Bocconi

# THE EU'S ANTI-SUBSIDY INVESTIGATION AGAINST CHINESE BATTERY ELECTRIC VEHICLE IMPORTS

## INDUSTRIAL POLICY AND GEOPOLITICS IN DISGUISE?

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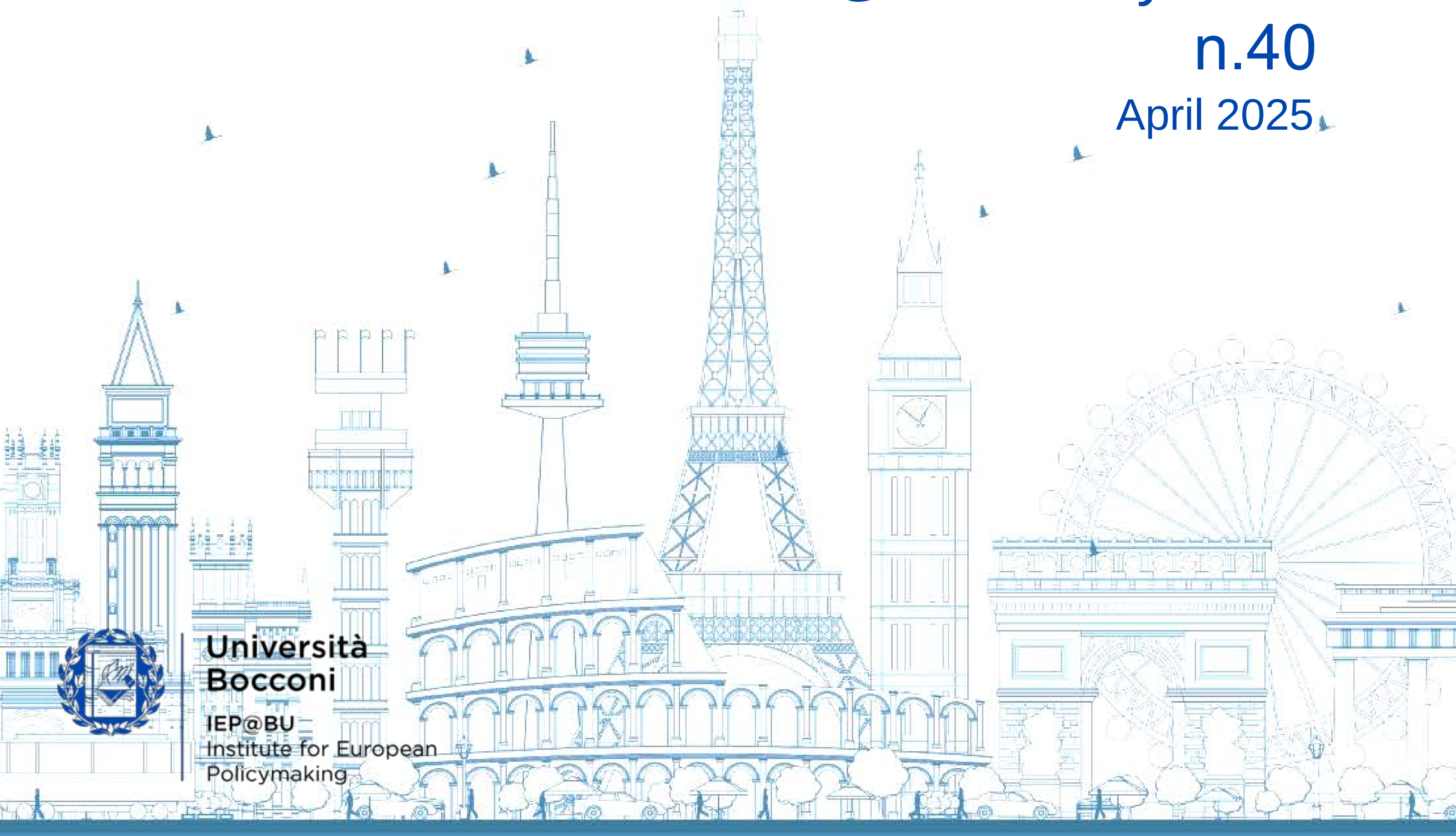

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## Abstract

In late 2024 the EU Council of Ministers approved a proposal from the Commission to impose a range of anti-subsidy tariffs on imports of battery electric vehicle (BEV) from China. The tariffs range from 7 % to 35 % and will be in force for 5 years. China is challenging these duties in the WTO.

This paper considers both the economic and the legal aspects of this case, which combines three unique features:

1. The first own initiative ASTDI anti-subsidy investigation.
2. The first EU anti-subsidy investigation that is not accompanied by a parallel anti-dumping proceeding.
3. The first EU ASTDI investigation targeting a product for which the EU is a net exporter.

The economic case for these duties appears weak given that at the time of the investigation the EU BEV industry appeared healthy and the EU maintains an important trade surplus in BEVs. Moreover, EU consumers pay much higher prices for the BEVs imported from China than Chinese consumers – the opposite of dumping.

Direct public subsidies to Chinese BEV producers in the forms of grants and tax breaks are relatively small. The Commission motivates a large part of the countervailing duties (CVD) with the argument that entire markets in China are so distorted by industrial policies that the Chinese BEV producers do not face market prices for credit and batteries.


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## Introduction

The anti-subsidy investigation on Chinese BEVs (OJEU 2023) launched in October 2023 by the Commission has several key features that set it apart from previous cases.

It concerns an industry that is globalised with many EU firms owning plants all over the world, including in China. It is also considered 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. European BEV production was growing during the investigation period. It was thus difficult to show any injury, forcing the Commission to rely on the argument that subsidised competition from China would stunt future growth of the European BEV sector. Finally, this case illustrates once more the conflict between the desire to preserve European industry and the cost of the green transition.

Two economic aspects distinguish this case from previous trade defence investigations. First, the EU has a considerable trade surplus in BEVs (and had one during the investigation period). Second, the prices for Chinese BEVs in Europe are much higher than in China. Proving 'material injury' to the EU industry – a key step to establish the Commission's case – becomes thus problematic. Neither of these two economic elements are acknowledged by the Commission although both would question the economic logic of the case.

This paper adds value to the discussions of this anti-subsidy investigation by examining its legal substance and economic logic. It will start by questioning the rationale of the investigation. Then, on subsidies, the focus of the paper is on the subsidies that are allegedly provided by 'State-owned banks and private financial institutions'. In this regard, it is a question whether the Commission's findings could withstand China's challenge, specifically on the unsettled debate on public/private body – as a provider of a financial contribution. After that, this paper investigates the economic reasoning of the BEV anti-subsidy investigation. Before concluding, the paper will highlight the 'Union interest' test that exposes the conflict between the protection of domestic industries and green policies.

## 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 under WTO rules. Very often subsidies are provided for pursuing the interest of a social good or an economic policy. However, subsidies that cause market distortions should be rectified in order to level the playing field so that fair competition could be restored. The applicable law of this investigation is the EU's Anti-Subsidy Trade Defense Instrument (ASTDI). It applies the rules provided for in the WTO Agreement on Subsidies and Countervailing Measures (ASCM), and reflects the language of the WTO agreement to 'the best extent possible'. The Commission thus had to follow the applicable in the EU (the ASTDI) in its investigation, but its findings might be challenged at the WTO under the ASCM if the ASTDI is more restrictive. We thus start by asking whether the Commission's approach was compatible with the ASTDI and later turn to the question of whether the findings might be challenged under WTO rules.

The Commission launched the BEV anti-subsidy investigation on its own initiative by virtue of Article 10.9 of the ASTDI. While this is foreseen in the ASTDI it makes the Commission the complainant and the judge of its own complaint. This is against the legal principle of 'nemo judex in causa sua'. This peculiar situation of the Commission of judging its own case might explain why, as mentioned above the Commission does not acknowledge any facts that might not support its view that imports from China threatened the EU BEV industry, such as the trade surplus of the EU in BEVs and that the fact that EU consumers pay much higher prices for the BEVs imported from China than Chinese consumers, even for cars produced by European firms in China. These facts are not mentioned in the several hundred pages of economic analysis that are supposed to underpin the case for imposing countervailing duties.

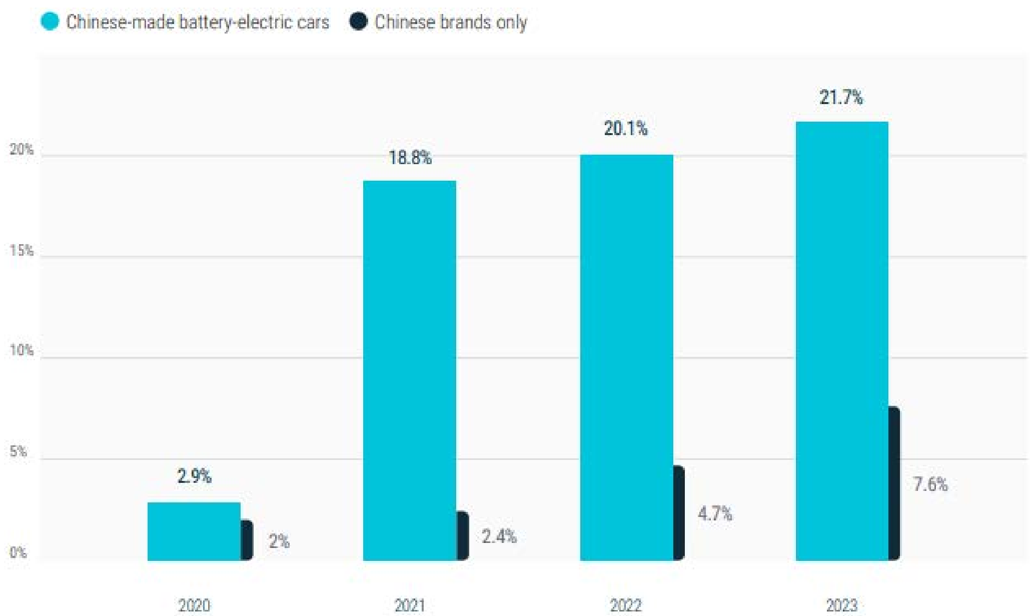
### 1) *The EU BEV industry itself did not see the need for protection*

The BEV anti-subsidy investigation represents a first because the Commission initiated it, although the EU BEV industry bodies had not complained about subsidised imports from China. Article 10.4 of the ASDI requires a majority of industry to support a complaint, which apparently was not the case.

The official motivation for the own-initiative investigation 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* (OJEU 2023).

The threat of injury was evident, according to the Commission, because during the investigation period from 1 October 2022 to 30 September 2023, the share of BEVs from China sold in the EU jumped from less than 1 percent to 8 percent in 2022, increasing further in 2023. A simple extrapolation of this trend would of course imply that imports from China would dominate the market soon. Two-thirds of EU imports of BEVs from China are from EU and one US firm (Tesla) manufacturing in China (Grieger 2023) (Figure 1).

Figure 1: Market share of Chinese-made cars (includes also non-Chinese brands which manufacture in China) in EU BEV sales:




*Source: ACEA 2024.*

Anti-subsidy actions are supposed to be initiated when, among others, there is a significant increase in volume of imports. This was the case, but starting from a very low base (ACEA 2024), and the relatively modest level of import penetration reached during the investigation period makes it more challenging to prove a negative impact of subsidised imports in the Union.

Moreover, the EU had a sizeable trade surplus during the investigation period (2022/3) as table 1 below shows. This surplus increased very strongly during the two years covered by the observation period. This fact constitutes another element that does not support the thesis that low-prices imports of Chinese BEVs were injuring the EU BEV industry. The presence of Chinese producers in non-EU markets was apparently no obstacle to the strong increases of extra-EU exports during these years.

The ASTDI does not mandate to elements like strong export performance into account. But economic logic suggests that a strong export performance constitutes a priori an indication that there has been no injury.

Table 1: EU Trade in EVs (in bn USD)

| | Imports | Exports | Balance | X/M |
|---|---|---|---|---|
| 2023 | 21.7 | 31.8 | 10.1 | 1.46 |
| 2022 | 13.3 | 23.7 | 10.4 | 1.78 |
| 2021 | 13.5 | 14.4 | 1.0 | 1.07 |
| 2020 | 8.6 | 9.3 | 0.7 | 1.08 |

*Source: Own calculations based on Comtrade data.*

The Commission thus had to motivate its case on the threat of future injury. Here it based its assessment on a variety of elements -including the Chinese government's policies to target production and exports of BEVs, resulting in a surge in China's worldwide exports 1 471 136 BEVs in the investigation period, registering an increase of 659 percent as compared to 2020 (OJEU 2024 a, paras 1113-8). Moreover, significant overcapacities in the Chinese domestic market seemed to foreshadow continuing growth in exports.

The motivation for the investigation speaks of "*low-priced imports of BEVs*'". In reality prices seem high in the EU. The prices of Chinese BEV models are typically 50 percent higher in Europe than in China as documented below.[1] This is the opposite of the 'significant price undercutting' or 'depress prices to a significant degree or prevent price increases', prescribed by Article 8.2 of the ASTDI on which the anti-subsidy investigation is based. This is another element that is difficult to reconcile with the idea that imports from China depressed prices in the EU market.

[1] As illustrated later in this paper, for example the starting price of BYD Seal in Belgium is €42,740 (incl. VAT) and thus around €40 thousand, while in China the MSRP for the model will cost ¥189,8001 (€24,646). This means the selling price of this BEV model is about 58 percent higher in Europe than in China.

It is thus understandable that China complained to the WTO that the Commission lacked sufficient evidence to justify the ex officio initiation of the investigation, and; therefore, breached the Articles 11.2, 11.3 and 11.6 of the ASCM (WTO 2024 a).

The Commission itself admits that the Union industry was healthy:*"… In particular, the Commission explained that the situation of the Union industry did not point to the existence of material injury that would be caused by imports from China. However, the Chinese exporters have significantly increased their penetration on the Union market in a very short period of time, at prices significantly lower compared to the prices of the Union industry, thereby depressing prices or preventing price increases which otherwise would have occurred and, consequently, placing significant pressure on Union sales, market shares and profit margins..."* (OJEU 2024 a, para 155).

This interpretation by the Commission of the 'threat of injury' shows how wide this concept can be extended and that it can be used to protect an industry that is healthy today, but for which one conjure a disastrous future by simply extrapolating the initial sure of imports for a sufficiently long time.

### *2) Subsidies that are prone to challenges under WTO rules*

Many countries subsidise their BEV industry, in order to accelerate a green transition (Bickenbach et al 2024).[2] For example, many Member States provide subsidies for BEV purchases. Moreover, the EU provides billions of euros in support of 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 (European Battery Alliance 2023). 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 (IRA). Since the purchase credit is contingent upon a 'local content' requirement, such a subsidy is prohibited outright, therefore countervailable, in accordance with 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, consistent with the relevant ratio decidendi, the Commission has argued that the BEV subsidies provided by, for example, Chinese 'State-owned banks and private financial institutions' are countervailable. 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 applied as norms from the standpoint of (fair) competition of the Single Market. Ultimately, if ever China succeeds in challenging the Commission

[2] 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.

in the WTO, and if ‘State-owned banks and private financial institutions’ are proven not public or private bodies which provide financial contribution within the meaning of Article 1.1(a)(1) of the ASCM, the existence of these subsidies will not even be established, let alone for the Commission to impose CVDs to rectify the alleged injury suffered by the EU BEV industry. Indeed, China challenged this aspect in its second complaint submitted to the WTO on the definitive countervailing duties imposed by the Commission (WTO 2024 b). In contrast to its attitude towards Section 30D of the IRA, it is interesting why the EU has aimed to impose countervailing duties to some Chinese BEV subsidies it has no guarantee to prove their existence in the WTO.

### *3) Sampling and protecting industry or domestic production*

After a controversial sampling exercise (OJEU 2023), the Commission picked three Chinese carmakers, namely BYD, SAIC and Geely, for the BEV anti-subsidy investigation. They are not the biggest exporters of BEVs from China into Europe, the biggest by far is Tesla (Preussen et al 2023).

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

The Commission did not dispute this point. However, while acknowledging that Tesla was one of the largest exporting producers to the EU during the investigation period, the Commission argues that its final sample selection, i.e. the three Chinese BEV manufactures, could be considered adequately representing the exporting producers of BEVs operating in China and was based on the largest representative volume of production, sales or exports to the Union during the investigation period that could reasonably be investigated within the time available (OJEU 2024 a, para 59). China alleged that the EU’s sampling was not based on valid statistics and, therefore, inconsistent with Article 15.1 of the ASCM (WTO 2024 b).[3]

During the investigation period, in the first six months of 2023, Tesla accounted for 36.5 percent of all Chinese EU BEV imports from China, almost as much as the three sampled exporters together (SAIC 26.3, BYD 14 and Geely 1.5 percent) of all Chinese EV exports (Figure 2).

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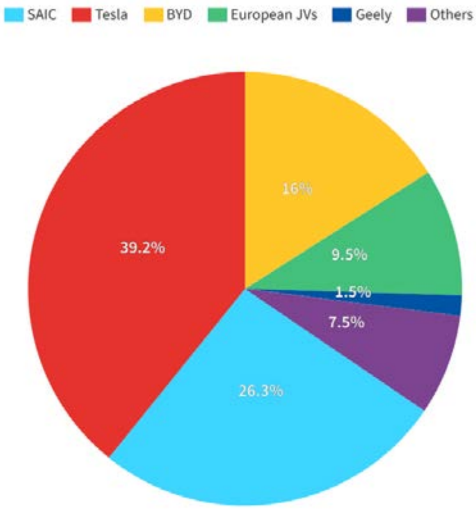
[3] China alleged that the EU failed to establish the sample of the Chinese BEV exporting producers on the basis of a statistically valid sample, or on the basis of the largest percentage of the volume of the exports which could have been reasonably investigated, and to include Tesla (Shanghai) Co. Ltd. in that sampling exercise. All these resulted in, inter alia, the EU's failure to analyse the volume and price effects of the allegedly subsidised imports on the basis of positive evidence and an objective examination, and therefore in violation of Article 15.1 of the SCM Agreement.

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




*Source: Mazzocco I. and Sebastian G. 2023.*

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.

This explains the focus on BEV production origin (OJEU 2024 b, para 676),[4] although the Commission[5] has a level of discretion (OJEU 2024 b, para 21) guaranteed by Article 27.2 of the ASTDI (OJEU 2024 a, para 32).[6] The underlying question raised by the sampling choice is whether

[4] The Commission has made clear that its focus is on the BEVs production origin, not brands or original equipment manufacturers groups, within the meaning of 'EU industry'.

[5] In addition to those mentioned earlier, the Commission argued that it considered the geographical spread of Union producers within the Union as well as ensured the inclusion of a wide range of BEVs models. The sampled Union producers accounted for 38 percent of sales and 34 percent of total production volume of the Union industry in the investigation period. Furthermore, after the verification visit of the sampled Union producers, the Commission confirmed that the sampled Union producers amounted to 32 percent of sales in the Union and 30 percent of production in the Union in the investigation period.

[6] Article 27.2 of the ASTDI provides the Commission the discretion to the final selection of investigation parties, as well as types of products or transactions. Regardless, the Commission maintained that its sampling exercise is in compliance with Article 27.1 of the ASTDI. Indeed, the Commission rebutted the allegations concerning sampling raised respectively by the Government of China, and the China Chamber of Commerce for Import and Export of Machinery and Electronic Products in the course of the investigation. The Commission recalled that Article 27 of the ASTDI contains no obligation to select only the largest producers in terms of production and sales volumes, nor does it contain any ranking in the criteria listed therein. This provision is meant to ensure that the Commission selects the most representative sample that can be reasonably investigated within the time available by applying such criteria.

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 aim at safeguarding production inside the EU or protecting the global interests of EU-based multinational producers.

## Subsidies provided by 'State-owned banks and private financial institutions'

On the countervailable subsidies established by the Commission, there are a few kinds of them, such as preferential financing, grants and the fiscal subsidy policy for the promotion and application of BEVs, governmental provision of goods and services for less than adequate remuneration (OJEU 2024 b). In general, there are two categories of countervailable subsidies.

One category is those 'conventional' subsidies. Their existence is based on the definition prescribed by the ASCM, as adopted by the ASTDI. 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 'conventional' subsidies are relatively 'easy' to prove, although China challenged much of the Commission's findings in this regard, for example on the 'specificity' of the 'dividends exemption between qualified resident enterprises' – which is the type of subsidies of 'government revenue forgone or not collected' – that is determined by the Commission as countervailable subsidies (OJEU 2024 b, paras 595-9; WTO 2024 b).

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 – which is being challenged by China in the WTO (WTO 2024 b)[7]– such subsidies are provided by China's 'State-owned banks and private 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.[8]

The Commission has developed over the years its practice with self-binding effect 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 (OJEU 2013; 2017; 2022). The ratio decidendi of the relevant countervailing duty determinations coincides

[7] China alleged that the Commission has breached the relevant provisions of the ASCM and Article VI:3 of the GATT 1994 in relation to the determination of public bodies, private bodies, financial contribution, benefits (and calculations) and specificity.

[8] 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.

with the Commission's policy objective – in the context of ASCM reform (EC 2018)[9] – 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. In the meantime, the WTO Appellate Body (AB) has construed the concept very narrowly in its adjudication but, then, the guidance it has provided is ambiguous subject to interpretation. This being the case, possible market distortions caused by the prohibited or actionable subsidies are unlikely to 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 private 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 are discrepancies between the approach that the Commission has undertaken and that of 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 challenges, in both substantive and procedural aspects, in the WTO DSB.

### *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 usually guided by the EU's own jurisprudence of the courts and case practices by the Commission 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, or 'countervailable subsidy' within the meaning of the ASTDI, must be specific. To prove specificity, the existence of a subsidy, the evidence of which includes financial contribution and benefit, 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 may 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 provided by a government or any public body in the country of origin or export[10] confers a benefit.

However, while 'government' is a straightforward concept, 'public body' is not defined by the ASTDI (neither by 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 it is largely related to SOEs (Sacerdoti and Borlini 2023), including State-owned banks and financial institutions. These financial institutions, although operating as a commercial entity, may occasionally undertake governmental functions, including

[9] 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).

[10] Financial contribution also means any form of income or price support within the meaning of Article XVI of the GATT 1994. 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.

acting as a provider of a financial contribution. In the absence of a definition, proving a 'private body' is a de facto 'public body' on a particular occasion could be a challenging undertaking. However, in the context of the EU 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. The legal status of the body does not matter (Maltoni 2019). 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 Directive is similar to the one undertaken when determining countervailable subsidies, where 'rebuttable presumption' and 'majority share-holding' are part of the criteria. But this does not appear compatible with the WTO approach.

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

The WTO AB has only provided a handful of general guidance, including, that a 'private body' may be qualified as a 'public body' on an 'entity-to-entity, state-to-state, and case-by-case' basis (WTO 2019; Hu 2019). Such guidance is subject to interpretation (USTR 2020).[11]

In China's case, the challenge is that after having undertaken the measures like privatisation and cross-investment in the past decades (Pelkmans et al 2018), many 'public bodies' appear perfectly (officially) 'private', for example for being listed in a stock market open for stock trading. But at the same time, these 'private' entities may perform governmental functions (or as public bodies in disguise) (EC 2024, pp 137-44). 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' (Dalton and Gill 2022).

Notwithstanding, in accordance with the findings of the WTO AB in US — Countervailing Duty Measures on Certain Products from China (DS437), it will be inconsistent with Art. 1.1(a)(1) of the ASCM if certain Chinese 'State-owned banks and private financial institutions' are identified 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 (WTO 2014). In parallel, as decided in United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from

[11] 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'.

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' (WTO 2011).

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.

In the present case, as far as the Commission is concerned, the above-mentioned ingredients were all established and the countervailable subsidies provided by those Chinese 'State-owned banks and private financial institutions' were determined. These findings are however challenged by China (OJEU 2024 b, paras 168-206; WTO 2024 b).

### *3) China's 'State-owned banks and private financial institutions' – are they public bodies?*

China alleged that the Commission failed to '… analyse the core characteristics, functions, and relationship with the government of each entity ('on its own merit', as it were) and determine whether each entity (individually; not as a group) can be classified as a public body.'(OJEU 2024 b, para 168). Reading the Commission's argument, it is primarily based on China's 'Party structures' which reflects basically their omni-influence in the financial sectors (OJEU 2024 a, paras 409-67)[12] in China. In the meantime, the Commission follows the ratio decidendi that it has established in its previous determinations against certain Chinese imports in the EU market (OJEU 2013; 2017; 2022). In the same regard, while trying to determine whether these banks and financial institutions 'possess, exercise or are vested with governmental authority' along the guidance set down by the WTO AB, the Commission's conclusion seems to be based on 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.

#### a. 'State-owned banks'

Considering China's State-owned banks in the light of the public-private body argument, a typical

[12] According to the Commission, it paid due regard to the core characteristics and functions of the banks, their relationship with the government, and the legal and economic environment prevailing in China. In this respect, the Commission sought information about State ownership as well as formal indicia of government control in the State-owned banks. It also analysed whether control had been exercised in a meaningful way in view of the normative framework in place. For this purpose, the Commission claimed that it relied on 'facts available' because most of such financial institutions are deemed as 'in-cooperating' since they did not reply to the Commission's questionnaires – cited by the Commission.

example in this regard will involve a State-owned bank listed in the world's major stock exchange markets, and therefore is seen as a private body. But on occasions it lends with below-market interest rates or automatically rolls over unpaid principal and interest for national development policy 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, in accordance with Article 3.1(a)(iv), ASTDI.

After all, it may not be especially difficult in determining a Chinese State-owned bank as a public body under certain circumstances. Very often such governmental function is stated in the statutes of these banks. If circumstances warrant, it maybe straightforward 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.' (ICBC). Referring to the case against the optical fibre cable imports from China (OJEU 2022), 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 factor*, 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*' (OJEU 2022).[13] The Commission followed the same approach of argument in the present anti-subsidy investigation (OJEU 2024 a, paras 471-3).

The Commission has also established 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 over a State-owned financial institution. Moreover, when managers and supervisors in a State-owned financial institution is appointed by the government and to be accountable to the government, a government's 'meaningful control' could lead to the same conclusion (OJEU 2022). Ultimately, even if the State-owned financial institutions are proven not public bodies, it may be possible to demonstrate 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.

In general, the Commission's understanding of the operation of the Chinese financial system features two main characteristics: (1) a strong presence of state-owned banks and (2) a widespread influence of the State in the financial system, including for the banks to implement the sophisticated economic planning system. Moreover, in recent years organisational changes have taken place. The subordination of financial institutions to the Party is reinforced (EC 2024, p179). This being the case, it may be unsurprising that the Chinese State-owned financial institutions and banks are – again – proven as public bodies in the present anti-subsidy investigation – as is usually the case under the

[13] 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.

Commission's trade defence investigations. China challenged this conclusion. China alleged that the Commission did not assess the issue of 'public body' on an 'entity-to-entity, state-to-state, and case-by-case' basis, but rather relied on past investigations and other publicly available documents, etc. (OJEU 2024 b, para 169; WTO 2024 b). China has a point (although the lack of cooperation from those financial institutions may have prevented the Commission from conducting a more comprehensive investigation) (WTO 2024 b).[14] But an interesting question may be put to China is that, if the Commission's conclusion is unfounded as alleged, why it did not rebut the same conclusion arrived in previous trade defence investigations conducted by the Commission?

### b. 'private financial institutions'

Based on the Notice for investigation, in relation to 'preferential financing' as countervailable subsidies, apart from the 'State-owned financial institutions', 'other financial institutions' are also referred to by the Commission. Usually considered privately-owned, such 'other financial institutions' are identified as Chinese banks and wholly-owned locally incorporated foreign banks, for example China Postal Savings Bank Co. Ltd., Citibank (China) Co., Ltd., DBS Bank (China), Standard Chartered Bank (China) Limited, Sumitomo Mitsui Banking Corporation (China) Co., Ltd., etc. (OJEU 2024 a, para 468).

To prove those private financial institutions are public bodies when subsidising the BEVs, the Commission examined, firstly, the Chinse government's overall regulatory requirements against the financial sector. Within the meaning of Article 3(1)(a)(iv) of the ASTDI, and based on the WTO jurisprudence, the Commission must, then, assess if there was a relationship of 'entrustment' or 'direction' between the government and a private financial institution when a specific subsidy was granted. Consequently, the Commission established that the government of China has exercised de facto control over the private financial institutions – which is rebutted by China.

Anyhow, on the government's alleged encompassing control over the financial sector in China, in accordance with its jurisprudence established over previous trade defence investigations, as far as the Commission is concerned, both the State-owned and private financial institutions in China operate under the same framework of banking legislation by, for example, examining the various implementing rules issued by China Banking and Insurance Regulatory Commission (OJEU 2022).[15]

Within the meaning of Article 3(1)(a)(iv) of the ASTDI, to assess whether the relevant private financial institutions had been 'entrusted or directed' by the Chinese government to grant a specific financial contribution to a BEV producer, based on the WTO jurisprudence, it is to apply the test that the WTO

[14] In fact, how the Commission resorted to 'facts available' with respect to a number of aspects of the investigation, including financial institutions, are without legal basis, and is one of the procedural inconsistencies highlighted in China's WTO complaint. In the same regard, China also alleged that the Commission's selection of facts did not reasonably replace the allegedly missing information, in violation of Articles 12.1 and 12.7 of the SCM Agreement.

[15] 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).

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*'. However, in accordance with Article 3(1)(a)(iv) of the ASTDI, exercising 'general regulatory powers' should not amount to 'entrustment' and 'direction', and does not warrant CVDs. Ditto 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'*(OJEU 2024 a, para 470; WTO 2005, paras 114-6).

In the Commission's view, those private financial institutions did act under the Chinese government's entrustment and direction as financial contributors on the premise of the general characteristics of the financial sector in China as mentioned above. And, the argument was construed on its ratio decidendi reached in previous trade defence investigations launched by the Commission. Yet, this conclusion does not appear to be based on the WTO test, for the lack of 'threat or inducement', at first sight. China rebutted it, too, alleging that the Commission breached Article 1.1(a)(1)(iv) of the ASCM Agreement. In essence, according to China, the Commission did not establish 'entrustment/direction' between the government's functions and what those private financial institutions perform. The Commission also did not perform an 'entity-by-entity', 'case-to-case' assessment in relation to 'entrustment/direction' when determining whether those private financial institutions are private bodies within the meaning of Article 3(1)(a)(iv) of the ASTDI. Therefore, as far as China is concerned, the Commission did not establish the relationship between those private financial institutions and the government in the context of countervailable subsidies (OJEU 2024 b, paras 202-7; WTO 2024 b).[16]

### c. Other forms of subsidisation

Besides cheap credits provided by State owned banks, the so-called government guidance funds (GGFs) (DiPippo 2022).[17] are also considered as a source of subsidized capital, representing a countervailable subsidy. GGFs may be understood as venture capital investment adapted to the Chinese political and economic context (Lan 2024), and can be found at all levels of government in

[16] China also argued that the Commission had cherry-picked information from various documents to support its view that the government had created a normative framework in order to exercise meaningful control over the financial institutions. China further argued that the Commission had relied on the same elements to demonstrate that the financial institutions were entrusted and directed by the government. Moreover, China claimed that, in addressing China's claim, the Commission had merely restated China's argument but ignored the evidence on record. China therefore rejected the Commission's findings. Additionally, China claimed that the entrustment/direction and public body analyses differ and that the notion of delegation (in the case of entrustment) or command (in the case of direction) must take the form of an affirmative act.

[17] 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.

China (USTR 2024). They are mostly funded by central and local governments, large SOEs and State-owned financial institutions. GGFs are enormous in size (Huang 2019),[18] they in general aim to produce financial returns and further the government's industrial policy goals.

The GGFs invest in China's BEV industry (Nikkei Asia 2019).[19] Specifically, for the present anti-subsidy investigation, the Commission established that Hubei Jiyuan Yangtze River Industrial Fund Partnership, a venture capital vehicle of the government of central Hubei province, is an SOE. The Commission found that the government directly transferred funds to the Geely group, one of the sampled Chinese BEV manufacturers of this anti-subsidy investigation, and their operations fall in line with the governmental policy imperatives. The investors did not behave as a normal market operator would do with business logic, etc. when financially supporting the Geely Group. Subsequently, the Commission considered that managers and supervisors in the State-owned companies owning the Fund are assumed to be appointed by and accountable to the State. In addition, the Commission considered that this equity injection serves as another form of preferential financial support for encouraged industries, of which the BEV sector is one of them. Thus, the Commission concluded that through these guidance funds, the Chinese government directly or indirectly transfers funds to the Chinese BEV via State-owned or State-backed equity funds (OJEU 2024 a, paras 590-3).

In a wide interpretation of the concept of public body the Commission also found that financing via the bond market for BEV producers constituted a countervailable subsidy (OJEU 2024 b, paras 346-9). The main arguments of the Commission in this respect were that State-owned banks dominate the market as investors and that only firms that conform with official industrial policy are allowed to issue bonds. Moreover, almost all firms in this market are rated AAA by Chinese rating agencies. The Commission thus treated the entire bond market as a 'public body', or at least equivalent to one and applied the US BB – AAA spread to all bond financing as a countervailable subsidy. This treatment of bond financing leads to the result that de facto all financing sources of BEV producers are considered subsidised.

Since batteries constitute a major component of the cost of a BEV the Commission equally investigated the battery supply chain and found extensive evidence of subsidies. Here again, the evidence was mainly based on the influence of the CCP or municipal share-holdings in various companies, raising again the issue of private bodies acting as public ones and to what extent industrial policy goals, like driving down the price of batteries, constitute sufficient evidence that private bodies were acting under the direction of the government.

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[18] 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.

[19] For example, as reported by Nikkei in May 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.

### d. Specificity

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 deemed specific. Yet, as mentioned earlier, the Commission's findings of the various types of countervailable subsidies, including each ingredient of them, are challenged by China in both of its WTO complaints lodged, respectively, after the preliminary and definitive CVD rates were announced. For example, on the specificity of the countervailable grants, China alleged that the Commission's determination that the countervailed grants were specific is based on assumptions, and not on positive evidence, contrary to Article 2.4 of the ASCM. China argued that the Commission had evidence that the alleged grants in question benefitted multiple products – therefore specificity would not have been present – and thus applied facts available in a punitive manner (OJEU 2024 b, para 386; WTO 2024 b).

As established by the Commission, the forms of BEV subsidisation include preferential financing, provision of lithium (for the production of batteries for less than adequate remuneration). land use, fiscal subsidy policy, grants, revenue foregone, etc. All these was, nonetheless, disputed by China claiming that, for each one of them, the Commission's conclusion is inconsistent with the ASCM. In fact, for each subsidisation, China claimed that the Commission failed to establish that 1) they are financial contribution; 2) benefits are conferred; 3) they are specific (Ledwos 2022; WTO 2024 b).[20] Still, some legal practitioners argue 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' – in accordance with Article 3(1)(a)(iv) of the ASTDI and the WTO AB DS296 test.

### e. Potential challenges in the WTO?

To prove a subsidy is countervailable is often a challenging undertaking. On top of all the technical and substantive complications, complainants/respondents are sometimes confronted with procedural challenges, too, such as when 'non-cooperation' (on the part of the respondent) takes place. 'Asking too much with too tight a submission deadline', 'requesting to disclose confidential

[20] 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. According to Ledwos, 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.

information', cherry-picking the 'facts available' and what may be qualified as such, are often the complaints against the Commission, on the other hand. The Chinese side was confronted by these procedural issues, too. In relation to the present anti-subsidy investigation, for example, what constitutes the 'facts available' when determining 'preferential financing' as a countervailable subsidy (OJEU 2024 b, paras 125-30; WTO 2024 b)[21] is contested by China against the Commission for 'procedural inconsistency'.

It is then worth asking whether the Commission would withstand China's challenge in the WTO. In particular, the Commission's findings in relation to 'State-owned banks and private financial institutions' concern the unsettled issue of 'public/private body' under the ASCM by applying its unique Single Market rules. Would that not amount to unilateral rule-making, although those findings seem to fall within the remit of the regulatory framework governing 'public bodies' in the Single Market?

Only by referring to 'formal indicia of control over' those State-owned banks via their overall 'governance structure', i.e. with the Chinese Communist Party in the supervision and decision-making process (OJEU 2024 a, paras 431-2),[22] and a general legal environment, the Commission managed to determine that the State-owned banks in China operate under the government's 'meaningful control', or with the government's entrustment or direction, and performed governmental functions by those private financial institutions. The Commission's evidence does not seem to have passed thresholds of the regulatory and WTO case law requirements, as mentioned above.

When a CCP member heads the management of a State-owned bank, it does suggest a level of 'meaningful control'. But, what if the CCP member's presence is for formality purposes without participating in, or influencing, decision-making, including on the particular occasion of lending to a BEV manufacturer. What if such a 'CCP-on-top' governance structure was simply meant to reinforce the Chinese Constitution which stipulates the CCP's leadership role 'in consolidating public resolve to carry out the modernization program'? In reality, the CCP member may simply serve to rub-stamp a lending decision. Formality or substance aside, the connection between the 'CCP-on-top' structure in general and the particular 'financial contribution' to a BEV producer is missing in the Commission's reasoning.

Moreover, some provisions of a given Chinese legislation contradict each other. This reflects the dilemma that the China's 'socialist market economy' is confronted with, i.e. who should let lead the country's economy, the CCP/government or the market? But the Commission seems to have always exclusively picked the government-related provisions to prove its point, while completely ignoring the contradicting 'market' part of the same legislation. 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, the same Law explicitly prohibits the government from exercising any form of control over the decisions of commercial banks. Articles 4 and 5 respectively provide that

[21] In relation to preferential financing materials, China argued that, among others, the information concerning the shareholding of the financial institutions is publicly available and that there was no basis for the Commission for the use of facts available. Also, the Commission's resort to facts available was unlawful as the Commission had not properly notified the respondent of the information required from them.

[22] For example, the Commission found that State-owned financial institutions have changed their Articles of Associations in 2017 to increase the role of the CCP at the highest decision-making level of the banks.

commercial banks shall *'make their own decisions'* and operate *'without interference from any unit or individual'*. Article 41 of the same Law equally stipulates that *'no entity or individual may coerce a commercial bank into granting loans or providing a guarantee'.* Thus, the provisions of the Chinese Bank Law displays diametrically opposite positions in relation to a financial institution's lending decision-making.

Furthermore, the Commission might have a reason to suggest the CCP's omni-influence in the financial sector in China. In the same breath, Article 5 of the Interim Regulations of Board of Supervisors of Key State-owned Financial Institutions stipulated that the Board of Supervisors 'shall not participate in nor interfere with the business decision-making and business management activities of the state-owned financial institution' (OJEU 2024 b, para 189). Although all these examples exposes the contradiction of China's financial regulations, the Commission did not explain why it chose to quote one provision but dismissed other opposing provisions in the same piece of legislation on a given occasion as far as a specific financial contribution to the BEV industry is concerned? Neither did the Commission 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. But, apparently, that was sufficient for the Commission to pinpoint the government's 'meaningful control' – within the meaning of public body (OJEU 2024 a, para 434-59).

In parallel, it remains debatable whether the Commission have established 'entrustment' or 'direction' before concluding that those private financial institutions are financial contributors as far as countervailable subsidies are concerned. Apparently, by extension, and partly based on findings established in previous investigations, the Commission concluded that, among others, the same 'facts available' would serve to prove its case concerning the 'private financial institutions', in the same manner as they did in relation to those State-owned financial institutions (OJEU 2024 b, para 205). Thus, the Commission did not try to prove 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 more likely a government's exercising its regulatory powers, and perhaps its determination to reinforce its omni-grip of the country. In spite of that, the Commission's conclusion of the existence of the government's control – as a 'general legal environment' – in the Chinese financial sector seems to be largely based on its conviction of the alleged authoritarian regime in general than on the specific occasions in relation to the financial contribution conferred to the sampled BEV manufacturers. The Commission's focus is exclusively on the regulatory authorities' guiding principles on financing. The Commission seemed to rather dismiss the other more detailed financing-related provisions within the same regulatory framework. Arguably, the latter could simply negate the very guiding principles.

In the meantime, as in the hot-rolled flat steel case, the Commission tends to use the findings of previous investigations to argue a present one. This is equally the case as far as the BEV anti-subsidy investigation is concerned, and the Commission admitted itself that some findings are '… from past investigations…' (OJEU 2024 b, para 203). Therefore, the principle of 'entity-to-entity, state-to-state, and case-by-case' set down by the WTO AB was not fully observed (OJEU 2017, para 292). That said, the Commission sometimes is obliged to rely on 'facts available' to conduct its investigations because of 'non-cooperation' of interested parties. Those 'facts available' may not be favourable to the respondents, e.g. sampled manufacturers/exporters. As far as the present investigation is concerned, the Commission encountered a few non-cooperative parties, too, including SAIC and a few Chinese financial institutions. They did 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 centred 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 (OJEU 2013, para 3.2). 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 best facts available and to draw its conclusions on the document (OJEU 2013, para 426).

Indeed, for example determining 'entrusted or directed' could be an arbitrary exercise (WTO 2005).[23] 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, whether such decisions must be followed, in the absence of 'cogent reasons'. The USTR has argued that it is not (USTR 2020, pp 55-63). The Panellists in future disputes cases will have to adjudicate. So the Commission's ratio decidendi may very well prove precarious in front of the WTO.

### *D. 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 (USTR 2023).[24] However, the improvement made has a focus on the aspects of

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[23] 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'.

[24] 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

'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 (WTO 2023 a). 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 expected but it's 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 (WTO 2023 b) and the US EXIM Bank (WTO 2023 c), respectively, are not notified to the WTO, either. Nonetheless, it's 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 subsidisation the reason for Chinese BEV's success?

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

A key element of the anti-subsidy investigation on BEVs is the low cost of batteries, when the Commission determined that the CATL, for example, a privately-owned battery producer is a public body due to the Chinese government's 'meaningful control', etc. – a conclusion disputed by the Chinese side. In fact, China rejected the Commission's whole package of conclusions that batteries and lithium iron phosphate at 'less than adequate remuneration' are countervailable subsidies. (OJEU 2024 b, para 470-561; WTO 2024 b)[25]

The claim that the Chinese government has subsidised the production of batteries (Rathi 2019), must be seen in the context of the fact that the EU is doing the same via the so-called European Battery Alliance. In 2023, the Commission has approved € 3 billion in (national) state aid to battery producers (European Battery Alliance 2025).

In relation to the EU-China dispute on 'benefit' in the context of 'countervailable subsidies', the issue is whether Chinese battery subsidises have contributed to the alleged market distortions caused by

as prohibited subsidies in a WTO case.

[25] Aside from 'public body', China also alleged that the Commission's conclusions in relation to 'financial contribution', 'benefit', calculation of the amount of 'benefit', and 'specificity', etc. are in breach of the various provisions of the ASCM, etc.

the BEV imports from China.

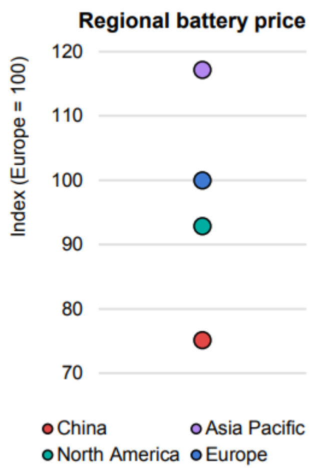
Two issues would need to be addressed in this context:

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 qualified as an exception by virtue of Article XX of the GATT, and not applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries or a disguised restriction on international trade. Although cited for other purposes in the investigation, the Commission's evidence on LG Chem Nanjing New Energy Solutions seems to suggest that this is unlikely the case (OJEU 2024 b para 490).[26]

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 percent below Europe's. But this price discrepancy per se is not evidence of subsidies. For example, it could be due to economies of scale given that around 65 percent of battery cells and almost 80 percent of cathodes globally are manufactured in China. In any case, if (government) money were the only reason for low price – which is the Commission's conclusion, why Northvolt was obliged to file bankruptcy although having received more than $10 billion (€9.54 billion) in eight years for producing EV batteries? Obviously, money cannot be the only answer to productivity advantage (Reuters 2024; IEA 2023, p.62).

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, p.62.*

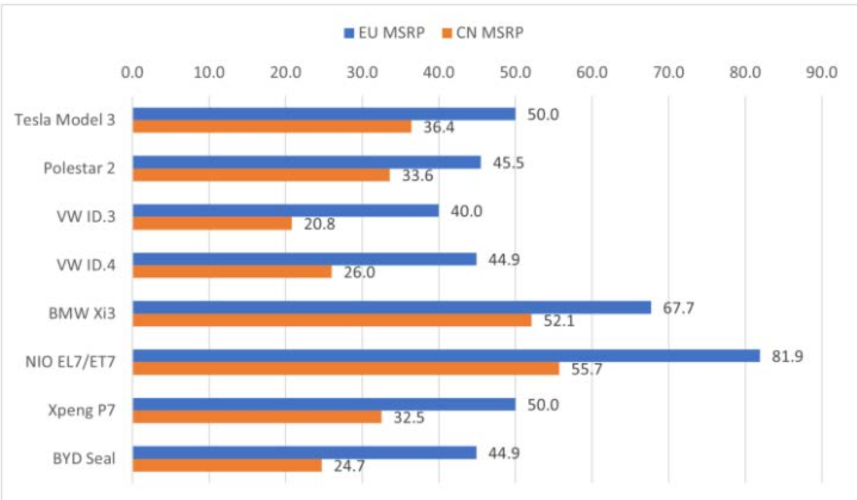
[26] LG Chem Nanjing New Energy Solutions (LG Nanjing) was established in 2015 by LG Chem, the chemicals subdivision of LG Corp., a South Korean multinational conglomerate and the parent company of LG Nanjing. In 2014, South Korea's LG Chem signed a memorandum of understanding (MOU) on cooperation with the Nanjing Municipal Government. Under the MOU, LG Nanjing would receive '*various assistance from the Nanjing Municipal Government, so the batteries produced [would] have price advantages*.'

## 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 (OJEU 2023). And, allegedly, the Chinese subsidised BEVs undercut significantly the Union industry's prices, the Commission argued that the profitability and return on investment of the Union industry was poor, or 'still far from making a profit', throughout the investigation period considered (OJEU 2024 a, para 1100-1; OJEU 2024 b, para 884) .[27] However, in addition to China's counterarguments, including those subsist in its WTO complaint (WTO 2024 b), the Commission failed 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). According to the Commission, the European EV unit cost was driven by the increase in the cost of components, especially batteries due to rising costs for raw materials, also steel and other metals due to the energy crisis (OJEU 2024 a, para 1078-9).

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 (Carlisle 2023). 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) (JATO 2023).

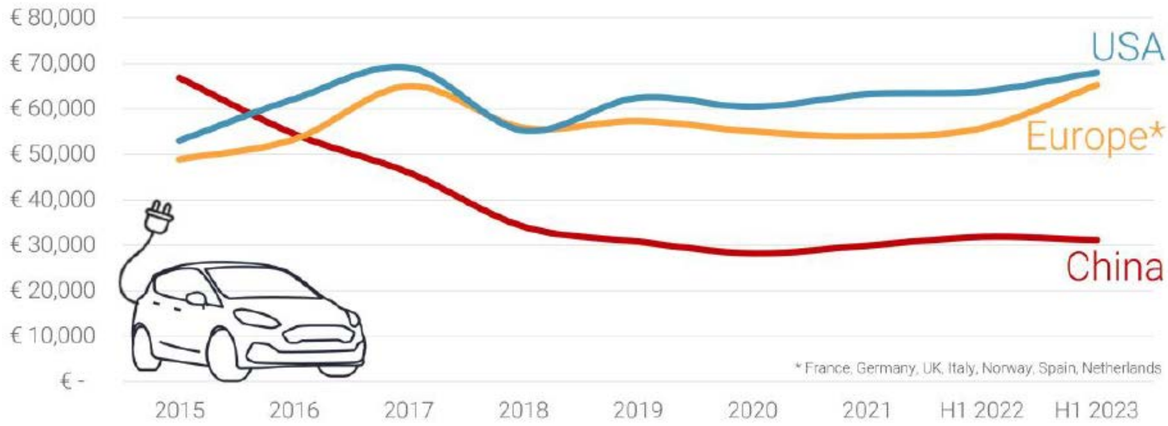
Figure 4: EU and Chinese MSRP comparison of the same BEV models:




*Source: Carlisle 2023.*

[27] The Commission further alleged that '...the situation in the investigation period of losses over 10% and continuing price suppression jeopardised the entire transition of the Union industry from ICE vehicles to BEVs.'

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




*Source: JATO 2023.*

A simple comparison of the MSRPs 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,[28] although fundamentally they are the same car in terms of design and technology while the differences are due to local regulatory requirements and preferences, etc.[29] 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 difference.

EU consumers thus pay clearly higher prices, even accounting for differences in VAT. The Commission should thus have investigated why European and Chinese car producers are charging European consumers so much more than their Chinese counterparts. Or, alternatively, why the BEV production cost in the EU are so high? According to the Commission, the Union industry average sales prices per piece increased by 38 percent (Table 2), average cost of production per piece increased by 24 percent, so as the labour cost, including increases in salaries and other labour costs

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[28] 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 inter-continentally, are of the expensive type. The Chinese are not selling their small/cheap BEVs in Europe.

[29] For example, Volkswagen has transitioned to using lithium iron phosphate (LFP) batteries in the ID.3 models sold in China. LFP batteries are generally more cost-effective and have a longer lifespan, though they offer lower energy density compared to other battery types. There are indications that the ID.3 models in China may feature different software configurations compared to their European counterparts, potentially offering enhancements or modifications to cater to local consumer preferences. Also, the ID.3 vehicles sold in China are produced locally through Volkswagen's joint venture with SAIC Motor, allowing for adaptations to meet local regulations and market demands. See Volkswagen Slashes ID.3 Prices In China, Now Starts At Just $17,500, Why this European brand is changing batteries in its affordable electric car: 2025 Volkswagen ID.3 swaps to LFP in China to compete on price with MG4 and BYD Dolphin, VW is Selling ID.3 in China for €15k with BETTER Software, Volkswagen cuts ID.3 price in China - now starts from €14,900.

due to high inflation especially in 2022 and 2023 (Table 3) (OJEU 2024 a, paras 1076, 1082). But the European BEV industry was still not able to make a profit, or the profit remain poor. 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.

Table 2: Sales price in the Union

| | 2020 | 2021 | 2022 | Investigation period |
|---|---|---|---|---|
| Average unit sales price on the Union market (EUR/piece) | 24 404 | 27 557 | 31 244 | 33 560 |
| Index | 100 | 113 | 128 | 138 |
| Unit cost of production (EUR/piece) | 30 683 | 32 029 | 35 079 | 38 140 |
| Index | 100 | 104 | 114 | 124 |

*Source: OJEU 2024 a, para 1075*.

Table 3: Average labour costs per employee

| | 2020 | 2021 | 2022 | Investigation period |
|---|---|---|---|---|
| Average labour costs per employee | 70 981 | 74 904 | 78 348 | 88 198 |
| Index | 100 | 106 | 110 | 124 |

*Source: OJEU 2024 a, para 1081.*

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 have been 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 U as an example, in Belgium the starting price was €42,740 (incl. VAT) and thus around €40 thousand in spring 2024, while in China the MSRP for the model cost ¥189,800 in the same period (€24,646). This means the selling price of this BEV model was about 58 percent higher in Europe than in China. Similarly, also in spring 2024, the MG4 EV, which is manufactured by SAIC, cost 55 percent more in Europe than in China. The model was advertised for €27,285 in Belgium, including the Flemish government premium worth of €5,000; while its starting price in China was ¥115,800 (€15,016). Proving 'material injury' to the EU industry – a key step to establish the Commission's case – becomes thus problematic. While price undercutting may exist, based on the Commission's own analysis it takes place at dealer's level (OJEU 2024 a, paras 1076, 1024). The Union's exclusive care dealership is an enabler.

The price differential between the Chinese and the EU market for the same cars is much higher than the subsidisation rate the Commission calculated for its countervailing duties (price differences of up to 40 percent, against subsidy margins of 17 to 35 percent). This means that BEVs produced in China could have been sold on the EU market with a profit even without the (alleged) Chinese subsidies. This is relevant in the context of Article 15.5 of the ASCM which recites:

*It must be demonstrated that the subsidized imports are, through the effects of the subsidy, causing injury within the meaning of this Agreement."*

The large price differences documented above thus imply that the (threat of) injury perceived by the Commission through the subsidised imports did not arise through the effects of the subsidies allegedly received by Chinese producers. Instead, the surge of imports was made possible by the very high prices charged by EU producers in the EU market[30] that would have left space for lower priced imports from China even in the absence of subsidies.

These very large differences are difficult to explain (BYD 2023).[31] German producers themselves have argued that they have lower production costs in China because of more competitive supplies and lower wages. This also suggests that subsidies might not be the key reason for lower prices in China and the success of Chines BEVs on the EU market.

International institutions like the IEA stress that elements, for example, a stronger market position for small 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 (IEA 2023, p.28; JATO 2023). This represents another avenue to support the view that production costs in China are lower anyway, implying that it is difficult to prove causation within the meaning of countervailable subsidies.

Nonetheless, the Commission argues that the profitability and return on investment of the EU BEV industry remained poor – indicating – therefore the industry was unable to pass on its costs to its customers. EU industry was prevented from setting prices to customers at profitable levels, the EU BEV industry's prices were suppressed by the availability of subsidised Chinese imports (OJEU 2024 a, paras 1076, 1100).

According to the ASTDI, 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 evidence shown here is that the selling prices of Chinese producers are much higher than those in China. Logically, this should have created a fundamental problem to establishing this link. In a normal subsidy case the

[30] 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.

[31] 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.

link is clear because subsidies lower production cost 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.

Nonetheless, the Commission is convinced that 'the substantial increase of the subsidised imports of Chinese BEVs, at prices below those of the Union industry' caused 'the Union industry lost market share', to the extent that the Union industry could not even sell at prices to cover its costs. The Commission also believed that the Chinese BEVs would be a growing threat of injury to the Union industry because of substantial and growing spare capacity in China ready to export to the Union market (OJEU 2024 a, paras 1170-5). China challenged the Commission's findings in its WTO complaint (WTO 2024 b).[32] It remains to be seen whether this case will lead to a clarification of the meaning of causation in article 15.5 of the ASCM.

Finally, a 'Union interest' test must be undertaken before a definitive countervailing duty may be imposed.[33]

## The 'Union interest' test

From the outset, in accordance with 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.

However, as observed from the past experience, the Union interest test is usually incapable to influence the outcome of a trade defence investigation launched by the Commission. mission. In theory, conducting the test is to balance a mixture of (maybe opposite) diverse interests of the Union stakeholders. Still, the interest of 'levelling the playing field' would usually be expected to override all other interest which is the objective of the ASTDI, anyway.  This scenario is proven true once

[32] China alleged that the EU failed to, among others, undertake an objective examination, based on positive evidence, of the causal link between the allegedly subsidised imports and the threat of injury to the domestic (EU) industry; and of other known factors, such as the lack of competitiveness and high production costs of the domestic (EU) industry. And, it is inconsistent with Articles 15.1, 15.5, 15.7 and 15.8 of the SCM Agreement.

[33] 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.

again for the present case. The Commission effectively dismissed all the Union interest, such as environmental benefits, dynamic competition, incentives for firms to innovate, China's possible retaliation. It reiterated that the imposition of the countervailing measures will not stop the imports from China. CVD is only to level the playing field on the Union market (OJEU 2024 b, paras 83-4).

A practical question is, nonetheless, how much the price tag on the Union's green transition would increase after the countervailing duties on Chinese BEVs are imposed. This conflict between mercantilism and green policies is not new, but particularly acute in this case.

## Mercantilism versus green policies: How much will it cost?

The conflict between the desire to protect domestic production and fostering the green transition became already 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 investigation 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 percent higher than in China. The average price of BEVs in Europe is at present about 50 thousand euro, 30 percent thus amount to about 15 thousand euro. In 2023 about 1.5 million BEVs were sold in Europe (market share of 15 percent on a total of 10 million). The higher prices for EU consumers of 15 thousand euro per car thus translates into 22.5 billion euro for 1.5 million cars. This is, an admittedly upper bound, to the cost to EU consumers of keeping the EU BEV market protected.

But the high cost to EU consumers of maintaining the profitability of EU industry is nowhere mentioned in the investigation.

Moreover, high prices are likely to slow down the adoption of BEVs. The Commission (OJEU 2024 a, para 111) acknowledges this point, but brushes it aside with a political argument:

*"…. efforts to combat climate changes cannot be built upon unfair competition by low-priced subsidised BEVs but should be based upon a level-playing field where fair competition and innovation will drive the green transition."*

The same argument was initially used in the solar panel case, but in 2018 the Commission decided to stop the measures that had been imposed in 2013, citing the high cost of domestic solar panels as an obstacle to the EU's renewable energy targets (Blenkinsop 2018).[34]

[34] On solar panels, the EU is now moving towards a "smarter" industrial policy—accepting reliance on Chinese solar panels in the short term while cautiously rebuilding domestic capacity through subsidies and diversification (McWilliams et al 2024).

## Conclusion

The BEV industry benefits from generous subsidies in many countries around the globe amidst the drive to fight against the 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 China.

Subsidies for batteries and green vehicles can be justified from an economic efficiency point of view as they accelerate the green transition. However, trade rules are ill-suited to deal with green subsidies. Formally, each country can impose counter-vailing duties even if it has similar subsidies at home. The Airbus - Boeing disputes provide an example where two trading partners each subsidised the same industry, but the two cases (the EU against subsidies for Boeing and the US against subsidies for Airbus) were dealt with independently for a long time until the two sides reached a political compromise, agreeing to end both cases.

In the case of batteries and BEVs, China is highly unlikely to start any proceedings against the EU's subsidies provided to its own BEV industry because the productivity differential is so large that there are no significant exports from the EU to China.

One key distinguishing feature of the BEV case is that it is the first time the Commission started an investigation ex-officio. This puts it in the position of being both judge and claimant and thus a source of potential conflict of interest. Another distinguishing feature of this case is that it is one of the very rare cases where anti-subsidy is not combined with anti-dumping. The combination of subsidies and dumping is a natural one as subsidies can allow firms to make loss-making sales below cost abroad. However, in the BEV the opposite is the case. Chinese producers sell their cars at a higher price in the EU than in China and EU producers also sell identical cars for a higher price in the EU than in China. This is an indication that competition in the EU market is less strong than in China. This is likely the reason why EU producers did not complain. It is curious that the Commission does not take the over-pricing in the EU BEV market into account.

It remains to be seen whether the findings of the Commission will withstand China's challenges in the WTO. China has challenged all Commission's findings, from sampling, subsidy determination to injury, causal link, etc on both substantive and procedural grounds. Key to the WTO challenge will be whether 'State-owned financial institutions' and 'private financial institutions', like the bond market, can be considered public bodies within the context of the WTO ASCM. 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.

Finally, the Union's interest test is not convincing as it simply asserts that the green transition needs a strong BEV industry.

The more general point arising from the BEV case 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 subsidising the production of green goods?

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