

## ON THE GOLD-PLATING IN THE CZECH TRANSPOSITION CONTEXT

Richard Král\*

**Abstract:** *The article defines and explicates the concept of gold-plating, i.e. non-minimalistic transposition of EU directives. It describes its typical manifestations in legislative practice and elaborates when and why it should be avoided. It is submitted in the article that the Czech methodological transposition guidelines and RIA methodology insufficiently deal with the issue of gold-plating. Therefore, the article seeks to propose amendments to the relevant Czech methodology so as to limit the occurrence of unjustified gold-plating in Czech legislation.*

**Keywords:** *gold-plating, minimalistic transposition, EU directives, justified/unjustified gold-plating, methodological transposition instructions, RIA methodology*

### INTRODUCTION

In the words of the European Commission gold-plating means “*exceeding the requirements of EU legislation when transposing Directives into national law*”<sup>1</sup>. Gold-plating can thus be understood as any transposition which in any permissible way exceeds the minimal requirements of an EU directive, i.e. any non-minimalistic transposition which does not represent the case of incorrect, impermissible transposition. Gold-plating is rather intensively debated especially in the United Kingdom.<sup>2</sup>

The aims of the article are threefold. The first aim is to demonstrate that gold-plating should be avoided, unless it can be justified especially by national grounds of public policy or interest. The second one is to demonstrate that the current Czech methodological transposition guidelines and RIA (regulatory impact assessment) methodology insufficiently prevent the occurrence of unjustified gold-plating of EU Directives in Czech legislation. The third one is to propose such amendments or modifications to the relevant Czech methodology which could result in a substantial decrease in the number of Czech cases of unjustified gold-plating.

In order to achieve these aims the article is structured into three sections. The first section expands on the definition of gold-plating and discusses when gold-plating typically occurs. The second section analyses when and why gold-plating should be avoided. In the

\* Associate professor JUDr. Richard Král, Ph.D., LL.M., European Law department of the Law Faculty, Charles University, Prague. Member of the Legislative Council of the Czech Government. The article builds on and draws from the collective study on unjustified gold-plating, KRÁL, R., SCHEU, H. et al. *Zbytečně zatěžující transpozice – neodůvodněný gold-plating směrnic EU v České republice*. [Unnecessarily Overburdening Transposition – Unjustified Gold-plating of EU Directives in the Czech Republic]. Praha, 2014.

<sup>1</sup> Commission Communication: Review of the “Small Business Act” for Europe, COM (2011) 78 final, 23 February 2011.

<sup>2</sup> See, for example, AMBLER, T., CHITTENDEN, F., OBODOVSKI, M. *How Much Regulation Is Gold Plate? A Study of UK Elaboration of EU Directives*. London: The British Chambers of Commerce, 2004; Institute of Directors. *The Midas Touch: Gold-plating of EU employment directives in UK law*. London: IoD, 2013; THOMAS, R., LYNCHWOOD, G. Transposing European Union Law in the United Kingdom: Administrative Rule-Making, Scrutiny and Better Regulation. *European Public Law*. 2008, Vol. 14, pp. 177–211; and GREENBERG, D. The ‘Copy-Out’ Debate in the Implementation of European Union Law in the United Kingdom. *Legisprudence*. 2012, Vol. 6, pp. 243–56.

third section it is argued that Czech methodological transposition guidelines and RIA methodology insufficiently deal with the issue of gold-plating. Therefore, the third section also presents several methodological recommendations aimed at preventing the occurrence of Czech cases of unjustified gold-plating.

### When gold-plating occurs

Gold-plating typically occurs in four different situations.<sup>3</sup>

- a) When a Member State takes advantage of the possibility to deviate/derogate from the requirements of the directive in a more stringent, wider or more burdensome direction.
  - b) When a Member State does not take advantage of the possibility to deviate/derogate from the requirements of the directive in a softer, narrower or less burdensome direction.
  - c) When a Member State does not opt, in case there are several possible alternatives of regulation of a given issue in the directive, for the option which is least stringent or burdensome.
  - d) When a Member State voluntarily extends the scope of application of the directive to cover also situations which are fully outside the scope of the directive.
- a) As to the first typical gold-plating situation it can be elaborated that Member States quite often have the possibility to deviate/derogate from the requirements of the directive in a more stringent, wider or more burdensome direction. They have this possibility either on the basis of deviation enabling clauses contained in the Treaty on the Functioning of the European Union<sup>4</sup> (TFEU) or on the basis of deviation clauses contained in many directives concerned. In both cases the clauses have in common that they specify in more or less concrete terms the limits for the exercise of the derogations.<sup>5</sup>

The TFEU contains many provisions that enable Member States to deviate from the requirements of the directives. These deviation clauses include Articles 82(2), 83(2), 114(4-9), 153(4), 168(4), 169(4) and 193 of the TFEU. For example, according to the clause in Article 193 of TFEU, directives adopted pursuant to Article 192 of the TFEU (i.e. environment protection directives) “*shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.*”

As to deviation/derogation clauses contained in the directives one can distinguish between general and specific deviation clauses enabling to adopt or maintain more stringent requirements. While the former enable Member States to deviate from (minimum) requirements concerning **all** the matters within the scope of a directive, the latter enable Member

<sup>3</sup> The UK Transposition Guidance structures the typical gold-plating situations in a slightly different way and it also considers premature transposition as another (independent) gold-plating situation. See HM Government. *Transposition Guidance: How to implement European Directives effectively*. London, 2013, para 2.10.

<sup>4</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

<sup>5</sup> See the examples below.

States to deviate from (minimum) requirements concerning only **one or few** of the matters within the scope of a directive.

General deviation clauses are typical for the directives that are based on the minimum harmonization approach.<sup>6</sup> Such a clause is, for example, contained in Article 8(2) of the Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees.<sup>7</sup> This provision lays down that “*Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.*”

Specific deviation clauses can be found in a number of directives, including total harmonization directives. Such a clause is, for example, contained in Article 45 of the Directive 2007/64 on payment services in the internal market.<sup>8</sup> This article stipulates in paragraphs 1-5 the requirements regarding termination of the payment service framework contract by the payment service user. Subsequently, paragraph 6 of this article lays down that “*Member States may provide more favourable provisions for payment service users.*”

The role of specific deviation clauses enabling to adopt or maintain more stringent requirements can sometimes be played by the textual expressions in the directive that relativize its requirements, such as “at least”, “no more than”, “not less than”, “until” (certain time)<sup>9</sup> and others. For instance, when Article 5(5) of the Tobacco Directive 2001/37<sup>10</sup> lays down that warnings required by the directive “*cover not less than 40 % of the external area of the corresponding surface of the unit packet of tobacco on which it is printed*”, it means, as confirmed by the CJEU,<sup>11</sup> that Member States may lay down in their respective transposition acts that the warnings shall cover a higher percentage of the external area.

**b)** As to the second typical gold-plating situation it can be elaborated that the possibility to deviate/derogate from the requirements of the directive in a softer, narrower or less burdensome direction usually stems from specific, softening enabling deviation clauses contained in some EU directives. Such clauses either enable Member States to exempt (wholly or partially) certain subjects or products from the scope of applicability of transposition measures and thus from the (more stringent) requirements of the directive, or enable Member States to impose on certain subjects or products certain lower than standard requirements of the directive, providing these lower requirements comply with the limits fixed in the

<sup>6</sup> See DOUGAN, M. Minimum Harmonization and the Internal Market. *Common Market Law Review*. 2000, Vol. 37, pp. 853–85.

<sup>7</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12.

<sup>8</sup> Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC [2007] OJ L 319/1.

<sup>9</sup> As a specific subtype of the first gold-plating situation can therefore be also considered premature transposition.

<sup>10</sup> Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products - Commission statement [2001] OJ L 194/26.

<sup>11</sup> See C-11/92 *Gallaher and Others*, ECR 1993, I-3545.

directive. The former type is exemplified by Article 1(3) of the Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees.<sup>12</sup> According to this article “Member States may provide that the expression ‘consumer goods’ does not cover second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person.” An example of the latter type is Article 7(1) of the same Directive, according to which “Member States may provide that, in the case of second-hand goods, the seller and consumer may agree contractual terms or agreements which have a shorter time period for the liability of the seller than that set down in Article 5(1). Such period may not be less than one year.”

- c) In case there are several possible alternatives of regulation of a given issue in the directive, then the third typical gold-plating situation occurs when a Member State does not opt for the option which is least stringent or burdensome for the persons concerned. As an example of a directive that provides Member States with a choice between two specific alternatives of regulation of a given issue can be mentioned Directive 98/59 on the approximation of the laws of the Member States relating to collective redundancies.<sup>13</sup>

Sometimes, however, one option could be less burdensome for some of the persons concerned (for example large corporations), while for others (for example small and medium-sized enterprises) it could be more burdensome.<sup>14</sup> In such a case the only way to avoid gold-plating could possibly be to transpose both options and to leave them both open to the persons concerned.

- d) When a Member State voluntarily extends the scope of application of a directive to cover also situations which are fully outside the scope of the directive, then the fourth typical gold-plating situation occurs. This gold-plating situation is often referred to in German literature as “überschiessende”, i.e. “overshooting” transposition.<sup>15</sup>

EU directives usually do not prevent Member States from “overshooting” transposition. Sometimes they even explicitly permit such transposition. Directive 2011/83 on consumer

<sup>12</sup> Supra note 7.

<sup>13</sup> Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L 225/16. This directive provides in Article 1(a) that “collective redundancies’ means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the **choice** of the Member States, the number of redundancies is:

(i) either, over a period of 30 days:

- at least 10 in establishments normally employing more than 20 and less than 100 workers,

- at least 10 % of the number of workers in establishments normally employing at least 100 but less than 300 workers,

- at least 30 in establishments normally employing 300 workers or more,

(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question”.

<sup>14</sup> See, for example, Article 47(1) of the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies [1978] OJ L 222/11. The provision gives Member States two options regarding regulation of publication of management reports.

<sup>15</sup> See HABERSACK, M.,MAYER, Ch. Die überschiessende Umsetzung von Richtlinien. *JuristenZeitung*. 1999, Vol. 19, pp. 913–21. In Czech literature this gold-plating situation is referred to as “přesahující transpozice”. See KRÁL, R. *Směrnice EU z pohledu jejich transpozice a vnitrostátních účinků*. Praha: C. H. Beck, 2014.

rights,<sup>16</sup> for instance, lays down in recital 13 of the preamble that “*Member States should remain competent, in accordance with Union law, to apply the provisions of this Directive to areas not falling within its scope. Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive. For instance, Member States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises.*”

### When and why gold-plating should be avoided

It is submitted that gold-plating should be avoided whenever it cannot be justified, i.e. to be more specific when it leads to unjustifiable regulatory overburdening of businesses and individuals concerned. There are three main cases when gold-plating can be justified. The first one is the gold-plating of directives with deregulatory or liberalization impact.<sup>17</sup> It is evident that non-minimalistic transposition of such directives can even increase their deregulatory effect. The second one is “overshooting” transposition in a situation when the provisions of a directive impose lighter regulatory burden than the so far applicable national rules concerning the relations outside the scope of the directive. The third one, admittedly the one that is not always easily determinable, is gold-plating which, even though it imposes regulatory burdens on businesses and individuals concerned by the requirements exceeding the minimum requirements of directives, can still be justified by the fact that such overburdening has been convincingly offset by national grounds of public policy or interest, such as increased consumer, health, labour or environment protection, or increased business safety, public security or the need for internal coherence of the national legal system.

It can be summarized that gold-plating, i.e. non-minimalistic transposition, should be avoided when it unjustifiably regulatorily burdens businesses and individuals concerned more than what is minimally necessary in the light of minimum requirements of the directive in question.

As a good example of unjustified gold-plating<sup>18</sup> can serve the Czech transposition of Directive 77/91.<sup>19</sup> This directive in its Article 11(1) lays down that “[if], *before the expiry of a time limit laid down by national law of at least two years from the time the company is incorporated or is authorized to commence business, the company acquires any asset belonging to a person or company or firm referred to in Article 3 (i) for a consideration of not less than one-tenth of the subscribed capital, the acquisition shall be examined and details of it published in the manner provided for in Article 10 and it shall be submitted for the approval of the general meeting.*” However, the Czech transposition act<sup>20</sup> did not provide for

<sup>16</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2001] OJ L 304/64.

<sup>17</sup> As an example of a directive with such impact can serve Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36.

<sup>18</sup> For several other examples of unjustified gold-plating of EU directives in the Czech republic see KRÁL, R., SCHEU, H. et al. *Zbytečně zatěžující transpozice – neodůvodněný gold-plating směrnice EU v České republice*. Praha, 2014, chapter 2.3.

any time limit, so the acquisition in question had to be examined and details of it published for unlimited time after incorporation of the company. This, of course, led to unjustifiable regulatory as well as financial overburdening of companies incorporated in the Czech Republic. It is thus no wonder that this unjustified gold-plating of Article 11 of the Directive 77/91 has been replaced by its minimalistic transposition in connection with the adoption of the new Czech Act on Business Corporations.<sup>21</sup>

Apart from the fact that unjustified gold-plating involves unjustifiable regulatory as well as financial overburdening of businesses and individuals concerned, there is another relevant reason why it should be avoided. The point is that persons from Member States where gold-plating has occurred are usually also put at a competitive disadvantage with respect to persons from those Member States which have opted for minimalistic transposition.<sup>22</sup> Their competitive disadvantage is even further increased if the applicability of more stringent national transposition measures is limited only to domestic persons, products or services. This is especially the case when a directive contains the so called “market access clause”.<sup>23</sup> In such a case gold-plating leads to reverse discrimination<sup>24</sup> of home persons against the persons from those other Member States which have opted for minimalistic transposition. The point is that producers in a Member State which has opted for gold-plating have access to their home market only with products meeting the more stringent requirements of the national transposition measure. The producers from Member States which have opted for minimalistic transposition, however, have access to the market of a gold-plating Member State with products meeting only the less stringent requirements of the directive in question.

The “market access clause” is, for instance, contained in Article 13(1) of the Tobacco Directive 2001/37.<sup>25</sup> This provision lays down that Member States which have adopted more stringent transposition measures “*may not, for considerations relating to the limitation of the tar, nicotine or carbon monoxide yields of cigarettes, to health warnings and other indications or to other requirements of this Directive, prohibit or restrict the import, sale or consumption of tobacco products which comply with this Directive, with the exception of measures taken for the purposes of verifying the data provided under Article 4.*”

---

<sup>19</sup> Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1977] OJ L 26/1. The Directive has been replaced by Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [2012] OJ L 315/74.

<sup>20</sup> Section 196a, para 3 of Act No. 513/1991 Coll., Commercial Code.

<sup>21</sup> See section 255 of Act No. 90/2012 Coll., on business corporations.

<sup>22</sup> See VOERMANS, W. Gold-plating and double banking: an overrated problem? In: SNIJDERS, H., VOGENAUER, S. (eds.). *Content and Meaning of National Law in the Context of Transnational Law*. Munich: Sellier, European Law Publisher, 2009, pp. 79–88.

<sup>23</sup> That is a clause according to which products from other Member States meeting the requirements of a directive shall have access to market of a Member State with more stringent transposition measures.

<sup>24</sup> For a comprehensive study on reverse discrimination in the EU, see TRYFONIDOU, A. *Reverse Discrimination in EC Law*. Kluwer Law International, 2009; see also KRÁL, R., supra note 15, chapter V.

<sup>25</sup> Supra note 10.



The preceding discussion has shown that unjustified gold-plating should be avoided mainly because it involves unjustifiable regulatory and financial overburdening of businesses and individuals concerned and also because it usually puts them at a competitive disadvantage with respect to persons from those Member States which have opted for minimalistic transposition. Gold-plating can even lead to reverse discrimination of home persons against the persons from those other Member States which have avoided gold-plating.

It therefore comes as no surprise that transposition guidelines or laws on transposition of several Member States explicitly deal with unjustified gold-plating in order to prevent its occurrence.<sup>26</sup>

### Gold-plating and Czech methodological guidelines

Simply and briefly said, the Czech methodological rules for transposition of EU directives as well as the Czech RIA (regulatory impact assessment) methodology deal with the issue of unjustified gold-plating only marginally and thus totally insufficiently. This insufficiency is quite regrettable especially given the undesirable consequences of unjustified gold-plating and in the light of the fact that the occurrence of unjustified gold-plating in Czech transposition practice is not rare.<sup>27</sup> This insufficiency is quite striking taking into account how comprehensibly unjustified gold-plating is methodologically addressed in some other Member States, namely the UK. The insufficiency is also hard to understand in the light of giving publicity to some cases of unjustified gold-plating in the Czech Republic<sup>28</sup> and in the light of growing criticism in academic literature.<sup>29</sup>

The Czech methodological rules for transposition of EU directives are primarily contained in the “Methodological instructions for ensuring the fulfilment of legislative obligations arising from the Czech membership in the EU”<sup>30</sup> (hereafter “Methodological instructions”). These instructions are so far conceptually framed primarily in a way which aims at effective prevention of cases of wrong, improper transposition of EU directives in the Czech Republic. For this reason, they do not explicitly deal with the issue of unjustified gold-plating. It is however submitted that after more than 10 years of the Czech membership in the EU and given the reasons mentioned above, Methodological instructions should be conceptually reframed so that they would aim at effective prevention of cases of unjustified gold-plating as well.

The proposed conceptual reframing of Methodological instructions should draw inspiration from the British methodological approach to tackling unjustified gold-plating<sup>31</sup> and

<sup>26</sup> For an analysis of transposition guidelines or laws on transposition of the UK, Austria, Germany and Italy, see KRÁL, R., SCHEU, H. et al., supra note 18, chapters 4–7. See also further sources mentioned there.

<sup>27</sup> For instance, the collective study mentioned supra n 18 lists 12 cases of unjustified gold-plating in the Czech Republic. It should also be added that these cases have been identified on the basis of rather random selection of Czech transposition acts to be analysed. Thorough gold-plating analysis could therefore reveal even more cases.

<sup>28</sup> See, for example, SURMANOVÁ, K. Systém zakázek se zrychlí a zjednoduší. *Hospodářské noviny*. 3. 4. 2014, p. 4; MUŽÍKOVÁ, M. Firmy ušetří čas i miliardy na ekologii. *Hospodářské noviny*. 12. 9. 2012, p. 1; KEMÉNYOVÁ, Z. Podnikatelům ubude zbytečné a drahé papírování kvůli životnímu prostředí. *Hospodářské noviny*. 12. 9. 2012, p. 5.

<sup>29</sup> See KRÁL, R., SCHEU, H. et al., supra note 18, chapter 2.

<sup>30</sup> “Metodické pokyny pro zajišťování prací při plnění legislativních závazků vyplývajících z členství ČR v EU”. The methodological instructions were approved by decree No. 1304 of the Czech government on 12 October 2005 and amended by decree No. 1344 of the Czech government on 26 October 2009.

should be based on the explicit stipulation of the principle of minimalistic transposition. Any deviation from this principle, i.e. any proposed gold-plating, should be subject to convincing justification. Methodological instructions should, of course, also offer some guidance and specification as to what kind of national grounds of public policy or interest could possibly justify gold-plating.

The Czech RIA methodology is contained in the “General Principles for Regulatory Impact Assessment (RIA)”.<sup>32</sup> The main insufficiency of the Czech RIA methodology as far as treatment of unjustified gold-plating is concerned rests in the fact that the methodology does not specifically and explicitly treat it. The methodology treats it only implicitly within the general fight against overregulation.<sup>33</sup> It is however submitted that the methodology should tackle unjustified gold-plating in a specific and targeted way. For this purpose the Czech RIA methodology should be amended in at least three following aspects. Firstly, in case of new transposition acts the so called reference regulation alternative, against which the regulatory impact of proposed new acts is assessed, should not be the existing regulation but minimalistic transposition. Secondly, in case the drafter of the new transposition measure opts for non-minimalistic transposition, i.e. gold-plating, then this should be explained in detail and justified by the drafter in line with the guidance to be offered by the above mentioned Methodological instructions. Thirdly, the RIA Working commission of the Legislative Council of the Czech Government, which plays an important role in implementing RIA, should be obliged to give supervisory opinion on gold-plating justifications presented by the drafter of the transposition act.

## CONCLUSION

It transpires from the text that gold-plating i.e. non-minimalistic transposition, should be avoided when it unjustifiably regulatorily burdens businesses and individuals concerned more than what is minimally necessary in the light of minimum requirements of the directive in question. Unjustified gold-plating should be avoided not only because it unjustifiably overburdens businesses and individuals concerned, but also because it puts them at a competitive disadvantage with respect to persons from those Member States which have opted for minimalistic transposition and because it can even lead to reverse discrimination of home persons against the persons from those other Member States which have avoided gold-plating.

The methodological instructions as well as the Czech RIA methodology should be reframed along the suggested lines so that they could serve as an effective tool for the substantial decrease in the number of cases of unjustified gold-plating in the Czech Republic.

---

<sup>31</sup> The British approach can clearly be considered as the most comprehensive and sophisticated. For a detailed analysis of this approach, see KRÁL, R., SCHEU, H. et al., *supra* note 18, chapter 4; see also THOMAS, R., LYNCHWOOD, G. *Transposing European Union Law in the United Kingdom: Administrative Rule-Making, Scrutiny and Better Regulation. European Public Law*. 2008, Vol. 14, No. 2, pp. 203–210, or HM Government. *Davidson Review: Final Report*. Londýn: TSO, 2006.

<sup>32</sup> “Obecné zásady pro hodnocení dopadů regulace (RIA)”. The General Principles were approved by decree No. 922 of the Czech Government on 14 December 2011 and decree No. 26 of the Czech Government on 8 January 2014.

<sup>33</sup> For a detailed analysis, see KRÁL, R., SCHEU, H. et al., *supra* note 18, chapter 3.