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THE DANGER OF SO-CALLED REGULATORY 'GOLD-PLATING' IN TRANSPOSITION OF EU LAW – LESSONS FROM POLAND

1. INTRODUCTORY REMARKS

Ukraine, just like Poland over thirteen years ago, is on its route to integration with the European Union. One of the most crucial aspects of accession is adjustment of the domestic law to the EU law, which is a long and arduous process. Moreover, it could transform, as the Polish experience shows, into some interesting phenomenon, particularly taking into consideration that this is a process of connection of different legal systems, each with a particular tradition, concepts and hierarchy of legal acts[1]. Part of EU legislation is enacted in the form of directives[2] which do not have direct application in domestic legal systems and need to be implemented by way of legislation introduced in the Member States in accordance with constitutional rules related to the types of legislative acts and their hierarchy[3].

Important questions return again and again – how deep should implementation of EU directives be, its requisite level of precision and whether domestic law should just be a strict "copy-paste" of provisions of an EU directive. Generally, it is a matter to be decided by the EU legislator – as implementation of EU law could have several different types. First of all, the notion of 'implementation' should be explained. There is no legal definition of 'implementation' but, as stated in the doctrine, implementation of EU law is understood as taking all necessary measures in order to establish conditions that guarantee application and super-

[1] See: A. Ramalho, *The Competence of the European Union in Copyright Lawmaking. A Normative Perspective of EU Powers for Copyright Harmonization*, Springer 2016, pp. 133–135.

[2] In 2016 – 16 directives, see http://eur-lex.europa.eu/statistics/2016/legislative-acts-statistics.html (accessed 28 May 2017).

[3] See e.g.: M. Kaeding, *Active Transposition of EU legislation*, "Eipascope" 2007, No. 3, http://www.eipa.eu/files/repository/eipascope/20080304110310_MKA_SCOPE2007-3_Internet-4.pdf (accessed 28 May 2017).

vision of EU law obedience in domestic jurisdictions[4]. This does not necessarily mean that implementation of EU law requires legislation – in fact, sometimes a hange of administrative or judiciary practice or other non-legislative measures constitutes implementation[5]. Moreover, in some circumstances such practical implementation is in fact required in order to effectively implement EU law into a domestic system of law[6]. Of course, implementation via legislation is a typical way of application of EU directives – so called 'transposition' (a narrower concept which lays within the scope of the notion of 'implementation'), which is also connected with the so-called indirect law-making process[7]. Directives determine an end goal that is intended to be achieved but the selection of measures is, generally, a matter for the domestic legislator. A typical feature of EU directives is to harmonize legislations of the Member States, especially as regards the common market, social and economic or tax issues. In this respect, the notion of 'approximation' of laws is also used[8].

For the purpose of this article only law-making implementation measures will be analysed. This is because the subject of the article – the issue of 'gold-plating' – relates mostly to regulatory activity of the Member States, being a consequence of harmonization of national laws[9]. However, it cannot be excluded that in some circumstances 'gold-plating' could also cover other issues, such as interpretation of laws in jurisprudence (see further below). Importantly, implementation of EU law could be a consequence of "minimum" or "total" harmonization[10]. Minimum harmonization means that only a part of the rules enacted at the EU level within a regulated area are being implemented verbatim, which is different from total harmonization where no derogation is allowed[11]. It could relate to the scope of harmonization (for instance, EU law could regulate some aspects of production and turnover of certain goods, however the rest of legislation in that respect remains in the hands of domestic legislators).

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[4] See T. Capeta, *Report "Harmonisation of national legislation with the acquis communautaire"*, Venice Commission, 1 July 2010, pp. 8–9.

[5] *Ibidem*.

[6] See: A. Trubalski, *Wybrane aspekty implementacji dyrektyw Unii Europejskiej do systemu prawnego Rzeczypospolitej Polskiej*, "Przegląd Prawa Konstytucyjnego" 2013, Vol. 1, issue 13, p. 178; see also B. Kurcz, *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego*, Kraków 2004, pp. 39–40.

[7] See A. Trubalski, *Wybrane*..., p. 177.

[8] R. Tokarczyk, *Problemy harmonizacji polskiej kultury prawnej z kulturą prawną Unii Europejskiej*, "Studia Europejskie" 2004, issue 3, p. 70.

[9] Regarding the notion of harmonisation, see: E. J. Lohse, *The Meaning of Harmonisation in the Context of European Community Law – a Process in Need of Definition*, (in:) M. Andenas, C. B. Andersen (eds.), *Theory and practice of harmonisation*, Cheltenham 2012, p. 282.

[10] R. de la Feria, *The EU VAT system and the internal market*, Amsterdam 2006, p. 38.

[11] E. Zielińska, *Implementacja do polskiego porządku prawnego dyrektyw Unii Europejskiej. Wybrane zagadnienia*, Warszawa 2012, pp. 5–6.

However, the notions presented could also be viewed in a separate context of intensity of harmonization[12]. It is strictly connected to the issue of the Member States' leeway as regards the implementation of EU law. Total harmonization forces the Member States to adopt legislation which is word-by-word the same as provisions of the relevant EU directive. The domestic legislator cannot choose from a variety of possible legislative solutions but should implement provisions of the directive verbatim[13] (of course adjusting them according to the technical rules of legislating which are usually different in each Member State[14]). The main consequence of such an approach could be that implementation of an EU directive is, in many cases, based on a strict translation (a verbatim copy) of the provisions thereof[15]. As stated in the jurisprudence of the CJEU, a Member State cannot, in case of total (complete) harmonization, choose to impose a higher degree of obligations on the addressees of the regulation than that prescribed in the directive (even if it guarantees higher protection of the values which are the *ratio* of the directive)[16].

An opposite type of harmonization is so-called partial harmonization[17] (sometimes also referred to as minimal harmonization *sensu largo*). However, there are several categories of partial harmonization mentioned in the doctrine of EU law, e.g. minimal harmonization *sensu stricte*, optional, partial and alternative harmonization[18]. In case of minimal harmonization *sensu stricte*, a national legislator

[12] A clear distinction between the notions of scope and intensity of harmonisation is made in doctrine of EU law. See i.a. R. Schütze, *European Union Law*, Cambridge 2015, p. 550.

[13] There are three main aspects of total harmonization of EU law related to manufacturing and turnover of goods: regulation of a product standard on EU level, obligations imposed on the Member States to permit free trade of products which conform with common standards and obligations to prohibit manufacturing and sale of products non-conforming with the regulated standard. See *ibid*.

[14] See judgment of CJEU of 25 April 2002 in Case C-52/00 *Commission of the European Communities v French Republic:* "the margin of discretion available to the Member States in order to make provision for product liability is entirely determined by the Directive itself and must be inferred from its wording, purpose and structure".

[15] See E. Zielińska, *Implementacja*..., p. 5.

[16] See the judgment of CJEU of 10 January 2006 in Case C-402/03 *Skov and Bilka*: "Since the Directive, as pointed out in paragraph 23 above, seeks to achieve complete harmonisation in the matters regulated by it, its determination in Articles 1 and 3 of the class of persons liable must be regarded as exhaustive"; also, see judgment of CJEU of 5 April 1979 in Case C-148/78 *Ratti*, para. 27.

[17] See E. Zielińska, *Implementacja*..., p. 5.

[18] See: B. Kurcz, *Dyrektywy*..., p. 82; There are many, slightly different, categorizations of harmonization and partial harmonization. *Cf.* P. J. Slot, *Harmonisation*, "European Law Review" 1996, issue 5, p. 382, quoted after A. Kunkiel-Kryńska, *Metody harmonizacji prawa konsumenckiego w Unii Europejskiej i ich wpływ na procesy implementacyjne w państwach członkowskich*, Warszawa 2013, p. 64; C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki*, Warszawa 2000, p. 595; R. Schütze, *European Union Law*..., p. 550.

could choose to adopt a stricter standard than that prescribed in an EU directive[19]. On the other hand, what is specific to optional harmonization is that domestic regulations could differ from the EU law standard and the addressees of the law could opt for either the EU or the domestic standard[20] – for different purposes (e.g. trade on the common or merely the domestic market). Slightly differently, the alternative harmonization method enables the Member State (not the final addressee of the provisions of the law) to opt for more than one method of regulation[21].

The issue of gold-plating must be then considered in the context of the above-mentioned different types of harmonization under EU law.

2. THE MEANING OF SO-CALLED 'GOLD-PLATING'

'Gold-plating' appears in many EU documents and is usually described as regulations or legislation that go beyond the requirements set forth in EU law[22], which make implementation of EU law more costly for the addressees of the regulations. In consequence, gold-plating increases the administrative burden[23]. It is also often mentioned in the context of so-called 'cutting red tape' initiatives[24] and reduction of the regulatory burden on the EU market[25]. That said, 'gold-plating' is commonly viewed as having negative and unwelcome impact on the regulatory environment. It is measured that implementing of EU law in a manner as efficient as in the most efficient Member State and without gold-plating could reduce the cost of the administrative burden by up to EUR 40 billion per annum[26]. It is also pointed out that 32% of the administrative burden has its origin in gold-plating and inefficient implementation of EU requirements[27].

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[19] R. Schütze, *European Union Law*, p. 551.

[20] A. Kunkiel-Kryńska, *Metody harmonizacji prawa konsumenckiego*..., p. 65.

[21] See: D. Mavromati, *The Law of Payment Services in the EU. The EC Directive on Payment Services in the Internal Market*, Alphen aan den Rijn 2008, p. 88.

[22] *Cutting Red Tape in Europe. Legacy and Outlook*, Brussels 2014, p. 6; see also *Better Regulation for Growth and Jobs in the European Union*, COM(2005) 97 final, Brussels 2005, where 'gold-plating' is defined as "the introduction of requirements or procedures in the course of the transposition of EU legislation which are not required by that legislation".

[23] See e.g. *Research for REGI Committee – Gold-plating in the European Structural and Investment Funds*, p. 16.

[24] Regarding 'cutting red tape' see, *inter alia*, *Cutting Red Tape in Europe. Legacy and Outlook*, Brussels 2014; *Cutting red tape: National Strategies*, OECD 2007.

[25] Which is a part of the Smart Regulation programme, see *Smart Regulation in the European Union*, COM(2010) 543 final, Brussels 2010.

[26] *Cutting Red Tape in*..., p. 20.

[27] *Ibidem*, p. 35.

Of course, the "gold-plating" issue relates exclusively to regulatory and administrative measures that are somehow touched by EU legislation[28]. Thus, it should not be connected to imposing administrative burdens that have no link to EU requirements. In such a case it is proper to speak about simple bureaucratic burdens rather than gold-plating. In this context, gold-plating should be viewed as 'over-transposition' of EU law and not a bureaucratic approach by itself.

'Gold-plating', however, has many faces. First of all, a distinction between active and passive gold-plating should be made. In case of active gold-plating, a national legislator adopts legislation that imposes a higher degree of requirements on the addressees than could be implied from EU directives which are implemented by such a measure. On the other hand, passive gold-plating relates to the situation where the national legislator just fails to repeal higher standards that existed before implementing EU law[29]. Moreover, several origins of gold-plating of EU law could be indicated:

– simple over-transposition of EU law, i.e. adopting law that goes beyond the requirements set forth in EU legislation;

– there are significant differences between legislations (in the context of implementation of EU law), which result in a lack of coherence between legislations in view of the common market and, thus, an unnecessary regulatory burden;

– national legislators or authorities fail to use exemptions allowed by EU law (which results in a stricter regulation);

– despite the fact that obligations adopted by a Member State do not go beyond EU standards, domestic legislation establishes sanctions, procedures or a burden of proof that are not required by EU law or whose level is not proportional[30].

Admissibility of gold-plating is, however, also a complex issue. It should be stated that a different approach should apply to total harmonization and partial harmonization. In case of total harmonization, additional regulatory burdens must be viewed as simply an improper implementation of EU law. In such a situation inconsistencies between EU and domestic legislation is a more crucial issue; in fact, the question of gold-plating falls into the background. In my opinion, gold-plating should be related to cases where national legislation is formally in compliance with EU law but establishes requirements that lead to higher regulatory burdens. That said, in case of hard, strict, total harmonization the problem of gold-plating usually would not arise.

A different situation arises with regard to partial harmonization. In such a case some parts of a subject of regulation (e.g. procedure, sanctions, some technical requirements) could be outside of the scope of EU secondary legislation or,

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[28] In view of the "occupy the filed pre-emption" doctrine, M. Szwarc-Kuczer, *Kompetencje Unii Europejskiej w dziedzinie harmonizacji prawa karnego materialnego*, Warszawa 2011, p. 26; see also R. Schütze, *European Union Law*, p. 550.

[29] *Research for REGI Committee – Gold-plating*..., p. 16.

[30] *Ibidem*, p. 16.

in case of so-called minimal harmonization, EU law simply leaves to the national legislator an opportunity to introduce higher standards than those prescribed in an EU directive (sometimes the ceiling of potential requirements is also indicated by EU law[31]). In both cases any additional burdens should viewed as, generally, being in compliance with EU law – as EU law does not preclude them and leaves to the national legislator some leeway in this respect. Of course, this does not mean that such burdens are always legal. Particularly, they could be contrary to the domestic constitution (e.g. in case of an inadmissible restriction of business activity) but it does not lead automatically to inconsistency with EU law. However, it is also possible (in particular cases) that restrictions imposed by the national legislator (despite the fact that they formally lay within the margin of discretion afforded by an EU directive) are too excessive in such a way that relations on the common market are interfered with contrary to the Treaties[32]. For the sake of clarity, both situations shall be viewed as gold-plating for the purpose of this article. In other words, gold-plating shall be understood as imposing administrative burdens, obligations or restrictions which are not required by EU directives and/or are more burdensome than other implementative provisions, albeit formally admissible considering the level of discretion accorded to the national legislator by virtue of a given EU directive (e.g. in case of partial, minimal, etc. harmonization).

3. EXPERIENCE WITH GOLD-PLATING IN POLAND

I would like to briefly present some examples of gold-plating in Polish law within the last 13 years (i.e. since the accession to the EU).

3.1. END-OF-LIFE VEHICLES DIRECTIVE'S IMPLEMENTATION

The EU Parliament and the Council have issued Directive 2000/53/EC of 18 September 2000 on end-of-life vehicles ("the ELV Directive"). The purpose of the ELV Directive was, *inter alia*, to harmonize national measures in order to minimize the negative impact of end-of-life vehicles on the environment and to avoid disruptions of the common market. The Directive called upon the Member States to ensure "that economic operators set up systems for the collection, treatment and recovery of end-of life vehicles. (…) Member States should ensure that the last holder and/or owner can deliver the end-of life vehicle to an authorised treatment

[31] E. Zielińska, *Implementacja*..., p. 6.
[32] E.g. are against rule of proportionality.

facility without any cost as a result of the vehicle having no or a negative, market value"[33]. The same obligation was set forth in Article 5(1) of the ELV Directive.

The ELV Directive was based on the "polluter pays" principle ("Member States should ensure that producers meet all, or a significant part of, the costs of the implementation of these measures; the normal functioning of market forces should not be hindered"[34]). As a consequence, it should be expected that national legislators would have imposed on so-called economic operators (producers, distributors, collectors, motor vehicle insurance companies, dismantlers, shredders, recoverers, recyclers and other treatment operators of end-of life vehicles, including their components and materials[35]) obligations regarding the establishment of a system of collection of end-of-life vehicles and/or an obligation to participate in the costs of the system.

This is what, in general, the Polish legislator did in 2005 by enacting the Act on the Recycling of End-of-Life Vehicles[36] ("the ELV Act"). However, the Polish way of implementing the ELV Directive was very peculiar. Producers and importers of vehicles were obliged to guarantee that an end-of-life vehicles collection net ("collection net") is available[37]. As the ELV Act stated, the collection net had to cover the whole territory of Poland in such a way that the distance from the place of residence or seat of each holder of an end-of-life vehicle to a collecting place should not be longer than 50 km. In other words, the collecting net should have consisted of a multitude of circles with a 50 km radius each, covering the whole territory of Poland. Of course, this is not in fact possible in 100% as some parts of the territory of Poland are hard to reach (peninsulas, mountains, lakes, rivers) and, additionally, it was not always necessary to have a collecting place in 50 km from home (sometimes it was closer to reach a collecting place that was situated theoretically beyond that limit than a collecting place that was less than 50 km in straight line – e.g. in case of natural obstacles such as rivers with no bridge).

As we can see, the regulation prescribed by the Polish legislator is much stricter than the obligations required by the ELV Directive (the latter requires merely "the adequate availability of collection facilities within their territory"[38]). Thus, it could be argued that the 50 km radius requirement is more burdensome than any other available measures of "adequate availability"[39]. That is, the obligations imposed by the Polish legislator in this respect are an example of 'gold-plating'.

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[33] Paras 6–7 of the preamble to the ELV Directive.

[34] Para 7 of the preamble to the ELV Directive.

[35] Article 2(10) of the ELV Directive.

[36] Polish Official Journal of Laws of 2005, No. 25, item 202.

[37] Article 11 of the ELV Act.

[38] Article 5(1). tiret No. 2 of the ELV Act.

[39] Legislations of other Member States prescribed obligations based on "adequate distance" or "adequate/appropriate availability", see the Finnish Government Decree on End-of-life Vehicles No. 581/2004 (Section 4(2)) in conjunction with Section 6 (10-11) and Section 7 of the Waste Act No. 1072/1993; British Statutory Instrument (the End-of-Life Vehicles (Producer Responsibility)

Besides the above, the Polish legislator decided also to impose a significant penalty (so-called "fee") on producers and importers that failed to provide the holders of end-of-life vehicles with the abovementioned collecting net covering 100% of the territory of Poland[40]. As practice shows, it was impossible to meet the mentioned standards so in 2006 nearly all of the entity addressees of the ELV Act were penalised with the imposing fee. Some of the entities paid the fee promptly and, further, initiated proceedings aimed at obtaining a reimbursement of the fees. Other entities refused to pay and waited for the decision of the General Inspector for Environment Protection[41]) – this, as it transpired, made a difference later on. It was peculiar that almost all producers and importers fulfilled the "collecting net" obligation in nearly 100%, however it was still too little to avoid the penalty (the penalty remained the same for those who fulfilled the obligation in 99% and for those who did not fulfil it at all or, for instance, in 2%).

The Polish legislator noticed the irrationality of the described regulations (one of the arguments against the law was that it was a clear example of gold-plating, as the ELV Directive did not require such a level of obligations to be imposed on producers and importers of vehicles) and changed the law in 2007[42]. The new regulation prescribed that an entity providing a collection net that covers at least of 95% of the territory of Poland is exempted from the penalty. Moreover, the penalty proportionately decreases if the collection net exceeds certain levels of coverage (85%, 90%). Unfortunately, the new rules were applied (a literal construction) only to penalties that were charged since 2007. As a result, it did not apply to fees levied in 2006, so the strict old law still harmed producers and importers of vehicles.

Most producers and importers challenged decisions on imposing fees in 2006 before administrative courts. In one of the cases, an administrative court[43] made a reference to the Constitutional Court in order to ask a question regarding the constitutionality of the ELV Act and its 2007 amendment[44]. The Polish Constitutional Court decided that the challenged provisions are consistent with the Polish

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Regulations 2005) No. 263, Article 11(1): "Each producer shall ensure that, as regards vehicles for which he has declared responsibility for placing on the market under regulation 7, or for which the Secretary of State has ascribed responsibility to him under regulation 8, his system for collection as referred to in regulation 10 **is reasonably accessible** to any person who wishes to deliver to it an end-of-life vehicle for which that producer is responsible" (emphasis – M. J.). See also: *Transposition of the ELV Directive in other EU Member States*, November 2004, Perchards; N. Kim, *Exploring determinant factors for effective end-of-life vehicle policy: experiences from European end-of-life vehicle systems*, IIIEE Reports 2002:7.

[40] Article 14 of the ELV Act.

[41] PL: Główny Inspektor Ochrony Środowiska, GIOŚ.

[42] See the Act of 29 June 2007 on Amending the ELV Act.

[43] Decision of the Voivodship Administrative Court in Warsaw of 16 November 2009, ref. number IV SA/Wa 1383/09.

[44] Polish Official Journal of Laws of 2007, No. 176, item 1236.

Constitution[45], however the question referred by the lower court was of a very narrow scope. At a later stage the Supreme Administrative Court ("SAC") issued several judgments[46] stating that provisions of the Act on Amending the ELV Act, which confined the new law merely to fees calculated since 2007, should be interpreted consistently with the Constitution, so the new law should apply also to fees calculated in 2006 provided that the fees were imposed by virtue of administrative decisions[47].

The discussed case is an example of a situation where the negative impact of gold-plating was partially cured by the activity of the courts and by a new law enacted by the parliament *ex post*.

3.2. IMPLEMENTATION OF THE TOBACCO PRODUCTS DIRECTIVE

Another example of gold-plating in Polish legislation is definitely the implementation of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC ("the TPD Directive"). It is important to underline that Poland had an important political and economic problem with the implementation of the TPD directive. The discussed Act prescribed new restrictions on the tobacco products market which may have adversely impacted the production and sale thereof. On the other hand, Poland plays an important role on the tobacco products market. In view of the statistics:

– there are approx. 12.5 thousands of individual plantations of tobacco in Poland;

– approx. 60 thousands of people are working in the tobacco agriculture;

– 35 thousand tons of tobacco per annum are manufactured and sold by the tobacco agriculture in Poland;

– 6 thousand people are working in the tobacco products' industry with gross income of PLN 400 mln (approx. EUR 100 mln);

– 150 billion cigarettes are manufactured in Poland per annum and 63% are exported abroad;

– the tobacco industry provides the state budget with approx. 10% of total tax income;

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[45] Judgment of the Polish Constitutional Court of 9 July 2012, ref. number P 8/10.

[46] See the judgment of the Supreme Administrative Court of 17 May 2016, ref. number II OSK 3070/15; judgment of the Supreme Administrative Court of 18 December 2012, ref. number II OSK 2370/12; judgment of the Supreme Administrative Court of 5 December 2012, ref. number II OSK 2377/12.

[47] As a result, entities that calculated fees on their own cannot benefit from the new approach as against the judiciary.

– it is measured that the implementation of the TPD Directive could result in a decrease of the tax income by a sum of approx. PLN 8.85 bln (approx. EUR 2.2 bln);

– it was also foreseen that the black market of tobacco products would have increased by 100–300%[48].

In view of the above, the Polish government was much against the TPD Directive which prescribes restrictions, *inter alia*, on the manufacture and sale of electronic cigarettes, flavoured cigarettes and on distance sale of tobacco products. For example, it should be noted that the electronic cigarettes industry in Poland employs approx. 12 thousand people[49]. Particularly, prohibition of sale of flavoured tobacco products (Article 7(1) of the TPD Directive) was difficult to be accepted by Poland as it implies the end of the manufacture and sale of menthol cigarettes which constitutes an important commodity on the Polish tobacco market[50]. Thus, Poland filed a complaint (supported also by Romania) against the validity of the TPD Directive with the CJEU, claiming that the prohibition of menthol cigarettes "does not contribute to improving the functioning of the internal market but, on the contrary, results in the creation of obstacles which did not exist before the Directive was adopted" and "is not an appropriate means for attaining the objectives pursued by the Directive. Furthermore, this prohibition runs counter to the requirement that measures taken must be necessary for attaining the objectives pursued"[51]. The complaint was unsuccessful as the CJEU held that the TPD Directive is valid, thus dismissing the Polish pleas against it[52].

The level of determination of the Polish government in challenging of the TPD Directive has not corresponded, however, with the manner of implementation thereof. Surprisingly, the Polish law implementing the TPD Directive imposes harsher restrictions on the tobacco market than the TPD Directive itself – in the Act of 22 July 2016 on Amending the Act on the Protection of Health Against the Ramifications of Using Tobacco and Tobacco Products (hereinafter referred to as "the New Tobacco Law"[53]). The main important changes relate, *inter alia*,

[48] See R. Gwiazdowski, A. Barna, M. Wepa, R. Marchewka, *Skutki wdrożenia dyrektywy tytoniowej. Raport Centrum im. Adama Smitha o ekonomicznych skutkach wdrożenia rewizji dyrektywy 2001/37/WE Parlamentu Europejskiego i Rady Europy z 5 czerwca 2001 roku*, Warszawa 2013, pp. 6–7.

[49] See *Wpływ implementacji dyrektywy tytoniowej na polską branżę elektronicznych papierosów*, Związek Przedsiębiorców i Pracodawców, 5 February 2016, p. 3.

[50] Approx. 18% of the cigarettes market in Poland, as stated in http://forsal.pl/artykuly/941076,polska-nie-obronila-papierosow-mentolowych-zobacz-co-to-oznacza-dla-naszej-gospodarki.html (accessed 27 May 2017).

[51] See http://curia.europa.eu/juris/document/document.jsf?text=&docid=156981&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=946116 (accessed 27 May 2017).

[52] See http://curia.europa.eu/juris/document/document.jsf?docid=177721&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=946116 (accessed 28 May 2017).

[53] Consolidated text is available at Polish Official Journal of Laws of 2017, item 957.

to the prohibition of sale of tobacco for oral use and the prohibition of distance sale of tobacco products. Further explanation is necessary as the TPD Directive also includes provisions that restrict the mentioned types of sale (Articles 17–18).

First of all, Article 7(1) of the New Tobacco Law prohibits manufacturing and placing tobacco for oral use on the market. *Prima facie* it corresponds with Article 17 of the TPD Directive. However, the latter allows for derogations from the prohibition ("without prejudice to Article 151 of the Act of Accession of Austria, Finland and Sweden") for the benefit of the mentioned three EU members. This is because consumption of tobacco for oral use is a tradition in those countries. Moreover, Article 17 clearly prohibits only "placing on the market of tobacco for oral use", therefore, *a contrario*, manufacturing of tobacco for oral use is not subject to the TPD Directive's regulations. In practice, it means that the EU Member States are not obliged to prohibit manufacturing of tobacco for oral use but merely to prohibit placing such products on the market within their territory. Manufactured products could, however, be exported abroad (outside of the EU) or to Austria, Finland or Sweden, where placing such products on the market is legal[54]. Thus, Poland has added to the TPD Directive restrictions which are not required by EU law. As a result, many Polish entrepreneurs that could manufacture and export tobacco for oral use, e.g. to Sweden, have been deprived of such an opportunity.

Article 7f of the New Tobacco Law corresponds with Article 18(1) of the TPD Directive which concerns cross-border distance sale of tobacco products. According to the provision, the EU Member States may prohibit cross-border distance sale of tobacco products to consumers. However, the prohibition is not mandatory and each state is able to accept cross-border sale on its territory provided that some additional requirements for entrepreneurs involved in such sale are introduced (including a registration duty). On the other hand, the Polish New Tobacco Law prescribes (Article 7f) that: "Distance sale of: 1) tobacco products and 2) electronic cigarettes and refill containers and parts thereof, shall be prohibited".

This short provision is an example of a regulation that gold-plates the TPD Directive in three ways. First of all, as previously stated, the TPD Directive does not oblige the Member States to prohibit cross-border distance sale of tobacco products but merely leaves such an option which is not mandatory. Secondly, Article 18 of the TPD Directive does not relate to internal, domestic distance sale of tobacco products but only to cross-border sale so the Polish law establishes an additional obstacle for Polish entrepreneurs in this respect. Thirdly, the TPD Directive relates only to distance sale to consumers but Article 7f of the New

[54] K. Piernik-Wierzbowska, *Czy ustawodawca nie potraktował rodzimej branży tytoniowej zbyt restrykcyjnie?*, www.krotoski-adwokaci.pl (accessed 28 May 2017).

Tobacco Law is not precise in this matter[55], which could lead to an interpretation that Polish law prohibits every kind of distance sale of tobacco products and electronic cigarettes no matter whether it is targeted at consumers or entrepreneurs (fortunately, there are strong arguments against such an interpretation, however it cannot be excluded).

The regulations presented above show that the Polish implementation of the TPD Directive went far beyond the obligations prescribed therein, thus causing significant harm to Polish entrepreneurs (and, to a certain extent, it puts Polish entrepreneurs in a worse position than their competitors from other EU Member States). Such an approach has been strongly criticized in Poland[56]. Nevertheless, there are other examples of gold-plating as regards the implementation of the TPD Directive. For the New Tobacco Law introduced a prohibition on using electronic cigarettes in many public places (Article 5), something not required by the TPD Directive. Moreover, the New Tobacco Law includes a prohibition on informing regarding tobacco products in retail outlets which is, as was the case with the previous examples, outside of the scope of the TPD Directive.

3.3. DISTANCE SALE OF MEDICINAL PRODUCTS

Another example of gold-plating in Polish law relates to one of the most important milestones for the development of EU Treaties' economic freedoms and the common market – the *DocMorris* judgment[57]. To remind ourselves, the CJEU held that: "A national prohibition on the sale by mail order of medicinal products the sale of which is restricted to pharmacies in the Member State concerned is in that regard a measure having an effect equivalent to a quantitative restriction where the prohibition has a greater impact on pharmacies established outside the national territory and could impede access to the market for products from other Member States more than it impedes access for domestic products. Article 30 EC may, however, be relied on to justify such a national prohibition on the sale by mail order of medicinal products in so far as the prohibition covers medicinal products subject to prescription. (…) However, Article 30 EC cannot be relied on to justify an absolute prohibition on the sale by mail order of medicinal products which are not subject to prescription in the Member State concerned".

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[55] Only the definition of cross-border distance sale (Article 2 (35) of the New Tobacco Law) relates to sale to consumers; however, the notion of distance sale, which could be viewed as wider, is not defined in the New Tobacco Law.

[56] See the letter of the President of Association of Entrepreneurs and Employers Mr. Cezary Kaźmierczak to the Minister of Health Konstanty Radziwiłł of 3 December 2015, http://zpp.net.pl/files/manager/file-2041fb9f98823c751080ed29c6071fbc.pdf (accessed 28 May 2017).

[57] See judgment of the CJEU of 11 December 2003, ref. number C-322/01 *Deutscher Apothekerverband eV v 0800 DocMorris NV, Jacques Waterval*.

A practical consequence of *DocMorris* was the conclusion that national provisions that prohibit distance sale of medicinal products available without a doctor's prescription (so-called OTC medicines) do not comply with EU law. On the other hand, the CJEU stated also that, generally, distance sale of medicines available only with doctor's prescription (so-called Rx medicines) could be prohibited by national legislation provided that it is justified by objective reasons in accordance with the EU Treaty[58]. However, importantly, *DocMorris* does not oblige the Member States to prohibit distance sale of Rx medicines. In fact, some EU Member States, as a result of *DocMorris*, repealed restrictions for distance sale of OTC and Rx medicines alike (e.g. the UK and Germany)[59].

In the context of the above, prohibition of distance sale of Rx medicines should be viewed only as an option for the national legislator, and any decision to institute such restrictions must be considered as going beyond the EU requirements. Polish pharmaceutical law prescribes (in Article 68(3)) that distance sale of OTC medicines is admissible, hence, *a contrario*, Polish law does not accept distance sale of Rx medicines – the Polish legislator has chosen to prohibit it despite the fact that it was not mandatory under EU law[60]. Moreover, the provision is interpreted as prescribing a prohibition of distance sale of veterinary medicinal products (both OTC and Rx)[61], which is also not required by EU law[62].

3.4. POLISH EXPERIENCE – INITIAL CONCLUSIONS

The examples of gold-plating of EU law in Polish legislation discussed above are, of course, only few among many other, similar acts of the Polish legislator that went beyond the obligations imposed by EU law but, on the other hand, are somehow presented, defectively, as implementation of EU law (or even as necessary measures in order to guarantee compliance with EU law). A close analysis of examples of gold-plating in Poland shows that this negative phenomenon is a consequence of a lack of a domestic implementation policy which results in implementing EU law without an analysis of different opportunities available.

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[58] See: A. Zimmermann, L. Wengler, *Wysyłkowa sprzedaż produktów leczniczych*, "Prawo w Farmacji" 2009, Vol. 65, issue 5, pp. 342–347.

[59] Z. Więckowski, *Sprzedaż leków na odległość – regulacje krajowe*, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2016, Vol. 8, issue 5, p. 56.

[60] See: M. Paluch, *"Ochrona pacjenta" kosztem przedsiębiorcy*, *czyli absurdy sprzedaży leków przez internet*, http://www.bankier.pl/wiadomosc/Ochrona-pacjenta-kosztem-przedsiebiorcy-czyli-absurdy-sprzedazy-lekow-przez-internet-2270808.html (accessed 28 May 2017).

[61] See e.g. the judgment of the Voivodship Administrative Court in Warsaw of 25 March 2013, ref. number VI SA/Wa 126/13.

[62] See: M. Bąkowska, *Ograniczenia w sprzedaży przez internet produktów leczniczych weterynaryjnych dostępnych bez recepty*, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2016, Vol. 5, issue 8, pp. 104–110.

Secondly, misunderstandings regarding what EU law requires from a Member State could be also pointed to. In many cases the burdens that EU regulations require relate only to cross-border sale and may be waived by national legislators in relation to the internal market – unfortunately, it is not always taken into consideration in the Polish legislative process. Finally – and it could be viewed as the darker side of EU law implementation in Poland – gold-plating is sometimes a result of lobbying by regulatory authorities which fight for greater administrative powers[63].

4. FACING THE GOLD-PLATING PLAGUE – REMEDIES AVAILABLE

Gold-plating as a negative legislative phenomenon is a risk factor associated with every EU law implementation process and its potential restriction could be viewed as an important step on the road to making legislation simpler and friendlier to entrepreneurs and citizens. It is worth noticing, in this context, several examples of anti-gold-plating policies introduced in some EU Member States.

The United Kingdom is one of the most advanced countries as regards developing steered anti-gold-plating policies. The UK government declared clearly in 2010 that its intention is to avoid any gold-plating which could harm the interests of British entrepreneurs and presented a duly considered strategy in this respect[64]. First of all, implementation of EU law in the UK is based on the following principles:

– "Work on the implementation of an EU directive should start immediately after agreement is reached in Brussels. By starting implementation work early, businesses will have more chance to influence the approach, ensuring greater certainty and early warning about its impact;

– Early transposition of EU regulations will be avoided except where there are compelling reasons for early implementation. (…)

– European directives will normally be directly copied into UK legislation, except where it would adversely affect UK interests e.g. by putting UK businesses at a competitive disadvantage.

– A statutory duty will be placed on ministers to conduct a review of domestic legislation implementing a European directive every five years (…)"[65].

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[63] About governmental interest groups see: A. M. Cammisa, *Governments as interest groups: intergovernmental lobbying and the federal system*, Westport 1995, p. 25.

[64] See: https://www.gov.uk/government/news/government-ends-gold-plating-of-european-regulations (accessed 28 May 2017).

[65] *Ibidem*.

The British approach in this respect is, of course, focused on the British national interest (of which Brexit is a major consequence). However, such an approach is interesting also for countries which are not planning to leave or even for countries which are going to access to the EU. It is not a mystery that EU law on occasion imposes significant burdens on domestic entrepreneurs, so – from national interests' point of view – there is no reason to introduce such burdens into domestic legislation too early before the deadline. It could also be viewed as unnecessary gold-plating. What is interesting is that the British government tried to adopt a "no national-toppings" policy and just copy-paste EU regulations except the situation where a lack of "additions" would be against the interests of British business. Any "additional" regulations need to be justified and reasoned before instituted.

Further analysis conducted by the UK government has led to additional recommendations[66]. For example, when implementing EU law it is better to seek non-legislative measures (such as soft law) and not resort to hard legislation. It is also crucial not to put domestic entrepreneurs at a competitive disadvantage compared with their EU competitors (avoidance of reverse-discriminatory legislation; always opting for implementing measures that do not impose on domestic business burdens and standards which are not required from EU businesses by EU law nor by manufacturers and traders based in other Member States)[67]. A comprehensive strategy and legislative policy (called the "new transposition framework"), which is supplemented by a wider 'one-in, two-out' programme[68], has led to certain effects. The UK is viewed as one of the EU leaders in least burdensome implementation of EU law[69].

Some other EU Member States fight with gold-plating through institutional measures. This is the case, *inter alia*, in Germany, where the National Regulatory Control Council (the *Normenkontrollrat*) exists. The Council is competent to assess whether new regulations constitute gold-plating of EU law. Every new legislative proposal that goes beyond the requirements of EU law needs to include an explanation why it is necessary and the explanation is subject to an analysis by the Council[70]. Similar authorities have been established in Sweden (*Regelrådet*[71])

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[66] See: *Gold-plating Review. The Operation of the Transposition Principles in the Government's Guiding Principles for EU Legislation*, March 2013, http://mbsportal.bl.uk/secure/subjareas/mgmt/bis/14583013_683_gold_plating.pdf (accessed 28 May 2017).

[67] *Ibidem*.

[68] https://www.gov.uk/government/publications/2010-to-2015-government-policy-business-regulation/2010-to-2015-government-policy-business-regulation#appendix-4-operating-a-one-in-two-out-rule-for-business-regulation (accessed 28 May 2017).

[69] See: *Europe can do better. Report on best practice in Member States to implement EU legislation in the least burdensome way*, High Level Group of Independent Stakeholders on Administrative Burdens, Warsaw, 15 November 2011.

[70] *Ibidem*, p. 34.

[71] *Ibidem*, p. 28–29.

and in the Czech Republic (Regulatory Impact Assessment Board[72]). Moreover, the EU itself emphasizes the need to reduce gold-plating, suggesting that every gold-plating legislative proposal has to be publicly transparent and it should be always explained why the legislation goes beyond EU requirements[73].

The Polish government also made an attempt to fight against unnecessary administrative burdens (including gold-plating) by introducing the Resolution of the Council of Ministers No. 13/2013 of 22 January 2013: '*Lepsze regulacje 2015*' (English: Better regulations 2015)[74]. Planned measures included preparation of a regulatory test which would be applied to the EU legislative process and, further, to the transposition process in Poland in order to identify every possible example of gold-plating. Identified examples of gold-plating should be then presented by the Secretary for European Matters before the European Matters Committee and the Committee would then decide on the introduction thereof. Unfortunately, there is no sufficient data that shows the effectiveness of the programme against gold-plating – on the other hand, there is ample evidence that the Polish legislator in fact ignores it (*vide* the implementation of the TPD Directive).

Examples from the Member States show that the fight against gold-plating, albeit difficult, is possible and necessary. This approach should be consistently applied in Poland and, I believe, also in the countries that aspire to EU membership (thus, also in Ukraine). It has to be remembered that the road to accession to the EU is also a process of making domestic law compliant with EU law – so the risk of gold-plating is not foreign to Ukraine. Some conclusions regarding best practices could be made:

First of all, a well-considered policy of implementation of EU law should be prepared. The government has to consider what it wants to achieve by way of implementation of EU law and what the available options are.

Secondly, an overall analysis of legislation is required in order to identify administrative burdens that are not a result of EU legislation but existed before the accession/implementation of EU law.

Thirdly, an independent governmental authority focusing on good legislative practices and which pays attention to each case of gold-plating should exist and should be a part of the legislative process.

Fourthly, an honest and detailed regulatory impact assessment needs to be prepared, including an explanation why a given legislative goes beyond the relevant EU law requirement. It should also be compared with implementing measures chosen by other EU Member States.

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[72] See: http://www.oecd.org/czech/regulatoryimpactassessmentriaintheczechrepublicandothercountries.htm (accessed 28 May 2017).

[73] *Cutting Red Tape in*..., p. 57.

[74] https://www.premier.gov.pl/wydarzenia/decyzje-rzadu/uchwala-w-sprawie-przyjecia-programu-lepsze-regulacje-2015-przedlozona.html (accessed 28 May 2017).

Last but not least, potential addressees of implemented EU law (stakeholders – domestic entrepreneurs and non-governmental organizations) have to be included in the implementation process as early as possible.

THE DANGER OF SO-CALLED REGULATORY 'GOLD-PLATING' IN TRANSPOSITION OF EU LAW – LESSONS FROM POLAND

Summary

Ukraine, just like Poland over thirteen years ago, is on its route to integration with the EU, which would also require a transposition of EU law into the domestic legal system. In fact, the experience of Poland and other Member States shows that transposition of EU law gives rise to several issues. One interesting aspect concerns so-called gold-plating – that is domestic legislation than goes beyond the requirements set forth in EU law. Usually, it results in a greater regulatory burden imposed on entrepreneurs. The paper discusses three examples of such gold-plating regulations in Polish law – being a consequence of implementation of the EU law. Generally speaking, gold-plating is a negative and unwelcome phenomenon. There exists extensive research that shows the cost of gold-plating for the Member States' economies. Some of the Member States have introduced regulatory policies in order to avoid gold-plating. The analysis shows that there are several actions that need to be performed to restrict the incidence of gold-plating.

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