How to identify and avoid gold-plating EU regulations

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Preventing gold-plating is once again reinstated by the EU as an important measure to reduce barriers to the single market. Gold-plating is not in line with the EU legislature's goal of keeping the single market differences to a minimum. Typically, it translates into undue and adverse burdens to all. It does not only disadvantage nationals but also makes the EU less attractive to foreign investments.

The main reason why gold-plating has not been abolished is that the measures to tackle it are not accompanied by responsibility and enforcement powers, which makes them ineffective.

Including gold-plating risk-assessment in the ex-ante and ex-post regulatory impact assessment would significantly aid in tackling gold-plating cases. Notably, some Member States have already established guidelines on avoiding gold-plating but they are not paired with enforcement mechanisms thus making them de facto null.

Introduction

Gold-plating[2] 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 market (European Commission, 2020).

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.

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 see fit.

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

When transposing directives the European Commission (hereinafter – EC) has long urged the Member States to refrain from creating additional burdens to its residents (European Commission, 2018). 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 upon the directives' minimal standards to fulfill its political agenda and thus shifting the focus away from the true purposes of the directives.

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

Any deviations 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 relative to the other Member States. Gold-plating has multifold effects, as the regulatory burden accumulates by imposing other EU regulations, national and sub-national regulations on the subject. Typically gold-plating leads to additional costs, which in the long run disincentives businesses and persons from expanding their economic activity hence reducing options for consumers. At the MS level, gold-plating forces operators into the shadow economy and reduces the state's attractiveness for investment. This in turn makes the EU a fragmented market and thus less competitive as a global player.

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[2] 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" (European Commission, OECD (2015).

2. Principles and good practices to avoid gold-plating when transposing EU directives

During the past years, the EC has made notable efforts to tame gold-plating. 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.

OECD promotes reliance on existing rules rather than new ones

Given that due transposition of directives implies not enacting new laws, but incorporating its requirements into the domestic legal system, it would be prudent 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" (OECD, 2019). This would aid in stopping the hyperinflation of laws and would reduce the burden to nationals.

The UK suggested focusing on minimal requirements and best resident interests

As demonstrated by the UK, 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 (Department for Business Innovation, & Skills, 2013)

The "one in, one out" (OIOO) approach, introduced by the UK, would significantly reduce the unwanted effects of gold-plating. 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.

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 other government bodies in check. Policymakers also had the obligation to justify deviations from the UK's principles before the RRC.

The UK ensured the efficiency of its principles on gold-plating by an obligation to include a statutory duty for Ministerial review every five years in each transposing act. However, research shows that even when provided an obligation for ex-post review policymakers tend to depart from this obligation since it has no enforcement. Thus imposing a sunset provision in transposing acts would be more efficient. 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.

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

Sweden demonstrated that it is possible 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.

3. The paramount role of impact assessment in avoiding gold-plating

The institution of the 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 advisory 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.

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

The OECD urges to conduct a thorough ex-ante RIA both during the negotiations of EU directives and when transposing them. The OECD recommended that governments should review current processes for the negotiation and transposition of EU regulations, to map strengths and weaknesses. 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 process (OECD, 2010).

By discussing and finding appropriate and reasonable measures and methods for the implementation of the future EU law during the consultations, the likelihood of excessive regulation in the later stage of the implementation of the EU law would be significantly reduced (European Law Department of Lithuania, 2015).

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 (European Law Department of Lithuania, 2015).

"Less red tape and more red carpet for SMEs and entrepreneurs" (European Commission, 2008). The EC has long pursued the "Think small first" principle. The European Law Department of Lithuania (2015) suggests taking a general approach of a more light-touch regime for SMEs as a priority for transposing EU law. This would help to avoid gold-plating, especially in cases where the draft law promoters lack specific, e.g. industry-specific, knowledge.

Gold-plating can occur after legislation has been adopted (even if it has not been identified in the *ex-ante* assessment). According to the OECD (2019), combining *ex-ante* and *ex-post* in the transposition of EU law would help to avoid gold-plating. 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 time of the drafting of the national legislation is still necessary, sufficient, and effective (European Law Department of Lithuania, 2015).

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