How Looking Back Can Help the EU Move Forward: The Case of Gold-Plating


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Gold-plating[1] is still one of the main factors disrupting the European Single Market. Not only does it unjustly disadvantage national businesses and consumers, but it also reduces the competitiveness of the European Union (EU) as a global player by increasing administrative costs and fracturing the internal market. Thus, preventing gold-plating is among the top explicit tasks of the EU in reducing barriers to the single market[2]. The recent humanitarian crisis caused by Russia's aggression against Ukraine has, among other things, illuminated the path of de-bureaucratization and trusting more in the self-regulation of persons both for the EU and its member states as a way to move forward. This path aligns with the aforementioned task of the EU to abolish gold-plating.

The common practice among the member states to *overachieve* when transposing directives not only harms the functioning of the EU, but also hurts national economies and citizens. However, many of the countries 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 members.

Yet, the question of whether the European Union can be held as an example when talking about reducing gold-plating shall be considered. In recent years, the EU legislator has shown indications that it is on the verge of *gold-plating* itself out of the global market. Years of observations of both national- and EU-level lawmaking (its quality and culture in particular) suggest that there are, unfortunately, more similarities than differences.

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THE COMMON PRACTICE AMONG THE MEMBER STATES TO *OVERACHIEVE* WHEN TRANSPOSING DIRECTIVES NOT ONLY HARMS THE FUNCTIONING OF THE EU, BUT ALSO HURTS NATIONAL ECONOMIES AND CITIZENS

[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, OECD (2015) *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 (2020) *Communication on Identifying and Addressing Barriers to the Single Market*, No. COM (2020) 93 final. Available [online]: https://ec.europa.eu/info/sites/default/files/communication-eu-single-market-barriers-march-2020_en.pdf

Meanwhile, the European Union should serve as an example of a non-gold-plating policy. The path to move forward is being motivated out of the willingness to create a fostering environment for all, rather than regulate based on fear of the unknown and by restricting a person's ability to act. The former is the impetus for connecting to the world (i.e., reality) to develop and thrive, while fear compels separation as a means of protection for oneself and the ones we care about.

THE PATH OF GOLD-PLATING DOES NOT LEAD TO A GOLDEN FUTURE

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

GOLD-PLATING IS NOT IN LINE WITH THE EU LEGISLATURE'S PARADIGM

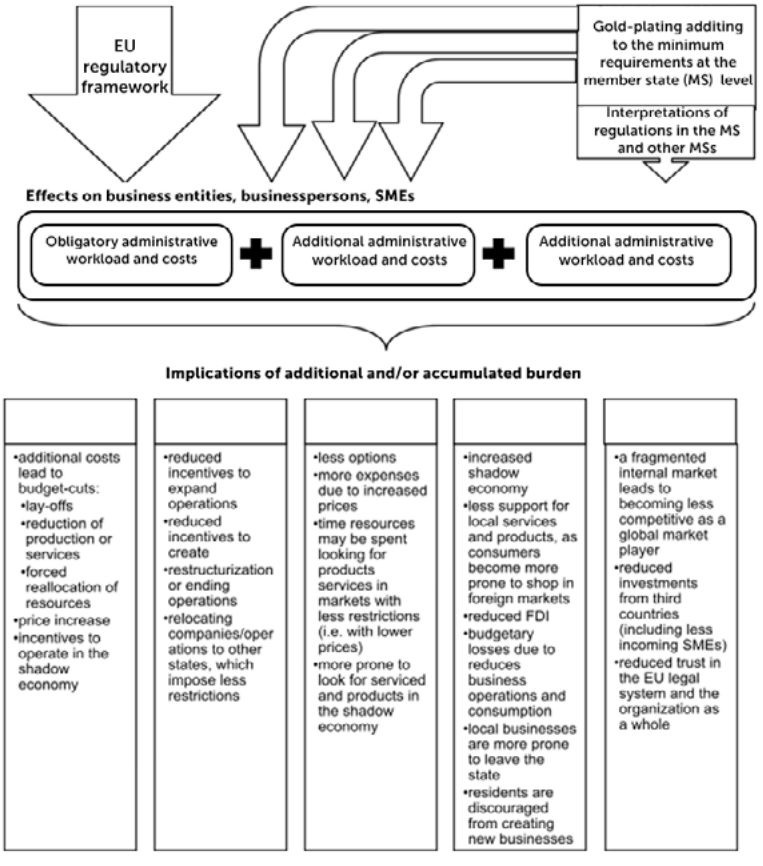
Under the EU law, any national derivations from the minimal EU requirements must meet the purposes set out in the directive transposed and generally not exceed the minimal requirements to ensure the smooth flow of the EU Single Market. When transposing directives, the European Commission (EC) has long 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, and must be proportionate, easy to understand, and compliant with the harmonized minimum rules[3].

Moreover, the EC emphasizes that even within the legal rules, considering 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 upon the directives' minimal standards to fulfill its political agenda and thus shifts the focus from the true purposes of the directives. This is

> 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 IN RELATION TO THE OTHER MEMBER STATES. GOLD-PLATING HAS MULTIFOLD EFFECTS

[3] European Commission (2018) *Communication of the Commission of 19 July 2018 on the Protection of Intra-EU Investment.*

Figure 1: The Multifold and Accumulated Effects of Gold-plating



Source: Lithuanian Free Market Institute (2021) Gold-Plating: How to Identify and Avoid. Available [online]: https://www.llri.lt/wp-content/uploads/2022/01/Gold-plating-final-2022-01-12.pdf

achieved by masking over-regulation as an inevitable "side effect" of EU regulations without fully considering the burden it may bring.

GOLD-PLATING TYPICALLY TRANSLATES INTO UNDUE AND ADVERSE BURDENS TO ALL

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 in relation to the other member states. Gold-plating has multifold effects [See: Figure 1].

GOLD-PLATING HAS A PARTICULARLY DISADVANTAGEOUS IMPACT ON SMES AND EU GOALS TOWARDS THEM

According to the European Commission, small and medium-sized enterprises (SMEs) 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

> SMALL AND MEDIUM-SIZED ENTERPRISES (SMES) ARE THE BACKBONE OF EUROPE'S ECONOMY

sector of the economy[4]. 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 development[5] and therefore allowing SMEs to take due advantage of the key freedoms of the EU[6].

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 SMEs[7]. 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 member states due to gold-plating, the possibilities of creating a fostering framework and attracting foreign SMEs to the EU are low.

WHAT IF THE EU IS *GOLD-PLATING* ITSELF OUT OF THE GLOBAL MARKET?

When analyzing the tendencies of the national- and EU-level lawmaking process and its flaws, common issues become evident. During recent years, the EU legislator in the fields of social security, competition, innovation, and economic activity has raised red flags to analysts indicating that the practice of gold-plating (or *overachieving*) is not that alien to the European Union itself.

The criteria to establish gold-plating[8] refer to the need to adhere to the common lawmaking principles, e.g., proportionality, necessity, and subsidiarity. In addition, the general notion of lawmaking implies that measures that create additional burdens must be necessary and proportionate.

According to the EU law, the proportionality principle means that to achieve its aims, the EU will only take the action it needs to and no more[9]. However, just as in national law, the EU legislator can do a convenient impact assessment that would create the necessary arguments to justify the principle of proportionality. The opposite of this is the essence of gold-plating by its effect, and there were a number of *red-flag* initiatives of the EU legislator during recent years.

In addition, there are no mandatory requirements to do a gold-plating risk assessment when producing impact assessments of

[4] European Commission (2021) *Entrepreneurship and Small and Medium-Sized Enterprises (SMEs)*. Available [online]: https://ec.europa.eu/growth/smes_en

[5] European Commission (2020) *Factsheet Unleashing the Full Potential of European SMEs.* Available [online]: https://ec.europa.eu/commission/presscorner/detail/en/fs_20_426

[6] European Commission (2021) *SMEs' Access to Markets*. Available [online]: https://ec.europa.eu/growth/smes/sme-strategy/improving-smes-access-marktets_en

[7] Ibid.

[8] See, for example: Europos Teisės Departamentas prie Lietuvos Respublikos Teisingumo ministerijos (2015) *Europos Sąjungos teisės aktų įgyvendinimo nacionalinėje teisėje ir administracinės naštos pagrįstumo įvertinimo rekomendacijos*. Available [online]: https://tm.lrv.lt/uploads/tm/documents/files/Perteklinis_reguliavimas_rekomendacijos_galutinis (1).pdf [in Lithuanian]

[9] Treaty on European Union, Article 5.

> WHEN ANALYZING THE TENDENCIES OF THE NATIONAL- AND EU-LEVEL LAWMAKING PROCESS AND ITS FLAWS, COMMON ISSUES BECOME EVIDENT

new EU regulations or directives. In general, all the directives allow for more stringent regulations at the national level meaning that the EU will not only achieve its goal of harmonization but also in a sense invite gold-plating. Understandably, the EU cannot establish close-ended requirements, since this would contradict the principle of subsidiarity and the sovereignty of member states. Yet, by declining an impact assessment on the possible ways of gold-plating, the proposed directive in no way benefits the EU's goals of reducing this practice.

THE DIGITAL MARKETS ACT WITH ITS ANTI-MARKET MECHANISMS[10]

The European Parliament (EP), the EC, and the European Council continue negotiations on the Digital Markets Act (DMA) – a proposal aiming to curtail the anti-competitive behavior of big digital market players and create a level playing field for everybody.

The DMA is based on a dubious impact assessment with wishfully projected positive outcomes and underestimated negative consequences. Proclaiming goals to improve the innovative capacity of the EU and to improve the results in the digital sector of the market, the proposal, ironically, ignores both consumer interests and the basic mechanisms of competition and innovation.

USING A POLITICAL UMBRELLA TO ENACT REGULATIONS WITHOUT DULY ASSESSING THE COSTS

The debate about improving the functioning of the market is dominated by a political standpoint, marginalizing discussions about economic consequences. Failing to address how innovations and technologies are created and what motivates people to pursue them, the DMA will hinder Europe's creative potential.

The European Commission justifies the proposal by the need to avoid regulatory fragmentation in the single market, create a safer digital space, and establish a level playing field for businesses, considering that some large online platforms act as *gatekeepers* in digital markets. Although the authors of the DMA claim that the act will restrict only big firms, the enforcement of the proposed regulation will inevitably hurt SMEs and the end users, the protection of which is among the EU's explicit tasks mentioned in the first part of this article.

In addition, the DMA introduces vague, ambiguous, and poorly defined concepts while leaving unrestricted scope and powers of the regulator to interpret them. And this will surely lead to gold-plating on the part of member states. All the regulatory uncertainty associated with the DMA is likely to cost years of lawsuits just for the designation of gatekeepers. They may also impose

[10] See: Lithuanian Free Market Institute (2021) *The Economic Analysis of the Digital Market Act.*

> THE DMA INTRODUCES VAGUE, AMBIGUOUS, AND POORLY DEFINED CONCEPTS WHILE LEAVING UNRESTRICTED SCOPE AND POWERS OF THE REGULATOR TO INTERPRET THEM

a tremendous waste of finances and time for companies as they try to avoid – or to comply with – the new regulatory framework.

Under the DMA, however, such pioneers will be labeled as *gatekeepers* and will face the regulatory, administrative, and financial burden imposed by the regulator. Yet, as established above, this is in no way substantiated to prove that it is necessary and proportionate.

PERFECT SERVICES AND PERFECT PROVIDERS ARE AKIN TO WISHFUL THINKING

Like any other market or sector, the digital market constantly pursues improvement and development. The EC thinks that they can accelerate the development towards better outcomes "for consumers in terms of prices, quality, choice, and innovation" by transforming or replacing the existing digital service providers[11]. No argumentation is provided as to why these new winners, who will come after the DMA has been implemented and the rules of the game have been changed, will bring only positive effects and will not have any adverse impact on consumers, innovation, and market potential.

"WE MUST DO SOMETHING": THE PREVAILING SPIRIT OF THE DMA

The European Commission claims that there is a legitimate fear that the market power that large platforms have acquired will be hard to challenge[12]. It is difficult to judge how much of this strive to regulate comes from a naïve but genuine belief that it is possible to engineer the market and how much is being driven by various interests.

One of the reasons for such initiatives is a negative attitude towards big companies and technologies (the so-called "tech lash") among certain groups and society. The EU legislator's impact assessment lacked clear arguments and grounds as to why big companies are the primary source of discrepancies in the digital market and any other reasons were not considered, which could lead to an assumption that one of the key arguments for promoting the DMA is populism. And as populism always does, it seduces politicians with visibly easy and popular solutions for problems that are neither simple nor visible. And what is most regrettable is that it ultimately harms those actors and processes that were supposed to improve.

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[11] European Commission (2020) *Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)*. Available [online] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52020SC0363

[12] Ibid.

The debate that is taking place around the regulation proposal is dominated by a political standpoint, marginalizing discussions about economic consequences. As a result, the political discourse fails to address how innovations and technologies are created, what motivates people to pursue them, and the effects the DMA will have on Europe's creative potential.

THE PLATFORM WORK DIRECTIVE THAT WILL NOT DELIVER

At the end of 2021, the European Commission proposed a directive of the European Parliament and Council on improving working conditions on platform work[13]. The proposal lays down intricate requirements for platforms whose application is likely to have serious unintended consequences for the consumers and workers contrary to the directive objectives.

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A "CONVENIENT" IMPACT ASSESSMENT

The impact assessment neglects the fact that individuals themselves decide to engage in platform work, which suggests that they regard certain conditions of platform work as more advantageous, and thus more attractive. Such behavior may also be indicative of the desire to distance oneself from employment relationships and related regulatory restrictions on work activities. The breakthrough of the gig economy was preconditioned by the laxity – or even absence – of regulation, i.e., more freedom to enterprise and act.

Juxtaposed to this, centralized rigid regulations of platform workers would negate the very essence of working through online platforms, and the employment presumption would unjustly deprive individuals of the ability to decide on their preferred work module and conditions. Imposing labor standards on platform work will reduce the supply of services and increase their cost for the consumers. This may lead to a number of platform workers losing their income.

MISCONCEPTIONS OF KEY CONCEPTS AND BENEFITS

Rather than getting employed, the service provider (the self-employed) *purchases* the connectivity service through a platform. In many cases, it is not the platform but its users who rate each other. To minimize their risks due to the application of the Draft Directive, it is likely that platforms will start by abolishing the rating system, which will have a negative impact on both service providers and consumers.

The directive provides for a presumption of an employment relationship if certain criteria indicating control are met. Automatically

[13] European Commission (2021) *Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work.* Available [online]: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12828-Improving-the-working-conditions-of-platform-workers_en

applying an employment status to any platform worker would unduly deprive the self-employed of the possibility of deciding for themselves their preferred model of organization and the conditions of their activity. It would also increase the uncertainty of the application of the directive. This, in turn, may force out platforms from the EU, since the potential risks of operating in this market would be too high to bear in comparison to other markets. Such market fragmentation could significantly reduce the competitiveness of the EU as a global market player and would make it less attractive for foreign investment and innovation.

Yet, this concept is applied at a higher level, meaning that *overachieving* and going further than what is necessary on the part of the EU legislator makes the European Union market less attractive on a global scale.

> CENTRALIZED RIGID REGULATIONS OF PLATFORM WORKERS WOULD NEGATE THE VERY ESSENCE OF WORKING THROUGH ONLINE PLATFORMS

FORCING PLATFORM WORKERS INTO A LEGAL VERTIGO

Forcing former service providers and atypical workers into formal and traditional employment relations poses another conundrum, given that the employment framework may be ill-prepared to handle unorthodox work through platforms. It must be kept in mind that platform workers may not wish to engage in traditional employment or are unable to do so due to the peculiarities of their status.

Most traditional employment contracts do not meet the need for flexibility that is provided by platform work. In such cases, an alternative could be zero-hour contracts, which are the closest alternative to platform work and could ensure the needed flexibility; however, the EU discourages such contracts.

THE EU DIRECTLY AIMS TO REGULATE WHAT IS ALREADY REGULATED

The directive on platform work duplicates effective control requirements, which can already be established under the EU acquis that covers labor relations and social protection. This implies that the issues that the European Commission aims to tackle are created not by an abundance of rules, but rather by the lack of their enforcement mechanisms.

In its impact assessment, the EC discloses that the issue of platform work is covered under various other EU regulations, yet it neglects to prove how current regulations are insufficient. The object of the directive is illegal work[14], the avoidance of which is already enshrined in various directives, regulations, and national laws (for example, national labor codes, which provide for

[14] 'Illegal work' is a situation where a person has signed a service provision contract when in fact based on certain control criteria the relationship between him and the enterprise is of employment nature.

the criteria of illegal work). And, in essence, duplicating the legal schemes that already exist is indeed gold-plating based on its effect[15].

MAXIMIZING THE GLOBAL MINIMUM TAX

The European Commission released a *Proposal for a Council Directive* on ensuring a global minimum level of taxation for multinational groups in the Union, which puts a minimum 15% corporate income tax rate on large-scale enterprises[16]. The proposal is based on OECD's *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy*[17], which consists of multiple rules aiming to ensure that the minimum tax rate is paid. The OECD agreement is in no way binding, as it states that EU countries: *"are not required to adopt the global rules, but, if they choose to do so, they will implement and administer the rules in a way that is consistent [with the agreement]."*

Meanwhile, the proposed directive makes the rules mandatory for all member states in the name of protection of the internal market. Additionally, the EU directive extends its scope to include purely domestic large companies, not only multinational enterprises, as stated in the OECD agreement. Even though this significant change was made, the EU has not conducted its own impact assessment of the proposed rules, referring to an impact assessment done by OECD in 2020.

THE MOST 'CONVENIENT' IMPACT ASSESSMENT – NO IMPACT ASSESSMENT AT ALL

One of the most troubling aspects of the directive proposal is that no proper impact assessment has been conducted. The explanation given by the European Commission is that OECD has already conducted the impact assessment of the global minimum tax regime. That is true, but there are significant differences from the policy presumed in the OECD impact assessment and the EC proposal. Firstly, OECD assumes a 12.5% minimum tax rate, while the directive proposes 15%. Secondly, specific tax

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[15] See: Mickute, K. (2022) *EK direktyva mažins galimybes pavežėjais dirbti tiek vietiniams, tiek nuo karo siaubo besitraukiantiems žmonėms*, [in]: *Delfi.lt*. Available [online]: www.delfi.lt\verslas\nuomones\karolina-mickute-ek-direktyva-mazins-galimybes-pavezejais-dirbti-tiek-vietiniams-tiek-nuo-karo-siaubo-besitraukiantiems-zmonems.d?id=89580397 [in Lithuanian]

[16] European Commission (2021) *Proposal for a Council Directive on Ensuring a Global Minimal Level of Taxation for Multinational Groups in the Union.* Available [online]: https://ec.europa.eu/taxation_customs/system/files/2021-12/COM_2021_823_1_EN_ACT_part1_v11.pdf.

[17] OECD (2021) *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy.* Available [online]: https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf

allowances called substance carve-outs are different in the impact assessment and the EU directive.

The impact assessment assumes a specific allowance for depreciation expenses, while the EU proposal allows a carve-out for a particular percentage value of tangible assets. Furthermore, no impact assessment was done if the EU enacts the minimum tax and other countries do not. Such a scenario would put the European business at a competitive disadvantage, but the costs are in no way evaluated. Additionally, the scope of the EU directive goes beyond what was agreed upon in the OECD as it also includes purely domestic groups, yet it is not considered a possible consequence of the regulation.

THE UNJUSTIFIED INCREASE IN ADMINISTRATIVE COSTS IS NOT EVEN CONSIDERED AS AN ARGUMENT

The directive might also create legal uncertainties for the countries with preferential CIT regimes to certain investment types or investments in specific locations. For example, Lithuania imposes no corporate income taxes in the case of investments exceeding 20 million euros and creating at least 150 jobs. Before coming into effect, these provisions were agreed upon with the European Commission and recognized as non-harmful. However, the minimum tax directive does not acknowledge the latter. There is a question about a breach of the company's legitimate interests if it made investments in Lithuania because of the 0% tax rate but is now in the scope of the minimum tax rules and will have to pay the top-up tax. Adopting the proposed EC minimum tax directive would cause an increase in bureaucracy.

In addition, to comply with the directive, companies would have to calculate their effective tax rates paid in every jurisdiction. This requirement will force companies to conduct a parallel accounting according to the proposed rules, as eligible taxes, revenues, and costs will differ based on national rules. The parallel accounting will require additional time and effort by companies to comply with taxation, which could instead be spent in other productive ways.

> PUBLIC CONSULTATIONS BOTH AT THE EU AND MEMBER STATES' LEVEL MUST BE HELD PROACTIVELY

LOOKING BACK IN ORDER TO PAVE A WAY FORWARD

Let us now analyze the key good practices and principles to adhere to when enacting laws both at the EU and the national level. For the latter, gold-plating may be avoided to better benefit its residents. And for the former, universal methods of increasing the quality of lawmaking and, in turn, trust in the European Union shall be discussed.

PUBLIC CONSULTATIONS ARE INSUFFICIENT TO SHOW THE VIEWS OF THE MANY

Motivation out of fear instead of love results in diminishing the powers of the many for the alleged protection of a few, and in most cases without even hearing the views of the key stakeholders – the users, the consumers, the self-employed, and the SMEs. For example, the DMA discussions involved only

a minor part of SMEs that would be directly affected by the regulation.

In a closed discussion held by the Lithuanian Free Market Institute in February 2022 on the quality of lawmaking, the majority of the smaller non-governmental organizations said that they are not motivated to engage in public consultations since they know that their opinions will not matter and preparing those takes up a lot of their valuable time. Given that small stakeholders have a lot on their plates, unfortunately, engaging in *fictional* public consultations costs them more than trying to work with new regulations and helping their peers.

This means that public consultations both at the EU and member states' level must be held proactively, and any responses to the public consultation materials must be (dis) agreed upon by using arguments. This is important to achieve greater cooperation with key stakeholders and maintain the EU's legality.

THERE ARE NO CONCRETE FORMAL REQUIREMENTS FOR THE FORM OF TRANSPOSITION SET OUT BY THE EU LEGISLATOR

THE KNOWLEDGE OF THE UK AND SWEDEN SUGGESTS INSTRUMENTS ON CREATING A MORE FOSTERING REGULATORY ENVIRONMENT

To tackle the issue with gold-plating, it is best to seek advice from the two countries that were first to experience 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. 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, the best developed, and most of them were incorporated into the national recommendations of other EU member states.

THE UK SUGGESTED FOCUSING ON MINIMAL REQUIREMENTS AND BEST RESIDENT INTERESTS

An analysis (finalized in 2013) on the application of the UK's EU law transposition principles for eighteen months showed that the UK's government was successful in preventing the additional regulatory burden, and there were only a few cases in which the government went beyond the minimum requirements when applying the transposition principles. In the process of the 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 (the Regulation Reducing sub-Committee) 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[18], making them *de facto* mandatory.

SEEKING ALTERNATIVE MEASURES

It is a crucial lesson to learn for other member states 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 the form of recommendations and guidelines – as long as the purpose of the directive is achieved[19]. 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.

This principle could also benefit the European Union in its decision-making. Most impact assessments contain the *cliché* that other alternative measures have been shown to be insufficient without providing an impact assessment of the exact alternative measures applied. Keeping in mind the key universal lawmaking principle of *necessity*, it is important to show that other means are indeed insufficient before enacting the rule at the highest and most stringent level (regulation of directive).

> CURRENTLY, MOST OF THE EU LAWS ALLOW FOR MORE STRINGENT REGULATIONS – BUT NOT THE OTHER WAY AROUND

For example, regarding the Platform Work Directive, the EU neglects the alternative to ensure more information and consultations for the platform workers. It also does not see that it duplicates already existing regulations, meaning that the situation is caused not by the abundance of rules, but rather the lack of enforcement. This, in turn, means that if any additional rules are established, they will also be of *paper value.*

'ONE- IN', 'ONE-OUT' AS A LEGAL OBLIGATION

The UK government had also introduced an approach entitled *one-in, one-out* (OIOO)[20], which meant that no new primary

[18] UK Department for Business Innovation, & Skills (UK) (2013) *Gold-Plating Review*. 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

[19] European Commission (2005) Commission Recommendation of 12 July 2004 on the transposition into national law of Directives affecting the internal market. Para. 1 of the Preamble: *"Member States transposing Directives into national law can choose the form and methods for such transposition, but are bound by the terms of the Directive as to the result to be achieved and the deadline by which transposition should take place."* See: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32005H0309

[20] RRC (2011) The OIOO Framework. Available [online]: https://www.regulation.org.uk/library/2011_oioo_methodology.pdf

or secondary legislation of the United Kingdom, which would create new expenses for businesses, could be introduced without the identification of an existing regulation with an equivalent financial burden that could be removed. This was a key requirement for both enacting new national laws and transposing EU laws. Such a measure would help combat the accumulation of burdens to persons in respective EU member states.

This principle could also be envisaged in the legal acts of the European Union. Currently, most of the EU laws allow for more stringent regulations – but not the other way around. Envisaging a notion that the implementation of the directive requires applying the OIOO principle would directly benefit the goal to diminish the unjust practice of gold-plating.

COPY-OUT PRINCIPLE WHEN TRANSPOSING RULES

The *copy-out* principle implies the obligation to use the exact wording of the directive in national laws when possible and reasonable. This is another important lesson to learn, as the administrative burden consists not only of additional new requirements, but also of the burden to understand the content of the rules. Simply put, 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.

For the European Union, this principle means establishing such definitions and notions that would be clear and easily understandable. Complex and ambiguous concepts (e.g., with the DMA, as described in the previous section) would undoubtedly lead to gold-plating.

SIMPLY PUT, THE MORE COMPLEX THE RULES ARE, THE MORE BURDEN BUSINESSES FACE TO COMPREHEND AND COMPLY WITH THEM

PAIRING PRINCIPLES WITH ENFORCEMENT MECHANISMS

A key role in the UK's commitment to abolish gold-plating was played by the Regulation Reducing sub-Committee (RRC) – an independent control body overseeing the implementation of the OIOO strategy and keeping a check on other government bodies. Policymakers also had the obligation to justify derivations from the UK's principles before the RRC. An analysis by the Department for Business & Skills[21] showed that these 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.

[21] UK Department for Business Innovation, & Skills (2013) *Gold-Plating Review.* 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

> SWEDEN IS AN EXAMPLE OF A PROACTIVE BUSINESS COMMUNITY, WHICH CAME FORWARD WITH A SET OF RECOMMENDATIONS THAT FOCUSED ON THE PRACTICE OF THE ADOPTION OF THE NEW EU LEGISLATION

In terms of the European Union, there are no internalized mechanisms to enforce the IA and the RIAs presented during the public consultations. Thus, incorporating mechanisms or even separate lawmaking quality ombudsmen would significantly benefit the goals of the EU.

SWEDEN RELIES ON A PROACTIVE BUSINESS COMMUNITY AND PROMOTES COST-CONSCIOUS DECISION MAKING

Based on previous research, 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 is an example of a proactive business community, which came forward with a set of recommendations that focused on the practice of the adoption of the new EU legislation.

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 EU[22]. NNR's 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 (Regelrådet), which is a designated decision-making body whose members are appointed by the government. The Regelrådet primarily 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, and assesses the quality of the impact assessment.[23]

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[22] European Economic and Social Committee, Tsipouri, L. J. (2014) *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

[23] Ibid.

SYNERGY BETWEEN THE PRIVATE AND PUBLIC SECTORS ENSURED A BETTER AND MORE THOROUGH EXCHANGE OF PRACTICAL ISSUES RELATED TO EU LAW TRANSPOSITION

ABOLISHING GOLD-PLATING IS A JOINT PROJECT OF THE PRIVATE AND PUBLIC SECTOR

The Regelrådet and the NNR enacted a joint analysis-position[24], 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 the form of a joint project involving a business organization and a government-appointed committee. 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.

CHECK YOURSELF BEFORE YOU WRECK YOURSELF: THE PARAMOUNT IMPORTANCE OF RIA

The institution of regulatory impact assessments (RIA) plays a key role in preventing gold-plating. Many EU member states have guidelines and principles in their national systems to avoid gold-plating; however, they are recommendatory in nature, and their application relies on the will of policymakers. These individuals may not only lack certain knowledge or resources when transposing directives but may also have their own 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. Typically, an impact assessment at a national level is not carried out during the negotiations phase. It is recommended that the 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

[24] Althoff, K. and M. Wallgren (2012) *Clarifying Gold-Plating – Better Implementation of EU Legislation.* Available [online]: https://www.regelradet.se/wp-content/uploads/2012/03/Clarifying-Gold-Plating.pdf

> IMPACT ASSESSMENTS OF EU REGULATIONS – BOTH AT THE NEGOTIATION AND TRANSPOSITION PHASES SHOULD BE MADE A FORMAL REQUIREMENT AND AN INTEGRAL PART OF THE NEW IMPACT ASSESSMENT PROCESS

ministries, and strengthen procedures and guidance aimed at addressing substantive issues. Such impact assessments of EU regulations – both at the negotiation and transposition phases should be made a formal requirement and an integral part of the new impact assessment process[25].

[25] Organization for Economic Co-operation and Development (2010) "The Interface Between the Member States and the European Union", [in]: *Better Regulation in Europe*. Available [online]: https://www.oecd.org/gov/regulatory-policy/44912396.pdf

The Ministry of Justice of the Republic of Lithuania suggests that stakeholder consultations during the negotiation 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[26].

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., the identification of the problem/objective (from the directive), an impact assessment of alternatives to achieve the objective, and the selecting of the least burdensome solution[27].

An *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

[26] Europos Teisės Departamentas prie Lietuvos Respublikos Teisingumo ministerijos (2015) *Europos Sąjungos teisės aktų įgyvendinimo nacionalinėje teisėje ir administracinės naštos pagrįstumo įvertinimo rekomendacijos.* Available [online]: https://tm.lrv.lt/uploads/tm/documents/files/Perteklinis_reguliavimas_rekomendacijos_galutinis (1).pdf [in Lithuanian]

[27] Ibid.

adopted (even if it has not been identified in the *ex-ante* assessment). According to the OECD, as regards the importance and methodological conduct of the *ex-post* evaluation, combining *ex-ante* and *ex-post* in the transposition of EU law would help to avoid gold-plating[28]. Monitoring national measures implementing EU law (i.e., carrying out an *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.

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. In this light, it would be prudent for the EU legislator to include a) an RIA checkpoint to evaluate the possibilities of enabling gold-plating, and b) an enforcing mechanism to stop itself from gold-plating.

> DIRECTIVES ARE TRANSPOSED THROUGH A NATIONAL LEGISLATION PROCEDURE, IN WHICH CASE THE BASIC LEGISLATIVE METHODS APPLY

CONCLUSIONS

Regardless of the efforts, gold-plating both at the member state and EU level has not been abolished. This is primarily due to the reason that gold-plating tackling measures are not accompanied by responsibility and enforcement. At the EU level, the legislator does not undergo an *overachievement inspection*, even though its actions are *de facto* gold-plating. Thus, it would be efficient to commit to a national- and EU- level priority to protect their residents in terms of not putting them at a competitive disadvantage and employing all possible means to reduce their administrative burden by creating a fostering environment for the subject to thrive in.

It is prudent to find common ground in order to tackle gold-plating among the European Union, member states, and the private sector, and create a functioning cooperation synergy. However, this should be the legislator's proactive initiative. No law with gold-plated provisions or an EU legal proposal with no gold-plating risk assessment should be submitted to the plenary without an estimation of the regulatory burdens. Moreover, no draft should move forward without a proper RIA. This could be achieved by establishing an independent body that would verify the quality (sic!) and not the arguments of the impact assessment.

In terms of the European Union, it would be most prudent to connect the *ex-ante* and *ex-post* RIA mechanisms and make it an

[28] OECD (2010) "The Interface Between the Member States and the European Union", [in]: *Better Regulation in Europe.* Available [online]: https://www.oecd.org/gov/regulatory-policy/44912396.pdf

> 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

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 outweighed the expected benefits of the regulation.

Lastly, the initiative of Single Market Directives[29] by the 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.

[29] European Commission (2022) *Single Market Scoreboard*. Available [online]: https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/transposition/index_en.htm

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