

GOLD-PLATING: HOW TO IDENTIFY AND AVOID



December 30, 2021

The study was prepared in cooperation with the Center for Liberal Studies – Markos Dragoumis (Greece), F. A. Hayek Foundation (Slovak Republic), Istituto Bruno Leoni (Italy), Fundación para el Avance de la Libertad (Spain), and Institute for Market Economics (Bulgaria).



The paper is supported by the Friedrich Naumann Foundation for Freedom.

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INTRODUCTION

Gold-plating¹ is still one of the main factors disrupting the EU single market. Not only does it unjustly disadvantage national businesses and consumers, but it also reduces the competitiveness of the EU as a global player. Thus, preventing gold-plating is among the top explicit tasks of the EU in reducing barriers to the single market².

The common practice among the Member States (hereinafter – MS) to “overachieve” when transposing directives not only harms the functioning of the EU but also hurts national economies and citizens. However, many MSs do not have any serious concerns about gold-plating and practice it without taking due consideration of its effects. Given the multiple negative implications that gold-plating has both at the EU and national level, tackling it should be in the crosshairs not only of the EU but also its Member States.

The purpose of this study is twofold. Firstly, it aims to provide the civil society with tools and arguments to assess national EU law transposition initiatives from a methodological and legislative perspective. The other objective is to inform policymakers about the risks of gold-plating and provide good practices of EU law transposition and recommendations for their efficient implementation.

The study is based on the materials of the Organization for Economic Co-operation and Development (hereinafter – the OECD), the European Commission (hereinafter – the EC), the European Parliament (hereinafter – the EP), and assessments made by national European law specialists. The study analyzes and consolidates the good practices of the UK and Sweden and aims to provide legislative remedies for addressing gold-plating cases both during the law enactment process and its *ex-post* review.

¹ According to the OECD, “Over-implementation of an EC Directive through the imposition of national requirements going beyond the actual requirements of the Directive. Directives allow member states to choose how to meet the objectives set out in the Directive, adapting their approach to their own institutional and administrative cultures. It is often at this stage that additional details and refinements, not directly prescribed by the Directive, are introduced. These can go well beyond the requirements set out in the Directive, resulting in extra costs and burdens.” See European Commission, Organization for Economic Co-operation and Development. Better Regulation in Europe: an OECD Assessment of regulatory Capacity in the 15 original Member States of the EU. Available online: <<https://www.oecd.org/gov/regulatory-policy/44952782.pdf>>.

² European Commission. Communication on identifying and addressing barriers to the single market No. COM(2020) 93 final, 2020. Available online: <https://ec.europa.eu/info/sites/default/files/communication-eu-single-market-barriers-march-2020_en.pdf>.

1. THE EFFECTS AND IMPLICATIONS OF GOLD-PLATING

For matters that are not fully harmonized at the EU level, MSs have a margin to set additional requirements at the national level for whatever reasons they may find fit.

"Transposition of European Union Directives represents a big part of the Greek national legislation. Between 2018 and 2020, 24% of the laws voted⁴ by the Greek Parliament transposed European Union Directives. Nevertheless, 87% of these EU Directives had the phrase "and other provisions" in their title, indicating that these laws regulate much more than the EU provisions. 81% of EU Directives of this period were accompanied by amendments (three amendments per EU Directive, on average) and most amendments were irrelevant to the Directives' objectives.

An example of this bad practice is law 4605/2019, titled "Harmonization of the Greek legislation with the Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of know-how and business information that has not been disclosed (trade secret) from their illegal acquisition, use and disclosure (EEL 157 of 15.6.2016) - Measures to accelerate the work of the Ministry of Economy and Development and other provisions". During its voting in the Greek Parliament, ten amendments of various irrelevant competencies (such as competencies of the Ministry of Environment and Energy or competencies of the Ministry of Infrastructure and Transportation) were attached to the law. However, these amendments do not add legal measures beyond the minimum necessary to comply with the Directive's provisions since they are completely irrelevant to the Directive. The amendments are a bad practice of codification in transposing EU law in the domestic legal framework."

Center for Liberal Studies – Markos Dragoumis (Greece), 2021

1.1. Gold-plating is not in line with the EU legislature's paradigm

Under EU law any national derivations from minimal EU requirements must meet the purposes set out in the directive transposed and generally not over-exceed the minimal requirements to ensure the smooth flow of the EU Single Market. When transposing directives the EC has long urged the Member States to refrain from creating additional burdens to its residents. Additional national requirements that go beyond what is set in the directives must be justified by an overriding reason of public interest, be proportionate, easy to understand, and compliant with the harmonized minimum rules⁵. Moreover, the EC emphasizes that even within the legal rules, in light of the objective of the single market differences must be kept to a minimum. Thus the paradigm that the EU regulator insists on applying is that of minimum standards and costs. Juxtaposed to this, gold-plating implies the national legislator's intent to build up upon the directives' minimal standards to fulfill its political agenda and thus shifting the focus for the true purposes of the directives. This is achieved by masking over-regulation as an inevitable "side effect" of EU regulations without dully considering the burden it may bring.

"Gold-plating was originally introduced under the claim that it would result in greater protection of constitutionally relevant values, such as the environment, human health, or the fight against corruption. However, under many circumstances, this assertion can be proven wrong. Still, it requires a big deal of political capital to remove gold-plating because the proponents shall face the charge of acting to please Big Business, and to the detriment of the common people. While there is no evidence whatsoever of this in most cases, it may be politically very hard to survive these charges, that are often promoted by ideologically-motivated types or by vested interests that benefit from the surplus of regulation."

Instituto Bruno Leoni (Italy), 2021

³ All data presented for years 2018, 2019, and 2020 are based on the Regulatory Quality Index published by the Center for Liberal Studies – Markos Dragoumis (KEFIM). The Regulatory Quality Index is a composited indicator, which assesses the domestic laws in 54 criteria of better regulation agenda. For the Greek study see [Regulatory Quality Index 2019](#), while for an overall look at its methodological framework see [Regulatory Quality Index: Methodology and Implementation Guide](#).

⁴ Net legislation, without ratifications of agreements of the Greek state with third national or international parts.

⁵ European Commission. Communication of the Commission of 19 July 2018 on "Protection of intra-EU Investment".

1.2. Gold-plating typically translates into undue and adverse burdens to all

"A common form of gold-plating is the introduction of requirements or obligations not foreseen in the directive for economic operators.

One example is Feique, the Spanish Chemical Industry Business Federation highlighted in the "Proposals for action in the chemical sector" in 2019 that in some cases the Member States introduce regulations or requirements stricter than those established in the Directive, generating inequality and competitive distortion in the internal market and propose that the modifications introduced in the transposition be the minimum necessary to adapt the European regulations to the particularities of the legal system, avoiding greater burdens for Spanish chemical companies that undermine their competitiveness. Along the same lines, the 2017 annual report of the Spanish Banking Association warns that gold-plating undermines the effectiveness of European regulations in their objective of creating a fair market among European credit institutions."

Fundación para el Avance de la Libertad (Spain), 2021

"In February 2018 a new requirement for NGOs was introduced – they should all declare with the Trade Registry the real owners of the organization and if they fail they may face a fine of up to 10,000 BGN (5,000 EUR). The justification was the implementation of Directive (EU) 2015/849 of the European Parliament and the Council of 20 May 2015 on the prevention of the use of the financial system for money laundering or terrorist financing. The directive does not require such declaration and in general, this requirement is impossible to be applied since the NGOs are a specific legal form that does not have owners, but founders, members of the organization, or its bodies. The requirement increases immensely the red tape and allows for arbitrary prosecution of specific NGOs that are critiques of the government. Another gold plating was the introduced obligation for lawyers to declare to State Agency for National Security, like the NGOs, suspicious transactions. This violates the confidentiality clause. All these were implemented initially and later were abolished."

Institute for Market Economics (Bulgaria), 2021

Any derivations from the minimal standards set in the directives often translate into an additional regulatory or administrative burden for businesses putting them in a disadvantaged position to the other Member States. Gold-plating has multifold effects (Fig. 1).

"The most common form of gold-plating in the Greek regulatory framework is the addition of extra regulatory burdens in terms of administrative documents, procedures, and conditions, rather than setting higher minimum quantitative standards of obligatory measures. A common practice of the former is the addition of informational obligations. Law 3777/2009 is a typical example of gold-plated provisions. Among several other gold-plated provisions in this law⁶, Article 11 demands an extra intermediary step between the approval of the common draft terms of cross-border merger by the general meeting and the registration of the cross-border merger. This step requires the merging companies to jointly conclude a notarial document of cross-border merger, stating that the merging companies agree that they merge. Article 13 of the Directive 2005/56/EC on cross-border mergers of limited liability companies does not require this further step between the two stages, which is a clear national addition with administrative costs."

"Similarly, the transposition of EU Directive 2015/849 (on the prevention of the use of the financial system for money laundering or terrorism financing) in the Greek legal framework introduced an obligation for the credit and financial institutions to crosscheck the records of the beneficiaries according to specific lists sent by the paying agents and to confirm the successful completion of the relevant transaction (article 11, law 4557/2018), even though this obligation is not explicitly required by the Directive and creates administrative costs for credit and financial institutions."

Center for Liberal Studies – Markos Dragoumis (Greece), 2021

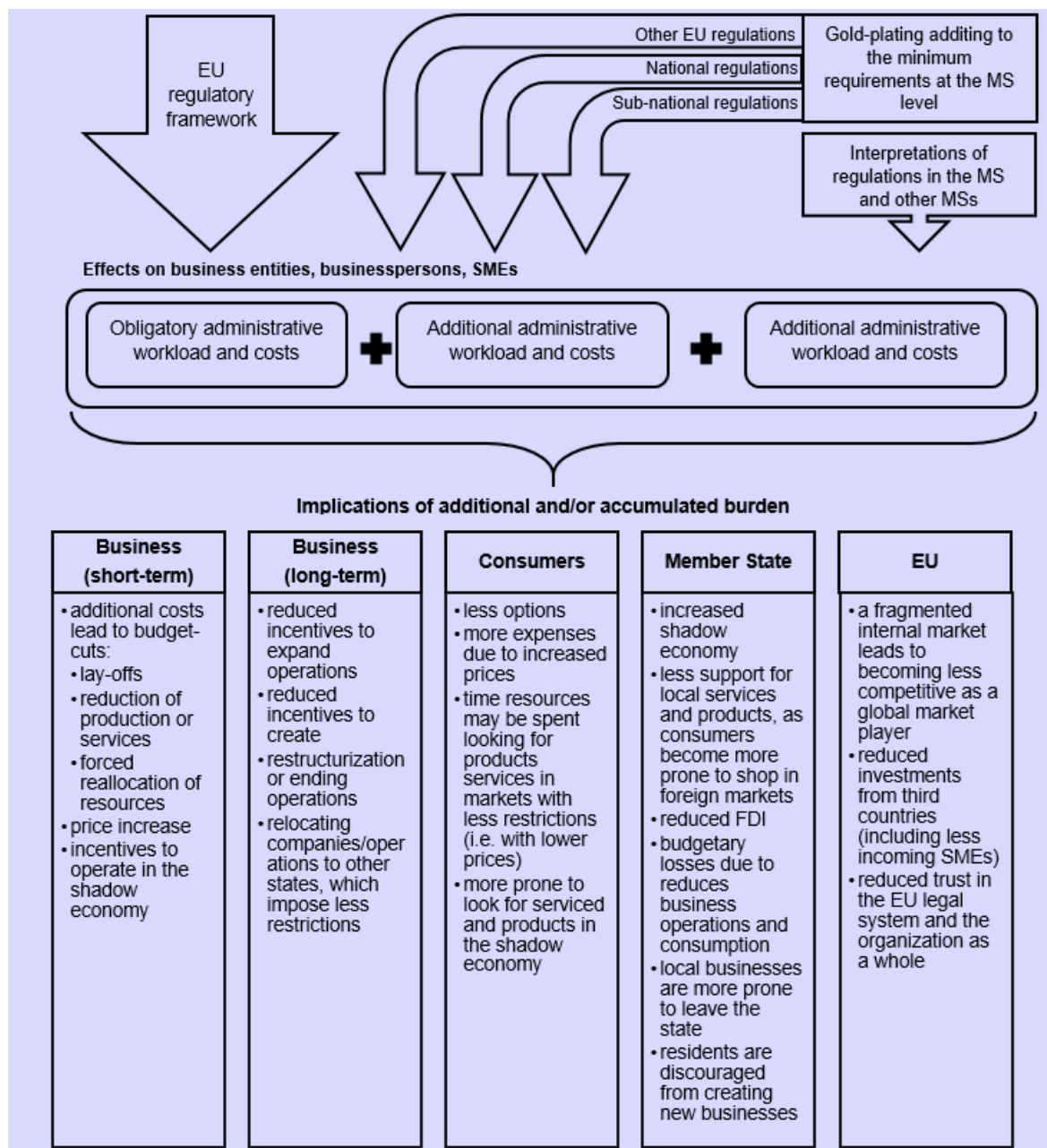
Examples of gold-plating cases are: "Inaccurate transposition with the consequence of broadening the objectives of the Directive; e.g. the Unfair Commercial Practices Directive was intended to provide increased legal certainty for consumers. However, when transposing the Unfair Commercial Practices Directive, the Slovak Republic failed to include (Section 8(2)(b) of the Act) important conditions for the fulfillment of the deceptive commercial practice. As a result of the above inaccurate transposition, in which the text of the Directive was not transposed in full for no apparent reason, the liability of the trader has been extended beyond what was the original intention of the Unfair Commercial Practices Directive;

Failure to make use of the possibility of applying exemptions; e.g. the Consumer Protection Directive on price labeling gives the Member States the possibility to determine exemptions from the obligation to label products simultaneously with the selling price and the unit price to a greater extent, which, however, the Slovak Republic did not make use of to the extent it could have done. Although the Slovak Republic provided for certain exemptions from this obligation, the Directive offered the possibility of applying exemptions to a greater extent than was ultimately provided for in national legislation."

F. A. Hayek Foundation (Slovak Republic), 2021

⁶ For a thorough analysis of gold-plated provisions of the Directive 2005/56/EC in the Greek legal system see [Experiences from the implementation of the Cross-Border Mergers Directive in Greece](#), published by Studies in European Economic Law and Regulation.

Fig. 1. The multifold and accumulated effects of gold-plating.



Source: LFMI's elaboration based on the analyzed data and literature.

1.3. Gold-plating has a particularly disadvantageous impact on SMEs and EU goals towards them

According to the EC, small and medium-sized enterprises are the backbone of Europe's economy as they represent 99% of all businesses in the EU, employ around 100 million people, account for more than half of Europe's GDP, and play a key role in adding value in every sector of the economy⁷. Thus it is no surprise that the EU has set a strategic priority of unleashing the full potential of SMEs by creating a favorable regulatory environment for their

⁷ European Commission. Entrepreneurship and small and medium-sized enterprises (SMEs). Available online: <https://ec.europa.eu/growth/smes_en>.

development⁸ and thus allowing SMEs to take due advantage of the key freedoms of the EU⁹. The EC's strategic ambitions entail actions to remove regulatory and practical obstacles to doing business or scaling up within the Single Market and beyond and increasing the internationalization of SMEs¹⁰. The latter focuses on building the capacity and legal framework for SMEs to flourish not only in the EU but also globally. And vice versa this also implies that the EU is interested in attracting foreign-based SMEs. Yet with a segmented internal market and severely divergent requirements of MS due to gold-plating, possibilities of creating a fostering framework and attracting foreign SMEs to the EU are low.

2. PRINCIPLES AND GOOD PRACTICES TO AVOID GOLD-PLATING WHEN TRANSPOSING EU DIRECTIVES

"In Spain, measures to combat gold-plating are scarce or non-existent, as there is no process during transposition that is directly involved in the supervision of possible gold-plating. However, the transposed standard goes through different phases of generic review in which this phenomenon may be noticed. Depending on the legal form that the transposed regulation adopts, it will be submitted or not to debate and vote in the Cortes or autonomous parliaments. However, the opinion of the Council of State is always mandatory and, being a more technical body than the parliaments or the Senate, it can highlight the existence of gold-plating if it considers it necessary, however, it is not obliged to pronounce on this reality."

Fundación para el Avance de la Libertad (Spain), 2021

"The primary and generally applicable solution, which would aim to effectively prevent cases of gold-plating in Slovakia, is the creation of a legally binding document that would comprehensively stipulate that the principle of minimum transposition applies in Slovakia in general. It should also be enshrined that if the submitter deviates from the principle of minimum transposition, he must justify this fact on the grounds of national public interest or because the directive has a deregulatory effect. The prohibition of non-minimalist transposition, or a possible deviation from the prohibition of non-minimalist transposition that does not lead to gold-plating and is duly justified, should be checked by a special public body (e.g. as some kind of Center of Better Regulation) set up for this purpose."

F. A. Hayek Foundation (Slovak Republic), 2021

During the past years, the EC has made notable efforts to tame gold-plating. It has generally promoted refraining from gold-plating and in the spirit of the single market has promoted the MSs to intensify their simplification efforts and reduce the unnecessary administrative burden¹¹. The study suggests that both EU and national legislators must consider and adopt the following consolidated good practices as an intricate part of their legislative process to ensure an EU Single Market that serves all.

Generally transposing an EU directive is an internal legislative matter meaning that the process and material content of the transposition notions must not only meet the principles set out in the directive but the legislative procedures and principles of the MS. That implies transposing a directive must undergo twofold scrutiny. It must meet the aims set out in the directive. And it also needs to meet the key principles of the legislature, including the imperative obligation of public consultations. This also implies following the key procedures of *ex-ante* and *ex-post* review of any legal amendment. The following sections explore the principles of EU law transposition made by OECD and the good practices of the UK and Sweden when transposing EU directives.

⁸ EC, Factsheet Unleashing the full potential of European SMEs, 2020. Available online: <https://ec.europa.eu/commission/presscorner/detail/en/fs_20_426>.

⁹ European Commission. SMEs' access to markets. Available online: <https://ec.europa.eu/growth/smes/sme-strategy/improving-smes-access-markets_en>.

¹⁰ European Commission. SMEs' access to markets <...>.

¹¹ See, e.g., European Commission. 4th MEETING of the High-Level Expert Group on Monitoring Simplification for Beneficiaries of ESI Funds (notes), 2016. Available online: <https://ec.europa.eu/futurium/en/system/files/ged/hlg_16_0008_00_conclusions_and_recomendations_on_goldplating_final.pdf>.

UK and Sweden were selected as countries that pioneered the term "gold-plating" and means to tackle it. This phenomenon was defined to highlight and then tackle its negative effects which became apparent in both of these countries as the cumulative effects of the added legislation at the national level was causing local business hard times compared with their competitors coming from a neighboring country¹². The best practices set out by UK and Sweden were later on incorporated in the national recommendations of other Member States (e.g., Lithuania). In addition, the UK was one of the first countries to explicitly commit to ending gold-plating under a coalition program for the UK's government.

2.1. OECD promotes reliance on existing rules rather than new ones

In its proposal for better regulation the OECD¹³ primarily suggested assessing the existing legislation as a means of coping with gold-plating (principle "stock of regulations"). This practice may come to use since in the majority of cases state governments, which are in charge of transposing directives, are keen on proposing new regulations rather than checking if any existing regulations could be considered as transposing the new directive. Contrary to common belief, this could be in line with the directive transposition requirements, since it does not imply automatically enacting laws, instead, the transposition requires directives to be incorporated into national systems, which broadens the concept of transposition.

Another paradigm that the OECD offers is that of a lighter transposition regime or choice of least restrictive measures. This would be most in line with the paradigm of the EU as a legislator to adhere to the minimum standards and costs. In addition, OECD emphasizes that during the process of transposing EU directives it is crucial to evaluate the alternative ways of achieving the aims of a directive and consult them with interested parties, i.e. the addressees and other stakeholders, who operate in the scope of suggested new regulations.

2.2. The UK suggested focusing on minimal requirements and best resident interests

To tackle the issue with gold-plating, it is best to seek advice from the two countries that were first to the phenomenon and to take concrete steps to tackle it. The first case is *in* the United Kingdom, whose coalition government of Conservatives and Liberal democrats has taken several steps to limit the impacts that the adoption of EU legislation could have on UK businesses. The basic principles and rules for the implementation of the European legal norms were finalized in June 2011. Although the UK left the EU following the referendum vote in 2016, its developed practices to avoid gold-plating are relevant to date since they are universal, best developed and most of them were incorporated into national recommendations of other EU MSs.

An analysis (finalized in 2013¹⁴) on the application of UK's EU law transposition principles for 18 months, showed that UK's Government was successful in preventing the additional regulatory burden and there were only a few cases when the government went beyond the minimum requirements when applying the transposition principles. In the process of the

¹² Lithuanian Free Market Institute. Briefing paper on an EU Agenda "Better Regulation for Better Results", 2025. Available online: <https://www.lfri.lt/wp-content/uploads/2016/01/Briefing-paper-on-an-EU-Agenda_LFMI.pdf>.

¹³ Organization for Economic Co-operation. Better Regulation Practices across the European Union, 2019. Available online: <<https://www.oecd.org/gov/regulatory-policy/EU-Highlights-Brochure-2019.pdf>>

¹⁴ Department for Business Innovation, & Skills (UK). Gold-plating review, 2013. Available online: <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>.

implementation of the EU legislation, the UK ministries were forced to show how they were using the five principles for the adoption of the EU law. In addition, there was an independent body established to oversee how the principles are being applied and to which policymakers had to provide justifications for departing from the principles. Therefore the principles of transposition were paired with enforcement mechanisms to ensure their actual functioning, making them *de facto* mandatory.

Basic principles of how the UK deals with preventing gold-plating¹⁵:

Principle 5(a): When transposing EU law, the Government will wherever possible, seek to implement EU policy and legal obligations through the use of alternatives to regulation.

Principle 5(b): When transposing EU law, the Government will endeavor to ensure that UK businesses are not put at a competitive disadvantage compared with their European counterparts.

Principle 5(c): When transposing EU law, the Government will always use copy-out for transposition where it is available, except where doing so would adversely affect UK interests e.g. by putting UK businesses at a competitive disadvantage compared with their European counterparts. If departments do not use copy-out, they will need to explain to the governmental Regulation Reducing sub-Committee the reasons for their choice.

Principle 5(d): When transposing EU law, the Government will ensure the necessary implementing measures come into force on (rather than before) the transposition deadline specified in a directive unless there are compelling reasons for earlier implementation.

Principle 5(e): When transposing EU law, the Government will include a statutory duty for Ministerial review every five years.

2.2.1. Seeking alternative measures

Some of the UK's principles were rather self-explanatory, i.e. principle 5(a) which implied seeking other means of achieving the directive's goals. It is a crucial lesson to learn for the other MSs as the correct transposition of a directive does not automatically imply enacting new laws or implementing acts. There are no concrete formal requirements for the form of transposition set out by the EU legislator, as due transposition entails the process of giving effect to Directives within their domestic *legal systems*. This means that certain directive requirements may even manifest in a form of recommendations and guidelines – as long as the purpose of the directive is achieved. Such a paradigm of seeking alternatives to laws is prudent in terms of reducing (or at least refraining from creating additional burden) to national residents. In addition, soft-law measures may offer more fluidity and flexibility to better meet the ever-changing needs of the market.

An analysis¹⁶ of the application of the UK's principles showed that departments have consistently considered the use of alternatives to regulation and there have been some good examples where Departments have used non-statutory alternatives to implement certain EU obligations.

2.2.2. One-in, One-out

The UK government had also introduced an approach entitled "one-in, one-out" (OIOO), which meant that no new primary or secondary legislation of the UK, which would create new expenses to businesses can be introduced without identification of an existing regulation with an equivalent financial burden that could be removed. This was a key requirement for both

¹⁵ Ibid.

¹⁶ Department for Business Innovation, & Skills (UK). Gold-plating review, 2013. Available online: <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>.

enacting new national laws and transposing EU laws. Such a measure would help combat the accumulation of burdens to persons. It is also in line with OECD's recommendations for better regulation (in particular the recommendation to first answer the question of whether existing rules are sufficient to meet the directive's goals).

2.2.3. Copy-out principle when transposing EU law

The principle implies the obligation to use the exact wording of the Directive in national laws when possible and reasonable. An analysis showed¹⁷ that during 2011-2013 where it was available, 'copy-out' had been applied in 72% of cases. Of the remaining cases where "copy-out" was available but not used, Departments argued against the use of "copy-out" since existing national rules set less of an administrative burden. This means that the departments departed from the "copy-out" principle and transposed the directive's requirements in their own words because it provided more clarity and businesses were more familiar with the national wording. This is another important lesson to learn as the administrative burden consists not only of additional new requirements but it also the burden to understand the content of the rules. i.e. the more complex the rules are, the more burden businesses face to comprehend and comply with them. The "copy-out" technique helps with avoiding such additional costs as it provides clear wording and ensures more legal clarity for persons. Yet once again we see that the application of the principle is preconditioned by the goal to impose the least possible amount of burden to the laws' addressees, which was enshrined in the Government's coalition agreement and the UK's guiding principles of EU law transposition, which were *de facto* of obligatory nature.

2.2.4. Pairing principles with enforcement mechanisms

A key role in UK's commitment to abolish gold-plating was played by the Regulation Reducing sub-Committee (RRC): an independent control body, which had the role of overseeing the implementation of the OIOO strategy and keeping the check on other government bodies. Policymakers also had the obligation to justify derivations from the UK's principles before the RRC. The aforementioned analysis of 2013¹⁸ showed there was only one single case of the law, where a UK's ministry suggested an added regulation on businesses. At the same time, there were only four cases, in which the EU legislation was adopted before the expiration of the timeframe allowed to the countries for the implementation of the rule. In all of these four cases, however, this was done to maintain a good competitive environment for UK businesses. The transposition principles were therefore an effective tool to ensure appropriate control of the measures adopted as a result of the EU legislation. The crucial aspect is to have the individual departments uphold these rules and avoid adopting additional measures.

"An Italian legislation adopted in 2005 states that gold-plating is not allowed in the act of transposing EU directives unless it can be proven that the additional requirements are needed to achieve a socially desirable goal. To enforce this provision it is requested that transposition laws are accompanied by a Regulatory Impact Analysis.

Unfortunately, this approach has not been successful in Italy. To begin with, most legislative acts are not accompanied by the Regulatory Impact Analysis. No sanction exists if the government fails to deliver this report. Moreover, there seems to be little (if any) correlation between the relevance of a legislative act and the development of a Regulatory Impact Analysis: in fact, highly relevant acts carry no regulatory analysis, while trivial ones do. The only – significant but highly insufficient – result from the 2005 provision is that, under some circumstances, specific requirements have been found inconsistent with the EU law by the Constitutional Court or by the State Council (the highest administrative court) on the basis that they were introducing unjustified gold-plating."

Instituto Bruno Leoni (Italy), 2021

¹⁷ Ibid.

¹⁸ Department for Business Innovation, & Skills (UK). Gold-plating review, 2013. Available online: <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>.

2.2.5. Red Tape challenge

The UK government also launched a website titled "The Red Tape Challenge" for the citizens and businesses to be able to comment on which regulations are working and which are not, which of them should be crossed out, simplified, or which should remain intact. Since there was a presumption that the government should lower the regulatory burden, the ministries have to put forward valid reasons to keep the regulation in place. This initiative as well as the reversed burden of proof is an efficient way of aiding an open discussion about how the objectives of the existing regulations can be achieved with a lower bureaucratic impact on businesses and ordinary people.

"Even though gold-plating may be to some extent understandable, given that Member States need to set their own rules to achieve the goals the Directives draw, among the thirty-one Greek laws transposed EU Directives between 2018 and 2020 only five (16%)¹⁹ had any provisions to simplify the procedures, as reported in their Regulatory Impact Assessments. In addition, none of them contained any kind of estimation of the imposed regulatory burdens. Therefore, the impact of gold-plating to the Greek economy and public administration remains unmeasured."

Center for Liberal Studies – Markos Dragoumis (Greece), 2021

2.2.6. Mandatory revision

The principles were finalized by an obligation to include a statutory duty for Ministerial review every five years in each transposing act. Such an impact assessment is crucial in ensuring that the goals of the laws are properly met and whether the changes in the market required amendments to the laws. The assessment of the application of the UK's principles was included in three-quarters of the UK implementing measures. Where a review clause was not included, this was because the proposed approach was deregulatory or revoked existing legislation. This exemption illustrates the general approach of the UK's legislator, which is to reduce the administrative burden to nationals and to foster their competition in the state and region.

"The methodological and legal framework of gold-plating in the territory of the Slovak Republic appears to be insufficient compared to the other Member States. This problem is evidenced by gold-plating identified in several Slovak legal norms. The lack of methodological and legal guidance also persists due to the infrequent reference to this problem, and also due to the existence of a very large amount of legislation that is adopted or amended annually, both at the national and European levels. The result is that the business professionals as well as the public lose track of the legislation and have no interest in finding out whether the regulation has a basis in EU law and, if so, in what respect and to what extent the drafter of the legislation has deviated from its basis in the course of transposition."

F. A. Hayek Foundation (Slovak Republic), 2021

2.3. Sweden relies on a proactive business community and promotes cost-conscious decision making

Based on previous research²⁰, the example of Sweden was chosen due to a different kind of positive example it can provide to other European countries. Unlike the United Kingdom, where the bulk of the initiative was orchestrated by the public sector, Sweden can be an example of a proactive business community, which came forward with a set of recommendations that focused on the practice of adoption of the new EU legislation.

¹⁹ According to the Regulatory Quality Index data.

²⁰ Pošvanc, M., Púchly, T., Reguli, M., Mauricé, E. The Gold-plating: identification of problems in Slovakia and Lithuania and possible solutions for EU member states, 2015. Available online: <http://4liberty.eu/wp-content/uploads/2015/05/Gold_Plating.pdf>.

2.3.1. *The better-regulation concern is shared by both the private and public sector*

A distinguishing feature about Sweden is the existence of the Board of Swedish Industry and Commerce for Better Regulation (Näringslivets Regelnämnd, NNR) and the Swedish Better Regulation Council (Regelrådet).

The NNR is an independent, non-party political organization, which speaks for more than a third of all active companies in Sweden and represents businesses of all sizes and sectors. NNR is unique among business advocates in that its sole focus is on bringing about regulatory reform and a more business-friendly regulatory environment in Sweden and the EU²¹. NNRs input is beneficial in terms of analyzing existing rules and providing policy changes.

The dedicated counterpart in the government is the Swedish Better Regulation Council (hereinafter – Regelrådet), which is a designated decision-making body whose members are appointed by the Government. Primarily the Regelrådet:

- examines the proposals for new and amended regulations that may have effects on the working conditions of enterprises and their competitiveness;
- considers whether the statutory impact assessments were carried out;
- assesses the quality of the impact assessment;
- assesses whether new and amended regulations have been formulated to achieve their purpose in a simple way and at a relatively low administrative cost for enterprises;
- promotes cost-consciousness and effective regulation²².

"The Regulatory Impact Assessment (RIA) document plays a key role in assessing the impact of regulation. However, the problem is the low quality of this process. Another problem is that the submitter of legislation often does not consider the aspect of who is to be affected by the legislation and puts itself in the directive position of the State, which is not a partner of the affected subjects but a regulator in a directive position."

F. A. Hayek Foundation (Slovak Republic), 2021

2.3.2. *Abolishment of gold-plating is a joint project of the private and public sector*

The Regelrådet and NNR enacted a joint analysis-position "Clarifying Gold-Plating – Better Implementation of EU Legislation"²³, which provided not only the status quo analysis of the phenomenon of gold-plating but also an exhaustive list of recommendations to tackle it. It was considered as a ground-breaking novel approach to tackle gold-plating in a form of a joint project involving a business organization and a government-appointed committee. Regardless of the Regelrådet and NNR working in different ways, they have both noted a need for several measures to ensure that implementation of EU legislation does not impair companies' competitiveness. Such synergy between the private and public sectors ensured a better and more thorough exchange of practical issues related to EU law transposition. The role of the Regelrådet as a decision-making quality-control subject in the legislative process, in cooperation with the NRE, ensures that the transposition of EU laws is well-justified. This is a significantly prudent measure to tackle gold-plating since the implications of it may be identified before they are enacted.

However, a disclaimer must be made, that the position of the Regelrådet and NNR is non-obligatory and the Regelrådet's opinion on the quality of the impact assessment does not automatically cancel-out the proposed EU transposition act. Thus the research suggests pairing principles and good practices with enforcement mechanisms.

²¹ European Economic and Social Committee, Tsipouri, L. J. Smart Governance of the internal market for business. Available online: <<https://www.eesc.europa.eu/sites/default/files/resources/docs/qe-01-14-863-en-n.pdf>>.

²² Ibid.

²³ Althoff, K., Wallgren, M. Clarifying Gold-Plating – Better Implementation of EU Legislation, 2012. Available online: <<https://www.regelradet.se/wp-content/uploads/2012/03/Clarifying-Gold-Plating.pdf>>.

3. THE PARAMOUNT ROLE OF IMPACT ASSESSMENT IN AVOIDING GOLD-PLATING

The institution of regulatory impact assessment (RIA) plays a key role in preventing gold-plating. Many EU MSs have guidelines and principles in their national systems to avoid gold-plating, however, they are recommendatory and their application relies on the will of policymakers. They may not only lack certain knowledge or resources when transposing directives but may also have their political agendas which they may fulfill through gold-plating. Thus good practices must be paired with enforcement mechanisms. This can be achieved by incorporating them into the formal legislative procedure, particularly in the *ex-ante* and *ex-post* RIA.

"There are no statutory duties to reduce gold-plating in Greece, beyond a few shared best practices. The Standing Orders of the Hellenic Parliament do not include any clauses or provisions to address gold-plating problems.²⁴ And even though²⁵, there is a manual on EU laws harmonization which states that gold-plating should be avoided since it leads to unnecessary regulatory burdens and loss of competitiveness of the national economy, it is not binding, and these best practices are not followed by the Parliament. Moreover, the [Manual on Legal Drafting](#), published in 2020 by the current government, which aligns the domestic regulatory framework with the principles of better regulation agenda, states the same best practices on avoiding gold-plating, but it remains quite inapplicable. Finally, there is no national monitoring agency or any related toolkit to check EU transpositions and identify gold plating and its consequences to the business environment."

Center for Liberal Studies – Markos Dragoumis (Greece), 2021

*"The Slovak Republic has not yet developed a manual or methodological guidance that would regulate the procedure for proper implementation of EU directives, to avoid unnecessarily burdensome transposition. A reference to the transposition of the Directive into the Slovak legal order can be found in the Legislative Rules on Lawmaking. According to Annex No. 1 entitled "Clause on the compatibility of the draft law with EU law" of the document in question, which is an annex to the draft law, it is necessary to indicate whether the subject matter of the draft law is also found in EU law. It is also necessary to indicate, *inter alia*, to what extent the EU law in question is transposed and whether the Bill is compatible with EU law. According to the Legislative Rules on Lawmaking, in addition to the "Clause on the compatibility of the draft law with EU law", a "Table on the compatibility of the draft law with EU law" is also attached to demonstrate the compliance of the draft law with EU law. Where a draft law transposes an EU directive, such a draft must also include a transposition annex. The transposition annex shall state "the precise designation of the legally binding act being transposed and an indication of its publication in the Official Journal of the European Communities or the Official Journal of the EU".*

At first glance, the submission of such annexes to any draft law may appear to be effective in combating unjustifiably burdensome transposition, but the above annexes are based on a simple statement by the submitter as to whether there has been full compliance, partial compliance, no compliance, or that it was not necessary to transpose a given article of the directive into Slovak law. Often the submitter has stated that the transposition of the directive into Slovak law has resulted in full compliance with the text of the directive, but in the end, gold-plating has been identified in the law."

F. A. Hayek Foundation (Slovak Republic), 2021

3.1. The impetus for gold-plating may be halted at the directive negotiations stage

The EU has a focus on applying the paradigm of minimum requirements and bringing benefits to ordinary people and businesses when enacting directives. EU Better regulation rules aim to ensure that EU legislation brings benefits to people and businesses, is based on evidence and a thorough impact assessment, and regulatory burdens on individuals and businesses are kept to a minimum²⁶.

OECD urges to conduct a thorough ex-ante RIA both during the negotiations of EU directives and when transposing them. OECD has noted that typically impact assessment at a national level is not carried out during the negotiations phase. OECD recommended that the

²⁴ See database of the Parliament at <https://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/Kanonismos-tis-Voulis/>

²⁵ See p. 80 in the [Manual of harmonization: the European Union law in Greece](#), published by the General Secretariat of the Government.

²⁶ European Commission. COMMISSION STAFF WORKING DOCUMENT: Overview of the Union's Efforts to Simplify and to Reduce Regulatory Burdens accompanying the document "Communication Completing the Better Regulation Agenda: Better solutions for better results" No SWD(2017) 675 final, 2015. Available online: <https://ec.europa.eu/info/sites/default/files/overview-union-efforts-tosimplify-and-to-reduce-regulatory-burdens_en.pdf>.

government should review current processes for the negotiation and transposition of EU regulations, to map strengths and weaknesses, deepen the involvement of the Interior, Finance, and Economic Affairs ministries, and strengthen procedures and guidance aimed at addressing substantive issues. Such impact assessment of EU regulations both at the negotiation and transposition phase should be made a formal requirement and an integral part of the new impact assessment process²⁷.

The Ministry of Justices of the Republic of Lithuania suggests that stakeholder consultations during the negotiations phase can not only effectively contribute to the identification of important interests that determine the national position, but the discussions, information, and suggestions received from stakeholders can also help to design the necessary and effective measures for the implementation of the EU law while it is still under consideration. By discussing and finding appropriate and reasonable measures and methods for the implementation of the future EU law during the consultations, the probability of excessive regulation in the later stage of the implementation of the EU law would be significantly reduced.²⁸

3.2. RIA standards apply when transposing EU directives

Due transposition entails carrying out a thorough RIA before even registering a draft law, which transposes a directive. According to the OECD and the European Law Department under the Ministry of Justice of the Republic of Lithuania, directives are transposed through a national legislation procedure, in which case the basic legislative methods apply, i.e. identification of the problem/objective (from the directive), impact assessment of alternatives to achieve the objective and choosing of the least burdensome solution²⁹.

*“Less red tape and more red carpet for SMEs and entrepreneurs”*³⁰. The EC has long pursued the “Think small first” principle.³¹ This would help to ensure that the transposition of EU law does not impose unnecessary burdens on SMEs, which are the key component of EU economic condition and strategy. The European Law Department under the Ministry of Justice of the Republic of Lithuania suggests taking a general approach of a lighter regime for SMEs as a priority for transposing EU law. This is supported by the OECD, which mandates impact assessments, evaluation of alternatives, and consultation of stakeholders (*ex-ante*)³². This would help to avoid gold-plating, especially in cases where the draft law promoters lack specific, e.g. industry-specific, knowledge.

Ex post RIA helps to identify gold-plating cases and any regulations that may have gold-plating effects. Gold-plating can also occur after legislation has been adopted (even if it has not been identified in the *ex-ante* assessment). According to the OECD’ on the importance and methodological conduct of *ex-post* evaluation: combining *ex-ante* and *ex-post* in the transposition of EU law would help to avoid gold-plating³³. Monitoring national measures implementing EU law, i.e. carrying out *ex-post* RIA would help both to identify cases of over-regulation and to assess whether over-regulation that seemed justified and necessary at the

²⁷Organization for Economic Co-operation and Development. Better regulation in Europe, ch. The interface between the Member States and the European Union”, 2010. Available online: <<https://www.oecd.org/gov/regulatory-policy/44912396.pdf>>.

²⁸ Europos Teisės Departamentas prie Lietuvos Respublikos Teisingumo ministerijos. Europos Sąjungos teisės aktų įgyvendinimo nacionalinėje teisėje ir administracinės naštos pagrįstumo įvertinimo rekomendacijos, 2015 m. Available online: <[https://tm.lrv.lt/uploads/tm/documents/files/Perteklinis_reguliavimas_rekomendacijos_galutinis_\(1\).pdf](https://tm.lrv.lt/uploads/tm/documents/files/Perteklinis_reguliavimas_rekomendacijos_galutinis_(1).pdf)>.

²⁹ Ibid.

³⁰ European Commission. Press release “Think Small First”: A Small Business Act for Europe”, 2008. Available online: <https://ec.europa.eu/commission/presscorner/detail/en/IP_08_1003>.

³¹ Ibid.

³² Organization for Economic Co-operation and Development. Better regulation in Europe <...>.

³³ Ibid.

time of the drafting of the national legislation is still necessary, sufficient, and effective³⁴. It is also recommended to incorporate review obligations in the legal acts themselves as a measure to undertake *ex-post* RIA responsibility however this practice is rarely used.

Table 1. Consolidated best practices to tackle gold-plating-related issues. The arrow's direction indicates whether the criterion increases (upward) or decreases (downward).

Criterion	Adjustment costs (abundance of rules)	Adjustment costs (complying with new regulations)	Ambiguity in wording	Relevance and efficiency of transposing laws	Necessity and appropriateness of regulation
Principle "stock of regulations" (OECD)	↓	↓		↑	↑
Lighter transposition regime (OECD)	↓	↓			↑
Use of alternatives to regulation (UK)	↓	↓		↑	↑
Copy-out (UK)	↓	↓	↓		
The enforcement mechanism (UK, SWE)				↑	↑
Red-tape challenge (UK)	↓	↓		↑	↑
Private-public cooperation				↑	↑
<i>Ex post</i> -RIA	↓	↓		↑	↑
<i>Ex-ante</i> RIA	↓	↓	↓	↑	↑
Statutory review obligation in the laws (UK)	↓	↓		↑	↑
Establishing independent "gold-plating watchdogs" with decision-making powers	↑	↑		↑	↑

Source: LFMI's summarization of analyzed data and literature.

³⁴ Europos Teisės Departamentas <...>.

CONCLUSIONS AND RECOMMENDATIONS

- Regardless of the efforts, gold-plating has not been abolished. This primarily is due to the reason that gold-plating tackling measures are not accompanied by responsibility and enforcement. When every rule in life is sanctioned, rules on lawmaking have no enforcement mechanisms thus making these rules inefficient.
- The initial step to tackle gold-plating is a government- and parliament-level joint position of acknowledging the implications of gold-plating and entering the commitment to battle it in the Government's agenda. Accordingly, a strict action plan should be composed and adhered to.
- It would be efficient to commit to a state-level priority to protect their nationals in terms of not putting them at a competitive disadvantage and employing all possible means to reduce their administrative burden (as illustrated by the UK's experience).
- It is prudent to find common grounds to tackle gold-plating between the state and private sector and create a functioning cooperation synergy (or forum). However this should be the government's proactive institution since private entities already present their arguments during public consultations, yet their comments are not legally binding (as illustrated by Sweden's experience).
- To ensure effective *ex-post* revisions (following the UK's example) it would be prudent to include a statutory requirement for review every five years in every act, which transposes a Directive. However, the research shows that even when provided an obligation for *ex-post* review policymakers tend to depart from this obligation since it has no enforcement. Therefore LFMI suggests imposing an obligation to include a sunset provision in transposing acts. Such a provision would be of terminating nature and the law at hand could only be in force if its necessity would be proven following a formal vote. When a consensus is not reached, the sunset provision would terminate the application of the law. An exemption should only be applied in cases where the new act was deregulatory or revoked existing legislation.
- Given that due transposition of directives implies not enacting new laws, but incorporating its requirements into the domestic legal system, it is recommended to set out obligations to (i) seek alternatives to laws and first enact non-statutory regulations, and (ii) to create an obligation to apply the principle "stock of regulations". This would aid in stopping the hyperinflation of laws and would reduce the burden to nationals.
- An obligatory requirement should be introduced for the Regulatory Impact Assessment (RIA) to identify gold-plating cases and measure the regulatory burdens caused by the national additions. No law with gold-plated provisions should be submitted to the plenary without an estimation of the regulatory burdens and the President of the Parliament should accept no law without a proper RIA.
- It would be most prudent to connect the *ex-ante* and *ex-post* RIA mechanisms and make it an obligatory cycle of the legislative process. The *ex-ante* RIA would act as a checklist for the forthcoming *ex-post* RIA. The purpose of the latter would be to evaluate whether the expected outcomes (both positive and negative) foreseen during

the *ex-ante* RIA were achieved. Accordingly, amendments must be initiated if the primary goals were not met or if the negative implications out-weighted the expected benefits of the regulation.

- The “one in, one out” (OIOO) approach should be mandatory in lawmaking. It implies a one-to-one offset and has proved to be a key instrument for reducing the legal flood, while in some countries more drastic measures have been taken such as one-in-two-out and one-in-three-out rules. The OIOO approach would result in burden reduction for citizens and businesses by estimating the implications and the regulatory costs of applying legislation, especially for SMEs.
- Particular attention must be paid to adhering to the principle of proportionality. This means that policymakers have the additional obligation to make sure that the set rules do not go beyond what is necessary and choose the least burdensome rule.
- Member States should promote more e-governance tools where national administrative changes can be launched, and greater administrative coordination can be achieved. The transition to e-governance tools is a tool to address the outcome, since less red tape means less regulatory burden, and does not cope with the cause of the problem, the tendency of the states to overregulate *per se*.
- The initiative of Single Market directives³⁵ by European Commission should include a gold-plating monitoring system. The initiative could add a task to assess the extent to which EU provisions are gold-plated and call the Member State to explain the necessity of this action. The overall objective of the Single Market directives monitoring system is to ensure that Single Market law is implemented properly.

³⁵ European Commission. Single Market Scoreboard. Available online: <https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/transposition/index_en.htm>.