



Universiteit
Leiden
The Netherlands

Gold-plating and double banking: an overrated problem?

Voermans, W.J.M.; Snijders H.J., Vogenauer S.

Citation

Voermans, W. J. M. (2008). Gold-plating and double banking: an overrated problem? In V. S. Snijders H.J. (Ed.), *Content and Meaning of National Law in the Context of Transnational Law* (pp. 79-88). Munich: Sellier European Law Publishers. Retrieved from <https://hdl.handle.net/1887/14019>

Version: Not Applicable (or Unknown)

License: [Leiden University Non-exclusive license](#)

Downloaded from: <https://hdl.handle.net/1887/14019>

Note: To cite this publication please use the final published version (if applicable).

Gold-plating and double banking: an overrated problem?

Prof. Wim Voermans[†]

Published in: Henk Snijders, Stefan Vogenauer (eds.), *Content and Meaning of National Law in the Context of Transnational Law*. Sellier European Law Publishers; Munich 2009, p. 79-88.

1. The red tape reduction mantra: strict interpretation of EC Law as a source of administrative burden

In the last decade business and industry throughout Europe have complained bitterly about the administrative burden imposed by legislation. Administrative requirements resulting from domestic or EU legislation are an important determinant of the business environment, since businesses across the EU are obliged to spend considerable amounts of time filling in forms and reporting on a wide range of issues. In 2007 the costs thereof were estimated to amount to 3.5% of the GDP in the EU.¹ Obviously burdens like these impede economic growth, and inevitably throw up obstacles when trying to achieve the Lisbon targets the EU has set itself for the year 2010.² Reducing administrative burdens – or ‘cutting red tape’³ as it is also commonly labelled - has therefore become topical: it ties in well with economic policies, and has become a very popular electoral promise Europe wide. Red tape reduction is at the heart of a great deal of the regulatory reform projects that have

^{††} Professor of Constitutional and Administrative Law, Faculty of Law, Leiden University. President of the Dutch Association for Legislation and vice-president of the International Association for Legislation (formerly the European Association for Legislation), Steenschuur 25, P.O. Box 9520 2300 RA Leiden, the Netherlands. The research in this contribution constitutes part of the research programme Trias Europea.

¹ Communication of the Commission COM (2007) 23 final, *Action Programme for Reducing Administrative Burdens in the European Union*, p.4.

² In March summit of 2000, the EU Heads of States and Governments in Lisbon agreed to make the EU ‘the most competitive and dynamic knowledge-driven economy by 2010’. From the outset these targets have seemed somewhat overambitious. At present (2008) it is obvious that the targets set in 2000 will not be met by far. See for a sobering 2005 overview of the targets and the amount of (then) 25 that have met these targets. http://prawo.uni.wroc.pl/~kwasnicki/EkonLit1/the_quatifiable_lisbon.pdf.

³ The origin of the term is not quite clear but it is generally held that ‘red tape’ refers to the 17th and 18th century English practice of binding documents and official papers with red tape. Another explanation holds that the 19th century records of US Civil War veterans were bound in red tape, which was particularly difficult to remove.

spread like wildfire throughout many EU member state countries.⁴ The European Commission itself has embarked on a Better Regulation strategy aiming for a reduction of administrative costs by as much as 25% by 2012. This would – it is believed - have a significant economic impact on the EU economy – and an increase in GDP of about 1.5% or around € 150 billion.⁵

Typically red tape reduction policies try to reduce administrative burden by way of screening the legislative stock and cutting away excessive burdens. In many EU countries however, one also aims to *prevent* disproportional burden from arising when drafting legislation. In this respect European legislation, especially EC Directives, come in to focus. EC Directives are believed to be a source of a great deal of red tape, both in themselves and indirectly. Businesses and industry in the UK and the Netherlands alike – until recently – believed that in the act of transposing a Directive, governments and government agencies were rather inclined to do more than what was strictly required by the Directive. Exceeding the strict terms of EC Directives governments and agencies were suspected – wilfully⁶ or unconsciously - to “tag on” additional national measures on the back of European Directives, resulting in unnecessary burdens and competitive disadvantages for domestic businesses. In the UK these national add-ons are commonly referred to as gold-plating.⁷ Burdens as a result of the transposition of EC directives into national law are not only kept in check by limiting the burden to the bare minimum required, but also by requiring a keen eye for the coordination of the regimes required by EC law and existing national regimes. So called ‘double-banking’, i.e. the situation when European legislation covers the same ground as existing domestic legislation, and where the two regimes have not been made fully consistent or merged into one, also needs to be avoided in order to circumvent unnecessary burdens for businesses and industry.

1.1 Gold-plating, double banking and the interpretation of law

⁴ At present 23 Out of 27 EU Member states have regulatory reform projects underway <http://www.administrative-burdens.com>. See for the EU-regulatory reform programme (the administrative burden reduction part). http://ec.europa.eu/governance/better_regulation/admin_costs_en.htm.

⁵ See the Commission’s Working Document, COM(2008) 35 final, Reducing administrative burdens in the European Union 2007 progress report and 2008 outlook.

⁶ In Italy this technique of piggybacking a Directive is believed to be often used as a device to pass through controversial measures and to ensure a lower degree of parliamentary scrutiny.

⁷ The Dutch wording for this is: ‘nationale kop’.

For our present object of study ‘Interpretation of National Law in the context of transnational law’ the phenomena’s of gold-plating and double banking are very interesting. First, because transposition of EC directives is – to a very large extent – an act of interpretation. Under article 249 of the EC Treaty directives are binding as to the result to be achieved, but they leave national authorities a choice of methods. This allows the Member states a double margin of discretion: first, states are, within certain confines,⁸ free to choose form and methods, integrating EC legislation in the most optimal way into domestic legislation. Secondly the Member state needs to interpret the result to be achieved. Even though they are under the scrutiny of the European Commission, and ultimately the European Court of Justice (ECJ), as regards their interpretation, in most cases they have a significant margin of appreciation. The very nature of EC Directives as instruments of EC policymaking is such (at least originally the meaning was) that it allows member states to adjust their national regimes to the Directive as they see fit. This means that some room to manoeuvre must be left to the national authorities; an element of subsidiarity is present in the Directive instrument. Not that they are always used as such: a great deal of the present day Directives are cemented shut. That is why the Interinstitutional Agreement on Better Lawmaking 2003⁹ in its points, and specifically point 13, calls upon the institutions not to use a Directive as if it were a regulation. This, as well as the tendency to over detail provisions, denatures the character of a Directive.

Second, gold-plating and double banking are interesting because they are relative concepts. The bite of gold-plating, for instance, only becomes painful when one Member state is overzealous in relation to another member state. A competitive disadvantage will present itself if this is the case.

Third, these phenomena are interesting in view of our present theme. When we discuss the interpretation of law (be it national or transnational) we tend to focus on judiciary interpretation. We study the way national judges interpret national law with

⁸ There is a host of case law of the European Court of Justice as regards the proper forms and methods to achieve the results required.

⁹ Point 13 of the Interinstitutional Agreement on Better Lawmaking *OJ C* 2003, 321, p. 1 reads: The three Institutions recall the definition of the term ‘directive’ (Article 249 of the EC Treaty) and the relevant provisions of the Protocol on the application of the principles of subsidiarity and proportionality. In its proposals for directives, the Commission will ensure that a proper balance is struck between general principles and detailed provisions, in a manner that avoids excessive use of Community implementing measures.

an eye for what is happening at the transnational level (e.g. the doctrine of directive conform interpretation), or what is happening in other member states, or countries.¹⁰ However, it is not only judges that interpret the law, and not every interpretation of national law in view of transnational law is subject to judicial scrutiny. Implementation of both national and transnational law requires interpretation of national (administrative) authorities. As regards the interpretation and implementation of EU legislation, national authorities tend recently to communicate and cooperate in formal and informal networks to learn from one another.¹¹

Fourth, gold-plating and double banking are very topical, but were – until recently – not well researched. They were more or less “buzz” words popping up in public debates on red tape reduction. Everyone had an example, but no one quite knew how big the problem was.

1.2 This contribution

In 2006 and 2007 both the United Kingdom and the Netherlands – the vanguard countries of regulatory reform – decided to see whether the emperors of gold-plating and double banking actually wore clothes. On either side of the Channel, two teams were asked to review the existence and effect of these practices. This contribution deals, in a comparative way, with the reports that resulted from the reviews. The contribution especially focuses on the element of interpretation of EC Directives as a source of gold-plating. In conclusion this contribution will consider how gold-plating by way of interpretation can be controlled.

2. The gold-plating conundrum in the UK: the Davidson review

Ever since the 1990’s British businesses – spurred on by OECD-reports on the damaging effects of legislative burden – have been deeply concerned about the effect of red tape in respect of their competitiveness. This concern resulted in the

¹⁰ See for instance Eyal Benvenisti (2008), *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, *American Journal of International Law*, Vol. 102.

¹¹ A very well known one is The European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) is the network of the environmental authorities of EU Member states. This network provides a framework for policy makers, environmental inspectors and enforcement officers to exchange ideas, and encourages the development of enforcement structures and best practices. See http://ec.europa.eu/environment/legal/implementation_en.htm.

establishment of an independent body, the Better Regulation Task Force (BRT) in 1997, whose mission was to advise government - on request or on its own accord – on matters pertaining to (unnecessary) regulatory and administrative burdens. The task force threw some heavy stones in to the pond when it estimated the total cost of regulation of the UK economy to be 10-12% of the GDP, or £100 billion, taking into account the related policy work. Already in its first reports the BRT targeted EC legislation as a possible source of red tape. It was at the very moment when the BRT was replaced by a permanent body, the Better Regulation Commission, on 1 January 2006 that the Lord Chancellor of the Exchequer decided to take a more in-depth look into the existence and effects of gold plating and double banking. Lord Neil Davidson Q.C.¹² was commissioned to conduct an independent review into the UK's implementation of EU legislation, focusing on the issue of 'over-implementation'. Over-implementation was used as an umbrella term for gold-plating, double banking and "regulatory creep" denoting over-zealous enforcement due to lack of clarity about the objectives or status of regulations and guidance.¹³

The first item on the review agenda was to get to grips with the definitions of gold-plating and double banking (we will – for reasons of brevity - not deal with regulatory creep). As it happened, the UK *Transposition Guide* – a guide for policy-makers and lawyers responsible for transposition issues in the UK¹⁴ – held a common definition for the two concepts. The Davidson review built on that and defined gold-plating – in very broad terms - as the process of when implementation goes beyond the minimum necessary to comply with a Directive, by:

- extending the scope, adding in some way to the substantive requirement, or substituting wider domestic legal terms for those used in the directive; or
- not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or
- providing sanctions, enforcement mechanisms and matters such as burden of proof which go beyond the minimum needed (e.g. as a result of picking up the existing criminal sanctions in that area); or
- implementing early, before the date given in the directive.

¹² Created a life peer on 22 March 2006 as Baron Davidson of Glen Clova.

¹³ See Davidson Review (2006), *Implementation of EC Legislation*, Final report, p. 3.

¹⁴ Cabinet Office (2005), *Transposition guide: How to implement European directives effectively*. London 2005 (revised in 2007).

The first two points in particular are interesting in light of the interpretative perspective we have chosen.

Double-banking – according to the definition of the Davidson Review - can occur when European legislation covers the same ground as existing domestic legislation, though possibly in different ways and to a varying extent, effectively resulting in a double (extra burdensome) regime – both European and domestic.

2.1 Findings of the Review

In order to find out whether the UK tends to gold plate (and double bank) more than other EU countries – as was suggested by some commentators¹⁵ - the Davidson Review adopted a multi-stage approach. In line with its terms of reference, the Review first launched a public call for evidence in the spring of 2006. The call asked businesses, organizations and the general public whether they thought over-implementation was a significant issue for the UK and if so, what should be done about it. Subsequently it invited the addressees of the call to come up with examples of what to their mind were clear cut cases of over-implementation. This generated 160 written responses from a wide range of respondents. These responses in turn were used as input for the selection of significant cases of potential over-implementation to be studied in more detail. Governmental departments, comparative insights, and external stakeholders assisted to the case study selection.

The Review debunks the idea that the UK is a systemic over achiever when it comes down to the transposition of EC Directives, as in the past some critics have argued, on the basis of comparison of transposition ratios (dividing the number of words in the national implementing legislation by the number of words in the original directive). The Review dismisses this simplistic and misconceived approach to assessing gold-plating: it totally fails to take account of whether elaboration of directives increases or reduces burdens for those being regulated.

In addition, the Review did not find any compelling evidence that the UK is systematically over-implementing. Over-implementation is an elusive concept, the Review noted, and there are as many myths as concrete examples. The Review

¹⁵ See Davidson Review (2006), p. 4.

certainly found that assessing whether a particular piece of European legislation had been over-implemented and whether that over-implementation was justified is not straightforward: it requires careful research into the background and context.

The Review did find some examples of gold-plating and double banking. The Insurance Mediation Directive (2002/92/EC) for instance has been gold-plated by extending the scope of the rules on sales of insurance so that they apply to sales by direct insurers as well as sales by insurance intermediaries. At the time of implementation (2002) this extension was widely supported by stakeholders, including the insurance industry, but at present the same industry has withdrawn its support because they think the regime is expensive and difficult to comply with, and is not really designed to deal with direct sales by insurers. Under the same Directive the national legislation also extends the scope to all motor warranties (where the Directive allows an exception for contracts costing less than 500 euros a year). The UK did not use the exception in order to avoid market distortions. This is widely accepted and the Review received no complaints about this. National implementation of the Insurance Mediation Directive, as well as that of the car safety test of the Ministry of Transport (commonly known as the MOT-test),¹⁶ provide examples of gold-plating by imposing higher standards than the Directive itself imposes. Directive 91/328/EC on the approximation of the laws of the Member States relating to the roadworthiness test for motor vehicles and their trailers imposes a regime that – basically – allows for a bi-annual test of seasoned cars, while the UK regime requires an annual test. At face value this is over-implementation by way of gold-plating but the Review then asks itself the question whether the over-implementation is justified and whether it creates a competitive disadvantage. The Review concludes that in the recent past other EU countries, notably Luxembourg, the Netherlands and Slovakia have had the same testing pattern as the UK, but that the Netherlands in 2008 were moving toward the minimum regime of the Directive, which, making the UK case of MOT testing in turn – a relative – example of problematic gold-plating.

The Davidson Review gives still more examples of gold-plating and some of double banking (Consumer Sales directive, Fisheries regulation, Waste and IPPC

¹⁶ The MOT test is an annual test of car safety and roadworthiness aspects applicable to most vehicles over a certain age in the United Kingdom if they are used on public roads.

regulation, Unfair Terms in Consumer Contracts directive) but – on the basis of the evidence – holds that even the few examples (out of the 160 reports) expressing inappropriate over-implementation may not be as big a problem – in absolute terms and relative to other EU countries – as is sometimes believed.¹⁷ A number of factors seem to indicate that over-implementation is not all that serious a threat.

First of all a great deal of the respondents answering to the call of evidence complained about issues which were not about over-implementation in the UK, but about EU legislation itself. In general many of the allegations regarding over-implementation are misplaced and often represent concerns about other issues. Even when some over-implementation does occur, it is sometimes beneficial for the UK economy to maintain regulatory standards rather than the minimum requirements of European Legislation. Many businesses that operate across Europe reported that differential implementation across Member States, thereby undermining the single market, matters more than whether there is over-implementation in a particular country. The idea of over-implementation and rigorous enforcement of the UK in relation to other EU Members States is persistent in business and industry, although the Review did not come across any hard evidence to support these assertions. Perceptions of under-implementation of other countries are widespread however – even in the Netherlands, Denmark, Spain and Germany, countries that were also involved in the Reviews research.¹⁸ The World Bank and the OECD in 2007 reported that the UK has one of the most favourable regulatory environments of doing business in the EU, which does not support the idea or suspicion that the UK overburdens business on a large scale when implementing EU legislation.

The Davidson Review gives a well balanced portrait of gold-plating and double banking, demonstrating how the process of elaboration of national law in order to implement EU legislation sometimes results in gold-plating or double banking, but not as a systemic process nor as a general intent. In most of the 160 reported cases no over-implementation as such was found and where it was found it was in most cases for good reason. The Review however does recommend that to undo some gold-

¹⁷ Davidson Review (2006), p. 4.

¹⁸ Davidson Review (2006), p. 15.

plating and double banking, the central one (i.e. the EU country with the biggest economic yield) be encouraged to change the MOT testing pattern bringing it back to bi-annual testing.

3. The search for golden rims in the Netherlands – the Europe-Asser Institute-report

Parallel to the Davidson Review a similar review was held in the Netherlands. In 2005 and 2006 the Ministry of Economic Affairs commissioned a research project into over-implementation in the Netherlands. A group of researchers and experts from Leiden's European Institute and the Hague-based Asser Institute analysed 119 reports of alleged over-implementation.¹⁹ The Dutch team used an approach comparable to the Davidson Review but deployed a less sophisticated working definition of over-implementation. Over-implementation occurs according to the Europe-Asser Institute when:

An EC-directive has been transposed correctly into Dutch Law and the Dutch regulatory regime goes beyond the minimum requirements imposed by the Directive.

Like the definition of the Davidson Review the definition is inspired by a common definition stemming from drafting guidelines (the Dutch Drafting Guidelines).²⁰

As a result of better regulation initiatives of the Balkenende-II and –III administrations²¹ a first call for evidence of over-implementation had already been issued in 2005. It yielded some 105 reports of potential over-implementation. On request of the Dutch House of Representatives (Tweede Kamer van de Staten-Generaal) – who wished to secure that all possible over-implementation came to the surface - a new inventory was drawn up assisted by the European-Asser Institute groups. The second call yielded 119 reports. These reports were analysed and screened by the Ministry of Economic Affairs. In more than a third of the reports (42)

¹⁹ See P.J. Slot, W.J.M. Voermans, S.F. Blockmans, M.K. Bulterman, M. van der Harst, S.A.L. Josaputra, B. Platell, P. Willemsen, A. Cuyvers, S.H. Romein, M. Park, H. Park (2007), *Nationale koppen op EG-regelgeving* (Over-implementation of EC Legislation), Leiden/Den Haag.

²⁰ *Aanwijzingen voor de regelgeving* (Dutch Drafting Guidelines 1992). Article 347 of these Guidelines – in the somewhat cryptic official translation - reads: 'No other rules will be included in the implementation rule other than necessary for the implementation.'

²¹ See W. Voermans, The Sisyphus paradox of cutting red tape and managing public risk. *Utrecht Law Review*, 4 (3), pp. 128-144.

it was directly apparent that they did not constitute any over-implementation. The 77 remaining reports of alleged over-implementation were handed over to the research team for closer study.

Like the Davidson Review the Dutch report did not find conclusive evidence of widespread or deliberate over-implementation. In fact only 18 cases of outright over-implementation were found and 11 debatable ones. Again, as with the Davidson Review, most of the true cases of over-implementation were justified and not very serious or damaging to the competitiveness of Dutch industry or businesses.

As regards our current topic of ‘interpretation’ the Dutch team encountered some 10 cases of over-implementation. Two of these examples resulted from widening the scope of the Directive underlying the implementation. The first concerns the implementation of EC Directive 2003/54/EC concerning common rules for the internal market in electricity, in which Dutch legislation effectively protects private consumers at the cost of the supplier where the Directive does not. The second concerns Regulation 561/2006/EC on the harmonisation of certain social legislation relating to road transport. The regulation imposes a regime for truck driving and resting hours for vehicle categories with a permissible mass over 3500 kg. Dutch legislation equally applies this regime to vehicle categories between 500-3500 kg, thus constituting over-implementation.

4. Golden plates and red herrings: a common heritage

Gold-plating and double banking have become catch phrases in the regulatory reform debates throughout Europe. They convey the evocative notion that over zealous governments are systematically hurting domestic business and industry by over-implementing EC legislation, where other member states are not. Recent research in both the UK and the Netherlands shows that – although over-implementation is elusive and hard to assess – no wide spread or systematic practices of over-implementation exist. What is apparent from both projects is that perceptions of over implementation in one’s own country and suspected under-implementation in other countries are widespread and tenacious.

Although over-implementation is not wide spread it does occur, only with less damaging effect to business and industry than is commonly believed. Businesses and industries that operate throughout Europe seems to suffer more from differentiated implementation in different countries than from over-implementation at home. In most cases over-implementation is – even to the present day – justifiable. In view of this evidence one might wonder whether the discussion on over implementation is not a red herring. To our minds, this would be a hastily conclusion: there may possibly be a deeper point to the complaints voiced in the over-implementation debate. Over-implementation has an absolute aspect to it (doing more than is strictly necessary) but, as the Davidson Review reveals, a relative aspect too (are we doing more than other EU countries). When implementing, EC member states may well keep within the margins of over-implementation (avoiding gold-plating, double banking etc.) but the implementing domestic legislation may be suboptimal for business and industry anyway in view of what other countries are doing. The Davidson Review hinted at this by comparing the MOT-regime to that in other Member States. Along these lines business and industry may have a lot to gain by comparing the way their domestic legislature has implemented EC legislation to that of other member states. Best practices of implementation may prove to be the future goldmines of regulatory reform. They are to be preferred over the tar pits of suspicion of neighbourly under-implementation.