subsidy investigation focuses however on the subsidies provided for production and selling of the BEVs concerned.

A potentially key element of the anti-subsidy investigation on BEVs could be the cost of batteries.<sup>50</sup> However, while the Chinese government has subsidised the production of batteries,<sup>51</sup> the EU is doing the same via the so-called [European Battery Alliance](#) for example. In 2023, the Commission has approved € 3 [billion in \(national\) state aid to battery producers](#).<sup>52</sup> The issue is whether Chinese battery subsidies have contributed to the alleged market distortions caused by the BEV imports from China.

Two issues would need to be addressed in this context:

Would the Chinese subsidies for battery production be justified by the green externality with similar policy considerations as the EU's. In this case China must show that its battery subsidies are not applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries or a disguised restriction on international trade.

Is it likely that low battery prices in China are mainly due to subsidies or inherent productivity advantages? Figure 3 shows a regional price comparison provided by the IEA which shows that China has the lowest battery prices on average, about 25 % below Europe's. But this price discrepancy per se is not evidence of subsidies. It could be due to economies of scale given that around 65% of battery cells and

<sup>48</sup> See WTO (2023), Subsidies – new and full notification pursuant to Article 16:1 of the GATT and Article 25 of the Agreement on Subsidies and Countervailing Measures, 25 July, G/SCM/N/401/EU. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/SCM/N/401/EU.pdf&Open=True>.

<sup>49</sup> In the case of the US, only See WTO (2023), Subsidies – new and full notification pursuant to Article 16:1 of the GATT and Article 25 of the Agreement on Subsidies and Countervailing Measures, 10 November, G/SCM/N/401/USA. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/SCM/N/401/USA.pdf&Open=True>.

<sup>50</sup> The [Sampling Forms for exporters](#) contained in Commission's notice request information on purchases of batteries and Lithium from State Owned enterprises.

<sup>51</sup> See Rath A. (2019), The inside story of how CATL became the world's largest electric-vehicle battery company. Available at: <https://qz.com/1585662/how-catl-became-the-worlds-biggest-electric-car-battery-company>.

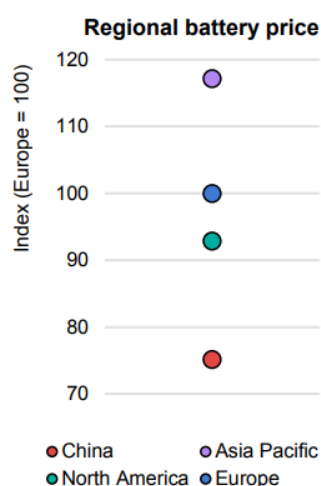
<sup>52</sup> See [European Battery Alliance \(EBA 250\) strongly welcomes new EU financial stimulus of €3bn to boost growth of the battery industry](#).



almost 80% of cathodes globally are manufactured in China, giving Chinese producers an advantage in scale.<sup>53</sup>

From an economic point of view the question would be somewhat different, namely: should the Commission focus on the subsidy element in batteries or the difference between EU and Chinese subsidies for batteries?

Figure 3: Price index for selected battery price in different regions, 2020-2023



Source: IEA (2023), *Global EV Outlook 2023: Catching up with climate ambitions*: <https://iea.blob.core.windows.net/assets/dacf14d2-eabc-498a-8263-9f97fd5dc327/GEVO2023.pdf>, p.62.

## Subsidies not reflected in selling prices

According to the Commission the selling prices of the subsidised Chinese BEV imports are significantly lower than the prices of their EU competitors.<sup>54</sup> However, the Commission fails to mention that the prices charged by Chinese BEVs in the EU are not lower than the prices at which EU producers sell their BEVs in China. European producers themselves claim that they can charge lower prices in China because production costs are lower there. But this would imply that the real problem for EU producers (or rather production in the EU) is that of high costs in Europe and the pricing policy that EU producers have adopted for the EU market (coupled with the fact that the block exemption for automobile retailers allows them to segment the market).

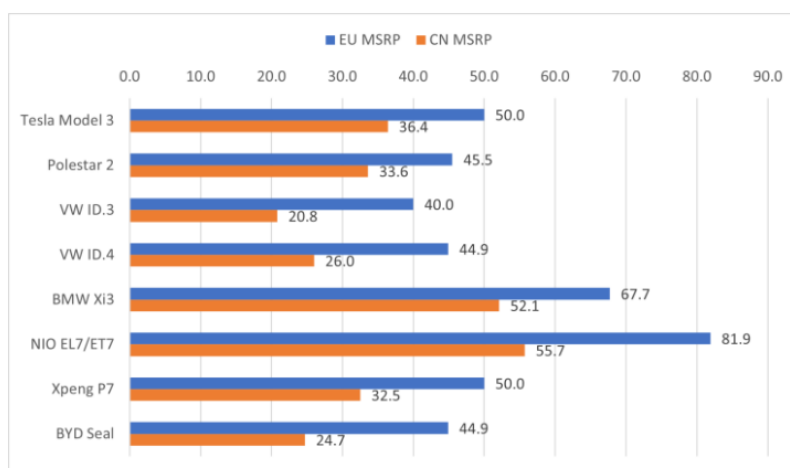
<sup>53</sup> See IEA (2023), *Global EV Outlook 2023: Catching up with climate ambitions*: <https://iea.blob.core.windows.net/assets/dacf14d2-eabc-498a-8263-9f97fd5dc327/GEVO2023.pdf>, p.62.

<sup>54</sup> See Evidence of threat of injury and causation, in Official Journal of the European Union (2023), Notice of initiation of an anti-subsidy proceeding concerning imports of new battery electric vehicles designed for the transport of persons originating in the People's Republic of China, 4 October, C/2023/160.



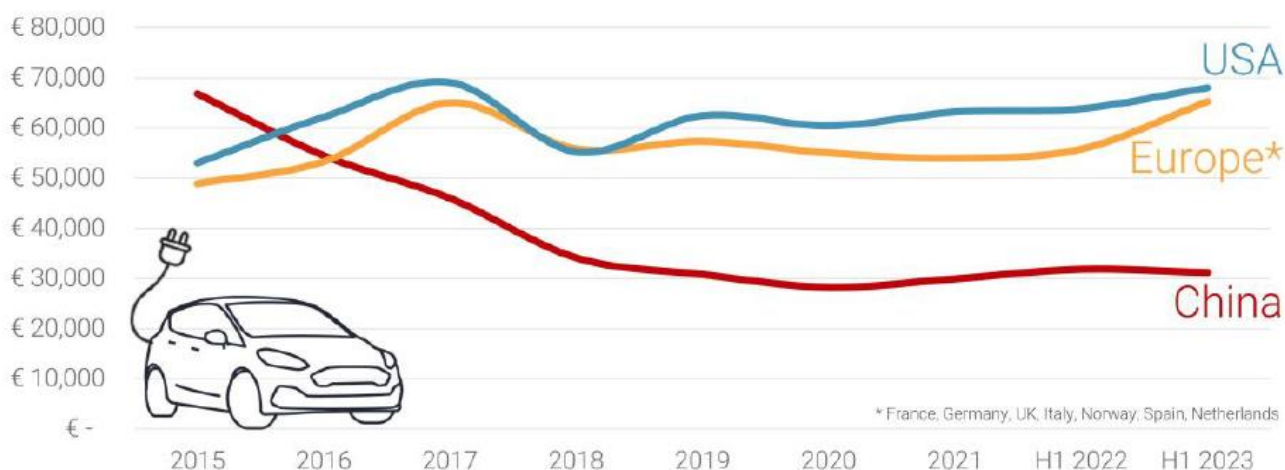
Figure 4 illustrates the gaps between the EU and Chinese Manufacturer's Suggested Retail Price (MSRP) of the same BEV models. The EU MSRP for the same BEV model are 30-40 percent higher than the Chinese. Even accounting for 10 percent VAT rebate this is astounding.<sup>55</sup> And overall, when the average MSRP of EV fell by 2 percent between H1 2022 and H1 2023 in China, it increased by 20 percent in Europe (and 7 percent in the US) (Figure 4).<sup>56</sup>

Figure 4: EU and Chinese MSRP comparison of the same BEV models:



Source: Carlisle D. (2023), *The Rapid Rise of Chinese Electric Vehicles in Europe: Challenges and Implications*.

Figure 5: Comparison of average MSRP of the electric cars available in China, Europe and the US:



Source: JATO (2023), *EV Price Gap: A divide in the Global automotive industry*.

<sup>55</sup> Carlisle D. (2023), *The Rapid Rise of Chinese Electric Vehicles in Europe: Challenges and Implications*. Available at: <https://www.linkedin.com/pulse/rapid-rise-chinese-electric-vehicles-europe-challenges-txziq/>.

<sup>56</sup> JATO (2023), *EV Price Gap: A divide in the Global automotive industry*.





A simple [comparison of the suggested manufactures retail prices](#) shows that EU consumers are charged about 30–40 percent more than their Chinese counterparts. The most egregious example is that of a popular EU brand, the VW’s model ID.3 with a [suggested retail price of less than 20 thousand in China and over 40 thousand in Europe](#).<sup>57</sup> The Chinese government has waived VAT on BEVs, whereas EU prices include VAT. Excluding VAT at 20 percent, the net price of a European car would still be about 33.5 thousand, leaving the comparable net of VAT tax EU price 60 per cent higher than the Chinese one. The VAT exemption in China cannot explain this wide a difference.

EU consumers thus pay clearly higher prices, even accounting for differences in VAT and maybe slight differences in quality of production. The Commission should thus investigate why European and Chinese car producers are charging European consumers so much more than their Chinese counterparts.

This would seem particularly important given that fostering the uptake of EVs is a key policy goal of EU policy. Any anti-subsidy duties would only increase the price of BEVs.

Besides, a key feature of the differences between the EU and Chinese BEV markets is that average BEV prices are much lower in China than in Europe. This is due in part to the fact that the Chinese are buying large number of small BEVs with a limited range for use in cities. What is more surprising, and should be key for the EU investigation, is that non-Chinese car makers (mainly European producers and Tesla) offer the same car for a significantly lower price in China than in Europe.

This applies also to imports from China. Chinese BEVs are sold at much higher prices in the EU than they are in China. Using the BYD Seal as an example, in Belgium the starting price is €42,740 (incl. VAT) and thus around €40 thousand,<sup>58</sup> while in China the MSRP for the model will cost ¥189,800<sup>59</sup> (€24,646). This means the selling price of this BEV model is about 58 percent higher in Europe than in China. Similarly, the MG4 EV, which is manufactured by SAIC, cost 55 percent more in Europe than in China. The model is advertised for €27,285<sup>60</sup> in Belgium, including the Flemish government premium worth of €5,000; while its starting price in China is ¥115,800 (€15,016).<sup>61</sup> There is definitely no dumping.

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<sup>57</sup> Total cost might be lower than estimated since the price differential is not necessarily 20 thousand euros per EV for all types of vehicles. But high transport costs make shipping small/cheap BEVs uneconomic. Hence most BEVs shipped intercontinentally, are of the expensive type. The Chinese are not selling their small/cheap BEVs in Europe.

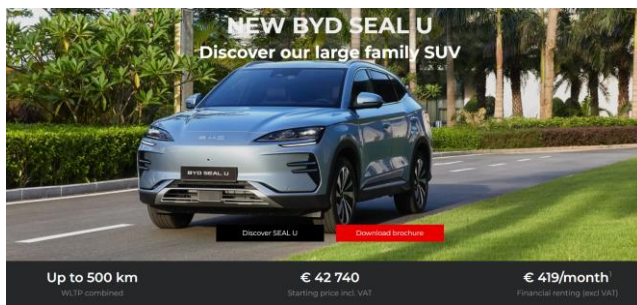
<sup>58</sup> Available at: <https://bydauto.be/en/>.

<sup>59</sup> Available at: [https://mall.bydauto.com.cn/pc/customized?id=73&is\\_presell=0&networkType=ocean](https://mall.bydauto.com.cn/pc/customized?id=73&is_presell=0&networkType=ocean).

<sup>60</sup> Available at: <https://www.mgmotor.be/nl/model/mg4>.

<sup>61</sup> Available at: <https://www.saicmg.com/vehicles/sedan/mg4ev.html>.

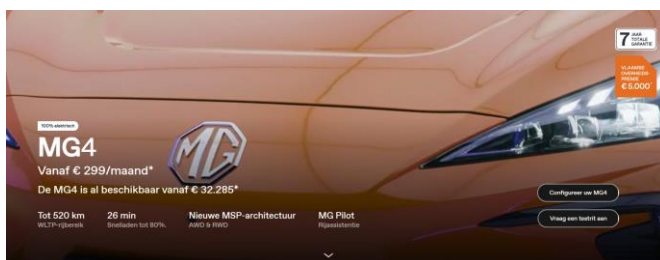




Source: <https://bydauto.be/en/>.



Source: [https://mall.bydauto.com.cn/pc/customized/?id=73&is\\_presell=0&networkType=ocean](https://mall.bydauto.com.cn/pc/customized/?id=73&is_presell=0&networkType=ocean).



Source: <https://www.mgmotor.be/nl/model/mg4>.



Source: <https://www.saicmg.com/vehicles/sedan/mg4ev.html>.

We note that large price differences also exist across EU Member States despite the ‘single market’. These price differences can persist because EU producers can effectively stop so-called parallel or grey market trade (buying a car in a country where it is cheaper and then selling it in a country with higher prices) through a system of exclusive car dealerships. These restrictive practices have been allowed by the Commission under the so-called Block exemption, that was recently [prolonged until 2028](#) on the basis of a [Commission study](#) that did not even address the issue of persistent price differences although there is [ample evidence of pricing to market](#). Opening the door to ‘grey’ imports from China could lead rapidly to much lower EV prices in Europe. The Commission seems to intend on achieving the opposite.

These very large differences are difficult to explain.<sup>62</sup> [German producers themselves have argued that they have lower production costs in China](#) because of more competitive supplies and lower wages. This suggests that subsidies might not be the key reason for lower prices in China and the success of Chinese BEVs on the EU market.

International institutions like the IEA also stress that elements like a stronger market position for small

<sup>62</sup> It was only reported in December 2023 that BYD would build a new energy passenger vehicle plant in Szeged, Hungary for localised production in Europe. Available at: [https://www.byd.com/eu/news-list/BYD\\_to\\_Build\\_A\\_New\\_Energy\\_Pas-senger\\_Vehicle\\_Factory\\_in\\_Hungary\\_for\\_Localised\\_Production\\_in\\_Europe.html](https://www.byd.com/eu/news-list/BYD_to_Build_A_New_Energy_Pas-senger_Vehicle_Factory_in_Hungary_for_Localised_Production_in_Europe.html).



and medium models, more integrated domestic battery value chains, a denser network of component suppliers, lower labour costs, tough local competition explain why the production costs of Chinese BEVs are low.<sup>63</sup> Arguably, if production costs in China are lower anyway the Commission will have a hard time proving those countervailable subsidies, which it might be able to deal with, have caused material injury to the EU BEV industry (or rather that part of the European industry that does not produce in China).

After establishing that some specific subsidies are countervailable, the Commission must still prove that such subsidies cause injury to the EU BEV industry and there is a causal link between the subsidies in question and the injury thereof. The fact that the selling prices of Chinese producers are much higher than those in China represents a fundamental problem to establishing this link. In a normal subsidy case, the link is clear because subsidies lower production costs which are then reflected in lower prices at home and abroad. This case is different because the alleged Chinese subsidies are not reflected in the prices charged in Europe. This means that one cannot directly link the success of Chinese brands on the European market to the subsidies received in China because the prices on the EU market are so high that they are much higher than the sum of the Chinese price plus the value of the subsidies. Chinese brands would have been able to rapidly gain market shares in Europe even without any subsidies.

Proving the link between (countervailable) subsidies in China and injury to the EU BEV industry is thus not straightforward.

Finally, a 'Union interest' test must be undertaken before a definitive countervailing duty may be imposed.<sup>64</sup>

## The 'Union interest' test

From the outset, as conceded by Article 31.1 of the ASTDI, although rectifying trade distortions caused by injurious subsidisation shall be given special consideration, countervailing measures may not be applied if they are deemed not in the Union's interest. Such interest may be represented by the interests of the domestic industry and users and consumers, etc.

Supplying European consumers price-performance competitive BEVs no matter from where they come from meets arguably the EU's broad policy objective of green transition. It is in the interest of consumers and downstream users, too.

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<sup>63</sup> See IEA (2023), Global EV Outlook 2023: Catching up with climate ambitions: <https://iea.blob.core.windows.net/assets/dacf14d2-eabc-498a-8263-9f97fd5dc327/GEVO2023.pdf>, p.28. JATO (2023), EV Price Gap: A divide in the Global automotive industry.

<sup>64</sup> Article 15.1, the ASTDI. Before a definitive measure may be imposed, based on Article 10.2, the Commission will initiate the investigation proceeding after receiving an evidence-based complaint submitted by a complaint or a Member State. Such evidence, which must be 'sufficient', shall include the existence of countervailable subsidies, injury and a causal link between the allegedly subsidised imports and the alleged injury.



However, as can be seen from the trade defence investigations launched by the Commission, the Union interest test will probably influence the percentage of countervailing duties eventually imposed by the Commission. Conducting the test by weighing the positive against the negative effects of a countervailing measure is an exercise of balancing a mixture of (maybe opposite) interests. Favouring one group's interest by denying entirely another's would be an inconceivable outcome is not what the Union interest test meant to be. Although arguably not based on solid legal and economic grounds, the anti-subsidy investigation is unlikely to collapse just because higher duties on the Chinese BEVs could dent the Union interest, for example the EU's 'green' interest.

The upshot is that, even if distortions caused by a countervailable BEV subsidy are proven, the 'Union interest' test might temper the Commission's ambition in reestablishing a level-playing field between the BEVs manufactured in the EU and Chinese imports. This conflict between mercantilism and green policies is not new, but particularly acute in this case.

## The conflict between mercantilism and green policies: How much will it cost?

The conflict between mercantilism and green policies already became apparent during an [anti-dumping procedure on solar panels imported from China](#). But the solar panel case differed in one crucial aspect: the Commission had found evidence that Chinese exporters had sold panels below production cost. In the present BEV the situation is the opposite in that EU prices of imported cars are higher than those in China (and certainly not below production costs). The continuing low prices of imported Chinese solar panels have driven most EU producers out of business, but they have also been at the basis of the ongoing boom in solar power, the only area where actual adoption exceeds targets.

As mentioned above, prices in the EU for BEVs are at least 30 to 40 % higher in the EU than in China. It is thus conceivable that the Commission imposes substantial anti-subsidy duties, say in the order of 20-25 %. These duties would formally apply to Chinese producers, but they would also allow EU producers to keep their own prices higher than they would be able to otherwise.<sup>65</sup> The average price of BEVs in Europe is at present about 50 thousand euro, 20 % thus amount to about 10 thousand euro. In 2023 about 1.5 million BEVs were sold in Europe ([market share of 15 % on a total of 10 million](#)). 10 thousand euro per car translates into 15 billion euro for 1.5 million cars. As the market share of BEVs is highly likely to increase, the annual cost of keeping EU prices higher is bound to increase. If the Commission intends to keep anti-subsidy duties for a longer period, the overall increase in the cost of the green transition in transport could easily be 100 billion euro or more. The [target of the 'Fit for 55' program of reducing](#)

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<sup>65</sup> Higher prices for BEVs would of course also mean that prices for hybrids will also increase somewhat. But this additional effect is not taken into account here.



[emissions from the transport sector by 55 % \(relative to 2021\)](#) can be achieved only if a similar percentage of car fleet is zero emissions. This would imply the need to have about 50 million BEVs on the road, 42 million more than today.<sup>66</sup> Keeping EU prices permanently higher by 10 thousand euros would imply an additional burden of over 400 billion euro (cumulatively until 2030). The cost might be somewhat lower because high prices are likely to slow down the adoption of BEVs. It is unlikely that the EU's ambitious EV penetration targets can be reached if prices are kept at present EU levels.

## Conclusion

The BEV industry benefits from generous subsidies in many countries around the globe amidst the drive to fight against climate change. Some of these subsidies might be justified as a valid policy tool, but many countries might have provided countervailable BEV subsidies. The EU might have done this as have the US and perhaps China.

The Commission is likely to find countervailable capital subsidies provided by China's State-owned banks and State-owned investment vehicles. It is hard to tell if the Commission could withstand China's challenge in the WTO given that the government might not have directed capital allocations directly. Besides, there appears a distinction between the application of domestic EU law and the political aim of supporting the global rules-based system under the WTO. Imposing anti-subsidy measures that are consistent with EU law but are then found inconsistent with WTO rules would be a major political embarrassment.

Government subsidies to battery production will be easier to prove, but they exist in the EU as well. Whether they caused market distortions in the EU is another matter, given the fact that Chinese brands still price their BEVs much higher than in China and presumably higher than their production cost in China would be without subsidies.

The economic logic of the investigation poses a few problems, too. In essence, the 'surge' in Chinese BEVs imports may very well be due to lower production costs in China and overpricing of BEVs and marketing strategy in the EU market by European producers.

Finally, the Union's interest test will expose the conflict between mercantilism and green policies. The much higher prices charged to EU consumers by EU producers cannot be in the interest of an EU that wants to lead the Green transition. Duties on imports of Chinese BEVs would increase the cost of the green transition by dozens of billions of euro. Any duty on imports of Chinese BEVs would be a tax on a green good, and a good that is already overpriced in Europe. This does not make sense if the green transition is supposed to be priority number one.

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<sup>66</sup> See also Marotta, A., Lodi, C., Julea, A. *et al.* European governments' electromobility plans: an assessment with a focus on infrastructure targets and vehicle estimates until 2030. *Energy Efficiency* **16**, 92 (2023). <https://doi.org/10.1007/s12053-023-10163-z>



The more general point is simple but has complex political implications: The EU is encouraging other countries to follow its lead and support the green transition. This requires massive subsidies in many different sectors. Why should the EU then complain if other countries outcompete it in terms of subsidizing the production of green goods?

