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Gold-plating of EU Law in the Czech Republic Revisited

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Keywords

concept of gold-plating, EU Law, gold-plating in Czechia, justification of gold-plating, RIA, typology of gold-plating

Abstract

The article first updates the concept and typology of gold-plating of EU law. In this respect, it makes the distinction between various types of gold-plating of EU law and submits that it should now be understood as any national transposition of EU directives as well as any national normative implementation of any other EU legal acts which exceeds the minimum regulatory requirements of the transposed or implemented EU act and which remains within EU legality. Secondly, it provides an updated view of the use of gold-plating in the Czech Republic. It does so by comparing the current gold-plating situation in this Member State with that of a decade ago. This comparison has revealed a predominantly positive development in this area, namely the almost total eradication of inadvertent gold-plating and the consolidation of deliberate justified gold-plating of EU law in Czech legislative practice. Still, the article pleads for some further refinements in the area concerned.

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I. Introduction

The issue of the gold-plating of EU law in the Czech Republic was first comprehensively analysed in scholarly literature almost 10 years ago.[1] Since that time, there have been significant developments as far as the gold-plating of EU law in Czech legislative practice is concerned. This topic therefore deserves to be revisited and updated.

The article first updates the concept and typology of gold-plating of EU law in the light of corresponding developments in national and EU legislative practice, as well as in the light of relevant academic literature.

Secondly, the article aims to provide an updated view of the use of gold-plating in the Czech Republic. The current gold-plating situation in this Member State is thus compared with that of 10 years ago. This comparative analysis reveals rather positive changes in the area of the gold-plating of EU law in Czech legislative practice that took place in the last 10 years. Still, the article proposes some further refinements in this area.

II. Updated concept and typology of gold-plating of EU law

While, in the past, gold-plating of EU law occurred almost exclusively in the context of national transposition of EU directives, today, as will be elaborated in the second part of this article, it also occurs quite often in the context of national normative implementation of EU regulations.[2]

Therefore, any up-to-date comprehensive definition of gold-plating of EU law should reflect this development and should encompass not only non-minimalistic national transposition of EU directives but also non-minimalistic national normative implementation of other EU legal acts, most notably EU regulations. Gold-plating of EU law should thus be understood as any national transposition of EU directives and any national normative implementation of any other EU legal acts which exceeds the minimum (regulatory) requirements of the transposed or implemented EU act and which remains within EU legality, i.e.,

1 Richard Král, Harald Scheu 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] (Univerzita Karlova v Praze 2014) 100. See also Richard Král, 'On the gold-plating in the Czech transposition context' (2015) TLQ 4/2015 300-307.

2 For the distinction between transposition of EU directives and national normative implementation of EU regulations see Richard Král, 'National normative implementation of EC Regulations: An exceptional or rather common matter?' (2008) 2/2008 European Law Review 243-256.

which remains allowed under EU law.[3] Therefore, further in the text, gold-plating of EU law will also be referred to as non-minimalistic implementation of EU law.

Gold-plating of EU law typically occurs in four different situations. The first gold-plating situation occurs when a Member State exercises an option to deviate (derogate) from the (minimum) requirements or rules of the EU act concerned in a more stringent, wider or more burdensome direction. This option is provided or recognised either by the deviation clauses contained in the Treaty on the Functioning of the EU[4] (TFEU) or by deviation clauses contained in many EU directives[5] and even in some EU regulations.[6]

The second gold-plating situation occurs when a Member State does not exercise an option to deviate (derogate) from the requirements or rules of an EU act in a softer, narrower or less burdensome direction. This option stems from specific softening, deviation-enabling clauses contained in some directives and regulations.[7] Such clauses mostly enable the Member States to exempt (wholly or partially) certain specific categories of persons, products or services from the scope of applicability of the more stringent requirements or rules of the EU act concerned.[8]

The third typical situation of gold-plating occurs when a Member State does not opt, in a situation where the EU act concerned provides Member States with a wide margin of discretion or with several possible alternatives of regulating a

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3 For further clarification of such definition see Karin Atthoff and Mia Wallgren, *Clarifying Gold-plating – Better Implementation of EU Legislation*, (The Swedish Better Regulation Council / Board of Swedish Industry and Commerce for Better Regulation, 2012). For more on concept of gold-plating and its development in EU see also Eduardo Magrani, Nevin Alija, Felipe Andrade, 'Gold-plating in the transposition of EU Law' 2/2021 e-Publica 45-68.

4 See, e.g., The Treaty on the Functioning of the European Union (TFEU) art 82(2), 83(2), 114(4–9), 153(4), 168(4), 169(4) and 193.

5 See, e.g., Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law [2019] OJ L 305, art 25(1). According to this provision, *Member States may introduce or retain provisions more favourable to the rights of reporting persons than those set out in this Directive, without prejudice to Article 22 and Article 23(2)*.

6 See e.g., Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119, art 37(4).

7 See, e.g., Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119, art 8 para 2.

8 See, e.g., Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property [2014] OJ L60/34, art 3(3)(d). According to this provision, *'Member States may decide not to apply this Directive to bridging loans'*.

given issue, for the regulatory option which is the least stringent or burdensome for the persons concerned.[9]

The fourth situation of gold-plating, which can sometimes partly overlap with the first one, arises when a Member State autonomously – that is, not on the basis of authorisation from the EU, but on the basis of its retained powers[10] – extends the application of the rules of an EU act to some legal situations, which are fully outside the scope of the EU act concerned.[11] This gold-plating can be thus referred to as autonomous scope-extending gold-plating. In German literature, this is sometimes referred to as 'überschiessende' ('overshooting') transposition or implementation.[12] A Member State is able to exercise this type of gold-plating when it retains the scope-extending power and an EU act leaves room for extended application of its provisions, for instance by limiting its scope of application only to free-moving EU citizens[13] or to public tenders exceeding certain thresholds.[14] Thus, if an EU act is of such nature,[15] the fourth gold-plating

9 See, e.g., Article 16(5) of Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law. The provision gives Member states several regulatory options regarding the means of disclosure of certain company documents and particulars.

10 See also below the distinction between power-recognising and power-granting deviation/derogation clauses.

11 For example, the Czech Republic wholly autonomously extended the application of the GDPR Regulation to some activities fully outside the scope of EU law. See Article 4(2) of the Czech Act No. 110/2019 Coll., on personal data processing.

12 See Mathias Habersack and Christoph Mayer, 'Die überschiessende Umsetzung von Richtlinien' (1999) 19 JuristenZeitung 913. For the updated and revised English version of their article, see Mathias Habersack and Christoph Mayer, 'Gold-Plating: the Implementation of Directives Through National Provisions with a Wider Scope of Application' in Karl Riesenhuber (ed.), *European Legal Methodology*, (Intersentia 2017 Cambridge) 343. The CJEU dealt with several issues concerning overshooting transposition (interpretation, admissibility of a preliminary ruling request, etc.) in the *Dzodzi* and *Leur-Bloem* line of cases: Joined Cases C-297/88 and C-197/89, *Dzodzi v Belgian State* [1990] EU:C:1990:360; Case C-28/95, *Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* [1997], EU:C:1997:369.

13 See Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77, art. 3.

14 See Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243, art 15.

15 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements [2015] OJ L 326/1 is a good example of a directive which leaves room for its overshooting transposition. It explicitly states in Recital 21 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'. See also Recital 5 of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law [2019] OJ L 305.

situation occurs when the national legislature autonomously expands the personal or material scope of its provisions to persons or situations which are not covered by it, for example to EU citizens in purely internal situations or to public tenders below the thresholds set by the EU act.

When it comes to an updated further categorisation or typology of the gold-plating of EU law, it is advisable for the current national legislative gold-plating practice to work with or distinguish especially between the following several types or categories of non-minimalistic implementation of EU law.

Firstly, a distinction should be made between gold-plating that leads to regulatory burdening and gold-plating that leads to regulatory easing. In the vast majority of cases, gold-plating leads not to regulatory easing but to higher than necessary regulatory burdening, that is, to the imposition of burdens that are not strictly necessary in the light of the minimum requirements of the implemented EU act in question. Such burdens can include, for instance, additional compliance costs or additional licensing and reporting costs.[16] Regulatory-burdening gold-plating therefore usually involves unnecessary regulatory repercussions for the businesses and individuals concerned.

There are three main potential repercussions. The first and the most immediate one is the imposition of higher burdens than those strictly required by EU law on the businesses and individuals concerned. The second one is that such additional burdens can put the businesses concerned at a competitive disadvantage to businesses from those Member States which have avoided regulatory-burdening gold-plating. The third possible repercussion of regulatory-burdening gold-plating is the reverse discrimination of home persons, who end up bearing additional regulatory burdens compared to minimally burdened persons from those other Member States which have avoided such gold-plating. This discrimination chiefly happens when the applicability of more stringent national implementation measures in the Member State that gold-plated EU law is limited to domestic persons, products or services.[17] In such a case, home persons of a given Member State have access to their home market only with products or

16 For a further specification of the burdens, see Lorenzo Squintani, B*eyond Minimum Harmonisation: Gold-Plating and Green-Plating of European Environmental Law* (Cambridge University Press 2019) 22–25.

17 The applicability of more stringent national implementation measures in Member state that gold-plated EU law is limited to domestic persons, products or services either when the EU act concerned contains the so-called 'market access clause' (see, e.g., 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 [2001] OJ L 194, art 13(1)) or when the unlimited applicability of such implementation measures can be substantiated neither by reasons provided in Articles 36, 45 and 52 of the TFEU nor by rule-of-law reasons derived from the case law of the Court of Justice of the European Union (Case C-120/78, *Rewe v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')*, [1979] EU:C:1979:42, para. 8).

services meeting the more stringent national implementation requirements. However, persons from those other Member States which have avoided such gold-plating have access to the market of the Member State that opted for the gold-plating even with products or services meeting the less stringent requirements of the EU act in question.

Regulatory-easing gold-plating of EU law is not as common as the regulatory-burdening variety. It can arise, for example, in the case of 'overshooting' implementation of EU acts when the application of rules of a directive or regulation is extended to some legal situations fully outside the scope of EU law and when those legal situations were previously governed by national rules that were more burdensome than the rules of the EU acts that replaced them. Regulatory-easing gold-plating is not accompanied by the regulatory repercussions that are characteristic of regulatory-burdening gold-plating. Nevertheless, regulatory-easing gold-plating should not be done automatically. It should be preceded by an analysis aimed at ascertaining whether deregulation caused by such gold-plating will result in undermining the protection of national public interest grounds that are protected by the existing (more burdensome) national regulation.

Secondly, it makes sense for the current national legislative gold-plating practice to work with and distinguish between justified as opposed to unjustified gold-plating**.**

Given that regulatory-burdening gold-plating usually involves regulatory repercussions and that regulatory-easing gold-plating may undermine the protection of those national public interest grounds that are protected by the existing (more burdensome) national regulation, both types of gold-plating should be avoided unless reasonably justified.

Regulatory-burdening gold-plating can be considered justified if its regulatory repercussions are outweighed or offset by relevant national public interest grounds, that is, grounds worth advancing or protecting even at the cost of the regulatory repercussions of a given instance of gold-plating. Such grounds can, for example, be increased consumer protection,[18] increased environmental protection, including the fight against climate change,[19] increased work-life

[18] For example, it was on these grounds that the Czech Republic gold-plated Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29, by laying down in the national transposition measure that not only a contractual term which has not been individually negotiated (as minimally required by the Directive), but also a contractual term which has been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. See § 1813 of the Czech Civil Code.

[19] For many examples of gold-plating of EU environmental directives, see Lorenzo Squintani, B*eyond Minimum Harmonisation: Gold-Plating and Green-Plating of European Environmental Law* (Cambridge University Press 2019). As the title of his book indicates,

balance for parents and carers,[20] the protection of internal coherence of the national legal system,[21] the protection of national cultural or production traditions and others.[22]

Regulatory-easing gold-plating, on the other hand, can be considered justified if it results in deregulation which does not undermine the protection of those national public interest grounds that are protected by the existing (more burdensome) national regulation.

Thirdly, it makes sense for the current national legislative gold-plating practice to work with and distinguish between blind or inadvertent gold-plating as opposed to deliberate gold-plating.

Mainly (but not only) due to the possible regulatory repercussions described above, non-minimalistic implementation of EU law should never be blind or inadvertent. It should always result from a deliberate choice, a choice based on a qualified gold-plating analysis and subsequent deliberate political legislative decision. A qualified analysis necessarily entails a proper identification of all gold-plating options provided or recognised by the EU act concerned. Furthermore, it requires a proper determination of whether the possible exercise of identified gold-plating options would lead to regulatory-burdening or -easing gold-plating. While in the former case, a qualified analysis also entails a proper identification and consideration of possible regulatory repercussions of the gold-plating concerned, as well as a proper identification and consideration of the relevant national public interest grounds capable of justifying or offsetting such regulatory

Squintani suggests using the term green-plating in case gold-plating can be reasonably justified by the grounds of environmental protection. See also Jessica Makowiak, 'À propos de la "sur-transposition" de directives européennes en droit français' (2018) 43 Revue juridique de l'environnement 667, who argues that the protection of the environment, as enshrined in the French constitutional Charter for the Environment and in the TFEU, is generally a particularly potent ground to justify gold-plating even where it creates competitive disadvantages for French businesses.

20 On these grounds the Czech Republic is considering to gold-plate Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers [2019] OJ L 188. While the Directive in its art. 9 requires Member States to take the necessary measures to ensure that workers with children up to a specified age, which shall be **8** years, and carers, have the right to request flexible working arrangements for caring purposes, according to transposition measure proposed by the ministry of labour the right to request flexible working arrangements for caring purposes should have workers with children up to **15** years.

21 It is mainly on these grounds that the Czech Republic is considering to gold-plate Directive (EU) 2019/1023 on restructuring and insolvency [2019] OJ L172/18. More specifically, the Czech Republic is considering exercising the gold-plating option provided in Article 1(4) of the Directive, that is, to extend the application of the procedures leading to a discharge of debt incurred by insolvent entrepreneurs also to insolvent natural persons who are not entrepreneurs.

22 For further examples of possible relevant justifying national public interest grounds see Richard Král, 'National Public Interest Grounds Justifying Gold-plating of EU Law' in Luboš Tichý, Michal Potacs (eds), *Public Interest in Law* (Intersentia 2021), 109-124.

repercussions, in the latter case, it also necessarily entails a proper identification and consideration of the national public interest grounds that could be undermined by the deregulation concerned.[23]

Fourthly, it makes sense for the current national legislative gold-plating practice to work with and distinguish between gold-plating that falls within the scope of the EU Charter of Fundamental Rights ('the EU Charter') as opposed to gold-plating which does not.

The issue whether and to what extent national legislative measures that gold-plate EU law fall within the scope of the EU Charter was until recently quite blurred.[24] A long-needed clarification in this respect was brought by the CJEU in the TSN and AKT case.[25]

It follows from the Court's judgment in this case that national gold-plating toppings to the rules or to the scope of application of the implemented EU act concerned do not automatically constitute implementation of EU law within the meaning of Article 51(1) of the EU Charter, and therefore, they cannot automatically fall within the scope of the EU Charter.

This judgment implies that a conceptual distinction must be made between power-granting deviation/derogation clauses in the EU acts and power-recognising ones. A typical example of the latter is the general deviation clause in EU directives based on the minimum harmonisation approach, that is, the clause that provides that the Member States may deviate (of course only in the 'upwards' direction) from, in principle, all the rules of the directive concerned.[26] Yet another example of the latter type of clause is a clause in some EU acts that provides that the Member States may extend the application of the rules of an EU act to some legal situations which are fully outside the scope of the EU act concerned.[27] On the other hand, a typical example of the former type of clause is specific deviation/derogation clauses in EU acts that enable the Member States to deviate from some specific rules of the EU act concerned or to exempt specific categories of persons, products or services from its application.[28]

While the power-granting deviation/derogation clauses authorise the Member States to exercise a certain legislative option (discretion) when

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23 For more on how qualified gold-plating analysis should look like and what factors should be especially considered in the analysis, see Král R., above n. 22.

24 See two rather contradictory cases on this issue. Case C-426/11 *Alemo-Herron and Others v Parkwood Leisure Ltd* [2013] EU:C:2013:521 and Case C-198/13 *Víctor Manuel Julian Hernández and Others v Reino de España and Others* [2014] EU:C:2014:2055.

25 *C-609/17 and C-610/17 TSN and AKT* [2019] EU:C:2019:981.

26 See, e.g., the example mentioned above at n.5.

27 See, e.g., the examples mentioned above at n.15.

28 See, e.g., the examples mentioned above at n.7 and 8.

implementing the EU act, the power-recognising ones acknowledge – in a purely declaratory fashion – the powers that the Member States have retained when implementing the given EU act. While the exercise of the former clause represents the exercise of a discretion/option provided to the Member States by the EU act, the exercise of the latter clause represents the exercise of a power retained by the Member States. Consequently, whilst national gold-plating toppings covered by a power-granting derogation clause are fully within the scope of the implemented EU act and of the Charter because they still constitute implementation of EU law within the meaning of Article 51(1) of the EU Charter, national gold-plating toppings that constitute the exercise of a power retained by the Member States are outside the scope of the given EU act and of the Charter because they no longer constitute implementation of EU law within the meaning of Article 51(1) of EU Charter.[29]

III. Gold-plating situation in the Czech Republic in a comparative historical perspective

When one compares the current gold-plating situation in the Czech Republic with the one a decade ago, three main changes can be pinpointed in the area of gold-plating of EU law in Czech legislative practice.

The first main change is almost a total eradication in Czech legislative practice of cases of inadvertent (blind) gold-plating as well as gold-plating lacking any justification whatsoever. In the past, such cases were not rare. This can be evidenced by the already mentioned gold-plating study from 2014, which revealed 12 cases of blind and/or unjustified gold-plating.[30] Now, such gold-plating cases are almost inexistent. Gold-plating of EU law in Czechia is now, as a rule, based on a deliberate political choice. It is also, as a rule, justified, at least in a rudimentary way. Among most recent cases of deliberate and justified gold-plating in Czechia are overshooting transpositions of the Whistleblowing

29 For a more detailed analysis of the TSN *and AKT* case see Richard Král, Petr Mádr, 'On the (in)applicability of the EU Charter of Fundamental Rights to national measures exceeding the requirements of minimum harmonisation Directives' 1/2021 European Law Review 81-91. See also Maxime Tecqmenne, 'Minimum harmonisation and fundamental rights: a test-case for the identification of the scope of EU law in situations involving national discretion?' 3/2020 European Constitutional Law Review 493-512.

30 See Richard Král, Harald Scheu et al., n.1 above.

Directive[31] and the Directive on restructuring and insolvency [32] as well as the non-minimalistic transposition of the Directive on work-life balance for parents and carers.[33] The almost total eradication in Czech legislative practice of cases of inadvertent (blind) gold-plating as well as of gold-plating lacking any justification whatsoever can be, to a certain degree, credited to the second main change in the area of gold-plating of EU law in Czech legislative practice.

This **second** main change is the adoption of specific gold-plating governmental legislative methodological guidelines or instructions. They are titled 'Methodological aid for the prevention of unnecessary regulatory burdens when implementing EU law',[34] and they were approved by the Council of the Czech Government for Public Administration in 2016.[35] This methodological aid is a soft-law part of the Czech RIA (regulatory impact assessment) legal framework.[36]

The methodological aid can be praised for laying down the three important methodological gold-plating principles. The first one is the principle of minimalistic implementation of EU law. According to this principle, minimalistic implementation of EU law should be the rule, and non-minimalistic implementation of EU law should be an exception to this rule. The second one is the principle that all cases of the gold-plating of EU law must be justified in the explanatory report to the Czech act based on the non-minimalistic implementation of EU acts. The third principle is that all cases of the gold-plating of EU law in the Czech Republic must be subject to the Czech RIA procedure. The gold-plating methodological aid also provides useful concrete examples of various types of softening as well as tightening or widening deviation/derogation clauses in EU acts. This of course helps those in charge of implementing EU acts in Czechia to properly identify and interpret those clauses in the implementation process and thus to avoid cases of inadvertent gold-plating.

Thus, overall, the methodological aid contributed to almost a total elimination of cases of inadvertent gold-plating as well as gold-plating lacking any justification whatsoever. The methodological aid also contributed to treating the gold-plating

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31 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law [2019] OJ L 305. For its overshooting transposition proposal see Parliamentary press no. 352/0.

32 See note 21 above.

33 See note 20 above.

34 'Metodická pomůcka pro prevenci nadbytečné regulatorní zátěže při implementaci práva EU'.

35 See decision no. 6/18 from 16.11. 2016 of the Council of the Czech government for Public Administration (RVVS).

36 Main part of this framework is General Principles for Regulatory Impact Assessment (RIA) (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 last time amended by decree No. 76/2016.

of EU law in Czech legislative practice as something which should be exceptional, deliberate and properly justified. There appear to be only two principal aspects of the methodological aid that could be criticised. First, that the aid is only a soft-law instrument. Secondly, that the aid is rather silent on how the proper justification of gold-plating should look.[37] This second imperfection naturally does not help avoid the occurrence of concrete cases when gold-plating is justified too rudimentarily or insufficiently and therefore questionably.[38]

The third main change in the gold-plating of EU law in Czech legislative practice is its widening to EU regulations as well. While in the past non-minimalistic implementation of EU law in Czechia occurred almost exclusively in the context of national transposition of EU directives, today, it occurs quite often also in the context of national normative implementation of EU regulations.

This is largely explainable by a clearly recognizable trend of substituting EU directives with EU regulations.[39] This trend is visibly accompanied by a significant increase in gold-plating options in those EU regulations that replaced EU directives. Such regulations usually contain several specific (power-granting) deviation clauses of both softening and tightening nature, the (non-)exercise of which leads to gold-plating. They also quite often contain some framework elements which require national-level concretisation and open the door for gold-plating. The point is that the Member states, when concretising the framework elements in EU regulations, dispose of certain discretion, which means they will avoid gold-plating only if they enact such national concretising measures that are (within the provided limits of discretion) least stringent or burdensome for the persons concerned.

A very good example of a regulation that replaced an EU directive and provides a multitude of gold-plating options is the GDPR Regulation.[40] This

37 For some suggestions on how the proper justification of gold-plating should look and on what it should be based, see Král R., above n. 22.

38 See e.g. rather insufficient justification of gold-plating of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation [2016] OJ L 64 in the explanatory report to the Czech transposition measure concerned (Act No. 94/2018 Coll., amending Act No. 280/2009 Coll.).While the Directive asks for access to anti-money laundering information by tax authorities only for effective administrative cooperation between tax authorities of Member States, the corresponding Czech transposition measure does so, to a certain extent, also for wholly internal taxation purposes.

39 See Filip Křepelka, 'Transformations of Directives into Regulations: Towards a More Uniform Administrative Law?' 4/2021 European Public Law 781-806.

40 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR). [2016] OJ L119/1.

regulation contains many framework elements as well as specific (power-granting) deviation clauses of both softening[41] and tightening[42] nature.

IV. Conclusions

Revisiting the issue of the gold-plating of EU law in Czechia has revealed predominantly positive developments in this area. The approach of Czech legislative practice towards the gold-plating of EU law is nowadays guided by the soft-law methodological guidelines for the prevention of unnecessary regulatory burdens when implementing EU law. These guidelines, which were adopted in 2016, stipulate that gold-plating of EU law in Czechia should always be a justified exception to the principle of minimalistic implementation of EU law and must be subject to the Czech RIA procedure. Despite their debatable soft-law character, these guidelines have contributed to an almost total eradication of inadvertent gold-plating and a consolidation of deliberate justified gold-plating of EU law in Czech legislative practice. Nevertheless, the justification of concrete cases of non-minimalistic implementation of EU law in Czechia could still sometimes be more thorough. For this purpose, the guidelines ought to be amended to provide elaborate functional guidance on how the proper justification of gold-plating should look.

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Mathias Habersack and Christoph Mayer, 'Gold-Plating: the Implementation of Directives Through National Provisions with a Wider Scope of Application' in Karl Riesenhuber (ed.), *European Legal Methodology*, (Intersentia 2017 Cambridge) 343.

41 See, e.g., Article 89(2) of the Regulation, according to which, '[w]here personal data are processed for scientific or historical research purposes or statistical purposes, Union or Member State law may provide for derogations from the rights referred to in Articles 15, 16, 18 and 21 subject to the conditions and safeguards referred to in paragraph 1 of this Article in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes'.

42 See, e.g., Article 37(4) of the Regulation according to which, '[i]n cases other than those referred to in paragraph 1, the controller or processor or associations and other bodies representing categories of controllers or processors may or, where required by Union or Member State law shall, designate a data protection officer. The data protection officer may act for such associations and other bodies representing controllers or processors'.

Richard Král, 'National normative implementation of EC Regulations: An exceptional or rather common matter?' (2008) 2/2008 European Law Review 243-256.

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