LEGAL MEMORANDUM

Analysis of the legality of electric vehicle support measures based on the Environmental Score under WTO and EU law

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To: Transport & Environment

INTRODUCTION

1. This note analyses the feasibility, under WTO and EU law, of measures at the French and/or EU level to support electric vehicles ("**EVs**") based on a comprehensive scoring system accounting for greenhouse gas ("**GHG**") emissions throughout their life-cycle. The objective is to stimulate demand for EVs with the best environmental performance, taking into account GHG emissions from production and transport, in addition to tailpipe emissions.

2. At the French level, a scoring system along these lines has been put in place, namely the *éco-score* (the "**Environmental Score**"). To date, there is one incentive scheme based on the Environmental Score, called the "***bonus écologique***" which incentivizes the purchase of vehicles meeting a minimum score under the Environmental Score. Transport & Environment ("**T&E**") proposes (i) to amend the Environmental Score to introduce a tiered system that would make it possible to differentiate between different categories of EVs (the "**Tiered Environmental Score**") and (ii) to make this scoring system a central metric for future fiscal and regulatory measures aimed at advancing the EV sector.

3. Given the broad range of potential measures and the prospective nature of the analysis, this note primarily aims at exploring whether and how WTO law can accommodate such support measures. A definitive assessment of WTO-compatibility should imply an in-depth, case-by-case examination of each measure, its structure and operational framework. Accordingly, this note outlines key considerations in the assessment of EV support measures under WTO rules.

4. This note also attempts to map potential legal constraints under EU law that may arise in the context of EV support measures taken at the French level.

5. Finaly, we analyse whether the adoption of a new scoring system at EU level - in line with T&E's proposal for a simplified scoring (the "**EU scoring method**") - would be feasible under current Regulation 2019/631 entrusting the EU Commission with the task of "setting out a methodology for the assessment and the consistent data reporting of the full life-cycle CO2 emissions of passenger cars and light commercial vehicles".

1. BACKGROUND

The Environmental Score and the current subsidy system

6. The current framework for EV incentives in France is centred around a "green bonus" (*bonus écologique*, in French), which is a financial subsidy aimed at promoting the purchase of 'environmentally friendly' vehicles. In accordance with Article D. 251-1 of the French Energy Code, since 1 January 2024, the *bonus écologique* for new electric cars has been conditioned on achieving a minimum environmental score, known as the *éco-score* (i.e. the Environmental Score).

7. Unlike previous systems and most existing measures in France or other EU Member States,[1] which focus only on tailpipe emissions, the Environmental Score aims at capturing the carbon footprint of EVs across their entire life cycle. This includes emissions from the manufacturing process and the energy used to transport vehicles to market. This is significant because, for EVs, up to 60% of total emissions occur before the vehicle is even driven, mostly during the production phase – especially for components like batteries. This percentage is expected to increase in the coming years as energy grids shift towards cleaner systems.

8. The Environmental Score currently operates with a single threshold (60 points). This means that all EVs that score 60 points or more may be eligible to the aid. The methodology of the Environmental Score was developed by ADEME and the French Ministry of Economy and Finance and is defined in Decree of 7 October 2023.[2] It relies on simplified parameters (emission factors) using as a proxy geographical reference values for each emission factor (e.g. battery production, transport, aluminium production).

T&E's proposal to introduce a tiered system

9. T&E proposes an expansion of the Environmental Score to introduce a tiered system (the Tiered Environmental Score). Indeed, the current single threshold limits the possible distinction between the most and least environmentally friendly EVs: all EVs that score 60 points or more are treated the same, regardless of their carbon footprint, which can vary significantly.

10. Under the proposed system, multiple categories would be created to better highlight the most climate-friendly models. For example, hypothetically, a car with a score of 100 would reflect an extremely low carbon footprint, while vehicles scoring below 60 would be ineligible for the *bonus écologique*. This tiered system would also adjust subsidy levels based on the vehicle's score, rewarding the cleanest models with the highest incentives. This would ultimately aim to

[1] For instance, traditional vehicle taxes in France, such as the *malus* CO_2, are based on tailpipe emissions.
[2] Arrêté du 7 octobre 2023 relatif à la méthodologie de calcul du score environnemental et à la valeur de score minimale à atteindre pour l'éligibilité au bonus écologique pour les voitures particulières neuves électriques, JORF n°0234 of 8 Octobre 2023.

help consumers make more informed choices and to encourage manufacturers to prioritise greener production practices to attain higher scores and, in turn, gain greater market appeal.

11. T&E suggests that the Tiered Environmental Score becomes a central metric for future tax and regulatory measures aimed at advancing the EV sector and allow for a more accurate reflection of the vehicle's environmental impact, ensuring that the cleanest vehicles benefit the most from subsidies and other incentives. This may include *inter alia* subsidies, vehicle taxation (e.g. registration, purchase, circulation, benefit-in-kind, business tax discounts), or corporate fleet targets.[3]

12. Moreover, T&E and other organizations advocate for a broader, EU-wide adoption of a new scoring system as a basis for future policies, drawing on the French Environmental Score.[4]

2. ANALYSIS OF POTENTIAL FRENCH EV SUPPORT MEASURES BASED ON THE ENVIRONMENTAL SCORE UNDER WTO LAW

13. In 2023, following the adoption of the revised *bonus écologique* by France, several trade partners (South Korea, China) have raised concerns as to the measure's WTO-compatibility.[5] Specifically, they argue that the measure could be discriminatory to foreign EV imports and may not be justified under the GATT general exceptions. They have requested France to clarify the methodology used to determine carbon emission factors, and to ensure that default values are reliable and reflect current data. South Korea, in particular, argues that the consideration of transport-related emissions and the differential emission factors applied to EU-produced versus non-EU EVs could breach WTO law.

14. These concerns are relevant to the analysis under WTO-law which looks at the existing scheme and the potential impacts of the adoption of the expanded Tiered Environmental Score.

15. As regards the different measures that could be adopted – tax incentives, subsidies, obligations to incorporate very low-emission cars into corporate fleets – their varying nature is only secondary to the analysis under WTO law,[6] the design of the scoring system being the central element. This justifies joint examination of the various suggested measures.

16. The analysis of the compatibility of a measure with WTO law requires first to determine which WTO Agreements would be applicable (**2.1**). The assessment under the GATT is divided between the examination of whether a measure complies with the substantive obligations (**2.2**) and, in case of non-compliance, of whether that measure can benefit from one of the exceptions listed in Article XX GATT (**2.3**).

[3] See e.g. this legislative amendment proposed in October 2024 regarding corporate fleet targets.
[4] T&E, BEUC and IMT Joint letter to the Commission (25 September 2024).
[5] WTO Council for Trade in Goods, Minutes of the meeting of 30 November – 1 December 2023, G/C/M/147 (30 January 2024), paras 14.2-14.18.
[6] Though each kind of measure may be more or less effective in reducing GHG emissions, or more or less trade-restrictive, which may impact the WTO analysis (see § 8).

2.1. Applicable WTO agreements

17. The GATT will apply to most EV support measures. As the general law, the GATT applies either alone – when none of the other agreements apply – or cumulatively to other agreements.[7]

18. The application of the SCM Agreement[8] and the TRIMS Agreement[9] can be considered as well. However, following established case-law it is unnecessary to proceed with an analysis under these agreements – to the extent they are applicable – when a measure is already inconsistent with Article III:4 GATT. In addition, in accordance with Article 3 of the TRIMs Agreement, all exceptions under Article XX GATT equally apply to the provisions of the TRIMs Agreement. These GATT exceptions may also be available to justify a *prima facie* violation of the SCM Agreement, though this is still debated.

19. Finally, the TBT Agreement may be applicable to measures such as labelling requirements for cars.[10] This agreement applies to technical regulations, standards and conformity assessment procedures. Its Annex 1 defines "technical regulations" as follows:

> "Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."

20. It follows from this, that it is justified to focus **on the GATT analysis**, as the GATT contains the general standards that are reflected in other agreements.

2.2. Analysis under the GATT's substantive provisions

21. Any domestic policies potentially affecting international trade must satisfy two basic obligations under the GATT:

- accord foreign products most favoured-nation treatment (Article I), and
- accord foreign products a national treatment regarding internal regulation and taxation (Article III).

22. In the present case, virtually all hypothetical measures based on the existing Environmental Score and the suggested tiered Environmental Score may result in treating EVs originating from certain third countries less favourably than domestically-produced EVs and/or EVs originating

[7] The General Interpretative Note to Annex 1A of the WTO Agreement states that in the event of a conflict between the GATT and a provision of one of the other agreements listed in Annex 1A to the WTO Agreement, "the provision of the other agreement shall prevail to the extent of the conflict".
[8] The SCM Agreement is the WTO Agreement on Subsidies and Countervailing Measures, which regulates the provisions of subsidies and provides rules for countervailing measures to offset the injury caused by subsidised imports.
[9] The TRIMS Agreement is the WTO Agreement on Trade-Related Investment Measures (TRIMs).
[10] The analysis under the TBT Agreement precedes any examination under the GATT (Panel Report, *EC – Sardines*, WT/DS231/R (29 May 2002), para. 7.15). A measure found to be inconsistent with the TBT Agreement may not be justified under the GATT (AB Report, *China – Rare Earths*, WT/DS431/AB/R (29 August 2014), para. 5.56).

from other non-EU countries. Therefore, both Articles I and III are equally relevant. However, this note will focus primarily on Article III, as the analysis largely overlaps.

23. Conditions for obtaining an advantage as well as other types of incentives that favour the use of domestic products over imported like products, such as in the context of the *bonus écologique* and tax discounts for companies or individuals,[11] are examined under Article III:4:

> "1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products […] should not be applied to imported products or domestic products so as to afford protection to domestic production.
>
> […]
>
> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

24. Taxes and other charges fall under Article III:2, which outlines a slightly different legal test:

> "2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1."

25. Both provisions set out a two-tier test to assess the compatibility of the measure with the GATT, namely whether the domestic and imported products are "like" (**2.1.1**) and whether imported products receive treatment less favourable than like domestic products (**2.1.2**).

2.2.1. Like products

26. For discrimination to be characterised pursuant to Article III GATT, it is necessary to benchmark against the treatment afforded to "like products".[12] This means that, where likeness is excluded, national treatment obligations do not apply.

27. The Appellate Body has made clear that likeness should be examined on a case-by-case basis.[13] However, it developed a non-exhaustive set of indicators to assess likeness: international tariff classification, physical qualities and properties, end-uses and consumer tastes and habits.[14]

[11] Different aspects of the same measure may be found to be inconsistent with one or more paragraphs of Article III GATT. For instance, in case of taxation measures, the aspect relating to differential tax treatment would fall under Article III:2, while the requirements for certification that result in less favourable treatment could be inconsistent with Article III:4 (see e.g. AB Reports, Brazil – Taxation, WT/DS472/AB/R and WT/DS497/AB/R (13 December 2018), para. 5.53).
[12] Case-law indicates that likeness under Article III:2 (relating to fiscal measures) should be construed more narrowly than under Article III:4 (AB Report, *Japan – Alcoholic Beverages*, pp. 19-20).
[13] AB Report, *EC – Asbestos*, WT/DS135/AB/R (12 March 2001), paras 101-102.
[14] Ibid, para. 101.

28. Though all four criteria are not subject to any hierarchy and their relative weight varies in each case, the key concern is ultimately whether the degree of competition between domestic and imported products is sufficiently close.[15] Only products that satisfy similar demands are "like" products.[16] Consumer perception (i.e. taste and habits) is thus often the decisive criterion.[17]

29. Here, the comparison is between similarly-sized domestic and imported EVs based on their carbon footprint, rather than between electric and thermal cars. Most criteria indicate a **high degree of competition**: EVs serve the same end-uses, fall under the same tariff heading (8703 80), and exhibit minimal – if any – physical differences. Thus, the question is whether a sole difference in carbon footprint is sufficient to distinguish EVs as unlike.

30. This ultimately relates to production methods and processes ("PPMs"), which can be relevant in various ways in assessing likeness:[18]

- First, the importance of the consumer perception criterion may lead to PPMs considerations influencing the competitive relationship, to the extent that these PPMs shape consumers' preferences. This has been expressly accepted in case-law.[19]

- Second, PPMs may also directly affect the products' physical characteristics. Physical characteristics encompass an expansive range of properties – including quality, health concerns and chemical composition – beyond the mere visual aspect of the product.[20]

- Third, PPMs as such may arguably be considered. The list of indicators referred to above is not exhaustive and subject to evolution. In this respect, the peremptory distinction between the product itself and the way it is manufactured is becoming increasingly irrelevant. It could be argued that PPMs are inherently part of the "product".[21]

31. In this context, it could be argued that consumers prefer less carbon-intensive EVs over more carbon-intensive EVs to exclude likeness. However, consumer preferences must be strong enough to translate into consumer behaviour and impact the competitive relationship of products. Though EV buyers can display strong climate change awareness that arguably shapes

[15] Ibid, para. 99.
[16] Panel Report, *Tuna III*, WT/DS381/R (15 September 2011), para. 7.235.
[17] AB Report, *EC – Asbestos*, para. 117.
[18] Though the relevance of PPMs in the likeness assessment was ruled out by the *US – Tuna I* and *II* panel reports issued in the early 1990s, these reports were not formally adopted and have no legal status. See GATT Panel Reports (unadopted), *US – Tuna/Dolphin I*, DS21/R (3 September 1991), para. 5.15 and *US – Tuna/Dolphin II*, DS29/R (1994).
[19] See Panel Report, *Tuna III*, para. 7.249, in which the panel did not exclude that US consumers' "preferences with respect to tuna products, based on their dolphin-safe status … may be relevant to an assessment of likeness".
[20] AB Report, *EC – Asbestos*, paras 126 and 134-141.
[21] See e.g. T. Kelch, *Globalization and Animal Law: Comparative Law, International Law and International Trade* (Wolters Kluwer 2nd edn 2017), p. 278. In *Canada – Renewable Energy* (relating to subsidies), the Appellate Body found that "what constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product" (AB Reports, *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, WT/DS412/AB/R and WT/DS426/AB/R (24 May 2013), paras 5.63 and 5.167-5.178).

their preferences for electric over traditional thermal cars, price still dominates consumer choice in general.

32. Recent case-law further illustrates these challenges. In *EU – Palm Oil*, the panel indeed rejected the EU's argument that consumers widely preferred palm-oil free over palm-oil based biofuels due to concerns about deforestation, considering rapeseed oil and soybean oil biofuels as like-products to palm oil biofuels.[22] The panel followed the standard reasoning set out by WTO case-law, establishing that these products had:

- Physical characteristics that while not identical, were very similar;
- A same primary end-use, given that downstream users of biofuel did not distinguish between the crop of origin when using such fuels;
- An identical tariff heading at the six-digit level under the EU's tariff nomenclature; and
- Similar preferences from consumers for biofuels from different sources. Although the panel did not rule out the possibility that consumer preferences against palm oil-based biofuels could preclude likeness, it set a high threshold. The EU would have needed to demonstrate that such preferences were "of such nature and magnitude that could rebut the findings of a high degree of competition" reached on the basis of the above criteria.[23]

33. In view of the above, European-made EVs should be considered like-products to imported EVs regardless of their carbon footprint, pursuant to both Article III:4 and Article III:2.

2.2.2. Differential treatment

34. Article III:4 GATT does not prohibit differential treatment *per se*. Rather, pursuant to this provision, an internal regulation should not treat imported products <u>less favourably</u> than like domestic products. Less favourable treatment occurs when a measure "modifies the conditions of competition in the relevant market to the detriment of imported products".[24]

35. Such treatment occurs either *de jure* or *de facto*:

- <u>*De jure* discrimination</u> exists when the measure expressly differentiates between products on grounds of origin. Measures that apply regardless of origin to all goods placed on a given market are not discriminatory *de jure*.
- <u>*De facto* discrimination</u> relates to a measure that is origin-neutral on its face, but results in less favourable treatment of imported products. For instance, *de facto* discrimination may

[22] Panel Report, *EU – Palm Oil (Malaysia)*, WT/DS600/R (5 March 2024), para. 7.453.
[23] Ibid, para. 7.453.
[24] AB Report, *Korea – Beef*, WT/DS161/AB/R (10 January 2001), para. 137.

exist if domestic products can more easily meet a certain standard or requirement – which applies without distinction – than like imported products.

36. A measure that differentiates among EVs based on the Environmental Score is likely to alter competition to the detriment of EVs imported from countries like China, Korea and Japan. European-made EVs typically have lower carbon footprints due to cleaner energy grids and shorter transport distances. They would therefore benefit more fully from the incentives offered by these schemes. While such measures stimulate demand for EVs, they limit the benefits of this stimulus for more carbon-intensive EVs, whose market appeal may consequently diminish.

37. This has already been observed following the revision of the *bonus écologique*, as none of the EVs originating from China qualify for the bonus. As a result, sales of Chinese EVs in France dropped in 2024, while European-made EVs' sales significantly increased.[25]

38. Similarly, tax incentives or discounts conditioned on meeting a minimum Environmental Score, where only or mostly European EVs satisfy the required threshold, would result in imported EVs being taxed in excess of like domestic products within the meaning of Article III:2.[26]

39. Thus, these measures are likely to be found inconsistent with Article III. This conclusion extends to Article I on MFN treatment, as the carbon emission factors used in calculating the Environmental Score vary by region or country. For instance, Northern-American production processes for EVs and their main components are considered less carbon-intensive than in Asian countries, effectively granting an advantage to EVs from specific regions.

2.3. Justification under Article XX GATT

40. Article XX allows WTO members to justify measures that would otherwise be inconsistent with the substantive provisions of the GATT.

41. The analysis under Article XX is divided into two parts: the measure must fall under one of the listed exceptions to be provisionally justified (**2.2.1**); and the measure must meet the requirements of the *chapeau* i.e. the introductory language to Article XX (**2.2.2**).

2.3.1. Provisional justification

42. Article XX sets out an exhaustive list of exceptions. Although certain policy objectives are not explicitly mentioned (e.g. climate change mitigation), they may fall under one or more of the listed exceptions. Ensuring a level-playing field for domestic products against imports is not a valid policy objective under this provision.

[25] TF1, "La fin du bonus écologique pour les voitures électriques chinoises a boosté les modèles européens" (30 May 2024.
[26] See e.g. Panel Report, *EU – Palm Oil*, para. 7.1226.

43. Article XX lists three exceptions relevant to climate change mitigation, namely those relating to measures:

> "(a) Necessary to protect public morals;
>
> (b) Necessary to protect human, animal or plant life or health;
>
> (g) Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption […]."

44. Of these three exceptions, the protection of "human, animal or plant life or health" (**a**) and the "conservation of exhaustible natural resources" (**b**) are considered to be the most appropriate with respect to measures addressing limiting GHG emissions.[27]

a. Article XX(b) relating to the protection of human, animal or plant life or health

45. According to case-law, Article XX(b) mandates a two-step analysis to examine first whether the measure is "designed to" protect human, animal or plant life or health, and second whether it is "necessary to" protect human, animal or plant life or health.[28]

Design of the measure

46. First, **the pursued policy objective should fall within the range of policies covered by Article XX(b)**. The protection of human, animal, and plant life or health within the meaning of this provision notably encompasses "measures adopted in order to attenuate global warming and climate change".[29] Specifically, case-law recognised that **"the reduction of CO2 emissions" falls among the policies that protect human life or health**.[30] This has been recalled by the panel in *EU – Palm Oil*, noting that "global warming and climate change pose one of the greatest threats to life and health on the planet".[31] Therefore, reducing GHG emissions undoubtedly falls within the covered policy objectives.

47. This is irrespective of whether these emissions occur within or outside of the borders of the regulating country. This was explicitly recognised in *EU – Palm Oil*.[32] The panel indeed stated that the objectives in Article XX(b) and (g) "do not have any inherent jurisdictional or territorial limitation". It also considered that a sufficient jurisdictional nexus could be established between the EU and the extra-territorial effects of its regulatory action because "climate change is inherently global in nature" and – importantly – because the measures should be characterised as regulating EU demand for crop-based biofuels, rather than emissions outside the EU as such.

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[27] In *EU – Palm Oil*, the EU also invoked the public morals exception for measures aimed at reducing deforestation, but the panel left open the question of whether these measures could fall under Article XX(a) (see Panel Report, *EU – Palm Oil*, paras 7.284 and 7.1292).
[28] AB Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R (17 December 2007), para. 178.
[29] Ibid, para. 151.
[30] Panel Report, *Brazil – Taxation*, para. 7.880.
[31] Panel Report, *EU – Palm Oil*, para. 7.1085.
[32] Ibid, paras 7.311-7.315.

The panel thus confirmed that WTO members can justify measures taken to minimise emissions generated in third countries through domestic demand.[33]

48. Second, **the measure should be designed to achieve the pursued policy objective**. This condition relates to the "existence of a relationship" between the measure and the objective: the measure must be "not incapable of" protecting human, animal, and plant life or health.[34] This objective assessment may involve "scrutinizing a range of evidence and considerations related to the measure at issue, including the texts of statutes and/or regulations, the measure's legislative history, the measure's objective, and other evidence regarding its content, structure, and expected operation".[35]

49. Measures aimed at advancing the transition to EVs using the Environmental Score, such as the *bonus écologique* or the ones contemplated by T&E, pursue the objective of limiting production- and transport-related emissions associated with EVs. This is to mitigate the risk that these emissions could partially undermine GHG emissions savings expected to result from the promotion of EVs when only CO2 emissions during use are considered.[36]

Necessity of the measure

50. Assessing the necessity of a measure entails "a process of 'weighing and balancing' a series of factors", in particular (i) the importance of the interest at stake, (ii) the contribution of the measure to the objective it pursues, and (iii) the trade-restrictiveness of the measure.[37]

51. Regarding the relative importance of the interest at stake for the regulating country, case-law shows that "[t]he more vital or important the interests or values … the easier it would be to accept a measure as 'necessary'".[38] The protection of the environment and of human life against climate change surely are vital interests,[39] making it easier to deem the measure "necessary".

52. Next, a contribution of the measure to its objective exists when there is "a genuine relationship of ends and means between the objective pursued and the measure".[40] Determining this requires to assess, "in a qualitative or quantitative manner", the extent of the contribution to the end pursued.[41] Again, the greater the contribution, the easier it is for the measure to be considered

[33] This finds support in the recent *KlimaSeniorinnen* judgment by the European Court of Human Rights (app. 53600/20, 9 April 2024) acknowledging that embedded emissions are "attributable" to the importing State (paras 279-280).
[34] AB Report, *Colombia – Textiles*, paras 5.68 and 5.70, stating that this is not a "particularly demanding step".
[35] Ibid, para. 5.80.
[36] Panel Report, *EU – Palm Oil*, para. 7.338.
[37] AB Report, *Brazil – Retreaded Tyres*, para. 150.
[38] AB Report, *Colombia – Textiles*, para. 5.71.
[39] See e.g. AB Report, *Brazil – Retreaded Tyres*, para. 144.
[40] Ibid, para. 145.
[41] AB Report, *Colombia – Textiles*, para. 5.72.

necessary.[42] However, there is no pre-determined threshold for such contribution: the assessment depends on the objective pursued and the level of protection sought.[43]

53. The approach to determine contribution varies according to the specific circumstances of each case, as well as the nature, quantity and quality of evidence available at the time of the analysis. When a measure is only at a "nascent stage of implementation", the lack of quantitative evidence makes it more difficult to ascertain the actual extent of contribution.[44] Specifically, according to case-law, climate change mitigation measures "can only be evaluated with the benefit of time".[45] This is likely to lead a panel to carry out a qualitative analysis based on projections.[46] In this respect, "evidence regarding the design of the measure at issue, including its content, structure, and expected operation" is of particular importance.[47]

54. Concretely, assessing the measure's contribution to reducing GHG emissions may ultimately require to assess whether:

- the measure can effectively steer demand towards cleaner EVs, and
- the measure would not have the unintended effect of reducing, or slowing the increase of, demand for EVs overall, which could benefit cheaper thermal cars, thereby undermining the measure's contribution to the objective of reducing GHG emissions.[48]

55. Taking the example of the *bonus écologique*, in response to the concerns by WTO members mentioned above, the EU argued that conditioning the bonus on achieving a minimum score "would reduce France's carbon footprint by an average of 800,000 tonnes of greenhouse gases per year between 2024 and 2027".[49] This suggests that this measure is apt to make a material contribution to limiting GHG emissions. However, such projections should be supported with relevant data and evidence.

56. In addition, the projected contribution to the objective of limiting GHG emissions could present potential limitations:

- While, within the market for larger EVs, the bonus appears to effectively incentivise demand for less carbon-intensive EVs, it could be argued that the *bonus écologique* does

[42] AB Report, *Korea – Various Measures on Beef*, para. 163.
[43] See AB Report, *EC – Seal Products*, para. 5.213; Panel Report, *EU – Palm Oil*, para. 7.362; AB Report, *Brazil – Retreaded Tyres*, paras 140 and 145, recalling that States are free to determine the level of protection they find appropriate.
[44] AB Report, *EC – Seal Products*, paras 5.221, 5.253-5.224, 5.228 and 5.253, noting *inter alia* that when the impact of the measure is not yet realised, it can be assessed whether the measure can be considered "'apt to' induce changes over time in the behaviour and practices of commercial actors in a manner contributing to the objective".
[45] AB Report, *Brazil – Retreaded Tyres*, para. 151.
[46] AB Report, *EC – Seal Products*, paras 5.221, 5.253-5.224, 5.228 and 5.253, noting *inter alia* that when the impact of the measure is not yet realised, it can be assessed whether the measure can be considered "'apt to' induce changes over time in the behaviour and practices of commercial actors in a manner contributing to the objective".
[47] AB Report, *Colombia – Textiles*, paras 5.67-5.70.
[48] For instance, in *EC – Seal Products*, the panel considered that indigenous communities exceptions to the ban on the sale of seal products diminished the measure's contribution (paras 7.444-7.445).
[49] WTO Council for Trade in Goods, Minutes of the meeting of 30 November – 1 December 2023, para. 14.13.

not adequately support the advancement of compact models whose carbon footprint is significantly lower in comparison to large EVs.

- Indeed, we understand that the *bonus écologique* reduce the availability and affordability of compact, entry-level EVs, by penalising small imported EVs whose Environmental Score is below the required threshold. Thus whereas, these vehicles could theoretically contribute to a broader adoption of EVs in more accessible segments and deliver GHG emission savings over thermal cars, they are excluded from financial incentives.

- This results in a notable shortage of compact EV options, in an EU landscape of EVs dominated by larger models, as car manufacturers focus on producing and selling premium, more profitable EVs. As a result, the average prices for compact EVs remain prohibitively high – €34,000 for segment A, €37,200 for segment B, and €48,200 for segment C.[50] This means that EVs are "not cost competitive for cost conscious European consumers" since there are many thermal car models available for less than €20,000.

- As a result the exclusion of small imported EVs could ultimately hinder EV adoption among price-sensitive consumers, potentially stalling overall EV growth and favouring cheaper, carbon-intensive thermal cars.

57. It follows that the measure's contribution to limiting GHG emissions could be diminished, failing to maximise emissions savings overall and potentially even partially neutralising the expected gains. Regulators seeking to incentivise demand for cleaner EVs should be mindful of these risks, which are essentially due to the setting of a single threshold for the Environmental Score. **This may be countered with a tiered system affording the highest subsidies to the best-scoring EVs** and adequately supporting the penetration of EVs in mass segments by making more imported compact EVs eligible to lower subsidy levels.

58. As to trade restrictiveness, the analysis should focus on the degree thereof. Measures with a slighter impact on imported products may be deemed "necessary" more easily, in comparison to measures "with intense or broader restrictive effects",[51] such as import bans. That said, according to case-law, even a measure that is "highly trade-restrictive in nature" can be found to be necessary within the meaning of Article XX(a).[52] In fact, a finding that a measure is apt to make a material contribution has systematically led WTO adjudicators to conclude that the measure was necessary in the context of the balancing the above three factors, regardless of the degree of trade restrictiveness.[53]

59. The degree of trade restrictiveness of potential measures may vary, but results from limiting the number of EVs eligible for subsidies or tax discounts. In this respect, in *EU – Palm Oil*, the

[50] T&E Brief, "Europe's BEV market defies odds but more affordable models needed" (February 2024).
[51] AB Report, *Colombia – Textiles*, para. 5.73.
[52] AB Report, *EC – Seal Products*, paras 5.215 and 5.290, finding that the seal products ban was "necessary".
[53] Panel Report, *EU – Palm Oil*, para. 7.363.

panel expressly rejected the EU's argument that "where a Member artificially creates a market for certain products (e.g. biofuels), any limitation on the eligibility of which products have access to that market … would not have any "limiting effect on trade"".[54]

60. Finally, necessity also requires a comparative analysis relative to possible alternatives. It should be considered whether there is a (i) less trade-restrictive measure that (ii) is not merely complementary[55] and (iii) provides an equivalent contribution to the achievement of the objective, and (iv) whether this alternative measure is "reasonably available"[56] – i.e. "capable of being implemented at reasonable cost in the real world".[57] Those alternatives must be identified by the complaining State in case of a dispute. In addition, the "equivalent contribution" is assessed against the contribution actually achieved by the challenged measure.

61. Though several alternative suggestions may be proposed, a less trade-restrictive option could be subjecting EVs to mandatory labelling requirements based on the Environmental Score. However, this option is likely to result in a weaker contribution to limiting GHG emissions. Simply increasing consumer information indeed appears insufficient as demand for cleaner EVs – as opposed to cheaper cars – does not seem strong enough. Hence the need for stronger price or tax incentives.

62. It follows that WTO law leaves sufficient room for support measures for cleaner EVs to pass the necessity test under Article XX(b) and be justified under this exception, provided they meet the requirements of the *chapeau*.

b. Article XX(g) relating to the conservation of exhaustible natural resources

Scope of the Article XX(g) exception

63. Article XX(g) allows WTO members to justify breaches of substantive GATT rules if the measure "relates to" the conservation of "exhaustible natural resources". The term "exhaustible natural resources" is broadly construed as covering both living and non-living resources and should be read "in light of contemporary concerns of the community of nations about the protection and conservation of the environment".[58] In addition, the word "exhaustible" refers to resources that are "susceptible of depletion, exhaustion and extinction, frequently because of human activities".[59]

64. A large range of policies were previously considered to fall within the scope of this exception, such as measures to preserve clean air or sea turtles.[60] In *EU – Palm Oil*, the panel found that

[54] Panel Report, *EU – Palm Oil*, para. 7.329.
[55] In *EU – Palm Oil*, the panel defined *alternative* measures as those that are not complementary i.e. that could not coexist with the challenged measure or that would render it obsolete or redundant (para. 7.374).
[56] AB Report, *US – Gambling*, paras 307-308.
[57] Howse and Levy, "The TBT Panels: *US–Cloves, US–Tuna, US–COOL*" (2013) 12(2) *World Trade Review*, p. 353.
[58] AB Report, *US – Shrimp*, paras 129 and 131.
[59] Ibid, paras 128 and 131.
[60] Panel Report, *EU – Palm Oil*, para. 7.274.

high carbon-stock land, such as forests and wetlands, could be considered an exhaustible natural resource under Article XX(g). The panel generally added that measures taken to avoid GHG emissions "are related to the conservation of a wide range of exhaustible natural resources that are threatened by increased GHG emissions and climate change".[61] The atmosphere as such is also widely regarded as a natural resource in international law.[62]

65. It follows that there is no doubt that measures aiming to reduce GHG emissions can *prima facie* be justified under Article XX(g). As indicated above, this includes the reduction of emissions generated in third countries through domestic consumption. Here, the measures would seek to mitigate the carbon footprint of EV consumption in France by steering demand towards less carbon-intensive EVs. They would therefore fall within the scope of Article XX(g).

Degree of connection between the means and the objective

66. The term "relating to" within the meaning of Article XX(g) requires "a close and genuine relationship of ends and means" between the measure at issue and the pursued conservation objective.[63] The legal standard is similar to the "contribution" required in the context of the necessity test under Article XX(b). The measure will not satisfy this requirement if it is "merely incidentally or inadvertently aimed at a conservation objective".[64]

67. In *EU – Palm Oil*, the panel simply noted that the measure had "by design, a limiting effect on EU demand" for high ILUC-risk crop-based biofuels to conclude that it related to the conservation of carbon sinks.[65] Measures based on the Environmental Score that are likely to steer demand towards cleaner EVs should likewise be deemed to contribute to limiting GHG emissions.

Restrictions on domestic production or consumption

68. Finally, in order to be provisionally justified under Article XX(g), measures must be "made effective in conjunction with restrictions on domestic production or consumption".[66] In *EU – Palm Oil*, the panel considered that the challenged EU measure "plainly meets this requirement as it, of itself, aims at and results in restricting EU demand for and consumption of crop-based biofuels classified as high ILUC-risk".[67] Likewise, support measures for cleaner EVs based on the Environmental Score aim at reducing domestic demand for more carbon-intensive EVs.

69. Thus, such measures may be provisionally justified under Article XX(g).

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[61] Ibid.
[62] For instance, the International Law Commission ("**ILC**") clearly refers to the atmosphere as the "Earth's largest single natural resource and one of its most important" (ILC, Draft guidelines on the protection of the atmosphere, with commentaries (2021), A/76/10, first preambular paragraph and commentary).
[63] AB, *China – Rare Earths*, para. 5.90.
[64] *ibid*.
[65] Panel Report, *EU – Palm Oil*, para. 7.1080.
[66] See e.g., AB Report, *China – Raw Materials*, WT/DS394/AB/R (22 February 2012), para. 360.
[67] Panel Report, *EU – Palm Oil*, para. 7.1081.

2.3.2. The Chapeau of Article XX GATT

70. Once a measure is found to be provisionally justified under one (or several) subparagraphs of Article XX GATT, it must pass the test of the *chapeau*:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures […]."

General remarks on the chapeau

71. The requirements of the *chapeau* are twofold: a measure which is provisionally justified under one of the subparagraphs of Article XX must not be applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail or in a manner that would constitute "a disguised restriction on international trade".[68]

72. These requirements aim to make sure that the WTO member invoking an exception exercise this right in good faith:[69] exceptions should not be misused or abused[70]. Demonstrating that a measure does not constitute such an abuse is "a heavier task" than showing that a measure falls under one of the specific exceptions.[71]

73. Case-law regularly emphasises that this legal test is closely dependent on the specific circumstances of each case and the concrete application of the measure.[72] It follows that the satisfaction of the *chapeau* requirements by one or several hypothetical measures cannot be precisely determined in the abstract. However, case-law provides some guidance on how to design a measure in order to minimise the risks of non-compliance.

74. Importantly, it should be stressed that a failure to satisfy the requirements of the *chapeau* **does not automatically invalidate the measure at issue**, nor mean that it should be repealed or watered-down. In some cases, the measure may simply be modified to eliminate the identified arbitrary discrimination, which may be done either by levelling up or down.

75. For instance, following the *EC – Seal Products* reports – which concluded that the indigenous communities exceptions for Greenland under the EU seal regime resulted in unjustifiable discrimination against Canadian products – the regulation was amended to reflect the rulings of the panel and the Appellate Body. The regime was eventually made more protective of seals welfare.[73] Similarly, the panel report in *EU – Palm Oil* was depicted as an EU victory because,

[68] AB Report, *Brazil – Retreaded Tyres*, para. 215.
[69] See e.g. ibid, paras 215 and 224.
[70] AB Report, *US – Shrimp*, paras 156-158; AB Report, *EC – Seal Products*, para. 5.297.
[71] AB Report, *US – Gasoline*, p. 21.
[72] Ibid, para. 224.
[73] Scholars have interpreted the *EC – Seal Products* rulings and the outcome thereof as favourable to highly protective animal welfare measures affecting trade. See A. Peters, *Animals in International Law* (Brill 2021), p. 316: "The more a state is dedicated to protecting animal welfare, for example with stringent animal welfare laws …, the more acceptable (or even compelling) its reliance on Article XX *lit. (a)* GATT will be". See also, Kelch, above n 22, p. 296.

even though the measures challenged were ultimately found unjustifiable under the *chapeau*, the panel did not question the legislation as a whole.[74]

Relevant factors in the assessment

76. A number of factors can be identified in determining whether the application of a measure results in arbitrary or unjustifiable discrimination, or a disguised restriction on trade.

77. First, the Appellate Body has explained that "[o]ne of the most important factors" is "whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX".[75] In other words, the reasons given for the discrimination **must be rationally related to the exception invoked** and **must not go against the objective pursued by the measure**:[76] the measure should apply equally to all sources of supply unless a legitimate reason – in the light of the objective of the measure – justifies otherwise. This is key to differentiate between "unjustifiable" and "justifiable" discrimination.

78. For instance, in *EC – Seal Products*, the Appellate Body found that the indigenous exceptions contained in the EU Seal Regime could not be related to the protection of EU public morals as they resulted in causing more seals pain and suffering.[77]

79. Second, the measure should be **designed and applied even-handedly** i.e. so as to be calibrated to different situations. Regulating States should carefully design primary legislation and implementing rules to (i) ensure that products which are equivalent in light of the stated objective (e.g. carbon footprint) are treated the same way, and, where necessary, (ii) allow sufficient flexibility to accommodate specific, individual and/or evolving conditions prevailing in the exporting countries.

80. In *US – Shrimp*, the Appellate Body has observed that although the US regulation itself may have been intended to provide flexibility, its "actual application" through implementing decisions imposed a "single, rigid and unbending requirement" that exporting countries adopt the same policy as that imposed on US vessels; it also noted that the US banned shrimp imports from uncertified countries regardless of whether the individual producers had observed harvesting standards equivalent to US standards for turtle protection – which could not be reconciled with the alleged policy goal.[78] In *EU – Palm Oil*, the panel faulted the EU for not

[74] Panel Report, *EU – Palm Oil*, paras 7.571 and 7.636. The panel ruled that because of deficiencies in its detailed design and concrete implementation, the methodology used by the EU used to classify palm oil as a high ILUC-risk feedstock instituted an arbitrary and unjustified restriction on trade.
[75] AB Report, *EC – Seal Products*, paras 5.306 and 5.318.
[76] See e.g. AB Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.316; AB Report, *Brazil – Retreaded Tyres*, paras 225-230.
[77] AB Report, *EC – Seal Products*, para. 5.320 and 5.338. See also AB Report, *US – Shrimp*, para. 165 ("[t]he resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles").
[78] AB Report, *US – Shrimp*, paras 162-165 and 177.

applying the measures in an even-handed manner because it did not use data that was sufficiently up to date.

81. Third, **due process** is required where the measure involves certification or other processes. Such processes must observe certain minimum standards of transparency, predictability and procedural fairness under Article X:3 GATT.[79]

82. For instance, in *US – Shrimp*, the Appellate Body found that the certification processes conducted by the US did not meet these standards and were "singularly informal and casual".[80] Applicant countries had "no formal opportunity … to be heard, or to respond to any arguments that may be made against [them]" before a decision to grant or deny certification is made, received "no formal written, reasoned decision" or notification, and could not appeal a denial. In *EC – Seal Products*, the implementing regulation setting the criteria for the indigenous community exception was found considerably ambiguous and overly discretionary, which could have resulted in (prohibited) seal products deriving from commercial hunts entering the EU market.[81]

83. Fourth, in certain cases, a range of other factors may be relevant to assess the regulating State's good faith, such as the engagement of prior diplomatic efforts to (genuinely) attempt to enter into cooperative arrangements with all exporting States, phase-in periods for manufacturers to adapt their practices, and technical or financial assistance.[82]

Practical findings regarding existing and hypothetical support measures for cleaner EVs using the Environmental Score

84. In the context of EV support measures based on the Environmental Score, eligibility requirements that *de facto* exclude EVs originating from certain countries from the benefit of an advantage, or differential tax treatment favouring French and/or European EVs, will be seen as arbitrary and unjustifiable if such exclusions bear no rational connection with the objective of reducing GHG emissions or if they undermine this objective. Specifically, an analysis should look at the specific elements, in the design or the application of the measures, that result in such exclusions (e.g. the reference values, the weight of each emission factor, the required threshold).

85. We understand that, as of today, no EVs made in Asia – even smaller ones – are eligible to the *bonus écologique*, as they fail to meet the single 60-point threshold for the Environmental

[79] Ibid, paras 180-183.
[80] Ibid, paras 180-181. See also, AB Report, *EC – Seal Products*, para. 5.328, expressing "similar concerns".
[81] AB Report, *EC – Seal Products*, para. 5.338.
[82] AB Report, *US – Shrimp*, paras 167-172, notably stressing that "the United States negotiated seriously with some, but not with other Members …, that export shrimp to the United States"; AB Report, *EC – Seal Products*, para. 5.337, noting that the EU "has not pursued cooperative arrangements to facilitate the access of Canadian Inuit to the IC exception". The importance of taking those steps seems higher when the measure's objective "demands" cooperation (e.g. conservation policies).

Score.[83] Yet, we also understand that under the EU scoring method proposed by T&E (see Section 4 below), small EVs made in China have an average carbon footprint lower than large European-made EVs, many of which qualify for the French bonus today.[84] Two observations follow from this:

- First, this situation would be difficult to reconcile with the stated policy objective, particularly as the lower availability of small EVs may drive consumers to thermal cars. This could be seen as arbitrary discrimination or a disguised trade restriction that purports to resolve the competitive disadvantage of EU-made compact EVs, or even to protect European manufacturers of conventional thermal cars.

- Second, this shows that imported EVs' eligibility to the incentives may vary depending on calculation methods. This suggests risks of arbitrariness in setting reference values and/or designing the methodology.

86. Specifically, the inclusion of emissions from transporting vehicles to market in the calculation, which has raised concerns from WTO trade partners such as Korea, is a sensitive point. While this indeed *de facto* disfavours EVs imported from distant countries, this appears rationally related to the goal of reducing GHG emissions: there is no reason for a principled exclusion of transport-related emissions when other embedded emissions from inputs and production processes are considered. In fact, it could be argued that this could undermine the objective of capturing life-cycle emissions or even result in discrimination against EVs imported from certain, less distant countries, whose total carbon footprint would otherwise be lower. That said, this requires overall consistency. As an illustration, if the calculation of the Environmental Score includes emissions from the transport of EVs once assembled but, at the same time, disregards the emissions from the transport of inputs imported to assemble EVs domestically, this could amount to an unjustifiable discrimination.

87. Accordingly, the following elements derived from case-law call for particular caution when assessing the compatibility of EV support measures based on the Environmental Score with the requirements of the *chapeau*:

(i) The generic reference values used for emission factors should be based on current, transparent, and accurate data; variations between different geographical areas should be objectively justified by a difference of conditions.

(ii) The calculation methodology should be clear and transparent, with appropriate weighting of all emission factors.

[83] See e.g. L'Usine nouvelle, "Aucun modèle de voiture électrique produit en Asie ne sera éligible au bonus écologique en 2024" (14 December 2023).
[84] T&E, IMT and BEUC, Briefing: "Making EVs fit for the future – How to design an environmental score for EVs" (April 2024), p. 13 (chart).

(iii) If included, transport-related emissions should also cover emissions from importing inputs to assembly sites within the EU, not solely emissions from the transport of assembled cars.

(iv) The generic reference values should be subject to a regular review to reflect evolving conditions in exporting countries, though not requiring real-time data, as specified by the panel in the *EU – Palm Oil* case.

(v) Derogatory mechanisms allowing manufacturers to declare better performances – such as the one established under Article D. 251-1-A of the French Energy Code – demonstrate even-handedness and are essential for accommodating individual situations where manufacturers adopt better practices. Such mechanisms should comply with minimum standards of due process, including the right for manufacturers to appeal rejection decisions.

(vi) The level of the relevant threshold(s) for a vehicle to qualify should be objectively justifiable, and should not have the effect of limiting the availability of affordable, compact EVs, which would favour thermal cars.

88. In this setting, the tiered approach suggested by T&E could provide more granularity and flexibility to accommodate such situations, and in turn increase overall consistency with the stated objective and reduce risks of arbitrary or unjustifiable discrimination. In particular, it may be considered whether setting distinct thresholds depending on vehicle size would be appropriate to support wider EV adoption in compact, lower price segments.

89. Based on the above, WTO law allows sufficient flexibility to justify well-designed measures supporting EVs that maintain low emissions throughout their entire life cycle, even if such measures might otherwise be considered discriminatory under national treatment and most-favoured nation standards.

3. ANALYSIS UNDER EU LAW

90. An analysis under EU law should first consider whether the subject matter of a national measure has been exhaustively harmonised at the EU level. If so, the measure should comply with the relevant EU legislative acts. Otherwise, its consistency with EU law is assessed by reference to the general principles contained in the EU Treaties.

91. In the present case, there is no harmonised EU law relevant to the Environmental Score and potential EV support measures – however, when the Commission will set a CO2 life-cycle analysis for vehicles, French measures would need to align with that methodology. Consequently, these measures should currently be analysed under the Treaties.

92. Two primary sets of rules may apply here: the freedom of movement of goods (**3.1**) and state aid rules (**3.2**).

3.1. Free movement of goods

93. Under Article 34 TFEU, Member States must avoid measures that are "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".[85] This includes measures that equally apply to domestic and imported products, but in fact impose an additional burden on imported goods. The mere fact that an importer is deterred from introducing or marketing the products in question in the Member State concerned amounts to a hindrance to the free movement of goods.

94. The CJEU puts emphasis on whether the measure at hand can influence consumer behaviour by making imported products less attractive.[86] It has already found that certain requirements for eligibility to an ecological subsidy scheme upon purchase by individual consumers can constitute a prohibited restriction on intra-EU trade.[87]

95. Here, it should be noted that many EU Member States have implemented *bonus-malus* subsidy schemes to promote low-emission vehicles without encountering EU law obstacles.[88] However, further analysis is necessary to determine if French EV support measures based on the Environmental Score, such as the current *bonus écologique,* would benefit domestic production. This could occur if face difficulty achieving the score required to qualify for incentives, or for the highest subsidies in a tiered system. Although this does not appear to be the case at present, France's low GHG emission intensity in electricity generation could result in higher scores for French-made EVs. This could mean that the highest incentives are more easily accessible to domestic vehicles, potentially making certain EV imports less attractive.

96. According to case-law, trade-restrictive measures adopted by Member States **may be justified by the objective of protection of the environment**, provided they are suitable for achieving the intended goal and do not exceed what is necessary.[89]

97. In the past, the CJEU has recognised that national support schemes for green electricity go under the protection of the environment inasmuch as they contribute to the reduction of GHG emissions.[90] In a case relating to a former version of the French *bonus écologique*, the CJEU stressed that the requirements for subsidy schemes should account for possible differences in circumstances across Member States.[91] For instance, this implies that any future unified EU methodology should form the basis of French EV support measures once adopted. Additionally, France should consider whether other Member States have established comparable scoring

[85] CJEU, 6 October 2011, C-443/10, EU:C:2011:641, para. 26.
[86] CJEU, 10 February 2009, C-110/05, EU:C:2009:66, Commission v Italy, para. 56.
[87] CJEU, 6 October 2011, C-443/10, EU:C:2011:641, paras 28-31.
[88] Milieu Consulting, Phasing-out sales of internal combustion engine vehicles (March 2020), p. 20, available here.
[89] CJEU, 6 October 2011, C-443/10, EU:C:2011:641, paras 32 and 34.
[90] CJEU, 1 July 2014, C-573/12, EU:C:2014:2037, Ålands Vindkraft, para. 78.
[91] CJEU, 6 October 2011, C-443/10, EU:C:2011:641, paras. 32-38.

systems to ensure fair treatment and maintain consistency in the application of support measures across the EU.

98. Therefore, while French EV support measures based on the Environmental Score may align with existing EU principles, France should account for similar scoring systems in other Member States to promote consistency. A unified EU-wide approach to CO_2 life-cycle assessment would further clarify guidance for national support schemes, fostering harmonisation and avoiding potential trade barriers.

3.2. State aid rules

99. State aid rules may also be relevant. Under Article 107(1) TFEU, a measure constitutes state aid if it involves a transfer of state resources that provides an economic advantage, is selective in nature, and affects trade between Member States. In the case of a national subsidy scheme for electric vehicle purchases, it is critical to assess whether these conditions apply when subsidies are granted to private individuals.

100. State aid rules typically apply to economic activities carried out by undertakings. The Commission has issued specific state aid guidance on bonuses and tax reductions supporting the acquisition of "zero- and low-emission road vehicles".[92] This guidance specifically focuses on aid at the level of the final beneficiary (i.e. the buyer of the vehicle) rather than carmakers. It clarifies that when aid is directed at individuals using vehicles for private, non-economic purposes, this does not qualify as state aid, as private individuals are not engaged in an economic activity. For this reason, a national scheme exclusively targeting private households and avoids support for business uses **would likely not trigger state aid rules**.

101. This finds further support in the Commission's Guidelines on State aid for climate, environmental protection and energy other types of interventions, indicating that "general measures aimed at promoting the acquisition of clean vehicles such as ecological bonus schemes" may serve as alternatives to state aid measures.[93]

102. However, if the subsidy were to extend to vehicles used in economic or commercial contexts (e.g. corporate fleets), it could be deemed state aid as these beneficiaries qualify as undertakings. That said, a scheme open to all companies purchasing electric vehicles and applied uniformly, without favouring specific companies or production sectors, would typically be regarded as general in nature and thus not selective. Care should be taken to ensure the scheme does not grant discretionary benefits that could lead to selectivity, for example, through eligibility criteria that are not objective or consistent. For instance, a *prima facie* generally

[92] European Commission, DG COMP, Guiding template: Premiums for the acquisition of zero- and low-emission road vehicles (Recovery and Resilience Facility – State aid) (2023), p. 3, available here.
[93] European Commission, Guidelines on State aid for climate, environmental protection and energy 2022 (2022/C 80/01), para. 171.

applicable measure may be deemed selective if meeting its criteria does not entitle beneficiaries to receive support.

103. It follows from this preliminary analysis that state aid rules are likely of limited relevance when assessing legal constraints posed by EU law on potential EV support measures in France, as these measures are expected to fall outside the scope of Article 107(1) TFEU. This, however, is subject to further in-depth analysis, in particular with regard to risks of indirect state aid.

4. THE PROPOSED EU-LEVEL SCORING METHOD

104. T&E and other organisations suggest extending the French Environmental Score at the EU level, using an EU scoring method, which would be a revised, simpler methodology compared to the one currently defined in the Decree of 7 October 2023.

105. Any resulting policies would be subject to the same WTO scrutiny as the measures discussed above at the French level, with the analysis remaining unchanged.

106. However, the proposed EU scoring method may clash with the methodology that the EU Commission is tasked to develop for evaluating emissions associated with EVs throughout their "full life-cycle", pursuant to Article 7a of Regulation 2019/631:[94]

> 1. The Commission shall by 31 December 2025 publish a report setting out a methodology for the assessment and the consistent data reporting of the full life-cycle CO2 emissions of passenger cars and light commercial vehicles that are placed on the Union market. The Commission shall submit that report to the European Parliament and to the Council.
>
> 2. By 31 December 2025, the Commission shall adopt delegated acts in accordance with Article 17 in order to supplement this Regulation by laying down a common Union methodology for the assessment and the consistent data reporting of the full life-cycle CO2 emissions of passenger cars and light commercial vehicles.
>
> 3. From 1 June 2026, manufacturers may, on a voluntary basis, submit to the Commission the life-cycle CO2 emissions data for new passenger cars and new light commercial vehicles using the methodology referred to in paragraph 2.

107. A key question is thus whether the Commission would exceed the limits of its delegated power by adopting the simplified EU scoring method that would focus on (i) vehicle energy efficiency (measured in kWh/km), and (ii) the carbon footprint of key components, namely batteries, steel, and aluminium. This raises the following sub-questions:

- Can the suggested EU scoring method be defined as "full life-cycle analysis" pursuant to Article 7a?

[94] This provision was added by Regulation (EU) 2023/851 amending Regulation (EU) 2019/631 as regards strengthening the CO2 emission performance standards for new passenger cars and new light commercial vehicles in line with the Union's increased climate ambition.

- If not, to what extent the Commission may deviate from the text of Article 7a?
- Would this require legislative amendments?

108. The suggested EU scoring method is presented in T&E's briefs as an alternative to the life-cycle analysis contemplated in Regulation 2019/631 as a full life-cycle analysis would be "highly complex" and "impractical" for comparing the environmental performance of all the different variants of a given EV model.[95]

109. If there is no possibility to argue that the suggested EU scoring method may still qualify as being a full life-cycle analysis, it should therefore be examined whether the Commission may deviate from the terms of Article 7a(2). In the exercise of the powers conferred on it, the Commission has broad discretion when it is called on to undertake complex assessments and evaluations. However, the Commission must act within the limits of its powers.[96]

110. Accordingly, the power delegated to the Commission by this Article 7a(2) should be exercised in accordance with Article 290(1) TFEU, which provides:

> 1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement … certain non-essential elements of the legislative act.
>
> The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

111. The Commission may not disregard essential elements of the basic legislative act.[97] Furthermore, according to the CJEU:

> The delegation of a power to 'supplement' a legislative act is meant only to authorise the Commission to flesh out that act. Where the Commission exercises that power, its authority is limited, in compliance with the entirety of the legislative act, adopted by the legislature, to development in detail of non-essential elements of the legislation in question that the legislature has not specified.[98]

112. The Court notes that the discretion conferred on the Commission in the exercise of its delegated power "may be more or less extensive, depending on the nature of the matter in question", adding that "a delegation of power within the meaning of Article 290 TFEU (and any discretion it may involve) must be delimited by bounds fixed in the basic act".[99] These bounds (i.e. the

[95] T&E, BEUC and IMT Joint letter to the Commission (25 September 2024). This is because, for a given EV model, it may be impractical to differentiate between all the different variants of that model, as a model may be equipped with a wide range of different options and trim levels. See also, T&E, IMT and BEUC, Briefing: "Making EVs fit for the future – How to design an environmental score for EVs" (April 2024), pp. 16-17.
[96] CJEU, 11 May 2017, C-44/16 P, EU:C:2017:357, Dyson v Commission, para. 53.
[97] Ibid, para. 76.
[98] CJEU, 17 March 2016, C-286/14, EU:C:2016:183, para. 41.
[99] CJEU, 26 July 2017, C-696/15, EU:C:2017:595, para. 52.

objectives, content, scope and duration of the delegation of power) "must be explicitly defined in the legislative act" and are not left to the Commission's discretion.[100]

113. In the present case, the Commission's delegated power is explicitly delineated by the use of the term "full life-cycle". While the Commission is entitled to "give concrete expression to what is meant" by the enabling act, it may not "ascribe a new meaning to the term" used in the delegating provision by reducing its scope.[101]

114. In this respect, recent legislative initiatives suggest an intent to give "full life-cycle" a specific meaning:

- The Batteries Regulation is considered as "the first piece of European legislation taking a full life-cycle approach in which sourcing, manufacturing, use and recycling are addressed and enshrined in a single law".[102]

- The Commission Delegated Regulation 2023/1185 sets a full life-cycle methodology to calculate GHG emissions for renewable liquid and gaseous fuels of non-biological origin, taking into account emissions "across the full life-cycle of the fuels, including upstream emissions, emissions associated with taking electricity from the grid, from processing, and those associated with transporting these fuels to the end-consumer".[103]

- Recital 33 of Regulation 2023/851 further stresses that it is "important to assess the full life-cycle CO2 emissions of light-duty vehicles".

115. It follows that the Commission may not depart from its initial mandate. To the extent that the EU scoring method suggested by T&E cannot qualify as a "full life-cycle" methodology, adopting it *in lieu* of the analysis required by Article 7a(2) would exceed the bounds of the Commission's discretion. This, unless the proposed methodology is further refined and enhanced to characterise a full life-cycle analysis.

116. In addition, case-law suggests that the fact that a life-cycle analysis is not technically feasible or realistic – as T&E indicates –[104] may not justify a deviation from the Commission's mandate.

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[100] Ibid, paras 48-49. See also, para. 55: "instead of observing the bounds laid down by the legislature, as that provision requires, the General Court interpreted the delegation of power in Article 7 of Directive 2010/40 solely from the point of view of its objectives, without satisfying itself that the content and scope of the delegated power were also defined, that definition being left by the General Court to the Commission's discretion".
[101] See Opinion of Advocate General Kokott, 30 May 2024, C-297/23 P, EU:C:2024:448, Harley-Davidson and Neovia Logistics v Commission, para. 65.
[102] European Commission, Press Release, "New law on more sustainable, circular and safe batteries enters into force" (17 August 2023).
[103] European Commission, Q&As: EU Delegated Acts on Renewable Hydrogen (13 February 2023); Commission Delegated Regulation (EU) 2023/1185 of 10 February 2023 supplementing Directive (EU) 2018/2001.
[104] T&E, IMT and BEUC, Briefing: "Making EVs fit for the future – How to design an environmental score for EVs" (April 2024), p. 17, arguing that in 2020, the Commission concluded that life-cycle analysis "was not a feasible, effective, or realistic option for rating vehicles at the individual model level".

Instead, the Commission should consider exercising its right to propose legislative amendments.[105]

117. To conclude, if the proposed scoring method by T&E may not be adapted to align with a life-cycle analysis, it could be safer for the Commission to propose an amendment to Article 7a of Regulation 2019/631.

[105] GC, 8 November 2018, T-544/13 RENV, EU:T:2018:761, Dyson v Commission, para. 76.