Global Counsel

The politics behind investment screening in the post-covid EU

Blog post by Associate Alessandro Gangarossa, 15 April 2020

One year after the EU adopted its first framework on foreign investment screening, the covid-19 crisis is prompting EU capitals to tighten their investment screening mechanisms in material ways. In many cases, these changes are an acceleration of an existing trend rather than genuine emergency measures – and as such may point towards a structural rather than a temporary change.

On March 25th, the European Commission issued guidelines in an attempt to coordinate an EU-wide approach to foreign investment screening. It called for the 13 member states that do not have screening regimes to create them, and for all member states to make full use of existing tools. This is a striking position from a commission that has historically been cautious on endorsing investment screening.

The 2019 regulation sought to incentivise cooperation and coordination on investment screening among member states and maintained that cautious posture by setting a narrow framework for its application. The von der Leyen Commission clearly thinks the weather has changed, something it signalled in its intent to be a “geopolitical” commission tasked with defining and defending the EU’s strategic autonomy and technological sovereignty.

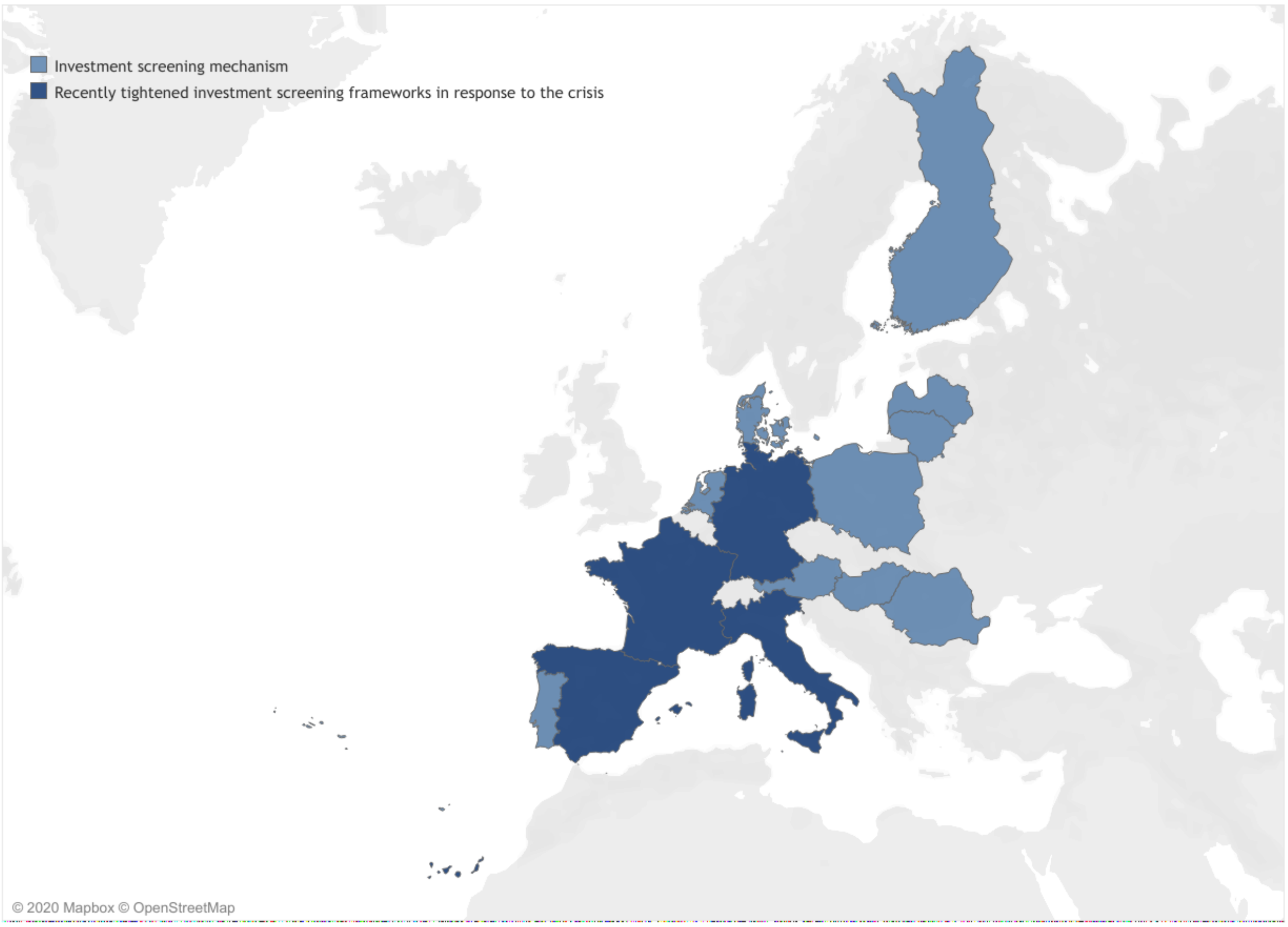
As much as the commission is keen to coordinate the action, however, the crisis so far is showing just how much control over investment policy is firmly in the hands of EU capitals. In the past couple of weeks, Madrid, Rome, Paris and Berlin have revamped their different scrutiny mechanisms to shield their domestic champions from foreign takeovers at cheap prices. While the attention is currently focused on essential infrastructures and medical equipment, policymakers in these capitals will be tempted to widen the scope quickly of what is defined “critical” and “strategic”. The concept of technological sovereignty can expand to the wider economy.

Notably, despite the relatively more solid position of the country’s economy, even the federal government in Berlin has agreed to review its screening mechanism. As the German Industry Minister Peter Altmaier put it, the “very liberal” Foreign Trade and Payments Act will be tightened by lowering the threshold of share value involved in the operations necessary for the government to intervene. Inevitably, this political paradigm will inform the debate around EU industrial strategy, the trade agenda, and competition policy as Germany takes over the rotating presidency of the EU Council in July.

The Italian case is particularly revealing of this approach. Similar to other screening mechanisms, it allows the government to veto, or to limit with specific conditionalities, operations carried out by foreign entities on domestic assets considered of strategic interest. The changes introduced last week significantly extend the government’s scrutiny powers. Not only life sciences, food supply chains, and finance will be under the revised remit of the regulation, but also water, energy and transport infrastructure, artificial intelligence, robotics, semiconductors and cybersecurity. The most significant novelty is that Rome will explicitly apply the revised “golden power” framework to intra-EU operations as well. It cannot be excluded that others may be tempted follow suit.

As the crisis unfolds, we will move into a new, but old, world. As governments will still be eager to attract foreign investment, in particularly those in need to revamp their flatlining economies, this won’t lead to a return to economic autarky or outright protectionism. But a more mercantilist attitude, in which the boundaries of 'national security' and 'strategic interests' are increasingly evolving and becoming blurred, should be expected. Investors will need to be even more sensitive to political risk in cross-border transactions as well as policy uncertainty and fragmentation among member states.

Investment screening in the EU27



Source: European Commission
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