INSTITUT MOBILITÉS
EN TRANSITION

ANALYSIS

N° 01
JANUARY 2026

Conditioning public support and foreign investment in the European automotive sector to local content or technology uptake: legal framework and strategic toolbox

OVERVIEW & CONTEXT

This briefing sets out recommendations as to how the EU and its Member States can condition inbound foreign direct investments ("FDIs") in the automotive sector, as well as the granting of European public support measures to criteria that foster value creation within the EU, technology uptake, and environmental sustainability. The recommendations are based on a legal analysis, which is annexed to this document ("Legal Analysis").

More specifically, the recommendations come as a response to the new threats and needs of the European automotive industry, which have been extensively documented in an IMT publication Europe-China between Competition and Collaboration[1]. The study pointed out the rapid increase of Chinese FDIs in Europe. For example, over the past few years, Chinese conglomerates have completed around 40 partial or full acquisitions of European automotive suppliers.

Importantly, the proposed framework aims to (i) enable and give value to collaboration with partner countries, (ii) protect Europe's automotive industry and jobs and (iii) ensure that European actors will be in a position to climb a learning curve and produce strategic technologies.

1 https://institut-mobilites-en-transition.org/publications/europe-china-between-competition-and-cooperation/

IDDRI

KEY MESSAGES

KEY MESSAGE 1

Establish a harmonised and mandatory FDI screening regime for the Automotive sector in the Industrial Accelerator Act (IAA) with precise screening criteria related to specific industrial or strategic stakes

Recommendation

The European Commission must develop mandatory, harmonised, sector-specific FDI restrictions for the automotive sector in the Industrial Accelerator Act (IAA) with mandatory conditionalities on technology transfer, governance, and partnership requirements with EU-based or countries with EU partnerships (CTIPs, CRMA...).

Rationale

An automotive sector FDI screening regime, as opposed to a cross-sectoral FDI screening framework, is crucial (i) to address the uniqueness of the sector's current situation in terms of threats and stakes and (ii) because a cross-sectoral FDI framework would remain at the discretion of Member States, leading to risks of both fragmentation and circumvention.

Indeed, cross-sectoral FDI screening has limited practical relevance as a policy instrument that helps closing technology and competitiveness gaps in the automotive industry:

— The current cross-sectoral FDI screening framework under Regulation 2019/452 presents various limitations that were highlighted by the OECD and acknowledged by the Commission. Investment by foreign-controlled EU companies currently falls outside its scope. This increases risks of circumvention that forces certain Member States (e.g. France, Sweden) to screen intra-EU investment, resulting in suboptimal conditions. While the existing framework will be revised to cover investment by foreign-controlled entities, the inclusion of the entire automotive supply chain within mandatory screening areas remains highly uncertain.

— Even if revised rules covered a wider scope and required mandatory prior authorisation for sensitive investments, FDI screening is inherently case-by-case, and the final decision to authorise an investment or to impose mitigating conditions (e.g. ownership restrictions, governance requirements, IP and skills transfer, mandatory EU partnerships) would remain a Member State prerogative, leaving room for potential fragmentation. This cannot adequately prevent competition between Member States to attract FDIs and therefore proves insufficient for the automotive sector, where common action is critical.

KEY MESSAGE 2

Channel production aid through EU funds to avoid fragmentation and market distortions

Recommendation

Production aid, particularly output-based production support, as well as operating aid, must be provided at EU level, notably through the European Competitiveness Fund (ECF), instead of relying on Member State aid schemes.

Rationale

In strategic sectors (e.g. battery), European producers require temporary production aid to close the cost gap with subsidised foreign competitors.

— Current frameworks mainly provide investment aid, not volume-linked production support, and lack EU preference or content requirements. For example, while support under the Innovation Fund covers anticipated OPEX,[1] it maintains a cost-based approach.

— Support relying mainly on State aid schemes would fragment the Single Market, triggering subsidy races, favouring fiscally stronger Member States, and exacerbating competitive imbalances.

— National budgets cannot provide uniform or predictable support at the scale needed for industrial ramp-up. The automotive transition requires large, predictable, and coordinated operating support, which national budgets cannot deliver uniformly. EU-level funding ensures a coherent, non-distortive framework, avoids administrative fragmentation, and maintains a level playing field.

Policy Mechanism

— Use the European Competitiveness Fund as the central vehicle to deliver output-based support with harmonised eligibility conditions.

— Frame such aid under directly applicable EU implementing acts, preventing national deviations and eliminating incentives to competition between Member States.

— Integrate binding EU preference rules (see ***Key Message 3***) and "Made in EU" requirements (see ***Key Message 4***) as eligibility conditions for output-based support.

1 Commission Delegated Regulation (EU) 856/2019, Article 5. Anticipated operating expenditures are part of the calculation for eligible costs (in terms of net present value over a decade, offset by benefits).

KEY MESSAGE 3

Make EU preference and EU content criteria (open under conditions to products from EU strategic partners) binding for public support

Recommendation

The Commission should adopt mandatory EU preference criteria through implementing acts for all output-based support programmes. Access to EU production aid should require demonstrated sourcing of equipment, components, and critical inputs originating from the EU and its strategic industrial partners.

Rationale

— The Commission's proposal for the European Competitiveness Fund expressly introduces "EU preference" eligibility criteria, but they remain voluntary. Without binding conditions, EU-funded production support risks flowing to entities that do not contribute to strengthening European autonomy over strategic technologies. Mandatory EU preference rules would ensure that recipients source key components, equipment, and critical inputs from EU-based manufacturers or from actors of countries engaged in a partnership with the EU (CTIP, CRMA Strategic Projects, MoU…), thus anchoring value creation within the Union (see ***Key Message 4***).

— Existing EU programmes are generally open to all legal entities established in the EU, which creates a blind spot regarding foreign-controlled EU entities in the absence of firm conditions on technology transfer governance, and European partnerships. Provided appropriate conditions are imposed from the outset on FDI (***Key Message 1***), this blind spot would be mitigated, thereby allowing to maintain indiscriminate access to all EU-based entities, while ensuring additional financing capacities to develop EU supply chains through FDI. Where necessary, EU funding should be excluded for foreign-controlled entities—as is already the case under certain programmes like the Connecting Europe Facility.

Policy Mechanism

— Set mandatory EU preference conditions under the European Competitiveness Fund and/or a general clause under the IAA, as well as Commission implementing acts defining when such eligibility criteria are necessary.

— Allow differentiated treatment of foreign-controlled EU companies where justified, consistent with existing precedents (e.g. Connecting Europe Facility).

— Require compliance audits and ex-post verification ensuring actual EU content in sourced inputs.

KEY MESSAGE 4

Develop a dedicated "Made in EU" product-origin instrument as a basis for EU preference support policies in the automotive sector and for access to EU lead markets

Recommendation

The EU should introduce a bespoke, legally binding product-origin instrument, defining when automotive and battery products qualify as "Made in EU". It must be applicable uniformly across all EU output-based support schemes and, where appropriate, selected regulatory instruments (e.g. corporate-fleet mandates, social leasing schemes, CO_2-standards crediting and public procurement scoring).

Rationale

— A dedicated product-origin framework for each relevant product would serve as a common metric applied exclusively for selected regulations favouring EU goods and could also guide Member States in designing domestic support policies. These requirements could draw inspiration from preferential rules of origin in Free Trade Agreements ("FTAs"), which often include tailored criteria for specific products or components. The IAA could empower the Commission to adopt such rules through implementing acts.

— To avoid confusion, this instrument would not replace or modify customs rules of origin. Instead, it would replicate their logic—clear, objective, product-specific criteria—solely for the purpose of internal industrial-policy instruments.

— It is important to avoid reliance on EU content requirements introduced on a national case-by-case basis, within different instruments, as they risk leading to a fragmented framework.

Policy mechanism

— Introduce a standalone instrument defining, for each product, where a vehicle, battery pack, cell, or other strategic component can legitimately claim European origin and qualify as "Made in EU" for the purposes of specific internal "EU preference" support policies, rather than by reference to non-preferential rules of origin.

— Key policy measures could refer to that instrument, integrating "Made in EU" requirements into demand boost mechanisms such as corporate-fleet mandates (Greening Corporate Fleets Initiative), social-leasing schemes, CO_2-standards crediting mechanisms and public-procurement scoring—although it is critical that this mechanism is not limited to public procurement.

— The "Made in Europe" label must remain opened to international actors in the framework of international strategic industrial partnerships (see ***Key Message 5***)

Hence, the combination of Made in Europe requirements with sectoral FDI restrictions should ensure that the rules are not only opening access to captive markets but also create broader product-level benefits (such as multipliers, fiscal advantages, or other forms of incentives) thereby strengthening the attractiveness of labelled products across the entire value chain.

KEY MESSAGE 5

Open the FDI Screening and local content tools to strategic EU partnerships with international partners

Recommendation

The EU Automotive FDI Screening and local content tools must recognise and give value to strategic partnerships with trusted EU partners. Mandatory screening criteria should include derogations or preferential treatment for projects involving EU-aligned partners, and the benefits of the "Made in Europe" label (including access to lead markets) should be extended to products resulting from EU industrial collaborations (e.g. CTIPs, CRMA Strategic Projects, FTAs).

Rationale

— International partnerships are a cornerstone of Europe's economic, geopolitical, and industrial relations. They are also essential to ensuring a cost-efficient, secure, and resilient transition of the automotive sector. To be effective, EU policy instruments must reward collaboration with trusted partners.

— The EU's approach to strategic international partnerships is underpinned by the Global Gateway, which provides the political and investment framework for cooperation with trusted partners. This strategy is operationalised through concrete instruments such as the Clean Technology and Industrial Partnerships (CTIPs) (e.g. South Africa), CRMA Strategic Projects with countries like Chile and Canada to secure critical raw materials, and Free Trade Agreements (FTAs) with partners including for example Japan, South Korea, and Canada. Together, these tools enable cooperation across the full value chain.

Policy mechanism

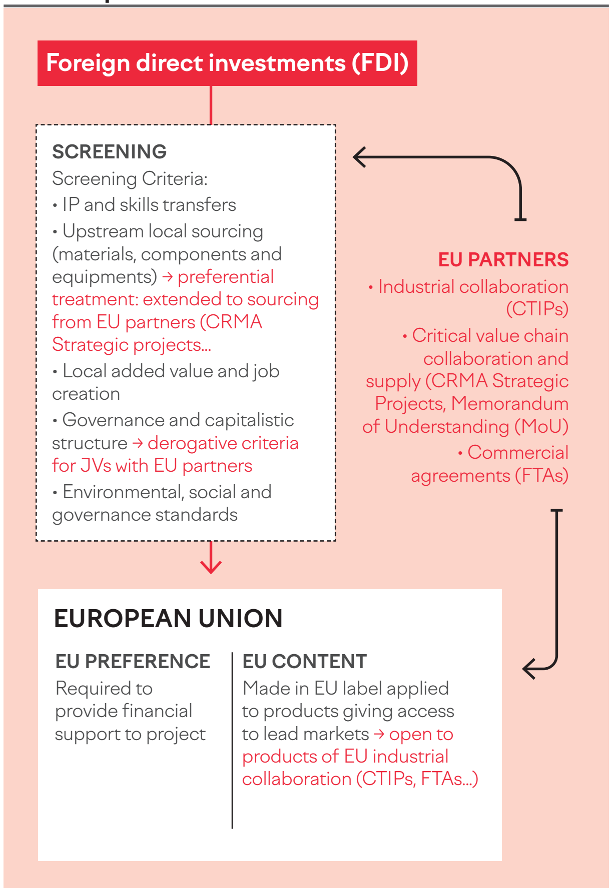
— Adapt Automotive FDI Screening Rules by introducing derogative or tailored screening criteria for investments involving EU strategic partners.

— The Screening must allow greater flexibility on capital ownership and governance structures for joint ventures with trusted partners. For example, a joint venture with a South African actor, if considered strategic for the EU, could be subject to less restrictive capital share constraints considering the recent CTIP.

— Local sourcing requirements of the FDI Screening should be adapted to recognise sourcing from EU partner countries as contributing to EU supply chain resilience. Upstream sourcing of materials, components, and equipment from partners involved in CRMA Strategic Projects should therefore benefit from preferential treatment equivalent to EU sourcing.

— Adapt the "Made in Europe" label by extending eligibility and the associated access to lead markets to products resulting from EU-led industrial collaborations with trusted partners. Eligibility should be conditional on clear industrial cooperation, mutual benefits, and alignment with EU strategic partnerships, including CRMA Strategic Projects, CTIPs, and relevant FTAs.

Implication of the framework for cooperation with EU partners



EXECUTIVE SUMMARY OF THE LEGAL ANALYSIS

1. Leveraging FDI to ensure EU technology uptake in the automotive sector

1. Given the constraints on Member States' ability to regulate FDI, the absence of harmonised EU rules, and the limited relevance of cross-sectoral FDI screening as a policy tool, the most effective way to ensure that FDI contributes to closing technology and competitiveness gaps in the automotive industry is to introduce harmonised restrictions through sector-specific rules at the EU level.

1.1. The EU law limits Member State's ability to regulate FDI and protects investment by foreign-controlled EU companies

→ **Legal Analysis, Section 1.1**

2. Since FDI falls under an exclusive EU competence, Member States may only adopt general rules on FDIs with EU authorisation—except when acting to protect their national security or defence interests, but these exceptions cover a narrow scope.
3. In addition, inside the EU, freedom of establishment—which protects the right to take up and pursue activities and to set up and manage companies—further constrains Member State's margin of action:
   - While investors based in third countries cannot claim benefit of freedom of establishment,[2] EU entities under foreign control can easily qualify as "EU companies" if they are legally incorporated in a Member State. This allows them to be treated like national companies and benefit from protection against discriminatory measures by Member States.
   - Treaty exceptions may allow distinctions between foreign-controlled EU entities and purely intra-EU situations, based on potential risks to public security. This could arguably extend to economic security considerations, such as the security of supply of critical technologies or goods defined as critical under recent EU instruments, but this is subject to Court of Justice of the EU (CJEU) interpretation.

1.2. The lack of harmonised EU rules on FDI and the limited relevance of the current EU FDI screening framework

→ **Legal Analysis, Section 1.1.2**

4. Despite the EU's exclusive competence, there are currently no EU-wide restrictions on foreign investment in strategic sectors: the EU is yet to exercise this competence in pursuit of strategic common objectives. The only relevant instrument is the cross-sectoral FDI screening framework under Regulation 2019/452.
5. This framework allows Member States to reject investments posing security risks or to impose mitigating conditions (e.g. ownership restrictions, governance requirements, IP and skills transfer, mandatory EU partnerships).
6. However, it has limited practical relevance as a policy instrument for building resilient industries and closing technology gaps:
   - It leaves major loopholes: investments by foreign-controlled EU entities are excluded, coverage of greenfield investments is only optional, and national security risks and sensitive areas are narrowly defined.
   - Member States retain considerable discretion in designing their screening mechanisms and deciding whether (and under what conditions) to authorise investments.
7. This has resulted in a highly fragmented legal landscape across the EU, which in turn exacerbates intra-EU competition to attract FDI.

1.3. The inadequacy of cross-sectoral FDI screening as a policy tool

→ **Legal Analysis, Section 1.2.1**

8. These current limitations were highlighted by the OECD and acknowledged by the Commission, which launched a revision process of FDI screening rules. In theory, this process presents clear opportunities to advance key strategic industrial interests: prior authorisation would become mandatory for investments in "critical technology areas for the EU's economic security" (e.g. net zero technologies such as batteries; advanced materials, manufacturing and recycling technologies); risks related to avoiding strategic dependencies and the availability and uptake of critical technologies could be recognised as public security concerns; and investment by foreign-controlled EU entities under foreign control would be covered.
9. But despite these opportunities, the potential of FDI screening as a policy tool will likely remain limited. FDI screening is inherently case-by-case, and the final decision to authorise an investment would remain a Member State prerogative—unless the Commission is granted final decision-making authority. This may fail to prevent competition between Member States to attract FDI, making it insufficient to meet the needs of sectors like automotive, where common action is critical.

2 As opposed to FDI, portfolio investments from third countries are always protected by the free movement of capital under Article 63 TFEU.

1.4. Harmonised FDI restrictions at the EU level in the automotive sector would prevent intra-EU dumping and ensure common conditions

→ **Legal Analysis, Section 1.2.2**

10. Unlike cross-sectoral screening, specific, harmonised and directly applicable EU rules for the automotive sector would remove national discretion and prevent intra-EU "dumping" to attract FDI.
11. This would enable the imposition of common conditions, effectively leveraging the attractiveness of the EU market to maximise the added value of FDI in the EU. Such conditions could include technology transfer, governance restrictions, partnership requirements, as well as commitments to supply critical inputs and strengthen local supply chains. These conditions should apply to all foreign investments, whether from EU-based entities under foreign control or non-EU investors.
12. At a minimum, such conditions should be mandatory for any foreign-controlled entity seeking access to EU public funding.

KEY MESSAGE 1

Establish a harmonised and mandatory FDI screening regime for the Automotive sector in the Industrial Accelerator Act (IAA) with precise screening criteria related to specific industrial or strategic stakes

2. Conditioning public support to the automotive industry to the production and supply of "Made in EU" goods

13. Current public support policies have so far failed to deliver transformative results in facilitating European industrial and technological development across the clean tech and automotive supply chains.
14. As it stands, EU funding instruments and State aid guidelines make no reference to European preference or "EU-content" requirements that would favour the use of European-made equipment or components. There is an urgent need for a comprehensive EU framework: EU funding rules should set the strategic direction; then, State aid guidelines may follow to ensure consistency and accelerate uptake through Member States.

2.1. The need to prioritise EU support tied to production output

Result-based support is still lacking under EU funding programmes and State aid.

→ **Legal Analysis, Section 2.1.2 and Section 2.2.2**

15. Current EU funding programmes and State aid frameworks still focus mainly on cost-based investment support—as opposed to operating aid and result-based support linked to production volumes. For example, while support under the Innovation Fund covers anticipated OPEX, it maintains a cost-based approach.

The room left for result-based funding under EU law

→ **Legal Analysis, Section 2.1.1**

16. EU law leaves significant discretion with regard to the form of financing available:
    - A wide range of funding instruments are available to the EU. Through grants (non-repayable payments), the EU can support (i) specific actions or (i) the operation of entities, as long as those are aligned with the relevant EU policy objective. Operation grants support the operating costs of an organisation.
    - Such support may be result- or cost-based:
        - Result-based payments are explicitly encouraged, through "financing not linked to costs" (i.e. payment triggered upon meeting predefined conditions or milestones). Such payments, like production aid, are different from operating support as they are not tied to the beneficiary's functioning expenses.
        - Cost-based funding may cover OPEX, as long as such costs are necessary for the implementation of the funded action (e.g. the objective is to support the activity of a company that aligns with the goal of the funding).

State aid

→ **Legal Analysis, Section 2.2**

17. Conversely, operating aid aimed solely at reducing costs for the automotive industry may be difficult to justify without legislation—except if it can be linked to facilitating the development of certain economic activities. However, there is room to introduce output-based production aid.

KEY MESSAGE 2

Channel production aid through EU funds to avoid fragmentation and market distortions

2.2. The need for binding EU preference and EU content criteria in public funding

Lack of conditionality in current EU funding programmes

→ **Legal Analysis, Section 2.1.2**

18. Existing EU funding programmes still fail to exploit these flexibilities and effectively leverage EU support for the development of EU manufacturing capacities across the clean tech and automotive supply chains (see Appendix 1).
19. EU funding instruments make no reference to European preference. At best, they promote "resilience" through criteria aimed at reducing dependency on

single suppliers, in line with the NZIA. In addition, conditions relating to the beneficiaries essentially require registration in the EU or an associated country, which creates a blind spot regarding foreign-controlled EU entities. A result-based approach also remains absent under these instruments.

20. Similarly, Commission guidelines directing State aid towards areas of EU interest do not introduce "EU-content" requirements that would favour the use of European-made equipment or components.

EU law leaves flexibility to direct EU funding towards common objectives

→ **Legal Analysis, Section 2.1.1**

21. The EU law offers significant flexibility to allocate EU support towards activities that advance common policy objectives. In general, EU institutions (or programme-specific rules) may include any additional eligibility and award criteria beyond standard rules, provided they align with the grant's objectives. The only constraints are compliance with general principles and respect for international obligations.

Opportunities and recommendations

→ **Legal Analysis, Section 2.1.3**

22. The upcoming European Competitiveness Fund will be a key instrument to address these shortcomings and embed conditionalities that prioritise EU industrial resilience and technological leadership:
    - The Commission's proposal, published in July 2025, expressly introduces "EU preference" eligibility criteria, including requirements to source equipment and components from European entities.
    - While the proposal does not make these criteria mandatory, there is clear scope to ensure access to funds is made conditional upon compliance with EU preference requirements, including in the automotive sector, and to prioritise output-based support and enable OPEX aid where necessary.
    - The Commission could then further define, through implementing acts, when such eligibility criteria are necessary and proportionate.
23. Moreover, rather than limiting eligibility to EU-based entities, support could also extend to foreign-controlled companies, provided they meet appropriate conditions on local control and technology transfer (see ***Key Message 1***).

KEY MESSAGE 3

Make EU preference and EU content criteria (open under conditions to products from EU strategic partners) binding for public support.

Spillover effect on State aid

→ **Legal Analysis, Section 2.4**

24. Such advances in EU funding instruments are even more important as they will serve as enabling conditions for State aid to replicate the same logic.
25. While operating aid aimed solely at reducing costs for the automotive industry may be difficult to justify without legislation—except if it can be linked to facilitating the development of certain economic activities—there is room to introduce output-based production aid to offset competitive disadvantages vis-à-vis third-country producers:
    - Revised or new sector-specific guidelines should be developed for the automotive sector, setting out the conditions under which Member States may support EU-based clean tech manufacturing while remaining compatible with the internal market. Such guidelines should draw on future EU funding rules and the shift towards result-based funding.
    - This possibility could also be embedded directly in EU legislation to ensure Member States can rely on appropriate "Made in EU" criteria in designing aid schemes tied to production output.

2.3. Public procurement

→ **Legal Analysis, Section 2.1.3** and **Session 2.2.3**

26. The CJEU made clear that the EU can introduce EU preference requirements in public procurement, although this would be constrained by the EU's international obligations under the Agreement on Government Procurement (GPA) and Free Trade Agreements (FTAs)—covering a limited number of third countries.

2.4. Other Member States measures incentivising EU content

→ **Legal Analysis, Section 2.4**

27. Member States may also take other types of measures, including regulatory intervention (e.g. corporate fleet requirements). But in the absence of harmonised EU rules in a given area, such measures may be found to amount to intra-EU trade restrictions, even though exceptions are available. This further underlines the need for common EU metrics and definitions, on which Member States could then rely to design their domestic support policies, as this would provide greater legal certainty.

3. Opportunity of a uniform "Made in EU" definition

→ **Legal Analysis, Section 3**

28. Two approaches can be considered for introducing "Made in EU" requirements:
    - The first one is to adopt specific rules of origin for relevant products in a dedicated legal instrument, creating a uniform metric for selected EU regulations and Member State support schemes, inspired by preferential rules in FTAs.
    - Alternatively, EU content requirements could be introduced on a case-by-case basis within different instruments, offering flexibility and reducing WTO law risks but leading to a more fragmented framework. Each option balances legal coherence against adaptability and enforcement complexity.
29. While the introduction of such requirements may deviate from the general non-preferential rules of origin under the Union Customs Code, there is no inherent inconsistency, as EU internal policies can lawfully establish specific origin criteria for targeted measures.

Institut des mobilités en transition
41, rue du Four – 75006 Paris – France

institut-mobilites-en-transition.org

BALDON AVOCATS

LEGAL ANALYSIS

Conditioning public support and foreign investment in the EU automotive sector to local content or technology uptake: legal framework and strategic toolbox

OVERVIEW

The objective of this legal note is to analyse the extent to which EU law allows the EU and its Member States to condition: the establishment of foreign direct investments ("FDIs") (I), and the granting of national or European public support measures (II), to criteria that foster value creation within the EU, strategic independency, technology uptake, and environmental sustainability. The analysis only focuses on the EU legal framework.

Table of contents

DEFINITIONS

CEEAG: Climate, Environment and Energy Aid Guidelines

CID: Clean Industrial Deal

CISAF: Clean Industrial Deal State Aid Framework

CJEU: Court of Justice of the European Union

CRMA: Critical Raw Materials Act

ECF: European Competitiveness Fund

EIB: European Investment Bank

FDI: Foreign Direct Investment

FTA: Free Trade Agreement

GBER: General Block Exemption Regulation

GPA: Agreement on Government Procurement

IAA: Industrial Accelerator Act

IPCEI: Important Projects of Common European Interest

OECD: Organisation for Economic Co-operation and Development

MFF: Multiannual Financial Framework

NZIA: Net-Zero Industry Act

RAG: Regional Aid Guidelines

TCTF: Temporary Crisis and Transition Framework

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

UCC: Union Customs Code

WTO: World Trade Organization

1 CONDITIONING FOREIGN INVESTMENTS TO EU CONTROL AND SKILLS TRANSFERS

1. This section first aims to map constraints and opportunities under EU law for EU and Member States measures affecting FDI (1.1), before turning to examine appropriate avenues for ensuring FDI effectively supports technology uptake within the EU (**1.2**).

1.1. Constraints and opportunities under EU law

2. The ability of Member States to regulate inbound foreign investment remains limited, due to EU rules on freedom of establishment—which while generally not extending to third-country entities, do protect foreign-controlled EU companies (**1.1.1**)—and the exclusive competence of the EU in this area, which has not yet been exercised to restrict FDI (**1.1.2**).

1.1.1. Freedom of establishment and free movement of capital

A. Principle

3. The EU principles of freedom of establishment and free movement of capital are far reaching and can widely benefit foreign companies, either directly or indirectly, through EU-based entities.

4. Rules on free movement of capital under Article 63 TFEU cover portfolio investments (i.e. shareholdings made solely with the intention of making a financial investment), regardless of origin—EU or foreign. Accordingly, these rules also benefit investors from third countries making portfolio investment in the EU.

5. As regards direct investments,[1] they are protected by Article 49 TFEU on freedom of establishment, which guarantees the right to take up and pursue activities and to set up and manage companies. In principle, **only "EU companies"** have a right to rely on freedom of establishment. Protection therefore **does not extend to third-country nationals and companies**.

6. However, in EU law, **"EU companies" are very liberally defined**. Pursuant to Article 54 TFEU,[2] a company qualifies as an "EU company" if it is incorporated in accordance with the laws of one of the Member States and has its "registered office, central administration or principal place of business" there. It is irrelevant whether its administrative headquarters are located outside the EU or its majority shareholders are third-country nationals.[3]

7. There is no unified definition of the criteria used to define an EU company. Article 54 leaves it to each Member State to select the location of registered office (statutory seat), the central administration, or the principal place of business as the appropriate criterion to define whether a company is considered as a "national" company under its domestic company law. Member States have taken diverging approaches.[4]

8. As an illustration, BYD set up BYD Europe B.V., which is incorporated in the Netherlands[5] and is considered a Dutch company under Dutch company law. Likewise, CATL created a European subsidiary in Germany—Contemporary Amperex Technology Thuringia (CATT) GmbH—where it established its European seat. As such, CATL's German subsidiary has already received a EUR 7.5 million grant from Bund and Thüringen Land for the construction of a battery factory.[6]

9. Once a company qualifies as a company connected to a Member State, it is deemed an EU company and must be treated as such in other Member States. This means that foreign-controlled "EU companies" are granted freedom of establishment in the whole EU, which includes the right to freely acquire

1 The CJEU defines FDI as investments which enable the holder to exert a definite influence on a company's decisions and to determine its activities (CJEU, Case C-35/11, *Test Claimants*, EU:C:2012:707, paras 91-93 and 98).

2 Article 54 TFEU: "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States."

3 Case C-106/22, *Xella Magyarország*, EU:C:2023:568, paras 46-48; Case C-80/12, *Felixstowe Dock*, EU:C:2014:200, para. 40.

4 In France, a company is presumed to be incorporated under French law if it has a registered office ("*siège statutaire*") in the country, unless that seat is fictitious and does not correspond to its real seat, where its actual central administration is situated (Article L. 210-3 of the Commercial Code). Under German law, a company based outside of the EU may register as a German company only if its actual place of establishment or administration is located in Germany. In contrast, in the Netherlands, it is sufficient that a company has its registered office in the country to qualify as a Dutch company—even if this seat does not coincide with its "real" seat.

5 See the Dutch Chamber of Commerce's website where BYD Europe B.V. is registered under the number 24288673.

6 See the minutes of the plenary session in Thüringen's parliament dated 04.07.2019, p. 84, available here.

companies incorporated in another Member State.[7] The CJEU has repeatedly stated that the fact that a company residing in a Member State is directly or indirectly controlled by third-country residents does not deprive that company of the right to rely on that freedom.[8]

10. In other words, **as a rule, Member States may generally not take measures discriminating against EU-based companies** on the sole basis that they are controlled by foreign nationals or that their central administration is not located within the EU, as this may breach Article 49 TFEU.[9]

11. However, differences in treatment may be permissible when they relate to "situations which are not objectively comparable".[10] In this respect, foreign-controlled EU companies are arguably in an objectively distinct situation from "purely" European companies.[11] This approach underpins the Commission's proposal for a new FDI screening regulation, stressing that concerns for security and public order are associated with all transactions involving a non-EU country (see below **Section 1.2.1**).

12. In addition, Member States may invoke Treaty exceptions, as further specified below.

a. Exceptions

13. Article 52 TFEU provides that freedom of establishment shall not prevent measures "providing for special treatment for foreign nationals on grounds of public policy, public security or public health".[12] This exception is subject to a strict interpretation.[13]

14. First, the measures at issue must be appropriate to achieve their stated objectives and not go beyond those necessary to achieve that objective. Furthermore, a measure will only be considered appropriate if it genuinely reflects a concern to attain the objective pursued in a consistent and systematic manner.[14]

15. Second, recourse to the grounds laid down in Article 52 TFEU is authorised only insofar as there is a "genuine and sufficiently serious threat to a fundamental interest of society".[15]

16. Considerations of a purely economic nature have been held not to amount to such a threat.[16] However, reasons of an economic nature **in the pursuit of an objective in the public interest** could represent an overriding reason in the public interest capable of justifying an obstacle to the right of establishment.[17]

17. According to the Court, the scope of **"public security" includes the security of supply for critical products** or certain basic public services. This traditionally concerns energy, oil and telecommunications.[18] But CJEU case law suggests that it is inclined to broadening the list of products for which ensuring security of supply could be a legitimate public security concern, extending it to other critical goods depending on their strategic importance and vulnerability to foreign control.[19]

18. The extent to which the CJEU will accept economic security considerations within the public security exception remains uncertain. In the context of major geopolitical challenges, the Court may allow an evolutive interpretation that encompasses areas essential to sovereignty, while drawing a line against objectives that primarily aim to counter industrial competitiveness losses or shield the EU's industrial base from global newcomers. However, distinguishing between measures genuinely linked to sovereignty and resilience and those driven by broader industrial policy is challenging, leaving significant room for debate and case law development.

7 See e.g. Case C-411/03, *SEVIC Systems*, EU:C:2005:762.

8 Case C-6/16, *Eqiom and Enka*, EU:C:2017:641, paras 47-48; Cases C-504/16 and C-613/16, *Deister Holding*, EU:C:2017:1009, para. 84.

9 Case C-106/22, *Xella Magyarország*, paras 46-48; Case C-80/12, *Felixstowe Dock*, EU:C:2014:200, para. 40.

10 Case C436/23, *Belgische Staat / Federale Overheidsdienst Financiën*, EU:C:2024:1023, para. 29.

11 See also Case C-106/22, *Xella Magyarország*, paras 46-48. The Court seems to have hinted that the ultimate owner's nationality could be taken into account in reviewing restrictions towards a foreign-controlled EU company: "the origin of Xella Magyarország's shareholders cannot in any event be relied on to deny that company the benefit of the freedom of establishment, particularly since it is common ground that the ultimate owner of the group of which it forms part is an Irish national."

12 See also Article 65(1)(b) TFEU in relation to free movement of capital.

13 Case C-326/07, *Commission v Italy*, EU:C:2009:193, paras 69-70.

14 Case C-64/08, *Engelmann*, EU:C:2010:506, para. 35.

15 Case C-244/11, *Commission* v *Greece*, EU:C:2012:694, para. 67.

16 Case C-546/07, *Commission v Germany*, EU:C:2010:25, para. 51; Case C-35/98, *Staatssecretaris van Financiën*, EU:C:2000:294, para. 48.

17 Case C-106/22, *Xella Magyarország*, EU:C:2023:568.

18 Case C-244/11, *Commission v Greece*, EU:C:2012:694, paras 65-67.

19 As the Advocate General also envisaged in *Xella* (Opinion of Advocate General Ćapeta delivered on 30 March 2023, Case C-106/22, *Xella Magyarország*, EU:C:2023:267, paras 82-83).

19. In this respect, **raw minerals, goods, components and technologies classified as "critical" or related to public security under recent EU instruments** could be covered by the exception. Recent legislation indeed set common objectives and definitions that could inform the Court's assessment of the scope of public security under the Treaty. In particular:

- The Critical Raw Minerals Act (**CRM Act**)[20] defines and provides a list of strategic raw materials (Annex I) and critical raw materials (Annex II).
- The Net-Zero Industry Act (NZIA)21 seeks to enhance European manufacturing capacity for net-zero technologies and their key components. It lists "net-zero technologies" as technologies specified in Article 4, including final products, specific components (including processed material), or machinery primarily used for their production.22 It also defines "net-zero strategic projects" (Article 3(18)).
- The Clean Industrial Deal (CID) Communication sets common European objectives, referring to "Union strategic priorities, such as the resilience of the Union" and the need to "boost demand and supply of clean tech products" and "power the circular economy".
- The Commission proposal for a new FDI screening regulation also lists technology areas that are "critical for the EU's economic security", making a clear link between public order and economic security (see below Section 1.2.1).

20. These objectives echo the TFEU provisions stating that the EU and the Member States "shall ensure that the conditions necessary for the competitiveness of the Union's industry exist" and that their action must notably be aimed at "speeding up the adjustment of industry to structural changes" and "fostering better exploitation of the industrial potential of policies of innovation, research and technological development" (Article 173(1)). Article 179(1) further provides that "[t]he Union shall have the objective of strengthening its scientific and technological bases ... and encouraging it to become more competitive, including in its industry".

20 Regulation (EU) 2024/1252 of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials.

21 Regulation (EU) 2024/1735 of 13 June 2024 on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem.

22 NZIA, Articles 3(1) and 4.

1.1.2. Current Member States' margin to regulate FDIs

21. FDI falls under the common commercial policy, an **exclusive EU competence** under Article 207 TFEU. Accordingly, **Member States need to be authorised by the EU legislature** to adopt general rules affecting FDI except to protect their national security under Article 4(2) TEU, or their "essential security interests" under Article 346 TFEU.[23]

22. Member States have traditionally made use of those powers to impose investment restrictions primarily in the defence sector. For example, Denmark's Act on War Material contains restrictions to maintain Danish control over companies producing war material, requiring prior authorisation from the Minister of Justice for any change in ownership or management that would grant foreign nationals influence over such a company.[24] Member States may maintain restrictions for investments relating to dual-use goods, components and technologies.[25] But given the narrow scope of these exceptions,[26] it is unlikely that Member States' action on strategic sectors taken to ensure technology uptake and improve industrial competitiveness can fall within their scope.

23. Furthermore, Member States can, under certain conditions, restrict FDIs under the framework for FDI screening under Regulation (EU) 2019/452, which **allows–but does not require**–Member States to establish national screening mechanisms for foreign investments.[27]

23 Case C-652/22, *Kolin*, EU:C:2024:910, paras 64 and 67, recalling that in the absence of an EU-derived power or an EU act that may be implemented, it is prohibited for Member States to legislate in the area of the common commercial policy.

24 Act on War Material, Danish Consolidated Act No. 1004 of 22 October 2012, Article 3, referring to cases where ownership or management changes result in (i) a company having its registered office outside Denmark, (ii) directors not being Danish citizens, (iii) less than 80% of board members being Danish citizens, (iv) less than 60% of the share capital being Danish-owned, (v) foreigners holding more than 20% of voting rights through share ownership, or (vi) foreigners otherwise gaining decisive influence over the company.

25 See e.g. Spain's Royal Decree No. 679/2014 on the control of foreign trade in defence material, other material, and dual-use products and technologies.

26 According to the CJEU, the national security exception relates to the protection of "the essential functions of the State and the fundamental interests of society", encompassing "the prevention and punishment of activities capable of seriously destabilising the fundamental constitutional, political, economic or social structures of a country" (Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net*, EU:C:2020:791, para. 135).

27 By the end of 2024, 24 Member States had FDI screening legislation in place (Report from the Commission to the European Parliament and the Council. Fifth Annual Report on the screening of foreign direct investments into the Union, COM(2025) 632 final), but the remaining three Member States–Greece, Croatia and Cyprus–enacted theirs in 2025.

24. The underlying principle of FDI screening is that certain investments are subject to prior authorisation on grounds of security or public order. In general, there are three categories of conditions to define whether a particular acquisition is subject to screening: the origin of the investment, the nature of the proposed transaction, and the nature of the target company's activity.

25. Depending on the outcome of the review, an investment may be approved, rejected, or approved subject to conditions ("**mitigating measures**"). Mitigation measures are conditions or obligations negotiated or imposed on the investor during the FDI review process.[28] They aim to address national security or public order concerns while allowing the transaction to proceed.

26. As mitigation measures are often defined in legislation only by their purpose—rather than by their means, scope or options—they offer flexibility to agree on transaction-specific arrangements.[29] They may include different types of measures, such as:

    - **Structural conditions** (e.g. local subsidiary establishment, mandatory local hiring, board composition requirements, limitations on voting rights, mandating joint ventures / partnerships with European partners),

    - **Contractual commitments** (e.g. technology licensing agreements, R&D collaboration clauses, IP sharing provisions, localisation of patents, requirements to source key inputs or components from EU suppliers),

    - **Operational safeguards** (e.g. restrictions on access to sensitive information, compliance monitoring and reporting obligations).

27. Despite the existence of this framework, **the practical relevance of FDI screening in the EU remains limited** due to several factors:

    - **Investment by foreign-controlled EU companies falls outside the scope** of Regulation 2019/452. This increases risks of circumvention that forces certain Member States to screen intra-EU investment, resulting in suboptimal conditions. In most jurisdictions, screening mechanisms exclude investment made by companies incorporated in the EU, but in certain Member States (e.g. France, Sweden),[30] EU investments are also subject to screening.

    - It **does not mandate coverage of greenfield investments** (most EU Member States have decided not to screen greenfield FDI),[31]

    - The scope of sensitive sectors and the list of risk assessment factors are narrow,

    - There is **high reliance on Member States**, which retain **broad discretion** in both designing their screening mechanisms and deciding whether to authorise a particular acquisition and under what conditions (as they **remain the ultimate authorities responsible for final approval**). This results in fragmentation and significant gaps across jurisdictions.

28. While Regulation 2019/452 does not prevent Member States from going further, there are legal limits under the Treaties (e.g. with regard to foreign-controlled EU companies) and a general reluctance to expand the scope of screening too widely—possibly as a result of the lack of harmonisation. The limitations and gaps were highlighted by the OECD and acknowledged by the Commission.[32]

28 OECD, Acquisition- and ownership-related policies to safeguard essential security interests. Current and emerging trends, observed designs, and policy practice in 62 economies, May 2020, paras 59-61.

29 See e.g. Article R. 151-8 of the French Monetary Code, providing that mitigating measures may "primarily" seek to (i) ensure continuity and security of the sensitive activities on French territory, (ii) preserve the entity's knowledge and know-how and prevent their capture, (iii) adapt internal organisation, governance, and the exercise of rights acquired through the investment, (iv) define monitoring and reporting obligations, and (v) require the investor to divest part of the acquired shares or a branch of activity to an approved third party.

30 See e.g. Articles R. 151-1 and R. 151-2 of the French Monetary Code.

31 OECD, Framework for Screening Foreign Direct Investment into the EU, 2022, p. 56.

32 Ibid; Commission, Staff Working Document, Evaluation of Regulation (EU) 2019/452, SWD(2024) 23 final.

1.2. Relevant legal instruments to condition FDI

29. In order to ensure FDI effectively supports technology uptake within the EU, the following options are available: reforming the existing cross-sectoral FDI screening rules (**1.2.1**), applying EU-wide sectoral FDI restrictions for the automotive sector (**1.2.2**), and introducing conditions to access to EU and Member State funding for foreign investors and foreign-controlled EU companies (**1.2.3**).

1.2.1. The revision of cross-sectoral FDI screening rules

30. The ongoing revision process for EU cross-sectoral FDI screening rules provides clear possibilities to advance key strategic industrial interests.

31. The Commission published a proposal for a new FDI regulation in January 2024 that would provide major changes to Regulation (EU) 2019/452:[33]

- Setting an investment screening mechanism **would become compulsory** for all EU Member States.
- The new regulation would **cover investments made through foreign-controlled EU-based entities**, which currently fall outside the scope of Regulation 2019/452.
- Greenfield investments would continue to be covered on an optional basis.
- Prior authorisation would become **mandatory** for foreign investments **concerning an EU project or programme of common interest** (Annex I)[34] **or operates in one of the sensitive sectors** listed in Annex II. The list of sensitive areas refers to "critical technology areas for the EU's economic security", such as "energy technologies" (e.g. "net zero technologies, including photovoltaics" and batteries) and "advanced materials, manufacturing and recycling technologies" (technologies for extraction, processing and recycling of critical raw materials").[35]
- The (non-exhaustive) list of risk factors related to the investment and investors, which are used to determine a likely negative impact on security and public order, would be broadened to include economic security considerations (e.g. the security, integrity and functioning of critical infrastructure; the availability of critical technologies; the continuity of supply of critical inputs).[36]

32. In practice, these changes mean that, for example, any foreign acquisition–including through an EU-based entity–of existing photovoltaics or battery production capacities would be subject to prior authorisation; conversely, Member States would have the choice to screen a Chinese investment in the installation of a new battery plant. In both cases, the final decision to approve, deny or authorise the investment subject to mitigating measures would **remain a Member State prerogative**,[37] although Member States would be required to give "utmost consideration" to comments by the Commission and other Member States.[38]

33. In May 2025, the European Parliament adopted an amended proposal that would substantially broaden the scope of the Commission's proposal.[39] It notably includes:

- A significantly extended list of sensitive sectors where screening is mandatory (notably **covering the automotive industry, including auto parts suppliers**),
- A requirement to screen greenfield investments that: (i) pertain to a mandatory sector as listed in the proposed new EU FDI Regulation; (ii) involve a sensitive investor (e.g. an investor controlled directly or indirectly controlled by a government or state body); and (iii) exceed EUR 250 million in value,
- Additional factors for security assessment (e.g. a likely negative impact on "the capacity to avoid and address strategic dependencies"; "the availability and uptake of critical

33 Commission Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council, COM(2024) 23 final ("FDI Screening Regulation Proposal").

34 FDI Screening Regulation Proposal, Annex I. The annexes to the Proposal are accessible here.

35 Ibid, Article 4(4).

36 Ibid, Article 13(3).

37 Ibid, Recital 28: "The final decision on foreign investments should remain the sole responsibility of the Member State where the foreign investment is planned or completed."

38 Ibid, Article 7(5).

39 See the European Parliament's amendments here (8 May 2025).

technologies, technology security and technology leakage"; "the security and resilience of supply chains for critical inputs").

- Strengthening the Commission's role and decision-making powers, in particular by giving it the final say in case of disagreement with the Member State on the outcome of a case (by authorising the investment subject to mitigating measures or prohibiting it).

34. This expanded scope may clash with the Council's position, which supports the Commission's proposal on certain core elements, but insists on affording greater autonomy and discretion to Member States.[40] The Council notably seeks to limit the role of the Commission and to retain a large share of final decision-making authority at Member State level, through greater control over their own assessments and a more limited list of sectors and EU common interest projects where screening is mandatory, with greater emphasis on military and dual-use items.[41]

35. As trilogue negotiations are still ongoing, there remains an opportunity to secure an ambitious outcome that provides stronger EU-level coordination.[42] However, unless the Commission is granted final decision-making authority, as proposed by the Parliament, **the discretion left to Member States may result in fragmented implementation across the EU**. Some Member States may indeed adopt a more lenient approach to security assessments in order to attract foreign investment.

Consider a scenario where a Chinese investor seeks to acquire a mid-sized European manufacturer of advanced battery components located in a Member State with a strong pro-investment stance. Under the revised regulation, this acquisition would fall under mandatory screening because batteries are listed as a sensitive sector in Annex II. However, if the Commission does not have final decision-making authority, the Member State could approve the deal despite concerns expressed by the Commission or other Member States over technology leakage and strategic dependency risks. This fragmented approach could create vulnerabilities and undermine EU-wide efforts to safeguard and develop critical technologies.

36. Thus, in certain sectors where common action is critical, the **general screening mechanism may not be fully adequate** and could be complemented with specific rules.

1.2.2. The adoption of sectoral FDI restrictions

37. In parallel to cross-sectoral FDI screening, it is possible to introduce sector-specific restrictions requiring imposing conditions on acquisitions and investments in strategic sectors, such as the automotive industry.

38. As mentioned above, several Member States have traditionally established sectoral restrictions on foreign investments in defence-related sectors. However, given the EU's exclusive competence, Member States have only a limited ability to impose FDI restrictions aimed at ensuring EU technology uptake.

39. Such restrictions **should be decided at the EU level**:[43]

- Contrary to a cross-sectoral screening mechanism, sector-specific rules adopted at EU level could establish **harmonised requirements that apply uniformly and directly across all Member States**, removing discretion at national level and **limiting intra-EU competition to attract FDI**. If the EU exercises its exclusive competence on FDI under Article 207 TFEU, this will ensure

40 See the Council's mandate for negotiations with the European Parliament here (6 June 2025).

41 The Council's position maintains net-zero technologies and advanced materials, manufacturing and recycling technologies within scope. It also proposes to remove *ex officio* reviews, which would have enabled Member States or the Commission to review sensitive investments that were not previously notified.

42 The second high-level trilogue meeting took place on 23 September. As shown by the negotiating table in preparation for this meeting, the co-legislators had not yet agreed on a common position regarding the sensitive provisions highlighted above (NEGO_CT(2024)0017(2025-09-19)).

43 See also Cleantech for Europe, "The Industrial Accelerator Act: Time for Made in Europe Clean Technologies", November 2025, available here.

legal certainty, prevent fragmentation, and allow the EU to set common conditions that align with internal market principles.

- The Commission already announced it will propose "conditions for inbound foreign investments in the automotive sector to further increase their added value for the EU" and their contribution to "EU competitiveness, technological leadership, and resilience".[44] Such conditions could include JV or partnership requirements, senior management or governance provisions, agreements supporting EU industry needs (off-take arrangements, licensing, royalty agreements), technology and IP licensing commitments, as well as obligations to supply critical inputs and strengthen local supply chains. The Commission reiterated this commitment in the Clean Industrial Deal State Aid Framework (**CISAF**),[45] and recent reports confirm this is currently being considered by EU.[46]

40. In this respect, the Industrial Accelerator Act could serve as an appropriate legislative vehicle to incorporate such conditionalities where relevant. Alternatively, these provisions could be introduced through standalone legislation.

1.2.3. Conditioning investment incentives

41. In parallel to imposing market access restrictions on foreign investment, EU and Member State support schemes could incentivise alignment with EU objectives by granting investment funding to foreign investors subject to strict conditions of EU control and technology transfer.[47]

42. The Commission is explicitly considering this option:

> "… the Commission and Member States will ensure that foreign direct investments are used to create added value in Europe, especially when public financing is involved, and require clear conditions that help close the gap in production know-how and expertise, including via effective mechanisms for IP and skills transfer as well as EU-based staff recruitment and local supply chains … To boost European added value, the support could be available to overseas players if European companies have entered in partnerships with them that ensure sharing of skills, know how, technical expertise and technology, as well as sufficient added value for the EU. When setting up such funding instruments, non-price criteria such as resilience requirements will be considered, both for EU and Member State funding."[48]

43. In addition, such conditions could also apply where beneficiaries are foreign-controlled EU companies. As mentioned below in **Section 2.1**, their access to EU funding may already be limited under certain EU funding programmes.[49] This therefore suggests that it may be broadened and generalised to EU and Member State funding.

44. In July 2025, the Commission published a recommendation outlining guiding principles for Member States when introducing tax incentives to support the objectives of the CID, thereby complementing the CISAF. It encouraged Member States to provide tax credits for investment projects that "create additional manufacturing capacity for final products"[50] and to grant enhanced tax credits to investments that align with resilience policy objectives. For instance, the guidance specifically highlights investments in the production of a "net-zero final product or a net-zero main specific component" that currently has a high level of dependency on a single third country, in accordance with the implementing act and the updated information published under the NZIA.[51]

44 Commission, Industrial Action Plan for the European automotive sector, published on 5 March 2025, COM(2025) 95 final.

45 Commission, Framework for State Aid measures to support the Clean Industrial Deal (Clean Industrial Deal State Aid Framework), C/2025/3602, para. 14.

46 Reuters, "EU floats conditions such as tech transfers for China investments" (15 October 2025); Brandsit, "European Union sets conditions for China: investment only for know-how" (16 October 2025).

47 See also Transport & Environment, "State Aid 2.0, Lean, clean, European", February 2025.

48 Communication from the Commission, Industrial Action Plan for the European automotive sector, published on 5 March 2025, COM(2025) 95 final.

49 Regulation (EU) 2021/1153 of the European Parliament and of the Council of 7 July 2021 establishing the Connecting Europe Facility, Article 11(4). See also **Section 2.1.3** below on the proposal for a European Competitiveness Fund (Article 10(2)).

50 Commission Recommendation of 2 July 2025 on tax incentives to support the Clean Industrial Deal and in light of the Clean Industrial Deal State aid Framework, C(2025) 4319 final, par. 2.1.

51 Ibid, para. 3.1.

2 INCENTIVISING THE PRODUCTION AND CONSUMPTION OF "MADE IN EU" GOODS

45. As of today, public support by the EU and the Member States is not used to incentivise the production and consumption of "Made in EU" goods. This also applies in the automotive industry. In this respect, this section assesses the margin of action left to the EU and the Member States under the Treaties and existing instruments, as well as the current limitations of these instruments. It aims to identify the scope for action under EU law and to outline potential pathways for supporting the effective dissemination of EU content requirements in the automotive sector.

46. The analysis first examines how EU funding programmes (**2.1**), State aids (**2.2**), and public procurement (**2.3**) can be leveraged for this purpose. It then considers the implications of EU rules on the free movement on goods on Member States' ability to take other support measures, such as regulatory interventions (**2.4**).

2.1. Leveraging EU funding

47. The general rules governing the allocation of EU funding allow significant flexibility for the EU legislature and institutions to align support with policy objectives (**2.1.1**). However, current instruments and practices have not fully exploited this margin to effectively leverage EU funding for the development of EU manufacturing capacities across the clean tech and automotive supply chains (**2.1.2**). Future legislation, by contrast, offers clear opportunities to address this gap (**2.1.3**).

2.1.1. Possibilities under EU law

48. State aid rules are not applicable to centrally managed EU funds. The rules governing EU funding programmes are instead set out in Regulation 2024/2509 (the "**Financial Regulation**").[52] Specifically, EU support in the form of **grants** is regulated by the provisions of Title VIII of the Financial Regulation, as well as Title V on common provisions.[53]

49. These provisions leave significant discretion to the EU institutions and the rules of each funding instrument, in particular with regard to the form of financing available:

- Grants can be either (i) **action grants** or (ii) **operating grants**. An action grant supports a specific action intended to help achieve an EU policy objective, while an operating grant is awarded to support the operating costs of an organisation pursuing such an objective (Article 183(2)).

- Support may be **result- or cost-based**, and take the form of lump sums, unit payments, flat rates, and/or financing not linked to operating costs:[54]

  - Financing not linked to costs refers to payment triggered when the beneficiary (i) **meets predefined conditions** established in the sectoral legislation for the programme (or a Commission decision implementing that act) or (ii) **achieves results** measured by reference to previously set milestones or performance indicators (e.g. production output).

  - In fact, **result-based financing is encouraged**: Article 184(2) provides that conditions triggering payment should be tied to the "the achievement of outputs and/or results" where possible and appropriate.[55]

  - **Cost-based funding may cover operating expenses**, as long as such costs are necessary for the implementation of the funded action.[56] Categories of costs

52 Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union.

53 Grants are defined as non-repayable financial contributions from the EU budget. Repayable forms of support (e.g. loans, guarantees, equity investments) are governed by Title X of the Financial Regulation. In particular, Article 212 requires EU financial instruments to be "consistent" with State aid rules.

54 Financial Regulation, Article 183(3), referring to Article 125(1).

55 Ibid, Article 184(2): "Where possible and appropriate, lump sums, unit costs or flat rates shall be determined in such a way as to allow their payment upon achievement of concrete outputs and/or results". See also, Article 184(4)(d)-(e) and Recital 94: "More emphasis should be put on performance and results of projects financed from the budget".

56 Under Article 125(1)(c), unit costs cover "specific categories of eligible costs which are clearly identified in advance by reference to an amount per unit". Eligible costs are those that are "necessary for the implementation of the action or of the work programme which is the subject of the grant", in accordance with Article 189(3)—which lists criteria that eligible costs incurred by the beneficiary shall meet (e.g. be reasonable, justified, compliant with applicable law, including tax and social legislation).

considered eligible for funding must be specified in the calls for proposals or the relevant EU instrument (Article 189(4)).

- While Article 196(3) precludes retroactive CAPEX support,[57] it does not prevent **production or operating aid for already built facilities**—as long as it does not relate to completed actions.

50. Likewise, there is great flexibility as regards eligibility and award criteria:

- There are **no residence- or nationality-based eligibility requirements** for the beneficiaries (Article 200(2)). Calls for proposals **may introduce "additional eligibility criteria"** beyond the standard eligibility rules if those criteria are relevant to the goals of the specific funding programme and subsidised action.[58] The relevant EU institutions may therefore decide whether foreign and foreign-controlled companies are eligible.

- Article 202 on **award criteria leaves significant flexibility** as it only requires that award criteria align with the grant's objectives and direct support towards actions maximising the impact of EU funding.

51. Thus, in practice, as long as they respect general principles (e.g. equal treatment, transparency, no-profit, no double financing),[59] the EU legislature and institutions have broad discretion in designing funding programmes and in imposing EU preference or local content criteria, through various types of funding, including OPEX support or output-based payment per unit.[60]

52. Moreover, while Article 136 of the Financial Regulation requires that conditions for participation in EU award procedures comply with the EU's international obligations,[61] the explicit reference of EU content conditionalities in the Commission's European Competitiveness Fund Proposal (see below **Section 2.1.3**) shows that this provision does not prevent the inclusion of EU preference criteria in EU funding programmes.

As an illustration, the EU may launch an action grant for battery production. The policy objective is to increase manufacturing capacity within the EU and reduce reliance on imported batteries. The grant operates with a fixed premium per unit, paid for each *eligible* battery module assembled. Eligible modules are those with a minimum share of cells manufactured in the EU. To ensure verification, beneficiaries may submit monthly production reports, as well as traceability data and cell supplier declarations. It could also be possible to support directly cell manufacturers located in the EU. Although such grants may ultimately support the manufacturers' operations, they link funding to a specific measurable output tied to an EU policy objective, not operating expenditures. They would therefore not be qualified as "operating grants", but performance-based action support.

Another example could involve a lump sum payment triggered when the beneficiary reaches or maintains a minimum share of components sourced from EU suppliers, or through instalments tied to progressive milestones, requiring EU-origin share to increase over time.

57 Under this provision, grants "shall not be awarded retroactively for actions already completed".

58 Ibid, Article 200(3): "The call for proposals may lay down additional eligibility criteria which shall be established with due regard for the objectives of the action and shall comply with the principles of transparency and non-discrimination."

59 Financial Regulation, Article 191.

60 This flexibility is further illustrated by recent Commission calls for proposals that incorporate additional resilience or strategic sourcing requirements as part of award criteria (see above **Section 2.1.1**).

61 Article 136(2) of the Financial Regulation provides exceptions for public security, stating that additional eligibility restrictions shall be imposed in award procedures affecting security or public order, "in particular concerning strategic assets and interests of the Union or its Member States". Article 10(3) of the ECF Proposal specifies that this may include limiting participation to entities with management, ownership, and control in Member States and requiring that activities use facilities or equipment located or originating in those countries.

2.1.2. Limitations of existing EU funding programmes

53. Several EU funding programmes are relevant to clean tech manufacturing and the automotive transition, such as Horizon Europe,[62] the Innovation Fund,[63] InvestEU,[64] and loans by the European Investment Bank loans (**EIB**).[65] The main features of these funds are set out in **Appendix 1**.

54. Despite the flexibilities under the Financial Regulation, which explicitly incentivises funding linked to achievement of predefined conditions or performance milestones,[66] such **a result-based approach is still lacking under those instruments**. For example, while support under the Innovation Fund covers anticipated OPEX,[67] it maintains a cost-based approach.

55. In addition, most programmes that include conditions relating to the beneficiaries essentially require registration in the EU or an associated country. This creates a **blind spot regarding foreign-controlled EU entities** (see above **Section 1.1.1**). Yet, other programmes such as Connecting Europe Facility allow the exclusion of foreign-controlled EU companies—thereby confirming that EU law already permits differentiated treatment in such cases.[68]

56. Furthermore, while most of these programmes aim to support projects that would contribute to the EU's strategic autonomy and industrial resilience, **none currently mandate or mention "Made in EU" requirements** as potential pre-qualification criteria to access funding.

57. Under the Innovation Fund rules, the Commission may introduce "additional award criteria or requirements" in sector-specific calls for proposals to assess the projects' contribution to EU objectives.[69] These may include the contribution to "the EU's access to a secure and sustainable supply of net-zero technologies needed to safeguard the resilience of the EU's energy system and to contribute to the creation of quality jobs". Accordingly, recent Innovation Fund calls included resilience-related award criteria:

    - The IF24 Call (€2.4 bn) and IF24 Battery Call (€1 bn) both included criteria aimed at "supporting the European battery ecosystem" (including suppliers of components and manufacturing equipment) and mitigating "the risk of building dependency specifically on China". However, these were **scoring criteria only**, **not eligibility requirements**. The IF24 Battery Call also contained an award criterion on "security of supply and countering dependency" assessing diversification of the supply of battery cell components away from China.[70] This criterion was worth 15 points (out of 108)—a level insufficient to compensate for the important price gap European and Chinese materials. The Commission explained the absence of strict conditions citing industry concerns about the current inability to meet non-China sourcing thresholds.[71]
    - Conversely, the IF24 call for RFNBO Hydrogen introduced a 25% maximum of China sourcing limit for electrolyser stacks as a pass-or-fail condition.[72]

58. Such criteria remain insufficient to ensure the development of manufacturing capabilities in Europe, as they focus on reducing dependency on a single supplier rather than promoting EU-based production. However, these examples show that the Commission already has a **legal basis to introduce content-related requirements** in Innovation Fund calls. Moreover, results from the IF24 calls confirm that such criteria did not deter applicants, as all calls were oversubscribed.[73] This approach could

62 Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe—the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination.

63 Commission Delegated Regulation (EU) 2019/856 of 26 February 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council with regard to the operation of the Innovation Fund.

64 Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme.

65 The Commission and the EIB signed an agreement clarifying that State aid law does not apply to loans directly granted by the EIB (see Joint statement by Joaquín Almunia, European Union Commissioner for Competition, and Werner Hoyer, President of the European Investment Bank (EIB), on State aid matters in relation to the activities of the EIB Group).

66 See Financial Regulation, Articles 183(2) and (3), 202.

67 Commission Delegated Regulation (EU) 2019/856, Article 5. Anticipated operating expenditures are part of the calculation for eligible costs (in terms of net present value over a decade, offset by benefits).

68 Regulation (EU) 2021/1153 of the European Parliament and of the Council of 7 July 2021 establishing the Connecting Europe Facility, Article 11(4). See also, Article 22(5) and (6) Horizon Europe.

69 Commission Delegated Regulation (EU) 2019/856, Article 11(3).

70 Call for proposals, Innovation call 2024 EV Batteries (INNOVFUND-2024-BATT), p. 21.

71 See the recording of the presentation of the IF24 Battery call.

72 Call for proposals, Innovation Fund fixed premium auction call 2024 for RFNBO Hydrogen (INNOVFUND-2024-AUC-RFNBO-Hydrogen), pp. 18-19.

73 See the results presented in May 2025 for the IF24 Call and IF24 Battery (373 proposals) and results for the Hydrogen auction (61 proposals).

therefore be **streamlined in other EU funding instruments** under EU management.

2.1.3. Potential pathways for leveraging EU funding

59. As part of the 2028-2034 Multiannual Financial Framework (**MFF**), the Commission's proposal for a **European Competitiveness Fund** (**ECF**)[74] **offers a clear opportunity** to make access to EU funds conditional on "Made in EU" requirements:

- The ECF proposal contains a provision on "EU Preference", stating that support under the ECF "shall target development manufacturing and exploitation in the Union of strategic technologies and sectors".[75] Article 10(2) specifies that award procedure "may" apply eligibility conditions "to ensure the competitiveness of the Union, including protection of economic interests and autonomy of the Union where necessary and appropriate". It explicitly provides that such "preferential conditions" may notably include requirements to source equipment and components from European entities. Additional eligibility restrictions could apply in procedures affecting public security.[76]

- As drafted, these conditions would not be mandatory. However, there is **scope to make access to funds contingent on meeting EU preference criteria**. Implementing rules in a Commission delegated or implementing regulation could then further define when such eligibility criteria are "necessary and appropriate."

- This is critical as the ECF would merge several EU funding programmes, including InvestEU, while incorporating Horizon Europe and the Innovation Fund.[77]

74 Proposal for a Regulation on establishing the European Competitiveness Fund (**ECF**), including the specific programme for defence research and innovation activities, repealing Regulations (EU) 2021/522, (EU) 2021/694, (EU) 2021/697, (EU) 2021/783, and amending Regulations (EU) 2021/696, (EU) 2023/588, COM(2025) 555 final.

75 ECF Proposal, Article 10(1).

76 Ibid, Article 10(3).

77 Proposal for a Regulation establishing Horizon Europe, the Framework Programme for Research and Innovation, for the period 2028-2034 laying down its rules for participation and dissemination, and repealing Regulation (EU) 2021/695 (**new Horizon Europe Proposal**), COM/2025/543 final, Article 20 provides that the EU preference provisions in the ECF would also apply for the Horizon Europe programme.

60. In addition, EU support under the ECF may take various forms (e.g. grants, loans, procurement, OPEX support, guarantees).[78] In particular, in accordance with Title VIII of the Financial Regulation, grants under the ECF would take the form of financing not linked to costs, thereby shifting towards result-based considerations, except where cost-based funding is necessary to achieve the desired objective.[79]

61. The importance of embedding strict pre-qualification criteria and linking funding to production output in EU funding programmes is further amplified by the **potential spillover effect on Member States aid schemes**. The Commission indeed encourages Member States to replicate in State aids the same requirements as in EU funding instruments.[80] This may also offer stronger basis for revising State aid guidelines to incorporate such conditions.

2.2. State aids

62. This section first presents the State aid legal framework (**2.3.1**) in order to highlight the main limitations under the existing framework (**2.3.2**), as well as potential pathways for leveraging State aids to disseminate EU preference criteria (**2.3.3**).

2.2.1. State aid legal framework

63. Articles 107 and 108 TFEU govern the granting of State aids by Member States. It is first important to define which types of measures qualify as State aid within the meaning of Article 107 (**a**) and then to analyse the circumstances under which State aid may be considered compatible with the internal market (**b**).

a. Measures qualifying as State aids

64. Under Article 107(1) TFEU, a measure constitutes State aid if it (i) is imputable to a Member State and involves a transfer of State resources (ii) confers an economic advantage on its recipients, (iii) is selective in nature, and (iv) potentially distorts competition and affects trade between Member States.

78 ECF Proposal, Article 12(6).

79 Ibid, Article 12(8). See also, new Horizon Europe Proposal, Article 10(4).

80 See e.g. Communication from the Commission Framework for State Aid measures to support the Clean Industrial Deal (Clean Industrial Deal State Aid Framework), C/2025/3602, para. 21: "Member States could in particular have regard to resilience requirements in EU funding instruments, such as the Innovation Fund."

65. The first condition means that Article 107(1) **only covers Member State measures**. "State resources" refer to all financial means that constantly remain under public control.[81] A positive transfer of funds does not have to occur; foregoing State revenue is sufficient. Conversely, measures that do not involve the transfer of public resources exclude the existence of State aid (e.g. legislation imposing minimum targets to buy or procure a certain number of zero-emission vehicles).

66. Funds provided directly by the EU do not constitute State resources and therefore do not fall within the scope of State aid control (see above **Section 2.1**). That said, EU funds may qualify as State aids where they are implemented under a system of **shared management**, i.e. where the Member States' authorities exercise control over the allocation of those funds and determine which projects to finance.[82] Projects financed through EU funds may also receive co-financing from Member States' resources, which could constitute State aids.[83]

67. The second condition, relating to the economic advantage, is met where a company or a sector receives an economic benefit which it would not have obtained under normal market conditions, in the absence of State intervention.

68. The third condition, relating to selectivity, requires that a measure favours certain companies or the production of certain goods over others in a comparable legal and factual situation. It operates as a discrimination test, distinguishing selective advantages from general economic measures. Individual aids are always selective; the question of selectivity only arises with respect to aid schemes.[84] A measure is considered selective if it derogates from the normal application of a general system, unless such differentiation is justified by the nature or structure of that system.[85]

69. State aid rules only apply where the beneficiary of a measure is an entity engaged in an economic activity (an "undertaking").[86] This typically covers **supply-side measures** (e.g. direct grants, subsidised loans, tax exemptions) targeting economic activities carried out by such companies. In that context, if eligibility to an aid scheme depends on compliance with "Made in EU" criteria, companies that do not meet these requirements are excluded, while compliant ones gain a selective advantage.

70. In some cases, **demand-side measures** may also qualify as State aids. For example, the Commission has issued specific guidance stressing that a national aid scheme exclusively targeting individual consumers such as ecological bonuses for low-emissions cars would not, in principle, trigger State aid control.[87] However, such aids may amount to **indirect State aid** where they result in favouring one or more manufacturers of alternative vehicles, for example where eligibility is linked to EU content requirements—thereby providing selective advantages to certain companies.[88] Furthermore, if the buyer is a company and the vehicles are used to perform economic activities, support for those vehicles may constitute State aid to that buyer.[89]

71. Finally, the fourth condition on competition distortion and affectation of intra-EU trade sets out two distinct, easily-fulfilled elements:

81 Case C-482/99, *Stardust Marine*, EU:C:2002:294, paras 37 and 52.

82 For example, for programmes managed and implemented by the EIB Group on behalf of, or together with, a Member State, funded by resources from national budgets, or by resources from the EU budget which flow through national budgets (European Structural and Investment Funds), or by a combination of those resources, State aid rules apply. It is also worth noting that EU funds such as the InvestEU Fund, while being under centralised management, foresee the contribution of Member States' resources under shared management via the "Member State compartment". Some of these contributions, imputable to State resources, may qualify as State aid.

83 Cumulation rules differ between different types of state aid/EU funds combination.

84 Joined Cases C-20-21/15 P, *World Duty Free*, EU:C:2016:981, para. 55; C270/15 P, *Belgium* v *Commission*, EU:C:2016:489, paras 49-50.

85 For instance, a national tax measure can constitute State aid even if it does not involve a transfer of State resources, provided it gives the recipients a more favourable position than other taxpayers, thereby conferring a selective advantage. Conversely, a tax advantage resulting from a general measure that applies without distinction to all economic operators does not amount to State aid under Article 107(1) TFEU (Joined Cases C-20-21/15 P, *World Duty Free*, EU:C:2016:981, para. 56).

86 Case C-222/04, *Cassa di Risparmio di Firenze*, EU:C:2006:8, para. 107.

87 Commission, DG COMP, Guiding template: Premiums for the acquisition of zero- and low-emission road vehicles (Recovery and Resilience Facility—State aid) (2023), pp. 2-3, available here. 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 aid directed at individuals using vehicles for private, non-economic purposes, does not qualify as State aid. See also, Commission, Guidelines on State aid for climate, environmental protection and energy 2022 (**CEEAG**), 18 February 2022, 2022/C 80/01, para. 171, citing "general measures aimed at promoting the acquisition of clean vehicles such as ecological bonus schemes or scrappage schemes" as examples of "other types of interventions than State aid".

88 Commission, Recovery and Resilience Plans, Example of component of reforms and investments—Clean, smart and fair urban mobility (2020), pp. 15-16, available here.

89 Commission, Guiding template: Premiums for the acquisition of zero- and low-emission road vehicles, p. 4.

a distortion of competition exists when a State grants a financial advantage to a company active in a liberalised sector subject to competition, while potential effects are sufficient to characterise an effect on trade.

B. Conditions under which State aids may be deemed compatible with the internal market

72. In principle, State aids meeting the above conditions are prohibited except for: (i) aids exempted from prior notification by Commission regulations under Article 108(4) TFEU[90] and (ii) aids declared compatible with the Treaties under Article 107(2) TFEU or considered compatible by the Commission under Articles 107(3) and 108.[91]

73. In particular, under Article 107(3) TFEU, the Commission may consider that the following aids are compatible with the internal market:

"(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest [...]"

74. All three subparagraphs are relevant, but most of the Commission's decisions on compatibility with the internal market are adopted on the basis of Article 107(3)(c). This provision requires a two-step legal assessment:

- First, the aid must facilitate the development of certain economic activities within the Union (positive condition). This generally implies an "incentive effect".[92]

- Second, the aid must not adversely affect trading conditions to an extent contrary to the common interest (negative condition). To assess this, the Commission examines the necessity, appropriateness and proportionality of the aid, and weighs up the expected positive effects of the aid and the negative effects it may have on the internal market.[93]

75. The Commission enjoys a **wide margin of discretion** in assessing whether these criteria are met and in declaring an aid compatible with the internal market.[94]

76. The Commission generally adopts **guidelines and frameworks** laying down how it will exercise its discretion in a particular area. Once the Commission has established guidelines, it cannot deviate from them in an individual case that falls into their scope.[95] These guidelines should not depart from the rules in the Treaty.[96]

77. In most cases, aids pursue one of the objectives for which the Commission has developed guidelines.[97] The existing guidelines relevant to this note are assessed below in **Section 2.2.2**. Guidelines usually set out in detail under which conditions the above compatibility criteria are met. Any aid falling with the scope of one of these guidelines and complying with the conditions set therein is presumed to be compatible with the internal market.

C. Other constraints on the authorisation of State aids and potential ways around

78. First, the Commission needs to respect general principles of EU law, such as equal treatment, transparency, necessity and proportionality.

90 Under Article 108(4) TFEU, the Commission adopted the De Minimis and the General Block Exemption (**GBER**) Regulations, which respectively exempt aids below a specific threshold and aids in certain sectors from notification to the Commission. Although the GBER is not analysed in depth in the present note, it could be revised to include EU conditionalities for the automotive sector, either as a new GBER objective or as an addition to the existing objectives.

91 Article 107(2) TFEU governs aids of social character, aids to repair damage caused natural disasters or exceptional occurrences and aids granted to support the reunification of Germany and is thus not applicable in the present case.

92 For example, an aid would have no such incentive effect where the subsidised activity is already compulsory under national law.

93 Necessity means that the aid must address "a situation where it can bring about a material development that the market alone cannot deliver"; appropriateness requires the aid is the suitable policy instrument to achieve its intended objective and that no less distortive policy or aid instrument is available to achieve the same result; proportionality implies that the aid amount per beneficiary is limited to the minimum necessary to carry out the aided project or activity.

94 Case 234/84, *Belgium v Commission*, EU:C:1986:302, para. 56; Case C-301/87, *France v Commission*, EU:C:1990:67, para. 49.

95 Case C-464/09 P, *Holland Malt*, EU:C:2010:733, para. 46; Case C-526/14, *Kotnik*, EU:C:2016:570, para. 40.

96 Case C-351/ 98, *Spain v Commission (RENOVE I)*, EU:C:2002:530, para. 53.

97 Aid that does not fit into any of the guidelines or frameworks may still be approved by the Commission on the basis of the conditions established in Article 107(3) TFEU.

79. Second, **aid that infringes rules of EU law cannot be declared compatible** with the internal market.[98] This concerns violations of both the Treaties or sector-specific legislation. For example, a Member State may not condition the granting of an aid to a requirement to use nationally produced goods or national services, as this would amount to violations of the free movement of goods under Article 34 TFEU.[99]

80. EU law compliance generally also implies that State aid measures must be consistent with the Union's **international obligations**, including WTO law:

- According to case law, EU legislation must, as far as possible, be interpreted in a manner that is consistent with international law.[100]

- In the past, the Commission has already refused to approve an aid scheme based on an EU Regulation that had been found incompatible with WTO rules by the WTO Dispute Settlement Body.[101]

- The Commission reaffirmed this requirement in the CISAF by encouraging Member States to include "additional conditions to address resilience objectives" and "European preference criteria", "as long as such conditions do not breach Union law including the Union's international obligations".[102]

81. "European content" conditionalities are a sensitive issue under WTO law. However, there are ways to design measures in a more WTO-compatible manner. It should also be noted that WTO rules have no direct effect within the EU legal order. This means that the CJEU cannot review the legality of EU acts in light of their WTO-law consistency.[103] Unless a specific provision of EU law seeks to implement a particular WTO obligation, the Court acknowledges the EU legislature's intention to adopt "an approach specific to the EU legal order".[104] In addition, interpretation in line with WTO rules **cannot override the clear wording of EU law provisions in the event of a contradiction with WTO law**. This would amount to interpretation *contra legem*, which is prohibited.[105] Therefore, it comes down to the EU legislature/Commission/Member States to decide whether they are willing to take such steps.

82. Third, in principle, **operating aids**, which offer support for a company's normal, recurring operating expenses, are excluded from the scope of aids that can be approved under Article 107(3) TFEU.[106] Such aids are generally considered not to facilitate the development of certain economic activities but merely to maintain them, and to carry important distortive effects on competition. However:

- Several Commission guidelines for clean tech manufacturing allow the ***ex ante* incorporation of expected operating costs** in the calculation of eligible costs or the funding gap, which forms the basis of an investment grant.[107]

- The Commission already **allows operating aid under certain frameworks**. For example, the CISAF allows temporary electricity price relief for energy-intensive industries that are exposed to international trade. The explicit objective is to address weakened international competitiveness due to higher energy costs and prevent relocation outside the EU.[108]

98 See e.g. Case C-156/98, *Germany v Commission*, EU:C:2000:467, para. 78.

99 Likewise, aids that are conditional upon a requirement for the beneficiary to have its headquarters in the Member State concerned or be predominantly established in that Member State are usually prohibited (see Commission, Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of IPCEI, 2021/C 528/02, para. 10). The Court has, however, upheld such eligibility criteria in aid schemes under Article 107(3)(b) provided they are justified by a legitimate objective and are necessary, appropriate and proportionate for achieving that objective (Case T628/20, *Ryanair v Commission*).

100 Case C-53/96, *Hermès International v FHT Marketing Choice BV*, EU:C:1998:292, para. 28.

101 Commission Decision of 24 April 2007 on State aid C 26/2006 (ex N 110/2006), temporary defensive mechanism to shipbuilding – Portugal.

102 Communication from the Commission Framework for State Aid measures to support the Clean Industrial Deal (Clean Industrial Deal State Aid Framework), C/2025/3602, para. 21. See also, Commission Staff Working Document Accompanying the CISAF, 4 November 2025, SWD(2025) 850 final, p. 26.

103 Case C-21/14 P, *Commission v Rusal* Armenal, EU:C:2015:494, para. 44.

104 Ibid, paras 45-46 and 48, also noting that "it is not sufficient ... for the preamble to an EU act to support only a general inference that the legal act in question was to be adopted with due regard for international obligations entered into by the European Union".

105 Erlbacher, "Article 207 TFEU" in Kellerbauer, Klamert and Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (2nd edn, OUP 2024), para. 69.

106 Case C-288/96, *Germany v Commission ('Jadekost')*, EU:C:2000:537, para. 90: "operating aid does not in principle fall within the scope of Article 92(3) [now Article 107(3)] of the Treaty" (citing Case T-459/93, Siemens, EU:T:1995:100, para. 48).

107 This methodology defines the maximum allowable aid by a "funding gap", namely the difference between discounted cost and revenues over the lifetime of a project. See also, Transport & Environment, Output-based support - production aid for cleantech, Q&A, June 2025.

108 CISAF, Section 4.5. See also, Commission Staff Working Document Accompanying the CISAF, 4 November 2025, SWD(2025) 850 final, p. 35.

- In addition, the Commission also permits **production aid**. In particular, the CEEAG allows aid in the form of contracts for difference for renewable energy generation—and now for climate mitigation projects.[109] The Commission also stated it will develop guidance for "output-based aid schemes" for industrial decarbonisation and energy efficiency measures.[110] While production aid remains distinct from operating aid, it ultimately supports the operation of the beneficiary.

83. Subject to the above constraints, the Commission retains significant flexibility to design guidelines aligned with common objectives defined at EU level, including to cover operating aid where justified—namely, where such aid contributes to the development of the sector in accordance with Article 107(3), rather than merely improving the financial position of beneficiaries.

2.2.2. *Current State aid frameworks relevant to clean tech manufacturing and the automotive sector*

84. In areas relevant to this analysis, the Commission has issued the following guidelines:

- The Guidelines on regional State aid (**RAG**),[111]
- The Framework for State aid for research and development and innovation (**R&D&I**),[112]
- The criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (**IPCEI**),[113]
- The Guidelines on State aid for climate, environmental protection and energy 2022 (**CEEAG**),[114]
- The Temporary Crisis and Transition Framework (**TCTF**) for State Aid measures to support the economy following the aggression against Ukraine by Russia, now repealed,[115]
- The Clean Industrial Deal State Aid Framework (**CISAF**), which replaces the TCTF and complements other frameworks like the CEEAG.[116]

85. These guidelines call for several comments.

86. First, while all these instruments pursue objectives of decarbonisation, competitiveness and resilience, **none introduces selection criteria or "EU-content" requirements** favouring the use of European-made equipment or components. In addition, it appears that no State aids approved by the Commission in the past years included conditions related to "Made in EU" requirements or intellectual property.[117]

87. Such requirements are at best encouraged: as stated above, the CISAF "strongly encourages" Member States to include in their tenders "additional conditions to address resilience objectives in particular with a view to strengthen the European value chain in clean technology contributing to the 40 % benchmark set by NZIA", including "European preference criteria".[118] France's inclusion of a resilience requirement limiting the share of components of Chinese origin in recent offshore-wind tenders, as mandated by Article 7 of Implementing Regulation 2025/1176 (which complements the NZIA), illustrates the need for prescriptive rules instead of mere encouragements.[119]

88. Second, with respect to clean tech manufacturing, these frameworks remain confined to investment-based support—that is,

109 The Commission recently approved Germany's Climate Contracts for Difference.

110 CISAF Working Document, p. 39.

111 Commission, Guidelines on regional State aid, 29 April 2021, 2021/C 153/01.

112 Commission, Framework for State aid for research and development and innovation, 28 October 2022, 2022/C 414/01.

113 Commission, Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, 30 December 2021, 2021/C 528/02.

114 Commission, Guidelines on State aid for climate, environmental protection and energy 2022, 18 February 2022, 2022/C 80/01.

115 Commission, Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, 17 March 2023, 2023/C 101/03, Section 2.8, paras 84 ff.

116 Commission, Framework for State Aid measures to support the Clean Industrial Deal, 4 July 2025, C/2025/3602, specifying the criteria the Commission will apply when assessing State aid measures that Member States intend to take to contribute to "further accelerate the roll-out of renewable energy, to deploy industrial decarbonisation, and to ensure sufficient manufacturing capacity of clean tech", to ensure such aids support "the development and resilience of European value chains".

117 See Transport & Environment, "State Aid 2.0, Lean, clean, European", p. 9.

118 Commission, Framework for State Aid measures to support the Clean Industrial Deal (Clean Industrial Deal State Aid Framework), C/2025/3602, para. 21.

119 Commission Decision of 5 August 2025 on State aid No.115764, CISAF, Régime de soutien à trois parcs éoliens en mer—France, C(2025) 5420 final.

CAPEX-related aid in the form of a lump sum calculated *ex ante* based on eligible investment costs per project. Although the funding-gap or eligible-cost calculation forming the basis of an investment grant may incorporate expected operating expenses, **no OPEX aid may be granted *ex post* or linked to actual production output under these frameworks**.

89. In particular, they do not cover aid tied to production volumes (e.g. a subsidy per panel, battery cell, or ton of product) intended to offset competitive disadvantages vis-à-vis third-country producers by compensating for higher marginal costs or remunerating production supporting the EU resilience goals.

90. For example, the CISAF only covers investment aid and excludes operating aid from its scope regarding clean tech manufacturing:[120]

- The framework—like other guidelines—maintains a project-by-project logic, relying on competitive tenders or administrative applications, and does not provide for automatic entitlement based on objective production or cost criteria.

- Even though the Commission itself acknowledges that EU clean technology manufacturers may face "unfair global competition, unexpected costs overruns, or uncertainties on future demand", the only flexibility admitted concerns market-based instruments, whereby Member States "may provide funding, including in the form of equity or quasi-equity instruments, on market terms and *pari passu* with private investors".[121] Such financing is not a subsidy but a commercial investment which may incidentally help cover operating costs. Consequently, CISAF confines State intervention for manufacturing to investment-related (CAPEX) measures or to market-conform co-investments, thereby ruling out recurring OPEX or output-linked support schemes. This contrasts with the approach taken with respect to temporary electricity price relief for energy-intensive industries (see above).

120 CISAF, para. 162: "Under normal market conditions, producers of clean technology should be able to cover their operating costs without any further public support, all the more so where their investment cost has already been subsidised. Operating aid has the potential to be particularly distortive as it can directly reduce the cost of goods or services provided on the market and maintain in the market operators that are loss-making on a long-term basis."

121 Ibid.

2.2.3. Potential pathways for leveraging State aids to disseminate EU preference criteria

91. As mentioned, operating or production-linked aid is not explicitly prohibited in the Treaty and is already allowed by the Commission for other sectors. The Commission could, in principle, extend its policy by adopting new guidelines defining objective, transparent and proportionate conditions for such support tied to Made in EU requirements—particularly where it would serve resilience or strategic-autonomy objectives consistent with the NZIA, the CRM and the CID (see above). Indeed, the Commission has announced, in the Industrial Action Plan for the European Automotive Sector, its intention to develop tailored conditions for foreign and domestic investments that reinforce European value chains, including criteria related to local content.

92. In that perspective, **revised or new sector-specific guidelines** should be envisaged for the automotive sector, setting out the conditions under which Member States may support EU-based clean tech manufacturing while remaining compatible with internal market and WTO rules. As mentioned, such guidelines could capitalise on future ECF rules.

93. Such a possibility could also be **embedded directly in EU legislation** to minimise legal risks and ensure that the "Made in EU" criteria—or at least the possibility for granting Member State public funding to projects meeting such criteria—are clearly defined and enforceable, providing legal certainty and predictability for both governments and industry.

2.3. Public procurement

94. EU rules on public procurement are currently under review, with advanced discussions on introducing EU preference criteria in pre-selection requirements or scoring systems.[122]

95. The CJEU recently confirmed that the existing framework neither mandates nor permits Member States to grant non-discriminatory access to third-country operators beyond the EU's international commitments under the GPA and FTAs. At the same time, Member States cannot adopt general measures restricting or

122 In accordance with Article 164 of the Financial Regulation, EU institutions apply the same standards as those imposed on Member States under the Directives 2014/23/EU (Concessions Directive) and 2014/24/EU (Public Procurement Directive).

denying such access, given the EU's exclusive competence in commercial policy.[123] Accordingly, the Court made clear that **the EU itself can exercise this competence to introduce EU preference requirements**–making EU-level action essential.[124]

96. Any introduction of EU preference in public procurement would, however, be constrained by the EU's international obligations under the GPA and FTAs. These commitments are currently incorporated in Article 25 of Directive 2014/24/EU,[125] which requires equal treatment in covered procurement. If this provision remains unchanged, for procurement procedures falling under those agreements, foreign suppliers benefiting from international commitments would have to receive the same treatment as EU suppliers under EU preference requirements.

2.4. Other types of support measures and EU rules on the free movement of goods

2.4.1. Relevant principles under EU law

97. In the absence of harmonised EU rules in a given area, national measures that may affect intra-EU trade in goods must be assessed under the Treaties.

98. Article 34 TFEU generally prohibits "quantitative restrictions on imports and all measures having equivalent effect" between Member States. This provision protects the free movement of goods within the EU internal market.

99. Article 34 encompasses a broad scope of measures, covering any national rule capable of hindering, directly or indirectly, actually or potentially, intra-EU trade.[126] This includes, *inter alia*, State aids–which must be consistent with the Treaties (see *above*)–but also use or marketing restrictions for certain goods[127] and measures restricting market access to products originating in other Member States.[128] This is notably the case where measures that equally apply to domestic and imported products 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.

2.4.2. Implications for measures based on "Made in EU" requirements

100. Measures incentivising or mandating EU content for clean-tech products or automotive goods (e.g. corporate-fleet requirements, social leasing schemes, obligations on the share of EU-recycled content in batteries) could raise concerns under Article 34. Although such measures would not intend to favour domestic production over imports from other Member States, the following issues may arise:

- While such rules do not necessarily favour domestic goods over imports from other Member States, they may impose a heavier burden on products originating from Member States where manufacturers may need to adapt their supply chain and production processes to meet the requirements.

- Depending on the regulating Member State and the level of European integration of its supply chain, the measure may in practice favour domestic production. In contrast, reverse discrimination (whereby a national measure adversely affects solely domestic goods) is not precluded by EU law.

101. However, restrictions to free movement of goods may be justified under Article 36 on grounds such as public policy, public security, or the protection of human health and life. The public security derogation has been frequently used to justify national measures protecting the security of supply of key products (oil and gas, telecommunications, energy)[129] or for strategically sensitive goods and dual use goods.[130] It

123 Case C-652/22, *Kolin*, EU:C:2024:910, para. 64; Case C-266/22, *CRRC Qingdao Sifang*, paras 58-59. The ultimate decision lies with individual contracting authorities.

124 Case C-266/22, *CRRC Qingdao Sifang*, EU:C:2025:178, paras 60-64.

125 See also, Articles 43 and 85(2) of Directive 2014/25/EU (Utilities Directive).

126 Case C-8/74, *Dassonville*, EU:C:1974:82, para. 5.

127 Case C-219/07, *Nationale Raad van Dierenkwekers en Liefhebbers*, EU:C:2008:353, para. 22.

128 Case C-591/17, *Austria v Germany*, EU:C:2019:504, paras 121-127.

129 Case C-648/18, *Hidroelectrica*, EU:C:2020:723, para. 36.

130 Case C-367/89, *Richardt*, EU:C:1991:376; Case C-70/94, *Werner*, EU:C:1995:328; Case C-83/94, *Leifer*, EU:C:1995:329.

could likely be extended to critical raw materials and other strategic goods within the meaning of the CMR Act and other recent EU texts (see above **Section 1.1.2**). Promoting R&D in the EU is also a valid policy objective.

102. Member States could seek to protect common EU interests rather than their own national interests. But taking harmonising measures at EU level and establishing a common metric for clean-tech content would ensure consistency, reduce litigation risk, and facilitate the functioning of the internal market. **Member State measures based on EU-defined metrics would then likely be less vulnerable to legal challenges**. Even a "Made in EU" criterion developed at EU level for limited purposes (e.g. funding eligibility) could potentially be reused by Member States in other contexts.

3. OPPORTUNITY OF A UNIFORM "MADE IN EU" DEFINITION

103. In addition to the legal frameworks analysed above, the introduction of "Made in EU" requirements—mandating minimum EU content for certain automotive goods, components, or technologies as a condition for EU and Member State support policies—can raise questions about coherence with existing EU rules on the definition of origin, depending on the chosen approach.

104. Two main options emerge:

- **Adopt specific rules of origin for each relevant product in a dedicated legal instrument.** This instrument would serve as a common metric applied exclusively for selected regulations favouring EU goods and could also guide Member States in designing domestic support policies. These requirements could draw inspiration from preferential rules of origin in FTAs,[131] which often include tailored criteria for specific products or components. The Industrial Accelerator Act could empower the Commission to adopt such rules through implementing acts. Illustrative provisions could read:
  - *"For the purposes of the implementation of the acts referred to in [•], [**product**] shall be deemed to originate from the Union if the following conditions are met: [•]."*
  - *"For the purposes of this [**Regulation/Directive/Guidelines/other**], references to the country of origin shall be construed by reference to [**act defining the specific rules of origin**]."*
- **Introduce EU content requirements or conditionalities on a case-by-case basis within different EU instruments.** This approach offers greater flexibility and could help minimise incompatibilities with WTO law, while enabling targeted action where needed. However, it may result in a more fragmented legal framework.

105. Such rules could be considered as creating a specific definition of EU origin for the products concerned, deviating from the generally applicable rules.

106. The general definition of "EU origin" is governed by the non-preferential rules of origin set out in Article 60 of the Union Customs Code (**UCC**).[132] According to this provision:

> "1. Goods wholly obtained in a single country or territory shall be regarded as having their origin in that country or territory.
>
> 2. Goods the production of which involves more than one country or territory **shall be deemed to originate in the country or territory where they underwent their last, substantial, economically-justified processing or working**, in an undertaking equipped for that purpose, **resulting in the manufacture of a new product or representing an important stage of manufacture**."

107. This definition applies broadly across sectors and is used for customs and trade purposes, as well as any "other Union measures relating to the origin of goods".[133]

108. Here, the objective is to develop standalone definitions of EU origin for certain goods in the automotive sector, which would deviate

131 Preferential rules of origin determine a product's origin for the purpose of applying trade preferences, such as reduced tariffs under FTAs, while non-preferential rules of origin are used to determine the country of origin for applying most-favoured nation tariffs (i.e. the standard rates a country offers to all WTO members unless a preferential agreement exists) and other trade policy measures.

132 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

133 UCC, Article 59(c). See for example the references to the UCC for determining the country of origin in resilience contribution under the NZIA (Articles 26(2), 28(4), 29(2)).

from the non-preferential rule of origin set in Article 60(2) UCC for manufactured products, to ensure higher degrees of localisation.

109. That said, there appears to be **no inherent inconsistency between Article 60 UCC and the use of "Made in EU" eligibility requirements** in EU public support frameworks:

- These definitions would not replace the existing non-preferential rules of origin applicable to the products concerned under customs law.
- The new definitions would be used exclusively for the purposes of certain EU policies, to introduce "Made in EU" requirements in the granting of public funding for manufacturing of end or supply chain components, as well as in other public support measures. Rather than an actual labeling regime determining EU origin (e.g. defining when a battery pack or cell is considered to originate from the EU), "Made in EU" requirements would apply in particular contexts, serving as eligibility criteria or broader legal requirements. Their role would be to determine whether a product qualifies for EU and Member State support.
- The CJEU already confirmed that specific EU policies may deviate from general rule of origin existing for a given product under the Union Customs Code.[134]

An illustrative example is found in the pre-qualification or award criteria to assess resilience under the NZIA for renewable energy auctions.[135] Normally, such criteria—which aim to reduce EU dependence on technologies or components from a single third country—rely on the origin of the final product. However, for photovoltaic (PV) technologies, the Commission refers to the place of assembly rather than origin, alongside origin requirements for specific components.[136] This is because under non-preferential rules of origin, a module assembled in the EU from Chinese cells would still be considered Chinese. The Commission expressly departs from this standard customs definition by focusing on assembly, to ensure that manufacturing steps performed in the EU count towards resilience.[137]

110. These frameworks may therefore deviate from the general rule of origin without conflicting with it, as they would serve different legal and policy functions. The main challenge would lie in ensuring compliance with WTO and FTA commitments.

134 Case C-686/17, *Zentrale zur Bekämpfung*, EU:C:2019:659, paras 46-48. See e.g. Implementing Regulation 2025/1176, Recital 10.

135 NZIA, Article 26; Commission Implementing Regulation (EU) 2025/1176 of 23 May 2025 specifying the pre-qualification and award criteria for auctions for the deployment of energy from renewable sources, Article 7.

136 Commission Implementing Regulation (EU) 2025/1176, Article 7(1)(a): "For PV technologies, the final products are not assembled in that third country and at least four main specific components used do not originate in that third country. The PV inverters and the PV cells or equivalent do not originate and the PV modules are not assembled in that third country."

137 Ibid, Recital 10.

APPENDIX 1 – OVERVIEW OF THE MAIN EU FUNDING INSTRUMENTS RELEVANT TO CLEAN TECH MANUFACTURING AND THE AUTOMOTIVE SECTOR

Instrument

HORIZON EUROPE

Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe—the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination.

See also: Council Decision (EU) 2021/764 of 10 May 2021 establishing the Specific Programme implementing Horizon Europe – the Framework Programme for Research and Innovation.

See also: Communication from the Commission on A dynamic EU Budget for the priorities of the future - The Multiannual Financial Framework 2028-2034, COM(2025)570 final, 16 July 2025.

See also: General Annexes of the Work Programme 2023-2025 of Horizon Europe, available here.

Presentation

Horizon Europe is the EU's key funding programme for research and innovation.

The current research and innovation programme runs from 2021 to 2027 with a financial envelope of €85.5 billion.

This envelope is funded by the EU's own resources, mainly through grants awarded following a tendering procedure published by the EU.

On 16 July 2025, the European Commission proposed a new Horizon Europe 2028-2034.

This fund is **managed by the European Commission**.

Grants are the main form of support under the programme, but funding may also be provided through prizes, procurement, and financial instruments within blending operations—which combine non-repayable support and/or financial instruments from the EU budget with repayable support—and equity support (Art. 6(2) of Regulation 2021/695).

Eligibility criteria (beneficiary)

Under Art. 23 of Regulation 2021/695, legal entities eligible for grants must be **established in a Member State** or an associated country. This also applies to blended finance (Art. 46(3)).

Conversely, any legal entity, regardless of its place of establishment (incl. third countries) may participate in actions under the programme—e.g. through a consortium (Art. 22(1)). However, Article 22(5) and (6) would allow for additional criteria for projects affecting security, defence or public order (in particular the strategic assets and interests of the EU or its Member States), including in relation to foreign-controlled EU entities.

Eligibility and award criteria (project)

Under Art. 18, actions eligible for funding involve research and innovation activities implementing the objectives referred to in Article 3 (e.g. strengthen the EU's scientific and technological bases and foster industrial competitiveness; deliver on EU strategic priorities and contribute to the realisation of EU objectives and policies; tackle global challenges such as climate change).

Award criteria must relate to the action's excellence, impact, and quality and efficiency of the implementation (Art. 28(1). But specifications to these criteria and additional criteria may be included in the work programmes (Art. 28(3)).

Thus, there is no explicit EU preference foreseen, but strategic autonomy and sovereignty considerations may indirectly favour EU-based production in certain sectors.

Article 20 of the Commission proposal for a new Horizon Europe provides that the EU preference provisions in the European Competitiveness Fund regulation (see below) would also apply for the Horizon Europe programme.

Eligible costs

Art. 36 describes the eligible cost as follows:

- in case of project-based remuneration, personnel costs are eligible up to the remuneration that the person would be paid for work in R&I projects;
- costs of resources made available by third parties by means of in-kind contributions shall be eligible.

Operating grants are allowed under the Horizon Europe programme.

In addition, Art. 36 refers to Art. 186 of the Financial Regulation (now Art. 189) which describes, in general terms, what costs are eligible under EU grants. This includes indirect costs operating such as operating costs.

Instrument

INNOVATION FUND

Commission Delegated Regulation (EU) 2019/856 of 26 February 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council with regard to the operation of the Innovation Fund

Presentation

The Innovation Fund focuses on highly innovative clean technologies and big flagship projects with European added value that can bring significant emission and greenhouse gas reductions.

This Fund is financed by EU Emissions Trading System revenues (Art. 10(a) of Directive 2003/87/EC).

The Innovation Fund is **managed centrally at the EU level**, by the European Commission, although certain specific tasks are delegated to implementing bodies.

The fund **generally awards grants** through calls for proposals and through competitive bidding procedures (auctions), but support may also take the form of contribution to blending operations under the Union investment support instrument, as well as any of the other form laid down in the Financial Regulation such as prizes and procurement (Art. 4 of Commission Delegated Regulation 2019/853).

Eligibility criteria (beneficiary)

Support under the Innovation Fund is available to **any legal entity registered in countries in the EEA that participates in the EU ETS**.

Eligibility and award criteria (project)

Innovation Fund projects are located in the EU, Liechtenstein, Iceland, and Norway.

Under Art. 11, grants shall be awarded based on the following criteria:

- participates in the carbon neutrality policy;
- degree of innovation;
- maturity of the project, which must be completed four years after the award decision;
- reproducibility and circularity of the project;
- amount plus any other public support that is part of the project's financial model, divided by the total projected amount of greenhouse gas emissions to be avoided in the first 10 years of operation.

Moreover, Art. 11(3) allows the inclusion of additional award criteria or requirements in sector-specific calls for proposals, to assess a project's contribution to Green Deal goals, including the "potential contribution of the proposed projects to the EU's access to a secure and sustainable supply of net-zero technologies needed to safeguard the resilience of the EU's energy system and to contribute to the creation of quality jobs."

There is **no explicit EU preference**, but strategic autonomy and sovereignty considerations may indirectly favour EU-based production in certain sectors (see Art. 11(3) above).

Eligible costs

The fund provides investment support that covers both CAPEX and OPEX. Beneficiaries can receive funding for up to 60% of their relevant costs including OPEX (Art. 10a(8) of the ETS Directive).

Instrument

INVESTEU

Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme.

Presentation

The InvestEU Fund provides an EU **guarantee** to support financing and investment operations that contribute to objectives of the Union's internal policies.

This is achieved by mobilising public and private financing sources. InvestEU is currently the main EU-level tool to leverage private funding.

The EU guarantee is granted on demand and takes effect through the entry into force of individual guarantee agreements with implementing partners.

The EU guarantee is €26.2 billion (Art. 4 of Regulation 2021/523) funded by NextGenerationEU resources and the multiannual financial framework (2021–2027).

This financial guarantee is granted to public financial institutions that can provide debt or equity financing that would not have been granted without a guarantee or would have been granted for lower amounts.

The InvestEU Fund supports private and public investments in four policy areas:

- sustainable infrastructure; research (€9.9 billion);
- innovation and digitisation (€6.6 billion);
- small and medium-sized businesses (€6.9 billion);
- and social investment and skills (€2.8 billion).

InvestEU guarantee is **implemented in indirect management** (Art. 6(1)) through operations carried out by the implementing partners, namely the EIB (Art. 11) and other implementing and advisory partners (e.g. Caisse des dépôts, Instituto de Credito Oficial).

Other forms of Union funding under InvestEU shall be implemented in direct or indirect management in accordance with the Financial Regulation (Art. 6(1)).

Eligibility criteria (beneficiary)

Under Art. 14(3), eligible entities must be established in:

- a Member State;
- a third county associated to the InvestEU Programme (see Art. 5); or
- acceding countries, candidate countries and potential candidates, countries; or
- in other third countries when necessary for projects in the above territories.

Eligibility and award criteria (project)

Under Art.14(1), the InvestEU Fund only supports operations that:

- respect the Financial Regulation, in particular Art. 212 (presenting the rules governing the proper management of financial instruments and budgetary guarantees);
- contribute to EU policy objectives and fall within the scope of eligible areas listed in Annex II (e.g. circular economy integration in production and product life cycle, research in key enabling technologies, recycling and manufacturing facilities for ICT components and devices, sustainable supply of primary and secondary raw material);
- are consistent with the investment guidelines, and;
- are not excluded activities under Annex V.

InvestEU mainly benefits **projects located in the EU**, but support can also be granted to cross-border projects involving Member States and certain third countries, and investment operations in third countries that contribute to specific financial products (Art. 14(2)).

Under Art. 14(3) InvestEU shall only benefit a final beneficiary established in a third country to the extent that this is necessary for the financing of a project in a Member State, a third country associated with the InvestEU programme, or an acceding countries, candidate countries and potential candidates

However, there is **no explicit EU preference**.

Eligible costs

Art. 16 explains that

the EU guarantee may be used towards risk coverage for the following types of financing provided by the implementing partners (if these financing have been granted, acquired or issued for the benefit of financing and investment operations referred to in Art.14(1)): loans, guarantees, counter-guarantees, capital market instruments, any other form of funding or credit enhancement, including subordinated debt, or equity or quasi-equity investments, provided directly or indirectly through financial intermediaries, funds, investment platforms or other vehicles to be channelled to final recipients.

Instrument

EUROPEAN INVESTMENT BANK

Article 309 TFEU

Protocol (No 5) on the Statute of the European Investment Bank

See also European Investment Bank Climate Action and Environmental Sustainability. List of eligible sectors and eligible criteria, 20 June 2024 which refers to the EU Taxonomy

See also Climate Bank Roadmap Phase 2 2026-2030

Presentation

Support from EIB focuses on long-term financing for large-scale projects in infrastructure, innovation and climate action.

Finance and advisory solutions are designed to support investments and businesses throughout different development stages.

As for loans, the bank grants loans for periods of approximately four to twenty years, depending on the economic life of the assets to be financed. Information on the financial terms and conditions of the loans is confidential.

As a general indication of the accessibility of EIB's support, the Bank explained that their support are available in all EIB regions of activity, with the exception of:

- some of their guarantees, which are only available in the EU and select countries;
- venture debt and credit enhancement for project finance are only available in the EU.

Type of support:

- Direct loans;
- equity;
- guarantees;
- direct equity and venture debt;
- risk-capacity instruments;
- bond purchases;
- intermediate loans.

Eligibility criteria (beneficiary)

As for direct loans, eligible criteria read as follow:

(i) Large corporates or groups

(ii) Mid-caps

(iii) Special Purpose Vehicles for project finance (including PPPs and Concessions)

There are **no restrictions based on EU incorporation / nationality**.

Eligibility and award criteria (project)

Under Article 309 TFEU, EIB loans and guarantees must finance projects that:

(i) develop less-developed regions;

(ii) modernise or convert business or create new activities needed for the internal market when projects are too large for national financing, or

(c) support major projects of common interest to several Member States.

In the EIB Group 2024-2027 Strategic Roadmap, the EIB sets eight core strategic priorities.

- Climate action and environmental sustainability
- Digitalisation and technological innovation
- Security and defence
- A modern cohesion policy
- Agriculture and bioeconomy
- Social infrastructure
- High-impact global investment
- Capital Markets Union

Projects must pursue one of these to obtain support from the bank.

The EIB stated that its strategic priority on climate should be aligned with the Clean Industrial Deal and support European leadership in key markets, in particular clean technologies.

Eligible costs

As for direct loans, eligible costs are investment costs (typically over a period of up to three years, but can be longer), such as for research and development expenditures on facilities or activities. The EIB typically covers up to 50% of a project's total cost. These loans typically start at €25 million and in certain cases the EIB will consider lower amounts. This covers anticipated OPEX.

Instrument

EUROPEAN COMPETITIVENESS FUND (ECF)

Proposal for a Regulation on establishing the European Competitiveness Fund (**ECF**), including the specific programme for defence research and innovation activities, repealing Regulations (EU) 2021/522, (EU) 2021/694, (EU) 2021/697, (EU) 2021/783, and amending Regulations (EU) 2021/696, (EU) 2023/588, COM(2025) 555 final

Presentation

The ECF aims at reinforcing Europe's competitivenesss by investing to assess a project's contribution to Green Deal goals, secure net-zero tech supply, energy-system resilience, and quality jobs. It will focus its support on four areas:

(i) clean transition and decarbonisation

(ii) digital transition

(iii) health, biotech, agriculture and bioeconomy

(iv) defence and space.

Type of support covers the entire financial toolbox provided by the Union budget (including loans, grants, equity, quasi-equity, blending, procurement and guarantees). The choice of the specific funding instrument and in particular whether support will be repayable or not, shall depend on the nature of the actions to be funded (for example underlying market failures, the specific need, the nature of the industry, the stage of development or type of beneficiary).

Eligibility criteria (beneficiary)

Article 9 of the Proposal sets criteria for eligibility including one concerning the entity eligible which must be **established** in:

(i) a Member State;

(ii) an associated third country;

(iii) non-associated third countries if this funding contributes to increase European competitiveness.

Article 9(5) recalls that the work programme or the documents related to the award procedure may further specify the eligibility criteria set out in this Regulation or set out additional eligibility criteria for specific actions.

Article 10(3) would allow additional criteria in cases where projects have an impact on security, defence or public order (in particular the strategic assets and interests of the Union or its Member States), including criteria relating to the origin of investors, regardless of the place of establishment of the direct beneficiary (EU or foreign).

Eligibility and award criteria (project)

Article 9(4) provides that some activities are not eligible, including:

(i) unlawful activity;

(ii) activities already fully financed from other public or private sources.

The proposal would introduce a "European preference" provision, pursuing the objective to target development manufacturing and exploitation in the Union of strategic technologies and sectors (Art. 10(1)).

Article 10(2) specifies that eligibility rules may protect EU competitiveness and autonomy, using **preferential conditions for EU entities** while avoiding single-market distortion, such as:

- participation and performance restrictions requiring participating entities to be established, use facilities, or perform activities in the Member States;
- beneficiaries of funding may not, for a certain period of time, directly or indirectly transfer all or part of the operations, results or related access and use rights, including licensing, from an eligible Member State or associated country to an ineligible third country. Failure to comply may result in the reduction of Union funding and may lead to its recovery in whole or in part;
- Imposition of supply and content restrictions requiring recipients of ECF funding to guarantee minimum use or supply of equipment, supplies and materials, or their components;
- Imposition of control restrictions requiring beneficiaries to acquire and/or retain the ability to make decisions without restrictions imposed by ineligible entities.

Eligible costs

Recital 4 of the Proposed Regulation provides that EU funding offers support to businesses and projects "along the entire investment journey", including "the necessary investment and operational costs support".

Moreover Art. 34 of the Proposed Regulation provides that in the area of energy efficiency and clean energy transition, EU support may cover up to 100% of the eligible costs.

BALDON AVOCATS

LEGAL ANALYSIS

Nikos Braoudakis nbraoudakis@baldon-avocats.com

Clémentine Baldon cbaldon@baldon-avocats.com

Juliette Robert jrobert@baldon-avocats.com