

'Gold-Plating' in the transposition of EU Law
'Gold-Plating' na transposição da legislação da UE

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Abstrac:

This paper has the purpose of discussing some of the main aspects concerning *gold-plating*, focusing on concepts, cases and possible solutions. The investigation aims to analyse some theoretical elements regarding the main concept of gold-plating, including the historical view and case studies, and also discussing measures adopted by Member-States to deal with the matter, namely transparency procedure and repeal of over transposition, as well as best practices to help minimizing the negative aspects of gold plating's practices.

Keywords:

gold-plating; transposition; applying EU law; better regulation; law-making.

Resumo:

Este artigo tem o propósito de discutir alguns dos principais aspectos relativos ao 'gold-plating', focando em conceitos, casos e possíveis soluções. O objetivo da investigação é analisar alguns elementos teóricos a respeito do conceito principal de 'gold-plating', incluindo a visão histórica e estudos de casos, e também discutir medidas adotadas pelos Estados-membros para lidar com o assunto, ou seja, procedimento de transparência e revogação de transposição excessiva, bem como melhores práticas para ajudar a minimizar os aspectos negativos das práticas de 'gold-plating'.

Palavras-chave:

gold-plating; transposição; aplicação da legislação da UE; melhor regulamentação; processo legislativo.

Submission: 24/07/2021

Acceptance: 20/08/2021

Introduction

The European Commission, in its latest communication on better regulation, emphasised the difficulty in identifying national provisions implementing EU legislation that goes beyond what is required by that legislation, even with compliance checks¹. There is no specific EU legal instrument yet to address this issue. Agreements, action programs, communications, reports and non-binding documents (soft law) provide for suggestions of best practice for the purpose of guidance to national legislators dealing with over-transposition. A substantive understanding about this phenomenon often called *gold-plating* is necessary.

Difficulties also arise in the practical treatment of *gold-plating* in national government spheres. What is the best way to conceptualise the *gold-plating*? What measures should be taken by Member-states to address excessive transposition?

Member-states have large discretion when transposing EU directives and implementing EU regulations. Over time, the concept has gained wider importance and is used for several phenomena in implementation of EU legislation. This could prove problematic as if we use a broad definition it will lead to difficulties in identifying what are the behaviours that should be avoided and if a extremely broad definition is used, so many measures fall within the concept *gold-plating*. Apart from the conceptual issue, Member-states consider that *gold-plate* EU rules leads to a loss of competitiveness vis-à-vis other Member-states, so the question is what legal instruments are available to avoid or correct this excessive transposition.

This article discusses some of these aspects about *gold-plating*. It focuses on some controversial issues: concept, cases and measures to improve. It aims to enhance some of

¹ Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of The Regions Better regulation: Joining forces to make better laws, COM/2021/219 final, Brussels, 29.4.2021, p. 20.

their aspects and bring nuances to others. It discusses some theoretical elements regarding the concept, including the historical view and case studies, also discusses some measures adopted by Member-States to deal with *gold-plating*, namely transparency procedure and repeal of over transposition, as well as best practices to help minimizing the negative aspects of gold plating's practices.

1. An initiation on Gold-Plating: concept and historical development

In order to be able to address the “gold-plating” issue and conceptualize it, it is necessary to briefly explain the main legal acts of European Union (EU) legislation. The goals established in the EU treaties are materialized by different secondary legislation: Regulations, Directives, Decisions, Recommendations and Opinions.²

With the intention of developing an efficient single market, similar rules are needed in all Member-States.³ In this sense, directives are one example of European legislative legal act that set specific goals that must be achieved by all Member-States, but, unlike regulations, it is not immediately enforceable, as it need to be transposed into national law.⁴ However, despite of being binding and directly applicable in the Member-States as a rule, exceptionally, EU Regulations need the adoption of measures to be adequately implemented considering the specific circumstances of each of the European countries.⁵

Notwithstanding of being created together, EU legislation need to be implemented into the countries' national legal systems in a remarkably similar way, which enable all the EU Member-States to pursue the same purpose with equitable burdens and costs.⁶

² K. ATTHOFF and M. WALLGREN, *Clarifying Gold-Plating: Better Implementation of EU Legislation*. Board of Swedish Industry and Commerce for Better Regulation (NNR) and the Swedish Better Regulation Council (Regelrådet), 2012, p. 13, Available at: https://nnr.se/wp-content/uploads/Clarifying_gold_plating_november_2012.pdf; European Union. Regulations, Directives and other acts. Available at: https://europa.eu/european-union/law/legal-acts_en.

³ ATTHOFF and WALLGREN, *Clarifying*, p. 8.

⁴ V. MILLER and C. FRETEN, *The European Union: a guide to terminology, procedures and sources*. House of Common's Library, SN/IA/3689, 2005, Available at: <https://web.archive.org/web/20100612213147/http://w4mp.org/html/library/standardnotes/snia-03689.pdf>.

⁵ ATTHOFF and WALLGREN, *Clarifying*, p. 13.

⁶ ATTHOFF and WALLGREN, *Clarifying*, p. 8, 9 e 14.

However, different companies all over Europe complain about these regulations, as it would create disproportional obligations and competitive disadvantages.⁷

Nevertheless, sometimes, these additional burdens are not a result of the EU legislation but created by extra provisions brought by national governments in the implementation process, exceeding the original regulation, but within legality.⁸ Data from an European Commission Report revealed that at least 32% of administrative burdens of European origin resulted from decisions of Member-States that go beyond what is required by the EU legislation.⁹

In this background, the term “gold-plating” is developed, usually associated with the national **implementation of EU legislation beyond the minimum necessary to comply with it**.¹⁰ The issue was a frequent topic of discussion in the United Kingdom over the last fifteen years, when the country was still an EU Member-State.¹¹ However, over time, different interpretations of the concept, with different levels of scope, were developed, which created legal uncertainty of what it would cover.¹² For a better understating of the gold-plating problem, it will be necessary to briefly expose its origin and historical development to finally comprehend its currently concept.

1.1. Origin and historical development

The notion of gold-plating derives from the United Kingdom (UK), used in the sense of national law that places burdens on business not required by the EU legislation, but had also a clear influence of a cross-fertilization¹³ between UK, the Netherlands and, more recently, European Union.¹⁴ The first well-known reference to the term is dated of 2001

⁷ E. DI FRANCO, *Gold-plating: how EU States over-regulate themselves and then blame Brussels*, published on April 15, 2018. Available at: <https://mycountryeurope.com/politics/european-union/gold-plating-regulate-blame-brussels/>.

⁸ ATTHOFF and WALLGREN, *Clarifying*, p. 9.

⁹ European Commission, *Study to analyse differences in costs of implementing EU policy: a project under DG Environment's Framework contract for economic analysis*, ENV.F.1/FRA/2010/0044, 2015, Available at: https://ec.europa.eu/environment/enveco/memberstate_policy/pdf/Differences%20in%20costs.pdf.

¹⁰ DI FRANCO, 2018.

¹¹ A. SANCHEZ-GRAELLS, “The Implementation of Directive 2014/24/EU in the UK”, in S. TREUMER & M COMBA (eds), *European Procurement Law Series*, Vol. 8, Edward Elgar, 2018, Available at: <https://ssrn.com/abstract=2947939>.

¹² ATTHOFF and WALLGREN, *Clarifying*, p. 9.

¹³ Cross fertilization is an specific term to define the mixing of ideas and customs of different places or groups of people to produce a better result; Oxford Dictionary. Available at: <https://dictionary.cambridge.org/dictionary/english/cross-fertilization>.

¹⁴ L. SQUINTANI, *Beyond Minimum Harmonisation: Gold-Plating and Green-Plating of European Environmental Law*, Cambridge University Press, 2019, pp. 13–71.

during the Director General of the Confederation of British Industry's speech entitled "no more gold-plating". However, research founded other references since after the accession of UK to the old European Economic Communities in 1973.¹⁵

Nowadays, the expression of "gold-plating" is defined by European Union in the context of Better Regulation Agenda,¹⁶ but it was directly influenced by the definitions created before by United Kingdom and the Netherlands during the years of deregulation.¹⁷ These two countries were the only ones to explicitly define the concept, which was followed by European Union,¹⁸ as we will see in the next topics.

a) United Kingdom

At present, United Kingdom is no longer a member of European Union, but the country was essential in the development of the notion of gold-plating, which is why it is still important to address its understating of the term.¹⁹ Attention to this phenomenon in the British territories increased during the 1990s and 2000s, when a great number of reports about a better regulation were related to the idea of gold-plating.²⁰

Yet, the focus on the problem grew even more in 2010 with the beginning of the government of former Prime Minister David Camaron, who introduced the "One-In/One-Out" method of law making also in the context of better regulation. This programme brought the rule that no new legislation, able to affect business, could be implemented if an old, with at least an equivalent administrative burden, was not eliminated.²¹

Furthermore, with the will to address the gold-plating problem, the British Government developed a guideline for policy makers and lawyers of how to implement EU legislation, especially Directives,²² last updated in February 2018. The document was

¹⁵ SQUINTANI, *Beyond*, p. 13.

¹⁶ European Commission's Better Regulation website: https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en.

¹⁷ The two countries passed through a period of deregulation, in other words, a process of removing or reducing state regulations, that happened during the end of the 20's century, as will be better explained in the following topics; SQUINTANI, *Beyond*, p. 15.

¹⁸ SQUINTANI, *Beyond*, p. 14.

¹⁹ Although the United Kingdom is no longer a Member State of the European Union, after the completion of the Brexit process on 1 January 2021, the UK has played an important role in the development of the "gold-plating" term over the years. The fact that the country is no longer an EU Member State does not delegitimize its importance over the years.

²⁰ SQUINTANI, *Beyond*, p. 15-16.

²¹ SQUINTANI, *Beyond*, p. 16.

²² ATTHOFF and WALLGREN, *Clarifying*, p. 28.

called “Transposition Guidance: How to implement European Directives effectively”²³ and was based on certain principles. One of them defined that the organization responsible for implementation of EU legislation should not do more than the minimum required in the Directive, unless there are very special reasons to do so²⁴ – if this is the case, it must be clearly and well justified.²⁵

Thus, as a consequence of the abovementioned guidelines, UK defined “gold-plating” as a national implementation that goes beyond the minimum necessary to comply with the EU Directive by, for example: (i) extending the scope, adding to the substantive requirement, or substituting wider UK legal terms for those used in the Directive; (ii) not taking full advantage of any derogations which keep requirements to a minimum; (iii) retaining pre-existing UK standards where they are higher than those required by the Directive; (iv) providing sanctions, enforcement instruments and matters, such as burden of proof, which are not aligned with the principles of good regulation; (v) implementing early, before the deadline defined by the Directive^{26 27 28}.

b) The Netherlands

Around the same time as the United Kingdom, the Netherlands began to address the issue of "gold-plating" as well. In 1975, the Ministry of Economic Affairs established a working group together with the business associations to simplify fiscal and social regulations that were affecting small and medium enterprises. After concluding that the levels of administrative burdens were uncontrollable in 1998, the government also created the Advisory Board on Administrative Burdens, institution responsible to advise the government on gold-plating cases since 2003.²⁹

²³ The document was withdrawn on 1st January 2021 due to the conclusion of the Brexit's process; The Government of the United Kingdom (2018). *Transposition Guidance: How to implement European Directives effectively*. February 2018. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/949143/withdrawn-eu-transposition-guidance.pdf.

²⁴ “Ensure that (save in exceptional circumstances) the UK does not go beyond the minimum requirements of the measure which is being transposed”.

²⁵ Government of the United Kingdom, *Transposition*, p. 7.

²⁶ Government of the United Kingdom, *Transposition*, p. 8.

²⁷ According to the UK's Guidance to an Effective Transposition of EU Directives (*Transposition Guidance: How to implement European Directives effectively*), the concept of “gold-plating” would be only related to the process of transposition of Directives, but the term is already being used in a broader way by other players, such as the European Union, including not only Directives, but European Legislation in a broader sense, as will be better explained in the following topics.

²⁸ SQUINTANI, *Beyond*, p. 19.

²⁹ SQUINTANI, *Beyond*, p. 20.

Additionally, the country has a specific policy on gold-plating since 2003 with the Government Coalition Agreement, which can be divided into four main moments. First, it established policies to avoid gold-plating, but initially it was limited to new measures related to environment protection. Around 2004, a new phase, known as “no gold-plating, unless” regime, began: the understanding was that the practice should be avoided, unless there was a specific and significant interest of the country. By this time, policies were extended to all fields of law and included old cases.³⁰

In October 2010, a new Government Coalition Agreement was settled and defined that gold-plating would be tracked down and eliminated. This new regime was “no gold-plating, regardless”, as there was no possibility of exceptions in the case of specific and significant Dutch interest. Finally, the currently phase of Dutch gold-plating started on 2012 with uncertainty about the government opinion on the issue, but it seems that the idea is to keep gold-plating to a minimum.³¹ Thus, with that said, in the Dutch scenario, gold-plating is referred as “national toppings” and “burden-neutral implementation”. The government has never defined the first expression but adopted the definition of some studies in the field.³²

Based on some reports and parliamentary documents, “national toppings” and “burden-neutral implementation” would have similar understandings and could cover cases in which: (i) Dutch law establishes stricter standards than the Union measure; (ii) the Netherlands does not take advantage of derogation clauses in a Union measure; (iii) the European measure’s aims are implemented before required, creating more burdens for business and industry; (iv) the enforcement of the level of protection is stricter than that required by a EU measure explicitly regulating the enforcement regime; (v) the Netherlands enlarges the field of application beyond the scope of the EU measure; (vi) Dutch law interprets concepts left vague by Union more stringently than required; (vii) Dutch law adopt more stringent means or instruments to achieve a Union objective than is strictly necessary. In addition to all these cases, some reports also imposed the

³⁰ SQUINTANI, *Beyond*, p. 21.

³¹ SQUINTANI, *Beyond*, p. 22.

³² According to an ECORYS report, “national topping” is “a measure which, in the presence of a Union directive which has been correctly implemented in the Netherlands, goes further than the minimum requirement if the directive pursued minimum harmonization or, if the directive pursued total harmonization, a measure that aims at the top of the space left by the directive or that introduces stricter standards than other Member States do where the directive allowed discretion as regards certain aspects of its implementation”; SQUINTANI, *Beyond*, p. 23.

interference on the competitive position of Dutch companies as a part of the national topping's concept.³³

To sum up, in the Dutch context, gold-plating, as a synonym for “national toppings” and “burden-neutral implementation”, demands the coexistence of three elements: the presence of an EU Directive, an implementation of it in the national level and the existence of a more stringent regime than strictly necessary by the EU legislation.³⁴

c) European Union

As a response of Member-States concerns about over regulatory burdens caused by EU legislation, followed the Interinstitutional Agreement on Better Law-Making of 2003, European Commission launched a “Better Regulation Guidelines”,³⁵ which aims to simplify and improve existing regulation, while also measuring and reducing administrative costs and burdens in the EU.³⁶

In this background of the “Better Regulation Agenda”, the term “gold-plating” is especially important, as this practice could erode the simplifying effect of EU rules,³⁷ affecting both transposition and implementation of EU legislation and, thus, the quality of local and national regulations.³⁸ According to the Commission, it is important to determine clearly who is responsible for the administrative costs, as it is not always a consequence of EU law, but rather an effect of transposing an obligation at a higher level or the addition of constraints beyond the requirement,³⁹ which could be qualified as gold-plating.

In this sense, the European Commission describes gold-plating as a process by which a Member State which has to transpose EU legislation into its national law, or has

³³ SQUINTANI, *Beyond*, p. 26-27.

³⁴ SQUINTANI, *Beyond*, p. 27.

³⁵ SQUINTANI, *Beyond*, 28.

³⁶ SQUINTANI, *Beyond*, p. 28; Commission of the European Communities. *Commission Working Document: Measuring administrative costs and reducing administrative burdens in the European Union*. COM(2006) 691 final, published on 14 nov. 2006. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0691:FIN:EN:PDF>. p. 2.

³⁷ Commission of the European Communities, *Commission Working Document: Second progress report on the strategy for simplifying the regulatory environment*. COM(2008) 33 final, published on 30 jan. 2008, p. 10, Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0033:FIN:EN:PDF>.

³⁸ SQUINTANI, *Beyond*, p. 19.

³⁹ Commission of the European Communities, 2006, p. 5.

to implement EU legislation, uses the opportunity to impose additional requirements, obligations or standards on its national law that go beyond the requirements or standards of the EU legislation.⁴⁰ Thus, the practice of gold-plating is not considered illegal in European scenario, but it is presented as a bad practice, as it may impose additional avoidable costs and burdens.^{41 42 43}

In addition, the Parliament declared in a 2007 resolution that the institution disapproves Member States' practice of 'gold plating' and calls upon the Commission to investigate what further measures might be taken to prevent it, including, for example, the introduction of a right of direct action for citizens and a 'follow-up impact assessments' analysing how decisions are in fact implemented in Member States and at local level.⁴⁴ In a similar position, the European Council invited Member-States to keep under review the options and discretions implemented in national law, limiting their use (when possible), and reporting to the Commission on these findings, in a way to avoid gold-plating.⁴⁵

Thus, it is clear that these three institutions of European Union have a negative opinion on gold-plating in the context of Better Regulation Strategy.⁴⁶ According to a 2019 report, Better Regulation is a shared effort between the European Parliament, the Council, the Commission and all Member-States that should deliver and implement high-quality EU legislation that is fit for purpose and without unnecessary layers of complexity. In this scenario, it is important that Member States could also report more transparently on national measures taken to implement EU law in particular when such measures go beyond what is required by EU law – gold-plating.⁴⁷

⁴⁰ “(...) burdens for business may be increased beyond what is foreseen by the legislation if the Member States impose additional obligations (so-called "gold-plating")”. European Commission. Commission Staff Working Document: Better Regulation Guidelines. SWD(2017) 350 final, published on 07 jul. 2017. p. 89.

⁴¹ ATTHOFF and WALLGREN, *Clarifying*, p. 28.

⁴² European Parliament (2011). *2011 discharge: Section III, Commission and executive agencies*. P7_TA(2013)0122. Available at: https://www.europarl.europa.eu/doceo/document/TA-7-2013-0122_EN.pdf.

⁴³ European Parliament, ‘Gold-plating’ in the EAFRD: to what extent do national rules unnecessarily add to complexity and, as a result, increase the risk of errors?, Directorate-General for Internal Policies, Policy Department D: Budgetary Affairs, 2014, p. 25 e 27.

⁴⁴ European Parliament (2007). Motion for a European Parliament Resolution on Better Regulation in the European Union. (2007/2095(INI), Committee on Legal Affairs.

⁴⁵ Council of the European Union, *2836th meeting of the Council of the European Union (Economic and Financial Affairs)*, 4 dec. 2007; SQUINTANI, *Beyond*, p. 30.

⁴⁶ SQUINTANI, *Beyond*, p. 30.

⁴⁷ European Commission. Better Regulation principles: at the heart of the EU's decision-making process. Published on 15 apr. 2019.

1.2. Currently concept

Despite some small differences, the previous topic showed a certain level of temporal and content overall convergence of the Dutch, British and European Union policies on gold-plating.⁴⁸ Currently, the concept focus on economic burdens and has a negative connotation in the societal discourse.⁴⁹ So, in most cases, the term is associated with the effect of overburdening the State, business and citizens, as it may lead to the increase of costs and the creation of disadvantage for companies if compared to other Member-States, which explains why the concept is pejorative in the European context.⁵⁰

In this background, both on national and European union level, the term “gold-plating” is usually associated with negative impacts on economic growth, companies and competition,⁵¹ as a result of unnecessary additional details or rules created by EU Member-States during the implementation of EU legislation (for instance, the transposition process of EU Directives or introduction of legislation to implement and enforce EU Regulations),⁵² in a way that goes beyond the minimum necessary to comply with the legal act, but within legality.⁵³

Gold-Plating is different from a transposition measure in contradiction with a Directive or from the introduction of amendments during the European legislative process or even from the option of “opting out” of a deregulatory measure.⁵⁴ To sum up, thus, ‘gold-plating’ should be understood as the creation of administrative (or other) burdens

⁴⁸ SQUINTANI, *Beyond*, p. 33.

⁴⁹ The concept is understood to be more focused on companies and businesses because it understands “excessive regulation” as negative. However, there are those who advocate for stronger regulation in some contexts, for instance in environmental law, as stronger protection can be positive for the protection of the environment; SQUINTANI, *Beyond*, p. 13.

⁵⁰ DI FRANCO, *Gold-plating*, 2018.

⁵¹ ATTHOFF and WALLGREN, *Clarifying*, p. 9.

⁵² UK Department for Business, Innovation & Skills (2013). *Gold-Plating Review: The Operation of the Transposition Principles in the Government’s Guiding Principles for EU Legislation*. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/137696/bis-13-683-gold-plating-review-the-operation-of-the-transposition-principles-in-the-governments-guiding-principles-for-eu-legislation.pdf.

⁵³ The University of Manchester. *Compliance, Transposition and Gold-Plating*. Available at: https://web.archive.org/web/20141006045749/http://www.policy.manchester.ac.uk/resources/civil-servant/skills/compliance_transposition/; The Government of the United Kingdom (2018). *Transposition Guidance: How to implement European Directives effectively*. February 2018. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/949143/withdrawn-eu-transposition-guidance.pdf.

⁵⁴ Commission of the European Communities (2007). Commission staff working paper - Annex to the report from the Commission “BETTER LAWMAKING 2006” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (14th report). {COM(2007) 286 final} /SEC/2007/0737 final. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007SC0737&from=EN>.

or costs, within legality, which go beyond what is needed to comply with the EU legislation, and are presented as an avoidable consequence of an European imposition.

2. Cases and problems associated with Gold-Plating

Having provided in the previous section a summary of the main aspects of the concept of gold-plating, herewith a series of measures have been selected to show how the transposition process at the Member State level is accompanied with final changes applied to the Union legislation depending on the approach taken by the National legislator and on which way the balance of interests has swayed.

2.1. British Transposition of The Working Time Directive⁵⁵

2.1.1 The Directive

Directive 2003/88/EC otherwise known as the Working Time Directive has as its objective regulating the working hours, rest breaks, and annual leave of employees as well as night and shift working times. The protection of worker's health and safety is one of the core pillars that drive both EU policy and economy and as such the right to fair working conditions can be found in Principle 10 of the European Pillar of Social Rights⁵⁶ and also in the Charter of Fundamental Rights of the European Union⁵⁷.

To ensure effective protection of these rights and that workers benefit to the fullest from the effort that they have demonstrated, it is of importance to have measures regulating the working hours which is the objective of the Directive at hand. It entitles employees to daily and weekly rest periods, four weeks of paid leave a year, and prescribes a maximum working week of 48 hours subject to certain exceptions and derogations.

The impulse for the approval of the Directive derived from fundamental changes that occurred over several decades in the working environment and economy, which have had impacted numerous aspects of the organisation of working time. The first version of

⁵⁵ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9–19

⁵⁶ Principle 10: Healthy, safe and well-adapted work environment and data protection
Workers have the right to a high level of protection of their health and safety at work. [...]"

⁵⁷ Article 31: Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

the directive was approved in 1993 and the obligation for Member State implementation was 1996, it was not long before a proposal for its revision was tabled⁵⁸, to extend the scope to the transportation sector and trainee doctors. The European Court of Justice (ECJ) has also examined the Directive and consolidated parts of it. The Directive has been subject to an action for annulment, infringement proceedings, preliminary rulings, social dialogues and amendments of minor provisions. However it is the consensus that these steps have failed to reformulate the most controversial provisions⁵⁹. Following several intents to better the instrument, finally, in May 2017 the European Commission published guidelines on how to interpret the directive. The CJEU has declared in the occasions where it examined the WTD that several practices of Member States were incompatible with EU law⁶⁰.

Without steering further from the objective of this analysis we highlight that the Directive was adopted by the European Parliament and the Council under Article 137(2) of the European Community Treaty (now Article 153 TFEU), which provides for Community measures to improve the working environment by protecting workers' health and safety. To those unfamiliar with the workings of EU law, this might appear a menial fact but this has been a point of contention for the United Kingdom early on. We may see the resistance to this piece of regulation from the 1993 Directive where the United Kingdom would not agree with the legal basis used by the Commission, Article 118a EEC on the health and safety of workers. Using this article as a legal basis would allow for Qualified Majority Voting (QMV) in the Council of Ministers and the UK insisted that the directive be based on Article 235 EEC on measures necessary to attain the goals of the Treaty but for which no powers are provided in the Treaty, which required unanimity. Eventually, QMV was applied and the UK abstained in the final vote in the Council, but it did not desist and as a result, brought an action for annulment against the Directive

⁵⁸ Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive

⁵⁹ Tobias Nowak, 'The Turbulent Life of the Working Time Directive' (2018) 25 *Maastricht Journal of European and Comparative Law* 118.

⁶⁰ The ECJ interpreted the Working Time Directive in *SIMAP* and in *Dellas* the AG called for a change in the definition of working time, to exclude time spent on-call. See for further reading on the topic T. NOWAK, "The Working Time Directive and the European Court of Justice", *Maastricht Journal of European and Comparative Law*, vol. 15, 2008, pp. 447-471; A. BOGG, "The Regulation of Working Time in Europe", *Research Handbook on EU Labour Law*, 2016, <https://www.elgaronline.com/view/edcoll/9781783471119/9781783471119.00019.xml> accessed 18 July 2021.

claiming that the wrong legal basis was used and several other procedural requirements were breached⁶¹.

Despite facing resistance from the Member States, the approval of the Directive is important on several levels: to cement the understanding that bettering workers' safety, hygiene and health at work goes beyond the financial contemplations; establishing the standard for the organisation of working time and ensuring adequate rest periods as a tool to protect workers' health and safety. As it pertains to its applicability, the Directive does not apply to self-employed workers and for volunteer workers, it varies whether they qualify as “workers” according to the Member State definition and their particular working arrangement under the applicable national law.

The contribution of the Directive in establishing common minimum requirements for all Member States may be summarized to include, e. g., daily and weekly rest periods for workers, 11 consecutive hours' daily rest and 24 – 35 hours' uninterrupted weekly rest; a rest period during working time, if the working day is longer than six hours; limitation to weekly working time for workers, 48 hours a week on average, including overtime; paid annual leave for workers, at least 4 weeks per year; additional protection for night workers, etc.

From all the above we may deduct that the Directive is reasonably detailed in its provisions, to follow with the objective of protecting the health and safety of workers. On the other hand, there is a level of flexibility provided to take into account the different national rules or requirements for working time. This materializes in the allowance for the Member States to adopt EU legislation to their national contexts, space for flexible working arrangements through collective bargaining, numerous derogations and exceptions from the general provisions. The way that the Member States opt to transpose the Directive differs, whereas some Member States working time rules are fixed by collective agreements, in others legislation fixes basic rules but collective agreements are also very important in specific sectors. In some Member States, specific working time rules are fixed by sectoral legislation.

2.1.2. The UK's Working Time Regulations

⁶¹The action was unsuccessful and for more information see Case C-84/94 United Kingdom of Great Britain and Northern Ireland v. Council of the European Union, EU:C:1996:431

The Directive was first implemented in the UK via the Working Time Regulations 1998 (WTR)⁶². Before the regulations coming into effect, there were no general regulations in the UK concerning this particular scope. The UK legislation is complex and has been amended almost 20 times since first enacted. The amendments to the Regulations have ranged from revising the record-keeping requirements relating to workers who have decided to opt-out of the 48 hours, changes to the regulations regarding unmeasured working time, removing the 13 week qualifying period for annual leave, incorporating the remaining provisions from the Young Workers Directive. In 2004 the regulations were revised so to include certain workers in the road, sea, inland waterways, lake transport, railway, offshore and aviation sector and also to junior doctors. Another amendment was increasing the minimum UK leave entitlement from 4 weeks to 5.6 weeks and increasing the maximum working hours for some junior doctors from 48 to 51 hours.

In the first part of this article we have talked about the concept of gold-plating, have shown how the UK has played an important role in the historical evolution of the concept and we have highlighted above the resistance of the United Kingdom to the Directive. The legislator making use of the spaces given by the Directive in the form of derogations, flexible provisions or even choosing to transpose the instrument by favouring several national interests to the common EU text has strayed in a series of elements from the Directive or could have done a more effective work to draw the most from this piece of legislation. We will illustrate by giving the example of how the Working Time Regulations has transposed the Directive on a number of topics:

a) Record Keeping

The Working Time Directive requires up to date records for workers who have made the choice to opt-out, with this records placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours⁶³.

⁶² 'The Working Time Regulations 1998' <https://www.legislation.gov.uk/uksi/1998/1833/made> accessed 18 July 2021; 'The Working Time (Amendment) Regulations 2003' <https://www.legislation.gov.uk/uksi/2003/1684/made> accessed 18 July 2021.

⁶³ Article 22, of Directive 2003/88/EC.

On this matter, we see that the National Legislator in transposing this requirement has added burden to the employer and also increased the administrative burden by obligating them to keep the records for the period of 2 years⁶⁴.

b) Opt-out from the 48 hour week

While it is important to limit the hours of working time in the best interest of the workers, the Directive allows for the possibility for employees to opt out of the 48 hours week. An example of over transposition may be considered that the British legislator has not only provided for the employee to participate in such an agreement with the employer but also that there is the possibility to rescind such an agreement with the 7 days notices. The Directive is silent on this matter⁶⁵.

c) Autonomous workers

One of the derogations provided for in the Directive regards autonomous workers, by providing that Member States may derogate from Articles 3 to 6, 8 and 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of: (a) managing executives or other persons with autonomous decision-taking powers.

⁶⁴ The Working Time Regulations 1998, RIGHTS AND OBLIGATIONS CONCERNING WORKING TIME

Records

9. An employer shall—

- (a) keep records which are adequate to show whether the limits specified in regulations 4(1) and 6(1) and (7) and the requirements in regulations 7(1) and (2) are being complied with in the case of each worker employed by him in relation to whom they apply; and
- (b) retain such records for two years from the date on which they were made.

⁶⁵ The Working Time Regulations 1998, RIGHTS AND OBLIGATIONS CONCERNING WORKING TIME

Maximum weekly working time

Agreement to exclude the maximum

5.— (1) The limit specified in regulation 4(1) shall not apply in relation to a worker who has agreed with his employer in writing that it should not apply in his case, provided that the employer complies with the requirements of paragraph (4).

(2) An agreement for the purposes of paragraph (1)—

- (a) may either relate to a specified period or apply indefinitely; and
- (b) subject to any provision in the agreement for a different period of notice, shall be terminable by the worker by giving not less than seven days' notice to his employer in writing.

The Directive allows an exemption from the 48 hour week for workers whose working time can be determined by themselves. The UK Regulations replicate this provision but lack clarity for the employers to implement⁶⁶.

2.2. Portuguese Implementation of the EAFRD

2.2.1. The Regulation

Rural development is the “second pillar” of the common agricultural policy (CAP), reinforcing the “first pillar” of income supports and market measures by strengthening the social, environmental and economic sustainability of rural areas⁶⁷. The CAP contributes to the sustainable development of rural areas through three long-term objectives: i. fostering the competitiveness of agriculture and forestry; ii. ensuring the sustainable management of natural resources, and climate action; iii. achieving a balanced territorial development of rural economies and communities including the creation and maintenance of employment⁶⁸.

The CAP’s contribution to the EU’s rural development objectives is supported by the European Agricultural Fund for Rural Development (EAFRD)⁶⁹.

Member States implement EAFRD funding through rural development programmes (RDPs), which are co-financed by national budgets and may be prepared on either a national or regional basis. Despite the European Commission playing an important role in approving and monitoring RDPs, decisions regarding the selection of projects and the granting of payments are handled by national and regional managing authorities. Each RDP must work towards at least four of the six priorities of the EAFRD: i. fostering knowledge transfer and innovation in agriculture, forestry and rural areas; ii. enhancing the viability and competitiveness of all types of agriculture, and promoting innovative farm technologies and sustainable forest management; iii. promoting food

⁶⁶ The Working Time Regulations 1998, EXCEPTIONS

Unmeasured working time

20. Regulations 4(1) and (2), 6(1), (2) and (7), 10(1), 11(1) and (2) and 12(1) do not apply in relation to a worker where, on account of the specific characteristics of the activity in which he is engaged, the duration of his working time is not measured or predetermined or can be determined by the worker himself, as may be the case for—

(a) managing executives or other persons with autonomous decision-taking powers

⁶⁷ European Commission, *Rural Development*, https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/rural-development_en accessed 18 July 2021.

⁶⁸ European Commission, *Rural Development*.

⁶⁹ Regulation (EU) N° 1305/2013 of the European Parliament and of the Council on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) sets out the specific rules relating to the EAFRD for rural development programming.

chain organisation, animal welfare and risk management in agriculture; vi. promoting resource efficiency and supporting the shift toward a low-carbon and climate-resilient economy in the agriculture, food and forestry sectors; v. restoring, preserving and enhancing ecosystems related to agriculture and forestry; vi. promoting social inclusion, poverty reduction and economic development in rural areas⁷⁰.

In their programmes, Member States set out targets relating to their chosen priorities and focus areas, as well as a strategy for meeting their targets. Member States may select from a range of 20 policy measures to formulate their programmes and tailor them to the circumstances in their countries and regions. Managing these funds demands compliance with several levels of administrative requirements and dealing with different legal norms, guidelines and procedures. Gold plating may occur at different times of the EAFRD programming, either the elaboration stage, design of measures or implementation and selection of projects. The plethora of issues that might be identified included too strict eligibility requirements, ambiguity or incompleteness of rules, conditions that are overly challenging for the beneficiaries, excessive administrative burden and targets that are too ambitious.

2.2.2 Portuguese Implementation

In 2014 the European Commission prepared a study on the application of gold-plating to EAFRD⁷¹ aimed at “identifying and presenting a detailed description of 'gold-plating and/or overly complex national rules and requirements concerning the basic regulations governing the EAFRD; analysing, evaluating and comparing the (potential) effects of such additional rules concerning the risk of errors (potentially) deriving from them and to the objectives to be achieved; and identifying best practices in the design of national rules with a view to the design of national rules for the EAFRD for the period 2014 - 2020.”

Amongst the Member States that was part of the study was Portugal and it was noticed that there was a series of common elements when examining the way that the

⁷⁰ *Rural Development*, n 60.

⁷¹ Study “‘Gold-plating’ in the EAFRD To what extent do national rules unnecessarily add to complexity and, as a result, increase the risk of errors?”, IP/D/ALL/FWC/2009-056, Ecorys: Mr Matteo BOCCI, Mr Jan Maarten DE VET, Mr Andreas PAUER; in collaboration with Roland BLOMEYER (Blomeyer & Sanz), Antonio SANZ (Blomeyer & Sanz) and Elena SARACENO (independent consultant), 27/02/2014.

Regulation had been implemented that pointed to gold-plating and also that risked being counterproductive to achieving the objectives of the CAP pillar.

2.2.3. Ambiguous requirements

The very nature of the Rural Development Program asks for the inclusion of several authorities at different levels of the chain such as the Managing Authorities or the Paying Agencies. The fact that these are empowered to act not in cohesion but have an assigned task that needs to be dealt with may result in commitments that have not been properly formulated, misinterpretations or divergences on how rules should be interpreted. It would be unfair to say that the burden on these matters falls on the Managing Authorities as the ones in charge of regulation but there is a need for a higher level of cooperation and coordination. According to the study in many cases these irregularities have risen in Portugal where the beneficiaries could not properly understand the eligibility criteria and they simply did not apply for the funding.

2.2.4. Strict eligibility

Midst the different kinds of gold-plating we also have considered the over “zealous” transposition and implementation that goes beyond the requirements of the EU legislation and in that category we can fit the implementation with very strict eligibility requirements. In the case of EAFRD, despite rigorous selection is very important, the national and regional authorities have to tread the thin line of not overexerting their authority by designing measures with eligibility criteria that are beyond the acceptable strictness and as a result, causing a bottleneck for possible beneficiaries and future applicant. This had been noticed in the case of measures aimed at encouraging “young farmers” and attracting younger generations to agriculture. To make sure that funding would be made available only to those that truly had an interest in the agricultural activity, the eligibility criteria were so demanding that in practice it did not produce the effect it aimed for.

2.2.5. Tight administrative requirements

The added administrative burden has been one of the faults that at times the Member States have shown when transposing or implementing legislation. In the case of Rural Development Programming, these added administrative requirements could be part of the design of the measures and how the applications for the funding has to be carried through.

However, it could also be in a phase that seems to be not that related to the design of the measure such as the payment phase. An example of these occurrences in Portugal relates to the obligation from young farmers that are applying for funding to provide a detailed business plan with less than seeming information, the applicant must provide information on milestones, targets, investments, etc. Despite this being a requirement for many activities, the possible beneficiaries could see this as disproportional and not transparent aside from the fact that it is too bureaucratic and unnecessary.

To sum up, in this section, we have seen the transposition and implementation of two pieces of EU legislation where ‘gold-plating has been used and it has lead to the creation of administrative (or other) burdens or costs, within legality, which go beyond what is needed to comply with the EU legislation.

3. Possible improvements on the current scenario

This section first highlights the opinion of the European Union to deal with *gold-plating*, namely an Interinstitutional Agreement on the subject. Subsequently, there are some legal measures adopted by Member States to lessen the harmful effects of *gold-plating* for citizens and governments.

It is descriptive approach to the measures taken at EU and national level, even because the search to avoid excessive implementation is not just an economic and administrative issue, we can say that there are legal problems involved in the excessive implementation⁷².

3.1. Transparency. The Interinstitutional Agreement on Better Law-Making

On 12 April 2013 the European Union adopted the Interinstitutional Agreement⁷³ between the European Parliament, the Council of the European Union and the European

⁷² See further, M. HABERSACK and C. MAYER, “Gold-Plating: The Implementation of Directives Thorough National Provisions with a Wider Scope of Application”, in K. RIESENHUBER, *European Legal Methodology*, Cambridge, Intersentia, 2017, pp. 343-371; see also, R. KRÁL, “On the Gold-Plating in the Czech Transposition Context”, *The Lawyer Quartely*, Vol. 5, No 4, 2015, pp. 300-307.

⁷³ On Interinstitutional Agreement, see S. PUNTSCHER RIEKMANN, “The Cocoon of Power: Democratic Implications of Interinstitutional Agreements”, *European Law Journal*, Vol. 13, No. 1, 2007, pp. 4-19, develops the idea of how “IIAs have become a sub-constitutional driving force of European integration though largely neglected by legal and political science and even more so by the European citizenry”.

Commission on Better Regulation⁷⁴. One of the purposes of this Interinstitutional Agreement (IIA) is to ensure that EU policies and legislation achieve their objectives with minimal costs and administrative burdens and to ensure that policy decisions are drawn up in an open and transparent manner, based on the best data and supported by the participation of stakeholders.

In this IIA, in mentioning gold-plating, the three institutions call on the Member States to clearly expose to the public when adopting measures to transpose EU legislation and to decide to add elements which are unrelated to that EU legislation, those additional elements should be identifiable in the act itself or acts of transposition. Two years after the publication of that IIA, the European Parliament issued a Resolution⁷⁵ on the interpretation and application of that IIA noting that this information is often not identified, urging the Commission and the Member States to act to address the problem of lack of transparency and other problems related to over-implementation.

The same Resolution reiterates that Member States should clearly distinguish cases of excessive implementation not related to EU legislation. It considers that in order to reduce problems related to excessive implementation, while the imposition of additional unnecessary administrative burdens should be avoided, this should not prevent Member States from maintaining or taking more ambitious measures and adopting higher social, environmental and consumer protection standards if EU legislation sets only minimum standards.

As is perceived, there is a repeated recommendation from the EU institutions for Member States to take a radical position of transparency when practicing *gold-plating*. Overregulation must be avoidable, but where it is not possible - in case of justifiably more restrictive or high national standards - it must be identified in the same act of transposition, clearly distinguishing the case of excesses not related to EU legislation, and the setting of a more demanding standard that goes beyond the minimum standard of the transposed directive.

More recently, the radical transparency warning was carried out in the Communication adopted by Commission “Better Regulation Commission: Joining Our

⁷⁴ Official Journal L 123, 12.5.2016, pp. 01–14.

⁷⁵ Official Journal C 76, 09.03.2020, pp. 86–102.

Forces to Improve Legislation”⁷⁶, which reiterates its call on Member States to inform it whenever they decide to add elements that do not result from EU legislation.

However, there are doubts about the binding of the Member States for the purposes of obligation in those recommendations.

Although gold-plating is generally presented as a bad practice because it imposes costs that could have been avoided, it is not illegal under EU law. Therefore, one may ask whether an IIA is the right instrument possibly imposing such a duty, because an IIA, by definition, binds only its own parts.⁷⁷

Finally, the Court of Justice of the European Union has also already ruled on the issue of transparency techniques in the act of transposition – this case to the Commission – according to Article 260.^o(3), TFEU. The CJEU considers that the obligation to communicate transposition measures may be accompanied by a correspondence table, where it must unambiguously indicate what legislative, regulatory and administrative measures by which the Member State considers that it has fulfilled the different obligations imposed by that directive on it⁷⁸.

3.2. Development of *ex ante* impact assessments

Ex ante impact assessment is always referred as an appropriate measure in pointing out administrative and pecuniary costs when negotiating legislation, which includes the implementation of directives in national law⁷⁹. As reiterated by the Commission, **“good implementation starts with a good impact assessment and stakeholder consultation”**⁸⁰.

Nevertheless, equally as important as the need for impact assessment is *who* carries out this procedure. I refer to an independent entity created to assist the government in identifying and clearly exposing excessive implementation. That is, the creation of an

⁷⁶ See Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of The Regions Better regulation: Joining forces to make better laws, COM/2021/219 final, Brussels, 29.4.2021.

⁷⁷ A. ALEMANNO, “How Much Better is Better Regulation?”, *European Journal of Risk Regulation*, Issue 3, 2015, p. 344-356.

⁷⁸ See Case C-543/17 (*Commission/Belgium*), 8 July 2019, ECLI:EU:C:2019:573.

⁷⁹ See, e. g B. TUNYAN, “Regulatory Impact Assessment and EU Law Transposition in the Western Balkans: A Comparative Analysis of the Practice of ex ante Assessment of Regulatory Proposals and EU law Transposition”, SIGMA Papers, No. 61, OECD Publishing, Paris 2021.

⁸⁰ Commission Staff Working Paper (2017) - Better Regulation Guidelines. SWD (2017) 350 final. Brussels, 7 Jul. 2017. Available at: <https://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-350-F1-EN-MAIN-PART-1.pdf>

independent body responsible for Impact Assessment, which will expressly indicate if the transposition points to overregulation.

As an example, it should be mentioned that Germany has established the National Regulatory Control Council (*Normenkontrollrat – NKR*). The Act establishing the *NKR* (*Gesetz zur Einsetzung eines Nationalen Normenkontrollrates*)⁸¹, provides that it is bound to the Chancellery, but independent in the exercise of its functions. The task of this body consists, *inter alia*, in verifying bills, including when transpose a European act and the reduction of bureaucracy. The Article 4 of that act details the allocation of the *NKR*, consisting of the exercise of a right of examination (*Prüfungsrecht*), on the one hand, to the preparatory work of the legal acts of the European Union (Regulations, Directives) and, on the other hand, of the legislative and legal and administrative provisions at issue in the transposition of EU law. Furthermore, provides that the *NKR* may verify the methodological implementation and consistency of the transposition of a Directive to what extent those provisions may lead to excessive transposition.

In its draft opinions, the *NKR*, besides clearly detailing the costs for citizens, the economy and the administration, also points out where the government includes norms that fits as *gold-plating* in the national draft act of transposition. And some of these draft opinions prior to the implementation of directives, the body was specific in saying exactly what norm the requirements of the German transposition are that exceed the standards set out in its Directive⁸². Similarly, the *NKR* clarifies when a draft transposition of directive does not exceed the standard requirements set out in the Directive.⁸³

⁸¹ Available at <http://www.gesetze-im-internet.de/nkr/>.

⁸² See, e. g., NKR Opinion No 4890 of 31 January 2020 on the bill for the implementation of the Directive (EU) 2018/851 relative to the residual, available at <https://www.normenkontrollrat.bund.de/nkr-de/stellungnahme-des-nkr-nationaler-normenkontrollrat-zum-entwurf-eines-gesetzes-zur-umsetzung-der-abfallrahmenrichtlinie-der-europaeischen-union-1727754>; NKR Opinion No 4468 of 2 August 2018 on the bill for the implementation of the Directive (EU) 2015/2193 on the limitation of emissions into the atmosphere, available at <https://www.normenkontrollrat.bund.de/nkr-de/homepage/erweiterte-suche/stellungnahme-des-nkr-nationaler-normenkontrollrat-zum-entwurf-einer-verordnung-zur-einfuehrung-der-verordnung-ueber-mittelgrosse-feuerungs-gasturbinen-und-verbrennungsmotoranlagen-sowie-zur-aenderung-der-verordnung-ueber-kleine-und-mittlere-feuerungsanlagen-1522912>; NKR Opinion No. 3995 from 27 January 2017 on the draft law for the implementation of Directive (EU) 2015/849 on preventing the use of the financial system for money laundering, available at <https://www.normenkontrollrat.bund.de/nkr-de/homepage/erweiterte-suche/entwurf-eines-gesetzes-zur-umsetzung-der-vierten-eu-geldwaescherichtlinie-zur-ausfuehrung-der-eu-geldtransferverordnung-und-zur-neuorganisation-der-zentralstelle-fuer-finanztransaktionsuntersuchungen-319476>.

⁸³ See, e. g., NKR Opinion No. 3251 and 3253 of April 8, 2016 on the bill for the implementation of the Directive 2012/18 on the control of the hazards of serious accidents with dangerous substances, available at <https://www.normenkontrollrat.bund.de/nkr-de/homepage/erweiterte-suche/entwurf-eines-gesetzes-und-einer-verordnung-zur-umsetzung-der-richtlinie-2012-18-eu-europaeische-union-zur-beherrschung-der-gefahren-schwerer-unfaelle-mit-gefaehrlichen-stoffen-zur-aenderung-und>

The German case is a great example of better regulation because the opinions of the body that does the impact assessments investigates in depth and exposes excessive transposition. Therefore, while it is perceived that in other Member States researchers strive to identify the provisions exceeding the European standard, the *Normenkontrollrat* does so clearly and explicitly in *ex ante* form.

3.3. An act repealing *gold-plating*

In addition to the measures adopted before the transposition of the Directive into national legislation, we see the emergence of arrangements adopted after transposition. With a survey and inventory of all transpositions made by a particular Member State, it is possible to identify the excess regulation beyond the minimum required by the Directive. So why not draft a act repealing all these norms causing unnecessary costs?

This is what Austria has done from the Anti-Gold-Plating Act 2019 (*Anti-Gold-Plating-Gesetz 2019*)⁸⁴, which amends eleven national laws with the aim of reducing regulations that go beyond the minimum requirements of European Union law, namely eliminating rules that have exceeded European Union directives in the banking, financial, accounting, insurance and environmental sectors.

Similarly, France intends to follow the Austrian stance. A law removing excessive transpositions of European directives into French law (*Projet de loi portant suppression de sur-transpositions de directives européennes en droit français*) is being processed in the French Senate⁸⁵. With that law, the French Government aims, from the implementation of an inventory of existing excessive transpositions, to eliminate *sur-transpositions* "which do not correspond to any identified national priority and which unduly weigh on France's competitiveness and attractiveness in Europe" in the field of consumer law, company law, financial services, public procurement, electronic communications, environmental law, transport, agriculture and culture.

This measure of repealing several rules at once also falls within government efforts to simplify administrative and control of normative production, with a view to alleviating

[anschliessenden-aufhebung-der-richtlinie-96-82-eg-europaeische-gemeinschaft-des-rates-bmub-bundesministerium-fuer-umwelt-naturschutz-bau-und-reaktorsicherheit--317962](https://www.ris.bka.gv.at/eli/bgbl/I/2019/46).

⁸⁴ BGBl. I Nr. 46/2019, available at <https://www.ris.bka.gv.at/eli/bgbl/I/2019/46>.

⁸⁵ See *Projet from Loi portant suppression from sur-transpositions from directives Européennes en Droit français* (EAEX1823939L), available in <https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000037460424/>

the constraints on the competitiveness of businesses, the daily lives of citizens and also on the efficiency of public services and local authorities.

In order to identify cases of excesses in the implementation of the Directive, the legislative work of these two Member States was careful to accurately conceptualise *gold-plating*.

The Austrian case, in the explanatory memorandum (*Erläuterungen*)⁸⁶ of the act, the gold-plating was defined as a legislative practice in which national legislation takes the implementation of EU legislation as an opportunity to provide for requirements, additional obligations or rules for recipients of the law that go beyond those laid down in EU law, and the following factors are still necessary: a) the enactment of the national legislative act must be causally and/or temporally linked to the EU Directive or Regulation; (b) The Directive or Regulation in question shall leave member states some room for manoeuvre for its transposition, usually with *ab* clauses; (c) and in terms of content, gold plating shall be assessed on the basis of the objective set out in EU legislation to be implemented.

In French case, in the explanatory memorandum (*exposé de motif*) of the draft law, before listing the rules to be excluded from national law, conceptualizes the meaning of gold-plating as "any measure of national transposition establishing a more restrictive rule than that which would result from the strict application of the Directive, without this being justified by an identified national objective. These excessive unjustified and penalising transpositions can take several forms: imposing obligations that go beyond that required by EU law, extending their scope or even not implementing the possibility of derogation or exclusion that it provides for."

These anti-gold-plating acts are perhaps not the fairest answer to a better regulation policy. The most important is not to cut all over-regulation in a deregulation process that is so high on the political agenda of Member-states. The central question is to be transparent on the use of excessive implementation to assess whether a given gold-plating is proportionate, adequate or negative for stakeholders and competitiveness. In certain situations, gold-plating made in the implementation of EU law is a matter of national interest, a normative standard more suited to the legal or social tradition of a particular Member-State in a particular matter. Therefore, we see with some suspicion the general

⁸⁶ The explanatory memorandum (*Erläuterungen*) of *Anti-Gold-Plating-Gesetz 2019* available at https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00508/index.shtml

repeal of any gold-plating found, without there being an impact analysis on the repeal of a norm that goes beyond what is provided for in the EU directive or regulation.

Conclusion

The aim of this work was to investigate what is covered by the idea of gold-plating, which demanded a brief study of its historical development and current concept, passing through real case analysis to catalogue its problems, in order to propose possible improvements for this issue. Although the notion of gold-plating was first derived from UK national system, the term was already associated with different interpretations and levels of scope and currently may be a consequence of all these influences, with the consensus that the phenomenon is not illegal, but considered a bad practice that should be avoided.

Based on it, the most complete concept of gold-plating defines it as the situation when unnecessary additional burdens, costs or rules are created by Member-States in the process of an implementation of the EU legislation, whether Directives or other legal rules, creating negative impacts and overburdening the States, business and citizens. So, after defining parameters for the concept of gold-plating, it was possible to analyse real cases in the European context, including the British Transposition of the Working Time Directive and the Portuguese Implementation of the European Agricultural Fund for Rural Development (EAFRD).

These two cases of, respectively, transposition or implementation of European legislations with the presence of gold-plating factor show how the phenomenon creates extra administrative (or others) burdens within a certain Member-State that goes beyond what is required by the EU legislation, harming governments, business and citizens of these countries, compared to the other Members who complied with the parameters defined by EU original legislation. Consequently, given the negative connotation of gold-plating to an united and well-developed single market, as it creates economic, administrative and legal issues, European Union and some Member-States developed measures to try to avoid this practice and lessen its harmful effects.

Among the initiatives, there are measures to be taken before the internalization of an EU legislation. For instance, the creation of stronger transparency obligations within, for instance, European Union's Interinstitutional Agreement, calling on Member States to inform whenever they decide to add internally elements that do not result from EU legislation. Besides, in the case of national legislation negotiation that aims to create extra

costs and burdens, it is highly recommended stakeholder consultation and the elaboration of an ex-ante impact assessment by an independent body, as established in Germany with the National Council for The Control of Standards.

Beyond prior measures, there are an increasing movement to developed measures to deal with gold-plating after the transposition or implementation of an EU legislation within a Member-State. The main example is the creation of a national act which repeals at once all the unnecessary burdens and costs that exceeded EU legislation. This initiative is already implemented in Austria and is intended also by France.

Thus, it is clear that gold-plating should be avoided and fought in European Union, as it creates negative effects to governments, businesses and citizens of an specific Member-State that went beyond what is required by the EU legislation, posing them in disadvantage when compared to the others. In order to address this issue that hamper the creation of an efficient European single market, it is essential to prior accurately define the term, to understand its hypothesis of occurrence and, then, implement possible solutions, whether by transparency requirements, stakeholders consultation, elaboration of impact assessment or the creation of a repealing single act.

REFERENCES

1. ATTHOF K, WALLGREN M. Clarifying Gold-Plating: Better Implementation of EU Legislation. Board of Swedish Industry and Commerce for Better Regulation (NNR) and the Swedish Better Regulation Council (Regelrådet); 2012. Available at: https://nnr.se/wp-content/uploads/Clarifying_gold_plating_november_2012.pdf
3. MILLER V, FRETTE C, The European Union: a guide to terminology, procedures and sources. House of Common's Library, SN/IA/3689; 2005. Available at: <https://web.archive.org/web/20100612213147/http://w4mp.org/html/library/standardnotes/snia-03689.pdf>.
4. FRANCO E. *Gold-plating: how EU States over-regulate themselves and then blame Brussels*; 2018 April 15. Available at: <https://mycountryeurope.com/politics/european-union/gold-plating-regulate-blame-brussels/>
5. GRAELLS AS. The Implementation of Directive 2014/24/EU in the UK. In TREUMER S, COMBA M, editors. European Procurement Law Series; 2018; vol. 8. Available at: <https://ssrn.com/abstract=2947939>.
6. SQUINTANI L. *Beyond Minimum Harmonisation: Gold-Plating and Green-Plating of European Environmental Law*. Cambridge: Cambridge University Press; 2019. pp. 13-71.

7. NOWAK T. The Working Time Directive and the European Court of Justice. *Maastricht Journal of European and Comparative Law*; 2008; vol. 15. pp. 447-471.
8. BOGG A. The Regulation of Working Time in Europe. *Research Handbook on EU Labour Law*; 2016.
<https://www.elgaronline.com/view/edcoll/9781783471119/9781783471119.00019.xml>
9. HABERSACK M, MAYER C. Gold-Plating: The Implementation of Directives Thorough National Provisions with a Wider Scope of Application. In RIESENHUBER K. *European Legal Methodology*. Cambridge: Intersentia; 2017. pp. 343-371.
10. KRÁL R. On the Gold-Plating in the Czech Transposition Context. *The Lawyer Quartely*; 2015; vol. 5;(4):300-307.
11. RIEKMANN SP. The Cocoon of Power: Democratic Implications of Interinstitutional Agreements. *European Law Journal*; 2007; vol. 13;(1):4-19.
12. ALEMANN A. How Much Better is Better Regulation? *European Journal of Risk Regulation*; 2015; (3):344-356.
13. TUNYAN B. Regulatory Impact Assessment and EU Law Transposition in the Western Balkans: A Comparative Analysis of the Practice of ex ante Assessment of Regulatory Proposals and EU law Transposition. *SIGMA Papers*. Paris: OECD Publishing; 2021; (61).

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